

CHAPTER 582

FORECLOSURE OF REAL ESTATE MORTGAGES; GENERAL PROVISIONS

582.01 ATTORNEY'S FEES.

HISTORY. 1873 c. 49 s. 1; G.S. 1878 c. 81 s. 44; G.S. 1894 s. 6074; R.L. 1905 s. 4499; G.S. 1913 s. 8170; G.S. 1923 s. 9646; M.S. 1927 s. 9646.

A stipulation in a mortgage for an attorney's fee on foreclosure is valid if inserted in good faith to indemnify the mortgagee for the expense of foreclosure and not as a cover for illegal interest. *Griswold v Taylor*, 8 M 342 (301).

The statute makes the mortgage and the lien created by it security for such fees as well as for the mortgage debt; and a fraudulent insertion of a covenant to pay fees has been held to invalidate a mortgage. *Coles v Yorks*, 28 M 464, 10 NW 775.

Where an attorney employed to foreclose drew the notice of sale and had it set up in type by the printer it was held that the claim for fees had accrued so that a tender not including them was ineffectual. *Bjones v Yellow Medicine Bank*, 45 M 335, 47 NW 1072.

The statute is not applicable to the foreclosure of railroad mortgages. *Seibert v M. & St. L.* 58 M 65, 59 NW 826.

The burden of proving fees excessive and unreasonable is on the party claiming them to be so. *Hobe v Swift*, 58 M 84, 59 NW 831; *Morse v Home Association*, 60 M 316, 62 NW 112.

The fees are not part of the debt secured and the mortgagee has no right to any part of them, except to indemnify himself for such reasonable sum, not exceeding the amount limited by statute and named in the mortgage, as he actually pays or absolutely and unconditionally incurs. It has been held that a corporation employing a salaried attorney to foreclose is entitled to fees. *Morse v Home Association*, 60 M 316, 62 NW 112.

No fees can be retained if no affidavit of costs and disbursements is filed. *Johnson v Northwestern Loan*, 60 M 393, 62 NW 381.

Where unauthorized fees are included an action as for money had and received will lie; and where a mortgage covers several tracts and the foreclosure is in one action only one set of fees is allowable. *Eliason v Sidle*, 61 M 285, 63 NW 730; *Truesdale v Sidle*, 65 M 315, 67 NW 1004.

A judgment including fees is not invalidated by the absence of a finding that they were reasonable. *Thorpe v Hanscom*, 64 M 201, 66 NW 1.

An application for a modification of a judgment including fees held properly denied on the ground that the form of judgment had been consented to. *Murray v Chamberlin*, 67 M 12, 69 NW 474.

An attorney employed by an assignee for the benefit of creditors in connection with foreclosure of a mortgage owned by the assignor held entitled to prove his claim against the estate as a general creditor but not entitled to be paid in full out of the trust estate. *Merrick v Putnam*, 73 M 240, 75 NW 1047.

The legislature may regulate the amount of fees as to subsequent mortgages. *Perkins v Stewart*, 75 M 21, 77 NW 434.

The county is entitled to fees where the county attorney forecloses a mortgage held by the county. *Swift v Board*, 76 M 194, 78 NW 1107.

Where a single mortgage is made a specific lien on several separate tracts the mortgagee may foreclose on each tract separately or on all together in one proceeding. If he adopts the former course he is entitled to fees for each foreclosure. *Farnsworth Loan v Commonwealth Co.* 87 M 179, 91 NW 469.

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It is not necessary to prove the value of services of counsel, where allowance made at conclusion of trial. *Kingsley v Anderson*, 103 M 510, 115 NW 642, 116 NW 112.

A corporation cannot itself practice law, nor can it lawfully do so by hiring an attorney to conduct a general law practice for others for pay, where the fees are absorbed by the corporation. *In re Otterness*, 181 M 254, 232 NW 318.

582.02 MAY BE COLLECTED WHEN.

HISTORY. 1873 c 49 ss. 2, 3; G.S. 1878 c. 81 ss. 45, 46; G.S. 1894 ss. 6075, 6076; R.L. 1905 s. 4500; G.S. 1913 s. 8171; G.S. 1923 s. 9647; M.S. 1927 s. 9647.

The statute clearly indicates that no attorney's fees can be charged or included in the costs unless an attorney at law is employed to conduct the foreclosure. *In re Otterness*, 181 M 257, 232 NW 318.

Bidding at a sale is a ministerial function which either the mortgagee or his attorney may delegate to a layman; the task being the submitting of a bid to the sheriff, no practice of law is involved. *Klotz v Jeddelloh*, 201 M 355, 276 NW 244.

582.03 PURCHASER AT FORECLOSURE, EXECUTION, OR JUDICIAL SALE MAY PAY TAXES, ASSESSMENTS, INSURANCE PREMIUMS, OR INTEREST.

HISTORY. 1895 c. 225; 1897 c. 193; R.L. 1905 s. 4501; 1909 c. 421; 1913 c. 110 s. 1; G.S. 1913 s. 8172; G.S. 1923 s. 9648; 1927 c. 347; M.S. 1927 s. 9648.

One copartner assigned his interest in the partnership, including real estate. A judgment creditor of the assigning partner, purchaser of the premises at execution sale, who in good faith redeemed the premises from prior tax sales, is entitled to be reimbursed for the amount so paid, as a condition for the entering of judgment in an action brought to determine the validity of the title. *Ryan v Ruff*, 90 M 169, 95 NW 1114.

Parcher leased the premises, covenanting as a part of the rent to pay the taxes. The owner mortgaged to Stewart, and when Parcher failed to pay the taxes Stewart paid them, foreclosed, and bid in the property for an amount including the money paid as taxes. There was no redemption. No action could be maintained by Stewart against Parcher to recover the sums so paid. *Stewart v Parcher*, 91 M 517, 98 NW 650.

The mortgage contained a provision that the mortgagee, if he paid the taxes, might add the disbursement to the amount to be paid on redemption, but overlooked filing an affidavit as to the payment of taxes, so the mortgagor redeemed without paying them. Held, even though the court cannot restore the statutory remedy lost through the mortgagee's omission, and under the foreclosure statute no personal claim may be made, still the mortgagee's payment of the taxes under the covenants in the mortgage was authorized and lawful, so that in equity he should be subrogated to the rights of the holders of such tax liens. *Sucker v Cranmer*, 127 M 124, 149 NW 16.

A mortgage assumption clause in a deed construed as imposing absolute liability and not a contract of indemnity, and such an agreement, the mortgage containing a covenant to pay taxes, is an agreement to pay such taxes. *Peterson v Herington*, 169 M 65, 210 NW 617.

The purchaser at the foreclosure sale having failed to file an affidavit of taxes paid, they did not become a part of the sum to be paid in making the redemption. *Limnell v Limnell*, 176 M 393, 223 NW 609.

Evidence supports the finding that the mortgagee in the second mortgage requested the mortgagee in the first mortgage to withhold foreclosure of the first mortgage until defendant's second mortgage could be foreclosed so that the mortgagee in the second mortgage could pay the interest due on the first mortgage, and tack it to the amount bid at the foreclosure sale. There was mutuality in the agreement and it was fully executed by the owner of the first mortgage, who is entitled to recover in this action. *Bankers Life v Farmers Bank*, 188 M 349, 247 NW 239.

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The record of affidavits made and filed pursuant to section 582.03 was competent proof of taxes and insurance paid subsequent to the foreclosure sale by the holder of the sheriff's certificate. *Young v Penn Mutual*, 192 M 446, 256 NW 906.

Covenants to pay taxes during the time the mortgage is in force do not run with the land. A mortgagee may pay delinquent taxes before the foreclosure and tack the amount so paid to the debt due; or the purchaser at foreclosure sale may pay taxes after sale and by affidavit filed add the amount so paid to the amount necessary to redeem; but except as so enforced the covenant to pay taxes accruing subsequent to the giving of the mortgage terminates with foreclosure. *Business Women's Co. v Farmers & Mechanics*, 194 M 177, 259 NW 812.

Before the amount paid as taxes can be tacked to the amount due on foreclosure it is mandatory that the purchaser file the statutory affidavit required by section 582.03. Failure to do so precludes the certificate holder from claiming payment of such additional amount as against a subsequent lien claimant redeemer. *Tomasko v Cotton*, 200 M 69, 273 NW 628.

582.04 HOMESTEAD INCLUDED IN MORTGAGE; SEPARATE SALE.

HISTORY. 1907 c. 389; G.S. 1913 s. 8173; G.S. 1923 s. 9649; M.S. 1927 s. 9649.

Until after the purchaser at the first sale had made his bid and it had been accepted he had no notice of a claim of homestead, so a second sale in separate tracts was immediately made. Held, the first attempt to sell was no sale because in violation of the statute made operative by notice of homestead claim. The power of sale was not exhausted by the attempt. It was not even exercised. The legal requisites having been complied with, the second sale was valid. *Everson v De Schepper*, 157 M 257, 195 NW 927.

In making a sale the sheriff was an officer of the law. His work was done when the sale was made and a certificate delivered. In an action to set aside a mortgage foreclosure upon the ground that the sale was of the whole tract as one, though it included a homestead of which due notice was given, no cause of action is stated as to the sheriff. *Mulroy v Rowe*, 162 M 312, 202 NW 723.

Laws 1907, Chapter 389 (section 582.04), does not curtail the rights or remedies of a homestead claimant, but is cumulative and provides an additional remedy for the protection of homestead rights. *Mulroy v Sioux Falls Bank*, 165 M 295, 206 NW 461.

The owner, having the burden of proof, failed to show that the part of the West Hotel claimed as a homestead was compact in form and so chosen as not unreasonably to affect the value of the remaining part, or that he was prejudiced. *Fidelity v Brown*, 181 M 392, 232 NW 740.

Compliance with Laws 1907, Chapter 389 (section 582.04), requires a separate sale of the homestead upon foreclosure even though the nonexempt property included in the mortgage brings no bid when first separately offered. *Madson v Nelson*, 182 M 450, 234 NW 636.

For inheritance purposes, the method of valuation where a mortgage covers both the homestead 80 acres and also the nonexempt 80 acres is on the basis of the value of the security. 1942 OAG 333, May 26, 1942 (232-d).

Application to doctrine of marshaling assets. 23 MLR 692.

Effect of claim of homestead on creditor's rights. 25 MLR 79.

582.05 COURT TO APPOINT RECEIVER OF RENTS WITH POSSESSION.

HISTORY. 1915 c. 305 s. 1; G.S. 1923 s. 9650; M.S. 1927 s. 9650.

Where the amount due on the mortgage was \$3,000, and it was bid in at \$2,000, the bidder took into consideration the back taxes and is not entitled to a receiver to collect the rent during the period of redemption. *Holt Bank v Hamernes*, 171 M 350, 214 NW 52; *House v Anderson*, 197 M 283, 266 NW 739.

Nonpayment of taxes and interest on prior mortgages, when considered with the insolvency of the owner and his omission to pay such charges out of income of the property, constitutes waste, to prevent which a receiver may rightfully

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apply rents and profits received prior to the foreclosure sale. *Windom Bank v Reno*, 172 M 193, 214 NW 886.

The mortgagee has no right to the rents and profits, even after foreclosure unless there is waste. In the instant case a receiver should not be appointed to collect rents and profits to apply on delinquent taxes and interest. *John Hancock Co. v Meester*, 173 M 18, 216 NW 329.

Borchardt mortgaged his pickle factory to Fischer for the benefit of various creditors. Plaintiff, one of the beneficiaries under the mortgage to Fischer which is being foreclosed, asks a receiver, the sale of the property by a receiver, and payment of the creditors. It is held that Fischer is rightfully foreclosing a valid mortgage and plaintiff's petition and complaint do not state a cause of action. *Monnens v Simons*, 187 M 100, 244 NW 410.

Failure to pay taxes is a species of waste. The trial court properly ordered the general receiver of the mortgagor corporation to segregate rents during foreclosure and the period of redemption and apply same to payment of repairs, taxes and insurance. *Brodala v St. Paul Home Co.* 191 M 97, 253 NW 113.

Inadequacy of security caused by nonpayment of taxes accruing after the execution of the mortgage, and the insolvency was waste sufficient to justify the appointment of a receiver to collect rents and apply same on unpaid taxes. *Minneapolis Savings Ass'n v Yolton*, 193 M 632, 259 NW 382.

In the absence of a showing that the trial court acted arbitrarily or without reasonable cause, the appellate court will not disturb its order in appointing a receiver pending foreclosure. *Lincoln National v Brock*, 196 M 433, 265 NW 290.

582.06 DEFAULT TO BE SHOWN.

HISTORY. 1915 c. 305 s. 2; G.S. 1913 s. 9651; M.S. 1927 s. 9651.

The burden is on the mortgagee to show waste; and without proof of insolvency of the mortgagor, or inadequacy of security, the nonpayment of taxes, not shown to jeopardize the title of the security during the period of redemption, does not warrant appointment of a receiver. *Minnesota Loan Ass'n v Murphy*, 176 M 71, 222 NW 516.

582.07 RECEIVER TO FURNISH BOND.

HISTORY. 1915 c. 305 s. 3; G.S. 1923 s. 9652; M.S. 1927 s. 9652.

582.08 TO ENTER INTO POSSESSION AFTER FILING OF BOND.

HISTORY. 1915 c. 305 s. 4; G.S. 1923 s. 9653; M.S. 1927 s. 9653.

The heirs of deceased mortgagor are necessary parties to an action to foreclose a mortgage. In an action to foreclose a mortgage, where the mortgagor died leaving a widow and children, a receiver was appointed. The widow, as administrator and in her own right, was a party to the action. The children were not. Prior to the appointment of a receiver one of the children took possession. Held, the receiver could not obtain possession through detainer proceedings. *Buff v Schafer*, 157 M 485, 196 NW 661.

582.09 RECEIVER TO FILE ACCOUNT FOR APPROVAL.

HISTORY. 1915 c. 305 s. 5; G.S. 1923 s. 9654; M.S. 1927 s. 9654.

582.10 NOT TO LIMIT CERTAIN RIGHTS AND REMEDIES.

HISTORY. 1915 c. 305 s. 6; G.S. 1923 s. 9655; M.S. 1927 s. 9655.

582.11 POWERS AND DUTIES OF TRUSTEES IN CERTAIN CASES.

HISTORY. 1937 c. 108 s. 1; M. Supp. s. 9685-5.

Date of accrual of Minnesota real estate taxes for the purpose of income tax reduction. 26 MLR 567.

582.12 COURT'S POWERS OVER TRUSTS NOT LIMITED.

HISTORY. 1937 c. 108 s. 2; M. Supp. s. 9655-6.

582.13 STATE MAY BE MADE DEFENDANT.

HISTORY. 1943 c. 134 s. 1; 1945 c. 2 s. 1.

582.14 LIMITATION ON FORECLOSURE.

HISTORY. 1945 c. 363 s. 1.

582.15 TERMINATION OF LIS PENDENS.

HISTORY. 1945 c. 363 s. 2.

582.16 PRESUMPTION OF IDENTITY.

HISTORY. 1945 c. 363 s. 3.

582.17 ACTION PENDING.

HISTORY. 1945 c. 363 s. 4.

582.18 CONSTRUCTION.

HISTORY. 1945 c. 363 s. 5.