

# GENERAL STATUTES

OF THE

STATE OF MINNESOTA,

IN FORCE JANUARY, 1891.

VOL. 2.

CONTAINING ALL THE LAW OF A GENERAL NATURE NOW IN FORCE AND NOT IN  
VOL. 1, THE SAME BEING THE CODE OF CIVIL PROCEDURE AND ALL REME-  
DIAL LAW, THE PROBATE CODE, THE PENAL CODE AND THE CRIM-  
INAL PROCEDURE, THE CONSTITUTIONS AND ORGANIC ACTS.

COMPILED AND ANNOTATED

BY

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SECOND EDITION.

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# MINNESOTA STATUTES 1891

## CHAPTER 76 (G. S. ch. 81).

### FORECLOSURE OF MORTGAGES.

Acts 1878, ch. 77, provided for action to set aside or test validity of foreclosure sale, and was repealed by acts 1881. Ex. S. ch. 51.

- TITLE 1. FORECLOSURE BY ADVERTISEMENT.
2. FORECLOSURE BY ACTION.
3. FEES ON FORECLOSURE.

#### FORECLOSURE BY ADVERTISEMENT.

##### Sections.

5344-5345.	Authorized.
5346-5347.	Notice.
5348-5357.	Sale.
5358-5364.	Certificate of sale.
5365-5370.	Perpetuate evidence of sale.
5371-5372.	Foreclosure by installments.
5373-5375.	Foreclosure by foreign executors.
5376-5379.	Redemption.

#### FORECLOSURE BY ACTION.

##### Sections.

5380-5382.	Authorized.
5383-5387.	Judgment of foreclosure.
5388-5395.	Sale.
5396.	Redemption.
5397.	Final decrea.
FEES ON FORECLOSURE.	
5398-5400.	Regulation of attorney fees.

### TITLE 1.

#### FORECLOSURE BY ADVERTISEMENT.

##### AUTHORIZED.

**SEC. 5344. Within fifteen years.**—Every mortgage of real estate heretofore or hereafter executed containing therein a power of sale upon default being made in any condition of such mortgage, may be foreclosed by advertisement within fifteen years after the maturing of such mortgage or the debt secured thereby, in the cases and in the manner hereinafter specified.

G. S. ch. 81, § 1, as amended 1871, ch. 52 (March 6); 1873, ch. 51 (February 17); 1877, ch. 121 (March 3); 1878, ch. 53, § 1 (March 7); 1879, ch. 21 (February 26). This section of general statutes contained no limitation. Acts 1871 inserted ten years, exempting mortgages foreclosed or attempted to be foreclosed. Acts 1873 continued the ten years' limitation and exemption, and required all re-foreclosures before October 1, 1873. Acts 1877 repealed this section. Acts 1878, ch. 53: "An act providing for the foreclosure of mortgages on real estate by advertisement," approved March 7th; in force from April 1, 1878, re-enacted this section with ten years' limitation but without the exemptions. Acts 1879 increased limitation from ten to fifteen years. The above same as general statutes except the limitation. 6 M. 168; 19 M. 85.

**SEC. 5345. Requirements.**—To entitle any party to give a notice, as hereinafter prescribed, and to make such foreclosure, it is requisite:

First. That some default in a condition of such mortgage has occurred, by which the power to sell has become operative.

Second. That no action or proceeding has [been] instituted at law to recover the debt then remaining secured by such mortgage, or any part thereof; or if the action or proceeding has been instituted, that the same has been discontinued, or that an execution upon the judgment rendered therein has been returned unsatisfied in whole or in part.

Third. That the mortgage containing such power of sale has been duly recorded, and if it has been assigned, that all the assignments thereof have been recorded.

G. S. ch. 81, § 2, as amended 1877, ch. 121; 1878, ch. 53, § 2. Acts 1877, ch. 121, repealed this section, and acts 1878 re-enacted it as it stood in G. S. 11 M. 438; 12 M. 113; 13 M. 194; 16 M. 116; 18 M. 232; 20 M. 464; 21 M. 336; 32 M. 206; 33 M. 42.

# MINNESOTA STATUTES 1891

SECS. 5346-5350.]

FORECLOSURE OF MORTGAGES.

## NOTICE.

**SEC. 5346. Publication and service.**— Notice that such mortgage will be foreclosed by sale of the mortgaged premises, or some part of them, shall be given by publishing the same for six successive weeks, at least once in each week, in a newspaper printed and published in the county where the premises intended to be sold, or some part thereof, are situated, if there is one, \* if not, then in a newspaper printed and published in an adjoining county, if there is such a newspaper; if there is not, then in a newspaper printed and published in the county to which the county in which the premises are located is attached for judicial purposes, if there be such a newspaper; if there is not,\* then in a newspaper printed and published at the capital of the state. In all cases, a copy of such notice shall be served in like manner as summons in civil actions in the district court, at least four weeks before the time of sale, on the person in possession of the mortgaged premises, if the same are actually occupied. Proof of such service may be made, certified and recorded in the same manner as proof of publication of a notice of sale under a mortgage.

G. S. ch. 81, § 5, as amended 1867, ch. 74; 1877, ch. 121; 1878, ch. 53, § 5. Acts 1877 repealed this section, and acts 1878, ch. 53, re-enacted it, excluding the provision for service when premises not occupied, and adding matter between \* \*. 4 M. 32; 6 M. 192; 7 M. 46, 49; 15 M. 512; 16 M. 45; 18 M. 66; 20 M. 448; 21 M. 132; 32 M. 206; 30 M. 24; 28 M. 493; 38 M. 349.

**SEC. 5347. Form of notice.**— Every notice shall specify:

First. The names of the mortgagor and of the mortgagee, and the assignee, if any;

Second. The date of the mortgage, and when and where recorded;

Third. The amount claimed to be due thereon, and taxes, if any, paid by the mortgagee at the date of the notice;

Fourth. A description of the mortgaged premises, conforming substantially to that contained in the mortgage; and

Fifth. The time and place of sale.

G. S. ch. 81, § 6, as amended 1877, ch. 121; 1878, ch. 53, § 6; 1883, ch. 24 (February 17). Acts 1877, ch. 121, repealed this section, and acts 1878, ch. 53, re-enacted it as it stood in G. S. Acts 1883 added "and where" in second subdivision. 4 M. 542; 6 M. 168; 7 M. 159; 18 M. 366; 19 M. 85; 20 M. 448, 453, 464; 30 M. 539; 4 M. 25.

## SALE.

**SEC. 5348. When, where, how.**— The sale shall be at public vendue, between the hours of nine o'clock in the forenoon and the setting of the sun, in the county in which the premises [are] to be sold, or some part thereof, are situated, and shall be made by the sheriff of the said county, or his deputy, to the highest bidder.

G. S. ch. 81, § 7, as amended 1877, ch. 121; 1878, ch. 53, § 7. Acts 1877 repealed this section, and acts 1878 re-enacted it as it stood in G. S. 6 M. 168; 10 M. 379; 12 M. 335; 19 M. 85; 32 M. 206.

**SEC. 5349. Postponement of sale.**— Such sale may be postponed from time to time, by inserting a notice of such postponement, as soon as practicable, in the newspaper in which the original advertisement was published, and continuing such publication until the time to which the sale is postponed, at the expense of the party requesting such postponement.

G. S. ch. 81, § 8, as amended 1877, ch. 121; 1878, ch. 53, § 8. Acts 1877 repealed this section, and acts 1878 re-enacted it as it stood in G. S. 4 M. 433; 8 M. 432.

**SEC. 5350. Distinct tracts sold separately.**— If the mortgaged premises consist of separate and distinct farms or tracts, they shall be sold separately, and no more farms or tracts shall be sold than are necessary to satisfy the

# MINNESOTA STATUTES 1891

FORECLOSURE OF MORTGAGES.

[SECS. 5351-5356.]

amount due on such mortgage at the date of notice of such sale, with interest, taxes paid, and costs of sale.

G. S. ch. 81, § 9, as amended 1877, ch. 121; 1878, ch. 53, § 9. Acts 1877 excepted this section from repealing clause, and acts 1878 re-enacted it as it read in G. S. 4 M. 260; 6 M. 168; 10 M. 379; 18 M. 366; 24 M. 419.

**SEC. 5351. Mortgagee, etc., may purchase.**—The mortgagee, his assignees, or his or their legal representatives, may fairly and in good faith purchase the premises so advertised, or any part thereof, at such sale.

G. S. ch. 81, § 10, as amended 1877, ch. 121; 1878, ch. 53, § 10. Acts 1877 repealed this section, and acts 1878 re-enacted it as it reads in G. S. 6 M. 192; 8 M. 435; 17 M. 61.

**SEC. 5352. Interest of purchaser.**—The interest acquired upon any such sale is subject to the lien of any attachment or judgment duly made or docketed against the person holding the same, as in case of real property, and may be attached or sold on execution in the same manner.

G. S. ch. 81, § 17, re-enacted 1878, ch. 53, § 17. Not repealed by 1877, ch. 121.

**SEC. 5353. Surplus purchase-money.**—If, after sale of any real estate, made [or] as herein prescribed, there remains in the hands of the officer making the sale any surplus money, after satisfying the mortgage on which such real estate was sold, and payment of the tax and cost of sale, the surplus shall be paid over by said officer, on demand, to the mortgagor, his legal representatives or assigns.

G. S. ch. 81, § 18. Repealed 1877, ch. 121. Re-enacted 1878, ch. 53, § 18. 14 M. 97; 20 M. 268; 37 M. 75.

**SEC. 5354. Recovery of surplus.**—That the mortgagor, his heirs or assigns, at any time within one year after foreclosure, may recover from the owner of the mortgage at the time of foreclosure three times the amount of any costs or disbursements not absolutely paid for said foreclosure, and three times the amount of any bonuses or interest over and above twelve per cent., embraced in said foreclosure, and for which the property was sold, unless said overplus has been paid to the mortgagor or his assigns.

1878, ch. 53, § 24. Not in G. S. 28 M. 7.

**SEC. 5355. Foreclosure in firm name.**—That all mortgages heretofore made of any real property in this state or of any interest therein to any partnership or firm, in their partnership or firm name and which said mortgages have been foreclosed by advertisement pursuant to the statute relating to foreclosure by advertisement, in the name of the said partnership or firm, be and the same are together with all proceedings had in such foreclosure, are hereby realized and confirmed so far as relates to any question of defect by reason of the mortgagees' names being stated in the said mortgage by their partnership or firm name instead of the individual names of the members of said partnership or firm.

1887, ch. 154: "An act to legalize mortgages heretofore made to partnerships or firms in the firm name, and foreclosure proceedings had thereunder." Approved March 7, 1887. Acts 1881, ch. 140. Approved February 21st. Same as above.

**SEC. 5356. Certain sales legalized.**—Every foreclosure sale heretofore made under a power of sale in the usual form, contained in a mortgage, heretofore made in good faith, of real property within the limits of this state, and previously actually recorded in the office of the proper register of deeds, is, together with such record thereof, hereby legalized and made valid and effectual to all intents and purposes, as against the following objections, namely: First—That the mortgage or any assignment thereof had but one witness. Second—That the mortgage, or any assignment thereof, was duly witnessed, but was recorded as if it had but one witness. Third—That the mortgage, or any assignment thereof, was not duly sealed. Fourth—That the mortgage, or any assignment thereof, was duly sealed, but was recorded as if not duly sealed. Fifth—That the original certificate of the acknowledgment of

# MINNESOTA STATUTES 1891

SECS. 5357-5359.]

FORECLOSURE OF MORTGAGES.

the mortgage was not sealed with the official seal of the officer taking such acknowledgment. Sixth—That the original certificate of the acknowledgment of the mortgage was duly sealed, but it was recorded as if not duly sealed.

*Provided*, however, that such mortgage was in other respects properly executed, witnessed, acknowledged, delivered and recorded, and such foreclosure was in other respects regular and according to the statute then in force.

*Provided, further*, that this act shall not affect or prejudice the rights of any bona fide purchaser, and shall not apply to any action now pending.

1889, ch. 37: "An act legalizing past foreclosures of mortgages heretofore made as against specified objections thereto." Approved March 7, 1889.

SEC. 5357. **Same.**—Mortgages, or assignments of mortgages, heretofore made in good faith of real property within the limits of this state, and actually recorded in the office of the proper register of deeds, but having, or having been recorded as having only one subscribing witness to such mortgage or assignment thereof, or not duly sealed, or having been recorded as if not duly sealed, or the certificate of acknowledgment to which has not been duly sealed, or has been recorded as if not duly sealed, are, together with said records thereof, hereby legalized and made valid to all intents and purposes as of, from and after such actual recording thereof; and foreclosure sales, under such mortgages, are hereby legalized and validated, provided all the proceedings in that behalf were in other respects according to the statute then in force. *Provided, further*, that this act shall not affect or prejudice the rights of any bona fide purchaser nor apply to any action now pending.

1889, ch. 36: "An act legalizing certain mortgages and assignments heretofore made, as well as the records and foreclosures thereof heretofore made, notwithstanding certain defects in the execution or record of such mortgages." Approved March 8, 1889.

## CERTIFICATE OF SALE.

SEC. 5358. **Form of.**—Whenever any sale of real property is made under a power of sale contained in any mortgage, the officer shall make, and deliver to the purchaser, a certificate, under his hand and seal, containing—

First. A description of the mortgage under which such sale is made;

Second. A description of the real property sold;

Third. The price paid for each parcel sold separately;

Fourth. The date of the sale, and the name of the purchaser; and

Fifth. The time allowed by law for redemption.

Said certificate shall be executed, proved or acknowledged, and recorded, as required by law for a conveyance of real estate, within twenty days after such sale.

G. S. ch. 81, § 11, as amended 1872, ch. 73; 1876, ch. 39, § 1; 1877, ch. 121; 1878, ch. 53, § 11. Acts 1876 struck out "within twenty days after such sale." Acts 1877 did not repeal this section, and acts 1878 re-enacted it as it reads in G. S. Acts 1872, ch. 73, contained provision that certificate be executed, proved, acknowledged and recorded within twenty days *after confirmation of sale*. If not, the court could, after notice to all parties, order that another certificate be given which could be recorded with same effect. 18 M. 66; 20 M. 458; 24 M. 164; 35 M. 235; 35 M. 410; 35 M. 451; 37 M. 77; 38 M. 206.

SEC. 5359. **Not invalid.**—That no certificate executed under and by virtue of section eleven, chapter eighty-one, title one, general statutes one thousand eight hundred and seventy-eight, shall be deemed invalid, by reason of the same not having been made, executed, proved, acknowledged, or recorded within the twenty days mentioned in said section, and the record of all such certificates heretofore executed, proved or acknowledged, and recorded after the expiration of said twenty days is hereby legalized and made valid, and the said record shall have the same force and effect as if the said certificates had been executed, proved, acknowledged and recorded within the said twenty days.

1889, ch. 35: "An act to legalize the record of certain certificates executed under and by virtue of section 11, ch. 81 of G. S." Approved April 3, 1889. The language of this section is

# MINNESOTA STATUTES 1891

FORECLOSURE OF MORTGAGES.

[SECS. 5360-5363.]

same as acts 1871, ch. 51, approved March 2d; 1873, ch. 52, approved March 7th; 1874, ch. 85, approved March 5th; 1875, ch. 46, approved February 13th; 1877, ch. 112, approved March 5th; 1883, ch. 90, approved March 3d; 1885, ch. 237, approved March 3d; 1889, ch. 38, § 2, approved February 21st. All except 1871, ch. 51, and 1889, ch. 35, contain a provision not to apply to pending actions.

**SEC. 5360. Operate as conveyance.**—Such certificate, so proved, acknowledged and recorded, shall, upon the expiration of the time for redemption, operate as a conveyance, to the purchaser or his assignees, of all the right, title and interest of the mortgagor in and to the premises named therein, at the date of such mortgage, without any other conveyance whatever.

G. S. ch. 81, § 12. Repealed by 1877, ch. 121. Re-enacted by 1878, ch. 53, § 12. 20 M. 106; 29 M. 57.

**SEC. 5361. Heretofore executed with one witness.**—That sheriffs' certificates issued on mortgage foreclosure sale or sales on execution authorizing or relating to the conveyance of real estate, or any interest therein in this state that have been heretofore executed, with but one subscribing witness, are hereby declared to be legal and valid, and the record thereof effectual to all intents and purposes as if such conveyance had been executed with two subscribing witnesses, provided this act shall not apply to or affect any suit or action now pending.

1889, ch. 38, § 1: "An act legalizing sheriffs' certificates issued on mortgage foreclosure and execution sales." Approved February 21, 1889.

**SEC. 5362. When may be set aside.**—That the sheriff's certificate of any sale, heretofore or hereafter made, under a power to sell contained in a mortgage, shall be prima facie evidence that all the requirements of law in that behalf have been duly complied with, and prima facie evidence of title in fee thereunder in the purchaser at such sale, his heirs or assigns, after the time for redemption therefrom has expired; and no such sale shall be held invalid or set aside by reason of any defect in the notice thereof, or in the publication or posting of such notice, or in the proceedings of the officer making such sale, unless the action in which the validity of such sale shall be called in question be commenced, or the defense alleging its invalidity be interposed within five years after the date of such sale. *Provided*, that persons under disability to sue by reason of being minors, insane persons, idiots, persons in captivity or in any country with which the United States are at war when such sale was made, may commence such action, or interpose such defense at any time within five years after the removal of such disability. *Provided further*, that such actions shall be commenced with reasonable diligence in all cases.

1883, ch. 112: "An act prescribing the force and effect of sheriffs' certificates of sale made under powers in mortgages, and limiting the time within which such sheriff sales may be called in question." Approved March 1st. In force from September 1, 1883. Acts 1878, ch. 77, provided for action to set aside or test the validity of foreclosure sale, and was repealed by acts 1881, Ex. S. ch. 51.

**SEC. 5363. Same.**—That no foreclosure heretofore or hereafter made by the mortgagee, his legal representatives, or assigns, of any mortgage on real property within the limits of this state, shall be adjudged invalid or be set aside, unless the action in which the validity of such foreclosure is called in question be commenced or the defense alleging its invalidity be interposed within twenty years from date of the foreclosure sale. *Provided*, that persons who, at the time of such foreclosure sale, were under disability to sue by reason of being minors, insane persons, idiots or in captivity, may commence such action or interpose such defense at any time within five years after removal of such disability. *Provided, further*, that such actions shall be commenced with reasonable diligence in all cases; *provided*, that this act shall not affect or prejudice the rights of any bona fide purchaser, nor apply to any action or proceeding now pending in any court of this state; and *provided*,

*further*, that nothing contained in this act shall be understood as intended to repeal chapter<sup>1</sup> one hundred and twelve of the general laws of Minnesota for eighteen hundred and eighty-three or any part thereof.

1889, ch. 81: "An act limiting the time within which mortgage foreclosure sales may be called in question." Approved March 19th. In force from January 1, 1890. <sup>1</sup>Sec. 5362, *ante*.

**SEC. 5364. Same.**— That the sheriff's certificate of any sale made and recorded in the office of the register of deeds of the proper county, more than twenty years prior to the passage of this act, under a power to sell contained in any mortgage covering and describing the same lands, shall be sufficient evidence that all the requirements of law in that behalf have been duly complied with and shall be sufficient evidence of title in fee thereunder in the purchaser at such sale, his heirs or assigns, after the time for redemption therefrom has expired, and no such sale shall be held invalid or set aside by reason of any defect or irregularity of any kind in said foreclosure proceeding unless the action in which the validity of such sale shall be called in question be commenced, or the defense calling such foreclosure in question be made within twenty years from the date of such sale. *Provided* that nothing herein contained shall be construed as a repeal of chapter<sup>1</sup> one hundred and twelve, general laws of eighteen hundred and eighty-three, or any part thereof. *Provided*, that nothing herein contained shall affect any action now pending, nor apply to any alleged foreclosure proceedings, or certificate mentioned or brought in question in such action, or the rights of any bona fide purchaser.

1889, ch. 33: "An act entitled an act prescribing the force and effect of sheriffs' certificates of sale made under powers in mortgages and limiting the time within which such sales may be called in question." Approved April 24, 1889. In force from January 1, 1890. <sup>1</sup>Sec. 5362, *ante*.

#### PERPETUATE EVIDENCE OF SALE.

**SEC. 5365. Affidavit of publication and sale.**— Any party desiring to perpetuate the evidence of any sale made in pursuance of the provisions of this chapter, may procure —

First. An affidavit of the publication of the notice of sale, and of any notice of postponement, to be made by the printer of the newspaper in which the same was inserted, or by some person in his employ knowing the facts; and

Second. An affidavit of the facts of any sale pursuant to such notice, to be made by the person who acted as an auctioneer at the sale, stating the time and place at which the same took place, the sum bid, and the name of the purchaser, which affidavit may be taken and certified to by any officer authorized by law to administer oaths.

G. S. ch. 81, § 19, as repealed 1877, ch. 121. Re-enacted 1878, ch. 53, § 19. 8 M. 342; 18 M. 66, 366; 20 M. 448, 453.

**SEC. 5366. To be recorded.**— Such affidavit shall be recorded at length by the register of deeds of the county in which the premises are situated, in a book kept for the record of deeds; and such original affidavits, the record thereof, and certified copies of such record, shall be presumptive evidence of the facts therein contained.

G. S. ch. 81, § 20, as repealed 1877, ch. 121, and re-enacted 1878, ch. 53, § 20. Acts 1869, ch. 67, enacted that "all such affidavits heretofore recorded in books of deeds instead of mortgages in the several counties of this state, and the records thereof, are hereby legalized to all intents and for all purposes to the same extent as though the same had been recorded in books of mortgages."

**SEC. 5367. Recording.**— A note referring to the page and book where the evidence of any sale having been made under a mortgage is recorded, shall be made by the register recording such evidence, in the margin of the record of such mortgage, if such record is in his office.

G. S. ch. 81, § 21, as repealed by 1877, ch. 121, and re-enacted 1878, ch. 53, § 21.

**SEC. 5368. Effect of record.**— A record of the affidavits herein provided, and of the certificates executed on the sale of the premises, shall be sufficient to pass the title thereto; and the said conveyance shall be an entire bar of all claims or equity of redemption of the mortgagor, his heirs and representatives, and of all persons claiming under him or them, by virtue of any title subsequent to such mortgage, except as herein provided.

G. S. ch. 81, § 22. Repealed 1877, ch. 121. Re-enacted 1878, ch. 53, § 22. 6 M. 240.

**SEC. 5369. Affidavit of costs and disbursements.**— That within ten days after foreclosure of any mortgage under the provisions of this act, the party foreclosing, or his attorney shall make and file for record with the register of deeds in the county where the property is located, an affidavit of costs and disbursements, setting forth in full a detailed bill of the costs and disbursements, including attorneys' fees embraced in the foreclosure sale, and that the same has been absolutely and unconditionally paid or incurred.

1878, ch. 53, § 23, as amended 1889, ch. 101. Approved April 23d. Same as before amendment. Not in G. S. Acts 1883, ch. 89, and 1885, ch. 234, enacted that affidavits under this section heretofore filed and recorded, or which shall be hereafter filed and recorded within one year thereafter, shall be received in evidence. 28 M. 7; 37 M. 532.

**SEC. 5370. Affidavits legalized.**— That in all cases where affidavits authorized by sections sixty-one and sixty-two of chapter seventy-three, and sections nineteen, twenty and twenty-three of chapter eighty-one of the general statutes of one thousand eight hundred and seventy-eight, have been heretofore filed and recorded, or which shall be hereafter filed and recorded within one year after the passage of this act, such affidavits or duly certified copies thereof shall be received in evidence in the same manner and with same effect as if the same had been filed and recorded within the time in said sections limited.

No proceeding in which such affidavits might have been heretofore filed and recorded shall be deemed invalid in consequence of the failure to file and record the same within the time specified by said sections. *Provided*, that nothing herein contained shall be held to affect any vested rights of any person or persons not parties to such proceedings.

1885, ch. 234: "An act to legalize the filing of affidavits in certain cases and making them evidence." Approved February 26, 1885. This statute same as 1870, ch. 72. 1873, ch. 62, approved February 7th. 1874, ch. 86, approved March 5th. 1876, ch. 69, approved February 28th, contains no limitation. 1883, ch. 89, approved March 3d. Prior laws are 1863, ch. 32; 1865, ch. 19; 1866, ch. 18; 1868, ch. 77; 1869, ch. 67.

#### FORECLOSURE BY INSTALMENTS.

**SEC. 5371. When and how made.**— When a mortgage is given to secure the payment of money by instalments, each of the instalments, either of principal or interest, mentioned in such mortgage, may be taken and deemed to be a separate and independent mortgage for each of such instalments, [and] may be foreclosed in the same manner, and with like effect, as if such separate mortgage was given for each of such subsequent instalments; and a redemption of any such sale by the mortgagor shall have the like effect as if the sale for such instalments had been made upon an independent mortgage.

G. S. ch. 81, § 3, as amended 1877, ch. 121; 1878, ch. 53, § 3. Acts 1877 excepted this section from the general repeal, and acts 1878 re-enacted it substantially as in G. S. 4 M. 172; 8 M. 67; 20 M. 106; 22 M. 349; 26 M. 340; 26 M. 551.

**SEC. 5372. Sale under.**— In such case, if the mortgaged premises consist of separate and distinct farms or tracts, only such tract or tracts shall be sold as are sufficient to satisfy the instalment then due, with interest and costs of sale; but if said premises do not consist of such separate and distinct farms or tracts, the whole shall be sold; and, in either case, the proceeds of such sale shall, after satisfying the interest, portion or instalment of the principal due, with interest and costs of sale, be applied towards the payment of the residue of the sum secured by said mortgage, and not due and payable at the time of such sale; and if such residue does not bear interest, such application shall be



made with a rebate of the legal interest for the time during which the residue shall not be due and payable; and the surplus, if any, shall be paid to the mortgagor, his legal representatives or assigns.

! G. S. ch. 81, § 4, as amended 1877, ch. 121; 1878, ch. 53, § 4. Acts 1877 excepted this section from general repeal, and acts 1878 re-enacted it as it stood in G. S. 30 M. 7; 26 M. 312; 26 M. 552.

#### FORECLOSURE BY FOREIGN EXECUTOR.

**SEC. 5373. When and how.**—Any executor or administrator duly appointed in any other state or country may foreclose by advertisement any mortgage of land in this state, belonging to the estate represented by him, in the same manner, and under like restrictions, as a resident, appointed in this state, may do: *provided*, that before commencing any such foreclosure, an authenticated copy of his appointment as such executor or administrator is filed for record in the office of the register of deeds of the county in which such foreclosure is to be commenced.

1876, ch. 41: "An act to enable foreign executors and administrators to foreclose mortgages by advertisements." Approved February 10, 1876.

**SEC. 5374. Sale legalized.**—That all foreclosures heretofore made under section twenty-five of chapter eighty-one of the general statutes of A. D. one thousand eight hundred and seventy-eight, and the executor or administrator was at the commencement of such foreclosure, authorized so to do by said section twenty-five, except that he had filed the authenticated copy of his appointment required by said section twenty-five with the probate court of the proper county, instead of filing such authenticated copy for record in the office of the register of deeds of the proper county, be and the same are hereby legalized and made valid from and after the filing and recording thereof in the office of the register of deeds; *provided*, that the time to redeem from such foreclosure is hereby extended one year from and after the filing and recording of said authenticated copy; *provided further*, that this act shall not be construed as to impair or in any way affect any vested right, nor actions now pending.

1885, ch. 192: "An act to legalize certain foreclosure proceedings by executors and administrators." Approved March 7, 1885.

**SEC. 5375. Same.**—In all cases where mortgages have been foreclosed by foreign executors or administrators, without having filed for record in the office of the register of deeds in the county where such foreclosure was had, an authenticated copy of his appointment as such executor or administrator before the commencement of such foreclosure, such foreclosure shall not for that reason be invalid; *provided*, that since such foreclosure was commenced such authenticated copy has been so filed, showing that he had been duly appointed such executor or administrator in some other state or county before the commencement of such foreclosure.

1885, ch. 238: "An act to legalize the foreclosure of mortgages by foreign executors and administrators in certain cases." Approved March 31, 1885.

#### REDEMPTION.

**SEC. 5376. By mortgagor, etc.—Interest.**—The mortgagor, his heirs, executors, administrators or assigns, whose real property is sold in conformity to the provisions of this act, may, within twelve months after such sale, redeem such property as hereinafter provided, by paying the sum of money for which the same was sold, together with interest on the same from the time of such sale: \* *provided*, that no redemption shall be made for real property sold in conformity to the provisions of this act, when the mortgage foreclosed contains a distinct rate of interest more than seven per cent. per annum, unless the party entitled to redeem shall pay, within the time provided, the sum for which said property was sold, together with interest thereon, from the date of

# MINNESOTA STATUTES 1891

FORECLOSURE OF MORTGAGES.

[SECS. 5377-5379.]

sale to the time of redemption, at the rate specified in the mortgage, not to exceed ten per cent. per annum: *provided*, that when no rate of interest is specified in the mortgage, the rate of interest after sale shall be seven per cent. per annum on the amount for which the property was sold.

G. S. ch. 81, § 13, as repealed by 1877, ch. 121, and amended and re-enacted 1878, ch. 53, § 13, by adding matter below \*. 4 M. 172, 483; 7 M. 167; 8 M. 387; 10 M. 178; 20 M. 106; 29 M. 436; 28 M. 7; 28 M. 49; 28 M. 497; 36 M. 137, 140; 37 M. 72.

**SEC. 5377. By creditors.**— If no such redemption is made, the senior creditor having a lien, legal or equitable, on the real estate, or some part thereof, subsequent to the mortgage, may redeem within five days after the expiration of the said twelve months; and each subsequent creditor, having such lien, within five days after the time allowed all prior lien-holders, as aforesaid, may redeem by [paying] the amount aforesaid, and all liens prior to his own held by the party from whom the redemption is made: *provided*, that no creditor shall be entitled to redeem, unless, within the year allowed for redemption, he files notice of his intention to redeem in the office of the register of deeds where the mortgage is recorded.

G. S. ch. 81, § 16, as amended 1869, ch. 66. Repealed by 1877, ch. 121, and re-enacted 1878, ch. 53, § 16. 20 M. 106, 268; 21 M. 132; 29 M. 56; 29 M. 229, 436; 28 M. 49; 28 M. 343; 37 M. 75.

**SEC. 5378. How made.**— Redemption shall be made as follows: The person desiring to redeem shall pay to the person holding the right acquired under such sale, or for him to the sheriff who made the sale, or his successor in office, the amount required by law for such redemption, and shall produce to such person or officer —

First. A certified copy of the docket of the judgment, or the deed of conveyance or mortgage, or of the record or files evidencing any other lien under which he claims a right to redeem, certified by the officer in whose custody such docket, record or files shall be;

Second. Any assignment necessary to establish his claim, verified by the affidavit of himself or the subscribing witness thereto, or of some person acquainted with the signature of the assignor; and

Third. An affidavit of himself or his agent, showing the amount then actually due on his lien.

**File with register of deeds.**— \* Within twenty-four hours after such redemption is made, the party redeeming shall cause the documents so required to be produced, to be filed in the office of the register of deeds of the county in which the mortgaged lands are situated, and the register of deeds shall endorse thereon the date and hour of receiving the same, and shall preserve such documents in his office for one year thereafter, for which service he shall be entitled to receive one dollar. *Provided*, that in case such redemption shall be made at any place other than the county seat, it shall be deemed a sufficient compliance herewith to forthwith deposit such documents in the nearest post office, addressed to such register of deeds, with the postage thereon prepaid.

G. S. ch. 81, § 14, as amended 1877, ch. 121; 1878, ch. 53, § 14; 1881, Ex. S. ch. 3. Approved November 22d. Acts 1877 excepted this section from general repeal. Acts 1878 re-enacted it as it stood in G. S., and acts 1881, Ex. S. ch. 3, added matter below \*. 14 M. 289; 16 M. 210; 21 M. 132; 27 M. 23.

**SEC. 5379. Certificate of redemption.**— The person or officer from whom such redemption is made, shall make, and deliver to the person redeeming, a certificate under his hand and seal, containing —

First. The name of the person redeeming, and the amount paid by him on such redemption;

Second. A description of the sale for which such redemption is made, and of the property redeemed; and

Third. Stating upon what claim such redemption is made, and, if upon a lien, the amount claimed to be due thereon at the date of redemption.

Such certificates shall be executed, and proved or acknowledged, and recorded, as provided by law for conveyances of real estate; and if not so recorded within ten days after such redemption, such redemption and certificate is void as against any person in good faith making redemption from the same person or lien. If such redemption is made by the owner of the property sold, his heirs or assigns, such redemption annuls the sale; if by a creditor holding a lien upon the property or any part thereof, said certificate, so executed, and proved or acknowledged, and recorded, operates as an assignment to him of the right acquired under such sale, subject to such right of any other person to redeem as is or may be provided by law.

G. S. ch. 81, § 15, excepted from repeal by 1877, ch. 121, and re-enacted by 1878, ch. 53, § 15. 21 M. 182; 29 M. 57.

## TITLE 2.

### FORECLOSURE BY ACTION.

#### AUTHORIZED.

**SEC. 5380. Conform to civil actions.**— Actions for the foreclosure of mortgages, shall be governed by the same rules and provisions of statute as civil actions, except as herein otherwise expressly prescribed.

G. S. ch. 81, § 24 (27). The first section of this title (§ 23) provided that there shall be but one method of foreclosing mortgages in court, and in every case the premises shall be sold at public auction to the highest bidder to satisfy the debt, costs and disbursements, which was repealed by acts 1870, ch. 58.

**SEC. 5381. Summons.**— Service by publication of the summons, in the manner provided in section 1 five, of title one of this chapter, for publication of the notice of sale therein specified, may be made upon all parties to the action against whom no personal judgment is sought; and in such case judgment may be taken without giving security as to those parties, at the expiration of twenty days after the completion of the period of publication; but such parties or any of them shall be permitted to appear and defend, upon good cause shown, at any time before final decree.

G. S. ch. 81, § 25 (28), as amended 1868, ch. 74; 1878, ch. 6. Acts 1868 struck out word "personal" before word judgment and acts 1878 restored it. <sup>1</sup>Sec. 5346, *ante*.

**SEC. 5382. Preceding sections.**— The provisions of sections three, four, nine, eleven, fourteen, fifteen and seventeen of title one aforesaid, shall apply to and govern proceedings under this title.

G. S. ch. 81, § 32 (35), as amended 1869, ch. 68; 1872, ch. 73; 1876, ch. 39, § 2. Same as before amendment. Amendment of 1872 also contained a provision that the certificate mentioned in section 11 be executed and recorded within twenty days after confirmation of report of sale, and if not the court could order another certificate to be given after proper notice to all parties. Acts 1876, ch. 39, § 2, amended this section as above without mentioning previous amendments. The reference is to §§ 5371, 5372, 5350, 5358, 5378, 5379 and 5352, *ante*.

#### JUDGMENT OF FORECLOSURE.

**SEC. 5383. For amount due and order of sale.**— Judgment shall be entered, under the direction of the court, adjudging the amount due, with costs and disbursements, and the sale of the mortgaged premises, or some part thereof, to satisfy said amount, and directing the sheriff to proceed and sell the same, according to the provisions of law relating to sales of real estate on execution, and make report to the court.

G. S. ch. 81, § 26 (29). 14 M. 537; 27 M. 331.

**SEC. 5384. For sale of whole of mortgaged premises.**— Nothing herein contained shall be so construed as to prevent the court from adjudging

# MINNESOTA STATUTES 1891

FORECLOSURE BY ACTION.

[SECS. 5385-5391.]

that the whole of the mortgaged premises shall be sold, notwithstanding they consist of distinct farms or tracts, whenever it is made to appear that a sale of the whole will be most beneficial to the interests of the parties.

G. S. ch. 81, § 88 (41).

**SEC. 5385. For strict foreclosure.**— Nothing contained in this chapter shall be so construed as to prevent judgment being given for the strict foreclosure of a mortgage, in cases when such remedy is just or appropriate; but in case of strict foreclosure, no final decree of foreclosure shall be rendered until the lapse of one year after the judgment adjudging the amount due on such mortgage.

1870, ch. 58, § 2: "An act to repeal § 23, title 2, ch. 81, and add a new section to said title 2, relating to the foreclosure of mortgages." Approved March 7th. 13 M. 194; 21 M. 101; 28 M. 22.

**SEC. 5386. For instalments.**— Whenever an action is brought for the foreclosure of any mortgage upon which there is due any interest, or any portion or instalment of the principal, and there are other portions or instalments to become due subsequently, the action shall be dismissed, upon the defendant's bringing into court, at any time before the judgment of sale, the principal and interest due, with costs.

G. S. ch. 81, § 36 (39).

**SEC. 5387. Same — Proceedings stayed.**— If, after a judgment of sale is entered against a defendant in such case, he brings into court the principal and interest due, with costs, the proceedings in the action shall be stayed; but the court shall enter a judgment of foreclosure and sale, to be enforced, by a further order of the court, upon a subsequent default in the payment of any portion or instalment of the principal, or of any interest thereafter to grow due.

G. S. ch. 81, § 37 (40).

## SALE.

**SEC. 5388. Authority for making.**— A transcript of such judgment shall be made, and signed by the judge, or certified by the clerk, and delivered to the sheriff, and shall be his authority for making the sale.

G. S. ch. 81, § 27 (30).

**SEC. 5389. Purchase by mortgagee.**— The mortgagee, or any one claiming under him, may fairly and in good faith bid off the premises at said sale; and in such case the statement of such fact in the report of sale shall have the same effect as a receipt for money paid upon a sale for cash.

G. S. ch. 81, § 28 (31). 6 M. 168; 8 M. 435.

**SEC. 5390. Confirmation of sale.**— Upon the coming in of the report of sale, the court shall grant an order confirming the same, or, if it appears upon due examination that justice has not been done, may order a resale on such terms as are just.

G. S. ch. 81, § 29 (32). 14 M. 138, 220.

**SEC. 5391. Same — Notice of application.**— That no order confirming sheriff's report of sale upon a decree on trial in foreclosure shall be set aside or deemed invalid upon the ground that notice of application to the court to confirm report of sale was not served upon the adverse party or his counsel before the giving of the order by the court. And the order and the record of all such orders so entered without notice is hereby legalized and made valid, and said order and the record thereof shall have the same force and effect as if notice of the application had been duly served upon the adverse party or his attorney. *Provided* that nothing herein contained shall be construed to apply to cases now pending, which involve the legality or validity of such sale.

1889, ch. 35, § 2: "An act to legalize orders confirming report of sale executed under and by virtue of § 29, ch. 81, title 2, G. S." Approved April 3, 1889.

# MINNESOTA STATUTES 1891

SECS. 5392-5397.]

FORECLOSURE BY ACTION.

SEC. 5392. **Delivery of possession.**— Whenever possession of lands foreclosed as aforesaid is wrongfully withheld after final decree, the court may compel delivery of possession to the party entitled thereto, by order directing the sheriff to effect such delivery.

G. S. ch. 81, § 39 (42). 36 M. 389.

SEC. 5393. **Entry of satisfaction of judgment.**— Upon confirmation of the report of sale, the clerk shall enter satisfaction of the judgment, to the extent of the sum bid for the premises, less expenses and costs; and for any balance of said judgment, execution may issue as in other cases; but no such execution shall issue on such judgment until after a sale of the mortgaged premises, and the application of the amount realized as aforesaid.

G. S. ch. 81, § 30 (33). 25 M. 323.

SEC. 5394. **Surplus brought into court.**— Whenever there is a sale for cash, under the provisions of this title, and, after satisfying the mortgage debt, with costs and expenses, there is a surplus, it shall be brought into court for the benefit of the mortgagor, or the person entitled thereto, subject to the order of the court.

G. S. ch. 81, § 34 (37).

SEC. 5395. **Surplus to be invested.**— If such surplus, or any part thereof, remains in the said court for the term of three months, without being applied for, the district judge may direct the same to be put out at interest, subject to the order of the court, for the benefit of the defendant, his representatives or assigns, to be paid to them by the order of the court.

G. S. ch. 81, § 35 (38).

## REDEMPTION.

SEC. 5396. **By mortgagor, creditor.**— The mortgagor, or those claiming under him, shall have one year after the date of the order of confirmation, in which to redeem the premises sold, or any separate portion thereof, by paying the amount bid therefor, with interest thereon from the day of sale; and judgment or other lien creditors may redeem in the order and manner specified in title one of this chapter: *provided*, that no creditor shall be entitled to redeem, unless, within the year allowed for redemption, he files notice of his intention to redeem, in the office of the district clerk where the judgment is entered.

G. S. ch. 81, § 31 (34), as amended 1883, ch. 25 (approved February 17th), by inserting "or other lien" between "judgment" and "creditors." 25 M. 83.

## FINAL DECREE.

SEC. 5397. **When — Form and effect of.**— At the expiration of the time allowed for redemption, and no one redeeming, the court, upon the application of the purchaser or his assigns, shall grant a final decree, which shall recite the judgment aforesaid, the fact of sale, the premises sold, and the amount bid therefor, and that no redemption has been made, and shall adjudge and decree that the title to said premises is in said purchaser or his assigns, free and clear of all equity of redemption on the part of any one who is a party to the judgment. Such decree, being recorded in the office of the register of deeds of the county in which the premises lie, shall be effectual to pass the title to the same as against the parties aforesaid.

G. S. ch. 81, § 33 (36). 27 M. 380.

## TITLE 3.

## FEES ON FORECLOSURE.

SEC. 5398. **Amount allowed.**—That in all cases and whenever any mortgage hereinafter executed, covering any lands in this state, shall contain any covenant on the part of the mortgagor to pay any sum as an attorney's or solicitor's fee in case of the foreclosure of such mortgage, or when any such mortgage shall contain any stipulation or provision, authorizing or empowering the mortgagee, in case of any sale of the mortgaged premises, either upon foreclosure by action or by advertisement, to retain any sum whatever as an attorney's or solicitor's fee, the amount of such fee contained in such mortgage shall not exceed the following sums, to wit: when the amount of the debt secured by such mortgage shall not exceed the sum of five hundred dollars, the amount of such attorney's or solicitor's fee shall not exceed the sum of twenty-five dollars; when the amount of such debt shall exceed the sum of five hundred dollars, and shall not exceed the sum of one thousand dollars, the amount of such fee shall not exceed the sum of fifty dollars; when the amount of such debt shall exceed the sum of one thousand dollars, and shall not exceed the sum of five thousand dollars, the amount of such fee shall not exceed the sum of seventy-five dollars; when the amount of such debt shall exceed the sum of five thousand dollars, and shall not exceed the sum of ten thousand dollars, the amount of such fee shall not exceed the sum of one hundred dollars; when the amount of such debt shall exceed the sum of ten thousand dollars, the amount of such fee shall not exceed the sum of two hundred dollars; and in all cases where any such mortgage shall contain any covenant to pay, or shall in any manner authorize or permit the retaining or application of, any greater sum as an attorney's or solicitor's fee, in case of the foreclosure of such mortgage, than as is herein provided, such covenant or authority shall be void for the excess of such fee above the fee herein provided; and no such excess whatever shall be collected, retained or applied, by virtue of anything in such mortgage contained.

1873, ch. 49, § 1: "An act fixing the amount of attorney's or solicitor's fee to be contained in mortgages upon real estate situate within this state." Approved March 7th. In force from May 1, 1873.

SEC. 5399. **No fees unless attorney actually employed.**—That in all cases where any mortgagee, or his heirs, executors, administrators or assigns, shall foreclose any mortgage without the employment of an attorney of the courts of record of this state to conduct such foreclosure, such mortgagee or other person shall not be entitled to collect, demand, receive or retain any sum whatever as an attorney's or solicitor's fee; and in all such cases, where any sum whatever as or for such fee is included in or made a part of the amount of the bid upon which the mortgaged premises are sold, the amount of such fee so included in such bid shall be paid in money by the purchaser to the sheriff or other officer making such sale, before the certificate of such sale shall be executed, and shall be by such sheriff or other officer paid to the mortgagor, or those having his estate in the mortgaged premises.

1873, ch. 49, § 2. 28 M. 466.

SEC. 5400. **Collect and retain.**—That where any such mortgage shall contain any covenant to pay, or any stipulation or provision authorizing or empowering the mortgagee, in case of any foreclosure sale of the mortgaged premises, to retain, any sum such as is in this act provided as an attorney's or solicitor's fee, such mortgagee, or his heirs, executors, administrators or assigns, shall be entitled to collect or retain such fee upon the foreclosure of such mortgage, either by action or advertisement.

1873, ch. 49, § 3.