

Statutes
1878

THE
GENERAL STATUTES
OF THE
STATE OF MINNESOTA,

As Amended by Subsequent Legislation.

PREPARED BY
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EDITED AND PUBLISHED UNDER THE AUTHORITY OF CHAPTER 67 OF THE LAWS
OF 1878, AND CHAPTER 67 OF THE LAWS OF 1879.

FOURTH EDITION.

WITH SUPPLEMENTS,
CONTAINING ALL THE GENERAL LAWS IN FORCE UP TO THE END OF
THE LEGISLATIVE SESSION OF 1883.

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§ 54. (SEC. 53.) Power to issue writ for various purposes. Nothing contained in this chapter shall be construed to restrain the power of any court to issue a writ of habeas corpus, when necessary to bring before them any prisoner for trial, in any criminal case lawfully pending in the same court, or to bring any prisoner to be examined as a witness in any action or proceeding, civil or criminal, pending in such court, when they think the personal attendance and examination of the witness necessary for the attainment of justice.

CHAPTER LXXXI.
FORECLOSURE OF MORTGAGES.

FORECLOSURE BY ADVERTISEMENT.

SECTION.

- 1-2. Of what mortgages—within what time—conditions precedent.
- 3-4. Of mortgages payable in instalments—what may be sold.
- 5-6. Notice of sale—publication and service—requisites of notice.
- 7-10. Sale, where and how made, etc.—postponements—sale in separate tracts—mortgagee, etc., may purchase.
- 11-12. Certificate of sale—acknowledgment and record—effect as a conveyance.
- 13-16. Redemption by mortgagor, etc.—how made—effect—by creditors.
- 17. Interest of purchaser subject to process against him.
- 18. Disposal of surplus purchase-money.
- 19-22. Perpetuating evidence of publication and sale—record of affidavit—duty of register—effect of record.
- 23-24. Affidavit of costs, etc., to be filed—mortgagor may recover excessive costs or interest.

SECTION.

- 25. Foreclosure by foreign executor, etc.
- 26. Defective certificates, etc., made valid.

FORECLOSURE BY ACTION.

- 27-28. By what rules governed—service by publication—rights of defendants.
- 29-34. Judgment—its contents—transcript for sheriff—purchase by mortgagee, etc.—confirmation of sale or resale—entry of satisfaction—execution for deficiency—redemption.
- 35. Sections of title one applicable.
- 36. Final decree—form and effect.
- 37-38. Surplus purchase-money, how disposed of—investment.
- 39-40. Foreclosure for instalment—dismissal—stay of proceedings.
- 41-43. Sale of entire mortgaged premises—delivery of possession—strict foreclosure.

ATTORNEY'S FEES ON FORECLOSURE.

- 44. Schedule of fees allowed—not chargeable unless attorney is employed—may be collected on foreclosure.

*1. See 1881 Sup't. p. 107.

TITLE 1.

FORECLOSURE BY ADVERTISEMENT.*

*§ 1. Foreclosure by advertisement within ten 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 ten years after the maturity of such mortgage or the debt secured thereby, in the cases and in the manner hereinafter specified. (1878, c. 53, § 1.)

6 M. 104 (168); 19 M. 85.

*§ 2. When such foreclosure may be made. 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.

*This title of the General Statutes, having been, with the exceptions of sections 3, 4, 9, 11, 14, 15, 17, repealed by laws 1877, c. 121, its provisions were substantially re-enacted in "An act to provide for the foreclosure of mortgages on real estate by advertisement," approved March 7, 1878. (Laws 1878, c. 53.)

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. (1878, c. 53, § 2.)

11 M. 323 (438); 12 M. 113; 13 M. 194; 16 M. 116; 18 M. 232; 20 M. 464; 21 M. 336.

*§ 3. Foreclosure for instalments of principal or interest. 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, 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. (*Id.* § 3.)

4 M. 117 (172); 8 M. 44 (67); 20 M. 106; 22 M. 349.

*§ 4. Same—what may be sold to pay instalments. 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. (*Id.*, § 4.)

*§ 6, subd. 2. See 1883 Sup. t. p. 82.

*§ 5. Notice of sale—publication—service on occupant. 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. (*Id.* § 5.)

4 M. 15 (32); 6 M. 123 (192); 7 M. 31 (46); 34 (49); 15 M. 512; 16 M. 45; 18 M. 66; 20 M. 448; 21 M. 132.

*§ 6. Requisites of notice of sale. Every notice shall specify—

4 M. 426 (542); 6 M. 104 (168); 7 M. 102 (159); 18 M. 366; 19 M. 85; 20 M. 448, 453, 464.

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

4 M. 11 (25.)

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

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

4 M. 426 (542); 6 M. 104 (168.)

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

Fifth. The time and place of sale. (1878, c. 53, § 6.)

*§ 7. Sale—when, where, how and by whom to be made. 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. (*Id.* § 7.)

6 M. 104 (168); 10 M. 304 (379); 12 M. 335; 19 M. 85.

*§ 8. 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. (*Id.* § 8.)

4 M. 335 (433); 6 M. 385 (432.)

*§ 9. Sale in separate tracts. 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 amount due on such mortgage at the date of notice of such sale, with interest, taxes paid, and costs of sale. (*Id.* § 9.)

4 M. 183 (260); 6 M. 104 (168); 10 M. 304 (379); 18 M. 366.

*§ 10. 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. (*Id.* § 10.)

6 M. 123 (192); 8 M. 386 (435); 17 M. 61.

*§ 11. Certificate of sale—acknowledgment and record. 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—

* 11. See 1887 Supp. 1, p. 83.

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. (*Id.* § 11.)

18 M. 66; 20 M. 453.

*§ 12. Certificate, when to operate as a 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. (*Id.* § 12.)

20 M. 106.

*§ 13. Redemption 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 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. (*Id.* § 13.)

4 M. 117 (172), 375 (483); 7 M. 110 (167); 8 M. 344 (387); 10 M. 144 (178); 20 M. 106.

*§ 14. **Redemption, 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. (1878, c. 53, § 14.)

14 M. 289; 16 M. 210; 21 M. 132.

*§ 15. **Certificate of redemption—contents—acknowledgment and record—effect 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. (*Id.* § 15.)

*§ 14. See 1883 Sup't., p. 83.

21 M. 132.

*§ 16. **Redemption by creditors—notice.** 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. (*Id.* § 16.)

20 M. 106, 268; 21 M. 132.

*§ 17. **Interest of purchaser is subject to legal process against him.** 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. (*Id.* § 17.)

*§ 18. **Disposal of 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. (1878, c. 53, § 18.)

14 M. 97; 20 M. 268.

*§ 19. **Perpetuating evidence 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. (*Id.* § 19.)

8 M. 301 (342); 18 M. 66, 366; 20 M. 448, 453.

*§ 20. **Same—record of affidavits.** 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. (*Id.* § 20.)

*§ 21. **Same—duty of register.** 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. (*Id.* § 21.)

*§ 22. **Same—effect of record to pass title.** 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. (*Id.* § 22.)

6 M. 188 (240.)

*§ 23. **Affidavit of costs, etc., to be filed with register of deeds.** 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 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 attorney's fees, embraced in the foreclosure sale, and that the same has been absolutely and unconditionally paid or incurred. (*Id.* § 23.)

*§ 24. **Recovery by mortgagor of excessive costs or interest.** 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. (*Id.* § 24.)

*§ 25. **Foreclosure by foreign executors, etc.** 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, c. 41, § 1.)

*§ 26. **Defective certificates, etc., made valid.** That no certificate executed under and by virtue of section eleven, chapter eight-one, title one, Statutes of Minnesota, shall be deemed invalid by reason of the same not having been made, executed,

proved or acknowledged, and recorded, within twenty days mentioned in said section; and the record of any such certificate heretofore, or that shall hereafter be executed, proved or acknowledged, and recorded, after the expiration of the said twenty days, is hereby legalized and made valid; and said record shall have the same force and effect as if said certificates had been executed, proved and acknowledged, and recorded, within the said twenty days: *provided*, that nothing herein contained shall be construed to apply to cases now pending which involves the legality or validity of any such certificate of sale. (1877, c. 112, § 1.)

TITLE 2.

FORECLOSURE BY ACTION.

§ 27. (SEC. 24.) **Action by what rules governed.** 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.

§ 28. (SEC. 25.) **Service of summons by publication—rights of defendant.** Service by publication of the summons, in the manner provided in section 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. (As amended 1868, c. 74, § 1, and 1878, c. 6, § 1.)

§ 29. (SEC. 26.) **Judgment—its contents.** 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.

§ 30. (SEC. 27.) **Transcript of judgment to be furnished sheriff.** 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. ^{14 M. 537.}

§ 31. (SEC. 28.) **Purchase by mortgagee, etc.** 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.

§ 32. (SEC. 29.) **Report of sale—confirmation—resale.** 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. ^{6 M. 104 (168); 8 M. 386 (435).}

§ 33. (SEC. 30.) **Entry of satisfaction of judgment—execution for deficiency.** 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. ^{14 M. 138, 220.}

§ 34. (SEC. 31.) **Redemption by mortgagor, etc.—by 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 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.

§ 35. (SEC. 32.) **Application of former sections.** The provisions of sections three, four, nine, eleven, fourteen, fifteen and seventeen, aforesaid, shall apply to and govern proceedings under this title. (*As amended 1876, c. 39, § 2.*)

NOTE.—The foregoing section has reference to sections of title one of this chapter as originally enacted in the General Statutes, the sections mentioned being identical in terms with the corresponding sections of the act of 1878 printed in this edition as title one of this chapter.

§ 36. (SEC. 33.) **Final decree granted, when—form and effect thereof.** 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.

§ 37. (SEC. 34.) **Surplus on sale, how disposed of.** 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.

§ 38. (SEC. 35.) **Surplus to be invested, when.** 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.

§ 39. (SEC. 36.) **Foreclosure for instalment—dismissal.** 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.

§ 40. (SEC. 37.) **Same—proceedings stayed, when.** 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.

§ 41. (SEC. 38.) **Court may order sale of whole of mortgaged premises, when.** Nothing herein contained shall be so construed as to prevent the court from adjudging, 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.

§ 42. (SEC. 39.) **Court may compel 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.

*§ 43. **Strict foreclosure—final decree.** 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, c. 58, § 2.*)

ATTORNEY'S FEES ON FORECLOSURE.*

*§ 44. *Schedule of fees 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 one hundred 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, c. 49, § 1.)

*§ 45. *No fees to be charged unless attorney is 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. (*Id.* § 2.)

*§ 46. *Lawful fees may be collected on foreclosure.* 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. (*Id.* § 3.)

*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 7, 1873. (Laws 1873, c. 49.)