

1936 Supplement  
To  
**Mason's Minnesota Statutes**  
1927

(1927 to 1936)  
(Superseding Mason's 1931 and 1934 Supplements)

Containing the text of the acts of the 1929, 1931, 1933 and 1935 General Sessions, and the 1933-34 and 1935-36 Special Sessions of the Legislature, both new and amendatory, and notes showing repeals, together with annotations from the various courts, state and federal, and the opinions of the Attorney General, construing the constitution, statutes, charters and court rules of Minnesota together with digest of all common law decisions.



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MASON PUBLISHING CO.  
SAINT PAUL, MINNESOTA  
1936

## MISCELLANEOUS ACTIONS

**9579. Action against cotenant.**

Property belonging to heirs cannot be considered a homestead where only one of heirs resides thereon. *Op. Atty. Gen.* (232d), June 6, 1935.

**9580. Nuisance defined—Action.**

See notes under *St. Peter City Charter*, Appendix No. 3, post.

Village ordinance prohibiting the keeping of dog kennels without reference to whether such kennels created a nuisance held invalid. 173M61, 216NW535.

Finding that school district was negligent in exposing school teacher to tuberculosis, sustained by evidence, but there was not sufficient evidence to show that it maintained a nuisance by its failure to make the school building sanitary, and it was not liable for damages under §3098. 177M454, 225NW449.

The findings do not show that the obstruction of the water was of such character as to constitute a nuisance. *Pahl v. L.*, 182M118, 233NW836. See *Dun. Dig.* 7240(52).

Finding that stove factory was a nuisance sustained. *Heller v. A.*, 182M286, 234NW316. See *Dun. Dig.* 7255.

Record sustains a finding that the district in which a funeral home is proposed to be established is not strictly residential, and that such establishment is not a nuisance. *O'Malley v. M.*, 182M294, 234NW323. See *Dun. Dig.* 6525, 7255.

Odors suffered by farmer from sewage dumped into stream by city and canning company constituted a nuisance. *Johnson v. C.*, 188M451, 247NW572. See *Dun. Dig.* 7244.

A nuisance does not rest upon degree of care but rather upon danger, indecency, or offensiveness existing or resulting even with best of care. *Id.* See *Dun. Dig.* 7248.

Owner of dwelling is not estopped to restrain maintenance of funeral home in vicinity of his residence by fact that she sought to sell her own residence to defendant for purpose of funeral home. *Gunderson v. A.*, 190M245, 251NW515. See *Dun. Dig.* 3217, n. 7.

Under doctrine of *Sheehan v. Flynn*, 59Minn436, 61NW 462, 26LRA632, surface water is regarded as a common enemy which a landowner may, within reason, appropriate to his own use or may expel from his land as he chooses. *Bush v. C.*, 191M591, 255NW256. See *Dun. Dig.* 10161, 10165.

Statute has no effect against state or its officers and agents engaged in a lawful undertaking under its sovereign authority. *Nelson v. M.*, 192M180, 256NW96. See *Dun. Dig.* 8831.

Contractor constructing bridge for highway department was an agency of the state and was not liable as for a private nuisance for damage to adjoining property as a result of necessary blasting, not being guilty of negligence nor trespass. *Id.* See *Dun. Dig.* 8831, 8846b.

In face of a finding that damage to the plaintiff is due to backing up of waters of river and that no more water is discharged upon his property than would be if a bridge were constructed instead of a culvert, we cannot disturb court's conclusions favorable to village and denying plaintiff relief on account of the overflow of banks of a tributary of that stream which he claims that defendant has wrongfully obstructed. *Nichols v. V.*, 192M 510, 257NW82. See *Dun. Dig.* 7253.

Section 5015-4 giving railroad and warehouse commission authority to require auto transportation company to maintain suitable depots, does not oust a city or village of jurisdiction to enjoin maintenance of a depot if it constitutes a nuisance. *Village of Wadena v. F.*, 194 M146, 260NW221. See *Dun. Dig.* 6752.

A truck warehouse and depot, located in Wadena, Minn., a block and a half from main business street and within a block of a public garage, a similar truck depot, a large warehouse, a furniture store and undertaking parlor, and on street running directly from railroad depot to main business street, is not a nuisance, either public or private. *Id.* See *Dun. Dig.* 7244.

A city has power of eminent domain in requiring necessary rights to empty sewerage into lake outside corporate limits subject to laws respecting nuisances and health regulations. *Op. Atty. Gen.*, June 20, 1933.

Whether or not city may declare keeping of bees a public nuisance is a question for judicial determination in each particular case. *Op. Atty. Gen.* (59a-32), May 23, 1934.

**9581. Fence, etc., when nuisance.**

174M457, 219NW770.

**9584. Waste pending year for redemption—Injunction.**

It is waste for a mortgagor in possession following foreclosure sale not to use current rents to the extent reasonably needed to keep the property tenantable. *Gardner v. W.*, 185M147, 240NW351. See *Dun. Dig.* 6459.

Waste will ordinarily not be enjoined unless of such character that it may so impair the value of the property as to render it insufficient or of doubtful sufficiency as security for the debt. *Gardner v. W.*, 185M147, 240 NW351. See *Dun. Dig.* 6459.

**9585. Trespass—Treble damages.**

Verdict for \$350 held not excessive for cutting of trees. *Hansen v. M.*, 182M321, 234NW462. See *Dun. Dig.* 2597, 9696(33).

**9590. Action to determine boundary lines.**

Establishment of center of section of land. 172M338, 215NW426.

Action to determine boundary line between city lots, evidence held to show that plaintiffs were estopped to deny ownership of land upon which building existed. *Lobnitz v. F.*, 186M292, 243NW62. See *Dun. Dig.* 1083.

In division of dried-up bed of meandered lake, if parties cannot agree, action in district court to determine boundary lines is only remedy. *Op. Atty. Gen.*, May 16, 1932.

**9591. Pleadings—Additional parties.**

Title by adverse possession may be proved under a general allegation of ownership. 171M488, 214NW283.

**9592. Judgment—Landmarks.**

Action contemplates the settlement of title and a judgment is res adjudicata in a subsequent action in ejectment. 171M488, 214NW283.

## CHAPTER 83

## Foreclosure of Mortgages

## BY ADVERTISEMENT

**9602. Limitation.**

After foreclosure sale remedy on mortgage as a security is exhausted and assignment in mortgage of rents to pay taxes was terminated. *Gardner v. W.*, 185M147, 240NW351. See *Dun. Dig.* 6465.

After foreclosure sale rights of parties are determined exclusively by statute. *Gardner v. W.*, 185M147, 240NW 351. See *Dun. Dig.* 6371.

Purchaser at mortgage sale is not entitled to rents accruing during the period allowed for redemption to pay taxes subject to which he bid in the property, though the mortgage expressly assigned rents to pay taxes. *Gardner v. W.*, 185M147, 240NW351. See *Dun. Dig.* 6371.

**1. Foreclosure in general.**

The measure of a mortgagor's damage for a premature foreclosure is not the value of the property in excess of the debt but only the value of the use to the extent that the mortgagor has been deprived thereof by the wrong done. *Bowen v. B.*, 185M35, 239NW774. See *Dun. Dig.* 6476.

Mortgagor of real estate has an equity of redemption which may not be terminated except by foreclosure or by lawful surrender of equity of redemption. *Stipe v. J.*, 192M504, 257NW99. See *Dun. Dig.* 6215.

Court of equity could order mortgage foreclosure set aside, provided mortgagor executed renewal notes and renewal mortgage in accordance with previous agreement entered into with mortgagee but unperformed by mort-

gagee. *Young v. P.*, 193M578, 259NW405. See *Dun. Dig.* 6487.

**4. The power.**

While attorney was acting as a collector for mortgagor, his failure to collect and pay mortgagee was not chargeable to mortgagee, though such attorney subsequently represented mortgagee in foreclosure of mortgage, as affecting wrongfulness of foreclosure. *Hayward Farms Co. v. U.*, 194M473, 260NW868. See *Dun. Dig.* 6318.

**13. Regulation by executive order.**

Federal land bank of St. Paul is not excepted from governor's order as to mortgage foreclosures. *Op. Atty. Gen.*, Mar. 24, 1933.

Governor's executive order did not affect time of redemption from foreclosure sales held prior to its issuance. *Op. Atty. Gen.*, Mar. 27, 1933.

Governor's executive order does not protect mortgagor who has parted with title to land, though he continues to reside thereon. *Op. Atty. Gen.*, Mar. 27, 1933.

Under governor's executive order, mortgagor could not consent to a foreclosure of mortgage. *Op. Atty. Gen.*, Mar. 27, 1933.

**9603. Requisites for foreclosure.****½. In general.**

Finding that interest had been paid and that no default had occurred held sustained by the evidence. 171 M469, 214NW472.

An agent to collect interest is within his authority in receiving the interest one day before it is due to be applied as of the date it is due. 171M469, 214NW472.

Mortgage foreclosure was not abandoned by reason of an agreement between mortgagee and mortgagor that latter might purchase on contract for a certain sum if there was no redemption. Investors' Syndicate v. H., 136M599, 244NW65. See Dun. Dig. 6150 to 6156.

**3. Only record owner may foreclose.**

Necessity for recording assignment of mortgage given under "Federal Farm Loan Act" (Mason's Code, Title 12, §§641 to 1021), see Laws 1929, c. 325.

**9604. Notice of sale—Service on occupant.**

**1. Publication.**

The statement of the holding in 6 Minn. 192 (123) to the effect that a sale may be held on the last day of publication may be somewhat misleading. It should be qualified by the further statement that the full period of notice must have run at the date of the last publication. Thus the requirement in this section is six weeks' notice or 42 days, and if the first publication occurs August 3 and the last on September 14, seven publications have occurred involving 42 days' notice after excluding the first day and including the last.—Editor.

Where mortgage sale by advertisements has been had on insufficient publication of notice, mortgagor may remain in possession and proceed with an action to set aside the sale, or remain in possession and assert right against any one claiming under foreclosure. White v. M., 192M522, 257NW281. See Dun. Dig. 6356.

First publication on August 6th and last publication on September 10th did not constitute six weeks' published notice necessary for foreclosure of mortgage on September 16. Id. See Dun. Dig. 6337.

**2. Service on occupant.**

Foreclosure was invalid where notice was not served on occupant. 172M183, 214NW925.

Where notice of foreclosure and sale was served upon the tenant holding the entire farm under lease from the owner, failure to serve also those who owned and occasionally used a hunter's cabin on the premises did not invalidate the foreclosure. 174M47, 218NW446.

That a return of service described a lessee in possession of a garage as "H. A. Salisbury" when in fact his name was Hector A. Salvail does not invalidate service. Rhode Island Hospital Trust Co. v. C., 191M354, 254NW466. See Dun. Dig. 6326, 6921, 7818.

Service of notice upon company which admittedly had possession of grounds, hallways, stairways, and untenanted apartments of an apartment building was service upon the "person in possession" of premises upon which houses were located. Id.

Governor's executive order relating to foreclosure sales does not prohibit serving notice on occupant in foreclosure proceedings. Op. Atty. Gen., Mar. 22, 1933.

**9606. Attorney to foreclose—Record of power.**

See Act Jan. 24, 1936, Sp. Ses. 1935-36, c. 92, set forth in Appendix 5, §121 herein, post.

So long as no attorney's fees are included as a charge against the mortgagor, it is not necessary to make and file a power of attorney. 176M609, 224NW264.

Foreclosure sale by advertisement made before power of attorney is recorded, held void; and action to set aside commenced within seven months is not barred by laches, and doctrines of estoppel and unjust enrichment were not applicable. 181M79, 231NW395.

Attorney's fees cannot be charged as costs unless an attorney at law is employed. 181M254, 232NW318. See Dun. Dig. 6425.

**9607. Sale, how and by whom made.**

**6. Inverse order of alienation.**

Where owner gives mortgage and thereafter conveys away part of land, one who obtains judgment lien upon part retained has no right to require that tract conveyed away be first sold on foreclosure of mortgage. 175M541, 222NW71.

**10. In general.**

Mortgagor in possession of real estate cannot consent to foreclosure sale in violation of governor's executive order. Op. Atty. Gen., Mar. 22, 1933.

Sheriff is not authorized to hold mortgage foreclosure sale after filing of petition under Mason's U. S. Code, Tit. 11, §203, prior to disposition of petition by court without specific authority from court of bankruptcy. Op. Atty. Gen. (544k), Oct. 12, 1934.

**9608. Postponement.**

Executive order issued by Governor directing sheriffs to refrain from conducting mortgage foreclosure sales was an attempt to exercise legislative power and not within his power. State v. Moeller, 189M412, 249NW330.

Adjournment of mortgage foreclosure sale by sheriff on February 27, 1933, was validated by curative provision of act of Mar. 2, 1933. Id.

**9610. Foreclosure for installments, etc.**

34F(2d)308. Appeal dismissed. 51SCR40.

The amendment of 1925, permitted foreclosure for default in one installment due under a mortgage, gave validity to a provision for such foreclosure in a pre-existing mortgage, and such construction of the statute does not deny the mortgagor due process of law or impair the obligation of his contract. 34F(2d)308.

One having taken an assignment of a mortgage under a foreclosure under the 1925 act amending this section cannot claim that the subsequent installments are not prior to his title, on the ground that the 1925 act was unconstitutional as to mortgages executed prior to its passage. 174M520, 219NW914.

Where junior mortgagee redeemed from foreclosure by advertisement because of default in payment of installment, notice being given of amount thereof, principal debt had priority over redemption. Des Moines Joint Stock Land Bank v. D., 185M435, 241NW393. See Dun. Dig. 6423.

After foreclosure of mortgage on installment, mortgage and all its covenants, including that to pay taxes, remain in full force, and mortgagee is entitled under assignment of rents as part of security to collect rents to apply upon delinquent taxes, even those accrued at time of foreclosure for installment. Peterson v. M., 189M98, 248NW667. See Dun. Dig. 9610.

**9612. Mortgagee, etc., may purchase.**

Fraudulent grantee can purchase and acquire good title against all creditors at foreclosure of a prior and paramount mortgage. 171M197, 213NW892.

Where mortgagee foreclosed and purchased for the amount due on note, there was no "collection" within the meaning of assignment of half interest in the debt secured, and assignee was only entitled to half interest in the land and not a money judgment. 178M360, 227NW182.

**9613. Certificate of sale—Record—Effect.**

THE CERTIFICATE

**4½. Assignment.**

180M552, 231NW234.

It is the duty of the sheriff to sign the certificate of sale regardless of what is stated in the affidavit of cost with which he had no concern. Op. Atty. Gen., Jan. 2, 1932.

RIGHTS AND LIABILITIES OF PURCHASER

**5. Nature of interest during redemption period.**

Where the mortgagee purchases for amount of mortgage at foreclosure sale he becomes a purchaser of premises with vested right to become absolute owner in absence of redemption. Klein (USDC-Minn), 9FSupp 57, 61. See Dun. Dig. 6369.

Bankruptcy Act prohibition against foreclosure proceedings subsequent to a farmer's petition for an extension, held not to extend period of redemption where a mortgagor did not file his petition until four months after foreclosure sale and purchase by mortgagee. Id. See Dun. Dig. 6400.

Right of purchaser to crops growing on mortgaged land at time of foreclosure and sale. 15MinnLawRev 717.

**10. Effect of mortgagee bidding in.**

Where holder of first and second mortgages, executed by same mortgagor and covering same real estate, forecloses his second mortgage, and thereby, in default of redemption, gets title in fee, lien of first mortgage is merged in fee; and debt thereby secured is discharged where it does not appear that there was intention to prevent such merger. Mulligan v. F., 194M451, 260NW 630. See Dun. Dig. 6117, 6272.

**12. Right to crops, rents and profits.**

Where premises are falling into disrepair, but are used in usual course of husbandry as in previous years, purchaser at a mortgage sale is not entitled to a receiver to apply rents to repairs during year of redemption. Greene v. T., 188M381, 246NW921. See Dun. Dig. 6457(40).

**12½. Taxes.**

Purchaser at mortgage foreclosure sale is not entitled to reimbursement during year of redemption for taxes paid by him which were a lien at time of sale. Id.

**9620. Affidavit of costs.**

Attorney's fees cannot be charged as costs unless an attorney at law is employed. 181M254, 232NW318. See Dun. Dig. 6425.

**9621. Excessive costs or interest.**

If mortgagee charges as a disbursement a sum which is not actually paid, the mortgagor or his heirs or assigns may recover from the owner of the mortgage at the time of foreclosure three times the amount of any such sum, but the foreclosure would be valid. Op. Atty. Gen., Jan. 2, 1932.

**9623. Action to set aside for certain defects.**

Where administrator forecloses mortgage and buys in his own name as administrator, an action to set aside the foreclosure and sale on ground that no default had occurred is properly brought in the district court and against the administrator as sole defendant. 171M469, 214NW472.

A second proceeding to foreclose a real estate mortgage by advertisement will not be set aside simply because of the pendency of an action to determine the validity of a prior attempted foreclosure which was found void. Sheasgreen Holding Co. v. D., 182M142, 233NW853. See Dun. Dig. 6487.

Section is unconstitutional insofar as it attempts to limit time within which person rightfully and con-

tinuously in possession of the mortgaged land can question foreclosure proceedings ineffective because proper statutory notice of foreclosure was not served upon the occupant. *Hammon v. H.*, 192M259, 256NW94. See Dun. Dig. 1620.

#### 9626. Redemption by mortgagor.

A mortgagor is not deprived of his right of redemption by foreclosure sale alone as it continues for a year after sale. *Brown v. B.*, 185M35, 239NW774. See Dun. Dig. 6381a(65).

#### 4. How lost.

Strict legal rights in respect to the time for redemption from foreclosure sale may be waived. *Ellingson v. S.*, 182M510, 234NW867. See Dun. Dig. 6400.

The detriment which results to mortgagor from his omission to make redemption in reliance on the mortgagee's promise that redemption may be made at a later date, is sufficient consideration for that promise. *Ellingson v. S.*, 182M510, 234NW867. See Dun. Dig. 1750(81), 6400.

#### 6. Release.

Though a mortgagor may not, at time of making a mortgage, bargain away or sell to mortgagee his equity of redemption, he may do so subsequently under certain circumstances. *O'Connor v. S.*, 190M177, 251NW180. See Dun. Dig. 6146, 6385, n. 74.

#### 12. Who is an assign.

During year allowed by statute either a life tenant or remainderman could have redeemed, and the rights of both were extinguished by failure to redeem. *Thielen v. S.*, 184M333, 238NW678. See Dun. Dig. 6399.

#### 15. By wife.

Where wife, on divorce, was given possession of apartment building and permitted mortgage to be foreclosed and had attorney take judgment against her and redeem property for purpose of defrauding divorced husband, such attorney held property as trustee for divorced couple, subject to prior lien for amount paid in redemption. *Slagle v. S.*, 187M1, 244NW79. See Dun. Dig. 9598, 9607.

#### 16. Time in which to redeem—Extension.

In action to enforce agreement to extend time for redemption, evidence held to support finding for defendants. 172M422, 215NW839.

#### 18. Effect of non-redemption.

Crop not harvested until a short time after expiration of year for redemption held, nevertheless, the property of the tenant and the mortgagor. 176M37, 222NW292.

Where an award of damages is made to the owner of a tract of land on establishment of a county road, upon which land a mortgage was in process of foreclosure, the mortgagee who purchased the property was entitled to the award in the absence of a redemption. *Op. Atty. Gen.*, Apr. 2, 1931.

#### 9627. Redemption by creditor.

##### 1. General plan.

Evidence held to sustain a finding of agreement that third mortgagee would redeem from first and lease land to mortgagor. 174M180, 218NW889.

Holder of second mortgage could sue for breach of condition of bond and recover damages for impairment or loss of his security without redeeming from foreclosure of first mortgage. 176M26, 222NW512.

The purchaser at the sale, having failed to file an affidavit of taxes paid, they did not become a part of the sum to be paid in making redemption. 176M393, 223NW609.

Where second mortgagee redeems from sale under first mortgage, third mortgagee cannot make redemption without making tender of amount sufficient to cover lien of second mortgagee. *Op. Atty. Gen.* (390c-14), June 20, 1935.

##### 2. Who may redeem.

*Slagle v. S.*, 187M1, 244NW79; note under §9626. Divorced wife having right to redeem as creditor of husband in her individual capacity, the fact that she made redemption for herself and also for her child did not render the redemption invalid. 176M393, 223NW609.

Judgment in divorce action making allowance for support of children, a lien upon real estate gave the divorced wife the right to redeem from a sale of the land under a mortgage. 176M393, 223NW609.

A life tenant whose right to redeem from mortgage foreclosure has been extinguished cannot question the right of redemption of one creditor from another. *Thielen v. S.*, 184M333, 238NW678. See Dun. Dig. 6411.

Where mortgage was foreclosed and neither life tenant nor remaindermen redeemed, and creditor of life tenant redeemed, a junior mortgage creditor of one of the remaindermen could redeem from the judgment creditor. *Thielen v. S.*, 184M333, 238NW678. See Dun. Dig. 6410(48).

#### 9628. Redemption, how made.

Affidavit of amount due properly stated entire amount covered by affiant's lien. 176M393, 223NW609.

##### ½. In general.

A redemption by a junior mortgagee operates as an assignment of the rights of a purchaser at a real estate foreclosure sale by advertisement, and the redemptioner is subrogated to such rights. *Des Moines Joint Stock Land Bank v. D.*, 185M435, 241NW393. See Dun. Dig. 6423(54).

#### 2. Amount necessary to redeem.

Where second mortgagee redeems from sale under first mortgage, third mortgagee cannot make redemption without making tender of amount sufficient to cover lien of second mortgagee. *Op. Atty. Gen.* (390c-14), June 20, 1935.

#### 9629. Certificate of redemption—Record.

Failure to record redemption certificate within four days, rendered it void as to subsequent good-faith redemption from sheriff. 177M563, 225NW815.

An action for money had and received did not lie to recover money paid to purchaser at foreclosure, but owner could recover from such purchaser, money received by the latter from the sheriff on a subsequent redemption by a creditor who was entitled to the land because the owner failed to file his certificate. 177M563, 225NW815.

#### 9630. Effect of redemption.

##### ½. In general.

Redeeming life tenant holds for joint benefit of himself and remainderman. 171M182, 213NW736.

Amount which remainderman must contribute. 171M182, 213NW736.

Evidence held to sustain a finding of agreement that third mortgagee would redeem from first and lease land to mortgagor. 174M180, 218NW889.

##### 1. Redemption by owner.

*Slagle v. S.*, 187M1, 244NW79; note under §9626.

A life tenant who redeems an outstanding mortgage lien is entitled to contribution from remaindermen in an amount equal to mortgage lien less present worth of life tenant's liability to pay interest during his expectancy. *Engel v. S.*, 191M324, 254NW2. See Dun. Dig. 1922a.

#### 9632. Holder of junior mortgage may pay.

Plaintiff, mortgagee, by releasing the mortgagors from their personal obligation to pay the mortgage, did not subordinate its mortgage to another mortgage obtained from a subsequent purchaser of the premises. 178M50, 226NW189.

The equities of mortgagees, as to each other, in respect to taxes paid or purchased by them, are not affected by the statute. *Des Moines Sav. Bk. & Trust Co. v. E.*, 183M46, 235NW390.2 See Dun. Dig. 6236.

#### 9633. Mortgages to be reinstated in certain cases.

178M50, 226NW189.

After foreclosure sale remedy on mortgage as a security is exhausted and assignment in mortgage of rents to pay taxes was terminated. *Gardner v. W.*, 185M147, 240NW351. See Dun. Dig. 6465.

After foreclosure sale rights of parties are determined exclusively by statute. *Gardner v. W.*, 185M147, 240NW351. See Dun. Dig. 6371.

Purchaser at mortgage sale is not entitled to rents accruing during the period allowed for redemption to pay taxes subject to which he bid in the property, though the mortgage expressly assigned rents to pay taxes. *Gardner v. W.*, 185M147, 240NW351. See Dun. Dig. 6371.

#### CURATIVE ACTS

Laws 1929, c. 5

Laws 1929, c. 53.

Laws 1929, c. 225.

Laws 1929, c. 378.

Laws 1931, c. 198.

Laws 1931, c. 199.

Laws 1931, c. 230.

Laws 1931, c. 237.

Laws 1933, c. 437. See Appendix 5, par. 21, post.

*Act. Ex. Ses.*, Dec. 27, 1933, c. 26, legalizes foreclosure by advertisement of mortgage or assignment thereof to banking corporation where defect consisted in omitting word "The" from corporate name.

*Act Jan. 5, 1934, Ex. Ses.*, c. 42, validates foreclosures by advertisement theretofore made in which power of attorney was not executed and/or recorded prior to sale. Omitted as temporary.

Laws 1935, c. 287. Certain defective foreclosures legalized.

Laws 1935-36, Sp. Ses., cc. 33, 51, 92. See Appendix 5, ¶21, post.

#### EMERGENCY RELIEF ACT

**9633-1. Application of Act.**—The provisions of this Act shall not apply to any mortgage while such mortgage is held by the United States or by any agency, department, bureau, board or commission thereof, as security or pledge of the maker, its successors or assigns, nor shall the provisions of this Act apply to any mortgage held as security or pledge to secure payment of a public debt or to secure payment of the deposit of public funds.

The following sections of this Act preceding Part Two shall constitute Part One. (Act Apr. 18, 1933, c. 339; Mar. 15, 1935, c. 47.)

##### Preamble to following act.

Whereas, the severe financial and economic depression existing for several years past has resulted in extremely

low prices for the products of the farms and the factories, a great amount of unemployment, an almost complete lack of credit for farmers, business men and property owners and a general and extreme stagnation of business, agriculture and industry, and

Whereas, a condition of subnormal rainfall has existed in the State of Minnesota for several years, and this condition has greatly reduced the total products of the farms in Minnesota during the past two years; and

Whereas, many owners of real property, by reason of said conditions, are unable, and it is believed, will for some time be unable to meet all payments as they come due of taxes, interest and principal of mortgages on their properties and are, therefore, threatened with loss of such properties through mortgage foreclosure and judicial sales thereof, and

Whereas, many such properties have been and are being bid in at mortgage foreclosure and execution sales for prices much below what is believed to be their real values and often for much less than the mortgage or judgment indebtedness, thus entailing deficiency judgments against the mortgage and judgment debtors, and

Whereas, it is believed, and the Legislature of Minnesota, hereby declares its belief, that the conditions existing as hereinbefore set forth has created an emergency of such nature that justifies and validates legislation for the extension of the time of redemption from mortgage foreclosure and execution sales and other relief of a like character; and

Whereas, the State of Minnesota possesses the right under its police power to declare a state of emergency to exist, and

Whereas, the inherent and fundamental purposes of our government is to safeguard the public and promote the general welfare of the people; and

Whereas, under existing conditions the foreclosure of many real estate mortgages by advertisement would prevent fair, open and competitive bidding at the time of sale in the manner now contemplated by law, and

Whereas, it is believed, and the Legislature of Minnesota hereby declares its belief, that the conditions existing as hereinbefore set forth have created an emergency of such a nature that justifies and validates changes in legislation providing for the temporary manner, method, terms and conditions upon which mortgage foreclosure sales may be had or postponed and jurisdiction to administer equitable relief in connection therewith may be conferred upon the District Court, and

Whereas, Mason's Minnesota Statutes of 1927, Section 9608, which provides for the postponement of mortgage foreclosure sales, has remained for more than thirty years, a provision of the statutes in contemplation of which provisions for foreclosure by advertisement have been agreed upon.

Laws 1933, c. 399, is valid. *Blaisdell v. H.*, 189M422, 249NW334.

This act is constitutional. *Blaisdell v. H.* Id. Aff'd 290US398, 54SCR231.

While statute is in derogation of common law, it is remedial in nature and to be fairly construed to accomplish its purpose. *Anderson v. H.*, 191M414, 254NW585. See Dun. Dig. 6400.

There can be no declaratory judgment as to constitutionality of bonds where both parties seek the same decree. *County Board v. B.*, 192M512, 257NW92.

Act is not applicable to mortgages held by reconstruction finance corporation and regional agricultural credit corporation, either as mortgages or as collateral security for loans. Op. Atty. Gen., June 10, 1933.

Provision accepting mortgages held by government or agency thereof does not apply to a mortgage assigned by a private party or bank to a federal agency as collateral security for loan to mortgagee. Op. Atty. Gen. (415c), June 19, 1935.

PART ONE

**9633-2. Emergency declared to exist.**—In view of the situation hereinbefore set forth, the Legislature of the State of Minnesota hereby declares that a public economic emergency does exist in the State of Minnesota. (Act Apr. 18, 1933, c. 339, §1; Mar. 15, 1935, c. 47, §1.)

Laws 1935, c. 47, §1, which continues in effect the provisions of this act is constitutional. Op. Atty. Gen. (415f), Mar. 5, 1935.

**9633-3. Mortgagee may apply to District Court for relief.**—In any proceedings heretofore commenced for the foreclosure of a mortgage on real estate by advertisement, in which a sale of the property has not been had, or in any such proceedings hereafter commenced, when the mortgagor, or the owner in possession of the mortgaged premises, or anyone claiming under said mortgagor, or anyone liable for the mortgage debt, at any time after the issuance of the notice of such foreclosure proceedings, shall apply to the District Court of the county wherein such foreclosure proceedings are being had, or are pending, by filing and serving a summons and verified complaint with prayer that the sale

in foreclosure by advertisement shall be postponed and that the foreclosure, if any, shall proceed by action. If it appears to the court that granting of the relief as prayed would be equitable and just, then, and in that event, the foreclosure proceedings by advertisement may be postponed by the court by an *exparte* order which shall be served with the summons and complaint upon the party foreclosing or his attorney, and at the time of the hearing upon said order the court may then further postpone such sale, and the parties seeking to foreclose such mortgage shall proceed, if at all, to foreclose said mortgage by interposing a cross complaint in such action. Such service may be made as now provided for the service of a summons in a civil action, or by registered mail, on the person foreclosing or his authorized agent or attorney, at the last known address of such person, agent or attorney respectively. As a condition precedent to such postponement of such foreclosure sale by advertisement the party filing such verified complaint shall pay to the clerk for the person foreclosing the mortgage the expenses incurred, not including attorney's fees which may accrue prior to any postponement. The filing of such verified complaint shall be deemed a waiver of publication of notice of postponement of the foreclosure sale, and the sale at the time which may be fixed by the court shall be deemed to be a sale postponed in lieu of the time of sale specified in the published notice of mortgage foreclosure sale. (Act Apr. 18, 1933, c. 339, §2; Mar. 15, 1935, c. 47, §2.)

Statute held valid as extending period of redemption from foreclosure of mortgages on land not homestead. *Grace v. L.*, 189M450, 249NW672.

This act is constitutional. Op. Atty. Gen. (415i), Mar. 5, 1935.

**9633-4. Court may order resale.**—When any mortgage has been foreclosed by action, the court shall, on the coming in of the report of sale, cause notice of a hearing thereon to be served on the parties to the action who have appeared, and fix the time and place for the hearing on said report. Before granting an order confirming said sale, the court shall, if it appears upon due examination that the sale price is unreasonably and unfairly inadequate, or that justice has otherwise not been done, order a resale. If the sale is confirmed, the sheriff, or his deputy, shall forthwith execute and deliver the proper certificate of sale which shall be recorded within 20 days after such confirmation. Upon the hearing of the motion for an order, confirming the sale of the premises involved in the foreclosure of mortgages by action, in case the evidence is insufficient to establish a fair and reasonable market or rental value of such property, the court shall receive any competent evidence, including evidence tending to establish the actual value of the property involved in said mortgage foreclosure proceedings, for the purpose, or purposes, for which said property is or can be used. The court shall also receive any evidence tending to show to what extent, if any, the property has decreased in actual or market value by reason of the economic conditions existing at the time of or prior to such sale.

**1. Compromises.**—In case the parties to any such foreclosure action shall agree in writing upon terms of compromise settlement thereof, or of composition of the mortgage indebtedness, or both, the court shall have jurisdiction and may by its order confirm and approve such settlement or composition, or both, as the case may be.

**2. Jurisdiction of court.**—The court shall have the same jurisdiction to postpone the enforcement of judgment by execution sale or to order resale or give other relief where such judgment is rendered in an action to collect a debt or obligation secured by a real estate mortgage, the foreclosure of which might be affected under the terms of this Act, as is conferred by this Act with regard to the mortgage. (Act Apr. 18, 1933, c. 339, §§3, 3.1, 3.2; Mar. 15, 1935, c. 47, §§3, 3.1, 3.2.)

Where parties concerned with application for an order extending period for redemption from mortgage foreclosure made a settlement in regard to extension by

agreeing that period of redemption should be extended to a certain date and that petitioner should have right to receive and retain rents from that date and receive a certain sum for a mechanical stoker, the agreement was a binding settlement of the litigation, notwithstanding terms had not been incorporated in a written stipulation or memorial of the completed settlement, and the agreement was not vitiated under the statute of frauds or otherwise by reason of inclusion of transfer of personal property or fixtures. *State v. District Court, 194 M32, 259NW542.* See Dun. Dig. 6392.

**9633-5. Period of redemption may be extended.—**

Where any mortgage upon real property has been foreclosed and the period of redemption has not yet expired, or where a sale is hereafter had, in the case of real estate mortgage foreclosure proceedings, now pending, or which may hereafter be instituted prior to the expiration of two years from and after the passage of this Act, or upon the sale of any real property under any judgment or execution where the period of redemption has not yet expired, or where such sale is made hereafter within two years from and after the passage of this Act, the period of redemption may be extended for such additional time as the court may deem just and equitable but in no event beyond March 1, 1937; provided that the mortgagor, or the owner in possession of said property, in the case of mortgage foreclosure proceedings, or the judgment debtor, in case of sale under judgment, or execution, shall prior to the expiration of the period of redemption apply to the district court having jurisdiction of the matter, on not less than 10 days' written notice to the mortgagee or judgment creditor, or the attorney of either, as the case may be, for an order determining the reasonable value of the income on said property, or, if the property has no income, then the reasonable rental value of the property involved in such sale, and directing and requiring such mortgagor or judgment debtor to pay all or a reasonable part of such income or rental value in or toward the payment of taxes, insurance, interest, mortgage or judgment indebtedness at such times and in such manner as shall be fixed and determined and ordered by the court; and the court shall thereupon hear said application and after such hearing shall make and file its order directing the payment by such mortgagor, or judgment debtor, of such an amount at such times and in such manner as to the court shall, under all the circumstances, appear just and equitable. Provided, further, that upon the service of the notice or demand aforesaid that the running of the period of redemption shall be tolled until the court shall make its order upon such application. Provided, further, however, that if such mortgagor or judgment debtor, or personal representative, shall default in the payments, or any of them, in such order required, on his part to be done, or commits waste, his right to redeem from sale shall terminate 30 days after such default, and holders of subsequent liens may redeem in the order and manner now provided by law beginning 30 days after the service upon such mortgagor, or judgment debtor, or their personal representatives or assigns and holders of subsequent liens, of notice of default and the filing of such notice of default with proof of service thereof with the clerk of such District Court, and his right to possession shall cease and the party acquiring title to any such real estate shall then be entitled to the immediate possession of said premises. Such 30 day period shall not begin to run until the filing of an order by the court finding such default or waste to exist. Provided, further, that the time of redemption from any real estate mortgage foreclosure or judgment or execution sale heretofore made, which otherwise would expire less than 30 days after the passage and approval of this act, shall be and the same hereby is extended to a date 30 days after the passage and approval of this act, and in such case, the mortgagor, or judgment debtor, or the assigns or personal representative of either, as the case may be, or the owner in possession of the property, may, prior to said date, apply to said court for and the court may thereupon grant the relief as hereinbefore and in this section provided.

Provided, further, that prior to March 1, 1937, no action shall be maintained in this state for a deficiency judgment until the period of redemption as allowed by existing law or as extended under the provisions of this act has expired. (Act Apr. 18, 1933, c. 339, §4; Mar. 15, 1935, c. 47, §4.)

Petition and not notice, was application required by statute to be made before expiration of period of redemption, and it is sufficient that it was served and filed within that time. *Anderson v. H., 191M414, 254NW 585.* See Dun. Dig. 6400.

Service of motion for extension of time for redemption from mortgage foreclosure sale upon attorneys who made such foreclosure by advertisement is good and effective service upon mortgagee who bid in premises at sale. Service on mortgagee by mail is not authorized. *Swanson v. C., 192M81, 255NW812.* See Dun. Dig. 6392, 6400.

Record of affidavits filed pursuant to §9648 was competent proof of taxes and insurance paid subsequent to foreclosure sale by holder of sheriff's certificate. *Young v. P., 192M446, 256NW906.* See Dun. Dig. 3355.

Granting of extension to redeem is not mandatory, but it is for trial court to determine according to equities of parties concerned. *Id.* See Dun. Dig. 6392.

Where court extended time within which redemption from a foreclosure sale might be made to Feb. 1, 1935, with a provision in order that a payment should be made by mortgagor to mortgagee on Oct. 1, 1934, court had no power to revise and alter terms of extension order after default had existed for more than 30 days in payment due on Oct. 1, 1934. *Mosse v. M., 193M496, 259NW 19.* See Dun. Dig. 6392.

Act does not forbid a suit in this state to recover balance due on a promissory note executed and delivered in Iowa and secured by real estate mortgage upon land situate in that state, which mortgage has been foreclosed and proceeds applied on note, leaving due and unpaid balance sued for. *Connecticut Mut. Life Ins. Co. v. H., 194M41, 259NW390.* See Dun. Dig. 6392.

Notice on mortgagee that mortgagor will apply for an extension of time to redeem is not application for extension of time to redeem. *Rebold v. C., 194M73, 259NW 684.* See Dun. Dig. 6392.

Where property under foreclosure produces no income from which holder of sheriff's certificate could receive any benefit, and there is no showing of any reasonable probability that property will produce income which could be allocated to holder of such certificate, and rental value of property is less than sufficient to pay taxes thereon and interest on incumbrances prior to foreclosed mortgage, court was fully justified in denying petition for extension of time for redemption. *Rodine v. D., 194M121, 259NW699.* See Dun. Dig. 6392.

Where mortgagor failed to make payments to mortgagee over a period of more than 30 days beyond time fixed by court in order extending time for redemption from mortgage foreclosure sale, court cannot thereafter revise or alter terms of extension under moratorium act, title having passed to mortgagee, who was purchaser at foreclosure sale. *Butts v. T., 194M243, 260NW308.* See Dun. Dig. 6392.

Mortgagors' bankruptcy did not suspend court's order extending time for redemption from mortgage sale, order having fixed terms and conditions, compliance with which was wholly lacking. *Id.* See Dun. Dig. 6392.

Service of notice upon attorney for mortgagee (purchaser at the sale) was insufficient where no petition, notice or other papers relative to matter were filed with court prior to expiration of period of redemption already extended. *Koerber v. T., 194M654, 260NW353.* See Dun. Dig. 6392.

Granting of an extension of time for redemption from a mortgage foreclosure sale is not mandatory, and time of extension is for court to decide. *Nordmarken v. E., 194M389, 260NW628.* See Dun. Dig. 6392.

**9633-6. Court may revise and alter terms.—**Upon the application of either party prior to the expiration of the extended period of redemption, as provided in this act, and upon the presentation of evidence that the terms fixed by the court are no longer just and reasonable, the court may revise and alter such terms in such manner as the changed circumstances and conditions may require. (Act Apr. 18, 1933, c. 339, §5; Mar. 15, 1935, c. 47, §5.)

*Mosse v. M., 193M496, 259NW19;* note under §9633-5.

**9633-7. Trial to be held within 30 days.—**The trial of any action, hearing or proceeding mentioned in this act, shall be held within 30 days after the filing by either party of notice of hearing or trial, as the case may be, and such hearing or trial may be held at any general or special term, or in chambers, or during vacation of the court, and the order of the court shall be filed within 5 days after trial or hearing, no more than 5 days stay shall be granted, and review by the Supreme Court may be had by certiorari, if application



for the writ shall be made within 15 days after notice of such order, and such writ shall be returnable within 30 days after the filing of such order. (Act Apr. 18, 1933, c. 339, §6; Mar. 15, 1935, c. 47, §6.)

Butts v. T., 194M243, 260NW308; note under §9633-5.

Entry of judgment instead of order extending time for redemption from mortgage foreclosure sale under the moratorium statute did not prevent a review by certiorari. Swanson v. C., 192M81, 255NW812. See Dun. Dig. 1400.

Extension of time to redeem from a mortgage foreclosure sale is granted by an order and not by judgment, and review of such order is by certiorari. *Id.* See Dun. Dig. 6392, 6400.

Proceedings are summary and do not contemplate motions for a new trial, nor may an order denying a new trial be reviewed on certiorari issued prior thereto to review original decision. Young v. P., 192M446, 256NW 906. See Dun. Dig. 7071.

**9633-8. Inconsistent laws suspended till March 1, 1937.**—Every law and all the provisions thereof now in force insofar as inconsistent with the provisions of this act, are hereby suspended until March 1, 1937. No extension of the period for redemption, nor any postponement of sale, shall be ordered or allowed under this act which would have the effect of extending the period for redemption beyond March 1, 1937. (Act Apr. 18, 1933, c. 339, §7; Mar. 15, 1935, c. 47, §7.)

**9633-9. Application of act.**—This Act as to mortgage foreclosures shall apply only to mortgages made prior to April 18, 1933, but shall not apply to mortgages made prior to the passage of this act which shall hereafter be renewed or extended for a period ending more than one year after the passage of this act; neither shall this act apply in any way which would allow a resale, stay, postponement or extension to such time that any right might be adversely affected by a statute of limitation. (Act Apr. 18, 1933, c. 339, §8; Mar. 15, 1935, c. 47, §8 (1).)

**9633-9a. Application of act.**—The provisions of this act shall also apply to mortgage foreclosures wherein the District Court has previously postponed the sale or granted one or more extensions of the time for redemption, all pursuant to the provisions of Laws 1933, Chapter 339; provided, that the period of redemption has not expired; and shall also apply to actions and proceedings now pending or hereafter commenced under said act. (Act Mar. 15, 1935, c. 47, §8 (2).)

**9633-10. Provisions separable.**—The provisions of this Act are hereby declared to be severable. If one provision hereof shall be found by the decision of a court of competent jurisdiction to be invalid, such decision shall not affect the validity of the other provisions of this Act. (Act Apr. 18, 1933, c. 339, §9; Mar. 15, 1935, c. 47, §9.)

**9633-11. Definition.**—The words "mortgagor," "mortgagee," "judgment creditor," "judgment debtor," and "purchaser," whenever used in this act, shall be construed to include the plural as well as the singular, and also to include their personal representatives, successors and assigns; provided, however the words "successors or assigns," when used in this act, shall be construed to include only persons who stand in privity of estate to the mortgagor. (Act Apr. 18, 1933, c. 339, §11; Mar. 15, 1935, c. 47, §10.)

**9633-12. Application.**—Whenever the term "this Act" is referred to in that part of the bill amended so as to constitute Part One thereof, the same shall be construed as having reference only to Part One of this Act. (Act Apr. 18, 1933, c. 339, §11; Mar. 15, 1935, c. 47, §11.)

## PART TWO

**9633-13. To apply to homesteads only.**—The following, Part Two, of this Act shall apply only to real estate occupied as a home exclusively by the person seeking relief or persons dependent upon him and to farm lands used by the person seeking relief as his principal means of furnishing necessary support to such person, his family and dependents, and shall ap-

ply only to cases not entitled to relief under some valid provision of Part One of this Act. (Act Apr. 18, 1933, c. 339, Pt. 2, §1; Mar. 15, 1935, c. 47, Pt. 2, §1.)

The Governor's executive order prohibits foreclosure of mortgages on "real estate upon which the mortgagor has his residence," and does not prohibit foreclosure of a mortgage upon an adjacent piece of real estate though the two properties together do not exceed one-third of an acre in area and constitute the "homestead" of the mortgagor. Op. Atty. Gen., Apr. 7, 1933.

**9633-14. Mortgagee may apply to District Court for relief.**—In any proceedings heretofore commenced for the foreclosure of a mortgage on real estate by advertisement, in which a sale of the property has not been had, or in any such proceedings hereafter commenced, when the mortgagor, or the owner in possession of the mortgaged premises, or anyone claiming under said mortgagor, or anyone liable for the mortgage debt, at any time after the issuance of the notice of such foreclosure proceedings, shall apply to the District Court of the county wherein such foreclosure proceedings are being had, or are pending, by filing and serving a summons and verified complaint with prayer that the sale in foreclosure by advertisement shall be postponed and that the foreclosure, if any, shall proceed by action. If it appears to the court that granting of the relief as prayed would be equitable and just, then, and in that event, the foreclosure proceedings by advertisement may be postponed by the court by an ex parte order which shall be served with the summons and complaint upon the party foreclosing or his attorney and at the time of the hearing upon such order, the court may then further postpone such sale, and the parties seeking to foreclose such mortgage shall proceed, if at all, to foreclose said mortgage by interposing a cross complaint in such action. Such service may be made as now provided for the service of a summons in a civil action, or by registered mail on the person foreclosing or his authorized agent or attorney at the last known address of such person, agent or attorney respectively. As a condition precedent to such postponement of such foreclosure sale by advertisement the party filing such verified complaint shall pay to the clerk for the person foreclosing the mortgage the expenses incurred not including attorney's fees which may accrue prior to any postponement. The filing of such verified complaint shall be deemed a waiver of publication of notice of postponement of the foreclosure sale and the sale at the time which may be fixed by the court shall be deemed to be a sale postponed in lieu of the time of sale specified in the published notice of mortgage foreclosure sale. (Act Apr. 18, 1933, c. 339, Pt. 2, §2; Mar. 15, 1935, c. 47, Pt. 2, §2.)

**9633-15. Jurisdiction of court.**—The court shall have the same jurisdiction to postpone the enforcement of judgment by execution sale or to order resale or give other relief where such judgment is rendered in an action to collect a debt or obligation secured by a real estate mortgage, the foreclosure of which might be affected under the terms of this Act, as is conferred by this Act with regard to the mortgage. (Act Apr. 18, 1933, c. 339, Pt. 2, §3; Mar. 15, 1935, c. 47, Pt. 2, §3.)

**9633-16. Application of act.**—The provisions hereof shall not apply to mortgages made after the passage of this Act nor to mortgages made prior to the passage of this Act which shall hereafter be renewed or extended to become due more than a year after such passage; neither shall this Act apply in any way which would allow a resale, stay, postponement or extension to such time that any right might be adversely affected by a statute of limitation. (Act Apr. 18, 1933, c. 339, Pt. 2, §4; Mar. 15, 1935, c. 47, Pt. 2, §4.)

**9633-17. Limitations of act.**—No postponement or extension shall be ordered under conditions which, under the temporary emergency, would substantially diminish or impair the value of the contract or obligation of the person against whom the relief is sought,

without reasonable allowance to justify the exercise of the police power hereby authorized. (Act Apr. 18, 1933, c. 339, Pt. 2, §5; Mar. 15, 1935, c. 47, Pt. 2, §5.)

**9633-18. Trial to be held within 20 days.**—The trial of any action, hearing or proceeding provided for in this Act shall be held within 20 days after the filing by either party of notice of hearing or trial, as the case may be, and such hearing or trial may be held at any general or special term, or in chambers, or during vacation of the court, and the order of the court shall be filed within 5 days after trial or hearing, no more than 5 days' stay shall be granted within which to apply for amended findings, and order or for review and review by the Supreme Court may be had by certiorari, if application for the writ shall be made within 10 days after notice of such order and such writ shall be returnable within 30 days after the filing of such order. (Act Apr. 18, 1933, c. 339, Pt. 2, §6; Mar. 15, 1935, c. 47, Pt. 2, §6.)

**9633-19. Provisions separable.**—The provisions of this Act shall be severable. The invalidity of any one provision, section or part, shall not affect the validity of the remainder. Wherever the term "this Act" or "hereof" are used in Part Two, the same shall be construed as having no reference to Part One. (Act Apr. 18, 1933, c. 339, Pt. 2, §7; Mar. 15, 1935, c. 47, Pt. 2, §7.)

**9633-20. Duration of act limited.**—This Act shall remain in effect only during the continuance of the emergency and in no event beyond March 1, 1937. No extension of the period for redemption nor any postponement of sale shall be ordered or allowed under this Act which would have the effect of extending the period for redemption beyond March 1, 1937. (Act Apr. 18, 1933, c. 339, Pt. 2, §8; Mar. 15, 1935, c. 47, Pt. 2, §8.)

**9633-21. Application of act.**—Nothing in Part Two of this Act shall limit or restrict any provision of Part One. (Act Apr. 18, 1933, c. 339, Pt. 2, §9; Mar. 15, 1935, c. 47, Pt. 2, §9.)

#### BY ACTION

##### 9634. By what rules governed.

###### 1. Object of action.

Is the mortgage only a power of sale under the lien theory of mortgages? 15MinnLawRev147.

###### 12. Defenses.

In an action to have a deed declared a mortgage and have it foreclosed, it was immaterial that plaintiff had demanded more cash than was due, where defendant did not refuse to perform for that reason, but defended on other grounds. Spielman v. A., 183M282, 236NW319. See Dun. Dig. 6435.

In action to enjoin foreclosure of a real estate mortgage of \$1,500 on ground that plaintiff had received no more than \$400 from mortgagee, wherein defendant pleaded that he was a holder in due course of note and mortgage, and that plaintiff, because of payment of one installment of interest to such holder, was estopped from claiming that no more than \$400 was received, evidence held not to require a finding of estoppel. Chamberlin v. T., —M—, 261NW577. See Dun. Dig. 6268.

Mortgagor in mortgage for \$1,500 was entitled to enjoin foreclosure for more than \$400 she obtained from mortgagee, and assignee of mortgage, took it subject to equities between original parties, even though a holder in due course of note. Id. See Dun. Dig. 6284.

###### 16. Notice of election—Treating whole amount due.

Acceleration clause, held operative after extension agreement with mortgagor's grantee. 181M249, 232NW33. See Dun. Dig. 6318.

##### 9636. Judgment—Transcript to sheriff.

Personal judgment against grantee on mortgagor held properly denied. 172M366, 215NW516.

###### 1. The judgment generally.

Judgment in foreclosure of mortgage is discharged as to any personal liability of mortgagor by his subsequent discharge in bankruptcy. Fiman v. H., 185M582, 242NW292. See Dun. Dig. 749.

Our statutes provide for only one judgment in suit to foreclose real estate mortgage. It is final judgment determining all issues in case, and determining personal liability of mortgagor. Fiman v. H., 185M582, 242NW292. See Dun. Dig. 6442.

Deficiency judgment entered by clerk without order of court and without notice to defendant, is but clerical computation of amount of deficiency for which execution may issue. Fiman v. H., 185M582, 242NW292.

Judgment in action for the foreclosure of a mortgage held res judicata and not open to collateral attack in action to enjoin trespass. Brown v. G., 188M22, 246NW473. See Dun. Dig. 5137, 5163.

On foreclosure of mortgage judgment is final judgment against mortgagor, but is not docketed as an unqualified personal judgment so that execution may issue thereon until after sale and determination of deficiency. People's State Bank of Jordan v. R., 189M348, 249NW325.

##### 9641. Report—Confirmation—Resale.

###### 2. Resale.

180M173, 230NW780.

##### 9642. Satisfaction of judgment—Execution for deficiency.

People's State Bank of Jordan v. R., 189M348, 249NW325; note under §9636.

Mortgagor conveying property to third person, who assumed the mortgage debt, held liable for deficiency after foreclosure where it requested and consented to extension of mortgage. 181M249, 232NW33. See Dun. Dig. 6294.

Deficiency judgment entered by clerk without order of court and without notice to defendant, is but clerical computation of amount of deficiency for which execution may issue. Fiman v. H., 185M582, 242NW292. See Dun. Dig. 6036.

Bankrupt did not lose or waive his right to have deficiency judgment vacated, and foreclosure judgment set aside so far as it imposed personal liability upon him, by failing to apply to court to have foreclosure judgment reopened so as to set up his discharge as bar. Fiman v. M., 185M582, 242NW292. See Dun. Dig. 5121.

Offer to waive right to judgment for deficiency could be withdrawn by mortgagee any time before acceptance. New England Mut. Life Ins. Co. v. M., 188M511, 247NW803. See Dun. Dig. 6484.

##### 9643. Redemption by mortgagor, creditor, etc.

For rights of a creditor of a decedent debtor, see Laws 1929, c. 195.

Mortgagor is entitled to rents and profits during redemption period even though the foreclosure is of a second mortgage. 179M571, 229NW874.

Title to real estate acquired through a creditor's redemption from a foreclosure sale, held absolute. Rochester Loan & Trust Co. v. M., 188M346, 247NW241. See Dun. Dig. 6423.

Where parties concerned with application for an order extending period for redemption from mortgage foreclosure made a settlement in regard to extension by agreeing that period of redemption should be extended to a certain date and that petitioner should have right to receive and retain rents from that date and receive a certain sum for a mechanical stoker, the agreement was a binding settlement of the litigation, notwithstanding terms had not been incorporated in a written stipulation or memorial of the completed settlement, and the agreement was not vitiated under the statute of frauds or otherwise by reason of inclusion of transfer of personal property or fixtures. State v. District Court, 194M32, 259NW542. See Dun. Dig. 6392.

County which has obtained judgment against surety of county depository may redeem land of such surety sold under mortgage foreclosure. Op. Atty. Gen. (412a-10), July 5, 1934.

County redeeming from mortgage foreclosure as judgment creditor of the mortgagor does not thereby extinguish the debt, except to the extent of the value of the property so redeemed less the amount he pays in redemption. Id.

#### GENERAL PROVISIONS

##### 9646. Attorney's fees.

Attorney's fees cannot be charged as costs unless an attorney at law is employed. 181M254, 232NW318. See Dun. Dig. 6425.

##### 9647. May be collected, when.

Attorney's fees cannot be charged as costs unless an attorney at law is employed. 181M254, 232NW318. See Dun. Dig. 6425.

##### 9648. Purchaser at foreclosure, execution or judicial sale may pay taxes, etc.

The purchaser at the sale, having failed to file an affidavit of taxes paid, they did not become a part of the sum to be paid in making redemption. 176M393, 223NW609.

Evidence supported finding that defendant requested plaintiff to withhold foreclosure of its first mortgage until defendant's second mortgage could be foreclosed so that defendant could pay interest due on first mortgage, and, by filing proper affidavit, tack it to amount bid at its foreclosure sale. Bankers' Life Co. v. F., 188M349, 247NW239. See Dun. Dig. 6260.

Record of affidavits filed was competent proof of taxes and insurance paid subsequent to foreclosure sale by holder of sheriff's certificate. Young v. P., 192M446, 256NW906. See Dun. Dig. 6485.

Evidence held conclusive that mortgagee bank had no contract under which money deposited by mortgagor in



bank could be appropriated to payment of unpaid delinquent taxes after defendant bid in mortgaged premises for full amount of debt. *Business Women's Holding Co. v. F.*, 194M171, 259NW812. See Dun. Dig. 6368.

A covenant in a real estate mortgage to pay taxes levied during life of mortgage does not survive foreclosure of mortgage where mortgaged premises are bid in for full amount of debt and expenses and there is no redemption, and purchaser takes subject to unpaid taxes, and remedy, if he pays same during year of redemption, is to file an affidavit, whereby amount paid is added to amount required to redeem. *Id.* See Dun. Dig. 6368.

A covenant in a real estate mortgage to pay taxes levied during life of mortgage does not survive foreclosure of mortgage where mortgaged premises are bid in for full amount of debt and expenses and there is no redemption, and purchaser takes subject to unpaid taxes, and remedy, if he pays same during year of redemption, is to file an affidavit, whereby amount paid is added to amount required to redeem. *Id.* See Dun. Dig. 6202.

Provision requiring filing of affidavit as to insurance and taxes 10 days before expiration of period of redemption is mandatory. *Op. Atty. Gen.*, Sept. 21, 1929.

**9649. Homestead included in mortgage—Separate sale.**

Upon a mortgage foreclosure sale of the West Hotel in Minneapolis, the owner claimed a portion of the building as a homestead and demanded that the remainder of the mortgaged premises be first sold to satisfy the mortgage debt. Held, that the owner having the burden of proof failed to show that the property selected was compact in form and so chosen as not unreasonably to affect the value of the remaining part or that he was prejudiced. 181M392, 232NW740. See Dun. Dig. 4213.

Compliance by the mortgagor requires a separate sale of the homestead upon foreclosure, even though the non-exempt property included in the mortgage brings no bid when first separately offered. *Madson v. N.*, 182M450, 234NW636. See Dun. Dig. 6344a.

**9650. Court to appoint receiver of rents.**

Appointment of receiver and his powers respecting payment of taxes and interest on prior incumbrances before and after foreclosure sale. 172M193, 214NW886.

Mortgagee who purchased at foreclosure sale was not entitled to appointment of receiver to collect and apply rent on unpaid taxes which were taken into consideration in bidding in the property. 171M350, 214NW52.

A receiver should not be appointed to collect rents and profits and apply them on delinquent taxes or interest, if the mortgagor is entitled to such rents, unless there is waste. 173M18, 216NW329.

Complaint against trustee foreclosing mortgage alleging that mortgage had been superseded by trust agreement and asking for receivership, held not to state cause of action. *Monnens v. H.*, 187M100, 244NW410. See Dun. Dig. 6459.

Evidence held to show such conduct on part of an insolvent mortgagor and its general receiver as to warrant an order requiring such receiver to segregate and hold separate all rents collected from mortgaged premises during foreclosure and period of redemption and to apply same to making of necessary repairs and to payment of taxes and insurance in order to save waste to mortgaged premises. Failure to pay taxes is a species of waste. *Brodala v. S.*, 191M97, 253NW113. See Dun. Dig. 6459.

Proof of inadequacy of security caused by nonpayment of taxes accruing after execution of mortgage and insolvency of mortgagors, justified appointment of a receiver to collect rents for application upon unpaid taxes. *Minneapolis Sav. & Loan Ass'n v. Y.*, 193M632, 259NW382. See Dun. Dig. 6459.

In refusing to continue to later date hearing on order to show cause why a receiver should not be appointed to collect rents on mortgaged property, and in allowing an amendment to complaint, court did not abuse its discretion. *Id.* See Dun. Dig. 6459.

**9651. Default to be shown.**

Without proof of insolvency or inadequacy of security, nonpayment of taxes, not shown to jeopardize title or security during year of redemption, does not warrant appointment of receiver in action to foreclose mortgage. 176M71, 222NW516.

**9655-1. Postponement of mortgage foreclosure sales.**

Any sale upon the foreclosure of a mortgage upon real estate, either by action or by advertisement, which has heretofore been advertised or which may hereafter be advertised to be held at any date subsequent to the passage and approval of this act and prior to May 1, 1933, may be postponed for a period of not to exceed ninety days to a date subsequent to April 30, 1933, by the sheriff of the county in which such sale is advertised to be held, without the publication of a notice of such postponement in any newspaper; provided, however, such sheriff shall post a notice of such postponement at one of the entrance doors of the court house or county jail of the county where the sale was originally advertised to be held, at least three weeks prior to the date to which said sale shall be postponed. (Act Mar. 2, 1933, c. 44, §1; Mar. 16, 1933, c. 90, §1.)

Laws 1933, c. 44, is constitutional. *State v. Moeller*, 189M412, 249NW330. See Dun. Dig. 207 to 209, 1628.

Duties of register of deeds as prescribed by Mason's Minn. St. sec 2217 are in no way affected by this law. *Op. Atty. Gen.*, Apr. 3, 1933.

Governor's executive order to officers to desist from foreclosing mortgages expired by limitation on Apr. 30, 1933. *Op. Atty. Gen.*, May 2, 1933.

**9655-2. Posting of notices.**

In all cases where any sheriff has heretofore and subsequent to February 23, 1923, postponed any such mortgage foreclosure sale, the said sheriff may again postpone the sale, provided, however, that the date to which said sale is finally postponed shall be subsequent to April 30, 1933, and shall not be more than ninety days from the date upon which said sale was originally advertised to be held, and provided further, that the said sheriff shall post a notice of such final postponement at one of the entrance doors of the court house or county jail of the county where the sale was originally advertised to be held, at least three weeks prior to the date to which the said sale shall be finally postponed. (Act Mar. 2, 1933, c. 44, §2; Mar. 16, 1933, c. 90, §2.)

**9655-3. Acts legalized.**

Any postponement heretofore made by any sheriff of any such mortgage foreclosure sale, without the publication of a notice of postponement in a newspaper, is hereby validated and is hereby declared to be legal and binding in all respects. (Act Mar. 2, 1933, c. 44, §3; Mar. 16, 1933, c. 90, §3.)

Adjournment of mortgage foreclosure sale by sheriff on Feb. 27, 1933, was validated by curative provision of act of Mar. 2, 1933. *Laws 1933, c. 44. State v. Moeller*, 189M412, 249NW330.

**9655-4. Provisions separable.**

If any section or part of this act shall be declared unconstitutional or invalid for any reason, the remainder of this act shall not be affected thereby. (Act Mar. 2, 1933, c. 44, §4; Mar. 16, 1933, c. 90, §4.)

CHAPTER 84

Actions by or against Personal Representatives and Heirs

**9656. What causes of action survive.**

**1. Held to survive.**

Rights under Wisconsin Statutes 1927, §287.01 may be enforced in Minnesota. *Chubbuck v. H.*, 182M225, 234NW314. See Dun. Dig. 14, 1530.

A right of action accruing to a party under a foreign statute will, as a matter of comity, be enforced in the courts of this state when jurisdiction can be had and justice done between the parties, if such statute be not contrary to the public policy of this state. *Chubbuck v. H.*, 182M225, 234NW314. See Dun. Dig. 14, 1530.

Action under Wisconsin Survival Statute, *Chubbuck v. M.*, 182M225, 234NW868.

A husband's cause of action for medical expenses and nursing incurred in attempting to cure his wife of the injuries negligently inflicted survives the death of the wife and the death of the wrongdoer. *Fowlie v. F.*, 184M82, 237NW846. See Dun. Dig. 14.

**2. Held not to survive.**

Rights of parent to support under deed to child are personal and do not survive. *Gamble v. M.*, 187M640, 246NW368; *Mallick v. M.*, 248NW723. See Dun. Dig. 2677.

**3. Cause of action arising in another state.**

Jurisdiction of estate of deceased tort-feasor may be acquired by service on personal representative as in case of surviving liability for torts committed here. *Kertson v. J.*, 185M591, 242NW329. See Dun. Dig. 3669.