

## CHAPTER 278.

## FORECLOSURE OF MORTGAGES.

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**278.01 Foreclosure judgment.** In actions for the foreclosure of mortgages upon real estate, if the plaintiff recover, the court shall render judgment of foreclosure and sale, as hereinafter provided, of the mortgaged premises or such part thereof as may be sufficient to pay the amount adjudged to be due upon the mortgage and obligation secured thereby, with costs. But such judgment shall not be entered until twenty days after the lis pendens has been filed.

**278.02 Foreclosure; defendant may have assignment of mortgage.** (1) In a mortgage foreclosure action, any defendant may upon payment to the plaintiff or his attorney, of the amount then owing thereon for principal, together with interest and all costs up to such time, demand the assignment of such mortgage to him. The plaintiff shall upon such demand and a tender of the amount owing for principal, interest and costs, assign the mortgage to such defendant and he shall be barred from further prosecuting such action. If dispute shall arise over the amount due for costs, application to fix the costs accrued shall be made to the court in which such action is pending.

(2) If such demand and tender is made after judgment, the plaintiff or his assignee shall assign such judgment to such defendant.

278.02 and 278.15 are not mutually exclusive. *Syver v. Hahn*, 272 W 165, 74 NW (2d) 803.

**278.04 Deficiency, judgment for.** The plaintiff may in his complaint demand judgment for any deficiency which may remain due to him after sale of the mortgaged premises against every party who is personally liable for the debt secured by the mortgage and judgment for any such deficiency remaining after applying the proceeds of sale to the amount due may in such case be rendered. Such judgment for deficiency shall be ordered in the original judgment and separately rendered against the party liable on or after the coming in and confirmation of the report of sale, and be docketed and enforced as in other cases.

**278.05 Foreclosure for nonpayment of instalment.** An action for the foreclosure of a mortgage upon which there shall be due any interest or any instalment of the principal and there shall be other instalments to become due shall be dismissed upon the defendant's bringing into court, before judgment, the principal and interest due, with the costs. If after judgment is entered in such case the defendant shall bring into court the principal and interest due, with the costs, proceedings on the judgment shall be stayed; but the court may enforce the judgment by a further order, upon a subsequent default in the payment of any instalment of the principal, or of any interest thereafter to grow due.

**278.06 Sale in parcels.** If in the cases mentioned in section 278.05 the defendant shall not, before judgment, bring into court the amount so due with costs the court before rendering judgment shall ascertain by reference or otherwise the situation of the mortgaged premises and whether they can be sold in parcels without injury to the interests of the parties; and if it shall appear that they can be so sold the judgment shall direct a sale in parcels, specifying them, or so much thereof as will be sufficient to pay the amount due for principal, interests and costs; and such judgment shall remain as security for any subsequent default.

**278.07 Order of sale for other defaults.** If, in the case mentioned in section 278.06, there shall be any default subsequent to judgment in the payment of any instalment or of any interest due upon such mortgage the court may, upon petition of the plaintiff, direct a sale of enough of the mortgaged premises, to be made under the judgment, to satisfy the amount due, with the costs of such petition and the proceedings thereon; and like proceedings shall be had as often as a default shall happen.

**278.08 Judgment for sale of whole; adjustment of parties' rights.** If, in any case mentioned in sections 278.06 and 278.07 it shall appear that the mortgaged premises are so situated that they cannot be sold in parcels without injury to the interests of the parties or that the sale of the whole will be most beneficial to them the court may adjudge the sale of the whole in which case the proceeds of sale, after deducting the costs of the action and of sale, shall be applied to the payment of the sums due and to become due deducting from all sums not due, which do not bear interest, interest from the time of payment to the time when the same are payable or the court may direct the balance of the proceeds of sale, after paying the sum then due with such costs, to be placed at interest for the benefit of the plaintiff, to be paid to him as such subsequent payments or instalments shall become due, with the interest thereon. The surplus, after paying the amount due the plaintiff and costs, shall be paid to the party entitled thereto on the order of the court.

**278.09 Amendments as to parties; process and pleading.** In any action for the foreclosure of a mortgage, at any time after judgment and before a sale pursuant thereto, the plaintiff may be granted leave to amend the summons, complaint and all the proceedings in the action by making as defendant any person who is a proper or necessary party thereto. Such person so made a party shall be served with the summons in like manner as if originally a party, and may answer and defend, and all matters and proceedings as to him shall be had and taken in like manner as if he had been originally made a party thereto. After such person has been thus made a party and served, and his rights adjudicated upon, the original judgment may be so amended as to bar and foreclose him thereby, or to make any provisions in regard to his rights and interests in like manner as it could have done had he been made originally a party.

**278.10 Foreclosure.** (1) If the plaintiff recovers the judgment shall describe the mortgaged premises and fix the amount of the mortgage debt then due and also the amount of each instalment thereafter to become due, and the time when it will become due, and whether the mortgaged premises can be sold in parcels and whether any part thereof is a homestead, and shall adjudge that the mortgaged premises be sold for the payment of the amount then due, and of all instalments which shall become due before the sale, or so much thereof as may be sold separately without material injury to the parties interested, and be sufficient to pay such principal, interest and costs; and when demanded in the complaint, direct that judgment shall be rendered for any deficiency against the parties personally liable and, if the sale is to be by referee, he must be named therein.

(2) Any party may become a purchaser. But no such sale shall be made or advertised until the expiration of one year from the date when such judgment is entered; and when judgment is for instalments due and to become due, and payment shall be made within the year, of the instalments found due at the date of the judgment, with interest and costs, no sale shall be made or advertised upon any instalment growing due after the date of the judgment until one year after the same shall become due; but in all cases the parties may, by stipulation, filed with the clerk, consent to an earlier sale. Sales under foreclosure of mortgages given by any railroad corporation may be made immediately after the rendition of the judgment.

(3) The proceeds of every sale shall be applied to the discharge of the debt adjudged to be due and the costs awarded; and if there shall be any surplus it shall be subject to the order of the court. If any surplus remains in the court for three months, without being applied for, the court shall direct the same to be put out at interest for the benefit of the party entitled thereto to be paid to him upon the order of such court.

(4) The court may order in the judgment of foreclosure that all sums advanced by the plaintiff for insurance, necessary repairs and taxes not included in the judgment may be added to the judgment by order at any time after the entry thereof.

**278.102 Disposition of surplus.** If there shall be any surplus paid into court by the sheriff or referee, any party to the action or any person not a party who had a lien on the mortgaged premises at the time of sale, may file with the clerk of court into which the surplus was paid, a notice stating that he is entitled to such surplus money or some part thereof, together with the nature and extent of his claim. The court shall determine the rights of all persons in such surplus fund by reference or by testimony taken in open court, but no such hearing shall be had in court or before a referee except upon 8 days' notice to all persons that have appeared in the action or filed notice of claim to such surplus money. If any such claimant shall not have appeared by attorney, notice of such hearing may be served by mail directed to the claimant at the place of his residence as stated in his notice of claim.

**Revisor's Note:** The above section was omitted from the statutes of 1935 by oversight resulting from an unnoticed conflict of legislative acts. The Supreme Court in *Kienbaum v. Haberny*, 273 W 413, 78 NW

(2d) 888 held that it was still the law and the complaint or make an appearance prior that junior lien holders may participate in to the confirmation of the sale. the surplus even though they fail to answer

**278.105 Application for confirmation of sale and for deficiency judgment.** (1) No sale on a judgment of mortgage foreclosure shall be confirmed unless 5 days' notice has been given to all parties that have appeared in the action. Such notice shall be given either personally or by registered mail directed to the last known post-office address, mailed at least 5 days prior to the date when the motion for confirmation is to be heard, if any post-office address is known; if not known, mailing may be dispensed with but an affidavit shall be filed with the court stating that the address is not known, and the notice shall state, in addition to other matter required by law, the amount of the judgment, the amount realized upon the sale, the amount for which personal judgment will be sought against the several parties naming them, and the time and place of hearing.

(2) In case the mortgaged premises sell for less than the amount due and to become due on the mortgage debt and costs of sale, there shall be no presumption that such premises sold for their fair value and no sale shall be confirmed and judgment for deficiency rendered, until the court is satisfied that the fair value of the premises sold has been credited on the mortgage debt, interest and costs.

**Cross Reference:** For tardy confirmation of sale, after 6 years, see 278.18.

**278.11 Homestead, how sold.** If any defendant appear and answer that any portion of the mortgaged premises is an exempt homestead the court shall ascertain whether such be the fact, and if so whether the part of the mortgaged premises not included in the exempt homestead can be sold separately therefrom without injury to the interests of the parties, and in that case shall direct in the judgment that the exempt homestead shall not be sold until all the other mortgaged lands have been sold.

**278.12 Interest; waste.** The amount adjudged due shall draw interest at the rate provided to be paid on the mortgage debt, but shall not exceed the minimum legal rate of interest until the date of sale or payment, and all the instalments which shall become due after the date of such judgment shall draw interest at the same rate from the time the same shall become due. The judgment may enjoin the defendants and all persons claiming under them from committing waste or doing any act that may impair the value of the mortgaged premises.

**278.13 Redemption from and satisfaction of judgment.** The mortgagor, his heirs, personal representatives or assigns may redeem the mortgaged premises at any time before the sale by paying to the clerk of the court in which the judgment was rendered, or to the plaintiff, or any assignee thereof, the amount of such judgment, interest thereon and costs, and any costs subsequent to such judgment, and any taxes paid by the plaintiff subsequent to the judgment upon the mortgaged premises, with interest thereon from the date of payment, at the same rate. On payment to such clerk or on filing the receipt of the plaintiff or his assigns for such payment in the office of said clerk he shall thereupon discharge such judgment, and a certificate of such discharge, duly recorded in the office of the register of deeds, shall discharge such mortgage of record to the extent of the sum so paid.

**Cross Reference:** See 235.59, relative to discharge after foreclosure.

**278.14 Redemption of part.** In case the mortgagor, his heirs, representatives or assigns shall desire to pay a portion of such judgment, taxes, interest and costs, so as to relieve any distinct lot or parcel of the premises which can be sold separately under such judgment from the lien thereof and of such mortgage thereon, the court, on application of such person and on notice to the parties to the action, may, if the amount to be paid therefor is not agreed upon, ascertain and adjudge the proportion of such judgment, taxes, interest and costs to be paid for the purpose aforesaid; and when the amount so adjudged shall be paid as aforesaid it shall relieve such distinct lot or parcel from such judgment and the lien of such mortgage thereon and shall satisfy such judgment to the amount so paid. Any heir, devisee, grantee or assignee of the mortgagor, owning an undivided interest in the mortgaged premises, subject to the lien of the mortgage, may redeem such undivided interest from such judgment and the lien of the mortgage thereon by paying as aforesaid a sum that will bear the same proportion to the whole of such judgment, taxes, costs and interest as the interest proposed to be redeemed bears to the whole of the mortgaged premises.

**278.15 Plaintiff's rights acquired by junior lienor.** Any person having a junior lien upon the mortgaged premises or any part thereof or interest therein, may at any time before such sale, pay to the clerk of court, or the plaintiff or his assignee the amount of such judgment, taxes, interest and costs, and costs subsequent to judgment, and shall thereupon be subrogated to all the rights of the plaintiff as to such judgment.

See note to 278.02, citing *Syver v. Hahn*, 272 W 165, 74 NW (2d) 803.

**278.16 Notice and report of sale.** (1) The sheriff or referee who makes sale of mortgaged premises, under a judgment therefor, shall give notice of the time and place of sale in the manner provided by law for the sale of real estate upon execution or in such other manner as the court shall in the judgment direct. He shall, within ten days thereafter, file with the clerk of the court a report of the sale, and shall also immediately after the sale deposit with the clerk of the court the proceeds of the sale, after deducting the costs and expenses thereon, unless otherwise ordered by the court. The sheriff may accept from the purchaser at such sale as a deposit or down payment upon the same not less than one hundred dollars, in which case such amount shall be so deposited with the clerk of the court as above provided, and the balance of the sale price shall be paid to the clerk by the purchaser at such sale upon the confirmation thereof. If the highest bid is less than one hundred dollars, the whole amount thereof shall be so deposited.

(2) If the judgment creditor is the purchaser he may give his receipt to the sheriff or referee for any sum not exceeding his judgment and such receipt shall be deemed a down payment, but in every case the purchaser shall pay the cost of sale; and if the sum due the creditor is less than the purchase price, he shall pay the difference at the time of sale.

**278.17 Deed, execution and effect of.** Upon any such sale being made the sheriff or referee making the same, on compliance with its terms, shall make and execute to the purchaser a deed of the premises sold, setting forth each parcel of land sold to him and the sum paid therefor, which deed, upon the confirmation of such sale, shall vest in the purchaser all the right, title and interest of the mortgagor, his heirs, personal representatives and assigns in and to the premises sold and shall be a bar to all claim, right of equity of redemption therein, of and against the parties to such action, their heirs and personal representatives, and also against all persons claiming under them subsequent to the filing of the notice of the pendency of the action in which such judgment was rendered; and the purchaser, his heirs or assigns shall be let into the possession of the premises so sold on production of such deed or a duly certified copy thereof, and the court may, if necessary, issue a writ of assistance to deliver such possession. Such deed or deeds so made and executed by the sheriff as above set forth shall be forthwith delivered by him to the clerk of the court to be held by the clerk until the confirmation of the sale, and upon the confirmation thereof the clerk of the court shall thereupon pay to the parties entitled thereto, or to their attorneys the proceeds of the sale, and shall deliver to the purchaser or purchasers at the sale such deed or deeds upon compliance by such purchaser or purchasers with the terms of such sale, and the payment of any balance of the sale price to be paid. In the event of the failure of such purchaser to pay any part of the purchase price remaining to be paid within ten days after the confirmation of such sale, the amount so deposited shall be forfeited and paid to the parties who would be entitled to the proceeds of such sale as ordered by the court, and a resale shall be had of said premises, and in such event such deed so executed to the defaulting purchaser shall be destroyed by said clerk, and shall be of no effect. In the event that such sale is not confirmed by the court, the clerk shall forthwith refund to the purchaser at such sale the amount so paid or deposited by him, and shall likewise destroy such sheriff's deed so executed, and the same shall be of no effect, and a resale of the premises shall be had upon due notice thereof.

**278.18 Tardy confirmation of sale.** In all cases where a mortgage foreclosure sale has been made but not confirmed and the purchaser or his successor or assign has taken possession of the land by virtue of said sale, and occupied it for 6 years from and after said sale, he may apply for and the court may enter an order confirming said foreclosure sale with the same force and effect as if said confirmation was made as otherwise provided by law.