

## CHAPTER 846

## REAL ESTATE FORECLOSURE

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**846.01 Foreclosure judgment. (1)** Except as provided in sub. (2), in actions for the foreclosure of mortgages upon real estate, if the plaintiff recover, the court shall render judgment of foreclosure and sale, as provided in this chapter, of the mortgaged premises or so much of the premises as may be sufficient to pay the amount adjudged to be due upon the mortgage and obligation secured by the mortgage, with costs.

**(2)** A judgment of foreclosure and sale shall not be entered until 20 days after the lis pendens has been filed.

**History:** 1973 c. 189 s. 7; Stats. 1973 s. 816.01; Sup. Ct. Order, 67 Wis. 2d 585, 768 (1975); Stats. 1975 s. 846.01; 1997 a. 254.

**Cross-reference:** See s. 840.10 as to requirement of filing of lis pendens.

The defense of laches, consisting of unreasonable delay by the mortgagee in commencing the action, its actual or constructive knowledge of the transfer and acquiescence therein, and prejudice to the mortgagor asserting the defense, is in itself a sufficient basis that it would be inequitable under the circumstances to decree foreclosure. *Mutual Federal Savings & Loan Assoc. v. American Medical Services*, 66 Wis. 2d 210, 223 N.W.2d 921 (1974).

The trial court could enter judgment against a co-defendant who received an excess payment of sheriff sale proceeds from another defendant. The trial court's authority in a foreclosure action is equitable in nature and not limited to that expressly granted by statute. The court's discretion extends even after confirmation of sale, if necessary to provide that no injustice be done to any of the parties. *Harvest State Bank v. ROI Investments*, 228 Wis. 2d 733, 598 N.W.2d 571 (Ct. App. 1999).

Mortgage foreclosure as fraudulent conveyance: Is judicial foreclosure an answer to the Durrett problem? 1984 WLR 195.

**846.02 Foreclosure; defendant may have assignment of mortgage. (1)** In a mortgage foreclosure action, any defendant may upon payment to the plaintiff or the plaintiff's 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 the defendant. 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 the plaintiff 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 the plaintiff's assignee shall assign such judgment to such defendant.

**History:** 1973 c. 189 s. 7; Stats. 1973 s. 816.02; Sup. Ct. Order, 67 Wis. 2d 585, 768 (1975); Stats. 1975 s. 846.02; 1993 a. 486.

**846.04 Deficiency, judgment for. (1)** The plaintiff may, in the complaint, demand judgment for any deficiency that may remain due the plaintiff after sale of the mortgaged premises against every party who is personally liable for the debt secured by the mortgage. Judgment may be rendered for any deficiency remaining after applying the proceeds of sale to the amount due. The judgment for deficiency shall be ordered in the original judgment and separately rendered against the party liable on or after the confirmation of sale. The judgment for deficiency shall be entered in the judgment and lien docket and, except as provided

in subs. (2) and (3), enforced as in other cases. A mortgage foreclosure deficiency judgment entered on property devoted primarily to agricultural use, as defined in s. 91.01 (5), on and after October 14, 1997, shall be recorded as an agriculture judgment.

**(2)** Except as provided in sub. (3), if a mortgage foreclosure deficiency judgment is entered on property devoted primarily to agricultural use, as defined in s. 91.01 (5), an action on the deficiency judgment shall be commenced within 10 years after the date on which the mortgage foreclosure deficiency judgment is entered or be barred.

**(3)** If a mortgage foreclosure deficiency judgment was entered before January 1, 1990, on property devoted primarily to agricultural use, as defined in s. 91.01 (5), an action on the deficiency judgment shall be commenced within 2 years after October 14, 1997, or be barred. If the deficiency judgment remains unsatisfied in a mortgage foreclosure deficiency judgment action entered before October 14, 1997, the defendant in that action shall notify the clerk of circuit court of the existence of that deficiency judgment and of the date that an action on that deficiency judgment shall be commenced or be barred. Not later than 60 days prior to 2 years after October 14, 1997, if notified of an unsatisfied deficiency judgment by the defendant in that action, the clerk of each circuit court in which a mortgage foreclosure deficiency judgment on property devoted primarily to agricultural use, as defined in s. 91.01 (5), was entered before January 1, 1990, and remains unsatisfied, shall, upon payment by the defendant in that action of the costs of the publication and certified mail, do all of the following:

(a) Publish a notice as a class 1 notice under ch. 985, in the official newspaper of the county where the mortgage foreclosure deficiency judgment was entered, stating that the party holding the mortgage foreclosure deficiency judgment is required to commence an action on the deficiency judgment prior to 2 years after October 14, 1997, or be barred from any further action on that deficiency judgment.

(b) Notify by certified mail the primary plaintiff in the action for the mortgage foreclosure deficiency judgment that the plaintiff is required to commence an action on the deficiency judgment prior to 2 years after October 14, 1997, or be barred from any further action on that deficiency judgment.

**History:** 1973 c. 189 s. 7; Stats. 1973 s. 816.04; Sup. Ct. Order, 67 Wis. 2d 585, 768 (1975); Stats. 1975 s. 846.04; 1993 a. 486; 1995 a. 224; 1997 a. 27.

**846.05 Foreclosure for nonpayment of installment.** An action for the foreclosure of a mortgage upon which there shall be due any interest or any installment of the principal and there shall be other installments 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 installment of the principal, or of any interest thereafter to grow due.

**History:** 1973 c. 189 s. 7; Stats. 1973 s. 816.05; Sup. Ct. Order, 67 Wis. 2d 585, 768 (1975); Stats. 1975 s. 846.05.

**846.06 Sale in parcels.** If in the cases mentioned in s. 846.05 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.

**History:** 1973 c. 189 ss. 7, 20; Stats. 1973 s. 816.06; Sup. Ct. Order, 67 Wis. 2d 585, 768, 783 (1975); Stats. 1975 s. 846.06.

**846.07 Order of sale for other defaults.** If, in the case mentioned in s. 846.06, there shall be any default subsequent to judgment in the payment of any installment 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.

**History:** 1973 c. 189 ss. 7, 20; Stats. 1973 s. 816.07; Sup. Ct. Order, 67 Wis. 2d 585, 768, 783 (1975); Stats. 1975 s. 846.07.

**846.08 Judgment for sale of whole; adjustment of parties' rights.** If, in any case mentioned in ss. 846.06 and 846.07 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 the plaintiff as such subsequent payments or installments 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.

**History:** 1973 c. 189 ss. 7, 20; Stats. 1973 s. 816.08; Sup. Ct. Order, 67 Wis. 2d 585, 768, 783 (1975); Stats. 1975 s. 846.08; 1993 a. 486.

**846.09 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 the person shall be had and taken in like manner as if the person had been originally made a party thereto. After such person has been thus made a party and served, and the person's rights adjudicated upon, the original judgment may be so amended as to bar and foreclose the person thereby, or to make any provisions in regard to the person's rights and interests in like manner as it could have done had the person been made originally a party.

**History:** 1973 c. 189 s. 7; Stats. 1973 s. 816.09; Sup. Ct. Order, 67 Wis. 2d 585, 768 (1975); Stats. 1975 s. 846.09; 1993 a. 486.

**846.10 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 installment 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 installments 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, the referee must be named therein.

**(2)** Any party may become a purchaser. No sale involving a one- to 4-family residence that is owner-occupied at the commencement of the foreclosure action, a farm, a church or a tax-exempt nonprofit charitable organization may be held until the expiration of 12 months from the date when judgment is entered, except a sale under s. 846.101 or 846.102. Notice of the time and place of sale shall be given under ss. 815.31 and 846.16 and may be given within the 12-month period except that the first printing of the notice shall not be made less than 10 months after the date when judgment is entered, except that the sale of a farm shall not be made or advertised until the expiration of one year from the date when such judgment is entered. 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 3 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 the party 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.

**History:** 1973 c. 189 ss. 7, 20; Stats. 1973 s. 816.10; Sup. Ct. Order, 67 Wis. 2d 585, 768, 783 (1975); Stats. 1975 s. 846.10; 1977 c. 304; 1993 a. 486.

A judgment of foreclosure and sale is a final judgment appealable as a matter of right under s. 808.03 (1). An appeal from an order confirming the sale does not enable the appellant to challenge the judgment of foreclosure. *Shuput v. Lauer*, 109 Wis. 2d 164, 325 N.W.2d 321 (1982).

There is no statutory requirement that sale proceeds be applied first to the portion of the debt that is guaranteed. *Crown Life Insurance Co. v. LaBonte*, 111 Wis. 2d 26, 330 N.W.2d 201 (1983).

In a foreclosure action under s. 703.16 (8) based on a failure to pay condominium fees, sub. (1) could not be applied sensibly to require a statement of installments to become due because monthly assessments were in varying amounts. The 12-month redemption period under s. 846.10 (2) is applicable to such foreclosures. *Geneva National Community Association, Inc. v. Friedman*, 228 Wis. 2d 572, 598 N.W.2d 600 (Ct. App. 1999).

Although a judgment must state whether any part of the property is homestead, if the evidence establishes a property is nonhomestead, the judgment need not state that fact. *Geneva National Community Association, Inc. v. Friedman*, 228 Wis. 2d 572, 598 N.W.2d 600 (Ct. App. 1999).

No statute provides that a creditor may not foreclose on a mortgage because the creditor has, in a prior action, obtained a judgment of foreclosure on another mortgage securing the same debt and a deficiency judgment. *Bank of Sun Prairie v. Marshall Development Co.* 2001 WI App 64, 242 Wis. 2d 355, 626 N.W.2d 319.

The Federal Farmers Home Administration is not subject to state exemption laws in the foreclosure of its mortgages. *U.S. v. Einum*, 821 F. Supp. 1283 (1993).

**846.101 Foreclosure without deficiency; 20-acre parcels. (1)** If the mortgagor has agreed in writing at the time of the execution of the mortgage to the provisions of this section, and the foreclosure action involves a one- to 4-family residence that is owner-occupied at the commencement of the action, a farm, a church or a tax-exempt charitable organization, the plaintiff in a foreclosure action of a mortgage on real estate of 20 acres or less, which mortgage is recorded subsequent to January 22, 1960, may elect by express allegation in the complaint to waive judgment for any deficiency which may remain due to the plaintiff after sale of the mortgaged premises against every party who is personally liable for the debt secured by the mortgage, and to consent that the mortgagor, unless he or she abandons the property, may remain in possession of the mortgaged property and be entitled to all rents, issues and profits therefrom to the date of confirmation of the sale by the court.

(2) When plaintiff so elects, judgment shall be entered as provided in this chapter, except that no judgment for deficiency may be ordered therein nor separately rendered against any party who is personally liable for the debt secured by the mortgage and the sale of such mortgaged premises shall be made upon the expiration of 6 months from the date when such judgment is entered. Notice of the time and place of sale shall be given under ss. 815.31 and 846.16 within such 6-months period except that first printing of a copy of such notice in a newspaper shall not be made less than 4 months after the date when such judgment is entered.

**History:** 1973 c. 189 ss. 7, 20; Stats. 1973 s. 816.101; Sup. Ct. Order, 67 Wis. 2d 585, 768, 783 (1975); Stats. 1975 s. 846.101; 1977 c. 304.

An election by a mortgagee to foreclose under s. 816.101, [now 846.101] on one or more mortgages securing a debt does not bar foreclosure upon the remaining mortgages but does bar pursuit of a personal deficiency. *Glover v. Marine Bank of Beaver Dam*, 117 Wis. 2d 684, 345 N.W.2d 449 (1984).

In a foreclosure was under s. 846.101, the Veterans Administration was not estopped from pursuing a deficiency against a veteran under an agreement to indemnify the VA for the VA's loss on a loan guaranty. *U.S. v. Davis*, 961 F.2d 603 (1992).

**846.102 Abandoned premises.** In an action for enforcement of a mortgage lien if the court makes an affirmative finding upon proper evidence being submitted that the mortgaged premises have been abandoned by the mortgagor and assigns, judgment shall be entered as provided in s. 846.10 except that the sale of such mortgaged premises shall be made upon the expiration of 2 months from the date when such judgment is entered. Notice of the time and place of sale shall be given under ss. 815.31 and 846.16 and may be given within such 2-month period. In this section “abandoned” means the relinquishment of possession or control of the premises whether or not the mortgagor or the mortgagor’s assigns have relinquished equity and title.

**History:** 1973 c. 189; Sup. Ct. Order, 67 Wis. 2d 585, 768, 783 (1975); 1975 c. 41 s. 52; 1975 c. 199; Stats. 1975 s. 846.102; 1977 c. 304.

**846.103 Foreclosures of commercial properties and multifamily residences.** (1) No foreclosure sale involving real property other than a one- to 4-family residence that is owner-occupied at the commencement of the foreclosure action, a farm, a church or a tax-exempt nonprofit charitable organization may be held until the expiration of 6 months from the date when judgment is entered except a sale under sub. (2). Notice of the time and place of sale shall be given under ss. 815.31 and 846.16 and may be given within the 6-month period except that the first printing of the notice shall not be made less than 4 months after the date when judgment is entered.

(2) If the mortgagor of real property other than a one- to 4-family residence that is owner-occupied at the commencement of the foreclosure action, a farm, a church or a tax-exempt nonprofit charitable organization has agreed in writing at the time of the execution of the mortgage to the provisions of this section, the plaintiff in a foreclosure action of a mortgage, which mortgage is recorded subsequent to May 12, 1978, may elect by express allegation in the complaint to waive judgment for any deficiency which may remain due to the plaintiff after sale of the mortgaged premises against every party who is personally liable for the debt secured by the mortgage, and to consent that the mortgagor, unless he or she abandons the property, may remain in possession of the mortgaged property and be entitled to all rents, issues and profits therefrom to the date of confirmation of the sale by the court. When the plaintiff so elects, judgment shall be entered as provided in this chapter, except that no judgment for deficiency may be ordered nor separately rendered against any party who is personally liable for the debt secured by the mortgage and the sale of the mortgaged premises shall be made upon the expiration of 3 months from the date when such judgment is entered. Notice of the time and place of sale shall be given under ss. 815.31 and 846.16 and may be given within the 3-month period except that first printing of the notice shall not be made less than one month after the date when judgment is entered.

**History:** 1977 c. 304.

The application of the reduced redemption period to a mortgage executed before enactment of ch. 304, laws of 1977, which created this section, would be an unconsti-

tutional impairment of contract. *Burke v. E. L. C. Investors, Inc.* 110 Wis. 2d 406, 329 N.W.2d 259 (Ct. App. 1982).

**846.11 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.

**History:** 1973 c. 189 s. 7; Stats. 1973 s. 816.11; Sup. Ct. Order, 67 Wis. 2d 585, 768 (1975); Stats. 1975 s. 846.11.

This statute gives the option to the mortgagor to insist that when a mortgage covers both homestead and nonhomestead property, the nonhomestead property be sold first. That issue is irrelevant if the entire mortgaged property is homestead. *Anchor Savings & Loan Association v. Week*, 62 Wis. 2d 169, 213 N.W.2d 737 (1974).

This section is inapplicable when separate mortgages cover homestead and nonhomestead property. *Valley Bank v. Jennings*, 198 Wis. 2d 857, 544 N.W.2d 243 (Ct. App. 1995), 94-3197.

The Federal Farmers Home Administration is not subject to state exemption laws in the foreclosure of its mortgages. *U.S. v. Einum*, 821 F. Supp. 1283 (1993).

**846.12 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 rate prevailing immediately prior to the default on which the foreclosure is based, until the date of sale or payment, and all the installments which shall become due after the date of such judgment shall draw interest at the same rate from the time the same 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.

**History:** 1973 c. 189 s. 7; Stats. 1973 s. 816.12; Sup. Ct. Order, 67 Wis. 2d 585, 768 (1975); Stats. 1975 s. 846.12.

**846.13 Redemption from and satisfaction of judgment.** The mortgagor, the mortgagor’s 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 the plaintiff’s assigns for such payment in the office of said clerk the clerk 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.

**History:** 1973 c. 189 s. 7; Stats. 1973 s. 816.13; Sup. Ct. Order, 67 Wis. 2d 585, 768 (1975); Stats. 1975 s. 846.13; 1993 a. 486.

**Cross-reference:** See s. 846.25, relative to discharge after foreclosure.

A bankruptcy court reduction of a mortgage lien does not affect the payment required for redemption. *Hobl v. Lord*, 162 Wis. 2d 226, 470 N.W.2d 265 (1991).

A circuit court has no authority to accept a plan of redemption that fails to provide for immediate, full payment. A mortgagor may only redeem the mortgaged property for the full amount of the foreclosure judgment, plus interest, costs, and taxes. *M&I Marshall & Ilsley v. Kazim Investment, Inc.* 2004 WI App 13, 269 Wis. 2d 479, 678 N.W.2d 479, 03-0404.

**846.14 Redemption of part.** In case the mortgagor, the mortgagor’s 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.

**History:** 1973 c. 189 s. 7; Stats. 1973 s. 816.14; Sup. Ct. Order, 67 Wis. 2d 585, 768 (1975); Stats. 1975 s. 846.14; 1993 a. 486.

**846.15 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 the plaintiff's 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.

**History:** 1973 c. 189 s. 7; Stats. 1973 s. 816.15; Sup. Ct. Order, 67 Wis. 2d 585, 768 (1975); Stats. 1975 s. 846.15; 1993 a. 486.

**846.16 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; where the department of veterans affairs is also a party in the foreclosure action, the judgment shall direct that notice of sale be given by registered mail, return receipt requested, to the department at Madison, Wisconsin, at least 3 weeks prior to the date of sale, but such requirement does not affect any other provision as to giving notice of sale. The sheriff or referee shall, within 10 days thereafter, file with the clerk of the court a report of the sale, and shall also immediately after the sale first deduct any fee due under s. 77.22 (1); then deposit that fee, a return under s. 77.22 and the deed with the clerk of the court for transmittal to the register of deeds; then deduct the costs and expenses of the sale, unless the court orders otherwise, and then deposit with the clerk of the court the proceeds of the sale 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 \$100, 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 \$100, the whole amount thereof shall be so deposited.

**(2)** If the judgment creditor is the purchaser the judgment creditor may give his or her receipt to the sheriff or referee for any sum not exceeding the judgment creditor's 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, the creditor shall pay the difference at the time of sale.

**History:** 1973 c. 189 s. 7; Stats. 1973 s. 816.16; Sup. Ct. Order, 67 Wis. 2d 585, 768 (1975); Stats. 1975 s. 846.16; 1989 a. 31; 1993 a. 486.

**846.162 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 the party or person is entitled to such surplus money or some part thereof, together with the nature and extent of the party's or person's 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 the claimant's residence as stated in the claimant's notice of claim.

**History:** 1973 c. 189 s. 7; Stats. 1973 s. 816.162; Sup. Ct. Order, 67 Wis. 2d 585, 768 (1975); Stats. 1975 s. 846.162; 1993 a. 486.

This section is procedural. It creates no substantive rights. First Wisconsin Trust Co. v. Rosen, 143 Wis. 2d 468, 422 N.W.2d 128 (Ct. App. 1988).

A mortgage covenant to pay taxes expires when the mortgage lien is extinguished upon confirmation of the sheriff's sale. Taxes accruing after confirmation cannot be recovered from a surplus in sale proceeds. Harvest Savings Banking v. ROI Investments, 209 Wis. 2d 586, 563 N.W.2d 579 (Ct. App. 1997).

**846.165 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.

**History:** 1973 c. 189 s. 7; Stats. 1973 s. 816.165; Sup. Ct. Order, 67 Wis. 2d 585, 768 (1975); Stats. 1975 s. 846.165.

**Cross-reference:** For tardy confirmation of sale, after 6 years, see s. 846.18.

The trial court should determine "fair value" under sub. (2) even though the bid does not shock the court's conscience. First Wisconsin National Bank of Oshkosh v. KSW Inv. 71 Wis. 2d 359, 238 N.W.2d 123 (1976).

The trial court did not abuse its discretion in setting aside a judicial sale when the buyer based its bid on incorrect figures in the judgment of foreclosure. Family Savings and Loan Assn. v. Barkwood Landscaping Co., Inc. 93 Wis. 2d 190, 286 N.W.2d 581 (1980).

An appeal from an order confirming sale does not enable the appellant to challenge a judgment of foreclosure. Shuput v. Lauer, 109 Wis. 2d 164, 325 N.W.2d 321 (1982).

There is no statutory requirement that sale proceeds be applied first to the portion of the debt that is guaranteed. Crown Life Ins. Co. v. LaBonte, 111 Wis. 2d 26, 330 N.W.2d 201 (1983).

"Fair value" under sub. (2) is determined by the property's sale value. The court may consider costs of selling, holding, or carrying the property only to the extent that they affect the sale value. First Financial Savings Assoc. v. Spranger, 156 Wis. 2d 440, 456 N.W.2d 897 (Ct. App. 1990).

The purchaser at a foreclosure sale has a right to notice of when the sale has been confirmed, when the mortgagor's redemption period ends, and when the 10-day payment period under s. 846.17 expires. GMAC Mortgage Corp. v. Gisvold, 215 Wis. 2d 484, 572 N.W.2d 466 (1998).

Because s. 703.10 (6) prohibits condominium bylaws from affecting the transfer of title to a condominium unit, a bylaw prohibiting the sale of any unit to an owner who would not reside in the unit could not be applied to prevent the confirmation of a foreclosure sale to the high bidder who admitted he would not occupy the premises. Also, the potential failure to occupy the unit had no recognized legal relationship to the confirmation of the sheriff's sale and the transfer of title. Bankers Trust Company of California, N.A. v. Bregant, 2003 WI App 86, 261 Wis. 2d 855, 661 N.W.2d 498, 02-2085.

Under sub. (2), when a creditor seeks a deficiency judgment, there is no presumption that the property sold for fair value. From that, it follows that where the mortgagee does not seek a deficiency judgment, there is a presumption. The statute does not eliminate the requirement that the court find fair value. A tax assessment, like an appraisal, can be viewed as a measure of fair value. Each case must be considered on its merits. Bank of New York v. Mills, 2004 WI App 60, 270 Wis. 2d 790, 678 N.W.2d 332, 03-1339.

**846.17 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, the purchaser's assigns or personal representatives, a deed of the premises sold, setting forth each parcel of land sold to the purchaser and the sum paid therefor, which deed, upon confirmation of such sale, shall vest in the purchaser, the purchaser's assigns or personal representatives, all the right, title and interest of the mortgagor, the mortgagor's 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, the purchaser's 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 the sheriff 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, the purchaser's assigns or personal representatives, at the sale such deed upon compliance by such purchaser 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 10 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 the purchaser, 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.

**History:** 1973 c. 189 s. 7; Stats. 1973 s. 816.17; Sup. Ct. Order, 67 Wis. 2d 585, 768 (1975); Stats. 1975 s. 846.17; 1993 a. 486.

That the balance of the purchase price be paid within 10 days of confirmation of sale or be forfeited is mandatory and is not waivable by the court as a matter of equity. The purchaser has a right to notice of when the sale has been confirmed, when the mortgagor's redemption period ends, and when the 10-day payment period expires. *GMAC Mortgage Corp. v. Gisvold*, 215 Wis. 2d 484, 572 N.W.2d 466 (1998).

**846.18 Tardy confirmation of sale.** In all cases where a

mortgage foreclosure sale has been made but not confirmed and the purchaser or the purchaser's 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, the purchaser 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.

**History:** 1973 c. 189 s. 7; Stats. 1973 s. 816.18; Sup. Ct. Order, 67 Wis. 2d 585, 768 (1975); Stats. 1975 s. 846.18; 1993 a. 486.

**846.25 Discharge after foreclosure.** After a mortgage has been foreclosed by action and the judgment and costs have been paid and satisfaction of the mortgage entered upon the court record, the clerk of circuit court, on request, shall sign a certificate attesting to those facts, which certificate is entitled to record.

**History:** Sup. Ct. Order, 67 Wis. 2d 585, 768 (1975); 1995 a. 224.

**Cross-reference:** For redemption from mortgage foreclosure, prior to sale, see s. 846.13.

**846.30 Redemption period for land contracts.** If a court finds that the purchaser under a land contract is obligated to make certain payments under that land contract, that the purchaser has failed to make the required payments and that the vendor is entitled to a judgment of strict foreclosure, the court shall set a redemption period of at least 7 working days from the date of the judgment hearing or, if there is no hearing, from the date of the entry of the judgment order. No judgment of strict foreclosure is final until the court enters an order after the expiration of the redemption period confirming that no redemption has occurred and making the judgment of strict foreclosure absolute.

**History:** 1995 a. 250.

This section leaves unchanged the common law rule that absolute title vests in the vendor at the end of the redemption period if payment in full has not been made. *Steiner v. Wisconsin American Mutual Insurance Co.* 2004 WI App 135, \_\_\_ Wis. 2d \_\_\_, \_\_\_ N.W.2d \_\_\_, 03-1959.