

CHAPTER 846

FORECLOSURE OF MORTGAGES

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846.01 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.

History: 1973 c. 189 s. 7; Stats. 1973 s. 816.01; Sup. Ct. Order, 67 W (2d) 768; Stats. 1975 s. 846.01.

Cross Reference: See 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 S. & L. v. American Med. Services*, 66 W (2d) 210, 223 NW (2d) 921.

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 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.

History: 1973 c. 189 s. 7; Stats. 1973 s. 816.02; Sup. Ct. Order, 67 W (2d) 768; Stats. 1975 s. 846.02.

846.04 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.

History: 1973 c. 189 s. 7; Stats. 1973 s. 816.04; Sup. Ct. Order, 67 W (2d) 768; Stats. 1975 s. 846.04.

846.05 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.

History: 1973 c. 189 s. 7; Stats. 1973 s. 816.05; Sup. Ct. Order, 67 W (2d) 768; 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 W (2d) 768, 783; 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 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.

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

History: 1973 c. 189 ss. 7, 20; Stats. 1973 s. 816.08; Sup. Ct. Order, 67 W (2d) 768, 783; Stats. 1975 s. 846.08.

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 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.

History: 1973 c. 189 s. 7; Stats. 1973 s. 816.09; Sup. Ct. Order, 67 W (2d) 768; Stats. 1975 s. 846.09.

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 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. 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 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.

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

Judgment of foreclosure and sale is final judgment appealable as matter of right under 808.03 (1). Appeal from order confirming sale does not enable appellant to challenge judgment of foreclosure. *Shuput v. Lauer*, 109 W (2d) 164, 325 NW (2d) 321 (1982).

Guarantor's liability was not extinguished by application of proceeds to guaranteed portion of debt. *Crown Life Ins. Co. v. LaBonte*, 111 W (2d) 26, 330 NW (2d) 201 (1983).

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 W (2d) 768, 783; Stats. 1975 s. 846.101; 1977 c. 304.

Election by mortgagee to foreclose under 816.101, 1973 stats., on one or more mortgages securing debt does not bar foreclosure upon remaining mortgages but does bar pursuit of personal deficiency. *Glover v. Marine Bank of Beaver Dam*, 117 W (2d) 684, 345 NW (2d) 449 (1984).

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 W (2d) 768, 783; 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

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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.

Application of reduced redemption period to mortgage executed before enactment of Chapter 304, laws of 1977, would be unconstitutional impairment of contract. *Burke v. E. L. C. Investors, Inc.* 110 W (2d) 406, 329 NW (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 W (2d) 768; Stats. 1975 s. 846.11.

This statute gives the option to the mortgagor to insist that, where a mortgage covers both homestead and nonhomestead property, the nonhomestead property be sold first. That issue was irrelevant in the instant case, since the entire mortgaged property was homestead. *Anchor Savings & Loan Assn. v. Week*, 62 W (2d) 169, 213 NW (2d) 737.

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 W (2d) 768; Stats. 1975 s. 846.12.

846.13 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.

History: 1973 c. 189 s. 7; Stats. 1973 s. 816.13; Sup. Ct. Order, 67 W (2d) 768; Stats. 1975 s. 846.13.

Cross Reference: See 846.25, relative to discharge after foreclosure

846.14 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.

History: 1973 c. 189 s. 7; Stats. 1973 s. 816.14; Sup. Ct. Order, 67 W (2d) 768; Stats. 1975 s. 846.14.

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 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.

History: 1973 c. 189 s. 7; Stats. 1973 s. 816.15; Sup. Ct. Order, 67 W (2d) 768; Stats. 1975 s. 846.15.

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 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.

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

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 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.

History: 1973 c. 189 s. 7; Stats. 1973 s. 816.162; Sup. Ct. Order, 67 W (2d) 768; Stats. 1975 s. 846.162.

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

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 W (2d) 768; Stats. 1975 s. 846.165.

Cross Reference: For tardy confirmation of sale, after 6 years, see 846.18. Court should determine "fair value" under (2) even though bid does not shock court's conscience. First Wis. Nat. Bank of Oshkosh v. KSW Inv. 71 W (2d) 359, 238 NW (2d) 123.

See note to 806.07, citing Family Savings and Loan Assn. v. Barkwood Landscaping Co., Inc. 93 W (2d) 190, 286 NW (2d) 581 (1980).

See note to 846.10, citing Shuput v. Lauer, 109 W (2d) 164, 325 NW (2d) 321 (1982).

See note to 846.10, citing Crown Life Ins. Co. v. LaBonte, 111 W (2d) 26, 330 NW (2d) 201 (1983).

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, his assigns or personal representatives, a deed of the premises sold, setting forth each parcel of land sold to him and the sum paid therefor, which deed, upon confirmation of such sale, shall vest in the purchaser, his assigns or personal representatives, 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, his 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 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.

History: 1973 c. 189 s. 7; Stats. 1973 s. 816.17; Sup. Ct. Order, 67 W (2d) 768; Stats. 1975 s. 846.17.

846.18 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.

History: 1973 c. 189 s. 7; Stats. 1973 s. 816.18; Sup. Ct. Order, 67 W (2d) 768; Stats. 1975 s. 846.18.

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 docket, the clerk, on request, shall sign a certificate attesting to such facts, which certificate is entitled to record.

History: Sup. Ct. Order, 67 W (2d) 768.

Cross Reference: For redemption from mortgage foreclosure, prior to sale, see 846.13.