

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. [1931 c. 79 s. 28]

Revisor's Note, 1931: The addition repeats the substance of part of 281.03 (the lis pendens section) and is made to obviate the mistake of entering foreclosure judgment in disregard of the requirement that the notice of the pendency of the action must be filed twenty days before judgment. (Bill No. 51 S. s. 28)

For grounds for employment of a receiver in foreclosure proceedings, see note to 268.16, citing Crosby v. Keilman, 206 W 252, 239 NW 431.

Where a land contract required the purchaser to pay the purchase price to children of the vendor and to execute a new contract and mortgage when a deed should be given, but a deed was given without the execution of a new contract or mortgage, the debt was not thereby extinguished, and the vendor and the beneficiaries under the land contract were equitable mortgagees having a specifically enforceable right to the execution of a mortgage and new contract, and to subject the premises to the payment of the debt. Knutson v. Anderson, 216 W 69, 255 NW 907.

A holder of a negotiable mortgage note, who had purchased the same after maturity from the agent of parties who had previously assumed the mortgage debt and who through the agent had previously paid the original mortgagee, could not foreclose the mortgage, since the note had been discharged by such payment and was no longer a subsisting obligation. [116.63, 117.06,

117.37.] Michalak v. Nowinski, 220 W 1, 264 NW 498.

A lessee of premises involved in an action to foreclose a mortgage, who had not been joined as a party, but who, pursuant to an order to show cause why he should not be required to vacate the mortgaged premises, entered a general appearance in such proceeding and moved for an adjournment and leave to produce testimony to enable the court to adjudge the rights of the parties therein, is deemed to have waived objection to the jurisdiction of the trial court to make an order requiring him to vacate. Evans v. Orgel, 221 W 152, 266 NW 176.

A mortgagee's agreement with a grantee, who had assumed a first mortgage debt, to extend the time of payment thereof, had the effect of releasing the mortgagor from personal liability, but did not destroy the mortgagee's right by foreclosure to subject the mortgaged land to payment of the debt, and did not have the effect of subordinating the lien of the first mortgage to the lien of a second mortgage. [Sexton v. Pickett, 24 W 346, distinguished.] Farmers & Merchants S. Bank v. Hildebrandt, 221 W 394, 267 NW 42, 268 NW 212.

An action to foreclose a mortgage is not an "action for damages founded on contract," within the provision in 267.01 (3). Roberts v. Saukville Canning Co. 247 W 277, 19 NW (2d) 295.

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. [1935 c. 541 s. 362]

278.03 [Renumbered section 278.10 (3) by 1935 c. 541 s. 363]

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. [1935 c. 541 s. 364]

Note: Mortgagee holding purchase money mortgage could join in one complaint, action on mortgage note and action to foreclose mortgage without asking for deficiency judgment, where parties were limited to parties to note. *Cavadini v. Larson*, 211 W 200, 248 NW 209.

Court's power to limit mortgagee's statutory right to deficiency judgment on foreclosure should be exercised with circumspection and solely for purpose of preventing a result that shocks the conscience. Order finding that unimproved unproductive property was worth \$10 a front foot more than mortgagee's bid, confirming sale on that basis and reducing mortgagee's deficiency judgment accordingly, held error. *Weimer v. Uthus*, 217 W 56, 253 NW 358.

In an action for foreclosure of a mortgage, wherein the judgment of foreclosure and sale provided that plaintiff was to have a deficiency judgment if the proceeds of the sale should be insufficient to pay the amount due, the trial court, after confirming the sale, had no power to deny the plaintiff a deficiency judgment on the ground that the value of the premises sold was in excess of the price obtained on the sale, although the court, prior to the sale, had found the fair value of the premises to be a sum which was in excess of the price obtained on the sale. [*Big Bay Realty Co. v. Rosenberg*, 218 W 318, 259 NW 735, applied.] *Buel v. Austin*, 219 W 397, 263 NW 82.

Pending action for foreclosure of mortgage and for deficiency judgment constitutes defense to subsequent action commenced by

same plaintiff, demanding judgment on obligation secured by mortgage against those personally liable thereon. *Farmers & Merchants Bank v. Matsen*, 219 W 401, 263 NW 192.

The complaint in action for strict foreclosure of a land contract is deemed amended to include a request for a deficiency judgment, where the supreme court on a former appeal held that the plaintiffs were entitled to the remedy to which they would have been entitled had they commenced an action for specific performance of the contract to execute a mortgage and had they been awarded a foreclosure of such mortgage. Plaintiffs who were properly before the trial court were entitled to a deficiency judgment, although their interests were several and not joint and several. *Knutson v. Anderson*, 220 W 364, 265 NW 91.

The trial court, having confirmed a foreclosure sale of mortgaged premises, could only render a deficiency judgment for the amount of deficiency appearing in the sheriff's report of sale, and the court erred in entering a deficiency judgment for a smaller amount. *Drach v. Hornig*, 221 W 575, 267 NW 291.

In an action to foreclose a mortgage where service of the summons is made by publication on a nonresident mortgagor, the court has no jurisdiction to render a personal judgment against such mortgagor for deficiency, and such judgment is void and may be attacked collaterally. *Riley v. State Bank of De Pere*, 223 W 16, 269 NW 722.

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. [1935 c. 541 s. 365]

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. [1935 c. 541 s. 366]

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. [1935 c. 541 s. 367]

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. [1935 c. 541 s. 368]

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.

Note: This section is not a substitute for 241 W 148, 5 NW (2d) 806; Winter v. O'Neill, a bill to redeem. Buchner v. Gether Trust, 241 W 280, 5 NW (2d) 809.

278.095 [Remembered section 278.10 by 1935 c. 541 s. 369]

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 perfected; 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. [Court Rule XXV; Supreme Court Order, effective Jan. 1, 1934; 1935 c. 541 s. 363, 369; 1937 c. 422; Supreme Court Order, effective July 1, 1939]

Revisor's Note, 1935: Disbursement of proceeds of sale is covered by 278.16. Execution of a deed is required by 278.17. Surplus goes under 278.03 and 278.08. The proceeds should not be paid before the sale is confirmed. (Bill No. 50 S, s. 369)

Purchaser of mortgaged land in foreign state, who assumed mortgage indebtedness, could be sued by the mortgagee for personal judgment without foreclosure or determination whether there would be deficiency. First T. Co. v. Calumet S. B. F. Ranch, 210 W 278, 246 NW 331.

Court in ordering foreclosure sale or resale may in its discretion take notice of economic emergency and fix minimum price at which premises must be bid in if sale is confirmed. On application to confirm foreclosure sale, court may establish property's value and require that it be credited on judgment, giving mortgagee option to accept or not. Suring State Bank v. Giese, 210 W 489, 246 NW 556.

The refusal of the trial court to confirm a foreclosure sale of farm premises because of the refusal of the mortgagees to bid in for the upset price fixed by the trial court is held an abuse of discretion, under circumstances disclosing that the mortgagees were aged and in necessitous circumstances; that the buildings on the premises were old and some were dilapidated and useless and beyond repair; that three times the trial court ordered a resale of the premises, and each

time no bidders except the mortgagees were found; that the trial court based its upset price on the price of farm products prevailing during 1910 to 1914; that there was no testimony adduced at the hearing to show that a better price would be bid at the second sale or at the third sale, which sales demonstrated that no better price would be offered; and that the mortgagees expressly waived a deficiency judgment. Kremer v. Rule, 216 W 331, 257 NW 166.

Where a judgment on foreclosure of a land contract required, as a condition to confirmation of the sale, that the fair value of the property as determined by the trial court be credited on the amount due, and the fair value as so determined after sale exceeded the amount due, the vendor nevertheless could not be compelled to accept a confirmation of the sale and a denial of a deficiency judgment, but was entitled in the alternative to reject confirmation and have a resale of the property. Wahl v. H. W. & S. M. Tullgren, Inc., 222 W 306, 267 NW 278.

A promissory note is merely the evidence of indebtedness, and the substitution of one note for another does not discharge the debt evidenced thereby nor release the security given for its payment. A debt secured by a mortgage is the principal thing, of which the mortgage is an incident, and the transfer of the debt carries the mortgage with it. In re Beaver Drainage District, 244 W 603, 13 NW (2d) 76.

278.101 to 278.104 [Repealed by 1935 c. 319]

278.105 Application for confirmation of sale and for deficiency judgment. (1)
No sale on a judgment of mortgage foreclosure shall be confirmed unless five days' notice has been given to all defendants who are owners of the equity of redemption when the action is commenced or against whom a deficiency judgment is asked or who have appeared in the action, or to attorneys of such parties. Such notice shall be given either personally or by registered mail directed to the last known post-office address, mailed at least five 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. [1933 c. 11; 1933 c. 474 s. 1; 1935 c. 319, 449; Supreme Court Order effective Jan. 1, 1938]

Cross Reference: For tardy confirmation of sale, after 6 years, see 235.59 (2).

Note: Where, on motion to confirm mortgage foreclosure sale, the court stated that sale might be confirmed on condition that deficiency would be a specified amount and that mortgagee might have deficiency judgment for that amount, the confirmation was conditional and plaintiff was given option to accept or reject it, and, not having rejected it, must be deemed to have accepted it and to be bound by the terms imposed. First Nat. Bank & Trust Co. v. Plous Bros., 224 W 634, 272 NW 861.

Subsection (2) gave the courts no power which they did not already possess. "Fair value" as used therein is that amount which will not shock the conscience of the court. What does not amount to a fair value is discussed at length in the decision. The lack of higher bids on a resale should be considered by the court when again called on to confirm a sale. It is optional with a mortgagee whether he will credit the fair value of the mortgaged premises as a condition of immediate confirmation, and the crediting of the amount fixed by the court as fair value cannot be compelled, but only a resale of the premises can be ordered. Northwestern Loan & Trust Co. v. Bidinger, 226 W 239, 276 NW 645; Cameron v. Heinze, 231 W 479, 286 NW 47.

Courts of equity will not refuse to confirm a mortgage foreclosure sale simply because of mere inadequacy of the price, where inadequacy of the price is the only fact appearing, and there is no showing of other facts such as mistake, misapprehension, or inadvertence on the part of the interested parties or intending bidders resulting in failure to obtain a fair and adequate price. A. J. Straus Paying Agency v. Jensen, 226 W 462, 277 NW 105; Cameron v. Heinze, 231 W 479, 286 NW 47.

The granting or refusing of an application to set aside a mortgage foreclosure sale and order a resale, as a favor, rests in the sound discretion of the trial court, and its determination cannot be disturbed on appeal except for clear abuse of judicial discretion.

278.106 to 278.108 [Repealed by 1935 c. 319]

278.11 Homestead, how sold. If any defendant appear and answer that any portion of the mortgaged premises is a homestead the court shall ascertain whether such be the fact, and if so whether the part of the mortgaged premises not included in the 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 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 un-

Prudential Insurance Company v. Cuttane, 227 W 48, 277 NW 630; Cameron v. Heinze, 231 W 479, 286 NW 47.

The contention that this section, enacted in 1935, affected or destroyed the plaintiff's judgment obtained in 1932 cannot be sustained. White Eagle Building & Loan Ass'n v. Freyer, 231 W 563, 286 NW 32.

The power of a court of equity to prevent an unconscionable result in mortgage foreclosure proceedings must be exercised with respect to the sale of the mortgaged premises. In fixing an upset price as a condition to confirmation of a mortgage foreclosure sale, the assessed value of the mortgaged premises or what the property may bring at a private sale is not the test of the real value thereof which the court should apply, but the "real value of the premises" should approximate that price which a person willing and able to buy the property would reasonably pay for it, not for the purposes of speculation, but for that use to which it has been or reasonably may be put. Rio-Fall River Union Bank v. Hollnagel, 234 W 181, 290 NW 636.

Where there was no bid at either the first or the second sale on foreclosure except the mortgagee's bid of \$10,500, which was the face amount of the mortgage, and there was no likelihood of a better bid if a third sale should be had, an order, based on alleged inadequacy of the bid but fixing no upset price, denying confirmation of the second sale unless the mortgagee elect to have the sale confirmed without a deficiency of \$1,990, and ordering a resale in the event of his not so electing, was an abuse of discretion. Welfare Building & Loan Ass'n v. Gearhard, 235 W 229, 293 NW 813.

The rule, long established in this state, that an offer or agreement to advance a bid on a judicial resale which is made before the sale is confirmed, not accompanied by a showing of mistake, misapprehension, or inadvertence, is insufficient to sustain an order setting aside the sale, is adhered to. Gratiot State Bank v. Martin, 242 W 254, 7 NW (2d) 363

der them from committing waste or doing any act that may impair the value of the mortgaged premises. [1935 c. 541 s. 370]

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. [1935 c. 541 s. 371]

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

Note: A contract executed pending the foreclosure of a mortgage, giving the mortgagors nine months to find a purchaser for the premises, failing which the premises were to be sold at public auction, and providing for a conveyance in escrow by the

mortgagors to a named third person, did not place the burden upon the mortgagee to show affirmatively that such conveyance was voluntarily based upon an adequate consideration untainted by fraud and made without advantage being taken of the debtor's necessity. *Waukesha Nat. Bank v. Dewey*, 216 W 524, 257 NW 622.

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. [1935 c. 541 s. 372]

Note: A second mortgagee who advanced interest due on a first mortgage to protect his own interest became subrogated to the extent of his advances to the lien of the first mortgage. *Vogt v. Calvary Lutheran U. M. Society*, 213 W 380, 251 NW 239.

See note to 281.01, citing *Buchner v. Gether Trust*, 241 W 148, 5 NW (2d) 806; *Winter v. O'Neill*, 241 W 280, 5 NW (2d) 809.

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. [1933 c. 304; 1935 c. 541 s. 373; 1935 c. 542; *Supreme Court Order*, effective Jan. 1, 1937; *Supreme Court Order*, effective Jan. 1, 1938]

Note: Where sheriff announced that ten per cent down payment would be required, and refused bids of \$51,000 and \$52,000 be-

cause bidders tendered only \$100 deposits, confirmation of sale for \$50,570 held not error, since statute merely gave sheriff discretion, whether to sell for cash or to accept

down payment, and provided minimum amount of down payment. *Plankinton Packing Co. v. Cincere Corporation*, 225 W 239, 272 NW 836.

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. [1935 c. 541 s. 374; 1935 c. 542]

Revisor's Note, 1935: An amendment of 278.17 withholds delivery of the sheriff's deed until the sale is confirmed. (Bill No. 50 S. s. 374)

A bona fide purchaser for value from a purchaser at a mortgage foreclosure sale takes free from the equities of the mortgagor and a second mortgagee. *First Nat. Bank v. Savings L. & T. Co.*, 207 W 272, 240 NW 381.

Parties purchasing mortgaged premises at foreclosure sale and obtaining possession through a writ of assistance issued after a void confirmation of the sale had only the rights of a purchaser before confirmation of the sale, and hence were not entitled to possession of the premises as against the mortgagor until the sale should be validly confirmed. *Kalb v. Feuerstein*, 234 W 507, 291 NW 840.

278.18 [Repealed by 1935 c. 319]