

1890

# Foreclosure under the Michigan Statutes

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under the

M i c h i g a n S t a t u t e s .

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by

Lewis Daniel Campbell,

C o r n e l l U n i v e r s i t y ,

S c h o o l o f L a w .

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Courts of Equity have inherent original jurisdiction of mortgages, both for the foreclosure and redemption of them. The Equity of Redemption is purely an equitable remedy, and its remedy is found here.

There are other remedies used for the foreclosure under the law and practice of the different states.

In many states jurisdiction in equity for the foreclosure of mortgages is conferred by statute. In Michigan foreclosure is regulated by statute. The mode used is by sale of the property under the direction of an officer of the Court, and the proceeds applied to the discharge of the encumbrances, according to priority. The surplus, if any, paid over to the mortgagor. The statute provides that all bills for foreclosure or satis-

faction of mortgages shall be filed in the Circuit Court in Chancery of the county where the mortgaged premises, or any part thereof, are situated. Section 111, Chap. 176 provides that whenever a bill shall be filed for the foreclosure or satisfaction of the mortgage, the Court shall have power to decree a sale of the mortgaged premises, or such part thereof as may be sufficient to discharge the whole amount due on the mortgage, and the cost of the suit ; but the Circuit Judge shall not, by such decree, order any lands to be sold within one year after the filing of the bill of foreclosure. In the case of *D. F. & M. Insurance Co. vs. Renz*, 33 Mich.298, the subpoena did not issue until six months after the filing of the bill, and the Court held that the time, one year as prescribed by statute, would run from the

issuing of the subpoena rather than from time of filing the bill. The Supreme Court, in 1878, made a new rule, providing that foreclosure sales should not be ordered on less than six weeks, or forty two days' notice, or a year after commencement of the suit.

Sec. 113, Chap. 176 provides that the Court may compel the delay of the possession of the premises to the purchaser, and on the coming in of the report of sale may decree judgment by the mortgagor of any balance of the mortgaged debt that may remain unsatisfied after a sale of the premises ; in the case in which such balance is recoverable at law ; and for that purpose may issue the necessary execution, as in other cases against other property of the mortgagor.

No proceedings at law can be had while a bill for

foreclosure is pending, and the bill must state whether any action of law has ever been had for the recovery of the debt, and if judgment has been had at law and satisfied, no proceedings can be had. Proceedings may be had if expressly ordered by the Court. This is done only in unusual cases.

The commencement of a suit at law on the bond or note accompanying the mortgage will not prevent the filing of the bill of foreclosure, unless a judgment has been obtained in that suit, but if after commencing such suit, the mortgagee files a bill of foreclosure, he will not be permitted to proceed in a suit at law without authority from the Court. A foreclosure proceeding in Chancery is no defense upon the merits to an action at law. If it is shown that a judgment has been obtained

in a suit at law. for the full amount or any part thereof, no proceedings can be had on the bill until execution has been returned unsatisfied in the whole or in part.

All sales are made by the Circuit Court Commissioner of the county in which the decree is rendered, or the land or some part thereof is situated, or by some other person authorized by the Court. Sales are to be public and are to be held between the hours of nine o'clock in the morning and the setting of the sun, at the Court House or place of holding the Circuit Court in the county in which the estate or some part thereof is situated, or at such place as the Court may direct. Deeds are executed by the Commissioner or other person making the sale, specifying the names of the parties to the suit,

the date of the mortgage, when and where recorded, the description of the premises sold, and the amount bid for the same, and shall vest in the purchaser the same estate which would have vested in the mortgagee if the equity of redemption had been foreclosed. The deeds are as valid as if executed by the mortgagor and mortgagee, and are an entire bar against each of them, and against all parties to the suit in which the decree was made, and against all persons claiming under them. The proceeds of every sale made under a decree in Chancery shall be applied to the discharge of the debt adjudged by such Court to be due, and of the costs awarded ; and if there be any surplus, it shall be brought into Court for the use of the defendant or the person entitled thereto, subject to the order of the Court.

Where any surplus is left in the Court for a period of three months, the Judge may direct that the same may be put out at interest under the direction of the Court for the benefit of the defendant, his representatives or assigns, to be paid by them by order of the Court.

All bills for the foreclosure of mortgages must be filed in the Circuit Court in Chancery for the county where the mortgaged premises or any part thereof are situated.

Generally all those who have an interest in the mortgage, and who may be affected by the decree are proper parties. If the mortgagee alone has any interest he alone is the only necessary party. The Supreme Court of Michigan holds that so far as the legal rights

are concerned, the mortgagor and mortgagee, and those who have acquired rights or interest under them subsequent to the mortgage are the only proper parties to a foreclosure action. Generally all persons who have a legal, as well as an equitable interest in the mortgage are necessary parties to a foreclosure proceeding.

Those who are necessary or proper parties to a foreclosure action are divided into two classes, parties defendant and parties plaintiff.

All persons having an interest in the Equity of redemption, are proper parties to a bill of foreclosure, and should be made parties to the suit. The mortgagor is a necessary party, though no personal remedy can be had against him, if it is not shown by the bill that a party defendant is not a party to the foreclosure, he is

not a proper party, and as to him bills should be dismissed with costs. A person or persons interested in the mortgaged premises, not made a party to a bill in foreclosure, are not included in the cost decree.

Where a grantor in a deed agrees to pay the mortgage on the premises, the mortgagee may treat the mortgagor and grantee as the principal debtors and can have a personal decree against either or both of them, but where the grantor purchases subject to encumbrances, he does not become personally liable. The mortgagee cannot enforce a promise by the mortgagor to the grantee because it is a promise made to a third person. Any one buying mortgaged property and promising to pay the mortgage is made a party defendant to a foreclosure action. If the mortgagor should die, his heir is a party

to the bill for foreclosure.

The policy of the law is adverse to the taking by right of survivorship, except in special cases, this is so in the case of husband and wife. Parties who set up legal titles, which if valid are adverse to the title of mortgagor and mortgagee, are not competent in a foreclosure suit. In a bill to foreclose a purchase money mortgage a wife is not a necessary party if mortgage is given by the husband alone, but in proper cases a wife may file a bill to protect her homestead from an invalid foreclosure.

The mortgagee in filing a bill for foreclosure need not bring in the parties interested in the equity of redemption unless he has actual or constructed notice of their claims, but if he has no such notice their

claims are barred by foreclosure. A bill to foreclose a mortgage given by a joint and several note must make all the parties defendant. A trustee who holds a mortgagee need not make his "cestes que trust" parties to a bill to foreclose.

The rules of the Court of Chancery provide that where the bill is in the nature of a foreclosure it shall not be necessary to set out at large the rights and interests of the several defendants, who are purchasers of, or who have liens on the equity of redemption in the mortgaged premises. The statutes provide that a bill must state whether any proceedings have been had at law for the recovery of the debt secured by mortgage, or any part thereof, has been collected or paid. Care should be taken that no proceedings at law had been had in the

premises, or if so, what they were.

Executors must set forth the death of their testator and the probate of the will. The bill must contain the proper averments, or no proof can be admitted. Debts due should be expressly averred or the bill will be demurrable. When the mortgage contains conditions precedent, a bill to foreclose must aver performance.

In the description of mortgaged premises, ordinary certainty of description is all that is necessary. A bill to protect the homestead must show all the necessary facts required in the description of a legal homestead.

Avoidance of a special defense, is pleaded by introducing the defense in the bill in the form of a pretense, and adding matter of reply in the form of a charge. If

the bill is not so <sup>framed</sup> originally, a particular defense set up by the answer should be met by amending the bill. 45 Mich. 638 ; 45 Mich 147.

To render the filing of a bill constructive notice to a purchaser of any real estate, it shall be the duty of a complainant to file for record, with a register of deeds of the county in which the land to be effected by constructive notice are situated. A notice of the pending of such suits in Chancery, setting forth the title of the cause, and the general object thereof, together with discription of the lands to be effected thereby ; and it shall therefore become the duty of the registrar to record such notice, in a book kept for that purpose, upon the payment of the same fee as is provided by law for recording deeds. A copy of such record, authenti-

cated by the registrar shall be evidenced of such notice and the filing of the same in all courts and places.

Each registrar of deeds shall enter in an index to be kept in his office, such references to the said notices, as will enable all persons interested to search his office for such notices. Notice to the defendants to a bill is for the purpose of informing parties against whom the personal decree is asked, of the object of the bill, and to save them from all necessary expense.

The statute provides that when a bill is filed for foreclosure, a mortgage upon which there shall be due any interest, or any portion or installment of the principal, and there shall be other portions or installments to become due subsequently, the bill shall be dismissed upon defendants bringing into Court, at any time before

the decree of sale, the principal and interest due with costs. If, after a decree of sale has been entered against the defendant in such case, he shall bring into Court the principal and interest due, with costs, the proceedings in the suit will be stayed ; but the Court will enter a decree of fore closure and sale to be enforced by a further order of the Court on a subsequent default in the payment of any portion or installment of the principal, or of any interest thereafter to grow due.

If the defendant is an infant and has put in a general answer by his guardian, or if any of the defendants are absentees, the complaint may have similar order of converse, referring it to a commissioner to take proof of the facts and circumstances stated in the complainant's bill, and to compute the amount due on the mortgage.

The commissioner must report such proof and examinations to the court.

Where a bill is filed for the payment of money, the Court may, in its discretion direct that the complainant be examined as to any payments made by him or for his use on account of the demand mentioned in the bill, or he may be examined in open Court. In computing the interest due, the commissioner cannot allow the amount of premium paid for insurance unless paid by express agreement, but he may allow payment for taxes or assessments which were a lien on the premises. The duty to pay taxes on mortgaged land is primarily on the mortgagor, but if he makes a default, any mortgagee may pay them and add the same to his lien, but not if he binds the premises at a tax sale.

A mortgagee does not owe any duty to a subsequent mortgagee, or to the owner to protect the latter's lien, as against tax titles; but if he bids in the premises at a tax sale, the mortgagor can treat the purchase as a payment and compel the cancellation of the tax certificate or deed on refunding the amount paid with interest. Neither party to a mortgage can cut off the other's interest by bidding in the premises at a tax sale if the other party objects thereto.

If the foreclosure proceedings are to be heard upon pleadings, or pleadings and proof, so as to bring it under the fourth class of causes on the calendar, it will be entitled to a preference over any other causes of the same class, unless the defendant before the cause is heard shall file with the registrar an affidavit that he

has a good and meritorious defense, and that his answer was not put in for the purpose of delay. The filing of such affidavits must be noticed on the calendar. Where the bill is taken as confessed, or the complainant's case is admitted by answer, or where there are defendant infants or absentees, the cause must be regularly brought to hearing at a term after the coming in of the commissioner's report, before a final decree is entered. If the bill be taken as confessed, the complainant must show to the Court at the hearing, by affidavit or otherwise, that the proceedings to take the bill have been regular according to the rules and practice of the Courts. It must be shown whether the bill has been taken as confessed against all the defendants upon proof of service of subpoena, or after an appearance, or

whether some of them have been preferred against as absentees.

A foreclosure is invalid that is based on an order of publication made upon the complainant's affidavit that the defendant could not be found, the subpoena having been returned before the return day. The proof of defendant's absence and of diligence in seeking to obtain service upon him, on which to base an order of publication. If the defendant does not bring into Court the amount due, with costs, or if for any other cause a decree shall pass for the complainant, the Court may direct a reference to a commissioner to ascertain and report the situation of the mortgaged premises, or may determine the same on oral or other testimony ; and if it should appear that the same can be sold in parcels

without injury to the interests of the parties, the decree should direct so much of the mortgaged premises to be sold as will be sufficient to pay the amount then due on such mortgage with cost, and such decree shall remain as security for any subsequent default. If there is any default subsequent to such decree, in the payment of any portion or installment of the principal, or on any interest due on such mortgage, the Court may, upon the petition of the complainant, by a future order, founded on such first decree, direct a sale of so much of the mortgaged premises to be made under such decree, as will be sufficient to satisfy the amount so due. The cost of such petition and the subsequent proceedings thereon, may be had as often as the default shall happen.

Where the money is payable by installments, no de-

decree can be lawfully made for any of them until an opportunity has been afforded to contest each alleged default, and the decree upon one hearing will not authorize a sale for a subsequent installment without a new hearing and adjudication. If it shall appear to the Court that the mortgaged premises are so situated that a sale of the whole will be most beneficial to the party, the decree must in the first instance, be entered for the sale of the whole premises accordingly.

In foreclosure proceedings against non-residents, absentees, etc. the Court, instead of proceeding to a sequestration as provided in sec. 5126 laws of 1871, may decree a sale of the mortgaged premises, or such part thereof as may be necessary to discharge the mortgage, and the costs of the suit, as in other cases ;

but the defendant may at any time before the sale, appear and pay to the complainant such costs as the Court may award, whereupon the sale will be stayed, and the same proceedings must thereafter be had as if the defendant had been served with process, and had regularly appeared. Such defendant may appear within one year after notice in writing, of a decree rendered against him, and in seven years after making of the decree, when such notice shall not be given. If such defendant, or his representatives, shall not appear, after the making of such decree, the Court must then by order confirm the decree against such defendant and against all persons claiming under him by virtue of an act subsequent to the commencement of the suit, and may make such further notice as may be proper. No such sale and conveyance

regularly made under the statutes upon a foreclosure bill shall be effected by the appearance of the defendant within one year, or seven years as mentioned ; nor by any other proceedings. Such defendant or his representatives may at any time within seven years after a decree ordering sale, file a bill against the complainant, or his representatives, to account for all monies received by him or them by notice of such decree, over and above the amount justly due on the mortgage, and the cost of suit ; and the court shall proceed on such bill according to the equity of the case.

Where a defendant claims that the mortgaged premises should be sold in the inverse order of alienation , a cross bill is not necessary, but the facts may be set up in the answer. Voluntary payment of a mortgage not

lawfully entitled to collection after notice, suit being brought by the owner to foreclose, is no protection to any one.

When the answer does not admit the facts set up in the bill, the burden of proof is upon the complainant, and the proof must conform to the allegations in the bill. When a defendant sets up a special defense to a foreclosure bill, the burden of proof is upon him, and it must be clearly proven, and the suit can only be defended upon the ground set up in the answer. The decree should follow the case pleaded, and the allegations of the bill.

Where a complainant parts with his interest before answer, it is a good objection to the suit, and no subsequent proceedings can be had on behalf of the assignee

until properly brought before the Court, but if the fault does not appear on the record, and is not brought to the knowledge of the Court ; it will not effect the proceedings of the decree. If a defendant in a foreclosure suit neglects to appear after due service, the complainant can proceed "ex parte" without noticing the case or having it placed on the term calendar.

Interest is allowable equally upon duress and judgments, and under section 1637 laws of 1869, compound interest is allowed upon installments of interest from the time it became due. It is the practice to allow a reasonable time for the payment of money fixed by the decree. A good legal tender being made, the mortgage which is treated as a lien is extinguished, although not releasing the debtor from personal liability. Tender

must be made in good faith, and it must be understood by the holder of the mortgage to be a present, absolute, and unconditional tender, intended to be in full payment and extinguishment of the mortgage. The holder will be allowed a reasonable time to look over the mortgage papers and accounts, and to calculate the amount due. The tender must be made during business hours, and if there be any objections made to the tender they must be stated at the time of making.

The statute authorizes a personal decree to be rendered in a foreclosure suit against the mortgagor of any balance of the mortgage debt that may remain unsatisfied after sale. It also provides for the rendering of a decree against third persons. A personal decree can be had only against persons personally served.

The proceeds of every sale made under a decree in Chancery must be applied to the discharge of the debt adjudged by that Court to be due, and of the costs awarded ; and if there be any surplus, it must be brought into Court for the use of the defendant or of the person entitled thereto, subject to the order of the court.

If such surplus or any part thereof, should remain in said court for the term of three months without being applied for, the Circuit Judge may direct the same to be put out at interest, under the direction of the Court, for the benefit of the defendant, his representatives or assigns, to be paid to them by the order of such Court.

Where an application is made for the surplus money after a satisfaction of a decree of foreclosure, all the

parties to the foreclosure suit are entitled to notice, in order that they may appear and contest the right of the applicant and assert their own ; and an order for payment of **such** money without notice to the parties, or any appearance by them, is erroneous.

The Court is authorized to direct the sale of the mortgaged premises and to compel delivery of possession to the purchaser.

