

MAINE STATE LEGISLATURE

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ONE HUNDRED AND FIRST LEGISLATURE

Legislative Document

No. 386

H. P. 292

House of Representatives, January 17, 1963.

Referred to the Committee on Judiciary. Sent up for concurrence and ordered printed.

HARVEY R. PEASE, Clerk

Presented by Mr. Rust of York.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED
SIXTY-THREE

**AN ACT Relating to a Power of Sale in a Mortgage and Sale Under a Power
in a Mortgage.**

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. R. S., c. 177, § 1-A, additional. Chapter 177 of the Revised Statutes is amended by adding a new section to be numbered 1-A, to read as follows:

‘Sec. 1-A. “Power of sale” in mortgage. The following “Power” shall be known as “The Statutory Power of Sale” and may be included in any mortgage or incorporated by reference in any mortgage.

POWER

But upon any default in the performance or the observance of the foregoing or other condition, the mortgagee or his executors, administrators, successors or assigns, his or their agent or attorney, may sell the mortgaged premises or such portion thereof as may remain subject to the mortgage in case of any partial release thereof, either as a whole or in parcels, together with all improvements that may be thereon, by a public sale on or near the premises then subject to the mortgage, or, if more than one parcel is then subject thereto, then on or near one of said parcels, or at such place as may be designated for the purpose in the mortgage, first complying with the terms of the mortgage and the statutes relating to the foreclosure of mortgage by the exercise of a power of sale, and he or they may convey the same by proper deed or deeds to the purchaser or purchasers absolutely and in fee simple; and such sale shall forever bar the mortgagor and all persons claiming under him from all right and interest in the mortgaged premises, whether at law or in equity.’

Sec. 2. R. S., c. 177, §§ 5-A - 5-F, additional. Chapter 177 of the Revised Statutes is amended by adding 6 new sections to be numbered 5-A to 5-F, to read as follows:

'Sec. 5-A. Foreclosure under the power of sale; procedure; notice; form. The mortgagee or the person having his estate in the land mortgaged, or a person authorized by the power of sale, or the attorney duly authorized by a writing under seal, or the legal guardian or conservator of such mortgagee or person acting in the name of such mortgagee or person, may, upon breach of condition and without action, do all the acts authorized or required by the power; but no sale under such power shall be effectual to foreclose a mortgage, unless, previous to such sale, notice thereof has been published once in each of 3 successive weeks, the first publication to be not less than 21 days before the day of the sale, in a newspaper, if any, published in the town where the land lies. If no newspaper is published in such town notice may be published in a newspaper published in the county where the land lies, and this provision shall be implied in every power of sale mortgage in which it is not expressly set forth. A newspaper which by its title page purports to be printed or published in such town, city or county, and having circulation therein, shall be sufficient for the purpose. A copy of said notice shall be served on the mortgagor or his representative in interest, or may be sent by registered mail addressed to him or such representative at his last known address, or to such person and to such address as may be agreed upon in said mortgage, at least 21 days before the date of the sale under the power in the mortgage.

The following form of foreclosure notice may be used and may be altered as circumstances require; but nothing herein shall be construed to prevent the use of other forms.

FORM

Mortgagee's sale of real estate

By virtue of and in execution of the Power of Sale contained in a certain Mortgage Deed given by _____ to _____ dated _____ and recorded in the _____ County Registry of Deeds, Book _____, Page _____, of which Mortgage the undersigned is the present holder, _____ (if by assignment, or in any fiduciary capacity give reference) _____, for breach of the conditions of said Mortgage and for the purpose of foreclosing the same there will be sold at Public Sale at _____ o'clock, _____ M. on the _____ day of _____ 19_____, at _____, all and singular the premises described in said Mortgages, _____, (in case of partial releases state exceptions).

To wit: "(Description exactly as in the Mortgage, including all reference to title, restrictions, encumbrances, etc., as made in the Mortgage)".

Terms of Sale: (State here the amount, if any, to be paid in cash by the purchaser at the time and place of the sale, and the time or times for payment

of the balance or the whole as the case may be and any other terms or conditions relating to the sale).

Other terms to be announced at the sale.

Signed: _____
 (Present holder of Mortgage)

_____ 19_____

A notice of sale in the above form, published in accordance with this chapter or in accordance with the power in the mortgage together with such other or further notice, if any, as is required by the mortgage, shall be a sufficient notice of the sale, and the premises shall be deemed to have been sold, and the deed thereunder shall convey the premises subject to and with the benefit of all restrictions, easements, improvements, outstanding tax titles, municipal or other public taxes, assessments, liens or claims in the nature of liens and existing encumbrances of record created prior to the mortgage, whether or not reference to such restrictions, easements, improvements, liens or encumbrances is made in the deed; but no purchaser at the sale shall be bound to complete the purchase if there are encumbrances, other than those named in the mortgage and included in the notice of the sale, which are not stated at the sale and included in the sellers contract with the purchase.

Sec. 5-B. Copy of notice; affidavit; recording; evidence: The person selling, or the attorney duly authorized by a writing under seal, or the legal guardian or conservator of such person shall, within 30 days after the sale, cause a copy of the notice as published and his affidavit, fully and particularly stating his acts, or the acts of his principal or ward, to be recorded in the registry of deeds for the county where the land lies. If the affidavit shows that the requirements of the power of sale and this chapter have in all respects been complied with, the affidavit or a certified copy of the record thereof shall be admitted as evidence that the power of sale was duly executed. In case of an error or omission in the affidavit recorded as aforesaid, the Superior Court, on petition and after such notice as it may order may, if it deems proper, authorize the recording of an affidavit amending, correcting or in substitution for, an affidavit so recorded, and the affidavit so authorized to be recorded or a certified copy of the record thereof, shall have the same effect and shall be admitted in evidence, as if it had been recorded within said 30 days, but such subsequent affidavit shall not prejudicially affect any title or interest in land which may have arisen or have been created between the recording of the original and of the subsequent affidavit.

Sec. 5-C. Statutory rights and interest by descent; barring of by sale. If the mortgagor had at the time of the execution of the mortgage no wife or husband, or if, being married, the wife or husband of the mortgagor joined in the deed in token of her or his release of her or his right of any interest therein by descent or of any other rights therein then a sale by virtue of and in execution of the power of sale in the deed shall bar all right of any interest therein by descent and all other rights therein by a wife or husband of the mortgagor.

Sec. 5-D. Conveyance by mortgagor; effect. A sale or transfer by the mortgagor shall not impair or annul any right or power of attorney given in the

mortgage to the mortgagee to sell or to transfer the land as attorney or agent of the mortgagor.

Sec. 5-E. Limitation of actions. Actions on mortgage notes, whether witnessed or not, or on other obligations to pay a debt secured by a mortgage of real estate, to recover judgments for deficiencies after foreclosure by sale under a power contained in the mortgage, and actions on such notes or other obligations which are subject to a prior mortgage, to recover the amount due thereon after the foreclosure sale of such prior mortgage under the power contained therein, shall, except as otherwise provided, be commenced within 2 years after the date of the foreclosure sale or, if the principal of the note or other obligation does not become payable until after the foreclosure sale, then within 2 years after the time when the cause of action for the principal accrues.

Sec. 5-F. Liability for deficiency on sale; necessity of notice; form; affidavit. No action for a deficiency shall be brought by the holder of the mortgage note or other obligation secured by mortgage of real estate after foreclosure by exercise of the power of sale unless a notice in writing of the mortgagee's intention to foreclose the mortgage shall have been served on the mortgagor or his representative in interest or the same has been sent by registered mail with return receipt requested at his last address then known to the mortgagee, or to such person and to such address as may be agreed upon in said mortgage, together with a naming of liability for the deficiency, in substantially the form below, at least 21 days before the date of the sale under the power in the mortgage, and an affidavit has been signed and sworn to, within 30 days after the foreclosure sale, of the mailing of such notice. A notice mailed as aforesaid shall be a sufficient notice, and such an affidavit made within the time specified shall be prima facie evidence in such action of the mailing of such notice.

The following form of notice and affidavit may be used and may be altered as circumstances require; but nothing herein shall be construed to prevent the use of other forms:

FORM

**Notice of Intention to Foreclose and of Liability
for Deficiency After Foreclosure of Mortgage**

To: A. B. of _____ Street, Town of _____
_____ County of _____ and State of _____

You are hereby notified in accordance with the statute, of my intention, on _____(date of sale), to foreclose by sale under the Power of Sale for breach of condition, the Mortgage held by me on property located on _____ Street, Town of _____, County of _____ and State of _____ dated _____ and recorded in the _____ County Registry of Deeds, Book _____, Page _____, to secure a note (or other obligation) signed by you, for the whole, or any part, of which you may be liable to me and in case of a deficiency in the proceeds of the Foreclosure Sale to hold you liable for the whole or any part thereof still remaining unpaid.

Very truly yours,

 (Name of holder of said Mortgage)

Affidavit

I hereby certify on oath that on the _____ day of _____ 19_____, I mailed by registered mail with return receipt requested, the notice a copy of which is hereinabove set forth, direct to such person or persons at the address therein named which was the last address of such person known to me at the time of mailing or to such person or persons at the address therein named which was the person and the address agreed upon in said Mortgage.

Subscribed and sworn to before me this _____ day of _____ 19_____.

 Justice of the Peace
 Notary Public'

Sec. 3. R. S., c. 177, § 6, amended. Section 6 of chapter 177 of the Revised Statutes is amended to read as follows:

'**Sec. 6. Fees of attorneys for foreclosure of mortgage.** For the foreclosure of a mortgage by either method prescribed by ~~the preceding section 5~~ or by ~~subsections II and III of section 3~~, **subsections II and III, or by sale under a power of sale in the mortgage**, the mortgagee or the person claiming under him may charge ~~an~~ a reasonable attorney's fee ~~of \$25~~ which shall be a lien on the mortgaged estate, and shall be included with the expense of publication, notice, service and recording in making up the sum to be tendered by the mortgagor or the person claiming under him in order to be entitled to redeem, provided said sum has actually been paid in full or partial discharge of an attorney's fee.'

Sec. 4. R. S., c. 177, § 7, amended. The 3rd paragraph of section 7 of chapter 177 of the Revised Statutes is amended to read as follows:

'The mortgagor or those claiming under him shall have the right to redeem the mortgaged premises from any or all sales thereof under and by virtue of authority and power contained in such mortgage or from any sale of the mortgaged premises under or by virtue of a separate instrument executed at or about the same time with the mortgage, and being a part of the same transaction, by paying or tendering to the mortgagee or to those claiming under him as appears by record at the registry of deeds where the mortgage is properly recorded, the debt, interest, costs of foreclosure and other obligations provided in the mortgage, at any time within one year from the date of such sale. Nothing herein shall apply to a sale under the statutory power of sale in a mortgage as provided for in sections 5-A to 5-F, to railroad mortgages, so-called, or to bond issues of corporations, or to bonds forming a part of a mortgage indebtedness of any corporation or corporations wherein the method of sale is provided in the deed of trust or any similar instrument.'