NINTH REVISION

REVISED STATUTES

OF THE

STATE OF MAINE

1954

FIRST ANNOTATED REVISION

IN FIVE VOLUMES

VOLUME 4

THE MICHIE COMPANY
CHARLOTTESVILLE, VIRGINIA

Chapter 177.

Mortgages of Real Estate.

Cross Reference.—See c. 171, § 29 et seq., re levies on equities of redemption.

Sec. 1. Forms.—Mortgages of real estate mentioned in this chapter include those made in the usual form, in which the condition is set forth in the deed, and those made by a conveyance appearing on its face to be absolute, with a separate instrument of defeasance executed at the same time or as part of the same transaction. (R. S. c. 163, § 1.)

History of section.—See Bisbee v. Knight, 139 Me. 1, 26 A. (2d) 637.

What constitutes a mortgage.—A mortgage is the conveyance of real or personal estate for the security of a debt by way of pledge, and to become void upon its payment. Goddard v. Coe, 55 Me. 385.

To constitute a mortgage, the condition must be part of the deed, or there must be a defeasance, which is an instrument of as high a nature, and executed at the same time. French v. Sturdivant, 8 Me. 246.

What constitutes a defeasance.—A defeasance is a collateral deed, made at the same time with a feoffment or grant, containing certain conditions, upon the performance of which, the estate created by such feoffment or grant, may be defeated. Shaw v. Erskine, 43 Me. 371.

Conveyance appearing to be absolute may be a mortgage if made with separate instrument of defeasance.—Mortgages of real estate include not only those made in the usual form, in which the condition is set forth in the deed, but also those made by a conveyance, appearing on its face to be absolute, with a separate instrument of defeasance of the same date, and executed at the same time. Shaw v. Erskine, 43 Me. 371; Snow v. Pressey, 82 Me. 552, 20 A. 78.

By this section, when the deed is absolute on its face, with a separate instrument of defeasance executed at the same time, or as part of the same transaction, they constitute a mortgage. Brown v. Holyoke, 53 Me. 9.

Thus, a deed and bond may constitute a mortgage.—A deed and bond of defeasance executed at the same time and as part of the same transaction, constitute a mortgage. The relation of the parties is that of mortgagor and mortgagee. Clement v. Bennett, 70 Me. 207.

Although bond provides for reconveyance instead of declaring the deed void.—If the instrument of defeasance is, in other respects sufficient, the fact that it provides for a reconveyance instead of declaring that the absolute deed shall become void is immaterial. Snow v. Pressey, 82 Me. 552, 20 A. 78.

A conveyance of land and a bond, made at the same time, by the grantee, to reconvey upon the performance of conditions, constitute a mortgage. McLaughlin v. Shepherd, 32 Me. 143; Purrington v. Pierce, 38 Me. 447.

If the bond is recorded.—A bond of defeasance will convert a deed, absolute in its terms, into a mortgage, if such bond is seasonably recorded; and such bond is seasonably recorded if done before it is introduced in evidence, and before any change of title has taken place, or the right of any third party has atttached. Smith v. Monmouth Mut. Fire Ins. Co., 50 Me. 96. See c. 168, § 15, re instrument of defeasance must be recorded.

And this is not necessary between the parties.—As between the parties to it, an instrument of defeasance is effectual to convert the absolute deed into a mortgage, without being recorded. Smith v. Monmouth Mut. Fire Ins. Co., 50 Me. 96.

But the instrument of defeasance must be of as high a nature as the deed thereby to be defeated. Warren v. Lovis, 53 Me. 463.

And to constitute a mortgage, the obligation to reconvey must be under seal. Warren v. Lovis, 53 Me. 463.

A written agreement to reconvey not under seal, though made at the same time with the deed, does not constitute a mortgage. Warren v. Lovis, 53 Me. 463.

But no personal security need be given.—To constitute a mortgage, it is not necessary that there should be any collateral or personal security for the debt secured by the mortgage. Smith v. People's Bank, 24 Me. 185; Mitchell v. Burnham, 44 Me. 286.

A conveyance by husband and wife of real estate belonging to the wife, and a bond to reconvey given to the wife alone, constitute a mortgage; and not the less so because the wife gave no personal security for the money to be paid, as speci-

fied in the condition of the bond. Mills v. Darling, 43 Me. 565.

The deed and bond of defeasance must be between the same parties. Warren v. Lovis, 53 Me. 463.

A bond given at the time of the conveyance from the grantee to the grantor and another, conditioned to convey to them, on receiving certain payments therein specified, is not such a defeasance as will constitute a mortgage. Warren v. Lovis, 53 Me. 463.

And executed at the same time or as part of same transaction.—A bond executed more than three years after the delivery of an absolute deed cannot be considered an instrument of defeasance, and thereby render the conveyance a mortgage, the bond not having been "executed at the same time or as part of the same transaction." Stowe v. Merrill, 77 Me. 550, 1 A. 684.

A bond relied upon by way of defeasance must be borne even date with the conveyance to the demandant, and both must have been parts of one transaction. Bennock v. Whipple, 12 Me. 346.

To make a good defeasance, it must be by deed. It must recite the deed it relates to, or at least the more material parts thereof. It is to be made between the same persons that were parties to the first deed. It must be made at the time, or after the first deed, and not before. It ought to be made of a thing defeasible. Shaw v. Erskine, 43 Me. 371.

But bond executed at same time is valid though bearing a subsequent date.—Where an absolute deed of real estate is given, and a bond executed by the grantee at the same time, though bearing a subsequent date, to convey the same land to the grantor, upon payment of a certain sum, the two instruments are to be taken as constituting a mortgage. Blaney v. Bearce, 2 Me. 132.

Though the bond of defeasance and deed have different dates, if delivered together, they constitute a mortgage. Brown v. Holyoke, 53 Me. 9.

Instrument held not one of defeasance.—See Fuller v. Pratt, 10 Me. 197; Cotton v. McKee, 68 Me. 486.

Applied in Lewis v. Small, 71 Me. 552; Buffalo Fertilizer Co. v. Aroostook Mut. Fire Ins. Co., 109 Me. 483, 84 A. 1078.

Quoted in Tomlinson v. Monmouth Mut. Fire Ins. Co., 47 Me. 232.

Cited in Reed v. Reed, 75 Me. 264.

Sec. 2. Mortgagee may enter before or after breach, unless otherwise agreed.—A mortgagee, or person claiming under him, may enter on the premises or recover possession thereof, before or after breach of condition, when there is no agreement to the contrary; but in such case, if the mortgage is afterwards redeemed, the amount of the clear rents and profits from the time of taking possession shall be accounted for and deducted from the sum due on the mortgage. (R. S. c. 163, § 2.)

Cross reference.—See note to § 5, sub-§ I, re mortgagee can take possession after commencement of foreclosure by publication.

As between the mortgagor and the mortgagee, the latter is considered as seized of the legal estate. Jewett v. Felker, 2 Me. 339; Smith v. Kelley, 27 Me. 237.

And the mortgagee is the owner in fee, as between himself and the mortgagor. Weeks v. Thomas, 21 Me. 465.

As between the mortgagor and mortgagee, the fee of the estate passes to the mortgagee at the time of the execution of the deed. Blaney v. Bearce, 2 Me. 132.

The mortgagee has the legal estate in lands mortgaged, and is regarded as owner in fee, as against the mortgagor, and those claiming under him, subject to defeasance. Brown v. Leach, 35 Me. 39; Gilman v. Wills, 66 Me. 273; Jones v. Smith, 79 Me. 446, 10 A. 254; Anderson v. Robbins, 82 Me. 422, 19 A. 910; Steward v. Welch, 84 Me. 308, 24 A. 860; Cook v. Curtis, 125 Me. 114, 131 A. 204.

But mortgagor can convey subject to the mortgage.—As between the mortgagor and other persons, he is considered as still having the legal estate in him, and the power of conveying the legal estate to a third person, subject to the incumbrance of the mortgage. Blaney v. Bearce, 2 Me. 132; Jewett v. Felker, 2 Me. 339; Given v. Marr, 27 Me. 212.

Property in timber cut is in mortgagee.—As between the mortgagor and mortgagee the property in timber cut on the mortgaged premises is in the latter, and a purchaser from the mortgagor takes it subject to the paramount rights of the mortgagee. Gore v. Jenness, 19 Me. 53.

And he may maintain action against person carrying it away.—The mortgagee of timber lands may maintain trespass or trover against any one who shall cut and carry away the timber, or afterwards convert it to his own use, without authority

from such mortgagee, although under a license from the mortgagor given after the mortgage. Frothingham v. McKusick, 24 Me. 403.

Mortgagor's possession is not adverse to mortgagee.—As between mortgagor and mortgagee, the legal estate is in the latter, and the possession of the mortgagor is not adverse to the mortgagee, but in fact is his possession. Smith v. Goodwin, 2 Me. 173.

But is the possession of the mortgagee.—The possession of the mortgagor and of his grantees, is the possession of the mortgagee; for the grantees purchase with a knowledge of the title, and when claiming under a deed, they are presumed to do so according to the title. Noyes v. Sturdivant, 18 Me. 104.

And is in subordination to his title.—The possession of the mortgagor must be presumed to be in subordination to the title of the mortgagee until the contrary is shown. Conner v. Whitmore, 52 Me. 185.

Mortgagor not liable for rents and profits.—While mortgagors remain in possession, they cannot be compelled to pay the rents and profits of the property to the mortgagees. Noyes v. Rich, 52 Me. 115.

On account of the peculiar relation subsisting between the parties to a mortgage, the mortgagor, though the title is in the mortgagee, cannot be required to pay rent to the latter so long as he is allowed to remain in possession, since his contract is to pay interest and not rent. Anderson v. Robbins, 82 Me. 422, 19 A. 910.

Until mortgagee has entered into possession.—The mortgagor is not accountable to the mortgagee for rents and profits, until the latter has entered into possession for condition broken or otherwise. Chase v. Palmer, 25 Me. 341.

So long as the mortgagor, without the entry of the mortgagee, continues in possession, his possession is rightful, but in the absence of any agreement to the contrary he is not liable for rent. Gilman v. Wills, 66 Me. 273.

And mortgagor can make improvements.—A mortgagee, while he permits the mortgagor to retain the possession, can have no just cause to interfere or to complain, if the mortgagor is found making improvements upon the estate. Heath v. Williams, 25 Me. 209.

But he cannot remove fixtures.—The mortgagor has no right to remove buildings or other fixtures erected by him on mortgaged premises, after the execution of the mortgage. Humphreys v. Newman, 51 Me. 40.

Tax title enures to benefit of mortgagee.—It is the duty of a mortgagor in possession, who has conveyed with covenants of warranty, to pay the taxes and prevent a sale of the estate; and if he acquires a tax title, that enures to the benefit of the mortgagee. Fuller v. Hodgdon, 25 Me. 243.

Mortgagee's interest before foreclosure cannot be attached.—The interest of the mortgagee in real estate, before an entry for condition broken, with a view to foreclosure, cannot be taken in satisfaction of a judgment and execution against him. Smith v. People's Bank, 24 Me. 185.

The interest of a mortgagee of lands, after entry for the purpose of foreclosing the mortgage and before a foreclosure has taken place, cannot be transferred by an attachment and levy thereon as the real estate of the mortgagee. Smith v. People's Bank, 24 Me. 185.

Assignment of mortgagee's interest.—See Smith v. Kelley, 27 Me. 237; Lunt v. Lunt, 71 Me. 377.

In the absence of agreement to the contrary, mortgagee has right to possession.—The mortgagee of real estate has, by statute, the right to immediate possession of the premises, when there is no agreement to the contrary. First Auburn Trust Co. v. Buck, 137 Me. 172, 16 A. (2d) 258.

The mortgagee has the right to take possession of the mortgaged premises at any time and receive the rents and profits. American Agricultural Chemical Co. v. Walton, 116 Me. 459, 102 A. 297.

As between the mortgagor and mortgagee, the fee of the estate passes to the mortgagee at time of the execution of the deed, and the mortgagee may enter immediately or maintain a writ of entry against the mortgagor, unless there is an agreement in writing, on his part, that the mortgagor may retain the possession and receive the profits. Blaney v. Bearce, 2 Me. 132; Given v. Marr, 27 Me. 212.

The mortgagee has the right to possession, without foreclosing. Tufts v. Maines, 51 Me. 393.

Before as well as after condition broken. — In the absence of any express or implied agreement in the mortgage or other writing between the parties, the mortgagee has the right of immediate possession, before as well as after condition broken. Gilman v. Wills, 66 Me. 273; Anderson v. Robbins, 82 Me. 422, 19 A. 910; American Agricultural Chemical Co. v.

Walton, 116 Me. 459, 102 A. 297; Cook v. Curtis, 125 Me. 114, 131 A. 204.

As between the mortgagor and mortgagee, the mortgagee has the legal estate and the right of possession even before a breach of the condition, when there is no agreement to the contrary. Howard v. Houghton, 64 Me. 445.

The right of possession under a mortgage of personal property as in a mortgage of lands, is in the mortgagee, before as well as after the breach of the condition, unless controlled by an agreement between the parties. Libby v. Cushman, 29 Me. 429.

The mortgagee may, at any time, enter upon the mortgaged premises, before breach of the condition, and without notice, and dispossess the mortgagor, unless there is some stipulation to the contrary in the mortgage. Allen v. Bicknell, 36 Me. 436.

A mortgagee may enter on the premises for the purpose of taking the rents and profits, even before a breach of the condition. Potter v. Small, 47 Me. 293.

A mortgagee may recover possession before any breach of the condition, when there is no agreement to the contrary. Allen v. Parker, 27 Me. 531; Mason v. Mason, 67 Me. 546.

A mortgagee, immediately upon the execution of his mortgage, may enter and take possession of the mortgaged premises, or maintain an action therefor, without waiting for a breach of the condition of the mortgage, when there is no agreement to the contrary. This right is secured to him by legislative enactment. Brastow v. Barrett, 82 Me. 456, 19 A. 916.

The right of a mortgagee, or of any one claiming under him, to recover possession of the mortgaged premises, even before a breach of the condition of the mortgage, when there is no agreement to the contrary, is affirmed by this section. Hadley v. Hadley, 80 Me. 459, 15 A. 47. See Brown v. Leach, 35 Me. 39.

Where there is no agreement in the mortgage, that the mortgagee shall not enter into possession of the premises before a breach of the condition, the mortgagee may maintain an action to recover the possession, without proof that the condition has been broken. Allen v. Parker, 27 Me. 531.

Which right exists until performance of condition.—The legal estate and the right of possession of a mortgagee in fee result from the legal effect and operation of a conveyance in mortgage; and they continue in him until a full and complete performance of the condition, or a tender equivalent thereto. Stewart v. Davis, 63 Me. 539; American Agricultural Chemical Co. v. Walton, 116 Me. 459, 102 A. 297.

Mortgagee has right of possession against second mortgagee.—A second mortgagee has no more right to hold possession of the premises against the first mortgagee than the mortgagor would have if the second mortgage had not been given. American Agricultural Chemical Co. v. Walton, 116 Me. 459, 102 A. 297.

Entry by mortgagee ends tenancy at will under mortgagor.—If the mortgagee makes an entry upon the mortgaged premises, and claims the possession, such entry puts an end to a tenancy at will, subsisting between the tenant and the mortgagor. Hill v. Jordan, 30 Me. 367.

Upon the entry of the mortgagee, the mortgagor is not entitled to emblements. Gilman v. Wills, 66 Me. 273.

Nor is mortgagee liable in trespass. — While in the lawful possession, the mortgagee, or his assignee, is not liable in trespass for the occupancy of the premises. He is entitled by his possession to the rents and profits, and is accountable for them to the mortgagor if the premises are redeemed. Jones v. Smith, 79 Me. 446, 10 A. 254.

A mortgagor, not entitled by agreement, express or implied, to retain possession, cannot maintain trespass quare clausum against a mortgagee who enters under his mortgage. And the motives or purposes for which the entry is made are not material. Cook v. Curtis, 125 Me. 114, 131 A. 204.

Or ejectment.—The mortgagor cannot maintain ejectment against a mortgagee in possession. Conner v. Whitmore, 52 Me. 185.

Or for removing goods. — The mortgagee, having a right of entry, may legally remove the goods on the premises and will not be liable for so doing, if after reasonable notice, the mortgagor neglects or refuses to cause their removal, provided it is done in a careful and prudent manner and to a safe and convenient place. Allen v. Bicknell, 36 Me. 436.

And his entry is rightful even if forcible.—Even if the mortgagee enters forcibly, and under circumstances which might render him criminally liable for a breach of the peace, still such entry will be rightful against the mortgagor, and he may retain the possession for the purpose of taking the rents and profits equally, as if his entry had been peaceable and under legal process. Allen v. Bicknell, 36 Me. 436.

But possession is of no effect for foreclosure.—The law allows a mortgagee to

have or to obtain possession for other purposes than foreclosure. This section authorizes a mortgagee to enter on the premises or recover possession by suit and judgment before any breach of the condition of the mortgage, when there is no agreement to the contrary. But this entry and possession has no relation to foreclosure, and is of no effect for that purpose, although continued for more than a year. The mortgagee, if he would foreclose, must proceed independently of such entry, before condition broken. Smith v. Larrabee, 58 Me. 361. See notes to § 3, sub-§ III, and § 5, sub-§ I, re mortgagee in possession may commence proceedings to foreclose.

And it does not affect right of redemption.—Possession of the mortgagee prior to foreclosure in no wise affects the right of redemption by the mortgagor. Libby v. Cushman, 29 Me. 429.

If premises redeemed, mortgagee must account for rents and profits.—Where the mortgagee takes possession of the premises, if the mortgage is afterwards redeemed, he must account for the clear rents and profits. American Agricultural Chemical Co. v. Walton, 116 Me. 459, 102 A. 297.

Between the mortgagor and mortgagee, the latter, when in possession, must account for the actual rents and profits received by him. Bailey v. Myrick, 52 Me. 132.

And he is accountable for crops taken.—If the mortgagee enters and takes crops from the premises, he will be accountable therefor in case of redemption of the mortgage. Gilman v. Wills, 66 Me. 273.

And the proceeds from lumber cut.—If the mortgagee seizes lumber cut from the premises, he holds it subject to a liability to account for the proceeds to the mortgagor, if the premises are redeemed. Gore v. Jenness, 19 Me. 53.

But the mortgagee is not bound to account for rents and profits unless the premises are redeemed. Portland Bank v. Fox, 19 Me. 99.

A mortgagee in possession cannot be charged for rent by the mortgagor, so long as the premises mortgaged remain unredeemed, unless there is a special agreement between the parties to the contrary. Weeks v. Thomas, 21 Me. 465.

In jurisdictions where the doctrine prevails, as in this state, that the mortgage conveys the legal title, the right of the mortgagor to an account of the rents and profits received by the mortgagee is purely and exclusively of equitable cognizance. At law the mortgagee cannot be made to account. He is the legal owner of the estate, and takes the rents and profits in that character. Unless the premises are redeemed, he is not bound to account for them in any proceeding. Wilcox v. Cheviott, 92 Me. 239, 42 A. 403.

And the deduction must be made at redemption, not afterwards. Wilcox v. Cheviott, 92 Me. 239, 42 A. 403.

This section recognizes the mortgagor's equitable right to an accounting for rents and profits received by the mortgagee in possession, in case, and only in case, the mortgage is redeemed; and provides that they shall be deducted from the sum due on the mortgage, not that they shall be recoverable from the mortgagee after redemption. Wilcox v. Cheviott, 92 Me. 239, 42 A. 403.

Mortgagee allowed credit for expenses necessary for protection and preservation of estate.—The mortgagee has no right to make it more expensive for the mortgagor to redeem than may be required for the purpose of keeping the property in a proper state of repair and for protecting the title to the property. But he is to be allowed credit for all expenses necessary for the protection and preservation of the estate. Pierce v. Faunce, 53 Me. 351.

But mortgagor not liable for unnecessary repairs.—If a mortgagee enters, as he may, before breach of a condition, he is held to the strictest accountability for the profits. And the mortgagor is not to be held chargeable in an action of assumpsit for repairs, not necessary to the preservation of the estate. Ruby v. Abyssinian Religious Society, 15 Me. 306.

Burden on mortgagor to show want of care in management of land.—In redeeming land, of which the mortgagee has taken possession for a foreclosure, if he accounts for the net incomes actually received, the burden is upon the mortgagor to show a want of ordinary care in its management. Porter v. Pillsbury, 36 Me. 278.

Agreement that mortgagor shall retain possession is binding on mortgagee.—The mortgagee may demand and recover possession before condition broken. But there may be an agreement that the mortgagor shall retain the possession, until the condition is broken, which shall bind the mortgagee. Bean v. Mayo, 5 Me. 89.

The cases, in which a mortgagee of real estate may recover possession, before condition broken, are those in which there has not been any agreement to the contrary. Clay v. Wren, 34 Me. 187.

But such agreement must be evidenced by some writing. — An agreement which will prevent the mortgagee from recovering possession, inasmuch as it affects the title to real estate, must be evidenced by some writing. Mason v. Mason, 67 Me. 546.

By the provisions of this section a mortgagee may recover possession, before any breach of the condition, "when there is no agreement to the contrary." Such an agreement, affecting the title to real estate, must be made in writing. Norton v. Webb, 35 Me. 218.

Although it may arise by implication.— The agreement named in the statute which would defeat the mortgagee's right to possession may be one arising by implication out of the written instruments executed at the time and necessary to carry their designs into effect. Clay v. Wren, 34 Me. 187.

The agreement defeating the mortgagee's right to possession may be so made without the use of any particular form of words; and it may be inferred from the language used in a written contract between the parties, which cannot be executed, according to its terms, without a construction permitting the mortgagor to remain in possession. Norton v. Webb, 35 Me. 218.

Applied in Pratt v. Skolfield, 45 Me. 386.

Stated in Reed v. Elwell, 46 Me. 270.

Sec. 3. Obtaining possession for foreclosure.—After breach of the condition, if the mortgagee or anyone claiming under him desires to obtain possession of the premises for the purpose of foreclosure, he may proceed in either of the following ways, viz.:

I. He may obtain possession under a writ of possession issued on a conditional judgment as provided in section 10, duly executed by an officer. An abstract of such writ stating the time of obtaining possession, certified by the clerk, shall be recorded in the registry of deeds of the district in which the estate is, within 30 days after possession has been obtained.

Cross reference.—See c. 113, § 156, re costs to be taxed for parties and attorneys.

Presumption of finding of separate instrument of defeasance.—The statute confers upon a court of general jurisdiction the right to adjudge foreclosure not only of legal but of equitable mortgages upon proof of certain facts. Whether there existed the required separate instrument of defeasance is an evidentiary fact after conferment of jurisdiction. That being so, it must be presumed that the court, before it rendered the conditional judgment and ordered the issue of the writ of possession under this subsection, found as a fact that there was such "a separate instrument of defeasance," there appearing nothing to the contrary in the original record. Bisbee v. Knight, 139 Me. 1, 26 A. (2d) 637.

If a certified abstract is not filed, the attempted foreclosure is incomplete and inoperative. Hatch v. Bates, 54 Me. 136.

Applied in Williams v. Hilton, 35 Me. 547; Tufts v. Maines, 51 Me. 393; Plummer v. Doughty, 78 Me. 341, 5 A. 526; Bisbee v. Knight, 139 Me. 1, 26 A. (2d) 637.

II. He may enter into possession and hold the same by consent in writing of the mortgagor or the person holding under him; and such consent with the affidavit of the mortgagee or his assignee to the fact and time of entry indorsed thereon shall be recorded in each registry of deeds in which the mortgage is or by law ought to be recorded, within 30 days after the entry is made.

It is the actual entry which may effect a foreclosure.—It is the actual entry into possession for condition broken, that may effect in due time a foreclosure, being made by the written consent of the mortgagor, or his assignee. The written consent is of no effect but to make such entry lawful. Pease v. Benson, 28 Me. 336; Jones v. Bowler, 74 Me. 310.

And foreclosure cannot be made without such entry.—A foreclosure cannot be made according to the mode prescribed by this subsection without an actual entry into possession for condition broken, by the consent in writing of the mortgagor or those claiming under him. Pease v. Benson, 28 Me. 336; Chamberlain v. Gardiner, 38 Me. 548; Storer v. Little, 41 Me. 69. See Chase v. McLellan, 49 Me. 375.

There must be an actual entry to avail the mortgagee under this subsection. Jones v. Bowler, 74 Me. 310.

And the possession required under this subsection cannot be less than that which

is actual. Chamberlain v. Gardiner, 38 Me. 548.

Entry not proved by mortgagor's consent.—The possession required to be held by the mortgagee, is equivalent to an actual possession. Such possession is not provable from the consent in writing by the mortgagor that he may enter, and that possession is thereby given. Chamberlain v. Gardiner, 38 Me. 548.

The consent to enter is no proof of an entry. The possession of the mortgagee is not proved by the consent of the mortgagor that he may enter. The entry must be subsequent to the consent given, and under it. Jones v. Bowler, 74 Me. 310.

The words contained in the paper signed by the mortgagor, "I hereby give possession," do not prove the fact that an actual entry was made and possession obtained. Pease v. Benson, 28 Me. 336.

Consent in writing is not intended to dispense with the proof of the entry, for if so, all that would be necessary to show, would be the written consent, duly recorded, that the mortgagor, etc., had given permission for the entry, and thereby dispense with evidence to prove the entry itself, and consequently authorize the omission in fact of that which the statute has made indispensable, to effect a foreclosure in this mode. Chamberlain v. Gardiner, 38 Me. 548.

Consent must be given by mortgagor or those claiming under him.—The consent in writing to an entry for foreclosure is not sufficient unless given by the mortgagor, or those claiming the entire equity under him. Chase v. Gates, 33 Me. 363.

And it must be seasonably recorded.—This section requires the writing, given by the mortgagor, acknowledging the entry, to be recorded within 30 days after the entry, in the office of the register of deeds. Southard v. Wilson, 29 Me. 56.

If entry is to be effectual.—By this subsection the mortgagor's written consent shall be recorded, and no such entry shall be effectual, unless such consent shall be recorded. Chamberlain v. Gardiner, 38 Me. 548.

Writing itself is evidence of consent.—The statute has provided that, as preliminary to the entry, the mortgagor shall give his written consent that it shall be made. And to prove this, the writing itself, duly recorded, is the evidence required. Chamberlain v. Gardiner, 38 Me. 548.

III. He may enter peaceably and openly, if not opposed, in the presence of 2 witnesses and take possession of the premises; and a certificate of the fact and time of such entry shall be made, signed and sworn to by such witnesses before a justice of the peace; and such certificate shall be recorded in each registry of deeds in which the mortgage is or by law ought to be recorded, within 30 days after the entry is made. (R. S. c. 163, § 3.)

Mortgagee already in possession may proceed under this subsection.—When the mortgagee is in possession, he may commence a proceeding for foreclosure by a peaceable and formal entry for that purpose, in the presence of witnesses, as provided in this subsection. The law does not require him to abandon his former possession absolutely, before he can resort to this method. He may change his former entry and possession into one for foreclosure, although the statute in terms gives the right thus to foreclose to those only who, after a breach of the condition, desire to obtain possession for the purpose of foreclosure. A fair construction of the statute will authorize a party, in possession for one purpose, to obtain a new possession of a different character from the former, i. e., one for the purpose of foreclosure. Smith v. Larrabee, 58 Me. 361.

Mortgagee may enter without notifying debtor.—A mortgagee, after default of performance of the condition, has the right to enter peaceably in the presence of two witnesses, under this subsection, to foreclose the mortgage for condition broken, without notifying the debtor of the intention to do so or of the fact that it has been done. Davis v. Rodgers, 64 Me. 159.

It is not required of the mortgagee to notify the mortgagor of entry for purpose of foreclosure, other than by recording. Donovan v. Sweetser, 135 Me. 349, 196 A. 767.

The mortgagor is bound to know whether or not he has performed the condition of his deed. If he has not, he must know that the law gives the right of entry to foreclose the mortgage on account of the breach, and that the registry of deeds of the county where the land lies will inform him whether or not the creditor has exercised this right. Therefore, he cannot claim to be notified by the mortgagee that he has proceeded in the manner provided by law. Davis v. Rodgers, 64 Me. 159.

It is for the mortgagor to examine the registry after forefeiture, not for the mortgagee to serve him with notice of what he has done, or of the certificate on record. Davis v. Rodgers, 64 Me. 159.

Or subsequent mortgagee.—An entry for

foreclosure of a mortgage, under this subsection, duly certified and recorded is sufficient without notice to the mortgagor or to a subsequent mortgagee in possession under a previous entry for foreclosure. Davis v. Rodgers, 64 Me. 159.

But entry ineffectual if not followed by certificate and record.—An entry for the purpose of foreclosing, to be effectual, if not by consent in writing of the mortgagor, or the person holding under him, must not only be open, peaceable and unopposed, but followed up by the certificate and record required by the statute, or otherwise it becomes a nullity. Potter v. Small, 47 Me. 293.

If the case does not show that the mortgagee had any "certificate" of his entry recorded, proceedings are not perfected under this subsection. Tufts v. Maines, 51 Me. 393.

And facts essential to foreclosure should appear in record of the certificate.—It was evidently the intention of the statute to require that the facts essential to operate as a foreclosure should appear in the record of the certificate. Morris v. Day, 37 Me. 386.

Certificate must state day of entry.—Although the certificate of witnesses, in whose presence he took possession, was dated and recorded, it will be insufficient, if therein the day of the entry is not stated, as it will not, with certainty, appear that it was recorded within thirty days from the time of entry. Freeman v. Atwood, 50 Me. 473.

A certificate which omits to state the time, though in other particulars sufficiently full and accurate, is fatally defective and will not effect a foreclosure. The statute must be strictly complied with. Snow v. Pressey, 82 Me. 552, 20 A. 78.

To foreclose a mortgage by peaceably and openly taking possession of the premises in the presence of two witnesses, as provided in this subsection, the certificate of the witnesses must state the time of the entry. It is not enough for the mortgagee to make a certificate in which he states the time of the entry. It is not enough for the magistrate to state the time when the witnesses made oath to the truth of their certificate before him; for the oath may have been administered long after the entry. The statute expressly requires that a certificate of the "time of such entry" shall be made, signed and sworn to by the witnesses. Snow v. Pressey, 82 Me. 552, 20 A. 78.

And that entry was for breach of condition of mortgage.—The entry must appear to have been made for breach of the condition of the mortgage, and the certificate signed by the witnesses must specify the fact of such entry; that is, that it was made for breach of the condition of the mortgage, and it must state the time when such entry was made. Morris v. Day, 37 Me. 386.

And for purpose of foreclosure.—Testimony by the two witnesses that the entry was by the mortgagee declared to be made to foreclose the mortgage, such proof not contained in the certificate by them signed, is insufficient and ineffectual to establish a foreclosure. Morris v. Day, 37 Me. 386.

Applied in Quint v. Little, 4 Me. 495; Brown v. Snell, 46 Me. 490; Bailey v. Myrick, 52 Me. 132; Chase v. Marston, 66 Me. 271.

Editor's note.—The remainder of this note is applicable to the entire section and is not restricted to subsection III.

Cross reference.—See c. 107, § 4, sub-§ 1, re equity powers.

Mortgagee must bring himself within provisions of section.—The language of the statute is plain and unambiguous, and the mortgagee, in order to avoid the plaintiff's right of redemption, must bring himself within one of the provisions named. Ireland v. Abbott, 24 Me. 155.

And perform all conditions required by statute.—The process of foreclosure is one of the modes of divesting a person of his interest in property, to which he is not a party. The mortgagee must strictly perform all the conditions required by the statute, or the right of redemption will not be barred. Freeman v. Atwood, 50 Me. 473.

And entry should conform to statute.—A mortgage cannot be foreclosed except by pursuing one of the modes provided by statute for that purpose, and the entry of the mortgagee, to be effective, should be in conformity with its provisions. Jones v. Bowler, 74 Me. 310.

Entry must be accompanied with intent to foreclose.—After condition broken, the mortgagee may enter for the purpose of foreclosure, in either of the modes pointed out in this section. But such an entry must be accompanied with evidence of the intention for which it is made. Potter v. Small, 47 Me. 293.

Which intent may be evidenced by declarations of the party.—The declarations of the party making entry, being part of the res gestae, are usually evidence of the intention with which the entry was made. Potter v. Small, 47 Me. 293.

But intention to foreclose is not alone

sufficient.—An intention to foreclose cannot operate to effect it without a compliance with the provisions of the statute. Morris v. Day, 37 Me. 386.

However clearly it may be exhibited.—The court cannot rightfully attempt to carry into effect the intentions of a party to foreclose, however clearly they may be exhibited, when he fails to show that he has performed the acts required by the statute, to make such intentions effectual. Morris v. Day, 37 Me. 386.

Among the modes for foreclosure, no provision is made for that of a clandestine entry. To effect a foreclosure by means of an entry, such entry must be with the consent, in writing, of the mortgagor, or person claiming under him, or it must be unopposed, peaceable, and open, in the presence of two witnesses. Reed v. Elwell, 46 Me. 270.

Mortgagee has estate which may be alienated.—A mortgagee, especially after entry for foreclosure, is considered as having a legal estate which may be alienated and transferred by any of the established modes of conveyance, subject only, until foreclosure, to be redeemed by the mortgagor. Hill v. More, 40 Me. 515.

Foreclosure must be of entire premises.—A foreclosure of a mortgage cannot take place as to one part of the mortgaged premises, and not as to the residue. If the mortgagor has a right to redeem any part, he has a right to redeem the whole. And so long as the mortgagor is suffered to remain in possession of any part of the mortgaged premises, his right of redemption to the whole will continue. Spring v. Haines, 21 Me. 126.

Applied in Cutts v. York Mfg. Co., 18 Me. 190; Roberts v. Littlefield, 48 Me. 61.

Sec. 4. Foreclosure in 1 year.—Possession obtained in either of these 3 modes and continued for 1 year forever forecloses the right of redemption. (R. S. c. 163, § 4.)

Possession must be continued.—A mortgage is not foreclosed if there was no continued possession, as required, by the mortgagee. The foreclosure is ineffectual for want of this continued possession. Chase v. Marston, 66 Me. 271.

For one year.—Possession taken for the purpose of foreclosure fails of effect unless continued for one year. Barton v. Conley, 119 Me. 581, 112 A. 670.

Proceedings for foreclosure are ineffectual if the taking possession by the mortgagee is merely formal and he does not retain it for a year thereafter. Jarvis v. Albro, 67 Me. 310.

And the burden of proving continued possession for a year is on the mortgagee. Barton v. Conley, 119 Me. 581, 112 A. 670.

Day of entry excluded in computing year.—In computing the year after entry for condition broken, within which a mortgagor may redeem, the day of entry is to be excluded. Wing v. Davis, 7 Me. 31.

Former provision of section.—For a case concerning a former provision of this section requiring the mortgagee, within three months after the completion of foreclosure, to record in the registry of deeds an affidavit setting forth certain facts, see Barton v. Conley, 119 Me. 581, 112 A. 670.

Applied in Smith v. Larrabee, 58 Me. 361; Davis v. Rodgers, 64 Me. 159.

Quoted in Chamberlain v. Gardiner, 38 Me. 548; Donovan v. Sweetser, 135 Me. 349, 196 A. 767; Bisbee v. Knight, 139 Me. 1, 26 A. (2d) 637.

Cited in Reed v. Elwell, 46 Me. 270.

Sec. 5. Foreclosing without possession.—If, after breach of the condition, the mortgagee or any person claiming under him is not desirous of taking and holding possession of the premises, he may proceed for the purpose of foreclosure in either of the following modes:

I. He may give public notice in a newspaper published and printed in whole or in part in the county where the premises are situated, if any, or if not, in the state paper, 3 weeks successively, of his claim by mortgage on such real estate, describing the premises intelligibly and naming the date of the mortgage and that the condition in it is broken, by reason whereof he claims a foreclosure; and cause a copy of such printed notice, and the name and date of the newspaper in which it was last published, to be recorded in each registry in which the mortgage deed is or by law ought to be recorded, within 30 days after such last publication.

II. He may cause an attested copy of such notice to be served on the mortgagor or mortgagors, or in case of any recorded transfer or transfers of the

mortgaged property since the giving of the mortgage, on the record holder or holders of the title of the mortgaged property at the time of the service of said notice, if he lives in the state, by the sheriff of the county where the mortgagor or the record holder of the title resides, or his deputy, by delivering it to him in hand or leaving it at his last and usual place of abode; and cause the original notice and the sheriff's return thereon to be recorded within 30 days after such service as aforesaid; and in case different mortgagors or record holders reside in different counties, then service shall be made of such notice as above provided by any sheriff or his deputy upon the mortgagors or record holders residing in the same county as such sheriff or deputy, and in all cases the certificate of the register of deeds is prima facie evidence of the fact of such entry, notice, publication of foreclosure and of the sheriff's return. (R. S. c. 163, § 5.)

I. General Consideration.

II. Publication of Notice.

III. Recordation.

I. GENERAL CONSIDERATION.

Validity of foreclosure rests on statute.—The right of foreclosure by publication is given by statute and rests for its validity on the statute alone. Treat v. Pierce, 53 Me. 71.

And performance of all statute conditions must be proved.—To support a foreclosure title, the performance of all statute conditions must be proved. Stafford v. Morse, 97 Me. 222, 54 A. 397.

When the foreclosure of a mortgage is claimed, a strict compliance with the provisions of the statute must be shown. Bragdon v. Hatch, 77 Me. 433, 1 A. 140.

In order to effect a legal foreclosure under this section, all conditions required must be strictly performed. Stafford v. Morse, 97 Me. 222, 54 A. 397.

By the demandant.—The burden is on the demandant to show a strict compliance with the provisions of this section. Blake v. Dennett, 49 Me. 102.

Mortgagee in possession may proceed under this section.—A mortgagee in possession, not for the purpose of foreclosure, can avail himself of this mode of foreclosing by publishing or serving a copy. Smith v. Larrabee, 58 Me. 361.

It is urged that the statute, in its terms, restricts the use of this provision to one "not desirous of taking or holding possession." The intention of the legislature in this provision was simply to provide for the case where the mortgagee did not wish to avail himself of any of the provisions of the law, to obtain by that proceeding possession of the premises. By the other modes, possession in fact was obtained. By this mode the party obtains no possession, nor any new rights relating to the possession. He simply obtains a right to have the year allowed for redemption commence running. If he is in a condition not to desire or to need the aid of any process or proceeding, under the law, to obtain possession, he may adopt the manner in question by advertisement or personal notice. Smith v. Larrabee, 58 Me. 361.

And publication does not bar the mortgagee from taking possession.—The plaintiff mortgagee has the right to enter and take possession, notwithstanding he has commenced foreclosure by publication under this section. Stewart v. Davis, 63 Me. 539.

The statute provides for a foreclosure by publication in a newspaper, but such publication is no bar to an action for the possession of the premises mortgaged. Concord Union Mut. Fire Ins. Co. v. Woodbury, 45 Me. 447.

As there is nothing legally inconsistent in taking possession after the publication. Stewart v. Davis, 63 Me. 539.

Applied in Holbrook v. Thomas, 38 Me. 256; Pearce v. Savage, 45 Me. 90; Concord Union, Mut. Fire Ins. Co. v. Woodbury, 45 Me. 447; Chase v. Savage, 55 Me. 543; Williamson v. Williamson, 71 Me. 442; Hussey v. Fisher, 94 Me. 301, 47 A. 525; Mitchell v. Elwell, 103 Me. 164, 68 A. 701.

Stated in part in Storer v. Little, 41 Me. 69.

Cited in Brown v. Snell, 46 Me. 490; Williams v. Smith, 49 Me. 564.

II. PUBLICATION OF NOTICE.

Notice must be binding from date of first publication.—By § 7, if the mortgagor, or those claiming under him, does not redeem within one year next after the first publication, the right of redemption is forever foreclosed. The time for redemption being thus fixed, to commence from the date of the first publication, the notice must, to be effectual, be binding on all parties at and from that time. Treat v. Pierce, 53 Me. 71.

And when the first publication of a notice is invalid, the foreclosure is void. Treat v. Pierce, 53 Me. 71.

Notice must be mortgagee's act.—The notice must be the mortgagee's act, as the statute gives this form of foreclosure to a party who, in the exercise of his own judgment, determines that he does not desire to take and hold possession of the premises pending the time of redemption. Treat v. Pierce, 53 Me. 71.

And advertising by other person is not effectual. — If the person attempting to foreclose at the time he advertises, is not the owner of the mortgage, the advertising is wholly ineffectual for the purpose of foreclosing the mortgage, and cannot enure to the benefit of any one. Cushing v. Ayer, 25 Me. 383.

And cannot be authorized by subsequent ratification. — The unauthorized signing and publishing of a notice of foreclosure cannot, by a subsequent ratification by the mortgagee, be rendered operative from the time of its first publication. Treat v. Pierce, 53 Me. 71.

The holder of the mortgage must determine in the first place that he will foreclose, and, in the second place, the mode, whether by entry, publication, or by suit, to obtain actual possession. No third party can, without authority, determine these questions for him, and thereupon proceed to foreclose in any form, in his name. Mere silence on his part would not be a ratification of such proceedings by a stranger, because the law would not presume an assent on his part to acts which he might or might not deem advantageous or desirable to have done. Treat v. Pierce, 53 Me. 71.

Notice by mortgagee after he has assigned mortgage is ineffectual. — Where notice of foreclosure of a mortgage by advertisement has been given, in pursuance of the mode provided in this subsection, by the mortgagee, after he has sold and assigned the mortgage, and has ceased to have any interest therein, such proceeding is wholly ineffectual and cannot enure to the benefit of any one. Cushing v. Ayer, 25 Me. 383.

And assignee cannot foreclose unless assignment recorded or mortgagor had notice.—To make effectual a notice by an assignee of a mortgage of real estate, of his claim to foreclose the same, by publication in a newspaper, as provided by statute, it must appear that, at the time of such proceeding to foreclose, the assignment to him of the mortgage had been recorded, or the person entitled to redeem had actual notice that he was the assignee; otherwise, the mortgage will not be foreclosed, at the expiration of a year from the time of publication. Reed v. Elwell, 46 Me. 270.

Notice must describe premises so that mortgagor may know what premises are intended.—In proceeding to foreclose a mortgage by publication, the notice must describe the premises so intelligibly, that those entitled to redeem may know, with reasonable certainty, what premises are intended. Chase v. McLellan, 49 Me. 375. See Smith v. Larrabee, 58 Me. 361.

It is not required by this section that the description of the premises shall be given as contained in the deed, any further than is necessary that they may be understood by those who are interested therein. But it should be such that those entitled to redeem should know with reasonable certainty what premises are intended. Chase v. McLellan, 49 Me. 375.

Description of premises held insufficient.—See Dela v. Stanwood, 61 Me. 51.

Notice must be given in newspaper printed in county where land is situated.—Under this section, requiring notice of a mortgage foreclosure to be published in a paper printed, in whole or in part, in the county where the premises are situated, foreclosure on a notice not shown to have been given in a newspaper printed as well as published in the county is invalid. Wyman v. Porter, 108 Me. 110, 79 A. 371.

At time of notice.—When a mortgage has been received and recorded in the registry of the county, and the town in which the mortgaged premises is situated becomes, by legislative enactment, part of another county, the notice of foreclosure should be published in the county in which the land is situated when the notice is given. Welch v. Stearns, 74 Me. 71.

And that newspaper was published in such county is not sufficient.—Evidence that a notice of foreclosure was published in a newspaper "published" in the county, is not a sufficient compliance with the statute requiring such notice to be published in a newspaper "printed" in the county. Bragdon v. Hatch, 77 Me. 433, 1 A. 140.

The certificate is fatally defective if it states that the notice was given in a newspaper "published," instead of "printed" in the county, as the statute requires. Hollis v. Hollis, 84 Me. 96, 24 A. 581.

As it may be published but not printed

there.—The statute requires the notice to be published in a newspaper printed in the county; and a newspaper may be published in a county, and yet not be printed there. Bragdon v. Hatch, 77 Me. 433, 1 A. 140.

Publication not required in county where mortgagor lives. — The statute names only a notice in a newspaper printed in the county where the premises are situated, and then provides that "a copy of such printed notice, and the name and date of the newspaper in which it was last published, be recorded in each registry of deeds, in which the mortgage deed is or by law ought to be recorded." The object of this provision is manifest. It is that each registry shall contain a record of the notice to foreclose the mortgage, so that the inquirer may find there all the proceedings affecting the title in that county, where he would naturally look for them. To effect this object, it is not necessary to multiply the number of newspapers in which the notice is to be published. Such publication is to give notice to the mortgagor or his grantee. It is not required to be in the county in which he lives. The words, "in the county where the premises are situated," may be complied with, if the notice is printed in the county in which any part of the premises are situated. Smith v. Larrabee, 58 Me. 361.

Notice in 3 consecutive weekly issues is sufficient.—A notice of foreclosure published in 3 consecutive weekly issues of the newspaper and recorded the next day after the last publication is compliance with the provisions of this section. Stowe v. Merrill, 77 Me. 550, 1 A. 684.

And it is not required to continue for 21 days.—The notice is not required to be published "3 weeks successively," so as to continue for the space of 21 days; it is to appear in three consecutive weekly issues of a newspaper. Wilson v. Page, 76 Me. 279.

Certificate of register is not conclusive as to publication.—The statute makes the register's certificate prima facie evidence of the fact of publication. But the fact that there was no publication may be shown otherwise. It is prima facie evidence, but not conclusive. The certificate may be attacked, but is sufficient as far as it goes, if not attacked. Stafford v. Morse, 97 Me. 222, 54 A. 397.

And mortgagee's certificate is not evidence of publication.—This section makes the certificate of the register of deeds prima facie evidence of the publication of a notice of foreclosure; but there is no statute or rule of evidence that makes the certificate of the mortgagee evidence of the fact. It is not competent evidence. Bragdon v. Hatch, 77 Me. 433, 1 A. 140.

Certificate of register held insufficient to show statute foreclosure.—See Blake v. Dennett, 49 Me. 102.

III. RECORDATION.

Registry within thirty days is essential to the very validity of the foreclosure. Ordinarily, an instrument of conveyance becomes effective without any regard to the registry. It is valid whether registered or not. It conveys title whether registered or not. Registry merely serves to give notice to third parties. In law, it is notice. But a foreclosure does not become a foreclosure unless it is recorded, and recorded within thirty days. The record becomes a part of the muniment of title. And if there is no title by record within the thirty days, there never can be. Stafford v. Morse, 97 Me. 222, 54 A. 397.

When it is sought to foreclose a mortgage on real estate by publication, the foreclosure will be ineffectual, unless it appears by record that a copy of the printed notice and the name and date of the newspaper in which it was last published were recorded in each registry in which the mortgage deed was or by law ought to have been recorded, within thirty days after such last publication. Stafford v. Morse, 97 Me. 222, 54 A. 397.

The record in the registry of deeds must be "within thirty days after such last publication." Therefore it may be within one day after. Wilson v. Page, 76 Me. 279.

And record must give notice of essential steps necessary to complete foreclosure.—The design of the statute undoubtedly is that the record shall give notice of the foreclosure. To give notice of the foreclosure, it must give notice of the successive essential steps necessary to complete foreclosure, because if any are missing, it is not a foreclosure, and notice of such imperfect proceedings would not be notice of a foreclosure. A defective record is not notice. Stafford v. Morse, 97 Me. 222, 54 A. 397.

Date of last publication must be recorded.—The certificate is fatally defective if it fails to show that the date of the newspaper in which the notice was last published, was recorded. Hollis v. Hollis, 84 Me. 96, 24 A. 581.

Time of recording is essential. — The time of recording is essential, because the foreclosure proceedings are null and void unless the printed notice is recorded within thirty days after the last publication. Stafford v. Morse, 97 Me. 222, 54 A. 397.

And must appear of record.—Inasmuch as the time of record is essential to the validity of the title created by record, that also must appear of record, or else there fails to appear a complete record title. All that appears of record may be true, and yet no title. It is not a muniment of title. It does not prove title. One cannot set it up as the last step in the proof of a record title—that is, a title not merely protected, but created by registry, without showing something that the record does not contain. The time of recording must appear of record. Stafford v. Morse, 97 Me. 222, 54 A. 397.

And cannot be shown by evidence aliunde.—Evidence aliunde the record is not admissible, when the record is silent, to prove that the printed copy was received for record within thirty days from the last publication. That fact must appear upon the record itself. Stafford v. Morse, 97 Me. 222, 54 A. 397.

There being no record evidence that the printed notice was recorded seasonably, the want of it cannot be supplied by evidence aliunde. Stafford v. Morse, 97 Me. 222, 54 A. 397.

Nor can record be amended to show time of recording.—When the record is silent as to time of recording, it cannot be amended after the thirty days have expired so as to show that the recording was within the thirty days. Stafford v. Morse, 97 Me. 222, 54 A. 397.

The record which makes a foreclosure legal and complete must be made within thirty days from the last publication. The record as it is on the last one of these thirty days is the record that must stand. No later amendment could be recorded within the thirty days, and so be in compliance with the statute requirement. A record which is a muniment of title, and which must exist as such within thirty days, or not at all, cannot be subsequently amended so as to make that good, which never was good within the thirty days. Stafford v. Morse, 97 Me. 222, 54 A. 397.

Record held sufficient where land mortgaged was in different counties.—When a mortgage describes two parcels of land in different counties, and the notice for foreclosure, describing both parcels, is published according to law in a newspaper printed in each county, a copy of the notice published in each county, with the name and date of the paper in each county in which it was last published, duly recorded in the respective registries, is a sufficient recording under this section. Smith v. Larrabee, 58 Me. 361.

Sec. 6. Fees of attorneys for foreclosure of mortgage.—For the foreclosure of a mortgage by either method prescribed by the preceding section, or by subsections II and III of section 3, the mortgagee or the person claiming under him may charge an attorney's fee of $25 which shall be a lien on the mortgaged estate, and shall be included with the expense of publication, 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. (R. S. c. 163, § 6. 1951, c. 297.)

Sec. 7. Mortgagor may redeem within 1 year; waiver. — The mortgagor or person claiming under him may redeem the mortgaged premises within 1 year after the first publication or the service of the notice mentioned in section 5, and if not so redeemed, his right of redemption is forever foreclosed.

The mortgagor and mortgagee may agree upon any period of time not less than 1 year in which the mortgage shall be forever foreclosed, which agreement shall be inserted in the mortgage and be binding on the parties, their heirs, legal representatives and assigns and shall apply to all the modes of foreclosure of mortgages on real estate.

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 forclosure and other obligations provided in the mortgage, at any time within 1 year from the date of such sale. Nothing herein shall apply 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.

The acceptance before the expiration of the right of redemption and after the commencement of foreclosure proceedings of any mortgage of real property of anything of value to be applied on or to the mortgage indebtedness by the mortgagee or any person holding under him shall constitute a waiver of such foreclosure unless an agreement to the contrary in writing be signed by the person from whom the same is accepted. Except, however, the receipt of income from the mortgaged premises, by the mortgagee or his assigns while in possession thereof, shall not constitute a waiver of the foreclosure proceedings of the mortgage on such premises. (R. S. c. 163, § 7.)

Right to redeem cannot be defeated by agreement.—The right of redemption is always incident to a mortgage. Even an express stipulation not to redeem, does not, in equity, bind the mortgagor. So long as the instrument is one of security, the borrower has a right to redeem, upon payment of the loan. Linnell v. Lyford, 72 Me. 280.

So inseparable is the equity of redemption from a mortgage, that it cannot be disannexed, even by an express agreement of the parties. If, therefore, it should be expressly stipulated that unless the money should be paid at a particular day, or by or to a particular person, the estate should be irredeemable, the stipulation would be utterly void. Baxter v. Child, 39 Me. 110.

The mortgagee cannot by force of any agreement, made at the time of creating the mortgage, entitle himself, at his own election, to hold the estate free from condition, cutting off the right in equity of the mortgagor to redeem. Such an agreement cannot be enforced as against a mortgagor; nor is it to be confounded with a sale upon condition. Baxter v. Child, 39 Me. 110.

In general, any party in interest may redeem. Cilley v. Herrick, 117 Me. 264, 103 A. 777.

If he would be a loser by foreclosure.—Ordinarily, anyone who has an interest, legal or equitable, in the land, and who would be a loser by foreclosure, is entitled to redeem. Cilley v. Herrick, 117 Me. 264, 103 A. 777.

But his interest must be derived from the right of the mortgagor.—The interest of the person redeeming must be derived directly or indirectly from or through the right of the mortgagor so that he is in privity of title with the mortgagor and an owner of part of his original equity or of some interest in it. Cilley v. Herrick, 117 Me. 264, 103 A. 777.

The equity of redemption under a mortgage is a subsisting estate in the land in the mortgagor, his heirs, devisees, assignees and representatives, and the right of redemption exists in every other person, who has acquired any interest in the lands mortgaged by operation of law, or otherwise in privity of title. True v. Haley, 24 Me. 297.

The mortgagor who has assigned his interest cannot redeem; but whoever holds an interest under him is entitled to that privilege. True v. Haley, 24 Me. 297.

Nor can his assignee who has conveyed the land.—If the mortgagor of land, or his assignee, conveys the same by deed of warranty, he no longer is entitled to redeem against the mortgage. Elder v. True, 32 Me. 104.

Norwithstanding covenants of warranty.—One who once held the mortgagor's interest and has assigned the same with covenants of warranty absolutely does not have the right of redemption by reason of the covenants. He has no remaining interest in land and no privity of title therein. True v. Haley, 24 Me. 297.

Owner of part may redeem the whole.—When the property mortgaged is afterwards conveyed to two or more persons in distinct parcels, the owner of a part may redeem the whole mortgage and hold the premises as security, until the owners of the other part pay their proportion of the mortgage debt. Bailey v. Myrick, 50 Me. 171.

But he must pay whole amount due on mortgage.—A grantee of a part of mortgaged premises can redeem his interest,

only by payment of the whole amount due on the mortgage. Smith v. Kelley, 27 Me. 237.

Where the mortgagor has conveyed to two or more persons, they all claim under him, and if one alone could not redeem, the others declining to do so, he would lose his estate. And one, who is willing that the estate should be foreclosed, ought not to be compelled to redeem. Hence, one owning a part of the right of redemption, may redeem the whole estate, but the mortgagee is entitled, from him, to all the money due on the mortgage. Bailey v. Myrick, 36 Me. 50.

Limitation begins after first publication.—The limitation of one year, for redemption, begins after the first publication of the notice of foreclosure. Shaw v. Merrill, 131 Me. 441, 163 A. 792.

The foreclosure must begin at the date of publication, by the express words of the statute. No other time can be substituted, and it must continue to run from that date. Treat v. Pierce, 53 Me. 71.

Prior to the inclusion in this section of the provision for redemption within a year from the first publication, it was held that the limitation began to run from the last publication. See Holbrook v. Thomas, 38 Me. 256.

And the right of redemption expires one year from the first publication. Wilson v. Page, 76 Me. 279.

For consideration of this section when it provided that a mortgagor had three years in which to redeem, after the commencement of foreclosure proceedings, but that the mortgagor and mortgagee could agree upon any shorter time for redemption, not less than one year, see Stowe v. Merrill, 77 Me. 550, 1 A. 684; Strout v. Lord, 103 Me. 410, 69 A. 694.

Or from the date of sale under the mortgage.—A mortgagor of real estate, or those claiming under him, may redeem the mortgaged premises from a sale under a power contained in a mortgage, or in a separate instrument executed at or about the same time and a part of the same transaction, by satisfying the obligation of the mortgage within one year from the date of the sale. Consolidated Rendering Co. v. Stewart, 132 Me. 139, 168 A. 100.

And time not extended because last day is Sunday.—The last day being Sunday does not extend the one year period of redemption. Fogg v. Twin Town Chevrolet, Inc., 135 Me. 260, 194 A. 609.

If the last day of the year limited by the statute for the redemption of land from a mortgage falls on Sunday, a tender of the amount due upon the mortgage upon the following day is too late. Fogg v. Twin Town Chevrolet, Inc., 135 Me. 260, 194 A. 609.

And foreclosure not waived by payments after the year.—The mere fact that, after the year, payments are made on account of the mortgage debt, will not work a waiver of foreclosure. Such payments, it has been said, may have been made because the premises were not adequate to satisfy the debt. Shaw v. Merrill, 131 Me. 441, 163 A. 792.

But the parties may extend time by parol.—The parties may agree by parol to extend the time for redemption of a mortgage, and the agreement will bind them. Brown v. Lawton, 87 Me. 83, 32 A. 733.

Applied in Storer v. Little, 41 Me. 69; Donovan v. Sweetser, 135 Me. 349, 196 A. 767.

Cited in Libby v. Cushman, 29 Me. 429; Phillips v. Leavitt, 54 Me. 405.

Sec. 8. Redemption in case of death of mortgagee; administrator appointed; notice.—Whenever a mortgagee or his assignee dies and there is no executor or administrator to receive the mortgage money, the mortgagor or person claiming under him having a right to redeem may apply to the judge of probate of the county where the estate mortgaged is situated for the appointment of an administrator upon such estate, and if, after due notice to all parties interested therein, they neglect or refuse to take out administration for 30 days, then the judge may commit administration to such person as he deems suitable, who may act as administrator with reference to said mortgage, as provided by law. In all such cases, however, personal notice shall first be given to the widow and heirs of the deceased known to be living in the state, either by service on them in person or by leaving such notice at their last and usual place of abode. (R. S. c. 163, § 8.)

Sec. 9. Form of declaration in suit to obtain possession. — The mortgagee or person claiming under him in an action for possession may declare on his own seizin, in a writ of entry, without naming the mortgage or

assignment; and if it appears on default, demurrer, verdict or otherwise that the plaintiff is entitled to possession and that the condition had been broken when the action was commenced, the court shall, on motion of either party, award the conditional judgment, unless it appears that the tenant is not the mortgagor or a person claiming under him, or that the owner of the mortgage proceeded for foreclosure conformably to sections 5 and 7 before the suit was commenced, the plaintiff not consenting to such judgment; and unless such judgment is awarded, judgment shall be entered as at common law. (R. S. c. 163, § 9.)

Mortgagee may bring action for possession without naming mortgage.—The right of a mortgagee, or of any one claiming under him, to bring his action for possession of the mortgaged premises without naming the mortgage in his writ, is affirmed by this section. Hadley v. Hadley, 80 Me. 459, 15 A. 47.

Husband may maintain writ on mortgage to him and wife without joining her.—Where a mortgage is made to husband and wife, for a consideration moving from him, conditioned to support them and the survivor of them during life, the husband may maintain a writ of entry on the mortgage in his own name without joining the wife. Greenlaw v. Greenlaw, 13 Me. 182.

Conditional judgment required only on motion of either party.—If a conditional judgment is not claimed by "motion of either party," and the plaintiff has declared on his own seizin, this section does not require a conditional judgment. Stewart v. Davis, 63 Me. 539.

If either party wishes for a conditional judgment, he must move for it. Hadley v. Hadley, 80 Me. 459, 15 A. 47.

Made to the court.—The motion must be addressed to and heard by the court. It is not a matter for the jury. Hadley v. Hadley, 80 Me. 459, 15 A. 47.

And absent such motion; mortgagee may have judgment at common law for possession.—If it appears on default, demurrer, verdict or otherwise, that the plaintiff is entitled to possession for breach of the condition of the mortgage, the court shall, on motion of either party, award the conditional judgment. But this is to be done only on motion. If neither party desires such conditional judgment, then the demandant may rely upon his general count, as it stands, and have judgment for possession on his own seizin, at common law. Treat v. Pierce, 53 Me. 71.

The mortgagee has the legal title to the mortgaged premises, and the right to possession as against the mortgagor, when not otherwise agreed, both before and after condition broken (see § 2 and note). In a writ of entry wherein he declares generally on his own seizin, upon proof of title, he may have judgment at common law, unless the defendant having the rights of the mortgagor, claims a conditional judgment according to the statute. Howard v. Houghton, 64 Me. 445.

A mortgagee, as well before as after condition broken, may have judgment for possession at common law, when he does not refer to or declare on his mortgage, and when the object of the suit is not foreclosure. And this against the mortgagor himself, unless, by plea or motion, he sets forth the fact, and prays for the conditional judgment. Treat v. Pierce, 53 Me. 71.

But such possession does not affect right of redemption.—Possession under a judgment at common law does not affect the right of redemption. It merely gives possession, which may be restored after redemption, under a bill in equity or otherwise. It may be conclusive as to the legal title at the time of suit, as between the mortgagor and mortgagee, but the equitable rights are not thereby concluded. A court of equity will protect them, although the legal title and possession may be in the mortgagee. The statute clearly recognizes this, in its provision. Treat v. Pierce, 53 Me. 71.

Common-law judgment entered if mortgagee proceeded under §§ 5 and 7.—If the evidence shows that the condition has been broken and no foreclosure has been begun, conditional judgment may be awarded. If it appears "that the owner of the mortgage proceeded for foreclosure conformably to sections 5 and 7 before the suit was commenced," judgment is entered as at common law. Weston v. McLain, 127 Me. 218, 142 A. 773.

If the foreclosure has been duly and legally completed and the period of redemption has expired, the mortgagee recovers judgment for possession as at common law and holds title free from the right of redemption. Weston v. McLain, 127 Me 218, 142 A. 773.

Or if the tenant is not the mortgagor.—The right is given, in this section, to the mortgagee, to declare on his own seizin, without naming the mortgage, and, in all

cases, where the tenant is not the mortgagor, or a person claiming under him, judgment may be entered as at common law, unless the plaintiff consents to the entry of a conditional judgment. Treat v. Pierce, 53 Me. 71.

A mortgagee may declare on his own seizin generally, and have judgment as at common law against all persons except the mortgagor and his successors in title; and even against them unless they plead their interest and pray for a conditional judgment which the court will grant when the condition has been broken. Stewart v. Davis, 63 Me. 539.

Mortgagee must produce bond or note on which mortgage founded.—A mortgagee, in a suit on the mortgage deed, before he can obtain his conditional judgment, must file or produce in court the bond or note on which the mortgage is founded, that the court may know what payments have been made, and how much is due in equity and good conscience. For such sum only can the conditional judgment be rendered; and if all the debt has been paid by the mortgagor or his representatives or assigns, or if the mortgagee has assigned the bond or note for a full consideration paid to him, there is no reason in law or justice why he should have any judgment whatever in his favor, though he never has assigned the mortgage. Vose v. Handy, 2 Me. 322. See § 11.

And he must prove a breach of the condition.—The mortgagee must prove a breach of the condition, whether he brings the writ of entry to take possession for foreclosure or to get possession after foreclosure, because to obtain possession in either case he must prove that he is entitled to possession and that the condition had been broken when the action was commenced. Weston v. McLain, 127 Me. 218, 142 A. 773.

Whether foreclosure completed or not.—The burden on the mortgagee of proving a breach is the same whether the foreclosure has or has not been completed; it is immaterial whether the mortgage was foreclosed or not. Weston v. McLain, 127 Me. 218, 142 A. 773.

Statute contemplates two distinct judgments.—The statute contemplates that there may be two separate and distinct judgments—the one as based upon the title put in issue by the pleadings, and the other as to the amount. The former may be the result of a verdict, or, if referred to the court, it becomes the judgment of the court in place of the jury. The latter, under our statutes, is the work of the court. Ladd v. Putnam, 79 Me. 568, 12 A. 628.

And testimony may be admissible as to one and not as to other.—These provisions involve the necessity, when raised by the pleadings, of inquiring not only into the title, but also the existence and amount of the debt claimed to be due, in order to make a proper entry of the conditional judgment. It may appear that the debt has been wholly paid, and that nothing is due—in which case no conditional judgment can be entered. Or it may appear, that something is due, or that the conditions have not been fully performed, and in that case the plaintiff is entitled to judgment, and upon motion of either party, to the conditional judgment for such amount as the court may adjudge to be due. These judgments being separate and distinct, testimony may be admissible as pertinent to the one which might not be as to the other. Ladd v. Putnam, 79 Me. 568, 12 A. 628.

Conditional judgment is conclusive as to amount due.—When an action is brought for the purpose of foreclosing a mortgage, the statute contemplates that there shall be two separate and distinct judgments—the one based upon the title put in issue by the pleadings, and the other as to the amount due upon the mortgage. The latter follows the conditional judgment upon which the court determines and adjudges the amount due upon the mortgage. The conditional judgment fixes the amount of the indebtedness secured by the mortgage, and is conclusive as to such amount. Fuller v. Eastman, 81 Me. 284, 17 A. 67.

Where, in a writ of entry to foreclose a mortgage, conditional judgment has been rendered, and the amount due thereon has been determined by the court, the defendant is estopped from afterwards setting up any defense, in a suit on the note, secured by such mortgage. Fuller v. Eastman, 81 Me. 284, 17 A. 67.

Applied in Rackleff v. Norton 19 Me. 274; Porter v. Read, 19 Me. 363; Dixfield v. Newton, 41 Me. 221; Hurd v. Coleman, 42 Me. 182; Mitchell v. Elwell, 103 Me. 164, 68 A. 701; York County Savings Bank v. Wentworth, 136 Me. 330, 9 A. (2d) 265.

Cited in Larrabee v. Lumbert, 32 Me. 97; Reed v. Elwell, 46 Me. 270.

Sec. 10. Form of conditional judgment.—The conditional judgment shall be that if the mortgagor, his heirs, executor or administrator pays the sum that the court adjudges to be due and payable, with interest, within 2 months

from the time of judgment, and also pays such other sums as the court adjudges to be thereafter payable, within 2 months from the time that they fall due, no writ of possession shall issue and the mortgage shall be void; otherwise it shall issue in due form of law, upon the first failure to pay according to said judgment; and if, after 3 years from the rendition of the judgment, the writ of possession has not been served or the judgment wholly satisfied, another conditional judgment may, on scire facias sued out in the name of the mortgagee or assignee, be rendered, and a writ of possession issued as before provided. When the condition is for doing some other act than the payment of money, the court may vary the conditional judgment as the circumstances require; and the writ of possession shall issue if the terms of the conditional judgment are not complied with within the 2 months. (R. S. c. 163, § 10.)

Cross reference.—See c. 113, § 156, re plaintiff's costs for making up conditional judgment.

These special provisions as to the judgment give to the special writ of entry nearly all the attributes of a suit in equity. Eugley v. Sproul, 115 Me. 463, 99 A. 443.

Mortgagee must prove debt and its amount.—No conditional judgment can be rendered in behalf of a mortgagee or his assignee, unless he proves both an indebtment and its amount. Blethen v. Dwinal, 35 Me. 556.

Costs are to be included in judgment.—In assessing the amount due on the mortgage as the amount of the conditional judgment, the costs in a suit to enforce payment of the mortgage debt are to be included, as well as the costs in the action on the mortgage. Holmes v. French, 70 Me. 341.

As are taxes paid by mortgagee.—In the conditional judgment in favor of a mortgagee, there may be included sums paid by him for taxes, though assessed while out of his possession. Williams v. Hilton, 35 Me. 547.

Applied in Dixfield v. Newton, 41 Me. 221; Bryant v. Erskine, 55 Me. 153; Ladd v. Putnam, 79 Me. 568, 12 A. 628; Hadley v. Hadley, 80 Me. 459, 15 A. 47; Fuller v. Eastman, 81 Me. 284, 17 A. 67; Bigelow v. Bigelow, 93 Me. 439, 45 A. 513.

Sec. 11. Judgment, if nothing due.—If it appears that nothing is due on the mortgage, judgment shall be rendered for the defendant and for his costs, and he shall hold the land discharged of the mortgage. (R. S. c. 163, § 11.)

Mortgagee cannot have judgment if debt paid.—If it appears that a debt secured by mortgage has been paid, the mortgagee, in a writ of entry upon his deed, cannot have judgment for possession of the land. Vose v. Handy, 2 Me. 322.

If the mortgage, under which the demandant claims to recover, has been paid, he is not entitled to the conditional judgment, and by this section, judgment must be rendered for the tenant, and he will hold the land discharged of the mortgage. Williams v. Thurlow, 31 Me. 392.

If the court is satisfied by competent evidence that there is nothing due upon the mortgage on which the plaintiff relies in support of his action, that the notes to secure which the mortgage was given have been paid in full, judgment must be entered for the defendant. Burnham v. Dorr, 72 Me. 198.

It is provided in this section that, if it appears that nothing is due on the mortgage, judgment shall be for the defendant. This is intended for a case where a mortgage has been fully satisfied or paid. That defense is made out when it appears that nothing is due or is ever to be due. "Nothing due," does not mean nothing payable merely. Mason v. Mason, 67 Me. 546.

Applied in Waldron v. Moore, 112 Me. 146, 91 A. 178.

Sec. 12. Action by executor or administrator.—When a mortgagee or person claiming under him is dead, the same proceedings to foreclose the mortgage may be had by his executor or administrator, declaring on the seizin of the deceased, as he might have had if living. (R. S. c. 163, § 12.)

Process must be in name of executor or administrator.—When a mortgagee is dead, the process for foreclosure must be in the name of his executor or administrator, and the same proceedings for that purpose may be had by such executor or administrator, declaring on the seizin of the deceased, as the deceased mortgagee might have had if living. Plummer v. Doughty, 78 Me. 341, 5 A. 526.

Sec. 13. Mortgages assets in hands of executors and administrators.—Lands mortgaged to secure the payment of debts or the performance of any collateral engagement, and the debts so secured are, on the death of the mortgagee or person claiming under him, assets in the hands of his executors or administrators; they shall have the control of them as of a personal pledge; and when they recover seizin and possession thereof, it shall be for the use of the widow and heirs, or devisees or creditors of the deceased, as the case may be; and when redeemed, they may receive the money, and give effectual discharges therefor, and releases of the mortgaged premises. (R. S. c. 163, § 13.)

Cross references.—See c. 156, § 28 and note, re distribution of lands held in mortgage or taken on execution; c. 163, § 1, sub-§ VIII, re license by court of probate to executors, etc., to sell real estate held in mortgage or taken on execution.

This section applies to equitable mortgages as well as to legal mortgages. Hawes v. Williams, 92 Me. 483, 43 A. 101.

The statute applies to "lands mortgaged," just as it reads; whether they are mortgaged in equity or in law. Such mortgages are assets in the settlement of estates of deceased persons to be applied and distributed as personal estate. Hawes v. Williams, 92 Me. 483, 43 A. 101.

Mortgaged estate passes to administrator or executor.—Mortgaged lands do not pass upon the death of the mortgagee to his heirs. They pass to the executor as fully as personal property passes to him. He administers them as he does personal property. Hemmenway v. Lynde, 79 Me. 299, 9 A. 620.

And he may maintain trespass.—An administrator of a mortgagee of real estate, who has obtained judgment and possession by foreclosure, can maintain trespass against the heir at law of the mortgagee for cutting wood on the mortgaged premises. Webster v. Calden, 56 Me. 204.

And he must be a party to suit affecting security.—The executor or administrator is by our law entitled to control the notes and the mortgage by which their payment is secured. He is, therefore, a necessary party to a bill that will operate upon the security, which it is his duty to protect and enforce. Felch v. Hooper, 20 Me. 159.

Proceedings to foreclose must be in name of executor or administrator.—When a mortgagee is dead, the proceedings to foreclose must be in the name of his executor or administrator. The lands mortgaged are assets in their hands before foreclosure, and "when they recover seizin and possession thereof, it shall be to the use of the widow and heirs, or devisees or creditors of the deceased, as the case may be." Webster v. Calden, 56 Me. 204.

Where a mortgage is given to secure one or more notes, and the note or notes is transferred without the mortgage, the mortgagee holds the mortgaged estate in trust for the payment of all the notes it was given to secure. In case of death, the mortgage vests in the administrator or executor of the mortgagee, by whom alone a suit can be brought for the benefit of the assignee to foreclose the mortgage. Webster v. Calden, 56 Me. 204.

Administration can assign mortgage by quitclaim deed.—An administrator of a mortgagee has authority to assign the mortgage, and such an assignment can be effected by a quitclaim deed, if the intent thereby to convey the title is apparent. Crooker v. Jewell, 31 Me. 306.

Under this section, which makes mortgaged lands, and the debts secured thereby, assets in the hands of the administrator, a quitclaim deed of the administrator of a mortgagee operates as an assignment of the mortgage. Douglass v. Durin, 51 Me. 121.

Without license from judge of probate.—Mortgages, and the debts thereby secured, are personal assets in the hands of executors and administrators, and may be sold or otherwise disposed of by them, at any time before a foreclosure is completed, the same as personal property pledged to the testator. And a sale or assignment of such mortgages by an executor or administrator is valid without a license from the judge of probate. Libby v. Mayberry, 80 Me. 137, 13 A. 577.

Heirs acquire title only by purchase or distribution.—The title to lands held by a decedent in mortgage, passes upon his death to his executor, and remains in the executor and his successors until redemption, sale, foreclosure or distribution. The heirs only acquire title by purchase or distribution. Hemmenway v. Lynde, 79 Me. 299, 9 A. 620.

And quitclaim deed by them before foreclosure is ineffectual.—A mortgagee's title vests, on his decease, in his administrator or executor, and a quitclaim by the heir at law before foreclosure conveys no title to his grantee. Webster v. Calden, 56 Me. 204.

Mortgages of real estate and the debts

thereby secured, being, by law, assets in the hands of an administrator, a quitclaim deed by the heirs of the mortgagee, before foreclosure, will not operate as an assignment of the mortgage. Douglass v. Durin, 51 Me. 121.

If the administrator is an heir and a releasee of the other heirs, his deed of quitclaim will not operate as an assignment where he does not convey in the capacity of administrator. Douglass v. Durin, 51 Me. 121.

Applied in Strout v. Lord, 103 Me. 410, 69 A. 694.

Quoted in part in Stewart v. Welch, 84 Me. 308, 24 A. 860.

Cited in Plummer v. Doughty, 78 Me. 341, 5 A. 526.

Sec. 14. Against whom action on mortgage brought.—An action on a mortgage deed may be brought against a person in possession of the mortgaged premises; and the mortgagor or person claiming under him may, in all cases, be joined with him as a cotenant, whether he then has any interest or not in the premises; but he is not liable for costs when he has no such interest and makes his disclaimer thereto upon the records of the court. (R. S. c. 163, § 14.)

Writ may be maintained against tenant who does not hold equity of redemption.— A writ of entry upon a mortgage, may be maintained against the tenant in possession, although he may not be the holder of the equity of redemption. Tuttle v. Lane, 17 Me. 437.

And against holder of such equity not in possession. — A mortgagee may maintain a writ of entry on the mortgage against the owner of the equity of redemption, although a third person was in the actual occupation of the demanded premises, both at the time when the mortgage was made and when the action was commenced, by title paramount to that of either demandant or defendant, under a lease for a term of years. Whittier v. Dow, 14 Me. 298.

Applied in Golder v. Golder, 95 Me. 259, 49 A. 1050.

Sec. 15. To redeem mortgage in equity. — Any mortgagor or other person having a right to redeem lands mortgaged may demand of the mortgagee or person claiming under him a true account of the sum due on the mortgage, and of the rents and profits, and money expended in repairs and improvements, if any; and if he unreasonably refuses or neglects to render such account in writing, or in any other way by his default prevents the plaintiff from performing or tendering performance of the condition of the mortgage, he may bring his bill in equity for the redemption of the mortgaged premises within the time limited in section 7, and therein offer to pay the sum found to be equitably due, or to perform any other condition, as the case may require; and such offer has the same force as a tender of payment or performance before the commencement of the suit; and the bill shall be sustained without such tender, and thereupon he shall be entitled to judgment for redemption and costs. (R. S. c. 163, § 15.)

I. General Consideration.

II. Demand and Tender.

III. The True Account.

IV. The Bill for Redemption.

A. Prerequisites to Maintaining Bill.

B. Parties to Suit.

C. Concerning the Decree.

Cross Reference.

See note to § 13, re executor or administrator is necessary party to bill.

I. GENERAL CONSIDERATION.

Section liberally construed to facilitate redemption of mortgages.—This section should have a liberal construction, by way of effectuating the object manifestly in view in passing it—to facilitate the redemption of mortgages, concerning which formerly much inconvenience had been experienced. A denial of the plaintiff's right will be sufficient to authorize the maintaining of a bill. Cushing v. Ayer, 25 Me. 383.

Applied in Felch v. Hooper, 20 Me. 159; Ireland v. Abbott, 24 Me. 155; True v. Haley, 24 Me. 297; Holden v Pike, 24 Me. 427; Sprague v. Graham, 29 Me. 160;

Howe v. Russell, 36 Me. 115; Baxter v. Child, 39 Me. 110; Roberts v. Littlefield, 48 Me. 61; Crooker v. Frazier, 52 Me. 405; Kennebec & Portland R. R. v. Portland & Kennebec R. R., 54 Me. 173; Parkhurst v. Cummings, 56 Me. 155; Dela v. Stanwood, 62 Me. 574; Huff v. Curtis, 65 Me. 287; Chase v. Marston, 66 Me. 271; Jones v. Bowler, 74 Me. 310; Sposedo v. Merriman, 111 Me. 530, 90 A 387; Cilley v. Herrick, 117 Me. 264, 103 A. 777; Batchelder v. Bickford, 117 Me. 468, 104 A. 819; Wilson v. Littlefield, 119 Me. 143, 109 A. 394.

Cited in Sheperd v. Adams, 32 Me. 63; Pearce v. Savage, 45 Me. 90.

II. DEMAND AND TENDER.

The demand for an account must be made upon the party having the legal record title to the mortgage. Doyle v. Williams, 137 Me. 53, 15 A. (2d) 65.

Demand requires account in entirety.—A demand for accounting under the provisions of this section, should call for an accounting of an entirety, not a portion of the debt due on the mortgage. Vermeule v. Hover, 113 Me. 74, 93 A. 37.

Object of demand is to enable tender to be made.—The object of a demand is to obtain a statement of the precise sum due, so that a tender can be made which will be accepted. Cushing v. Ayer, 25 Me. 383; Stone v. Locke, 46 Me. 445.

And if defendant prevents seasonable demand, he cannot deny that demand was made. — If the defendant designedly prevents the plaintiff from making a demand for an accounting within the year, he will not be permitted to say that there has been no demand for an accounting. Fogg v. Twin Town Chevrolet, Inc., 135 Me. 260, 194 A. 609.

Demand for account held sufficient.—See Cushing v. Ayer, 25 Me. 383; Crooker v. Holmes, 65 Me. 195; Wallace v. Stevens, 66 Me. 190.

Tender, to discharge a mortgage, must be made to him who has the legal estate, and the right to reconvey. Therefore where the mortgagee has assigned all his interest to a stranger, of which the mortgagor has actual or implied notice, the tender must be made to the assignee. Dorkray v. Noble, 8 Me. 278.

And bill cannot be maintained by virtue of tender to previous assignee.—A bill in equity to redeem a mortgage cannot be maintained, under our statutes, against an assignee of the mortgage by virtue of a tender made to a previous assignee, who has since parted with all his interest. Williams v. Smith, 49 Me. 564.

But demand and tender may be made to mortgagee if he assigns without recording or giving notice.—A bill in equity to redeem a mortgage which had been assigned and transferred, with due notice to the plaintiff, should be brought against the assignee; and to him the tender made and upon him the demand for the rents and profits, although the deed of assignment may not have been recorded; but where the assignment has not been recorded or notice of it given, the tender may well be made, and notice to account for the rents and profits given, to the mortgagee; and payments made to him without notice or record of the assignment will be upheld in payment of the debt. Mitchell v. Burnham, 44 Me. 286.

If there is a valid assignment and transfer of the mortgage and the redemptioner has due notice by record or otherwise thereof, he must demand an account from the assignee and bring his bill against him. It is only when such an assignment has not been recorded, or notice of it given, that a demand for an account upon the mortgagee alone is sufficient. Doyle v. Williams, 137 Me. 53, 15 A. (2d) 65.

And tender not necessary if mortgagee refuses to render true account.—A bill for the redemption of mortgaged land, may be maintained without a previous payment or tender, if the mortgagee or person claiming under him, shall have neglected on request to render, before the commencement of the suit, a true account of the sum due and secured by the mortgage. Roby v. Skinner, 34 Me. 270; Stone v. Locke, 46 Me. 445.

III. THE TRUE ACCOUNT.

The true account must be for full sum due. — It was the intention of the legislature that the mortgagee should, on request, furnish the mortgagor, or the person having the right to redeem, with such information as would enable him to tender the sum justly due; and not to leave him exposed to the danger of tendering more, for want of knowledge of the facts. Stone v. Locke, 46 Me. 445.

After request, the mortgagee is to be the moving party, not only in making up the account, but also in rendering it to the mortgagor. Roby v. Skinner, 34 Me. 270; Stone v. Locke, 46 Me. 445.

The mortgagor cannot reasonably be expected to continue in attendance upon the mortgagee while the account is being prepared. He would not be informed of the time, when it might be expected to be prepared and presented. The account is to be rendered by the mortgagee. He is,

by the statute, after demand, made the active party. When the parties reside in the same town, it is not unreasonable to expect, that he should cause his account when prepared to be presented to the mortgagor. Roby v. Skinner, 34 Me. 270.

Mortgagee given reasonable time to account. — A mortgagee or his assignee, when called upon to render an account due, is entitled to a reasonable time to make up an accurate statement of the rents, profits and expenditures, and of the amount due. He cannot be expected to have it prepared, unless the demand is made at a time very near the expiration of the right to redeem. Roby v. Skinner, 34 Me. 270.

And failure so to account is unreasonable neglect or refusal. — The design of the statute being to afford to a party seeking to redeem, information of the exact amount claimed to be due upon the mortgage any failure to afford it within a reasonable time after request must be regarded in the sense of the statute as an unreasonable neglect or refusal. Pease v. Benson, 28 Me. 336.

Nor is mortgagee excused by unreasonably short notice. — Though the mortgagor in demanding the account may have prescribed a time unreasonably short in which it should be rendered, that will not excuse the mortgagee for a neglect to do it within a reasonable time. Roby v. Skinner, 34 Me. 270.

Computation of account. — By this section the mortgagee in possession is to account for the clear rents and profits from the time of the entry or for sums found due for rents and profits over and above the sums reasonably expended in repairing and increasing the value of the estate redeemed. It is immaterial how the mortgagee is paid, whether in money or by the rents and profits of the mortgaged estate; the payment in either event is equally beneficial to him. If in money, the rule for the computation of interest is well established. If by rents and profits, the same principle applies. The gross amount of the rents and profits is to be ascertained, as well as the costs of reasonable repairs and improvements on the premises, and a suitable compensation for the care and management of the estate and taxes thereon, one sum to be set off against the other, and whenever the balance in the hands of the mortgagee exceeds the interest on the mortgage debt at that time, it is to be regarded and deducted, as in case of a partial payment on such debt, and so on from year to year. Pierce v. Faunce, 53 Me. 351.

In a bill to redeem real estate mortgaged, the mortgagee is properly called upon to account for what he has received or ought to have received of the proceeds of personal property mortgaged to him to secure the same demands, deducting all reasonable and necessary expenses incurred in and about it. Stone v. Bartlett, 46 Me. 438.

Mortgagor cannot require part of premises estimated in payment of debt, and redeem remainder.—The mortgagor has no right to have a part of the mortgaged premises, under any circumstances, estimated in payment of his debt, with a view to the redemption of the residue. Spring v. Haines, 21 Me. 126.

Taking possession under mortgage does not oblige mortgagee to account for unrealized rents. — The taking possession of the mortgaged premises after condition broken, for the purpose of foreclosure, in the presence of two witnesses, according to the provisions of § 3, subsection III, does not necessarily impose upon the mortgagee the obligation to account for rents, if he should not receive them. Such is the fair construction of this section. Bailey v. Myrick, 52 Me. 132.

Mortgagee allowed necessary expenses. —The mortgagee has no right to make it more expensive for the mortgagor to redeem than may be required for the purpose of keeping the property in a proper state of repair, and for protecting the title to the property. But he is to be allowed all expenses necessary for the protection and preservation of the estate. Pierce v. Faunce, 53 Me. 351.

Account claiming items not due is not "true account," and constitutes refusal.— If a mortgagee, upon a demand being made by the assignee of the mortgagor "to render a true account of the sum due," renders an account, wherein he states that two separate items are both due, and claims to be paid the amount of both in order to effect a redemption, when he is entitled to receive but one of those sums; this is not "a true account of the sum due," and amounts to such refusal to render an account as will enable the assignee of the equity of redemption to maintain a bill in equity to redeem the mortgage without having first tendered payment. Cushing v. Ayer, 25 Me. 383.

If a mortgagee states a variety of items as presenting the amount due, and he has no right to one or more of them, it is no statement of the sum due. Cushing v. Ayer, 25 Me. 383.

IV. THE BILL FOR REDEMPTION.

A. Prerequisites to Maintaining Bill.

Compliance with statute prerequisite to suit.—The court will not entertain a bill to redeem from a mortgage of real estate unless the statutory prerequisites have been complied with. Munro v. Barton, 95 Me. 262, 49 A. 1069.

The redemptioner must bring himself within the statutory provisions and the bill must be brought in accordance therewith. Fogg v. Twin Town Chevrolet, Inc., 135 Me. 260, 194 A. 609.

A bill to redeem real estate from a mortgage by virtue of this section will not be entertained without full compliance on the part of the plaintiff with the statutory prerequisites. Doe v. Littlefield, 99 Me. 317, 59 A. 438; Fogg v. Twin Town Chevrolet, Inc., 135 Me. 260, 194 A. 609; Doyle v. Williams, 137 Me. 53, 15 A. (2d) 65.

The remedies to enforce a right of redemption are prescribed by §§ 15 and 16; and a bill in equity to redeem from a mortgage will not be entertained unless these statutory provisions have been complied with. Fogg v. Twin Town Chevrolet, Inc., 135 Me. 444, 199 A. 265.

Under this section the bill must be filed before the time for redemption has elapsed. Brown v. Lawton, 87 Me. 83, 32 A. 733; Fogg v. Twin Town Chevrolet, Inc., 135 Me. 260, 194 A. 609.

Verification by oath not required.—A bill in equity to obtain a decree to redeem mortgaged premises is not technically one for discovery, and its verification by oath is not required. Hilton v. Lothrop, 46 Me. 297, overruled on another point in Strout v. Lord, 103 Me. 410, 69 A. 694; Dinsmore v. Crossman, 53 Me. 441.

A bill cannot be sustained which neither alleges a tender, nor a demand for an account. Wing v. Ayer, 53 Me. 138.

Necessary averments.—To support a bill in equity to redeem from a mortgage of real estate, unless the mortgagee or person claiming under him resides without the state or his residence is unknown (§ 18), or the mortgage is alleged and proved to be fraudulent in whole or in part (§ 17), the plaintiff must allege and prove either a prior tender or payment (§ 16), or such facts as show that the defendant upon demand has unreasonably refused or neglected to render in writing a true account of the sum due upon the mortgage, or has in some other way by his default prevented the plaintiff from performing, or tendering performance of, the condition of the mortgage. Munro v. Barton, 95 Me. 262, 49 A. 1069.

The plaintiff must allege and prove either a prior tender or payment, or such facts as show that the defendant upon demand has unreasonably refused or neglected to render in writing a true account of the sum due upon the mortgage, or has in some other way by his default prevented the plaintiff from performing or tendering performance of the condition of the mortgage. Stevens Mills Paper Co. v. Myers, 116 Me. 73, 100 A. 11; Doyle v. Williams, 137 Me. 53, 15 A. (2d) 65.

Averments and proof where no tender made.—To support a bill in equity to redeem real estate under mortgage, without first making a tender of the amount due upon the mortgage, the plaintiff must aver and prove that he has been prevented from making the tender by the default of the defendant. This default may consist in refusing or neglecting to render an account of the sum due upon the mortgage, when requested so to do; or in rendering a false account. But when the defendant is guilty of neither, and has in no other way, by his default, prevented the plaintiff from performing or tendering performance of the conditions of the mortgage, a suit against him to redeem cannot be maintained. He cannot be mulcted in cost, and have the foreclosure of his mortgage indefinitely postponed, at the mere will and pleasure of the mortgagor, or those claiming under him, when he is himself in no fault. Dinsmore v. Savage, 68 Me. 191.

"Unreasonable refusal or neglect" authorizes suit without tender.—If the plaintiff or anyone in his behalf makes a demand for an accounting and there is an unreasonable refusal or neglect upon the part of the defendant to render such account in writing, the bill can be maintained within the year without tender. Fogg v. Twin Town Chevrolet, Inc., 135 Me. 260, 194 A. 609; Fogg v. Twin Town Chevrolet, Inc., 135 Me. 444, 199 A. 265.

If the mortgagee does not render a true account of the amount due upon the mortgage, as required by this section, the mortgagor is entitled to maintain his bill for that reason. Miller v. Ward, 111 Me. 134, 88 A. 400.

But mere denial of mortgagor's right to redeem does not avoid necessity of tender.—It was the design of this section to enable one in certain circumstances to maintain a bill without performance or tender. But the mere denial of the mortgagor's right to redeem cannot prevent him from tendering performance. Pease v. Benson, 28 Me. 336.

Leave may be granted to amend bill to include allegation of neglect to account.—Should the bill be dismissed without prejudice, it would be too late to bring a new bill, even though the plaintiff was able to prove a tender on his part, or demand and unreasonable refusal to account, or other default on the part of the defendant prior to the commencement of the suit. If the facts are such as to support such an allegation, considering that the plaintiff is without remedy unless the bill can be sustained, the plaintiff should be permitted to amend by inserting the necessary allegations. Munro v. Barton, 95 Me. 262, 49 A. 1069; Miller v. Ward, 111 Me. 134, 88 A. 400; Fogg v. Twin Town Chevrolet, Inc., 135 Me. 444, 199 A. 265.

Provisions for "offer to pay" in the bill, construed.—This section provides that the offer in the bill to pay or perform "shall have the same force as a tender of payment or performance before the commencement of the suit; and the bill shall be sustained without such tender." But this cannot be separated from the language which precedes it. The whole section taken together shows plainly that the offer is to have such force, and the bill be maintained only, if the defendant by his unreasonable refusal and neglect to account upon demand or in some other way by his default, has prevented the plaintiff from performing or tendering performance. Munro v. Barton, 95 Me. 262, 49 A. 1069.

Mortgagor having conveyed by deed of warranty cannot maintain bill.—When the assignee of the mortgagor has conveyed the land by deed of warranty, he has no such interest as will enable him to maintain a bill in equity against the mortgagee to redeem the mortgage. Phillips v. Leavitt, 54 Me. 405.

And assignment by mortgagor of entire interest is valid defense to bill.—In a bill in equity to redeem a mortgage, an assignment by the complainant after answer filed, of all his interest in the premises mortgaged, can be made available to the respondent by a cross bill. Such an assignment, thus brought to the knowledge of the court, constitutes a valid defense to the original bill. Lambert v. Lambert, 52 Me. 544.

Bill held not maintainable.—A bill is not maintainable under this section which contains an offer to pay what shall be found to be due upon the mortgage, but in which there is neither allegation nor proof of any prior tender of payment or performance, nor of any demand upon the mortgagee, or persons claiming under him, for a true account of the sum due upon the mortgage and a neglect or refusal on his or their part to render such an account, and no facts are stated showing that such tender could not be made, or that the defendants have in any way by their default prevented the plaintiff from performing, or tendering performance of the condition of the mortgage. Munro v. Barton, 95 Me. 262, 49 A. 1069.

If the plaintiff not only fails to make any offer in his bill to pay the sum found to be equitably due on the mortgage, but the bill contains no allegation of any prior tender of payment by the plaintiff, or of any neglect or refusal on the part of the defendant to render an account of the amount due as requested by the plaintiff, or that the defendant has "in any other way by his default" prevented the plaintiff from performing or tendering performance of the condition of the mortgage; under such circumstances it has uniformly been held in this state that a bill to redeem cannot be maintained. Doe v. Littlefield, 99 Me. 317, 59 A. 438.

Case not within section.—A case is not within this section if there has been no tender on the part of the mortgagor, nor refusal on the part of the mortgagee to render an account upon request, nor any negligence nor delay in accounting. Brown v. Snell, 46 Me. 490.

The plaintiff's proof does not bring him within the provisions of this section, if it does not appear that he made demand for an accounting and that there was an unreasonable refusal or neglect to render an account. Fogg v. Twin Town Chevrolet, Inc., 135 Me. 444, 199 A. 265.

A bill which contains no allegation that the plaintiff had asked the defendant for an accounting of the amount due on the mortgage, and that the defendant had refused to render the same, is not a bill under this section. Sweeney v. Shaw, 134 Me. 475, 188 A. 211.

Bill for enforcement of trust under absolute deed need not allege demand and tender.—In a bill seeking the enforcement of an alleged trust in relation to real estate held by a deed absolute in form, but as security for certain loans, no allegation of a demand for an account, or of a tender of the amount due is necessary, as in a bill for the redemption of a statutory mortgage. Chamberlain v. Lancey, 60 Me. 230.

B. Parties to Suit.

All parties interested should be before court.—A court of equity will be careful to have all the parties, who apparently have an interest in the subject matter of

the suit which may be affected by the decree, before it, giving all an opportunity to be heard, so that such decree may be made as will effectually bind all and settle the rights of all thus interested; and this, with the twofold purpose, first, to do full justice to all concerned, and make a decree the performance of which shall be ultimately and entirely safe to those who are bound to obey the order of the court in the premises, and second, to prevent future litigation. Brown v. Johnson, 53 Me. 246.

In a bill in equity to redeem by one of the grantees or any person claiming under him, it is requisite that all other persons holding under any of such conveyances, should be made parties to the bill. Bailey v. Myrick, 36 Me. 50.

Where a mortgagee assigns the mortgage and the notes thereby secured as collateral security for his own debt, he must be made a party to a bill to redeem. So must the assignee who receives such assignment, although he afterwards makes an absolute assignment of the mortgage to another party. Brown v. Johnson, 53 Me. 246.

All the owners of the equity of redemption must be made parties to the bill in equity to redeem the mortgage, otherwise the bill will be dismissed. Welch v. Stearns, 69 Me. 192.

Mortgagee—assignor having even doubtful interest is necessary party.—If the assignment is such as leaves an interest in the mortgagee which will be affected by the decree, whether it be an interest in the legal estate, or an interest in the debt, or an interest in the rents and profits to be accounted for, or if the extent or validity of the assignment is questioned, or if his interest in the subject matter of the suit is left in doubt even, he is a necessary party, and the court will not proceed in his absence. Beals v. Cobb, 51 Me. 348.

If the assignment leaves an interest in the mortgagee which will be affected by the decree, as when he has been in possession and received rents and profits or other moneys, he must be joined as a party defendant and the court will not proceed in his absence. Doyle v. Williams, 137 Me. 53, 15 A. (2d) 65.

When the mortgagee has merely given to another a quitclaim deed of the mortgaged premises, without assigning the mortgage debt, he must be made a party to such bill. Beals v. Cobb, 51 Me. 348.

But mortgagee assigning whole interest need not be made party.—If the assignment by a mortgagee is such as to leave no interest in him to be affected by the decree; that is, if he has assigned his whole interest in the legal estate, and his whole interest in the debt secured by the mortgage, and the extent and validity of the assignments are not questioned, and there is no claim upon him for rents and profits, it is not necessary to make him a party defendant to a bill in equity to redeem the estate. Beals v. Cobb, 51 Me. 348.

If the assignment of the mortgage is absolute and the redemptioner has notice, the mortgagee is not a necessary party. Doyle v. Williams, 137 Me. 53, 15 A. (2d) 65.

Only last assignee need be made party.—In a bill brought to redeem, it is not in general necessary to make any person but the last assignee a party to the bill, however many mesne assignments have been made. Bryant v. Erskine, 55 Me. 153.

The heirs or devisees, as well as the personal representative, of a deceased mortgagee, should be made parties to a bill in equity to redeem mortgaged real estate. Hilton v. Lothrop, 46 Me. 297.

Mortgagor may bring in all possible redemptioners.—A mortgagor, filing his bill to redeem, may bring before the court all parties who might call for redemption—second mortgagees, subsequent encumbrancers, and all interested. Stone v. Bartlett, 46 Me. 438.

Mortgagor refusing to join may be made defendant.—When one of the mortgagors refuses to join in a bill for the redemption of the mortgaged estate, he may be properly made a defendant, if from the allegations in the bill it appears that he still has an interest. Lovell v. Farrington, 50 Me. 239.

If mortgagor assigns to third party, he must be made party.—If the answer of the mortgagee shows information to have been received by him from the mortgagor, that the right of redemption has been assigned to a third person, such third person must be made a party to the bill. Bailey v. Myrick, 36 Me. 50.

Mortgagor need not be party if he has transferred all his interest.—In a bill in equity to redeem by an assignee of the mortgagor, it is not necessary to make the mortgagor a party, if he has transferred all his interest in the subject matter. Bailey v. Myrick, 36 Me. 50; Hilton v. Lothrop, 46 Me. 297, overruled on another point in Strout v. Lord, 103 Me. 410, 69 A. 694.

Amendment as to parties is allowed.—The court will take notice of the want of necessary parties to a bill in equity, and ordinarily in such cases will allow an

amendment on just terms. Beals v. Cobb, 51 Me. 348.

Case held dismissed when submitted on agreed statement without necessary parties.—But when a case in equity is submitted to the court on an agreed statement, with the stipulation that "no facts, statements, or allegations are to be considered by the court except those therein agreed upon," and the bill is defective for want of necessary parties, it will be dismissed, but without costs and without prejudice to either party. Beals v. Cobb, 51 Me. 348.

C. Concerning the Decree.

Court will decree as substantial justice requires.—It is clearly within the province of courts of equity having full equity jurisdiction to render such a decree as substantial justice requires between the parties. By filing his bill for redemption, the mortgagor invokes the aid of the court to enable him to determine and adjust the differences between him and his mortgagee. He declares that he desires to pay the mortgage debt, and thus relieve the mortgaged premises from the incumbrance. The court takes him at his word and ascertains the amount due, fixes the time when it must be paid, and the consequences of default of payment, to wit: expiration of the right of redemption, and a foreclosure of the mortgage. There is nothing inequitable or unjust in such a decree. The action of the mortgagor subjects the mortgagee to expense in defending the bill; and he has rights to be regarded as well as the mortgagor. Both parties being in court either has a right to demand, and substantial justice requires, that the court should put an end to their controversy. Pitman v. Thornton, 66 Me. 469.

Court fixes time of redemption.—It has been the uniform practice of courts of equity, in bills to redeem mortgages, to fix the time within which the mortgagor shall pay the mortgage debt, or the bill will be dismissed with costs. Such limitation is an essential element of the decretal order; without it the decree would not operate as a finality. Pitman v. Thornton, 66 Me. 469.

And such time is not to remain open.—To allow the time of redemption to remain open after default of payment as fixed by the decree would be to subject the mortgagee to the caprice of the mortgagor and compel an indefinite postponement of the controversy, which the mortgagor himself prayed to have determined by his bill. Pitman v. Thornton, 66 Me. 469.

The remedy of mortgagors extends, not only to mortgagees, but to those claiming under them. Whitmore v. Woodward, 28 Me. 392.

Master ascertains amount due.—It is not for the court, in a suit in equity, brought to redeem mortgaged premises, to ascertain the amount due, upon the payment of which the plaintiff is entitled to a conveyance; that is a service appropriate to a master. Jewett v. Guild, 42 Me. 246.

Rule determining contribution of several owners to redeem.—In a bill in equity to redeem land which is under a mortgage, where several owners hold distinct parcels of the mortgaged premises, the present value of the several parcels, in case no improvements or erections had been made on them subsequent to the mortgage, is the rule by which to determine what each owner shall contribute to redeem the mortgage, this value to be determined by a master. Bailey v. Myrick, 50 Me. 171.

Effect of dismissal with cost is foreclosure.—The legal effect of the dismissal of a bill with costs is a foreclosure of the mortgage, though the decree is silent upon that subject. Pitman v. Thornton, 66 Me. 469.

If bill sustained, mortgagor entitled to redemption and costs.—If the bill is sustained, the statute declares that the plaintiff "shall be entitled to judgment for redemption and costs." His right to costs is no longer discretionary; it is a strict legal right. Dinsmore v. Savage, 68 Me. 191.

Dismissal of bill under § 15 or § 16 does not determine rights under other section.—A decree dismissing a bill brought under § 15 or § 16 does not determine the right to bring one under the other, but it does not, however, follow that a bill brought under one section may not be amended to come under the terms of the other. Fogg v. Twin Town Chevrolet, Inc., 135 Me. 444, 199 A. 265.

Sec. 16. Amount due on mortgage paid or tendered; when not.—When the amount due on a mortgage has been paid or tendered to the mortgagee, or person claiming under him, by the mortgagor or the person claiming under him, within the time so limited, he may have a bill in equity for the redemption of the mortgaged premises, and compel the mortgagee, or person claiming under him, by a decree of the supreme judicial court or of the superior court,

to release to him all his right and title therein; although such mortgagee or his assignee has never had actual possession of the premises for breach of the condition; or, without having made a tender before the commencement of the suit, he may have his bill in the manner prescribed in the preceding section, and the cause shall be tried in the same manner. (R. S. c. 163, § 16.)

History of section.—See Fogg v. Twin Town Chevrolet, Inc., 135 Me. 444, 199 A. 265.

The statute provides remedy for reconveyance upon payment or tender.—The legislature by the enactment of this section gave to the mortgagor of real estate or to those claiming under him a remedy in equity to compel a reconveyance if the mortgage had been paid or the amount due tendered. This statute did not create a new right, but rather a remedy for the enforcement of an existing right. Fogg v. Twin Town Chevrolet, Inc., 135 Me. 444, 199 A. 265.

Statutory provisions must be complied with.—The remedies to enforce a right of redemption are prescribed by §§ 15 and 16, and a bill in equity to redeem from a mortgage will not be entertained unless these statutory provisions have been complied with. Fogg v. Twin Town Chevrolet, Inc., 135 Me. 444, 199 A. 265.

Bill must allege tender or facts excusing tender.—A bill in equity under this section cannot be maintained to redeem from a mortgage without a previous tender of performance of the condition of the mortgage or proof of facts lawfully excusing the omission of such tender. The bill itself must contain allegations of such previous tender or of such facts as will lawfully excuse the omission to so tender. Lumsden v. Manson, 96 Me. 357, 52 A. 783.

Otherwise it will be dismissed.—When the bill contains no allegations of lawful tender of performance nor of any facts lawfully excusing the omission, the bill cannot be maintained as a bill to redeem; but when such facts may perhaps exist, it may be dismissed without prejudice. Lumsden v. Manson, 96 Me 357, 52 A. 783.

A bill under this section is properly dismissed if the plaintiff failed to show that he had actually tendered to the defendant the correct amount due. For this section provides for redemption when the amount due on a mortgage has been actually tendered. Sweeney v. Shaw, 134 Me. 475, 188 A. 211; Fogg v. Twin Town Chevrolet, Inc., 135 Me. 260, 194 A. 609.

Tender must be made to mortgagee or to person claiming under him.—If a mortgagor, or person claiming under a mortgagor, would lay the foundation for the maintenance of a bill in equity, for the redemption of mortgaged estate, by previous payment or tender, such payment or tender is required to be made to the mortgagee or person claiming under him. Smith v. Kelley, 27 Me. 237.

It must be made to assignee who holds premises.—Where a mortgage has been assigned, and the assignee has entered and holds the title and possession, the tender for the purpose of redemption must be made to him. Wing v. Davis, 7 Me. 31.

And it must be made within one year after tender. — Under this section, tender or performance of condition must be made during the time for redemption and the bill may be brought at any time within the year named in § 20. Brown v. Lawton, 87 Me. 83, 32 A. 733; Stevens Mills Paper Co. v. Myers, 116 Me. 73, 100 A. 11; Fogg v. Twin Town Chevrolet, Inc., 135 Me. 260, 194 A. 609; Fogg v. Twin Town Chevrolet, Inc., 135 Me. 444, 199 A. 265. See § 20.

Upon tender, mortgagee bound only to discharge or cancel mortgage. — The purchaser of an equity of redemption cannot require the mortgagee or his assignee to assign the mortgage and mortgage debt to him upon being tendered the amount thereof. The only duty of the mortgagee or his assignee upon being tendered the amount of the debt is to discharge or cancel the mortgage. Lumsden v. Manson, 96 Me. 357, 52 A. 783.

For section requires only release or removal of title. — The language of this section that the court may compel the mortgagor "to release to him (the owner of the equity of redemption) all his right and title" in the mortgaged premises does not imply an assignment of the mortgage, but only its release or removal. Lumsden v. Manson, 96 Me. 357, 52 A. 783.

But tender with demand for assignment is not sufficient tender.—A tender to the mortgagee or his assignee of the amount due upon the mortgage, coupled with the demand and condition that the mortgage shall be assigned to the person proffering the money, is not a sufficient tender of performance. The tender must be unconditional or at least accompanied only by a demand for a discharge or cancellation of the mortgage. Lumsden v. Manson, 96 Me. 357, 52 A. 783.

If defendant prevents tender, he cannot

claim tender not seasonable. — If the defendant designedly prevents the plaintiff from tendering performance of the condition of the mortgage by rendering it impossible for him to do so, a court of equity will not listen to his plea that the tender was not seasonably made. To do so would be to permit him to take advantage of his own wrong and to defeat the debtor's rights by fraud. Stevens Mills Paper Co. v. Myers, 116 Me. 73, 100 A. 11.

Whereupon forfeiture will not be permitted.—Where the debtor has shown a readiness and a reasonable effort on his part to perform the legal duty required of him, and the failure to accomplish it is due to no fault of his own, but to the act of the other party putting it beyond his power, a forfeiture will not be permitted by the court. Stevens Mills Paper Co. v. Myers, 116 Me. 73, 100 A. 11.

And demand of statement of sum due is dispensed with if mortgagee refuses tender.—Whenever any sum of money due on a mortgage, has been paid or tendered to the mortgagee, or person claiming under him, by the mortgagor, or person claiming under him, within the time prescribed for the redemption of mortgaged estates, he may have a bill in equity for the redemption of the mortgaged premises. The preliminary demand of a statement of the amount due, in order to sustain a bill, is, in such case, dispensed with. Chase v. Palmer, 25 Me. 341.

For to require a tender that has been designedly prevented is to insist upon the impossible. Stevens Mills Paper Co. v. Myers, 116 Me. 73, 100 A. 11.

And to require a tender that has been waived is to require the useless. Stevens Mills Paper Co. v. Myers, 116 Me. 73, 100 A. 11.

Mortgagor need not tender performance if mortgagee refuses to accept.—The mortgagor is not obliged to go through the idle ceremony of tendering to the mortgagee after the latter states that he will not accept the money. To preserve his rights the mortgagor is not required to do what would be useless. Fogg v. Twin Town Chevrolet, Inc., 135 Me. 444, 199 A. 265.

Nor need he deposit in court.—It is unnecessary for the mortgagor to keep his tender good by depositing the money in court after the mortgagee refuses the tender. This section does not require such payment, nor is it necessary in order to settle the rights of the parties, for a decree in equity can make the reconveyance by the defendant contingent on the payment of the amount due. Fogg v. Twin Town Chevrolet, Inc., 135 Me. 444, 199 A. 265.

After condition broken, mortgagee's title can be defeated only by suit in equity under this statute.—The tender of payment of the note, made long after its maturity, could not have the effect of discharging the mortgage. After the condition in the mortgage was broken, the mortgagee's title to the estate was perfect, subject to be defeated only by a process in equity, founded upon payment or tender of payment before foreclosure, as provided in our statute. Smith v. Kelley, 27 Me. 237.

Action at law would be ineffective.—The mortgagee having entered into possession for breach of condition, and thus having the legal estate, may successfully resist the suit of the mortgagor at law, though the debt may have been paid since such entry. In such case his remedy is by bill in equity. Wilson v. Ring, 40 Me. 116.

The remedy of mortgagors extends, not only to mortgagees, but to those claiming under them. Whitmore v. Woodward, 28 Me. 392.

But burden is on plaintiff.—In a proceeding under this section the burden of proof, as in all cases, is on the plaintiff to support his bill of complaint by full, clear, and convincing evidence. Webber v. Brunk, 147 Me. 192, 85 A. (2d) 79.

Accounting is incidental to relief under this section. — Section 23, which unquestionably has reference to proceedings under this section, provides for an accounting of rents and profits and for a refund of any excess which the mortgagee or those claiming under him may have received. It is therefore clear that an accounting under this section is authorized as incidental to the relief provided for. That § 15 also gives to the holder of the equity of redemption a right to an accounting does not modify in any way the procedure under this section. Fogg v. Twin Town Chevrolet, Inc., 135 Me. 444, 199 A. 265.

Dismissal of bill under this section does not avoid remedy under § 15.—The dismissal of a bill under this section does not preclude the mortgagor from proceeding under the provisions of § 15 for an accounting and redemption. The second bill sets forth an issue quite different from that raised by the first. Sweeney v. Shaw, 134 Me. 475, 188 A. 211; Fogg v. Twin Town Chevrolet, Inc., 135 Me. 444, 199 A. 265.

Nor does it follow that amendment of such bill may not be made.—A decree dis-

missing a bill brought under one section of the statutes does not determine the right to bring one under the other, but it does not, however, follow that a bill brought under one section may not be amended to come under the terms of the other. Fogg v. Twin Town Chevrolet, Inc., 135 Me. 444, 199 A. 265.

Applied in Bartlett v. Fellows, 47 Me. 53; Crooker v. Frazier, 52 Me. 405; Richards v. Pierce, 52 Me. 560; Androscoggin Savings Bank v. McKenney, 78 Me. 442, 6 A. 877.

Quoted in part in Stewart v. Crosby, 50 Me. 130.

Cited in Holden v. Pike, 24 Me. 427; Sheperd v. Adams, 32 Me. 63; Williams v. Smith, 49 Me. 564; Munro v. Barton, 95 Me. 262, 49 A. 1069.

Sec. 17. Bill brought before entry, notice to mortgagee if out of state; fraudulent mortgage.—When a bill to redeem is brought before an actual entry for breach of the condition, and before payment or tender, if the mortgagee or person claiming under him is out of the state and has not had actual notice, the court shall order proper notice to be given him and continue the cause as long as necessary. When a mortgage is alleged and proved to be fraudulent, in whole or in part, an innocent assignee of the mortgagor, for a valuable consideration, may file his bill within the time allowed to redeem and be allowed to redeem without a tender. (R. S. c. 163, § 17.)

Cited in Munro v. Barton, 95 Me. 262, 49 A. 1069.

Sec. 18. Redemption, when mortgagee is out of state.—When a mortgagee or person claiming under him residing out of the state, or whose residence is unknown to the party entitled to redeem, has commenced proceedings under the provisions of section 5, or when such mortgagee or claimant having no tenant, agent or attorney in possession on whom service can be made has commenced proceedings under the provisions of section 3, in either case the party entitled to redeem may file his bill, as prescribed in section 15, and pay at the same time to the clerk of the court the sum due, which payment shall have the same effect as a tender before the suit; and the court shall order such notice to be given of the pendency of the suit, as it judges proper. (R. S. c. 163, § 18.)

Applied in Williams v. Smith, 49 Me. 564.

Cited in Brown v. Snell, 46 Me. 490; Munro v. Barton, 95 Me. 262, 49 A. 1069.

Sec. 19. Redemption after payment or tender, and before foreclosure, when mortgagee is out of state; notice published; discharge.—When an amount due on a mortgage has been paid or tendered to the mortgagee or person claiming under him before foreclosure of the mortgage, and the mortgagee or his assignee is out of the state and the mortgage is undischarged on the record, the mortgagor or person claiming under him may have his bill in equity for the redemption of the mortgaged premises, as provided in section 16, or for the discharge of the mortgage; and on notice of the pendency of the bill, given by publication in some newspaper in the county where said premises are situated for 3 weeks successively, the last publication being 30 days before the time of hearing, or in such other way as the supreme judicial court or the superior court or a justice of either of said courts in vacation orders, said court may decree a discharge of such mortgage; and the record of such decree in the registry of deeds where said mortgage is recorded is evidence of such discharge. (R. S. c. 163, § 19.)

Sec. 20. Limitation of bill in equity.—No bill in equity shall be brought for redemption of mortgaged premises, founded on a tender of payment or performance of the condition made before commencement of the suit, unless within 1 year after such tender. (R. S. c. 163, § 20.)

Applied in Brown v. Lawton, 87 Me. 83, 32 A. 733; Stevens Mills Paper Co. v. Myers, 116 Me. 73, 100 A. 11; Fogg v. Twin Town Chevrolet, Inc., 135 Me. 444, 199 A. 265.

Quoted in Fogg v. Twin Town Chevrolet, Inc., 135 Me. 260, 194 A. 609.

Cited in Chamberlain v. Lancey, 60 Me. 230.

Sec. 21. Court may order other persons joined as defendants and notified.—In any suit brought for the redemption of mortgaged premises, when it is necessary to the attainment of justice that any other person besides the defendant, claiming an interest in the premises, should be made a party with the original defendant, the court on motion may order him to be served with an attested copy of the bill amended in such manner as it directs, and on his appearance, the cause shall proceed as though he had been originally joined. (R. S. c. 163, § 21.)

Sec. 22. Award of execution on decree of court, jointly or severally.—The court, when a decree is made for the redemption of mortgaged lands, may award execution jointly or severally as the case requires; and for sums found due for rents and profits over and above the sums reasonably expended in repairing and increasing the value of the estate redeemed. (R. S. c. 163, § 22.)

Computation of sum due.—By this section, the mortgagee in possession is to account for the clear rents and profits, from the time of the entry or "for sums found due for rents and profits over and above the sums reasonably expended in repairing and increasing the value of the estate redeemed." It is immaterial how the mortgagee is paid, whether in money or by the rents and profits of the mortgaged estate, the payment in either event is equally beneficial to him. If in money, the rule for the computation of interest is well established. If by rents and profits, the same principle applies. The gross amount of the rents and profits is to be ascertained, as well as the costs of reasonable repairs and improvements on the premises, and a suitable compensation for the care and management of the estate and taxes thereon, one sum to be set off against the other, and whenever the balance in the hands of the mortgagee exceeds the interest on the mortgage debt at that time, it is to be regarded and deducted, as in case of a partial payment on such debt, and so on from year to year. Pierce v. Faunce, 53 Me. 351.

The mortgagee has no right to make it more expensive for the mortgagor to redeem than may be required for the purpose of keeping the property in a proper state of repair and for protecting the title to the property. But he is to be allowed credit for all expenses necessary for the protection and preservation of the estate. Pierce v. Faunce, 53 Me. 351.

Applied in Crooker v. Frazier, 52 Me. 405.

Sec. 23. Deduction of rents and profits from sum brought into court for redemption; statement of amount due.—When money is brought into court in a suit for redemption of mortgaged premises, the court may deduct therefrom such sum as the defendant is chargeable with on account of rents and profits by him received or costs awarded against him; and the person to whom money is tendered to redeem such lands, if he receives a larger sum than he is entitled to retain, shall refund the excess. Any mortgagee or person holding under him when requested by an assignee in insolvency or trustee in bankruptcy to render a statement of the amount due on a mortgage given by the insolvent where there is an equity of redemption shall render a true statement to the assignee or trustee of the amount due on such mortgage; and, for any loss resulting to the insolvent estate from any misrepresentation of the amount due, the assignee or trustee shall have a right of action on the case against such person to recover such loss. (R. S. c. 163, § 23.)

Cross reference.—See note to § 16, re this section provides for accounting in proceeding under that section.

Action may be maintained for refund.—This section provides that "the person to whom money is tendered to redeem such lands, if he shall receive a larger sum than he is entitled to retain, shall refund the excess." Under this special provision, it has been held that an action at law will lie. Whitcomb v. Harris, 90 Me. 206, 38 A. 138; Wilcox v. Cheviott, 92 Me. 239, 42 A. 403.

But this statute only affords remedy against the person to whom a tender has been made, and who has received the money. Wilcox v. Cheviott, 92 Me. 239, 42 A. 403.

Applied in Bragg v. Pierce, 53 Me. 65; Hagerthy v. Webber, 100 Me. 305, 61 A. 685; Fogg v. Twin Town Chevrolet, Inc., 135 Me. 444, 199 A. 265.

Sec. 24. Owner of subsequent mortgage may request assignment of prior mortgage under foreclosure; bill in equity to compel assignment; appeal. — When proceedings for the foreclosure of any prior mortgage of real estate have been instituted by any method provided by law, the owner of any subsequent mortgage of the same real estate or of any part of the same real estate may, at any time before the right of redemption from such prior mortgage has expired, in writing, request the owner of such prior mortgage to assign the same and the debt thereby secured to him, upon his paying to the owner of such prior mortgage, the full amount, including all interest, costs of foreclosure and such other sums as the mortgagor or person redeeming would be required to pay in order to redeem; if the owner of such prior mortgage neglects or refuses to make such assignment within a reasonable time after such written request, the owner of such subsequent mortgage may bring a bill in equity in the supreme judicial court or in the superior court for the purpose of compelling the owner of such prior mortgage to assign the same and the debt thereby secured, to him, the owner of such subsequent mortgage, upon making payment as aforesaid. If the court, upon hearing, shall be of the opinion that the owner of such prior mortgage will not be injured or damaged in his property matters and rights by such assignment, and that such assignment will better protect the rights and interests of the owner of such subsequent mortgage, and that the rights and interests of any other person in and to the same real estate, or any part thereof, will not be prejudiced or endangered thereby, the court, in its discretion, may order and decree that such prior mortgage and the debt thereby secured, shall be assigned by the owner thereof to the owner of such subsequent mortgage upon his making payment as aforesaid. The time within which and the place where such payment shall be made shall be fixed by the court, and if the parties are unable to agree upon the amount of such payment, the court shall fix and determine the amount. The court may issue all necessary and needful process or processes to enforce any order or decree made under the provisions of this section. The owner of any prior mortgage assigned under the provisions hereof shall not be holden on nor liable for the debt secured by such mortgage unless he especially agrees in writing by him signed to be so holden or liable. An appeal from any final decree may be taken as provided by section 21 of chapter 107. (R. S. c. 163, § 24.)

Estoppel applied against prior mortgagee.—Where a mortgagee in a prior mortgage, under a demand for a true account due under the mortgage, states to a person about to take a subsequent mortgage that a certain amount had been paid on the prior mortgage, he and his assignee of the mortgage are estopped from claiming the full amount of the prior mortgage, and and also estopped from claiming interest on the amount which had been stated as having been paid on the prior mortgage. Kerr v. McDonald, 126 Me. 438, 139 A. 476.

Sec. 25. Treasurer of state may discharge or foreclose mortgages made to state.—When a mortgage is made or assigned to the state, the treasurer may demand and receive the money due thereon and discharge it by his deed of release. After breach of the condition, he may, in person or by his agent, make use of the like means for the purpose of foreclosure, which an individual mortgagee might, as prescribed in section 3 and 5.

All mortgages in the name of the state and made under the provisions of chapter 30 of the revised statutes of 1944 shall be collected, discharged or foreclosed in accordance with the provisions of this section. (R. S. c. 163, § 25. 1947, c. 55, § 3.)

Sec. 26. Bill in equity for redemption filed against state.—If the treasurer of state and the person applying to redeem any lands mortgaged to the state disagree as to the sum due thereon, such person may bring a bill in equity against the state for the redemption thereof in the supreme judicial court or in the superior court. (R. S. c. 163, § 26.)

Sec. 27. Notice and proceedings.—The court shall order notice to be served on the treasurer of state in the usual form, and shall hear the cause and decide what sum is due to the state on said mortgage, and award costs as it deems equitable; and the treasurer shall accept the sum adjudged by the court to be due and discharge the mortgage. (R. S. c. 163, § 27.)

Sec. 28. On death of person entitled to redeem, administrator or heir may redeem; tender in behalf of nonresident.—If a person entitled to redeem a mortgaged estate, or an equity of redemption which has been sold on execution, or the right to redeem such right, or the right to redeem lands set off on execution, dies without having made a tender for that purpose, a tender may be made and a bill for redemption commenced and prosecuted by his executor or administrator, heirs or devisees; and if the plaintiff in such bill in equity dies pending the suit, it may be prosecuted to final judgment by his heirs, devisees or his executor or administrator. When a mortgagor resides out of the state, any person may, in his behalf, tender to the holder of the mortgage the amount due thereon; and the tender shall be as effectual as if made by the mortgagor. (R. S. c. 163, § 28.)

Sec. 29. Tender to guardian of mortgagee; discharge of mortgage.—When the mortgagee or person holding under him is under guardianship, a tender may be made to the guardian and he shall receive the sum due on the mortgage; and upon receiving it, or on performance of such other condition as the case requires, he shall execute a discharge of the mortgage. (R. S. c. 163, § 29.)

Sec. 30. Claimant of mortgagor's interest may file bill in equity to have facts determined and damages assessed. — In all cases where a debtor has mortgaged real and personal estate to secure the performance of a collateral agreement or undertaking, other than the payment of money, and proceedings have been commenced to foreclose said mortgage for alleged breach of the conditions thereof, but the time of redemption has not expired, any person having any claim against the mortgagor and having attached said mortgagor's interest in said estate on said claim may file a bill in equity in the supreme judicial court or in the superior court in the county where such agreement has to be performed, where the owner of such mortgage resides or where the property mortgaged is situated, alleging such facts and praying for relief; and said court may examine into the facts and ascertain whether there has been a breach of the conditions of said mortgage, and if such is found to be the fact, may assess the damages arising therefrom, and may make such orders and decrees in the premises as will secure the rights of said mortgagee or his assignee, so far as the same can be reasonably accomplished, and enable the creditor, by fulfilling such requirements as the court may impose, to hold said property, or such right or interest as may remain therein by virtue of such attachment, for the satisfaction of his claim. Such claim may include possession of the property by the mortgagee for such time as the court deems just and equitable. Pending such proceedings, the right of redemption shall not expire by any attempted foreclosure of such mortgage. (R. S. c. 163, § 30.)

For a case concerning the constitutionality of this section as applied to mortgages in existence at the time of its enactment, see Phinney v. Phinney, 81 Me. 450, 17 A. 405.

Sec. 31. Discharge of mortgages; neglect to discharge mortgage.—A mortgage may be discharged by an entry acknowledging the satisfaction thereof made on the margin of the record of the mortgage in the registry of deeds, and signed by the mortgagee or by his executor, administrator or assignee, and such entry shall have the same effect as a deed of release duly acknowledged and recorded. If a mortgagee or his executor, administrator or assignee, after full performance of the condition of his mortgage whether before or after breach of such

condition, refuses or neglects for 7 days after being thereto requested to make such discharge or to execute and acknowledge a deed of release of the mortgage, he shall be punished by a fine of not less than $10 nor more than $50, to be recovered in an action on the case. (R. S. c. 163, § 31.)

Cross reference.—See note to c. 119, § 1, sub-§ IV, re mortgagee's oral promise to relinquish claim is void.

An absolute discharge of the mortgage is not essential to constitute a redemption in contemplation of law, nor are circumstances under which the mortgagee can be compelled to discharge the mortgage. If a mortgagor is able to arrange for or cause the mortgage debt to be paid and by agreement the premises are released to a third party for the mortgagor's benefit, it constitutes a redemption as to the mortgagee, and by the mortgagor, though the property is not directly conveyed to the mortgagor or the mortgagee discharged in accordance with this section. Bernstein v. Blumenthal, 127 Me. 393, 143 A. 698.

Section contemplates mortgage effectual as long as indebtedness remains.—It was probably contemplated by the authors of this section, that ordinarily the mortgage would continue effectual, as long as any part of the indebtedness secured by it, should remain; and hence the form prescribed. Patch v. King, 29 Me. 448.

Nothing but payment in fact or the release of the mortgagee will discharge a mortgage. Smith v. Stanley, 37 Me. 11; Parkhurst v. Cummings, 56 Me. 155.

Acknowledgment upon back of mortgage deed constitutes discharge.—An acknowledgment upon the back of a mortgage deed, that the condition thereof had been complied with and that all obligations therein had been discharged, under the hand and seal of the mortgagee, is a discharge of the mortgage. Allard v. Lane, 18 Me. 9.

And effect of statutory discharge is not to be enlarged by construction.—The manifest purpose of the provision was to furnish and perpetuate the proof that the incumbrance no longer exists, and that the constructive notice of the mortgage by the record should be accompanied by that of the discharge. Accordingly the statute has declared expressly the effect of such a discharge, and it cannot have a more enlarged construction than was manifestly designed. Patch v. King, 29 Me. 448.

A renewal of a note secured by mortgage is not such a payment as will discharge the mortgage, unless it was so intended by the parties. Parkhurst v. Cummings, 56 Me. 155.

In equity the cancellation of a mortgage on the records is only prima facie evidence of its discharge, and leaves it open to the party making such objection to prove that it was made by accident, mistake, or fraud. On such proof being made, the mortgage will be established, even against subsequent mortgagees without notice, if they became such anterior to the cancellation. Robinson v. Sampson, 23 Me. 388.

When a creditor has a note against two joint promisors, secured by mortgage upon real estate, and he acknowledges payment upon the margin of the record, from the promisors, and discharges the mortgage; the acts and declarations of one of the promisors may control and overcome the evidence of payment from the margin of the record, so that an action may be maintained upon the note against the other promisor. Patch v. King, 29 Me. 448.

Cited in Leavitt v. Pratt, 53 Me. 147.

Sec. 32. Validating certain mortgage discharges. — All marginal discharges of mortgages recorded prior to August 6, 1949, duly attested by the register of deeds as being recorded from discharge in margin of original mortgage, are validated and shall have the same effect as if made as provided in section 31. (1949, c. 166. 1951, c. 266, § 119.)

Sec. 33. Discharge by attorney at law.—A mortgage may be discharged on the record thereof in the office of the registry of deeds by an attorney at law authorized in writing by the mortgagee or person claiming under him; provided, however, that said writing is first recorded or filed in said office and a minute of the same is made by the register on the margin of the page in connection with said discharge. (R. S. c. 163, § 32.)

Sec. 34. Redemption of estate from purchaser of equity.—If the purchaser of an equity of redemption, sold on execution, has satisfied and paid to the mortgagee or those claiming under him the sum due on the mortgage, the

mortgagor or those claiming under him, having redeemed the equity of redemption within 1 year after such sale, may redeem such mortgaged estate from such purchaser or any person claiming under him within the time and in the manner that he might have redeemed it of the mortgagee if there had been no such sale made, and within such time only. (R. S. c. 163, § 33.)

Purchaser of redemption on execution acquires no attachable interest until year elapses. — The purchaser of a right in equity to redeem real estate sold on execution, acquires no interest in the estate that can be attached or seized, until the year allowed the debtor to redeem from the purchaser has expired. Rogers v. Wingate, 46 Me. 436.

If not made party, mortgagor may question jurisdiction in bill to redeem, based on levy on equity of redemption.—When a bill in equity is brought to redeem a mortgage, and the complainant bases his right to redeem upon a levy made upon the mortgagor's equity of redemption, the respondent, not being a party or privy to the judgment, may prove it erroneous and void for want of jurisdiction of the parties. Buffum v. Ramsdell, 55 Me. 252.

Effect of purchase of redemption in property lying in two states.—When a railroad company owning a railroad lying in two different states, under charters from each of those states, mortgages the whole road and franchise, and its right to redeem in one state is sold on execution, the purchaser of the equity is entitled to redeem the whole road from the mortgage. Wood v. Goodwin, 49 Me. 260.

Sec. 35. Writ of entry against mortgagee in possession, after mortgage paid.—When the mortgagee or person claiming under him has taken possession of the mortgaged premises, and the debt secured by the mortgage is paid or released after condition broken and before foreclosure perfected, the mortgagor or person claiming under him may maintain a writ of entry to recover possession of said premises, the same as if paid or released before condition broken. (R. S. c. 163, § 34.)

Mortgagee ousted in suit at law under this section after condition broken and debt paid.—If in possession, the mortgagee cannot be dispossessed by the mortgagor in a suit at common law, even if the mortgaged debt, after condition broken, has been paid. But by this section, a mortgagee may now be ousted by a suit at law brought after condition broken, if the debt is paid. Wilson v. European & North American Ry., 67 Me. 358.

Extinguishment of mortgage by regular payment, appropriation of land, payment after condition broken. — A mortgage by its very terms becomes extinguished by payment of the mortgage debt, at or before the breach of the condition. And, as a matter of course, if the land mortgaged be all appropriated on the mortgage debt, the mortgage would be extinguished, though the debt might not all be thereby paid. And since the provisions of this section have been in force, the same result is wrought by payment after condition broken. Lord v. Crowell, 75 Me. 399.

Applied in Jones v. Smith, 79 Me. 446, 10 A. 254.

Sec. 36. To bar action on undischarged mortgage.—When the record title of real estate is encumbered by an undischarged mortgage, and the mortgagor and those having his estate in the premises have been in uninterrupted possession of such real estate for 20 years after the expiration of the time limited in the mortgage for the full performance of the conditions thereof, he or they, or any person having a freehold estate, vested or contingent in possession, reversion or remainder, in the land originally subject to the mortgage or in any undivided or any aliquot part thereof, or any interest therein which may eventually become a freehold estate, or any person who has conveyed such land or any such interest therein with covenants of title or warranty, may apply to the superior court or any justice of the superior court in vacation in the county where the whole or any part of the mortgaged premises is situated, by petition setting forth the facts, and asking for a decree as hereinafter provided; and if after notice to all persons interested as provided in section 39, no evidence is offered of any payment within said 20 years or of any other act within said time, in recognition of its existence as a valid mortgage, the superior court or any justice of the superior court in vacation upon hearing may enter a decree setting forth

such facts and its findings in relation thereto, which decree shall within 30 days be recorded in the registry of deeds where the mortgage is recorded; and thereafter no action at law or proceeding in equity shall be brought by any person to enforce a title under said mortgage. (R. S. c. 163, § 35. 1947, c. 64, § 1.)

Sec. 37. Two or more persons owning in severalty may join in petition.—Any 2 or more persons owning in severalty different portions or different interests of the character above described, in the whole or in different portions thereof, may join in 1 petition. Two or more defects arising under different mortgages affecting 1 parcel of land may be set forth in the same petition; and in case of a contest the court shall make such order for separate issues as may be proper. (R. S. c. 163, § 36.)

Sec. 38. To bar action on undischarged mortgage given to secure against some contingent liability.—When the mortgagor of such an undischarged mortgage and those having his estate in the premises have been in uninterrupted possession of such real estate for 20 years from the date thereof, and it shall appear that such mortgage was not given to secure the payment of a sum of money or a debt, but to secure the mortgagee against some contingent liability assumed or undertaken by him, and that such conditional liability has ceased to exist and that the interests of no person will be prejudiced by the discharge of such mortgage, the mortgagor or those having his estate in the premises, or any of the persons to whom a similar remedy is granted in section 36 may apply to the superior court or any justice of the superior court in vacation in the county where the whole or any part of the mortgaged premises is situated, by petition setting forth the facts and asking for a decree as hereinafter provided; and if after notice to all persons interested as provided in the following section, and upon hearing it shall appear that the liability on account of which such mortgage was given has ceased to exist and that such mortgage ought to be discharged, the superior court or any justice of the superior court in vacation may enter a decree setting forth the facts proved and its findings in relation thereto, which decree shall within 30 days be recorded in the registry of deeds where the mortgage is recorded; and thereafter no action or proceeding in equity shall be brought to enforce a title under said mortgage. (R. S. c. 163, § 37. 1947, c. 64, § 2.)

Sec. 39. Description of unknown mortgagees; service of petition.—When it is alleged under oath in the petition that the mortgagees or persons claiming under them are unknown or that their names are unknown, they may be described generally as claiming by, through, or under some person or persons named in the petition. Personal service by copy of the petition and order of notice shall be made upon all known respondents residing in the state, 14 days before the return day, or if such petition is brought before a justice of the superior court in vacation, 14 days before the date of hearing; and upon all other respondents, service may be made by personal service of copy of the petition and order of notice; by publication for such length of time in such newspapers or by posting in such public places as the court may direct; or in any or all of these ways at the discretion of the court. (R. S. c. 163, § 38. 1947, c. 64, § 3.)

Sec. 40. Court has jurisdiction over all respondents.—Upon the service of such notice in accordance with the order of the court, the court shall have jurisdiction of all persons made respondents in the manner above provided, and shall upon due hearing make such decree upon the petition and as to costs as it shall deem proper. (R. S. c. 163, § 39.)

Sec. 41. Decree effectual to bar claims.—The decree of the court determining the validity, nature or extent of any such encumbrance shall operate directly on the land as a proceeding in rem, and shall be effectual to bar all the

respondents from any claim thereunder contrary to such determination, and such decree so barring said respondents shall have the same force and effect as a release of such claims executed by the respondents in due form of law. The court may, in its discretion, appoint agents or guardians ad litem to represent minors or other respondents. (R. S. c. 163, § 40.)