

MASON'S MINNESOTA STATUTES

1927

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EMBRACING THE ORGANIC LAWS, THE CONSTITUTION, AND THE STAT-
UTES CONTAINED IN THE GENERAL STATUTES OF 1923, EXCEPT
THOSE WHICH HAVE BEEN REPEALED OR SUPERSEDED
BY THE SUBSEQUENT LEGISLATION OF 1925
AND 1927

AND ALSO EMBRACING LAWS OMITTED FROM THE GENERAL STATUTES
1923, AND THE LAWS OF THE 1925 AND 1927 SESSIONS OF THE
LEGISLATURE UNDER APPROPRIATE CLASSIFICATION.

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149, 68+855; 84-526, 88+16). Exclusion of material evidence is ordinarily fatal to an award and the party attacking an award on this ground is only required to prove the exclusion by a fair preponderance of evidence (50-341, 52+932). Scope of subd. 5 not well defined (see 40-164, 41+659). An award may be set aside on the ground that it was procured by false testimony and fraudulent practices (23-46). It will not be set aside on the ground that the arbitrators have not acted on all matters submitted to them or that they have exceeded their powers unless party complaining has been prejudiced (7-374, 295. See 14-153, 120). An arbitrator cannot impeach his own award but he may impeach an award in which he took no part and give evidence of misconduct on the part of other arbitrators (66-138, 68+855). Every reasonable intendment will be indulged in favor of the finality and validity of an award, but if it is clearly not final and certain it may be set aside (81-356, 84+48). It may be set aside in part (57-490, 59+547).

The determination of arbitrators in excess of the scope of their inquiry is void. 163-355, 203+988.

Arbitrators do not acquire jurisdiction to make an award when they fail to give the parties an opportunity to be heard. 163-355, 203+988.

9518. Modification of the award—The court, upon motion, may modify or correct an award in the following cases:

1. Where there is a miscalculation of figures, or an evident mistake in the description of any person or thing referred to therein.

2. Where the arbitrators have awarded upon a matter not submitted to them, or not affecting the merits of the decision upon any matter submitted.

3. Where the award is imperfect in a matter of form which does not affect the merits, and where, if it had been a verdict, such defect could have been amended or disregarded by the court. (4385) [8021]

9519. Judgment—Contents and effect—Appeals—Upon confirmation or modification of the award, the court shall order judgment in accordance therewith, and the clerk shall enter the same forthwith, unless a stay be granted. Costs not included in the award shall be taxed as in civil actions. The judgment shall be docketed as in other cases, shall have the same force and effect in all respects, and be subject to all provisions of law relating to judgments in civil actions, including appeals therefrom. It shall recite the submission, the hearing before the arbitrators, their award, and the action of the court thereon. (4386) [8022]

Judgment must conform to award (57-490, 59+547). Judgment on award has same effect as judgment in ordinary civil actions and can only be impeached, reviewed or set aside in same manner as such judgment (23-46). Scope of review on appeal (30-38, 14+57; 23-64). Parties may stipulate against an appeal (7-374, 295).

CHAPTER 82

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GENERAL PROVISIONS

9520. Agent of non-resident to accept service—Any non-resident person or corporation owning or claiming any interest or lien in or upon lands in the state may file with the secretary of state a writing, executed and acknowledged in the manner of a conveyance, appointing a resident agent, whose place of residence shall be stated, to accept service of process or summons in any action or proceeding in the courts of the state concerning such interest or lien, except actions or proceedings for the collection of taxes, and consenting that service of such process or summons upon such agent shall be binding upon the person executing the same. Such writing shall be recorded by the secretary. No service by publication of summons shall be made upon any such non-resident who has complied with the provisions hereof, but in all such cases service of such process or summons, or of any writ or notice in the action or proceedings, shall be made upon such agent in the manner provided by law for such service upon residents of the state, and shall have the same effect as personal service within the state upon such owner or claimant; but, if such party appears by attorney therein, the service of papers shall thereafter be upon such attorney. The authority of such agent may be revoked by writing similarly executed and acknowledged and recorded, but no revocation shall affect any action or proceeding then pending. For filing and recording such papers the secretary shall be entitled to fifteen cents for each folio. (4387) [8023]

Applicable only to foreign corporation (36-35, 30+432). Cited (55-386, 57+134). 165-95, 205-694.

9521. Notice of lis pendens—In all actions in which the title to, or any interest in or lien upon, real property is involved or affected, or is brought in question by either party, any party thereto, at the time of filing the complaint, or at any time thereafter during the pendency of such action, may file for record with the register of deeds of each county in which any part of the premises lies a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the real property in such county involved, affected or brought in question thereby. From the time of the filing of such notice, and from such time only, the pendency of the action shall be notice to purchasers and incumbrancers of the rights and equities of the party filing the same to the premises. When any pleading is amended in such action, so as to alter the description of, or to extend the claim against, the premises affected, a new notice may be filed, with like effect. Such notice shall be recorded in the same book and in the same manner in which mortgages are recorded, and may be discharged by an entry to that effect in the margin of the record by the party filing the same, or his attorney, in the presence of the register, or by writing executed and acknowledged in the manner of conveyance, whereupon the register shall enter a minute thereof on the margin of such record. Provided, however, that the filing of such lis pendens at the time of filing the complaint and before the commencement of the action shall have no force, effect, or validity against the premises described in said lis pendens, unless the filing of the complaint is followed by the service of the summons in the action within ninety days after the filing of the complaint therein. Provided, further, however, that any party claiming any title or interest in or to the real property involved or affected may on such notice as the court shall in each case prescribe,

make application to the district court in the county in which said action is pending or in which said real property involved or affected is situated, for an order discharging said lis pendens of record, when any such action has not been brought on for trial within two years after the filing of said lis pendens and in case the court orders said lis pendens discharged of record upon the filing of a certified copy of the order of said court in the office of the register of deeds, where said real property is situated, said lis pendens shall be void and of no force nor effect. Provided, further, that all lis pendens heretofore filed, at the expiration of fifteen years from the date of filing thereof, shall be void and of no force and effect. (R. L. § 4389, amended '07 c. 332 § 1; '19 c. 527 § 1) [8025]

Purchasers and incumbrancers pendente lite not chargeable with notice unless lis pendens filed (25-206; 92-2, 99+209). Persons claiming under conveyances prior to filing of lis pendens but not recorded until after such filing unaffected by judgment (17-457, 434; 20-165, 148; 20-170, 153; 25-206; 39-35, 38+757; 46-174, 48+773). Notice operates only from time of filing. Subsequent judgment does not give notice retroactive effect (92-2, 99+209). Notice filed prior to service of summons held a nullity (91-226, 97+974. See 89-71, 93+705). And see proviso, added by amendment of 1907. Filed in improper action nullity (89-71, 93+705). If filed in proper action cannot be canceled by court while action pending (85-130, 88+410, 744; 89-71, 93+705). Object to give constructive notice (64-531, 67+639; 89-71, 93+705). Continued on appeal (70-243, 73+161). Effect to save rights against prior judgment (29-322, 13+145). Proof of publication held sufficient (53-197, 55+117). Rule prior to statute (1-274, 210; 4-294, 211; 25-206). In actions to foreclose mechanic's lien (54-499, 56+172; 61-303, 63+718; 63-154, 65+267). Vendee under unrecorded contract for sale of lands entitling him to possession, who has paid part of price before filing of notice, is not injuriously affected thereby. When, however, he comes to pay balance, he has legal knowledge of lis pendens and may protect himself against paying wrong person, or, if vendor seeks to enforce contract, may rescind in case vendor cannot give title as agreed (97-426, 107+154). Rule of property and applies to suit in equity pending in federal court (172 Fed. 271). Cited (55-386, 393, 57+134). Cancellation of lis pendens filed in action of unauthorized class. (123-342, 143+911; 141-115, 169+489).

156-506, 194+460.

The doctrine of lis pendens does not apply to negotiable paper, and filing a notice of lis pendens, in an action to cancel a note and a mortgage securing it, does not operate as constructive notice of defenses to the note. 161-10, 200+849.

9522. Notice of no personal claim—When in any such action there are defendants against whom no personal claim is made, the plaintiff may serve upon them, at the time of the service of the summons, a notice subscribed by him or his attorney, and setting forth the general object of the action, a description of the property affected by it, and that no personal claim is made against such defendants. If any defendant on whom such notice is served unreasonably defends the action, he shall pay full costs to the plaintiff. (4390) [8026]

Unreasonable defence (65-107, 67+803). Failure to publish lis pendens is not cured by publishing notice of no personal claim (123-200, 143+361).

9523. Transfer of title by judgment—The district court has power to pass the title to real estate by a judgment, without any other act to be done on the part of the defendant, when such appears to be the proper mode to carry its judgment into effect; and such judgment, being recorded in the proper registry of deeds, while in force, shall be as effectual to transfer such title as the deed of the defendant. (4391) [8027]

21-299; 24-517, 575; 51-213, 53+365; 55-386, 394, 57+134; 94-150, 102+381; 101-169, 112+336. Nature of proceeding, by virtue of statute, is in rem (123-434, 144+139). Adjudication by probate court (124-90, 144+457).

167-463, 209+270, note under § 9207.

ACTIONS FOR PARTITION

9524. Action for partition or sale, who may bring— When two or more persons are interested, as joint tenants or as tenants in common, in real property in which one or more of them have an estate of inheritance or for life or for years, an action may be brought by one or more of such persons against the others for a partition thereof according to the respective rights and interests of the parties interested therein, or for a sale of such property, or a part thereof, if it appears that a partition cannot be had without great prejudice to the owners. (4392) [8028]

When maintainable (14-289, 216; 19-167, 129; 26-307, 3+698; 39-92, 38+805; 40-450, 42+352; 76-489, 79+520; 77-533, 80+702; 82-347, 85+173; 92-527, 100+366; 93-489, 101+797). Parties (39-92, 38+805; 39-481, 40+611). Governed by same rules as ordinary civil actions (86-165, 90+369). Costs of repairs by one cotenant not recoverable (82-347, 85+173). Right of partition may be waived or suspended by agreement (100-359, 111+289). Suspension or waiver of partition for limited time (128-211, 150+799). Not such estate of inheritance where action will lie (129-276, 152+535). Preference for partition in kind rather than sale (143-448, 174+305). Under statute a cotenant in remainder may compel partition (151-197, 186+305).

163-506, 204+468.

The judgment ordered in the partition suit is for the best interests of defendants 161-255, 201+437.

Where husband and wife own real estate as joint tenants, and the husband makes improvements with the consent of the wife, there is no implied contract entitling the husband to be reimbursed or protected therefor in action in partition. 167-489, 209+636.

Partition of lands in kind instead of by sale is preferred. And the burden is on the one demanding a sale to prove that partition in kind cannot be made without great prejudice to all the owners. 210+850.

The evidence does not justify the findings that the property involved is so situated that partition in kind cannot be had without great prejudice to the respective owners thereof and that it is to the best interest of all the owners that it be sold. 210+850.

The sole owner of a life estate cannot maintain an action in partition against the owner of the remainder. Such actions can be maintained only where the plaintiff is a cotenant with others. 212+595.

9525. Summons—Service—The summons shall be addressed by name to all the owners and lienholders who are known, and may also be addressed "to all other persons unknown having or claiming an interest in the property described in the complaint herein." Service of the summons may be had upon all such unknown persons defendant by publication in the same manner as against non-resident defendants, upon the filing of the complaint, in which case the plaintiff shall, before the commencement of the action, file with the register of deeds a notice of the pendency of the action, a copy of which shall be published in the same newspaper with, and immediately following, the summons. (4393) [8029]

How addressed (14-13, 1).

9526. Complaint—The complaint shall particularly set forth the interest of all persons in the property, whether by way of ownership or lien, so far as known to the plaintiff; and if any such person, or his share or interest, is unknown to the plaintiff, or is uncertain or contingent, or the ownership of the inheritance depends upon an executory devise, or there is a contingent remainder, so that such person cannot be named, that fact shall be set forth. The complaint shall also state the cash value of the property, and shall be verified. (4394) [8030]

14-13, 1; 26-307, 3+698; 86-165, 90+369; 93-334, 101+1133; 152-97, 188+223.

9527. Judgment for partition—Referees—Except as provided in § 9528, the title to the property and the

rights of the parties shall be established by evidence or by the written stipulation of the parties to be affected thereby; and thereupon, in a proper case, the court shall render judgment that partition be made accordingly, and shall appoint three disinterested and judicious citizens of the county as referees to make partition and set off the shares of the several persons interested as determined by the judgment. (4395) [8031]

39-92, 38+805; 44-526, 47+171; 128-207, 150+798. Status of permanent improvement erected by one co-tenant with consent of other (135-134, 160+496).

9528. Dispute between defendants no defence—If the title of the plaintiff to a certain undivided share of the property is proved or admitted, it shall not be a defence that there is a dispute or litigation undetermined between some of the defendants as to the right or title of such defendants in or to any undivided shares of the property claimed by them; but in such case the court shall render judgment that partition be made, or that the property be sold as in other cases, and shall cause the portion of the property or of the proceeds thereof pertaining to such undivided shares in dispute to be allotted to the defendants claiming the same, without determining their respective rights thereto, and, in case of sale, may order the portion of the proceeds pertaining to such shares to be paid into court to abide the result of any existing or subsequent litigation between such defendants. (4396) [8032]

50-157, 52+527; 152+98; 188+224.

9529. Duty of referees—Report—Expenses—When partition is made, the referees shall divide the property, and allot the several portions thereof to the respective parties, quantity and quality relatively considered, according to their respective rights, designating the several portions by proper landmarks, and may employ a surveyor, with necessary assistants, to aid them therein. They shall make a report of their proceedings, specifying the manner of executing the trust, and describing the property and the share allotted to each party, with a particular description thereof. The expenses and fees of the referees, including those of a surveyor and his assistants, when employed, shall be paid by the plaintiff, and may be allowed as part of the charges. (4397) [8033]

78-127, 80+850. Report has effect of verdict (133-51, 157+908).

9530. Confirmation of report—Final judgment—The court may confirm or set aside the report, and, if necessary, appoint new referees. Upon the report being confirmed, final judgment shall be rendered that such partition be effectual forever, and such judgment shall be binding:

1. On all the parties named therein, and their legal representatives, who had at the time any interest in the property divided, as owners in fee or as tenants for years, or as entitled to the remainder, reversion, or inheritance thereof, after the determination of a particular estate therein, or who by any contingency may be entitled to a beneficial interest therein, or who have an interest in an undivided share thereof as tenants for years or for life.

2. On all persons interested in the property who may be unknown, and to whom notice has been given by publication of the summons.

3. On all persons claiming from such parties or persons, or either of them. (4398) [8034]

Sale for inadequate price set aside (56-12, 57+217; 60-262, 62+233). Motion to open default—subsequent purchasers as parties (39-481, 40+611). Scope of review on appeal from judgment (44-526, 47+171). Cited (19-167,

129; 40-450, 42+352; 77-533, 80+702). Final judgment on report of division or upon confirmation of sale (152-97, 188+224).

9531. Persons not affected—Such judgment shall not affect tenants or persons having claims as tenants for life to the whole of the property which is subject of the partition; nor shall such judgment preclude any persons except such as are specified in § 9530 from claiming title to such property, or from controverting the title of the parties between whom partition is made. (4399) [8035]

19-167, 129; 40-450, 42+352; 77-533, 80+702; 151-197, 186+305.

9532. Liens, how affected—When there is a lien on an undivided interest or estate of any of the parties, if partition is made such lien is thenceforth a charge only on the share allotted to such party; but such share shall first be charged with its just proportion of the costs and charges of the partition, in preference to such lien. (4400) [8036]

9533. Costs apportioned—The costs, charges, and disbursements of partition shall be paid by the parties respectively entitled to share in the land, and the amounts to be paid by each shall be determined by the court, and specified in the final judgment. Such judgment may be docketed, and payment of such amounts may be enforced by execution against the property of the respective judgment debtors as in the case of other judgments for money. (4401) [8037]

Attorney's fees (84-346, 87+915). Expenses not within purview of this section (128-539, 151+1102). Rule inapplicable to appeal to supreme court (135-135, 160+496).

9534. Compensation for equality—When it appears that partition cannot be made equal between the parties without prejudice to the rights or interests of some, the court may adjudge compensation to be made by one to another for equality of partition; but such compensation shall not be required to be made by an unknown owner, nor by an infant, unless it appear that the infant has personal property sufficient therefor, and that his interest will be promoted thereby. (4402) [8038]

Determination of payment of taxes and adjustment according to interests (136-476, 162+463). Decreeing owelty (140-225, 165+472).

9535. Property not capable of division may be set off, etc.—Occupancy assigned—When the premises consist of a mill or other tenement which cannot be divided without damage to the owners, or when any specified part is of greater value than either party's share, and cannot be divided without damage to the owners, the whole premises or the part so incapable of division may be set off to any party who will accept it, he paying to one or more of the others such sums of money as the referees award to make the partition just and equal; or the referees may assign the exclusive occupancy and enjoyment of the whole or of such part to each of the parties alternately for specified times, in proportion to their respective interests. (4403) [8039]

140-225, 165+472.

9536. Occupant liable to cotenants—Trespass—When the whole or a specific part of the premises is thus assigned, the person entitled for the time being to the exclusive occupancy shall be liable to his cotenants for any injury thereto occasioned by his misconduct, as a tenant for years under a common lease without express covenants would be liable to his landlord; and the other tenants in common may have their remedy therefor against him by action, jointly or severally,

at their election. While the estate is in the exclusive occupancy of such cotenant, he shall have the same remedy against one who trespasses upon or otherwise injures the premises as if he held the same under a lease for the term for which they were so assigned to him, and he and all the other tenants in common may recover such other and further damages as they have sustained by the same trespass or injury in like manner as if the premises had been leased by them. Joint damages recovered by such tenants in common shall be apportioned and divided between them according to their respective rights by the court in which the judgment is recovered. (4404) [8040]

9537. Sale ordered, when—Except as provided in § 9538, if it is alleged in the complaint and established by evidence that the property, or any part of it, is so situated that partition cannot be had without great prejudice to the owners, the court may order a sale of the property or of such part, and for that purpose may appoint one or more referees; or when, without such allegation and proof, referees are appointed to make partition, who report that the property, or any distinct part of it, is so situated that partition cannot be had without great prejudice to the owners, and the court is satisfied that such report is correct, it may order the referees to sell the property or such part. (4405) [8041]

93-334, 101+1133; 118-117, 136+575; 128-211, 150+799. Incapable of division; sale ordered (135-135, 160+497). Partition in kind favored (143-448, 174+305).

9538. Liens—New parties—No sale, when—Proof shall be made of the existence, amount, and priority of any liens on the property of which partition is sought in such manner and upon such notice to those interested as the court shall direct. When any person having a lien has not been made a party, the court may make an order requiring him to appear and become a party defendant, and no such person can be affected by a sale unless he has been made a party. If there are liens on the property amounting to more than its value as alleged in the complaint, or if it appears probable after examination that the property will not sell for a sum in cash equal to the amount of such liens, with costs and expenses, no sale shall be ordered; but, if such liens do not amount to the value of the property as admitted or proved, the court may order a sale, and in such case the sale shall not be delayed by the proceedings to ascertain the priority of the liens. (4406) [8042]

56-12, 57+217; 118-117, 136+575, 1026; 123-474, 144+141; 152-97, 188+224.

9539. Proceeds, how applied—The proceeds of the sale of the property shall be applied under the direction of the court as follows:

1. To pay its just proportion of the general costs of the action.
2. To pay the costs of the reference.
3. To satisfy and cancel of record the several liens, if any, in their order of priority, by payment of the sums due and to become due; the amount remaining due to be verified by affidavit at the time of payment.
4. The residue among the owners of the property sold, according to their respective shares. (4407) [8043]

56-12, 57+217; 76-489, 79+520; 135-135, 160+497; 152-97, 188+224.

9540. Sale, how made—Notice—The sale shall be by public auction to the highest bidder for cash, upon published notice in the manner required for the sale of real property on execution. The notice shall state the terms of the sale; and if the property, or any part

of it, is to be sold subject to a prior estate, charge, or specific lien, the notice shall so state. The terms of sale shall be made known at the time thereof, and, if the premises consist of distinct farms or lots, they shall be sold separately. (4408) [8044]

9541. **Persons forbidden to purchase**—Neither the referees, nor any person for the benefit of either of them, shall be interested, directly or indirectly, in any purchase of the premises sold; nor shall a guardian of an infant party be interested in any such purchase, except for the benefit of the infant. All sales contrary to this section are void. (4409) [8045]

9542. **Purchase by part owner, etc.**—When a party entitled to a share in the property, or an incumbrancer entitled to have his lien paid out of the proceeds of the same, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belong to him. They shall also pay over to the plaintiff or his attorney, and take his receipt for, the costs and charges of the action. (4410) [8046]

9543. **Report of sale**—The referees shall report the sale to the court, describing the different parcels sold to each purchaser, and specifying the name of the purchaser, the price paid or secured, and the terms and conditions of the sale, which report shall be filed with the clerk. (4411) [8047]

9544. **Final judgment on confirming report**—If the sale is confirmed by the court, final judgment shall be entered directing the referees to execute conveyances pursuant thereto, and also directing the application of the proceeds of the sale. (4412) [8048]

56-12, 57+217; 152-97, 188+224.

9545. **Claims to proceeds, how determined**—When the proceeds of sale of any shares belonging to parties to the action who are known are paid into court, the action may be continued, as between them, for the determination of their respective claims thereto. Further testimony may be taken in court or by a referee, at the discretion of the court, which may, if necessary, require the parties to present the facts in controversy by pleadings, as in an original action. The proceedings authorized by this section shall not delay or affect any party whose rights are not involved therein. (4413) [8049]

9546. **Record and effect of conveyances**—The conveyances executed by the referees shall be recorded, and shall bar all parties to the action, including all persons having liens, specific or general, against the property, and all persons unknown, interested in the property, to whom notice has been given by publication of the summons, and all persons claiming under them or any of them. (4414) [8050]

9547. **Sale of part—Life estate, etc.**—When a part of the property only is ordered to be sold, if there is an estate for life or for years in an undivided share of the property, the whole of such estate may be set off in any part of the property not ordered sold. (4415) [8051]

Partition made subject to life estate (151-197, 186+305).

9548. **Estate for life or years, etc., may be set off or sold**—When the estate of a tenant for life or for years in the whole or any part of the property has been proved or admitted to exist at the time of the order for sale, and the person entitled thereto has been made a party, such estate may first be set off out of any part of the property, and a sale made of such part subject to such estate; but if, in the judgment of the court, a due regard to the interest of all parties requires that such estate be sold, the sale may be so ordered. If a sale of the property including such

estate is ordered, such estate passes thereby, and the purchaser, his heirs and assigns, shall hold the property discharged from all claim by virtue thereof, whether the same relate to the undivided share of a joint tenant or tenant in common, or to the whole or any part of the property sold. (4416) [8052]

19-167, 129; 77-533, 80+702; 151-198, 186+305.

9549. **Gross sum in lieu of estate—Proceeds of sale to be invested, when—Unknown parties**—Such person whose estate has been so sold shall be entitled to receive such sum in gross as may be deemed, upon principles of law applicable to annuities, a reasonable satisfaction therefor. His written consent to accept such sum in lieu of such estate, executed and acknowledged in the same manner as a conveyance, must be filed at or before the report of sale. If consent be not so given, the court shall direct that the whole proceeds of the sale of the property, or of the individual share thereof in which such estate may be, shall be deposited in court, and invested for the benefit of the person entitled to such estate during the period thereof; and, if any person entitled to any such estate is unknown, the court shall provide for the protection of his rights in the same manner, so far as may be, as if he were known and had appeared. In all cases the proper proportion of expenses of the proceedings shall be deducted from the proceeds of sale. (4417) [8053]

9550. **Future estates**—When it appears that any person has a vested or contingent future right or estate in any of the property divided or sold, the court shall ascertain and settle the proportionate value thereof according to the principles of law applicable to annuities and survivorships, and direct such proportion of the proceeds of sale to be invested, secured, or paid over in such manner as to protect the rights and interests of the parties. (4418) [8054]

9551. **Wife may release**—A married woman may release to her husband her contingent interest in his real estate by writing executed and acknowledged in the same manner as a conveyance, and, upon the filing of such instrument with the clerk, the whole proceeds arising from such sale shall be paid to the husband. Such release shall bar her contingent interest in such real estate. (4419) [8055]

9552. **Investment of proceeds**—When there are proceeds of sale belonging to an unknown owner, or to a person without the state who has no representative within it, or when there are proceeds arising from the sale of property including the prior estate of a tenant for life or for years, which are paid into court or deposited with the clerk, the same shall be invested in interest-bearing securities for the benefit of the persons entitled thereto. Except as in this chapter otherwise provided, such investment shall be made in the name of the clerk and his successors in office, who shall hold the same for the use and benefit of the persons interested, subject to the order of the court. The clerk shall receive the interest and principal as it becomes due, and apply and invest the same as the court may direct, and shall file in his office the securities taken, and keep an account of such investments, and of the moneys received thereon and his disposition thereof, in a book kept for that purpose, which shall be open to inspection by all persons. (4420) [8056]

86-188, 90+371.

9553. **Share of infant, how paid**—When the share of an infant is sold, his share of the proceeds may be paid by the referees making the sale to his general guardian, or to the special guardian appointed for him

in the action, if the guardian has given the security required by law. (4421) [8057]

9554. Share of insane person, etc.—When the share of an insane person, or other person adjudged incapable of conducting his own affairs, is sold, his share of the proceeds may be paid by the referees making the sale to the guardian who is entitled to the custody and management of his estate, if the guardian has executed an undertaking, approved by a judge of the court, that he will faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled thereto, or his representatives. (4422) [8058]

9555. Proceedings when state a party—The state may be made a party to an action for the sale or partition of real property, in which case the summons and complaint shall be served upon the attorney general, who shall appear on behalf of the state. (4423) [8059]

ACTIONS TO TRY TITLE

9556. Action to determine adverse claims—Any person in possession of real property by himself or his tenant, or any person having or claiming title to vacant or unoccupied real property, may bring an action against any person who claims an estate or interest therein, or a lien thereon, adverse to him, for the purpose of determining such adverse claim and the rights of the parties, respectively. (4424) [8060]

1. Nature and object of action—2-153, 129; 6-177, 111; 27-92, 6+445; 28-413, 10+424; 33-357, 23+527; 43-346, 46+238; 45-412, 48+13; 49-91, 51+662; 85-333, 88+992; 150-513, 185+953.

1½. Action to quiet title.

The propriety of a sale of real estate by an executor, under a license from the probate court, may not be attacked in an action to quiet title against the purchaser at the executor's sale; the remedy being by appeal from the order granting the license to sell. 161-252, 201+422.

In an action to quiet title, where the summons were served by publication and judgment entered quieting title in the plaintiff, and the defendant, through whom plaintiff claims title, was known to have died, leaving heirs and devisees, who were not made parties, appellant, being one of them, subsequently appears in the action and asks to have the judgment opened as to her, with leave to answer and defend upon the grounds of mistake, inadvertence, and excusable neglect, the decision is adverse to her, and she fails to appeal, therefore the judgment becomes binding against her. 161-372, 201+605.

2. One adverse claim—An action will lie under the statute for the determination of one adverse claim, which may be specified in the complaint, and if a complaint to remove a cloud cannot be sustained as such it may be sustained as a complaint under the statute, if its allegations are sufficient for that purpose (77-20, 79+587, overruling 28-413, 10+424; 30-433, 16+873; 68-273, 71+2).

3. Interests determined—Any interest or estate in or a lien on land claimed adversely to plaintiff, whether claimed under the same or a different and independent source, may be determined (5-223, 178; 21-308; 27-92, 6+445; 31-77, 16+493; 31-244, 17+381; 33-357, 23+527; 45-412, 48+13; 49-91, 51+662; 52-484, 55+54; 54-9, 55+745; 65-191, 68+9; 65-466, 68+98). 129-238, 152+405. Tax title failing lien is enforceable (135-187, 160+490).

4. Who may maintain action—Equitable owner (31-77, 16+493; 69-547, 72+794), owner of fee and owner of timber on land (80-348, 83+156). One having no property interest and not in possession cannot maintain (40-485, 42+392; 65-466, 68+98; 72-138, 75+5). Owner of city assessment certificate on vacant land, on which notice of expiration of redemption had been given, but who was not entitled to and had not received deed because of failure to pay subsequent assessments, could not maintain (98-416, 108+840; 99-513, 108+1118). Action by purchaser at tax sale of vacant and unoccupied land (110-79, 124+632). See 120-187, 139+485; 126-223, 148+275. Equitable title owner against holder of legal title (139-156, 166+183; 139-220, 166+187).

5. Possession—An action will lie under the statute by a party who is in possession of land, whether he has any property interest in it or not, but the possession for this purpose must be actual and not merely constructive (2-153, 129; 5-223, 178; 8-403, 359; 12-153, 89; 12-192, 116; 15-182, 139; 16-457, 411; 16-521, 27-92, 6+445; 33-403, 23+546; 35-318, 29+129; 36-314, 31+51; 38-384, 37+

799; 51-116, 52+1127; 64-513, 67+632; 65-466, 68+98). A party who is in actual possession of a part of a tract himself and in possession of the remainder by a tenant may maintain an action on the whole tract (83-206, 86+11). Whether plaintiff is or is not in possession of the land is vacant or not does not go to the merits of the controversy, and if defendant in his answer demands affirmative relief he waives all question as to possession or vacancy (31-264, 17+476; 39-35, 38+757; 41-163, 42+870; 41-250, 42+1016; 47-535, 50+610; 56-60, 57+320; 62-310, 64+903; 73-5, 75+746; 77-20, 79+587; 88-349, 93+117). Plaintiff need not prove possession of all the land described in complaint. He may succeed as to a part and fail as to the remainder (77-512, 80+629). Tenant of buildings on land held under lease by another does not, by accepting lease of land from stranger before expiration of lease without consent of his landlord or lessee, place stranger in possession so as to enable him to maintain action (99-11, 108+867).

The finding that the plaintiff was in such possession of land as to maintain the statutory action to determine adverse claims is sustained. 167-356, 209+257.

The possession of successive occupants who are in privity may be taxed to make possession for the statutory period. 167-356, 209+257.

The finding of the necessary elements to constitute adverse possession is sustained. 167-356, 209+257.

Possession beyond a boundary line, under mistake as to the true line, but with an intent to appropriate, is adverse. 167-356, 209+257.

5½. Construction of will.

The district court, being a court of general jurisdiction, may, as an incident to an action to determine adverse claims, in order to effectuate its judgment, construe a will, which has been admitted to probate, although it has not been construed by the probate court. 211+465.

6. Complaint—Not necessary to anticipate or state nature of adverse claim. It is not necessary to state that the claim of the defendant is invalid or that he does plaintiff any injury in making it. All that the complaint need allege of defendant is that he has or claims some estate or interest in or lien on the land (27-92, 6+445; 28-413, 10+424; 49-91, 51+662; 68-273, 71+42). The statutory conditions entitling plaintiff to relief must be alleged (40-485, 42+392). Plaintiff need not allege his title in detail (91-84, 97+575). If plaintiff is in actual possession he need only allege such possession and that defendant claims an estate in or interest in the land (see cases under note 5 supra). When the land is vacant plaintiff must allege some title or interest in himself (32-153, 19+736; 35-318, 29+129; 40-485, 42+392; 41-344, 43+71; 52-443, 54+484; 62-429, 64+920; 72-138, 75+5). If he is the equitable owner he must allege the facts giving rise to his equity (43-26, 44+522). See 49-91, 51+662). He must allege that the land is vacant or unoccupied (16-457, 411; 40-485, 42+392). It is not sufficient for him to allege that he "claims" title (35-318, 29+129). The adverse title of the defendant may be specified (77-20, 79+587).

7. Answer—If defendant asserts title he should set it forth as if he were plaintiff (28-413, 10+424; 49-91, 51+662; 86-165, 90+369). He may set up a claim from several sources (33-49, 21+861). If his title is an equitable one he must state the facts giving rise to his equity (49-91, 51+662). It is for defendant to disclose the nature of his claim in his answer (27-92, 6+445; 43-346, 46+238; 49-91, 51+662). He is limited to the title so disclosed (80-348, 83+156). Claim not asserted is waived (21-449). Pleading pendency of prior proceeding to register title wherein plaintiff was made defendant and appeared (127-416, 149+735).

8. Reply—When defendant asserts a legal title a plaintiff in possession may in reply plead facts showing an equitable title of such a nature that it should prevail over the legal title (5-223, 178; 31-77, 16+493; 54-9, 55+745; 72-138, 75+5). Various forms of replies—issues which may be raised by replies (21-431; 21-449; 31-505, 18+645; 39-431, 40+565; 40-319, 41+1054; 54-9, 55+745; 65-191, 68+9; 65-466, 68+98; 72-138, 75+5; 79-264, 82+581; 80-348, 83+156).

8½. Issues.

No issue as to the court's jurisdiction to render a judgment for the foreclosure of a mortgage was raised by the pleadings, in an action brought to vacate the judgment and remove a cloud on respondent's title, caused by the foreclosure and redemption proceeding. 212+905.

8¾. Evidence.

Evidence bearing upon the proposition that there was an irrevocable delivery of the deed is so against such delivery that there should be a resubmission of the case in the interests of justice. 164-384, 205+434.

Evidence examined, and held sufficient to sustain the finding that there was a delivery of the deed under which defendants claim title to the premises involved. 209+752.

9. Judgment—Contingent interest determined by (85-333, 88+992). Force of to convey title (93-150, 102+381).

Forms of judgment considered (32-153, 19+736; 33-357, 23+527; 40-439, 42+296). Not for recovery of possession (50-284, 52+643; 60-506, 72+796). On disclaimer (30-11, 13+911, 14+879). When defendant asserts no interest in himself (31-244, 17+381). Judgment adjudging that defendant by virtue of paramount title is owner in fee and in possession, and that plaintiff has no title or interest, is evidence of constructive eviction of plaintiff (103-272, 114+840). Judgment awarding relief beyond prayer or scope of complaint, the excessive relief appearing from face of the record, is void (101-169, 112+386). Finality of judgment of a Minnesota court (201 Fed. 47). Invalidity of plaintiff's tax title does not warrant judgment for defendant, it appearing defendant's claim to title was bad (121-340, 141+293). Judgment was no bar against asserting equitable rights in subsequent action (126-1, 147+662; 130-405, 153+758). Judgment not an adjudication of mortgagor's right to rents, etc., under lease (135-444, 161+165).

9557. Unknown defendants—In any action brought under § 9556, the plaintiff may insert in the title thereof, in addition to the names of such persons as are known or appear of record to have some right, title, estate, interest, or lien in or on the real property in controversy, the following: "Also all other persons unknown claiming any right, title, estate, interest, or lien in the real estate described in the complaint herein." Service of the summons may be had upon all such unknown persons defendant by publication in the same manner as against non-resident defendants, upon the filing of an affidavit of the plaintiff, his agent or attorney, stating the existence of a cause of action under § 9556, and if in addition to the above known or unknown defendants, the heirs of a deceased person are proper parties defendant, and their names are unknown, and such affidavit shall further state that the heirs of such deceased person are proper parties to such action, and that their names and residences cannot with reasonable diligence be ascertained, then service of summons may be made on such unknown heirs by publication thereof in the same manner as against non-residents, and in such case the plaintiff may insert in the title thereof the following: "Also the unknown heirs of (naming him) and all other persons unknown claiming any right, title, estate, interest, or lien in the real estate described in the complaint herein." The plaintiff shall, before the commencement of such publication, file with the register of deeds a notice of the pendency of the action, a copy of which shall be published in the same newspaper with, and immediately following, the summons, but on publishing such notice of his pendency it shall not be necessary to republish the names of the parties to said action and shall be sufficient to state in lieu thereof the following: "same parties as in summons immediately preceding this notice." All such unknown persons so served shall have the same rights to appear and defend before and after judgment as would named defendants upon whom service is made by publication, and any order or judgment in the action shall be binding upon them, whether they be of age or minors; but, if they be minors when judgment is rendered, they may be allowed to defend at any time within two years after becoming of age. (R. L. '05 § 4425, G. S. '13 § 8061, amended '19 c. 344 § 1; '23 c. 434 § 1)

Explanatory note—Laws '23, c. 434, § 2 repeals G. S. '13, § 8024.

Constitutional (46-174, 48+773). Order of court unnecessary (84-329, 87+838). Construed strictly. Record owner must be named (46-174, 48+773; 46-180, 48+775. See 89-454, 95+317, 895, 96+704). Jurisdiction over unknown parties acquired though named record owner dead when action begun (53-197, 55+117; 81-329, 87+838). Published summons must contain names of parties known and of all who appear by record to have interest. Reasonable diligence must be exercised to ascertain party (46-174, 48+773). Opening default by "parties unknown" (39-73, 38+889; 44-392, 46+766; 93-249, 101+304). Cited (39-35, 38+757; 92-2, 99+209; 113-433, 129+853). Failure in publication as to designated unknown defendants is fatal (123-200, 143+361).

161-372, 201+605, note under § 9556; 211+686, note under § 8316.

9558. Disclaimer—Default—Costs—If the defendant, in his answer, disclaims any interest in the property, or suffers judgment to be taken against him without answer, the plaintiff cannot recover costs; but if the summons has been served upon the defendant personally, and it is made to appear that after the accrual of the cause of action, and before commencement thereof, the plaintiff demanded in writing of the defendant, and the defendant neglected to execute within a reasonable time thereafter, a good and sufficient quitclaim deed of the property described in the complaint, upon tender of such deed ready for execution, the plaintiff shall nevertheless recover his costs. (4426) [8062]

Disclaimer (15-245, 190; 30-11, 13+911, 14+879; 31-244, 17+381; 46-260, 48+1124; 62-428, 64+920). Cited (12-192, 116). 126-223, 148+273; 154-128, 191+247.

9559. Claimants under common grantor—Joinder—When lots or tracts of real estate are claimed in severalty by two or more persons from or under conveyance from the same grantor, as the common source of title, and an adverse claim of title thereto is made by some person as against the title of such grantor, any one claiming under such grantor may bring an action in behalf of himself and all others who may come in and become parties thereto against such adverse claimant, to have the title of such grantor perfected or quieted as to such lots or tracts claimed by the plaintiff and the others who may become parties. Any person who so claims under the same grantor as the plaintiff, and whose title is controverted by the same defendant upon the same ground as the title of the plaintiff, may become a party, as of course, by filing a complaint setting forth the property he claims and his source of title, and may have his rights adjudicated with those of the original plaintiff. The answer of the defendant shall be taken as an answer to all who may thus become parties. (4427) [8063]

48-501, 51+614; 149-92, 182+911.

'19 Ex. Sess. c. 5, renders effective judgments entered in actions brought by two or more persons to determine adverse claims to real estate, with provision for ex parte application, on or before January 1, 1920, but not thereafter, for leave to appear and defend.

'21 c. 163, renders effective judgments entered and to be entered, in actions by two or more persons to determine adverse claims to real estate, or to quiet title thereto, and in then pending actions in which judgment may be entered within three months after April 7, 1921, with provision for ex parte application on or before January 1, 1922, but not thereafter, for leave to appear and defend.

9560. Action against cotenant—Denial of right—In an action by a tenant in common or joint tenant of real property against a cotenant, the plaintiff shall show, in addition to the evidence of his right, that the defendant either denied the plaintiff's right, or did some act amounting to such denial. (4428) [8064]

151-363, 186+812.

Where one cotenant farms a tract of land without excluding the others, the crops so raised belong to him, and he is not liable to his cotenants for rents and profits. 161-255, 201+437.

Conceding plaintiff stood in a confidential relation to his weak-minded brother and sister, his cotenants of the farm upon which all made their home, the stock and personal property he used in the farming were his and his operation of the farm under the circumstances did not withdraw from him his legal rights of non-liability for rents and profits. 161-255, 201+437.

The duration of the restraint upon the acquisition and assertion of a paramount adverse title by a tenant in common is coextensive with the existence of the cotenancy; it does not continue after the common interest is at an end. 164-160, 204+958.

The facts pleaded do not fairly warrant the inference

that, at the expiration of the time to redeem from the foreclosure of a mortgage, the former owners of the land retained possession as tenants in common. 164-160, 204+958.

9561. Termination of plaintiff's right pending action—In an action for the recovery of real property, when the plaintiff shows a right to recover at the time the action was commenced, but it appears that such right has terminated during the pendency of the action, the verdict and judgment shall be according to the fact, and the plaintiff may recover damages for withholding the property. (4429) [8065]

17-215, 188.

9562. Ejectment, etc.—Trial, how conducted—No second trial—That hereafter the trial of all actions of ejectment or of any other action in the courts of this state involving the possession of real estate shall be conducted as are other civil actions, and the right to a second trial of such actions as heretofore allowed by the laws of this state is hereby abolished. ('11 c. 139 § 1) [8066]

Section 2 repeals R. L. §§ 4430, 4431, providing for a second trial in ejectment.

122-158, 142+150.

9563. Ejectment — Damages — Improvements — Damages for withholding the property recovered shall not exceed the fair value of the use of the property, exclusive of the use of improvements made by the defendant, for a period not exceeding six years; and, when permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claims of the plaintiff, in good faith, the value thereof shall be allowed as a setoff against the damages of the plaintiff. (4432) [8068]

32-189, 20+144; 37-157, 33+326; 147-215, 179+909; 151-363, 186+812.

9564. Removal of building erected in good faith—When any person, in good faith and under color of title, and with good reason to believe that the legal title to land is vested in him, has erected any building or other structure thereon, when the legal and equitable title thereto was vested in another, such person may remove the same, doing no unnecessary damage, and in so doing shall be liable only for the actual damage to the land. Such removal shall be made within sixty days after the determination adversely to him of any action or proceeding respecting the title, or within sixty days after notice from the holder of the legal title to remove the same: Provided, that if, within sixty days after receiving such notice, such person brings action to try such title, he may make such removal within sixty days after the determination thereof. (4433) [8069]

40-397, 42+202.

9565. Occupying claimant—Compensation for improvements—When any person, under color of title in fee and in good faith, has peaceably taken possession of land for which he has given a valuable consideration, or when any person has taken possession of land under the official deed of any person or officer empowered by law or by any court of competent jurisdiction to sell land, and such deed is regular upon its face, and he has no actual notice of any defects invalidating the same, neither such person, nor his heirs, representatives, or assigns, shall be ejected from such land, except as hereinafter provided, until compensation is tendered him or them for such improvement which he or they have made upon such land previous to actual notice of the claim upon which the action is

founded, or, in case of possession under an official deed, previous to actual notice of defects invalidating the same. The word "improvement" shall be construed to include all kinds of buildings and fences, and ditching, draining, grubbing, clearing, breaking, and all other necessary or useful labor of permanent value to the land. When the occupant holds as heir, devisee, or grantee, either immediate or remote, of any person who is not a resident of the state, the good faith of the original taker shall be presumed. (4434) [8070]

1. Object and justification of act—22-488; 30-372, 15+665; 37-157, 33+326; 40-450, 42+352; 55-202, 56+824.

2. Right statutory—22-488, 30-372, 15+665; 51-349, 53+713.

3. Who may claim—Heirs, representatives and assigns (55-202, 56+824. See 30-372, 15+665; 32-527, 21+717). Tenant for life (40-450, 42+352).

4. What is color of title—27-60, 6+403; 27-449, 8+166; 29-264, 13+45; 30-372, 15+665; 32-527, 21+717; 37-157, 33+326; 71-360, 74+142; 93-106, 100+636; 95-309, 104+290.

5. What is an official deed—24-372; 29-264, 13+45; 37-157, 33+326; 38-433, 38+106; 55-202, 56+824.

6. Notice—Good Faith—23-386; 27-60, 6+403; 30-372, 15+665; 38-433, 38+106; 55-202, 56+824; 93-106, 100+636.

7. No compensation for improvements—(143-40, 172+913; 147-319, 180+235).

8. Peaceable entry presumed—27-60, 6+403.

9. Improvements defined—93-106, 100+636.

10. Constitutional questions—22-488; 24-372; 46-458, 49+238; 47-59, 49+396.

9566. Pleadings—Trial—Verdict—In an action to try the title to land, brought by any person claiming title thereto against the occupant, the occupant may, in addition to other defences, allege the amount and value of all improvements made, and the amount of all taxes and assessments paid, by himself or those under whom he claims, and, if the claim be under an official deed, the purchase money paid therefor; and the claimant may reply, alleging the value of the premises without improvements at the commencement of the action, and also the value of the yearly rent of the land without improvements during the possession of the occupant. In any such action brought by the occupant against a claimant to quiet title or to determine any adverse claim, the claimant, in his answer, in addition to setting up his title, may allege the value of the premises without improvements at the commencement of the action, and also the value of the yearly rent of the land without improvements during the possession of the occupant; and the occupant may, in addition to other proper matters of reply, allege the amount and value of all improvements made, and the amount of all taxes and assessments paid by himself or those under whom he claims, and, if the claim be under an official deed, the purchase money paid therefor. In case the title be found to be in the claimant, the jury, or, if the case be tried without a jury, the court, shall assess the value of all improvements made and taxes and assessments paid upon the land by the occupant, or those under whom he claims, with interest at six per cent., and, if he claims under an official deed, regular upon its face, and without actual notice of any defect invalidating it, shall also find the purchase money paid by him, or those under whom he claims, with interest at six per cent.; and the jury or court shall also assess the value of the land at the commencement of the action, without improvements, and also the value of the yearly rent thereof during the occupant's possession. If the land has depreciated in value since its purchase at an official sale, the jury or court may allow such part only of the purchase money as, in their discretion, they may see fit. (4435) [8071]

1. Pleading—22-541; 38-433, 38+106; 84-502, 87+1115; 85-359, 88+988.

2. **Burden of proof**—27-60, 64403; 29-264, 13445; 30-372, 154665; 32-527, 214717; 38-433, 384106; 55-202, 564824.

3. **Evidence**—Receipt of treasurer is evidence of payment of taxes. Good faith may be proved by direct testimony of occupant. Value of improvements may be proved by evidence of cost (27-60, 64403).

4. **Taxes**—Recovery can be had only for such taxes as were a valid charge on the land (24-372). Owner must be given opportunity to contest validity of taxes claimed (see 84-53, 864375). Taxes must have been paid by occupant when in actual possession under color of title in good faith and without notice (27-411, 84142; 60-328, 624395).

5. **When improvements must have been made**—27-60, 64403; 30-272, 154665; 37-157, 33326. See 32-200, 84733.

6. **Interest**—24-372; 39-470, 404575.

7. **Directing verdict**—35-337, 294130.

8. **Order of proof**—39-431, 404565.

9567. Compensation before execution—If the claimant succeed in the action, execution for possession shall not issue, except as herein provided, unless, within one year from entry of judgment on the verdict or findings, the claimant pay into court for the occupant the amount so found as the value of the improvements, and also the amount of the taxes and assessments, and also the purchase money, if the occupant claim under an official deed as aforesaid, with interest thereon as aforesaid, less the assessed value of the yearly rent of the land without the improvements during the occupant's possession. (4436) [8072]

39-470, 404575; 46-458, 49238; 47-59, 494396.

9568. Occupant to pay value of land, when—Unless the occupant claims under an official deed given either to himself or those under whom he claims, as hereinbefore provided, or under an entry in the land office of the United States, or the official certificate, duplicate or receipt thereof, or unless the claimant has had notice, actual or constructive, of the occupant's possession, the claimant may, within thirty days after entry of judgment on the verdict or findings in his favor, serve upon the occupant a written demand that within one year he pay the claimant the sum assessed as the value of the land without the improvements, less the taxes and assessments paid thereon as aforesaid, with interest as aforesaid. Such demand shall be served, and the service proved, as in the case of a summons, and shall then be filed with the clerk. If the occupant do not within one year after such service pay into court the amount so demanded, he shall forfeit all claim to compensation, and execution may then issue for the possession of the land; but, if he do so pay, the court shall by judgment confirm the title in him. (4437) [8073]

38-433, 384106. See 40-94, 414453; 40-450, 424352; 79-423, 824677.

9569. May remove crops—In case of ejection, the occupant shall be entitled to enter upon the land, and gather and remove all crops sown thereon prior to entry of judgment against him. (4438) [8074]

79-304, 824585.

167-413, 209437.

9570. Occupant not in actual possession—Actions in other form—All the provisions of §§ 9565-9569 shall apply to cases where the occupant is not, as well as where he is, in actual possession. In case an action is brought for damages for trespass upon such land, or for the rents and profits or use and occupation thereof, or in any other form, if the action is one in effect to test the validity of the title thereto, all said sections shall, so far as possible, be complied with; and the value of all improvements, taxes, and assessments, and the purchase money in case the occupant claims under an official deed, with interest as aforesaid, shall be set

off against any judgment for money that the claimant may obtain; and, if any excess remain in favor of the occupant after such setoff, such excess may be set off against any judgment that the claimant, or those claiming under him, may subsequently obtain in any such or similar action relating to the same land. (4439) [8075]

Claim may be asserted and adjudged in any action the result of which may determine and cut off the claim to a lien. It may be asserted and determined in an action of partition (40-450, 424352. See 19-167, 129); in a statutory action to determine adverse claims (27-411, 84142; 39-431, 404565; 40-450, 424352. See 39-35, 384757); in an action in the nature of ejectment (22-541); in an action to redeem from a tax sale by a person who has been under a disability (27-97, 64452). It cannot be asserted in an action under 1887 c. 127 to test a tax title (38-27, 354666). If claim cannot be asserted in the particular action it may be asserted subsequently in a proper action (38-27, 354666; 39-35, 384757). No action against mere trespasser (123-450, 1434128).

9571. Order for survey—When an action for the recovery of real property is pending, upon motion of either party, and for cause shown, the court may make an order describing the property, and allowing such party to enter thereon and make survey thereof for the purpose of the action. A copy of the order shall be served on the owner or occupant, and thereupon such party may enter upon the property, with necessary surveyors and assistants, and make such survey; but, if any unnecessary injury is done to the property, he is liable therefor. (4440) [8076]

9572. Mortgagee not entitled to possession—A mortgage of real property is not to be deemed a conveyance, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure. (4441) [8077]

122-235, 142498; 135-446, 161465; 145-192, 176445. Appointing receiver of accruing rents (155-283, 1934453).

In the absence of physical waste, or other improper and prejudicial conduct on the part of one in the possession and control, as the assignee of the owner, of a mortgaged apartment building, there is no ground for the appointment of a receiver of the rents and profits pending the foreclosure of a second mortgage, where the one so in possession has expended upon the property for taxes, and to apply upon both the first and second mortgage, an amount largely in excess of the net rents and profits received by him. 2104388.

9573. Conveyance by mortgagor to mortgagee—No conveyance absolute in form between parties sustaining the relation of mortgagor and mortgagee, whereby the mortgagor or his successor in interest conveys any right, title or interest in real property theretofore mortgaged, shall be presumed to have been given as further security, or as a new form of security, for the payment of any existing mortgage indebtedness, or any other indebtedness, or as security for any purpose whatsoever. ('13 c. 209 § 1) [8078]

128-126, 1504396; 128-398, 1514132; 143-266, 173431; 148-8, 18041004.

The evidence sustains the finding of the trial court that a deed given by the defendant Albert Woolery to his brother, the defendant Roy Woolery, was intended as a mortgage. This holding is made having in view the rule, announced in Young v. Baker, 128 Minn. 398, 151 N. W. 132, that evidence to prove a deed a mortgage must be clear, strong, and convincing. 156-193, 194753.

In an action at law, a deed absolute on its face may be shown to be in fact a mortgage, without bringing a bill in equity to have it declared. 161-157, 201299.

If a deed was given as security, the fact that it contains no statement of the amount of the debt will not defeat an action brought to have the deed declared to be a mortgage registry tax imposed by section 2302, G. S. 1913, defeat the action. 161-391, 2014623.

The finding that the deed in controversy was given as security and is in fact a mortgage is sustained by the evidence. 163-242, 2034961.

9574. Action to declare mortgage—Limitation—No

action to declare any such conveyance a mortgage shall be maintained unless commenced within fifteen years from the time of execution thereof. ('13 c. 209 § 2) [8079]

148-8, 180+1004.

9575. To what conveyances applicable—This act shall apply to all conveyances past and future, but shall not be held to apply to any action heretofore commenced or now pending in any of the courts of this state. ('13 c. 209 § 3) [8080]

148-8, 180+1004.

'17 c. 401, legalizes as a mortgage or security for debt any instrument relating to real estate made prior to January 1, 1916, which is absolute in form but given and intended as security for a debt and in which the fact that it is so intended and the amount of such debt are not expressed.

9576. Notice to terminate contract of sale—Service and return—Reinstatement of contract—When default is made in the conditions of any contract for the conveyance of real estate or any interest therein, whereby the vendor has a right to terminate the same, he may do so by serving upon the purchaser, his personal representatives or assigns, either within or without the state, a notice specifying the conditions in which default has been made, and stating that such contract will terminate thirty days after the service of such notice unless prior thereto the purchaser shall comply with such conditions and pay the costs of service. Such notice must be given notwithstanding any provisions in the contract to the contrary, and shall be served within the state in the same manner as a summons in the district court, without the state, in the same manner, and without securing any sheriff's return of not found, making any preliminary affidavit, mailing a copy of said notice or doing any other preliminary act or thing whatsoever. Service of said notice without the state may be proved by the affidavit of the person making the same, made before an authorized officer having a seal, and within the state by such an affidavit or by the return of the sheriff of any county therein.

Provided, however, that three weeks' published notice, and if the premises described in said contract are actually occupied, then in addition thereto, the personal service of a copy of said notice within ten days after the first publication of said notice, and in like manner as the service of a summons in a civil action in the district court upon the person in possession of said premises, shall have the same effect as the personal service of said notice upon said purchaser, his personal representatives or assigns, either within or without the state as herein provided for; and provided further, that in case of such service by publication as herein provided, the said notice shall specify the conditions in which default has been made and shall state that such contract will terminate ninety days after the service of such notice, unless prior thereto the purchaser shall comply with such conditions and pay the costs of service, and the purchaser, his personal representatives or assigns, shall be allowed ninety days from and after the service of such notice to comply with the conditions of such contract.

If within the time mentioned the person served complies with such conditions and pays the costs of service, the contract shall be thereby reinstated; but otherwise shall terminate. A copy of the notice with proof of service thereof, and the affidavit of the vendor, his agent or attorney, showing that the purchaser has not complied with the terms of the notice, may be recorded with the register of deeds, and shall be prima facie

evidence of the facts therein stated; but this act shall in no case be held to apply to contracts for the sale or conveyance of lands situated in another state or in a foreign country. (R. L. '05, § 4442; amended '13, c. 136, § 1; '15, c. 200, § 1; '25, c. 163, § 1)

Explanatory note—Laws 1927, c. 222 reads as follows: "Section 1. That in all cases where a contract for the purchase or sale of real estate has been foreclosed or cancelled between July 17, 1926, and November 26, 1926, and such foreclosure or cancellation is defective by reason of the fact that prior thereto no mortgage registration tax has been paid on said contract, such foreclosure or cancellation, and all proceedings in connection therewith and the records thereof, if any, shall have been made, are hereby legalized and made as valid and effectual to all intents and purposes and of the same force and effect in all respects for the purpose of notice, evidence, validity, foreclosure, cancellation and in all respects, the same as if such mortgage registration tax had been paid prior to the time of the commencement of any such proceedings, provided, that said mortgage registration tax on any such contract shall be paid in full before the trial of any action commenced by the vendee of any such contract subsequent to the passage of this act; and provided however that said mortgage registration tax must be paid in any event prior to June 1, 1927, in order for any cancellation proceeding to be validated under the provisions of this act.

"Sec. 2. Any person, persons, copartnership or corporation as vendee holding any contract for the purchase or sale of real estate which said contract has been heretofore foreclosed or cancelled, or attempted to be foreclosed or cancelled, and the mortgage registration tax was not paid, said person, persons, copartnership, or corporation shall have until July 1, 1927, to assert any rights they may have under and by virtue of said contract, or be forever barred from asserting same, provided, that nothing in this act shall be held to apply to any action heretofore commenced or now pending in any of the courts of this state."

1. In general.

Previously amended by 1909 c. 355. Applicable only to contracts of actual purchase and not to agreements amounting to mere options depending upon some contingency (85-130, 88+410, 744; 92-328, 100+9. See 90-197, 95+898). Time limited by notice absolute. Statute exclusive mode of limiting right of vendees (83-362, 86+336; 89-187, 94+555; 109-139, 123+292). Where contract for purchase of land in Colorado was executed, and payments were to be made in Minnesota, though it provided that contract should be void on default in payments at stipulated time, 1897 c. 223, requiring notice, applied (102-334, 113+883). Followed (109-136, 123+291; 114-339, 131+371). 1897 c. 223 constitutional (109-136, 123+291; 114-339, 131+371). The vendor in an executory contract made and to be performed within the state for the sale of land in another state is not deprived of his property without due process by applying, in an action by the vendee against him for his refusal to perform, the provision of 1897 c. 223. Nor is an extraterritorial effect thereby given to the act. Nor is the equal protection of the laws, thereby denied to the vendor (33 Sup. Ct. 69, 226 U. S. 112, 57 L. Ed. —). Sufficiency of notice (111-365, 127+43). Notice held not operative (140+132). Service on vendee named in contract sufficient in absence of notice of its assignment (111-365, 127+43). Notice may be served on bankrupt vendee before appointment of trustee (118-42, 136+289). Cited (86-52, 90+11, 793; 86-509, 91+29; 89-319, 94+1085; 1135; 89-513, 95+455; 90-230, 96+335, 787; 93-437, 101+792; 93-485, 101+655). 1897 c. 223 cited (97-385, 107+397). See, also, 98-366, 108+299. Not an option contract but one for sale of land (125-450, 147+443). Contract executed in Minnesota for land in foreign state may be within this section (126-75, 147+950; 126-231, 148+68). Vendee cannot reinstate contract after expiration of period of notice by making claim for damages (127-91, 148+895). Statute is exclusive, without relieving vendee of effects of abandonment (132-346, 157+589). Injunction (132-385, 157+587). Statute not preventing abandonment (136-295, 161+588; 143-262, 173+431). No refund of payments (147-355, 180+227). Removal of default reinstates contract (149-479, 184+34). After service of notice injunction does not lie (150-411, 185+647). When rescinded, notice is ineffective (151-268, 187+137). Inapplicable to option (151-493, 187+518; 152-324, 188+997; 152-331, 188+732; 154-8, 190+980; 154-151, 191+422). Applicable to executory contract to convey ground lease (154-225, 191+823).

2. Notice to terminate.

165-262, 206+168; 167-384, 209+22; 212+908.

Where the notice served was invalid because the tax was not paid and the vendors entered and took possession of the premises, relying upon such invalid notice, and thereafter retained possession to the exclusion of the vendees, such possession and exclusion is unlawful, and amounts to a repudiation of the land contract. 157-97, 195+635.

The vendors in an executory contract for the sale of land, under which the vendees went into possession, may not terminate the contract or divest them of their interest therein and right of possession by serving a notice of cancellation, on account of default in payments, without first paying the registration tax on the contract. 157-97, 195+635.

The statute does not require such notice to specify the amount claimed to be due. 158-217, 197+209.

The vendee loses all right at the expiration of the 30 days. 158-217, 197+209.

An erroneous allegation in the original complaint to the effect that the amount in default covered all money unpaid, which is corrected in an amended complaint, does not put a construction on the notice itself so as to render it void. 158-217, 197+209.

A vendee in default must do more than to show that a third person was ready, willing, and able to furnish the money for him. He must tender payment. 158-217, 197+209.

A notice to terminate a contract for deed for default in payment is sufficient in respect to signature when it describes the contract so that it could be identified, even though it is unsigned by the owner, but is signed by her attorney individually, but to the left of the signature is the attorney's name followed by language showing that he is the attorney for the owner. 158-217, 197+209.

A mortgagee of the vendee in a contract for deed is included in the word "assigns." 159-119, 198+127.

The recording of such mortgage is constructive notice to the vendor, and, like actual knowledge, requires the vendor to serve notice of cancellation upon such mortgagee in order to terminate his rights in the interest of the vendee under the contract. 159-119, 198+127.

Where, pending an action by a vendee of real estate in possession to recover damages from the vendor for alleged fraud inducing the contract, and to have them applied in reduction of the unpaid portion of the purchase price, the vendor serves the statutory notice of cancellation of the contract, equity cannot vacate, pendente lite and by a temporary injunction, the service of the notice; but, temporarily and pending the action for fraud, it may enjoin the vendor from recording proof of the cancellation or taking any step to oust the vendee from possession. 160-307, 200+90.

The cancellation of the defendant's contract of purchase, by notice under the statute, divested his equitable title, and the intervener then had no lien. 161-413, 201+612.

Where the vendor in an executory contract conveys the title of the land to several parties, all must join in giving the statutory notice to terminate the contract, as their relation to the contract is joint, not several, and such notice given by one alone is of no effect. 166-153, 207+311.

Does not require notice to be served on a judgment creditor of the purchaser, as he is not an "assign." 211+827.

Without deciding whether an executory contract for the sale of real and personal property can be canceled by giving the statutory notice, it is held that, the parties having provided in the contract for the kind of notice of cancellation required to terminate it, and such notice having been given, it operated to terminate the vendee's rights under the contract. 213+551.

A notice of cancellation signed by the attorney in fact of the vendor's assignee, in behalf of the assignee, is sufficient. 213+551.

After an executory contract for the sale of land has been canceled by the statutory notice for the default of the vendee, the vendor can no longer recover the unpaid portion of the purchase price for which the contract provided. 213+563.

The evidence supports a finding that, in lieu of the initial or down payment for which the contract provided, the vendor accepted the note of the vendees, secured by a real estate mortgage. 213+563.

The facts found by the trial court are sustained by the evidence and warrant a judgment affirming the title of defendant as the assignee of the vendee in the land contract described in the complaint, upon condition that defendant first pay plaintiffs the amount, with interest, which they paid the vendor to prevent cancellation of the contract after its assignment to defendant. But the evidence and facts found do not authorize a personal judgment against defendant for the amount so paid. 160-288, 199+925.

3. Exclusiveness of remedy.

Is not exclusive of the remedy by action. The statutory remedy, while in the nature of a strict foreclosure, is cumulative, and not exclusive of a strict foreclosure by action. 162-72, 202+70.

Executory contracts for the sale of real estate, whatever their form, may be terminated for the default of the vendee. 166-58, 206+948.

They may also be terminated by abandonment acquiesced in by both parties. 166-58, 206+948.

Where such a contract is terminated for the default of the vendee and he abandons the land, the owner takes possession of it before the crop matures, he is entitled to the crop as against the holder of a chattel mortgage given by the vendee. 166-58, 206+948.

This section does not provide exclusive remedy. 210+871.

4. Action for damages.

Action for damages for breach of contract to purchase. 159-364, 199+94.

9577. Conveyance by defendant in ejectment—Liability of purchaser—An action for the recovery of real property against a person in possession or in receipt of the rents and profits thereof cannot be prejudiced by an alienation made by him either before or after the commencement of the action; but in such case, if the defendant has no property sufficient to satisfy the damages recovered for the withholding of possession, such damages may be collected by action against the purchaser. (4443) [8082]

MISCELLANEOUS ACTIONS

9578. Reversioner, etc., may sue—A person seized of an estate in remainder or reversion may maintain a civil action for any injury done to the inheritance, notwithstanding an intervening estate for life or years. (4444) [8083]

9579. Action against cotenant—One joint tenant or tenant in common, and his executors or administrators, may maintain an action against his cotenant for receiving more than his just proportion of the rents and profits of the estate owned by them as joint tenants or tenants in common. (4445) [8084]

25-222; 29-87, 12+145; 29-252, 13+43 No recovery except for exclusion or on agreement (151-300, 186+811).

The plaintiff and the defendant owned a tract of land as tenants in common. They gave a mortgage. Afterwards defendant gave a mortgage upon his undivided one-half to the same bank. The plaintiff paid one-half of the mortgage first mentioned. Afterwards it was foreclosed. Within the year of redemption the plaintiff redeemed as part owner. By his redemption he obtained an equitable mortgage upon the undivided one-half interest of defendant for the amount which he paid in redemption and such mortgage is prior to the mortgage by defendant of his undivided one-half. 160-269, 199+881.

It is held that in this action for partition he is entitled to contribution for taxes and interest and money paid for necessary improvements, but must apply profits made, and for the balance he may have contribution of an undivided half. 160-269, 199+881.

9580. Nuisance defined — Action — Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance. An action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered. (4446) [8085]

12-451, 347; 16-355, 315; 17-215, 188; 18-260, 236; 27-245, 6+787; 33-516, 24+255; 72-259, 75+234; 116-467, 134+218. Private action when maintainable (123-323, 143+910). 125-230, 146+355. Cited (126-101, 147+955; 126-474, 148+312). Barns in residence district (131-347, 155+390). Village sewer (132-124, 155+1069). Whether public or private nuisance (136-158, 161+501).

There was evidence from which the jury could find an implied invitation or permission for the boy injured to use lift for amusement, and, such being the case, his contributory negligence in its use was a jury question. 160-162, 199+570.

In the absence of a finding that plaintiff and his family are supersensitive to distracting noises, it is to be assumed that they are persons of ordinary sensibilities. 160-335, 200+350.

Noises alone may be of such character and volume as to constitute a nuisance abatable during the usual hours of sleep, even though even greater and more distracting noises during other hours of the day may not be such. 160-335, 200+350.

A lawful business should not be destroyed or unreasonably hampered, except to the extent imperatively necessary for the reasonable protection of another's proper enjoyment of life or property. 160-335, 200+350.

The findings authorize the abatement of the noises found to constitute a nuisance; but the conclusions of law went too far in directing a judgment which enjoined matters not found to be abatable disturbances. 160-335, 200+350.

9580-1 to 9580-3. (See §§ 10123-1 to 10123-3, post.)

9581. Fence, etc., when nuisance—Any fence, or any other structure, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property shall be deemed a private nuisance. ('07 c. 387 § 1) [8086]

9582. Remedies—Any such owner or occupant injured, either in his comfort or in the enjoyment of his estate by such fence, or any other structure, may have an action of tort for the damage sustained thereby and may have such nuisance abated. ('07 c. 387 § 2) [8087]

9583. Action for waste—If a guardian, tenant for life or years, joint tenant, or tenant in common, of real property, commits waste thereon, any person injured by the waste may bring an action against him therefor, in which there may be judgment for treble damages, forfeiture of the estate of the party offending, and eviction from the property. Judgment of forfeiture and eviction can only be given in favor of the person entitled to the reversion, against the tenant in possession when the injury to the estate in reversion is adjudged in the action to be equal to the value of the tenant's estate or unexpired term, or to have been done in malice. (4447) [8088].

16-58, 46; 36-380, 31+357; 51-358, 53+805; 65-124, 67+657. Basis for damages (113-45, 128+1006).

9584. Waste pending year for redemption—Injunction—When real property is sold upon execution or under judgment or mortgage, until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, by order granted, with or without notice, on application of the purchaser or his assigns holding the certificate of sale; but it is not waste for the person in possession of the property at the time of sale, or entitled to the possession afterwards, during the time allowed for redemption, to continue to use it in the same manner in which it was previously used, or to use it in the ordinary course of husbandry, or to make the necessary repairs of the buildings thereon, or to use wood or timber on the property therefor, or for the repair of fences or for fuel for his family, while he occupies the property. (4448) [8089]

34-458, 26+631.

9585. Trespass—Treble damages—Whoever without lawful authority cuts down or carries off any wood, underwood, tree, or timber, or girdles or otherwise injures any tree, timber, or shrub, on the land of another person, or in the street or highway in front of any person's house, village, or city lot, or cultivated grounds, or on the commons or public grounds of any city or town, or in the street or highway in front thereof, is liable in a civil action to the owner of such land, or to such city or town, for treble the amount of

damages which may be assessed therefor, unless upon the trial it appears that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which the trespass was committed was his own, or that of the person in whose service or by whose direction the act was done, in which case judgment shall be given for only the single damages assessed. But this section shall not authorize the recovery of more than the just value of timber taken from uncultivated woodland for the repair of a public highway or bridge upon or adjoining the land. (4449) [8090]

22-537; 58-84, 59+831; 127-362, 149+462; 135-349, 160+863; 151-509, 187+611.

166-215, 208+3.

In an action to recover treble damages for the willful cutting of timber upon the land of another, held, that a finding of the jury that a written contract for cutting of timber the former season had not been extended is warranted by the evidence. 160-49, 199+889

The verdict was amply warranted by the evidence. 155-65, 205+701.

9586. Trespass after execution or foreclosure sale—When real property is sold on execution or under judgment or mortgage, the purchaser thereof, or any person who has succeeded to his interest, after his estate becomes absolute, may recover damages for injury to the property by the tenant in possession after the sale, and before possession is delivered under the conveyance. (4450) [8091]

9587. Forcible eviction—Treble damages—If a person who is put out of real property in a forcible manner without lawful authority, or who, being so put out, is afterwards kept out by force, shall recover damages therefor, judgment may be entered for three times the amount at which the actual damages are assessed. (4451) [8092]

34-470, 26+602.

9588. Forcible entry, etc.—Treble damages—In case of forcible entry and detention, if a person, claiming in good faith, under color of title, to be rightfully in possession, so put out or kept out, shall recover damages therefor, judgment may be entered in his favor for three times the amount at which the actual damages are assessed. (4452) [8093]

9589. Settler—Action for possession, etc.—Any person who has settled on not more than one hundred and sixty acres, consisting of not more than two distinct tracts, of the lands belonging to the United States, on which settlement is not prohibited by the general government, may maintain an action for injuries done thereto, or to recover the possession thereof, provided he has made improvements thereon of the value of fifty dollars, and has actually occupied or cultivated the same. A neglect to occupy or cultivate such land, continued for six months, shall be deemed an abandonment, and preclude such person from maintaining such action. (4453) [8094]

43-123, 44+1149. R. S. 1851 c. 88 (G. S. 1894 §§ 6128-6130) superseded by this section (114-398, 131+474).

9590. Action to determine boundary lines—An action may be brought by any person owning land or any interest therein against the owner, or persons interested in adjoining land, to have the boundary lines established; and when the boundary lines of two or more tracts depend upon any common point, line, or landmark, an action may be brought by the owner or any person interested in any of such tracts, against the owners or persons interested in the other tracts, to have all the boundary lines established. The court

shall determine any adverse claims in respect to any portion of the land involved which it may be necessary to determine for a complete settlement of the boundary lines, and shall make such order respecting costs and disbursements as it shall deem just. (4454) [8095]

76-496, 79-537, 602; 77-375, 79-1024, 82-1118; 78-515, 81-524; 88-273, 92-982; 89-31, 93-1038; 91-259, 97-889; 96-137, 104-759; 99-421, 109-821. Scope of action (101-356, 112-421). Lost corners,—rule for locating and correcting errors (121-189, 141-102). 125-259, 146-1106. Practical location of boundary line (121-468, 141-788). 125-365, 147-241; 129-9, 151-273; 124-233, 144-758. Reference to circumstances in case of doubt (124-332, 144-1089). Maintenance of fence not concluding owners as to boundary (126-206, 148-115). When meander line is determinative (126-214, 148-60).

From a consideration of the record and evidence in this case, held, that the findings made by the trial court as to the northwesterly corner of lot 15 in controversy are warranted by the proofs. 160-244, 199-966.

Action to locate a disputed boundary. The finding that plaintiff had been in possession of the strip of land in controversy for more than 15 years is not sustained by the evidence. 161-431, 201-919.

A judgment quieting title, to which an adjoining landowner is a party, does not preclude him from asserting that the boundary line between the two tracts has been established by a practical location thereof based on his adverse possession of the adjoining tract up to such line. 161-431, 201-919.

Evidence in a boundary line case held to sustain the finding of adverse possession by defendants. 165-293, 206-434.

9591. Pleadings—Additional parties—Such actions shall be governed by the rules governing civil actions, except as herein otherwise provided, but every allegation in every answer shall be deemed in issue without further pleading. When in any such action it appears to the court that any owner, lienholder, or person interested in any of the tracts involved ought, for a full settlement and adjudication of all the questions involved, to be made a party, the court shall stay the proceedings and issue an order requiring such persons to come in and plead therein within twenty days after service of the order, which shall be served upon them in the same manner as a summons in a civil action. Any person so served who shall fail to file an answer within twenty days thereafter shall be in default. All pleadings or copies thereof shall be filed before such order is made. The court may also, in its discretion, in like manner, order the owners and persons interested in other tracts than those originally involved to come in and plead, in which case the order shall describe such additional tracts, and state that the purpose of the action is to establish the boundary lines thereof. (4455) [8096]

91-259, 97-889.

9592. Judgment—Landmarks—The judgment shall locate and define the boundary lines involved by reference to well-known permanent landmarks, and, if it shall be deemed for the interest of the parties, after the entry of judgment, the court may direct a competent surveyor to establish a permanent stone or iron landmark in accordance with the judgment, from which future surveys of the land embraced in the judgment shall be made. Such landmarks shall have distinctly cut or marked thereon "Judicial Landmark." The surveyor shall make report to the court, and in his report shall accurately describe, the landmark so erected, and define its location as nearly as practicable. (4456) [8097]

125-258, 146-1106; 147-335, 180-218.

Record in a boundary line case examined, and found to support the decision for plaintiff. 212-13.

9593. Action for opening mines, quarries, etc., belonging to plurality of owners—That where veins, lodes or deposits of iron, iron ores, minerals or mineral ores

of any kind, stone, coal, clay, sand, gravel or peat are known to, or do exist on or in lands which are shown by properly executed deeds or leases having more than one year to run of record in the county in which said lands are situated, to belong to a plurality of owners, the owner or owners of an interest equal to one-half or greater in said lands, as shown by said deeds or leases so recorded, may bring action in the district court in the county where said lands are situated, for permission to open, operate and develop said veins, lodes or deposits of iron, iron ores, minerals or mineral ores of any kind, stone, coal, clay, sand, gravel or peat that are found in or on said lands. ('07 c. 177 § 1) [8098]

Section 10 repeals inconsistent acts, etc.

9594. Complaint—Hearing—The complaint shall describe the land to be affected, and there shall be an abstract of said lands thereto attached, showing the title thereof as appears by the deeds or leases recorded in the county where said land is situated. Upon the case being brought on for hearing, the court shall determine who are the owners of the property described in the complaint, as appears by the properly executed deeds or leases thereof of record in said county in which the same is situated. ('07 c. 177 § 2) [8099]

9595. Order—Bond—If upon said hearing it appears that the complainant or complainants own one-half or more of said property, as shown by the properly executed deeds or leases of record in said county, the court shall make an order permitting and authorizing complainant or complainants, upon the filing in the office of the clerk of the court having jurisdiction of the action, of such bond, with such sureties as may be ordered and approved by the court or a judge thereof, conditioned for the faithful, complete and timely performance of all orders of the court made in the action or concerning the subject matter thereof, and for the faithful, complete and timely performance of all the provisions of this act, to enter upon, open, develop and operate said lands for the purpose of producing therefrom and from the veins, lodes and deposits therein situate, the iron, iron ore or other minerals or mineral ores of any kind, coal, clay, sand, gravel and peat, that may exist thereon or therein. ('07 c. 177 § 3) [8100]

9596. Entry upon lands—Accounting—Application of receipts—Expenses—Said complainant or complainants may thereupon, after the filing and approval of the bond provided for in section 3 [9595] of this act, enter upon said lands and develop the same, and produce therefrom and from the lodes, veins and deposits the iron, iron ore, minerals, mineral ores of any kind, coal, sand, clay, gravel and peat, that exist thereon or therein. A strict account shall be kept, by the party or parties operating said properties and workings, of all expenses of opening and working any and all such mines, or iron or iron ores, minerals or mineral ores of any kind, coal, or deposits of clay, sand, gravel or peat; and a true and correct account of the output of said workings in tons and of the receipts from the sale or disposal of the output. A monthly statement of such expenses and said output shall be made by said parties operating said workings and properties and filed with the clerk of said court where said action was commenced or is pending. The parties operating such properties shall be entitled to use so much of the receipts from the sales of the total output as may be necessary for the payment of the expenses and charges of opening and operating such property, and the surplus of receipts over the amount so paid

out for expenses and charges of opening and operating such property shall be divided pro rata among all the owners of such property according to their interests, and the amount to which any party is entitled shall be paid to him by the parties operating such property upon demand at any time after the filing of any monthly statement as herein provided, which shows a surplus over the charges and expenses aforesaid. No part of the expenses or charges, and no claim for work or labor performed in or about the opening, operating or improvement of such property shall be a lien upon or a charge against any portion of the property or interest therein not owned by the parties operating such property, and none of the owners of any part of or interest in the property who are not operating such property shall be liable for any of the charges or expenses of opening, operating or improving such property. ('07 c. 177 § 4) [8101]

9597. **Surface rights**—The parties operating the said veins, lodes and deposits, as herein provided, shall have the right to use the surface of the ground for placing machinery and coverings therefor, for roads, tramways, drains, water pipes, steam and electric plants, and all other appliances necessary in the operation and developing of said properties and workings, including buildings for offices and houses for man and shelter for animals engaged and employed in and by said workings, without charge from co-owners. ('07 c. 177 § 5) [8102]

9598. **Rights of nonoperating owners**—The owners of said property not engaged in operating the same shall have access to the property and workings therein at all reasonable times for the purpose of measuring up the workings and verifying thereby the accounts of operators thereof, and shall have access to the property for the purpose of removing and taking away the property delivered to them on the dump of said property as herein provided. But this right must be so exercised as not to interfere with the parties operating the property and workings on or in said property, or of any of the hoisting or working apparatus, rail-

roads, roads, tramways or other appliances thereon, or of the workmen, servants of the operators of the property. ('07 c. 177 § 6) [8103]

9599. **Abandonment of work—Rights of minority owners**—In case the parties owning one-half or more of the property and land on which said veins, lodes or deposits of iron, iron ores, minerals or mineral ores of any kind, or coal, clay, sand, gravel or peat, are known to or do exist, fail or refuse to proceed under this chapter, or if, after commencing the work and operations hereunder, said parties abandon said work for one year, then the owners of less than a half interest of said property, lands and the title therein, as shown by properly executed deeds recorded in the county in which the same is situate, may proceed to open and work said property in the same manner and under the same restrictions as provided herein. ('07 c. 177 § 7) [8104]

9600. **No liens to attach**—No liens created by the statutes of this state, whether mechanics or material, men or laborers, or for supplies or any other liens except those of judgment against owners of interests in said lands, shall attach to the lands on or in which operations for producing from the veins, lodes or deposits of iron, iron ores, minerals or mineral ores of all kinds, coal, clay, sand, gravel, or peat, are carried on under and in accordance with this act. ('07 c. 177 § 8) [8105]

9601. **Actions apply only to output—Partition**—Actions for operation of property in all cases where lands are held by a plurality of owners, are opened, operated and developed for the purpose of obtaining therefrom the products of the veins, lodes and deposits of iron, iron ores, minerals, mineral ores of any kind, coal, clay, sand, gravel and peat under the provisions of this chapter, shall be held to apply only to the output of said workings, and decree of partition shall be made by the courts to apply only to the division of the output of said workings of said lands, and the veins, lodes and deposits aforesaid therein. ('07 c. 177 § 9) [8106]

1940 Supplement
To
Mason's Minnesota Statutes
1927

(1927 to 1940)
(Superseding Mason's 1931, 1934, 1936 and 1938
Supplements)

Containing the text of the acts of the 1929, 1931, 1933, 1935, 1937 and 1939 General Sessions, and the 1933-34, 1935-36, 1936 and 1937 Special Sessions of the Legislature, both new and amendatory, and notes showing repeals, together with annotations from the various courts, state and federal, and the opinions of the Attorney General, construing the constitution, statutes, charters and court rules of Minnesota together with digest of all common law decisions.



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in difference between them, is too indefinite to show that dissolution of partnership, sale of assets thereof to one or other of partners, leasing by one to other of real property which was not partnership property, and an agreement by one partner not to compete in business with other, were matters within authority of arbitrators to determine. *McKay v. M.*, 187M521, 246NW12. See Dun. Dig. 487a.

Conciliator under Laws 1939, c. 440, §9, has no authority to pay arbitrators, but they must be paid as provided for in this section. *Op. Atty. Gen.* (270), June 6, 1939.

9517. Grounds of vacating award.

Where award of referees so links matters submitted to arbitration with matters not so submitted that they cannot be separated without prejudice to parties, court should not sustain a part of award and set aside other parts thereof. *McKay v. M.*, 187M521, 246NW12. See Dun. Dig. 507.

Where a controversy between employer and employee is submitted to arbitrators for their decision upon two or more determinative issues, favorable decision of both of which for employee is essential to his cause of action, he cannot recover where decision of arbitrators ignores one of determinative issues so submitted. An award so unresponsive to submission is void. *Mueller v. C.*, 194M 83, 259NW798. See Dun. Dig. 499.

Arbitration, particularly in disputes between employers and employees, is a favorite of law, and award, if any, will ordinarily be final. *Id.* See Dun. Dig. 488.

(5).

District court may vacate an award if there is no evidence to sustain it. *Borum v. M.*, 184M126, 238NW4. See Dun. Dig. 509.

9519. Judgment—Contents and effect—Appeals.

Perjury as ground for setting aside award after entry of judgment. 20MinnLawRev428.

CHAPTER 82

Actions Relating to Real Property

GENERAL PROVISIONS

9521. Notice of lis pendens.

Judgments and decrees legalized where notice of lis pendens was not recorded. Laws 1939, c. 344.

9522-1. Judgments validated in certain cases.—

That in all actions when judgments and decrees have been entered in the district court of this state where jurisdiction of any defendants including unknown defendants, has been obtained by publication of the summons and notice of lis pendens, and the notice of lis pendens in such action has not been recorded in the office of the Register of Deeds, that nevertheless all such judgments and decrees, when otherwise legal and valid, are hereby made valid and binding upon such defendants and unknown defendants so served by publication, in like manner as if such notice of lis pendens had been filed with the register of deeds prior to publication thereof, as required by law.

Provided, however, that the act shall not apply to cases where the judgment and decree has been entered since February 8, 1921, and provided, further, that nothing herein shall apply to or affect any action or proceedings now pending in any court in this state, or any action or proceedings commenced within thirty days after the passage of this act. (Act Apr. 20, 1939, c. 344.)

ACTIONS FOR PARTITION

9524. Action for partition or sale, who may bring.

Partition is a statutory action but the proceeding is governed by equity principles. *Kauffman v. E.*, 195M569, 263NW610. See Dun. Dig. 7333.

9527. Judgment for partition—Referees.

Smith v. W., 195M589, 263NW903; note under §9538.

Court must determine rights and interest of all parties to action in property to be partitioned, whether such interest consists of liens, taxes paid, advances or improvements made. *Kauffman v. E.*, 195M569, 263NW610. See Dun. Dig. 7335.

9530. Confirmation of report—Final judgment.

Referee's report in partition proceedings is entitled to record without payment of taxes. *Op. Atty. Gen.* (373b-22), Apr. 10, 1937.

9532. Liens, how affected.

In action for partition of two separate farms valued respectively at \$15,500 and \$18,500, fact that plaintiff owned a mortgage on undivided half interest of defendant, did not require that there be a sale, and court should have made a division in kind, placing mortgage lien after proper adjustment upon farm set aside to defendant. *Kauffman v. E.*, 195M569, 263NW610. See Dun. Dig. 7343.

9534. Compensation for equality.

Where supreme court reversed decree in partition ordering sale of two farms and determined that one farm must go to each of two parties, a new trial was unnecessary where trial court had made specific findings and values of farms, but referees might value farms and determine owelty. *Kauffman v. E.*, 195M569, 264NW781. See Dun. Dig. 7345.

9537. Sale ordered, when.

Smith v. W., 195M589, 263NW903; note under §9538.

In determining whether there should be a sale, situation of parties and financial ability of either one of parties to purchase should be considered. *Kauffman v. E.*, 195M569, 263NW610. See Dun. Dig. 7343.

Partition in kind is favored rather than a sale, and he who asks a sale has burden of proving that partition in kind cannot be made without great prejudice to owners. *Id.*

9538. Liens—New parties—No sale, when.

In partition proceedings, an objection under §9538 to a sale, on ground that liens exceed value of property proposed to be partitioned, must be made prior to order or judgment directing sale, as authorized by §§9527 and 9537. *Smith v. W.*, 195M589, 263NW903. See Dun. Dig. 7343.

That one of cotenants claims a homestead exemption in his undivided interest does not prevent a partition sale of property which cannot be divided without great prejudice to the owners. *Id.*

9540. Sale of real property under action for partition—Notice.—

The sale may be by public auction to the highest bidder for cash, upon published notice in the manner required for the sale of real property on execution. The notice shall state the terms of the sale; and if the property, or any part of it, is to be sold subject to a prior estate, charge, or specific lien, the notice shall so state. The terms of sale shall be made known at the time thereof, and, if the premises consist of distinct farms or lots, they shall be sold separately. The court may, if it be for the best interests of the owners of said property, order such property sold by private sale. If a private sale be ordered the real estate shall be appraised by two or more disinterested persons under order of the court, which appraisal shall be filed before the confirmation of the sale by the court. No real estate shall be sold at private sale for less than its value as fixed by such appraisal. The court may order sale of real estate for cash, part cash and a purchase money mortgage of not more than fifty per cent of the purchase price, or on contract for deed. (As amended, Apr. 12, 1937, c. 190, §1.)

9542. Purchase by part owner, etc.

There was no error in permitting purchaser, who was an incumbrancer, to give a receipt for so much of proceeds of sale as belonged to her. *Smith v. W.*, 195M 589, 263NW903. See Dun. Dig. 7343.

9544. Final judgment on confirming report.

Order of the court confirming a sale in partition sustained against objection that the price was inadequate. *Grimm v. G.*, 190M474, 252NW231. See Dun. Dig. 7343(95).

Sale to incumbrancer held not to result in a price so grossly inadequate as to require resale, and receipts from purchaser were in accordance with judgment and law. *Smith v. W.*, 195M589, 263NW903. See Dun. Dig. 7343.

ACTIONS TO TRY TITLE

9556. Actions to determine adverse claims.

1. Nature and object of action.

When the husband dies after the judgment of divorce in his favor, and pending the appeal in this court, and

property rights are involved, his personal representative will be substituted and the case reviewed, notwithstanding the general rule as to the abatement of divorce action by the death of either party. *Swanson v. S.*, 182M492, 234NW675. See Dun. Dig. 15.

Defendants who allege title in themselves and ask judgment quieting it in them waive form of action, and fact of possession or vacancy is unimportant. *Union Central Life Ins. Co. v. P.*, 190M360, 251NW911. See Dun. Dig. 8044.

1½. Action to quiet title.
Jurisdiction of equity to quiet title to personalty. 16 MinnLawRev596.

Does an instrument void on its face constitute a cloud that equity will remove? 16MinnLawRev710.

3. Interests determined.
A recorded contract for sale of real property, which has been terminated by cancellation, is a cloud upon vendor's title. *Union Central Life Ins. Co. v. P.*, 190M360, 251NW911. See Dun. Dig. 8033, n. 75.

In action to determine adverse claims or equitable action to remove cloud from title, a defaulting defendant is not bound by pleading of other defendants that such defaulting defendant had assigned land contract executed by plaintiff to them and it cannot be said that controversy is moot as to such defendant. *Id.* 7563a.

5. Possession.
A plaintiff may maintain an equitable action to remove a cloud, though he is not in possession. *Union Central Life Ins. Co. v. P.*, 190M360, 251NW911. See Dun. Dig. 8031.

In statutory action to determine adverse claims, fact of possession or vacancy is not jurisdictional, nor does it go to merits, and defendants who allege title in themselves and ask judgment quieting it in them waive form of action and fact of possession or vacancy is unimportant. *Id.* See Dun. Dig. 8044.

6. Complaint.
In action to determine adverse claims to real property, where plaintiff pleaded a judgment in a former action as a bar to defendants' claim of title through a deed, allegations in complaint in former action were sufficient to support action to quiet title and on authority of *Mitchell v. McFarland*, 47M535, 50NW610, and it was not necessary that complaint in former action allege that plaintiff was in possession of land or that it was vacant property. *Whitney v. C.*, 199M312, 271NW589. See Dun. Dig. 8048.

An allegation that present occupant entered and is in possession by virtue of an agreement with predecessor of plaintiff's title is sufficient. *Exsted v. E.*, 202M521, 279NW554. See Dun. Dig. 8048.

7. Answer.
Answer, held not sham. 180M480, 231NW224.
In action to determine adverse claims or equitable action to remove cloud from title, a defaulting defendant is not bound by pleading of other defendants that such defaulting defendant had assigned land contract executed by plaintiff to them and it cannot be said that controversy is moot as to such defendant. *Union Central Life Ins. Co. v. P.*, 190M360, 251NW911. See Dun. Dig. 7563a.

8. Reply.
Where in a legal action to determine adverse claims, the defendants assert a legal title, the plaintiffs may, in their reply, plead facts showing an equitable title that ought to prevail over defendants' legal title. *Garrey v. N.*, 185M487, 242NW12. See Dun. Dig. 8052.

8½. Evidence.
Parol evidence as to land intended to be included in mortgage. 181M115, 231NW790.

Evidence held sufficient to sustain a finding that occupants of land entered and hold in subordination to plaintiff's title. *Exsted v. E.*, 202M521, 279NW554. See Dun. Dig. 8053.

9. Judgment.
Value of land involved as affecting jurisdiction of federal court for purpose of removal from state court. 31F(2d)136.

Former judgment between the parties held not res adjudicata on possession. 173M242, 217NW337.

Equitable title of one who purchased fractional interest under deed mistakenly conveying smaller fractional interest and who improved land, held to prevail over legal title in action to determine adverse claims. *Garrey v. N.*, 185M487, 242NW12. See Dun. Dig. 8042.

Where judgment is entered against a defendant by default, relief granted must be within allegations of complaint and within demand for relief. *Union Central Life Ins. Co. v. P.*, 190M360, 251NW911. See Dun. Dig. 4996.

Possession necessary for plaintiff to show in action to determine adverse claims is actual as distinguished from constructive possession, but it may be possession in a tenant or vendee-owner. *Id.* See Dun. Dig. 8043.

Equitable relief may be granted in an action to determine adverse claims to real property, upon such terms and conditions as may be necessary to do justice. *Engel v. S.*, 191M324, 254NW2. See Dun. Dig. 8058.

9556-1. Publication of summons legalized in certain cases.—In every action to quiet title to real estate heretofore completed, wherein the summons published was not subscribed by the plaintiff or his

attorney, the publication of such summons, if the publication and form thereof otherwise conforms to law, is hereby validated and legalized and made effective to all intents and purposes. (Mar. 23, 1937, c. 83, §1.)

9556-2. Not to affect pending action.—Nothing herein contained shall affect any action or proceeding now pending or which shall be commenced within six months after passage hereof, in any of the courts of this state involving the validity of publication. (Mar. 23, 1937, c. 83, §2.)

9557. Unknown defendants.
When parties not named as defendants in an action to determine adverse claims are known to plaintiff at time of bringing action, such parties are not bound by the judgment as "persons unknown," and where such persons are known to plaintiff to have a possible interest, such interest is not barred, though their names do not appear on record. *State Bank of Good Thunder v. B.*, 195M243, 262NW561. See Dun. Dig. 8046.

9563. Ejectment—Damages—Improvements.
Written promise by remaindermen to pay for improvements erected by life tenant, held to create a mere personal obligation and constituted no defense or counterclaim in ejectment. 180M151, 230NW634.
Remaindermen are not liable for improvements made by life tenant, and holding of trial court that there was consideration for the contract is affirmed by equally divided court. 180M151, 230NW634.

In a suit to recover for improvements made by plaintiff upon land of defendant, under an unenforceable oral contract for its conveyance to plaintiff, measure of damages is not cost or value of improvements, but enhancement in value of real estate because thereof. *Lepak v. L.*, 195M24, 261NW484. See Dun. Dig. 10045.

9565. Occupying claimant.
One who, through mistake as to the boundary participated in by the adjoining owner, builds a house on the land of such other, remains the owner thereof. 171M318, 214NW59.

9566. Pleadings—Trial—Verdict.
3. Evidence.
Fraud in obtaining signature of wife to deed. 173M51, 216NW311.

9. Survey.
If the description in the verdict in ejectment and judgment was not sufficiently definite or certain, the trial court indicated that on application a survey and plat would be ordered to make it so. *Deacon v. H.*, 182M540, 235NW23. See Dun. Dig. 2905.

In ejectment plaintiff relying upon tax proceedings for title held not to have shown that lot included property along lake shore or that plat should be reformed to include such property. *Rahn v. W.*, 190M508, 252NW432. See Dun. Dig. 9486.

9569. May remove crops.
176M37, 222NW292.

9572. Mortgagee not entitled to possession.
An assignment of rents, contained in a real estate mortgage, for the purpose of paying taxes and insurance on the property in case of the failure of the mortgagor or his grantees to pay the same, is held valid, following *Cullen v. Minnesota L. & T. Co.*, 60M6, 61NW818. 178M150, 226NW406.

The assignee of the rents was entitled to recover same from a tenant of one who acquired title to the property subject to the assignment. 178M150, 226NW406.

Mortgagor is entitled to rents and profits prior to foreclosure, and until the period of redemption has expired after foreclosure, and on the foreclosure of a second mortgage any right of the second mortgagee to have rents applied on the prior liens terminated, and the mortgagor was entitled to the rents and profits during the period of redemption. 179M571, 229NW874.

This section does not deprive mortgagee of former recourse to equitable remedy of a receivership to protect security. *Gardner v. W.*, 185M147, 240NW351. See Dun. Dig. 6456(38).

After foreclosure of mortgage on instalment, mortgage and all its covenants, including that to pay taxes, remain in full force and mortgagee is entitled under assignment of rents as part of security to collect rents to apply upon delinquent taxes, even those accrued at time of foreclosure for instalment. *Peterson v. M.*, 189M98, 248NW667. See Dun. Dig. 6227n. 26.

Provision of real estate mortgage assigning rents to mortgagee to reimburse him if he is compelled to pay taxes, maintain insurance, and make necessary repairs on mortgaged property, held valid. *Mutual Ben. Life Ins. Co. v. C.*, 190M144, 251NW129. See Dun. Dig. 6230.

A mortgage of land is no longer a conveyance, but creates only a mere lien or security. *Hatlestad v. M.*, 197M640, 268NW665. See Dun. Dig. 6145.

A grant by mortgagor to mortgagee, made after breach of conditions of mortgage, to take possession of mortgaged premises, collect income therefrom, to be applied on taxes, interest, and mortgage debt, invested mortgagee with rights of a mortgagee in possession. *Seifert v. M.*, 203M415, 281NW770. See Dun. Dig. 6230.

Rights of a mortgagee in possession do not give him an estate in the land itself; nor does it abridge or enlarge the mortgagee's interest nor convert previously existing security into a seizin of the freehold. All it amounts to is that possession once rightfully acquired may be retained until the debt is paid. *Id.* See Dun. Dig. 6230.

A real estate mortgage is not a conveyance so as to enable mortgagee to recover possession without foreclosure, but subsequent to execution of mortgage, mortgagor may assign rents to mortgagee, to be applied on mortgage debt, and incidentally authorize mortgagee to take possession for purpose of leasing property and collecting rents. *Id.* See Dun. Dig. 6230, 6237, 6238, 6240, 6242.

Mortgagor giving grant to mortgagee and making him a mortgagee in possession could not be shown to create a trust based on constructive fraud where evidence necessary to entitle mortgagor to recovery of rents and profits would violate parol evidence rule. *Id.* See Dun. Dig. 9915, 9916.

Mortgagee is not entitled to possession of property or to rents and income therefrom until mortgage has been foreclosed and period for redemption has expired. *Fredin v. C.*, 285NW615. See Dun. Dig. 6227.

Mortgagee has right to require mortgagor to apply rents and profits to extent of protecting property from waste, including failure to pay taxes or installments of interest on prior mortgages, but this rule had no application where there was no prior mortgage. *Id.* See Dun. Dig. 6227, 6230, 6231.

When mortgagee purchased property at foreclosure sale, he took it not only subject to taxes and interest then past due, but subject to installments thereof which would become due thereafter, and a receiver appointed on foreclosure could not collect and apply rents and income upon mortgage or taxes. *Id.* See Dun. Dig. 6230, 6461.

A mortgagee has a mere lien upon mortgaged property and holds the same as security only for the debt or other obligation created thereby. *Id.* See Dun. Dig. 6227.

9573. Conveyance by mortgagor to mortgagee.

Craig v. B., 191M42, 254NW440.

Notwithstanding this section equity may scan a conveyance by mortgagor to mortgagee, and if the transaction is fair it will be given effect as a conveyance. 179 M73, 228NW340.

A building contract, warranty deed, and a contract for deed held a conditional sale, not an equitable mortgage. *Westberg v. W.*, 185M313, 241NW315. See Dun. Dig. 6153.

There is no longer a presumption that a transfer by a mortgagor to his mortgagees is given as further security or as a new form of security, and a mortgagor may eliminate his title by conveying directly to mortgagees. *McKinley v. S.*, 188M325, 247NW389. See Dun. Dig. 6150, 6166, 6250.

Evidence held to show conveyance to plaintiff and contract by him and wife to reconvey was equitable mortgage. *Jeddloh v. A.*, 188M404, 247NW512. See Dun. Dig. 6154, 6157.

There is no longer a presumption that a conveyance between a mortgagor and a mortgagee is intended as further security, yet equity will scan such a transaction with jealous care to see that no unconscionable advantage is taken of the mortgagor. *O'Connor v. S.*, 190M177, 251NW180. See Dun. Dig. 6146.

If mortgagee (a) oppressed mortgagor or took undue advantage of him, (b) if mortgagee paid an inadequate consideration for conveyance, or (c) if parties orally agreed that such a conveyance was to be merely additional security for mortgage indebtedness, equity will decree that an absolute deed from a mortgagor to a mortgagee and a contract for deed back is additional security merely. *Id.* See Dun. Dig. 6146.

Mortgagee, by merely advising mortgagor of his intention forthwith to foreclose, did no more than state that he would insist upon his legal right, and did not thereby oppress mortgagor as to render an absolute deed from him to the mortgagee and a contract for deed back ineffective according to their terms. *Id.* See Dun. Dig. 6146.

9574. Action to declare mortgage—Limitation.

Craig v. B., 191M42, 254NW440.

9576. Notice to terminate contract of sale—Etc.

Laws 1931, c. 173, legalizes proceedings under this section where mortgage registration tax has not been paid.

1. In general.

Where contract terminated, unpaid installments cannot be recovered. 176M601, 224NW157.

Having procured judgment for cancellation of contract, vendor could not proceed for specific performance. 177M79, 224NW464.

One borrowing money and giving deed and taking back a contract of sale enters into a "mortgage" which

cannot be cancelled. *Sanderson v. E.*, 182M256, 234NW 450. See Dun. Dig. 6154, 10091.

Certain timber permits construed as being conditioned upon the payment for the timber on the date therein specified for payment, and not to give the grantee the right thereafter to enter upon the land and remove the timber without making payment therefor. *Northern Lumber Co. v. L.*, 182M89, 233NW593. See Dun. Dig. 10091(18).

After a cancellation, nothing remains of the contract upon which the remedy of rescission can operate. *Olive v. T.*, 182M327, 234NW466. See Dun. Dig. 10091.

In an unlawful detainer action, there was no default justifying a notice of cancellation. *Mattson v. G.*, 183M 580, 237NW588. See Dun. Dig. 10091.

Vendor upon cancellation of executory land contract recovers the land and can retain payments made, but cannot recover for installments not paid. *Hoyt v. K.*, 184M154, 233NW41. See Dun. Dig. 10091(51).

A vendor and owner of farm land, on cancelling an executory contract for its sale and conveyance, is entitled to possession of the land and growing crops. *Roehrs v. T.*, 185M154, 240NW111. See Dun. Dig. 10091 (49).

A vendor, in a contract for deed, whose interest has been sold at sheriff's sale, may, before the expiration of the time for redemption, terminate the contract by serving the statutory 30 days' notice upon the defaulting vendee; it not being necessary to serve the notice upon the purchaser at the sheriff's sale. *W. T. Bailey Lumber Co. v. H.*, 185M251, 240NW666. See Dun. Dig. 3540, 6398, 10091.

A judgment against the vendee for an unpaid installment on a contract for deed will be canceled and discharged of record where contract is canceled for a default in subsequent installment. *Des Moines Joint-Stock Land Bank v. W.*, 185M476, 241NW592. See Dun. Dig. 10091(51).

Evidence held to show that vendors lawfully and by proper procedure cancelled land contract by notice, as against claim of confidential relationship and agreement to execute new contract. *Peterson v. S.*, 188M272, 247 NW6. See Dun. Dig. 10091.

Where mortgagor to state deeded land to it and took contract back and later conveyed property to another, contract was valid and could be terminated on 30 days' notice. *McKinley v. S.*, 188M325, 247NW389. See Dun. Dig. 6150, 6166, 10091.

Evidence of default in form of testimony in regard to book entries, held sufficient to go to jury as against any objections made by defendant. *Gruenberg v. S.*, 188 M568, 248NW724. See Dun. Dig. 10091.

Acceptance of installment held not waiver of proceeding to terminate contract for default in failing to pay mortgage. *Swanson v. M.*, 189M158, 248NW727. See Dun. Dig. 10091.

Evidence held to support finding that vendors did not agree to extend time or waive default. *Id.*

Laws 1927, c. 222, §2, does not apply where contract has been voluntarily surrendered as distinguished from canceled pursuant to statutory procedure for so doing. *Craig v. B.*, 191M42, 254NW440. See Dun. Dig. 10091.

A deed of real estate absolute in form, followed by grantee's contract to resell to one of grantors, having properly been found to have been security for a debt, and so a mortgage, this section has no application. *Stipe v. J.*, 192M504, 257NW99. See Dun. Dig. 10091.

Under brokerage contract providing that real estate agent would receive certain commission for execution of a contract for a deed and a certain amount as commission in event monthly payments specified were made and a large payment on a certain date, agent was entitled to full compensation where monthly payments were not made as specified and large payment was not made on date provided, being later paid by assignee of vendee, vendors making no attempt to cancel contract on account of default. *Stevens v. D.*, 193M146, 258NW147. See Dun. Dig. 1147, 1827.

Judgment for vendor in unlawful detainer was res judicata in action to recover purchase money paid on theory that vendor repudiated contract for deed. *Herold v. D.*, 193M618, 259NW189. See Dun. Dig. 5161, 5162, 5163.

Complaint held to state facts sufficient to constitute a cause of action for cancellation of land contract for default in payment of installment. *Madsen v. P.*, 194M 418, 260NW510. See Dun. Dig. 10091.

Termination of a contract for deed under §9576-2 is a judicial proceeding of an equitable character, while formerly such proceedings were in pais under §9576. *Veranth v. M.*, 284NW849. See Dun. Dig. 10091.

Where land was sold on installment payment plan under Laws 1935, c. 386, prior to amendment by Laws 1939, c. 328, and default was made in payment, cancellation should be according to procedure under this section, unaffected by amendment. *Op. Atty. Gen.* (4071), May 24, 1939.

Strict foreclosure on land contracts. 14MinnLawRev 342.

2. Notice to terminate.

A vendee of real estate who acquiesces in a statutory cancellation by notice of his contract, and surrenders possession accordingly, is estopped from thereafter questioning the validity of the notice on technical

grounds. *Olive v. T.*, 182M327, 234NW466. See Dun. Dig. 10091.

An executory contract of sale of real property gives the vendee the equitable title in fee. The proceeding for forfeiture is in the nature of a strict foreclosure of the vendee's interest, and no right of redemption survives the 30 days' notice. *Minn. Bldg. & Loan Ass'n v. C.*, 182M452, 234NW372. See Dun. Dig. 10091.

A contract in the form of an executory contract of sale, if made to secure a loan, is a mortgage. If a mortgage, the vendee's title can be extinguished only by foreclosure and the lapse of the statutory period of redemption. *Minn. Bldg. & Loan Ass'n v. C.*, 182M452, 234NW872. See Dun. Dig. 6152, 10091.

A building and loan association organized under §7748 et seq., including the amendments of 1919 and 1925, cannot make a loan in the form of an executory contract of sale and have a forfeiture or strict foreclosure on 30 days' notice pursuant to Gen. Stat. 1923, §9576. *Minn. Bldg. & Loan Ass'n v. C.*, 182M452, 234NW872. See Dun. Dig. 10091.

Notice of cancellation of contract served upon vendee one day before discharged as sane by decree of probate court, was valid, there being no guardian and vendee being on parole. *McKinley v. S.*, 188M325, 247NW389. See Dun. Dig. 4519, 4531, 10091.

A recorded contract for sale of real property, which has been terminated by cancellation, is a cloud upon vendor's title. *Union Central Life Ins. Co. v. P.*, 190M360, 251NW911. See Dun. Dig. 8033, n. 75.

Where executory contract is, in fact, mortgage, building and loan association, except in cases specified in §7757, as amended, has no right to cancel by giving 30 days' notice. *Op. Atty. Gen.*, Mar. 6, 1933.

Notice of cancellation served less than 30 days before passage of Laws 1933, c. 422, was ineffective to terminate contract without court order. *Op. Atty. Gen.*, May 15, 1933.

Register of deeds is not required to record contract for deed which is not properly witnessed nor acknowledged, though attached by attorney to notice of cancellation of contract and other documents in connection therewith. *Op. Atty. Gen.*, July 17, 1933.

3. Exclusiveness of remedy.

Statute suspending remedy of vendor to terminate land contract by notice did not prevent equity action to cancel such contract. *Madsen v. P.*, 194M418, 260NW510. See Dun. Dig. 10091.

4. Action for damages.

Cancellation of contract under this section precludes subsequent suit for damages for false representations inducing contract. 181M169, 231NW326.

If vendee wrongfully remains in possession and harvests crops, the measure of the vendor's damage is the value thereof, plus the value of the use of the land during the period of the vendee's subsequent wrongful possession. *Roehrs v. T.*, 185M154, 240NW111. See Dun. Dig. 2567, 10091.

Measure of vendor's damages where vendee wrongfully remains in possession after cancellation of executory contract. 16MinnLawRev725.

9576-1. Cancellation of contracts may be suspended.

—Cancellation of contracts for deed made prior to April 21, 1933, pursuant to Mason's Minnesota Statutes of 1927, Section 9576, and the acts amendatory thereof and supplemental thereto are hereby suspended from and after the passage of this act upon the conditions hereinafter provided. (Act Apr. 21, 1933, c. 422, §1; Mar. 26, 1935, c. 68, §1; Mar. 2, 1937, c. 58, §1; Feb. 25, 1939, c. 33, §1.)

Preamble to act.

Whereas, there exists in the State of Minnesota a public economic emergency of such force and effect as to seriously interfere with the ordinary performance of contracts; and

Whereas, it is believed, and the Legislature of Minnesota hereby declares its belief, that the conditions existing as hereinbefore set forth has created an emergency of such nature that justifies and validates legislation for the extension of the time of performance by vendees of contracts for the conveyance of real property; and

Whereas, the welfare of the people demands that the State, pursuant to its police power, interfere for a limited time with a literal enforcement of the law regarding contracts for deed. Now, Therefore—

Statute suspending remedy of vendor to terminate land contract by notice did not prevent equity action to cancel such contract. *Madsen v. P.*, 194M418, 260NW510. See Dun. Dig. 10091.

Service of notice of cancellation less than 30 days before passage of this act was ineffective to terminate contract without a court order. *Op. Atty. Gen.*, May 15, 1933.

Laws 1935, c. 68, suspending foreclosure of contracts of deed, does not apply to state lands sold under certificate of sale. *Op. Atty. Gen.* (415m), May 25, 1935.

9576-2. Cancellation for contracts of deed.—No notice to terminate any contract for the conveyance of real estate or any interest therein for a breach of condition contained in such contract shall be effectual to divest title and/or possession to the vendee or those claiming under him, or to reinvest title and/or possession in the vendor or those claiming under him, during the emergency herein declared except as hereinafter provided.

When default is made in the conditions of any contract for the conveyance of real estate, or any interest therein, whereby the vendor has a right to terminate the same, he may do so by serving upon the purchaser his personal representatives or assigns, either within or without the state, a notice specifying the conditions in which default has been made, and stating that at a time specified, not less than forty days after the service of said notice, he will apply to said court for an order adjudging said contract terminated, unless prior thereto the purchaser, his personal representatives or assigns, shall comply with and perform the conditions then in default and pay the costs of service. Such notice must be given notwithstanding any provisions in the contract to the contrary and shall be served within the state in the same manner as a summons in the district court, and if served without the state, or upon unknown heirs, in the manner provided in Mason's Minnesota Statutes of 1927, Section 9234; provided that where such notice by publication is served upon unknown heirs there shall be filed with the clerk of court, an affidavit stating that the heirs of the vendee are proper parties and that their names and residences cannot with reasonable diligence be ascertained.

Provided, however, that if service is made by publication under Section 9234, three weeks published notice shall be given and if the premises described in the contract are actually occupied, then in addition thereto, and within 10 days after service on the vendee, a copy of such notice shall be served upon the person in possession of said premises; and provided, further, that in case of such service by publication as herein provided, the said notice shall specify the conditions in which default has been made and stating that at a specified time, not less than ninety days after the first publication of said notice, he will apply to said court for an order adjudging said contract terminated, unless prior thereto the purchaser, his personal representatives or assigns shall comply with and perform the conditions then in default and pay the costs of service.

If within the time mentioned in said notice within which the vendee, his personal representatives or assigns must perform the conditions in default, the vendee complies with such conditions and pays the costs of service, the contract shall remain in full force and effect; but if the vendee fails or neglects to perform the conditions in default within the time mentioned in said notice for such performance and to pay the costs of service, and fails to serve written objections to the termination of such contract upon the vendor, within fifteen days after service of notice on the vendee, the court shall, upon motion of the vendor, and proof of service of said notice, and in the absence of any appearance upon behalf of the vendee, make its order adjudging such contract terminated and said contract shall, thereupon forthwith, be and become finally terminated.

The vendee may, within fifteen days after service of said notice, serve upon the vendor, or his attorney, written objections to the making of any order adjudging the contract terminated and any legal or equitable defenses claimed by him; and if it shall be made to appear to the court upon the application and hearing for an order adjudging the termination of said contract, that the vendee has, in addition to the payment of taxes, insurance and interest, if any, made and paid for valuable improvements upon the premises, or paid upon the contract price of the premises whether to the vendor or to the owner of any

incumbrance subject to which the contract was made, or which the contract provides that the vendee, his successors or assigns shall pay, or to both, a sum or sums equal to a substantial part of the original contract price and that the vendor's interest is reasonably secure, the court may, on taking into consideration the reasonable value of the income of such property, or, if the property have no income, then the reasonable rental value thereof, the efforts and ability of the vendee to pay, and all the facts and circumstances of the case, by order and upon such terms and conditions as to it appear just and equitable, extend the time in which the vendee may perform the conditions of the contract in default, not to exceed one year from the date of the service of notice of termination on the vendee and in no event beyond March 1st, 1941.

In case the vendee, in addition to taxes, insurance and interest, has paid upon the total contract price and/or for improvements upon the real estate an amount equal to or exceeding 30 per cent of the value of the real estate, or has made substantial improvements thereon, in cost or value at the time of hearing equal to or exceeding 30 per cent of the value of the real estate, a showing of such facts shall be prima facie evidence that substantial improvements have been made or substantial payments made.

If the vendee shall fail to perform the conditions in default, or any of them, as required and directed by the court to be performed, said contract shall forthwith be and become terminated and the vendor may thereupon apply to the court for an order adjudging said contract terminated, on giving at least ten days' written notice of such application to the vendee, served in the manner herein provided for service of the notice of application for an order terminating the contract. If it shall be made to appear to the court, upon a hearing on said application, that the vendee has defaulted in performing such conditions, the court shall make an order declaring said contract terminated and said contract shall thereupon forthwith be and become finally terminated. (Act Apr. 21, 1935, c. 422, §2; Mar. 26, 1935, c. 68, §2; Apr. 23, 1935, c. 240, §1; Mar. 2, 1937, c. 58, §2; Feb. 25, 1939, c. 33, §2; Apr. 14, 1939, c. 257, §1.)

Filing and serving of notice to cancel contract for deed does not constitute cancellation of contract where proceedings are dismissed before completion thereof, contract remaining in force until terminated by proper order of court. *Killmer v. N.*, 196M420, 265NW293. See Dun. Dig. 10091.

Denial of application for further extension was proper where affidavit of defendant simply stated financial situation to be such that it was impossible to make payment required by contract. *Prudential Ins. Co. v. D.*, 196M594, 265NW809. See Dun. Dig. 6392.

Trial court did not err in consolidating action for cancellation of contract brought by appellant and actions to enjoin cancellation proceedings and for specific performance brought by respondents, and in granting specific performance. *Schultz v. U.*, 199M131, 271NW249. See Dun. Dig. 8788, 10091.

Termination of a contract for deed under §9576-2 is a judicial proceeding of an equitable character, while formerly such proceedings were in pais under §9576. *Veranth v. M.*, 284NW849. See Dun. Dig. 10091.

Intervention may be allowed in a proceeding to terminate a contract for deed. *Id.* See Dun. Dig. 4398a.

One adjudged to be beneficial owner of vendee's rights under a contract for deed has sufficient interest in the subject matter of a suit seeking to cancel the interest of the vendee, that he may intervene. *Id.* See Dun. Dig. 4399.

Where beneficial owner's rights in vendee's interest under contract depend upon continued existence of that contract, and named vendee defaults and fails to defend against cancellation, denial of beneficial owner's petition to intervene is an abuse of discretion. *Id.* See Dun. Dig. 4398.

9576-3. Order to be recorded.—A copy of any order of the court made pursuant to this act may be recorded with the register of deeds of the county wherein the real estate is situated. (Act Apr. 21, 1933, c. 422, §3; Mar. 26, 1935, c. 68, §3; Mar. 2, 1937, c. 58, §3; Feb. 25, 1939, c. 33, §3.)

9576-4. Application of act.—The provisions of this act shall not apply to leaseholds. This act shall ap-

ply only to contracts for deed made prior to April 21, 1933 but shall not apply to contracts made prior to the passage of this act which shall hereinafter be renewed or extended for a period ending more than one year after the passage of this act; neither shall this act apply in any way which would allow a stay, postponement or extension to such time that any right might be adversely affected by a statute of limitation. The provisions of this act shall all apply to proceedings for cancellation of contracts for deed wherein the district court has previously granted one or more extensions of time for the performance of the conditions in default, including proceedings where the extended period has expired but no final court order has been made adjudging such contract terminated, pursuant to Laws 1933, Chapter 422, Chapter 68, Laws 1935, and Chapter 58, Laws 1937, and shall also apply to actions and proceedings now pending or hereafter commenced under said acts.

Upon the application of either party prior to the expiration of the extended period, as provided in this act, and upon the presentation of evidence that the terms fixed by the court are no longer just and reasonable, the court may revise and alter said terms in such manner as the changed circumstances and conditions may require. (Act Apr. 21, 1933, c. 422, §4; Mar. 26, 1935, c. 68, §4; Apr. 23, 1935, c. 240, §2; Mar. 2, 1937, c. 58, §4; Feb. 25, 1939, c. 33, §4.)

When, under act of 1933, a final order canceling contract has not been made before act of 1935 took effect, a notice of extension under latter is effective if served prior to May 1, 1935, though not filed until next day. *Prudential Ins. Co. v. D.*, 196M594, 265NW809. See Dun. Dig. 6392.

9576-5. Trial or hearing.—The trial of any action, hearing or proceeding mentioned in this act shall be held within 30 days after the filing by either party of notice of hearing or trial, as the case may be, and such hearing or trial may be held at any general or special term, or in chamber, or during the vacation of the court. (Act Apr. 21, 1933, c. 422, §5; Mar. 26, 1935, c. 68, §5; Mar. 2, 1937, c. 58, §5; Feb. 25, 1939, c. 33, §5.)

9576-6. Time limit of act.—The emergency herein declared to exist shall be deemed to be terminated whenever the governor of this state shall by proclamation declare that the emergency is at an end or whenever in fact the emergency shall have terminated and this Act shall remain in effect no longer than March 1st, 1941. (Act Apr. 21, 1933, c. 422, §6; Mar. 26, 1935, c. 68, §6; Mar. 2, 1937, c. 58, §6; Feb. 25, 1939, c. 33, §6.)

9576-7. Definitions.—The terms "vendor" and "vendee" shall be construed to include the plural and the survivor or survivors, the heirs, known or unknown, executors, administrators, assigns, or successors thereof. (Act Mar. 26, 1935, c. 68, §7; Mar. 2, 1937, c. 58, §7; Feb. 25, 1939, c. 33, §7; Apr. 14, 1939, c. 257, §2.)

MISCELLANEOUS ACTIONS

9579. Action against cotenant.

Property belonging to heirs cannot be considered a homestead where only one of heirs resides thereon. *Op. Atty. Gen.* (232d), June 6, 1935.

9580. Nuisance defined—Action.

See notes under St. Peter City Charter, Appendix No. 3, post.

Village ordinance prohibiting the keeping of dog kennels without reference to whether such kennels created a nuisance held invalid. 173M61, 216NW535.

Finding that school district was negligent in exposing school teacher to tuberculosis, sustained by evidence, but there was not sufficient evidence to show that it maintained a nuisance by its failure to make the school building sanitary, and it was not liable for damages under §3098. 177M454, 225NW449.

The findings do not show that the obstruction of the water was of such character as to constitute a nuisance. *Pahl v. L.*, 182M118, 233NW836. See Dun. Dig. 7240(52).

Finding that stove factory was a nuisance sustained. *Heller v. A.*, 182M286, 234NW316. See Dun. Dig. 7255.

Record sustains a finding that the district in which a funeral home is proposed to be established is not strictly residential, and that such establishment is not a nuisance. *O'Malley v. M.*, 182M294, 234NW323. See Dun. Dig. 6525, 7255.

Odors suffered by farmer from sewage dumped into stream by city and canning company constituted a nuisance. *Johnson v. C.*, 188M451, 247NW572. See Dun. Dig. 7244.

A nuisance does not rest upon degree of care but rather upon danger, indecency, or offensiveness existing or resulting even with best of care. *Id.* See Dun. Dig. 7248.

Owner of dwelling is not estopped to restrain maintenance of funeral home in vicinity of his residence by fact that she sought to sell her own residence to defendant for purpose of funeral home. *Gunderson v. A.*, 190M245, 251NW515. See Dun. Dig. 3217, n. 7.

Under doctrine of *Sheehan v. Flynn*, 53Minn436, 61NW 462, 26LRA632, surface water is regarded as a common enemy which a landowner may, within reason, appropriate to his own use or may expel from his land as he chooses. *Bush v. C.*, 191M591, 255NW256. See Dun. Dig. 10161, 10165.

Statute has no effect against state or its officers and agents engaged in a lawful undertaking under its sovereign authority. *Nelson v. M.*, 192M180, 256NW96. See Dun. Dig. 8831.

Contractor constructing bridge for highway department was an agency of the state and was not liable as for a private nuisance for damage to adjoining property as a result of necessary blasting, not being guilty of negligence nor trespass. *Id.* See Dun. Dig. 8831, 8846b.

In face of a finding that damage to the plaintiff is due to backing up of waters of river and that no more water is discharged upon his property than would be if a bridge were constructed instead of a culvert, we cannot disturb court's conclusions favorable to village and denying plaintiff relief on account of the overflow of banks of a tributary of that stream which he claims that defendant has wrongfully obstructed. *Nichols v. V.*, 192M 510, 257NW82. See Dun. Dig. 7253.

Section 5015-4 giving railroad and warehouse commission authority to require auto transportation company to maintain suitable depots, does not oust a city or village of jurisdiction to enjoin maintenance of a depot if it constitutes a nuisance. *Village of Wadena v. F.*, 194 M146, 260NW221. See Dun. Dig. 6752.

A truck warehouse and depot, located in Wadena, Minn., a block and a half from main business street and within a block of a public garage, a similar truck depot, a large warehouse, a furniture store and undertaking parlor, and on street running directly from railroad depot to main business street, is not a nuisance, either public or private. *Id.* See Dun. Dig. 7244.

It is only when obstruction becomes inconsistent with public use of a street that it becomes a nuisance. *Heidemann v. C.*, 195M611, 264NW212. See 1310½. See Dun. Dig. 7240.

Cheese factory being a lawful business, and entitled to a reasonable use of creek in common with all riparian owners, above and below, court should only enjoin that use thereof which evidence shows to be productive of nuisance. *Satren v. H.*, 202M553, 279NW361. See Dun. Dig. 7271.

Mason's Minn. St. 1927, §§5377-1 to 5377-6, granting State Board of Health power to administer and enforce all laws relating to pollution of waters of state, did not repeal or affect §9580, giving district courts jurisdiction to abate private nuisances arising from pollution of waters. *Id.* See Dun. Dig. 7271.

Whey discharged by cheese factory into creek which ran through farm polluted waters of creek into a nuisance. *Id.* See Dun. Dig. 7240.

Cheese factory did not obtain a prescriptive right to pollute creek, pollution not being continuous in substantially same way or with same injurious results during entire statutory period. *Id.* See Dun. Dig. 7256.

Whether electric power pole with mast arm and cable, within easy reach of the youth of 15 years of age, was an alluring attraction or attractive nuisance, nuisance consisting in concealed death dealing danger of cable contacting high voltage transmission wire, held for jury. *Ekdahl v. M.*, 203M374, 281NW517. See Dun. Dig. 6989.

Easements for light and air and for view were not invaded by erection of a viaduct on a street not adjacent to property. *McCarthy v. C.*, 203M427, 281NW759. See Dun. Dig. 95b.

Generally, owner of private property has no action against city for erection of a public improvement unless as to him it amounts to a private nuisance. *Id.* See Dun. Dig. 3128.

City substantially contributing to pollution of stream flowing by farm was liable for damages. *Shuster v. C.*, 203M518, 282NW135. See Dun. Dig. 7264.

A city discharging sewage into a stream and another city discharging sewage into a tributary stream acted as independent and not joint tortfeasors and could not be joined in one action for damages to farm owner. See Dun. Dig. 7264.

A metal canopy extending only 10 inches over base line of building and over sidewalk and constructed to protect awning when raised from rain or snow, outer edge for ornament or use having a so-called gutter three-fourths of an inch deep, was neither a nuisance

nor obstruction to the free and safe use of the sidewalk, so as to render abutting owner or city liable for very small patch of ice formed on sidewalk. *Johnson v. C.*, 204M115, 282NW693. See Dun. Dig. 7260.

Action to abate nuisance in which injunctive relief and appointment of a receiver are asked are ordinarily within jurisdiction of district court. *State v. District Court*, 204M415, 283NW738. See Dun. Dig. 7286.

A city has power of eminent domain in requiring necessary rights to empty sewerage into lake outside corporate limits subject to laws respecting nuisances and health regulations. *Op. Atty. Gen.*, June 20, 1933.

Whether or not city may declare keeping of bees a public nuisance is a question for judicial determination in each particular case. *Op. Atty. Gen.* (59a-32), May 23, 1934.

Injunction may be brought against places selling liquor illegally. *Op. Atty. Gen.* (494b-21), Apr. 30, 1936.

Keeping of cows within village limits is not a nuisance per se. *Op. Atty. Gen.* (477b-20), July 31, 1936.

Prohibiting the keeping of turkey ranches within a small village, but permitting families to have a few chickens or turkeys for their own use, would be valid if turkey ranches were in fact a nuisance. *Op. Atty. Gen.* (477b-20), Nov. 5, 1936.

Nuisances maintained by tenants by throwing of refuse on property forfeited to state for delinquent taxes may not be abated in proceedings against the state or tax commission, but may be corrected by criminal or civil proceedings against tenants. *Op. Atty. Gen.* (133b-2), May 22, 1937.

Village may enact ordinance prohibiting undertaking establishment in purely residential district. *Op. Atty. Gen.* (477b-20), June 21, 1937.

A village may regulate hawkers, peddlers, transient merchants and solicitors, but may not prohibit doing business by them within village, though it is probable that proper ordinances could be passed making it a nuisance to solicit orders upon private premises without invitation or consent of occupants. *Op. Atty. Gen.* (477b-21), Oct. 15, 1937.

Whether gasoline curb pump constitutes an unlawful obstruction or nuisance is a matter for governing body of municipality to determine. *Op. Atty. Gen.* (356a-1), March 4, 1938.

Whether erection of a theater on lot adjoining a church would be a nuisance is a question of fact. *Op. Atty. Gen.* (477e), Apr. 25, 1938.

If a hog feeding ranch is dangerous to health and constitutes a nuisance, nuisance may be abated and criminal proceedings instituted. *Op. Atty. Gen.* (225j), Dec. 31, 1938.

Radio interference may constitute a nuisance which may be abated. *Op. Atty. Gen.* (434B-18), March 3, 1939.

A fence erected by an abutting landowner across a platted but ungraded and seldom used street may be declared a nuisance by ordinance and may be abated by action or removed by council. *Op. Atty. Gen.* (396g-9), August 18, 1939.

9581. Fence, etc., when nuisance.

174M457, 219NW770.

9584. Waste pending year for redemption—Injunction.

It is waste for a mortgagor in possession following foreclosure sale not to use current rents to the extent reasonably needed to keep the property tenantable. *Gardner v. W.*, 185M147, 240NW351. See Dun. Dig. 6459.

Waste will ordinarily not be enjoined unless of such character that it may so impair the value of the property as to render it insufficient or of doubtful sufficiency as security for the debt. *Gardner v. W.*, 185M147, 240 NW351. See Dun. Dig. 6459.

9584-1. Cultivation of lands sold under mortgage foreclosures or execution—petitions.—Where any mortgage upon farm lands has been foreclosed or farm lands have been sold upon execution and the period of redemption shall expire between April 15th and October 1st of any year and it is made to appear to the Court that said lands may not be farmed or cultivated during said year, the mortgagor, or the owner in possession of the mortgaged premises or any one claiming under such mortgagor, or any one liable for the mortgage debt at the time of the making of the application, may apply to the District Court of the County wherein such foreclosure proceedings were held, or are pending, by filing in said Court, a verified petition setting forth the claims of the applicant of his interest in said land or in the crops that may be raised thereon in the year in which said period of redemption expires and setting forth that said land can not be farmed or cultivated during said year except under order of the Court and that he is unable to redeem said lands at the time the year for redemption will expire, and offering to farm and culti-

vate said land during said year upon such terms as the Court shall find to be just and equitable. (Apr. 24, 1937, c. 408, §1.)

9584-2. Service of notice of petition—hearing.—Such petition and notice of motion for hearing thereon shall be served as now provided for the service of a summons in a civil action upon the mortgagee or execution creditor if he is the owner of the Sheriff Certificate of Sale of record and upon each creditor of the mortgagor holding a lien of record upon the mortgaged premises; if said Certificate has been transferred of record, then upon the owner of the Sheriff Certificate of Redemption or execution sale appearing of record. If the owner of record is the original mortgagee or the execution creditor, then service may be made by registered mail upon such mortgagee or execution creditor or upon his attorney foreclosing said mortgage or the attorney whose name appears on the execution as attorney for the execution creditor in the case of an execution sale.

The hearing upon said motion shall be not less than 10 days nor more than 20 days after the service of such notice of motion. (Apr. 24, 1937, c. 408, §2.)

9584-3. District Court to have jurisdiction.—When service has been made as provided in the previous section of such notice and petition before the time for redemption has expired, the District Court of the County in which said lands are situated shall have jurisdiction and equitable power to provide for the cultivation of said lands during said year as herein provided upon such terms as the Court shall find to be just and equitable, and prevent irreparable loss to the parties interested. (Apr. 24, 1937, c. 408, §3.)

9584-4. Court to determine fair rental value.—Upon such hearing, if the Court shall find that the allegations of the petition are true and that said lands may not be farmed or cultivated during the year in which the period of redemption expires, the Court shall determine the fair rental value of said premises from the time the period of redemption expires until the 1st day of October in said year assuming that said land is farmed in a good and husbandlike manner and shall determine what rent or share shall be paid to the holder of the Sheriff Certificate of foreclosure sale or execution sale during said extended period and shall provide for the giving of security by the applicant or tenant for the payment of such rents or share of the crops or income from said lands, and the Court may require the parties to execute a lease or leases to carry out the order of the court, the lease by its terms to expire on October 1, of the year in which made; but the tenant shall have a reasonable time thereafter to remove from the land his crops grown thereon and other articles of personal property owned by him. (Apr. 24, 1937, c. 408, §4.)

9584-5. Court may grant certain rights—Plowing.—The Court may further grant to the owner of the Sheriff Certificate of Redemption or Certificate of Execution Sale, the right to plow upon said premises after the crops have been removed or should have been removed from said premises. (Apr. 24, 1937, c. 408, §5.)

9584-6. Application of act.—This act shall not be construed as extending the period of redemption but as granting relief in equity to the interested parties and to prevent irreparable loss and to fully compensate the owner of the Sheriff Certificate for the use and occupation of the lands granted pursuant to this act. (Apr. 24, 1937, c. 408, §6.)

9585. Trespass—Treble damages.

Verdict for \$350 held not excessive for cutting of trees. *Hansen v. M.*, 182M321, 234NW462. See Dun. Dig. 2597, 9696(33).

9590. Action to determine boundary lines.

Establishment of center of section of land. 172M338, 215NW426.

In action to determine boundary line between city lots, evidence held to show that plaintiffs were estopped to deny ownership of land upon which building existed. *Lobnitz v. F.*, 186M292, 243NW62. See Dun. Dig. 1083.

Testimony of county highway engineer and surveyor acquainted with locality and reputed corners and quarter corners of section involved, held sufficient to admit his survey in evidence, and upon which court could find true boundary line between farms of plaintiff and defendants. *Lenzmeier v. E.*, 199M10, 270NW677. See Dun. Dig. 1081.

Evidence held not such as to warrant a finding that owners of two farms had ever established a boundary line by practical location, nor that defendants by adverse occupation had acquired title to any of plaintiff's land. *Id.* See Dun. Dig. 1083.

Words "about," "approximately," and "more or less," in connection with courses and distances, may be disregarded if not controlled or explained by monuments, boundaries, and other expressions of intention, and may be given meaning and effect when so controlled and explained. *Ingelson v. O.*, 199M422, 272NW270. See Dun. Dig. 1060.

Action to determine boundaries, is not merely to establish boundary lines according to government survey, but also to determine boundary line according to respective existing rights of property of parties. *Hacklander v. P.*, 204M260, 283NW406. See Dun. Dig. 1084.

In division of dried-up bed of meandered lake, if parties cannot agree, action in district court to determine boundary lines is only remedy. *Op. Atty. Gen.*, May 16, 1932.

9591. Pleadings—Additional parties.

Title by adverse possession may be proved under a general allegation of ownership. 171M488, 214NW288.

9592. Judgment—Landmarks.

Action contemplates the settlement of title and a judgment is res adjudicata in a subsequent action in ejectment. 171M488, 214NW288.

In a suit to establish a boundary line, evidence conclusively shows an estoppel in pais in favor of defendants. *Liedberach v. P.*, 199M554, 273NW77. See Dun. Dig. 1083.

CHAPTER 83

Foreclosure of Mortgages

BY ADVERTISEMENT

9602. Limitation.

½. In general.

After foreclosure sale remedy on mortgage as a security is exhausted and assignment in mortgage of rents to pay taxes was terminated. *Gardner v. W.*, 185M147, 240NW351. See Dun. Dig. 6465.

After foreclosure sale rights of parties are determined exclusively by statute. *Gardner v. W.*, 185M147, 240NW351. See Dun. Dig. 6371.

Purchaser at mortgage sale is not entitled to rents accruing during the period allowed for redemption to pay taxes subject to which he bid in the property, though the mortgage expressly assigned rents to pay taxes. *Gardner v. W.*, 185M147, 240NW351. See Dun. Dig. 6371.

1. Foreclosure in general.

The measure of a mortgagor's damage for a premature foreclosure is not the value of the property in excess of the debt but only the value of the use to the extent that the mortgagor has been deprived thereof by the wrong done. *Bowen v. B.*, 185M35, 239NW774. See Dun. Dig. 6476.

Mortgagor of real estate has an equity of redemption which may not be terminated except by foreclosure or by lawful surrender of equity of redemption. *Stipe v. J.*, 192M504, 257NW99. See Dun. Dig. 6215.

Court of equity could order mortgage foreclosure set aside, provided mortgagor executed renewal notes and renewal mortgage in accordance with previous agreement entered into with mortgagee but unperformed by mortgagee. *Young v. P.*, 193M578, 259NW405. See Dun. Dig. 6487.