1944 Supplement

To

Mason's Minnesota Statutes, 1927

and

Mason's 1940 Supplement

Containing the text of the acts of the 1941 and 1943 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 Law Review Articles and digest of all common law decisions.

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SAINT PAUL 1, MINNESOTA
1944

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Mercury & Indemnity Co., 215M60, 9NW(2d)413. See Dun. Dig. 324.

An appeal bond insufficient or unenforceable as a statutory obligation may be valid as a voluntary, or so-called common-law, obligation. Id. See Dun. Dig. 327, 331.

An appeal bond, invalid for noncompliance with statute, is unenforceable as a voluntary obligation, if it lacks consideration. Id. See Dun. Dig. 331.

9500. Appeal from order—Supersedeas.

A supersedeas bond given under a void appeal does not operate to stay proceedings. Hampshire Arms Hotel Co. v. St. Paul Mercury & Indem. Co., 215M60, 9NW(2d) 413. See Dun. Dig. 326.

Where the consideration claimed for an appeal bond is that there was an appeal from a judgment, which had no existence, there is no consideration for the bond, because there could be no appeal. Id. See Dun. Dig. 327.

General rule is that the obligors in an appeal bond are estopped to contradict a recital therein of the existence of the judgment appealed from, but this is not true where appellee promptly moves for dismissal of the appeal on the ground that no judgment has been entered, the dismissal of the appeal being in effect an adjudication that the appeal, and consequently the bond, was void, and operates to estop appellee from asserting that the bond was valid or that the attempted appeal was a consideration for it. Id. See Dun. Dig. 331.

Where appellate court takes jurisdiction and hears an unauthorized appeal, the obligors on the appeal bond receive a benefit, which is consideration for the bond, and in such a case the grounds of the appellate court's decision, whether it be on the merits or otherwise, makes no difference, but there is not consideration where appellee procures a prompt dismissal of the appeal on the ground that it is a nullity. Id. See Dun. Dig. 331.

Where appellee procured dismissal of an attempted appeal from a judgment in an unlawful detainer case as premature, because taken before entry of judgment, obligors on a supersedeas bond given under this section are not liable for rents accruing between the dates of appeal and the dismissal, because of the invalidity of the appeal and lack of consideration for the bond. Id. See Dun. Dig. 331.

Where attempted appeal from a judgment in an unlawful detainer case was premature because taken before entry of judgment, and appellee promptly obtained dismissal of appeal, defendant is liable independently of appeal bond for any damage caused plaintiff by the attempted appeal, though he and the surety are not liable as obligors under the appeal bond. Id. See Dun. Dig. 331.

9501. Money judgment—Supersedeas.

Where appeal bond does not recite any consideration, and is given for purposes of an appeal from a judgment which does not exist, it is insufficient to create liability either as a statutory obligation or common-law obligation. Hampshire Arms Hotel Co. v. St. Paul Mercury & Indem. Co., 215M60, 9NW(2d)413. See Dun. Dig. 331.

CHAPTER 81

Arbitration and Award

9513. What may be submitted—Submission irrevocable.

Where contracting parties first agree to a statutory arbitration and later make complete submission to an arbitration which does not comply with statute but which is good at common law, it will be given effect as a common-law arbitration, overruling Holdridge v. Stowell, 39M360, 40NW259. Park Const. Co. v. I., 209M182, 296NW475, 135ALR59. See Dun. Dig. 499, 500.

Doctrine is discarded that general agreements to arbitrate oust jurisdiction of courts, and are therefore illegal as against public policy. Id. See Dun. Dig. 499.

A contract provision for arbitration of disputes "at the choice of either party" is not self-executing, and may be modified, rescinded, or waived by agreement or acts and conduct of parties and this notwithstanding a further provision that a "decision" of arbitrators "shall be a condition precedent to any right of legal action." Independent School Dist. No. 35 v. A. Hedenberg & Co., 214M82, 7NW(2d)511. See Dun. Dig. 487a.

Building contractor's conduct in failing to demand arbitration of dispute for over a year and in proceeding to trial of action for damages without making such demand or asking for a stay to permit arbitration constituted a waiver of its right to arbitration. Id. See Dun. Dig. 487a.

Word "irrevocable," even as used in an arbitration statute, means that contract to arbitrate cannot be revoked at the will of one party over the objection of the other, but that it can only be set aside for facts existing at or before time of its making, which would permit revocation of any other contract. Id. See Dun. Dig. 498.

Arbitration in insurance.

Glidden Co. v. Retail Hardware Mut. Fire Ins. Co., 181 M518, 233NW310, 77ALR616. Aff'd 284US151, 52SCR69, 76 LEd214.

9516. Procedure after filing.

If arbitration is under statute award is summarily reviewable, but if proceeding was under common law, an action lies on the award. Park Const. Co. v. I., 209M182, 296NW475, 135ALR59. See Dun. Dig. 507.

9517. Grounds of vacating award.

Where arbitrators are permitted by submission to fix their own fees, such allowance to themselves is a severable matter, subject to review and correction as such without effect on award otherwise. Park Const. Co. v. I., 209M182, 296NW475, 135ALR59. See Dun. Dig. 509.

CHAPTER 82

Actions Relating to Real Property

GENERAL PROVISIONS

9521. Notice of lis pendens.

Lis pendens filed by attorney suing for money judgment in sum equal to a third interest in land acquired by former client was of no effect as against subsequent purchaser of land without actual notice. Melin v. Mott, 212M517, 4NW(2d)600. See Dun. Dig. 5669.

Notice of lis pendens need not be filed or published in an action by the state to quiet title under Laws 1939, c. 341. Op. Atty. Gen. (374g), Dec. 4, 1940.

ACTIONS FOR PARTITION

9527. Judgment for partition—Referees.

Appeals from orders or interlocutory judgments in partition proceedings to the supreme court. Laws 1941, c. 448.

An interlocutory judgment directing sale is open to review on appeal from final judgment in partition. Burke v. Burke, 209M386, 297NW340. See Dun. Dig. 389, 7345.

9530. Confirmation of report—Final judgment.

Appeals from orders or interlocutory judgments in partition proceedings to the supreme court. Laws 1941, c. 448.

9537. Sale ordered, when.

Appeals from orders or interlocutory judgments in partition proceedings to the supreme court. Laws 1941, c. 448.

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

Where separate owners each had a home building on one tract of land and that tract and another some distance away were sold enmasse, sale was valid as against alleged homestead rights where there was a relatively large single mortgage covering both tracts and court retained jurisdiction to pass upon any homestead claims and enforce them against proceeds of sale. Burke v. Burke, 209M386, 297NW340. See Dun. Dig. 7343.

Provision that distinct farms or lots shall be sold separately is directory and not mandatory, and contravention thereof does not render a sale void, but voidable upon a showing of fraud or prejudice or for other good cause. Id.

9544. Final judgment on confirming report.

Appeals from orders or interlocutory judgments in partition proceedings to the supreme court. Laws 1941, c. 448.

9544-1. Appeals from orders or interlocutory judgments.—Any party to any partition proceedings may appeal from any order or interlocutory judgment made and entered pursuant to Mason's Minnesota Statutes of 1927, Section 9527, 9530, 9537 or 9544, to the Supreme Court within thirty (30) days after the making and filing of any such order or interlocutory judgment. Any appeal taken pursuant to the provisions hereof shall be governed by the rules and laws applicable to appeals in civil cases. (Act Apr. 25, 1941, c. 448, §1.)
[558.215]

9544-2. Conclusiveness of determination.—All matters determined by any such order or intnerlocutory judgment shall be conclusive and binding upon all parties to such proceedings, and shall never thereafter be subject to review by the Court unless appealed from as provided for herein. (Act Apr. 25, 1941, c. 448, §2.)
[558.215]

9544-3. Repeal of inconsistent acts.—All acts or parts of acts inconsistent herewith are hereby repealed so far as may be necessary to give full force and effect to the provisions of this act. (Act Apr. 25, 1941, c. 448, §3.)

9544-4. Pending proceedings.—This act shall not affect any proceedings heretofore instituted and now pending. (Act Apr. 25, 1941, c. 448, §4.)

ACTIONS TO TRY TITLE

9556. Actions to determine adverse claims.

Laws 1943, c. 134, provides that state may be made a party defendant in action to quiet title or foreclose mortgage or other lien on real or personal property.

1. Nature and object of action.

Rights of a vendee under a contract for deed may be determined in either an equitable action to remove a cloud or statutory action to determine adverse claim. Ferch v. Hiller, 210M3, 297NW102. See Dun. Dig. 8029, 8031, 8043.

3. Interests determined.

Where in neither registration proceedings themselves nor by the record, existence of an unclaimed claimant is shown, want of jurisdiction does not appear from judgment roll itself, judgment of registration is not subject to collateral attack in a suit to quiet title. Dean v. R., 208M38, 292NW765. See Dun. Dig. 8361.

5. Possession.

As affecting purchase by school district of tax title lands, a tax title is not a good marketable title until title has been quieted by action, since a tax title is subject to many errors and mistakes, which might be raised at any time within 15 years by original owner. Op. Atty. Gen. (425c-12), Sept. 12, 1940.

7. Answer.

In action to quiet title, defendant probably should have challenged the plaintiff's title by answer rather than by motion to dismiss complaint, but plaintiff is in no position to challenge procedure where he stipulated judgment roll in registration proceedings into the record, showing title in defendant, and did not challenge procedure until motion for new trial and rehearing. Dean v. R., 208M38, 292NW765. See Dun. Dig. 8049.

9. Judgment.

Previous adjudication of location of a boundary line, made in an action to recover property unlawfully possessed, operated as an estoppel against re-litigation of that issue in a later action brought to determine location of same boundary line. Holtz v. Beighley, 211M153, 300NW445. See Dun. Dig. 1084, 5163.

9557. Unknown defendants.

Notice of lis pendens need not be filed or published in an action by the state to quiet title under Laws 1939, c. 341. Op. Atty. Gen. (374g), Dec. 4, 1940.

9562. Ejectment, etc.—Trial, how conducted, etc.

Action to evict parties from real estate which has been forfeited to the state should be brought in name of the state of Minnesota, but it is not necessary that any action be taken by any state department or officer before proceedings are begun by the proper county authority. Op. Atty. Gen. (700-d), July 3, 1941.

9563. Ejectment—Damages—Improvements.

The action for mesne profits is an emanation from the action of ejectment, and under mode of proceeding by ejectment invented at an early day in this country, plaintiff recovered term as laid in his demise, and nominal damages only, and when by this method he recovered possession, in fiction of law, he was remitted to his original seizin, and being so, had an action of trespass to recover mesne profits for the whole time he was out of possession. Martin v. Smith, 214M9, 7NW(2d)481. See Dun. Dig. 2898, 9695.

Mesne profits are a sum recovered for value or benefit which a person in wrongful possession has derived from his wrongful occupation of land between time when he acquired wrongful possession and time when possession was taken from him. Id. See Dun. Dig. 2898.

9569. May remove crops.

Fructus industrailes are regarded as personalty, whether separated from the soil or not, and a tenant, as owner of crops, may remove them even after entry of a judgment in ejectment against him. State Bank of Loretto v. Dixon, 214M39, 7NW(2d)351. See Dun. Dig. 2508.

9570. Occupant not in actual possession—Actions in other form.

The action for mesne profits is an emanation from the action of ejectment, and under mode of proceeding by ejectment invented at any early day in this country, plaintiff recovered term as laid in his demise, and nominal damages only, and when by this method he recovered possession, in fiction of law, he was remitted to his original seizin, and being so, had an action of trespass to recover mesne profits for the whole time he was out of possession. Martin v. Smith, 214M9, 7NW(2d)481. See Dun. Dig. 2898, 9695.

An incompetent's guardian who, contrary to provisions of a will giving incompetent exclusive use of certain rooms in testator's dwelling, consents to use and occupancy of rooms by a member of his own household under a rental arrangement cannot maintain an action of trespass against occupant, latter's entry not having been forcible or unlawful. Id. See Dun. Dig. 9684.

Gist of action of trespass quare clausum fregit is breaking and entering vi et armis of plaintiff's close, and whatever is done after the breaking and entering is but aggravation of damages, and unless entry was forcible and unlawful, there can be no recovery. Id. See Dun. Dig. 9684.

9572. Mortgagee not entitled to possession.

Where mortgagee taking possession contracted, in event of foreclosure, either to buy property for full amount of debt or to release any deficiency judgment procured pursuant to foreclosure, and on foreclosure purchased for less than debts, subject to accrued taxes, mortgagor was entitled to rentals collected by mortgagee during period of redemption, and they could not be applied either on accrued taxes or upon indebtedness, though there was no deficiency judgment, contract wiping out entire debt on foreclosure. Wagner v. B., 206M 118, 288NW1. See Dun. Dig. 6242.

It was always competent for debtor, by use of apt words in his contract, to create a mere lien on his land to secure payment of debt, without conveying legal title to creditor, or giving him right to possession, but before passage of this statute he could by use of other apt words convey legal title and give creditor right to possession before foreclosure, as security for his debts, and statute was passed to prevent him from doing this, and a contract contravening policy of statute cannot be enforced. Lemon v. Dworsky, 210M112, 297NW329. See Dun. Dig. 6149, 6223, 6227.

A grantee of a mortgagor takes subject to right of a mortgagee in possession to retain possession and apply rent upon indebtedness. Id. See Dun. Dig. 6217, 6242.

A mortgagee in possession is entitled to rents and profits and cannot be dispossessed by mortgagor or persons in privity with him until his mortgage is satisfied. Id. See Dun. Dig. 6230, 6240.

Doctrine of mortgagee in possession, derived from common-law conception of a mortgage as a conveyance transferring right to possession from grantor to grantee, has been adopted notwithstanding that under our law a mortgage creates merely a lien enforceable by foreclosure. Id. See Dun. Dig. 6237.

Mortgagees who obtained possession of mortgaged property with consent of mortgagor were mortgagees in possession. Id. See Dun. Dig. 6238.

Since a mortgagee in possession holds premises by virtue of mortgagor's consent, he may retain that possession until mortgage obligation has been met, while mortgagee seeking by legal means to obtain possession to collect income must rely upon statutory authority to accomplish that end. Gandrud v. Hansen, 210M125, 297 NW730. See Dun. Dig. 6230, 6240.

Holder of an inferior mortgage lien has right to insist that holder of a prior mortgage in possession apply rents and profits arising out of mortgaged property upon those charges which, unless paid, become additional charges thereon superior to those of such inferior mortgagee, especially if it appears that otherwise inferior mortgagee's security will become inadequate. Id. See Dun. Dig. 6236.

To constitute one a mortgagee in possession, it must appear that such possession was given by reason of agreement or assent of mortgagor or his assigns that mortgagee have possession under mortgage and because of it. Id. See Dun. Dig. 6238.

A mortgage of real property is not to be deemed a conveyance so as to entitle owner of mortgage to recover

possession without foreclosure, though a mortgagor may give to his mortgagee a right of possession before foreclosure by agreement subsequent to the mortgage. Id. See Dun. Dig. 6239.

A mortgagor may give mortgagee right of a mortgagee in possession, absent any claim of unconscionable advantage practiced by mortgagee. Id. See Dun. Dig. 6239.

By this statute, the rule that a mortgage of real estate conveyed the legal title was abrogated and the rule adopted that a mortgage creates a lien in favor of the mortgagee as security for his debt with right of ownership and possession in the mortgagor until foreclosure and expiration of the period of redemption, and then foreclosure does effect a severance of title. Romanchuk v. Plotkin, 215M156, 9NW(2d)421. See Dun. Dig. 6215, 6223.

Liability of a senior mortgagee to account to a junior mortgagee for rents released to the mortgagor. 26 Minn. Law Rev. 880.

9573. Conveyance by mortgagor to mortgagee.

Mortgagee may purchase mortgagor's right of redemption provided there is fair consideration given and no unconscionable advantage is taken of necessities of the mortgagor. Gandrud v. Hansen, 210M125, 297NW730. See Dun. Dig. 6228, 6396(2).

Liability of a senior mortgagee to account to a junior mortgagee for rents released to the mortgagor. 26 Minn. Law Rev. 880.

9576. Notice to terminate contract of sale, etc.

1. In general.

While contract for deed itself could not be recorded without certificate of auditor and treasurer that all taxes have been paid, notice of cancellation may be recorded without certificate as to taxes. Op. Atty. Gen. (373b-9(e)), May 21, 1941.

3. Exclusiveness of remedy.

Though an installment contract for a deed contained no acceleration clause, vendor on default had right to sue for breach of contract instead of proceeding to cancel contract. Kirk v. Welch, 212M300, 3NW(2d)426. See Dun. Dig. 10091.

MISCELLANEOUS ACTIONS

9580. Nuisance defined—Action.

Where property near which nuisance is maintained is owned jointly by husband and wife, husband and he alone may recover for injury to members of his family. King v. S., 207M573, 292NW198. See Dun. Dig. 7274.

In action against a sanitary district for damages based on trespass and invasion of premises of land owner by a nuisance damaging structures thereon, consisting of blasting and other operations in construction of a sewer under a city street, it not being shown that construction of a sewage disposal plant was "ultra hazardous", objection to question propounded to an engineer whether 50 pounds of dynamite exploded at one time was or was not ultra hazardous, might well have been sustained, but was not prejudicial where jury well understood that blast in question was a mishap. Jones v. Al Johnson Const. Co., 211M123, 300NW447. See Dun. Dig. 7249.

Rule that statute defining a private nuisance has no effect against state, its officers and agents engaged in a lawful undertaking under its sovereign authority has no application to a sanitary district guilty of trespass and invasion of premises of a land owner by a nuisance damaging structures, incident to blasting and other operations in construction of a sewer under a city. Id. See Dun. Dig. 7264.

A sanitary district, while lawfully engaged in constructing a sewage tunnel under a city street, may be held liable to adjacent property owner for creating a private nuisance, if, by blasting or other operations, soil is so shaken and disturbed that building settles unevenly, breaking windows, cracking cement floors, foundation walls and plastering, dislocating plumbing, and putting doors out of plumb. Id. See Dun. Dig. 7240.

For temporary injury caused by unintentional trespass or private nuisance, cost of restoration rather than difference in market value before and after, is proper measure of damages. Id. See Dun. Dig. 9694.

In action against a power plant to enjoin and recover damages for a nuisance, court did not err in refusing to admit in evidence a bottle containing materials said to have been removed from a plant using competitive devices, to establish the superiority of such system, no proper foundation having been made and its probative value being too speculative to be relevant unless identity of operating conditions between the two plants was established in considerable detail. Jedneak v. Minneapolis General Electric Co., 212M226, 4NW(2d)326. See Dun. Dig. 3244.

Residents living in vicinity of objectionable activity are to be protected against a material and substantial interference with their ordinary physical comfort. However, not only is the degree of discomfort measured by "the standards of ordinary people" and "not by the standards of persons of delicate sensibility," but even more important, residents are entitled only to have the substantial and material phase of the interference removed so that they "will suffer discomforts no greater than those ordinarily incident to life in many sections of every city." Id. See Dun. Dig. 7244.

Though negligence upon part of defendant in operating a plant need not be proved, whether defendant was doing as much as reasonably was possible in the way of careful operation becomes a measure of whether there has been substantial interference with enjoyment of life by residents of a vicinity. Id. See Dun. Dig. 7246.

In an area zoned for industrial use, whether conditions incident to the operation of a particular industry constitute a nuisance—a substantial interference with the enjoyment of life of those resident there—must be determined by whether that industry is being operated under conditions best calculated to remove or minimize the interference. Id. See Dun. Dig. 7244.

Whether power company operating a plant in an area zoned by city for heavy industrial use was using the most efficient devices for removal of cinders, smoke and ashes from its smoke stacks held a question of fact for jury. Id. See Dun. Dig. 7244.

In action against a power plant emitting smoke and cinders to enjoin and recover damages for a nuisance, it was not error to fail to admit into evidence an ordinance of city making it unlawful to permit the escape of certain noxious substances and odors. Id. See Dun. Dig. 7282.

A sewer discharging offensive, unpurified effluent into a natural stream so as to create a nuisance is the proximate and not the remote cause or condition of the nuisance, since if sufferers from the nuisance were left to recover from each householder and business in a city, it would create an intolerable situation and be a travesty on justice. Huber v. City of Blue Earth, 213M319, 6NW(2d)471. See Dun. Dig. 7264.

A city is liable for pollution of water by sewage. Id. See Dun. Dig. 7264.

That a city enacts an ordinance forbidding certain offensive matter from being cast into its sewers affords it no defense to an action for nuisance brought against it by a lower riparian owner for polluting a stream, into which the sewers drain, with sewage which includes such offensive matter. Id. See Dun. Dig. 7264.

In action by lower riparian owner against a city, evidence held to show that pollution of stream was caused by materials passing through sewer of city. Id. See Dun. Dig. 7281.

Testimony of expert that from 85 to 90% of pollution of stream was caused by materials coming from canning factory through city sewer and that from 10 to 15% was created by drainage from stalk pile not passing through city sewer was sufficient to enable jury to apportion harm caused by each source and confine city's liability to that portion for which it was responsible. Id. See Dun. Dig. 7288.

An adjoining owner who raised his land above that of his neighbor and built a terrace half on land of neighbor, and when neighbor removed half of terrace had his servants enter upon such land to cut sod in process of making a new grade for the terrace, he was guilty of both nuisance and trespass. Sime v. Jensen, 213M476, 7NW(2d)325. See Dun. Dig. 7240.

Rules applicable to damages recoverable for trespass and for nuisance interfering with use of land occupied as a home. Id. See Dun. Dig. 7288.

In action by landowner to enjoin a nuisance and for damages growing out of drainage of creamery waste upon land, there was no showing made of impossibility of disposing of objectionable matter except over plaintiff's premises so as to invoke doctrine of Harrisonville v. W. S. Dickey Clay Co., 289US334, 53SCR602, 77LEd1208, or of treating it or otherwise relieving burden upon plaintiff's property as in such cases as Roukovina v. Island Farm Creamery Co., 160M335, 200 NW350, 38ALR1502; Satren v. Hader Cooperative Cheese Factory, 202M553, 279NW361. Herrmann v. Larson, 214 M46, 7NW(2d)330. See Dun. Dig. 7244.

Drainage of creamery and other waste upon land so that it sumberges a part of pasture, kills vegetation, and creates noxious odors, constitutes a nuisance entitling landowner to an injunction and damages unless creamery has acquired a right by prescription or implied grant to drain waste upon such land. Id.

As regards maintenance of nuisance, rights of habitation do not have to yield to rights of business. Id.

Where creamery and a landowner agreed to laying of a tile drain by creamery to connect with landowner's drain and thereafter part of tile laid by creamery was torn up under its authority or consent, creamery waived any rights that may have arisen by virtue of the agreement to drain waste from creamery upon such land, as affecting nuisance and injunction and damages. Id. See Dun. Dig. 7247.

Whether creamery has acquired a prescriptive right or implied grant to drain waste from creamery upon land is unimportant where amount of drainage and extent of injuries are substantially greater than they were when such right or grant was acquired. Id. See Dun. Dig. 7247, 7256.

Government can obtain an injunction to restrain a public nuisance, without showing any property right in itself, duty of protecting property rights of all of its citizens being sufficient. State v. Sportsmen's Country Club, 214M151, 7NW(2d)495. See Dun. Dig. 4499a, 7274.

Village probably would not be liable for nuisance occasioned by sewer system not owned or controlled by it. Op. Atty. Gen., (387G-5), Jan. 20, 1940.

City council may adopt an ordinance prohibiting playing of music or making of advertising announcements from aircraft flying over city at low altitude. Op. Atty. Gen. (234a), Nov. 8, 1940.

An action may be maintained for the abatement by injunction of a beer tavern guilty of continous and persistent violation by selling intoxicating liquor without a license. Op. Atty. Gen. (218f), May 24, 1943.

Interference with surface waters. 24 MinnLawRev. 891.

9583. Action for waste.

Decree that trustees restore leased property and remedy waste afforded complete remedy and relief to owner so far as waste or any other unsafe or unlawful condition was concerned. S. T. McKnight Co. v. Central Hanover Bank & Trust Co., (CCA8), 120F(2d)310.

9585. Trespass—Treble damages.

A verdict is not as a matter of law excessive where there is sufficient evidence to go to the jury that actual damages as distinguished from treble damages amounted to $1300, verdict being for actual damages of $400 and treble damages of $1200. Lawrenz v. L., 206M315, 288NW 727. See Dun. Dig. 2597.

Vendee in possession of land under a contract of purchase is entitled to recover all damages to land resulting from a trespass by third person. Id. See Dun. Dig. 9687.

Where plaintiff's complaint in suit for trespass alleged only fact of title generally and without disclosing means by which acquired, and defendant's answer pleaded generally that its alleged acts of trespass were consented to by plaintiff but without pleading anything more, plaintiff, under his reply denying all new matter, could assail a written grant of easement, introduced by defendant defensively against the charged trespass, upon ground that grant was result of a mutual mistake between parties thereto, defendant being in privity with grantee therein named. Id. See Dun. Dig. 9691.

A mutual mistake as to location of a grant of right-of-way to an electric company which cut down trees and is sued for trespass held established as a matter of law. Id. See Dun. Dig. 9696.

Evidence held to sustain verdict that trespass by electric company was not casual, the result of inadvertence, mistake, or unintentional. Id. See Dun. Dig. 9696.

Insurer in a public liability policy by refusing to defend insured in a suit was concluded by implications contained in verdict and judgment to effect that trees for destruction of which suit was brought were not cut by accident or mistake, but willfully and wrongfully, so that treble damages could be awarded. Langford Elec. Co. v. Employers Mut. Indem. Corporation, 210M289, 297 NW843. See Dun. Dig. 4875pp, 5176.

Accidental injury or destruction of trees does not give rise to treble damages. Id. See Dun. Dig. 9696.

An adjoining owner who raised his land above that of his neighbor and built a terrace half on land of neighbor, and when neighbor removed half of terrace had his servants enter upon such land to cut sod in process of making a new grade for the terrace, he was guilty of both nuisance and trespass. Sime v. Jensen, 213M476, 7NW(2d)325. See Dun. Dig. 9684.

Rules applicable to damages recoverable for trespass and for nuisance interfering with use of land occupied as a home. Id. See Dun. Dig. 9694.

9590. Action to determine boundary lines.

Evidence held to sustain finding of possession for required period, but not necessary intention to claim title adverse to true owner. Sullivan v. Huber, 209M592, 297 NW33. See Dun. Dig. 114.

Previous adjudication of location of a boundary line, made in an action to recover property unlawfully possessed, operated as an estoppel against re-litigation of that issue in a later action brought to determine location of same boundary line. Holtz v. Beighley, 211M153, 300 NW445. See Dun. Dig. 1084, 5163.

Practical location of a boundary line can be established only in one of three ways: acquiescence for sufficient length of time to bar right of entry under statute of limitations; express agreement between parties claiming land on both sides and acquiescence therein afterwards; or party whose rights are to be barred must, with knowledge of true line, have silently looked on while other party encroached upon it, and subjected himself to expense which he would not have done had line been in dispute. Dunkel v. Roth, 211M194, 300NW610. See Dun. Dig. 1083.

Since effect of a practical location of a boundary line is to divest owner of his property, evidence establishing such location should be clear, positive, and unequivocal. Id. See Dun. Dig. 1083.

Fact that judgment establishing boundary line results in a jog in true platted line does not, without more, divest true owner of his title to that portion of his land not lost to him by adverse possession. Id. See Dun. Dig. 1084.

Title to bed of a meandered non-navigable lake passes by a deed conveying shoreland unless a contrary intention appears. Schmidt v. Marschel, 211M539, 2NW(2d) 121. See Dun. Dig. 1067.

If lands are subject of private ownership, adverse possession may be had of them even though they are covered by water. Id.

Fact that government posts and corners have become lost does not preclude use of "extrinsic aids" to show their actual location. City of North Mankato v. Carlstrom, 212M32; 2NW(2d)130. See Dun. Dig. 1081.

Where landowner sold land in parcels to several persons and dispute arose as to boundary between the parcels, holder of old mortgage on land could not be prejudiced by a determination in a suit to reform, for the worst that could happen to her security would be that she might be compelled to sell the land on foreclosure in inverse order of alienation. Czanstkowski v. Matter, 213M257, 6NW(2d)629. See Dun. Dig. 1084.

Where a fence is in existence when an owner acquires ownership of contiguous parcels of real property and afterwards conveys a part thereof which includes land beyond the line of the fence, and where there is no adverse possession for the period of limitation or an agreement between the parties that the line is fixed by the fence with acts by the grantor in reliance thereon to his prejudice, there is no basis for claiming a practical location of the boundary line as of the line of the fence. Romanchuk v. Plotkin, 215M156, 9NW(2d)421. See Dun. Dig. 1083, 2659a.

Ordinarily, in order to establish a practical location of a boundary line it must appear the location relied on was acquiesced in for the full period of the statute of limitations; or the line was expressly agreed upon by the parties and afterwards acquiesced in; or the party barred acquiesced in the encroachment by the other, who subjected himself to expense which he would not have done if there had been a dispute as to the line. Id. See Dun. Dig. 1083.

Description in mortgage controls as against fence or other structure on land at the date of its execution. Id. See Dun. Dig. 1083.

Title, points and lines in lakes and streams. 24Minn LawRev305.

9592. Judgment—Landmarks.

Where a deed contains an unqualified reference to a monument as location of a boundary, line thereof passes through center of monument. Holtz v. Beighley, 211M153, 300NW445. See Dun. Dig. 1061.

Fact that judgment establishing boundary line results in a jog in true platted line does not, without more, divest true owner of his title to that portion of his land not lost to him by adverse possession. Dunkel v. Roth, 211 M194, 300NW610. See Dun. Dig. 1084.

CHAPTER 83

Foreclosure of Mortgages

BY ADVERTISEMENT

9602. Limitation.

9. Statute of limitations.

See §9189 (Laws 1909, c. 181, §2) which changed law concerning limitations.

10. Effect of foreclosure on debt.

An action to recover a deficiency after foreclosure of a mortgage is one to enforce personal liability of mortgagor for debt, and where debt is barred, an action against mortgagors cannot be maintained. Massachusetts Mut. Life Ins. Co. v. Paust, 212M56, 2NW(2d)410, 139ALR 473. See Dun. Dig. 6484.

11. Effect of foreclosure on lien.

Where property was forfeited to state for delinquent taxes after foreclosure sale at which mortgagee bid in premises for full amount of mortgage debt, mortgagor's grantee could purchase state's title, because duty to pay delinquent taxes terminated with foreclosure. Pulsifer v. Paxton, 212M68, 2NW(2d)427. See Dun. Dig. 6267, 9374.

9605. Requisites of notice.

1. By whom signed—names of the parties.

Notice of mortgage foreclosure sale by advertisement need not mention assignment by mortgagee bank to Reconstruction Finance Corporation and its reassign-