

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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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 continuous 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 shoreline 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. Faust, 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-

ment to the bank. *Peterson v. Jacobs*, 303Mich329, 6NW (2d)533, disapproving *Moore v. Carlson*, 112Minn433, 435, 128NW578; *Hathorn v. Butler*, 73Minn15, 75NW743. See Dun. Dig. 6308, 6326.

#### 9607. Sale, how and by whom made.

##### 10. In general

Where all mortgage notes are owned by one person, payments, either voluntary or involuntary, should not be applied pro rata. *Massachusetts Mut. Life Ins. Co. v. Paust*, 212M56, 2NW(2d)410, 139ALR473. See Dun. Dig. 6351.

#### 9608. Postponement.

Relief from inequitable foreclosure of real estate mortgages and execution sales, extension of periods of redemption, and limitation of right to maintain actions for deficiency judgments. Laws 1941, c. 38.

#### 9610. Foreclosure for installments, etc.

Absent a provision in note or mortgage for application thereof, proceeds of a foreclosure sale are treated as an involuntary payment subject to application by court according to principles of equity and justice, and in absence of controlling equity compelling a different application, such proceeds should be applied first on indebtedness for which personal liability is barred by statute of limitations and then to the balance. *Massachusetts Mut. Life Ins. Co. v. Paust*, 212M56, 2NW(2d) 410, 139ALR473. See Dun. Dig. 6351.

#### 9611. Surplus.

Old age assistance lien, junior to a mortgage, is transferred from the land to the surplus of the proceeds of sale after satisfying the first mortgage, following foreclosure of first mortgage. Op. Atty. Gen. (521p-4), Apr. 28, 1943.

#### 9613. Certificate of sale—Record—Effect.

Construction of sheriff's certificates in mortgage foreclosure by advertisement before January 1, 1875. Laws 1941, c. 388.

### RIGHTS AND LIABILITIES OF PURCHASER

#### 10. Effect of mortgagee bidding in.

Since taxes were a paramount lien upon land, mortgagee foreclosing mortgage and bidding in land for full amount of mortgage debt and expenses of foreclosure presumably knew of taxes and adjusted amount of bid accordingly. *Pulsifer v. Paxton*, 212M68, 2NW(2d)427. See Dun. Dig. 6213.

#### 12. Right to crops, rents and profits.

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. 6371.

#### 12½. Taxes.

Purchase of land by mortgagee upon foreclosure was, in law, subject to tax lien. *Pulsifer v. Paxton*, 212M68, 2NW(2d)427. See Dun. Dig. 6213.

**9618. Perpetuating evidence of sale.**—Any party desiring to perpetuate the evidence of any sale made in pursuance of this chapter may procure:

1. An affidavit of the publication of the notice of sale and of any notice of postponement, to be made by the printer of the newspaper in which the same was inserted, or by some person in his employ knowing the facts.

2. An affidavit or return of service of such notice upon the occupant of the mortgaged premises, to be made by the officer or person making such service, or, in case the premises were vacant or unoccupied at the time when such service must be made, an affidavit or return showing that fact, to be made by the officer or person attempting to make such service.

3. An affidavit by the person foreclosing said mortgage, or his attorney, or someone knowing the facts, setting forth the facts relating to the military service status of the owner of the mortgaged premises at the time of sale.

Such affidavits and returns shall be recorded by the Register of Deeds and they and the records thereof, and certified copies of such records, shall be prima facie evidence of the facts therein contained.

The affidavit provided for in subdivision 3 hereof may be made and filed for record for the purpose of complying with the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, passed by the Con-

gress of the United States and approved on October 17, 1940, and may be made and filed for record at any time subsequent to the date of the mortgage foreclosure sale. (As amended Act Apr. 26, 1941, c. 477, §1.)

Sec. 2 Act Apr. 26, 1941, provides that the act shall take effect from its passage.

#### 9626. Redemption by mortgagor.

Persons in military service. Laws 1943, c. 431.

#### 10. Time in which to redeem—Extension.

An estoppel may be based on an oral promise of the purchaser at a mortgage foreclosure or judicial sale that he will not insist on the statutory period of redemption. *Albachten v. Bradley*, 212M359, 3NW(2d)783. See Dun. Dig. 6400.

#### 9627. Redemption by creditor.

Relief to persons in military service. Laws 1943, c. 431.

#### 9629. Certificate of redemption—Record.

Rights of bona fide purchasers at execution sale. 24 MinnLawRev 805.

**9632. Holder of junior liens may pay default in prior liens.**—Any person who has a mortgage lien upon any land against which there exists a prior mortgage may pay any taxes or assessments on which any penalty would otherwise accrue, and may pay the premium upon any policy of insurance procured in renewal of any existing policy upon mortgaged premises, and may, in case any interest upon any prior or superior lien is in default, or any part of the principal shall become due, or amortized instalments which may be in default upon any such prior lien, pay the same, and all such sums so paid shall become due upon such payment and be a part of the debt secured by such junior mortgage, shall bear interest from date of payment at the same rate as the indebtedness secured by such prior lien, and shall be collectible with, as a part of, and in the same manner as the amount secured by such junior mortgage. Such payments shall be proved by the affidavit of the junior mortgagee, his agent or attorney, stating the items and describing the premises, and a copy must be filed for record with the register of deeds. (As amended Act Apr. 12, 1943, c. 395, §1.)

A surety on a guardian's bond who holds a second mortgage as collateral security for the surety's liability on such bond owes his principal the duty of exercising ordinary care for the preservation of such security, provided it is in his possession and control, but this does not impose upon him the obligation of advancing substantial personal funds to prevent or to redeem from the foreclosure of first mortgage. *Faunce v. Schueller*, 214M 412, 8NW(2d)523. See Dun. Dig. 6233, 6236.

Guardian has burden of establishing that his loss was occasioned by the negligence or breach of duty of his surety. Id.

#### 9633. Mortgages to be reinstated in certain cases.

### CURATIVE ACTS

Foreclosure sales by advertisement heretofore made, legalized. Laws 1941, c. 305.  
Laws 1943, c. 142, legalizes certain defective mortgage foreclosure sales.

### EMERGENCY RELIEF ACT

Moratorium extended to July 1, 1942, by identical provisions of Act Feb. 28, 1941, c. 38.

#### 9633-1. Application of Act.

*Blaisdell v. Home Bldg. & Loan Assoc.*, 189M422, 249 NW334, 86ALR1507. *Aff'd* 290US398, 54SCR231, 78LEd413, 88ALR1481.

Constitutionality of moratorium law although challenged and argued by counsel, need not be determined where it is apparent from record that holder of sheriff's certificate does not wish to obtain possession of mortgaged property if some other reasonable means can be found to liquidate his claim. *Shumaker v. H.*, 206M458, 288NW339. See Dun. Dig. 1644.

### PART ONE

#### 9633-2. Emergency declared to exist.

Purpose of act was to grant distressed mortgagors, for a limited time only, an opportunity to save equities in their holdings, as a defensive shield to protect owners from exploitation by holders of mortgages. *Shumaker v. H.*, 206M458, 288NW339. See Dun. Dig. 6392.

**9633-5. Period of redemption may be extended.**

If owner of property cannot procure a loan on a tract claimed to be of value of more than twice amount of mortgage debt within a period of more than three years it is not probable that value claimed is there. *Shumaker v. H.*, 206M458, 288NW839. See Dun. Dig. 6392.

Upon facts held that a new trial be had to determine whether there is reasonable probability of refinancing present mortgage indebtedness within a reasonable time. *Id.* See Dun. Dig. 6392.

If upon due hearing it shall appear that refinancing seems probable, mortgagee should receive the net amount of rental income of not less than \$250 per month where gross monthly income is in excess of \$450. *Id.* See Dun. Dig. 6392.

Laws 1939, c. 7, does not authorize the period of redemption from mortgage foreclosure sale to be extended where the proof is conclusive that the mortgagor's equity in the premises is of less value than the amount required to redeem and where mortgagor admits no effort made to refinance the mortgage, knowing it to be hopeless. *Smith v. T.*, 207M349, 291NW516. See Dun. Dig. 6392.

Provision of New York moratory law that in event owner of mortgaged property fails to apply to the redemption of the principal any surplus which mortgaged property produces over carrying charges and interest mortgagee may foreclose, does not transfer the right to rent ipso facto to the mortgagee so as to impose a liability upon last record owner for amount of such surplus enforceable by supplementary proceedings where such owner did not assume the obligations of the mortgage. *Chase Nat. Bank of N. Y.*, 283NY350, 28NE(2d)868.

**PERSONS IN MILITARY SERVICE**

**9633-31. Foreclosure actions against persons in military service.**—Any person now or hereafter in military service of the United States as defined by the federal Soldiers' and Sailors' Civil Relief Act of 1940, as amended, or the Women's Army Auxiliary Corps of the United States, who, at or prior to his or her enlistment or induction therein, and at the time of sale as hereinafter referred to, is the owner of real estate or an interest therein subject to mortgage, or judgment, or other lien, which mortgage, judgment, or lien has been or shall be foreclosed by advertisement or by action or other proceedings, shall have the right prior to the expiration of the time now allowed by law for redemption, to have such time extended until six months after the cessation of hostilities in the present war between the United States and its allies, and Germany, Japan, Italy, and their allies, is terminated by proper federal authority, or until six months after his or her decease while in service, or discharge from the military service, whichever is the later date, in the manner hereinafter provided. (Act Apr. 13, 1943, c. 431, §1.)

**9633-32. Redemption period extended in certain cases.**—If such foreclosure is by advertisement, such period of redemption shall be extended as hereinbefore set forth by such mortgagor or the present owner of such real estate, or interest therein, his or her agent, attorney, next friend, personal representative or assigns, serving in the manner required for service of a summons in a civil action within twelve months after said foreclosure sale upon the purchaser at such foreclosure sale or his assigns, and recording in the office of the register of deeds of said county an affidavit, together with proof of service thereof, wherein is set forth the name of such mortgagor, or present owner, the date of said mortgage, and the book and page of its record in the office of the register of deeds, a description of the real estate covered by said mortgage, the date of his or her enlistment or induction into such military service and at the time of said sale, and further stating that such mortgagor or owner was the owner of said premises or of an interest therein at the time of said sale, and that such mortgagor or owner is a member of the military service of the United States or the Women's Army Auxiliary Corps, and the date of the sheriff's certificate of sale. Such affidavit shall be personally served upon said purchaser, or his assignee, if found within said county. Provided, however, that if said purchaser or his assignee cannot be found within said county, as appears by the certificate of the sheriff of said county, after due and diligent search and inquiry has been

made, wherein it is made to appear that said purchaser, or his assignee, cannot be found in said county, and that the place of residence of said purchaser or his assignee is to him unknown, service of said affidavit shall be deemed for the purpose hereof to have been made by the filing and recording of such certificate of said sheriff with said affidavit in the office of the register of deeds or the registrar of titles in and for the county or counties in which said real estate is situated. Upon compliance with the foregoing conditions the period of redemption shall be extended as hereinbefore set forth. (Act Apr. 13, 1943, c. 431, §2.)

**9633-33. Redemption period extended in certain cases.**—In a case where the mortgage, lien, or judgment has been foreclosed by an action in the district court and a sale thereunder has been held, and which sale has been duly confirmed by said court if required by statute, the period of redemption from such sale shall be extended by said mortgagor or owner of said premises, his or her agent, attorney, next friend, or personal representative, filing within twelve months from date of said order of confirmation of said sale if required, otherwise after said sale, an affidavit, together with proof of service thereof in the manner provided in Section 2 hereof, wherein is set forth the name of such mortgagor, or present owner, the date of said mortgage, and the book and page of its record in the office of the register of deeds, a description of the real estate covered by said mortgage, the date of said sale, and further stating that such mortgagor or owner was the owner of said premises or of an interest therein at the time of his or her enlistment or induction into such military service and at the time of said sale, and that such mortgagor or owner is a member of the military service of the United States or the Women's Army Auxiliary Corps, and the date of the order of the court confirming such sale if confirmed, with the clerk of the district court wherein said foreclosure action or judgment is pending, and by filing and recording a certified copy thereof with the register of deeds or registrar of titles of the county wherein said real estate is situated. The period within which such mortgagor or present owner of said premises, or his or her personal representative, may redeem from any such foreclosure and sale, under this act, shall be extended as hereinbefore set forth, but in no event shall such period of redemption in any case be extended beyond June 1, 1945. (Act Apr. 13, 1943, c. 431, §3.)

**9633-34. Receiver may be appointed.**—In the event the benefits of this act shall have been invoked by or in behalf of such person, at any time after the date of sale, the holder of the sheriff's certificate of sale, or his assignee, may apply with or without notice to said mortgagor or owner to the district court in the county in which any of such real estate is situated, for the appointment of a receiver of such real estate, who shall receive the rents, profits and income therefrom accruing after twelve months from the date of sale, and thereafter account to the court at least once in each six months' period, and perform such other duties and exercise such other powers as the court by its order may direct; provided such receiver shall not be entitled to possession of said real estate or to receive the rents, profits and income therefrom until the expiration of twelve months from the date of sale. The court may, as the equities may warrant, direct and order that the receiver apply all or part of such rents, profits and income towards the payment of taxes which have become a lien subsequent to the date of sale, insurance, interest, the amount paid for said property at such sale, or repairs at such time and in such manner as it fixes and orders, and said receiver shall give bond in an amount to be fixed by the court, and shall in all things comply with the orders of the court relative thereto. (Act Apr. 13, 1943, c. 431, §4.)

**9633-35. Proceeding after expiration of time of redemption.**—Upon the expiration of the time for redemption as may be hereunder extended, the certificate of sale shall operate as a conveyance to the purchaser or his assignee of all the right, title, and interest of the mortgagor or owner in and to the premises described therein at the date of such lien without any other conveyance or formality whatsoever. (Act Apr. 13, 1943, c. 431, §5.)

**9633-36. Not to affect rights of junior lienors.**—Nothing herein contained shall be construed to extend the time for redeeming by junior lienors under Mason's Minnesota Statutes of 1927, Section 9627 and said junior lienors who have filed during the year of redemption, notice of intention to redeem under Mason's Minnesota Statutes of 1927, Section 9627, and have complied therewith, shall have the right to redeem within said five day periods respectively in accordance with their priority upon payment of the amounts required to redeem in each case and upon making said redemption the person last redeeming shall be exactly in the same position with the same and no greater rights and privileges, with exception as to the amount due necessary to redeem by the original mortgagor, his assigns or his or her personal representative, as the first holder and owner of the sheriff's certificate of sale and the mortgagor or the present owner of said premises or his or her personal representative shall have the same right to redeem during the extended period of redemption as provided in this act from such foreclosure sale, from the last of said persons redeeming as junior lienors, by paying the total amount then and there due as he or she would have had to redeem from the first owner and holder of said sheriff's certificate under said foreclosure sale, but in no event shall said right to redeem extend beyond June 1, 1945. (Act Apr. 13, 1943, c. 431, §6.)

#### BY ACTION

##### 9634. By what rules governed.

**13. Issues which may be litigated.**  
In suit to foreclose trust deed, in which suit trustees acting under authority expressly conferred upon them by such trust deed selected a court of equity and demanded equitable relief of having amount of secured debt established and legal remedy of judgment for deficiency, not only the validity of the trust deed was an issue but also the validity of the bonds and the consideration therefor as well as question of fraud inhering in them. *Phoenix Finance Corp. v. L.*, (CCA8) 115F(2d)1, 139ALR1490. Rev'd on other grounds 314US118, 62SCR139. See 313US538, 61 SCR833, 314US582, 62SCR294, 316US641, 62SCR940. See Dun. Dig. 5173, 6438.

**9634-1. State of Minnesota may be made defendant in certain cases.**—In all cases not otherwise provided for, the consent of the State of Minnesota is given to be named a party in any suit which is now pending or which may hereafter be brought in any State Court having jurisdiction of the subject matter,

to quiet title to or for the foreclosure of a mortgage or other lien upon real estate or personal property, for the purpose of securing an adjudication touching any mortgage or other lien the State of Minnesota may have or claim on the real estate or personal property involved, provided, that this shall not be deemed to supersede any express provision of law relating to actions to which the state may be made a party, nor to relieve any person from complying with any requirement of such laws. (Act Mar. 15, 1943, c. 134, §1.)  
[582.13]

##### 9636. Judgment—Transcript to sheriff.

###### 1. The judgment generally.

Where personal liability for debt in a lien foreclosure action is found against two defendants jointly and severally and judgment is entered against only one of them, latter may not complain since he may seek contribution from other defendant for his proportionate share of any sum he has paid on judgment. *Smude v. Amidon*, 214M266, 7NW(2d)776. See Dun. Dig. 1920, 6442.

Lien claimants, parties to a foreclosure action, before finally submitting their cause to the court, may waive their lien rights and limit recovery sought to personal judgments against a defendant personally liable for the debt. *Id.* See Dun. Dig. 6442.

Judgment need not specifically provide for a deficiency judgment in order to authorize later entry of a personal judgment against a defendant found personally liable, for the balance due after the foreclosure sale. *Id.* See Dun. Dig. 6442.

In actions to foreclose mechanics' liens or mortgages, ordinarily personal judgment may not be entered against a defendant found personally liable for the debt until lien rights covered by judgment have first been exhausted by foreclosure sale. *Id.* See Dun. Dig. 6442.

###### 3. Modification of judgment.

In foreclosure actions, court retains jurisdiction after entry of judgment and after time to appeal therefrom has expired for purpose of supervising and controlling the foreclosure sale, and in exercise of such control may permit a lien claimant to waive completely worthless lien rights included in such judgment and order entry of personal judgment against a defendant personally liable for the debt without first requiring a foreclosure sale. *Smude v. Amidon*, 214M266, 7NW(2d) 776. See Dun. Dig. 6443.

In ordinary action, after time for appeal expires, court cannot modify a judgment except for clerical error or misprision, or except as prescribed in statute, but there is a distinction in mortgages and mechanics' lien foreclosure action. *Id.*

###### 6. Distribution of proceeds of sale.

A determination in a prior action that plaintiffs, as holders of the third mortgage, were entitled to have rents due under the renewal of a lease executed during the period of redemption from the foreclosure of the second mortgage applied to reduce amount due under the first mortgage, is res judicata in a subsequent action between the same parties. *Gandrud v. Hansen*, 215M474, 10NW(2d)372. See Dun. Dig. 5205.

##### 9642. Satisfaction of judgment—Execution for deficiency.

Judgment need not specifically provide for a deficiency judgment in order to authorize later entry of a personal judgment against a defendant found personally liable, for the balance due after the foreclosure sale. *Smude v. Amidon*, 214M266, 7NW(2d)776. See Dun. Dig. 6442.

## CHAPTER 84

### Actions by or against Personal Representatives and Heirs.

**9656. What causes of actions survive.**—A cause of action arising out of an injury to the person dies with the person of the party in whose favor it exists, except as provided in Section 9657. It also dies with the person against whom it exists, except a cause of action arising out of bodily injuries or death caused by the negligence of a decedent survives against his personal representatives. All other causes of action by one against another, whether arising on contract or not, survive to the personal representatives of the former and against those of the latter. (As amended Act Apr. 25, 1941, c. 440, §1.)

#### ½. In general.

Prior to amendment by Laws 1941, Ch. 440, §1, an action to recover loss of earnings and medical, hospital, and nursing expenses resulting from personal injuries caused by negligence of wrongdoer who was instantly killed by act of negligence was based on a cause of action for "injury to the person" which died with person of tortfeasor. *Eklund v. Evans*, 211M164, 300NW617. See Dun. Dig. 14.

Amendment by Laws 1941, Ch. 440, §1, abolishes rule against survivorship as to causes of action for negligence arising out of injuries to the person where tortfeasor dies, but rule where person wronged dies has been continued as before. *Id.*