CHAPTER 557

ACTIONS RELATING TO REAL PROPERTY

557.01 AGENT OF NON-RESIDENT TO ACCEPT SERVICE.

HISTORY. 1877 c. 88 s. 1; G.S. 1878 c. 75 s. 1; G.S. 1894 s. 5816; R.L. 1905 s. 4387; G.S. 1913 s. 8023; G.S. 1923 s. 9520; M.S. 1927 s. 9520.

A corporation formed by a consolidation of a domestic and foreign corporation, must be deemed a domestic corporation, although it has its general office in another state, and the provisions of this section have no application. In re St. Paul & Northern Pacific Ry. Co. 36 M 85, 30 NW 432.

Filing of the return of the sheriff that defendant cannot be found is not a jurisdictional prerequisite to the publication of the summons. Overruling Corson v Shoemaker, 55 M 386, 57 NW 134. Easton v Childs, 67 M 242, 69 NW 903.

This section expressly limits the jurisdiction conferred by service on the agent to actions or proceedings in the courts of the state concerning such interest or lien. It does not embrace any action which may be brought against the non-resident. Dragon Motor Car Co. Ltd v Storrow, 165 M 99, 205 NW 694.

An issue of title to real estate in this state must be determined under local law. Stipe v Jefferson, 192 M 507, 257 NW 99.

557.02 NOTICE OF LIS PENDENS.

HISTORY. R.S. 1851 c. 74 s. 23; P.S. 1858 c. 64 s. 23; 1860 c. 60 s. 1; 1861 c. 19 s. 1; G.S. 1866 c. 75 s. 16; 1869 c. 75 s. 1; G.S. 1878 c. 75 s. 34; G.S. 1894 s. 5866; R.L. 1905 s. 4389; 1907 c. 332 s. 1; G.S. 1913 s. 8025; 1919 c. 527 s. 1; G.S. 1923 s. 9521; M.S. 1927 s. 9521.

Before the statute, all purchasers from either party, pendente lite, were bound by the result of the action Steele v Taylor, 1 M 274 (210); Burt v McKinstry & Seely, 4 M 294 (211); Jorgenson v Minneapolis & St. Louis Ry. Co. 25 M 206.

Plaintiff, one G, and defendant were partners in a business firm for which G kept the books. G and defendant were also engaged in a banking business of which G had charge, in which the surplus funds of the firm were deposited. Plaintiff requested G to pay a mortgage which S held on his property, procure a discharge, and charge the amount so paid to plaintiff on the books of the firm. G, with defendant's knowledge, agreed so to do, and on the same day paid the amount of the mortgage to S, and charged it to plaintiff on the firm's books. Instead of procuring said discharge, G and defendant secretly caused the mortgage to be assigned to themselves, after which G assigned his interest in it to defendant. Defendant commenced foreclosure proceedings by advertisement, and plaintiff commenced an action praying that the mortgage be declared satisfied, the assignments thereof adjudged void, the defendant be perpetually restrained from foreclosing or enforcing it, and in the meantime for a temporary injunction restraining said foreclosure proceedings, which temporary injunction the court granted. Defendant claimed it should not have been granted, as a notice of lis pendens filed and recorded as required by law fully protected plaintiff's rights during the pendency of the action. Held, the notice was not sufficient to protect plaintiff from injury as such foreclosure sale would be a cloud on his title during the pendency of the suit, and that the injunction was properly granted. Conkey v Dike, 17 M 457 (434).

H executed to Mrs. S, a bond for the conveyance of land to her upon payment of her two notes for the purchase price. She went into possession and made large payments upon the notes. Therefore B recovered a judgment against Mr. S, the husband, and filed a creditor's bill against him and his wife, charging the purchase evidenced by the bonds and notes was in fact made for the benefit of Mr. S in his wife's name, and recovered a judgment that the interest of the wife was

held by her in trust for her husband to the extent necessary to satisfy the judgment. In this suit, notice of lis pendens was filed and recorded, summons duly served on both the S's, but H was not made a party. Seven days before the judgment was entered in favor of B, H commenced an action against Mrs. S to cancel the bond for her alleged failure to pay the notes, and upon her default to appear, a decree of cancelation was made and filed. Thereafter the land was sold to B under the decree in the case of the creditor's bill, after which B brought action against H and the S's, to compel H to account as to what had been paid him under the contract, and to compel him to convey to B upon payment of whatever upon such accounting might be found due. Held, the filing of lis pendens is notice only to persons acquiring rights pendente lite, or after judgment, and that H, not being made a party to the action brought by B against the S's, the filing of the notice of lis pendens did not affect him because his interest in the property was paramount and prior to that claimed by B. Bennet v Hotchkiss et al, 20 M 165 (148).

Plaintiff claiming title to a lot, brought an action to remove a cloud created upon such title by a deed to defendant and record thereof, praying that the deed and its record be decreed void, and that plaintiff's title be decreed perfect. Defendant alleged in his answer that several months before the commencement of the action, he sold and conveyed by warranty deed all his right and title to the premises, and disclaimed all further interest therein. Upon the evidence, the court below was of the opinion that plaintiff was, as against defendant, entitled to the relief prayed for, but it appearing that defendant had conveyed the premises by warranty deed to C before commencement of the action, which deed was not recorded until after the action was commenced and lis pendens filed, the court held C to be a necessary party, and made an order giving plaintiff leave to take proceedings to bring C in as a defendant within 20 days after notice, otherwise the action to be dismissed, which plaintiff failing to do, the action was dismissed. Held, the court rightly held that the lis pendens did not bind C, whose rights were fixed before the commencement of the action, that defendant had no interest in the subject of the action, save that arising out of his warranty, and that C was a necessary party to the action. Notwithstanding the fact that the decree would not bind C, unless he were a party to the action, the practical effect of a decree in accordance with the prayer of the complaint, and its entry in the registry of deeds, would have been to cloud his title so that the determination of the suit would have affected and injured him, and at the same time his rights would have been left undetermined and unsettled. Johnson v Robinson, 20 M 170 (153).

G commenced an action affecting the title to real estate against J, and filed a notice of lis pendens; pending the action G conveyed a parcel of the real estate to a railway company; J recovered judgment in the action and thereafter conveyed an undivided half of all the real estate to B, after which J and B brought an action in ejectment against the railway company. Held, the statute abrogates, as to all parties, the common-law rule that purchasers pendente lite are charged with notice by the mere pendency of the action and bound by its result, and leaves it to each party to protect himself against the effect of transfers by the opposite party, by filing notice. Since J had not filed a notice in G's action against him, the railway company purchasing from G was not charged with notice of J's rights and was not bound by the judgment for him. Jorgenson v Minneapolis & St. Louis Ry. Co. 25 M 206.

In July, 1875, H and wife executed a mortgage to plaintiffs, which was recorded unsealed. In September, 1876, H and wife conveyed the mortgaged premises to M, which deed was not recorded until May, 1877. In March, 1877, B recovered and docketed a judgment against M. In April, 1877, plaintiffs commenced an action to reform and foreclose the mortgage, and on that date recorded a notice of the pendency thereof. Held, the notice of lis pendens duly filed prior to the record of the deed from H and wife to M, saved to plaintiffs their prior lien as against such judgment, because such judgment, by the terms of the recording act, only takes precedence where the judgment is against a debtor whose title is of record. Lebanon Savings Bank v Hollenbeck, 29 M 322, 13 NW 145.

B, by warranty deed, conveyed land to plaintiff. Before plaintiff recorded his deed, F and M, holding tax certificates to the land, brought an action as an adverse claimant against B in whom the title appeared of record, to quiet title, and

obtained a judgment. In an action to determine the adverse claims of plaintiff and defendant, held, the case was not within the recording act as the question of superior diligence arises between parties claiming under a common grantor as the source of title, and the tax deed was a new title, an independent grant from the sovereignty. F and M's suit was not to obtain any lien upon the land or acquire B's title but to have their tax title confirmed. All persons claiming under B subsequently to the lis pendens filed in F and M's action would be barred by the judgment, but persons claiming under a prior conveyance, as plaintiff, would not be affected by the suit or judgment; as to all prior grantees, such judgment was res inter alios. Windom v Schuppel, 39 M 35, 38 NW 757.

From H, the patentee of land, title passed under mesne conveyances to B, in 1879, who recorded his and the prior conveyances in 1883. In 1882, D, claiming the land by virtue of tax sales, brought an action to quiet title and determine adverse claims against H, in whom the title appeared of record, in which action H and all other persons unknown claiming any title in the property were made defendants. Summons was by publication as provided by Ex. Laws 1881, Chapter 81, and judgment was rendered by default in favor of D, in 1888, after which D conveyed the land to plaintiff. Defendant claimed title by deed dated 1885, through B. In plaintiff's action for possession of the land, since it was necessary that B should have been made a party to the suit brought by D in 1882, when the lis pendens was filed, in order to make his judgment effectual, the question was whether the summons, in the form published, was sufficient notice to B, and the judgment binding on defendant who claimed through B. Held, the law providing for service of process upon unknown claimants in that class of actions was constitutional, and affirmed judgment for plaintiff. Shepherd v Ware, 46 M 174, 48 NW 773.

Plaintiff, having tax titles to a lot, brought an action to determine adverse claims against G, a non-resident, and all other persons or parties unknown claiming any interest therein. The summons and notice of lis pendens were published for six consecutive weeks, and the printer made affidavit of such publication, to which was attached a copy of each, cut from a newspaper. Judgment, in 1885, was ordered for plaintiff. In 1892, heirs of G, who had died in 1861, filed an affidavit stating that they were residents of Vermont and did not have notice of the pendency of the action, and moved the court to vacate the judgment and permit them to answer, and to redeem, which was refused. Held, the proof of publication was sufficient; and that the mere fact that the named defendant was dead before the action was brought, did not prevent the court from acquiring jurisdiction to determine the right of persons or parties unknown claiming an interest in the land described in the complaint. Order refusing to vacate the judgment affirmed. Inglee v Welles, 53 M 197, 55 NW 117.

Defendant gave a mortgage on a lot to B on Feb. 25, 1891, which B foreclosed for non-payment of interest under a power therein. The lot was sold by the sheriff on Feb. 26, 1892, to Mary M. whose certificate was recorded on Mar. 14, 1891. F and Co. filed a lien for lumber furnished between Nov. 19, 1890, and Mar. 7, 1891, for building a house on the lot. Plaintiff, who finished digging the cellar and building the foundation walls for the house on May 4, 1891, filed a lien, and on Aug. 21, 1891, filed a notice of lis pendens in an action commenced to foreclose it. The summons was not served upon B until Mar. 7, 1892, nor upon Mary M. until April 28, 1892, at which time she was by order brought in and made a defendant. Judgment was ordered in favor of plaintiff for the lien's amount and that it be a lien prior to the mortgage; further that F and Co. have judgment for its lien, but subject to the lien and certificate of Mary M. In an appeal by F and Co. from the decision adjudging the rights of Mary M. superior to its lien, claiming that she was bound by the record of the lis pendens' notice when she purchased at the foreclosure sale, held, the action was not commenced against Mary M. within one year after the date of the last item on the account of the lien claimants. B, not having been served with process at the time of the foreclosure of his mortgage, he was not bound by the notice of lis pendens because the action was not commenced or pending as to him until he was served or had voluntarily appeared therein; hence Mary M. was not bound by the pendency of the action. It was not material whether she had actual notice of the suit, unless she could be legally bound by the adjudication therein, as notice avails nothing unless or until the party receiving it, or the party under whom

he claims, has an opportunity to have his rights litigated and determined. The purchaser at a mortgage sale is a necessary party to a suit affecting the interest of the mortgagee unless the mortgagee is made a party, and it is not sufficient that the mortgagor alone is joined. The result was that Mary M. was not seasonably made a party, and did not take under anyone who was such at the time she purchased. Hokanson v Gunderson, 54 M 499, 56 NW 172.

Where in an action against a non-resident defendant to reform a deed and obtain title to land omitted, service of the summons is by publication, the complaint is filed with the clerk of the court, and the notice of lis pendens with the register of deeds of the county of the real property involved. Such complaint and lis pendens each describes the property affected by the action, and the judgment sought affects the land only so described. The action is in the nature of an action in rem. Corson v Shoemaker, 55 M 398, 57 NW 134.

It is not necessary to allege, in a complaint in an action to foreclose a mechanic's lien, that the notice of lis pendens has been filed in the office of the register of deeds. Proof of the fact may be introduced on the trial without a formal pleading of it. John Paul Lumber Co. v Hormel, 61 M 303, 63 NW 718.

In an action to enforce a mechanic's lien, the filing of notice of lis pendens is not a condition precedent to a right of action; neither does it go to the jurisdiction of the court. The omission to file such a notice may, before trial, be good ground for a motion to require it to be filed, and to continue the cause until this is done; but it cannot be raised for the first time after trial as an objection to the rendition of judgment. Julius v Callahan, 63 M 154, 65 NW 267.

E gave a mortgage to a trust company on 740.33 acres of land, which included several separate and distinct tracts. Subsequent to its execution and recording, G constructed three buildings on a separate 40-acre tract included in the mortgage, and filed three mechanic's liens on the 40 acres. He thereafter commenced and consolidated three actions against the mortgagor and the mortgagee, as parties defendant, to enforce the liens, claiming that he was entitled to liens prior to the mortgage, upon the buildings and the 40 acres. The complaints were filed in the office of the clerk of the district court under the mechanic's lien law, and mentioned only the 40 acres. The mortgagor did not appear in these lien actions, but the mortgagee appeared and filed its answers in the nature of a cross-bill in the office of the clerk of the district court, and at the same time filed three notices of lis pendens in the office of the register of deeds, alleging in the answers, its mortgage, and default in the payment thereof, and demanded relief that such mortgage be foreclosed upon the 440.33 acres of land, which relief the court granted. Held, the mortgagor having no actual notice of the relief demanded in the complaint, the court was without jurisdiction to render judgment upon the new matter embraced in the cross-bill; nor was the mortgagor affected by the lis pendens notices, as a lis pendens is merely to charge subsequent purchasers with notice of the pendency of the action. Jewett v Iowa Land Co. 64 M 531, 67 NW 639.

Filing of the return of the sheriff that defendant cannot be found is not a jurisdictional prerequisite to the publication of the summons. Overruling Corson v Shoemaker, 55 M 386, 57 NW 903. Easton v Childs, 67 M 242, 69 NW 903.

An appeal continues the lis pendens until final judgment on the appeal. Aldrich v Chase, 70 M 243, 73 NW 161.

Plaintiff and defendant entered into a contract for the sale of land by which defendant agreed if title to the premises was not, and could not be made good within 60 days from the date thereof, the agreement should be void, and the earnest money refunded. On the day after its execution, one W filed and recorded a notice of lis pendens, giving notice of an action by him against defendant to enforce specific performance of a contract executed for the purchase of the same premises. On the 59th day, defendant tendered plaintiff the deed and demanded the balance of the purchase price, which plaintiff refused. As soon as W's case was dismissed and the lis pendens in it, plaintiff demanded the deed and offered to pay the balance, which defendant refused. In an action then by plaintiff to enforce specific performance of the contract upon the theory that defendant could have procured the discharge of the lis pendens within the contract limitation of 60 days, held, defendant was required to use reasonable diligence to remove the defect within the 60 days specified in the contract. Since the next general term

of court at which W's action could be tried came on after the expiration of the 60 days, there was no lack of diligence on defendant's part, and having tendered the deed, and upon its refusal, the earnest money, defendant was relieved from further obligation, and was entitled to judgment. Joslyn v Schwend, 85 M 130, 88 NW 1103.

This statute gives the right to file a lis pendens only in a certain class of actions, but it gives a party the absolute right to file it in any action belonging to the authorized class. This right is not subject to the discretion or control of the court. Joslyn v Schwend, 89 M 71, 93 NW 705.

A lis pendens filed before the commencement of a proper action can have no effect until the action is actually pending. Joslyn v Schwend, 89 M 71, 93 NW 705.

When once filed in a proper action, it cannot be canceled by order of court, on motion or otherwise, so long as the action is pending and undetermined. Joslyn v Schwend, 89 M 71, 93 NW 705.

If a party files a lis pendens in an action not of the authorized class, or an insufficient one in a proper action, the court may, on motion in the action, order it canceled. Joslyn v Schwend, 89 M 71, 93 NW 705.

If a lis pendens is filed in an action not of the class mentioned in the statute, it is a nullity. Joslyn v Schwend, 89 M 71, 93 NW 705.

The function of the lis pendens is to give constructive notice of the pendency of the action, and is notice to all persons of the rights and equities of the party filing the lis pendens in the land therein described. Joslyn v Schwend, 89 M 71, 93 NW 705.

Plaintiff, in an action to establish and enforce a lien upon real estate, alleged to have been conveyed to defendant, Mary K. in fraud of the creditors of W. H. K. on Sept. 4, 1902, filed a complaint, and a notice of lis pendens in the office of the register of deeds. That same day a summons was delivered to the sheriff for service upon defendant, who was not in this state but was a resident of Iowa. Sixteen days thereafter, the sheriff made a return of "Not found" and sent the summons to the sheriff of the county in Iowa where defendant resided, for service upon her, in supposed compliance with the statutory requirements for service of summons by publication upon a non-resident. Plaintiff did not file the affidavit for publication and publish the summons as required by statute until after Oct. 3, 1903. On Sept. 11, 1903, Mr. and Mrs. S., in good faith, for a valuable consideration, and with no knowledge of the alleged fraud, purchased the property from defendant; and in plaintiff's action, intervened. The question was as to the effect of the lis pendens notice filed and recorded seven days before the S's purchased the land, but prior to the attempt to serve the summons. Held, no action is commenced until the summons has been served upon the defendant in accordance with the statutory provisions, but we do not wish to be understood as intimating in case of service upon a non-resident by publication the action is not commenced, within the meaning of the lis pendens statute, until the full period for publication has expired. The lis pendens was irregularly and prematurely filed, and served no purpose as notice until the action was actually commenced, and affirmed judgment for intervenors. H. L. Spencer Co. v Koell, 91 M 226, 97 NW 974.

Plaintiff held an unrecorded deed to land from one D, Defendant, in an action against D claiming to be the owner of the land, filed a notice of lis pendens. Pending the action and before judgment, in favor of defendant against D, plaintiff recorded its deed from D. In plaintiff's action to determine the adverse claims of defendant, held, where a notice of lis pendens has been filed by either party to an action, such notice does not affect the rights of the holder of a prior unrecorded conveyance until judgment therein, and affirmed judgment for plaintiff. West Missabe Land Co. v Berg, 92 M 2, 99 NW 209.

Under the provisions of the recording act which makes a judgment lawfully obtained notice against the person in whose name the title appears of record, such judgment has no retroactive power in favor of a notice of lis pendens previously filed in the action. West Missabe Land Co. v Berg, 92 M 2, 99 NW 209.

Notice of lis pendens, duly filed, affects subsequent purchasers and encumbrancers only, and does not operate retroactively. Rights acquired prior to such filing are paramount to the adverse claim of parties to the litigation. Such notice, however, advises parties to an uncompleted transaction concerning the premises

described in it of the pendency of the controversy. Moulton v Kolodzik, 97 M 423, 107 NW 154.

The title vested in a vendee under an unrecorded contract for the sale of lands entitling him to possession who has paid only part of the purchase price before the filing of such notice, is not injuriously affected by that notice. When, however, he comes to pay the balance of the purchase price, he is in law aware of the controversy, and may protect himself against paying money to the wrong person by any means permitted by the original or subsequent agreement between the parties, or provided by law, as by paying the money into court. Moulton v Kolodzik, 97 M 423, 107 NW 154.

Plaintiff in an action to abate a nuisance consisting in the obstruction of a public highway, and to recover damages, filed a notice of lis pendens describing the property included in the highway. He had no proprietary rights or interest in such land. Defendant moved to cancel the lis pendens. Held, a lis pendens filed in an action not of the authorized class may be canceled on motion, and that plaintiff's action was not of the authorized class; but that defendant, not claiming ownership of the land included in the highway, not an abutting owner, and having no interest in the highway, except as he was a portion of the general public, was not in position to move for a cancelation of the lis pendens. Painter v Gunderson, 123 M 342, 143 NW 911.

In an action against C. H. McCutchen to quiet title to vacant and unoccupied real property, the record title of which was in Charles H. McCutchen, the property having been assessed and taxed under the name "C. H. McCutchen" by which the record owner was known in connection therewith, service of the summons by publication, together with a notice of lis pendens containing a full description of the land, constitutes constructive notice to the owner of the record title. Trask v Bodson, 141 M 114, 169 NW 489.

Plaintiff brought suit against defendant for specific performance of a contract to convey a lot, in which he filed a notice of lis pendens. Specific performance was ordered, and affirmed on an appeal, but before the decision could be entered in the lower court, defendant filed an affidavit to the effect that she had agreed to sell the south 40 feet of the lot to her sister, which plaintiff knew, and conveyed the south 40 feet to her sister, who recorded the deed. In an action by plaintiff against both sisters to cancel the deed and purge the record of the affidavit, held, since the evidence sustained the finding that plaintiff had purchased in good faith and not knowing of the sale of the 40 feet, his notice of lis pendens in the action for specific performance duly filed before the sister placed on record any evidence of title, entitled him to the relief he asked. Bredeson v Nickolay, 156 M 506, 194 NW 460.

Plaintiff, in an action to rescind a purchase of land for fraudulent misrepresentations, and to have a negotiable note given therefor, and the mortgage securing it surrendered and canceled, filed a notice of lis pendens. On the following day, the note and the mortgage were transferred by the holder to defendant. Plaintiff contended the lis pendens operated as constructive notice of the defenses to the note. Held, the doctrine of lis pendens does not apply to negotiable paper; and that the lis pendens did not operate as constructive notice. Allen v Cooling, 161 M 10, 200 NW 849.

Plaintiff, an attorney, obtained a judgment for defendant, which he docketed in the county where the judgment debtor had property. There was no redemption from the execution sale, and defendant acquired title. Plaintiff had rendered his services on a contingency basis with the understanding that he was to receive one-third of the recovery, i.e., the value of the land. Unable to adjust a disagreement over the fee, he began an action Sept., 1936, against defendant to recover his share, and simultaneously filed a notice of lis pendens. In June, 1937, defendant conveyed the land to one V, receiving $2,400 as consideration. Plaintiff recovered judgment in the action in 1939 for $766.63, and then brought action against defendant and V, to set aside the deed, and subject the property to a lien of his money judgment. Since the evidence sustained the finding that V had no actual knowledge concerning plaintiff's claim of any interest in the property, the question was as to the effectiveness of plaintiff's notice of lis pendens. Held, since in the previous action, the recovery of money was the sole object, and plaintiff neither sought nor recovered a lien upon the premises, the only relevancy of the real

property was in respect to its value so that plaintiff's share could be determined; consequently his attempted use of lis pendens was in support of an action outside the scope of the statute, and of no effect. Melin v Mott, 212 M 517, 4 NW(2d) 600.

Where properly applicable, a notice of lis pendens is effective to preserve the rights of a successful litigant against the claim of a subsequent purchaser or encumbrancer; not so, however, where lis pendens has been improperly used. It is then wholly ineffectual to accomplish that result. Melin v Mott, 212 M 517, 4 NW(2d) 600.

An ineffective notice of lis pendens cannot be given effect as a notice of intention to claim an attorney's lien where it does not comply with the statutory requisites of such notice. Melin v Mott, 212 M 517, 4 NW(2d) 600.

The doctrine of lis pendens applies only where a third person attempts to intrude into controversy by acquiring an interest in matter in litigation pending the suit, and does not apply when a person takes by conveyance prior to commencement of suit without actual notice, whether interest be acquired by deed or by executory contract. Roberts v Friedell, 218 M 88, 15 NW(2d) 496.

Minnesota Statutes 1941, Section 557.02, providing that the pendency of an action relating to real estate is notice to purchasers or encumbrancers only from the time of the filing of notice thereof in the office of the register of deeds of the county in which the land is situated, is a rule of property of the state relating to real estate, and applies to a suit in equity pending in a federal court. U.S. v Chicago, M. & St. P. Ry. Co. 172 F 271.

Guardianships and commitments under the probate code. 20 MLR 336.

Lis pendens as constructive notice. 24 MLR 599.

Protection of an interest in real property acquired by a purchaser in good faith at an execution sale. 24 MLR 815.

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

557.03 NOTICE OF NO PERSONAL CLAIM.

HISTORY. R.S. 1851 c. 74 s. 24; P.S. 1858 c. 64 s. 24; 1860 c. 60 s. 2; 1861 c. 19 s. 2; G.S. 1866 c. 75 s. 17; G.S. 1878 c. 75 s. 35; G.S. 1894 s. 5867; R.L. 1905 s. 4390; G.S. 1913 s. 8026; G.S. 1923 s. 9522; M.S. 1927 s. 9522.

The court did not err when it directed a separate judgment for plaintiff's costs and disbursements, as to each, against such of the defendants as were duly notified that no personal claim was made against them, and then answered and took part in the trial. They unreasonably defended, and must pay for the privilege. Siebert v Quesnel, 65 M 107, 67 NW 803.

Before the commencement of an action to determine adverse claims to real property, the record owner died, and his heirs were made defendants under the designation of "unknown persons" claiming an interest in the land. Before service of the summons by publication, a notice of lis pendens was filed in the office of the register of deeds, but it was not published. A notice of "no personal claim" was attached to the summons, and published in connection therewith. Held, the failure to publish the notice of lis pendens with the summons as required by the statute when the action was brought, was fatal to the jurisdiction of the court as to the heirs, the unknown defendants, and such failure was not cured by the publication of the summons to which was attached the notice of "no personal claim," which notice did not, by itself, contain all the information required by statute to be set forth in the notice of lis pendens. Jenson v Anderson, 123 M 199, 143 NW 361.

557.04 TRANSFER OF TITLE BY JUDGMENT.

HISTORY R.S. 1851 c. 94 s. 33; P.S. 1858 c. 83 s. 1; G.S. 1866 c. 75 s. 14; G.S. 1878 c. 75 s. 32; G.S. 1894 s. 5864; R.L. 1905 s. 4391; G.S. 1913 s. 8027; G.S. 1923 s. 9523; M.S. 1927 s. 9523.

B, a married man, owning and occupying a homestead of 45½ acres, contracted to convey the same to D, with 19 lots adjacent thereto, his wife not signing the contract. D brought suit against B and recovered judgment for specific performance, providing that unless B should, within 30 days after service of such

judgment upon him, have ready for delivery the deed therein directed to be executed by him, he should be deemed to be in default, and that upon such default, the judgment should become a lien upon the land. B and wife then brought an action to set aside the judgment and lien thereof, so far as it related to the 45½ acres. Held, as the conveyance directed by the judgment would have been void as to the 45½ acres forming the homestead, the judgment requiring the contract to be performed by the execution of such void conveyance, could not be a valid lien, and was void. Even where, as by Minnesota Statutes 1941, Section 557.04, a judgment may pass the title and stand as a conveyance of the estate of the defendant, it has no greater effect than the deed of the defendant. Barton v Drake, 21 M 299.

In an action against the trustees of a hospital for the insane, and D, as governor of the state, to establish the title of plaintiff to lands set apart to that institution by the state, held, the court may pass the title by its judgment, although it could not enforce a conveyance by the governor. St. Paul & Chicago Ry. Co. v Brown, 24 M 517 (575).

A judgment for the recovery of money was recovered against G. Under execution issued thereon, land belonging to G was sold to C. Thereafter for some excusable negligence on G's part, the judgment was vacated by the court, and G was allowed to interpose a defense to the action. G then brought an action to have the execution sale set aside. Held, the setting aside of a judgment for the recovery of money, upon grounds not affecting the original validity of the judgment, does not avoid a sale of real estate under execution issued on the judgment, to a stranger who purchased in good faith. Gowen v Conlow, 51 M 213, 53 NW 365.

Where plaintiff seeks by his complaint to have a deed reformed, and have a description of certain land omitted by mistake, inserted in the deed, it is not to be expected that the defendant will go through the physical performance of inserting in the deed already executed, the omitted description, nor make a new deed including such description. By Minnesota Statutes 1941, Section 557.04, it is provided that title may be transferred by judgment. Corson v Shoemaker, 55 M 386, 394, 57 NW 134.

An ordinary judgment and decree quieting title to land, removing clouds, or determining adverse claims, does not operate proprio vigore to vest or transfer title; it can have that effect only when it so decrees in express terms. Minn. Debenture Co. v Johnson, 94 M 150, 102 NW 381.

Plaintiff, in an action against G to determine adverse claims to a vacant lot, alleged in his complaint that he was the fee owner of the land and that G claimed some title or interest therein adverse to plaintiff; and prayed that he be adjudged to be the fee owner and that G be adjudged to have no interest or title therein, and for such other and further relief, etc. On default of G, the court directed entry of judgment in accordance with the prayer of the complaint. The clerk entered judgment that plaintiff was the fee owner and that G had no interest therein as prayed for in the complaint, also the further relief not prayed for in the complaint, nor embraced within the scope of the order for judgment; namely, that all interest or title in the land held by G, be and it is hereby transferred to and vested in plaintiff. There were no findings of fact disclosing the source of plaintiff's title, or G's. G, in fact, had no interest in the land, having conveyed it prior to the action to Mrs. W, whose deed was not recorded. She, more than a year after judgment, upon affidavits of her ownership and ignorance of the action, moved the court to strike from the judgment the provision by which the title of G was transferred to and vested in plaintiff, on the ground that the court had no authority to incorporate it in the judgment, in that the relief thereby granted was not prayed for in the complaint. Held, the judgment in so far as it attempted to transfer to plaintiff the title held by G, exceeded the jurisdiction and power of the court, and was void; further as to plaintiff's contention that that particular feature of the judgment came within the scope of the complaint and was, therefore, properly granted, held, conceding that a transfer of title may be effected in this form of action under proper pleadings, it was clear that such was not the purpose of this action. The complaint was not framed upon such a theory. Sache v Wallace, 101 M 169, 112 NW 386.

A judgment in an action to determine adverse claims, based upon the usual form of complaint, does not, of itself, operate to transfer title from defendant

to plaintiff because there is nothing of record to disclose or reveal the title that was in fact adjudicated. Though an ordinary judgment in such an action might be made a link in the chain of title, by evidence dehors the record connecting plaintiff with the title adjudicated, yet, standing alone, the judgment is evidence only of the fact that the rights of the defendant have been extinguished. Sache v Wallace, 101 M 169, 112 NW 386.

Pursuant to a partnership agreement between plaintiff and the defendant S, title to land for mining was taken in trust by their attorney, the defendant G. In an action against S and G, non-residents, for the dissolving of the partnership, an accounting, and for a conveyance to plaintiff of such interest in the land as he should be found entitled to, the summons was personally served on defendants without the state. They moved to set the service aside on the ground that the court could not acquire jurisdiction by this mode. Held, the service of the summons on the defendants, personally, outside the state was of the same effect as service by publication, and was constructive service, which was sufficient to give the court jurisdiction in cases where the object of the action was to reach and dispose of property in the state, or some interest therein. The action was primarily to recover an interest in land within the state, and the complaint, by appropriate allegations, made the land the subject of the action. The power to render judgment in such cases must be conferred by statute, and by virtue of Minnesota Statutes 1941, Section 557.04. The court could dispose of the title by its decree. Accordingly, the court acquired jurisdiction to determine plaintiff's interest in the property, and to vest in him such interest, even though a partnership accounting was necessary to determine that interest. Smith v Smith, 123 M 431, 144 NW 138.

Where statutory power is given to the court to effectuate the decree by passing title to the property, the proceeding becomes in the nature of a proceeding in rem, and in such case, service by publication upon non-residents will confer jurisdiction to deal with the property. Smith v Smith, 123 M 431, 144 NW 138.

As to the power of the probate court to award plaintiff a share of the intestate's estate by final decree where it was found that an executed contract created an equitable estate in the intestate's property in favor of plaintiff, held, Minnesota Statutes 1941, Section 557.04, authorizing courts to pass title by judgment, applies only to district courts. There is a marked distinction between the jurisdiction and powers of our probate courts under the constitutional provision giving them jurisdiction over the estates of deceased persons, and probate courts of other states which derive all their jurisdiction and powers by statute. It was clearly the intention of the constitution to give the probate courts the entire and exclusive jurisdiction over the estates of deceased persons and persons under guardianship, and within the limitations incident to the subject matters specified by the constitution, our probate courts possess superior and general jurisdiction, and have implied power to do whatever is reasonably necessary to carry out the powers expressly conferred. Fiske v Lawton, 124 M 90, 144 NW 455.

In a suit by a minority stockholder to compel the assignment of a mining lease to his corporation, based on an allegation that the defendant directors, in violation of their duties as fiduciaries, had taken the lease in the name of another corporation, held, when the relief sought by such action is obtainable by a judgment in personam, all defendants being within the state, the fact that the court has power to transfer the lease by judgment under Minnesota Statutes 1941, Section 557.04, does not transform the action into one in rem or necessitate its trial in the county where the res is situated. Quinn v Butler Brothers, 167 M 463, 209 NW 270.

Where judgment was entered by state district court canceling deed by which mother of one of farm debtors conveyed realty to farm debtors and adjudging mother to be absolute owner and entitled to immediate possession, and thereafter an appeal, was taken to supreme court without giving a supersedeas bond, the appeal did not prevent judgment of the district court from becoming "final," so that jurisdiction over the realty would not pass to bankruptcy court upon farm debtors filing a petition for composition and extension prior to decision of the supreme court affirming the district court judgment. West v Manemann, 144 F(2d) 905.

557.05 REVERSIONER MAY SUE.

HISTORY. R.S. 1851 c. 49 s. 37; P.S. 1858 c. 36 s. 37; G.S. 1866 c. 75 s. 23; G.S. 1878 c. 75 s. 42; G.S. 1894 s. 5879; R.L. 1905 s. 4444; G.S. 1913 s. 8083; G.S. 1923 s. 9578; M.S. 1927 s. 9578.

557.06 ACTION AGAINST COTENANT.

HISTORY. R.S. 1851 c. 49 s. 38; P.S. 1858 c. 36 s. 38; G.S. 1866 c. 75 s. 24; G.S. 1878 c. 75 s. 43; G.S. 1894 s. 5880; R.L. 1905 s. 4445; G.S. 1913 s. 8084; G.S. 1923 s. 9579; M.S 1927 s. 9579.

One cotenant of real property cannot recover from his cotenant on account of the appropriation, by the latter, directly to his own use, of the products of the common property, where there is no agreement between the parties making the latter liable to the former on account of such appropriation, and where the latter has not excluded the former from the enjoyment of the common property. Minnesota Statutes 1941, Section 557.06, does not apply, as this statute is applicable only where rent and payment, in money or in kind, due in respect of the premises, is received from a third party by one cotenant who retains for his own use, the whole, or more than his proportion. Kean v Connelly, 25 M 222.

A tenant in common cannot, in the absence of an agreement or understanding with his cotenant to that effect, make improvements upon the common property at the expense, in any part, of his cotenant, so as to enable him to recover any portion of the cost or value of the improvements, either in an action brought by him for that purpose, or by way of set-off in an action brought against him by his cotenant. Walter v Greenwood, 29 M 87, 12 NW 145.

Where the defendant cotenant had sole possession and use of the whole of the common lands, and cultivated them, raising thereon large crops of grain and other products, all of which he appropriated to his own use, by using a portion thereof and selling the remainder, and refused to account for or deliver to plaintiff cotenant any of their proceeds, and did not hinder plaintiff from entering upon, using or enjoying any part of such common land, the rule of Kean v Connelly, 25 M 222, was followed and applied; and the circumstance that the defendant who received such products, had sold any part of them, was not held important. Hause v Hause, 29 M 252, 13 NW 43.

Where plaintiff brought an action to recover his just proportion of rents and profits of land which he and defendants owned as tenats in common, and of which defendants had been in possession and cultivation for two years, and the complaint appeared also to have been framed with reference to a recovery for rent upon the basis that, by agreement, the relation of landlord and tenant had existed between plaintiff and defendants during the two years; held, the two causes of action being inconsistent, plaintiff was properly compelled to elect for which cause he would proceed. Hause v Hause, 29 M 252, 13 NW 43.

Each tenant in common has the right to occupy the common property, and there can be no recovery of rents and profits from one who occupies the whole of the property, unless such occupant has excluded his cotenant or has agreed to share the profits with him. Minnesota Statutes 1941, Section 557.06, has not changed this rule, but the rule does not apply where one tenant has collected and received rents from a third person and has kept more than his just share. Sons v Sons, 151 M 360, 186 NW 811.

A cotenant, excluded from possession by his fellow tenant, is entitled to recover only the reasonable rental value of his interest in the common property, and cannot compel an accounting for and recover a share of the profits actually received by the occupying tenant. Sons v Sons, 151 M 360, 186 NW 811.

Where evidence sustained the court's finding that all of the heirs of a decedent who died in 1911, of whose estate the plaintiff was appointed administratrix in 1919, consented to the possession and use of the estate, consisting of 200 acres of farm land, by the defendant, who was an heir, and to the payment of rent therefor to the widow of the decedent. Held, plaintiff was not entitled to an accounting from the defendant, nor could she charge him as an executor de son tort. McHugo v Norton, 159 M 90, 198 NW 141.

Plaintiff and defendant owned a tract of land as tenants in common. They gave a mortgage to a bank. Afterwards defendant gave a mortgage upon his

undivided one-half to the same bank, and plaintiff paid one-half of the mortgage first mentioned. Afterwards it was foreclosed. Within the year of redemption, 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 to the bank. After plaintiff redeemed, he paid taxes on the land, interest on a first mortgage prior to the bank's mortgages, and expended money for necessary improvements. He was in possession, managed the farm, and received the rents and profits which were in excess of the cost of improvements and taxes. In an action for partition, held, plaintiff was entitled to contribution for taxes and interest and money paid for necessary improvements, but must apply profits made, and for the balance could have contribution prior to the mortgage of defendant of an undivided half to the bank. Kirsch v Scandia American Bank, 160 M 269, 199 NW 881.

One tenant in common could not have sole possession and receive the profits of farm without applying them as far as they would go to payment of taxes and necessary improvements while asserting a right of contribution for such items. Hoverson v Hoverson, 216 M 228, 12 NW(2d) 501.

Contribution does not mature until the party owing a common liability has paid more than his just share of the obligation. Hoverson v Hoverson, 216 M 228, 12 NW(2d) 501.

Where tenant in common in exclusive possession of farm had refused to disclose what his income was, his claim to contribution from cotenants must be denied. Hoverson v Hoverson, 216 M 228, 12 NW(2d) 501.

Where one tenant in common had misappropriated property belonging to cotenants, he was liable for the property so taken, and settlement by the respective guardians of the two incompetent cotenants involved was proper, and guardian of tenant liable to the other, was not liable to incompetent ward for payment of such legal obligation. Hoverson v Hoverson, 216 M 237, 12 NW(2d) 498.

A tenant in common in possession of property should not receive more than his just proportion of the rents and profits of the common property. Hoverson v Hoverson, 216 M 237, 12 NW(2d) 498.

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

557.07 SETTLER; ACTION FOR POSSESSION.

HISTORY. R.S. 1851 c. 88 ss. 1 to 4; P.S. 1858 c. 78 ss. 1 to 4; G.S. 1866 c. 85 ss. 1 to 4; G.S. 1878 c. 85 ss. 1 to 4; G.S. 1894 ss. 6128 to 6131; R.L. 1905 s. 4453; G.S. 1913 s. 8094; G.S. 1923 s. 9589; M.S. 1927 s. 9589.

Plaintiff married and went to live with her husband on his homestead claim, on which was a house, granary and stable. He thereafter filed a relinquishment of the claim, abandoned plaintiff who refused to leave the homestead, and sold the improvements thereon to one R, who sold them to defendant, a brother of plaintiff's husband, who thereafter was permitted to enter them as a timber claim under the timber-culture act. R and defendant knew of plaintiff's husband's intention to abandon her. *Held*, a deserted wife, left in possession of a homestead, and recognized by the land department as having a right to contest the entry thereof by a subsequent claimant with notice, will be protected in her possession pending such contest, and may recover damages against such claimant for his wrongful acts in dispossessing her, and removing and destroying the improvements left in her possession. She may, in such case, recover punitive damages if such acts are wilful and malicious, or accompanied with circumstances of aggravation. Michaelis v Michaelis, 43 M 123, 44 NW 1149.

In an action for the conversion of timber cut by R without right from and banked on public land at all times in the exclusive possession of plaintiff, under a homestead claim, and sold by R to defendant who carried it away and converted it to its own use, held, the facts found sustained judgment for plaintiff. General Statutes 1894, Sections 6128 to 6130, requiring settlers on public land to mark out the boundaries of their claims, was not applicable as they were superseded by Minnesota Statutes 1941, Section 557.07. Preston v Cloquet Tie & Post Co. 114 M 398, 131 NW 474.

557.08 FORCIBLE EVICTION; TREBLE DAMAGES.

HISTORY., R.S. 1851 c. 74 s. 21; P.S. 1858 c. 64 s. 21; G.S. 1866 c. 75 s. 31; G.S. 1878 c. 75 s. 50; G.S. 1894 s. 5887; R.L. 1905 s. 4451; G.S. 1913 s. 8092; G.S. 1923 s. 9587; M.S. 1927 s. 9587.

An under-tenant, in possession of demised premises under a lease from the original tenant, cannot lawfully be dispossessed in proceedings under the statute relating to forcible entry and unlawful detainer, by the landlord against the tenant, to which such under-tenant is not made a party. Where a tenant or under-tenant is wrongfully and forcibly ejected from the leased premises, he may recover treble damages under the statute, or may proceed, as in an ordinary action of trespass for the recovery of damages actually suffered by him, including special damages to his property. Bagley v Sternberg, 34 M 470, 26 NW 602.

557.09 FORCIBLE ENTRY; TREBLE DAMAGES.

HISTORY. R.S. 1851 c. 74 s. 22; P.S. 1858 c. 64 s. 22; G.S. 1866 c. 75 s. 32; G.S. 1878 c. 75 s. 51; G.S. 1894 s. 5888; R.L. 1905 s. 4452; G.S. 1913 s. 8093; G.S. 1923 s. 9588; M.S. 1927 s. 9588.