CHAPTER 559

ACTIONS TO DETERMINE ADVERSE CLAIMS TO REAL ESTATE

559.01 ACTION TO DETERMINE ADVERSE CLAIMS.

HISTORY. R.S. 1851 c. 74 s. 1; P.S. 1858 c. 64 s. 1; G.S. 1866 c. 75 s. 1; 1874 c. 68 s. 1; G.S. 1878 c. 75 s. 2; G.S. 1894 s. 5817; R.L. 1905 s. 4424; G.S. 1913 s. 8060; G.S. 1923 s. 9556; M.S. 1927 s. 9556.

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1. Nature and object of action

The only facts necessary to constitute a cause of action under this section are actual possession by plaintiff, in person or by tenant, and an adverse claim by defendant of an estate or interest therein. Steele v Fish, 2 M 153 (129); Meighen v Strong, 6 M 177 (111); Barber v Evans, 27 M 92, 6 NW 445; Bausman v Faue, 45 M 412, 48 NW 13.

A complaint which is clearly one to remove a specified cloud upon title to real estate, cannot, if it fails to show that the instrument under which defendant claims is invalid, be sustained against a demurrer on the ground that the facts stated show plaintiff might have brought an action under the statute to determine adverse claims to real estate. Walton v Perkins, 28 M 413, 10 NW 424.

In an action under section 559.03, any interest or estate in or lien upon land claimed adversely to the plaintiff may be determined, whether claimed under the same or a different and independent source from that under which the plaintiff claims. Walton v Perkins, 33 M 357, 23 NW 527.

In an action under the statute to determine adverse claims to real estate, if a party relies on the legal title and seeks no equitable relief, his right to relief is barred only by the lapse of time prescribed by the statute of limitations. The equitable rule as to laches defeating relief sought, applies only when the relief sought is equitable. Morris v McClary, 43 M 346, 46 NW 238; Stuart v Lowry, 49 M 91, 51 NW 662.

An action to determine adverse claims to real estate is substantially an equitable one, and, except as otherwise provided by statute, all the ordinary rules governing suits in equity to quiet title apply to the action. Matthews v Lightner, 85 M 333, 88 NW 992.

The relief asked relates to nothing but the real estate described in the complaint, and is triable in the county where the land is situated. State ex rel v District Court, 150 M 513, 185 NW 953.

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

In an action to quiet title, where the summons was served by publication and judgment entered quieting title in the plaintiff, and the defendant, through whom the plaintiff claims title, was known to have died, leaving heirs and

devisees, who were not made parties, appellant, being one of them, subsequently appears in the action and asks to have the judgment reopened as to her, the decision is adverse to her, and she fails to appeal therefrom, the judgment becomes binding against her. Yennie v Slingerland, 161 M 372, 201 NW 605.

No issue as to the court's jurisdiction to render a judgment for the foreclosure of a mortgage was raised by the pleadings in an action brought to vacate the judgment and remove a cloud on respondent's title. Conty v Bockenstedt, 170 M 383, 212 NW 905.

When one party to a divorce action dies after the judgment and pending an appeal, and property rights are affected by the judgment, the personal representative of the decedent will be substituted, and the judgment will be reviewed. Swanson v Swanson, 182 M 494, 234 NW 675.

Possession or vacancy is not jurisdictional, nor does it go to the merits. It goes only to the right of the plaintiff to litigate title in the particular form of action; and defendants who allege title in themselves waive the form of action, and the fact of possession or vacancy is unimportant. Union Central v Page, 190 M 360, 251 NW 911.

Where neither in the proceedings themselves nor by the records, the existence of an unnamed claimant is shown, the want of jurisdiction does not appear from the judgment roll itself, and the judgment is not subject to collateral attack. Dean v Rees, 208 M 38, 292 NW 765.

Action to determine adverse claims to a 40-acre tract worth $700.00 not removable notwithstanding defendant's counter-claim seeking to void an alleged fraudulent deed to plaintiff involving such 40 and three others. Enger v N. P. 31 F(2d) 136.

Rights of persons disappearing. 9 MLR 99.

Cloud on title, what constitutes. 12 MLR 80.

Jurisdiction of equity to quiet title to personalty. 16 MLR 596.

Whether an instrument void on its face constitutes a cloud that equity will remove. 16 MLR 710.

Suit by landlord against tenant. 20 MLR 93.

2. One adverse claim

An action will lie under the statute for the determination of one adverse claim which may be specified in the complaint, and if a complaint to remove a cloud cannot be sustained as such, it may be sustained as a complaint under the statute if its allegations are sufficient for that purpose. (This overrules a line of cases such as Walton v Perkins, 28 M 413, 10 NW 424; Knudson v Curley, 30 M 433, 15 NW 873; Bovey v Dow, 68 M 273, 71 NW 2). Palmer v Yorks, 77 M 20, 79 NW 587.

3. Interests determined

Any interest or estate in or lien on land claimed adversely to plaintiff, whether claimed under the same or a different and independent source, may be determined. State v Bachelder, 5 M 223 (178); Banning v Bradford, 21 M 308; Barber v Evans, 27 M 92, 6 NW 445; School District v Wrabeck, 31 M 77, 16 NW 493; Donohue v Ladd, 31 M 244, 17 NW 381; Walton v Perkins, 33 M 357, 23 NW 527; Bausman v Faue, 45 M 412, 48 NW 13; Stuart v Lowry, 49 M 91, 51 NW 662; Brown v Jones, 52 M 484, 55 NW 54; Schofield v Quinn, 54 M 9, 55 NW 745; Alt v Graff, 65 M 191, 68 NW 9; Eide v Clarke, 65 M 466, 68 NW 98.

In an action of ejectment and for damages for use, plaintiff had judgment for part of plot of ground west of a certain right of way. Moore v Minneapolis & St. Paul Ry. 129 M 237, 152 NW 405.

No valid tax title can be acquired, unless the fee owner's title has first been eliminated by the service of such notice of redemption as the statute prescribes. Glaze v Stryker, 135 M 186, 160 NW 490.

The evidence relating to delivery of the deed after the death of the donor is so against such delivery that there should be a resubmission of the case in the interests of justice. Weston v Weston, 164 M 384, 205 NW 434.

The evidence sustains the finding of a proper delivery of the deed on which defendant's title depends. McGrath v Pothen, 168 M 206, 209 NW 752.

The district court may, as an incident to an action to determine adverse claims, being a court of general jurisdiction, and in order to effectuate its judgment, construe a will which has been admitted to probate, although it has not been construed by the probate court. Melby v Nelson, 169 M 272, 211 NW 5.

A recorded contract for the sale of real property which has been terminated by cancelation is a cloud upon the vendor's title. Union Central v Page, 190 M 360, 251 NW 911.

4. Who may maintain action

An action to determine adverse claims may be maintained by an equitable owner. School District v Wrabeck, 31 M 77, 16 NW 493; Roy v Duluth & Iron Range, 69 M 547, 72 NW 794;

By an equitable title owner against a holder of a legal title. School District v Wrabeck, 31 M 77, 16 NW 493; Porten v Peterson, 139 M 156, 166 NW 183; Deaver v Napier, 139 M 219, 166 NW 187.

One having no property interest and not in possession cannot maintain an action under this statute. Jellison v Halloran, 40 M 485, 42 NW 392; Eide v Clarke, 65 M 466, 68 NW 98; James v City of St. Paul, 72 M 138, 75 NW 5.

An owner of fee and owner of timber on land may bring action. Hall v Sauntry, 80 M 348, 83 NW 156.

The owner of a city assessment certificate on vacant land on which notice of expiration of redemption had been given, but who was not entitled to and had not received a deed because of failure to pay subsequent assessments, could not maintain an action under this statute. Coffman v London & Northwest, 98 M 416, 108 NW 840; Pieper v Maclaren, 99 M 513, 108 NW 1118.

When in an action to quiet title brought by the holder of the tax certificate, the tax title is found defective, it is the duty of the court to determine the amount and validity of plaintiff's lien for taxes paid by him. Foster v Clifford, 110 M 79, 124 NW 632.

An action to determine adverse claims may be either legal or equitable, according to the facts and relief sought. Where the plaintiff sought through a deed and contract of sale declared a mortgage, and adjudged inoperative because of violation of the mortgage tax law, the action being of equitable cognizance, and as such subject to the rules of equity, that equity will not enforce a forfeiture to one who has neither done equity nor indicated his willingness to do so. Mason v Fichner, 120 M 185, 139 NW 485.

In an action to determine adverse claim where the defendant answers claiming title absolute, the court properly allowed costs to plaintiffs, although a lien was decreed defendant as holder of a tax title. Culligan v Cosmopolitan, 126 M 223, 148 NW 273.

5. Possession

An action will lie under the statute by a party who is in possession of land, whether he has any property interest in it or not, but the possession for this purpose must be actual and not merely constructive. Steele v Fish, 2 M 153 (129); State v Bachelder, 5 M 223 (178); Hamilton v Batlin, 8 M 403 (359); Eastmen v Lamprey, 12 M 153 (89); Wilder v City of St. Paul, 12 M 192 (116); Murphy v Hinds, 15 M 182 (139); Conklin v Hinds, 16 M 457 (411); Byrne v Hinds, 16 M 521 (469); Barber v Evans, 27 M 92, 6 NW 445; Greene v Dwyer, 33 M 403, 23 NW 546; Herrick v Churchill, 35 M 318, 29 NW 129; Baker v Thompson, 36 M 314, 31 NW 51; Knight v Alexander, 38 M 384, 37 NW 799; Child v Morgan, 51 M 116, 52 NW 1127; Neisen v Canfield, 64 M 513, 67 NW 632; Eide v Clarke, 65 M 466, 68 NW 98.

Whether plaintiff is or is not in possession, or the land is vacant or not, does not go to the merits of the controversy, and if defendant in his answer demands affirmative relief, he waives all question as to possession or vacancy. Hooper v Henry, 31 M 264, 17 NW 476; Windom v Schuppel, 39 M 35, 38 NW 757; Abraham v Halloway, 41 M 163, 42 NW 870; Burke v Lacock, 41 M 250, 42 NW 1016; Mitchell v McFarland, 47 M 535, 50 NW 610; Todd v Johnson, 56 M 60, 57 NW 320; Mc-

Roberts v McArthur, 62 M 310, 64 NW 903; Kipp v Hagman, 73 M 5, 75 NW 746; Palmer v Yorks, 77 M 20, 79 NW 587; Cartwright v Hall, 88 M 349, 93 NW 117.

Plaintiff need not prove possession of all the land described in the complaint. He may succeed as to a part and fail as to the remainder. Wellendorf v Tesch, 77 M 512, 80 NW 629.

A party who is in actual possession of a part of a tract himself and in possession of the remainder by a tenant may maintain an action on the whole tract. Lowe v Lowe, 83 M 206, 86 NW 11.

Tenant of buildings on land held under lease by another does not, by accepting lease of land from a stranger before expiration of lease without consent of his landlord or lessee, place stranger in possession so as to enable him to maintain an action. Trimble v Lake Superior, 99 M 11, 108 NW 867.

The possession of successive occupants who are in priority may be tacked to make possession for the statutory period. Possession beyond the boundary line under mistake as to true line, but with an intent to appropriate it, is adverse. Fredericksen v Henke, 167 M 357, 209 NW 257.

Plaintiff may maintain an equitable action to remove a cloud, though he is not in possession. Union Central v Page, 190 M 360, 251 NW 911.

Right to possession action before entry. 2 MLR 373.

6. Complaint

If such is the case, the plaintiff must allege the land to be vacant or unoccupied. Conklin v Hinds, 16 M 457 (411); Jellison v Halloran, 40 M 485, 42 NW 392.

It is not necessary to anticipate or state the nature of the adverse claim. It is not necessary to state that the claim of the defendant is invalid or that he does plaintiff an injury in making it. All that the complaint need allege of defendant is that he has or claims some estate or interest in or lien on the land. Barber v Evans, 27 M 92, 6 NW 445; Walton v Perkins, 28 M 413, 10 NW 124; Stuart v Lowry, 49 M 91, 51 NW 662; Bovey v Dow, 68 M 273, 71 NW 2.

If plaintif is in actual possession, he need only allege such possession and that defendant claims an estate in or interest in the land. When the land is vacant plaintiff must allege some title or interest in himself. Myrick v Coursalle, 32 M 153, 19 NW 736; Herrick v Churchill, 35 M 318, 29 NW 129; Jellison v Halloran, 40 M 485, 42 NW 392; Wakefield v Day, 41 M 344, 43 NW 71; Pinney v Russell, 52 M 443, 54 NW 484; Wheeler v Winnebago, 62 M 429, 64 NW 920; James v City of St. Paul, 72 M 138, 75 NW 5.

It is not sufficient for plaintiff to allege that he "claims" title. Herrick v Chuchill, 35 M 318, 29 NW 129.

All statutory conditions entitling plaintiff to relief must be alleged. Jellison v Halloran, 40 M 485, 42 NW 392.

If plaintiff is an equitable owner, he must allege the facts giving rise to his equity. Duford v Lewis, 43 M 26, 44 NW 522; Stuart v Lowry, 49 M 91, 51 NW 662.

Overruling Knudson v Curley, 30 M 433, 15 NW 873, and cases referred to therein, the adverse claim of title by the defendant may be specified. Palmer v Yorks, 77 M 20, 79 NW 587.

Plaintiff need not allege his title in detail. Buffalo Land v Strong, 91 M 84, 97 NW 575.

Plaintiff pleaded a judgment in a former action as a bar to defendant's claim of title through a deed. The allegations in the complaint in the former action were sufficient to support an action to quiet title. It was not necessary that the complaint in the former action allege that plaintiff was in possession of the land or that it was vacant property. Whitney v Clow, 199 M 312, 271 NW 589.

An allegation that the present occupant entered and is in possession by virtue of an agreement with the predecessor of plaintiff's title is sufficient. Exsted v Exsted, 202 M 521, 729 NW 554.

7. Answer

A claim not asserted is waived. Weide v Gehl, 21 M 449.

The defendant must disclose the nature of his claim in his answer. Barber v Evans, 27 M 92, 6 NW 445; Morris v McClary, 43 M 346, 46 NW 238; Stuart v Lowry, 49 M 91, 51 NW 662.

Defendant in asserting his title should set it forth as if he were plaintiff. Walton v Perkins, 28 M 413, 10 NW 424; Stuart v Lowry, 49 M 91, 51 NW 662; McArthur v Clark, 86 M 165, 90 NW 369.

A claim of title under tax sale is not inconsistent with a claim of title antecedent to it. Defendant may set up a claim from several sources. Branham v Bezanson, 33 M 49, 21 NW 861.

If defendant claims an equitable title, he must state the facts giving rise to his equity. Stuart v Lowry, 49 M 91, 51 NW 662.

Defendant is limited to the title disclosed by his answer. If he acquires title pendente lite, he must give notice and ask the right to file a supplemental pleading. Hall v Sauntry, 80 M 349, 83 NW 156.

Defendant properly pleaded in abatement the pendency of a prior proceeding by her to register her title, and in which plaintiff was served as defendant. Seeger v Young, 127 M 416, 149 NW 735.

The complaint and separate answer of Muekel, together with the affidavits in support of each present an issue to try, possibly two of them; and it was error to strike the answer as shown. Tappan v Joslyn, 180 M 480, 231 NW 224.

The two defendants answering alleged that the defendant in default assigned to them the land contract executed by plaintiff. The defaulting defendant is not bound by the pleading alleging the fact to be so, and therefore it does not appear that as to such defendant the controversy is moot. Union Central v Page, 190 M 360, 251 NW 911.

8. Reply

When defendant asserts a legal title, a plaintiff in possession may, in reply, plead facts showing an equitable title of such a nature that it should prevail over the legal title. State v Bachelder, 5 M 223 (178); School District v Wrabeck, 31 M 77, 16 NW 493; Schofield v Quinn, 54 M 9, 55 NW 745; James v City of St. Paul, 72 M 138, 75 NW 5.

Cases showing various forms of replies. Issues which may be raised by replies. Broughton v Sherman, 21 M 431; Hunter v Cleveland, 31 M 505, 18 NW 645; Mueller v Jackson, 39 M 431, 40 NW 565; Bailey v Galpin 40 M 319, 41 NW 1054; Schofield v Quinn, 54 M 9, 55 NW 745; Alt v Graff, 65 M 191, 68 NW 9; Eide v Clarke, 65 M 466, 68 NW 466; James v City of St. Paul, 72 M 138, 75 NW 5; Fifield v Norton, 79 M 264, 82 NW 581; Hall v Sauntry, 80 M 348, 83 NW 156.

Where in a legal action to determine adverse claims the defendants assert a legal title, the plaintiffs may, in their reply, plead facts showing an equitable title of such character that it ought to prevail over defendants' legal title. Garrey v Nelson, 185 M 487, 242 NW 12.

9. Judgment

Forms of judgment considered:

On disclaimer by defendant. Perkins v Morse, 30 M 11, 13 NW 911, 14 NW 879;

When the defendant asserts no interest in himself. Donohue v Ladd, 31 M 244, 17 NW 381;

Various forms. Myrick v Coursalle, 32 M 153, 19 NW 736; Walton v Perkins, 33 M 357, 23 NW 527; Windom v Wolverton, 40 M 439, 42 NW 296;

Where recovery of possession is not demanded. Godfrey v Valentine, 50 M 824, 52 NW 643; McRoberts v McArthur, 69 M 506, 72 NW 796.

Equitable relief may be granted in an action to determine adverse claims to real property upon such terms and conditions as may be necessary to do justice. Stuart v Lowry, 49 M 91, 51 NW 662; Engel v Swenson, 191 M 324, 254 NW 2.

A contingent interest in real estate is bound by a judgment in an action to quiet title thereto where the court has before it all the parties that can be brought before it, and it acts on the property according to the rights that appear. Mayall v Mayall, 63 M 511, 65 NW 942; Matthews v Lightner, 85 M 333, 88 NW 992.

The rule that a judgment is admissible in evidence against all the world, as a link in a party's chain of title, does not apply to ordinary judgments in actions to determine adverse claims, which do not purport to transfer title, or render valid an otherwies defective link in the chain of title. Minnesota Debenture v Johnson, 94 M 150, 102 NW 381.

A judgment awarding relief beyond the prayer of the complaint or scope of its allegations, the excessive relief appearing from the face of the record, is void for want of jurisdiction. Sache v Wallace, 101 M 169, 112 NW 386.

Judgment adjudging that defendant by virtue of paramount title is owner in fee and in possession, and that plaintiff has no title or interest, is evidence of constructive eviction of plaintiff. Larson v Goettl, 103 M 272, 114 NW 840.

The fact that the tax title on which plaintiff relied was invalid, does not warrant a judgment for defendant, where it appears that defendant's title was also bad. DeLaurier v Stilson, 121 M 339, 141 NW 293.

Where plaintiffs alleged title in themselves and evidence that they were the equitable owners being excluded under the pleadings, judgment was rendered in favor of defendant. This does not bar the plaintiffs from asserting their equitable rights in a subsequent action. Major v Owen, 126 M 1, 147 NW 662; Knapp v Great Northern, 130 M 405, 153 NW 848.

Judgment for plaintiffs in an action by creditors who have redeemed from a mortgage foreclosure sale, quieting title to the land and a mining lease thereof, determining their redemption valid, is not an adjudication of their right to recover rents or royalties that accrued during the year allowed for redemption after foreclosure sale. Orr v Bennett, 135 M 443, 161 NW 165.

Although the same facts may be admissible, an adjudication determining the title to lot 11, is not res judicata as to title to lot 12. Jerolaman v Gilliane, 173 M 242, 217 NW 337.

Under the equitable maxim that equity regards that as done which ought to have been done, plaintiff's equitable title prevails over defendant's legal title. Garrey v Nelson, 185 M 487, 242 NW 12.

Where judgment is entered against the defendant by default, the relief granted must be within the allegations of the complaint and within the demand for relief. Union Central v Page, 190 M 360, 251 NW 911.

The judgment of the district court sustained by the supreme court of Minnesota is final on the question of adverse claims as against the objection that the relief granted is broader than authorized by the complaint, since the construction placed on the complaint is erroneous, and the judgment bars a subsequent action to determine rights to the property. Gibbs v Alger, 201 F 47.

Action to determine adverse claims to a 40-acre tract worth $400.00, being one of four alleged by defendant to be worth $3,100, is not removable, notwithstanding defendant's counter-claim seeking to void alleged fraudulent deed to plaintiff involving all four 40-acre tracts. Enger v Northern Finance, 31 F(2d) 136.

559.02 UNKNOWN DEFENDANTS.

HISTORY. Ex. 1881 c. 81 s. 1; G. S. 1878 Vol. 2 (1888 Supp.) c. 75 s. 4a; G. S. 1894 s. 5818; R. L. 1905 s. 4425; G. S. 1913 s. 8061; 1919 c. 344 s. 1; 1923 c. 434 s. 1; G. S. 1923 s. 9557; M. S. 1927 s. 9557.

The object of the suit of F & M against B was not to obtain a lien upon the land or acquire his title, but to have their tax title judicially confirmed and

his title barred. All persons claiming under B, subsequent to lis pendens filed in that action, would be barred by the judgment, but persons claiming under a prior conveyance, though not recorded until after the filing of the lis pendens, would not be affected by the judgment. As to what the effect would have been, had plaintiff proceeded under the unknown claimant's act of Ex. Laws 1881, Chapter 81, it is not necessary to determine. Windom v Schuppel, 39 M 35, 38 NW 757; West Missabe v Berg, 92 M 2, 99 NW 209.

A bona fide purchaser from the successful party in a judgment rendered in an action to determine adverse claims to real estate is not in the same position as a purchaser at a judicial sale, and takes his title subject to be defeated by a subsequent reversal or vacation of the judgment. A defendant served by publication, and not personally, judgment entered by default, may apply for relief within one year after notice of entry of judgment. Lord v Hawkins, 39 M 73, 38 NW 689; Boeing v McKinley, 44 M 392, 46 NW 766; Hoyt v Lightbody, 93 M 249, 101 NW 304.

The statute is constitutional; and as the statute must be strictly construed, the record owner must be named. Shepard v Ware, 46 M 174, 48 NW 773; Ware v Easton, 46 M 180, 48 NW 775.

The published summons must contain the names of parties known, and of all who appear by record to have an interest. Reasonable diligence must be exercised to ascertain the parties. Shepard v Ware, 46 M 174, 48 NW 773.

The fact that the named defendant was dead when the action was commenced, will not prevent the court from acquiring jurisdiction to determine the rights of "other persons or parties unknown" claiming an interest in the real estate described in the complaint. Inglee v Welles, 53 M 197, 55 NW 117; McClymond v Noble, 84 M 329, 87 NW 838.

No order of court for the service of the summons by publication is necessary. McClymond v Noble, 84 M 329, 87 NW 838.

In publishing a summons under the "Torrens law," where the examiner suggests that a party named by him be made a defendant, but his suggestion is not observed, the judgment thereon entered is void as against such party or his privies. Dewey v Kimball, 89 M 454, 96 NW 704.

Lack of notice or knowledge of the pendency of the action is sufficient excuse under the statute for the "unknown defendant" to answer therein, and authorizes the court, under said section, upon seasonable application, to give such defendant an opportunity to interpose a meritorious defense. Foster v Coughran, 113 M 433, 129 NW 853.

Failure to publish the notice of lis pendens as required by statute was as to unknown defendants fatal to the jurisdiction of the court, and as to their rights in the property, the judgment rendered in the action was void. Jenson v Anderson, 123 M 199, 143 NW 361.

Defendant bound by an adverse decision from which she did not appeal. Yennie v Slingerland, 161 M 372, 201 NW 605.

The owner of a tax title who cannot claim 15 years adverse possession and whose tax title has not been adjudged valid, is not entitled under section 508.70 (of the Torrens act) to apply for a certificate of registration and the cancelation of an existing certificate of title. Application of Jamieson, 169 M 472, 211 NW 686.

Where parties not named as defendants in an action to determine adverse claims are known to the plaintiff at the time of bringing the action, or where such parties are known to have a possible interest, but not of record, such parties are not bound by the judgment as "persons unknown." State Bank v Bryson, 195 M 243, 262 NW 561.

Rights of persons disappearing. 9 MLR 99.

What constitutes a cloud on title. 12 MLR 80.

559.03 DISCLAIMER; DEFAULT; COSTS.

HISTORY. R. S. 1851 c. 74 s. 2; P. S. 1858 c. 64 s. 2; G. S. 1866 c. 75 s. 2; G. S. 1878 c. 75 s. 3; 1889 c 111 s. 1; G. S. 1894 s. 5819; R. L. 1905 s. 4426; G. S. 1913 s. 8062; G. S. 1923 s. 9558; M. S. 1927 s. 9558.

An abandonment of a public easement will not be presumed from a lapse of time less than that which would raise the presumption of a grant. Wilder v City of St. Paul, 12 M 192 (116).

An answer which denies that defendant claims any estate, interest, or lien, except a lien under a certificate of sale for delinquent taxes, amounts to a disclaimer. Brackett v Gilmore, 15 M 245 (190); Perkins v Morse, 30 M 11, 13 NW 911; Donohue v Ladd, 31 M 244, 17 NW 381; Morrill v Little Falls, 46 M 260, 48 NW 1124; Culligan v Cosmopolitan, 126 M 223, 148 NW 273.

In an action under the statute to determine adverse claim to vacant and unoccupied real estate, the plaintiff is not entitled to judgment on the pleadings where the answer denies his title, but fails to show that the defendant has any interest in the premises. Overruling, on this point, Donohue v Ladd, 31 M 244, 17 NW 381. Wheeler v Winnebago, 62 M 429, 64 NW 920.

Where the defendant disclaims any interest, he is not liable for costs and disbursements. Lippert v Kowalke, 154 M 128, 191 NW 246.

559.04 CLAIMANTS UNDER COMMON GRANTOR; JOINDER.

HISTORY. 1870 c. 57 s. 1; G. S. 1878 c. 75 s. 4; G. S. 1894 s. 5820; R. L. 1905 s. 4427; G. S. 1913 s. 8063; G. S. 1923 s. 9559; M. S. 1927 s. 9559.

Laws 1870, Chapter 57 (section 559.04), was not intended to give any new remedy or form of action against adverse claimants to real estate, but is simply a regulation of practice in respect to the joinder of parties. Magan v Carter, 48 M 501, 51 NW 614; Chance v Hawkinson, 149 M 91, 182 NW 911.

NOTE: See curative and limitation acts of Ex. Laws 1919, Chapter 5, and Laws 1921, Chapter 163.

559.05 ACTION AGAINST COTENANT; DENIAL OF RIGHT.

HISTORY. R. S. 1851 c. 74 s. 3; P. S. 1858 c. 64 s. 3; G. S. 1866 c. 75 s. 3; G. S. 1878 c. 75 s. 9; G.S. 1894 s. 5843; R. L. 1905 s. 4428; G. S. 1913 s. 8064; G. S. 1923 s. 9560; M. S. 1927 s. 9560.

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 property, unless the occupant has excluded his cotenant or agreed to share the profits with him. Sons v Sons, 151 M 360, 186 NW 811; Arnold v De Booy, 161 M 256, 201 NW 437.

Cotenant may purchase mortgage without duty to redeem from its foreclosure for benefit of his cotenants. Fuller v Dennistoun, 164 M 160, 204 NW 958.

The entry and possession of one tenant in common is regarded in law as the entry and possession of all the cotenants and not as a disseizin, and such possession is not adverse until there is an ouster. Hoverson v Hoverson, 216 M 228, 12 NW(2d) 505.

Owelty should be decreed with caution. It should not be decreed except when necessary to make an equitable and fair division. A sale on partition may offer the preferable method. Hoerr v Hoerr, 140 M 229, 165 NW 474, 167 NW 735; Hoverson v Hoverson, 216 M 228, 12 NW(2d) 505.

A cotenant may retain the use and appropriate the benefits of the land, but this extends only to the products of its proper use and employment and not to that which is a part of the land. Proposed drainage of a portion of a lake by a mining company which would destroy riparian rights of its cotenant was an improper exercise of such right. Petraborg v Zontelli, 217 M 536, 15 NW(2d) 174.

559.06 TERMINATION OF PLAINTIFF'S RIGHT PENDING ACTION.

HISTORY. R. S. 1851 c. 74 s. 4; P. S. 1858 c. 64 s. 4; G. S. 1866 c. 75 s. 4; G. S. 1878 c. 75 s. 10; G S. 1894 s. 5844; R. L. 1905 s. 4429; G. S. 1913 s. 8065; G. S. 1923 s. 9561; M. S. 1927 s. 9561.

Where part of the property, in respect to which plaintiff claims relief by reason of defendant's alleged unlawful acts thereon, is sold by plaintiff after suit commenced, the fact must be alleged by supplemental answer before defendant can avail himself thereof. Harrington v St. Paul & Sioux City, 17 M 215 (188).

559.07 EJECTMENT; TRIAL, HOW CONDUCTED; NO SECOND TRIAL.

HISTORY. R. S. 1851 c. 74 s. 8; P. S. 1858 c. 64 s. 8; 1911 c. 139 s. 1; G. S. 1913 s. 8066; G. S. 1923 s. 9562; M. S. 1927 s. 9562.

Revised Laws 1905, Section 4430, granting second trial in actions for the recovery of real property, does not apply to an equitable action for the determination of the title, in which a counter-claim in ejectment was interposed, but was dismissed prior to the trial. Upton v Merriman, 122 M 158, 142 NW 150.

Similiarity of replevin to an action in ejectment. In ejectment plaintiff must have the right of immediate possession. Seebold v Eustermann, 216 M 577, 13 NW(2d) 739.

559.08 EJECTMENT; DAMAGES; IMPROVEMENTS.

HISTORY. G. S. 1866 c. 75. s. 7; G. S. 1878 c. 75 s. 13; G. S. 1894 s. 5847; R. L. 1905 s. 4432; G. S. 1913 s. 8068; G. S. 1923 s. 9563; M. S. 1927 s. 9563.

A disseizee cannot maintain an action against a disseizor to recover the value of crops sowed and harvested by the latter while in the actual adverse possession of the premises and removed therefrom before the disseizee recovered possession. Nash v Sullivan, 32 M 189, 20 NW 144.

To entitle the defendant in an ejectment suit to be allowed for improvements, the improvements must have been made by him or those under whom he claims while holding under color of title. McLellan v Omodt, 37 M 157, 33 NW 326.

The sum which the taker of land under right of eminent domain is entitled to offset against the interest accruing on the award because of the use made of the land taken by the owner between the filing of the first award and the payment of the final award, is the fair rental value of the part actually occupied; and the burden of proof is upon the party claiming the offset to prove the extent of the use as well as the rental value. Ford Motor v City of Minneapolis, 147 M 211, 179 NW 907.

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.

Improvements made by a life tenant become a part of the real estate and pass therewith to the remaindermen, and to authorize removing them after the termination of the life estate, requires the consent of all the remaindermen; and the remaindermen are under no obligation to pay a life tenant for improvements made by him on the property, unless they were made under an agreement to reimburse him therefor. Day v Day, 180 M 151, 230 NW 634.

In a suit to recover improvements made by plaintiff upon land of defendant, under an unenforceable oral contract for its conveyance to plaintiff, the measure of damage is not cost or value of improvements, but enhancements in value of the real estate because thereof. Lepak v Lepak, 195 M 24, 261 NW 484.

559.09 REMOVAL OF BUILDING ERECTED IN GOOD FAITH.

HISTORY. 1864 c. 43 s. 1; G. S. 1866 c. 75 s. 8; G. S. 1878 c. 75 s. 14; G. S. 1894 s. 5848; R. L. 1905 s. 4433; G. S. 1913 s. 8069; G. S. 1923 s. 9564; M. S. 1927 s. 9564.

An action for use and occupation will not lie against a party in possession of real estate by the license of the owner. Reed v Lammel, 40 M 397, 42 NW 202.

559.10 OCCUPYING CLAIMANT; COMPENSATION FOR IMPROVEMENTS.

HISTORY. 1873 c. 55 ss. 1, 5, 9; G. S. 1878 c. 75 ss. 15, 19, 23; G. S. 1894 ss. 5849, 5853, 5857; R. L. 1905 s. 4434; G. S. 1913 s. 8070; G. S. 1923 s. 9565; M. S. 1927 s. 9565.

1. **Object of act**
2. **Right is statutory**
3. **Who may claim**
4. **What is color of title**
5. **What is an official deed**
6. **Notice; good faith**
7. **No compensation for improvements**
8. **Peaceable entry presumed**
9. **Improvements defined**
10. **Constitutional questions**

1. Object of act

Laws 1873, Chapter 55, was not intended to apply to cases of improvements upon land made before the passage of the act. Wilson v Red Wing School, 22 M 488.

The occupant is not entitled to improvements made before he acquired color of title. Wheeler v Merriman, 30 M 372, 15 NW 665; McLellan v Omodt, 37 M 157, 33 NW 326.

The provisions of the occupying claimant's law apply to an action in partition; but a tenant for life, making improvements and paying taxes during continuance of the life estate, is not. Smalley v Isaacson, 40 M 450, 42 NW 352.

Where one acting in good faith places a building on the land of another through a bona fide mistake as to boundary, which is participated in by the adjoining owner, an agreement will be implied by law that the structure shall remain the property of the person erecting it in the absence of anything indicating an intention or creating an equity to the contrary. Karpik v Robinson, 171 M 318, 214 NW 59.

A vendor and owner of farm land, on canceling an executory contract for its sale, is entitled to possession of the land and of the growing crops. Roehrs v Thompson, 185 M 154, 240 NW 111.

Equitable relief when improvements are made on the land of another. 14 MLR 565.

Constructive trusts. 25 MLR 715.

2. Right is statutory

This act is in abrogation or modification of the common law and is purely statutory. Wilson v Red Wing School, 22 M 488; Wheeler v Merriman, 30 M 372, 15 NW 665; Scharffbillig v Scharffbillig, 51 M 349, 53 NW 713.

3. Who may claim

An occupant is not entitled to compensation for improvements made before he acquired color of title. Wheeler v Merriman, 30 M 372, 15 NW 665.

"Color of title in fee" means color of title in fee in the occupying claimant himself, or in the person under whom he claims. Hall v Torrens, 32 M 527, 21 NW 717.

A tenant for life making improvements and paying taxes during the continuance of the life estate, is not entitled to the benefits of the occupying claimant's law. Smalley v Isaacson, 40 M 450, 42 NW 352.

Heirs, representatives, and assignees stand on the same footing as the original occupant. Pfefferle v Wieland, 55 M 209, 56 NW 824.

4. What is color of title

A person is properly said to have color of title to lands when he has an apparent (though not real) title to the same founded upon a deed which purports to convey the same to him. Taking possession of land in "good faith" is taking possession in a belief that such taking is rightful. Seigneuret v Fahey, 27 M 60, 6 NW 403; Everett v Boyington, 29 M 264, 13 NW 45; McLellan v Omodt, 37 M 157, 33 NW 326; Northern Investment v Bargquist, 93 M 106, 100 NW 636. Kampfer v East Side Syndicate, 95 M 309, 104 NW 290.

One in possession of real estate under an instrument which, upon its face, does not appear to give him any title or right to possession, is not holding under color of title. O'Mulcahy v Floror, 27 M 449, 8 NW 166.

The occupant is not entitled to compensation for improvements made before he acquired color of title. Wheeler v Merriman, 30 M 372, 15 NW 665.

"Color of title in fee" means color of title in fee in the occupying claimant himself, or in the person under whom he claims. Hall v Torrens, 32 M 527, 21 NW 717.

Defendant, without license, but by mistake, built a house on plaintiff's lot. The mistake resulted from defendant's own negligence. The house became part of the lot, and defendant is not entitled either to remove the house nor enforce a lien for its value. Mitchell v Bridgeman, 71 M 360, 74 NW 142.

5. What is an official deed

A tax deed should recite the power under which it is made, or, in other words, should recite enough to show authority to make it. A tax deed containing such recitals, and in other respects so made as to be operative as a deed at common law, is "regular on its face." Madland v Benland, 24 M 372; Everett v Boyington, 29 M 264, 13 NW 45; Jewell v Truhn, 38 M 433, 38 NW 106.

A certificate of sale at tax-judgment sale neither possess title to the holder nor gives him the right to possession, until the time for redemption has expired. McLellan v Omodt, 37 M 157, 33 NW 326.

A certificate of the county auditor, executed under provisions of Laws 1874, Chapter 2, Section 19. Assigning the right of the state to lands bid in at the sale, is "an official deed" within the meaning of the occupying claimant act. Pfefferle v Wieland, 55 M 202, 56 NW 824.

6. Notice; good faith

Taking possession of land in good faith is taking possession in a belief that such taking is rightful. A deed invalid on its face is sufficient notice to destroy any claim of good faith. The county auditor's certificate that the time for redemption has expired, is sufficient to prove that the notice required has been duly given to the certificate holder. Shillock v Gilbert, 23 M 386; Seigneuret v Fahey, 27 M 60, 6 NW 403; Wheeler v Merriman, 30 M 372; 15 NW 665; Jewell v Truhn, 38 M 433, 38 NW 106; Pfefferle v Wieland, 55 M 202, 56 NW 824; Northern Investment v Bargquist, 93 M 106, 100 NW 636.

7. No compensation for improvements

The defendant who made the improvements knew, or was chargeable with notice of plaintiff's claim before she made the improvements, and is not entitled to compensation for making them. Rux v Adam, 143 M 37, 172 NW 912; Aiken v Timm, 147 M 319, 180 NW 234.

8. Peaceable entry presumed

In the absence of evidence to the contrary, a taking possession of land is presumably peaceable. Seigneuret v Fahey, 27 M 60, 6 NW 403.

9. Improvements defined

Improvements of permanent value to the land are within the scope of the occupying claimant's act, but ordinary repairs are not. Northern Investment v Bargquist, 93 M 106, 100 NW 636.

10. Constitutional questions

Laws 1873, Chapter 55, the occupying claimant's act, is constitutional, but not retrospective in effect. Wilson v Red Wing School, 22 M 488; Madland v Benland, 24 M 372; Flynn v Le Mieux, 46 M 458, 49 NW 238; Craig v Dunn, 47 M 59, 49 NW 396.

559.11 PLEADINGS; TRIAL; VERDICT.

HISTORY. 1873 c. 55 ss. 2, 8; G. S. 1878 c. 75 ss. 16, 22; G. S. 1894 ss. 5850, 5856; 1897 c. 38; R. L. 1905 s. 4435; G. S. 1913 s. 8071; G. S. 1923 s. 9566; M. S. 1927 s. 9566.

1. Pleadings

In an action of ejectment, allegations in the answer that defendant entered under an official deed, has had no notice of any defects invalidating the deed, and has made improvements and has paid taxes, are not admitted by failure to reply. Reed v Newton, 22 M 541.

The burden rests on the claimant in the first instance to bring himself within the exception (as to notice) in order to entitle himself to an election to sell the land instead of reimbursing the occupant for his improvements. Jewell v Truhn, 38 M 433, 38 NW 106.

The special denial in the answer which modifies the general denial as to defendant's alleged possession, admits possession and occupancy. Yorks v Mooberg, 84 M 503, 87 NW 1115.

A new trial being granted amendments of pleadings should be allowed liberally where justice can be promoted, especially where a meritorious defense, such as a demand under the occupying claimant's act, a remedial statute, is attempted to be interposed by a defendant. Cool v Kelly, 85 M 359, 88 NW 988.

2. Burden of proof

Good faith may be proved directly by the testimony of the party whose good faith is to be shown. The question of good faith is one of fact, and for the jury. Seigneuret v Fahey, 27 M 60, 6 NW 403.

A bona fide occupant must establish the validity of the tax judgment and prior proceedings. Everett v Boyington, 29 M 264, 13 NW 45.

The grantee must show that his grantor was within the provisions of the statute when he made the improvements. Wheeler v Merriman, 30 M 372, 15 NW 665; Hall v Torrens, 32 M 527, 21 NW 717.

The burden rests on the claimant, in the first instance, to bring himself within the exception (as to notice) in order to entitle himself to an election. Jewell v Truhn, 38 M 433, 38 NW 106.

3. Evidence

Receipt of treasurer is evidence of the payment of taxes. Good faith may be proved by direct testimony of the occupant. Evidence of cost, while not conclusive, is admissible as evidence of value of improvements. Seigneuret v Fahey, 27 M 60, 6 NW 403.

To rebut an allegation of fraud, the testimony of the wife and husband as to what was said and done in procuring her signature was not hearsay. Sommerfield v Griffith, 173 M 51, 216 NW 311.

4. Taxes

Recovery can be had only for such taxes as were a valid charge on the land. Madland v Benland, 24 M 372.

Taxes must have been paid by the occupant while in actual possession under color of title in good faith and without notice. Dawson v Girard Life, 27 M 411, 8 NW 142; Pfefferle v Wieland, 60 M 328, 62 NW 396.

It is the duty of the trial court to hear and determine the validity of the taxes conditioned to be paid as a prerequisite to vacation of the void judgment. Lewis v Knowlton, 84 M 53, 86 NW 875.

5. When improvements must have been made

Occupying claimant is entitled to the value of improvements made by him previous to actual notice of plaintiff's claim to the land. Seigneuret v Fahey, 27 M 60, 6 NW 403; McLellan v Omodt, 37 M 157, 33 NW 326.

Occupant is not entitled to compensation for improvements made before he acquired color of title. Wheeler v Merriman, 30 M 372, 15 NW 665.

Whether in a second trial in ejectment proceedings one making improvements while in possession under a judgment rendered in the first trial is entitled to compensation, quaere. In the instant case there being no evidence as to whether the improvements were made prior or subsequent to the entry of judgment, there can be no recovery. Gohre v Berry, 82 M 200, 84 NW 733.

6. Interest

The occupant is not entitled to recover interest on the value of the improvements. Madland v Benland, 24 M 372, Taylor v Slingerland, 39 M 470, 40 NW 575.

7. Directing verdict

In an action for the recovery of specific real property, if there is no conflict in the evidence as to the facts, the court may, as in any other case, direct a verdict. Hallam v Doyle, 35 M 337, 29 NW 130.

8. Order of proof

Where in an action to determine adverse claim to real property the defendant interposes an answer in the nature of a cross-action in ejectment for the recovery of the possession, and plaintiff in reply sets up a claim for improvements under the "occupying claimants' act", in case defendant establishes title, the matters set up in the reply constitute no part of plaintiff's case in chief under the complaint, but are only defensive to defendant's answer. Mueller v Jackson, 39 M 431, 40 NW 565.

9. Court may determine boundaries

If the description in the verdict and judgment was not sufficiently definite or certain, the trial court indicated that on application a survey and plat would be ordered to make it so. Deacon v Haugen, 182 M 540, 235 NW 23.

In ejectment proceedings plaintiff wholly failed to show that lot 30 included the property in dispute or to sustain a reformation of the plat. Rohm v Weiss, 190 M 508, 252 NW 432.

559.12 COMPENSATION BEFORE EXECUTION.

HISTORY. 1873 c. 55 s. 3; G. S. 1878 c. 75 s. 17; 1889 c. 190 s. 1; G. S. 1894 s. 5851; R. L. 1905 s. 4436; G. S. 1913 s. 8072; G. S. 1923 s. 9567; M. S. 1927 s. 9567.

The sum which the judgment in favor of the owner requires him to pay the occupant, as a condition to the issuing of execution, does not bear interest. Taylor v Slingerland, 39 M 470, 40 NW 575.

Upon failure of the landowner to pay within the time prescribed the amount awarded to the occupant for improvements, the title vests in the occupant. Flynn v Lemieux, 46 M 458, 49 NW 238; Craig v Dunn, 47 M 59, 49 NW 396.

559.13 OCCUPANT TO PAY VALUE OF LAND, WHEN.

HISTORY. 1873 c. 55 s. 4; G. S. 1878 c. 75 s. 18; 1889 c. 190 s. 1; G. S. 1894 s. 5852; R. L. 1905 s. 4437; G. S. 1913 s. 8073; G. S. 1923 s. 9568; M. S. 1927 s. 9568.

The bona fide occupant, under color of title in fee, is entitled to an election to be paid the value of his improvements as a condition of the recovery of the possession by a successful claimant, unless the latter make it appear that he had no notice, actual or constructive, of the possession of the former in time to disclose or assert his claim before the improvements were made. Jewell v Truhn, 38 M 433, 38 NW 106.

In order to constitute a breach of the covenant for quiet enjoyment in a deed, it is not necessary there be an actual ouster under process; nor a judgment of ouster by the holder of the permanent title; and he may leave or purchase the title. If he yields, he does so at his peril, and the burden is then on him, in a suit against his covenanter, to establish the validity of the title he has yielded. The application of the above rules is not affected by the occupying claimant act. Ogden v Ball, 40 M 94, 41 NW 453; Smalley v Isaacson, 40 M 450, 42 NW 352.

There must be a specific recovery of the damages found in a judgment for the recovery of real estate, to require a payment thereof, in order to secure a second trial. Western Land v Thompson, 79 M 423, 82 NW 677.

559.14 MAY REMOVE CROPS.

HISTORY. 1873 c. 55 s. 6; G. S. 1878 c. 75 s. 20; G. S. 1894 s. 5854; R. L. 1905 s. 4438; G. S. 1913 s. 8074; G. S. 1923 s. 9569; M. S. 1927 s. 9569.

The owners of crops which they have sown upon lands occupied by them may enter upon the premises for the purpose of removing the crops after entry of judgment against them in ejectment, although such owners were adjudged to be not entitled to possession of the land when the crops were sown. Bloomendal v Albrecht, 79 M 304, 82 NW 585.

Plaintiff who was not a tenant will not be entitled to harvest what he sowed, nor was he entitled to the rye crop, for he voluntarily surrendered possession to the mortgagee's tenant after the rye was seeded in the fall, which tenant, the respondent, cared for, harvested and stored the crop. Gunderson v Hoff, 167 M 413, 209 NW 37.

A tenant of the mortgagor raised a crop on the land during the year for redemption. The crop was not harvested and severed from the land until after

the expiration of the year for redemption. The holder of the sheriff's certificate of foreclosure made no demand for possession, but permitted the tenant to harvest and thresh the grain, and to set apart and deliver to the mortgagor his share. The tenant was the owner of the crop and title to that part delivered to the mortgagor vested in him. Schuchard v St. Anthony Elev. 176 M 40, 222 NW 292.

A vendor and owner of farm land, on canceling an executory contract of sale, is entitled to possession of the land and of the growing crops. Roehrs v Thompson, 185 M 158, 240 NW 111.

Measure of vendor's damages where vendee wrongfully remains in possession after cancelation of executory contract. 16 MLR 726.

559.15 OCCUPANT NOT IN ACTUAL POSSESSION; ACTIONS IN OTHER FORM.

HISTORY. 1873 c. 55 ss. 7, 10; G.S. 1878 c. 75 ss. 21, 24; G.S. 1894 ss. 5855, 5858; R.L. 1905 s. 4439; G.S. 1913 s. 8075; G.S. 1923 s. 9570; M.S. 1927 s. 9570.

Where lands leased for a term of years and in the actual possession of the lessee, are owned by several tenants in common both of the rents and the reversion, an action in partition can be maintained by any one of such owners. Cook v Webb, 19 M 167 (129).

Claim may be asserted in an action in the nature of an ejectment. Reed v Newton, 22 M 541;

In an action to redeem from a tax sale by a person who has been under a disability. Goodrich v Florer, 27 M 97, 6 NW 452;

In a statutory action to determine adverse claims. Dawson v Girard Life, 27 M 411, 8 NW 142; Mueller v Jackson, 39 M 431, 40 NW 565; Smalley v Jacobson, 40 M 450, 42 NW 352.

It cannot be asserted in an action under Laws 1887, Chapter 127, to test a tax title. Sanborn v Mueller, 38 M 27, 35 NW 666.

If claim cannot be asserted in the particular action it may be asserted subsequently in a proper action. Sanborn v Mueller, 38 M 27, 35 NW 666; Windom v Schuppel, 39 M 35, 38 NW 757.

Claim may be asserted and adjudged in any action the result of which may determine and cut off the claim to a lien. It may be asserted and determined in an action of partition. Smalley v Isaacson, 40 M 450, 42 NW 352.

Where defendant paid rent for February, but moved to a new location on February 10th but retained possession of the old premises until forcibly evicted by plaintiff, defendant could properly counterclaim for damages and for the amount paid as rent from February 10th to February 28th. Hackney v Fetsch, 123 M 450, 143 NW 1128.

559.16 ORDER FOR SURVEY.

HISTORY. R.S. 1851 c. 74 ss. 9, 10; P.S. 1858 c. 64 ss. 9, 10; G.S. 1866 c. 75 ss. 9, 10; G.S. 1878 c. 75 ss. 27, 28; G.S. 1894 ss. 5859, 5860; R.L. 1905 s. 4440; G.S. 1913 s. 8076; G.S. 1923 s. 9571; M.S. 1927 s. 9571.

559.17 MORTGAGEE NOT ENTITLED TO POSSESSION.

HISTORY. R.S. 1851 c. 74 s. 11; P.S. 1858 c. 64 s. 11; G.S. 1866 c. 75 s. 11; G.S. 1878 c. 75 s. 29; G.S. 1894 s. 5861; R.L. 1905 s. 4441; G.S. 1913 s. 8077; G.S. 1923 s. 9572; M.S. 1927 s. 9572.

One who has acquired the rights of a mortgagee in possession does not lose the same by being temporarily or involuntarily dispossessed. Finley v Erickson, 122 M 235, 142 NW 198.

A mortgagee of land is not entitled to possession. The same rule applies to rents and royalties under a mining lease. Orr v Bennett, 135 M 446, 161 NW 165.

The facts do not warrant the appointment of a receiver of mortgaged property pending foreclosure. Justus v Fogerstrom, 145 M 189, 176 NW 645; Strimling v McDonald, 168 M 486, 210 NW 388.

The appointment of a receiver for property during the period of redemption is a harsh measure and the power of appointment, under our theory of a mortgage,

is exercised cautiously; but in the instant case the facts warranted such appointment. Larson v Orfield, 155 M 283, 193 NW 453.

An assignment of rents, contained in a real estate mortgage for the purpose of paying taxes and insurance on the property in case of the failure of the mortgagor or his grantees to pay the same, is valid. Fidelity v West, 178 M 153, 226 NW 406.

Any right which the mortgagee may have to require rents and profits to be applied on taxes and interest on prior encumbrances terminates at the foreclosure sale. Grady v First State Sec. 179 M 571, 229 NW 874.

It is waste for the mortgagor in possession of an apartment building after foreclosure sale and during the period of redemption not to use current rents to the extent reasonably needed to keep the property tenantable. But waste ordinarily will not be enjoined unless of such character that it may so impair the value of the property as to render it insufficient as security for the debt. Gardner v Prindle, 185 M 147, 240 NW 351.

Where a mortgage debt is due in instalments and there is a foreclosure for one other than the last, the mortgage continues as security for the remaining debt and the foreclosure does not exhaust the security. The mortgage and all its covenants, including payment of taxes, remains in full force, and the covenant for collection of rents to apply on taxes remains in force. Peterson v. Met. Life, 189 M 100, 248 NW 667.

Provision of a real estate mortgage assigning rents to the mortgagee to reimburse him if he is compelled to pay taxes, maintain insurance, and make necessary repairs on mortgaged property, is valid. Mutual Benefit v Canby, 190 M 144, 251 NW 129.

The common law effect that a mortgage was a conveyance has been cut down until now, while in form a conveyance, it creates only a mere lien or security. Hatterstad v Mutual Trust, 197 M 643, 268 NW 665.

A real estate mortgage is not deemed a conveyance so as to enable the owner of the mortgage to recover possession of the property without foreclosure. But, subsequent to the execution of the mortgage, the mortgagor may assign rents to the mortgagee to be applied on the mortgage debt, and incidentally authorize the mortgagee to take possession for the purpose of leasing the property and collecting the rents. Seifert v Mut. Benefit, 203 M 415, 281 NW 770.

Any right a mortgagee may have had to require rents to be applied on taxes terminated with the foreclosure sale. A mortgagee has a mere lien upon the real property covered by his mortgage and holds the same only as security for the debt or other obligation created thereby; and no lien is created in his favor as to rents and profits. Fredin v Cascade Realty, 205 M 256, 285 NW 615.

A mortgagee in possession with consent of the mortgagor has the right to collect rents and profits and to apply any excess over fixed charges on the indebtedness secured by the mortgage, and cannot be dispossessed until his mortgage is satisfied. Lemon v Devosky, 210 M 114, 297 NW 329.

A mortgagor may give to his mortgagee a right of possession before foreclosure by agreement subsequent to the mortgage, creating a mortgagee in possession. The mortgagee in possession may retain possession until the mortgage obligation has been met. Gandrud v Hansen, 210 M 125, 297 NW 730.

Accounting by senior mortgagee to junior mortgagee of rents released to mortgagor. Gandrud v Hansen, 210 M 125, 297 NW 730.

Under section 559.17 the common law 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 a security for his debt with right of ownership and possession in the mortgagor or until foreclosure and expiration of the period of redemption. Romanchuk v Plotkin, 215 M 161, 9 NW(2d) 421.

A real estate mortgage is a lien under our law; and, when a prior lien is foreclosed, a junior lienholder, whether in form of a judgment or mortgage has a right of redemption. Krahmer v Koch, 216 M 423, 13 NW(2d) 370.

If, in the application of established principles of equity and consistently with the legal title remaining in the mortgagor, the court finds it necessary to intervene by taking possession of the mortgaged premises through a receivership, the

statute will not prevent its doing so. National Guardian v Schwartz, 217 M 294, 14 NW(2d) 347.

An assignment of rents from mortgaged property to be applied upon the mortgage debt before default, which is executed as a part of the same transaction as the mortgage itself, is invalid under section 559.17; but an agreement authorizing the mortgagee to apply rents to the payment of taxes and assessments upon the mortgaged property is enforceable. Erickson v Wells, 217 M 363, 15 NW(2d) 162, 459.

Right to appointment of receiver of rents and profits. 13 MLR 386.

Right of mortgagor to possession; acquisition of possession as tenant. 24 MLR 436.

Liability of a senior mortgagee to account to a junior mortgagee for rents released to the mortgagor. 26 MLR 882.

559.18 CONVEYANCE BY MORTGAGOR TO MORTGAGEE.

HISTORY. 1913 c. 209 s. 1; G.S. 1913 s. 8078; G.S. 1923 s. 9573; M.S. 927 s. 9573.

The plaintiff having an option to purchase a lot entered into an arrangement with defendants whereby title was to be taken in the name of one of them, and held as security for advances to the plaintiff. By this arrangement an equitable mortgage was created. Tenvoorde v Tenvoorde, 128 M 126, 150 NW 396.

A deed absolute in form may be shown by parol evidence to be in fact a mortgage. To sustain a decision to that effect the evidence must be clear, strong and convincing, but not necessarily beyond a reasonable doubt. Young v Baker, 128 M 398, 151 NW 132; Farmers Bank v Woolery, 156 M 193, 194 NW 759; Higgins v Lamoreaux, 163 M 242, 203 NW 961; Jeddeloh v Altman, 188 M 407, 247 NW 512.

The transaction occuring prior to the passage of Laws 1873, Chapter 209, the court rightly instructed the jury that the rule, "once a mortgage, always a mortgage" applies. First Nat'l v Coon, 143 M 266, 173 NW 431.

The evidence sustains the trial court that defendant's ancestor purchased land at a foreclosure sale pursuant to an agreement that he should advance, as a loan, the money necessary for that purpose, and take and hold the legal title as security for its repayment, and that the transaction created but a mortgage interest. Jentzen v Pruter, 148 M 8, 180 NW 1004.

In an action at law, a deed absolute on its face may be shown to be in fact a mortgage without bringing a bill in equity to have it declared. Nellas v Carline, 161 M 157, 201 NW 299.

Neither the non-payment of the mortgage registry tax nor the fact that the deed contains no statement of the amount of the debt will defeat an action to have a deed declared to be a mortgage. Lundeen v Nyberg, 161 M 391, 201 NW 623.

The doctrine "once a mortgage always a mortgage" does not apply to a future contract between mortgagor and mortgagee for the purchase by the mortgagee of the equity of redemption. The mortgagee may purchase that right, as plaintiff here is found to have done, if the transaction is for a fair consideration and without oppression. Poehrs v Thompson, 179 M 73, 228 NW 340; McKinley v State, 188 M 329, 247 NW 389; O'Connor v Schwan, 190 M 181, 251 NW 180.

Evidence sufficient to show such conduct on the part of the insolvent mortgagor and its general receiver as to warrant an order requiring receiver to segregate and hold separate all rents collected from the mortgaged premises during foreclosure and the period of redemption and properly apply same. Brodala v St. P. Home Co. 191 M 98, 253 NW 113.

Constructive trusts. 25 MLR 700.

559.19 ACTION TO DECLARE MORTGAGE; LIMITATION.

HISTORY. 1913 c. 209 s. 2; G.S. 1913 s. 8079; G.S. 1923 s. 9574; M.S. 1927 s. 9574.

See notes under section 559.18. Jentzen v Pruter, 148 M 8, 180 NW 1004; McKinley v State, 188 M 329, 247 NW 389; Brodala v St. P. Home, 191 M 48, 253 NW 113.

559.20 TO WHAT CONVEYANCES APPLICABLE.

HISTORY. 1913 c. 209 s. 3; G.S. 1913 s. 8080; G.S. 1923 s. 9575; M.S. 1927 s. 9575.

See curative acts.

See notes under section 559.18. Jentzen v Pruter, 148 M 8, 180 NW 1004; McKinley v State, 188 M 329, 247 NW 389.

559.21 NOTICE TO TERMINATE CONTRACT OF SALE; SERVICE AND RETURN; REINSTATEMENT OF CONTRACT.

HISTORY. 1897 c. 223; 1901 c. 294; R.L. 1905 s. 4442; 1913 c. 136 s. 1; G.S. 1913 s. 8081; 1915 c. 200 s. 1; G.S. 1923 s. 9576; 1925 c. 163 s. 1; M.S. 1927 s. 9576.

1. Application
2. Notice; requisites
3. Service of notice
4. Effect of notice
5. Remedy
6. Damages
7. Reinstatement

1. Application

The provisions of this section are applicable only to contracts of actual purchase. They do not apply to agreements amounting to mere options depending upon some contingency. Joslyn v Schwend, 85 M 130, 88 NW 410, 744; Murray v Nickerson, 90 M 197, 95 NW 898; Womack v Coleman, 92 M 328, 100 NW 9; Western Realty v Phelps, 86 M 52, 9 NW 11, 793.

The court, having found the ultimate facts at issue, was not required to find upon matters of evidence. Fitchette v Victoria Land, 93 M 485, 101 NW 655.

The contract calls for a marketable title. A title open to doubt is not marketable; nor is one where the purchaser must resort to parol evidence to cure it. Howe v Coates, 97 M 385, 107 NW 397.

The instrument in its original form was an option, but as later modified it became a contract of purchase. Libby v Parry, 98 M 366, 108 NW 299.

Laws 1897, Chapter 223, held to be constitutional. Walsh v Selover, 109 M 136, 123 NW 291; Finnes v Selover, 114 M 339, 131 NW 371.

Contract held to be an option and not an executory contract of purchase. Moore v Allen, 109 M 139, 123 NW 292.

Held to be a contract for the sale of land, and not an option. Chapman v Propp, 125 M 447, 147 NW 442.

A contract executed in Minnesota for land in a foreign state may be within this section. True v N. P. 126 M 75, 147 NW 950; Olson v N. P. 126 M 231, 148 NW 68.

A vendee, who defaults in the payments due under such a contract and announces his inability to perform, is not entitled, unless the contract so provides, to a return of his payments. Nelson v Seeman, 147 M 355, 180 NW 227.

This section is applicable to ground leases. Lilienthal v Tordoff, 154 M 225, 191 NW 823.

Where the vendor in a contract for a deed, the vendees being in possession, makes a lease of the farm to a third party, it is not such repudiation of the contract as to authorize the vendees to rescind. Stadelman v Boothroyd, 170 M 430, 212 NW 908.

A conveyance and a contract whereby the plaintiff agreed to repurchase at a sum in excess of the purchase price, was a cloak or device to cover usury. Schrump v Jennrich, 174 M 204, 219 NW 86.

Timber permits construed as being conditioned upon the payment for the timber on a date specified, and not to give the grantee the right thereafter to enter upon the land without making the specified payment. Northern Lumber v Lundgren, 182 M 91, 233 NW 593.

The deed and contract being in fact a mortgage, the provision for cancelation under section 559.21 does not apply to the instant contract. Sanderson v Engel, 182 M 256, 234 NW 450.

Non-payment of taxes on part of an undivided tract not ground for cancelation. Mattson v Greifendorf, 183 M 580, 237 NW 588.

Where the vendee assigns his contract, in the absence of an assumption or an agreement of the assignee to pay the unpaid purchase price, he assumes no personal liability therefor. Hoyt v Kittson Bank, 184 M 159, 238 NW 41.

A judgment against the vendee for an unpaid instalment will be canceled and discharged of record where the contract is canceled for a subsequent default. Des Moines Bank v Wyffels, 185 M 476, 241 NW 592.

During the pendency of a foreclosure proceeding the mortgagee gave the assignee of the mortgagor's interest an option for a land contract to be entered into when the mortgagee acquired title. The assignee defaulted on the contract. These facts did not constitute an abandonment, or even an extension of the foreclosure proceedings. Investors Synd. v Horrigan, 186 M 601, 244 NW 65.

Mortgagor in default to the state, deeded the land back to the state, and took back an executory land contract. On default, the state rightfully canceled the contract proceeding by notice under the statute against the vendee's assignee. McKinley v State, 188 M 325, 247 NW 389.

The payment of $35.00 on a default of $1,900 did not in the instant case constitute a waiver of the proceeding to terminate the contract. Swanson v Miller, 189 M 158, 248 NW 727.

Laws 1935, Chapter 68, and subsequent supplemental laws do not prohibit the state from re-selling delinquent trust fund lands held under a certificate of sale. 1936 OAG 330, May 25, 1935 (415m).

Lands sold under Laws 1935, Chapter 386, prior to enactment of Laws 1939, Chapter 328, in case of default, are subject to cancelation proceedings under section 559.21 unaffected by Laws 1939, Chapter 328. OAG May 24, 1939 (407i); 1942 OAG 324, Sept. 12, 1941 (425c-a).

Forfeiture for breach of contract. 5 MLR 350.

Forfeiture; recovery of payments. 5 MLR 468.

Effect of failure to pay tax on validity of statutory notice to terminate interests of vendee. 7 MLR 70.

Forfeiture; rights of heirs of vendee. Analogy of vendee in possession to mortgagee in possession. 7 MLR 170.

Right of purchaser to lien on land for payments made where cancelation for fraud by purchaser. 7 MLR 231, 256.

Termination of contract for fraud. 9 MLR 146, 155.

Time of the issuance in real property contracts. 9 MLR 286.

Conflict of laws in relation to cancelation of land contracts. 10 MLR 500.

Strict foreclosure of land contracts. 14 MLR 342, 362.

2. Notice; requisites

Where default complained of is non-payment of instalments, the notice need not specify the amount claimed to be due. Hage v Benner, 111 M 365, 127 NW 3.

A notice to cancel a contract for the purchase of real estate, for failure to make the stipulated payments, examined and held sufficient as to form, signature and service. First Nat'l v Coon, 143 M 262, 173 NW 431.

Notice of default signed by one joint tenant is valid. Holmes v Wolfe, 154 M 8, 190 NW 980.

A notice to terminate need not specify the amount due; and may be signed by attorney for the owner. An error corrected in an amended complaint does not put a construction on the notice so as to render it void. Clark v Dye, 158 M 217, 197 NW 209; Robitshek v Wick, 171 M 127, 213 NW 551.

A mortgagee of the vendee in a contract for a deed is included in the word "assigns," and the recording of such mortgage is constructive notice to the vendor, and requires the vendor to serve notice of cancelation on such mortgage. Stannard v Marboe, 159 M 119, 198 NW 127.

3. Service of notice

Where contract of purchase of land in Colorado was executed, and payments were to be made in Minnesota, though it provided that contract should be void on default in payments at stipulated time, the notice required by Laws 1897, Chapter 223, must be served. Finnes v Selover, 102 M 334, 113 NW 883; Walsh v Selover, 109 M 136, 123 NW 291; Finnes v Selover, 114 M 339, 131 NW 371.

Service on the vendee named in the contract is sufficient, in the absence of notice of its assignment. Hage v Benner, 111 M 365, 127 NW 3.

During the interval between the adjudication in bankruptcy and the appointment of the trustee, the vendor in an executory contract for the sale of land to the bankrupt may serve notice upon the bankrupt for termination and cancelation of the contract for default. Christopherson v Harrington, 118 M 42, 136 NW 289.

Failure to pay mortgage tax under Laws 1907, Chapter 328, imposes such a state of dormancy that a service of notice to terminate an executory contract, if subject to the tax, would be wholly inoperative to divest the vendee's equitable estate. First State Bank v Hayden, 121 M 45, 140 NW 132.

Notice is not required where the contract is merely an option to purchase. Ballard v Friedman, 151 M 493, 187 NW 518; Kreuscher v Roth, 152 M 320, 188 NW 996; Weisman v Miller, 152 M 330, 188 NW 732.

The contract was not terminated by notice given by only one of the cotenants. Krost v Moyer, 166 M 153, 207 NW 311.

Service of notice of cancelation need not be served on a judgment creditor of the purchaser, as he is not an "assign." Paschke v Adams, 169 M 445, 211 NW 827.

4. Effect of notice

Time limited by notice is absolute. Sylvester v Halasek, 83 M 362, 86 NW 336; Lamprey v Chic. St. P. 89 M 187, 94 NW 555.

Appellant had not, prior to the commencement of the action, abandoned the contract; nor were his rights abrogated. Libby v Parry, 98 M 366, 108 NW 299.

The proceeding for a cancelation of a land contract under this section, by serving, upon default, a notice of termination, is in the nature of a statutory strict foreclosure. The proceeding is in pais. If there is no default, it is without effect. The time for removing the default commences running when the notice is served. After the service of the notice the vendee cannot have a temporary injunction restraining or suspending the proceedings on the ground that he is not in default. Nolan v Greeley, 150 M 441, 185 NW 647.

Where plaintiff served notice of rescission on the ground of fraud on October 15, and tendered back possession of the farm, which was refused by the defendant, and on October 23 brought an action to recover the money paid, but remained in possession of the land until the trial of the case in December, he does not as a matter of law waive the rescission. Blosick v Warmbold, 151 M 264, 187 NW 136.

The vendor may before forfeiture under notice extend the time by parol, or waive the forfeiture; but where after such extension the vendee fails to complete the contract, he cannot claim that his acts constituted a rescission. Lynch v Higgins, 154 M 151, 191 NW 422.

Exclusion of vendees from possession, on strength of notice invalid because of non-payment of mortgage registration tax, is unlawful. Halvorsen v Bexell, 157 M 97, 195 NW 635.

Vendee loses all rights at the expiration of 30 days. Clark v Dye, 158 M 217, 197 NW 209.

Where pending an action by a vendee to recover damages from the vendor for alleged fraud, and to have such damages applied in reduction of the unpaid portion of the purchase price, the vendor serves a statutory notice of cancelation, equity cannot vacate, pendente lite, the service of the notice; but pending the action for fraud, it may enjoin the vendor form recording proof of cancelation, or ousting the vendee from possession. Follingstad v Syverson, 160 M 307, 200 NW 90.

The cancelation of the defendant's contract of purchase by notice under the statute, divested the vendee's equitable title, and the intervening judgment creditor of the vendee then had no lien. Farmers & Mchts v Stageberg, 161 M 413, 201 NW 612.

After the vendor has canceled executory contract by the statutory notice, he cannot recover the unpaid portion of the price. Andresen v Simon, 171 M 168, 213 NW 563; Smith v Dristig, 176 M 601, 224 NW 157.

The proceeding for forfeiture is in the nature of a strict foreclosure of the vendee's interest, and no right of redemption survives the 30 days' notice. Minn. Ass'n v Closs, 182 M 452, 234 NW 872.

A vendor of farm land, on cancelation, is entitled to possession of the land and of the crops growing thereon. Roehrs v Thompson, 188 M 158, 240 NW 111.

Where a vendee's interest is canceled by statutory notice, a judgment creditor of the vendee loses any lien he may have had. Peterson v Siebrecht, 188 M 272, 247 NW 6.

A recorded contract for the sale of real property which has been terminated by cancelation is a cloud upon the vendor's title. Union Central v Page, 190 M 367, 251 NW 911.

The mortgage registration tax statute does not apply where the contract has been voluntarily surrendered as distinguished from canceled pursuant to the statutory procedure. Craig v Baumgartner, 191 M 42, 254 NW 440.

The provisions of the section do not apply where the deed and contract back are in effect a mortgage. Stipe v Jefferson, 192 M 504, 257 NW 99.

The broker who negotiated the sale on contract was entitled to his commission on the whole sale, even if no strict compliance with the terms of the contract. Stevens v Durrenberger, 193 M 148, 258 NW 147.

In an action in equity to adjudge a default and cancel a contract, service was by publication, and judgment was entered on default. A motion to vacate and reopen was properly denied because no "sufficient cause" was shown. Madsen v Powers, 194 M 421, 260 NW 510.

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5. Remedy

This statute is the exclusive mode of limiting right of vendees. Sylvester v Helasek, 83 M 362, 86 NW 336; Lamprey v Chic. St. P. 89 M 187, 94 NW 555; Walsh v Selover, 109 M 136, 123 NW 291.

The allegations of the complaint are not sufficient to constitute a cause of action to set aside the contracts. Phelps v Western Realty, 89 M 319, 94 NW 1085, 1135.

Plaintiff is estopped from asserting his claim as against the contract made through his agent. Barchent v Selleck, 89 M 513, 95 NW 455.

Where the vendor in a contract for the sale of land subsequently conveys land to a third party, the contract vendee has the election of two remedies: (1) to acquiesce in the conveyance, and seek a performance of the contract by a third party; or (2) treat the conveyance as a breach of contract, and resort to an action against the vendor for damages. Meyers v Markham, 90 M 230, 96 NW 787.

Where the defendant's husband and after his death the defendant, had been in possesion under the contract for more than ten years, under an indefinite contract as to time, and had continued making payments, equity will not permit plaintiff arbitrarily to declare a forfeiture. Tingue v Patch, 93 M 437, 101 NW 792.

This section provides the exclusive method by which the vendor may terminate the rights of the vendee on default; but does not relieve the vendee from the effects of an abandonment in which the vendor acquiesces. Mathwig v Ostrand, 132 M 346, 157 NW 589.

There was a sufficient showing of probable irreparable injury to plaintiff if defendant was permitted to cancel the contract during the pendency of a pending

action to warrant granting the injunction. Freeman v Fehr, 132 M 384, 157 NW 587.

The statute forbidding a vendor to terminate a land contract without giving a prescribed notice, does not prevent the vendee's abandonment of the contract. Enkema v McIntyre, 136 M 293, 161 NW 587.

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

The evidence warrants a judgment affirming the title of the defendant as assign of the vendee on condition that defendant first pay plaintiffs the amount of interest they paid the vendor to prevent a cancelation of the contract after its assignment to defendant; but a personal judgment for the amount cannot be sustained. Muns v Motty, 160 M 288, 199 NW 925.

This section, providing that the vendor may cancel a contract for the sale of land by notice, is not exclusive of the remedy by action. The statutory remedy, while in the nature of a strict foreclosure, is cumulative and not exclusive of a strict foreclosure by action. State Bank v Sylte, 162 M 72, 202 NW 70; Sovell v First Nat'l, 167 M 388, 209 NW 22; Bowers v Norton, 169 M 198, 210 NW 871.

Executory contracts for the sale of real estate, whatever their form, may be terminated in the manner prescribed by section 559.21. Graceville Bank v Hofschild, 166 M 58, 206 NW 948.

The contract contained a provision that vendee's rights on default could be terminated "in accordance with the statute in such case made and provided." The notice prescribed in section 559.21 was sufficient although personal property was included in the contract. Robitshek v Wick, 171 M 127, 213 NW 551.

Having procured a judgment for cancelation of contract, vendor could not proceed for specific performance. Blythe v Kujawa, 177 M 82, 224 NW 464.

A statutory cancelation of an executory contract prevents a subsequent suit by the vendee to recover damages from the vendor for fraudulent inducement. West v Walker, 181 M 169, 231 NW 826.

A vendee who acquiesces in a statutory cancelation and surrenders possession cannot thereafter question the validity of the notice. Olive v Taylor, 182 M 329, 234 NW 466.

A vendor in a contract for a deed, whose interest has been sold at sheriff's sale, may, before the expiration of the time for redemption, terminate the contract by serving the 30 days' notice upon the defaulting vendee; and it is not necessary that service be made on the purchaser at the sheriff's sale. Bailey v Hendrickson, 185 M 253, 240 NW 666.

The vendor having prevailed in an action in unlawful detainer, the contract is deemed repudiated, and the holding in that case is res judicata in an action by the vendee to recover payments made on the contract. Herried v Deaver, 193 M 622, 259 NW 189.

Under the provisions of Laws 1933, Chapter 422, and Laws 1935, Chapter 68, contracts for the conveyance of land cannot be canceled for default of vendee except by proceedings instituted in district court. Prudential v Dressler, 196 M 594, 265 NW 809.

The moratorium act is remedial in its purpose and is to be construed liberally to make its objectives realizable in its application to existing legal rights and remedies. It is the duty of the court, within the limits of the act, so to construe it as to avoid forfeitures. Tomasko v Cotton, 200 M 69, 273 NW 628.

Proceedings under section 559.21 are in pais; while proceedings under the moratorium law, Laws 1935, Chapter 422, and subsequent supplemental laws are judicial proceedings of an equitable nature. Intervention may be allowed in a judicial proceeding to terminate a contract for a deed. Veranth v Moravitz, 205 M 27, 284 NW 849.

A contract made in one state for the sale of land in another can be enforced in the former according to the law lex loci contractu and not according to the lex rei sitae. Selover v Walsh, 226 US 113; Selover v Walsh distinguished, Kryger v Wilson, 242 US 173.

6. Damages

The vendee repudiated the contract of sale prior to the time for performance by vendor. Under the circumstances the plaintiff was not prevented from recovering damages from the vendee because he did not have a satisfaction of the mortgage in hand at the time fixed for closing. The vendee cannot by counter-claim recover differential damages. Seerup v Goraczkowski, 159 M 364, 199 NW 94.

Measure of vendor's damages where vendee wrongfully remains in possession after cancelation. 16 MLR 726.

7. Reinstatement

It is inequitable to require plaintiff to pay the balance of the purchase price into court before the defendants give notice of willingness to accept the money and deliver the deed, or, in case such notice is not given, before the contract becomes irreversible by affirmance on appeal, or by expiration of time to appeal. Lamprey v St. P. & Chgo. 86 M 509, 91 NW 29.

Vendee cannot reinstate contract after expiration of period of notice by making a claim for damages. Internat'l v Vanderpoel, 127 M 89, 148 NW 895.

Under the facts in this case, the vendee having complied with the conditions in which default was declared, the payment of the deferred instalments could not be required in the statutory proceeding, and the removal of the default which authorized the cancelation reinstated the contract. Needles v Keyes, 149 M 477, 184 NW 34.

There was no reinstatement under the subsequent contract. Zuercher v Woodward, 165 M 262, 206 NW 168.

559.213 PRIMA FACIE EVIDENCE OF TERMINATION.

HISTORY. 1945 c. 406 s. 1.

559.214 SUPPLEMENTARY AFFIDAVIT.

HISTORY. 1945 c. 406 s. 2.

559.22 CONVEYANCE BY DEFENDANT IN EJECTMENT; LIABILITY OF PURCHASER.

HISTORY. R.S. 1851 c. 74 s. 13; P.S. 1858 c. 64 s. 13; G.S. 1866 c. 75 s. 13; G.S. 1878 c. 75 s. 31; G.S. 1894 s. 5863; R.L. 1905 s. 4443; G.S. 1913 s. 8082; G.S. 1923 s. 9577; M.S. 1927 s. 9577.

559.23 ACTION TO DETERMINE BOUNDARY LINES.

HISTORY. 1893 c. 68 ss. 1, 2, 6, 7; G.S. 1894 ss. 5823; 5824, 5828, 5829; R.L. 1905 s. 4454; G.S. 1913 s. 8095; G.S. 1923 s. 9590; M.S. 1927 s. 9590.

The statute, Laws 1893, Chapter 68, providing for fixing boundary lines of land was not designed merely to establish the location of the original government or other line between the parties, but to establish the present boundary line between them according to their respective existing rights of property; and the court is required to determine adverse claims if necessary. Scope of action. Stadin v Helin, 76 M 496, 79 NW 537; Kistner v Beseke, 96 M 137, 104 NW 759; Tierney v Gondereau, 99 M 421, 109 NW 821; Krabbenhopt v Wright, 101 M 356, 112 NW 421, Hacklander v Parker, 204 M 260, 283 NW 406.

A witness or bearing tree is not an established corner, but merely a designated object from which, in connection with field notes, the location of the corner may be ascertained. Stadin v Helin, 76 M 497, 79 NW 537.

Where a government corner is lost or obliterated, so that resort must be had to the government field notes for the purpose of determining its location, but these field notes are inconsistent, there is no universal rule that certain ones shall be preferred to others, but, as in a case where living witnesses contradict each other, those should be accepted as correct which, under all the circumstances, are most

entitled to credit, and most likely to be in accordance with the actual facts. Stadin v Helin, 76 M 497, 79 NW 537; Molkenbur v Salmon, 160 M 244, 199 NW 966.

Laws 1893, Chapter 68, is not unconstitutional. Benz v City of St. Paul, 77 M 375, 79 NW 1024.

The government field notes gave the width of all sections on the north of the standard parallel from section 33 to section 35, at exactly 80 chains each; and there being no surplus to distribute, the actual location of a lost closing corner between two sections lying south of the standard parallel is to be determined by measuring east or west, as the case may be, from the nearest standard corner, the distance shown by the government field notes. These notes and the original plats control in such cases. Ferch v Konne, 78 M 515, 81 NW 524.

Where there is a variance between the meander line established by the surveyors, as shown by the official plat of the survey and the field notes, the former controls. Hanson v Rice, 88 M 273, 92 NW 982.

Where lot owners are entitled to accretions, the boundaries of adjoining tracts, as to land beyond the meander line, are fixed by extending their side lines on a deflected course from their intersection with the meander line toward a point in the center of the lake. Hanson v Rice, 88 M 273, 92 NW 982; Tucker v Mortenson, 126 M 214, 148 NW 60.

The "practical location" of a boundary line can be established in one of three ways only: (1) the location relied upon must have been acquiesced in for a sufficient time to bar a right of action under the statute of limitations; (2) the line must have been expressly agreed upon by the interested parties, and afterwards acquiesced in; and (3) the party whose rights are to be barred must, with knowledge of the true line, have silently looked on while the other party encroached thereon and subjected himself to expense which he would not have done had the line been in dispute. Benz v City of St. Paul, 89 M 31, 93 NW 1038; Marek v Jellinek, 121 M 468, 141 NW 788; Nadeau v Johnson, 125 M 365, 147 NW 241; Roy v Dannehr, 124 M 233, 144 NW 758; Einung v Schlopkohl, 129 M 9, 151 NW 273; Rouse v Boye, 161 M 431, 201 NW 919; Sprandel v Nims, 165 M 293, 206 NW 434; Cottrel v Schulind, 186 M 292, 243 NW 62; Sullivan v Huber, 209 M 592, 297 NW 33; Dunkel v Roth, 211 M 194, 300 NW 610.

The court, whenever it appears that any person interested in any of the lands involved in the action as shown by the complaint ought to be made a party, must stay proceedings and order such party to come in and plead; but as to persons interested in any tract not so originally involved the court may, in its discretion, order them to appear and plead. Rock v Donora, 91 M 259, 97 NW 889.

Where quarter corners are lost, and the field notes are inconsistent, the boundary of the quarter sections is found by a proportional measurement between the known section corners to which the quarter corners belong. Goroski v Towney, 121 M 189, 141 NW 102; Sommer v Meyer, 125 M 258, 146 NW 1106.

Deed with inconsistent descriptions; intent of parties; resort may be had to circumstances. Sandrett v Wohlsten, 124 M 332, 144 NW 1089.

Maintenance of fence does not conclude owners as to boundary. County of Houston v Burns, 126 M 206, 148 NW 115.

Question of res judicata and adverse possession. Molkenbur v Salmon, 160 M 244, 199 NW 966; Speer v Kramer, 171 M 489, 214 NW 283.

Government surveys do not mark section centers. The center of the section is the intersection of a straight line from the north quarter corner to the south quarter corner with a straight line from the east quarter to the west quarter corner. Lunz v Sandmeier, 172 M 338, 215 NW 426.

Testimony of county highway engineer and surveyor acquainted with the locality and reputed corners and quarter corners of the section involved is admissible as evidence. Lunzmeier v Ess, 199 M 10, 270 NW 677.

Words such as "about", "approximately" and "more or less", in connection with courses and distances, may be disregarded if not controlled or explained by monuments, boundaries, and other expressions of intention, and may be given meaning and effect when so controlled and explained. Ingelson v Olson, 199 M 422, 272 NW 270.

The practical location in a boundary line can be established in one of three ways only: (1) The location relied upon must have been acquiesced in for a sufficient length of time to bar right of entry under the statute of limitations; (2) the time must have been expressly agreed upon between the parties claiming the land on both sides thereof, and afterwards acquiesced in; or (3) the party whose rights are to be barred must, with knowledge of the true line, have silently looked on while the other party encroached upon it, and subjected himself to expense in regard to the land, which he would not have done had the line been in dispute. The fact that the judgment establishing boundary line results in a jog in the true platted line does not divest the true owner of his title to that portion of his land not lost to him by adverse possession. Dunkel v Roth, 211 M 194, 300 NW 610.

559.24 PLEADINGS; ADDITIONAL PARTIES.

HISTORY. 1893 c. 68 ss. 3, 4; G.S. 1894 ss. 5825, 5826; R.L. 1905 s. 4455; G.S. 1913 s. 8096; G.S. 1923 s. 9591; M.S. 1927 s. 9591.

Whenever it appears that any person interested in any of the lands involved in the action as shown by the complaint ought to be made a party, the court must stay proceedings and order such persons to come in and plead; and as to persons interested in any tract not so originally involved the court may, in its discretion, order them to appear and plead. Rock v Donora, 91 M 259, 97 NW 889.

559.25 JUDGMENT; LANDMARKS.

HISTORY. 1893 c. 68 s. 5; G.S. 1894 s. 5827; R.L. 1905 s. 4456; G.S. 1913 s. 8097; G.S. 1923 s. 9592; M.S. 1927 s. 9592.

See court rules, Minnesota Statutes 1941, Page 3982.

A section corner is where the government surveyors placed it. Where a section corner post had disappeared, the evidence of witness-bearing trees and the surveyor's field notes will usually prevail. Use or rejection of erroneous field notes is a practical question. The court must make its decision as in other cases, from all the evidence. Sommer v Meyer, 125 M 258, 146 NW 1106; Lawler v Counties, 147 M 234, 180 NW 37; Riley v Kump, 170 M 58, 212 NW 13; Speer v Kramer, 171 M 488, 214 NW 283; Liederbach v Pickett, 199 M 554, 273 NW 77.