

REVISED LAWS

MINNESOTA

1905

ENACTED APRIL 18, 1905 TO TAKE EFFECT MARCH 1, 1906

EDITED AND ANNOTATED BY
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PUBLISHED UNDER CHAPTER 185, LAWS 1905

ST. PAUL
PUBLISHED BY THE STATE
1906

tendment will be indulged in favor of the finality and validity of an award, but if it is clearly not final and certain it may be set aside (81-356, 84+48). It may be set aside in part (57-490, 59+547).

4385. Modification of the award—The court, upon motion, may modify or correct an award in the following cases:

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

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

3. Where the award is imperfect in a matter of form which does not affect the merits, and where, if it had been a verdict, such defect could have been amended or disregarded by the court. (6222)

4386. Judgment—Contents and effect—Appeals—Upon confirmation or modification of the award, the court shall order judgment in accordance therewith, and the clerk shall enter the same forthwith, unless a stay be granted. Costs not included in the award shall be taxed as in civil actions. The judgment shall be docketed as in other cases, shall have the same force and effect in all respects, and be subject to all provisions of law relating to judgments in civil actions, including appeals therefrom. It shall recite the submission, the hearing before the arbitrators, their award, and the action of the court thereon. (6224-6227)

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

CHAPTER 82

ACTIONS RELATING TO REAL PROPERTY

GENERAL PROVISIONS

4387. Agent of non-resident to accept service—Any non-resident person or corporation owning or claiming any interest or lien in or upon lands in the state may file with the secretary of state a writing, executed and acknowledged in the manner of a conveyance, appointing a resident agent, whose place of residence shall be stated, to accept service of process or summons in any action or proceeding in the courts of the state concerning such interest or lien, except actions or proceedings for the collection of taxes, and consenting that service of such process or summons upon such agent shall be binding upon the person executing the same. Such writing shall be recorded by the secretary. No service by publication of summons shall be made upon any such non-resident who has complied with the provisions hereof, but in all such cases service of such process or summons, or of any writ or notice in the action or proceedings, shall be made upon such agent in the manner provided by law for such service upon residents of the state, and shall have the same effect as personal service within the state upon such owner or claimant; but, if such party appears by attorney therein, the service of papers shall thereafter be upon such attorney. The authority of such agent may be revoked by writing similarly executed and acknowledged and recorded, but no revocation shall affect any action or proceeding then pending. For filing and recording such papers the secretary shall be entitled to fifteen cents for each folio. (5816)

Applicable only to foreign corporation (36-85, 30+432). Cited (55-386, 57+134).

4388. Actions against unknown heirs—In any action relating to real property, when the heirs of a deceased person are proper parties defendant and their names are unknown, upon the filing of an affidavit of the plaintiff, his

agent or attorney, showing to the satisfaction of the court or judge that the heirs of such deceased person are proper parties to such action, and that their names and residences cannot with reasonable diligence be ascertained, the court or judge may make an order that service of the summons be made on such unknown heirs by publication thereof in the same manner as against non-resident defendants. The plaintiff shall before the commencement of the action file with the register of deeds a notice of the pendency of the action, a copy of which shall be published in the same newspaper with, and immediately following, the summons. All such heirs so served shall have the same rights to appear and defend before and after judgment as would named defendants upon whom service is made by publication, and any order or judgment in the action shall be binding upon them, whether they be of age or minors; but, if they be minors when judgment is rendered, they may be allowed to defend at any time within two years after becoming of age. (5339-5842)

Opening default (44-392, 46+766; 93-249, 101+304).

4389. Notice of lis pendens—In all actions in which the title to, or any interest in or lien upon, real property is involved or affected, or is brought in question by either party, any party thereto, at the commencement or at any time during the pendency thereof, may file for record with the register of deeds of each county in which any part of the premises lies a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the real property in such county involved, affected, or brought in question thereby. From the time of the filing of such notice, and from such time only, the pendency of the action shall be notice to purchasers and incumbrancers of the rights and equities of the party filing the same to the premises. When any pleading is amended in such action so as to alter the description of, or to extend the claim against, the premises affected, a new notice may be filed, with like effect. Such notice shall be recorded in the same book and in the same manner in which mortgages are recorded, and may be discharged by an entry to that effect in the margin of the record by the party filing the same, or his attorney, in the presence of the register, or by a writing executed and acknowledged in the manner of a conveyance, whereupon the register shall enter a minute thereof on the margin of such record. (5866)

Purchasers and incumbrancers pendente lite not chargeable with notice unless lis pendens filed (25-206; 92-2, 99+209). Persons claiming under conveyances prior to filing of lis pendens but not recorded until after such filing unaffected by judgment (20-165, 148; 17-457, 434; 20-170, 153; 25-206; 39-35, 38+757; 46-174, 48+773). Notice operates only from time of filing. Subsequent judgment does not give notice retroactive effect (92-2, 99+209). Notice filed prior to service of summons nullity (91-226, 97+974. See 89-71, 93+705). Filed in improper action nullity (89-71, 93+705). If filed in proper action cannot be canceled by court while action pending (89-71, 93+705; 85-130, 88+410, 744). Object to give constructive notice (64-531, 67+639; 89-71, 93+705). Continued on appeal (70-243, 73+161). Effect to save rights against prior judgment (29-322, 13+145). Proof of publication held sufficient (53-197, 55+117). Rule prior to statute (1-274, 210; 25-206; 4-294, 211). In actions to foreclose mechanic's lien (54-499 56+172; 61-303, 63+718; 63-154, 65+267). Cited (55-386, 398, 57+134).

4390. Notice of no personal claim—When in any such action there are defendants against whom no personal claim is made, the plaintiff may serve upon them, at the time of the service of the summons, a notice subscribed by him or his attorney, and setting forth the general object of the action, a description of the property affected by it, and that no personal claim is made against such defendants. If any defendant on whom such notice is served unreasonably defends the action, he shall pay full costs to the plaintiff (5867)

Unreasonable defence (65-107, 67+803).

4391. Transfer of title by judgment—The district court has power to pass the title to real estate by a judgment, without any other act to be done on the part of the defendant, when such appears to be the proper mode to carry its judgment into effect; and such judgment, being recorded in the proper

registry of deeds, while in force, shall be as effectual to transfer such title as the deed of the defendant. (5864)

21-299; 24-317, 375; 51-213, 53+365; 55-386, 394, 57+134; 94-150, 102+381.

ACTIONS FOR PARTITION

4392. Action for partition or sale, who may bring—When two or more persons are interested, as joint tenants or as tenants in common, in real property in which one or more of them have an estate of inheritance or for life or for years, an action may be brought by one or more of such persons against the others for a partition thereof according to the respective rights and interests of the parties interested therein, or for a sale of such property, or a part thereof, if it appears that a partition cannot be had without great prejudice to the owners. (5770; '97 c. 299)

When maintainable (14-289, 216; 19-167, 129; 39-92, 38+805; 40-450, 42+352; 77-533, 80+702; 26-307, 3+698; 82-347, 85+173; 76-489, 79+520; 92-527, 100+366; 93-489, 101+797). Parties (39-92, 38+805; 39-481, 40+611). Governed by same rules as ordinary civil actions (86-165, 90+369). Costs of repairs by one cotenant not recoverable (82-347, 85+173).

4393. Summons—Service—The summons shall be addressed by name to all the owners and lienholders who are known, and may also be addressed "to all other persons unknown having or claiming an interest in the property described in the complaint herein." Service of the summons may be had upon all such unknown persons defendant by publication in the same manner as against non-resident defendants, upon the filing of the complaint, in which case the plaintiff shall, before the commencement of the action, file with the register of deeds a notice of the pendency of the action, a copy of which shall be published in the same newspaper with, and immediately following, the summons. (5771, 5773)

How addressed (14-13, 1).

4394. Complaint—The complaint shall particularly set forth the interest of all persons in the property, whether by way of ownership or lien, so far as known to the plaintiff; and if any such person, or his share or interest, is unknown to the plaintiff, or is uncertain or contingent, or the ownership of the inheritance depends upon an executory devise, or there is a contingent remainder, so that such person cannot be named, that fact shall be set forth. The complaint shall also state the cash value of the property, and shall be verified. (5772)

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

4395. Judgment for partition—Referees—Except as provided in § 4396, the title to the property and the rights of the parties shall be established by evidence or by the written stipulation of the parties to be affected thereby; and thereupon, in a proper case, the court shall render judgment that partition be made accordingly, and shall appoint three disinterested and judicious citizens of the county as referees to make partition and set off the shares of the several persons interested as determined by the judgment. (5774, 5775)

39-92, 38+805; 44-526, 47+171.

4396. Dispute between defendants no defence—If the title of the plaintiff to a certain undivided share of the property is proved or admitted, it shall not be a defence that there is a dispute or litigation undetermined between some of the defendants as to the right or title of such defendants in or to any undivided shares of the property claimed by them; but in such case the court shall render judgment that partition be made, or that the property be sold as in other cases, and shall cause the portion of the property or of the proceeds thereof pertaining to such undivided shares in dispute to be allotted to the defendants claiming the same, without determining their respective rights thereto, and, in case of sale, may order the portion of the proceeds pertaining to such shares to be paid into court to abide the result of any existing or subsequent litigation between such defendants. (5774)

50-157, 52+527.

4397. Duty of referees—Report—Expenses—When partition is made, the referees shall divide the property, and allot the several portions thereof to the respective parties, quantity and quality relatively considered, according to their respective rights, designating the several portions by proper landmarks, and may employ a surveyor, with necessary assistants, to aid them therein. They shall make a report of their proceedings, specifying the manner of executing the trust, and describing the property and the share allotted to each party, with a particular description thereof. The expenses and fees of the referees, including those of a surveyor and his assistants, when employed, shall be paid by the plaintiff, and may be allowed as part of the charges. (5776, 5780)

78-127, 80+850.

4398. Confirmation of report—Final judgment—The court may confirm or set aside the report, and, if necessary, appoint new referees. Upon the report being confirmed, final judgment shall be rendered that such partition be effectual forever, and such judgment shall be binding:

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

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

3. On all persons claiming from such parties or persons, or either of them. (5777)

Sale for inadequate price set aside (56-12, 57+217; 60-262, 62+283). Motion to open default—subsequent purchasers as parties (39-481, 40+611). Scope of review on appeal from judgment (44-526, 47+171). Cited (19-167, 129; 40-450, 42+352; 77-533, 80+702).

4399. Persons not affected—Such judgment shall not affect tenants or persons having claims as tenants for life to the whole of the property which is subject of the partition; nor shall such judgment preclude any persons except such as are specified in § 4398 from claiming title to such property, or from controverting the title of the parties between whom partition is made. (5778)

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

4400. Liens, how affected—When there is a lien on an undivided interest or estate of any of the parties, if partition is made such lien is thenceforth a charge only on the share allotted to such party; but such share shall first be charged with its just proportion of the costs and charges of the partition, in preference to such lien. (5779)

4401. Costs apportioned—The costs, charges, and disbursements of partition shall be paid by the parties respectively entitled to share in the land, and the amounts to be paid by each shall be determined by the court, and specified in the final judgment. Such judgment may be docketed, and payment of such amounts may be enforced by execution against the property of the respective judgment debtors as in the case of other judgments for money. (5815)

Attorney's fees (84-346, 87+915).

4402. Compensation for equality—When it appears that partition cannot be made equal between the parties without prejudice to the rights or interests of some, the court may adjudge compensation to be made by one to another for equality of partition; but such compensation shall not be required to be made by an unknown owner, nor by an infant, unless it appear that the infant has personal property sufficient therefor, and that his interest will be promoted thereby. (5810)

4403. Property not capable of division may be set off, etc.—Occupancy assigned—When the premises consist of a mill or other tenement which cannot be divided without damage to the owners, or when any specified part is

of greater value than either party's share, and cannot be divided without damage to the owners, the whole premises or the part so incapable of division may be set off to any party who will accept it, he paying to one or more of the others such sums of money as the referees award to make the partition just and equal; or the referees may assign the exclusive occupancy and enjoyment of the whole or of such part to each of the parties alternately for specified times, in proportion to their respective interests. (5783)

4404. Occupant liable to cotenants—Trespass—When the whole or a specific part of the premises is thus assigned, the person entitled for the time being to the exclusive occupancy shall be liable to his cotenants for any injury thereto occasioned by his misconduct, as a tenant for years under a common lease without express covenants would be liable to his landlord; and the other tenants in common may have their remedy therefor against him by action, jointly or severally, at their election. While the estate is in the exclusive occupancy of such cotenant, he shall have the same remedy against one who trespasses upon or otherwise injures the premises as if he held the same under a lease for the term for which they were so assigned to him, and he and all the other tenants in common may recover such other and further damages as they have sustained by the same trespass or injury in like manner as if the premises had been leased by them. Joint damages recovered by such tenants in common shall be apportioned and divided between them according to their respective rights by the court in which the judgment is recovered. (5784, 5785)

4405. Sale ordered, when—Except as provided in § 4406, if it is alleged in the complaint and established by evidence that the property, or any part of it, is so situated that partition cannot be had without great prejudice to the owners, the court may order a sale of the property or of such part, and for that purpose may appoint one or more referees; or when, without such allegation and proof, referees are appointed to make partition, who report that the property, or any distinct part of it, is so situated that partition cannot be had without great prejudice to the owners, and the court is satisfied that such report is correct, it may order the referees to sell the property or such part. (5781)

93-334, 101+1133.

4406. Liens—New parties—No sale, when—Proof shall be made of the existence, amount, and priority of any liens on the property of which partition is sought in such manner and upon such notice to those interested as the court shall direct. When any person having a lien has not been made a party, the court may make an order requiring him to appear and become a party defendant, and no such person can be affected by a sale unless he has been made a party. If there are liens on the property amounting to more than its value as alleged in the complaint, or if it appears probable after examination that the property will not sell for a sum in cash equal to the amount of such liens, with costs and expenses, no sale shall be ordered; but, if such liens do not amount to the value of the property as admitted or proved, the court may order a sale, and in such case the sale shall not be delayed by the proceedings to ascertain the priority of the liens. (5782, 5787, 5789, 5806)

56-12, 57+217.

4407. Proceeds, how applied—The proceeds of the sale of the property shall be applied under the direction of the court as follows:

1. To pay its just proportion of the general costs of the action.
2. To pay the costs of the reference.
3. To satisfy and cancel of record the several liens, if any, in their order of priority, by payment of the sums due and to become due; the amount remaining due to be verified by affidavit at the time of payment.
4. The residue among the owners of the property sold, according to their respective shares. (5788)

56-12, 57+217; 76-489, 79+520.

4408. Sale, how made—Notice—The sale shall be by public auction to the highest bidder for cash, upon published notice in the manner required for the sale of real property on execution. The notice shall state the terms of the sale; and if the property, or any part of it, is to be sold subject to a prior estate, charge, or specific lien, the notice shall so state. The terms of sale shall be made known at the time thereof, and, if the premises consist of distinct farms or lots, they shall be sold separately. (5791, 5800)

4409. Persons forbidden to purchase—Neither the referees, nor any person for the benefit of either of them, shall be interested, directly or indirectly, in any purchase of the premises sold; nor shall a guardian of an infant party be interested in any such purchase, except for the benefit of the infant. All sales contrary to this section are void. (5801)

4410. Purchase by part owner, etc.—When a party entitled to a share in the property, or an incumbrancer entitled to have his lien paid out of the proceeds of the same, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belong to him. They shall also pay over to the plaintiff or his attorney, and take his receipt for, the costs and charges of the action. (5804)

4411. Report of sale—The referees shall report the sale to the court, describing the different parcels sold to each purchaser, and specifying the name of the purchaser, the price paid or secured, and the terms and conditions of the sale, which report shall be filed with the clerk. (5802)

4412. Final judgment on confirming report—If the sale is confirmed by the court, final judgment shall be entered directing the referees to execute conveyances pursuant thereto, and also directing the application of the proceeds of the sale. (5803)

56-12, 57+217.

4413. Claims to proceeds, how determined—When the proceeds of sale of any shares belonging to parties to the action who are known are paid into court, the action may be continued, as between them, for the determination of their respective claims thereto. Further testimony may be taken in court or by a referee, at the discretion of the court, which may, if necessary, require the parties to present the facts in controversy by pleadings, as in an original action. The proceedings authorized by this section shall not delay or affect any party whose rights are not involved therein. (5789, 5790)

4414. Record and effect of conveyances—The conveyances executed by the referees shall be recorded, and shall bar all parties to the action, including all persons having liens, specific or general, against the property, and all persons unknown, interested in the property, to whom notice has been given by publication of the summons, and all persons claiming under them or any of them. (5805, 5806)

4415. Sale of part—Life estate, etc.—When a part of the property only is ordered to be sold, if there is an estate for life or for years in an undivided share of the property, the whole of such estate may be set off in any part of the property not ordered sold. (5786)

4416. Estate for life or years, etc., may be set off or sold—When the estate of a tenant for life or for years in the whole or any part of the property has been proved or admitted to exist at the time of the order for sale, and the person entitled thereto has been made a party, such estate may first be set off out of any part of the property, and a sale made of such part subject to such estate; but if, in the judgment of the court, a due regard to the interest of all parties requires that such estate be sold, the sale may be so ordered. If a sale of the property including such estate is ordered, such estate passes thereby, and the purchaser, his heirs and assigns, shall hold the property discharged from all claim by virtue thereof, whether the same relate to the undivided share of a joint tenant or tenant in common, or to the whole or any part of the property sold. (5792, 5793)

19-167, 129; 77-533, 80+702.

4417. Gross sum in lieu of estate—Proceeds of sale to be invested, when—Unknown parties—Such person whose estate has been so sold shall be entitled to receive such sum in gross as may be deemed, upon principles of law applicable to annuities, a reasonable satisfaction therefor. His written consent to accept such sum in lieu of such estate, executed and acknowledged in the same manner as a conveyance, must be filed at or before the report of sale. If consent be not so given, the court shall direct that the whole proceeds of the sale of the property, or of the individual share thereof in which such estate may be, shall be deposited in court, and invested for the benefit of the person entitled to such estate during the period thereof; and, if any person entitled to any such estate is unknown, the court shall provide for the protection of his rights in the same manner, so far as may be, as if he were known and had appeared. In all cases the proper proportion of expenses of the proceedings shall be deducted from the proceeds of sale. (5794-5797)

4418. Future estates—When it appears that any person has a vested or contingent future right or estate in any of the property divided or sold, the court shall ascertain and settle the proportionate value thereof according to the principles of law applicable to annuities and survivorships, and direct such proportion of the proceeds of sale to be invested, secured, or paid over in such manner as to protect the rights and interests of the parties. (5798)

4419. Wife may release—A married woman may release to her husband her contingent interest in his real estate by writing executed and acknowledged in the same manner as a conveyance, and, upon the filing of such instrument with the clerk, the whole proceeds arising from such sale shall be paid to the husband. Such release shall bar her contingent interest in such real estate. (5799)

4420. Investment of proceeds—When there are proceeds of sale belonging to an unknown owner, or to a person without the state who has no representative within it, or when there are proceeds arising from the sale of property including the prior estate of a tenant for life or for years, which are paid into court or deposited with the clerk, the same shall be invested in interest-bearing securities for the benefit of the persons entitled thereto. Except as in this chapter otherwise provided, such investment shall be made in the name of the clerk and his successors in office, who shall hold the same for the use and benefit of the persons interested, subject to the order of the court. The clerk shall receive the interest and principal as it becomes due, and apply and invest the same as the court may direct, and shall file in his office the securities taken, and keep an account of such investments, and of the moneys received thereon and his disposition thereof, in a book kept for that purpose, which shall be open to inspection by all persons. (5807-5809)

86-188, 90+371.

4421. Share of infant, how paid—When the share of an infant is sold, his share of the proceeds may be paid by the referees making the sale to his general guardian, or to the special guardian appointed for him in the action, if the guardian has given the security required by law. (5811)

4422. Share of insane person, etc.—When the share of an insane person, or other person adjudged incapable of conducting his own affairs, is sold, his share of the proceeds may be paid by the referees making the sale to the guardian who is entitled to the custody and management of his estate, if the guardian has executed an undertaking, approved by a judge of the court, that he will faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled thereto, or his representatives. (5812)

4423. Proceedings when state a party—The state may be made a party to an action for the sale or partition of real property, in which case the summons and complaint shall be served upon the attorney general, who shall appear on behalf of the state. (5814)

ACTIONS TO TRY TITLE

4424
101-M - 170

4424. Action to determine adverse claims—Any person in possession of real property by himself or his tenant, or any person having or claiming title to vacant or unoccupied real property, may bring an action against any person who claims an estate or interest therein, or a lien thereon, adverse to him, for the purpose of determining such adverse claim and the rights of the parties, respectively. (5817)

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

2. One adverse claim—An action will lie under the statute for the determination of one adverse claim, which may be specified in the complaint, and if a complaint to remove a cloud cannot be sustained as such it may be sustained as a complaint under the statute if its allegations are sufficient for that purpose (77-20, 79+587, overruling 28-413, 10+424; 30-433, 15+873; 68-273, 71+2).

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

4. Who may maintain action—Equitable owner (69-547, 72+794; 31-77, 16+493). owner of fee and owner of timber on land (80-348, 83+156). Actual occupant with or without title (See Note 5 infra). One having no property interest and not in possession cannot maintain (40-485, 42+392; 65-466, 68+98; 72-138, 75+5).

5. Possession—An action will lie under the statute by a party who is in possession of land, whether he has any property interest in it or not, but the possession for this purpose must be actual and not merely constructive (2-153, 129; 12-192, 116; 27-92, 6+445; 35-318, 29+129; 36-314, 31+51; 38-384, 37+799; 51-116, 52+1127; 65-466, 68+98; 5-223, 178; 8-403, 359; 12-153, 89; 15-182, 139; 16-521, 469; 16-457, 411; 33-403, 23+546; 64-513, 67+632). A party who is in actual possession of a part of a tract himself and in possession of the remainder by a tenant may maintain an action on the whole tract (83-206, 86+11). Whether plaintiff is or is not in possession 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 (31-264, 17+476; 39-35, 38+757; 41-163, 42+870; 41-250, 42+1016; 47-535, 50+610; 56-60, 57+320; 62-310, 64+903; 77-20, 79+587; 73-5, 75+746; 88-349, 93+117). Plaintiff need not prove possession of all the land described in complaint. He may succeed as to a part and fail as to the remainder (77-20, 79+587).

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

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

8. Reply—When defendant asserts a legal title a plaintiff in possession may in reply plead facts showing an equitable title of such a nature that it should prevail over the legal title (5-223, 178; 31-77, 16+493; 54-9, 55+745; 72-138, 75+5). Various forms of replies—issues which may be raised by replies (21-431; 40-319, 41+1054; 21-449; 39-431, 40+565; 65-191, 68+9; 54-9, 55+745; 31-505, 18+645; 65-466, 68+98; 72-138, 75+5; 80-348, 83+156; 79-264, 82+531).

9. Judgment—Contingent interest determined by (85-333, 88+992). Force of to convey title (93-150, 102+381). Forms of judgment considered (33-357, 23+527; 40-439, 42+296; 32-153, 19+736). Not for recovery of possession (50-284, 52+643; 69-506, 72+796). On disclaimer (30-11, 13+911, 14+879). When defendant asserts no interest in himself (31-244, 17+381).

4425. Unknown defendants—In any action brought under § 4424, the plaintiff may insert in the title thereof, in addition to the names of such persons as are known or appear of record to have some right, title, estate, interest, or lien in or on the real property in controversy, the following: "Also all other persons unknown claiming any right, title, estate, interest, or lien in the real estate described in the complaint herein." Service of the summons may be had upon all such unknown persons defendant by publication in the same manner as against non-resident defendants, upon the filing of an affidavit of the plaintiff, his agent or attorney, stating the existence of a cause of action under § 4424. The plaintiff shall, before commencement of such publication, file with the register of deeds a notice of the pendency of the action, a copy of which shall be published in the same newspaper with, and immediately following, the summons. All such unknown persons so served shall have the same rights to appear and defend before and after judgment as would named defendants upon whom service is made by publication, and any order or judgment in the action shall be binding upon them, whether they be of age or minors; but, if they be minors when judgment is rendered, they may be allowed to defend at any time within two years after becoming of age. (5818)

Constitutional (46-174, 48+773). Order of court unnecessary (84-329, 87+838). Construed strictly. Record owner must be named (46-180, 48+775; 46-174, 48+773). See 89-454, 95+317, 895, 96+704). Jurisdiction over unknown parties acquired though named record owner dead when action begun (53-197, 55+117; 84-329; 87+838). Published summons must contain names of parties known and of all who appear by record to have interest. Reasonable diligence must be exercised to ascertain party (46-174, 48+773). Opening default by "parties unknown" (39-73, 38+689; 44-392, 46+766; 93-249, 101+304). Cited (39-35, 38+757; 92-2, 99+209).

4426. Disclaimer—Default—Costs—If the defendant, in his answer, disclaims any interest in the property, or suffers judgment to be taken against him without answer, the plaintiff cannot recover costs; but if the summons has been served upon the defendant personally, and it is made to appear that after the accrual of the cause of action, and before commencement thereof, the plaintiff demanded in writing of the defendant, and the defendant neglected to execute within a reasonable time thereafter, a good and sufficient quitclaim deed of the property described in the complaint, upon tender of such deed ready for execution, the plaintiff shall nevertheless recover his costs. (5819)

Disclaimer (15-245, 190; 30-11, 13+911, 14+879; 31-244, 17+381; 46-260, 48+1124; 62-429, 64+920). Cited (12-192, 116).

4427. Claimants under common grantor—Joinder—When lots or tracts of real estate are claimed in severalfy by two or more persons from or under conveyance from the same grantor, as the common source of title, and an adverse claim of title thereto is made by some person as against the title of such grantor, any one claiming under such grantor may bring an action in behalf of himself and all others who may come in and become parties thereto against such adverse claimant, to have the title of such grantor perfected or quieted as to such lots or tracts claimed by the plaintiff and the others who may become parties. Any person who so claims under the same grantor as the plaintiff, and whose title is controverted by the same defendant upon the same ground as the title of the plaintiff, may become a party, as of course, by filing a complaint setting forth the property he claims and his source of title, and may have his rights adjudicated with those of the original plaintiff. The answer of the defendant shall be taken as an answer to all who may thus become parties. (5820)

48-501, 51+614.

4428. Action against cotenant—Denial of right—In an action by a tenant in common or joint tenant of real property against a cotenant, the plaintiff shall show, in addition to the evidence of his right, that the defendant either denied the plaintiff's right, or did some act amounting to such denial. (5843)

4429. Termination of plaintiff's right pending action—In an action for the recovery of real property, when the plaintiff shows a right to recover at the time the action was commenced, but it appears that such right has

terminated during the pendency of the action, the verdict and judgment shall be according to the fact, and the plaintiff may recover damages for withholding the property. (5844)

17-215, 188.

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4430. Second trial in ejectment—Any person against whom judgment is recovered in an action for the recovery of real property, within six months after written notice of such judgment, or, if an appeal be taken therefrom to the supreme court, within six months after written notice of the determination of such appeal, upon payment of all costs and damages recovered by the judgment, may demand another trial by notice in writing to the adverse party or his attorney, and thereupon the action shall be retried, and may be brought on for trial by either party: Provided, that unless notice of such demand, with proof of service, be filed with the clerk of the district court within two years after such judgment, or, in case of appeal, within two years after the filing therein of a remittitur from the supreme court showing the final determination of the appeal, no retrial shall be had hereunder. (5845; '01 c. 344)

1. **Origin and object of statute**—26-75, 1+808; 54-157, 55+928; 80-76, 82+1103; 6-220, 142.

2. **Construed liberally**—79-20, 81+537; 81-508, 84+343; 104+681.

3. **To what actions applicable**—The phrase "action for the recovery of real property" was intended to refer to actions in the nature of the common law action of ejectment (25-183; 32-130, 19+649; 26-75, 1+808; 21-515; 50-284, 52+643). In determining the right to a second trial the court will look to the substance of the action, and, whatever may be the form of the pleadings, if the action is one in which either party seeks to recover possession of real property, the right to a second trial will be conceded (20-433, 387; 25-183; 32-130, 19+649; 49-88, 51+662; 79-20, 81+537; 81-508, 84+343; 93-369, 101+605; 104+681; 104+903). It is no objection that the action involves other issues (93-369, 101+605). It is the general rule that a second trial cannot be had as of right unless the recovery of possession of real property is sought, either by plaintiff or defendant (35-367, 29+3; 54-157, 55+928; 50-284, 52+643; 61-128, 63+257; 69-506, 72+796; 26-75, 1+808; 104+681). Ordinarily in a statutory action to determine adverse claims there is no right to a new trial (35-367, 39+3; 50-284, 52+643; 69-506, 72+796; 104+903). If in such an action the plaintiff is in possession and defendant in his answer alleges ownership in himself and possession by plaintiff and a withholding and demands possession, the action becomes in substance an action for the recovery of real property and either party has a right to a new trial under the statute (20-433, 387; 50-284, 52+643; 79-20, 81+537; 81-508, 84+343). A cause of action substantially in ejectment does not lose the right to a second trial because joined with a cause of action to which the statute does not apply (32-130, 19+649). It is immaterial that the party seeks other relief than the recovery of possession (49-88, 51+662; 54-157, 55+928). Statute is not ordinarily applicable to actions under the forcible entry and unlawful detainer act (14-170, 131; 25-183).

4. **Payment of costs and damages**—16-445, 402; 29-189, 12+526; 79-423, 82+677; 14-170, 131.

5. **Only one new trial as of right**—Only one new trial of right is allowed (51-221, 53+367), but apparently a party has the right to reserve his statutory privilege until a judgment has been rendered against him which is free from error. He may have a new trial for error without reference to the statute (66-152, 68+972; 65-514, 68+1102; 54-190, 55+960; 63-330, 63+267, 65+649, 68+458; 80-76, 82+1103). The statute declares the second judgment final, but like all other final judgments it may be reviewed for errors committed on the trial (6-220, 142).

6. **New trial unaffected by prior trial**—80-76, 82+1103. See 93-369, 101+605.

7. **Necessity of filing demand and proof of service**—78-281, 80+1120.

8. **Applies to both parties**—16-445, 402.

9. **Demand**—16-445, 402.

10. **Personal representatives entitled to**—22-542.

11. **Waiver of jury trial**—66-152, 68+972.

12. **Notice of judgment**—80-524, 83+415.

13. **In case of default**—35-337, 29+130.

14. **Amendment of pleadings on second trial**—85-359, 88+988.

15. **Authority of agent to waive right**—39-355, 40+262.

16. **Recovery for improvements**—82-200, 84+733.

17. **Waiver of as condition of opening default**—71-468, 74+173.

18. **Judgment final as to other issues**—93-369, 101+605.

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4431. Judgment on second trial—Restitution—The judgment given on a trial had under § 4430 shall be annexed to the judgment roll of the former trial, and the judgment last given shall be the final determination of the rights

of the parties. If a prior judgment has been executed, restitution shall be ordered as the last judgment may determine the rights of the parties, and the same may be enforced by execution. (5846)

78-281, 80+1120; 51-221, 53+367; 6-220, 142.

4432. Ejectment—Damages—Improvements—Damages for withholding the property recovered shall not exceed the fair value of the use of the property, exclusive of the use of improvements made by the defendant, for a period not exceeding six years; and, when permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claims of the plaintiff, in good faith, the value thereof shall be allowed as a setoff against the damages of the plaintiff. (5847)

32-189, 20+144; 37-157, 33+326.

4433. Removal of building erected in good faith—When any person, in good faith and under color of title, and with good reason to believe that the legal title to land is vested in him, has erected any building or other structure thereon, when the legal and equitable title thereto was vested in another, such person may remove the same, doing no unnecessary damage, and in so doing shall be liable only for the actual damage to the land. Such removal shall be made within sixty days after the determination adversely to him of any action or proceeding respecting the title, or within sixty days after notice from the holder of the legal title to remove the same: Provided, that if, within sixty days after receiving such notice, such person brings action to try such title, he may make such removal within sixty days after the determination thereof. (5848)

40-397, 42+202.

4434. Occupying claimant—Compensation for improvements—When any person, under color of title in fee and in good faith, has peaceably taken possession of land for which he has given a valuable consideration, or when any person has taken possession of land under the official deed of any person or officer empowered by law or by any court of competent jurisdiction to sell land, and such deed is regular upon its face, and he has no actual notice of any defects invalidating the same, neither such person, nor his heirs, representatives, or assigns, shall be ejected from such land, except as hereinafter provided, until compensation is tendered him or them for such improvement which he or they have made upon such land previous to actual notice of the claim upon which the action is founded, or, in case of possession under an official deed, previous to actual notice of defects invalidating the same. The word "improvement" shall be construed to include all kinds of buildings and fences, and ditching, draining, grubbing, clearing, breaking, and all other necessary or useful labor of permanent value to the land. When the occupant holds as heir, devisee, or grantee, either immediate or remote, of any person who is not a resident of the state, the good faith of the original taker shall be presumed. (5849, 5853, 5857)

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

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

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

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

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

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

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

8. **Improvements defined—**93-106, 100+636.

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

4435. Pleadings—Trial—Verdict—In an action to try the title to land, brought by any person claiming title thereto against the occupant, the occu-

pant may, in addition to other defences, allege the amount and value of all improvements made, and the amount of all taxes and assessments paid, by himself or those under whom he claims, and, if the claim be under an official deed, the purchase money paid therefor; and the claimant may reply, alleging the value of the premises without improvements at the commencement of the action, and also the value of the yearly rent of the land without improvements during the possession of the occupant. In any such action brought by the occupant against a claimant to quiet title or to determine any adverse claim, the claimant, in his answer, in addition to setting up his title, may allege the value of the premises without improvements at the commencement of the action, and also the value of the yearly rent of the land without improvements during the possession of the occupant; and the occupant may, in addition to other proper matters of reply, allege the amount and value of all improvements made, and the amount of all taxes and assessments paid, by himself or those under whom he claims, and, if the claim be under an official deed, the purchase money paid therefor. In case the title be found to be in the claimant, the jury, or, if the case be tried without a jury, the court, shall assess the value of all improvements made and taxes and assessments paid upon the land by the occupant, or those under whom he claims, with interest at six per cent., and, if he claims under an official deed, regular upon its face, and without actual notice of any defect invalidating it, shall also find the purchase money paid by him, or those under whom he claims, with interest at six per cent.; and the jury or court shall also assess the value of the land at the commencement of the action, without improvements, and also the value of the yearly rent thereof during the occupant's possession. If the land has depreciated in value since its purchase at an official sale, the jury or court may allow such part only of the purchase money as, in their discretion, they may see fit. (5850, 5856; '97 c. 38)

1. **Pleading**—22-541; 38-433, 38+106; 84-502, 87+1115; 85-359, 88+988.
2. **Burden of proof**—27-60, 6+403; 30-372, 15+665; 55-202, 56+824; 32-527, 21+717; 38-433, 38+106; 29-264, 13+45.
3. **Evidence**—Receipt of treasurer is evidence of payment of taxes. Good faith may be proved by direct testimony of occupant. Value of improvements may be proved by evidence of cost (27-60, 6+403).
4. **Taxes**—Recovery can be had only for such taxes as were a valid charge on the land (24-372). Owner must be given opportunity to contest validity of taxes claimed (See 84-53, 86+875). Taxes must have been paid by occupant when in actual possession under color of title in good faith and without notice (27-411, 8+142; 60-328, 62+396).
5. **When improvements must have been made**—30-272, 15+665; 37-157, 33+326; 27-60, 6+403. See 82-200, 84+733.
6. **Interest**—24-372; 39-470, 40+575.
7. **Directing verdict**—35-337, 29+130.
8. **Order of proof**—39-431, 40+565.

4436. Compensation before execution—If the claimant succeed in the action, execution for possession shall not issue, except as herein provided, unless, within one year from entry of judgment on the verdict or findings, the claimant pay into court for the occupant the amount so found as the value of the improvements, and also the amount of the taxes and assessments, and also the purchase money, if the occupant claim under an official deed as aforesaid, with interest thereon as aforesaid, less the assessed value of the yearly rent of the land without the improvements during the occupant's possession. (5851)

46-458, 49+238; 47-59, 49+396; 39-470, 40+575.

4437. Occupant to pay value of land, when—Unless the occupant claims under an official deed given either to himself or those under whom he claims, as hereinbefore provided, or under an entry in the land office of the United States, or the official certificate, duplicate or receipt thereof, or unless the claimant has had notice, actual or constructive, of the occupant's possession, the claimant may, within thirty days after entry of judgment on the verdict or findings in his favor, serve upon the occupant a written demand that within one year he pay the claimant the sum assessed as the value of the land without the improvements, less the taxes and assessments paid thereon as

aforesaid, with interest as aforesaid. Such demand shall be served, and the service proved, as in the case of a summons, and shall then be filed with the clerk. If the occupant do not within one year after such service pay into court the amount so demanded, he shall forfeit all claim to compensation, and execution may then issue for the possession of the land; but, if he do so pay, the court shall by judgment confirm the title in him. (5852)

38-433, 38+106. See 40-450, 42+352; 40-94, 41+453; 79-423, 82+677.

4438. May remove crops—In case of ejection, the occupant shall be entitled to enter upon the land and gather and remove all crops sown thereon prior to entry of judgment against him. (5854)

79-304, 82+585.

4439. Occupant not in actual possession—Actions in other form—All the provisions of §§ 4434-4438 shall apply to cases where the occupant is not, as well as where he is, in actual possession. In case an action is brought for damages for trespass upon such land, or for the rents and profits or use and occupation thereof, or in any other form, if the action is one in effect to test the validity of the title thereto, all said sections shall, so far as possible, be complied with; and the value of all improvements, taxes, and assessments, and the purchase money in case the occupant claims under an official deed, with interest as aforesaid, shall be set off against any judgment for money that the claimant may obtain; and, if any excess remain in favor of the occupant after such setoff, such excess may be set off against any judgment that the claimant, or those claiming under him, may subsequently obtain in any such or similar action relating to the same land. (5855, 5858)

Claim may be asserted and adjudged in any action the result of which may determine and cut off the claim to a lien. It may be asserted and determined in an action of partition (40-450, 42+352. See 19-167, 129); in a statutory action to determine adverse claims (27-411, 8+142; 39-431, 40+565; 40-450, 42+352. See 39-35, 38+757); in an action in the nature of ejection (22-541); in an action to redeem from a tax sale by a person who has been under a disability (27-97, 6+452). It cannot be asserted in an action under 1887 c. 127 to test a tax title (38-27, 35+666). If claim cannot be asserted in the particular action it may be asserted subsequently in a proper action (38-27, 35+666; 39-35, 38+757).

4440. Order for survey—When an action for the recovery of real property is pending, upon motion of either party, and for cause shown, the court may make an order describing the property, and allowing such party to enter thereon and make survey thereof for the purpose of the action. A copy of the order shall be served on the owner or occupant, and thereupon such party may enter upon the property, with necessary surveyors and assistants, and make such survey; but, if any unnecessary injury is done to the property, he is liable therefor. (5859, 5860)

4441. Mortgagee not entitled to possession—A mortgage of real property is not to be deemed a conveyance, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure. (5861)

4442. Notice to terminate contract of sale—When default is made in the conditions of any contract for the conveyance of real estate or any interest therein, whereby the vendor has a right to terminate the same, he may do so by serving upon the purchaser, his personal representatives or assigns, a notice specifying the conditions in which default has been made, and stating that such contract will terminate thirty days after the service of such notice unless prior thereto the purchaser shall comply with such conditions and pay the costs of service. Such notice must be given notwithstanding any provisions in the contract to the contrary, and shall be served in the same manner as a summons in the district court. If the person to be served is not a resident of the state, or cannot be found therein, of which facts the return of the sheriff of the county where the real estate lies that he cannot be found in such county shall be prima facie evidence, service may be made by three weeks' published notice. If within the time mentioned the person served complies with such conditions and pays the costs of service, the contract shall be thereby reinstated, but otherwise shall terminate. A copy of the notice, with

the proof of service thereof, and an affidavit of the vendor, his agent or attorney, showing that the purchaser has not complied with the terms of the notice, may be recorded with the register of deeds; and shall be prima facie evidence of the facts therein stated. ('97 c. 223; '01 c. 294)

Applicable only to contracts of actual purchase and not to agreements amounting to mere options depending upon some contingency (85-130, 88+410, 744; 92-328, 100+9. See 90-197, 95+898). Time limited by notice absolute. Statute exclusive mode of limiting right of vendees (83-362, 86+336; 89-187, 94+555). Cited (86-52, 90+11, 793; 86-509, 91+29; 90-230, 96+335, 787; 89-319, 94+1085, 1135; 89-513, 95+455; 93-485, 101+655; 93-437, 101+792).

4443. Conveyance by defendant in ejectment—Liability of purchaser—An action for the recovery of real property against a person in possession or in receipt of the rents and profits thereof cannot be prejudiced by an alienation made by him either before or after the commencement of the action; but in such case, if the defendant has no property sufficient to satisfy the damages recovered for the withholding of possession, such damages may be collected by action against the purchaser. (5863)

MISCELLANEOUS ACTIONS

4444. Reversioner, etc., may sue—A person seized of an estate in remainder or reversion may maintain a civil action for any injury done to the inheritance, notwithstanding an intervening estate for life or years. (5879)

4445. Action against cotenant—One joint tenant or tenant in common, and his executors or administrators, may maintain an action against his cotenant for receiving more than his just proportion of the rents and profits of the estate owned by them as joint tenants or tenants in common. (5880)

25-222; 29-87, 12+145; 29-252, 13+43.

4446. Nuisance defined—Action—Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance. An action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered. (5881)

12-451, 347; 16-355, 315; 17-215, 188; 18-260, 236; 27-245, 6+787; 33-516, 24+255; 72-239, 75+234.

4447. Action for waste—If a guardian, tenant for life or years, joint tenant, or tenant in common, of real property, commits waste thereon, any person injured by the waste may bring an action against him therefor, in which there may be judgment for treble damages, forfeiture of the estate of the party offending, and eviction from the property. Judgment of forfeiture and eviction can only be given in favor of the person entitled to the reversion, against the tenant in possession when the injury to the estate in reversion is adjudged in the action to be equal to the value of the tenant's estate or unexpired term, or to have been done in malice. (5882, 5883)

16-58, 46; 36-380, 31+357; 51-358, 53+805; 65-124, 67+657.

4448. Waste pending year for redemption—Injunction—When real property is sold upon execution or under judgment or mortgage, until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, by order granted, with or without notice, on application of the purchaser or his assigns holding the certificate of sale; but it is not waste for the person in possession of the property at the time of sale, or entitled to the possession afterwards, during the time allowed for redemption, to continue to use it in the same manner in which it was previously used, or to use it in the ordinary course of husbandry, or to make the necessary repairs of the buildings thereon, or to use wood or timber on the property therefor, or for the repair of fences or for fuel for his family, while he occupies the property. (5477)

34-438, 26+631.

4449. Trespass—Treble damages—Whoever without lawful authority cuts down or carries off any wood, underwood, tree, or timber, or girdles or otherwise injures any tree, timber, or shrub, on the land of another person, or in the street or highway in front of any person's house, village, or city lot, or cultivated grounds, or on the commons or public grounds of any city or town, or in the street or highway in front thereof, is liable in a civil action to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor, unless upon the trial it appears that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which the trespass was committed was his own, or that of the person in whose service or by whose direction the act was done, in which case judgment shall be given for only the single damages assessed. But this section shall not authorize the recovery of more than the just value of timber taken from uncultivated woodland for the repair of a public highway or bridge upon or adjoining the land. (5884-5886)

22-537; 58-84, 59+831.

4450. Trespass after execution or foreclosure sale—When real property is sold on execution or under judgment or mortgage, the purchaser thereof, or any person who has succeeded to his interest, after his estate becomes absolute, may recover damages for injury to the property by the tenant in possession after the sale, and before possession is delivered under the conveyance. (5862)

4451. Forcible eviction—Treble damages—If a person who is put out of real property in a forcible manner without lawful authority, or who, being so put out, is afterwards kept out by force, shall recover damages therefor, judgment may be entered for three times the amount at which the actual damages are assessed. (5887)

34-470, 26+602.

4452. Forcible entry, etc.—Treble damages—In case of forcible entry and detention, if a person, claiming in good faith, under color of title, to be rightfully in possession, so put out or kept out, shall recover damages therefor, judgment may be entered in his favor for three times the amount at which the actual damages are assessed. (5888)

4453. Settler—Action for possession, etc.—Any person who has settled on not more than one hundred and sixty acres, consisting of not more than two distinct tracts, of the lands belonging to the United States, on which settlement is not prohibited by the general government, may maintain an action for injuries done thereto, or to recover the possession thereof, provided he has made improvements thereon of the value of fifty dollars, and has actually occupied or cultivated the same. A neglect to occupy or cultivate such land, continued for six months, shall be deemed an abandonment, and preclude such person from maintaining such action. (6128-6131)

43-123, 44+1149.

4454. Action to determine boundary lines—An action may be brought by any person owning land or any interest therein against the owner, or persons interested in adjoining land, to have the boundary lines established; and when the boundary lines of two or more tracts depend upon any common point, line, or landmark, an action may be brought by the owner or any person interested in any of such tracts, against the owners or persons interested in the other tracts, to have all the boundary lines established. The court shall determine any adverse claims in respect to any portion of the land involved which it may be necessary to determine for a complete settlement of the boundary lines, and shall make such order respecting costs and disbursements as it shall deem just. (5823, 5824, 5828, 5829)

76-496, 79+537, 602; 77-375, 79+1024, 82+1118; 78-515, 81+524; 88-273, 92+982; 89-31, 93+1038; 91-259, 97+889; 104+759.

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4455. Pleadings—Additional parties—Such actions shall be governed by the rules governing civil actions, except as herein otherwise provided, but

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every allegation in every answer shall be deemed in issue without further pleading. When in any such action it appears to the court that any owner, lienholder, or person interested in any of the tracts involved ought, for a full settlement and adjudication of all the questions involved, to be made a party, the court shall stay the proceedings and issue an order requiring such persons to come in and plead therein within twenty days after service of the order, which shall be served upon them in the same manner as a summons in a civil action. Any person so served who shall fail to file an answer within twenty days thereafter shall be in default. All pleadings or copies thereof shall be filed before such order is made. The court may also, in its discretion, in like manner, order the owners and persons interested in other tracts than those originally involved to come in and plead, in which case the order shall describe such additional tracts, and state that the purpose of the action is to establish the boundary lines thereof. (5825, 5826)

91-259, 97+889.

4456. Judgment—Landmarks—The judgment shall locate and define the boundary lines involved by reference to well-known permanent landmarks, and, if it shall be deemed for the interest of the parties, after the entry of judgment, the court may direct a competent surveyor to establish a permanent stone or iron landmark in accordance with the judgment, from which future surveys of the land embraced in the judgment shall be made. Such landmarks shall have distinctly cut or marked thereon "Judicial Landmark." The surveyor shall make report to the court, and in his report shall accurately describe, the landmark so erected, and define its location as nearly as practicable. (5827)

CHAPTER 83

FORECLOSURE OF MORTGAGES

BY ADVERTISEMENT

4457. Limitation—Every mortgage of real estate heretofore or hereafter executed, containing a power of sale, upon default being made in any condition thereof, may be foreclosed by advertisement within fifteen years after the maturing of such mortgage or the debt secured thereby, in the cases and in the manner hereinafter specified. Said fifteen years shall not be extended by reason of any non-residence, or of any payment made or applied upon such debt after its maturity. (6028; '03 c. 15)

1. Foreclosure in general—The term foreclosure is sometimes used to denote the sale and attendant proceedings (28-6, 8+829; 32-460, 21+714; 63-517, 65+941); sometimes the entire process of barring the equity of redemption, including the expiration of the redemption period (27-175, 6+489). Foreclosure proceedings, in whatever manner conducted, have for their object the enforcement of the security; the application of the property to the satisfaction of the debt or obligation secured (29-226, 13+34). The right to foreclose is not affected by possession (23-328).

2. Two methods—There are only two methods by which a mortgage may be foreclosed, namely, by action and by advertisement (21-520). The common law method by entry and possession does not obtain in this state (See 29-226, 13+34). The two remedies are cumulative (39-378, 40+255). There is this difference between a foreclosure by advertisement and a foreclosure by action. In the former the title passes by virtue of the mortgage and the mortgage must be sufficient to operate as a conveyance as soon as the equity of redemption is barred by the sale; but in the latter the title passes by virtue of the decree and sale under it. There is no going behind the decree to ascertain if the mortgage was sufficient to operate as a conveyance (39-378, 40+255). If the mortgage contains no power it can only be foreclosed by action (20-264, 237). A release by the mortgagor to the mortgagee of the equity of redemption after condition broken, is tantamount to foreclosure (29-226, 13+34).

3. General nature of foreclosure by advertisement—A foreclosure by advertisement is an ex parte proceeding (7-315, 243) in pais and in rem (53-346, 55+557; 72-49, 74+1018; 74-72, 76+958; 18-232, 212; 46-164, 47+970, 48+783; 24-315; 31-495, 18+450).