

130278

1941 Supplement

To

Mason's Minnesota Statutes

1927

1939 to 1941

(Supplementing Mason's 1940 Supplement)

Containing the text of the acts of the 1941 Session of the Legislature, both new and amendatory, and notes showing repeals, together with annotations from the various courts, state and federal, and the opinions of the Attorney General, construing the constitution, statutes, charters and court rules of Minnesota together with Law Review Articles and digest of all common law decisions.

Edited by
the
Publisher's
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MASON PUBLISHING CO.

SAINT PAUL, MINNESOTA

1941

to and from place of holding trial. Op. Atty. Gen., (266a-13), Oct. 23, 1939.

6999. Fees in justices courts—Costs and disbursements.

Where action is settled between parties without any further court action after issuance of summons, it is only where summons asked for costs and disbursements that justice could enter judgment against defendant for costs. Op. Atty. Gen. (266B-7), Jan. 17, 1941.

7002. Fees of register of deeds—Certain counties.
Section 8365, as amended by Laws 1935, chapter 168, supersedes §7002(c), and register of deeds should receive 25 cents and no more for furnishing a certified copy of chattel mortgage filed with him. Op. Atty. Gen., (373B-10(e)), Oct. 18, 1939.

(4). Articles of incorporation in the Norwegian language cannot be recorded. Op. Atty. Gen. (373B-17(d)), Dec. 18, 1940.

(5). Where mortgagee has a number of mortgages against one mortgagor, and last mortgage is paid and on satisfaction he sets up mortgage paid and also all other prior mortgages and gives number and date of filing of each instrument, register of deeds is entitled to charge a separate fee for each satisfaction recorded. Op. Atty. Gen., (373B-16), March 19, 1940.

7005. Fees of appraisers, etc.

Where sheriff picks up city police officers and goes to scene of a bank robbery in another town and engage in

gun battle and capture and convict the robbers, county board is limited in payment of city officers to three dollars per day and mileage, and is without power to pay reasonable compensation for services rendered. Op. Atty. Gen., (390a-1), Dec. 11, 1939.

7007. Witness fees of officers of municipalities.

Village councilmen of New York Mills attending court in defense of action against village are not entitled to reimbursement for expenses, though they are eligible to receive witness fees and mileage outside of village. Op. Atty. Gen., (469a-8), Jan. 4, 1940.

7009. Expert witnesses.

Fees of all witnesses, expert and otherwise, in a proceeding under the Psychopathic Personality Act are payable by county on order of probate court, and it is immaterial who calls the witnesses. Op. Atty. Gen., (248B-11), April 12, 1940.

A psychiatrist under subpoena as an expert in a psychopathic personality proceeding is entitled to fee fixed by court under general statute, and it is immaterial that he is employed in the service of the state. Op. Atty. Gen. (248B-11), June 1, 1940.

7014. Fees for services not rendered—Illegal fees.

Constable is only village officer who may charge a fee for serving justice court warrants or attending on justice court, and enforcement of village ordinances, including appearances in justice court in connection with prosecutions thereunder is a part of regular, official duties of village marshal and village policemen, for which their salaries are full compensation. Op. Atty. Gen. (847-2-4), Jan. 21, 1941.

CHAPTER 49A

Trade and Commerce

1. Contracts and written instruments in general.

2. —Mutual assent.

Relief from a mutual mistake may be granted defensively as well as offensively. *Lawrenz v. L.*, 288NW727. See Dun. Dig. 8337(30).

A statement of intention is not a promise upon which can be predicated a contract. *Sickmann's Estate*, 289NW 832. See Dun. Dig. 1726.

On a claim by a son against his mother's estate for improvements made to her farm, evidence held insufficient to sustain a finding of a contract to reimburse him therefor. *Id.* See Dun. Dig. 1742.

A mistake of one contracting party, with knowledge of it by the other, is as much a ground for relief as mutual mistake. *Rigby v. N.*, 292NW751. See Dun. Dig. 1743.

Whether performance by an optionee to purchase land has been made or tendered is a question of fact. *Ferch v. H.*, 295NW504. See Dun. Dig. 1749a.

3½. —Parties to contracts.

In action for damages for breach of contract to give certain sales rights, held that there was a fact issue whether defendant or a corporation in which he had a substantial interest was the contracting party. *Foster v. B.*, 291NW505. See Dun. Dig. 1901.

Privity, in law of contracts, is merely name for a legal relation arising from right and obligation. *La Mourea v. R.*, 295NW304. See Dun. Dig. 1733.

4. —Rights of third persons.

Privity of contract, if needed to permit a third person to recover thereon, arises from right of such said third person to recover on promise in his favor. *La Mourea v. R.*, 295NW304. See Dun. Dig. 1896.

A promise of a contractor with a city to pay damages to third persons arising from work of sewer construction may be enforced by any third person injured by the work. *Id.*

A creditor or donee beneficiary of a contract may recover thereon though not a party to it, though promise in his favor is conditioned upon a future event, and he is not identified when contract is made. *Id.*

Where sub-contractor decided to stop work because of doubts about getting paid and continued to work upon promise that owner would satisfy his claims, sub-contractor had a cause of action against a title insurance company which promised owner to satisfy the claims, as a third party contract beneficiary. *Schau v. B.*, 295NW 910. See Dun. Dig. 1733, 1896.

4½. —Modification.

A litigant cannot select one of a series of agreements and maintain an action when agreement sued upon has in law been supplanted by another. *Foster v. B.*, 291NW 505. See Dun. Dig. 1778.

A provision in a written contract "therefore this letter upon your accepting and signing and returning a copy to our office will become our final agreement and void all other agreements now in existence" did not merely modify an existing contract of employment but superseded it. *Lidenberg v. A.*, 291NW512. See Dun. Dig. 1807.

4%. Novation.

There is no novation where a debtor is not released and another substituted in his stead, pursuant to agreement between creditor and debtors. *First & American Nat. Bank of Duluth v. W.*, 292NW770. See Dun. Dig. 7238.

Burden of proof of novation is upon debtor who asserts that he has been discharged. *First & Am. Nat. Bank of D. v. W.*, 292NW770. See Dun. Dig. 7238a.

5. Quasi contracts.

Claim of quasi contractual liability presupposes the absence of contract in fact, express or implied, and there is no longer any justification in use of term contract to describe obligation. *Ind. School Dist. v. C.*, 292NW777. See Dun. Dig. 1724.

Rights quasi ex contractu are in personam and are enforced by actions in personam. *Id.*

Whether labor or service is performed by an individual or by a public utility, basis upon which proof must rest is that there be reasonably adequate compensation for that which is furnished. *Scandrett v. H.*, 296NW26. See Dun. Dig. 10366.

6. Bailment.

Lessee of a machine was not liable for rent for time it was kept in use under promise to comply with representation and warranty. *Jaeger Mach. Co. v. M.*, 289NW51. See Dun. Dig. 731.

In action for rent for use of machines, evidence held to warrant submission of counterclaim for extra expense occasioned by failure of machine to do amount and kind of work represented. *Id.*

A gas company installing a heater and drums of propane gas for fuel and installing it in a brooder house to be used by a party of hunters, all without any charge of any kind, owed no duty to warn hunters that heater would give off carbon monoxide gas where it had no knowledge that such gas would be given off, and was not liable for not installing a pipe to carry gas to outside. *Ruth v. H.*, 296NW136. See Dun. Dig. 731c.

A lender of a chattel for gratuitous use of borrower owes latter duty of warning him of only those defects of which lender is aware and which might imperil borrower by intended use of chattel. *Id.*

One who shares in gratuitous use of a chattel by consent of a bailee or donee stands in no better position than bailee or donee with respect to his rights against bailor or donor for injuries suffered from defects. *Id.* See Dun. Dig. 731d.

Where a chattel is delivered to a party for his gratuitous use with authority to consume a part of it by such use and party is to return part which is not consumed, there is a gift of part which is consumed and a bailment for gratuitous use of bailee of part which is to be returned. *Id.* See Dun. Dig. 728.

7. Employment.

There can be no recovery for services performed for benefit of another if idea of charging for them was an after-thought. *Sickmann's Estate*, 289NW832. See Dun. Dig. 1742.

8. Consideration.

There was a consideration for a contract between householder and electric company to supply electric

energy during lifetime of franchise, notwithstanding existence of oral contract and the supplying of electricity terminable at will. *Macdanz v. N.*, 289NW58. See Dun. Dig. 1764.

It is no objection to an action on a contract by a donee or creditor beneficiary that he did not furnish any of consideration. *La Mourea v. R.*, 295NW304. See Dun. Dig. 1755.

9. Fraud.

Value of property such as a house and lot which have no market value like property sold on stock of commodity exchanges, where a market value can be ascertained as of any date or hour, is not the subject of actionable misrepresentation. *Beck v. N.*, 288NW217. See Dun. Dig. 3824.

Representation as to what property cost is a representation of fact and not opinion. *Id.*

Fraud generally renders voidable everything into which it enters, and court will look through any form of instrument or proceeding, no matter how solemn, in order to prevent a party from profiting by his own fraud, and it is immaterial that he has conformed to all formal requirements of law. *Turner v. E.*, 292NW257. See Dun. Dig. 3834.

Where it is reasonably clear that parties are not dealing at arm's length and, because of relations of parties and peculiar circumstances of case, a false representation as to value and a reliance thereon had produced a palpable fraud, strict rule that representations of value are mere expressions of opinion and trade talk yields to justice of case and resolves the representation to one of fact. *Gable v. N.*, 296NW525. See Dun. Dig. 3824.

While mere matter of disparity of intelligence and business experience is not of itself a sufficient ground for relief from contract, law does not ignore such disparity so as to protect positive, intentional fraud successfully practiced upon the simple-minded or unwary. *Id.* See Dun. Dig. 3830.

12. —Evidence.

Evidence held to sustain finding that written contract to provide home and board was entered into fairly and without fraud or undue influence, and that defendant had not breached it, and plaintiff was not entitled to recover consideration paid. *Holzgraver v. S.*, 289NW881. See Dun. Dig. 1815a.

Admissibility of tax assessment on question of value of farm in an action for damages for fraud in sale. *Rother v. H.*, 294NW644. See Dun. Dig. 3247.

13. —Questions for jury.

Whether a party relied upon false representations is a question for the jury. *Bulau v. B.*, 294NW845. See Dun. Dig. 3821.

The question of fraud is for jury unless evidence is conclusive. *Id.* See Dun. Dig. 3840.

15. Legality.

Contracts that obviously and directly tend in a marked degree to bring about results that law seeks to prevent cannot be made ground of a successful suit. *Kniefel v. K.*, 290NW218. See Dun. Dig. 1885.

An agreement in fraud of law is unenforceable. *Id.* See Dun. Dig. 1885.

Where creditor enters into a compromise agreement with federal land bank and land bank commissioner and farmer under Emergency Farm Mortgage Act, any contemporary agreement whereby farmer assumes additional obligation to creditor is in fraud of law and unenforceable, and federal land bank and land bank commissioner may intervene in action to enforce obligation, though they would not suffer any pecuniary loss by reason of the fraud. *Id.* See Dun. Dig. 1885.

A new and independent contract founded on a new consideration in relation to property which was subject matter of a prior illegal agreement is valid, where new contract does not seek to carry out or enforce any of unexecuted provisions of former agreement. *Geo. Benz & Sons v. H.*, 293NW133. See Dun. Dig. 1879.

Courts grant relief against wrongs and to enforce an existing right, although property involved was acquired by some past illegal act. *Id.*

Doctrine is discarded that general agreement to arbitrate ousts jurisdiction of courts, and are therefore illegal as against public policy. *Park Const. Co. v. I.*, 296NW475. See Dun. Dig. 499.

16. —Penalty or liquidated damages.

Agreement of car dealer to return "deposit" in case of failure to deliver new car, construed as a contract for liquidated damages in amount of allowance made for old car received and resold by dealer, held not so unreasonable as to constitute a penalty. *Stanton v. M.*, 296NW521. See Dun. Dig. 2537.

Provision in a contract for liquidated damages will be deemed a penalty and therefor unenforceable where liquidated damages so provided are so great as to bear no reasonable relation to amount of actual injury suffered by breach. *Id.*

18. Construction.

Ambiguity in a contract must be resolved so as to give effect to intent of parties. *Farmers & Merchants State Bank*, 288NW19. See Dun. Dig. 1816.

Construction of a contract is to be avoided which would lead to unjust results. *Id.* See Dun. Dig. 1824(40).

Words of an instrument are to be taken most strongly against party using them. *Id.* See Dun. Dig. 1832.

Contract must be construed strictly against drafting party. *Miller v. M.*, 289NW399. See Dun. Dig. 4659.

Substantive character of an instrument must govern though it is sprinkled with words which in law are of an inconsistent nature. *Minnesota Valley Gun Club v. N.*, 290NW222. See Dun. Dig. 1816.

When terms of a contract are expressed in language which is clear and unambiguous there is no room for construction or interpretation. *Lidenberg v. A.*, 291NW512. See Dun. Dig. 1817, (18).

Construction of a written contract is, as a rule, for the court, and it is only where ambiguity exists which may be solved by a jury's finding on disputed facts or questions surrounding circumstances that a verdict may aid court. *Id.* See Dun. Dig. 1841.

Cardinal rule in interpretation of written instruments is to ascertain intention of parties and to give effect to that intention if it can be done consistently with legal principles, but rules of interpretation are not inflexible, their purpose being to reach probable intent of parties to instrument. *Downing v. I.*, 291NW613. See Dun. Dig. 1816.

In construing written instruments actual intent of parties is to be deduced from entire instrument, taking into consideration, reconciling, and giving meaning to all of its parts so far as possible, including recitals as well as operative clauses; and, when so considered, language which has distinct meaning standing alone may in connection used, become doubtful or its meaning modified by other parts of instrument, including particular recitals. *Id.* See Dun. Dig. 1816.

There is no practical construction of a written instrument unless parties have adopted an interpretation of instrument to settle meaning as between themselves of ambiguous language. *First & American Nat. Bank of Duluth v. H.*, 293NW585. See Dun. Dig. 1820.

When sense of language used in an instrument is made or becomes plain, process of interpretation ends, since extraneous cannot be resorted to refute what is already apparent from instrument itself. *State v. Wm. O'Neil Sons Co.*, 296NW7. See Dun. Dig. 1817.

A practical construction of anything written is but an aid to interpretation and is not to be resorted to unless such aid is required. *Id.* See Dun. Dig. 1820.

19. Rescission and cancellation.

It is duty of party who has been induced to enter into a contract through fraud to act upon first opportunity after discovering such fraud, and to rescind contract by repudiating its obligations and restoring what has been received under it, if he desires to avail himself of his right to rescind. *Beck v. N.*, 288NW217. See Dun. Dig. 1188.

Equity will grant rescission of a transaction induced by fraud and false representation, if party injured makes timely application. *Id.* See Dun. Dig. 1196.

Parties are at liberty by mutual consent to void and terminate a prior unexpired contract of employment. *Lidenberg v. A.*, 291NW512. See Dun. Dig. 1807.

A woman does not become of legal age when she marries. *Op. Atty. Gen.* (33B-9), Sept. 28, 1940.

20. —Placing in status quo.

Corporation, not having sought rescission and having recovered secret profits made by its directors, may not mulct person dealing with directors and his non-director associates of their remaining interest in property which was open and apparent on face of contract made with corporation. *Risvoid v. G.*, 292NW103. See Dun. Dig. 1810.

21. Performance or breach.

In action for damages for breach of contract to give sales right, evidence held sufficient to show that defendant accepted one of several alternatives mentioned in a memorandum, either by expressed oral acceptance or implied assent to plan. *Foster v. B.*, 291NW505. See Dun. Dig. 1805.

In absence of an agreement as to time of performance, law requires that a contract be performed within a reasonable time. *Parsons v. T.*, 295NW907. See Dun. Dig. 1785.

22. —Damages.

On breach of a contract injured party may sue upon the contract or use the breach as foundation for a tort action, but having recovered in action based upon contract cannot seek other recoveries in tort action. *Cashman v. B.*, 288NW732. See Dun. Dig. 1805a.

Invasion of a legal right imports a damage, but damages are susceptible of proof and he who claims them must prove them, and absent proof of actual loss only nominal damages are recoverable for contractual obligation. *Geo. Benz & Sons v. H.*, 293NW133. See Dun. Dig. 2561.

23. Agency.

24. —Evidence.

Successive purchases by an automobile finance company of paper from an automobile dealer do not require an inference that their relationship is that of principal and agent where the transactions between them show the relationship to be that of vendor and vendee, as affecting usury. *Dunn v. M.*, 289NW411. See Dun. Dig. 150.

25. —Scope and extent of authority.

Favorable assurance of clerk in post office as to genuineness of postal orders, in response to bank's inquiry when orders were presented to it for payment, did not prejudice government's rights. *U. S. v. Northwestern Bank & Trust Co.*, (DC-Minn), 35FSupp484.

Principal is responsible for representations and warranties made by salesman in connection with lease of

machine. *Jaeger Mach. Co. v. M.*, 289NW51. See Dun. Dig. 152.

26. —Notice to agent.

Court did not err in submitting to jury salesman's authority to accept notice of termination of lease and disposition of machine let. *Jaeger Mach. Co. v. M.*, 289NW51. See Dun. Dig. 152.

27. —Ratification and waiver.

Ratification is only effectual when unauthorized act was done by a person professedly acting as agent of person or body sought to be charged as principal. *City of Minneapolis v. C.*, 288NW706. See Dun. Dig. 179(37).

In action for damages for fraud in sale of land, plaintiff is entitled to inquire on question of ratification whether defendant ever offered to return purchase price after learning agents made misrepresentations, but counsel should so phrase question that it will not convey that there was a legal duty save to avoid a ratification under the rule that a principal ratified by asserting a right to the fruits of the agents' act when the action was brought. *Rother v. H.*, 294NW644. See Dun. Dig. 189.

28. —Liability of agent.

Equity will impose a constructive trust on land acquired by defendant as result of information received at a time when he was, for all practical purposes, an agent for plaintiff and under an obligation, by reason of his employment, to report such information, even though tract was of a type only occasionally purchased by his employer and notwithstanding absence of a finding that plaintiff would have purchased land had he known of it. *Whitten v. W.*, 289NW509. See Dun. Dig. 194, 9917.

Principal must establish by a fair preponderance of evidence that agent has actually received particular thing for which he is sought to be held. *Raymond Farmers Elevator Co. v. A.*, 290NW231. See Dun. Dig. 206.

In action by elevator company against manager for an accounting, evidence held insufficient to sustain finding that manager converted certain items of grain, in view of defective scales. *Id.* See Dun. Dig. 206.

An agent cannot deal with his principal as an adverse party in a transaction connected with agency whether damage results or not, and manager of an elevator could not engage in purchasing grain from his principal and in trucking it to other places for sale, notwithstanding that principal did not engage in trucking grain to sell, and manager was liable for gross profit made and could not deduct expense of operating truck owned by him. *Id.* See Dun. Dig. 194.

28½. Payment.

When payment of money to a village is made under protest, with possibility of fine or imprisonment if it is not made and in order to protect payor's right to proceed with lawful business, he is not a volunteer in such sense as to prevent recovery. *Moore v. V.*, 289NW837. See Dun. Dig. 7462.

Whether a transfer of money or thing will operate as payment of a debt is determined by intention of parties, and it must be received as well as paid in satisfaction of the debt. *State v. Tri-State Tel. & Tel. Co.*, 295NW511. See Dun. Dig. 7438.

30. Accord and satisfaction and compromise and settlement.

National Sur. Corp. v. Wunderlich, (CCA8), 111F(2d) 622, rev'g on other grounds 24FSupp640.

Giving of a note and its subsequent payment indicates a settlement of whatever claims there may have been between the parties. *Sickmann's Estate*, 289NW832. See Dun. Dig. 1525.

In action for damages for breach of contract to give certain sales rights wherein a specific contract was alleged and sought to be established it was prejudicial error to permit proof of a subsequent agreement which in nature closely parallels an offer to settle. *Foster v. B.*, 291NW505. See Dun. Dig. 3425.

Pledgee of a chose in action, under extreme circumstances indicating that loss to all concerned would have resulted if it had not accepted exchange of securities provided for by reorganization in bankruptcy of debtor, held properly to have accepted exchange as a compromise where procedure resulting in exchange was participated in by representatives of pledgor's estate without objection either to procedure or result. *First & American Nat. Bank of Duluth v. W.*, 292NW770. See Dun. Dig. 1520.

An injured party who has accepted satisfaction, from whatever source it may come, cannot recover again for same injury. *Driessen v. M.*, 294NW206. See Dun. Dig. 8371.

Compromise of a disputed claim is supported by valuable consideration. *Connors v. U.*, 296NW21. See Dun. Dig. 1520.

31. Gifts.

Legal elements of a gift are delivery, intention to make a gift on part of donor, and absolute disposition by him of thing which he intends to give another. *Owens v. O.*, 292NW89. See Dun. Dig. 4020.

Where a chattel is delivered to a party for his gratuitous use with authority to consume a part of it by such use and party is to return part which is not consumed, there is a gift of part which is consumed and a bailment for gratuitous use of bailee of part which is to be returned. *Ruth v. H.*, 296NW136. See Dun. Dig. 4020.

A donor of a chattel owes donee duty of warning him of only those defects of which donor is aware and which might imperil donee by intended use of chattel. *Id.*

32. Suretyship.

For cases respecting fidelity bonds, see §3710.

34. —Discharge.

Fraud of principal in a bond inducing surety to execute it is not a defense in action by obligee against surety. *Noefus v. N.*, 296NW579. See Dun. Dig. 9098.

35½. Guaranty.

Contention that written guaranty executed to trust company prior to its consolidation with plaintiff bank was not relied upon by plaintiff in making loans to defendant subsequent to consolidation, held frivolous, where guaranty was a continuing one and was in possession of plaintiff at all times subsequent to consolidation. *Chase Nat. Bank v. B.*, (DC-Minn), 32FSupp230.

Damage caused by negligence of railroad to a pile driver of a sub-contractor working on its right of way held within terms of bond of general contractor indemnifying railroad against damage to property "arising in any manner out of or in any manner connected with the said work". *Northern Pac. Ry. Co. v. T.*, 288NW226. See Dun. Dig. 4337.

35¾. Indemnity.

Absent attempted escape from absolute duty to public or third person, a party may, without violation of public policy, contract for indemnity against damage resulting from his own negligence. *Northern Pac. Ry. Co. v. T.*, 288NW226. See Dun. Dig. 1872, 4334.

Indemnity contract should be construed fairly to accomplish its purpose, rather than being subjected to an arbitrary or strict interpretation. *Id.* See Dun. Dig. 4335.

36. Estoppel.

There can be no estoppel without a deceptive assurance upon faith of which one claiming estoppel has acted, to his detriment if estoppel is not allowed. *First & American Nat. Bank of Duluth v. W.*, 292NW770. See Dun. Dig. 3187.

A promise relating to intended abandonment of an existing right which influences the promisee to act to his prejudice may be basis of an estoppel, where substantial injustice will result unless promise is enforced, although there is no consideration for the promise. *Thom v. T.*, 294NW461. See Dun. Dig. 3188.

Where estoppel is based on a party's silence, there must be not only silence, but a duty to speak under circumstances of the case, and ordinarily mere silence will not work an estoppel where a party's right appears of record. *Conner v. C.*, 294NW650. See Dun. Dig. 3209 (80).

A party cannot claim an estoppel unless truth was unknown to him at time he acted. *Id.* See Dun. Dig. 3185.

Estoppel is based on proposition that party estopped is at fault, and estoppel by conduct might more appropriately be called estoppel by misconduct. *Id.* See Dun. Dig. 3186.

37. Patents.

Royalty agreement held to give licensee right to terminate upon ten day notice, notwithstanding supplemental agreement including additional patent omitted any mention of cancellation clause contained in original contract. *Markwood v. O.*, 289NW830. See Dun. Dig. 7422.

Patented part of machine may not be reproduced for use without consent of patentee, even by the state. *Op. Atty. Gen.* (980a-11), Aug. 8, 1940.

CHAPTER 51

Interest and Negotiable Instruments

INTEREST

7036. Rate of interest.

1. In general.

State law to be applied in determining validity of a chattel mortgage questioned on ground that note secured thereby isurious is that intended by parties. *State v. Rivers*, 287NW790. See Dun. Dig. 1540.

The rule of *American Surety Co. of New York v. J. N. Peyton*, 186 Minn. 588, 244NW74, has no application to a

case where all creditors stand, as against the insolvent debtor, on an equal footing. *Farmers & Merchants State Bank*, 288NW19. See Dun. Dig. 824e.

Where bank entered into an agreement with its depositors and creditors whereby former was to treat a specified amount of a certain judgment as an asset, amount remaining to be held in trust for latter, and that all recoveries made on such asset should be first applied toward liquidation of the bank's "share", judgment debtor being in process of liquidation, and extent of reorganized