

CHAPTER XLIII.

OF ACTIONS RELATING TO REAL PROPERTY.

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TITLE I.

ACTIONS CONCERNING AND RIGHTS IN REAL PROPERTY.

(This Title is Chapter LXXV. of the Statutes of 1866.)

SECTION 1 (AS AMENDED BY ACT OF MARCH 7, 1867). *Action to determine adverse claim to real property.*—An action may be brought by any person in possession, by himself, or his tenant of real property, against any person who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse claim, estate, or interest, and any person having or claiming title to vacant or unoccupied real estate may bring an action against any person claiming

an estate or interest therein, adverse to him, for the purpose of determining such adverse claim and the rights of the parties respectively.

S. L. 1867, 117.

Plaintiff must be in possession, *Steele v. Fish*, 2 Minn. 153; *Meighen et al. v. Strong*, 6 Minn. 177. Above cases and *State v. Bachelder*, 5 Minn. 223, *Donnelly v. Simonton*, 7 Minn. 179, commented on and explained in *Hamilton et al. v. Battin et ux.*, 8 Minn. 403; *Eastman et al. v. Lamprey*, 12 Minn. 153; *Murphy v. Hinds*, 15 Minn. 182; but *vide Donnelly v. Simonton*, 7 Minn. 179.

Land must be vacant or plaintiff in possession, *Couklin v. Hinds*, 16 Minn. 457.

Rights of plaintiff against third parties immaterial, *Wilder v. City of St Paul*, 12 Minn. 192.

When corporate authorities may bring to settle rights of easement, *Village of Mankato v. Wildard et al.*, 13 Minn. 13.

Defendant in possession sufficient defense, *Weisberger v. Tenny*, 8 Minn. 456.

What matters are embraced within the purview of the statute, *vide Bidwell v. Webb*, 18 Minn.

59. *Lien upon land not an estate or interest*, *Brackets v. Gilmore*, 15 Minn. 245.

SEC. 2 (ACT OF MARCH 1, 1870). *How to proceed when two or more claim from the same grantor.*—Whenever lots or tracts of real estate are claimed in severalty by two or more persons from or under conveyance from the same grantor as the common source of title, and a claim or title thereto is set up or made by any one else as against the title of such grantor, any one claiming under such grantor may bring an action on behalf of himself and all others who may come in and become parties to such action, against the person so claiming adversely, to have the title of such grantor perfected, settled, or quieted, as to the lots or real estate claimed by the plaintiff and others who may become parties to the action, and in such action any person who claims title to property by conveyance from or under the same grantor or common source as the plaintiff, and when title thereto is disputed or controverted by the same defendant upon the same ground as that of the plaintiff, may come in as of course and become a party in such action, by filing a statement therein in the form of a complaint, setting forth the property he claims, and his source of title, and may have his rights adjudicated the same as the plaintiff who commenced the action. The answer of the defendant to the complaint of the plaintiff shall be taken and considered as an answer also to all who may thus come in and become parties to such action.

S. L. 1870, 118.

SEC. 3 (2). *Effect of disclaimer or default.*—If the defendant in such action disclaims in his answer any interest or estate in the property, or suffers judgment to be taken against him without answer, the plaintiff cannot recover costs.

SEC. 4 (3). *Plaintiff must show denial of his right, when.*—In an action for the recovery of dower, before admeasurement, or by a tenant in common, or joint tenant of real property, against a co-tenant, 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.

SEC. 5 (4). *Effect of termination of right during pendency of 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.

SEC. 6 (5, AS AMENDED BY ACT OF MARCH 7, 1867). *Who may have new trial in action to recover real property.*—Any person against whom a judgment is recovered, in an action for the recovery of real property, may within six months

after written notice of such judgment, upon payment of all costs and damages recovered thereby, demand another trial by notice in writing to the adverse party or his attorney in the action, and thereupon the action shall be re-tried and may be brought to trial by either party.

S. L. 1867, 118.

When plaintiff in action not entitled to new trial, *Howes v. Gillett*, 10 Minn. 397.

SEC. 7 (6). *Judgment, how entered in trial under last section.*—The judgment given on a trial to be had under the last section, 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.

Statute limits right to two trials, and declares second judgment final, etc., *Baze v. Arper*, 6 Minn. 220. Payment of costs, effect of on right to new trial, *Whitaker v. McClung et al.*, 14 Minn. 170. Plaintiff not entitled to second trial as a matter of right, on paying costs, etc., *Howes v. Gillett*, 10 Minn. 397. Conditions precedent to a re-trial, *Davidson v. Lamprey*, 16 Minn. 445.

SEC. 8 (7). *Rule of damages—improvements allowed as set-off, when.*—Damages for withholding the property recovered shall not exceed the fair value 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 set-off against the damages of the plaintiff for the use of the property.

SEC. 9 (8). *Buildings or fences erected in good faith, removable, when.*—Any person who erects any building, tenement, or fences upon land, in good faith, and having color of title, and good reason to believe that the legal title to such lands is or was vested in him, when, in fact, such title was or is not in him, and he has no legal or equitable rights whereby he can enforce a conveyance to him of such title, such person shall be entitled to and may remove such buildings, tenements, or fences from said land, doing no unnecessary damage to the land, and in so doing shall only be liable for the actual damage done the land: *provided*, that no person shall remove a building or fence under the provisions of this section, unless he removes the same within sixty days after the determination of the action or proceeding, respecting the title to the premises on which such building or fence is erected, as contemplated herein, or within sixty days after notice to remove the same, given by the holder of the legal title, unless within said sixty days an action is commenced and prosecuted to try such question of title.

SEC. 10 (9). *Court may grant order for survey of property.*—The court in which an action is pending for the recovery of real property, may on motion, upon notice by either party, and for cause shown, grant an order allowing to such party the right to enter upon the property and make survey and measurement thereof for the purpose of the action.

SEC. 11 (10). *Order shall contain, what.*—The order shall describe the property, and a copy thereof 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 and measurement, but if any unnecessary injury is done to the property, he is liable therefor.

SEC. 12 (11). 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.

Ejectment will not lie against mortgagee in possession, *Face v. Chadderton*, 4 Minn. 499.

Owner of mortgage of real estate not entitled to possession without foreclosure, *Donnelly v. Simonton*, 7 Minn. 197; *Adams v. Corrison*, *ib.* 456.

SEC. 13 (12). *Purchaser of land sold on execution may recover for injury thereto after sale.*—When real property is sold on execution, the purchaser thereof, or any person who may have succeeded to his interest, may, after his estate becomes absolute, recover damages for injury to the property by the tenant in possession, after the sale, and before possession is delivered under the conveyance.

SEC. 14 (13). *Action not prejudiced by sale of land while proceedings are pending.*—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 such person, 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.

SEC. 15 (14). *District court may pass title to land by judgment—effect of judgment when recorded.*—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 judgments into effect; and such judgment being recorded in the registry of deeds of the county where such real estate is situated, shall, while in force, be as effectual to transfer the same as the deed of the defendant.

SEC. 16 (15). *Action by landlord against tenant, equivalent to demand and re-entry—tenant, how restored to possession.*—When in case of a lease of real property, and the failure of the tenant to pay rent, the landlord has a subsisting right to re-enter for such failure, he may bring an action to recover possession of the property, and such action is equivalent to a demand of the rent and a re-entry upon the property; but if at any time before the expiration of six months after possession obtained by the plaintiff on recovery in the action, the lessee or his successor in interest, as to the whole or part of the property, pays to the plaintiff, or brings into court the amount of rent then in arrear, with interest and the costs of the action, and performs the other covenants on the part of the lessee, he may be restored to the possession, and hold the property according to the terms of the original lease.

Re-entry by landlord on default of rent, *Byrane v. Rogers*, 8 Minn. 281.

SEC. 17 (16, AS AMENDED BY ACT OF MARCH 5, 1869). *Parties to file notice of lis pendens—what to contain—to be recorded.*—In all actions heretofore or hereafter commenced, in which the title to, or any lien upon, or interest in real property shall be affected, involved, or brought in question by either party, any party to such action may, at the commencement, or any time during the pendency thereof, file for record in the office of the register of deeds of each county in which the real property so affected, involved, or brought in question, or some part thereof, is situated, 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 the county affected, involved, or brought in question thereby. And when any pleading in such action is amended by altering the description of the premises affected, involved, or brought

in question, or so as to extend the claim against such premises, the party filing such notice shall file a new notice. And the register of deeds shall record all such notices in the same book and in the same manner as mortgages are recorded. From the time of filing 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 such notice to the real property in such notice described. The said notice may be discharged and the effect thereof annulled by an entry to that effect, on the margin of the record thereof, by the party filing the same, or his attorney, in presence of the register of deeds, or by an instrument in writing, executed in the manner provided by law, for the execution of deeds of conveyance, and such register shall thereupon enter a minute of the same on the margin of the record of such notice.

S. L. 1869, 90.

Purchaser takes title subject to *lis pendens*, *Hart v. Marshall*, 4 Minn. 294.

SEC. 18 (17). *Plaintiff may serve written notice on what defendants—effect of such notice.*—If in any such action there are defendants against whom no personal claim is made, the plaintiff may serve upon such defendants at the time of the service of the summons on them, a written notice, subscribed by the plaintiff or his attorney, 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 such defendant on whom such notice is so served unreasonably defends the action, he shall pay full costs to the plaintiff.

SEC. 19 (18). *Person in possession of land, how liable for rent.*—Every person in possession of land, out of which any rent is due, whether it was originally demised in fee, or for any other estate of freehold, or for any term of years, shall be liable for the amount or proportion of rent due from the land in his possession, although it is only a part of what was originally demised.

SEC. 20 (19). *Such rent recoverable in civil action—evidence in such case.*—Such rent may be recovered in a civil action, and the deed, demise, or other instrument, in writing, if there is any, showing the provisions of the lease, may be used in evidence by either party, to prove the amount due from the defendant.

SEC. 21 (20). *Limitation of two preceding sections.*—Nothing contained in the two preceding sections shall deprive landlords of any other legal remedy for the recovery of their rent, whether secured to them by their leases or provided by law.

SEC. 22 (21). *Estates at will, how determined.*—Estates at will may be determined by either party by three months' notice in writing for that purpose, given to the other party; and when the rent reserved is payable at periods of less than three months, the time of such notice shall be sufficient if it is equal to the interval between the times of payment; and in all cases of neglect or refusal to pay the rent due on a lease at will, fourteen days' notice to quit, given in writing by the landlord to the tenant, is sufficient to determine the lease.

SEC. 23 (22). *Rights of aliens as to real estate.*—Aliens may take, hold, transmit, and convey real estate; and no title to real estate shall be invalid on account of the alienage of any former owner.

SEC. 24 (23). *Reversioners may sue for injury to inheritance.*—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.

SEC. 25 (24). *One joint tenant may maintain action against co-tenant.*—One joint tenant or tenant in common, and his executors or administrators, may maintain an action against his co-tenant, for receiving more than his just proportion of the rents or profits of the estate owned by them as joint tenants or tenants in common.

SEC. 26 (25). *Nuisance defined—action to abate or enjoin.*—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, and the subject of an action; such 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.

Title in fee not necessary to maintain, *Dorman v. George*, 12 Minn. 451. No action will lie where no injuries have resulted from removal of nuisance, *Couklin v. Co. Coms. of Fillmore Co.* 13 Minn. 454. When sewer is a nuisance, *O'Brien v. City of St Paul*, 18 Minn. 176. An excavation and embankment across roadway a nuisance, when, *Cleveland v. City of St Paul*, *ib.* 279.

SEC. 27 (26). *Action for waste—rule of damages.*—If a guardian, tenant by the curtesy, in dower, 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 action there may be judgment for treble damages, forfeiture of the estate of the party offending, and eviction from the property.

SEC. 28 (27). *Judgment in such case.*—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.

SEC. 29 (28). *Rule of damages in action for willfully cutting trees, etc.*—Whoever cuts down or carries off any wood or 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 on the street or highway in front thereof, without lawful authority, is liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor, in a civil action in any court having jurisdiction, except as provided in the next section.

SEC. 30 (29). *When damages may be mitigated.*—If upon trial of such action 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, judgment shall be given for only the single damages assessed in the action.

SEC. 31 (30). *Cutting timber on highways.*—Nothing in the last two sections authorizes the recovery of more than the just value of the timber taken from uncultivated wood land for the repair of a public highway or bridge upon the land, or adjoining it.

SEC. 32 (31). *Damages for forcible eviction.*—If a person put out of real property in a forcible manner without lawful authority, or being so put out, is afterwards kept out by force, recovers damages therefor, judgment may be entered for three times the amount at which the actual damages are assessed.

SEC. 33 (32). *Rule of damages in case of forcible entry or detention.*—In case

of forcible entry or forcible detention, if a person, claiming in good faith under color of title to be rightfully in possession, so put out, or kept out, recovers damages therefor, judgment may be entered in his favor for three times the amount at which the actual damages are assessed.

SEC. 33A.

AN ACT

TO PROTECT BONA FIDE OCCUPANTS OF REAL ESTATE.

Be it enacted by the Legislature of the State of Minnesota:

Sec. 1. Right of certain occupants of land to compensation for improvements.—Where any person under color of title in fee, and in good faith, has peacefully taken possession of any land for which he has given a valuable consideration, or when any person has taken possession of any 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 person has no actual notice of any defects invalidating such deed, and such deed is regular upon its face, 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 all improvements which he or they may have made upon said 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.

Sec. 2. Provisions to secure such occupants their outlay for improvements, taxes, etc.—In any action to try the title to land the occupant may in addition to his other defenses allege the amount and value of all improvements made by himself or those under whom he claims, and also the amount of all taxes and assessments paid upon such land by himself or those under whom he claims, and if the claim be under an official deed, the purchase money paid therefor, the claimant may reply alleging the value of the premises without the improvements at the time of the commencement of the action, and also the value of the yearly rent of the land without the improvements during the possession of the occupant. In case the title is found to be in the claimant, the jury or court, in case the action is tried without a jury, shall assess the value of all improvements made and all taxes or assessments paid upon the land by the occupant, or those under whom he claims, with interest at seven per cent., and if his claims be under an official deed, regular upon its face, and without actual notice of any defect invalidating the same, shall also find the purchase money paid by him or those under whom he claims, with interest thereon at seven per cent. The jury or court, in case of trial by the court, shall also assess the value of the land at the time of commencing the action, without the improvements, and also the value of yearly rent thereof during the occupant's possession.

Sec. 3. When execution for possession may issue.—Should claimant succeed in the action, execution for possession shall not issue except as herein provided, unless within one year from the rendition of the verdict or the finding of the court, 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 or assessments, and also the purchase money if 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 occupant's possession.

Sec. 4. Further provisions for settling the title.—Unless the occupant claims

under an official deed given either to himself or to those under whom he claims, as provided in section one of this act, the claimant may within thirty days after rendition of the verdict or finding of the court in his favor, serve upon the occupant a written demand that within one year he pay claimant the sum assessed as the value of the land without improvements, less the taxes or assessments paid thereon as aforesaid with interest as aforesaid. Such demand shall be served and the service proved as in case of a summons, and shall then be filed with the clerk of the court where the judgment was rendered. If occupant do not, within the one year after the service of such demand, pay into court for claimant the amount so demanded, he shall forfeit all claim to compensation, and execution may then issue for the possession of the land. If he do so pay into court the amount demanded, the court shall by decree confirm the title in him. But when the occupant claims under an official deed, as provided in section one of this act, which is regular upon its face, and occupant had no notice of any defect making it void, execution shall not issue unless claimant within one year pay into court the value of improvements, taxes, assessments, purchase money, and interest, as provided in section three of this act: *provided*, that when claimant has had notice, either actual or constructive, of occupant's possession, or when the claim of the occupant is derived through or under any entry in the land office of the United States, or the official certificate, duplicate, or receipt thereof, the provisions of this section shall not apply, and execution shall not issue unless plaintiff comply with the provisions of section three of this act.

Sec. 5. "Improvements" defined.—The word "improvements" as used in this act shall be construed to include all kinds of buildings, fences, ditches, draining, grubbing, clearing, breaking, and all other necessary or useful labor of permanent value to the land.

Sec. 6. Occupant may remove his crops.—The occupant, in case of ejection, shall be entitled to enter the land and gather and remove all crops sown thereon previous to the entry of judgment against him.

Sec. 7. Application of the statute.—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, but which action is in effect one testing the validity of the title thereto, all the foregoing provisions of this act shall so far as possible be complied with, and the value of all improvements, taxes, and assessments, and 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 remains in favor of occupant after such set-off, such excess may be set off against any judgment or judgments that claimant or those claiming under him may subsequently obtain in any such or similar action relating to said land.

Sec. 8. When land has depreciated.—In case the land has depreciated in value since its purchase at an official sale, the jury or court, in case of trial by the court, may allow such part only of the purchase money as in their discretion they may see fit.

Sec. 9. Good faith presumed, when.—When occupant holds as heir or devisee, or as grantee, either immediate or remote, of any person who is a non-resident of this state, the good faith of the original taker shall be presumed.

Sec. 10. Act applies, when.—All the provisions of this act shall apply to

cases where occupant is not, as well as where he is, in actual possession, and also to cases where the action is brought by the occupant himself to determine an adverse claim.

Sec. 11. Act takes effect.—This act shall take effect and be in force from and after its passage.

Approved March 10, 1873.

TITLE II.

ACTIONS FOR THE PARTITION OF REAL PROPERTY.

(*This Title is Chapter LXXIV. of the Statutes of 1866.*)

SEC. 34 (1). *Who may have partition of real property.*—When two or more persons are interested in real property, as joint tenants, or as tenants in common, in which one or more of them have an estate of inheritance, or for life or years, an action may be brought by one or more of such persons against the others, in the district court of the proper county, for a partition thereof, according to the respective rights and interests of the persons interested therein, or a sale of such property, or a part of it, if it appears that a partition cannot be had without great prejudice to the owner.

SEC. 35 (2). *Summons, to whom addressed.*—The summons shall be addressed by name to all the owners and lien holders who are known, and generally to all persons unknown, having or claiming an interest in the property.

SEC. 36 (3). *Complaint, what to set forth.*—The interest of all persons in the property, whether by way of ownership or lien, and whether such persons are known or unknown, shall be set forth in the complaint specifically and particularly, as far as known to the plaintiff, and if any one or more of the parties or the share or quantity of interest of any of the parties is unknown to the plaintiff or uncertain or contingent, or the ownership of the inheritance depends upon executory devise, or the remainder is a contingent remainder so that such parties cannot be named, that fact shall be set forth in the complaint. The complaint shall also contain an allegation of the cash value of the property, and shall be verified.

SEC. 37 (4). *Action for partition, how governed.*—Such action shall be governed by the rules and provisions applicable to civil actions, including the right of appeal, except that, when service of the summons is made by publication, it shall be accompanied by a brief description of the property sought to be divided, and except as herein otherwise expressly provided.

SEC. 38 (5). *Judgment of partition shall be rendered, when.*—Judgment of partition shall not be rendered in any case until the title to the property and the rights of the parties are established by evidence, unless upon written stipulation of the parties to be affected thereby.

SEC. 39 (6). *Judgment, how rendered.*—The title and rights of the parties, respectively, being duly proved or admitted, the court shall render judgment that partition be made accordingly, and appoint three disinterested and judicious citizens of the county referees, to make partition of the estate, and set off each share of the several persons interested, according to their respective rights as determined in the action.

SEC. 40 (7). *Property, how divided—duty of referees.*—When partition is made, the referees shall divide the property, and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties, as determined by the court, designating the several portions by proper land marks, and may employ a surveyor, with the necessary assistants, to aid them therein. They shall make report of their proceedings, specifying the manner of executing their trust, describing the property divided and the shares allotted to each party, with a particular description of each share.

SEC. 41 (8). *Power of court—effect of judgment.*—The court may confirm or set aside the report, and, if necessary, appoint new referees; upon the report being confirmed, judgment shall be rendered that such partition be effectual for ever, which judgment is binding and conclusive:

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

Second. On all persons interested in the property who may be known, to whom notice has been given of the application for partition, by publication; and,

Third. On all other persons claiming from such parties or persons or either of them.

SEC. 42 (9). *What persons not affected by judgment.*—But such judgment and partition cannot affect tenants or persons having claims as tenants in dower, by the curtesy, or for life, to the whole of the property which is the subject of the partition; nor can such judgment and partition preclude any person except such as are specified in the last section, from claiming title to the property in question, or from controverting the title of the parties between whom the partition is made.

SEC. 43 (10). *Lien, how affected by partition.*—When there is a lien on an undivided interest or estate of any of the parties, such lien, if partition is made, is thenceforth a charge only on the share assigned to such party, but such share shall be first charged with its just proportion of the costs of the partition in preference to such lien.

SEC. 44 (11). *Fees and expenses, how ascertained and by whom paid.*—The expenses of the referees, including those of a surveyor and his assistants, when employed, shall be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by law to the referees, shall be paid by the plaintiff, and may be allowed as part of the charges.

SEC. 45 (12). *Court may order property to be sold, when.*—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 made without great prejudice to the owners, the court, except as provided in the next section, may order a sale thereof, 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 portion thereof, is so situated that a partition thereon cannot be made without great prejudice to the owners, and the court is satisfied that such report is correct, it may

thereupon by an order direct the referees to sell the property or portion so situated.

SEC. 46 (13). *No sale allowed, when.*—When there are liens on the property amounting to more than the value thereof as stated in the complaint, or when, after due examination, it appears probable that the property will not sell for a sum in cash equal to the amount of the liens thereon existing, with costs and expenses of sale, no sale shall be made.

SEC. 47 (14). *Property not capable of division, may be set off or sold.*—When the premises consist of a mill or other tenement which cannot be divided without damage to the owners, or when any specified part of the estate is of greater value than either party's share and can not be divided without damage to the owners, the whole estate, or the part thereof so incapable of division, may be set off to any one of the parties who will accept it, he paying to any 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 the part, to each of the parties alternately for certain specified times, in proportion to their respective interests.

SEC. 48 (15). *Occupant liable to co-tenants, how.*—When the whole or any specific part of the premises is thus assigned, the person entitled for the time being to the exclusive occupancy, shall be liable to his co-tenants for any injury to the premises, 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.

SEC. 49 (16). *Rights of co-tenant in occupancy of premises assigned—damages.*—While an estate is in the exclusive occupancy of a co-tenant under such an assignment, he shall be entitled to the same remedy against whoever 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 shall be entitled to 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 by force of this or the preceding section, shall be apportioned and divided among them according to their respective rights, by the court in which the judgment is recovered.

SEC. 50 (17). *Life estates, etc., how disposed of in case of sale.*—When a part of the property only is ordered to be sold, if there is an estate by the curtesy, in dower or for life, or 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 to be sold.

SEC. 51 (18). *Liens to be proved.*—In every case proof shall be made of the existence, priority, and amount 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, and if said liens do not amount to the value of the premises as admitted or proved, a sale may be ordered by referees under the direction of the court.

SEC. 52 (19). *Proceeds of sale, how applied.*—The proceeds of the sale of the incumbered property shall be applied, under the direction of the court, as follows:

First. To pay its just proportion of the general costs of the action.

Second. To pay the costs of the reference.

Third. To satisfy and cancel of record the several liens, 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.

Fourth. The residue among the owners of the property sold, according to their respective shares.

SEC. 53 (20). *Sale not to be delayed, by what proceedings.*—The proceedings, to ascertain the amount of incumbrances, and to determine their priority, as above provided, or those herein authorized to determine the rights of parties to funds paid into court, shall not delay the sale nor affect any other party whose rights are not involved in such proceedings.

SEC. 54 (21). *Claims of parties to proceeds of sale, how determined.*—When the proceeds of sales of any shares or parcels, belonging to persons who have become parties to the action, and who are known, are paid into court, the action may be continued as between such parties, for the determination of their respective claims thereto, which shall be ascertained and adjudged by the court; further testimony may be taken in court, or by a referee, at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy, by pleadings, as in an original action.

SEC. 55 (22). *Sales, how made.*—All sales of real property made by referees under this chapter, shall be made by public auction to the highest bidder for cash, upon notice published 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, that shall be stated in the notice.

SEC. 56 (23). *Estates for life or years may be set off or sold.*—When the estate of a tenant in dower, or by the curtesy, or for life, or years, in the whole or any part of the property in question, has been admitted by the parties, or ascertained by the court to be existing at the time of the order for sale, and the person entitled to such estate has been made a party to the action, such estate may be first set off out of any part of the property, and a sale made of such parcel, subject to the prior unsold estate of such tenant therein; but if in the judgment of the court, a due regard to the interest of all the parties requires that such estate be also sold, the sale may be so ordered.

SEC. 57 (24). *Effect of sale on such estate.*—If a sale of the property, including such estate, is ordered, the estate and interest of every such tenant or person passes thereby; and the purchaser, his heirs and assigns, shall hold the property, discharged from all claims, by virtue of such estate or interest, whether the same relate to the individual share of a joint tenant, or tenant in common, or to the whole, or any part of the property sold.

SEC. 58 (25). *Gross sum allowed for dower, etc.*—The persons entitled to such estate, in dower, tenancy by curtesy, or tenancy for life, or years, whose estate has been sold, are entitled to receive such sums in gross as may be deemed, upon principles of law applicable to annuities, a reasonable satisfaction for such estate, and which the person so entitled may consent to accept instead thereof, by an instrument under seal duly acknowledged or proved, in the same manner as deeds for the purpose of record.

SEC. 59 (26). *Amount, how ascertained.*—If such consent is not given at or before the report of sale, the court shall ascertain and determine what proportion

of the proceeds of the sale, deducting expenses, will be a just and reasonable sum to be invested for the benefit of the person entitled to such estate in dower, by the curtesy, or for life, and order the same to be deposited in court for that purpose.

SEC. 60 (27). *Proportions of proceeds of sale to be invested, how ascertained.*—The proportions of the proceeds of the sale to be invested, shall be ascertained and determined in the several cases, as follows :

First. If an estate in dower is included in the order of sale, its proportion shall be one-third of the proceeds of the sale of the property; or of the sale of the individual share in such property, upon which the claim of dower existed.

Second. If an estate by the curtesy, or other estate for life, or years, is included in the order of sale, its proportion shall be the whole proceeds of the sale of the property, or of the sale of the individual share thereof in which such estate may be. And in all cases the proportion of the expenses of proceedings shall be deducted from the proceeds of the sale.

SEC. 61 (28). *Court to protect rights of parties unknown.*—If the persons entitled to such estate in dower, by the curtesy, or for life, or years, are unknown, the court shall provide for the protection of their rights, in the same manner, as far as may be, as if they were known and had appeared.

SEC. 62 (29). *Value of inchoate right of dower to be ascertained, and amount thereof invested.*—In all cases of sales in partition, when it appears that a married woman has an inchoate right of dower in any of the property, divided or sold, or that any person has a vested or contingent future right or estate therein, the court shall ascertain and settle the proportional value of such inchoate, contingent, or vested right or estate, according to the principles of law applicable to annuities and survivorships, and direct such proportion of the proceeds of the sale to be invested, secured, or paid over, in such manner as to protect the rights and interests of the parties.

SEC. 63 (30). *Dower may be released.*—A married woman may release such right, interest, or estate to her husband, and acknowledge the same in the manner required by law, in respect to the acknowledgment of deeds by married women, before any officer authorized to take acknowledgment of deeds, or if executed out of this state, before any officer residing in the state, territory, district, or county where the acknowledgment is made, who is authorized to take the acknowledgment of deeds, to be recorded in this state. Upon the release, the share of the proceeds of the sale arising from her contingent interest shall be paid to her husband, and the release, or the payment, investment, or otherwise securing of a share of the proceeds of a sale shall be a bar against such right, estate, or claim.

SEC. 64 (31). *Terms of sale announced—lots sold separately.*—The terms of the sale shall be made known at the time ; and if the premises consist of distinct farms or lots they shall be sold separately.

SEC. 65 (32). *Parties forbidden to be purchasers, sale void, when.*—Neither of the referees, nor any person for the benefit of either of them, can be interested in the purchase, nor can a guardian of an infant party be interested in the purchase of any real property, being the subject of the action, except for the benefit of the infant. All sales contrary to the provisions of this section are void.

SEC. 66 (33). *Referees to make report of sale—report to be filed.*—After completing the sale, the referees shall report the same to the court, with a description

of the different parcels of land sold to each purchaser, the name of the purchaser, the price paid or secured, the terms and conditions of the sale; the report shall be filed in the office of the clerk of the district court of the county where the property is situated.

SEC. 67 (34). *Order on confirmation of report, shall specify, what.*—If the sale is confirmed by the court an order shall be entered directing the referees to execute conveyances, which they are authorized to do; such order may also give directions to them respecting the disposition of the proceeds of the sale.

SEC. 68 (35). *Referees may take receipts of certain purchasers in payment.*—When a party, entitled to a share of the property, or an incumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him, and shall also pay over to the plaintiff or his attorney, and take his receipt for, the costs and charges of the action.

SEC. 69 (36). *Conveyance to be recorded—effect of conveyance.*—The conveyance shall be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way who have been named as parties in the action, and against all such parties and persons as were unknown, if the summons has been properly served, and against all persons claiming from them or either of them.

SEC. 70 (37). *Conveyances to be a bar against persons having general or specific liens.*—The conveyances shall also be a bar against all persons having specific or general liens or incumbrances, by judgment, on any undivided share or interest in the premises sold, or who have been served with notice, as prescribed by section eighteen, and also against all persons having specific liens of any undivided share or interest therein, who have been made parties to the action; but no creditor having such specific lien can be affected by the sale or conveyance, unless he has been made a party.

SEC. 71 (38). *Proceeds of sale belonging to unknown person to be paid into court and invested.*—When there are proceeds of sale belonging to an unknown owner, or to a person without the state, who has no legal representative within it, or when there are proceeds arising from the sale of an estate subject to the prior estate of a tenant in dower, or by the curtesy, or tenant for life, or years, which are paid into court or deposited with an officer, by order of the court, the same shall be invested in securities on interest, for the benefit of the persons entitled thereto.

SEC. 72 (39). *Such investment, how made.*—When an investment of any such proceeds is made, it shall be done, except as herein otherwise provided, in the name of the clerk of the district court of the county where the papers are filed, and his successors in office, who shall hold the same for the use and benefit of the parties interested, subject to the order of the court.

SEC. 73 (40). *Clerk to receive interest and file securities.*—The clerk by whom an investment is made, and his successors in office, 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 all securities taken, and keep an account book, provided and kept for that purpose, in the clerk's office, free for inspection by all persons, of investments and moneys received by him thereon, and the disposition thereof.

SEC. 74 (41). *When partition cannot be made equal, court may adjudge compensation.*—When it appears that partition cannot be made equal between the parties, according to their respective rights, without prejudice to the rights and interest of some of them, the court may adjudge compensation to be made by one party to another for equality of partition; but such compensation cannot be required to be made to others by owners unknown, nor by infants, unless in case of an infant it appears that he has personal property sufficient for that purpose, and that his interest will be promoted thereby.

SEC. 75 (42). *Share of infant to be paid to general or special guardian.*—When the share of an infant is sold, the proceeds of the sale 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 such general or special guardian, before the payment of such share into court, has given the security required by statute.

SEC. 76 (43). *Guardian of insane person may receive share of proceeds of sale—shall execute bond.*—The guardian who is entitled to the custody and management of the estate of an insane person, or other person, adjudged incapable of conducting his own affairs, whose interest in real property has been sold, may receive in behalf of such person his share in the proceeds of such real property from the referees, if the guardian, before the money is paid into court, has executed with sufficient sureties an undertaking approved by the judge of the district court, that he will faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled or to his legal representative.

SEC. 77 (44). *Guardian of infant may consent to partition, and execute release.*—The general guardian of an infant, and the guardian entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, who is entitled to real estate held in joint tenancy, or in common, or in any other manner, to authorize his being made party to an action for the partition thereof, may consent to a partition without action, and agree upon the share to be set off to such infant or other person entitled, and may execute a release in his behalf to the owners of the shares of the parts to which they may be respectively entitled, upon an order from the court.

SEC. 78 (45). *State may be made a party—summons and complaint, how served.*—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.

SEC. 79 (46). *Costs of partition, how paid.*—The costs of partition, including fees of referees and other disbursements, shall be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment; in that case they are a lien on the several shares, and the judgment may be enforced by execution against the parties separately. Where, however, a litigation arises between some of the parties only, the court may require the expense of such litigation to be paid by the parties thereto, or any of them.

TITLE III.

OF FORCIBLE ENTRIES AND UNLAWFUL DETAINERS.

(This Title is Chapter LXXXIV. of the Statutes of 1866.)

SEC. 80 (1). *Forcible entry into lands or tenements forbidden.*—No person shall hereafter make an entry into lands or tenements, except in cases where entry is given by law; and in such cases, not with strong hands, nor with a multitude of people, but only in a peaceable manner; if any person from henceforth does to the contrary, he shall be punished by fine.

SEC. 81 (2). *Justices of the peace to have jurisdiction.*—Any justice of the peace has authority to inquire as hereinafter directed, as well against those who may make unlawful or forcible entry into lands or tenements, and detain the same, as against those who having lawful or peaceful entry into lands or tenements, unlawfully and forcibly detain the same; and if it is found upon such inquiry, that an unlawful or forcible entry has been made, and that said lands or tenements are unlawfully detained by force and strong hand, or that the same after a lawful entry are so held or detained unlawfully, such justice shall cause the party complaining to have restitution thereof.

SEC. 82 (3). *Upon complaint made, justice shall issue summons.*—When any complaint is made in writing to any justice of the peace, of any such unlawful or forcible entry or unlawful detainer, said justice shall issue a summons, directed to the sheriff or any constable of the county, commanding him to summon the person against whom such complaint is made, to appear before the said justice on a day in such summons named, which shall not be less than six nor more than ten days from the day of issuing such summons.

Property must be particularly described, *Lewis v. Steele et al.*, 1 Minn. 90. In complaint it is sufficient to allege title and right of possession in plaintiff and wrongful withholding of possession by defendant, *Pinney v. Fridley*, 9 Minn. 34. When complaint held fatally defective, *vide Fallmans v. Gilmore*, 1 Minn. 179.

SEC. 83 (4). *Summons, how served.*—Such summons shall be served upon the person against whom the same is issued, by delivering a certified copy thereof to him, at least three days before the return day thereof; and the officer serving the same shall make a special return of the time and manner of serving said summons.

Fallmans v. Gilmore, 1 Minn. 179, *supra*.

SEC. 84 (5). *Proceedings on return of summons.*—After the return of said summons, and at the time and place appointed therein, the said justice shall proceed to hear and determine said complaint: *provided*, that if either party calls for a trial by jury, the said justice shall issue a venire, in the same manner, and upon the same terms, as in other cases in justices' courts; and such jury shall be sworn as in other cases.

SEC. 85 (6). *Summons served by leaving copy.*—If at the time of making said complaint, it appears that the person against whom said complaint is made, is absent from the county, the justice before whom the same is made shall issue his summons as hereinbefore provided, and make the same returnable not less than six, nor more than ten days from the time of issuing the same, and such summons may

be served by leaving a true and attested copy thereof at the last and usual place of such person's abode, not less than six days before the return day thereof; such copy shall be left with some member of the family, or some person residing at such place, of suitable age and discretion, to whom the contents thereof shall be explained by the officer, and the said officer shall make a special return of the time and manner of serving said summons; and the action shall thereafter proceed as though a personal service were made of such summons.

SEC. 86 (7). *Adjournment of trial granted, when.*—The justice may at his discretion adjourn any trial under this chapter, not exceeding six days; but in all cases mentioned in section eleven of this chapter, when the defendant, his agent, or attorney makes oath that he cannot safely proceed to trial, for the want of some material witness, naming him, that he has made due exertion to obtain said witness, and believes if an adjournment is allowed, he will be able to procure the attendance of said witness, or his deposition, in season to produce the same upon such trial, and if such person will give bond, with one or more sufficient sureties, conditioned to pay the said complainant for all rent which may accrue during the pendency of such action, and all costs and damages consequent upon such adjournment, the justice shall adjourn said cause for such reasonable time as appears necessary, not exceeding three months.

SEC. 87 (8). *Depositions taken and used, when.*—The deposition of any witness whose testimony is considered necessary by either party, may be taken for the same reason, in the same manner, and with the same effect, as is provided by law for taking of depositions to be used in justices' courts.

SEC. 88 (9). *Judgment, how entered when defendant is found guilty.*—If, upon the trial of any complaint under this chapter, the justice or jury shall find that the defendant or defendants, or either of them, are guilty of the allegations in the complaint, the said justice shall thereupon enter judgment for the complainant, to have restitution of the premises, and shall impose such fine, not exceeding one hundred dollars, as he may deem just, and shall tax the costs for the complainant, and may issue execution in favor of said complainant, for such costs, and shall also award and issue a writ of restitution; but if the said justice or the jury find that the person complained of is not guilty, the justice shall tax the costs against the complainant, and issue execution therefor.

SEC. 89 (10). *Proceedings when jury cannot agree.*—If the jury cannot agree upon a verdict, the justice may discharge them, and issue a venire, returnable forthwith, or at some other time agreed upon by the parties, or fixed by the justice, for the purpose of impaneling a new jury.

SEC. 90 (11). *Justices have jurisdiction in cases of unlawful detention of lands—proceedings on complaint in such cases.*—When any person holds over any lands or tenements, after a sale thereof on an execution, judgment, or on foreclosure of a mortgage by advertisement, and expiration of the time for redemption, or after the termination of the time for which they are demised or let to him or to the person under whom he holds possession, or contrary to the conditions or covenants of the lease or agreement under which he holds, or after any rent becomes due, according to the terms of such lease or agreement, or when any tenant at will holds over after the determination of any such estate by notice to quit, in all such cases the party entitled to possession may make complaint thereof to any justice of the peace of the county, and the justice shall proceed to hear, try and determine the same, in

the same manner as in other cases hereinbefore provided for ; but he shall impose no fine upon such tenants, or persons holding over.

Statute does not confer upon justice jurisdiction to oust a mortgager holding over after sale, until the period of redemption has expired, *Stone v. Bassett*, 4 Minn. 298. Action will not lie by mortgagee after sale against mortgager in possession when latter is in no default in paying interest nor the time of redemption expired, *Heyward v. Judd*, 4 Minn. 483. What pleadings confers jurisdiction upon justice, *vide Chandler v. Kent*, 8 Minn. 524.

SEC. 91 (12). *Restitution not to be made, when—writ not to issue for twenty-four hours in any case.*—No restitution shall be made, under the provisions of this chapter, of any lands or tenements of which the party complained of, or his ancestors, or those under whom he holds the premises, have been in the quiet possession for three years next before the entering of the complaint, unless his estate therein is ended ; nor shall a writ of restitution issue in any case for twenty-four hours after judgment, if the party against whom judgment is rendered, or his attorney, states to the justice that he intends to take an appeal.

SEC. 92 (13). *Appeal, when and how taken.*—If either party feels aggrieved by the verdict of the jury, or decision of the justice, he may appeal within ten days, as in other cases tried before justices of the peace, except that his bond shall be with two or more sufficient sureties, to be approved by said justice, conditioned to pay all costs of such appeal, and abide the order the court may make therein, and pay all rent and other damages justly accruing to said complainant during the pendency of such appeal.

SEC. 93 (14). *Proceedings stayed by appeal.*—Upon the taking of such appeal, all further proceedings in the case shall be stayed, and the appellate court shall thereafter issue all needful writs and processes to carry out the provisions of this title (chapter), according to the true intent and meaning thereof.

SEC. 94 (15). *Justice to grant certificate of appeal, when—effect of certificate.*—If a writ of restitution has been issued previous to the taking of an appeal, as provided in this title (chapter), the justice shall forthwith give the appellant a certificate of the allowance of such appeal ; and upon the service of such certificate upon the officer having such writ of restitution, the said officer shall forthwith cease all further proceedings by virtue of such writ ; and if such writ has not been completely executed, the defendant shall remain in possession of the premises until the appeal is determined.

SEC. 95 (16). *Appeal not to be dismissed for want of form.*—In all cases of appeal under the provisions of this title (chapter), the appellate court shall not dismiss or quash the proceedings for want of form only, provided they have been conducted substantially according to the provisions of this title (chapter).

SEC. 96 (17). *Amendments may be allowed.*—Amendments may be allowed by the court at any time before final judgment, upon such terms as to the court appear just, in the same cases and manner, and to the same extent, as in civil actions.

SEC. 97 (18). *Answer to contain, what.*—All matters in excuse, justification, or avoidance of the allegations in the complaint shall be set up in the answer.

SEC. 98 (19). *Appellate court may compel justice to make or amend return.*—The appellate court has power to compel the justice, by attachment, to make or amend any return which is withheld, or insufficiently or improperly made.

SEC. 99 (20). *Forms allowed.*—The following or equivalent forms shall be used in proceedings under this title (chapter), to wit :

Form of Summons.

State of Minnesota, }
 County of } ss.

The State of Minnesota,

To the sheriff or any constable of the county aforesaid :

Whereas, , of , hath exhibited unto a justice of the peace, in and for said county aforesaid, a complaint against of , for that the said , on the day of ; at (here insert the substance of the complaint with legal certainty); therefore you are hereby commanded to summon the said , if to be found in the said county, to appear before me at , on day of , at of the clock in the noon, then and there to make answer to, and defend against the complaint aforesaid, and further to be dealt with according to law, and make due return to me of this summons, with your doings thereon.

Dated at , this day of , in the year one thousand eight hundred and .

J. P., *justice of the peace.*

Form of Writ of Restitution.

State of Minnesota, }
 County of } ss.

The State of Minnesota,

To the sheriff or any constable of the county aforesaid :

Whereas, , of , at the court of inquiry of an unlawful or forcible entry and unlawful detainer, held at , in the county aforesaid, on the day of , one thousand eight hundred and , before , a justice of the peace, in and for the county aforesaid, by the consideration of the court, recovered judgment against , of , to have restitution of (here describe the premises as in the complaint); therefore you are hereby commanded, that taking with you the force of the county, if necessary, you cause the said to be immediately removed from the aforesaid premises, and the said to have peaceable restitution of the same; you are also hereby commanded, that of the goods and chattels of the said , within said county, you cause to be levied, and the same being disposed of according to law, to be paid to the said , the sum of , being the cost taxed against said , for the said , at the court aforesaid, together with twenty-five cents for this writ, and thereof together with this writ, make due return within thirty days from the date hereof, according to law.

Dated at , the day of , one thousand eight hundred and .

J. P., *justice of the peace.*

Form of Verdict.

At a court of inquiry held at _____, on the _____ day of _____, one thousand eight hundred and _____, before _____, a justice of the peace, in and for the county of _____, complainant, against _____, respondent, the jury find the facts alleged in the said complaint are true, that the said _____ is guilty thereof, and the said _____ ought to have restitution of the premises therein described without delay; (or in case the jury do not find the allegation of complaint proved) the jury find that the facts alleged in the same complaint are not proved, and that the said _____ is not guilty thereof.

C. D., *foreman.*

J. P., *justice of the peace.*

TITLE IV.

OF ACTIONS BY PERSONS HOLDING CLAIMS ON UNITED STATES LANDS.

(*This Title is Chapter LXXXV. of the Statutes of 1866.*)

SEC. 100 (1). *Settler on public land may maintain action to recover possession, or for injuries thereto.*—Any person settled upon any of the public lands belonging to the United States, on which settlement is not expressly prohibited by congress or some department of the general government, may maintain an action for injuries done to the possession thereof, or to recover the possession thereof.

SEC. 101 (2). *Plaintiff's claim defined.*—On the trial of any such cause, the possession, or possessory right of the plaintiff, shall be considered as extending to the boundaries embraced by the claim of such plaintiff, so as to enable him to have and maintain either of the aforesaid actions, without being compelled to prove a natural inclosure: *provided*, that such claim shall not exceed in any case one hundred and sixty acres; and the same may be located in two different parcels to suit the convenience of the holder.

SEC. 102 (3). *Claim shall be marked—action not maintainable unless by actual settler.*—Every such claim, to entitle the holder to maintain either of the aforesaid actions, shall be marked out so that the boundaries thereof may be easily traced, and the extent of such claim easily known; and no person shall be entitled to maintain either of said actions for possession of or any injury done to, any claim unless he is an actual settler, or causes the land to be constantly occupied, and has improvements, made thereon, to the amount of fifty dollars.

SEC. 103 (4). *Claim considered abandoned, when.*—A neglect to occupy or cultivate such claim for the period of six months, shall be considered such an abandonment as to preclude the claimant from maintaining either of the aforesaid actions.

TITLE V.

FORECLOSURE OF MORTGAGES.

(This Title is Chapter LXXXI. of the Statutes of 1866.)

ARTICLE I.

FORECLOSURE BY ADVERTISEMENT.

SEC. 104 (1, AS AMENDED BY ACT OF FEBRUARY 17, 1873). *Mortgage foreclosed by advertisement, when.*—Every mortgage of real estate containing therein a power of sale, upon default being made in any condition of such mortgage, may be foreclosed by advertisement within ten years after the maturity of such mortgage or the debt secured thereby, in the cases and in the manner hereafter specified: *provided*, that mortgages that have been foreclosed, or where an attempt has been made to foreclose the same, may be foreclosed previous to the first day of October A.D. one thousand eight hundred and seventy-three.

S. L. 1873, 171. *Vide also S. L. 1871, 107.*

SEC. 105 (2). *Conditions precedent to giving notice.*—To entitle any party to give a notice as hereinafter prescribed, and to make such foreclosure, it is requisite: *First.* That some default in a condition of such mortgage has occurred by which the power to sell has become operative;

Second. That no action or proceeding has been instituted at law to recover the debt then remaining secured by such mortgage, or any part thereof; or if the action or proceeding has been instituted, that the same has been discontinued, or that an execution upon the judgment rendered therein has been returned unsatisfied in whole or in part; and,

Third. That the mortgage containing such power of sale has been duly recorded, and if it has been assigned, that all the assignments thereof have been recorded.

Where mortgage covered land in three counties, *Balme v. Wamburg et al.*, 16 Minn. 116.

SEC. 106 (3). *Mortgage may be foreclosed for each installment.*—When a mortgage is given to secure the payment of money by installments, each of the installments, either of principal or interest, mentioned in such mortgage, may be taken and deemed to be a separate and independent mortgage; and such mortgage for each of such installments may be foreclosed in the same manner, and with the like effect, as if such separate mortgage was given for each of such subsequent installments, and a redemption of any such sale by the mortgagor shall have the like effect as if the sale for such installments had been made upon an independent prior mortgage.

For what installments a mortgage may be foreclosed, *vide Daniels et al. v. Smith*, 4 Minn. 172
Shorts v. Cheadle, 8 Minn. 67.

SEC. 107 (4). *Mortgaged premises, how sold—proceeds of sale, how applied.*—In such case if the mortgaged premises consist of separate and distinct farms or tracts, only such tract, or tracts, shall be sold as are sufficient to satisfy the installment or

installments then due, with interest and costs of sale, but if said premises do not consist of such separate and distinct farms or tracts, the whole shall be sold, and in either case the proceeds of such sale shall, after satisfying the interest, portion, or installment of the principal due, with interest and costs of sale, be applied toward the payment of the residue of the sum secured by said mortgage, and not due and payable at the time of such sale, and, if such residue does not bear interest, such application shall be made with a rebate of the legal interest for the time during which such residue shall not be due and payable, and the surplus, if any, shall be paid to the mortgagor, his legal representatives, or assigns.

Although premises consist of two distinct tracts of land, yet if they constitute but one farm they may be sold in gross, *Merrill v. Nelson*, 18 Minn. 366.

SEC. 108 (5, AS AMENDED BY ACT OF MARCH 1, 1867). *Notice of foreclosure, how given.*—Notice that such mortgage will be foreclosed by sale of the mortgaged premises, or some part of them, shall be given by publishing the same for six successive weeks, at least once in each week, in a newspaper printed and published in the county where the premises intended to be sold, or some part thereof, are situated, if there is one, if not, then in a newspaper printed and published in an adjoining county, if there is such newspaper, if not, then in a newspaper printed and published at the capital of the state. In case said notice is published in any newspaper printed and published outside of the county in which such premises, or some part thereof, are situated, a copy of such notice shall be served at least four weeks before the time of sale on the person in possession of the mortgaged premises, if the same are occupied. Proof of such service may be made, certified, and recorded in the same manner as proof of the publication of a notice of sale under a mortgage.

S. L. 1867, 120.

Publication—number of weeks, *Worley et al. v. Naylor et al.*, 6 Minn. 192; *Atkinson v. Duffy*, 16 Minn. 45; *Goenen v. Schroeder*, 18 Minn. 66. *Discontinuance and republication*, *Banning et al. v. Armstrong*, 7 Minn. 46; *Armstrong v. Sanford*, *ib.* 49. *What a sufficient allegation of want of notice of sale*, *Lowell v. North et al.*, 4 Minn. 32.

SEC. 109 (6). *Notice shall specify, what.*—Every notice shall specify :

First. The names of the mortgagor and of the mortgagee, and the assignee, if any ;

Second. The date of the mortgage, and when recorded ;

Third. The amount claimed to be due thereon, and taxes, if any, paid by the mortgagee, at the date of the notice ;

Fourth. A description of the mortgaged premises, conforming substantially to that contained in the mortgage ; and,

Fifth. The time and place of sale.

Notice by administrator—what a sufficient signature, *Baldwin v. Allison*, 4 Minn. 25. *Amount claimed to be due*, *Daniels v. Smith*, *ib.* 172 (*Emmett, C. J., dissents*) ; *Spencer v. Ames*, *ib.* 542 ; *Ramsey v. Merriam*, 6 Minn. 168. *Notice of lien for taxes*, *Jones v. Cooper*, 8 Minn. 334. *What a sufficient notice of place of sale*, *Merrill v. Nelson*, 18 Minn. 366.

SEC. 110 (7). *Sale, how and by whom made.*—The sale shall be at public vendue, between the hours of nine o'clock in the forenoon, and the setting of the sun, in the county in which the premises to be sold, or some part thereof, are situated, and shall be made by the sheriff of the county, or his deputy, to the highest bidder.

Sale to be made by sheriff, *Ramsey v. Merriam*, 6 Minn. 168. *Sheriff acting as agent of mortgagee*, *Paquin v. Braley*, 10 Minn. 379. *Sheriff of county attached to another*, *Berthold v. Holman et al.*, 12 Minn. 235.

SEC. 111 (8). *Sale may be adjourned.*—Such sale may be postponed from time to time, by inserting a notice of such postponement, as soon as practicable, in the newspaper in which the original advertisement was published, and continuing such publication until the time to which the sale is postponed, at the expense of the party requesting such postponement.

Changing notice of sale from 23d to 25th of May, irregular, *Dana et al. v. Farrington et ux.*, 4 Minn. 433. Postponement may be made at any time, etc., *Bennett v. Brundage*, 8 Minn. 432.

SEC. 112 (9). *Separate farms or tracts to be sold separately.*—If the mortgaged premises consist of separate and distinct farms or tracts, they shall be sold separately, and no more farms or tracts shall be sold than are necessary to satisfy the amount due on such mortgage at the date of the notice of sale, with interest, taxes paid, and costs of sale.

Sale of the whole premises, though sale of a lesser portion would have satisfied the debt, regular, when, *Johnson v. Williams*, 4 Minn. 260 (Atwater, J., dissents). Use of the term "distinct" in the statute means separation by some natural means, etc., and not by arbitrary imaginary lines, *Worley et al. v. Naylor et al.*, 6 Minn. 192. The sheriff may sell the whole in one parcel, when, *Paquin v. Braley*, 10 Minn. 373.

SEC. 113 (10). *Who may purchase.*—The mortgagee, his assigns, or his or their legal representatives, may fairly, and in good faith, purchase the premises, so advertised, or any part thereof, at such sale.

Mortgagee at sale under a power running to himself may bid in property, the sale being made by sheriff in good faith, *Ramsey v. Merriam*, 6 Minn. 168. Where mortgagee bids, officer must sell, *Allen et al. v. Chatfield*, 8 Minn. 435. Purchaser at a mortgage sale by an administratrix of an estate which owns the mortgage can only be questioned by the *cestui que trust*, *Kent v. Chalfant*, 7 Minn. 487; following *Baldwin v. Allison*, 4 Minn. 25; *vide also Worley et al. v. Naylor et al.*, 6 Minn. 195, *supra*.

SEC. 114 (11). *Officer to give purchaser certificate.*—Whenever any sale of real property is made, under a power of sale contained in any mortgage, the officer shall make and deliver to the purchaser a certificate under his hand and seal, containing:

First. A description of the mortgage under which such sale is made.

Second. A description of the real property sold.

Third. The price paid for each parcel sold separately.

Fourth. The date of the sale and name of the purchaser.

Fifth. The time allowed by law for redemption.

Said certificate shall be executed, proved, or acknowledged, and recorded, as required by law, for a conveyance of real estate, within twenty days after such sale.

Vide S. L. 1871, 106; S. L. 1873, 171; part v., infra.

What a sufficient signature, *Merrill v. Nelson*, 18 Minn. 366. Sheriff's certificate is evidence that sale took place, *Goenen v. Schroeder et al.*, *ib.* 66.

SEC. 115 (12). *Effect of certificate.*—Such certificate so proved, acknowledged, and recorded, shall, upon the expiration of the time for redemption, operate as a conveyance to the purchaser, or his assigns, of all the right, title, and interest of the mortgagor in and to the premises, named therein, at the date of said mortgage, without any other conveyance whatever.

Goenen v. Schroeder, 18 Minn. 66, *supra*.

SEC. 116 (13). *Who may redeem, and when.*—The mortgagor, his heirs, executors, administrators, or assigns, whose real property is sold in conformity to the provisions of this chapter, may, within twelve months after such sale, redeem such property as hereinafter provided, by paying the sum of money for which the same

was sold, together with interest on the same, at the rate of seven per cent. per annum, from the time of such sale.

Redemption governed by law in force at date of mortgage, *Heyward v. Judd*, 4 Minn. 483; *Whitacre v. Fullar*, 5 Minn. 508; *Carroll v. Rossiter*, 10 Minn. 174. Period of redemption same as on execution sale, *Stone v. Bassett*, *ib.* 298. Purchaser does not obtain title until expiration of time to redeem, *Donnelly v. Simonton*, 7 Minn. 167. Act of March 10th, 1860, does not affect sales made by virtue of power sale in mortgages executed prior to its passage, *Goenen v. Schroeder*, 8 Minn. 387; *vide also*, *Same v. Same*, 18 Minn. 66.

SEC. 117 (14). *Redemption, how made.*—Redemption shall be made as follows: The person desiring to redeem, shall pay to the person holding the right acquired under such sale, or for him to the sheriff, who made the sale, or his successor in office, the amount required by law for such redemption, and shall produce to such person or officer:

First. A certified copy of the docket of the judgment, or the deed of conveyance or mortgage, or of the record or files evidencing any other lien under which he claims the right to redeem, certified by the officer in whose custody such docket, record, or files, shall be.

Second. Any assignment necessary to establish his claim, verified by the affidavit of himself, or of a subscribing witness thereto, or of some person acquainted with the signature of the assignor.

Third. An affidavit of himself or his agent, showing the amount then actually due on his lien.

SEC. 118 (15). *Certificate of redemption to be given—certificate void, when—effect of redemption.*—The person or officer from whom such redemption is made, shall make and deliver to the person redeeming a certificate under his hand and seal, containing:

First. The name of the person redeeming, and the amount paid by him on such redemption.

Second. A description of the sale from which such redemption is made, and of the property redeemed.

Third. Stating upon what claim such redemption is made, and if upon a lien, the amount claimed to be due thereon at the date of redemption.

Such certificate shall be executed and proved or acknowledged and recorded, as provided by law for conveyance of real estate, and if not so recorded within ten days after such redemption, such redemption and certificate is void, as against any person in good faith making redemption from the same person or lien. If such redemption is made by the owner of the property sold, his heirs, or assigns, such redemption annuls the sale; if by a creditor holding a lien upon the property or some part thereof, said certificate so executed and proved or acknowledged and recorded, operates as an assignment to him of the right acquired under such sale, subject to such right of any other person to redeem, as is, or may be provided by law.

Goenen v. Schroeder, 18 Minn. 66, *supra*.

SEC. 119 (16, AS AMENDED BY ACT OF FEBRUARY 27, 1869). *Creditors may redeem, when and in what order.*—If no such redemption is made, the senior creditor having a lien, legal or equitable, on the real estate or some part thereof, subsequent to the mortgage, may redeem within five days after the expiration of said twelve months; and each subsequent creditor having such lien, within five days after the time allowed all prior lien holders, as aforesaid, may redeem by paying the amount

aforesaid, and all liens prior to his own held by the party from whom the redemption is made: *provided*, that no creditor shall be entitled to redeem unless, within the year allowed for redemption, he files notice of his intention to redeem in the registry of deeds where the mortgage is recorded. Until the expiration of the time allowed for redemption, the court or a judge thereof in vacation may restrain the commission of waste on the property by order granted with or without notice, on application of the mortgagee, purchaser, or creditor having a lien on such property.

S. L. 1869, 80.

SEC. 120 (17). *Interest acquired on sale, subject to attachment or judgment.*—The interest acquired upon any such sale is subject to the lien of any attachment or judgment, duly made or docketed, against the person holding the same, as in case of real property, and may be attached, or sold on execution, in the same manner.

SEC. 121 (18). *Surplus on sale, how disposed of.*—If after sale of any real estate, made as herein prescribed, there remains in the hands of the officer making the sale any surplus money, after satisfying the mortgage on which such real estate was sold, and payment of the taxes and costs of sale, the surplus shall be paid over by such officer, on demand, to the mortgagor, his legal representatives, or assigns.

Second mortgagee entitled, when—owner of redemption entitled, *Ayer v. Stewart*, 14 Minn. 97.

SEC. 122 (19). *Evidence of sale, how perpetuated.*—Any party desiring to perpetuate the evidence of any sale made in pursuance of the provisions of this chapter, may procure:

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

Second. An affidavit of the fact of any sale pursuant to such notice, to be made by the person who acted as auctioneer at the sale, stating the time and place at which the same took place, the sum bid, and the name of the purchaser. Which affidavits may be taken and certified by any officer authorized by law to administer oaths.

Vide S. L. 1870, 139; S. L. 1873, 177; part v. *infra*.

Affidavits of printer and sheriff, presumptive evidence of facts, etc., *Griswold v. Taylor*, 8 Minn. 343.

SEC. 123 (20, AS AMENDED BY ACT OF MARCH 3, 1869). *Affidavit shall be recorded.*—Such affidavit shall be recorded at length by the register of deeds of the county in which the premises are situated, in a book kept for the record of deeds; and such original affidavits, the record thereof, and certified copies of such record, shall be presumptive evidence of the facts therein contained.

S. L. 1869, 81. For sec. 2 of said act *vide* part v. *infra*; *vide* also S. L. 1873.

SEC. 124 (21). *Register to make note of record of affidavits.*—A note, referring to the page and book where the evidence of any sale having been made under a mortgage is recorded, shall be made by the register recording such evidence, in the margin of the record of such mortgage, if such record is in his office.

SEC. 125 (22). *Effect of record of affidavits and certificate.*—A record of the affidavits aforesaid, and of the certificate executed on the sale of the premises, shall be sufficient to pass the title thereto; and the said conveyance shall be an entire bar of all claim or equity of redemption of the mortgagor, his heirs and

representatives, and of all persons claiming under him or them, by virtue of any title subsequent to such mortgage.

Conveyance made on the sale shall be a bar, etc., section applied, *Bennett et al. v. Henley*, 6 Minn. 240.

ARTICLE II.

FORECLOSURE BY ACTION.

Sec. 23 repealed by Act of March 7, 1870 (S. L. 1870, 119).

SEC. 126 (24). *Action, how governed.*—Actions for the foreclosure of mortgages, shall be governed by the same rules and provisions of statute as civil actions, except as herein otherwise expressly prescribed.

SEC. 127 (25). *Service by publication, on what parties allowed—judgment taken without giving security.*—Service by publication, as provided in section five of title one, of this chapter, may be made upon all parties to the action against whom no personal judgment is sought, and in such case judgment may be taken without giving security as to these parties, at the expiration of twenty days after the completion of the period of publication; but such parties or any of them shall be permitted to appear and defend, upon good cause shown, at any time before final decree.

SEC. 128 (26). *Judgment how entered in first instance.*—Judgment shall be entered under the direction of the court, adjudging the amount due, with costs and disbursements, and the sale of the mortgaged premises or some part thereof to satisfy said amount, and directing the sheriff to proceed and sell the same, according to the provisions of law relating to sales of real estate on execution, and make report to the court.

SEC. 129 (27). *Transcript of judgment to be furnished sheriff.*—A transcript of such judgment shall be made and signed by the judge, or certified by the clerk, and delivered to the sheriff, and shall be his authority for making the sale.

SEC. 130 (28). *Who may bid off premises—sheriff may take receipt as cash, when.*—The mortgagee or any one claiming under him may fairly and in good faith bid off the premises at said sale, and in such case, the statement of such fact in the report of sale shall have the same effect as a receipt for money paid upon a sale for cash.

Mortgagee may become purchaser, when, *Ramsey v. Merriam*, 6 Minn. 168. Where mortgagee bids sheriff must sell, *Allen et al. v. Chatfield*, 8 Minn. 435.

SEC. 131 (29). *Report of sale shall be confirmed, or re-sale ordered.*—Upon the coming in of the report of sale, the court shall grant an order, confirming the same, or if it appears upon due examination that justice has not been done, may order a re-sale, on such terms as are just.

Sale cannot be set aside until coming in of report, *Trowbridge et al. v. Forepaugh et al.*, 14 Minn. 133. Confirming report has effect of judgment, *Hotchkiss v. Cutling*, *id.* 537.

SEC. 132 (30). *Clerk to enter satisfaction of judgment, when.*—Upon confirmation of the report of sale, the clerk shall enter satisfaction of the judgment, to the extent of the sum bid for the premises less expenses and costs, and for any balance of said judgment execution may issue as in other cases, but no such execu-

tion shall issue on such judgment until after a sale of the mortgaged premises and the application of the amount realized as aforesaid.

SEC. 133 (31). *Who may redeem—time and manner of redemption.*—The mortgagor, or those claiming under him, shall have one year after the date of the order of confirmation in which to redeem the premises sold, or any separate portion thereof, by paying the amount bid therefor with interest thereon from the day of sale, and judgment creditors may redeem in the order and manner specified in title one of this chapter: *provided*, that no creditor shall be entitled to redeem, unless within the year allowed for redemption he files notice of his intention to redeem in the office of the district court where the judgment is entered.

Time of redemption governed by law in force at date of decree and not at date of mortgage, *Turrell v. Morgan*, 7 Minn. 368.

SEC. 134 (32, AS AMENDED BY THE ACT OF MARCH 1, 1872). *Certificates to be executed and recorded within twenty days.*—The provisions of section three, four, nine, eleven, fourteen, fifteen, and seventeen of article (title) one aforesaid, shall apply to and govern proceedings under this article (title): *provided*, that the certificate required by section eleven of article (title) one aforesaid, shall be executed, proved, or acknowledged, and recorded as required by law, for the conveyance of real estate within twenty days after the confirmation of the report of such sale, and in all cases when such certificate has not been, or hereafter may not be, made and recorded, in the time and manner herein, and by law provided for, the court upon application, and upon showing that a former certificate has been made, may order that another certificate as required by section eleven aforesaid be executed, acknowledged, and recorded, with the like effect as if the same had been made and recorded within said twenty days: *provided*, that the party applying for such certificate shall make proof to the court that all parties who may have acquired any interest in said premises so sold subsequent to the confirmation of said sale and the time of making said application have been duly notified of the time and place of making said application.

S. L. 1872, 139; *vide* also S. L. 1869, 82.

SEC. 135 (33). *Final decree granted, when—form and effect of such decree.*—At the expiration of the time allowed for redemption, and no one redeeming, the court, upon the application of the purchaser or his assigns, shall grant a final decree, which shall recite the judgment aforesaid, the fact of sale, the premises sold, and the amount bid therefor, and that no redemption has been made, and shall adjudge and decree that the title to said premises is in said purchaser or his assigns free and clear of all equity of redemption on the part of any one who is a party to the judgment. Such decree being recorded in the office of the register of deeds of the county in which the premises lie, shall be effectual to pass the title to the same as against the parties aforesaid.

SEC. 136 (34). *Surplus on sale, how disposed of.*—Whenever there is a sale for cash under the provisions of this article (title), and after satisfying the mortgage debt with costs and expenses, there is a surplus, it shall be brought into court for the benefit of the mortgagor or the person entitled thereto, subject to the order of the court.

SEC. 137 (35). *Surplus to be invested, when.*—If such surplus, or any part thereof, remains in the said court, for the term of three months, without being

applied for, the district judge may direct the same to be put out at interest, subject to the order of the court, for the benefit of the defendant, his representatives or assigns, to be paid to them by the order of the court.

SEC. 138 (36). *Action to foreclose mortgage for installment, dismissed, when.*—Whenever an action is brought for the foreclosure of any mortgage upon which there is due any interest, or any portion or installment of the principal, and there are other portions or installments to become due subsequently, the action shall be dismissed upon the defendants bringing into court, at any time before the judgment of sale, the principal and interest due, with costs.

SEC. 139 (37). *Proceedings stayed, when.*—If, after a judgment of sale is entered against a defendant in such case, he brings into court the principal and interest due, with costs, the proceedings in the action shall be stayed, but the court shall enter a judgment of foreclosure and sale, to be enforced by a further order of the court, upon a subsequent default in the payment of any portion, or installment of the principal, or of any interest thereafter to grow due.

SEC. 140 (38). *Court may order sale of whole of mortgaged premises, when.*—Nothing herein contained shall be so construed as to prevent the court from adjudging that the whole of the mortgaged premises shall be sold, notwithstanding they consist of distinct farms or tracts, whenever it is made to appear that a sale of the whole will be most beneficial to the interests of the parties.

SEC. 141 (39). *May compel delivery of possession by order.*—Whenever possession of lands foreclosed as aforesaid is wrongfully withheld after final decree, the court may compel delivery of possession to the party entitled thereto by order directing the sheriff to effect such delivery.

SEC. 142 (40, ADDED BY ACT OF MARCH 7, 1870). *Strict foreclosure, when final decree may be rendered.*—Nothing contained in this chapter shall be so construed as to prevent judgment being given for the strict foreclosure of a mortgage in cases when such remedy is just or appropriate; but in case of strict foreclosure no final decree of foreclosure shall be rendered until the lapse of one year after the judgment adjudging the amount due on such mortgage.

S. L. 1870, 119.

Before the statute, court had power to decree a strict foreclosure, *Drew et al. v. Smith*, 7 Minn. 301; *Bacon v. Cottrell*, 13 Minn. 194.