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EMBRACING THE ORGANIC LAWS, THE CONSTITUTION, AND THE STATUTES CONTAINED IN THE GENERAL STATUTES OF 1923, EXCEPT THOSE WHICH HAVE BEEN REPEALED OR SUPERSEDED BY THE SUBSEQUENT LEGISLATION OF 1925 AND 1927

AND ALSO EMBRACING LAWS OMITTED FROM THE GENERAL STATUTES 1923, AND THE LAWS OF THE 1925 AND 1927 SESSIONS OF THE LEGISLATURE UNDER APPROPRIATE CLASSIFICATION.

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CHAPTER 77

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9164. One form of action—Parties how styled—The distinction between actions at law and suits in equity, and the forms of such actions and suits, are abolished. There shall be in this state but one form of action for the enforcement or protection of private rights and the redress of private wrongs. This shall be called a civil action, and the party complaining shall be styled the plaintiff, and the adverse party the defendant. (4052) [7673]

1–162, 136; 6–420, 284; 14–394, 300; 21–308, 64–505, 67+637; 72–143, 75+122; 77–20, 79+587; 86–365, 90+767.

121–296, 141+181; 122–152, 142+143; 124–195, 144+942; 150–499, 185+1019.

The distinction between actions at law and suits in equity is abolished and parties liable upon the same obligation may all, or any of them, be included in the same action. 210+66.

An "equitable defense" defined. 157–161, 195+898.

An action in equity to cancel an insurance policy will not lie after the death of the insured, for then the insurer has an adequate remedy at law by way of defense to an action on the policy, and because the beneficiary would be unjustly deprived of a jury trial. 157–253, 195+913.

Plaintiff cannot now waive the tort and recover for money had and received, for the probate court has exclusive jurisdiction of claims agianst the estate of decedents arising under implied or quasi contracts for the payment of money., 158–14, 196+655.

The complaint and the course of trial do not justify a claim that this is an action to recover damages for fraud and deceit, in which it is not necessary to proceed in the probate court. 158–14, 196+655.

An action to have contract and other papers declared a mortgage, and for the foreclosure of such mortgage, but judgment stayed awaiting the outcome of another action for personal judgment on notes secured by such mortgage, so that the amount thereof may be impressed as a lien upon the mortgaged property, is not subject to demurrer on the ground that another action is pending between the same parties for the same cause; and it is *held that the nature of the two actions is essentalily* different, though they relate to the same subject-matter. 158–231, 197+277.

The action for money had and received is a remedy whereby one municipality may recover from another tax money which in equity and good conscience belongs to the former. 158–271, 197+266.

Complaint construed as one for the recovery of money only, and not one for specific perfromance, and as such it stated a cause of action to recover an intermediate and independent payment maturing on a contract for deed. 160–414, 200+481.

Complaint construed as stating a cause of action in tort arising out of a wrongful interference with the contract relation of others causing a breach thereof. 161–522, 201+326.

Reformation and enforcement. 162–159, 202+448.

The general rule in actions at law is that the rights of the parties are determined as of the time of the beginning of the action. In this respect a suit in equity stands on a different footing, the general rule being that, to serve the ends of justice, equity will adapt its relief to the state of facts existing at the time of the determination of the suit. 209+537.

Reformation rather than recission is the proper remedy, where the parties to a contract and conveyance of a residence property agreed from the start upon the identity of the property and its boundaries but through mutual mistake supposed that it had a frontage of 30 feet, whereas the actual frontage was only 28.87 feet. 210+42.

Misrepresentation as to financial responsibility of a purchaser in an executory contract providing for the payment of the purchase price in future installments, such purchaser to be in possession, is ground for rescission by the seller. 210+149.

A claim for damages caused by the destruction of leased property, due to the lessee's failure to exercise the degree of care required by the lease, and his inability to rstore the property at the expiration of the term, constitute one cause of action, which cannot be split up into several suits. 213+54.

PARTIES

9165. Real party in interest to sue—When one may sue or defend for all—Except when otherwise expressly provided by law, every action shall be prosecuted in the name of the real party in interest; but this section shall not authorize the assignment of a thing in action not arising out of contract: Provided, that when the question is one of common or general interest to many persons, or when those who might be made parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all. (4053) [7674]

5. In general.

No competent evidence showed plaintiff not to be a real party in interest, nor did the court err in refusing defendant, in the third trial of the case, leave to amend the answer so as to allege that she was not such a patry. 161–437, 201+626.

A stranger to an action can take no part therein, except to intervene or make an application to become a party thereto. 162–247, 202+489.

Where the award to the employe is paid by an insurance company, pursuant to a policy held by the city, and the city has paid nothing, it has suffered no damage, is not the real party in interest, and cannot maintain an action against the negligent third party who caused the injury. 163–54, 203+622.

Neither the employer nor his insurer is a necessary party to an action against a third party whose negligence caused the injury or death of the employee, it is optional with the employer. 165–390, 206+714

The United States was the proper party to maintain an action for the destruction of growing timber by fire negligently set by defendant where the land, on which the timber was destroyed, is held by an Indian under a restricted patent prohibiting the patentee from selling, leasing, or in any manner alienating the land without the consent of the President. It appearing that such an action had been brought in the proper federal court, this action in the state court was rightly dismissed. 166–14, 206+939.

An order substituting the Agent of the President as party defendant, in a suit pending against a railway company for death by wrongful act at the time of the termination of federal control, made more than two years thereafter, is violative of § 206a of the Transportation Act of February 28, 1920 (Mason's Code, Title 49, § 74), requiring suits to be brought within two years. 166–126, 207+23.

An action for rescission may be maintained against one who has made a contract for an undisclosed principal. 166–195, 207+305.

Plaintiff, grantee in a trust deed, whose tenants were ousted by defendants, was entitled to maintain action. 213+549.

1. Held real party in interest—An assignee, legal or equitable, of a thing in action (1–162, 136; 2–44, 32; 3–332, 232; 5–352, 283; 14–145, 113; 15–132, 99; 35–434, 29+169; 36–198, 30+879; 46–185, 48+777; 54–272, 55+1130; 56–14, 57+218; 59–378, 61+29; 64–57, 65+930; 67–41, 69+477; 69–156, 71+1028; 75–527, 78+93; 79–275, 82+634); the party holding the legal title to property, although others may have an equitable interest therein (23–359; 46–277, 48+1113; 60–140, 61+1134); a pledgee of a note payable to order and not indorsed to him (14–27, 21). See (2–44, 32); the holder of a note payable to order (2–107, 89); the holder of a certificate of deposit payable to order (30–86, 14+363); the owner of a note, although the note by mistake was indorsed to his agent (30–436, 15+875); the holder of a note unconditionally indorsed by the payee (45–305, 47+970; 54–323, 56+38); the payee of a bill of exchange made payee really, but not expressly, for collection (37–191, 33+555; 49–395, 52+33); a cestui que trust, the trustee having died and no successor appointed (30–380, 15+672); an executor (81–324, 84+118); an infant (17–497, 473; 48–82, 50+1022; 52–386, 54+185).

2. Held not real party in interest—An indorsee "for collection" (21–385; 23–263. See 37–191, 33+555; 49–395, 52+33); a public officer (9–172, 159; 50–290, 52+652). Commission merchant to whom property is consigned for sale, without prior contract or advances made to shipper (109–513, 124+377).

3. Pleading—An allegation that the plaintiff is not the real party in interest is a conclusion of law (82–462, 85+238, 718).

The defendant in an action on a promissory note, who wishes to take advantage of the fact that the plaintiff is not the real party in interest, or has commenced the action prematurely, must plead the facts as matter in abatement. 156–335, 194+879.

A general demurrer does not raise the question of defect of parties plaintiff or defendant. 162–47, 202+272.

4. Assignments—It is the general rule that a right of action for a personal tort is not assignable and the statute leaves this rule unaffected (26–500, 5+376; 47–557, 50+614; 53–249, 54+1108. See 67–420, 70+2).

5. One or more suing for many—74–67, 76+1026. Mandamus, brought by a legal voter, on behalf of himself and all other legal voters in county, was authorized (100–49, 110+364).

See 124–239, 144+764; 124+239, 144+764; 125–466, 147+441; 126–14, 147+670; 127–440, 149+669; 128–345, 150+1086; 130–510, 153+1088; 130–71, 153+262; 139–227, 166+177; 150–10, 184+179; 150–377, 185+391.

6. Action by taxpayer.
Following Burns v. Essling et al (Minn.) 203 N. W. 605, it is held, that a taxpayer may maintain an action in behalf of a city, against the officers of the city, to compel the restitution of money illegally withdrawn from the city treasury as the result of the unauthorized acts of the officers. 163–48, 203+608.

7. Bonds.
Where a bond, given for the benefit of a bank, runs to the superintendent of banks, the bank and the superintendent may properly join in an action on the bond. 164–265, 204+938.

8. Waiver of objection.
The objection that a widow brings action for the death of her husband in her representative capacity is waived, when not raised by demurrer or answer, nor at the trial. 160–49, 199+889.
The objection that the administrator was not the proper party to bring the action was waived by failing to demur. 160–49, 199+889.

9166. Action by assignee—Setoff saved—Exception—If a thing in action be assigned, an action thereon by the assignee shall be without prejudice to any setoff or defence existing at the time or before notice of the assignment; but this section does not apply to negotiable paper, transferred in good faith and upon good consideration before due. (4054) [7675]

1. General rule—It is the general rule that an assignee of a non-negotiable thing in action takes it subject to all equities existing against it in the hands of his assignor at the time of the assignment or before notice thereof (23–175; 25–404; 5+273, 217; 54–14, 55+744 See 37–65, 33+42; 43–171, 45+11; 81–376, 84+119). Equitable doctrine of set-off applicable to all cases of assignments of non-negotiable choses in action (109–468, 124+223).
The defendant was the owner of an overdue note of the bankrupt and another person. Held, that the defendant was entitled to offset the note. Held, that the defendant was entitled to offset the note. 161–302, 201+431.
The fact that the subject-matter of the contract was land owned by the promisor's wife did not prevent him from taking advantage of the statutory provision for notice 167–389, 209+263.
In the absence of notice to the promisor of an assignment by the proimsee of his rights under a contract between the parties, or proof of knowledge on the part of the promisor of facts which should have put him on inquiry, the assignment is without prejudice to any set-off or defense which would have been available to the promisor had the assignment not been made, and the burden of proving actual or constructive notice rests upon the assignee. 167–389, 209+263.
The right of legal set-off is not affected by §§ 7688, 7689, referring to claims against the bank after possession is taken for the purpose of liquidation, the right of the examiner to reject claims, and suits thereon. 212+895.
When a bank goes into liquidation, a debtor of the bank, who has a then due claim against the bank, has a right of legal set-off. 212+895.

2. Equities of third parties—An assignee does not take subject to equities of third parties of which he had no notice (46–33, 48+450; 67–311, 69+1079; 71–139, 73+850).

3. Latent equities—The doctrine of latent equities does not prevail in this state. If A assigns to B a right of action against C, and B assigns the same to D, the latter takes it subject to any equities existing in A against B, in the absence of an estoppel (75–412, 78+103, 671. See 5–352, 283).

4. Counterclaim—A counterclaim can only be used against an assignee as a setoff and not as the basis of an affirmative judgment (23–307; 32–48, 19+82; 64–277, 66+973).

5. Mortgages—A mortgage is not a negotiable instrument although it secures a negotiable note and on assignment passes to the assignee as an ordinary thing in action subject to all equities of the original parties (7–176, 120; 22–559; 29–177, 12+517; 35–245, 28+710; 36–460, 32+89, 864; 43–283, 45+445; 52–367, 54+736; 55–520, 57+311; 65–118, 67+796; 65–475, 68+100; 70–467, 73+404; 72–229, 75+106; 73–39, 75+749; 85–240, 88+760; 89–177, 94+550), but not as to equities of third parties of which the assignee was without notice (71–139, 73+850. See 49–462, 52+45). While, so far as the personal liability of the mortgagor on the note is concerned, the assignee may, if a bona fide purchaser before maturity, take it free from equities, the mortgage in his hands is subject to them (65–118, 67+796). The assignee of a paid mortgage takes it subject to the defence that it has been paid although it is not satisfied of record (43–283, 45+445). The recording act does not render a mortgage negotiable (70–467, 73+404).

6. Negotiable paper—The assignee of overdue negotiable paper takes it subject to equties as in the case of an ordinary thing in action (19–181, 145; 23–175; 31–33, 16+426; 33–422, 23+864; 67–311, 69+1079). See 64–277, 66+973). If a promissory note payable to the order of a party is transferred without his indorsement the holder takes it as a mere thing in action, subject to all defences thereto (10–255, 197; 61–490, 63+1031; 62–150, 64+160; 79–151, 81+765).
A person who takes assignments of notes secured by real estate mortgages after default had been made in the payment of an installment of principal and interest stands in the shoes of the assignor and takes the assignments subject to any set-off or defense existing when they were made. 212+457.

7. Notice—Notice to the obligor is not essential to the validity of an assignment as between the assignor and the assignee or as between the assignee and creditors of the assignor (5–352, 283; 30–244, 15+113; 95–383, 104+236). Until notice of an assignment the obligor may regard the assignor as owner and pay him the debt or acquire a claim against him which may be used as a set-off against the assignee (1–270, 205; 12–375, 251; 19–181, 145; 23–175; 65–475, 68+100). A second assignee may take advantage of a notice given by a first assignee (19–181, 145). Notice to a "cashier" held not notice to his principal (80–343, 83+156).

8. Estoppel—The obligor may be estopped from asserting equities against an assignee (21–435; 75–412, 78+103, 671).

9. Object of statute—The statute is intended solely for the benefit of the debtor (95–383, 104+236). 141–438, 170+596; 148–63, 180+920; 150–226, 184+1024.

9167. Executor, trustee, etc., may sue alone—An executor, administrator, or guardian, a trustee of an express trust, or a person expressly authorized by statute to sue, may sue without joining with him the person for whose benefit the action is brought. And a person with whom, or in whose name, a contract is made for the benefit of another is a trustee of an express trust, within the meaning of this section. (4055) [7676]

½. In general.
164–265, 204+938, note under § 9165.
To save a state bank from being closed as insolvent, the officers and stockholders induced plaintiffs to accept a majority of the capital stock, and take over the management of the bank, and furnish sufficient funds to enable it to pay its liabilities. As a part of the transaction the stockholders guaranteed payment to plaintiffs of a specified amount of the doubtful paper held by the bank, to be selected by plaintiffs. Held, that this guaranty, although made to the plaintiffs, was intended for the benefit of the bank. 158–243, 197+219.
A person in whose name a contract is made for the benefit of another may sue thereon. 158–243, 197+219.
Where a promissory note is the basis of the claim, the payee may enforce it, although the note was given for the benefit of another. 164–57, 204+546.
One who takes an assignment of a note and mortgage, for a corporation in which he is interested, becomes a "trustee of an express trust," and has a right to bring an action to foreclose in his own name. 212+905.

1. Statute permissive—The statute is permissive and not mandatory (17–497, 473).

2. Executor or administrator—71–374, 74+152; 81–324, 84+118.

3. Guardian—48–82, 50+1022.

4. Trustee of express trust—An assignee for the benefit of creditors is within the statute (1–246, 195; 25–509; 31–244, 17+381; 63–73, 54+1055; 79–373, 82+674). So is a receiver (35–303, 29+132; 70–349, 73+169). A trustee under a mortgage held within the statute (50–367, 52+960; 52–148, 53+1134; 64–57, 65+930). A guardian held not within the statute prior to revision (48–82, 50+1022).

5. Party expressly authorized to sue—22–97; 50–290, 52+652.

6. Party in whose name contract made for another—37–453, 35+177; 40–145, 41+411; 40–511, 42+467; 42–37, 43+685; 44–204, 46+335; 44–530, 47+256; 64–57, 65+930; 66–369, 69+140; 71–374, 74+152. See 57–319, 59+309.

7. Party with whom contract made for another—11–220, 142; 36–148, 30+455, 124+53; 144+416.

9168. Married women may sue or be sued alone—In cases where the husband, except for the marriage relation, would not be a necessary party, a married woman may sue and be sued as if unmarried and without joining her husband. And if a woman marry while a party to a pending action, she shall thereafter be designated by her married name. (4056) [7677]

The unnecessary joinder of a husband as plaintiff is a mere irregularity which may be disregarded or corrected by striking out his name (22–565). Residence of husband and wife on the real estate of the latter does

not make him a necessary party to an action by her for trespass (22–29; 22–34). In an action by a creditor to set aside a fraudulent conveyance of the property of a husband his wife is not a proper party defendant, but the wife of the fraudulent grantee is (59–52, 60+848). In an action to enforce a resulting trust under § 6707 the judgment debtor is a proper but not a necessary party defendant; and where a wife in such case is sought to be charged as trustee, her husband need not be made a party (34–137, 24+915; 77–282, 79+1016. See 53–73, 54+1055). A wife's interest in her husband's homestead is not affected by an action to foreclose a mortgage thereon to which she is not a party (56–523, 58+156). Prior to 1869 c. 58 the statute was less liberal (3–202, 133; 10–133 106; 19–338, 292). Cited (113–517, 130+8). See 124–270, 143+786).

9169. Infants and insane persons—Guardians ad litem—When an infant or insane person is a party, he must appear by guardian, who shall be appointed by the court in which the action is prosecuted, or by a judge thereof. Such guardian shall be a resident of this state, and shall file with the clerk his consent to such appointment, before the same shall take effect, and in case of the plaintiff such consent shall be so filed before the issuing of the summons in the action. Before he shall receive any money or other property of the party, such guardian shall also file a bond, as security therefor, in such form and with such sureties as the court shall prescribe and approve. (4057) [7678]

1. Necessity of appointing—Infants must sue and be sued in their own name, appearing by a general guardian or a guardian ad litem (17–497, 473; 25–338; 42–84, 43+784; 48–82, 50+1022; 52–386, 54+185). It is not necessary to have a guardian ad litem appointed if there is a general guardian. The statute provides that the general guardian "shall appear for and represent his ward in all legal proceedings unless another person is appointed for that purpose" (§ 7446. See 48–82, 50+1022; 52–386, 54+185; 67–298, 69+923). *This provision does not impair the* power of the court to appoint a guardian ad litem (55–22, 56+351). An infant may appear by a guardian ad litem although there is a general guardian competent to act (52–386, 54+185). In proceedings to probate a will no guardian ad litem is necessary (30–202, 14+887; 62–29, 64+99). Nor is it necessary, before the administration account of an executor or administrator is allowed, to appoint a guardian at litem for minor heirs or legatees (32–158, 20+124; 62–29, 64+99, 69 R. L. A. 785). Complaint sufficiently alleged appointment by proper court (102–363, 113+902).

2. Effect of not appointing—A judgment rendered on default against an infant over fourteen years of age, after service of summons on him, but without the appointment of a guardian ad litem, is erroneous and voidable, but not void (42–84, 43+784; 79–476, 82+990). It is improper for an infant to appear by attorney, but upon reaching majority he may adopt an action so begun (25–338).

3. Mode of objecting to competency of guardian—24–339.

4. Guardian not a party—A guardian is not a party to the action (20–313, 271, 295), nor is he the real party in interest (17–497; 48–82, 50+1022; 52–386, 54+185), but he is a proper party to the record. He is really the active party who institutes the action and has the entire control of its prosecution (24–339; 48–82, 50+1022).

5. Appointment before service of summons improper—Service of summons on an infant defendant in the mode authorized by statute must precede the appointment of a guardian ad litem for him (79–476, 82+990).

6. Powers and duties of guardian—20–313, 271; 48–53, 50+933.

7. Authority of guardian continues on appeal—Rule 7, Supreme Court.

8. Next friend appointed in justice court—The authority of a next friend appointed to prosecute an action in justice court for an infant plaintiff continues on appeal in the district court (81–302, 84+1115).

9. Guardian for insane person—55–22, 56+351; 72–49, 74+1018. See 95–464, 104+300. 140–388, 168+584.

9170. How appointed—Notice—The appointment of such guardians shall be made as follows:

1. If the party be an infant plaintiff of the age of fourteen years, upon the application of such infant. If he be under the age of fourteen, or an insane person, upon the application of his general or testamentary guardian, or of a relative or friend, upon notice to such general or testamentary guardian, if there be one in this state; otherwise, if the party be a resident, to the person with whom he resides.

2. If a party defendant, and within the state, the application may be made as provided in the preceding subdivision; but if no application therefor be made within twenty days after the service of the summons, any party to the action may apply, upon notice as therein provided: Provided, that if the party be an infant of the age of fourteen years, such notice shall be given to him. And if the defendant be a non-resident, and have no resident guardian, of which facts the return of the sheriff that the defendant cannot be found in his county shall be prima facie evidence, three weeks' published notice of such application shall be deemed sufficient. (4058) [7679]

9171. Parent or guardian may sue for seduction—A father, or, in case of his death or desertion of his family, the mother, may maintain an action for the seduction of the daughter, and the guardian for the seduction of the ward, though such daughter or ward is not living with, or in the service of, the plaintiff at the time of the seduction or afterwards, and there is no loss of service. (4059) [7680]

48–82, 50+1022; 59–251, 61+140; 78–468, 81+522.

Right of action of woman for seduction (98–475, 108+483).

9172. Parent or guardian may sue for injury to child or ward—Bond—Settlement—A father, or, in case of his death or desertion of his family, the mother, may maintain an action for the injury of a minor child, and a general guardian may maintain an action for the injury of his ward. Provided, that if no such action is brought by the father or mother, an action for *such injury may be maintained by a guardian ad litem,* either before or after the death of such parent. Before any such parent shall receive any money or other property in settlement or compromise of any action so brought, or in satisfaction of any judgment obtained therein, such parent shall file a bond as security therefor, in such form and with such sureties as the court shall prescribe and approve; and no settlement or compromise of any such action shall be valid unless the same shall be approved by a judge of the court in which such action is pending. (R. L. § 4060, amended '07 c. 58) [7681]

This statute is constitutional (61–196, 63+493; 66–79, 68+774). It is applicable only to a minor child (23–463; 59–251, 61+140). Applies to nonresident minor child (118–444, 137+172). It authorizes an action by the parent in all cases where an action might be maintained by the child. No damages are recoverable except those suffered by the child. The action is not for the benefit of the parent but for the child and whatever is recovered is held in trust by the parent for the child. The action is a bar to a subsequent independent action by the child (23–463; 60–477, 62+817; 61–196, 63+493; 66–79, 68+774; 93–257, 101+163; 118–444, 137+172). It is not a bar to a subsequent independent action by the parent for any losses that he may have sustained personally (61–549, 63+1116). Punitive damages are recoverable (82–477, 85+236). It is not necessary to allege in the complaint that the action is brought for the benefit of the child where the only damages alleged or claimed are those sustained by the child (60–477, 62+817). Negligence of parent not imputable to child (95–477, 104+443). Cited as basis of action (49–106, 51+814; 53–521, 55+540; 54–216, 55+1122; 55–446, 57+144; 58–120, 59+1082; 59–234, 61+24; 73–123, 75+1038; 78–176, 80+957; 82–477, 85+236; 84–397, 87+1117; 102–363, 113+902). Settlement prior to amendment of 1907 (101–396, 112+534; 102–21, 112+885). 130–3, 153+250.

The defendant stood ready to pay the judgment at all times after it was entered, but the father did not furnish the bond required by section 7681, G. S. 1913, until some time later. Under these circumstances defendant was not chargeable with interest on the judgment prior to the approval and filing of the bond, and section 7913, G. S. 1913, providing for the deposit in certain cases of the amount of the judgment, was without application. 160–122, 199+579.

9173. Deserted wife may sue and defend in husband's name—When a husband has deserted his fam-

ily, the wife may prosecute or defend, in his name, any action which he might have prosecuted or defended, and shall have the same powers and rights therein as he might have had. (4061) [7682]

19–174, 137; 68–8, 70+800.

9174. Joinder of parties to instrument—Persons severally liable upon the same obligation or instrument, including parties to bills of exchange and promissory notes, and sureties on the same instrument, may all or any of them be included in the same action, at the option of the plaintiff. (4062) [7683]

Applicable to parties liable on a joint and several obligation (24–116; 40–27, 41+302. See 69–156, 71+1028). The maker and guarantor of an instrument may be joined (31–314, 17+858; 33–21, 21+849; 57–374, 59+311; 71–185, 73+858). Cited (5–333, 264; 48–3, 50+891). Joinder of parties defendant in actions of tort governed by common law (100–79, 110+356). Applicable only to actions on contract (134–462, 159+1082). Assignee's bond (140–71, 167+294).

164–265, 204+938.

The defendant Tople, a party to the sales contract, was a guarantor of payment and not merely of indemnity against damage, and could be sued jointly with the purchaser. 159–158, 198+425.

A complaint against two defendants, alleging that *their negligence caused an injury to plaintiff, is bad as* against a demurrer for misjoinder of causes, where it appears upon the face of the pleading that the acts of negligence were separate torts, not concurrent in point of time or effect. 160–143, 199+894.

The maker and guarantors of promissory notes may be sued in the same action, although the guaranty is by a separate contract, to which the maker is not a party. 161–30, 200+851.

The surety on the statutory bond may be sued alone, without joining his principal. 161–169, 200+937.

When a third party, for whose benefit a contract is made, is a daughter of the promisee, such relationship is sufficient to supply the legal right in her to maintain an action upon the contract against the promisor. 164–201, 204+936.

The distinction between actions at law and suits in equity is abolished and parties liable upon the same obligation may all, or any of them, be included in the same action. 210+66.

9175. Surety may bring action—An action may be brought against two or more persons for the purpose of compelling one to satisfy a debt due to the other, for which the plaintiff is bound as surety. (4063) [7684]

5–310, 246; 8–124, 97; 11–150, 92; 37–162, 33+700; 37–431, 35+10; 149–183, 183+831; 151–351, 186+794; 152–338, 188+1021.

9176. Action not to abate by death, etc.—Torts—No action shall abate by reason of the death or disability of a party, or the transfer of his interest, if the cause of action continues or survives. In such cases the court, on motion, may substitute the representative or successor in interest, or, in cases of transfer of interest, may allow the action to proceed in the name of the original party. And after a verdict, decision, or report of a referee, fixing the amount of damages for a wrong, such action shall not abate by the death of any party thereto. (4064) [7685]

1. Effect of death on jurisdiction—A court should not exercise jurisdiction over a person who is dead but a judgment against a deceased person is not void if the court had acquired jurisdiction over him before his death (20–405, 355; 22–542; 27–475, 8+383). Where a defendant dies pending publication of summons against him the court cannot authorize a substitution of his executor (26–421, 4+816. See 53–197, 55+117).

See *(132–409, 157+648; 147–470, 180+773).*

212+196, note under § 9498.

A suit for divorce abates at the death of either party, and judgment cannot thereafter be entered unless the complainant was entitled to have it entered while both parties were living. 166–468, 208+180.

Where, in the lifetime of both parties, the court determined all the issues, and made an order directing that judgment of divorce be entered, and nothing remained to be done except to enter the judgment in the judgment book, such judgment may be entered nunc pro tunc after the death of the complainant, at the instance of those interested in his estate. 166–468, 208+180.

2. Motion for substitution—Remedy by motion is exclusive. It is a substitute for the former bill of revivor and original bill in the nature of revivor. On such a motion the facts on which it is based may be contested (9–90, 79; 80–432, 83+377. See 12–375, 251; 20–173, 157).

3. When motion must be made—Whether a party has moved with proper diligence is a question for the trial court and its action will rarely be reversed on appeal (80–432, 83+377; 82–278, 84+1008. See 20–173, 157; 22–542; 44–392, 46+766; 45–159, 47+537).

4. How far substitution discretionary—Although the statute is in terms permissive and not mandatory the court is not at liberty to exercise an arbitrary discretion, but in case of death, at least of the plaintiff, where the action cannot proceed without substitution, it should always be allowed unless good cause is shown to the contrary. In case of the death of the plaintiff his executor is ordinarily substituted as a matter of course (9–90, 79). In an action on a joint and several contract if one of the defendants dies the action may be continued against the survivors without joining the representatives of the deceased defendant (24–116). Whether there shall be a substitution of an assignee is a matter of discretion (61–113, 63+248).

5. Effect of assignment—A person cannot sue upon a claim which he has assigned (1–246, 195; 20–170, 153; 40–281, 41+979). An action may be continued in the name of the original plaintiff although he has assigned the right of action pendente lite (9–295, 279; 12–375, 251; 14–220, 158; 15–132, 99; 61–113, 63+248). The real party in interest must prosecute the action, but it may be continued in the name of the original party. When the transfer is made the rights of the assignor terminate and he can take no further steps in the action, and the assignee will be recognized in all future proceedings, although he may proceed in the name of the assignor. But the court cannot take judicial notice of such transfer, and the parties on the record are the only ones who are entitled to the notice of the court, and until such transfer is properly brought to the attention of the court the parties to the record are prima facie entitled to proceed. If, therefore, a transfer of interest takes place pendente lite, and the assignee desires to proceed, whether in the name of the original party or otherwise, he must, in a proper proceeding, establish the fact of the transfer and obtain leave of the court to continue the action in the name of the original plaintiff or be added or substituted in the action (12–375, 251. See 7–29, 15; 31–448, 18+281; 61–113, 63+248) If by an assignment plaintiff retains any substantial interest, or may become liable to assignee, intervention and not substitution, is proper remedy (103–124, 114+649). Assignment of litigated proceeds pendente lite, does not bar continuance of action in name of plaintiff (139–195, 165+1062).

6. Meaning of representative—The term representative includes not only executors and administrators but also all who occupy the position held by the deceased party, succeeding to his rights and liabilities (80–432, 83+377). Permission for assignee of cause of action to continue prosecution in name of original party is in discretion of trial court (154–154, 191+395).

7. Substitution granted—Foreign administrator (35–191, 28+238), executor (55–134, 56+588); successor in interest (38–234, 36+345, 45–159, 47+537; 80–432, 83+377). Where after verdict, plaintiff died, and his mother, as administratrix, was substituted as plaintiff, this section controlled (104–1, 115+949). Motion to dismiss on the ground that the right to maintain the proceedings had passed from plaintiff to a receiver held properly denied; the remedy being by motion for substitution under this section (105–233, 117+428). Order is appealable (131–365, 155+396; 132–422, 157+646; 133–129, 157+1089). Death of party defendant after service of process and joinder of issue (137–423, 163+781).

8. Who may object—A stranger to the action cannot object to a substitution (78–281, 80+1120).

9. Effect of verdict for wrong—55–134, 56+588; 67–420, 70+2.

10. Cited—33–220, 22+383; 36–452, 32+176.

9177. Exemption from civil action—No member, officer, or employee of either branch of the legislature shall be liable in a civil action on account of any act done by him in pursuance of his duty as such legislator. (4065) [7686]

9178. Actions against receivers, etc.—Any receiver, assignee, or other person appointed by a court to hold or manage property under its direction may be sued on account of any of his acts or transactions in carrying on the business connected with such property without prior leave of court. (4066) [7687]

58–145, 59+987; 58–472, 59+1103; 59–303, 61+333, 62+265; 71–390, 73+1095.

The foreclosure sale, under a paramount mortgage of real estate, which, at the time being, is subject to a

receivership for the benefit of general creditors of the owner, is not void simply because the foreclosure was instituted and the sale had without first obtaining leave of the court appointing the receiver. 164–90, 204+917.

9179. How tried, and judgment, how satisfied—Such action may be brought in any county in which it could have been brought against the person or corporation represented by such receiver or other person, shall be tried in the same manner and subject to the same rules of procedure, and any judgment recovered therein against such receiver or other person shall be paid by him as a part of the expenses of managing such property. (4067) [7688]

9180. Actions against partnership, etc.—When two or more persons transact business as associates and under a common name, whether such name comprise the names of such persons or not, they may be sued by such common name, and the summons may be served on one or more of them. The judgment in such case shall bind the joint property of all the associates, the same as though all had been named as defendants. (4068) [7689]

Not applicable to unincorporated associations not engaged in business, such as labor unions (94–351, 102+725). Applicable to fraternal or benevolent associations engaged in business (64–261, 66+970; 68–521, 71+701; 89–222, 94+684. See 48–82, 50+1022; 91–189, 97+668). Does not authorize association to sue in its associate name (94–351, 102+725). Action is against associates; not against the association (45–357, 47+1064; 70–298, 73+182). Complaint need not name associates (70–298, 73+182). Service of summons on one member of an association will authorize a judgment which will bind all the associate property (9–55, 44). A judgment against the association does not bind the individual property of the associates, but a personal judgment against the associates personally served may be entered. Before ordering such a judgment the court should insert the names of the associates personally served (45–357, 47+1064; 70–298, 73+182). An affidavit of service of summons to the effect that the persons served are members of the association and doing business under the associate name is sufficient to confer jurisdiction (45–357, 47+1064; 70–298, 73+182; 89–222, 94+684). The mere fact that one is an agent for certain persons in a business does not authorize him to transact the business for them by a common name so as to make them liable under this section (11–341, 241). Allegations of complaint held to show that defendant trustees were carrying on business as associates under common name within section (108–62, 121+212). 149–401, 184+17.

Baseball association. 160–341, 200+300.

9181. Bringing in additional parties—Whenever it shall be made to appear, upon motion of the plaintiff in any pending action, or of any defendant in such action who has alleged a counterclaim or other ground for affirmative relief, that in order to a full determination of such action another should have been made a party defendant or plaintiff therein, the court, upon such terms as may be proper, shall order such additional party to be brought in, and may stay other proceedings in the action for such time as may be necessary for that purpose. (4069) [7690]

An order should be granted only when necessary to secure a full determination of the controversy between the original parties tendered by the complaint, answer, or counterclaim (88–4, 92+464). Where a complaint fails to state a cause of action against a person he cannot be brought in except on an amended complaint (27–358, 7+364). An infant may be made a defendant under this section (75–138, 77+788). A motion not made promptly will not be granted to the prejudice of third parties (92–143, 99+638). The court on its own motion may order new parties to be brought in and continue a cause for that purpose (12–124, 71; 20–170, 153; 65–295, 68+32; 66–487, 507, 69+610, 1069). Failure to bring in parties as ordered may be made ground for dismissal (20–170, 153; 43–449, 45+868). An ex parte order adding new parties defendant is not appealable, but an order denying a motion to vacate such an order is appealable (92–143, 99+638). Motion denied (23–307; 39–481, 40+611; 72–169, 75+116; 92–143, 99+638). Cited (34–346, 25+633; 39–219, 39+153; 64–43, 66+5; 66–24, 68+95).

See 122–122, 142+316; 131–365, 155+396; 150–396, 185+384; 151–472, 187+521.

Does not curtail the inherent power of the district court to bring before it persons who are not parties to an action whenever, for the complete administration of justice, it is necessary to bring them in as parties. Since the court might so direct, there is no reason why such additional parties should not be allowed to come in voluntarily. 162–132, 202+482.

An order vacating an ex parte order bringing in an additional party defendant is appealable. 211+470.

The pleadings raised two issues: Were the notes sued on usurious? Was plaintiff, the indorsee of the notes, a holder in due course The ex parte order made the payee of the notes a party defendant. Held, that he had no interest and was not concerned in the determination of the second issue. 211+470.

9182. Contents of order—How served, etc.—The order, in addition to the other proper directions thereof, shall briefly recite the grounds of such motion, direct that the complaint, or the answer, as the case may be, with such amendment thereof as may be necessary as against such added party, be filed with the clerk, prescribe the time within which the order shall be served, and require the party so brought in to answer or reply within twenty days after such service. The manner of service shall be the same as is prescribed by law for the service of a summons, and when service is made the action shall proceed, by or against all the parties, as though all had originally been joined. (4070) [7691]

9183. Joinder of connecting carriers—That whenever any personal property shall be transported by two or more connecting common carriers into or through this state and shall become injured or damaged during transportation, the consignor, consignee or owner thereof, or his assignee, in an action to recover damages for such injury, may join as parties defendant one or more of such connecting common carriers with the last or delivering common carrier. ('07 c. 466 § 1) [7692]

Does not change rule that action may be prosecuted only by real party in interest (109–513, 124+377).

9184. Pleading and proof—In any such action brought in any court of this state against the last or delivering carrier and any one or more connecting common carriers, it shall be sufficient for the plaintiff to allege in his complaint and prove upon the trial of such action, that such personal property was in good order and condition when delivered to the initial carrier, that the same was transported from the initial point of shipment to its destination by two or more connecting common carriers, including the defendants, that it was in whole or in part injured or damaged on arrival at destination, and the general nature and amount of such injury or damage thereto, and such proof shall be prima facie evidence that such injury or damage was caused by the negligence of all the defendants and the amount of loss or damage caused to such property by the negligence of each and every one of the defendants shall be determined by the jury upon the trial of said action from all the evidence in the case, and a verdict rendered accordingly. ('07 c. 466 § 2) [7693]

LIMITATION OF ACTIONS

9185. General rule—Exceptions—Actions can only be commenced within the periods prescribed in this chapter, after the cause of action accrues, except where, in special cases, a different limitation is prescribed by statute. (4071) [7694]

1. In general—The statute is applicable to all actions whether of a legal or equitable nature (11–459, 341; 12–522, 431; 24–17; 39–115, 39+67; 47–193, 48+608). It is applicable to all legal proceedings that are analogous in their nature to actions (40–512, 526, 41+465, 42+473). It does not run against defences but only against remedies (55–492, 57+211; 74–134, 76+1017). A court has no authority to extend or modify the statute (12–522, 431;

39–115, 39+67). The parties to a contract may by the terms of the contract, limit the time within which an action may be brought thereon (68–373, 71+272. See 58–163, 59+996, 737). Statute giving cause of action and fixing limitation (116–461, 134+111). Operates prospectively unless clear contrary legislative intent appears (134–21, 158+715). Rule for determining whether cause of action is barred (134–78, 158+908).

2. **When action accrues**—Day on which it accrued is excluded (102–89, 112+880). When statute begins to run against breach of covenant of seisin (104–404, 116+931). Cited (102–245, 113+450). When by contract money is payable only on demand, statute does not begin to run till demand (110–213, 124+994). See 124–176, 144+761. Contract stipulations limiting time (125–512, 147+651).

3. **Waiver**—Where notes more than six years overdue were received in evidence without objection, and attention was not called to plea of limitation until conclusion of trial, defense was waived (98–343, 108+296).

4. **Laches**—Where one who may proceed in equity for rescission of contract, or sue at law for damages, adopts latter course, equitable doctrine of laches has no application (99–149, 108+884, 109+1).

9186. Bar applies to state, etc.—Exception—Such limitation shall apply to actions by or in behalf of the state and the several political divisions thereof: Provided, that no occupant of a public way, levee, square, or other ground dedicated or appropriated to public use shall acquire, by reason of his occupancy, any title thereto. (4072) [7695]

The legislature having adopted the policy of making the statutes of limitation applicable to the state they are to be given as liberal a construction against the state as against citizens (40–512, 41+465, 42+473; 45–387, 48+17. See 38–397, 37+949). They are applicable to municipal corporations whether suing in a sovereign or proprietary capacity (45–387, 48+17). Prior to 1899 c. 65 an occupant of a public street or square might acquire title by adverse possession (45–387, 48+17; 46–505, 49+205; 48–402, 51+377; 53–398, 55+560; 64–459, 67+360; 73–270, 76+35; 85–331, 88+987; 93–455, 101+791). Statutes of limitation do not operate against the state or federal government unless there is an express provision or necessary implication to that effect, and title to public land cannot be acquired by adverse possession (93–295, 101+182). Title to lands granted to state for use of schools by United States cannot be acquired by adverse possession, as against state (102–52, 112+860; 107–378, 120+374). Nor can title to state swamp lands be so acquired (104–123, 116+210). Cited (119–132, 137+298). See 101–378, 112+385; 129–59, 151+532. Long continued user (123–344, 144+150). Acquisition of title by adverse possession despite public easement (132–313, 156+351). No prescriptive right in public street (194+630).

In so doing the commission may consider how the abutting property is affected and give the owners thereof as much benefit and use of the street as may be consistent with the public easement therein. In fixing such space it was not improper to take into account that one owner had obtained title to part of the street by prescription. 156–293, 194+627.

9187. Recovery of real estate, fifteen years—No action for the recovery of real estate, or the possession thereof, shall be maintained unless it appears that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within fifteen (15) years before the beginning of the action:

Provided, however, such limitation shall not be a bar to an action for the recovery of real estate assessed as tracts or parcels separate from other real estate, unless it appears that the party claiming title by adverse possession or his ancestor, predecessor, or grantor, or all of them together, shall have paid taxes on the real estate in question at least five (5) consecutive years of the time during which he claims said lands to have been occupied adversely.

Providing, further, that the provisions of the foregoing proviso shall not apply to actions relating to the boundary line of lands, which boundary lines are established by adverse possession, or to actions concerning lands included between the government or platted line and the line established by such adverse possession, or to lands not assessed for taxation. (R. L. § 4073, amended '13 c. 239 § 1) [7696]

½. **In general.**

No rights can be acquired by adverse possession in state school land, nor in land occupied under an agreement with the owner. 158–53, 196+806.

Evidence held to sustain the finding that the boundary line in dispute had been established by the practical location thereof by the parties. 1558–53, 196+806.

A failure to pay taxes on a portion of an adjoining tract of land, assessed as one tract, does not, under the provisions of the statute prevent adverse possession of the portion actually occupied. 167–356, 209+257.

A title acquired by adverse possession is a legal title, though not a record title, and is not lost by the ceasing of occupancy. 167–356, 209+257.

Evidence held sufficient to justify the finding that the defendant and its immediate predecessor had been in adverse possession of the strip of land in controversy for the period of 15 years. 213+562.

1. **Policy and theory of statute**—31–81, 16+495; 38–197, 36+333; 45–299, 48+711; 55–290, 56+1060; 126–389, 148+125; 134–417, 159+966.

2. **Essentials of adverse possession**—To be adverse possession must be actual, open, continuous, hostile, exclusive and accompanied by an intention to claim adversely (17–361, 335; 36–152, 30+551; 44–135, 46+299; 55–290, 56+1060; 61–113, 63+248; 62–229, 64+559; 62–310, 64+903; 84–4, 86+756; 87–526, 92+471; 93–295, 101+182; 95–396, 104+131). 124–393, 145+30.

3. **Payment of taxes**—Rule as to payment of taxes by adverse claimant (123–344, 144+150). 137–203, 163+162; 142–85, 170+922.

3a. **Possession must be hostile and under claim of right**—The possession must be hostile to the title of the true owner and under claim of right. Claim of right means claim of exclusive ownership. The claimant must have intended to occupy the land as owner in fee against the world (17–361, 335; 31–81, 16+495; 31–500, 18+452; 44–135, 46+299; 44–432, 46+913; 46–505, 49+205; 48–402, 51+377; 53–398, 55+560; 55–290, 56+1060; 65–500, 67+1022; 67–362, 69+1096; 75–9, 77+424; 78–102, 80+861; 84–4, 86+756; 84–143, 86+1102; 86–199, 90+364; 87–526, 92+471; 96–137, 104+759). The intent to claim adversely may be inferred from the nature of the occupancy. Oral declarations of a claim are not necessary. Continued acts of ownership, occupying, using and controlling the property as owner, constitute the usual and natural modes of asserting a claim of title (31–81, 16+495; 44–135, 46+299; 48–402, 51+377; 55–290, 56+1060; 61–113, 63+248; 65–500, 67+1022; 78–102, 80+861; 89–462, 83+442; 84–4, 86+756; 101–378, 112+385). A recognition of the title of the owner by the disseizor breaks the continuity of claim as well as the continuity of possession and in such case he must begin de novo if he wishes to claim the benefit of the statute (63–330, 63+267, 65+649, 68+458). But after the statute has run in favor of a disseizor, no acknowledgment of the former owner's title, except by deed sufficient to pass title, will divest the title acquired by adverse possession (67–362, 69+1096). One in adverse possession of land may purchase the title of one person against whom he is holding adversely without abandoning his adverse holding as to the title of another (45–387, 48+17). A finding that a possession was adverse is a finding that it was hostile (55–290, 56+1060).

132–311, 156+350.

User of platted street by abutting owner (139–394, 166+766).

4. **Public land**—A person who takes possession of land in the erroneous belief that it is public land, with the intention of holding and claiming it under the federal homestead law, may acquire title thereto by adverse possession as against the true owner (93–295, 101+182).

5. **Mistake as to boundary lines**—31–81, 16+495; 44–432, 46+913; 45–401, 48+322; 52–537, 54+740; 57–135, 58+686; 62–229, 64+559; 64–459, 67+960, 87–475, 92+402; 89–31, 93+1038; 99–410, 109+828. Boundary lines. Sufficiency of adverse user to overcome true boundary line (121–469, 141+788). 124–337, 144+759.

6. **Permissive possession—Licensee**—To make a permissive possession adverse there must be some open assertion of hostile title and knowledge thereof brought home to the owner (60–100, 61+814; 63–272, 65+459; 66–390, 69+37. See 106–205, 118+798).

7. **Between tenants in common**—13–501, 462; 16–164, 146; 31–500, 18+452; 37–338, 34+26; 45–545, 48+407; 60–100, 61+814; 69–149, 72+56; 77–533, 80+702; 99–380, 109+819.

8. **Between mortgagor and mortgagee**—31–500, 18+452; 63–272, 65+459.

9. **Between life tenant and remainderman**—37–338, 34+338; 77–533, 80+702.

10. **Between railroad and homesteader**—One who enters land under the homstead laws within a congressional grant to a railroad cannot acquire title against the railroad by adverse possession (23 S. Ct. 671, 190 U. S. 267, 47 L. Ed. 1044, overruling 84–152, 86+1007).

11. **Between husband and wife**—69–149, 72+56.

12. **Between parent and child**—66–390, 69+37; 86–199, 90+364; 88–418, 93+605.

13. **Between widow and heirs**—84–143, 86+1102.

14. **Between vendor and vendee**—Where a grantor re-

mains in possession after a valid conveyance his possession as well as that of those occupying the land under him is presumed to be permissive. The presumption, however, is not conclusive, for, if the party so in possession asserts claim to title in himself, and his claim is made known to the grantee, his possession is hostile and adverse. Notice of such hostile claim need not be given to the grantee directly or in words. It may be brought home to him by acts of the occupant so open, notorious and hostile as to show clearly that he is claiming adversely (91–133, 97+578). The possession of a vendee under an executory contract of purchase is not adverse to the vendor so long as the purchase money is not paid or until the vendee is entitled to demand a deed (55–290, 56+1060; 80–501, 83+396; 90–503, 97+384. See 86–199, 90+364), although it may be adverse as to third parties (55–290, 56+1060). The vendee bears somewhat the relation of a tenant of the vendor and is estopped from denying his title (57–148, 58+873; 58–301, 59+1023). A mistake in a deed whereby a portion of the premises intended to be conveyed are omitted does *not prevent the grantee from acquiring title by prescription* to the land so intended to be conveyed (42–163, 44+525). Want of assertion of adverse claim (140+120).

15. Possession must be actual—The possession must be actual and of a nature calculated to give the true owner unequivocal notice of adverse claim (44–135, 46+299; 45–299, 47+811; 45–545, 48+407; 47–141, 49+662; 61–113, 63+248; 80–462, 83+442; 87–526, 92+471; 95–396, 104+131). The possessory acts to constitute adverse possession must necessarily depend upon the character of the property, its location, and the purposes for which it is ordinarily fitted or adapted (37–133, 33+220; 44–135, *46+299; 45–299, 47+811; 45–545, 48+407; 55–290, 56+1060;* 62–229, 64+559; 63–272, 65+459; 69–167, 71+930; 80–462, 83+442). No general rules can be laid down (17–361, 335; 37–113, 33+220; 69–167, 71+930). The possessory acts must be such as to indicate and serve as notice of an intention to appropriate the land itself and not the mere products of it to the dominion and use of the occupant (40–48, 41+238; 44–135, 46+299; 45–299, 48+711; 47–141, 49+662; 69–122, 71+923; 80–462, 83+442). Actual residence on the land is not always necessary (17–361, 335; 37–113, 33+220; 44–135, 46+299; 55–290, 56+1060; 69–167, 71+930; 80–462, 83+442). It is not ordinarily necessary that a farm should be fenced (69–167, 71+930). It is necessary that there be at all times some person in an action against whom the real owner may recover the possession of the land (45–387, 48+17). Where there is no adverse possession the title draws to it the possession; that is, the owner is constructively in possession (17–361, 335; 31–81, 16+495; 63–156, 65+357. See 107–36, 119+492; 118–344, 136+852).

16. Possession must be open and visible—The possession must be open or notorious, that is, it must be such as would naturally charge the true owner with knowledge of the adverse holding. In other words, it must be visible (38–197, 36+333; 40–48, 41+238; 44–135, 46+299; 47–141, 49+662).

17. Possession must be exclusive—55–290, 56+1060.

18. Possession must be continuous—The possession must be continuous for the statutory period. An acknowledgment by the adverse claimant of the owner's title before the statute has run in his favor breaks the continuity of his adverse possession and it cannot be tacked to any subsequent adverse possession (36–152, 30+551; 38–122, 35+862; 42–163, 44+525; 43–346, 46+238; 44–135, 46+299; 45–387, 48+17; 45–401, 48+322; 45–545, 48+407; 55–290, 56+1060; 63–330, 63+267; 65+649; 68+458; 65–500, 67+1022; 67–362, 69+1096; 69–149, 72+56; 76–401, 79+497; 90–503, 97+384; 94–456, 103+335). The possession of a tenant is the possession of his landlord for the purposes of the statute (36–152, 30+551; 45–387, 48+17; 45–401, 48+322). The continuity of adverse possession is not broken by the party in possession taking written conveyances from other parties claiming an interest therein, as this may give him color of title and perhaps define the boundaries of the premises claimed (55–290, 56+1060). After the statutory period has run any interruption in the possession is immaterial (55–290, 56+1060. See 67–362, 69+1096). Pendency of former action by defendant against plaintiff to determine adverse claims in which *she affirmatively alleged in her answer that she was* owner, which action was afterwards dismissed on her motion, plaintiff therein consenting, did not interrupt the continuity of adverse possession by defendant (104–84, 116+205). 132–311, 156+350; 152–8, 187+615.

19. Tacking—Successive disseizins cannot be tacked for the purpose of constituting a continuous adverse possession unless there is privity between the successive disseizors (36–152, 30+551; 38–122, 35+862; 45–401, 48+322). Privity exists between two successive disseizors when one takes under the other, as by descent, will, grant, or voluntary transfer of possession (36–152, 30+551; 42–163, *44+525; 45–387, 48+17; 45–401, 48+322, 736; 45–545, 48+407;* 78–193, 80+968; 84–143, 86+1102). Such continuity may be effected by any conveyance or understanding which has for its object a transfer of the rights of the possessor or of his possession when accompanied by an actual transfer of possession (42–163, 44+525; 45–387, 48+17; 45–401, 48+322). No conveyance or assignment in writing is necessary (76–401, 79+497).

20. Color of title—Color of title is not necessary (48–402, 51+377; 65–500, 67+1022; 75–9, 77+9; 78–102, 80+861). But the disseizor must enter with "claim of right." "Color of title" and "claim of right" are not synonymous (75–9, 77+424). A person has color of title when he has apparent though not real title, founded upon a deed which purports to convey to him (27–60, 6+403. See 27–449, 8+166; 30–372, 15+665; 32–527, 21+717; 37–157, 33+326). It is not necessary that the deed be valid or recorded (37–113, 33+220; 44–135, 46+299; 64–513, 67+632). "Claim of title," "claim of right," "claim of ownership" mean nothing more than the intention of the disseizor to appropriate and use the land as his own to the exclusion of all others (75–9, 77+424). Color of title though not necessary is important in determining the extent of the possession (17–361, 335; 45–387, 48+17; 75–9, 77+424). Where the disseizor enters without color of title adverse possession is only coextensive with his actual occupancy *(36–525, 32+859; 61–113, 63+248; 69–122, 71+923;* 78–102, 80+861; 78–193, 80+968). But where the disseizor enters under color of title his possession is ordinarily coextensive with the description in his deed (37–113, 33+220; 43–346, 46+238; 45–387, 48+17; 64–513, 67+632; 78–193, 80+968; 82–112, 84+732; 94–513, 103+561. See 62–310, 64+903). One who enters without color of title cannot extend his possession by merely obtaining color of title subsequent to his entry (78–193, 80+968).

125–484, 147+655; 151–269, 186+691.

21. Nature of title acquired by adverse possession—The title acquired is a perfect title in fee simple (31–81, *16+495; 31–360, 17+957; 44–199, 46+432;* 44–432, 46+913, 46–458, 49+238; 55–290, 56+1060; 67–362, 69+1096; 86–165, 90+369; 94–513, 103+561). The holder of a title by adverse possession may bring ejectment against the holder of the paper title by whom he has been dispossessed (36–152, 30+551; 86–165, 90+369).

22. Easements—36–273, 30+886; 65–500, 67+1022; 86–70, 90+156.

23. Evidence admissible—The deed under which the disseizor entered is admissible to show the nature and extent of his claim although void on its face (17–361, 335; 37–113, 33+113; 45–545, 48+407). The fact of payment *or non-payment of taxes is admissible* (37–113, 33+220; 44–135, 46+299; 55–290, 56+1060; 69–167, 71+930; 80–462, 83+442; 84–4, 86+756). Declarations of a prior deceased disseizor characterizing his possession are admissible in favor of a party claiming under him (61–113, 63+248). Conduct and admissions subsequent to the expiration of the statutory period are admissible to explain and characterize the antecedent possession (84–4, 86+756; 96–137, 104+759). 126–489, 148+296.

24. Question for jury—Except where only one reasonable inference can be drawn from the evidence the question of adverse possession is for the jury (17–361, 335; 48–402, 51+377; 61–113, 63+248; 62–229, 64+559; 69–167, 71+930; 84–4, 86+756; 87–526, 92+471).

25. Burden of proof—40–48, 41+238; 53–398, 55+560; 61–113, 63+248; 73–270, 76+35.

26. Degree of proof required—The evidence to establish a title by prescription must be direct, clear and convincing. Every presumption is to be indulged against the disseizor (17–361, 335; 44–135, 46+299; 73–270, 76+35; 84–4, 86+756; 87–526, 92+474; 88–110, 92+525). 127–397, 149+647; 134–430, 159+830.

27. Facts held sufficient to constitute adverse possession—Building a house on the property of another through mistake as to the boundary line (31–81, 16+495); clearing, grubbing and fencing a portion of a farm, putting in crops, tapping trees, cutting grass and draining land—No buildings being built on the farm, the claimant living near by (37–113, 33+220); cutting trees on a lot, grubbing and burning the brush, digging out the stumps of trees, leaving tools on the land from year to year, camping on the land at intervals, paying taxes and finally building a house (44–135, 46+299); extensive ditching of the land and using it as a hay farm for which it was alone adapted (45–545, 48+407); building a warehouse on an alley in a village (48–402, 51+377); living on the land and cropping it annually although no fences were built around it *(69–167, 71+930); building a fence around* land and using it as a pasture (78–193, 80+968); cutting wood, pasturing cattle, cutting hay, fencing a portion and living at intervals and for a short time in a shanty, the land being bottom land along the Mississippi (80–462, 83+442); piling lumber on a city lot, building a barn and shed, keeping and stabling horses, paying taxes (55–290, 56+1060); setting out trees along a boundary line (62–229, 64+559); enclosing tract by brush fence, cutting hay and pasturing cattle (45–299, 47+811. See 87–526, 92+471). Title by adverse possession may be acquired by maintenance of dam across stream, thereby causing lands to be *submerged for statutory period* (107–370, 120+373).

28. Facts held insufficient to constitute adverse possession—Cutting timber without actual occupancy or cultivation or inclosure where the land is capable of such improvement (17–361, 335); cutting natural hay

on and letting cattle run over and feed upon wild and uninclosed land adjoining land actually occupied by the trespasser (40–48, 41+238; 47–141, 49+662; 69–122, 71+923. But see 45–545, 48+407; 69–167, 71+930); camping in a tent on vacant and unoccupied land and cooking, preparing food and sleeping on it for a few days or a week and watching it for several weeks for the purpose of keeping off trespassers and asserting title to the land but doing and intending to do nothing else to improve the land or subject it to any proper use (56–443, 57+1072). 125–25, 145+404.

29. Title without possession—The legal "title" carries with it the right of possession, which is sufficient under this section to authorize an action to recover from one in possession without title (107–36, 119+492; 118–344, 136+852).

30. Tax sales—Short statutes of limitation—Short statutes of limitation as to actions to test validity of tax sales do not apply to actions for possession of real estate, nor to actions where party invoking statute alleges title in himself by virtue of tax sale and asks court to determine question of title on merits and adjudge it to be in him, for such a judgment would carry with it as necessary incident unquestionable right to the possession of the land (98–269, 107+954). See also '11 c. 328 providing that no action to recover estates in or in lieu of dower or by curtesy shall be maintained after October first, 1911, when conveyance was made prior to January first, 1896.

9188. Foreclosure of real estate mortgages—No action or proceeding to foreclose a real estate mortgage, whether by action or advertisement, or otherwise, shall be maintained unless commenced within fifteen years from the maturity of the whole of the debt secured by said mortgage, and this limitation shall not be extended by the non-residence of any plaintiff or defendant or any party interested in the land upon which said mortgage is a lien in any action commenced to foreclose such mortgage, nor by reason of any payment made after such maturity, nor by reason of any extension of the time of payment of said mortgage or the debt or obligation thereby secured or any portion thereof, unless such extension shall be in writing and shall have been recorded in the same office in which the original mortgage is recorded, within the limitation period herein provided, or prior to the expiration of any previously recorded extension of such mortgage or debt, nor by reason of any disability of any party interested in said mortgage. ('09 c. 181 § 1) [7698]

This act supersedes R. L. 4074 and 1907 c. 197.

Under prior laws—Not applicable to foreclosure by advertisement (20–453, 407). Not applicable to the mortgage debt. An action to foreclose is governed by the six year limitation so far as it is an action for the recovery of a personal judgment (46–422, 49+237). An action to foreclose will lie after an action on the mortgage debt is barred (11–459, 341; 35–518, 29+314; 88–253, 92+951. See 15–512, 423; 63–156, 65+357). Prior to 1901 c. 11 it was held that a partial payment which prevented the running of the statute against the mortgage debt would also prevent the statute from running against an action to foreclose the mortgage (24–97; 52–67, 53+1130; 52–136, 53+1132; 81–454, 84+323; 82–296, 84+1018). When a mortgage is given to secure several separate notes the payment of one of them as it falls due does not toll the statute as to the others or the mortgage (82–296, 84+1018). At present the running of the statute is not affected by the nonresidence of the defendant (45–167, 47+653). Prior to 1887 c. 69 the rule was otherwise (24–358; 39–39, 38+765; 44–290, 46+356; 52–67, 53+1130). Under 1870 c. 60 the limitation was ten years (20–264, 237; 21–520; 26–365, 4+611; 63–156, 65+357). Under G. S. 1866 c. 66 § 11 the limitation was twenty years (15–69, 50; 63–156, 65+357). Under 1901 c. 11, where mortgage was extended, statute commenced to run from maturity of debt, and not from date of maturity as originally stated in mortgage (101–387, 112+281). 148–13, 180+1004; 152–9, 187+165.

9189. When time begins to run—Commencement of proceedings—The time within which any such action or proceeding may be commenced shall begin to run from the date of such mortgage, unless the time of the maturity of the debt or obligation secured by such mortgage shall be clearly stated in such mortgage. Any action or proceeding to foreclose a real estate mortgage whether by action, by advertisement or otherwise, commenced within the period of limitation herein provided, may be prosecuted to completion notwithstanding the expiration of said period of limitation, and proceedings to foreclose a real estate mortgage by advertisement shall be deemed commenced on the date of the first publication of the notice of sale. ('09 c. 181 § 2) [7699]

1907 c. 197 cited (101–387, 112+281). 148–13, 180+1004.

9190. Judgments, ten years—No action shall be maintained upon a judgment or decree of a court of the United States, or of any state or territory thereof, unless begun within ten years after the entry of such judgment. (4075) [7700]

A judgment constitutes, of itself, a cause of action, and, like other causes of action, a suit may be brought upon it within the time limited by statute and such suit may proceed to trial and judgment even after the expiration of the ten years (39–330, 40+161; 56–390, 57+938). Operation of statute not suspended by new promise (99–433, 109+1001. See 28–248, 9+732; 62–507, 64+1151). Equity will not extend the statutory limitation by means of equitable remedies (28–248, 9+732; 39–330, 40+161; 94–216, 102+453). Prior to 1902 c. 2 § 83 the statute was held applicable to judgments for taxes. Action on judgment, domestic or foreign, must be brought within 10 years from rendition without reference to residence of judgment debtor during the 10 years. Section 9200 does not modify this section (102–245, 113+450). 138–121, 164+586.

9191. Various cases, six years—The following actions shall be commenced within six years:

1. Upon a contract or other obligation, express or implied, as to which no other limitation is expressly prescribed.

2. Upon a liability created by statute, other than those arising upon a penalty or forfeiture.

3. For a trespass upon real estate.

4. For taking, detaining, or injuring personal property, including actions for the specific recovery thereof.

5. For criminal conversation, or for any other injury to the person or rights of another, not arising on contract, and not hereinafter enumerated.

6. For relief on the ground of fraud, in which case the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

7. To enforce a trust or compel a trustee to account, where he has neglected to discharge the trust, or claims to have fully performed it, or has repudiated the trust relation.

8. Against sureties upon the official bond of any public officer, whether of the state or of any county, town, school district, or municipality therein; in which case the limitation shall not begin to run until the term of such officer for which the bond was given shall have expired. (4076) [7701]

½. In general.

209+864, 210+622.

The enactment by Congress of section 206 (f) of the Federal Transportation Act of February 28, 1920, did not have the effect of reviving causes of action which had theretofore become barred by the statute of limitations of this state. 156–20, 194+9.

Thresher's lien. 160–38, 199+748.

Promissory notes. 160–146, 199+567.

Claim of drainage engineer not barred. 161–66, 200+833.

Action on a depositary's bond. 211+7.

Applies only to express, technical, and continuing trusts of the kind which were originally cognizable only in a court of equity. Actions for an accounting and to impress upon land a trust arising by implication under a contract are governed by subdivision 1 of section 9191, G. S. 1923, relating to action "upon a contract or other obligation, express or implied," and the six-year limitation began to run with the accrual of plaintiff's right to demand an accounting or enforce a trust. 209+864.

1. Subd. 1—An action on the implied contract of a ferry company to carry safely (22–476); an action for an accounting between partners (24–17. See 62–324, 64+823); an action to compel specific performance of a contract for the sale of real property (39–301, 39+802; 140+

120); an action by a mortgagor against a mortgagee to recover a surplus at a sale under a power (14–97, 68); an action on an account for goods sold and delivered at different dates (43–219, 45+429); an action to foreclose a mortgage, so far as the right to a deficiency judgment is concerned (46–422, 49+237); an action for an accounting (62–324, 64+823; 29–115, 12+343); an action on a bond to secure distribution of estate of decedent (75–228, 77+818); an action on the official bond of a constable (35–167, 28+191); an action against a municipality for damages set apart for the owner in condemnation proceedings (66–176, 68+836); an action to enforce an implied trust (66–176, 68+836. But see 40–506, 42+479); an action for the recovery of part payments on a contract for the sale of land (81–428, 84+221); an action on a guardian's bond (68–388, 71+402); an action on a promissory note (9–64, 54); an action on instalments of salary (13–394, 365); an action to secure refundment of money paid at a void tax sale (58–1, 59+634). Cited and applied (104–65, 112+1054). Cited (104–404, 116+931; 179 Fed 137. See 106–233, 118+834). Not barred by six-year statute (121–22, 140+120). 136–288, 161+593; 125–887, 145+799; 138–37, 163+975; 131–136, 154+795; 133–409, 158+625; 140–512, 167+1047; 142–181, 171+799. Malpractice action as brought rests on contract of employment (149–48, 184+32). Continuing contract with decedent (151–499, 187+610). The Federal Employer's Liability Act of 1908 creates a new right of action and consequent limitation of action (151–159, 186+795). Employer's remedy under workmen's compensation act is that prescribed by ch. 84 (152–199, 188+265). Limitation for injury to employe of steam railroad is '15 c. 187 (154–183, 191+608). Federal Transportation Act of Feb. 28, 1920 (194+9).

2. **Subd. 2**—Liability of stockholders (48–349, 51+117; 62–152, 64+145; 66–487, 69+610, 1069; 84–144, 86+872; 92–423, 100+222). Prior to 1902 c. 2 § 82 proceedings for *the enforcement of taxes were held to come* within this provision. Prior to 1902 c. 2 § 61 this provision was held to apply to an action for the refundment of money paid at a void tax sale (53–309, 55+128. See 81–254, 83+991). Inapplicable to action to recover penalty for trespass on state lands (95–272, 104+240). Cited (99–392, 109+703). See 136–111, 161+498; 142–187, 171+778; 146–291, 178+600; 148–352, 182+442.

Subd. 3—129–113, 151+968.

3. **Subd. 5**—Actions for personal injuries are within this provision (67–146, 69+710; 70–35, 72+1134; 70–50, 72+833). Action against city for injuries to employe is governed by subd. 5, and not by § 9193, subd. 1 (120–373, 139+716). See 120–375, 139+716; 123–19, 142+930.

4. **Subd. 6**—This provision is applicable alike to legal and equitable actions (12–522, 431; 39–115, 39+67; 47–193, 48+608. See 38–197, 36+333). The statute begins to run only from the discovery of the fraud or from the time it ought to have been discovered. *The means of knowledge* are equivalent to knowledge, that is, a knowledge of the facts which would put an ordinarily prudent man upon inquiry which if followed up would result in the discovery of fraud is equivalent to actual discovery (12–522, 431; 22–97; 22–287; 39–115, 39+67; 47–193, 48+608; 53–371, 55+547; 70–113, 72+838; 71–69, 73+645; 75–396, 78+101; 87–456, 92+340; 88–413, 93+110; 89–184, 94+551; 89–232, 94+688; 113–410, 129+777; 115–86, 131+1071). Constructive notice of a record of a deed in the register's office is insufficient to set the statute running (22–287; 70–113, 72+838). When an action for relief on the ground of fraud is not commenced until more than six years after the commission of the acts constituting the fraud the burden is on the plaintiff to allege and prove that he did not discover the facts constituting the fraud until within six years before the commencement of the action (39–115, 39+67; 53–371, 55+547; 70–113, 72+838; 71–69, 73+645; 75–396, 78+101; 88–413, 93+110; 89–184, 94+551). The title of a fraudulent grantee is protected by the statute and unless defrauded creditors effect a cancellation thereof in some appropriate action brought within six years from the discovery of the fraud his title becomes absolute and unassailable (87–456, 92+340). The following actions fall within this provision: an action by a county against its treasurer for fraudulent conversion of the county funds (22–97); an action by a principal against an agent for the fraudulent conversion of funds of the principal (12–522, 431); an action by stockholders to have a deed of the corporation set aside for fraud (53–371, 55+547); an action by heirs to charge an administrator as trustee (47–193, 48+608); an action to set aside a fraudulent conveyance (30–519, 16+404; 70–113, 72+838; 87–456, 92+340; 88–413, 93+110. See 44 Fed. 817; 49 Fed. 315, 1 C. C. A. 256). Statute does not begin to run in action to set aside partnership accounting for fraud till discovery (107–109, 119+652). See *134–284, 158+428; 159+569; 147–263, 180+221.*

5. **Subd. 7**—Express trusts are created by contracts and agreements which directly and expressly point out the persons, property and purposes of the trust. Implied trusts are those which the law implies from the language of the contract and the evident intent and purpose of the parties (79–53, 81+549). This provision has no application to implied trusts (66–176, 68+836. But see 40–506, 42+479). The statute begins to run against an express trust only from the time a breach, disavowal or repudiation thereof by the trustee is made known to the cestui que trust (33–329, 34+272; 44–260, 46+406; 62–132, 64+141; 62–324, 64+823; 79–53, 81+549; 84–109, 86+894). The mere fact that a contract creates a relation in the nature of a trust, or that the action to enforce the obligations growing out of such contract is of an equitable nature, does not bring the action within this provision (24–17). Statute followed in federal courts (47 Fed. 782).

Subd. 7—Statute commences to run against action to recover trust funds on performance of trust, or when trustee repudiates, and the cestui is notified. Mere lapse of time, without inquiry into trusteeship, does not constitute such laches as to preclude recovery (107–109, 119+652).

Subd. 8—Cited and applied (105–295, 117+496). 1895 c. 126, prescribing that no action against surety on bond given by public officer, etc., should be maintained unless "recommended" within four years from date of filing new bond or expiration of term of office, held inoperative, because incapable of rational construction (101–294, 112+276).

9192. Against sheriffs and others — Forfeitures, three years—The following actions shall be commenced within three years:

1. Against a sheriff, coroner, or constable for any act done in his official capacity and in virtue of his office, or for any omission of an official duty, including the non-payment of money collected or received on a judgment or execution.

2. Upon a statute for a penalty or forfeiture to the party aggrieved. (4077) [7702]

1. **Subd. 1**—35–167, 28+191; 65–391, 67+1024. Does not apply to action for money had and received against sheriff on account of money obtained from county on verified bills, alleged to be untrue, for official services (102–134, 112+899). Where property was converted by sheriff when the sale was made under execution, and action against the sheriff was commenced within three years thereafter, it was not barred (105–295, 117+496).

Action by sheriff on bond of deputy. 163–419, 204+158.

2. **Subd. 2**—48–349, 51+1117 (overruled); 61–375, 63+1079; 66–213, 68+976; 78–124, 80+853; 95–272, 104+240. In action under 1895 c. 163 § 7 to recover treble damages for willful trespass to pine timber of state, limitation is three, not two, years (99–392, 109+703). Action in conversion, brought by state to recover value of timber not removed within time prescribed by permit, not barred by this subdivision or by § 9193 subd. 2 (106–1, 115+162).

Action on a depositary's bond. 211+7.

9193. Two years limitations—The following actions shall be commenced within two years.

1. For libel, slander, assault, battery, false imprisonment, or other tort, resulting in personal injury, and all actions against physicians, surgeons, dentists, hospitals, sanitariums, for malpractice, error, mistake, or failure to cure, whether based on contract or tort; Provided, a counterclaim may be pleaded as a defense to any action for services brought by a physician, surgeon, dentist, hospital or sanitarium, after the limitations herein described notwithstanding it is barred by the provisions of this chapter, if it was the property of the party pleading it at the time it became barred and was not barred at the time the claim sued on originated, but no judgment thereof except for costs can be rendered in favor of the party so pleading it.

2. Upon a statute for a penalty or forfeiture to the State.

3. For damages caused by a milldam; but as against one holding under the pre-emption or homestead laws, such limitations shall not begin to run until a patent has been issued for the land so damaged.

4. Against a master for breach of an indenture of apprenticeship; the limitation, in such case, to run from the expiration of the term of service. (4078) [7703] (Amended '25, c. 113, § 1)

Legislature intended to make the act applicable to causes of action existing at the time, and the delay was for the very purpose of permitting actions to be brought thereon before the statute became effective. 210+622.

If a reasonable time is allowed for the commencement of actions upon existing causes of action, a statute cannot be invalidated as unconstitutional. This court cannot say that the three months allowed in this case was unreasonable. 210+622.

1. **Subd. 1**—An action for malicious prosecution is within this provision (69–30, 71+826). An action for personal injury is not (see § 9191 note 3). Under G. S. 1894 § 2369 no action for damages for overflowing lands by erection and maintenance of milldam, a permanent structure, can be maintained unless brought within two years after damages first sustained by reason of the dam (104–419, 116+829). Cited and applied (100–27, 110+68). Not applicable to personal injuries received through another's negligence (120–373, 139+716). Physician's unskillful services (122–153, 142+143). Six-year limitation applies to saloon keeper's bond when damages ensue from breach of contract (131–141, 154+795). Malicious prosecution of civil action (123–19, 142+143). Limitation of action for malpractice is not barred by 2 year statute (149–481, 184+32).

2. **Subd. 2**—Cited and applied (99–392, 109+703; 106–1, 115+162).

3. **Subd. 3**—11–15, 1; 11–336, 237; 12–451, 347; 13–324, 297; 13–498, 457; 39–61, 38+777; 46–118, 48+558.

9194. Local improvement certificate of certain cities—Two years—Lien superseded—That no action for the refundment or recovery of moneys paid on account of the purchase of any valid or invalid certificate of sale for a local improvement assessment, heretofore or hereafter issued by any city in this state now or hereafter having a population of over fifty thousand inhabitants, shall be maintained after the expiration of two years from the date when notice of expiration of the period of redemption of the property described in such certificate from the sale evidenced thereby could have lawfully been given; nor shall such action be maintained in any case where the person claiming under such certificate of sale has permitted the lien evidenced by such certificate to be superseded, avoided or cut out by a subsequent or superior lien arising either from the levy of taxes for general purposes or from the levy of a duly authorized local improvement assessment. ('07 c. 183 § 1) [7704]

Held unconstitutional as applied to certificates purchased prior to passage, under provision of St. Paul charter that, if in action within 15 years certificates be declared invalid, city should reimburse purchaser (105–19, 116+1111).

9195. Action to be commenced within one year—No action shall be maintained upon any judgment note or other instrument, heretofore or hereafter executed, containing any provision authorizing a confession of judgment thereon, unless begun within one year after the cause of action shall have accrued. ('15 c. 222 § 1)

Judgment by confession, under a power of attorney from the debtor, held to have been properly vacated, because the action was not commenced within one year after the accrual of the cause of action. 164–81, 204+923.

Any proceeding resulting in a judgment in favor of one party and against another is an "action," within the meaning of that statute. 164–81, 204+923.

9196. Action upon judgment from U. S. court—No action shall be maintained upon any judgment or decree of any court of the United States, or of any state or territory thereof, heretofore or hereafter entered upon a plea of confession under any warrant of attorney or other instrument signed by the debtor authorizing such confession, unless the action upon such judgment be begun within one year after the rendition or entry thereof. ('15 c. 222 § 2)

164–81, 204+923.

9197. Mutual accounts—If the action be to recover a balance due upon a mutual, open, and current account, and there have been reciprocal demands between the parties, the limitation shall begin to run from the date of the last item proved on either side. (4079) [7705]

An account showing on one side items for goods sold and delivered at different dates and payments made by the purchaser on the other side does not come within this provision for the credit is all on one side and there is nothing to offset (43–219, 45+429). If credit is given for an article of personal property delivered by the debtor to his creditor at a valuation agreed upon the account is within this provision (17–469, 447).

9198. For a penalty given to prosecutor—Every action upon a statute for a penalty given in whole or in part to the person who prosecutes therefor shall be commenced by such party within one year after the commission of the offence; but, if the action is not commenced within one year by a private party, it may be commenced within two years thereafter on behalf of the state by the attorney general or the county attorney of the county where the offence was committed. (4080) [7706]

9199. When action deemed begun—Pendency—For the purposes of this subdivision, an action shall be considered as begun against each defendant when the summons is served on him, or on a codefendant who is a joint contractor or otherwise united in interest with him, or is delivered to the proper officer for such service; but, as against any defendant not served within the period of limitation, such delivery shall be ineffectual, unless within sixty days thereafter the summons be actually served on him or the first publication thereof be made. And when an action is begun it shall be deemed pending until the final judgment therein has been satisfied. (4081) [7707]

Applied as to time when action is commenced (13–326, 299; 26–421, 4+816; 50–445, 52+915; 50–503, 52+922; 91–226, 97+974; 91–352, 98+188). Services on joint contractor (3–106, 58). Applied as to when action is pending (10–158, 127; 25–120; 30–161, 14+795; 91–226, 97+974). Applied as to delivery of summons to officer for service (13–326, 299; 26–421, 4+816; 50–445, 52+915; 56–476, 58+38; 70–212, 73+4; 70–286, 73+164). G. S. 1894 § 5143 cited (97–423, 107+154). Garnishee summons is issued when delivered to proper officer for service on garnishee, and, when writ is sent to officer by mail, delivery is not completed until received by him (103–69, 114+257). See 124–195, 144+942. Registration of land title deemed pending (127–418 149+736). 139–486, 167+272; 147–376, 180+231.

212+22, note under § 8501; 163–114, 203+614, note under § 9342.

Does not apply to actions to enforce mechanics' liens. 161–143, 201+300.

Amendment stating new cause of action. 166–1, 206+945.

9200. Effect of absence from state—If, when a cause of action accrues against a person, he is out of the state, an action may be commenced within the times herein limited after his return to the state; and if, after a cause of action accrues, he departs from and resides out of the state, the time of his absence is not part of the time limited for the commencement of the action. (4082) [7708]

Applicable only to actions the subject matter of which arises or originates in this state (91–339, 97+1056). The mere fact that a note is made payable in this state does not make this section applicable (93–112, 100+664). It is not applicable to an action of ejectment (45–387, 48+17; 45–401, 48+322); to an action to foreclose a mortgage (see § 9188), or to foreign corporations with offices in this state (45–387, 48+17). If when the cause of action accrues against a person he is out of the state the action may be commenced within the statutory time after his return to the state (14–268, 199; 15–159, 123; 16–306, 270; 21–15). It is the general rule that the statute does not begin to run in favor of the party to be charged until he comes within the jurisdiction (9–64, 54; 13–390, 362; 44–260, 46+406; 45–112, 47+543; 54–14, 55+744). If, after the cause of action accrues, the debtor departs from and resides out of the state his new residence out of the state must, in order to toll the statute, be not merely temporary and occasional, but of such character and with such intent as to constitute a new domicil (16–306, 270; 19–483, 422; 50–320, 52+642. See 40–428, 42+292; 46–243, 48+1019; 61–256, 63+634). Cited and applied (102–245, 113+450). See 124–203, 144+945; 143–241, 173+657; 150–117, 184+785.

9201. When cause of action accrues out of state—When a cause of action has arisen outside of this state, and, by the laws of the place where it arose, an action thereon is there barred by lapse of time, no such action shall be maintained in this state unless the plaintiff be a citizen of the state who has owned the cause of action ever since it accrued. (4083) [7709]

This section applies to cases not covered by § 9200 that is, to actions the subject matter of which arises out of the state (91–339, 97+1056). Where a cause of action not arising in this state nor accruing to a citizen thereof is barred by the law of another state it is barred here (49–356, 51+1162; 93–112, 100+664. See 18–527, 471). It is the general rule that the statute does not begin to run in favor of the party to be charged until he comes within the jurisdiction (9–64, 54; 13–390, 362; 44–260, 46+406; 45–112, 47+543; 54–14, 55+744). The effect of the statute is to allow a citizen of this state to plead the statute of limitations of a foreign state or country when it is more favorable to him than our own and to allow him, when he is plaintiff in a foreign cause of action, which he has had from the time it accrued, the benefit of our own statute; or, in other words, it confers a privilege on a defendant when sued by a foreigner which it denies to him when sued upon the same demand by a domestic plaintiff (9–64, 54). See 138–121, 164+586; 146–337, 178+747; 150–117, 184+785.

9202. Periods of disability not counted—Any of the following grounds of disability, existing at the time when a cause of action accrued, shall suspend the running of the period of limitation until the same is removed: Provided, that such period, except in the case of infancy, shall not be extended for more than five years, nor in case for more than one year, after the disability ceases:

1. That the plaintiff is within the age of twenty-one years.
2. His insanity.
3. His imprisonment on a criminal charge, or under sentence of a criminal court for a term less than his natural life.
4. Is an alien and the subject or citizen of a country at war with the United States.
5. When the beginning of the action is stayed by injunction or by statutory prohibition.

And if two or more disabilities shall coexist, the suspension shall continue until all are removed. (4084) [7710]

The disability must exist at the time the cause of action accrues (67–169, 69+812). Infancy (63–272, 65+459. See 85–473, 89+848; 114–34, 129+1049). Bankruptcy proceedings (41–363, 43+79; 58–163, 59+996). Pendency of contest in general land office (87–117, 91+294. See 91–325, 98+89, 100+106). Action to sequester property of corporation (84–144, 86+872; 84–217, 87+604).

Where complaint alleged that as result of conspiracy between defendants plaintiff was falsely adjudged insane and committed on July 24, 1902, and was restored to capacity April 6, 1903, the action being commenced February 21, 1905, the action was barred (100–27, 110+68). Where personal injury caused by negligence of another and resulting insanity occur on the same day, the two events are legally simultaneous, and disability of insanity exists at time cause of action accrued (102–89, 112+880). Statutory provisions suspending running of period of limitation while action is stayed by injunction apply only between parties to suit (107–491, 120+1086). See 129–346, 152+736; 135–45, 159+1082.

That the statute begins to run when the cause of action accrues, and the courts have no power to extend or modify the periods of limitation provided therein. When once it begins to run it will not cease to do so by reason of any event not within the saving of the statute. 160–32, 199+431.

In the absence of fraudulent concealment, the running of the statute is not prevented, although the party having a right of action was ignorant of its existence 160–32, 199+431.

9203. Period between death of party and granting of letters—The time which elapses between the death of a person and the granting of letters testamentary or of administration on his estate, not exceeding six months, and a period of six months after the granting of such letters, are not to be deemed any part of the time limited for the commencement of actions by executors or administrators. If the death occur within the last year of the period of limitation, the action may be commenced by the personal representative at any time within one year after such death. And if a cause of action survive against a decedent, which is not required by law to be presented to the probate court, an action may be brought thereon against the personal representative of such decedent at any time within one year after the granting of letters testamentary or of administration. (4085) [7711]

15–159, 123; 30–386, 15+676; 39–39, 38+765; 44–449, 47+51; 45–167, 47+653; 75–527, 78+93; 115–86, 131+1071; 179 Fed. 137.

9204. New promise must be in writing—No acknowledgment or promise shall be evidence of a new or continuing contract sufficient to take the case out of the operation of this chapter, unless the same is contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of a payment of principal or interest. (4086) [7712]

1. Acknowledgment or promise—The acknowledgment or promise must be in writing signed by the person to be charged (39–518, 40+829; 82–296, 84+1018). Sufficiency of the acknowledgment or promise considered (11–138, 87; 12–352, 229; 12–407, 291; 16–215, 187; 29–361, 13+148; 35–63, 27+379; 39–367, 40+257; 51–482, 53+766). An acknowledgment cannot be withdrawn so as to restore the bar (12–17, 1). Acknowledgment by corporation (12–17, 1). A conditional promise will not take the debt out of the statute unless the condition is performed (12–407, 291). The acknowledgment or promise must itself describe or furnish the means of identifying the debt or debts to which it refers and cannot be supplemented by parol evidence (51–482, 53+766). It is immaterial whether the acknowledgment is made before or after the running of the statute (39–367, 40+257. See 80–361, 83+351). An account stated, which is not supported by evidence of some writing signed by the party to be charged, will not prevent the running of the statute against previously existing liabilities included therein (39–518, 40+829). A judgment, does not come within rule made foundation of this section, by which new promise or payment suspends operation of the statute (99–433, 109+1001; 142–183, 171+800; 151–499, 187+610).

2. Part payment—Partial payment on a partnership debt, after dissolution, suspends operation of statute as to other partners, in favor of creditor receiving such payment, who has had dealings with partnership and has no notice of dissolution (96–527, 105+972). Part payment on note by one of two joint makers will not prevent running of statute as to the other. Where note was executed by R. and L., and R. made part payment, indorsement thereof on note was not, by § 9888, evidence of correctness of recital that it was paid at request of L. (97–214, 106+310). Partial payments by principal debtor will not prevent running of statute as to guarantor of promissory note, unless contract of guaranty expressly so provides (104–130, 116+106). To prevent running of statute, payment must be made voluntarily by debtor in person, or by his authority, or must be ratified (101–1, 111+639). To infer new promise from part payment, debt or obligation must be definitely pointed out by debtor and intention to discharge it in part made manifest (103–168, 114+742). The indorsement on note of proceeds of sale of collateral deposited with note at time it was given is not part payment which will interrupt running of statute (97–214, 106+310). Where creditor holds separate claims, and debtor makes general payment on indebtedness, without directing or authorizing application upon any one, all of which are barred, bar is not removed as to any (12–352 [Gil. 229], applied. 103–168, 114+742. See 111–418, 127+923; 133–289, 158+391).

Moneys received by the payee of a note from collateral pledged by the maker, and indorsed on the principal note, do not constitute partial payments, so as to suspend the running of the statute of limitations. 160–146, 199+567.

This rule is applied where the guarantor of a pledged note made a trust deed for the benefit of his creditors, to which the payee of the principal note, with the consent of the maker, became a party, and the trustees paid certain of the proceeds of the guarantor's estate to the payee in the principal note, on which it was indorsed; and it is held that such payment did not suspend the running of the statute of limitations. 160–146, 199+567.

9205. New action in case of reversal—If judgment be recovered by plaintiff in an action begun within the

prescribed period of limitation, and such judgment be afterward arrested or reversed on error or appeal, the plaintiff may begin a new action within one year after such reversal or arrest. (4087) [7713]

VENUE

9206. General rule—Exception—Except as provided in § 9207, every civil action shall be tried in the county in which it was begun, unless the place of trial be changed as hereinafter prescribed; and, when so changed, all subsequent papers in the action shall be entitled and filed in the county to which such transfer has been made. (4088) [7714]

Entitling papers after change of venue (68–4, 70+777). See 132–9, 155+754; 150–499, 185+1019.

162–132, 202+482, note under § 9215.

9207. Actions relating to land, situs to govern—Actions for the recovery of real estate, the foreclosure of a mortgage or other lien thereon, the partition thereof, the determination in any form of an estate or interest therein, and for injuries to lands within this state, shall be tried in the county where such real estate or some part thereof is situated, subject to the power of the court to change the place of trial in the cases specified in § 9216 subds. 1, 3, 4. If the county designated in the complaint is not the proper county, the court therein shall have no jurisdiction of the action. (4089) [7715]

Held applicable to an action to cancel a real estate mortgage and to expunge the record thereof (83–114, 85+939); to an action for injuries to land within this state (65–48, 67+846); to an action to set aside mortgage foreclosure and redeem (101–16, 111+654); to action to set aside deeds procured by fraud (120–526, 139+613). Held not applicable to an action to cancel a contract for the sale of land on the ground of fraud (94–370, 102+869); to an action to set aside a judgment and levy on real estate (85–283, 88+755); to an action by heirs to avoid an administrator's sale of land, to recover lands in the hands of purchasers and for an accounting and recovery of the sales (76–513, 79+507); to an action for injuries to land in another state (65–48, 67+846); to proceedings for the appointment of a receiver in insolvency (60–358, 62+325). An action to set aside deeds of real estate, situated in more than one county, in fraud of creditors, may be brought in either county (91–96, 97+574). The modern tendency is to treat all actions as transitory which are not clearly and wholly local (65–48, 67+846; 91–96, 97+574; 94–370, 102+869). The precise effect of the last clause of this section is an open question (see 74–211, 77+41; 76–513, 79+507; 91–76, 97+574). Bringing an action in the wrong county does not go to the jurisdiction of the court over the subject matter. By consent of all the parties a court may try an action for the recovery of real estate lying in another county (76–513, 79+507). Prior to 1885 c. 169 it was held that if the county designated in the complaint was not the proper county the action might nevertheless be tried therein unless the defendant, before the time of answering expired, demanded that the trial be had in the proper county (21–15; 46–535, 49+257; 74–211, 77+41). Cited (120–458, 139+947). See 129–240, 152+408. Action for breach of contract to establish railway station upon grantor's land is not within this section (133–442, 158+266). Cause of action transitory (134–332, 159+788; 36–472, 162+351; 144–70, 174+525). Actions for cancellation of contracts, even though covering real estate, may be transitory and not local (146–424, 178+1005; 150–499, 185+1019). Triable in county where real estate is situated (150–513, 185+953). Action was not wholly local, but partly local and partly transitory (154–400, 191+814).

An action brought to cancel a contract on the ground of fraud is triable where the defendant resides, although it may incidentally involve the determination of rights in real estate. 164–433, 205+284.

By filing an affidavit for the attachment of the property, plaintiff did not elect to treat the action as purely local. 166–442, 208+203.

Where the primary purpose of an action is to establish the existence of a constructive trust, obtain an accounting, and have the court determine whether the rights of the defendants in the property which is the subject of the alleged trust are superior to those of the plaintiff, th eaction is not wholly local, and does not come within the provisions of section. 166–442, 208+203.

A suit by a minority stockholder to compel the assignment of a mining lease to his corporation, based on an allegation that the directors, in violation of their duties as fiduciaries, had taken the lease in the name of another corporation, is not local, and, though brought in the county where the leased land is situaetd, may be removed on the demand of the defendants to the county of their residence. 167–463, 209+270.

When the relief sought by such a suit is obtainable by a judgment in personam, the fact that the court has power to transfer the lease by judgment under section 9523, G. S 1923, does not transform the suit to one in rem or necessitate its trial in the county where the res is situated. 167–463, 209+270.

Precluded second trial after reversal in county where land was located. 210+405.

In suit to cancel mortgage, triable in county in which land was situated, plaintiff, having acquiesced in transfer of suit to county of defendant's residence and tried case there without objection, waived right to trial in county where land was located. 210+405.

Action to rescind and annul a contract to convey land is transitory. 211+469.

9208. Official misconduct, etc., where cause arose—Actions against a public officer, or person specially appointed to execute his duties, for acts done by virtue of such office, and against any person for like cause who has acted in place or in aid of such officer, and actions to recover penalties or forfeitures imposed by statute, shall be tried in the county in which the cause of action arose: Provided, that if the act for which the penalty or forfeiture is imposed be committed upon a lake or stream extending into, or bordering upon, more than one county, such action may be tried in any of said counties. (4090) [7716]

Action against public officer (92–402, 100+2). Officer may waive privilege (3–277, 191). Not applicable to an action of replevin for property wrongfully taken by an officer (34–506, 26+733; 45–170, 47+655). Not applicable to an action by a creditor against the officers of a corporation (66–213, 68+976). Cited (120–458, 139+947). Statute inapplicable (139–389, 156+534).

Venue. 166–499, 207+648.

9209. Bail bonds—Actions and proceedings prosecuted upon forfeited bail bonds or recognizances shall be heard and tried in the county in which the forfeiture was adjudged. ('23 c. 100 § 1)

147–272, 180+199.

9210. Cost bond — Recognizances — Non-residents—Actions upon bonds for costs given in any civil action or proceeding by a non-resident plaintiff, as provided by law, and upon any recognizance by a party or witness in any criminal prosecution, or on any security for costs given in justice court, shall be tried in the county where such bond or security is filed, unless the court, for cause other than the residence of the defendant, shall change the venue. An action against a non-resident defendant proceeded against by attachment may be brought in any county wherein such defendant has property liable to attachment. (4091) [7717]

An action against a non-resident for the recovery of money may be brought in any county in the state and a writ of attachment may issue therein directed to the sheriff of any other county for service (91–352, 98+188). Cited (120–458, 139+947). See 139–389, 166+533.

9211. Replevin—Actions to recover the possession of personal property wrongfully taken shall be tried in the county in which the taking occurred, or, at plaintiff's election, in the county in which he resides; in other cases in the county in which the property is situated. (4092) [7718]

34–506, 26+733; 45–170, 47+655; 92–205, 99+806; 101–81, 111+950. Cited (120–458, 139+947). Before holding, action was brought in replevin solely to avoid change of venue, it must appear conclusively that conversion is only available remedy (130–104, 153+266; 144–190, 174+890).

9212. Actions by or for the state—Except as otherwise provided by law in particular cases, civil actions

for trespass in which the state of Minnesota is plaintiff, may be begun and tried in such county as the attorney general, or other attorney authorized to bring the same, shall select. (4093) [7719]

139-389, 166+533.
159-355, 200+17.

9213. Actions for wages—An action for the recovery of wages or money due for manual labor may be brought in the county in which such labor was performed; and when so brought the venue of such action shall not be changed to another county without the written consent of the plaintiff filed with the court. (4094) [7720]

Cited (120-458, 139+947). Money due for manual labor (139-391, 166+533; 150-499, 185+1019).

Action to recover wages, combined with several other causes for recovery of money, is not triable in county where labor was performed in which defendant did not reside. 162-522, 203+435.

9214. Other cases—Residence of defendant—Residence of corporations—All actions not enumerated in paragraphs 9207-9213 shall be tried in a county in which one or more of the defendants reside when the action was begun. If none of the parties shall reside or be found in the state, or the defendant be a foreign corporation, the action may be begun and tried in any county which the plaintiff shall designate. A domestic corporation other than railroad companies, street railway companies, and street railroad companies whether the motive power is steam, electricity, or other power used by said corporations or companies, also telephone companies, telegraph companies and all other public service corporations, shall be considered as residing in any county wherein it has an office, resident agent or business place. The above enumerated public service corporations shall be considered as residing in any county wherein the cause of action shall arise and wherein any part of its lines of railway, railroad, street railway, street railroad, without regard to the motive power of said railroad, street railway or street railroad, telegraph or telephone lines or any other public service corporation shall extend, without regard to whether said corporation or company has an office, agent or business place in said county, or not. (R. L. § 4095, amended '13 c. 552 § 1) [7721]

Applied as to individuals residing in the state (45-186, 47+719; 46-311, 48+1123; 80-373, 83+342; 85-283, 88+755; 94-370, 102+869). An action against a non-resident for the recovery of money may be brought in any county in the state and a writ of attachment may issue therein directed to the sheriff of any other county for service (91-352, 98+188). A foreign corporation, although it has complied with all the provisions of law as to its right to do business in this state, may be sued in any county which the plaintiff may designate (30-444, 15+876; 74-139, 76+1030). A domestic corporation may be sued in any county where it has an office, agent or place of business (55-479, 57+208; 77-302, 79+960; 98-36, 107+545). Action against municipality is local (120-458, 139+947). Action in municipal court against railroad company; defendant cannot move for change of venue to another municipal court in same county (128-225, 150+924). Personal service of summons in one county and entry of default judgment in another (136-459, 161+1054). Action for specific performance of contract for sale of land, is controlled as to place of trial by this section (138-336, 164+1014; 139-391, 166+533). Railroad defendant (151-453, 187+415). Transitory action (154-398, 191+814). Writ of mandamus depends on whether defendant has an office, etc., in such county (193+169). Statute construed as to venue of suits against Public Service corporations (194+876).

164-525, 205+448; 167-473, 209+270, note under § 9207.

Construed to permit suits against domestic public service corporations in any county wherein a cause of action arises, and wherein any part of the defendant's lines are situated. But, the statute does not change the long established rule that a domestic public service corporation may be sued (in transitory action) in any county where it "has an office, resident agent, or business place." 156-394, 194+876.

Chapter 223, Laws 1921, imposing an occupation tax on the business of mining ore, requires actions for the collection of that tax to be brought in Ramsey county or in the county where the ore was mined, and intends that such actions shall be tried in the county in which they are brought. 159-282, 198+667.

Although mandamus was not intended as a reviewing writ, the practice of using it to settle disputes as to the proper place of trial has become firmly established. 159-282, 198+667.

Cases arising under the federal Employers' Liability Act against a foreign corporation may be commenced in the courts of this state "in any county which the plaintiff shall designate." The jurisdiction of the state courts over such cases is settled by the act of Congress, but the venue of such actions within the state is governed by state law. 159-323, 198+1006

Does not apply to special statutory proceeding provided by § 9262. 159-355, 200+17.

An action is brought to cancel a contract on the ground of fraud, is triable where the defendant resides, although it may incidentally involve the determination of rights in real estate. 164-433, 205+284.

It is the general rule that actions must be tried where the defendant resides, and the requirement that certain actions shall be tried where the subject-matter is situated is an exception to the rule, and to bring a case within the exception the subject-matter must be wholly local. 164-433, 205+284.

CHANGE OF VENUE

9215. As of right—Demand—If the county designated in the complaint is not the proper county, the action may notwithstanding be tried therein unless, within twenty days after the summons is served, the defendant demands in writing that it be tried in the proper county. Such demand shall be accompanied by the affidavit of the defendant, or his agent or attorney, setting forth the county of his residence at the time of the commencement of the action. Such demand and affidavit, with proof of service thereof upon the plaintiff's attorney, shall be filed with the clerk, in the county where the action was begun, within thirty days from the date of its service, and thereupon the place of trial shall be changed to the county where the defendant resides, without any other proceedings. If there are several defendants residing in different counties, the trial shall be had in the county upon which a majority of them unite in demanding, or, if the numbers be equal, in that whose county seat is nearest. When the place of trial is changed, all other proceedings shall be had in the county to which the change is made, unless otherwise provided by consent of parties filed with the clerk or by order of the court, and the papers shall be transferred and filed accordingly. When a demand for a change of the place of trial is made as herein provided, the action shall not for any of the reasons specified in § 9216 be retained for trial in the county where begun, but can be tried therein only upon removal thereto from the proper county in the cases provided by law. (4096) [7722]

1. **When applicable**—This section has no application where the action is properly brought in the county designated in the complaint (92-205, 99+806; 92-402, 100+2). Where venue properly laid, third person substituted as defendant not entitled, as matter of right, to change (108-125, 121+428). Has no application to action for divorce (110-501, 126+133). Does not authorize change in action to which municipal corporation is defendant from the county in which such municipality is located, though majority of individual defendants unite in demanding change (120-458, 139+947). Cited (120-526, 139+613). Venue in contest proceedings is not controlled by this section (126-406, 150+625; 148-488, 182+165).

159-282, 198+667, note under § 9214; 166-442, 208+203, note under § 9216; 167-463, 209+270, note under § 9207.

If venue of an action is changed improperly, plaintiff waives right to have it remanded by noticing case for trial in county to which it was removed. 157-207, 195+891.

No error found in denial of a motion for a change of venue for the purpose of procuring an impartial trial, the same having been denied on conflicting affidavits. 160-114, 199+465.

A change of venue as a matter of right cannot be had by persons who voluntarily come into an action brought in the proper county and become defendants in

that action, but, if the venue is changed on their application, the right to question the change is waived by the plaintiff by retaining an answer in which the new county is named as the county to which the place of trial has been changed, by replying to the answer laying the venue in that county, and by retaining the notice of trial similarly entitled. 162-132, 202+482.

Effect of failure to file demand and affiadvit in right county. 162-516, 202+820.

After serving the affidavit and demand for a change of venue pursuant to section, the defendant may make a second service at any time within 20 days after the summons was served, and, if he does, the time within which the papers must be filed with the clerk of court begins to run from the date of the second service. 211+11.

To effect a change of venue of an action commenced in the district court of Hennepin county, the deposit fee required by chapter 333, G. L. 1903, must be paid and the affidavit and demand filed within 30 days after service was made. 211+11.

By retaining the answer in which the venue was laid in the county of defendant's residence, and by serving a reply before the affidavit and demand were filed, the plaintiff did not waive the right to insist that a change of venue had not been effected. 211+11.

2. **Policy of law**—It is the policy of the law that transitory actions shall be brought and tried in the county where the defendant resides, or, in case of several defendants residing in different counties, in the county to which they unite in demanding the venue to be changed (92-164, 99+621).

3. **Several defendants**—Where one of several defendants is the only one concerned, the others being merely nominal parties, he may have the venue changed to his county without reference to the others (85-283, 88+755). Parties who are in default may be disregarded (64-444, 67+67). Where there are several defendants residing in different counties a majority of them may secure a change by making the proper affidavit and serving a joint demand therefor before the time for answering has expired as to any of them, or by each of them making such affidavit and serving a demand for the same at any time before his time for answering expires (92-164, 99+621). Where there are several defendants residing in different counties the place of trial must be changed to the county which a majority of them unite in demanding although the action is brought in a county where one or more of them reside (83-447, 86+415). See 122-377, 142+817; 132-220, 156+284; 139-391, 166+533.

4. **When demand must be made**—It must be made before the time to answer expires and the right to a change must be determined as of the time of the demand (90-427, 97+112). Amendment of complaint held not to revive or extend the time (72-153, 75+591). See 127-324, 149+536.

5. **Affidavit**—It must state the actual place of residence of the defendant at the time of the commencement of the action. A defect in this regard waived (88-95, 92+518). It need not state that the time for answering has not expired (92-164, 99+621). Defendant must make a record, to effect change of venue, showing full compliance with statutory requirements (141-59, 169+251).

6. **A matter of right—No order of court**—If a defendant complies or duly tenders compliance with the provisions of this section he has an absolute right to have the venue changed to the county of his alleged residence. The action cannot be retained in the county in which the venue is laid for the purpose of traversing the allegations of the affidavit as to defendant's residence, or for the hearing of a motion to retain the case for the convenience of witnesses. If the plaintiff wishes to challenge the truth of the affidavit his remedy is to move the court in the county to which the venue is changed to remand the case. Upon a compliance with the provisions of this section the place of trial is ipso facto changed and the defendant has an absolute right to have the papers and files transferred to the district court of the proper county. No order of court is necessary (66-213, 68+976; 72-153, 75+591; 77-302, 79+960; 80-373, 83+342; 83-447, 86+415; 85-283, 88+755; 88-95, 92+518; 90-118, 95+591). See 130-103, 153+266; 148-490, 182+513; 150-498, 185+1019.

7. **Waiver**—The place of trial is not jurisdictional (3-277, 191; 5-148, 113; 10-133, 106; 21-15; 30-512, 16+403; 46-535, 49+257; 55-401, 56+1056; 76-513, 79+507), and hence a party may waive his right to a trial in a particular court (3-277, 191; 5-148, 113; 24-377; 27-498, 8+593; 28-337, 9+872; 29-46, 11+132; 32-185, 20+91; 45-186, 47+719; 62-261, 64+564; 68-4, 70+777). He waives it under this section by not making the demand before the time for answering expires (90-427, 97+112). See 141-67, 174+523.

9216. By order of court—Grounds—The venue of any civil action may be changed by order of the court in the following cases:

1. Upon written consent of the parties;

2. When it is made to appear, on motion, that any party has been made a defendant for the purpose of preventing a change of venue under § 9215;

3. When an impartial trial cannot be had in the county wherein the action is pending; or

4. When the convenience of witnesses and the ends of justice would be promoted by the change. (4097) [7723]

Cited (108-125, 121+428).

162-507, 201+949; 156-394, 194+876, note under § 9214.

1. **Subd. 2**—32-185, 20+91; 45-186, 47+719; 50-305, 52+864; 150-500, 185+1019.

2. **Subd. 3**—18-184, 168; 131-489, 154-789; 148-490, 182+513.

The showing made in support of the motion fell short of establishing the contention that the defendants who opposed it were merely nominal parties having no substantial interests at stake. 166-442, 208+203.

3. **Subd. 4**—28-337, 9+872; 51-232, 53+462; 56-68, 57+322. See rule 28, district court. Motion for change for convenience of witnesses is addressed to discretion of court (108-527, 121+878). 194+878.

Where such a suit is commenced in a county remote from all offices and lines of defedant railway company, its venue should be changed in such manner as will best serve the convenience of witnesses and promote the ends of justice. (159-323, 198+1006.

Prior order denying change of venue is not res adjudicata 161-520, 201+302.

The court did not err in denying a motion, because not seasonably made, to change the place of trial upon the ground that the change would promote the convenience of witnesses and the ends of justice. 161-176, 201+298.

9217. Action on contractor's bond — An action against the sureties on a public contractor's bond, or against such sureties and contractor jointly, may be brought in the county where the cause of action arose, and when so brought the venue of such action shall not be changed without the written consent of the plaintiff filed with the Court, or unless changed by order of the Court pursuant to Section 7723, General Statutes 1913 [9216]. ('23 c. 128 § 1)

Venue, 166-499, 207+648.

9218. Interest or bias of judge—No judge shall sit in any cause, except to hear a motion to change the venue, if he be interested in its determination, or if he might be excluded for bias from acting therein as a juror. If he be the only judge of the court or district, he shall grant a change of the venue whenever, upon a motion therefor, his interest or bias shall be made to appear, unless before the motion is heard the governor shall have assigned another judge to try such cause: Provided, that such sole judge may order the venue changed, upon his own motion, whenever he shall deem it improper to sit in the cause. (4098) [7724]

The interest which disqualifies under this section is a pecuniary interest—not an interest of feeling, or sympathy, or bias that would disqualify a juror (26-501, 5+677; 88-130, 92+529. See 3-274, 188; 20-313, 271; 22-245; 26-220, 2+697; 26-445, 4+1107; 50-14, 52+222; 52-283, 53+1157).

159-403, 199+103, note under § 9221.

"For bias" construed—Judge not disqualified because related within ninth degree to attorney of either party (111-110, 126+477).

9219. Actions in municipal court—The foregoing provisions relating to venue shall apply to civil actions begun in the municipal courts, except that the application for such change shall be made after answering and before the time fixed for the trial of the cause; and upon a change of venue being effected in any such action, under either of §§ 9215-9218, the transfer shall be made to the district court of the proper county. (4099) [7725]

This section overrules 30-473, 16+365.

9220. On appeal from justice court—Any action pending in a district or municipal court against a natural person, upon appeal from a justice of the peace,

may be transferred to the district court of the county in which the defendant resides upon compliance with the following requisites:

1. The defendant or his attorney, within ten days after the appeal is perfected, shall file with the clerk of the court in which the action is pending an affidavit, setting forth that the defendant, or, if there be more than one, a majority of them, resided at the commencement of the action in another county in this state, naming it;

2. Within twenty days after the filing of such affidavit the party filing it shall make application to the court for an order transferring the action to the county named therein.

Upon such application being made, the court shall forthwith make an order transferring the action to such county and papers shall be transferred accordingly. (4100) [7726]

55-479, 57+208; 80-22, 82+1084. See 27-498, 8+593; 30-473, 16+365. Order transferring cause from municipal court to district court not appealable (109-96, 123+56).

9221. Affidavit of prejudice or bias of judge—Any party to a cause pending in a district court having two or more judges, within one day after it is ascertained which judge is to preside at the trial thereof, or at the hearing of any motion, order to show cause, or argument on demurrer, may make and file with such judge and serve on the opposite party an affidavit stating that, on account of prejudice or bias on the part of such judge, he has good reason to believe, and does believe, that he cannot have a fair trial or hearing thereof, and thereupon such judge shall forthwith secure some other judge of the same or another district to preside at the trial of such cause or hearing of the motion, demurrer or order to show cause, and shall continue the cause on the calendar, until such judge can be present. In criminal actions such affidavit may be made and filed with such judge by the defendant not less than two days before the expiration of the time allowed him by law to prepare for trial, and in either of such cases such presiding judge shall be incapacitated to try such cause: Provided, that in criminal cases such judge, for the purpose of securing a speedy trial, may, in his discretion, change the place of trial to another county. (R. L. '05, § 4101; G. S. '13, § 7727; amended '19, c. 92, § 1; '27, c. 283)

88-130, 92+529; 96-348, 105+68.

On filing of affidavit of prejudice, presiding judge is thereby incapacitated for trial of accused. Affidavit held filed in time (111-325, 126+1090). Inapplicable to motion for temporary alimony (135-307, 160+778). Inapplicable to actions in district courts, having less than three judges (194+875).

Does not apply to actions pending in a district court having less than three judges. 156-392, 194+875.

Where a court having jurisdiction of the subject matter and of the defendant erroneously denies an application for change of judge, the remedy is by appeal. The defendant is not entitled to be discharged on a writ of habeaus corpus. 159-403, 199+103.

Affidavit must state facts which will justify a reasonable mind in believing that the judge will not be impartial. 159-403, 199+103.

Applies to the State in civil actions. 163-141, 203+979.

9222. Expenses to be paid by county in which action was commenced—Whenever the venue hereafter shall be changed in a civil action upon the consent of parties, with or without an order of court, to a county other than the one where the same is properly triable or by an order of court under either subdivision three (3) or four (4), of section 7723, General Statutes 1913 [9216], the expenses of the trial of such action, including officers and jurors fees, and all expenses caused by the trial of such action which would not otherwise have been incurred by the county where the same is tried shall be paid by the county in which such action was commenced. ('17 c. 421 § 1)

9223. To be first paid by county in which action is tried—Such expenses shall be paid in the first instance by the county in which the action is tried, and thereupon the clerk of court of said county shall prepare, under his hand and seal, an itemized statement of such expenses, and upon approval thereof by the judge of the court in which said trial was had, and the filing of such itemized statement and approval in the office of the county auditor in which such action was commenced, such auditor shall issue his warrant for the amount of such approved statement in favor of the county in which the trial was had. ('17 c. 421 § 2)

SUMMONS—APPEARANCE—NOTICES, ETC.

9224. Actions, how begun—Civil actions in the district court shall be commenced by the service of a summons as hereinafter provided. (4102) [7728]

47-581, 50+823; 73-167, 75+1043; 91-226, 97+974.

Delivery of summons to proper officer for service, if completed within prescribed time, commences action. Code alone governs (124-197, 144+943). Exhaustive consideration as to when an action is deemed begun (139-486, 167+271, 194+697).

9225. Requisites of summons—Notice—The summons shall be subscribed by the plaintiff or his attorney, be directed to the defendant, and require him to serve his answer to the complaint on the subscriber, by copy, at a specified place within the state where there is a postoffice, within twenty days after the service on him of such summons, exclusive of the day of service. It shall also notify him, in substance, that if he fails so to serve his answer:

1. If the action be for the recovery of a debt or a liquidated money demand only, that the plaintiff will take judgment for an amount specified therein.

2. In other actions, that he will apply to the court for the relief demanded in the complaint. (4103) [7729]

1. **Not a process**—A summons is not a process required under the constitution to run in the name of the state. It is a mere notice (12-80, 43; 12-255, 166; 68-28, 70+775. See 11-194, 126; 19-17, 1; 33-36, 21+838; 65-156, 68+2). But it is in the nature of original process (46-164, 47+970; 48+783). Summons is one of documents in action and may be amended by leave of court (131-173, 154+952). No general rule as to what defects are jurisdictional; statute is to be liberally construed (143-309, 173+652).

2. **Directed to the defendant**—86-13, 89+1124.

3. **Contents of notice**—14-537, 408; 21-335; 24-43; 34-395, 26+122.

4. **Signature**—It may be subscribed by the printed signature of the plaintiff or his attorney (37-250, 33+849. See 40-189, 41+1031). A written signature purporting to be that of the plaintiff but made by his agent in his presence and by his express direction is sufficient (14-537, 408).

5. **Irregularities**—No general rule can be laid down as to what defects in a summons are jurisdictional. If the summons is regular on its face and is duly served the court acquires jurisdiction. Mere irregularities cannot be taken advantage of collaterally but are deemed waived unless the defendant moves to set aside the service (12-80, 43; 14-537, 408; 24-43; 24-188; 26-306, 3+700; 31-479, 18+283; 34-395, 26+122; 43-137, 45+4; 47-581, 50+823; 53-315, 55+127; 55-443, 57+141; 56-390, 57+938; 73-167, 75+1043; 86-13, 89+1124). May be amended to make time conform the statute (116-115, 133+398). Judgment entered in district court upon summons issuing out of municipal court is a nullity (136-459, 161+1054). To acquire jurisdiction over defendant, summons must substantially comply with statute. (149-124, 182+989).

The attempted service of the summons in a mechanic's lien action is fatally defective when the copy delivered to the defendant places the venue of the action in the wrong county, recites that the complaint is on file with the clerk of the district court of that county, requires the answer to be filed there, and also misdescribes the real estate as being situated there. 161-143, 201+300.

A summons properly served, which requires the defendant "to answer the complaint," instead of strictly complying with section, providing that it shall require

defendant "to serve his answer to the complaint on the subscriber, by copy," gives jurisdiction. 212+812.

9226. Summons, by whom served—Fees, etc.—The summons may be served by the sheriff of the county in which the defendant is found, or by any other person not a party to the action; but, if served by a person other than an officer authorized by law to make such service, no fees or mileage shall be allowed therefor. (4104) [7730]

May be served by plaintiff's attorney (68–28, 70+775). Service of summons not taxable unless made by sheriff (124–363, 145+114; 143–265, 173+432). Municipal court officer is not an officer authorized by law to serve a district court summons. (194+94).

9227. Service of complaint—Appearance, etc.—A copy of the complaint shall be served with the summons, unless the complaint be filed with the clerk, in which case the summons shall contain a notice of such filing. If it be not so served, and the defendant shall appear in the action within ten days after the service of the summons, the plaintiff, within five days after such appearance, shall serve the complaint, by copy, on the defendant or his attorney. The defendant shall then have at least ten days in which to answer the same. (4105) [7731]

Except for the purpose of preventing the statute of limitations from running an action is commenced by *service of the summons and not as in some states by* filing a complaint and issuing a summons (47–581, 50+823). Where a summons is regular on its face, and is duly served, the court acquires jurisdiction. The fact that the complaint is not filed, or a copy thereof is not served with the summons, does not render the judgment void. It is a mere irregularity and is waived unless the defendant moves to set aside the service (26–306, 3+700; 55–443, 57+141; 73–167, 75+1043).

9228. Service of summons—On natural persons—Service of the summons on natural persons residing or being within the state shall be made by delivering a copy thereof, as follows:

1. To the defendant personally.

2. *If the defendant have a resident guardian,* appointed for any purpose, to such guardian also.

3. If he be a minor under the age of fourteen years, and have no such guardian, to his father also, or to his mother, or, if he have neither within the state, to the person having the control of such minor, or with *whom he resides, or by whom he is employed.*

But in all such cases it shall be deemed a personal service of the summons if the copy thereof be left at the house of the usual abode of the person to be served, with some person of suitable age and discretion then residing therein. (4106) [7732]

It is the fact of service that gives jurisdiction. If service is made, and jurisdiction acquired, a return showing defective service does not divest it. 159–111, 198+307.

The attempted service of the summons in a mechanic's lien action is fatally defective when the copy delivered to the defendant places the venue of the action in the wrong county, recites that the complaint is on file with the clerk of the district court of that county, requires the answer to be filed there, and also misdescribes the real estate as being situated there. 161–143, 201+300.

1. Personal service—It must be direct. That is, it must be on the defendant personally and not through the mediation of a third person (29–108, 12+342; 52–98, 53+812). Wrong initial in defendant's name not fatal to jurisdiction, where summons served on right party; otherwise, where service is by publication (139+1066).

2. House of usual abode—In the case of a married man the house of his usual abode is prima facie the house where his wife and family reside. The term "the house of his usual abode" means a person's customary dwelling place or residence (61–256, 63+634; 64–485, 67+540; 106–458, 119+404). A boarding house may be a house of usual abode (45–33, 47+309).

3. Persons with whom summons may be left—A person fourteen years old is prima facie a person of "suitable age and discretion." It is not necessary that he should understand the nature of judicial proceedings (53–286, 55+133). He must be an actual resident in the house. If he is not, the judgment is void (29–108, 12+342). The summons may be left with a person living in the same suite of rooms in an apartment house as the person to be served, although he is not a member of the family or household of such person (79–350, 82+668). It is the validity of the service made which controls and not what may be thought or supposed concerning the same by the person who made it. It is not necessary to inform the person with whom it is left for whom it is intended (50–348, 52+934).

4. On minor—42–84, 43+784; 79–476, 82+990. See 121–28, *139+1066. Non-resident attorney taking deposition* is not exempt (135–317, 160+795). Receivers are natural persons and the method of service prescribed by this section controls (137–329, 163+521).

9229. On public corporations, etc.—Service of a summons upon municipal or quasi municipal corporations shall be made by delivering a copy thereof as follows:

1. If the action be against a city, village, or other incorporated place, to its chief executive officer, or, in his absence, to its clerk.

2. If against a county, to the chairman of the county board or to the county auditor.

3. If against a town, to the chairman of the town board or to the town clerk.

4. If against a school district, to any member of its board of trustees or other governing body.

5. If against any other public board or body subject to suit, to any member thereof.

And in any of the cases enumerated in this section, if it be made to appear that service cannot be made as herein provided, the court may direct the manner of such service. (4107) [7733]

Action against village (115–182, 131+1079). In action in justice court against village this section controls *(115–500, 133+159). See 194+775.*

Service of a summons on a county as provided in section 7733, Gen. St. 1913, is sufficient to confer jurisdiction, although such service, was not made during or within ten days before a session of the county board. 156–327, 194+775.

9230. On the state—In all actions and proceedings to which the state may lawfully be made a party, the summons and other papers therein shall be served on the attorney general, or, in his absence, upon one of his assistants. (4108) [7734]

9231. On private corporations—1. If the action be against a private domestic corporation, the summons may be served by *delivering a copy thereof to its* president, vice-president, secretary, cashier, or treasurer, or to any director or managing agent thereof.

2. If such domestic corporation have no officer within the state upon whom service can be so made, of which fact the return of the sheriff that none can be found in his county shall be conclusive evidence, service of the summons upon it may be made by depositing two copies thereof with the secretary of state, which shall be deemed personal service upon such corporation. One of such copies shall be filed by such secretary, and the other forthwith mailed by him to the corporation, if the place of its main office be known to him or be disclosed by the files of his office.

3. If the defendant be a foreign corporation the summons may be served by delivering a copy to any of its officers or agents within the state, provided that any foreign corporation having an agent in this state for the solicitation of freight and passenger traffic or either thereof over its lines outside of this state, may be served with summons by delivering a copy thereof to such agent. If a foreign insurance corporation, two copies shall be delivered to the insurance commissioner, who shall file one in his office and forthwith mail the other postage prepaid to the defendant at its home office.

4. If such foreign corporation shall have appointed

a resident agent authorized to accept service of process, and shall have caused such appointment to be filed and recorded as required or authorized by law, delivery of a copy of the summons to such agent shall be deemed service thereof on such corporation. (R. L. § 4109, amended '13 c. 218 § 1) [7735]

298 Fed. 977; 165–95, 205+694.

Subd. 1—150–344, 135+386; 151–452, 187+415.

Subd. 2—70–105, 72+835; 80–32, 82+1088; 140+1027; 146 Fed. 630, 77 C. C. A. 56. Domestic corporation appointing a resident agent for service of legal process (145–448, 177+633).

Subd. 3—The proviso was added by 1913 c. 218. To constitute a person an agent of a foreign corporation upon whom service may be made he must be one actually appointed by and representing the corporation, and not one created by mere construction or implication, contrary to the intention of the parties (73–305, 76+36; 102–386, 114+243; 105–198, 117+391. See 66–79, 68+774; 66–271, 68+1085). If a foreign corporation has no property within this state or the cause of action did not arise here jurisdiction cannot be acquired over it by personal service of the summons on its officers or agents temporarily within this state (26–233, 2+698; 81–346, 84+46. See 10–386, 308; 13–278, 256; 97 Fed. 22, 38 C. C. A. 34). On foreign insurance company (80–147, 82+1083; 87–260, 91+1115). The question whether a foreign corporation is doing business in the state, so that service of summons may be made upon its agent within the state, is one of due process of law under the federal constitution (102–386, 114+243). Corporation must be doing business in the state (105–198, 117+391; 118–1, 136+291). Question whether corporation is "doing business" in state (118–1, 136+291). Jurisdiction over foreign corporations voluntarily appearing and submitting to jurisdiction (111–48, 126+410). See 129–233, 152+410; 130–35, 152+1102; 131–135, 154+750. Foreign corporation whose president resides in this state (131–162, 154+950) 131–335, 155+103; 134–245, 158+975; 134–261, 159+272; 134–480, 159+947. Service of summons on legal holiday does not confer jurisdiction (132–390, 157+643). See 137–122, 162+1068. Agent of receivers of foreign railroad company with no line in this state are not subject to valid service under this section *(137–328, 163+521)*. *Construing* agent of foreign corporation upon whom valid service may be made (146–244, 178+504). Service upon soliciting freight agent of foreign railroad in this state (151–452, 187+415). See 147–189, 179+734; 148–483, 182+1004; 150–534, 186+130; 152–539, 187+976. Jurisdiction cannot be obtained of a foreign corporation by service of summons upon its president, a resident of Minnesota, unless the corporation, at the time of the service, is doing business within Minnesota. (153–19, 189+653; 153–440, 190+797). Jurisdiction cannot be acquired of receiver of Canadian railroad appointed by Canadian authorities (194+615). This subdivision is inapplicable to and not controlling the federal court (284 Fed. 1007).

A foreign corporation, which ships goods on orders received by mail from purchasers in this state, and which pays a commission to a resident of this state for procuring orders if they are accepted, but which gives him no authority to accept orders or make contracts, is not doing business in this state in the sense required to give the courts of this state jurisdiction. 166–151, 207+201.

162–55, 202+56, note under § 9223.

Service on foreign railroad corporation. 284 Fed. 1007.

The courts of this state cannot acquire jurisdiction of the receiver of a Canadian railroad appointed by the Canadian authorities by service of process in the manner provided in the third subdivision, for service on foreign corporations. 156–120, 194+614.

The rule permitting the severance of illegal from legal provisions of a statute has no application. 157–306, 196+266.

Following Davis v. Farmers' Co-operative Equity Co., 43 Sup. Ct. 556, 67 L. Ed. —, it is held that chapter 218, Laws 1913, embraced in section 7735, subsec. 3, G. S. 1913, has no validity for any purpose. 157–306, 196+266.

A court does not obtain jurisdiction to render a personal judgment against a foreign corporation by the service of the summons on an officer of the corporation residing in this state unless the corporation is doing business within the state at the time of the service or has entered into contracts with its citizens of extended duration and mutual obligation. 210+620.

Subd. 4—84–497, 88+10.

9232. Service of summons and notice on express companies—In any action or proceeding against an express company, whether domestic or foreign, transacting business in the State of Minnesota, service of summons and of all notices and orders in any action or proceeding wherein such express company is a party may be made by delivering a copy thereof to any agent of such express company within the county in which the action or proceeding is begun, and such service shall have the same effect as though made pursuant to the provisions of Section 7735 General Statutes, 1913 [9231]; Provided that, if such company shall *appear in an action or proceeding by a resident attorney*, service of notices or orders in said action or proceeding shall thereafter be made upon such attorney. ('21 c. 160 § 1)

9233. On railway companies—In any action or proceeding against a railway company, whether domestic or foreign, including proceedings under the right of eminent domain, service of the summons and of all notices required to be served therein may be made by delivering a copy thereof to any ticket or freight agent of such company within the county in which the action or proceeding is begun, with the same effect as though made pursuant to § 9231: Provided that, if such company shall appear in an action by a resident attorney, service shall thereafter be made upon such attorney. (4110) [7736]

55–479, 57+208; 64–361, 67+80. See 36–85, 30+432, overruled by change of statute. Foreign company, whose cars are brought into state by another company under joint traffic arrangement, held not transacting business within state. Agent of local company, who sells through joint tickets, not "ticket agent" of foreign company (106–263, 119+398). Where several foreign corporations established a common agency and appointed an agent to solicit business, service of process on such agent was service on the constituent corporations (113–367, 129+765). Service upon ticket and freight agent retained by receivers of foreign railway operating within Minnesota, is valid (137–205, 163+284; 150–345, 185+387). Construing service under above (151–451, 187+415).

G. S. 1913, § 7736, was void. 298 Fed. 977.

Aside from chapter 218, Laws 1913 (Gen. St. 1913, § 7735), service of a summons on a foreign corporation by the delivery of a copy to an agent of the croporation for the solicitation of freight and passenger traffic over its lines outside this state was not authorized by statute. 157–306, 196+266.

Service could not be made on agent of foreign railroad soliciting business in the state. 162–55, 202+56.

9234. Service by publication—Personal service out of state—In any of the cases mentioned in § 9235, when the sheriff of the county in which the action is brought shall have duly determined that the defendant cannot be found therein and an affidavit of the plaintiff or his attorney shall have been filed with the clerk, stating the existence of one of such cases and that he believes the defendant is not a resident of the state, or cannot be found therein, and either that he has mailed a copy of the summons to the defendant at his place of residence, or that such residence is not known to him, service of the summons may be made upon such defendant by three weeks' published notice thereof; provided, that personal service of such summons without the state proved by the affidavit of the person making the same, made before an authorized officer having a seal, shall have the same effect as the published notice herein provided for. (R. L. § 4111, amended '13 c. 241 § 1) [7737]

Laws 1925, c. 72, § 1, reads as follows: "That in all cases where judgments or decrees have been entered in the District Court of this State where jurisdiction of any defendant has been obtained by publication of summons, and the affidavit of such publication has not been filed with the Clerk of Court before the issuance of the order of Court authorizing such publication, or before such publication, all such judgments or decrees, when otherwise legal and valid, are hereby made valid and binding upon such defendants so served by publication, in like manner as if such affidavit has been filed with the clerk, as required by law, prior to the issuance of such order and the publication of such service summons.

PROVIDED, HOWEVER, that this act shall not apply to cases wherein the judgment and decree has been entered since the 19th day of January, 1915, and provided, further that nothing herein shall apply to or affect any

actions or proceedings now pending in any court in this state."

½. **In general.**

212+905.

Service on foreign railroad corporation. 284 Fed. 1007.

The service of a summons upon a nonresident by delivering a copy thereof to him without the state, is a substitute for the publication of the summons, and canno tbe made without taking the steps required when the summons is to be published. 161–246, 201+323.

The filing of the affidavit prescribed is a jurisdiction prerequisite to the publication of the summons. 161–246, 201+323.

Defects in an immaterial clause in an affidavit for the service of a summons by publication cannot destroy the affidavit which must be considered in its entirety. 163–114, 203+614.

A delay of nine months in making a personal service of a summons without the state, after the making of the sheriff's return that defendant cannot be found, is as a matter of law unreasonable, and the return will not support and sustain the service. 163–114, 203+614.

As a foundation for substituted personal service without the state, every step must be made to permit the service to be made by publication. 163–114, 203+614.

Plaintiff, upon an adverse ruling vacating a judgment and setting aside a personal service without the state, does not waive his right to appeal from such ruling by filing a new affidavit and causing another personal service to be made without the state. 163–114, 203+614.

Process in municipal court of Minneapolis may be served by publication (Laws 1917, c. 407). 210+874.

1. **Not applicable to Torrens system**—89–454, 95+317, 895, 96+704.

2. **No order of court necessary**—47–581, 50+823; 67–242, 69+903; 84–329, 87+838, 87 Am. St. Rep. 354.

3. **Affidavit**—Affidavit is jurisdictional and must state all the statutory requirements. It cannot be aided by reference to the complaint (86–493, 90+1113. See 9–239, 225; 53–197, 55+117). It must state facts positively and not on information and belief except where the latter form is expressly authorized (38–341, 37+585). It need not be sworn to on the day on which the action is commenced. It is not void because entitled in an action not actually commenced at the time. If it is filed with the clerk the fact that he fails to keep his office at the county seat will not invalidate the publication (47–581, 50+823).

4. **Filing affidavit**—The filing of the affidavit is a jurisdictional prerequisite. It cannot be filed after publication or after the commencement of publication (37–194, 33+559; 38–506, 38+698; 44–97, 46+315; 44–505, 47+169; 67–242, 69+903; 85–261, 88+748. See validating act, 1901 c. 349). What constitutes filing (85–261, 88+748).

5. **Mailing copy of summons**—The mailing of a copy to a non-resident does not constitute personal service although it is duly received. It is the publication of the summons that gives the court jurisdiction and not the service through the mails (46–66, 48+459).

6. **Filing the complaint**—Proper practice requires that the complaint should be filed before the commencement of the publication but it is not jurisdictional (43–137, 45+4; 47–581, 50+823).

7. **Filing return of sheriff**—The filing of the return of the sheriff is not a jurisdictional prerequisite. It may be filed any time before the entry of judgment (67–242, 69+903; 86–493, 90+1113). Neither making nor filing of return jurisdictional under G. S. 1894 § 5204 (108–151, 121+605).

8. **Sufficiency of return**—49–140, 51+666.

9. **Form of summons**—43–137, 45+4.

10. **Misnomer**—A misnomer in the summons is fatal (72–105, 75+115, 104–165, 116+357; 139+1066).

11. **Publication**—The publication need not be made on the same day of each week (53–84, 54+1058). It is valid though one of the publications is on a holiday (50–457, 52+915).

12. **Statute must be followed strictly**—27–265, 6+783; 37–194, 33+559; 44–505, 47+169; 46–174, 48+773; 46–180, 48+775; 55–386, 57+134; 86–493, 90+1113.

13. **Personal service out of state**—Personal service out of the state under the last clause of this section is simply a substitute for service by publication and must be preceded by a strict compliance with all the statutory requirements essential to publication (91–226, 97+974. See 94–301, 102+861. Bue see 117–366, 135+998).

14. **Divorce**—Sections 7116, 7737, 7738, made no substantial change as to service by publication in divorce. Affidavit showing that personal service cannot well be made and containing statements required, with return of sheriff that defendant cannot be found, sufficient to justify order directing service by publication and to authorize publication, without further affidavit after the order has been made (99–307, 109+243). In divorce where summons is served personally out of state, not prerequisite that there be either return of sheriff or affidavit (117–366, 135+998). Personal service outside of state of same effect as by publication (123–431, 144+138). Service by publication and necessary elements requisite to personal judgment (135–400, 161+149). In action in personam constructive service by publication or personal service outside the state is not due process (137–425, 163+782). Sufficiency of affidavit for publication (138–224, 164+904). Giving of bond in attachment by non-resident does not constitute a general appearance (147–378, 180+232). Service by publication (154–34, 191+53). Garnishment of funds and service on soliciting agent (284 Fed. 1007).

9235. In what cases—Such service shall be sufficient to confer jurisdiction:

1. When the defendant is a foreign corporation, having property within the state.

2. When the defendant, being a resident of the state, has departed therefrom with intent to defraud his creditors, or to avoid service, or keeps himself concealed therein with like intent; or has departed therefrom, or cannot be found therein, and has property or credits therein upon which the plaintiff has acquired a lien by attachment or garnishment.

3. When the defendant is not a resident of the state, but has property therein, and the court has jurisdiction of the subject of the action.

4. When the action is for a divorce, or a separation from bed and board, and the court shall have ordered that service be made by published notice.

5. When the subject of the action is real or personal property within the state, in or upon which the defendant has or claims a lien or interest, or the relief demanded consists wholly or partly in excluding him from any such interest or lien.

6. When the action is to foreclose a mortgage or to enforce a lien on real estate. (4112) [7738]

Service on foreign railroad corporation. 284 Fed. 1007.

The jurisdiction of the district court to remove a cloud on the title to property embraces personal as well as real property. Mere verbal assertions of ownership do not cast a cloud upon the title to property which the courts will dispel, nor can a suit be maintained to remove a cloud created by an instrument invalid upon its face. 162–18, 202+64.

Subd. 1—Where a cause of action arises in another state a court of this state cannot acquire jurisdiction of a foreign corporation unless it has property within this state of some substantial value and of a character to justify a reasonable probability that the creditor can secure something from a sale thereof that can be applied as a payment on his demand (81–346, 84+46; 92–20, 99+365).

Subd. 3—See 284 Fed. 1008; 123–364, 143+915; 123–431, 144+138. Defendant a resident, but owing to discrepancy in surname is not found (129–270, 152+640; 137–425, 163+782).

Subd. 4—135–397, 161+148.

Subd. 5—Stock of domestic corporation involved (90–76, 95+887; 96–914, 97+127). An action to reform the discription in a deed (55–386, 57+134). An action to set aside a fraudulent conveyance (43–137, 45+4). See 138–224, 164+903; 154–34, 191+53.

Subd. 6—47–581, 50+823.

Extent of jurisdiction acquired over non-residents—29–108, 12+342; 36–190, 31+210; 44–505, 47+169; 45–277, 47+967; 46–396, 49+190; 47–581, 50+823; 51–181, 53+460; 55–386, 57+134; 87–510, 92+461; 88–456, 93+520.

9236. When defendant may defend—Restitution—If the summons be not personally served, the defendant, on application to the court before judgment and for sufficient cause, shall be permitted to defend; and, except in an action for a divorce, the defendant, in like manner, may be permitted to defend at any time within one year after judgment, on such terms as may be just. If the defence be sustained, and any part of the judgment has been enforced, such restitution shall be made as the court may direct. (4113) [7739]

See notes under § 9283.

Applicable in actions to foreclose mechanics' liens 166–430, 208+136.

The court may impose "such terms as may be just" as a condition to the right to relief under the statute. Terms stated in the opinion as requested by appellants were unreasonable and harsh. 166–430, 208+136.

1. **A matter of right**—39–73, 38+689; 42–243, 44+9; 44–392, 46+766; 46–66, 48+459; 55–386, 57+134; 79–264, 82+581; 85–261, 88+748. Matter of right, unless applicant

guilty of laches (112–400, 128+464; 112–508, 128+670). G. S. 1894 § 5206 cited (97–135, 106+108). Opening an interlocutory judgment in partition (123–471, 144+140).

2. **Relief granted liberally**—35–278, 28+508; 39–73, 38+689.

3. **A good defence sufficient cause**—A good defence is a sufficient cause within the meaning of the statute (39–73, 38+689; 42–243, 44+9; 46–66, 48+459). It is indispensable that the applicant should show a good defence in his moving papers (74–234, 76+1132), but he need do no more than propose an answer setting up a good defence (79–264, 82+581). It is not necessary for him to exhibit the evidence of his defence. Neither an affidavit of merits or a verified answer is necessary if a good defence appears by the moving affidavits. The proper practice is to propose a verified answer showing a good defence (81–515, 84+338). The defence need not be affirmative. A verified general denial is sufficient (see 58–20, 59+629. But see 50–1, 52+219). An affidavit of merits may take the place of a proposed answer (50–1, 52+219).

4. **Diligence in making application**—The applicant need not show in his moving papers that he has been diligent. He need not show that he did not have actual notice of the action in time to interpose his defence before judgment (35–278, 28+508). But he is bound to meet any charge of laches made by the plaintiff on proper affidavits (59–409, 61+455; 85–261, 88+748; 113–433, 129+853). There is no general rule as to the diligence required in making application after actual notice. Each case must be determined on its own facts (42–243, 44+9; 46–66, 48+459; 51–550, 53+872; 56–476, 58+38; 59–409, 61+455). If a party receives the summons through the mail he is bound to act with great promptness thereafter (85–261, 88+748). As to laches, see note 1. What diligence must be shown (112–508, 128+670). Delivery of summons to defendant outside state is merely equivalent of summons by publication. (122–396, 142+714). See 139–24, 165+378.

Application to have a judgment rendered against a nonresident on substituted service vacated and for leave to defend. The summons was served on the defendant personally outside the state. His laches in taking no action in the matter for five months thereafter justified the court in denying the application. 164–504, 205+636.

5. **When year begins to run**—15–63, 43.

6. **Action for divorce**—93–195, 101+163; 151–302, 186+694.

7. **The question on appeal**—11–232, 153; 15–63, 43; 35–278, 28+508; 39–73, 38+689; 46–66, 48+459; 51–550, 53+872.

9237. Proof of service—Service of the summons and other papers shall be proved as follows:

1. If made by the sheriff or other officer thereunto authorized by law, by his certificate; if by any other person, by his affidavit; or

2. By the written admission of the party served;

3. If by published notice, by the affidavit of the printer, or of his foreman or clerk, and by that of the person who mailed a copy of the summons, if one was mailed.

If service be made otherwise than by published notice, the proof shall state the time, place, and manner thereof. (4114) [7740]

1. **Affidavit of personal service**—It is not necessary that it should state that the person upon whom the service was made was to affiant known to be the person upon whom service was required to be made (18–90, 72; 74–282, 77+137). In an action against partners under a firm name the affidavit of a person who served the summons that the persons upon whom he served it (naming them) are members of the firm named in the summons is sufficient (45–357, 47+1064). The absence of a venue is not fatal (18–90, 72). A municipal court officer is not an officer authorized by law to serve a district court summons (194+94).

2. **Affidavit of substituted service**—When service is made by leaving a copy at the defendant's usual place of abode the affidavit should state the name of the person with whom it is left, but it is not indispensable (64–485, 67+540). It is not necessary to state that the defendant could not be found (26–154, 2+163; 64–485, 67+540).

3. **Return of officer**—The return of an officer is conclusive in collateral proceedings, but the defendant may impeach it on motion or other direct proceedings in the action to set aside the judgment on default, if the rights of third parties have not intervened (39–305, 40+71; 40–52, 41+244; 51–363, 53+646; 56–351, 57+1060. See 70–105, 72+835). A return will not be set aside except upon strong evidence (33–372, 23+541; 41–12, 42+594; 56–351, 57–1060; 78–295, 80+1127). A misnomer in a return is not fatal (56–390, 57+938). To a summons addressed to two defendants a sheriff returned that the defendants, naming them conjunctively, could not be found. Held that the return should be construed disjunctively (49–140, 51+666). Ordinarily a return is not complete until it is filed (55–386, 57+134; 67–242, 69+903).

It is the fact of service that gives jurisdiction. If service is made, and jurisdiction acquired, a return showing defective service does not divert it. 159–111, 198+307.

No presumption of jurisdiction attaches to a domestic judgment when the record contains a certificate by the sheriff of service of the complaint and none of the service of the summons. 159–458, 199+235.

The presumption that public officers perform their official duties does not dispense with the necessity of a showing of a strict compliance with the requirements of the statute, in a sheriff's return of service of a notice of expiration of time of redemption from a tax sale, in a tax title proceeding. 160–136, 199+895.

A notice of the expiration of redemption from a tax sale must be directed to the person in whose name the lands are assessed, and to all owners and persons interested in the land, and the return of the notice by the sheriff must show the time, place, and manner of service upon the persons to whom the notice is directed. 160–136, 199+895.

4. **Admission of service**—4–163, 108; 4–473, 366; 15–447, 360; 79–476, 82+990.

5. **Affidavit of publication**—Affidavit of publication for "six successive weeks" is insufficient (8–381, 338; 20–453, 407; 39–336, 40+163). An affidavit stating that the summons was published "seven" weeks, once a week, the date of the first and last publication being shown, from which it clearly appeared that six weeks was intended held sufficient (43–137, 45+4). It need not show that the publication was on the same day of each week (53–84, 54+1058).

9238. Jurisdiction, when acquired — Appearance — The court shall have jurisdiction of the defendant from the time of the service of the summons or other process upon him, and service by published notice shall be deemed complete at the expiration of the prescribed period of publication. A voluntary appearance by the defendant shall be equivalent to personal service, unless the same be made for the sole purpose of attacking the jurisdiction. (4115) [7741]

When service by publication complete (26–421, 4+816).

APPEARANCE

1. **Definition**—To "appear" means to come into court as a party to an action (26–87, 1+801).

Demand for change of venue constitutes a general appearance. 160–181, 199+928.

The action of defendant's attorney in challenging the jurisdiction of the court to entertain the proceeding cannot be construed as a general appearance. 164–363, 205+264.

By personally signing an answer, interposed to a complaint for the recovery of a stated sum upon an official bond, defendants appeared in the action; and since such answer admitted the amount claimed in the complaint to be due and authorized the clerk of court to enter judgment against defendants for such amount, without applicaton to the court, the judgment entered was valid, and defendants were not entitled to have it vacated as a matter of right. 211+5.

2. **Effect of a general appearance**—A general appearance gives the court jurisdiction over the person (1–192, 166; 9–55, 44; 10–178, 144; 13–174, 165; 14–16, 4; 18–312, 281; 20–102, 86; 21–30; 21–403; 22–552; 23–268; 25–41; 25–128; 28–400, 10+429; 29–46, 11+132; 31–289, 17+623; 31–429, 18+148; 31–479, 18+283; 34–96, 24+319; 38–523, 38+753; 48–221, 50+1037; 51–401, 53+714; 64–43, 66+5; 64–547, 67+662; 74–264, 77+142; 74–302, 77+144; 74–339, 77+222; 80–40, 82+1099; 83–35, 85+825). Although the proceeding is in rem a voluntary appearance gives the court jurisdiction so far as the party's interest in the property is concerned (35–1, 15, 25+457, 30+826; 51–401, 53+714). A non-resident may give the court jurisdiction by a voluntary appearance (10–178, 144). Jurisdiction over the subject matter cannot be conferred by a general appearance (8–536, 479; 15–447, 360; 17–41, 23; 35–1, 15, 25+457, 30+826). By appearing generally a party waives all defects in the summons, in its service and in the proof of service (1–192, 166; 14–16, 4; 18–312, 281; 20–102, 86; 21–30; 29–46, 11+132; 55–102, 56+581; 83–35, 85+825. See 55–443, 57+141). A general appearance in an action of claim and delivery does not waive irregularity in the seizure (16–490, 443).

3. **Void judgment not validated by an appearance**—39–336, 40+163; 48–521, 51+478. See 33–419, 23+854.

4. **Appearance in foreign court**—55–401, 56+1056.

5. **Appearance by infant**—79–476, 82+990.

6. **What constitutes general appearance**—An appearance for any other purpose than to question the juris-

diction of the court is general and gives the court jurisdiction of the person (53-129, 54+1064). If a party so far appears as to call into action the powers of the court for any purpose, except to decide upon its own jurisdiction, it is a full appearance (23-268). A party cannot at the same time object to and ask the court to exercise its jurisdiction (30-260, 15+117). A party appears generally when he takes or consents to any step in the cause which assumes that the jurisdiction exists or continues (21-403; 48-221, 50+1037). In determining whether an appearance is general or special the purposes for which it was made should be considered rather than what the party has labeled it (55-443, 57+141).

7. Appearances held general—Demurrer to the complaint for want of jurisdiction over the person (10-178, 144); an application for an extension of time to answer, though a motion was pending to set aside the summons (11-271, 184. See 34-96, 24+319); a motion to set aside a judgment on grounds not expressly limited to the jurisdiction of the court (23-268); a motion objecting to the jurisdiction but at the same time asking a decision on the merits (30-260, 15+117); interpleading and consenting to an adjournment (28-400, 10+429); opposing a motion on the merits and offering to submit to an order of the court (64-43, 66+5); stipulating for an adjournment (48-221, 50+1037); an objection to the jurisdiction coupled with an objection to the appointment of a receiver (53-129, 54+1064). Acquiring jurisdiction (124-201, 144+942). Voluntary appearance is equivalent to personal service (144-384, 175+698).

8. General appearance by appealing—25-41; 25-128; 31-479, 18+283; 38-523, 38+753; 53-508, 55+597; 74-302, 77+144.

9. What constitutes special appearance—A party cannot be deemed to submit to the jurisdiction of a court by the mere act of denying its jurisdiction (35-285, 28+506). Special appearances are not favored (11-271, 184). Where a party appears specially he has no standing on appeal to attack the validity of the judgment in any other respect than the jurisdiction of the court (90-74, 95+887, 96+914, 97+127). Presence at general term call of calendar not necessarily a general appearance (122-352, 142+709). Where special appearance does not resolve itself into general appearance (122-245, 142+310).

A special appearance for defendant at the garnishee's disclosure, under the circumstances of the case, held not to have been too late. 160-443, 200+468.

10. Appearances held special—A motion to vacate a judgment on grounds taken solely with reference to their supposed bearing upon the jurisdiction of the court to render the judgment and solely for the purpose of attacking said jurisdiction, the attorney appearing "for the purposes of the motion only" (23-539); a motion to dismiss—after stating the objections to the jurisdiction of the court the motion proceeded as follows: "If such objection to the jurisdiction be overruled, the undersigned further, as a separate defence in said matter, objects" etc., setting up a defence on the mertis (25-131. See 66-409, 69+220); an answer setting forth objections to the jurisdiction (35-285, 28+506); an answer simply protesting against the exercise of jurisdiction and claiming no other right (37-466, 35+362); a motion to set aside the service of a summons on the ground that the complaint was not filed, and no copy of it served with the summons, although the moving party did not state that his appearance was special (55-443, 57+141).

11. Modes of appearing specially—By motion (13-174, 165; 22-552; 23-539; 25-131; 37-52, 33+314; 55-443, 57+141). By answer (35-285, 28+506; 37-466, 35+362. See 13-174, 165). By demurrer (10-178, 144).

12. Waiver of special appearance—When a party appears specially and objects to the jurisdiction of the court over his person and his objection is overruled he does not waive the objection by answering to the merits and proceeding the trial (25-131; 26-233. 2+698; 66-79, 68+774; 66-409, 69+220; 86-210, 90+383).

13. Withdrawal of appearance—28-400, 10+429; 29-46, 11+132.

9239. Appearance and its effect—A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, after which he shall be entitled to notice of all subsequent proceedings therein. Until such appearance, notice of ordinary proceedings in the action need not be given. (4116) [7742]

After appearance a defendant is entitled to notice of all subsequent proceedings (61-534, 63+1111; 66-185, 68+834). But to require the service of notice the appearance must be by answer, demurrer or notice. A written admission of service indorsed on a summons is not an appearance entitling defendant to notice (12-529, 437). A stipulation signed by the plaintiffs and some of the defendants in a settlement and dismissal of an action is not such an appearance (22-1). The entry of a judgment is not a proceeding that always requires notice to the opposite party. When a defendant fails to appear service of notice and papers in the ordinary proceedings in an action need not be made upon him (12-529, 437; 22-1; 66-185, 68+834). Defects may be waived by general appearance (122-352, 142+709). Unverified answer in justice court is an appearance (124-147, 144+449).

Notice of proceedings. 160-181, 199+328.

A defendant cannot on a special appearance contest or litigate the question of his interest in property attached. 163-114, 203+614.

A party challenging the jurisdiction of the court on a special appearance, of which due notice is given, is not entitled to notice of subsequent proceedings. 163-114, 203+614.

9240. Service of notices, etc.—Where a party who has appeared resides out of the state and has no attorney in the action, the service of notices and other papers may be made by mail if his residence is known; if not known, on the clerk for him. But where a party, whether resident or non-resident, has an attorney in the action, service shall be made upon the attorney instead of the party. And if the attorney shall have removed from the state, such service may be made upon him personally either within or without the state, or by mail if his residence is known, and, if not known, then by mail upon the party, if his residence is known, whether within or without the state. If the residence of neither the party nor his attorney is known, service may be made upon the clerk for the attorney: Provided, that this section shall not apply to the service of a summons or any process, or of any paper to bring a party into contempt. (4117) [7743]

Where after the commencement of an action the defendants and their attorney removed from the state it was held proper to serve a notice of trial by mail on the attorney out of the state (64-243, 66+988). Until the entry of judgment the attorney of record is the proper person upon whom to serve notices of all kinds. As a general rule the authority of an attorney ceases upon the entry of judgment and notices must thereafter be served on the party (21-51; 79-476, 82+990). Where a county is a party the county attorney is the proper person on whom to serve (23-299). On appeal to the district court from an order of the probate court admitting a will to probate a notice of appeal may be served on the attorney of the proponent (32-443, 21+474). The provisions of this section are not applicable to the service of a summons or other process or of any paper to bring a party into contempt (4-163, 108; 42-40, 43+686; 52-98, 53+812).

Notice of appeal. 158-467, 197+847.

9241. Same—Personal—Personal service, within the meaning of § 9240, shall mean:

1. If upon the attorney, leaving a copy with him; or, if he be absent from his office, with his clerk therein or other person having charge thereof; or, if there be no one in charge of the office, leaving such copy, between 6 o'clock a. m. and 9 o'clock p. m., in a conspicuous place therein; or, if the office be closed, leaving it at the house of his usual abode, with some person of suitable age and discretion residing therein.

2. If upon a party, delivering the copy to him, or leaving it at the house of his usual abode, between 6 o'clock a. m. and 9 o'clock p. m., with a person of suitable age and discretion residing therein. (4118) [7744]

This section is not applicable to the service of notice to terminate a lease (81-445, 84+454). Service on an attorney at his office, he being absent, can be made by leaving the paper in a conspicuous place in his office only when there is in the office no clerk of his, or person having charge thereof (53-273, 55+44).

9242. By mail — When and how made — Effect — Service by mail shall be made by depositing a copy of the paper to be served in the postoffice, addressed to the person on whom service is to be made at his place of residence, with the postage prepaid. Such service may be made whenever the person serving the paper and the person to be served reside in different places, between which there is regular communication by mail.

The party so served shall have double the time allowed in case of personal service. (4119) [7745]

The paper must be mailed at the place of residence of the attorney or party serving it. When the paper actually comes into the hands of the person to be served within the time required for personal service, it is immaterial where it is mailed; for then it is equivalent to personal service. But if it be mailed at any other than the proper place, the person adopting that mode of service must take the risk of its reaching the person to whom sent within the proper time. Service by mail being in derogation of common law must be made in strict compliance with the statute (37-514, 35+381). This section does not apply to service of papers on the clerk of court, so that a service on him by mail is not good unless the paper actually reaches him within the proper time (32-434, 21+471). When a complaint is served by mail after a seasonable demand of a copy by an appearing defendant the latter has double the time in which to answer (55-75, 56+576). Whether a party can secure double time in which to amend of course by serving his pleading by mail is an open question (59-485, 61+555). When a paper is properly mailed the service is deemed complete. The risk of failure of the mail is on the person addressed. A paper is properly served under this section if mailed on the last day of the time allowed for service although not received until after the expiration of such time (37-514, 35+381). This section has no reference to notice under private contracts (129-335, 152+723). Service by mail (138-154, 164+665). Presumption as to mailed letter (151-501, 187+514).

Notice of appeal. 158-467, 197+847.

9243. Defects disregarded — Amendments, extensions, etc.—A notice or other paper shall be effectual though the title of the action be omitted, or it be otherwise defective as to the designation of the court or the parties, if it intelligibly refers to the action or proceeding. In furtherance of justice, the court, on proper terms, may permit any other defect or error in the papers to be amended, and may relieve against any mischance, omission, or defect within one year after it occurs; and, for good cause shown, the court may enlarge the time within which any act or proceeding is required by law to be done or taken, permitting the same within such enlarged time on reasonable terms: Provided, that the time for bringing a writ of error or for taking an appeal shall not be so extended. (4120) [7746]

Neither the district nor supreme court can give a party a right to appeal after the time for appeal prescribed by statute has passed (53-431, 55+540). This section has reference to matters of practice and procedure in pending actions and does not confer power to extend or modify the statute of limitations (39-115, 39+67). Under this section the supreme court may relieve an appellant and reinstate an appeal which has been dismissed (28-68, 9+79). A stay held under this section to operate as an extension of time to serve a case (81-467, 84+324). Complaint held sufficient (123-122, 143+253). Two different causes of action tried as one (127-490, 150+218). Contract limitation to new action, as a bar, cause for re-instatement (131-246, 154+1099). Enlarging time for review in judicial ditch proceeding (131-374, 155+626; 140-236, 167+1043; 144-449, 175+900, 193+590).

209+868.

9244. Pleadings, etc., to be filed—Penalty—All pleadings, affidavits, bonds, and other papers in an action shall be filed with the clerk, unless otherwise provided by law or by order of the court. And all pleadings shall be so filed on or before the second day of the term at which the action is noticed for trial; otherwise the court may continue the action or strike it from the calendar. (4121) [7747]

9245. Assessment of damages without answer—A defendant, without answering, may appear in the action and demand in writing an assessment of the amount which the plaintiff is entitled to recover; and thereupon the court, upon application of either party, shall direct the manner of such assessment. When the amount is thus ascertained, the clerk shall enter judgment therefor as in other cases. (4122) [7748]

MOTIONS AND ORDERS

9246. Defined—Service of notice—Every direction of a court or judge made or entered in writing, not included in a judgment, shall be called an order, and every application for an order shall be known as a motion. When notice of a motion is required, it shall be served eight days before the time appointed for the hearing; but the judge, by an order to show cause, may prescribe a shorter time. (4123) [7749]

Renewal of motion on the same facts (122-154, 142+134). Shortening notice by order to show cause (125-477, 147+654). Misnomer of defendant (133-434, 158+711). Order to show cause (136-425, 162+523).

9247. Motions, etc., where noticed and heard—Demurrers and motions for judgment on the pleadings may be heard and determined at the regular or special term of the court held in any county of the district, or at any time and place within the district which a judge thereof shall fix. All motions of which notice is required to be given shall be made within the judicial district, or at some place in an adjoining district which is nearer, by railway, to the county seat of the county in which the action is pending than is the residence of the nearest qualified judge of the district of which such county is a part. Orders so made by the judge of another district shall be filed in the county of the venue, with like effect as though made by a judge of the local district. Provided, that in any county having two special terms of court each month, all motions in actions pending therein shall be made in such county. (R. L. § 4124, amended '09 c. 433 § 1) [7750]

An issue of law arising on a demurrer may be noticed for hearing before the court in the county wherein the action is pending at any time, whether it be at a term of court or not (86-46, 90+126). Objection that the court did not fix the time for argument on a demurrer as provided in this section cannot be raised for the first time on appeal (71-238, 73+860). If a motion is made in an adjoining county it is not necessary that the moving papers or the record on appeal show that it is proper to make it there, for the presumption is in favor of the jurisdiction (15-486, 400; 39-367, 40+257. See 36-129, 30+447). If the judge of the district court in the district where an injunction of the court has been disobeyed is disqualified from acting, proceedings for such contempt may be had in an adjoining district (52-283, 53+1157). Where an action was brought in Le Sueur county and the venue was changed to Hennepin county it was held irregular for the plaintiff to notice a demurrer of the defendant for argument in Sibley county after the change of venue, but that it was an irregularity not going to the jurisdiction of the court (66-213, 68+976). Opening judgment on pleadings (122-154, 142+134). Motion upon supplemental action in ejectment (124-538, 144+1090). Every reasonable intendment accorded pleading assailed (125-119, 145+812). Motion in mandamus for judgment on the pleadings (129-183, 151+970).

165-482, 205+888.

Motion for change of place of trial may be entertained by judge in adjoining district. 161-520, 201+302.

Not applicable to a motion for new trial or of motion of necessity to be heard by judge presiding at trial. 161-520, 201+302.

Findings should not be made upon the granting of a motion for judgment on the pleadings. 166-323, 207+632.

The owners having failed to redeem from the foreclosure sale, and defendants having stipulated that they make no claim, under their lien, against that portion of the tract not covered by the mortgage, judgment was properly granted upon the pleadings; there being nothing further to litigate. 211+323.

On a motion for judgment on the pleadings, findings of fact and conclusions of law should not be made. 212+896.

Orders appealable. 212+896.

9248. Ex parte motions—Motions of which notice is not required to be given may be heard and granted by a judge of the district at any place within the state; but no order to stay proceedings for a longer time than sixty days, nor for a second stay thereof, shall be granted without notice to, or consent of, the adverse party. (4125) [7751]

Limitation on stays (81-467, 84+324; 90-451, 97+128).

PLEADINGS

9249. Pleadings, etc., how regulated—The forms of proceedings in civil actions, and the rules by which the sufficiency of pleadings is to be determined, shall be governed by statute. The pleadings shall be:

1. On the part of the plaintiff, a complaint, and a demurrer, or a reply.

2. On the part of the defendant, a demurrer, or an answer. (4126) [7752]

Pleadings regulated by statute (25–278, 292).

A general allegation of agency is limited by the allegation of the specific facts supposed to give rise to the agency. The general allegation is in the nature of a conclusion of law, and, if not sustained by the specific facts pleaded, it will be disregarded. 162–18, 202+64.

9250. Contents of complaint—The complaint shall contain:

1. The title of the action, naming the court and the county in which it is brought, and the parties, plaintiff and defendant, therein.

2. A plain and concise statement of facts constituting a cause of action, without unnecessary repetition.

3. A demand for the relief desired by the plaintiff; and, if a recovery of money be demanded, the amount shall be stated. (4127) [7753]

½. In general.

Pleading conclusions. 162§139, 202+708.

Where mistake is relied on, the particular mistake and how it occurred must be set forth and that the mistake was common to both parties. 210+628.

In such an action, where the reformation is set up as a defense in an answer, the facts must be pleaded with the same accuracy and the same extent as though it were the initial pleading. 210+628.

Where a pleading asks to refrom a written contract and to recover damages for its breach, or to enforce it, the allegations must be sufficient for both purposes. 210+628.

Where it is sought to reform a written contract, good practice requires that the instrument to be reformed should be attached to or set forth in the pleading so that, from it and the allegations in the pleading, it may appear clearly that it does not conform to the real contract made by the parties. 210+628.

Where fraud is relied on, the pleading must be specific in pleading the facts and circumstances which constitute the fraud, and that the representations, inducing the execution of the instrument, were relied upon and were false, and that the pleader was misled thereby. 210+628.

Pleading as evidence. 211+463.

1. Subd. 1—The number of the judicial district is not an essential element of the title (22–67). Where several counties are attached together for judicial purposes a complaint is properly entitled if it names them all (18–90, 72. See 16–282, 249; 17–76, 54). Entitling a cause in a particular county and bringing the action therein is a designation of that county as the place of trial (80–373, 83+342). After a change of venue the venue in the title should be changed accordingly (see § 9206; 68–4, 70+777). The full Christian names of the party should be given, the use of initials being objectionable as leaving the record doubtful as to the parties concluded by the judgment (6–250, 167; 43–180, 45+10; 52–443, 54+484. See 82–474, 85+206). The middle name need not ordinarily be given, but it is proper practice to insert it by initial (31–385, 18+98; 60–1, 61+816). "Jr." need not be inserted (11–78, 45).

2. Subd. 2—58–514, 60+338; 64–527, 67+645; 86–101, 90+370; 121–271, 141+175; 121–281, 141+179; 121–335, 141+297; 122–152, 142+143; 122–209, 142+193; 122–295, 142+710; 122–327, 142+706; 122–380, 142+871; 123–76, 142+1045; 123–122, 143+253; 123–160, 143+257; 123–254, 143+783; 123–333, 143+907; 124–117, 144+450; 124–155, 144+462; 124–260, 144+950; 124–266, 144+954; 124–416, 145+125; 125–54, 145+622; 125–179, 146+347; 125–431, 147+434; 125–458, 147+444; 126–52, 147+827; 126–115, 148+50; 126–133, 147+964, 126–176, 148+43; 126–229, 148+67; 126–334, 148+286; 128–3, 150+170; 128–217, 150+785; 128–490, 151+203; 129–259, 152+412; 130–28, 153+134; 130–72, 153+262; 130–410, 153+619; 131–109, 154+793; 131–123, 154+945; 131–318, 155+200; 136–466, 162+72; 137–464, 162+1050.

3. Subd. 3—If the defendant appears the relief granted is not in any way limited or controlled by the prayer for relief, except that in actions for damages greater damages cannot be awarded than prayed, but this limitation may always be avoided by amendment (1–126, 101; 3–134, 80; 72–344, 75+208, 76+41). The plaintiff may pray for relief in the alternative (see 10–439, 352; 46–548, 49+323, 646). Effect of general prayer (20–178, 163; 32–293, 20+234; 68–112, 71+9). A complaint, whether framed as bill in equity or otherwise, regardless of prayer for relief, is good as against general demurrer, if the facts alleged show plaintiff entitled to any substantial relief (106–62, 118+61). See 124–281, 144+953; 124–265, 144+954.

9251. Demurrer to complaint — Grounds — Within the time allowed by law for answering the complaint, the defendant may demur thereto if it shall appear therefrom either:

1. That the court has not jurisdiction of the defendant's person or of the subject of the action;

2. That the plaintiff has not legal capacity to sue;

3. That there is another action pending between the same parties for the same cause;

4. That there is a defect of parties, plaintiff or defendant;

5. That several causes of action are improperly united;

6. That the facts stated do not constitute a cause of action. (4128) [7754]

½. In general.

A general demurrer does not raise the question of defect of parties plaintiff or defendant. 162–47, 202+272.

A demurrer to a pleading admits all material facts well pleaded, all inferences of fact which may fairly be made therefrom, and all necessary legal inferences which arise from the facts pleaded. 164–265, 204+938.

The trial court did not err in striking the demurrer as being frivolous. 210+66.

1. Statutory grounds exclusive—4–141, 93; 9–178, 164; 10–178, 144; 25–155; 32–122, 19+652; 34–243, 25+406.

2. Defect must appear on face of pleading—9–178, 164; 10–178, 144; 24–327; 71–331, 73+1086; 72–312, 75+232; 90–154, 95+901.

3. For want of jurisdiction—Over the person (10–178, 144). Over the subject matter (1–365, 268; 7–502, 409; 9–178, 164; 59–73, 60+847). See 121–488, 142+3.

4. For want of capacity to sue—It is not enough that it does not appear that the plaintiff has legal capacity to sue, but the want of such legal capacity must appear affirmatively (24–327; 22–272; 31–227, 17+373; 39–527, 40+831; 93–432, 101+796). See 140–391, 168+585.

5. For pendency of another action—18–82, 65, 71; 31–213, 17+341; 60–82, 61+902; 86–42, 90+119.

6. For defect of parties—The objection of defect of parties whether raised by demurrer or answer must be distinctly raised and must specifically show wherein the defect consists, naming the person who should have been joined (31–230, 17+377; 32–548, 21+748; 70–356, 73+171; 94–30, 101+1061).

7. For misjoinder of causes of action—13–264, 246; 13–379, 352; 14–133, 100; 31–367, 18+94; 53–191, 54+1062; 132–28, 155+757.

8. For failure to state a cause of action—Under a general demurrer the following objections may be raised: that the complaint does not state facts constituting a cause of action against the defendant and in favor of the plaintiff, although it may state a cause of action between others (73–198, 75+1053); former adjudication (5–223, 178; 7–234, 176); that the action is barred by the statute of limitations (38–508, 38+693; 58–133, 59+984); contributory negligence (28–69, 9+75); that the action is prematurely brought (62–128, 64+143); that the contract alleged is void under the statute of frauds (2–277, 238; 20–40, 33; 39–145, 39+302); failure to plead a foreign statute (69–476, 72+694); the defence of bona fide purchaser (46–33, 48+450); that the facts alleged do not authorize equitable relief (38–211, 36+338); misjoinder of parties (3–151, 95; 4–13, 1; 7–252, 192; 50–21, 52+390). The following objections cannot be raised: want of legal capacity or authority to sue (31–227, 17+373; 39–527, 40+831; 73–198, 75+1053); misjoinder of causes of action (13–264, 246); defect of parties (71–331, 73+1086; 75–350, 78+4); want of jurisdiction of the subject matter (9–178, 164). Where complaint alleges in alternative two statements of fact, one sufficient to constitute cause of action and the other not, they neutralize each other, and demurrer lies (103–224, 114+1123). As against general demurrer, the question is whether, assuming every fact alleged, enough has been stated to constitute cause of action (107–68, 119+509). Demurrer does not reach discrepancies between relief to which complaint may entitle and prayer in summons (107–64, 119+651). Allegation in complaint in ejectment that plaintiff is owner in fee carries with it by inference immediate right of possession. The demurrer admits it as conclusion necessarily resulting from ownership (104–472, 116+947). Degree of insufficiency of complaint on demurrer (122–152, 142+143; 122–504, 142+899). Issue of reasonableness as against general demurrer (122–164, 142+138). Limitation of action (129–342, 152+734).

9. Not ground for demurrer—A demurrer will not lie

for a defect in the prayer for relief the prayer being no part of the cause of action. If a complaint states facts constituting a cause of action entitling the plaintiff to any relief, either legal or equitable, it is not demurrable because it prays for the wrong relief (10–439, 352; 11–150, 92; 31–239, 17+385; 32–122, 19+652; 33–408, 23+840; 34–13, 24+309; 36–75, 30+440; 42–526, 44+1030; 50–171, 52+526; 54–255, 55+1128; 62–265, 64+816; 64–326, 67+60; 69–5, 71+694; 71–331, 73+1086; 81–454, 84+323; 89–840, 95+309), or for inconsistent relief (10–439, 352; 11–150, 92; 31–367, 18+94; 32–122, 19+652), or for greater relief than the facts alleged warrant (11–113, 70; 25–278; 58–39, 59+822). A demurrer does not lie for a defect in the allegations of damages (10–392, 314; 23–69; 64–216, 66+723); nor for misjoinder or excess of parties (3–151, 95; 4–13, 1; 5–304, 240; 31–186, 17+275); nor for indefiniteness (1–106, 83; 10–133, 106; 14–153, 120; 22–548; 28–69, 9+75; 36–380, 31+357; 43–532, 45+1131; 71–363, 73+1089; 89–276, 94+868); nor for redundancy (1–175, 150; 10–199, 161); nor for non-existence of the facts alleged (40–180, 41+936; 61–476, 63+1029; 64–3, 65+959); nor for suing by initials (6–250, 167); nor for failure to state several causes of action separately (28–232, 9+712; 31–235, 17+383; 37–502, 35+365); nor for a defective prayer for relief (31–367, 18+94); nor for irrelevancy (10–199, 161); nor for a defect in the verification (26–246, 2+703); nor for failure to obtain leave of court to sue (32–122, 19+652; 35–167, 28+191; 78–228, 80+1118); nor for bringing an action in the wrong county (3–277, 191; 5–148, 113; 10–133; 106; 21–15; 46–535, 49+257; 76–513, 79+507); nor that plaintiff's exclusive remedy is in equity (59–73, 60+847; 71–331, 73+1086); nor because the summons is not served on a co-defendant (37–364, 34+335); nor that two counterclaims are not stated separately (25–155). Failure to allege incorporation (122–380, 142+871). In general—Rule of construction on demurrer (122–441, 142+822). Not a bar to new action (136–151, 161+388).

9252. Requisites—Waiver—The demurrer may be taken to the whole complaint, or to any of the causes of action therein stated. It shall distinctly specify the grounds of objection; otherwise it may be disregarded. If any such ground exists, but does not appear upon the face of the complaint, the objection may be taken by answer. If not taken by either demurrer or answer, the defendant shall be deemed to have waived the same, save only the objection to the jurisdiction of the court and to the sufficiency of the facts to constitute a cause of action. (4129) [7755]

½. In general.

Defect of parties defendant. 167–279, 209+7.

The trial court did not err in striking the demurrer as being frivolous. 210+66.

1. Demurrer to whole pleading—A demurrer may be to the whole complaint or to any of the causes of action stated therein, but if it is made to the whole complaint it will be overruled if any one of the causes of action therein stated is good. A demurrer must be good to the whole extent to which it is interposed (8–124, 97; 9–356, 341; 26–179, 2+489; 28–150, 9+626; 52–211, 53+1146; 53–181, 54+1059; 63–110, 65+257; 69–488, 72+563; 78–48, 80+838).

2. Demurrer to part of pleading—A demurrer will only lie to a whole pleading or to the whole of a single cause of action or defence (1–408, 292; 9–356, 341; 21–419; 38–459, 38+366; 42–448, 44+663; 49–350, 51+1102; 64–216, 66+723). It will lie to a single cause of action although it is not separately stated (1–408, 292; 53–191, 54+1062).

3. Specifying grounds—A party may specify as many of the statutory grounds as he desires, but he is limited to those specified (4–141, 93; 9–178, 164; 13–264, 246; 31–227, 17+373; 39–527, 40+831; 68–95, 70+869; 71–331, 73+1086; 73–198, 75+1053). A general demurrer to a pleading that it does not state facts sufficient to constitute a cause of action or defence is sufficient without further specification (7–234, 176). A demurrer for defect of parties must point out the defect and name the persons omitted (94–30, 101+1061). See 122–250, 142+315. Joint demurrer cannot be sustained if complaint is good as against one of demurring defendants (128–303, 150+912).

4. Objection by answer—Where there is a defect of parties plaintiff or defendant, if the defect appears on the face of the complaint, the objection must be taken by demurrer; if the defect does not appear on the face of the complaint, the objection may be taken by answer; and if no such objection is taken either by demurrer or answer the defendant is deemed to have waived the same (12–124, 71; 12–255, 166; 17–372, 348; 18–108, 91; 22–303; 22–476; 25–493; 26–43, 1+161; 28–166, 9+666; 31–62, 16+466; 31–230, 17+377; 32–548, 21+748; 37–214, 33+782; 40–436, 42+291; 43–449, 45+868; 44–409, 46+851; 46–54, 48+528, 681; 49–99, 51+663; 58–279, 59+1017; 59–73, 60+847; 60–240, 62+281; 65–515, 68+208; 66–487, 69+610, 1069; 71–331, 73+1086; 82–336, 85+13; 104–481, 117+158). Want of legal capacity to sue (10–448, 360; 94–502, 103+500). Misjoinder of causes of action (23–463; 25–305; 46–54, 48+528, 681; 95–375, 104+547). Failure of objecting by answer (131–380, 155+623).

5. Waiver—Defect of parties, want of legal capacity to sue, misjoinder of causes of action (see note 4 supra). Objection to the jurisdiction of the court and the sufficiency of the complaint is not waived (7–502, 409; 10–187, 151; 15–81, 59; 61–271, 63+735; 81–324, 84+118). The objection that the facts set up in the answer as a counterclaim do not constitute a cause of action is not waived (39–46, 38+762; 46–306, 48+1112. See 50–429, 52+910). The objection that a cause of action pleaded as a counterclaim is not the proper subject of counterclaim in the particular action is waived if not taken by demurrer (28–147, 9+632; 34–71, 24+344; 39–46, 38+762; 79–386, 82+632. See 22–132; 40–176, 41+935; 58–112, 59+981). Objection to complaint in equity that plaintiff has adequate remedy at law must be taken by demurrer or is waived (97–315, 105+902). Jurisdiction of court and sufficiency of facts (121–237, 141+170). Improper joinder of causes (132–27, 155+756). See 136–235, 161+515; 140–391, 168+585; 145–294, 177+134.

Want of capacity to sue in our courts is waived, unless objection is taken by answer or demurrer. 211+949.

By answering, a demurrer to the complaint previously interposed and the order overruling the same are both eliminated from consideration upon an appeal after trial on the merits. 213+549.

9253. Contents of answer—The answer shall contain:

1. A denial of each allegation of the complaint controverted by the defendant, or an averment that he has not knowledge or information thereof sufficient to form a belief.

2. A statement, in ordinary and concise language, of any new matter constituting a counterclaim or defence.

3. All equities in favor of the defendant existing at the time of the commencement of the action, or afterwards and before the service of the answer. If the same be admitted or the issue thereon be determined in favor of the defendant, he shall be entitled to such relief as the nature of the case demands. (4130) [7756]

½. In general.

161–302, 201+431, note under § 9254.

163–481, 204+531, note under § 9254.

Reformation and enforcement. 162–159, 202+448.

That no leave of court to sue on an official bond has been obtained cannot be raised, where the answer consists only of a general denial. 210+161

Answer stricken as sham. 210+690.

An allegation in the answer, denied in the reply, cannot be relied upon by plaintiff as establishing the fact alleged. 210+869.

Debtors to an insolvent bank cannot, when sued by the receiver, offset moneys paid by them after the insolvency as sureties on a bond of the bank given to secure the repayment of deposits. 210+162.

DENIALS

1. General denial—Denials are either general or specific. General when they deny each and every allegation of the complaint. Specific when they deny some particular allegation. Although the general denial is not expressly authorized by our statute its use has been approved (12–515, 425; 36–46, 29+326). Forms of general denial held sufficient (22–538; 23–304; 36–46, 29+326; 46–115, 48+768); forms held insufficient (10–168, 136, 68; 11–384, 278; 13–114, 105).

2. Effect of general denial—A general denial has the same effect as a specific denial of each allegation. It has as wide a scope as the allegations of the pleading to which it is directed and puts in issue every material allegation thereof (7–217, 159; 12–515, 425; 23–304; 36–46, 29+326; 38–390, 38+351; 38–471, 38+361; 92–299, 100+87; 99–335, 109+597). It puts in issue material allegations of value (38–471, 38+361). Slander (122–177, 142+147; 122–517, 142+897). Assault and battery (124–260, 144+950; 125–179, 146+347). Assignment of wages (125–216, 146+361). Trespass (127–360, 149+461; 127–449, 149+950). Promissory note (136–103, 161+398).

Under a general denial, any evidence is admissible which tends directly to controvert the allegations of the complaint. If doubt exists as to whether defensive matter is admissible thereunder, great liberality should be shown in allowing an amendment to render it admissible. 160–200, 199+737.

3. Denials of knowledge or information—If the de-

fendant has no personal knowledge of the facts alleged in the complaint or any of them, or no information regarding them sufficient to form a belief as to their truth or falsity, he may put them in issue by simply denying any knowledge or information sufficient to *form a belief (2–219, 180; 5–397, 321; 12–412, 295; 40–450,* 42+352; 49–525, 52+140). This form of denial is not permissible where the facts are within the knowledge of the defendant (2–219, 180; 3–225, 154; 10–168, 136; 31–267, 17+388; 35–470, 29+170; 40–450, 42+352; 49–525, 52+140; 68–30, 70+775). But a denial in this form when the facts are within the knowledge of the defendant makes a good issue so long as it remains in the record. The only way to object to it is to move to strike it out as sham before pleading *(40–450, 42+352; 49–525, 52+140).* Form of denial held sufficient (65–17, 67+652).

4. Denial upon information and belief—58–514, 60+338; 128–7, 150+216.

5. *Specific denials control*—*If there is a specific denial* and also a general denial in the same answer the former controls and if insufficient no issue is made (34–314, 26+394. See 39–454, 40+521).

6. Denials controlled by subsequent admissions—If there is a denial and also an admission the latter controls (4–148, 99; 5–119, 85; 7–494, 401; 21–378; 28–186; 28–526, 11+94; 38–111, 35+728; 71–311, 73+956).

7. A denial must not be a negative pregnant—A negative pregnant *is a denial which implies an* affirmative. It is inherently ambiguous and therefore bad (15–288, 219; 20–382, 334; 33–495, 24+305; 36–46, 29+326; 38–356, 37+453; 38–471, 38+361; 60–214, 62+264). A general denial can never be construed as a negative pregnant (36–46, 29+326; 38–471, 38+361). When several facts are alleged conjunctively a conjunctive denial is a species of negative pregnant and raises no issue *(34–314, 26+394).* The effect of a negative pregnant *is the admission of the fact sought to be denied* (33–495, 24+305; 34–314, 26+394; 36–312, 30+814; 60–214, 62+264). A negative pregnant has this effect, however, only when the fact denied is a material traversable fact. In actions for unliquidated damages, allegations of value are not traversable. Hence denials in the form of negative pregnant do not admit the value as alleged (34–314, 26+394; 38–471, 38+361).

8. Argumentative denials—15–427, 346; 30–265, 269, 15+237.

9. General denials coupled with admissions—12–515, 425; 15–427, 346; 16–38, 24; 38–545, 38+622; 39–515, 40+833; 40–485, 42+392; 70–471, 73+144; 86–140, 90+378. Admission as to form and execution of bond. (123–218, 143+355; 128–241, 150+870).

10. Non-traversable allegations—Allegations of immaterial matters (1–170, 144; 9–194, 179; 12–192, 116; 17–123, 98; 20–382, 334; 33–424, 23+837; 47–56, 49+383; 71–69, 73+645), of legal conclusions (9–194, 179; 15–288, 219; 17–493, 470; 39–122, 39+74, 140), of unliquidated damages (34–314, 26+394), of time generally (9–194, 179); and the prayer for relief (32–92, 19+393), are not traversable.

NEW MATTER CONSTITUTING A DEFENCE

11. Compared with denial—28–232, 9+712.

12. Defendant must not be a stranger to new matter—11–45, 24; 30–395, 15+676. See 46–148, 48+769.

13. When one of several obligors is sued—If A sues B on an obligation of B and C, B may set up any defence which B and C might have set up had they been *sued jointly (62–188, 64+387; 77–509, 80+630).*

14. Must be pleaded specially—Matter in the nature of confession and avoidance cannot be proved unless specially pleaded (9–194, 179; 16–91, 81; 35–55, 27+74; 38–111, 35+728; 40–30, 41+239; 42–382, 44+126; 47–28, 49+393; 56–450, 58+35; 62–46, 64+84; 62–128, 64+143; 65–240, 68+14; 101–155, 111+962). Illegality of lease (126–421, 148+566; 132–205, 156+4; 136–138, 161+390). Release on bond by extension of time (123–223, 143+715).

15. Partial defences—*Although not expressly authorized* the defendant may plead partial defences (28–172, 9+677; 29–128, 12+348; 50–426, 52+909; 55–244, 56+817; 55–492, 57+211; 77–509, 80+630).

16. Each defence must be complete in substance and form—68–82, 70+856.

EQUITIES

17. Nature of equities pleadable—An equity, to be pleadable under this section, must be one which, according to the rules governing courts of equity under the former system, would have entitled the defendant to relief, wholly or in part, against the liability set forth in the complaint. An equitable defence should contain in substance the elements of a bill in equity and its sufficiency other than as to matters of mere form is to be determined by the application of the rules observed in courts of equity when relief was granted there under the former practice (2–31, 21; 5–178, 139; 14–469, 351; 17–100, 76; 19–383, 329; 20–234, 212; 21–534; 25–222; 33–157, 22+292; 37–320, 33+865; 37–420, 34+896; 40–184, 41+815; 44–61, 46+210; 51–428, 53+651; 69–440, 72+452; 74–354, 77+234, 407, 968; 78–29, 80+783; 93–475, 101+610). The equity must be perfect at the time it is pleaded and not depend on the happening of a contingent event (37–320, 33+865). If the facts giving rise to the equity also constitute a cause of action at law it must be shown that the remedy at law is inadequate and the answer should allege facts showing this inadequacy (2–31, 21; 14–469, 351; 17–100, 76; 37–420, 34+896). Where defendant relies on fraud in procuring execution of instrument set out in complaint, he must allege facts *constituting fraud (98–213, 107+812). Defense of title* by parol gift, (126–389, 148+125). See 131–266, 154+1093. Equity within meaning of section (143–267, 173+423).

18. Need not demand affirmative relief—A defendant may plead an equity as a defence and without asking for any affirmative relief thereon (37–420, 34+896; 51–428, 53+651; 77–438, 80+618).

19. Practice—When an equity is pleaded in a legal action the issue thereon is to be decided by the *court without a jury and should ordinarily be taken up* first, as its disposition may make it unnecessary to submit the legal issue to the jury. The order of trial, however, is a matter of discretion with the trial court to be determined by the exigencies of the particular case (93–475, 101+610. See 17–104, 83; 28–330, 9+876).

20. Burden of proof—28–418, 10+425.

21. Several defendants—(129–324, 152+755).

22. Admission of ultimate facts—(132–238, 156+283).

9254. Requisites of a counterclaim—Pleading does not admit—The pleading of a counterclaim shall not be construed as an admission of any cause of action alleged in the complaint. Such counterclaim must be an existing one in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and must be:

1. A cause of action arising out of the contract or transaction pleaded in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action; or

2. In an action arising on contract, another cause of action arising also on contract, and existing when the action was begun. (4131) [7757]

1. Nature of counterclaim—A counterclaim is in the nature of a cross-action, and a defendant who pleads one is, as to that, considered as if he had brought his action (20–433, 387; 33–438, 23+862; 45–203, 47+642). The effect of a counterclaim may be to just balance the claim set up in the complaint, but there is no such thing in the law as setting up one right of action as a bar to another right of action (41–46, 42+601). There can be no counterclaim to a mere defence (46–121, 48+682).

165–486, 206+445; 212+896; 206+384, note under § 9488.

Counterclaim in action for damages for breach of contract to purchase land. 159–364, 199+84.

The defendant was the owner of an overdue note of the bankrupt and another person. Held, that the defendant was entitled to offset the note. 161–302, 201+431.

The evidence fell short of establishing a contract obligating plaintiff to furnish all the cement required to construct the building. The conterclaim for damages, resulting from a breach of the alleged contract, was *not established by the evidence. 161–353, 201+548.*

It was error to dismiss the counterclaim without making findings upon the issues presented. 162–328, 202+734.

The verdict awarding the defendant the amount of his counterclaim is supported by the evidence. 164–414, 205+276.

The court did not err in refusing to submit to the jury counterclaim growing out of the conviction of defendant for selling extracts for beverage purposes. *209+625.*

His agent deposited plaintiff's money to his own credit in the defendant bank, which, without otherwise changing its position upon the faith of the deposit or being prejudiced in any way, attempted to appropriate the deposit by offsetting it *against matured notes of the* agent, a depositor. Judgment for plaintiff affirmed. 211+825.

In an action by the state to recover on a seed grain note, the defendant is not prevented from asserting that the sale was induced by the fraudulent misrepresentations of the state representative, and he may recoup any damages suffered as a result of the misrepresentation. 210+1006.

1½. Against one of two plaintiffs.

Counterclaim against one of two plaintiffs improper. 158–31, 197+277.

2. Compared with defence—Matter may be of such a nature as to be a defence and also a counterclaim (20–433, 387; 21–225; 22–92; 45–203, 47+642; 46–121, 48+682; 81–272, 83+1084).

3. Compared with setoff—6–319, 224, 236.

4. Compared with recoupment—*3–182, 116; 5–373, 301;* 6–319, 224, 235; 16–121, 48+682. See as to recoupment:

28–172, 9+677; 31–427, 18+147; 46–113, 48+678; 46–468, 49+245; 47–183, 49+740; 48–539, 51+604; 55–341, 56+1119; 55–492, 57+211; 57–278, 59+194; 60–442, 454, 62+613; 62–188, 64+387; 63–481, 65+938; 68–454, 71+676; 72–308, 75+226.

5. Compared with equitable setoff—In the absence of special circumstances courts of equity follow the statute regulating counterclaims. But the equitable right of setoff was not derived from and is not dependent on such statute. In cases not within the statute a court of equity will permit an equitable setoff if from the nature of the claim or from the situation of the parties it would be impossible to secure full justice in a cross-action. When such equities exist a court of equity will set off a separate debt against a joint debt, or conversely, a joint debt against a separate debt (19–383, 329; 23–175; 25–299; 44–61, 46+210; 47–557, 50+614; 53–105, 54+941; 53–214, 54+1115; 57–87, 85+826; 60–208, 62+273; 64–469, 67+361; 65–426, 68+76; 67–172, 69+813; 67–201, 69+889; 69–196, 71+934; 71–394, 73+1096; 74–354, 77+234, 407, 968; 75–138, 77+788). See 128–58, 150+227.

6. Must be an independent cause of action—A counterclaim must be a complete and independent cause of action, either legal or equitable. It must be something more than a mere equitable defence. The test is, would it authorize an independent action by the defendant against the plaintiff? (4–51, 26; 6–550, 386; 8–461, 410; 14–140, 108; 17–403, 381; 19–181, 145; 20–234, 212; 21–308; 22–541; 25–155; 26–105, 1+811; 36–300, 30+890; 41–524, 43+392; 64–277, 66+973; 93–475, 101+610).

7. Must exist in favor of the defendant who pleads it—It is the general rule that the defendant cannot set up as a counterclaim a cause of action existing in favor of another person whatever his relations with such person may be (5–155, 119). The demands of stockholders individually cannot be set off in an action against the corporation (53–214, 54+1115), and in an action against stockholders a cause of acton in favor of the corporation cannot be set up (44–430, 46+911). If a surety is sued alone or together with his principal he cannot set up as a counterclaim a cause of action existing in favor of his principal, not even one arising out of a contract in suit. But if the principal is a party and insolvent a court of equity will allow the surety to set off a debt due the principal from the debtor. If the action is brought against the surety alone the principal may be allowed to intervene and set off his claim (44–31, 46+210). If a partner is sued on what is really a partnership obligation he may avail himself of any recoupment of which the partners would have a right to avail themselves if the suit were against all of them (62–188, 64+387).

8. Must exist against the plaintiff—The counterclaim must be a cause of action existing against the plaintiff which would authorize a judgment against him. If A, the assignee of B, sues C the latter cannot set up as a counterclaim a cause of action against B (8–461, 410; 19–181, 145). In an action by an undisclosed principal the defendant may sometimes set off a counterclaim against the agent (73–434, 76+211).

9. Must exist in defendant at commencement of action—A cause of action which is not mature at the commencement of the action cannot be set up as a counterclaim (50–429, 52+910; 49–521, 52+139). A cause of action assigned to the defendant after the commencement of the action cannot be set up. A person who is sued cannot buy up a claim against the plaintiff for the purpose of pleading it as a counterclaim (62–361, 64+909). A party owing an insolvent cannot buy a claim against the insolvent and set it up as a counterclaim in an action brought against him by the assignee or receiver of the insolvent, nor can he buy up such a claim prior to the assignment of the insolvent, if he knew or had reasonable grounds for believing that an assignment was about to be made (60–208, 62+273; 61–230, 63+625; 62–361, 64+909. See 79–390, 82+653). A cause of action for damages for breach of contract, arising simultaneously and concurrently with commencement of action, may be interposed as counterclaim (105–96, 117+240). See 123–450, 143+1128; 125–317, 146+1113; 133–314, 158+423.

10. Must exist against a plaintiff and in favor of a defendant—If A and B sue C on a joint claim C cannot set up as a counterclaim a demand against A or B individually (17–100, 76; 47–398, 50+470). If A sues B and C on a joint and several liability B or C may set up as a counterclaim an individual claim against A (47–557, 50+614). If A sues B and C on a claim against them jointly neither B nor C can set up an individual claim against A (1–94, 73; 17–100, 76; 25–299). A cause of action which cannot be determined without bringing in new parties cannot be set up as a counterclaim (25–155; 28–147, 9+632; 37–65, 33+42; 46–380, 49+186). See 138–270, 164+979.

11. A cause of action "arising out of the contract" alleged—6–319, 224; 13–488, 451; 46–306, 48+1112; 47–183, 49+740; 61–226, 63+493; 63–481, 65+938; 72–395, 75+601; 93–280, 101+304; 124–54, 144+427; 132–415, 157+639.

12. A cause of action arising out of the "transaction" alleged—The term "transaction" means a commercial or business transaction or dealing, or a series of such transactions or dealings. It is broader than the term "contract." The transaction is not necessarily confined to the facts stated in the complaint, but the defendant may set up new facts and show the entire transaction and counterclaim on such statement of facts (14–469, 351; 93–52, 100+667. See 7–356, 282; 15–501, 413; 29–46, 11+132; 29–122, 12+349; 54–259, 55+1126; 60–212, 62+272; 61–226, 63+493; 72–395, 75+601; 93–280, 101+304). See 123–450, 143+1128; 140–202, 167+554.

13. A cause of action "connected with the subject of the action"—The meaning of the phrase "subject of the action" is not well defined (see 14–469, 351). It should receive a liberal construction (26–252, 2+847). The "connection" must be direct and immediate. The counterclaim must have such a relation to and connection with the subject of the action that the determination of the plaintiff's cause of action would not do exact justice without at the same time determining defendant's cause of action (14–469, 351). Held "connected with the subject of the action" (20–433, 387; 22–132; 26–252, 2+847; 61–226, 63+493; 63–481, 65+938; 69–440, 72+452; 98–240, 107+1131; 114–92, 130+1). Held "unconnected" (11–235, 154; 11–243, 160; 14–469, 351; 29–46, 11+132; 29–122, 12+349; 54–259, 55+1126; 72–395, 75+601; 93–280, 101+304; 114–92, 130+1). See 123–450, 143+1128; 126–462, 148+308; 145–136, 176+498.

The facts set forth constitute a tort not arising out of the contract or transaction pleaded in the complaint. 160–445, 200+473.

The rule is that, in an action ex contractu, a cause of action ex delicto cannot be set up as a counterclaim unless it arises out of the same transaction or is connected with the subject-matter of the action. 160–445, 200+473.

14. A claim on contract in an action on contract—Under subd. 2 of the statute a cause of action ex contractu may be set up as a counterclaim, although wholly unconnected with the cause of action alleged in the complaint. Implied contracts are within the statute and it matters not whether the damages recoverable are liquidated or unliquidated (6–319, 224; 6–420, 284; 7–356, 282; 10–13, 1, 25–210; 43–25, 44+523; 50–562, 52+972; 53–105, 54+941; 53–301, 55+129; 58–112, 59+981; 68–48, 70+866; 72–395, 75+601; 93–475, 101+610. And see cases under note 4 supra). A judgment, whether rendered in an action ex contractu or ex delicto, is a contract within the meaning of the statute. One judgment may be set off against another (3–419, 306; 6–562, 398; 47–557, 50+614; 50–562, 52+972; 54–14, 55+744; 64–46, 65+931; 68–328, 71+395, 72+71; 79–390, 82+653). Where an injured party may waive the tort and sue on the contract implied by law his demand may be set up as a counterclaim in an action ex contractu, and when he is the plaintiff and sues on the implied contract it may be opposed by a counterclaim arising out of contract (58–112, 59+981). Action for services and conversion, defense, breach of contract (130–50, 152+865; 132–415, 157+639; 133–314, 158+423).

15. When a tort may be set up as a counterclaim—In an action ex delicto another tort cannot be set up as a counterclaim unless it arises out of the same transaction or is connected with the subject of the action (29–46, 11+132). In an action ex contractu a cause of action ex delicto cannot be set up as a counterclaim unless it arises out of the same transaction or is connected with the subject of the action (20–102, 86; 29–122, 12+349; 40–176, 41+935; 54–259, 55+1126; 72–395, 75+601). But when the defendant may waive a tort and sue on the contract implied by law he may set up his claim (58–112, 59+981; 94–135, 102+217).

16. Claim ex contractu in action ex delicto—93–52, 100+667; 96–50, 104+762.

17. Public funds—An attorney cannot offset his claim for services against public funds (83–512, 86+775).

18. Statute construed liberally—26–252, 2+847; 50–562, 52+972.

19. Effect of failure to plead counterclaim—The defendant is not bound to plead a counterclaim. He may reserve it for a separate action (17–35, 18; 21–225; 29–341, 13+156; 39–353, 40+165; 72–119, 75+10).

20. Rules as to pleading counterclaim—The defendant must allege all the material facts constituting his cause of action in the same manner as if he were drafting a complaint against the plaintiff and he must likewise demand the relief to which he believes himself entitled. Allegations may be made by reference to the complaint (8–243, 209; 20–433, 387; 36–312, 30+814; 45–203, 47+642). A defendant may set up any cause of action that would be a proper counterclaim to any cause of action which the plaintiff may prove within the allegations of the complaint, although such cause of action may not be of the precise character indicated by those allegations and although the cause of action might not be a proper counterclaim if all such allegations should be proved (40–450, 42+352). A counterclaim being "new matter" is admitted if not controverted, but to require a reply it must be pleaded as such (16–38, 24; 19–181, 145; 21–431; 22–92; 22–132; 41–46, 42+601; 46–121, 48+682; 46–306, 48+1112; 55–492, 57+211; 57–395, 59+485; 72–109, 75+19; 79–243, 82+479). Matter pleaded expressly as a counterclaim, though not proper as such, may, if it constitute a defence to a claim in the opposite plead-

ing, be available as a defence (46–121, 48+682; 81–272, 83+1084). If a counterclaim is pleaded in a reply it can only be used as a defence (46–121, 48+682). Several counterclaims may be pleaded (25–155). On accounting, entitled to deduction though set-off or counter claim is not pleaded (128–307, 150+903).

21. Mode of objecting to counterclaim—The only way in which a plaintiff may object that a cause of action pleaded as a counterclaim is not the proper subject of counterclaim in the particular action is by demurrer. If he omits to demur he waives the objection and the cause of action must be tried as though a proper one to plead as a counterclaim (28–147, 9+632; 34–71, 24+344; 39–46, 38+762; 79–386, 82+632. See 22–132; 40–176, 41+935; 58–112, 59+981). The objection that two counterclaims are not *stated separately cannot be raised by demurrer. The* proper practice is to object by motion before replying (25–155). That a counterclaim cannot be determined without the presence of other parties may be raised by demurrer (25–155). The objection that the facts set up in the answer as a counterclaim do not constitute a cause of action is not waived by a failure to demur or reply, but may be taken on the trial by motion for dismissal or after verdict in arrest of judgment (39–46, 38+762; 46–306, 48+1112. See 50–429, 52+910. A counterclaim may be stricken out as sham (93–232, 100+1104). See 143–251, 173+429.

22. Relief awarded—45–203, 47+642; 81–272, 83+1084; 93–475, 101+610.

23. Action by state—In an action by the state claims arising out of independent transactions cannot, without its consent, be asserted as set-off or counterclaim (107–71, 119+792).

24. Recoupment—(121–280, 141+179).

25. Counterclaim against counterclaim.

There can be no counterclaim against a counterclaim. But as against a counterclaim the reply may plead re*coupment; i. e., a claim arising out of the same* transaction as the counterclaim and going in direct reduction thereof. Such matter is defensive only, as distinguished from counterclaim, which is offensive as well as defensive. 163–481, 204+531.

9255. Several defences, etc., how pleaded—Answer and demurrer—The defendant may set forth by answer as many defences and counterclaims as he has. They shall be separately stated, and so framed as to show the cause of action to which each is intended to be opposed. He may also demur to one or more of several causes of action in the complaint and answer to the remainder. (4132) [7758]

167–32, 208+526, notes under § 9699.

SEVERAL DEFENCES

1. Each must be complete in substance and form—68–82, 70+856; 138–270, 164+979.

2. Must be separately stated and numbered—1–408, 292; rule 6, district court.

3. Must be consistent—A defendant may plead as many defences, either legal or equitable, as he may have, provided they are not inconsistent. Separate and distinct defences are consistent when both may be true and are only held inconsistent when the proof of one necessarily disproves the other (5–119, 85; 13–158, 145; 52–211, 53+1146). It is no test of inconsistency that if one is proved true the other is unnecessary (42–368, 44+125; 46–61, 48+454). When inconsistent defences are pleaded the remedy is by motion to compel an election (13–158, 145; 19–407, 350; 73–52, 75+732). 134–199, 158+970.

4. Defences held consistent—12–426, 310; 13–158, 145; 28–43, 8+904; 31–421, 18+145, 821; 33–49, 21+861; 36–132, 30+449; 42–368, 44+125; 46–61, 48+454; 51–53, 52+986, 38 Am. St. Rep. 473; 52–211, 53+1146; 56–450, 58+35; 68–48, 70+866; 68–82, 70+856; 73–52, 75+732; 89–473, 95+308; 94–209, 102+373; 101–381, 112+419; 134–199, 158+970.

5. Defences held inconsistent—5–119, 85; 7–494, 401; 19–407, 350; 71–311, 73+956.

6. Hypothetical admissions—Hypothetical statements or admissions may be made in an answer for the purpose of enabling a defendant to plead all his defences (38–390, 38+351; 65–9, 67+650).

7. Defences in bar and in abatement—Defences in bar and in abatement may be united (25–493; 37–368, 34+896; 86–42, 90+119).

DEMURRER

8. To one or more causes of action—78–48, 80+838. See 123–159, 143+257.

9256. Judgment on defendant's default—On proof being filed that the summons has been duly served, and that no answer or demurrer to the complaint has been received within the time allowed therefor by law, judgment may be had as follows:

1. If the action be upon contract for the payment of money only, the clerk shall enter judgment for the amount stated in the summons.

2. In other actions for the recovery of money only, the court shall ascertain, by a reference or otherwise, the amount to which plaintiff is entitled, and order judgment therefor.

3. If other relief be demanded, and the taking of an account, or the proof of any fact, be necessary to enable the court to give judgment, it may take or hear the same or order a reference for that purpose, and order judgment accordingly.

4. When service of the summons has been made by published notice, or by delivery of a copy without the state, no judgment shall be entered on default until the plaintiff shall have filed a bond, approved by the court, conditioned to abide such order as the court may make touching the restitution of any property collected or obtained by virtue of the judgment in case a defence is thereafter permitted and sustained: Provided, that in actions involving the title to real estate or to foreclose mortgages thereon, such bond shall not be required. (4133) [7759]

½. In general.

A default judgment entered, where such proof was defective, is not void, and cannot be attacked collaterally for want of jurisdiction affirmatively appearing on the face of the record It is the fact of service, and not the proof thereof, that gives the court jurisdiction. 156–30, 194+93.

An action for goods sold and delivered, alleged to be of a stated reasonable value and stipulated and agreed price, is on contract for the recovery of money only within the statute authorizing the entry of judgment by the clerk on default; and proof of a cause of action, or ascertainment of damages, is not necessary. 165–460, 206+951.

Te court did not abuse its discretion in ordering judgment for plaintiff as for want of an answer. 210+885.

A default judgment cannot be attacked collaterally because entered for a larger amount than demanded in the summons and complaint. 211+838.

1. Notice—34–395, 26+122; 41–477, 43+329; 61–534, 63+1111.

2. Filing proof of service—74–282, 77+137; 156, 194+94.

3. Necessity of proving cause of action—10–178, 144; 21–515; 37–182, 33+567; 55–53, 56+463; 90–74, 95+887, 96+914; 90–430, 97+127.

4. Reference—18–90, 72.

5. Bond—7–506, 412; 28–501, 11+64; 44–505, 47+169.

6. Effect of failure to apply to court—If the proper judgment is entered it is immaterial that it was entered by the clerk without an order where regularly an application should have been made to the court (28–38, 8+903; 34–395, 26+122; 38–521, 38+613; 58–550, 60+667; 83–35, 85+825). In an action against four defendants jointly indebted upon a contract a judgment on default entered by the clerk against the three only who were served is not void but only irregular (36–341, 31+56). Where a cause of action in tort is joined with others on contract it is error for the clerk upon default to enter judgment including the amount claimed for the tort (10–178, 144).

7. Unreasonable delay in entering—87–492, 92+408.

9257. Demurrer or reply to answer—The plaintiff, within twenty days after the answer is served, may demur thereto, or to any counterclaim or defense pleaded therein, upon the ground that the same does not state facts sufficient to constitute a defense or a counterclaim, as the case may be; and he may demur to one or more of such defenses or counterclaims, and reply to the remainder. If the answer contain new matter not demurred to, the plaintiff shall reply there*to, denying the averments controverted by him,* or averring that he has not knowledge or information thereof sufficient to form a belief, or alleging any new matter, not inconsistent with the complaint, constituting a defense thereto. (R. L. § 4134, amended '13 c. 54 § 1) [7760]

½. In general.

Counterclaim and recoupment. 163–481, 204+531.

* Where persons join in a demurrer it must be overruled if the pleading against which it is directed is good as to one of the persons. 158–231, 197+277.

A demurrer admits traversable facts, but not conclusions of law. An allegation that the employer's insurer is the real party in interest and that plaintiff has no interest in the cause of action is in the nature of a conclusion of law. 165–390, 206+714.

The reply construed as admitting the rendition in a competent court of Iowa, having jurisdiction of the parties and cause of action, of a judgment against defendant for the wrongful death of plaintiff's deecdent, the recovery being under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665) for the sole benefit of decedent's wife and minor child. 210+70.

1. Demurrer to answer—There is only one statutory ground of demurrer to an answer but under it the objection may be raised that a counterclaim cannot be determined without the presence of other parties (25–155). That a cause of action pleaded as a counterclaim is not a proper subject of counterclaim is ground for demurrer (25–155; 28–147, 9+632; 39–46, 38+762). An answer not containing new matter but consisting only of denials of what is alleged in the complaint is not subject to demurrer (34–243, 25+406). See 133–305, 158+420; 134–321, 159+752; 136–103, 161+398.

2. Reply to answer—Departure—The plaintiff must recover if at all upon the cause of action set out in his complaint. A complaint cannot be aided by the reply. The office of a reply is to meet the allegations of the answer and not to change the character of the action or enlarge the rights and remedies of the plaintiff (2–79, 61; 5–377, 305; 15–479, 394; 32–92, 19+393; 33–512, 24+198; 34–237, 25+401; 37–426, 34+902; 46–121, 48+682; 72–138, 75+5; 108–313, 122+320). Although a distinct cause of action or ground for relief cannot be set up in the reply allegations which explain or fortify the complaint or controvert or avoid the matter set up in the answer are permissible. A more particular and exact statement of the facts constituting the cause of action is not a departure (11–423, 312; 31–410, 18+273; 34–237, 25+401; 37–122, 33+547; 37–171, 33+698; 51–183, 53+461; 64–61, 66+132). There is a departure when a party quits or departs from the case or defence which he first made and has recourse to another (11–423, 312; 34–237, 25+401; 50–341, 52+932; *51–183, 53+461; 77–462, 80+353; 80–533, 83+461*). The test of departure is, could evidence of the facts alleged in the reply be received under the allegations of the complaint? If not, there is a departure (11–423, 312; 34–237, 25+401; 50–341, 52+932). A variance or inconsistency between the reply and complaint on immaterial matter does not constitute a departure (51–183, 53+461). A departure is a defect of substance which may be taken advantage of by demurrer (33–512, 24+198; 51–183, 53+461; 72–138, 75+5); by motion to strike out (33–512, 24+198; 72–138, 75+5); by request for instructions (34–237, 25+401); by motion for judgment on the pleadings (15–479, 394; 46–121, 48+682. See 77–462, 80+353). Objection to departure must be taken before verdict or it will be deemed waived (41–163, 42+870; 57–472, 59+943). It is discretionary with the court to allow an amendment to correct a departure (77–462, 80+353). Reply, being by confession and avoidance of new matter, held not a departure (97–209, 106+337). See 122–154, 141+1134, 142+134; 127–198, 149+197; 128–112, 150+385. Admissions (129–214, 152+404).

3. Counterclaim in reply—A counterclaim as such cannot be set up in a reply (46–121, 48+682).

4. Waiver of reply—When a reply should have been made to matter in an answer but such matter is treated on the trial as controverted without a reply the want of a reply will be deemed waived (22–132; 76–20, 78+868; 79–234, 82+364; 79–243, 82+479).

5. Demurrer to reply—The provision for a demurrer to the reply is omitted in the section as amended in 1913 (33–512, 24+198).

9258. Failure to reply—Judgment—If the plaintiff shall fail, within the time allowed by law, to demur or reply to new matter contained in the answer, the court, on motion, may order such judgment in defendant's favor as he may be entitled to upon his answer, or may direct a reference or an assessment of damages by a jury, as the case requires. (4135) [7761]

1. Admission of counterclaim by failure to reply—16–38, 24; 19–181, 145; 20–234, 212; 22–132; 22–541; 46–306, 48+1112.

2. Admission of defensive matter by failure to reply—Affirmative matter in the answer which merely tends to deny the allegations of the complaint is not new matter requiring a reply. New defensive matter to require a reply must be in the nature of confession and avoidance (12–98, 53; 22–541; 28–232, 9+712; 30–131, 14+577; 38–469, 38+370; 40–417, 42+289; 40–492, 42+351; 46–225, 48+914; 58–133, 59+984; 76–20, 78+868; 79–243, 82+479; 93–288, 101+202).

3. Failure to demur—The objection that the facts set up in the answer by way of counterclaim do not constitute a cause of action is not waived by a failure to demur but may be raised on the trial by a motion for dismissal (39–46, 38+762; 46–306, 48+1112. See 50–429, 52+910). The objection that the facts set up in the answer do not constitute a defence is not waived by failure to demur but may be raised on the trial by objection to the introduction of any evidence (51–562, 53+875; 68–30, 70+775).

4. Judgment on the pleadings—Judgment on the pleadings may be ordered when the reply admits or fails to deny the defence set up in the answer (38–111, 35+728; 39–535, 41+107; see 28–232, 9+712); or when the reply admits or fails to deny the counterclaim set up in the answer (46–306, 48+1112). Allegation in answer of payment not met by reply (131–249, 154+1072).

9259. Sham and frivolous pleadings—Sham, irrelevant, or frivolous answers, defences, or replies, and frivolous demurrers, may on motion be stricken out, or judgment rendered notwithstanding the same, as for want of answer or reply. (4136) [7762]

SHAM PLEADINGS

¼. In general.

163–480, 205+889.

"Frivolous pleading" defined. 160–95, 199+897.

The answer put in issue the allegations of the complaint that defendant had not a proper assignment of the vendor's contract when he assigned the same to plaintiff; hence it was error to grant the motion for judgment on the pleadings. 156–224, 194+622.

An answer consisting of a general denial does not raise an issue as to the plaintiff being the real party in interest, and, when it is shown that defendant executed the note, and that it is past due, and has not been paid, the answer may be struck out as sham. 156–335, 194+879.

Test to be applied is whether answer presents a real issue for trial. 156–499, 194+375.

Where, in support of a motion to strike an answer as sham and frivolous, the showing is that defendant has repeatedly made unqualified admissions of the liability sought to be enforced, and there is no explanation or denial of such admissions, an order granting the motion will not be reversed. 157–88, 195+769.

Where a party to whose pleading a general demurrer is interposed and sustained, again proposes the same pleading, or one with changes which are clearly immaterial, thereby making unfair use of his leave to amend, such amended pleading may be stricken out as frivolous. 157–449, 196+563.

Record examined, and held, that a reply was properly stricken as sham, irrelevant, and frivolous. 158–31, 196+814.

Motions to strike as sham, frivolous, or irrelevant must be cautiously granted. 158–31, 196+814.

Duty of court on motion to strike a sham pleading. 160–95, 199+897.

Record examined, and held, that motion to strike an answer as sham and frivolous was properly granted. —Id.

The answer was clearly shown to be sham and frivolous. 160–440, 200+636.

A motion seeking to vacate an order striking out an answer and permitting the filing of an amended answer is addressed to the discretion of the trial court. 160–530, 200+807.

An order denying a motion to vacate an order, striking out an answer as sham is appealable, but the motion to vacate must be made returnable before the time to appeal from the original order expires. 160–530, 200+807.

Order striking out answer as sham and frivolous properly granted. 163–98, 203+446.

Denial of agency held not sham. 163–357, 204+24.

An answer by way of general denial was properly stricken out as sham, where its showing was evasive and not at all responsive to that of plaintiff in support of the motion. 163–424, 204+164.

An answer is sham, though on its face sufficient, when it is so clearly false that it tenders no genuine issue.

An answer is frivolous when its insufficiency is determinable immediately upon inspection. 166–129, 207+199.

A motion to strike out the answer as sham was granted. The motion was based on an affidavit containing new matter not denied or explained by the defendant. Held, that the court was justified in striking out the answer. 166–360, 208+8.

Answer stricken as sham. 210+590.

In an action on a contract for the payment of money, a general denial was properly stricken from the answer, when it appeared that the execution of the contract and the defendant's failure to make the stipulated payments were conceded. 210+885.

The defendant is not prejudiced by striking from an

answer allegations of fact which, if true, would constitution no defense. 210+885.

A "frivolous answer" is one which does not present a defense, in any view of the facts pleaded. 210+885.

1. **Defined**—2-219, 180; 29-166, 12+460.

"Sham pleading" defined. 160-95, 199+897.

2. **Verified pleading may be stricken out**—13-158, 145; 13-165, 154; 29-166, 12+460; 31-267, 17+388; 35-470, 29+170; 37-509, 35+372; 53-98, 54+939; 61-103, 63+255; 84-224, 87+618; 133-240, 158+239.

3. **Denials may be stricken out**—15-221, 172; 31-267, 17+388; 35-470, 29+170; 37-509, 35+372; 40-450, 42+352; 57-140; 58+872; 68-30, 70+775; 84-224, 87+618; 94-261, 102+700.

4. **Counterclaims may be stricken out**—93-232, 100+1104.

5. **When part only is sham**—31-7, 16+453.

6. **Power to strike out to be exercised sparingly**—To justify a court in striking out a pleading as sham its falsity must be clear and indisputable (29-166, 12+460; 33-505, 24+299; 33-507, 24+300; 61-103, 63+255; 84-224, 87+618; 94-261, 102+700). A sham answer may be stricken out when its falsity is clearly shown, even though interposed in the belief of its truth and in good faith (96-422, 105+490).

7. **Time of making motion**—29-166, 12+460.

8. **Affidavits on motion**—Whether a pleading is sham or not may be determined by inspection alone, but resort may be had to documentary evidence and affidavits of the parties or third persons (29-166, 12+460; 53-98, 54+939; 55-419, 57+139; 56-390, 57+938; 57-140, 58+872; *61-103, 63+255). Affidavits simply denying the facts* alleged in the answer and asserting their falsity are insufficient (94-261, 102+700). Where affidavits in support of the motion make out a clear prima facie case of falsity they will be taken as true for the purposes of the motion if not met by counter affidavits, and the motion granted (29-166, 12+460; 33-507, 24+300; 34-444, 26+601; 53-98, 54+939; 61-103, 63+255). The court may take into consideration the quibbling and evasive character of defendant's counter affidavits (72-111, 75+4; 74-320, 77+232).

9. **Amendment**—It is discretionary with the court to order judgment as for want of an answer or to allow an amendment (74-320, 77+232; 94-261, 102+700).

10. **Motion to strike out granted**—13-165, 154; 29-166, 12+460; 31-7, 16+453; 31-267, 17+388; 34-444, 26+601; 35-470, 29+170; 37-509, 35+372; 40-450, 42+352; 53-98, 54+939; 55-144, 56+589; 55-419, 57+139; 56-390, 57+938; 57-140, 58+872; 61-103, 63+255; 68-30, 70+775; 72-111, 75+4; 74-320, 77+232; 93-232, 100+1104; 94-261, 102+700; 101-53, 111+733. Sham reply (125-100, 145+787; 133-240, 158+239; 136-53, 161+257; 150-118, 184+786).

11. **Motion to strike out denied**—2-219, 180; 13-158, 145; 15-221, 172; 28-43, 8+904; 33-505, 24+299; 33-507, 24+300; 34-218, 25+347; 40-86, 41+544; 58-159, 59+995; 84-224, 87+618; 108-89, 121+427.

IRRELEVANT PLEADINGS

12. **Defined**—2-219, 180.

13. **Cases containing irrelevant allegations**—10-136, 108; 12-52, 23; 13-165, 154; 15-43, 25; 16-329, 291, 298; 23-359; 25-404; 30-265, 15+237; 38-528, 38+623; 41-71, 42+787; 43-295, 45+444; 47-300, 50+80; 51-558, 53+874; 54-107, 55+904; 55-144, 56+589; 62-429, 64+920; 63-238, 65+457; 65-277, 68+23; 68-538, 71+699; 72-138, 75+5; 136-343, 162+448.

14. **Remedy**—The exclusive remedy is a motion to strike out (10-139, 161; 31-54, 16+458).

15. **Power to strike out to be exercised sparingly**—It is only when matter is clearly and indisputably irrelevant that an order striking it out is justifiable (82-84, 84+727).

FRIVOLOUS PLEADINGS

16. **Frivolous answer or reply**—2-219, 180; 28-43, 8+904; 55-144, 56+589; 94-261, 102+700; 125-100, 145+787; 133-240, 158+239; 136-53, 161+257.

17. **Frivolous demurrer**—13-55, 50; 17-22, 5; 22-272; 29-106, 12+153; 40-499, 42+471; 46-207, 48+782; 61-17, 63+95; 52-55, 53+1024; 62-203, 64+392.

9260. Supplemental pleadings—The plaintiff may be permitted, on motion, to file a supplemental complaint or reply, and the defendant a supplemental answer, alleging material facts which have occurred since the former pleading. (4137) [7763]

1. **Compared with amendment**—76-129, 78+970; 91-161, 97+581.

2. **How far a matter of right—Diligence**—19-357, 309; 50-199, 52+522; 50-258, 52+861; 51-450, 53+708; 59-234, 61+24; 63-1, 65+88.

3. **Supplemental complaint**—It cannot set up a distinct cause of action accruing subsequent to the service of the original complaint (17-48, 31; 39-438, 40+513). A party cannot sue on an unripe claim and afterwards by supplemental complaint set up the fact of the maturity of the claim. A party must recover on a right existing at the commencement of the action (65-466, 68+98). While a party cannot set up a title acquired since the commencement of the action he may allege facts strengthening his title. If in his original complaint he alleges an equitable title he may by supplemental complaint set up a legal title subsequently acquired. The function of a supplemental complaint is to strengthen the plaintiff's cause of action by alleging material facts occurring subsequent to the commencement of the action. Facts may be thus alleged which may enlarge or change the kind of relief to which the plaintiff is entitled (1-106, 83; 12-225, 166; 39-438, 40+513; 56-60, 57+320; 80-348, 83+156). See 127-524, 149+131.

4. **Supplemental answers**—Far greater liberality is shown in allowing supplemental answers than complaints. Any material matter of defence, either complete or partial, arising since the original answer may be set up by supplemental answer (17-215, 188; 17-439, 417; 76-129, 78+970; 78-71, 80+847; 96-329, 104+976, 977). Ejectment (124-538, 144+1090; 133-316, 158+420).

5. **Allowable after verdict or judgment**—91-161, 97+581; 110-66, 124+644. See 49-469, 52+46.

6. **Objection to**—Objection to a supplemental complaint cannot be made on the trial (12-255, 166).

9261. Interpleader—In an action for the recovery of money upon contract, or of specific real or personal property, if any person not a party to the action demands of the defendant the same debt or property, the defendant may move the court to substitute such claimant as defendant in his stead, and that he be permitted to pay the money into court, or deliver the property or its value to such person as the court may direct. If it be made to appear that such demand is without collusion with the defendant, the motion may be granted, and upon compliance with the order the defendant shall be discharged. Thereafter the action shall proceed against the substituted defendant, and the court may compel the parties to interplead. (4138) [7764]

4-407, 309; 30-86, 14+363; 31-276, 17+617; 79-39, 81+547; 81-372, 84+21; 122-187, 142+144; 122-221, 142+316; 132-167, 156+271; 135-115, 160+500; 145-428, 177+770. Available in municipal court (149-367, 183+821).

159-355, 200+17.

9262. Deposit when no action is brought—When money or other personal property in the possession of any person, as bailee or otherwise, is claimed adversely by two or more other persons, and the right thereto as between such claimants is in doubt, the person so in possession, though no action be commenced against him by any of the claimants, may place the property in the custody of the court. He shall apply to the district court of the county in which the property is situated, or to any municipal court therein, setting forth by petition the facts which bring the case within the provisions of this section, and the names and places of residence of all known claimants of such property. If satisfied of the truth of such showing, the court, by order, shall designate a depositary to whom the money or other property may be delivered, and direct that upon such delivery, and upon giving notice thereof to all persons interested, personally or by registered mail, as in such order prescribed, the petitioner be relieved from further liability on account thereof. This section shall apply to cases where property held under like conditions is garnished in the hands of the possessor; but in such cases the application shall be made to the court in which the garnishment proceedings are pending. (4139) [7765]

86-188, 90+371; 86-232, 90+384; 86-385, 90+789; 149-369, 183+822; 154-230, 191+825.

The court in which the proceedings are pending alone has authority over it which should be exercised by appropriate procedure in the pending cause. 159-355, 200+17.

§ 9214 does not apply to proceeding under this section. 159-355, 200+17.

A defeated plaintiff in a replevin action, who has taken the property under his writ, and given bond for its return, cannot escape liability on the bond by procuring an ex parte order permitting him to deliver the property into court. 213+378.

9263. Intervention—Any person having such an interest in the matter in litigation between others that he may either gain or lose by the direct legal effect of the judgment therein may serve a complaint in the pending action, at any time before the trial begins, alleging the facts which show such interest, and demanding appropriate relief against either or both of the parties. Such intervener shall not be entitled to delay, and, if a continuance be occasioned by him, it may be granted at his expense. The ordinary rules of pleading shall govern, except that the court, in order to avoid delaying the trial, may shorten the time within which subsequent pleadings shall be served. All the issues shall be determined together, and if the intervener's claim be not sustained he shall pay the costs resulting therefrom. (4140) [7766]

162-132, 202+482, note under § 9181.

1. **Origin of statute**—25-148; 28-428, 10+586; 92-68, 99+424.

2. **Interest entitling party to intervene**—It has been frequently declared that to entitle a party to intervene his interest must be in the matter in litigation in the action as originally brought and of such a direct and immediate character that he would either gain or lose by the direct legal operation and effect of the judgment (25-148; 26-479, 5+365; 28-428, 10+586; 33-519, 24+291; 42-500, 44+517; 44-61, 46+210; 51-259, 53+631; 54-272, 55+1130; 60-461, 62+826; 61-299, 63+723; 62-256, 64+553, 54 Am. St. Rep. 639; 65-295, 68+32; 69-276, 72+104, 210; 69-319, 72+129; 74-234, 76+1132; 78-48, 80+838; 79-39, 81+547; 85-302, 88+977; 111 Fed. 308, 49 C. C. A. 357). But see 110-311, 125+673, infra. His interest need not necessarily be of a pecuniary nature (92-68, 99+424). Where, pending action to set aside a deed for fraud, plaintiff conveyed, grantee had right to intervene (103-124, 114+649). Previous decisions do not compel a construction of this section that the right to intervene exists only where the party applying for leave would necessarily gain or lose by the direct legal effect of the judgment therein if he did not become a party to the action (110-311, 125+676). See 143-430, 174+413; 150-40, 184+225.

3. **Complaint**—33-519, 24+291. Intervener reiterating allegations of complaint (127-212, 149+295; 143-430, 174+413).

4. **Demurrer**—33-519, 24+291.

5. **Answer**—54-47, 55+827; 64-265, 268, 66+977, 67+537.

6. **Order of court unnecessary**—25-148.

7. **Remedy for wrong intervention**—The objection that the intervener has no right to intervene may be raised by demurrer (33-519, 24+291; 52-148, 53+1134); by motion for dismissal on the trial (28-428, 10+586); by motion to strike out the complaint (51-259, 53+931).

8. **Waiver of objection to intervention**—42-323, 44+194; 74-234, 76+1132; 82-26, 84+635.

9. **Intervener cannot stop action**—26-479, 5+365; 84-200, 87+611.

10. **Intervener liable for statutory costs**—(131-194, 154+954).

9264. Consolidation—Separate trials—Actions triable together—Two or more actions pending at one time between the same parties and in the same court, upon causes of action which might have been joined, may be consolidated by order of the court. Separate trials between plaintiff and any of several defendants in the same action may be allowed whenever, in the opinion of the court, justice will be promoted thereby. (4141) [7767]

Consolidation (52-455, 55+47; 64-386, 67+217; 76-48, 78+881).

9265. Subscription and verification—Every pleading in a court of record shall be subscribed by the party or his attorney, and may be verified in the manner following:

1. By the affidavit of the party, or of one or more of the parties pleading together, that the affiant knows the contents of the pleading, that the averments thereof are true of his own knowledge, save as to such as are therein stated on information and belief, and that as to those he believes them to be true.

2. If the party be a corporation, the affidavit may be made by any officer thereof having knowledge of the facts sworn to; if the state, or any officer thereof acting in its behalf, by the attorney general.

3. If no party or officer acquainted with the facts and capable of making such affidavit be within the county where the attorney resides, the pleading may be verified by the attorney or agent of the party, stating the fact of such absence, and that the pleading is true to the best of his knowledge and belief.

When any pleading is so verified, all subsequent pleadings in the case, except demurrers, shall be verified also. The verification may be omitted when an admission of the truth of the allegation might subject the party to prosecution for felony. (4142) [7768]

1. **Must be subscribed by attorney**—Rule 4, district court.

2. **Verification**—A pleading not properly verified may be treated as not verified at all (2-319, 273). The exclusive remedy for a defective verification or for a failure to verify is a prompt return of the pleading (2-319, 273; 5-333, 264; 13-165, 154; 17-469, 447; 26-246, 2+703). It may be made before an attorney in the action if he is a notary (18-90, 72). The court may allow a pleading to be amended by inserting a verification (79-362, 82+686). Cited (58-514, 60+338).

9266. Pleadings liberally construed—For the purpose of determining the effect of a pleading, it shall be liberally construed, with a view to substantial justice between the parties. (4143) [7769]

19-335, 289; 20-189, 169; 58-514, 60+338; 82-89, 84+654; 92-306, 99+886; 95-11, 103+623; 96-190, 104+816; 96-492, 105+1124; 98-130, 107+1054; 122-118, 142+10. Reply unnecessary (122-154, 141+1134, 142+134; 149-421, 184+19).

9267. Irrelevant, redundant, and indefinite pleadings—If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion; and when a pleading is double, or does not conform to the statute, or when the allegations thereof are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may strike it out on motion, or require it to be amended. (4144) [7770]

REDUNDANT PLEADINGS

½. **In general.**

The special damages, both as to the loss of profits from farming, and the consequent loss of the farm, were speculative and conjectural, and the allegations were properly stricken as irrelevant. 157-100, 195+765.

The complaint alleged a wanton, willful and malicious conversion of a tractor and other farm machinery. Allegations stating the circumstances of the conversion, evidentiary of the character of it, were properly stricken as redundant. 157-100, 195+765.

The order striking out the plaintiff's complaint and disallowing his claim in a mechanic's lien action because of his failure to file a bill of particulars as directed by the court, is sustained. 160-479, 200+637.

1. **Cases containing redundant matter**—25-404, 421; 30-103, 14+366; 30-265, 15+237; 40-394, 42+87; 54-107, 55+904; 65-277, 68+23; 68-538, 71+699; 126-144, 148+455.

2. **Remedy**—The exclusive remedy for redundancy is a motion to strike out made before pleading (1-175, 150; 10-193, 161; 11-45, 24; 31-54, 16+458).

INDEFINITE PLEADINGS

3. **General Rule**—No general rule can be laid down except that a pleading is subject to a motion to make more definite and certain only where its allegations are so indefinite that the precise nature of the charge or defence is not apparent (28-80, 9+175; 30-103, 14+306; 39-370, 40+167; 43-208, 45+151; 54-99, 55+817; 64-527, 67+645; 71-363, 73+1089). A motion to make more definite and certain or to strike out cannot be allowed to take the place of a demurrer (28-80, 9+175; 35-468, 29+72; 53-453, 55+604; 71-363, 73+1089). See 216 Fed. 895.

4. **Defect must appear on face of pleading**—34-225, 25+399; 37-358, 35+5; 54-99, 55+817.

5. **Motion papers**—The particular allegations objected to should be specifically pointed out in the motion papers (35-468, 29+72).

6. **Remedy**—The exclusive remedy for indefiniteness is by motion to strike out or to make more definite and certain, before pleading. While the court may entertain such a motion on the trial it is then a mere matter of favor and is usually denied (rule 12, district court; 5-486, 390; 8-59, 37; 11-45, 24; 28-69, 9+75; 29-390, 13+189; 30-453, 16+263; 32-465, 21+557; 46-115, 48+768; 53-453, 55+604; 55-290, 56+1060). Objection cannot be raised by demurrer (1-106, 83; 10-133, 106; 14-153, 120; 22-548; 28-69, 9+75; 36-380, 31+357; 43-532, 45+1131; 71-363, 73+1089;

89–276, 94+868); by request for instruction to disregard (8–59, 37); by motion for judgment on the pleadings (15–479, 394; 17–372, 348; 36–325, 31+170); or by objection to the admission of evidence (14–516, 388; 29–390, 13+189; 46–115, 48+768; 70–486, 73+408). The objection cannot be raised for the first time on appeal (83–35, 85+825). In absence of statute or rule of court, trial court may, after pleading has been sustained on demurrer and before answer, entertain motion to make more definite (108–201, 120+688, 121+911). See 124–260, 144+950.

7. **Order**—The order should specify wherein the pleading is to be made more definite and certain and it may direct that the pleading be stricken out if not amended. A pleading should not be stricken out without leave to amend being first given (3–126, 74; 11–45, 24; 29–390, 13+189).

8. **Action of trial court generally final**—11–45, 24; 30–103, 14+366; 30–453, 16+263; 31–219, 17+376; 31–234, 17+377; 71–363, 73+1089.

9. **Motion granted**—3–126, 74; 11–45, 24; 29–390, 13+189; 30–453, 16+263; 39–370, 40+167. See 126–144, 148+455.

10. **Motion denied**—28–80, 9+175; 30–103, 14+366; 31–219, 17+376; 31–234, 17+377; 34–225, 25+399; 35–468, 29+72; *37–358, 35+5; 43–208, 45+151; 54–99, 55+817. See 35–73,* 27+448; 36–147, 30+449.

9268. Averments, when deemed admitted—Every material allegation of the complaint, and of new matter in the answer, not controverted by the answer or reply, respectively, shall be taken as true. All allegations of new matter in the reply shall be deemed denied, and may be controverted by defendant at the trial by proofs, either in direct denial or in avoidance thereof. (4145) [7771]

123–389, 143+916; 126–494, 148+299; 134–302, 159+624.

9269. Judgment, how pleaded—Proof—In pleading a judgment or other determination of a court or officer of general or special jurisdiction, it shall be sufficient to allege that the same was duly made or given, without stating the facts conferring jurisdiction. In cases of special jurisdiction, if such allegation be controverted, the party pleading the judgment or determination must prove the facts conferring jurisdiction. *(4146)* [7772]

7–159, 102; 51–536, 53+799. See 36–177, 30+466.

9270. Ordinances and local statutes—In pleading any ordinance of a city or village, or any special or local statute, or any right derived from either, it shall be sufficient to refer to the ordinance or statute by its title and the date of its approval, and thereupon the court shall take judicial notice thereof. (4147) [7773]

83–456, 86+457; 89–502, 95+449. Sufficiency of complaint by reference to ordinance, etc. *(124–498, 145+383).* Pleading ordinance and probable cause (144–452, 175+1005; 148–3, 180+1021; 148–129, 181+107).

9271. Incorporation, pleading and proof—In actions by or against a corporation, domestic or foreign, it shall be a sufficient averment of its incorporation to allege, in substance, that the party is a corporation duly organized and existing under the laws of the designated state, country, or place. And unless the adverse party shall specifically aver that the plaintiff or defendant is not a corporation, no proof thereof shall be required at the trial. (4148) [7774]

This section was designed to simplify the form of pleading when an averment of incorporation is necessary (14–49, 39; 55–102, 56+581). Allegation of incorporation held sufficient (14–49, 39; 60–116, 61+908). An answer held to admit incorporation (21–60). In an action by or against a corporation it is not necessary to allege that it is a corporation except in cases where the fact of corporate existence enters into and constitutes a part of the cause of action itself (69–527, 72+805; 84–251, 87+776). An affidavit for garnishment need not state that the garnishee is a corporation (55–102, 56+581). A denial of incorporation must be specific (28–396, 10+421; 31–440, 18+277). Not applicable to condemnation proceedings (43–527, 46+475). Failure to allege incorporation is not demurrable (122–380, 142+871; 124–317, 145+37; 128–73, 150+226). Not a material allegation (135–127, 160+258; 144–81, 174+526).

9272. Copartnerships—Proof as to members—When two or more persons sue or defend as copartners, they may give in evidence any contract admissible under the pleadings. And unless the partnership is specifically denied by the adverse party, no proof shall be required that they are the same persons who composed such copartnership when the contract was made or at any subsequent time. (4149) [7775]

60–348, 62+394; 65–9, 67+650; 122–380, 142+871.

9273. Conditions precedent—In pleading the performance of conditions precedent in a contract, it shall not be necessary to allege the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be denied, the party so pleading must prove the facts showing such performance. (4150) [7776]

Applicable only to performance of contracts (41–519, 43+482). Not applicable to performance by a stranger to the contract (20–370, 322). Applied (22–339; 50–341, 52+932; 56–48, 57+317; 60–292, 62+330).

9274. Items of account, how pleaded—The items of an account need not be set forth in a pleading, but the party alleging it, if a written demand therefor be served by the adverse party, shall deliver a copy of the account within ten days after such demand, verified by the affidavit of himself, or of some person *having knowledge thereof, as in the case of a pleading.* If such copy be withheld, or if a further or more particular bill be not furnished when ordered by the court, evidence of the account may be excluded. (4151) [7777]

A bill of particulars may be demanded only in actions on an account. In other cases, if a party wishes a more particular statement of the cause of action of defence, he must resort to a motion to make the pleading more definite and certain. Under the code there is no such general right to demand a bill of particulars as existed under the former system (22–97; 67–410, 69+1108; 75–*489, 78+113; 82–354, 85+170).* The term "*account*" means items of work and labor, of goods sold and delivered, and the like (67–410, 69+1108). A bill of particulars may be demanded in an action for professional services (96–130, 104+766). To bring an account within the statute it is not necessary that the plaintiff should have entered the items in a book (50–52, 52+131). The proper remedy for a failure to furnish a bill of particulars is to bring to the knowledge of the court on the trial the fact of a demand having been properly made and to object to the admission of evidence of the account. The objection cannot be raised by answer (42–233, 44+10; 43–295, 45+444; 50–52, 52+131; 67–410, 69+1108; 96–130, 104+766). Objection to the sufficiency of a bill of particulars cannot be made on the trial. The exclusive remedy is a motion, before trial, for a more specific bill (51–512, 53+768; 96–130, 104+766). A stipulation to furnish a bill of particulars within a certain time waives the necessity of making the statutory demand and has the same effect (42–233, 44+10). Cited (140+339). Verification by counsel does not exclude evidence (130–196, 153+310). Failure to furnish bill of particulars (132–8, 155+617). Failure to serve upon demand (147–154, 179+897). Recovery for services (149–304, 184+180).

The right to demand a bill of particulars is limited to suits on an account, and, even in such suits, the trial court has some discretion in admitting or excluding evidence for the failure to furnish a bill of particulars. 212+9.

9275. Pleadings in slander and libel—In actions for libel or slander, it shall be sufficient instead of stating extrinsic facts showing the application to plaintiff of the defamatory matter complained of, to allege, generally, that the same was published or spoken concerning the plaintiff; and if such allegation is controverted, the plaintiff is bound to establish on the trial that it was so published or spoken. The defendant may allege, in his answer, both the truth of the matter charged as defamatory and any circumstances in mitigation of damages, and, whether he proves the justification or not, he may give in evidence the mitigating circumstances. (4152) [7778]

1. Alleging extrinsic facts—This section does not obviate the necessity of alleging that the defamatory words were spoken or published of and concerning the plaintiff (28–28, 8+879; 47–337, 50+229. See 58–329, 59+1040; 64–280, 66+974, 1149; 73–195, 75+1115). The actionable quality of the words, as respects the plaintiff, must be made to appear (21–80; 22–276; 40–291, 41+1034; 47–337, 50+229). Where the words amount to a libelous charge against some person, but it is left uncertain as to the application thereof to the plaintiff, such application may be shown by proof of extrinsic facts, and under this section it is not necessary to allege them (40–291, 41+1034. See also 119–351, 138+312). This section merely dispenses with an inducement to show the application of the language to the plaintiff. It does not dispense with the necessity of averments of extrinsic facts to show the meaning of ambiguous language, and what it was understood to mean (69–457, 72+704). While a party is not required to plead extrinsic facts to show the application to the plaintiff, yet if he does so, and the facts thus pleaded show that it applied to some one else, and not to him, the special allegation controls the general allegation and the complaint is bad (73–195, 75+1115). Where the language of a libel as pleaded shows on its face that it was used of and concerning the plaintiff in an official capacity or special character, an express averment that it was so used is not necessary (34–193, 25+63. See 21–80). Although a defamatory article appears on its face to refer to the managing agent of a corporation individually, it may be shown by extrinsic facts that it was published of and concerning the corporation (73–195, 75+1115; 79–465, 82+857). Two separate causes of action (125–122, 145+808; 126–10, 147+668). Joint and several liability (131–375, 155+621).

In determining whether allegations in a pleading are privileged as against a claim that they are libelous, the test is whether they are so palpably wanting in relation to the subject-matter of the controversy that no reasonable man could doubt their irrelevancy and impropriety, following Burgess v. Turle & Co. (Minn. 193 N. W. 954. 157–443, 196+481

Complaint on such an article held defective, because it does not plead any extrinsic circumstances showing that the article was libelous in fact. 166–173, 207+497.

On demurer to a complaint for libel, where the publication is not libelous per se and innuendo is resorted to for the purpose of making it appear so in fact, it is for the court to determine whether the construction put forward by the innuendo is permissible. If it is not, if it is forced and unnatural, the demurrer should be sustained. 212+898.

Language which at worst falsely charges plaintiff, a school principal, with having formed an adverse judgment of the work and qualifications of a grade teacher, held not susceptible of any construction which would make it defamatory. 212+898.

2. Pleading mitigating circumstances—Prior to this statute there was much uncertainty as to when defendant might prove mitigating circumstances (23–178). Under the statute it is apparently necessary to plead mitigating circumstances in order to prove them (23–178, 47–56, 49+383). A plea in mitigation held not inconsistent with a general denial (31–421, 18+145, 821). Matter in mitigation held improperly stricken out on motion before trial (41–71, 42+787). See 122–182, 142+147. Aggravation and mitigation of damages (122–517, 142+897).

9276. Answer in action for distrained animals—In actions for the recovery of animals distrained while doing damage, an answer alleging that defendant, or the person under whose command he acted, was lawfully possessed of the land upon which the distress was made, and that the animal at the time was doing damage thereon, shall be sufficient, without alleging title to such land. (4153) [7779]

9277. Joinder of causes of action—Two or more consistent causes of action, whether legal or equitable, may be united in one pleading, being separately stated therein: Provided, that they must affect all parties to the action, must not require separate places of trial, and must be included in one only of the following classes:

1. The same transaction, or transactions connected with the same subject of action;
2. Contracts, express or implied;
3. Injuries to either person or property, or both;
4. Injuries to reputation;
5. For the recovery of real property, with or without damages for withholding the same, and of the rents and profits thereof;
6. For the recovery of personal property, with or without damages for withholding the same; or
7. Claims against a trustee by virtue of a contract, or arising by operation of law. (4154) [7780]

It appears from the amended complaint that there is a misjoinder of causes of action, and that the demurrer should have been sustained. 157–366, 196+270.

Following Burns v. Essling, et al (Minn.) 203 N. W. 605, it is held, that a taxpayer may maintain an action in behalf of a city, against the officers of the city, to compel the restitutions of money illegally withdrawn from the city treasury as the result of the unauthorized acts of the officers. 163–48, 203+608.

Subd. 1—A cause of action for tort and a cause of action on contract arising out of the same transaction or connected with the same subject of action (26–82, 1+579; 37–502, 35+365; 68–95, 70+869); an action to foreclose and for an accounting (31–129, 16+694); an action by a principal against his agent for conversion and an accounting (30–316, 15+254); an action to compel conveyance from legal to equitable owner and for an accounting (26–179, 2+489); an action for an accounting, the appointing of a receiver, and to set aside a conveyance (15–106, 81); an action for the possession of a railroad the appointment of a receiver, the payment of money and an accounting (25–278); an action for the recovery of the amount due on a note and for delivery and canceling a note and mortgage forming a part of the same transaction 7–351, 276); an action for injuries from noxious vapors from a cesspool in an excavation and for damages from depositing dirt from such excavation (56–20, 57+221); an action against a trustee as such and against him personally (10–199, 161); an action for an accounting and to wind up a copartnership (48–451, 51+470); an action for several acts of conspiracy (31–140, 16+854); an action for the appointment of a receiver, collection of rents and application of the same on a personal judgment (73–6, 75+759); an action for money wrongfully withheld and for money wrongfully or fraudulently exacted and paid (37–469, 35+276); an action by a parent for damages resulting from injury to child with claim for sickness and suffering of child (31–364, 17+959); an action for the sale of mortgaged premises, surrender of a quitclaim deed and personal judgment against maker of note for any deficiency (5–304, 240); an action for an injunction and for damages (31–173, 17+282); an action for reformation and specific performance (51–105, 52+1080); an action by a trustee in bankruptcy to set aside a preferential payment and a fraudulent transfer of property by the bankrupt (81–341, 84+44); an action to abate a nuisance and for an injunction (89–480, 95+309); an action for the recovery of money lost at a game of cards (94–416, 103+163); a cause of action to bring certain tracts of defendant's property, said to have been fraudulently conveyed, within reach of the judgment, and for the purpose of satisfying it, and also to bring a part of an alleged homestead within reach of the same judgment (91–96, 97+574). When several acts of negligence concur in giving rise to a single right of action, they may be united in the same complaint (100–79, 110+356). A cause of action for unpaid rent under a lease and one for damages by act of tenant in setting fire to building in violation of covenants may be united (103–66, 114+261). Several causes of action arising out of same contract or transaction, and not inconsistent, may be united where they affect all parties to the action, though all be not affected alike (108–342, 122+166). Concurrent negligence of two defendants (124–531, 144+474; 130–235, 153+532). Complaint beyond permissible liberal construction (141–246, 170+197; 143–203, 173+440). Improper joinder of not inconsistent causes; remedy demurrer or answer (145–292, 177+133).

Subd. 2—121–352, 141+481. Two causes not improperly united (122–380, 142+871).

Subd. 3—28–232, 9+712; 121–461, 141+518. One defendant liable under statute and other at common law (134–461, 159+1081).

Subd. 5—8–254, 221; 16–164, 146; 22–376, 24–110; 37–314, 34+38.

Subd. 7—10–199, 161.

Must affect all the parties—5–304, 240; 13–379, 352; 14–133, 100; 43–176, 45+15; 49–189, 51+817; 53–191, 54+1062; 63–263, 65+451; 66–437, 69+324; 71–494, 74+281; 94–8, 101+971; 96–194, 104+817. Need not affect them alike (106–365, 119+55; 108–342, 122+166).

Must be consistent—22–15; 29–252, 13+43; 29–341, 13+156; 33–348, 23+308; 49–528, 52+140; 63–110, 65+257; 94–30, 101+1061.

In equity—94–30, 101+1061; 94–486, 103+495; 96–194, 104+817; 96–288, 104+946.

When pleading insufficient—Where there is only one cause of action sufficiently pleaded there is no misjoinder of actions (90–508, 97+129. See, also, 99–384, 109+817).

Remedy—Objection to a complaint for misjoinder of

causes of action is waived unless taken by demurrer or answer (23-463; 25-305; 31-364, 17+959; 46-54, 48+528, 681; 95-375, 104+547). When the objection is raised for the first time on the trial it is discretionary with the court to compel an election (18-468, 525; 22-15; 33-348, 23+308; 36-392, 32+86; 49-528, 52+140).

Different items not constituting separate causes of actions—(121-296, 141+181). Refusal to require election not prejudicial (127-490, 150+218; 131-380, 155+623) Misjoinder appearing upon face of complaint (132-27, 155+756).

9278. Unknown defendant, how designated—When the plaintiff is ignorant of the name of a defendant, and shall so allege in his complaint, such defendant may be designated by any name; and when his true name is discovered, the process and all pleadings and proceedings in the action may be amended by substituting the same. (4155) [7781]

45-357, 47+1064.

In law, a married woman's name consists of her Christian name and her husband's surname, the prefix "Mrs." being a mere title If ignorant of her name, the plaintiff in an action against a married woman should allege that fact, and, when her true name is ascertained, it should be substituted for the name by which she was sued. 153-458, 199+235.

9279. Amendments of course, and after demurrer—A pleading may be once amended, without costs and without prejudice to proceedings already had, at any time before the period for answering it has expired; or, if the trial be not delayed thereby, it may be so amended within twenty days after the same has been answered, demurred to or replied to, in which case the adverse party shall have twenty days after service of the amended pleading in which to plead thereto. Upon the decision of a demurrer which appears to have been interposed in good faith, the court, in its discretion, may permit the party to plead over, or, if the demurrer be sustained, may allow an amendment upon proper terms. (4156) [7782]

Where a new complaint is filed amending the original complaint, after answer, the answer may stand as the answer to the amended complaint, and the defendant will not be in default except as to new matter not put in issue by the answer previously filed. 156-71, 194+102.

An amended pleading takes the place of the original. 167-479, 209+490.

1. Amendment of course—59-485, 61+555; 63-447, 65+722.

2. Pleading over—It is discretionary with the court to allow a party to withdraw his demurrer and plead over. It should ordinarily be allowed as a matter of course (39-328, 40+160; 74-508, 77+416). The court may impose terms (26-325, 4+41; 39-328, 40+160). If the demurrant desires to plead over he should ask leave (72-153, 75+591). When a party withdraws his demurrer and with leave of court pleads over he is held to waive his exception to the decision on demurrer (1-134, 110; 58-301, 59+1023; 68-474, 71+670).

3. Amendment after demurrer—The supreme court will rarely allow an amendment upon sustaining a demurrer but will leave it to the trial court to grant or refuse leave to amend after the cause is remanded (27-102, 6+450, 7+267; 28-551, 11+117). By amending his pleading after demurrer a party waives his exception to the decision on demurrer (1-311, 243). Unless the decision on demurrer involves plaintiff's right of action under any complaint which the facts would warrant, it is ordinarily advisable for him to amend his complaint to conform to the views of the court rather than to appeal (31-312, 17+621). See 129-342, 152+734.

9280. Amendment by order—The court, in furtherance of justice and upon proper terms, may amend any pleading, process, or proceeding, either before or after judgment, by adding or striking out the name of a party, by correcting a mistake in the name of a party or in any other particular, by inserting other material allegations, or, if the amendment does not substantially change the claim or defence, by conforming any pleading or proceeding to the facts proved. (4157) [7783]

AMENDMENT OF PLEADINGS

½. In general.

164-21, 204+634; 209+868.

Denying a motion to amend the answer made during the trial was within the discretion of the trial court. 156-301, 194+772.

Permitting the complaint to be amended was within the discretion of the trial court. 156-357, 194+884.

Allowing the amendment to the answer was within the discretion of the trial court. 158-356, 197+743.

Under a general denial, any evidence is admissible which tends directly to controvert the allegations of the complaint. If doubt exists as to whether defensive matter is admissible thereunder, great liberality should be shown in allowing an amendment to render it admissible. 160-200, 199+737.

In an action for divorce started in November, 1921, defendant admitted he was worth $160,000 and plaintiff relied thereon, the court properly, in the exercise of its discretion, refused to permit the withdrawal of the admission on trial. 160-224, 199+908.

There was no error in permitting the amendment, at the trial, of the complaint in a bastardy proceeding, by adding a formal allegation that the child in question was illegitimate. 161-28, 200+746.

No competent evidence showed plaintiff not to be a real party in interest, nor did the court err in refusing defendant, in the third trial of the case, leave to amend the answer so as to allege that she was not such a party. 161-437, 201+626.

Action for damages caused by a fire alleged to have been set by defendant's locomotive. The trial court was within its discretion in refusing to permit an amendment to the complaint alleging that the loss was caused by a different fire, starting at a different time and place from that alleged in the original complaint. 162-256, 202+483.

Trial courts not only may, but should, freely permit amendments of complaint to conform to proof. 163-517, 204+326.

There was no abuse of discretion, on the part of the trial court, in permitting plaintiff to amend her complaint during the trial, and in requiring the trial to proceed. 165-67, 205+628.

In an action against a surety company, by indorsee of certain certificates of deposit, to reform certain certificates of deposit, to reform certain surety bonds to assure payment of such certificates, held:

That it was not an abuse of discretion for the trial court to permit plaintiff, after trial, to amend its complaint to conform to the proof. 210+66.

There was no error in refusing the plaintiff permission to amend the complaint by alleging a negligent plan of construction of a sidewalk. 211+819.

There was no error in refusing the plaintiff permission to amend the complaint by alleging that the defendant was negligent in permitting the artificial accumulation of ice and snow upon its sidewalk. 211+819.

The insurer pleaded the limitation in the rider and a cancellation of the policy as defenses. After verdict, it moved to amend by striking out the allegation relative to the rider and substituting an allegation that the policy was void because the insured had taken out additional insurance without the knowledge or consent of the insurer. There was no error in the denial of the motion. 212+451.

The ruling permitting an amendment of the answer at the trial cannot be reviewed, for there was no objection or exception. 213+533.

1. A matter of discretion—The amendment of pleadings is a matter lying almost wholly in the discretion of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion manifestly prejudicial to the appellant (5-505, 399; 10-192, 155; 13-66, 58; 29-68, 11+228). A refusal to allow an amendment held an abuse of discretion (78-394, 81+207).

2. Amendments on the trial held discretionary—6-319, 224; 8-236, 205; 8-324, 284; 10-192, 155; 13-442, 407; 19-32, 14; 37-507, 35+371; 40-273, 41+1040; 47-221, 49+691; 50-429, 52+910; 56-450, 58+35; 62-420, 64+915; 63-5, 65+91; 63-20, 65+86; 70-486, 73+408; 72-169, 75+116; 74-154, 76+68; 75-489, 78+113; 78-210, 80+965; 80-15, 82+978; 84-347, 87+937; 85-363, 88+998; 88-64, 92+512; 96-142, 104+765; 104-476, 116+1116. When, in the course of trial, court grants motion to amend complaint, by tendering new issues, defendant cannot be required to disclose by affidavit names of witnesses, nor what evidence he desires to produce, as a condition to continuance (105-384, 117+506). See 131-10, 154+508; 147-3, 179+369.

3. Amendments before trial held discretionary—5-505, 399; 29-68, 11+228; 72-169, 75+116.

4. Amendments after trial held discretionary—29-68, 11+228; 54-514, 56+173; 61-513, 63+1110; 95-434, 104+304; 97-460, 107+160; 99-457, 109+995; 101-460, 112+865.

5. Amendments conforming the pleadings to the proof held discretionary—37-130, 33+548; 39-326, 40+157; 45-460, 48+197; 51-330, 53+650; 59-375, 61+329; 61-513, 63+1110; 64-505, 67+637; 71-69, 73+645; 73-58, 75+756; 75-489, 78+113; 82-3, 84+460; 92-369, 100+93; 94-23, 101+954; 95-292, 104+4; 96-213, 104+886; 104-476, 116+1116.

6. Statute to be liberally construed and applied—85-359, 88+988.

7. In furtherance of justice—A court may, to a cer-

tain extent, take into account the nature of the defence in determining, in the exercise of its discretion, whether to grant an amendment (62–315, 64+902).

8. **Must be material**—An amendment introducing immaterial averments will not be allowed (17–123, 98; 32–101, 20+89).

9. **Terms**—8–286, 252; 36–302, 30+813; 61–513, 63+1110.

10. **Motion**—The motion for leave to amend, except when made on the trial, is regularly made on notice and "in all cases where an application is made for leave to amend a pleading * * * such application shall be accompanied with a copy of the proposed amendment * * * and an affidavit of merits and be served upon the opposite party" (14–469, 351; 75–138, 77+788).

11. **Service of order**—An order granting leave to amend need not be served on the opposite party unless it so directs (12–221, 141).

12. **Scope of allowable amendment of complaint**—Amendment does not mean substitution. A complaint cannot be amended by introducing an entirely new cause of action (39–325, 40+159; 48–366, 51+120; 58–247, 59+1016; 59–325, 61+329; 62–420, 64+915; 63–447, 65+722; 78–210, 80+965; 85–363, 88+998. See 12–221, 141).

13. **Scope of allowable amendment of answer**—Whether an entirely new defence may be introduced by amendment is an open question. Greater liberality is allowed to defendant than to plaintiff in making amendments (see 5–505, 399; 13–394, 365; 17–123, 98; 54–514, 56+173; 62–315, 64+902).

14. **Changing action ex contractu to action ex delicto**—30–399, 16+462; 39–54, 38+763; 58–247, 59+1016.

15. **Amendment of parties**—The court may at any time amend the name of any party except for the purpose of acquiring jurisdiction (9–55, 44; 22–558; 37–402, 34+740. See 32–548, 21+748; 60–485, 62+1130; 61–353, 63+737). The court may strike out the name of a plaintiff improperly joined (50–21, 52+390). In an action brought in favor of a minor in the name of the guardian held allowable to amend the record by adding the name of the ward (48–82, 50+1022; 67–298, 69+923). See 133–434, 158+711.

16. **Amendment increasing damages**—The court may allow a complaint to be amended on the trial by increasing the amount of damages claimed (34–473, 26+607). An amendment may be allowed increasing damages claimed on appeal from a justice court (14–214, 153; 40–388, 42+83).

17. **Amendment after verdict**—A court has no power to grant an amendment of a complaint after verdict to conform to evidence which was seasonably objected to on the trial as inadmissible under the pleadings and without which the plaintiff could not have recovered (44–20, 46+138). Otherwise if the evidence was not objected to (37–130, 33+548; 64–505, 67+637; 73–58, 75+756; 94–23, 101+954. See cases under Note 5 supra). See 141–151, 169+540; 147–3, 179+369.

18. **Amendment after judgment**—The court has power to amend pleadings after judgment but it is a power to be exercised sparingly (36–99, 30+429; 64–505, 67+637; 65–429, 68+68; 73–58, 75+756; 79–423, 82+677; 91–161, 97+581). An amendment after judgment of an insufficient statement for judgment by confession will not be allowed to the prejudice of third parties (27–478, 8+380; 40–258, 41+946). 131–159, 154+951; 141–151, 169+540.

19. **Amendment after appeal**—29–68, 11+228; 54–514, 56+173; 80–466, 83+443; 85–359, 88+988. After affirmance on appeal (102–260, 113+906). See 147–3, 179+369.

OTHER AMENDMENTS

20. **Application of statute**—It is applicable only to judicial proceedings. It is not applicable to a mechanic's lien statement (83–187, 86+19). It authorizes the *supreme court to reinstate an appeal (28–68, 9+79).* It authorizes the district court to amend its records (21–51; 43–401, 45+715). It is applicable to condemnation proceedings (35–439, 29+148). It does not authorize the bringing in of new parties (20–173, 157. See 32–548, 21+748). Amendment of notice of motion for a new trial (95–367, 104+233). Amendment of summons (116–115, 133+398). Cited (104–165, 116+357). Amendment of findings (121–285, 141+186). Amending summons (131–174, 154+952).

21. **Amendment to an answer** (126–494, 148+299; 130–152, 153+316; 130–342, 153+745; 132–390, 157+642).

9281. Variance—Amendment—Exceptions—No variance between the allegations in the pleading and the proof is material unless it has actually misled the adverse party to his prejudice in maintaining his action or defence on the merits. Whenever a party alleges that he has been so misled, he shall prove the fact to the satisfaction of the court, showing in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as may be just. When the variance is not material, the court may direct the fact to be found according to the evidence; or may order an immediate amendment without costs. (4158) [7784]

1. **Proof must follow pleadings**—The evidence must follow the allegations. In order to recover it is not enough for the plaintiff to prove a cause of action. He must prove the cause of action alleged in his complaint (1–17, 1; 1–87, 65; 2–314, 268; 25–337; 33–189, 22+300; 43–270, 45+443; 47–131, 49+688; 56–52, 57+318; 57–93, 58+825; 57–377, 59+311; 60–346, 62+391; 77–428, 80+364). Plaintiff who has declared on express agreement, cannot recover on proof of implied contract (98–146, 107+1053). See 122–59, 141+1105.

165–67, 205+628.

Plaintiff, who has declared on an express contract, cannot recover on proof of an implied contract. Hav*ing based his claim upon the specified contract he must* prove its performance before he can recover. 166–163, 207+193.

The fact that the complaint alleged that defendant had collected the mortgage, while the proof shows that defendant had not collected it, but had taken it over as its own property, is not a fatal variance under the facts of this case. 209+899.

2. **Immaterial variance**—When the disagreement between the facts alleged and the facts proved or sought to be proved is so slight that it is perfectly obvious that the adverse party could not have been misled in his preparation for trial, the variance is deemed immaterial, and the court will either disregard it altogether or order an immediate amendment without costs (4–270, 190; 10–350, 277; 13–442, 407; 16–83, 72; 21–358; 22–25; 30–308, 15+252; 31–396, 18+103; 39–54, 38+763; 39–325, 40+159; 42–480, 44+530; 44–441, 46+914; 46–31, 48+446; 61–513, 63+1110; 74–171, 77+26; 75–489, 78+113; 82–116, 84+730; 89–280, 94+871; 89–412, 94+1091; 89–465, 95+316; 94–23, 101+954; 103–173, 114+738; 119–470, 138+694, 139+703).

120–359, 139+703; 121–280, 141+179; 122–295, 142+710; 125–137, 145+304; 128–112, 150+385; 128–304, 150+901; 133–318, 158+424; 135–178, 160+773, 137–457, 163+780; 146–436, 179+47.

3. **Material variance**—When the disagreement between the facts alleged and the facts proved or sought to be proved is so great that the adverse party might reasonably have been misled in his preparation for trial and such party makes it appear to the court that he was actually misled the variance cannot be disregarded and an amendment will be ordered with costs, or a continuance granted with leave to amend with or without costs in the discretion of the court. It is not enough that there is a material variance appearing on the face of the pleadings and evidence but the fact that the adverse party has been misled must be proved aliunde the pleadings and evidence (4–119, 78; 16–33, 19. See cases under Note 2 supra).

4. **Effect of statute on pleadings**—This and the following section do not relieve a plaintiff from alleging in his complaint all the essential facts constituting his cause of action (1–176, 150).

5. **Complaint ordered amended to conform to the evidence**—(146–65, 177+928).

9282. Failure of proof—When the averment to which the proof is directed is unproved, not in some particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within § 9281, but a failure of proof. (4159) [7785]

When the disagreement between the facts alleged and the facts proved is of such a character that a different *cause of action than the one set up in the pleading* is proved the court cannot order or grant an amendment over objection but must dismiss the action. To prove fatal the disagreement need not extend to all the facts. The same facts may enter into two different causes of action. The test is not the extent of the disagreement in the facts, but the different character of the causes of action made out by the facts (1–48, 32; 1–87, 65; 3–332, 232; 10–192, 155; 12–494, 398; 18–176, 163; 20–345, 298; 22–449; 25–337; 30–399, 16+462; 40–445, 42+207; 45–250, 47+795; 58–112, 59+981; 59–329, 61+328; 60–346, 62+391; 64–527, 67+645; 71–69, 73+645; 71–533, 74+891; 77–428, 80+364; 83–336, 86+335). Under an allegation of facts constituting a legal title facts constituting an equitable title cannot be proved (47–137, 49+693; 49–91, 51+662; 50–373, 52+963; 70–203, 72+1068; 89–280, 94+871). Incorporation where not material need not be proved (128–73, 150+226). No fatal variance (128–112, 150+386; 128–332, 150+1088).

9283. Extensions of time—Relief against mistakes, etc.—The court, in its discretion, may likewise permit an answer or reply to be made, or other act to be done, after the time limited therefor by this chapter, or by its order may enlarge such time; or at any time

within one year after notice thereof, in its discretion, may relieve a party from any judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; or may, for good cause shown, modify or set aside its judgments, orders, or proceedings, whether made in or out of term and may supply any omission in any proceeding, or in the record, or by amendment conform any proceeding to the statute under which it was taken: Provided, that this section shall not apply to a final judgment in an action for a divorce, nor shall any relief granted thereunder affect the title to real estate as determined by any final judgment which shall have been of record in the office of the proper register of deeds for three years next prior to the date of application for such relief, as against any bona fide purchaser or incumbrancer thereof; but this shall not prevent the granting of just and equitable relief against any party to any such action affecting real estate, his heirs or devisees. (4160) [7786]

THE STATUTE GENERALLY

1. Application—Applicable only to judicial proceedings; not to proceedings in pais (51–417, 53+719; 84–62, 86+877). Applicable to proceedings in the supreme court (28–68, 9+79); in municipal court of St. Paul (110–107, 124+977). Applicable to cases where a party has failed to take or to take correctly some step pointed out by the statute under which he is proceeding (16–490, 443). Inapplicable to a final judgment in an action for divorce (93–195, 101+163). Where jurisdiction was acquired over a party in the suit in which judgment was obtained, the remedy by motion under this section where applicable, is exclusive, except as to judgments obtained by fraud (114–454, 131+627). See 126–156, 147+959; 128–321, 150+906; 131–174, 154+952; 131–374, 155+626; 133–88, 157+999. Action dismissed for want of prosecution reinstated (135–471, 160+1032). Vacating order of dismissal and reinstatement (134–261, 159+272). Injunction against railroad from occupying street may be vacated (136–423, 162+523). Order vacating final order under drainage statute (137–466, 163+126). Applicable to opening decree of probate court (138–99, 163+1031). Apply to ordinary procedure in ditch and other special proceedings (140–236, 167+1043). Vacating order for ditch (144–449, 175+906; 147–335, 181+858). Inapplicable to Torrens proceeding (147–375, 182+449). No application to limit sum settlement under Workmen's Compensation Act (149–341, 183+837; 151–326, 184+273). Commutation to lump payment under Workmen's Compensation Act (152–12, 187+703; 153–186, 189+1026).

164–443, 205+374; 165–262, 206+168; 209+868.

Where no delay, inconvenience, or prejudice results to a defendant, the court, in the interest of justice, should readily grant a plaintiff's motion to open the case to supply a missing link in the testimony, called to his attention when defendant rested for the purpose of moving for a directed verdict. 161–58, 200+811.

In order to sustain a judgment for the vacation of a part of a street, it was permissible for the district court to receive evidence extranious to the record that notice of the application for the judgment had been given by posting; the judgment roll containing proof of notice by publication only. 163–206, 203+593.

Discretion of court. 163–513, 203+984.

In this case the verdict for the employee and against the employer is so perverse as to require a new trial. 167–84, 208+547.

2. Extension of time—25–234; 51–417, 53+719; 74–508, 77+416; 79–362, 82+686. Enlarging time for demand of jury trial in judicial ditch proceeding (131–374, 155+626). Permission to serve reply (131–490, 154+789).

3. Protection to bona fide purchasers or incumbrancers—39–73, 38+689; 39–481, 40+611; 44–501, 47+158; 51–213, 53+365; 51–421, 53+806; 70–243, 73+161; 88–281, 92+1121; 92–271, 99+889. Purchaser, after entry of judgment in case where lis pendens has been filed, is not affected by proceedings to modify or set aside judgment (110–6, 124+446).

AMENDMENT OF JUDGMENTS AND JUDICIAL RECORDS

3½. In general.

The trial court rightly ordered the dismissal of an action, on the showing made, the clerk having mistakenly entered a memorandum indicating that the case was stricken from the calendar, when in fact it was dismissed by the court on the motion of the defendant. 157–396, 196+486.

Such order, under the circumstances of this case, should not have been entered nunc pro tunc, when the effect of such entry would prevent the plaintiff or the beneficiary of the action from obtaining a reinstatement of the action, so that they might proceed with it as a compensation proceeding, or substantially embarrass him in so doing the time for instituting a proceeding under the Compensation Act having expired. 157–396, 196+486.

Where the sitting judge makes an order in a preliminary hearing in a judicial ditch proceeding, and, through mistake, inserts a finding not intended, such mistake may be corrected by his successor in office. 163–383, 204+318.

Error in findings. 165–293, 206+434.

4. To be made with caution—3–427, 313.

5. Discretionary—3–427, 313; 21–51; 43–401, 45+715.

6. When may be made—It may be made after the expiration of the term (3–427, 313). It cannot be made after an appeal and return to the supreme court so as to affect the rights of the parties on appeal (75–75, 77+537).

7. Notice of motion—21–51; 23–518; 70–243, 73+161; 70–252, 73+155; 79–476, 82+990.

8. Who may oppose motion—21–51.

9. Order of court necessary—37–533, 35+377. Court commission has no power to vacate judgment (131–129, 154+748).

10. Extrinsic evidence admissible—41–508, 43+394; 45–441, 48+198.

11. Clerical mistakes of clerk—1–134, 110; 19–17, 1; 21–51; 24–48; 41–508, 43+394; 63–205, 65+268; 137–153, 163+126. In workmen's compensation cases, same as in others (149–341, 183+837).

12. Mistakes of judge—Clerical mistake (15–185, 142; 43–305, 45+438; 47–491, 50+533; 62–498, 65+84; 84–14, 86+613, 1004). Where a cause is submitted on a stipulation of facts covering certain issues, and by mistake the court determines issues excluded, findings and judgment may be amended to express intention of parties (104–460, 116+940). In workmen's compensation cases same as in others (149–341, 183+837).

13. Amendment of verdict—1–134, 110; 3–134, 80; 4–433, 335; 15–501, 413; 19–79, 54; 21–327; 27–108, 6+456; 45–441, 48+198; 81–312, 84+40.

14. Judgment not authorized by order—41–508, 43+394; 47–257, 49+981; 47–260, 49+980; 66–138, 68+855; 66–487, 69+610, 1069; 68–437, 71+619; 70–71, 72+827, 73+1; 72–16, 74+1016.

15. Judgment not authorized by verdict—3–134, 80; 18–199, 182; 42–179, 43+966; 47–260, 49+980.

16. Judgment not authorized by report of referee—12–60, 27; 47–260, 49+980.

17. Modification of orders—86–26, 90+8. Power of court to correct errors and mistakes, and to modify its judgments and orders is not limited to non-appealable orders (137–153, 163+126). See 147–417, 180+701.

18. Modification of judgments—It was formerly held that after entry of judgment pursuant to order a court had no authority to correct its judicial errors on motion, the only remedy being a new trial or an appeal (22–1; 23–214; 24–43; 28–33, 8+900). It is now the rule that a court may modify its judgments on motion at any time within the period for taking an appeal (79–226, 81+1057; 93–350, 101+496. See 53–54, 54+935; 84–14, 86+613, 1004, 89–297, 94+887). Judgment of dismissal upon stipulation (131–248, 154+1099). Divorce judgment excepted (133–88, 157+999). Power of court to correct errors and mistakes, and to modify its judgments and orders is not limited to non-appealable orders (137–153, 163+126). Court may amend final decree so as to protect right of after-born children (138–99, 163+1031; 147–417, 180+701; 147–335, 181+858). Inapplicable to Torrens proceedings (147–375, 182+449). Judgments for foreclosure of mortgages is no exception (154–312, 193+590).

19. Amendment of proof of service of summons—9–55, 44; 22–178; 43–401, 45+715; 44–56, 46+319; 63–205, 65+268; 81–19, 83+464; 87–271, 92+6.

20. Amendment of false return of sheriff—37–8, 32+786; 53–96, 54+932.

21. Amendment of execution—19–17, 1.

22. Amendment of names of parties—37–402, 34+740; 48–82, 50+1022; 61–353, 63+737; 66–40, 68+321; 67–298, 69+923; 77–543, 80+700; 79–423, 82+677. Amending summons (131–174, 154+952).

23. Supplying omissions in the record—3–427, 313; 6–287, 194; 38–359, 37+455. See 78–427, 81+198; 137–153, 163+126.

24. Replacing lost records—32–95, 20+229.

25. Rights of third parties to be saved—21–51; 27–478, 8+380; 40–258, 41+946; 43–401, 45+715.

VACATION OF JUDGMENTS AND ORDERS

25½. In general.

The court was justified, on the showing made, in refusing to vacate a judgment in favor of the plaintiff and in denying the defendant permission to defend. 157–94, 195+768.

A motion to vacate is not too late, although made after the expiration of the time within which an appeal from the judgment might have been taken, when it is not sought by the motion to accomplish a result which might have been secured by an appeal. 158–391, 197+754.

Where points could have been made by appeal from judgment, they cannot be reviewed by motion to vacate it. 165–479, 205+637.

The trial court did not abuse its discretion in exercising this power when it vacated an order, made three days after the death of the plaintiff, setting aside a verdict in his favor in a personal injury action, and in denying, on a rehearing, the defendant's motion for a new trial. 210+866.

26. Statute a regulation not a grant of power—22–1; 39–305, 40+71.

27. Notice of motion—79–476, 82+990. See note 7 supra.

28. Application by non-resident—Attachment—74–4, 76+787.

29. Application by stranger to judgment—20–173, 157; 31–505, 18+645; 40–410, 42+89; 43–80, 44+675; 46–314, 48+1120; 74–234, 76+1132.

30. Application by assignee—12–375, 251; 137–472, 163+1069.

31. Merits need not be shown—5–367, 296; 20–173, 157; 29–108, 12+342; 52–98, 53+812, 850.

32. Diligence—When the judgment is absolutely void and not merely voidable the moving party need not show diligence (20–173, 157; 29–108, 12+342; 38–341, 37+585; 79–476, 82+990. See 35–207, 28+507). A void judgment never becomes good by lapse of time (61–335, 63+880). When the judgment is merely voidable the applicant must show due diligence (14–464, 346; 22–542; 23–539; 36–341, 31+56; 38–341, 37+585; 42–84, 43+784; 58–72, 59+828). See 132–355, 157+586; 135–290, 160+781.

33. Motion defeated by amendment—43–401, 45+715.

34. Void judgments—A person against whom a void judgment has been entered has an absolute right at any time and without showing diligence or a meritorious defence to have it vacated on motion. An appearance to set aside a void judgment does not validate it (5–367, 296; 20–173, 157; 23–539; 29–108, 12+342; 35–1, 35, 25+457, 30+826; 38–341, 37+585; 39–336, 40+163; 43–80, 44+675; 46–484, 49+247; 48–66, 50+936; 48–521, 51+478; 52–98, 53+812; 55–75, 56+576; 62–18, 63+1117; 74–234, 76+1132; 79–476, 82+990).

35. Jurisdictional defects—The following jurisdictional defects have been held ground for vacating judgments on motion: defective or untrue affidavits for publication of summons (5–367, 296; 35–1, 35, 25+457; 30+826; 38–341, 37+585); defective publication of summons (39–336, 40+163; 87–271, 92+6); improper personal service of summons (52–98, 53+812); service of summons on wrong person (43–80, 44+675; 52–98, 53+812); service by publication on resident of state (23–539; 44–97, 46+315. See 46–174, 48+773; 84–329, 87+838); failure to substitute proper parties after death of defendant (20–173, 157); rendition of judgment in state court after removal to federal court (48–521, 51+478); improper service at house of usual abode (39–305, 40+71); unauthorized appearance (35–207, 28+507. See 82–162, 84+745); no service of summons (47–250, 49+981; 51–363, 53+646; 56–351, 57+1060; 79–476, 82+990); departure from the requirements of the statute in the service of summons (53–315, 55+127); improper service of summons on officer of a foreign corporation (26–233, 2+698).

36. Return of service of summons not conclusive—39–305, 40+71; 40–52, 41+244; 41–12, 42+594; 51–363, 53+246; 56–351, 57+1060; 70–105, 72+835; 78–295, 80+1127.

37. Unauthorized action—35–207, 28+507; 82–162, 84+745.

38. Erroneous judgment—65–90, 67+893.

39. Facts arising after judgment—30–477, 16+269; 33–516, 24+255. See 23–214.

40. Fraud—23–46; 23–227; 24–345; 41–297, 43+67. To vacate default judgment of divorce, the evidence of fraud must be clear and convincing (151–302, 186+694).

41. Surprise—23–227; 23–539. See 58–72, 59+828; 151–326, 184+273.

42. Failure to file or serve complaint—73–167, 75+1043.

43. Judgment against infant—42–84, 43+784.

44. Default judgment prematurely entered—55–75, 56+576.

45. Vacation of orders—86–26, 90+8; 144–449, 175+900.

OPENING DEFAULTS

45½. In general.

There was no abuse of judicial discretion in refusing to open a default judgment and permitting defendant to answer, or, upon the showing made, the court might well conclude that defendant had knowledge of the entry of the judgment for nearly four years before he applied for relief. 160–13, 199+226.

On the facts of this case, it was not an abuse of discretion to refuse to open a default judgment. 160–180, 199+904.

Record examined, and held, that the trial court did not abuse its discretion in relieving parties defendant from default, and permitting one defendant to answer, and as to both defendants permitting a trial upon the merits. 160–181, 199+928.

Abuse of discretion not to open default judgment. 161–94, 200+847.

A judgment entered upon the default of the defendant without due service of process is void for want of jurisdiction, and will be vacated at any time on reasonable notice. Neither diligence nor the showing of a meritorious defense is necessary. 161–246, 201+323.

In an action to quiet title, where the summons was served by publication and judgment entered quieting title in the plaintiff, and the defendant, through whom plaintiff claims title, was known to have died, leaving heirs and devisees, who were not made parties appellant, being one of them, subsequently appears in the action and asks to have the judgment opened as to her, with leave to answer and defend upon the grounds of mistake, inadvertence, and excusable neglect the decision is adverse to her, and she fails to appeal therefrom, the judgment becomes binding against her. 161–372, 201+605.

The court properly vacated a default judgment and permitted the defendants to answer. 161–489, 201+936.

The statute does not require an affidavit of merits as a condition to such relief. The rule of court making such requirement is properly waived when the record shows merits. 161–489, 201+936.

The showing, in opposition to a motion to vacate a default judgment and permit defendant to answer, indicates that, when the service was made upon him, defendant knew perfectly well what was happening. Held not an abuse of discretion to deny his motion for relief. 165–308, 206+447.

A mortgagee, upon whom service has been made by publication, and who has not appeared, applying within one year after judgment, not being guilty of laches and tendering an answer constituting "sufficient cause" because it states a good defense is entitled to have the judgment vacated and be given permission to serve and file her answer. 166–430, 208+136.

Order denying defendant's motion to vacate judgment against him and to permit him to answer and defend, based on ground that defendant did not answer because of promise of plaintiff's attorney to drop action based on conflicting evidence, will not be disturbed on appeal. 166–494, 207+20.

46. Remedy by motion how far exclusive—The exclusive remedy is by motion under this section (88–431, 93+310; 89–300, 94+885; 89–319, 94+1085, 1135; 154–538, 191+816.

47. Statute a regulation not a grant of power—5–23, 10; 40–463, 42+391. See 13–66, 58.

48. To what applicable—Held applicable to foreclosure proceedings (40–463, 42+391); to tax proceedings (62–18, 63+1117); to condemnation proceedings (38–157, 36+105); to habeas corpus proceedings (38–278, 37+338); to garnishment proceedings (10–162, 130); to actions in which the summons was served by publication (39–73, 38+689; 39–481, 40+611; 40–463, 42+391; 44–392, 46+766; 45–252, 47+796; 93–249, 101+304); to actions against "unknown heirs" (44–392, 46+766); to actions against "other persons or parties unknown" (93–249, 101+304); to partition proceedings (39–481, 40+611); to an action of ejectment (35–337, 29+130). Not applicable to judgment in action for divorce (93–195, 101+163. See 102–344, 113+896). Action to annul marriage for fraud and duress is not action for divorce, within proviso (102–405, 113+1013). Workmen's compensation act (134–191, 158+825). Inapplicable to Torrens proceeding (147–375, 182+449). Inapplicable to final judgment in divorce (149–105, 182+955; 154–538, 191+816).

49. Relief granted liberally—Courts are inclined to relieve a party from a default if he furnishes any reasonable excuse for his neglect and makes any fair showing of merits (50–1, 52+219; 70–489, 73+405; 72–393, 75+606; 77–159, 79+669; 81–515, 84+338; 94–437, 103+506; 99–272, 109+248; 104–399, 116+751). It is ordinarily in furtherance of justice that an action should be tried on the merits (11–232, 153; 94–437, 103+506). Different considerations apply when the application is made by a "prowling assignee" or speculative purchaser (84–329, 87+838). Relief should not be allowed in a way to encourage loose practice or a lax administration of the law (7–493, 399; 60–117, 61+910; 94–506, 103+506). When no application to trial court, no consideration will be accorded on appeal (123–352, 143+1123). Discovery of evidence after rendition of judgment; application granted cautiously (134–191, 158+825; 137–472, 163+1069).

50. Discretionary—The matter of opening a default lies almost wholly in the discretion of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion (1–203, 176; 5–65, 47; 6–458, 315; 6–550, 386; 9–181, 166; 10–162, 130; 11–65, 37; 11–232, 153; 16–81, 69; 17–402, 378; 23–518; 28–38, 8+903; 32–266, 20+159; 32–312, 20+238; 34–96, 24+319; 35–212, 28+255; 35–337, 29+130; 36–117, 30+436; 39–315, 40+66; 39–390, 40+518; 40–463, 42+391; 41–526, 43+482; 42–62, 43+782; 43–195, 45+427; 44–392, 46+766; 44–417, 46+854; 45–88, 47+462; 45–252, 47+796; 46–352, 49+60; 46–535, 49+257; 47–245, 49+983; 47–428, 50+530; 50–1, 52+219; 50–258, 52+861; 52–501, 55+58; 55–287, 56+895; 57–267, 59+195; 58–20, 59+629; 58–196, 59+1000; *60–61, 61+824; 61–256, 63+634; 61–271, 63+735; 62–18,* 63+1117; 66–54, 68+515; 66–64, 68+604; 66–131, 68+845; 67–131, 69+708; 67–368, 69+1101; 69–176, 71+928; 70–105, 72+835; 70–489, 73+405; 72–393, 75+606; 74–4, 76+787; 77–159, 79+669; 77–543, 80+700; 78–295, 80+1127; 81–372, 84+21; 81–515, 84+338; 82–162, 84+745; 84–329, 87+838; 85–138, 88+411; 86–286, 90+1133; 89–477, 95+310; 90–301, 96+794; 90–517, 97+373; 92–271, 99+889; 101–22, 111+729; 102–405, 113+1013; 108–151, 121+605). Particularly is this true when the determination of the court is made on conflicting affidavits (28–38, 8+903; 32–266, 20+159; 38–359, 37+455; 47–250, 49+981). If it is obvious that the trial court has acted wilfully, arbitrarily, capriciously, or under a misapprehension of the law, and in denial of justice, its action will be reversed on appeal, for its power in this regard is not absolute but judicial and must be judicially exercised (20–100, 83; *28–132, 9+633; 39–481,* 40+611; 40–45, 41+243; 50–1, 52+219; 50–164, 52+379; 57–251, 59+297; 60–117, 61+910; 74–508, 77+416; 78–295, 80+1127; 94–37, 101+951). The discretion contemplated by the statute is not the arbitrary and uncontrolled pleasure or caprice of the judge but a sound legal discretion; a discretion in the exercise of which it is his duty to grant the desired relief in a meritorious case (7–493, 399; 24–345; 66–54, 68+515; 74–508, 77+416). The discretion cannot be exercised except in favor of a party who brings himself within the provisions of the statute by a showing of fraud, mistake, inadvertence, surprise or excusable neglect (94–37, 101+951). If a default judgment is entered when in fact there was no default an application to open is not addressed to the discretion of the court but is a matter of right (6–550, 386). See 122–187, 142+144; 123–352, 143+1123; 124–535, 144+1134, 125–475, 147+654; 126–185, 148+57; 127–435, 149+671. Not an abuse of discretion (128–311, 150+907; 129–316, 152+721; 129–316, 152+721; 129–414, 152+772; 130–45, 152+865). Amending summons (131–174, 154+952; 131–248, 154+1099; 131–490, 154+789; 132–355, 157+586; 133–116, 157+1076). No absolute right, and inexcusable neglect of counsel appearing, there is no abuse of discretion (134–328, 159+752; 134–328, 159+752; 136–320, 162+352; 137–472, 163+1069). Vacating judgment and permitting amended complaint (147–3, 179+370; 147–156, 179+902). Inapplicable to Torrens proceeding (147–375, 182+449; 152–12, 187+703; 153–186, 189+1026; 154–538, 191+816).

51. Excusable neglect—7–493, 399; 9–181, 166; 20–100, 83; 20–156, 139; 29–68, 11+228; 35–212, 28+255; 39–390, *40+518; 41–526, 43+482; 42–62, 43+782; 47–428, 50+530;* 55–287, 56+895; 60–117, 61+910; 61–256, 63+634; 66–64, 68+604; 66–131, 68+845; 67–368, 69+1101; 70–489, 73+405; 72–393, 75+606; 74–4, 76+789; 77–159, 79+669; 78–295, 80+1127; 81–372, 84+21; 81–515, 84+338; 85–138, 88+411; 89–477, 95+310; 92–271, 99+889; 113–433, 129+853. Default in filing reply (122–155, 141+1134, 142+134; 122–187, 142+144). Delivery of summons outside state (122–399, 142+714; 126–185, 148+57; 133–63, 157+903; 133–116, 157+1076; 137–472, 163+1069).

52. Surprise—16–81, 69; 20–100, 83; 20–156, 139; 42–62, 43+782; 126–185, 148+57.

53. Mistake—9–181, 166; 37–128, 33+546; 47–428, 50+530; 52–501, 55+58; 66–54, 68+515; 67–131, 69+708; 70–489, 73+405; 124–535, 144+1134; 126–185, 148+57; 130–46, 152+865; 136–320, 162+352; 136–428, 162+518; 137–472, 163+1069; 147–156, *179+902.*

54. Fraud—6–458, 315; 17–181, 153; 39–390, 40+518; 45–88, 47+462.

55. When year begins to run—23–227; 36–341, 31+56; 39–73, 38+689.

56. Time of application—Diligence—A party must make his application within a reasonable time after notice of the judgment and at all events within one year of such notice (5–23, 10; 7–325, 254; 9–181, 166; 13–66, 58; 28–132, 9+633; 28–251, 9+756; 34–96, 24+319; 36–341, 31+56; 37–514, 35+381; 46–535, 49+257; 47–245, 49+983; 50–258, 52+861; 56–476, 58+38; 58–72, 59+828; 67–131, 69+708; 69–176, 71+928; 81–515, 84+338; 89–477, 95+310). He must proceed with due diligence regardless of the one year limitation (5–23, 10; 7–325, 254; 28–132, 9+633; 39–315, 40+66; 40–45, 41+243; 70–105, 72+835; 84–329, 87+838). It must affirmatively appear, to justify granting such motion, when addressed to discretion of court, that it was made with due diligence and within one year from actual notice of the judgment (97–135, 106+108; 101–48, 111+732). Party who applies, within one year after entry of default judgment on service of summons by publication only, must be permitted to defend as matter of right, provided his motion is accompanied by answer setting up defense on merits, and he has not been guilty of laches (102–374, 113+909). Record of judgment is not "notice" of the entry thereof within this section (113–433, 129+853).

57. Meritorious defence necessary—The applicant must have a good defence on the merits and exhibit it to the court on the motion (15–288, 219; 39–315, 40+66; 44–417, 46+854; 50–1, 52+219; 57–251, 59+297; 70–105, 72+835; 78–295, 80+1127). The proper practice is to exhibit a proposed answer setting forth a good defence (81–515, 84+338). The applicant need not set forth the evidence of his defence and its truth or falsity cannot be tried on affidavits (47–428, 50+530; 81–515, 84+338; 89–477, 95+310). A verified general denial shows a good defence and is ordinarily sufficient (58–20, 59+629; 57–251, 59+297. See 44–514, 47+172; 58–196, 59+1000). See 124–530, 144+1134; 124–535, 144+1134; 124–537, 144+755; 134–328, 159+752; 136–320, 162+352; 136–428, 162+518; 152–12, 187+703.

58. Sufficiency of proposed answer—16–81, 69; 23–518; 47–428, 50+530; 58–196; 59+1000; 66–54, 68+515.

59. Affidavit of merits—23–518; 40–463, 42+391; 50–1, 52+219; 58–196, 59+1000; 66–54, 68+515; 81–515, 84+338; 85–138, 88+411; 90–301, 96+794; 97–135, 106+108. See 127–435, 149+671; 133–116, 157+1076; 136–320, 162+352; 136–428, 162+518. Not a statutory but court requirement (145–75, 176+154). Insufficiency (151–302, 186+694).

60. Counter affidavits—Counter affidavits are not permissible to show want of merits or to controvert the allegations of the proposed answer or affidavit of merits. The court cannot try the merits of the cause on affidavits (47–428, 50+530; 81–515, 84+338; 89–477, 95+310).

61. Notice of motion—A motion should be brought on by a written notice of eight days or by an order to show cause (5–27, 14; 10–162, 130; 55–75, 56+576). Within two years after the entry of judgment notice should be served on the attorney (23–518. See 79–476, 82+990). Purchasers of property affected by the judgment must be served with notice (70–243, 73+161; 92–271, 99+889).

62. Terms—15–63, 43; 36–117, 30+436; 37–128, 33+546; 60–61, 61+824; 71–468, 74+173; 77–543, 80+700.

63. Allowing judgment to stand as security—23–458; 37–128, 33+546.

64. Who may apply—Only parties can apply (7–487, 393. See 22–203; 57–267, 59+195; 84–329, 87+838; 90–517, 97+373), but a grantee or personal representative may be substituted as defendant and then apply (22–542; 44–392, 46+766. See 12–375, 251; 84–329, 87+838; 97–135, 100+108). Authority to vacate and reinstate fraud or collusion appearing (122–355, 142+818; 127–435, 149+671).

65. Application by municipal corporations—66–54, 68+515; 67–368, 69+1101; 89–477, 95+310; 127–435, 149+671.

66. Application by minors—93–249, 101+304.

67. 130–530, 152+866.

9284. Vacating real estate judgment—Within what time—No judgment or decree quieting title to land or determining the title thereto or adverse claims therein heretofore entered or hereafter to be entered shall be adjudged invalid or set aside, unless the action or proceeding to vacate or set aside such judgment or decree shall be commenced, or application for leave to defend be made, within five years from the time of filing a certified copy of such judgment or decree in the office of the register of deeds of the county in which the lands affected by such judgment or decree are situated. ('09 c. 451 § 1) [7787]

Explanatory note—Laws '09, c. 451, § 2 (G. S. '13, § 7788) provides that "nothing herein contained shall apply to any action or proceeding now pending to have any such judgment or decree vacated or set aside or to any application now pending for leave to defendant in any such action, nor shall this act apply to any proceeding under the provisions of chapter 65, Revised Laws 1905." For R. L. '05, c. 65, see c. 65 of this compilation.

Showing not justifying vacation of judgment (154–37, 191+55).

9285. Unimportant defects disregarded—In every stage of an action, the court shall disregard all errors or defects in the pleadings and proceedings which do *not affect the substantial rights of the adverse party,* and no judgment shall be reversed or affected by reason thereof. (4161) [7789]

See also notes under § 9325.

1. In general.

10–423, 340; 12–437, 326; 14–464, 346; 58–514, 60+338;

65–429, 68+68; 75–489, 78+113; 120–52, 139+142; 121–258, 141+164; 121–388, 141+488; 121–395, 141+519; 121–473, 141+843; 122–20, 141+810; 122–130, 141+1118; 122–177, 142+147; 122–209, 142+193; 122–229, 142+307; 122–328, 142+706; 122–346, 142+817; 122–393, 142+803; 123–110, 143+121; 123–191, 143+718; 123–360, 143+973; 123–503, 144+214; 124–53, 144+415; 124–208, 144+940; 124–291, 144+965; 124–357, 145+115; 124–388, 145+117; 124–432, 145+119; 124–437, 145+120; 124–505, 145+381; 125–104, 145+794; 125–318, 146+1113; 125–353, 147+244; 125–431, 147+435; 126–50, 147+717; 126–116, 148+50; 126–154, 158+787; 126–169, 148+62; 126–338, 148+287; 126–339, 148+281; 126–432, 148+309; 127–1, 148+446; 127–15, 148+476; 127–291, 149+467; 127–490, 150+218; 128–18, 150+215; 128–30, 150+229; 128–65, 150+223; 128–129, 150+618; 128–193, 150+800; 128–245, 150+805, 128–277, 150+915; 128–499, 151+201; 129–12; 151+408; 129–129, 151+907; 129–417, 152+833; 130–112, 153+259; 130–329, 153+742; 130–434, 152+262, 153+736; 131–155, 154+956; 131–451, 155+628; 131–453, 155+216; 131–482, 155+758; 132–8, 155+617; 132–128, 155+1078; 132–271, 156+124; 133–423, 158+705; 134–210, 158+979; 134–378, 159+832; 134–394, 159+956; 134–468, 158+787; 135–68, 160+191; 136–20, 161+213; 136–223, 161+413; 136–257, 161+515; 137–62, 162+1059; 142–207, 171+777; 143–316, 173+718; 143–373, 173+719; 148–411, 182+523; 155–348, 193+592. 165–146, 205+948; 164–466, 206+380; 166–374, 208+22; 209+868; 211+311; 167–32, 208+526, note under § 9699; 209+899, note under § 9281.

A decision of the Industrial Commission in a workmen's compensation case will not be reversed on a mere matter of procedure. 157–122, 195+784.

Assessment of stockholders. 157–209, 195+923.

A judgment will not be reversed on account of a harmless error. 160–78, 199+513.

Instructions and admission of evidence. 162–514, 202+441.

2. Rulings on pleadings.

An application for an order directing that a complaint be made more definite and certain is addressed to the discretion of the trial court, and its conclusion will not be reversed where substantial rights upon the merits are not affected. 166–53, 206+929.

3. Clerical errors.

Mere clerical errors will not reverse a case. 167–479, 209+490.

4. Reception of evidence.

160–330, 200+297; 161–440, 201+929; 167–437, 209+317.

No prejudicial error resulted to defendants from rulings complained of in the admission or exclusion of testimony. 156–52, 194+752.

Under the circumstances mentioned in the opinion, error in permitting a layman to testify to the nature of plaintiff's injury was not prejudicial. 156–211; 194+639.

No error in the reception of defendants' evidence prejudiced plaintiff, because the latter failed to prove a case. 157–102, 195+637.

Where documentary evidence is offered to prove a fact admitted, the rejection of the offer is not error. 157–250, 195+901.

In an action tried to the court, even though it appears that certain important facts were shown by evidence to which technically there might be valid objections, still, if it is clear that such facts exist and can be conclusively established were another trial had, there should not be a reversal. 158–14, 196+655.

It is not error to exclude testimony corroborating a telephone talk which is in substance admitted. 158–280, 197+282.

No prejudicial error could result to the county from evidence of representations made by its engineer, who had made a survey and indicated his findings upon a survey map for the use of those invited to bid for the construction of certain bridges. 159–380, 199+104.

The admission of evidence which should have been rejected must have actually prejudiced the excepting and defeated party, to have him a right to a new trial. 160–326, 200+293.

Granting it was error to permit plaintiff to testify what he paid for a dog shot by appellant, no prejudice resulted, for the uncontradicted testimony was that the animal was worth $150 when killed, and the verdict was for $75, the amount plaintiff paid when he bought three years before. 160–402, 200+446.

The exclusion of evidence as to mental condition bearing upon the amount of damage will not be considered, where the jury have found no liability, and there is an affirmance. 161–45, 200+922.

Error in receiving evidence of the rental value of bowling alleys was cured by the instructions to the jury. 161–135, 201+537.

No reversible error is found in the admission of the letters and documentary evidence in the record, nor in the parts of the charge upon which errors are assigned. 164–401, 205+282.

No reversible error is found in the rulings sustaining objections to questions calling for immaterial matters or facts which appeared from documents. The leading questions, to which objections were saved, related to an issue not submitted to the jury. 164–425, 205+286.

There was no reversible error in the rulings upon the admissibility of evidence. 210+394.

There was no prejudicial error in excluding prior appliactions to defendant containing similar misstatements because the answers in the later applications were copies of those in the earlier ones, and the jury gained all the information they would have had if the first applications had been received. 210+846.

5. Remarks of court and counsel.

Substantial rights of the defendant were prejudiced by a statement made by the county attorney in his closing argument to the jury, which was entirely outside the record, and was calculated to place witnesses for the state in a better light and to add to the weight of their testimony. 157–374, 196+483.

A comment by the court was not prejudicial, in view of the evidence. 161–135, 201+537.

6. Instructions.

Instructing the jury that a fair preponderance of the evidence was sufficient to establish the mistake was without prejudice, as the right to avoid the release was conclusively established. 158–259, 197+257.

Defendant was not prejudiced by the submission to the jury of a question which must be resolved in plaintiff's favor as a matter of law. 159–388, 199+178.

Where plaintiff failed to make out a case and defendant was therefore entitled to a directed verdict, any error in confining responsibility for blowing of whistle to railroad engineer was harmless. 161–514, 200+747.

Defendant was not prejudiced by the submission of question to the jury. 162–206, 202+724.

Error in charge. 162–412, 203+59.

Error in charge to jury held to be without prejudice, when considered in connection with verdict and the evidence. 212+605.

7. Findings of fact.

Findings of fact. 157–102, 195+637.

The fact that the jury found that the appellant was entitled to certain specified property not involved in the litigation was without prejudice to the appellant. 159–345, 198+1009.

Although the findings of fact are faulty in not covering every specific issue litigated, appellant is not entitled to a reversal, since his motion for findings did not point out the specific issues upon which findings were desired, and since the findings as made are properly supported by the evidence, and do support the judgment. 160–449, 200+468.

Since the matters of fact admitted constitute no defense, the refusal to embody the same in the findings of fact will not reverse. 161–310, 201+440.

Failure to find value, under the facts stated in opinion, is harmless. 164–136, 204+639.

8. Opening and closing.

There was no reversible error in permitting the defendant to open and close the case. 158–348, 197+489.

ISSUES AND TRIAL

9286. Terms defined—Issues, either of law or of fact, arise upon the pleadings, whenever a fact or conclusion of law is maintained by one party and controverted by the other. A trial is the judicial examination of such issues between the parties. (4162) [7790]

Trial defined (27–29, 6+407; 37–382, 34+739; 68–166, 70+1083; 89–297, 94+887; 135–308, 160+778).

The reasonable value of the services of a real estate broker, who produced a purchaser to whom the owner of the property made a sale thereof, though no in issue under the pleadings, was litigated by consent. 164–207, 204+929.

That no leave of court to sue on an official bond has been obtained cannot be raised, where the answer consists only of a general denial. 210+161.

9287. Issues, how joined—An issue of law arises upon a demurrer to the complaint, answer, or reply. An issue of fact arises:

1. Upon a material allegation of the complaint, controverted by the answer;

2. Upon new matter in the answer, controverted by the reply; or,

3. Upon new matter in the reply, except when an issue of law is joined thereon.

Issues both of law and of fact may arise upon different and distinct parts of the pleadings in the same action. (4163) [7791]

1. Issue of law—A demurrer raises an issue of law on which the court is to render judgment (38-459, 38+366).

An allegation in the answer, denied in the reply, cannot be relied upon by plaintiff as establishing the fact alleged. 210+869.

2. Issues of fact—70-471, 73+144; 86-1, 90+3.

Where the parties have, by consent, tried issues not made by the pleadings they are bound by the result the same as if the issues were within the pleadings. 212+16.

9288. Issues, how tried—Right to jury trial—Issues of law, unless referred as provided by the statutes relating to referees, shall be tried by the court. In actions for the recovery of money only, or of specific real or personal property, or for a divorce on the ground of adultery the issues of fact shall be tried by a jury, unless a jury trial be waived or a reference be ordered. All other issues of fact shall be tried by the court, subject to the right of the parties to consent, or of the court to order, that the whole issue or any specific question of fact involved therein, be tried by a jury or referred. (4164) [7792]

RIGHT TO JURY TRIAL

½. In general.

209+907.

Action to recover money and annul a chattel mortgage is triable without jury. 161-519, 200+930.

1. Constitutional provision—The constitution did not *enlarge old rights or create new ones but simply conserved* rights already existing and placed them beyond legislative impairment (4-109, 70; 19-132, 99; 21-241, 292; 22-178; 25-123; 38-403, 38+104; 40-213, 41+1020; 47-451, 50+598; 65-196, 68+53; 85-215, 88+742). The method of selecting the jury is subject to legislative control but the method provided must be reasonably adapted to secure an impartial jury. The legislature may provide for a struck jury (65-196, 68+53). The constitutional right is limited to "cases at law" (40-213, 41+1020). The right depends on the nature of the right to be adjudicated and not on the form of the action or proceeding (22-178. See 119-96, 137+390). See 130-254, 153+528; 131-441, 155+393; 137-187, 163+129; 150-454, 185+935.

2. Statutory provision—This provision was in force at the time of the adoption of the constitution (40-213, 41+1020). Its effect is to preserve in substance the common law distinction between actions at law and suits in equity (14-394, 300). See 131-441, 155+393; 137-187, 163+129.

3. Complaint controls—The decisive test whether an action is triable by the court or by a jury is to be determined on an examination of the complaint (93-414, 101+952).

4. Held entitled to jury trial—An action for the recovery of money only (68-521, 525, 71+701; 85-215, 88+742); an action in the nature of replevin although it involved an issue as to a secret trust (13-326, 299; 35-476, 29+171); an action by an assignee in insolvency to recover money paid by the insolvent to a creditor as an unlawful preference (45-383, 48+4); an action on a policy of insurance for the recovery of a loss (45-441, 48+198. See 66-138, 68+855); an action for conversion although it involved an account (19-132, 99). See 30-316, 15+254; an action by a contractor for labor and material although a long account was involved (79-352, 82+644); an action for trespass on land (34-43, 24+308); an action for money had and received (39-46, 38+762); an action for the recovery of rent (46-115, 48+768); an action on a stated account between partners (93-414, 101+952). See 122-513, 142+883; 123-401, 143+1125; 123-405, 143+1131; 123-468, 143+1134; 123-505, 144+160; 124-65, 144+434; 124-257, 144+955; 124-269, 144+958; 124-438, 145+120; 124-466, 145+385; 124-518, 145+747; 125-7, 145+613; 125-40, 145+613; 125-54, 145+624; 125-137, 145+804; 125-238, 146+353; 125-256, 146+1092; 125-311, 146+1109; 126-144, 148+108; 126-279, 148+101; 126-346, 148+285; 126-389, 148+125; 127-242, 149+285; 127-341, 149+545; 128-14, 150+164; 128-47, 150+221; 128-95, 150+379; 128-144, 150+398; 128-146, 150+395; 128-245, 150+804; 128-360, 150+1091; 128-440, 151+188; 128-491, 151+203; 129-70, 151+537; 129-262, 152+408; 130-406, 153+848; *137-463, 162+1049; 150-454, 185+935.*

5. Equitable actions—In equitable actions pure and simple, that is, in actions based on an equitable cause of action, or to obtain equitable relief solely, there is no right to demand a jury trial of any of the issues (20-91, 77; 25-475; 30-380, 15+672; 35-380; 29+49; 46-308, 48+1122; 61-43, 63+3; 93-414, 101+952; 129-59, 151+532; 130-254, 153+528; 135-115, 160+500).

An action on a lease for the recovery of rent is triable by jury, and the fact that defendant pleaded a surrender and release, alleged by plaintiff to have been signed in the mistaken belief that it was a receipt for rent, did not entitle defendant to a trial of the case by the court without a jury. 156-494, 195+450.

5a. Controversies between attorney and client.

Where there has been a settlement between attorney and client, the former retaining from the moneys of his client, with the latter's consent, the amount of his fee, the attorney cannot thereafter force the client into court by the summary, statutory proceeding for the enforcement of attorney's liens, and have the settlement confirmed or the amount of his fee determined anew and by the court. In such a case, if the client should sue the attorney for a part or all of the money retained by him, he would have the constitutional right to trial by jury, which the attorney's lien statute does not and cannot impair. 157-379, 197+110.

5b. Municipal ordinances.

A defendant is not entitled to a jury trial when charged with an offense under a municipal ordinance. 157-506, 196+279.

5c. Garnishment.

The issue between a judgment creditor and a garnishee as to whether the latter is under any liability to the judgment debtor which can be subject to garnishment arises under a statutory proceeding which is equitable in nature. In consequence, there is no constitutional right to trial by jury. 165-100, 205+947.

5d. Mental condition of witness.

The mental impairment of a witness is for the consideration of the jury. 210+75.

6. Mixed actions—In mixed actions based on both a legal and an equitable cause of action a party has a constitutional right to have the legal cause submitted to a jury but he is not entitled to a jury trial of both causes and a demand for such a trial is properly denied unless it is strictly limited to the legal cause (30-316, 15+254; 30-380, 15+672; 30-395, 15+676; 34-43, 24+308; 34-547, 27+66; 39-46, 38+762; 46-115, 48+768; 66-138, 68+855; 93-475, 101+610; 109-519, 124+218. See 47-131, 49+688; 63-269, 65+454). In actions not of a strictly legal nature where the plaintiff seeks both legal and equitable relief there is no right to a jury trial (16-355, 315; 109-519, 124+218). See *123-453, 144+218; 127-129, 148+1077;* 127-133, 148+1078; 131-231, 154+1081; 130-320, 155+205.

7. Held not entitled to jury trial—Proceedings on information in the nature of quo warranto (40-213, 41+1020); mandamus proceedings (15-221, 172; 25-404; 28-40, 8+899); condemnation proceedings (18-155, 139; 21-241; 30-140, 14+581; 42-262, 44+59); taxation proceedings (22-178; 60-178; 60-164, 62+261); proceedings in laying out highways (25-123); proceedings to enforce a mechanic's lien (27-312, 7+265); proceedings under the insolvency law of 1881 (30-234, 15+109; 38-403, 38+104. See 45-383, 48+4); garnishment proceedings (61-398, 63+1075); proceedings for contempt (23-411); election contests (4-109, 70; 13-518, 480; 26-529, 6+346); proceedings *for the recommitment of a pardoned convict, except on* the question whether he is the same person who was convicted (53-135, 54+1065); on appeal to the district court in proceedings to test the validity of a will (47-451, 50+598. See 26-391, 4+685); proceedings for the commitment of infants to the reform school (50-353, 52+935); an action to determine adverse claims (46-308, 48+1122); an action to remove a cloud (34-547, 27+66; 64-175, 66+198; 82-523, 85+545); an action in the nature of a bill of peace or to prevent multiplicity of suits (85-215, 88+742); an action in the nature of a creditor's bill (61-398, 63+1075); an action to foreclose a mortgage (27-312, 7+265; 30-395, 15+676); an action to have land discharged from the lien of a mortgage (20-91, 77); an action for an accounting (25-475; 30-316, 15+254; 35-380, 29+49; 39-46, *38+762; 61-43, 63+3; 93-414, 101+952*); an action for an accounting of a trustee, a partition and the appointment of a receiver (30-380, 15+672); an action to abate a dam and for damages (16-355, 315); an action for an injunction to restrain a trespass on land and to determine that the defendant has no interest or easement therein (34-43, 24+308); an action to reform a written lease (46-115, 48+768); an action to set aside an award and recover on an insurance policy (66-138, 68+855); an action to reform a policy of insurance (17-104, 83); an action for divorce on the ground of cruelty (31-106, 16+513); an action to compel specific performance (20-274, 245; an action for the cancellation of instruments (32-45, 19+86; 70-89, 72+817); an action to restrain the foreclosure of a mortgage (32-45, 19+86); an action for an accounting in a case where a deed absolute in form was in fact a mortgage (31-414, 18+143); an action for the correction of a stated account (44-278, 46+364); an action to

restrain a trespass whereby the flow of a river was obstructed (31-4, 16+425); an action to have a deed absolute in form declared a mortgage (34-118, 24+369); action to set aside deed and mortgage as fraudulent and to subject land to payment of judgment for alimony (96-523, 105+183); proceedings to foreclose mechanic's lien though defendant interposes counterclaim (140+118); proceedings to register land title (119-96, 137+390). See 123-453, 144+218; 124-234, 144+759; 126-128, 147+1093; 130-254, 153+528; 132-36, 155+1048; 132-323, 156+666; 135-115, 160+500; 137-187, 163+129; 139-400, 166+1078.

7½. Questions for jury.

When the evidence concerning a given issue is uncontradicted, there is nothing for the jury unless such evidence in itself is improbable or inconclusive or put in doubt by other circumstances in evidence. The circumstances justifying such a conclusion must appear from the evidence and must be such that reasonable minds upon fair consideration may arrive at different conclusions. 156-446, 195+280.

It is a question of law whether at the close of the evidence there is sufficient proof plaintiff's cause of action to take the case to the jury. 156-446, 195+280.

In actions for malicious prosecution, it is the province of the court to determine whether the established facts constituted probable cause for the prosecution; but it is the province of the jury to determine the facts if in dispute. Plaintiff's testimony made a question for the jury. 164-260, 204+885.

Where verdict is grounded on testimony in the case, it will not be disturbed on appeal. 164-523, 205+63.

It was within the discretion of the court to determine what issue, if any, should be submitted to a jury. 166-328, 207+641.

Triers of fact must accept, as true, positive, uncontradicted, and unimpeached testimony of witnesses, which is neither inherently improbable, nor rendered so by facts and circumstances disclosed. 209+626.

The question of defendant's negligence was for the jury. 210+75.

The evidence was sufficient to take to the jury the question whether the employee was injured by the calling tile, and also whether there was a causal connection between the injury and the act of negligence. 210+75.

ISSUES TO THE JURY IN EQUITABLE ACTIONS

8. Compared with equity practice—14-394, 300.

9. Submission of the "whole issue"—The statute provides for the submission of the "whole issue" (14-394, 300; 94-67, 102+376). This does not mean that the case may be submitted to a jury generally for them to return a general verdict as in a legal action (21-366). Question of law (122-232, 142+309; 122-396, 142+803; 152-473, 189+447).

10. How far discretionary—The court is not authorized to submit issues intrinsically unfit to be tried by a jury (14-394, 300), but when the issues are suitable for submission the discretion of the court is absolute. It may submit all or some of the issues or refuse to do so without regard to the wishes of the parties (20-91, 77; 27-312, 7+265; 32-45, 19+86; 44-278, 46+364; 46-308, 48+1122; 47-451, 50+598; 66-327, 69+31; 70-89, 72+817). Exercising summary jurisdiction (122-87, 141+1103; 129-59, 151+532; 131-439, 155+392; 152-473, 189+447; 126-346, 148+285; 131-65, 154+661; 131-441, 155+393; 131-448, 155+627; 139-460, 166+1078).

11. Issues suitable for submission—14-394, 300; 31-4, 16+425; 35-380, 29+49; 47-451, 50+598; 93-414, 101+952; 120-201, 139+139; 126-389, 148+125; 126-446, 148+302; 127-291, 149+467; 131-441, 155+393; 152-473, 189+447.

12. Order of court—It is the better practice to have the issue submitted by a formal order of court (14-394, 300; 17-104, 83; 131-65, 154+661; 152-473, 189+447.

13. Framing the issues—The court on its own motion may submit issues of its own framing (32-45, 19+86. See 54-47, 55+827).

14. Court must find on reserved issues—If, as is usually the case, the verdict of the jury does not cover all the issues it is the duty of the court to make findings on the reserved issues and order judgment on the verdict and findings (20-274, 245; 27-312, 7+265; 31-106, 16+543). It is not necessary for the court to make an order reserving the cause after the return of the verdict (31-106, 16+543). When the court erroneously orders judgment on the verdict without making findings on the reserved issues the remedy is not a motion for a new trial but a motion for the trial of the reserved issues (44-278, 46+364; 51-48, 52+985; 55-235, 56+828). If all the issues are covered by the special verdict judgment may be ordered thereon (see § 9304 notes 1, 12).

15. Dismissal of action—Directing verdict—31-414, 18+143; 82-523, 85+545; 129-59, 151+532; 132-36, 155+1048.

16. Mode of trial—17-104, 83; 26-391, 410, 4+685; 28-330, 9+876; 31-106, 16+543; 31-414, 18+143.

17. Findings of jury how far conclusive on court—The verdict of the jury on the issues submitted to them is binding on the court until vacated and set aside and cannot be disregarded in the determination of the action (10-216, 174; 26-391, 4+685; 34-118, 24+369; 73-171, 75+1124; 93-399, 101+601). After a court has submitted issues to a jury it may withdraw them before verdict, discharge the jury and determine the issues itself (54-47, 55+827).

18. See in General—122-405, 143+1131; 125-40, 145+623; 125-186, 145+964; 125-431, 147+435; 126-203, 148+113; 126-494, 148+299; 127-122, 149+18; 127-144, 149+14; 127-498, 150+166; 128-43, 150+211; 128-112, 150+385; 129-97, 151+895; 129-328, 152+732; 129-340, 152+724; 130-3, 153+250; 132-452, 157+708, 137-96, 162+1068.

9289. Notice of trial—Notice of issue—Issues of facts may be brought to trial by either party, upon notice served eight or more days before the beginning of a general term. At least seven days before the term one of the parties shall file a note of issue, containing the title of the action and the names of the respective attorneys, and stating the time when the last pleading was served and whether the issue is triable by the court or a jury. The clerk shall thereupon enter the cause on the calendar according to the date of issue, and it shall remain thereon, from term to term, until tried or stricken off by the court. Provided, that in all districts now or hereafter consisting of one county only, wherein but one term of court is or hereafter shall be held annually, no notice of trial need be served, but the party desiring to place a cause upon the calendar thereof for trial, shall, after issue is joined therein, prepare a note of issue containing the title of the cause, a statement as to whether the issue is an issue of law or an issue of fact, and if an issue of fact, whether triable by court or jury, and the names and addresses of the respective counsel, and shall serve the same on opposing counsel, and file such note of issue, with proof of service, with the clerk of court within ten days after such service; and, thereupon, the clerk shall set such cause for trial, in accordance with such rules as the judges of said court may make, but in no event earlier than thirty days after the filing of such note of issue, and shall notify all counsel in said cause by mail of the date of such setting. The judges of said court may, by order or rule of court, provide for the assigning and setting of cases for trial upon such calendar, and the order in which they shall be heard, and the re-setting thereof. All appeals from inferior tribunals, including probate court, justice court, county commissioners, and all boards from the decision of which an appeal lies to such court, shall in like manner be placed upon the calendar for trial. For all purposes, other than those specifically herein provided for, the first Monday in each month of the year, except in the months of July, August and September, shall be deemed the first day of a regular or general term of such district court, held in such county, and all persons committed for trial, or held to appear before such court, shall, unless otherwise provided, appear on such dates. Provided, that when the first Monday of any such month shall be a legal holiday the following day shall be deemed to be the first day of such general term of such district court. (R. L. '05 § 4165, amended '09 c. 221 § 1; '17 c. 6 § 1) [7793]

1. Notice of trial—A party is entitled to a notice of trial as a matter of right. If a new trial is ordered and an appeal taken from the order the cause must be again noticed if the order is affirmed. A right to have a cause stricken from the calendar is not waived by participating in a trial after a refusal of the court to strike from the calendar or to continue the cause (43-239, 45+228; 64-394, 67+216). A notice is not avoided by a subsequent amendment of the pleadings (10-316, 249; 59-485, 61+555). Whether an adjourned term is a "term" within the statute is an open question (86-46, 90+126). The statute was formerly applicable to special terms (19-539, 469).

A defendant is under no obligation to notice a cause for trial (82–278, 84+1008). The erroneous refusal of the court to strike from the calendar a case based on an improper notice is a ground for a new trial (64–394, 67+216). Admission of service of a notice is not a waiver of objection to a want of jurisdiction over the subject matter (71–42, 73+628). In computing the time the day of service is excluded and the first day of the term included (39–426, 40+561).

A party litigant is not entitled to proceed to trial in the absence of proof of service of notice of trial upon parties who have appeared. 160–181, 199+928.

2. *Note of issue—Irregularities in a note of issue held* immaterial (35–401, 29+123). The designation of the case as a "court case" or "jury case" is not conclusive on the court (93–414, 101+952). See 129–528, 152+270; 148–411, 182+523.

9290. Of law, how brought to trial—Issues of law may be brought on for argument by either party, upon eight days' notice, at any general or special term of the court, or before a judge thereof out of term and within the county; or they may be heard, on like notice, out of term, at any time and place within the district which the court shall have fixed therefor. If noticed for a general term, a note of issue shall be filed as provided in § 9289; if for a special term, such note shall be filed at least two days in advance thereof. (4166) [7794]

An issue of law arising on a demurrer may be noticed for hearing before the court in the county wherein the action is pending at any time whether it be at a term of court or not (86–46, 90+126). Objection that the court did not fix the time for argument on a demurrer as provided in this section cannot be raised for the first time on appeal (71–238, 73+860).

Upon the facts stated in the opinion, it is held that there was an abuse of discretion in refusing to permit defendant to amend his answer. 167–323, 209+32.

9291. Order of trial—Absence of parties—The issues on the calendar of a general term shall be disposed of in the following order, unless the court shall otherwise direct:

1. Jury cases;
2. Issues of fact to be tried by the court;
3. Issues of law.

If a party be absent, unless the court for good cause shall otherwise order, the adverse party may proceed with his case, and take a dismissal of the action, or a verdict or judgment, as the case may require. If neither be present, the cause shall be stricken from the calendar. (4167) [7795]

Where the answer denies material allegations in the complaint it is error for the court to order judgment for plaintiff without proof merely because the defendant fails to appear when the cause is called (48–66, 50+936; 68–1, 70+776). The failure of a party demurring to appear at the hearing in the trial court does not prevent him from being heard on appeal (13–260, 242). Cited (106–353, 119+57).

9292. Continuance—A motion to postpone a trial for the absence of evidence can only be made upon affidavit, stating the evidence expected to be obtained, the reasons for its absence and for expecting that it can be procured, and showing its materiality, and that due diligence has been used to procure it; and if the adverse party thereupon admits that such evidence would be given, and that it be considered as actually given on the trial, or offered and rejected as improper, the trial shall not be postponed. (4168) [7796]

22–466; 105–384, 117+506, 118+152; 141–483, 170+693.

JURY TRIALS

9293. Jury, how impaneled — Ballots — Rules of court—Examination—Challenges—When an action is called for trial by jury, the clerk shall draw from the jury box ballots containing the names of jurors, until the jury is completed or the ballots are exhausted. If exhausted, the sheriff, under direction of the court, shall summon from the bystanders, or the body of the county, so many qualified persons as are necessary to complete the jury. The ballots containing the names of jurors sworn to try the case shall not be returned to the box until the jury is discharged. All others so drawn shall be returned as soon as the jury is completed. Provided, it shall be lawful for the judge or judges of any district court in the state to provide by rule that in selecting a jury the clerk shall draw eighteen names from the jury box in the first instance and that the said eighteen shall then be examined as to their qualifications to sit as jurors in the action and if any of said eighteen be excused for any reason whatever, another shall be called in his place until there shall be eighteen jurors in the box qualified to sit in the action; and the parties shall have the right to exercise their peremptory challenges as to these eighteen. When the peremptory challenges have been exhausted, of the remaining men the twelve first called into the jury box shall constitute the jury. (R. L. § 4169, amended '09 c. 417 § 1) [7797]

134–378, 159+832.

9294. Challenges—Either party may challenge the panel, or individual jurors thereon, for the same causes and in the same manner as in criminal trials, except that but three peremptory challenges shall be allowed on either side, and that a full panel shall be called in the first instance, but before challenging a juror either party may examine him in reference to his qualifications to sit as a juror in the cause. If there be more than one party on a side, they shall join in any challenge made; except where the interest of two or more defendants are adverse, or if actions be consolidated for purposes of trial, each such defendant and party shall retain the right to three peremptory challenges. Unless the court shall otherwise direct, challenges shall be made alternately, beginning with the defendant. (R. L. '05, § 4170; amended '13, c. 217, § 1; '27, c. 281) [7798]

1. **Order of challenging**—20–277, 249; 80–56, 82+1093.
2. **Peremptory challenge**—97–269, 105+967; 124–208, 144+938.
3. **Implied bias**—97–217, 106+517; 99–97, 108+891; 111–275, 126+903.
4. **Jury fee**—Prior to the amendment of 1913 the section provided for a jury fee to be paid by the plaintiff. Constitutional (7–456, 365). On new trial (66–281, 68+1080).
5. **Joinder of defendants in challenge.**
Defendants must join in peremptory challenges. 159–485, 199+237.
6. **Waiver of right.**
Where the fact that an outsider has attempted to influence a juror in favor of the accused is made known in open court, and the accused thereafter voluntarily proceeds with the trial to a verdict, he waives any right which he may have had to object to the competency of the jury on the ground that this occurrence may have prejudiced them gaainst him. 160–527, 200+803.

9295. Order of trial—When the jury is completed and sworn, the trial shall proceed in the following order, unless for special reasons the court shall otherwise direct:

1. The plaintiff, after stating the issue, shall produce the evidence on his part.
2. The defendant may then open his defence, and produce his evidence in support thereof.
3. The parties may then respectively offer rebutting evidence only, unless the court, in furtherance of justice, shall permit either to introduce evidence upon his original case.
4. When the evidence is concluded, unless the case be submitted by one side or both without argument,

the defendant shall open and the plaintiff close the argument to the jury: Provided, that if the defendant have the affirmative of the issue to be tried the foregoing order of trial shall be reversed.

5. If several defendants, having separate defences, appear by different counsel, the court shall determine their relative order in respect to both evidence and argument.

6. When the argument is closed the court may charge the jury. (4171) [7799]

1. **Right to open and close**—17–188, 162; 19–500, 433; 33–495, 24+305; 47–414, 50+471; 53–42, 54+933; 85–369, 88+985; 105–60, 116+1023; 121–170, 141+1.

There was no reversible error in permitting the defendant to open and close the case. 158–348, 197+489.

1½. **What constitutes resting case.**
Where a plaintiff fairly covers his field of proof and then announces, "That is all the witnesses we have present," and silently permits the other side to offer their proof, held, that he has rested. 157–108, 195+781.

1¾. **Reception of evidence.**
Practice in the examination of medical experts disapproved. 210+75.

2. **Effect of admission in opening**—19–449, 388; 127–443, 149+667.

3. **Order of proof**—It is discretionary with the court to allow evidence in rebuttal which should have been introduced in chief (7–184, 128; 12–502, 406; 14–105, 75; 22–15; 34–1, 24+458; 50–192, 52+385).

The order of proof was for the trial court, and its rulings present no reversible error. 160–162, 199+570.

3½. **Instructions.**
The court correctly instructed the jury that the burden of proof was upon the answering defendatns, and there was no error in allowing the defendants the closing arguments. 165–82, 205+699.

Dying declarations may be impeached in the same manner as other testimony. The charge to that effect is without error. 210+45.

Instructions held not to be argumentative or too favorable to the party who obtained the verdict. 165–28, 205+639.

4. **Re-opening case**—2–37, 26; 5–201, 160; 6–220, 142; 8–286, 252; 37–512, 35+370; 53–546, 55+742; 55–417, 57+141; 62–60, 64+95; 82–544, 85+549; 128–498, 151+201.

There was no abuse of discretion in opening the case for additional testimony, or in denying a new trial because of surprise and newly discovered evidence. 166–308, 207+644.

5. **See in General**—(124–389, 145+117; 126–491, 148+304).

9296. View of premises—Procedure—Whenever the court deems it proper that the jury should view real property which is the subject of litigation, or the place where a material fact occurred, it may order them to be taken, in a body and in the custody of proper officers, to the place, which shall be shown to them by the judge, or by a person appointed by the court for that purpose; and while the jurors are thus absent, no one other than the judge or person so appointed shall speak to them on any subject connected with the trial. (4172) [7800]

The object of a view is not to furnish evidence on which to base a verdict but to enable the jury better to understand and apply the evidence submitted in open court. An instruction that gives the jury to understand that they may take into consideration the knowledge obtained on the view in arriving at their verdict is erroneous and ground for a new trial (19–271, 230; 29–41, 11+124; 57–493, 59+631; 85–65, 88+272). Misconduct of jurors or parties on the view is a ground for a new trial (22–5; 29–5, 11+112; 41–223, 43+2). The objection that only eleven jurors attended the view is waived unless raised as soon as discovered (41–223, 43+2). When a view is ordered it is proper practice for the court to instruct the jury as to the object of the view and their conduct while on the view but this is not indispensable. If a party wishes such instructions given he should make a timely request (19–271, 230). The matter of granting a view lies in the discretion of the trial court (19–271, 230; 61–113, 63+248; 85–65, 88+272). A view is not generally allowed if there has been a material change in the place (85–65, 88+272). See 126–203, 148+113.

9297. Sickness of juror—Food and lodging—If a juror becomes sick or otherwise unable to perform his duty, the court may discharge him. In that case, unless the parties consent to accept the verdict of the remaining jurors, another may be sworn in his place and the trial begun anew, or the jury may be discharged and another then or afterward impaneled. If the court, while a jury is kept together, shall order that they be provided with food and lodging, the sheriff shall furnish the same at the expense of the county. (4173) [7801]

91–419, 98+334.

9298. Requested instructions—Before the argument begins either party may submit to the court written instructions to the jury, opposite each of which the judge shall write the words, "Given," "Given as modified," or "Refused;" and the court, in its discretion, may hear arguments before acting on such requests. And the court of its own motion may, and upon request of either party shall, lay before the parties before the commencement of the argument any instructions which it will give in its charge, and all such instructions may be read to the jury by either party as a part of his argument. But at the close of the argument the court may give, with the instructions so approved, such other instructions as may be necessary fully to present the law of the case. (4174) [7802]

1. **Object of statute**—84–58, 86+881.

2. **Drafting requests**—22–152; 71–34, 73+634.

3. **When requests may be refused**—It is the duty of the court, when requested in a timely and proper manner (12–17, 1; 17–308, 284; 78–487, 81+392), to give in its charge any requested instruction which is correct as a proposition of law and applicable to the issues in the case, and a refusal to do so is ordinarily a ground for a new trial (68–519, 71+664; 71–34, 73+634; 81–434, 84+325; 84–1, 86+616). The court may refuse to give a requested instruction which is not applicable to the case as made out by the evidence however correct it may be as an abstract legal proposition (69–19, 71+698; 73–181, 75+1132); or one which assumes the existence of controverted facts (15–13, 1; 17–322, 299; 21–215; 21–442; 22–152; 22–431; 25–88; 26–172, 2+473; 28–352, 10+18; 29–465, 13+902; 76–461, 79+523); or one which is in part erroneous (18–184, 168); or one which is misleading, indefinite or ambiguous (17–308, 284; 23–430; 68–155, 71+5; 71–34, 73+634); or one embodying no legal proposition but only a logical inference from the facts in the case (34–51, 24+324; 34–132, 24+359; 82–145, 84+659); or one which lays too much emphasis on particular facts (53–551, 55+742; 94–257, 102+451); or one which is argumentative (75–533, 78+98; 82–98, 84+652; 94–257, 102+451); or one which invites the jury to disagree (72–296, 75+235); or one which is inconsistent with the theory on which the case has been tried (48–82, 50+1022); or one which is unduly prolix (94–257, 102+451). Requested instructions may be refused when not seasonably handed to the court (104–476, 116+1116). See 124–155, 144+462; 127–515, 150+177; 128–193, 150+800; 128–491, 151+204.

See notes under § 9325, subd. 6.

165–374, 206+716; 166–487, 208+194.

It is the duty of the trial court to present to the jury the law applicable to the case in clear and intelligent language so that jurors may readily comprehend it; and there must be some latitude in the expression of language so long as he correctly states the substance of the law. 157–187, 195+896.

The record in the case justifies the appellate court considering the assignment of error made as to instructions to the jury. 157–187, 195+896.

Brevity in a charge to a jury is commendable. 157–187, 195+896.

The error in one sentence of the charge relating to usury was sufficiently cured by the following sentence. 158–356, 197+743.

No error is found in the refusal to give requested instructions. 160–162, 199+570.

Where a cause is submitted to the jury under a charge framed as requested by plaintiff, the charge, whether right or wrong, is the law of the case so far as plaintiff is concerned. 167–248, 208+803.

A requested instruction was properly refused because inaccurate. 157–362, 196+478.

Where a requested instruction is inaccurate or inapplicable to the evidence its refusal is not reversible error. 161–480, 201+939.

No error occurred in refusing to instruct that good faith in the instigation of the slander litigation might mitigate damages. 156–62, 194+752.

A charge to the effect that the plaintiff cannot recover if he is "negligent in any degree whatsoever," though accurate enough as an abstract statement of the law, has a tendency to confuse and mislead a jury by the emphasis it places upon the presence of the negligence of the plaintiff and its effect upon the final result; and such a charge, unless the occasion is exceptional so that there are circumstances calling for it, is erroneous, following Craig v. Benedictine Sisters, 88 Minn. 535, 93 N. W. 669. 156–107, 194+322.

When a jury, after deliberating some time on a negligence case in which the law of comparative negligence has no place, returns for further instructions, having a confused notion in its mind as to the application of the rule of comparative negligence, and asks whether it may arrive at a verdict for any amount if it finds that the defendant "was to blame for 75 per cent." and that the plaintiff was to blame "for 25," a further charge that the plaintiff cannot recover if he "was negligent in any degree whatsoever," such charge being fair in tone and further stating that he could not recover if he was "guilty of contributory negligence," and that he could not recover "if the collision was caused by the combined negligence" of both, is not error. 156–107, 194+322.

No error was made in refusing an instruction singling out and indicating the effect of evidentiary matter. 211+306.

The fact that a request is couched in language of an appellate court does not necessarily mean that it must be given to the jury as an instruction. 212+413.

4. Amendment of requests—The court may amend or qualify a request and if the instruction given is substantially as requested there is no error (9–223, 209; 13–326, 299; 15–152, 117; 15–257, 197; 23–314; 25–88; 38–308, 37+580; 51–86, 52+1068; 78–218, 80+962; 77–104, 79+611). A party at whose request an erroneous instruction is given cannot complain of an erroneous qualification of it (18–184, 168). See 125–431, 147+434.

Prejudicial error cannot be predicated on the modification of a proper request for an instruction if the charge, taken as a whole, correctly states the law applicable to the issues to which the requested instruction was directed. 156–211, 194+639.

5. Giving requests with disparaging comment—21–187; 29–336, 13+168.

6. Request covered by the general charge—The failure of the court to give requests is no ground for a new trial if everything of substance in them is fully covered by the general charge. It is neither necessary for the court to adopt the language of the request primarily, nor, after it has fully instructed the jury, to repeat its instructions in the language of the request. A party is entitled to have the jury instructed fully, fairly and correctly, but he is not entitled to have them instructed in any particular language (17–76, 54; 17–241, 218; 21–65; 22–152; 26–183, 2+494, 683; 28–362, 10+21; 31–526, 18+651; 32–133, 19+655; 34–51, 24+324; 34–107, 24+366; 35–485, 29+198; 44–195, 46+329; 55–177, 56+686; 55–199, 56+826; 64–123, 66+139; 68–138, 71+14; 74–146, 76+1032; 77–412, 80+356, 784; 83–180, 86+14; 89–228, 94+1135; 94–257, 102+451). See 121–160, 141+104; 121–258, 141+164; 122–20, 141+810; 124–229, 144+774; 125–150, 145+806; 149–6, 182+774.

No error was made in refusing requests substantially covered in the charge. 162–419, 203+57.

The issues were simple and were presented fully in the general charge. There was no error in refusing the requested instructions. 163–187, 203+782.

The charge of the court to the jury was full and fair, and clearly submitted all of the issues to the jury. There was no error in the refusal of the requested instructions. 166–29, 206+950.

6½. Necessity for request.

In the absence of a request therefor, defendants were not entitled to an instruction that the jury might find that the parties, by their conduct, had placed a practical construction upon the terms of their contract with respect to the measurement of wood plaintiff had furnished to defendants. 156–349, 194+718.

Plaintiff took no exceptions to the instructions to the jury and made no request for additional instructions, but, in the notice of motion for a new trial, assigned as error the alleged failure to submit clearly two charges of negligence. There was no fundamental error in the instructions; hence the rule stated in Sassen v. Haegle, 125 Minn. 441, 147 N. W. 445, 52 L. R. A. (N. S.) 1176, is applicable. 160–468, 200+629.

Where no request to charge was made, and no exceptions taken to charges given, objection to charge made for first time on motion for new trial was too late. 161–533, 201+936.

Failure to charge that defendant had the burden of proof on an affirmative defense is not ground for reversal, where there was no request to so charge. 165–417, 206+725.

7. General charge in language of court preferable—34–51, 24+324; 53–551, 55+742; 64–123, 66+139; 85–142, 88+436; 94–257, 102+451.

8. Expression of opinion as to facts—Court may express to jury in its instructions its opinion of facts in issue, provided their ultimate determination thereof be left to jury. If party be apprehensive that jury may be unduly influenced, he should specially request court to instruct that they, not court, are exclusive judges of all questions of fact (97–227, 106+909).

9. *Punitive damages*—*Duty of court to explain meaning* (100–5, 110+99).

10. See in General—121–269, 141+175; 122–344, 142+816; 122–517, 142+897; 123–109, 143+121; 121–439, 141+523; 122–344, 142+816; 122–517, 142+897; 123–495, 144+220; 123–110, 143+121; 123–174, 143+322; 123–495, 144+221; 123–516, 144+407; 124–2, 144+466; 124–143, 144+751; 124–245, 144+772; 124–432, 145+118; 125–353, 147+244; 125–441, 147+445; 125–466, 147+441; 126–206, 148+115; 129–71, 151+537; 131–274, 154+1070; 131–482, 155+758; 132–149, 153+514; 134–392, 159+956; 151–394, 186+807.

9299. What papers jurors may take—On retiring for deliberation, the jury may take with them all papers received in evidence except depositions; but the court may direct that copies be made for their use of such records and documents as ought not, in its judgment, to be taken from those entitled to their possession. The jurors may also take with them notes of the testimony and proceedings made by themselves, but none others. All such papers, except the notes aforesaid, shall be returned to the clerk before the jurors are discharged. (4175) [7803]

1–134, 110; 8–236, 205; 95–104, 103+727. Court may, in its discretion, permit jury to take pleadings, but of doubtful propriety, and they should not be given to jury unless there is special reason (98–296, 108+517). See 124–431, 145+118; 125–291, 146+1104; 133–157, 157+1073; 150–178, 184+854.

The court properly permitted the jury to take all the exhibits in evidence to the jury room. 159–346, 198+1009.

9300. Verdict, when received—Correcting same—Polling jury—While the jury are absent the court may adjourn from time to time, in respect to other business, but it shall be considered open, for all purposes connected with the cause submitted, until a verdict is rendered or the jury discharged. A final adjournment shall discharge the jury. Before the verdict is recorded *either party may require the jury to be polled*, whereupon the clerk shall ask each juror if it be his verdict. If any answer in the negative, the jury shall be sent out for further deliberation. If the verdict be defective in form or insufficient, it may be corrected under the advice of the court, or the jury may be again sent out. (4176) [7804]

1. Court always open to receive verdict—46–212, 48+909.

2. Polling the jury—The right to poll a jury is not affected by an agreement that the jury may return a sealed verdict. After a verdict is recorded neither party has a right to poll the jury (15–501, 413). A jury cannot be polled before they have rendered their verdict for the purpose of ascertaining how they stand (61–531, 63+1115).

3. Correction of verdict—8–140, 110; 17–296, 273; 20–130, 122; 46–136, 48+684; 61–531, 63+1115; 123–422, 144+148.

There is no merit in the assignment of error that plaintiff is not entitled to disbursements as taxed, nor in the contention that it was error to deny defendant's application for amended findings. 210+66.

4. Informal verdict—101–180, 112+12.

5. See in General—129–372, 152+765.

9301. Five-sixths of jury may render verdict, etc.—In all civil actions or proceedings in any court of record of this state, after twelve hours' deliberation, the agreement of five-sixths of any jury therein shall be a sufficient and valid verdict; the deliberation of the jury shall be deemed to have commenced when the officer taking charge of the jury has been sworn, and

the clerk shall enter such time in his records. ('13 c. 63 § 1) [7805]

126–180, 148+51; 126–264, 148+107; 128–118, 150+387; 131–231, 154+1075, 131–236, 154+1081; 132–391, 157+650; 135–65, 160+189.

9302. How signed—Where the verdict is agreed to by the full membership of the jury the foreman only shall sign the verdict, when less than the full number agree on the verdict the same shall be signed by all the jurors who concur therein, and the clerk of said court shall enter on his minutes the number of said jurors concurring in said verdict. ('13 c. 63 § 2) [7806]

126–264, 148+107.

9303. Verdict, general and special—A general verdict is one by which the jury find generally upon all the issues in favor of the plaintiff or defendant. A special verdict is one by which they find the facts only, and it shall so present the conclusions of fact as established by the evidence that nothing remains to the court but to draw from them conclusions of law. (4177) [7807]

21–366; 99–357, 109+812; 127–451, 149+951.

9304. Interrogatories—Special findings—In every action for the recovery of money only or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict in writing upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to make a written finding upon any particular question of fact submitted to them in writing. Where the special finding of facts is inconsistent with the general verdict the former shall control the latter, and the court shall give judgment accordingly. (4178) [7808]

SPECIAL VERDICTS

1. Must cover all the issues to authorize a judgment—6–177, 111; 31–4, 16+425; 40–375, 42+84; 44–278, 46+364; 45–441, 48+198; 55–334, 56+1117; 72–403, 75+742.

2. Effect of failure to cover all the issues—The effect of a failure in a special verdict to cover all the issues depends upon whether the action is being tried by the court or the jury, in other words, whether it is an action of legal or equitable nature (20–274, 245; 27–312, 7+265; 31–106, 16+543; 31–268, 17+387; 44–250, 46+403; 44–278, 46+364; 45–441, 48+198; 51–48, 52+985).

3. How far optional with jury—74–480, 77+303. See 36–3, 29+588.

INTERROGATORIES—SPECIAL FINDINGS

3½. In general.

There was no abuse of discretion in denying defendant's request for the submission of special interrogatories to the jury. 156–211, 194+639.

A special verdict sufficinetly indicates that the general verdict for plaintiff was founded thereon, and the presence of another element of alleged negligence, though probably not established by the evidence yet submitted to the jury, will not justify a reversal on the theory of the rule applied in Burmister v. Giguere & Son, 130 Minn. 28, 153 N. W. 134. 156–338, 194+762.

A special finding inconsistent with the general verdict controls. 161–64, 200+748.

The court was within its discretion in submitting specific questions to a jury, and there was no reversible error in the form of such questions. 210+66.

4. Discretionary—The submission of special interrogatories is a matter lying almost wholly in the discretion of the trial court and its action will not be reversed on appeal except for a manifest abuse of discretion (12–530, 438; 17–296, 273; 40–273, 41+1040; 50–429, 52+910). There must be a real exercise of discretion (17–296, 273). The court need not submit interrogatories unless requested (7–267, 207), but it may do so (81–59, 83+490). See 127–475, 149+947; 132–181, 156+251.

5. Withdrawal of interrogatories—81–59, 83+490; 123–353, 143–975; 123–420, 144+148.

6. Character of interrogatories—They should be clear, concise, few in number and capable of categorical answer (17–296, 273; 24–429; 40–273, 41+1040).

7. When request must be made—17–296, 273.

8. Answer compulsory—A party has an absolute right to have his interrogatories answered if they are material and proper and to have them answered clearly and fully. If the jury come in without discharging their duty in this regard they must be sent out again and required to return full and satisfactory answers (20–139, 122; 40–547, 42+541; 67–451, 70+572; 76–430, 79+503; 81–59, 83+490). A failure of the jury to answer immaterial questions is harmless error (16–355, 315; 42–68, 43+783).

9. Objections to answers—Formal defects in answers are waived unless objection is made on the coming in of the verdict (21–506; 24–127; 30–18, 13+921), or at least before the jury are discharged (20–139, 122).

10. Order reserving case—When there is a general verdict and a special finding of fact, if the court desires to reserve the case for further consideration it must at the coming in of the verdict enter an order reserving the case. Unless this is done the party in whose favor the general verdict is may have judgment entered on it (22–19; 31–106, 16+543).

11. Judgment notwithstanding the general verdict—Judgment will not be ordered because special findings are inconsistent with the general verdict unless they are wholly irreconcilable. Every doubt will be resolved in favor of the general verdict (22–55; 24–127; 39–164, 39+402; 42–172, 43+849; 58–10, 59+632; 69–285, 72+111; 84–415, 87+1015; 85–160, 88+443; 85–391, 89+64; 86–77, 90+122; 87–441, 92+406; 89–154, 94+442; 89–160, 94+443; 90–260, 95+1122; 122–171, 142+145).

12. Judgment on findings as on special verdict—If special findings cover all the issues they may be treated as equivalent to a special verdict and judgment may be entered thereon even in the absence of a general verdict (9–356, 341; 27–262, 6+801; 30–209, 14+895; 36–3, 29+588; 38–260, 36+638; 40–375, 42+84; 40–397, 42+202; 45–441, 48+198; 74–480, 77+303. See 87–441, 92+406).

9305. Fellow servant, when named in verdict—In actions for damages resulting from the negligence of a fellow servant or coemployee of the person injured, if either party shall so request before the case is submitted to the jury, the court shall direct the jury, if they find for the plaintiff, to name or otherwise designate, in their verdict such fellow servant or coemployee. If the name be not disclosed by the evidence, he shall be described by the designation of his employment or by such other identification as the case will permit: Provided, that this section shall not apply to cases where the name or description is not so disclosed. (4179) [7809]

82–278, 86+328.

9306. Jury to assess recovery—When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a counterclaim for the recovery of money is established beyond the amount of the plaintiff's claim as established, the jury shall assess the amount of the recovery. (4180) [7810]

30–368, 15+670.

9307. Verdict in replevin—In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff and the jury find that he is entitled to its recovery, or if the property is not in the possession of the defendant, and by his answer he claims a return thereof, and the verdict is in his favor, the jury shall assess the value of the property and the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention, or taking and withholding, of such property. Whenever the verdict is in favor of the party having possession of the property its value shall not be found. (4181) [7811]

If the property is in the possession of the party in whose favor the verdict is given its value need not be assessed and this is true regardless of whether such party is the general or special owner (34–506, 26+733; 76–227, 79+99). Where the plaintiff has only a special interest in the property or lien thereon the alternative

value of the property is assessed, as against the general owner, only to the extent of such interest or lien (13–114, 105; 13–291, 269; 20–196, 175; 42–102, 43+835; 51–546, 53+871; 62–99, 64+81; 66–57, 68+514; 68–293, 71+384; 76–227, 79+99). If the plaintiff recovers the practice is to assess the value as of the time of the wrongful taking or of the commencement of the wrongful detention, as the case may be; and if the defendant recovers, to assess it as of the time when the property is replevied from him (13–501, 462; 24–37, 42; 35–388, 29+63; 50–101, 52+381).

9308. Receiving verdict—When the verdict is given, and is such as the court may receive, the clerk shall immediately record it in full in the minutes, and read it to the jury, and inquire of them whether it is their verdict. If any juror disagrees, the fact shall be entered in the minutes, and the jury again sent out; but if no disagreement is expressed, the verdict is complete, and the jury shall be discharged from the case. (4182) [7812]

20–139, 122; 24–362. Verdict not justified by law or evidence (108–165, 121+625). See 129–372, 152+765; 137–474, 163+527.

9309. Entries on receiving verdict—Reserving case—Stay—Upon receiving the verdict an entry shall be made in the minutes, specifying the time and place of trial, the names of the jurors and witnesses, the verdict, and any order of the court made in reference to the case. The court may reserve the case for argument and further consideration, or, in its discretion and upon the proper terms, may stay the entry of judgment and further proceedings under the verdict until the hearing and determination of a motion for a new trial, in arrest of judgment, for judgment notwithstanding the verdict, to set the verdict aside or to dismiss the action. (4183) [7813]

Reserving case (22–19; 31–106, 16+543). A notice of a motion for a new trial does not constitute per se a stay of proceedings, and does not prevent the entry of judgment. A stay for the purposes of a motion for a new trial is ordinarily granted as a matter of course (3–134, 80; 29–302, 13+129). Terms (55–144, 56+589; 69–532, 72+811). See 123–353, 143+975; 125–529, 147+273.

Findings of fact and conclusions of law should be stated separately. 161–266, 201+423.

The failure of plaintiff to adduce proof through a misapprehension of the effect of admissions should not result in judgment non obstante, but a new trial. 210+70.

9310. Trial by jury, how waived—In actions arising on contract, and by permission of the court in other actions, any party thereto may waive a jury trial in the manner following:

1. By failing to appear at the trial;
2. By written consent, by the party or his attorney, filed with the clerk;
3. By oral consent in open court, entered in the minutes. (4184) [7814]

The waiver of a jury when a cause is called for trial is a waiver only as to issues then formed (53–235, 55+117). A waiver on the first trial of an action in ejectment is not a waiver of a second trial under the statute (66–152, 68+972). The court may in its discretion in actions other than on contract disregard a waiver of a jury by the parties. A waiver not yet acted upon may be withdrawn with the consent of the court. A waiver agreed to with reference to the exigencies of a particular term will not be extended to a subsequent term (78–342, 81+14). In an action of a legal nature the parties may agree, the court consenting, that a part of the issues be tried by the court and a part by the jury (40–375, 42–84). The modes of waiving a jury prescribed by the statute are not exclusive. Waiver by conduct is not favored (19–132, 99; 78–342, 81+14; 85–118, 88+438). A party waives all right to a jury trial by consenting, on the call of the calendar, that the case be set down as a court case (45–215, 47+789); by proceeding to trial before the court without objection (7–414, 328; 21–398; 54–47, 55+827; 70–89, 72+817); by consenting to a reference (19–132, 99; 36–302, 30+813); by consenting that the jury be discharged and the case submitted to the court (66–300, 68+1093). A motion by each party that a verdict be directed in his favor cannot be construed as a waiver of the right to have the facts passed upon by the jury or as an agreement to submit them to the trial judge in case the motion is denied (94–309, 102+694. See 66–300, 68+1093; 85–118, 88+438). Bringing an action for rescission on the ground of fraud is not a waiver of the right to bring a separate action for damages and have them assessed by a jury (47–131, 49+688).

Where plaintiff's counsel on the call of the trial calendar acquiesces in a case being marked for the court calendar, and thereafter requests resetting of the case as a court case, and later consents to the case being set as the last case on the court calender, he waives a jury trial. 160–414, 200+481.

TRIAL BY THE COURT

9311. Decision, how and when made—When an issue of fact has been tried by the court, the decision shall be in writing, the facts found and the conclusions of law shall be separately stated, and judgment shall be entered accordingly. All questions of fact and law, and all motions and matters submitted to a judge for his decision, shall be disposed of and his decision filed with the clerk within five months after such submission, unless sickness or casualty shall prevent, or the time be extended by written consent of the parties. And no part of the salary of any judge shall be paid unless the voucher therefor be accompanied by a certificate of the judge that he has fully complied with the requirements of this section. (4185) [7815]

FINDINGS AND CONCLUSIONS

1. Definitions and distinctions—The findings of fact and conclusions of law together constitute the decision of the court (28–330, 9+876; 69–491, 72+694). They are not the judgment of the court (69–491, 72+694), but rather the authorization or basis of the judgment (33–348, 23+308; 69–491, 72+694. See 25–362). A memorandum attached to, but not expressly made part of, the order or decision, may be referred to when it furnishes a "controlling reason for the court's decision," but not to impeach or contradict express findings of fact, or conclusions necessarily following from the decision (97–135, 106+108).

Section applies to all issues of fact tried in the district court without a jury, and consequently in every such case, however arising, which is tried and disposed of on the merits, there must be a decision in writing, stating separately the findings of fact and conclusions of law. 156–422, 195+140.

Findings of fact. 157–102, 195+637.

Applies only to civil actions. 161–422, 201+933.

The failure to file findings made by a district judge until the day after he ceased to hold office did not affect the validity of the findings. 163–294, 204+38.

Findings should embrace only ultimate facts which relate to the issues to be tried, and should not intermingle evidentiary facts. 163–294, 204+438.

Under the provisions of testator's will and the issues and proofs, appellant was entitled to specific findings as to the income of the entire estate and the disbursements thereof up to the time of the death of testator's surviving widow; she being entitled to the income of the entire estate during her natural life. 166–315, 207+629.

2. Object of statute—3–311, 217; 68–454, 71+676; 195+140.

3. When findings necessary—Whenever the main issues of fact in an action are tried by the court findings of fact must be made (68–1, 70+776. See 74–371, 77+221). It is not alone issues made by the pleadings on which findings must be made. If the parties by consent or without objection litigate issues not made by the pleadings it is the duty of the court to make findings on such issues (28–238, 9+707; 38–479, 38+490; 40–31, 41+240; 40–176, 41+935; 44–451, 47+50; 46–10, 48+416; 46–369, 49+127; 50–438, 52+913; 51–162, 53+196), and to order judgment accordingly, granting as full measure of relief as if the issues had been made by the pleadings (61–346, 63+713). It is not necessary to make findings as to immaterial issues (3–45, 17; 4–32, 15); as to facts admitted by the pleadings (3–45, 17; 5–409, 332; 26–433, 4+1113; 74–1, 76+785); or when judgment is ordered on demurrer (5–409, 332); or as the basis of an interlocutory order (42–112, 43+794, 70–66, 72+816; 73–203, 75+1116; 84–144, 86+872; 86–1, 90+3; 88–105, 92+522). If the action is dismissed by the court for insufficiency of the evidence to warrant findings and judgment for the plaintiff findings are unnecessary (24–4; 47–546, 50+612). But a court has no right to dismiss an action without findings on the ground that the plaintiff has failed to establish a cause of action, except where the evidence adduced by the plaintiff would not have justified findings in his favor (58–233, 59+1009; 66–

72, 68+771; 78–475, 81+526; 80–139, 83+41; 90–497, 97+379; 95–127, 103+1017; 95–301, 104+242). Where the court expressly declines to pass on a question of fact involved, it is unnecessary after decision filed, to apply for amended findings covering the question (103–129, 114+651). See 148–367, 182+438.

4. Waiver of findings—68–1, 70+776.

5. Nature of facts to be found—The facts which the court must find and state separately are the ultimate, issuable facts—the facts put in issue by the pleadings or actually litigated as issuable facts by consent or without objection (2–134, 110; 31–325, 17+862; 36–276, 30+880; 46–467, 49+230; 68–1, 70+776; 93–485, 101+655). The findings should not contain evidentiary facts, argument, explanation, or comment of any kind (20–382, 334; 33–348, 23+308; 36–276, 30+880; 46–467, 49+230; 79–354, 82+649). The test is, would they be sufficient to authorize a judgment if presented in the form of a special verdict (36–276, 30+880). They must include all the facts essential to the judgment and on which it is based (4–32, 15; 45–290, 47+805; 46–338, 48+1109). They must be so full that the facts on which the judgment rests may be ascertained with clearness without resort to the evidence (45–290, 47+805). See 121–285, 141+186; 122–17, 141+789; 122–97, 142+1; 128–5, 150+216; 131–249, 154+1072; 132–144, 155+1038; 132–160, 156+268; 132–321, 156+348; 134–468, 158+787; 135–444, 161+165.

6. Sufficiency of particular findings—When in a pleading facts are specifically set forth, which, if established, would entitle a party to relief as a legal conclusion, a finding by the court of the truth of the allegations in the pleading is sufficient (30–433, 15+873; 31–77, 16+493; 47–27, 49+406; 52–51, 53+1023; 52–203, 53+1114; 68–454, 71+676; 93–411, 101+619). But a finding that the allegations of the complaint are true is insufficient if there are issues formed on new matter in the answer (55–334, 56+1117). Where the complaint does not state facts sufficient to constitute a cause of action a finding that the allegations of the complaint are true is not sufficient to support a judgment for the plaintiff (30–433, 15+873). A finding that all the "material" allegations of the complaint are true is insufficient (68–454, 71+676). A finding "that the allegations of fact in the complaint are not proved" is sufficient to sustain a judgment for the defendant (33–417, 23+858). A general finding that each and all of the allegations of the complaint are untrue is equivalent to a special finding as to each allegation that it is untrue (76–450, 79+531). A finding by the court that the allegations of the complaint are not established by the evidence is equivalent to a general finding that the facts are not as alleged (44–132, 46+236). A finding that there is no evidence as to a particular issue is a finding against the party having the affirmative of the issue (46–321, 48+1129). A finding that the party on whom the burden rests has not proved false representations negatives such representations (20–382, 334). Cited (110–501, 126+133; 127–502, 150+167).

7. Findings and conclusions must be stated separately—3–83, 41; 3–225, 154; 3–311, 217; 20–382, 334; 195+140.

8. Effect of finding a fact as a conclusion of law—49–111, 51+816; 54–6, 55+736; 59–468, 61+560; 81–64, 83+497; 84–254, 87+782.

9. Findings must be definite and specific—28–93, 9+585.

10. Findings must cover all the issues—46–308, 48+1122; 48–325, 51+218.

11. Findings must be within the issues—25–52; 46–369, 49+127; 51–48, 52+985; 55–235, 56+828; 58–385, 59+1038; 77–428, 80+364; 137–71, 162+1054.

12. Effect of finding only evidentiary facts—A judgment based on findings of evidence as distinguished from issuable facts cannot be sustained (33–348, 23+308; 34–426, 26+233; 39–11, 38+702; 89–147, 94+434). All the issuable facts must be found directly and not inferentially. It is insufficient to find the evidentiary facts from which the issuable facts might be inferred (28–93, 9+585; 33–348, 23+308; 43–389, 45+842; 46–338, 48+1109; 60–491, 62+1127).

13. Judgment must be justified by the findings—The findings are the sole authority for the judgment and constitute the basis on which it must rest. If the judgment is not justified by the findings the objection may be raised for the first time on appeal (28–93, 9+585; 30–433, 15+873; 33–348, 23+308; 34–426, 26+233; 39–11, 38+702; 43–389, 45+842; 44–159, 46+295; 45–290, 47+805; 79–486, 82+976; 89–147, 94+434). The supreme court cannot draw inferences of fact in order to sustain a judgment (53–398, 55+560). See 135–444, 161+165; 148–367, 182+438.

14. Construction of findings—40–489, 42+395; 46–467, 49+230; 74–1, 76+785; 80–462, 83+442; 81–388, 84+126; 84–109, 86+894; 88–38, 92+500; 92–167, 99+803; 195+140).

15. By whom made—Only the judge who tried the cause can make or amend findings. There is no exception in the case of death or termination of office (55–334, 56+1117; 73–58, 75+756). After an action was tried but before it was decided the county wherein it was tried was attached to a different judicial district. Held, that the judge who tried the action was authorized to render a decision (74–345, 77+214).

16. When findings become part of record—58–72, 59+828; 195+140.

17. Time within which findings must be filed—5–294, 232.

18. See in General—122–59, 141+1105; 122–295, 142+710; 122–448, 142+876; 122–510, 142+885; 123–231, 143+728; 125–322, 147+107; 126–445, 148+302; 129–181, 151+970; 129–380, 152+774; 129–460, 152+872; 130–450, 153+874; 130–530, 152+866; 131–17, 154+512; 134–276, 159+567; 137–5, 162+679.

9312. Proceedings on decision of issue of law—On the trial of an issue of law, the plaintiff, if the decision be in his favor, may proceed as in the case of the defendant's failure to answer after being personally served with the summons. If in such case the decision be in favor of the defendant, and the taking of an account or the proof of any fact is necessary to enable the court to complete the judgment, a reference may be ordered. (4186) [7816]

2–50, 37; 61–534, 63+1111; 126–370, 148+306.

9313. Court always open—Decisions out of term—The court shall always be open for the transaction of business, for the entries of judgments and orders, and for the hearing and determination of all matters brought before it, except the trial of issues of fact. When any matter is heard, a decision may be made out of term, and such decision may be an order or a direction that an order or judgment be entered, and upon filing the same with the clerk of the county where the action or proceeding is pending an order or judgment, as the case may require, shall be entered by him in conformity therewith. When an order or decision is filed, the clerk shall forthwith mail notice thereof to the attorneys of record in such case, but such notice shall not limit the time for taking an appeal or other proceeding on such order or decision (4187) [7817]

Court always open (11–271, 184; 53–232, 54+1118; 64–226, 66+969; 86–46, 90+126). Orders and directions for orders distinguished (12–437, 326; 25–362). Court commissioner (131–129, 154+748; 147–3, 179+370).

9314. Trial unfinished at end of term—When the trial of any action or proceeding, or of an indictment, is not concluded at the expiration of the term in which it was begun, it may be concluded; and all proceedings may be had in the case in the same manner and with like effect as if it had been concluded within such term. (4188) [7818]

9315. Trial in vacation by consent—With consent of parties the court may try and decide issues of law or fact in vacation, and thereupon judgment may be rendered at any time with the same effect as upon issues tried in term time. (4189) [7819]

TRIAL BY REFEREES

9316. Reference by consent—Fees when paid by the County—By consent of the parties to any civil action or proceeding, the court may appoint one or more referees, not exceeding three in number:

1. To try any or all of the issues therein, whether of law or of fact, except in an action for divorce, and to report judgment thereon;
2. To ascertain and report any fact involved therein;
3. To take and report the evidence therein.

Whenever, in such cases, the court shall state in the order of appointment that the reference is made necessary by press of business, the fees of the referee, as taxed and allowed by the court, shall be paid out of the County treasury, as the salaries of county officers are paid. (R. L. '05 § 4190, G. S. '13 § 7820, amended '21 c. 279, § 2)

Constitutional (5-78, 58; 19-132, 99). Consent to a reference must be explicit (19-132, 99).

9317. Compulsory reference, when—In like actions and proceedings the court may also direct a reference, without the consent of parties:

1. When the trial of an issue of fact, in a case of equitable nature, involves the examination of a long account on either side, in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved;

2. When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect;

3. When a question of fact, other than those raised by the pleadings, arises upon motion or otherwise in any stage of the case;

4. In a special proceeding of a civil nature, when it is necessary for the information of the court. (4191) [7821]

A compulsory reference in a legal action cannot be ordered simply because a long account is involved (19-132, 99; 35-380, 29+49); otherwise in an equitable action (35-380, 29+49; 61-43, 63+3). Under subd. 3 (81-346, 84+46).

9318. Selection of referees—Majority may act—If the parties do not agree upon the persons to be appointed, the selection shall be made by the court from the resident electors of the state. If two be appointed, they shall meet and act together; if three, all shall meet, but two may do any act which might be done by all. (4192) [7822]

9319. Trial and report—Powers—Effect of report—Trials by referee shall be conducted in the same manner and upon like notice as trials by the court. Referees shall have all the powers of the court to preserve order, amend the pleadings, grant adjournments, and enforce the attendance of witnesses. Their rulings and decisions may be reviewed in the same manner, and not otherwise, and they may settle a case or bill of exceptions, but they shall not entertain a motion for a new trial. The report of referees to try and determine the whole issue shall state the facts and conclusions of law separately, and stand as the decision of the court, upon which judgment may be entered in the same manner. If the reference be to report facts, the report shall have the effect of a special verdict. When the report is set aside or a new trial is granted, the case shall stand as though no reference had been ordered. (4193) [7823]

Where by order of reference the whole issues are referred the referee is substituted for the court. The trial is to be conducted in the same manner as a trial by the court and the referee's report stands as the decision of the court. He must make findings in the same manner as the court (20-382, 334; 50-470, 52+918; 86-177, 90+316). He must find on all the material issues (2-134, 110; 19-396, 342; 20-382, 334; 50-470, 52+918), but must not go beyond them (18-176, 163; 25-52; 50-470, 52+918). He need not find on immaterial issues or facts admitted by the pleadings (3-45, 17). He must follow a stipulation of the parties as to the facts (17-231, 207). He must state his findings of fact and conclusions of law separately (2-134, 110, 3-83, 41; 3-311, 217; 20-382, 334). He may dismiss an action on the trial for failure of proof or other cause in the same manner as the court (19-443, 384). His control over the order of proof is the same as that of the court and the rules of evidence and the rules governing the examination and cross-examination of witnesses are the same as on a trial before the court (12-502, 406). He may re-open a case for further evidence (5-201, 160). Where all the issues are submitted to him he must report a judgment, that is, he must specify in his conclusions of law the exact nature of the judgment to which the successful party is entitled and order its entry (8-265, 231; 22-92). He does not lose jurisdiction by the mere fact of filing his findings of fact and conclusions of law. He has authority to revise and amend his findings and conclusions to the same extent possessed by a trial court, until judgment has been entered or until he has been removed as such referee by the court (86-177, 90+316). Judgment may be entered by the clerk on the report of the referee as of course and without notice (12-60, 27; 16-38, 24). In entering judgment the clerk must follow the report with strictness (69-491, 72+694. See 12-60, 27). If the judgment entered by the clerk is not authorized by the report the proper remedy is an application to the court for a correction and not an appeal from the judgment (12-60, 27). See 151-336, 186+809.

Disbarment proceedings. 209+870.

GENERAL PROVISIONS

9320. Minors may be excluded, when—When a cause of a scandalous or obscene nature is to be tried, the court or referee may exclude from the courtroom all minors whose presence is not necessary as parties or witnesses. (4194) [7824]

9321. Dismissal for delay—That any district court may dismiss, upon its own or upon the motion of either party, after such notice as the court shall in each case prescribe, any and all actions or proceedings pending therein in which issue shall have been joined and which shall not be brought to trial within five (5) years from and after the commencement of each action or proceeding. ('19 c. 56 § 1)

Does not affect the inherent power of the district court to dismiss an action for plaintiff's failure to prosecute it with due diligence. 156-362, 194+777.

9322. Dismissal of action—An action may be dismissed, without a final determination of its merits, in the following cases:

1. By the plaintiff at any time before the trial begins, if a provisional remedy has not been allowed, or a counterclaim made or other affirmative relief demanded in the answer: Provided, that an action on the same cause of action against any defendant shall not be dismissed more than once without the written consent of the defendant or an order of the court on notice and cause shown;

2. By either party, with the written consent of the other, or by the court upon the application of either party after notice to the other and sufficient cause shown, at any time before trial;

3. By the court where, upon the trial and before the final submission of the case, the plaintiff abandons it, or fails to substantiate or establish his cause of action or right to recover;

4. By the court when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal;

5. By the court on the application of some of the defendants, when there are others whom the plaintiff fails to prosecute with diligence.

All other modes of dismissing an action are abolished. The dismissal mentioned in the first two subdivisions is made by an entry in the clerk's register and notice to the adverse party. In all cases other than those mentioned in this section, the judgment shall be rendered on the merits. (4195) [7825]

½. In general.

166-422, 195+140, note under § 9311; 165-482, 205+888; 166-507, 203+408.

Upon an uncontradicted affidavit as to the existence of a foreign statute, the court was justified in dismissing the action, although by virtue of an unverified reply the existence of the statute was in issue in the case. 212+3.

Cited (104-84, 116+205; 116-40, 133+67. See 106-353, 119+57, cited under § 7497).

1. Dismissal by plaintiff before trial—At any time before trial the plaintiff may dismiss his action, at least once, if a provisional remedy has not been allowed or counterclaim made or affirmative relief demanded in the answer (1-179, 153; 37-485, 35+273; 40-132, 41+156). He may do so upon an appeal from a justice court (1-179, 153), and after a new trial is granted (37-485, 35+273). He may dismiss his action without the consent of his attorney (86-480, 91+12; 111-183, 126+731). The phrase "before the trial" means before the commencement of the trial and not before the final submission

of the case to the court or jury (31–329, 17+863. See 2–50, 37). When a cause has been called for trial in its order, and a jury has been called to try the cause, the trial has begun, even though the jury has not been sworn (23–186). Merely calling a cause for trial is not the commencement of a trial (see 25–534; 44–400, 46+850). To constitute affirmative relief the answer must be in the nature of a cross-action. Relief which is simply conditioned on recovery by plaintiff is not affirmative (40–132, 41+156. See 54–157, 55+928). A demand for affirmative relief without allegations of facts authorizing it is not enough to defeat the right to a dismissal (36–312, 30+814). Where defendant pleads a counterclaim plaintiff cannot dismiss as of right (22–92). In an action of claim and delivery where the property is taken by plaintiff and returned to defendant on a proper bond a provisional remedy has been allowed (18–82, 65). The rule is otherwise if the property is not taken by plaintiff (14–491, 368). Where in an action to recover personal property defendant obtained an order of interpleader and the appointment of a receiver to take possession of the property the question whether plaintiff could dismiss of right was raised but not determined *(31–276, 17+617). Plaintiff cannot dismiss as of right* after demurrer and the due submission by both parties of the issues presented thereby to the court (89–297, 94+887). The entry of dismissal may be made either by the clerk at the request of the plaintiff or by the attorney of the plaintiff (14–491, 368; 45–102, 47+462). It is not necessary that there should be an entry of judgment or payment of costs (14–491, 368; 37–368, 34+896; 45–102, 47+462; 48–18, 50+1018). An entry in the clerk's register signed by the plaintiff's attorney that, "The above action is hereby dismissed" is sufficient (45–102, 47+462). The proviso in the statute against more than one dismissal as of right is merely prohibitory and a dismissal forbidden thereby does not in itself operate as a determination of the action on the merits (52–127, 53+1068). Where defendant has obtained a decision or verdict on the merits, plaintiff cannot, as matter of right, after obtaining an order granting a new trial, dismiss to the prejudice of defendant's right to review the order on appeal (104–517, 116+107). See 123–532, 144+137.

2. Dismissal by court before trial—2–50, 37; 6–572, 406; 44–400, 46+850; 149–221, 183+145.

3. Dismissal by consent before trial—*14–333, 256*; 17–48, 31; 20–408, 360; 22–1; 30–156, 14+794; 39–398, 40+267; 41–477, 43+329; 51–153, 53+199.

4. Voluntary nonsuit—The right of a plaintiff to take a voluntary nonsuit or in the language of the statute to "abandon" his action is not well defined by the decisions (see 30–501, 16+401). It is settled that if the plaintiff asks the court to be permitted to take a dismissal it is discretionary with the court to grant or deny the application (48–1, 50+828; 81–279, 83+1089. See 51–15, 52+977; 57–338, 59+346). See 124–496, 145+380; 126–15, 147+670; 126–108, 147+822; 127–443, 149+667; 133–435, 158+711; 152–419, 183+1014.

5. Dismissal for failure to prove cause of action—The statutory dismissal for failure of proof is the same as a common law nonsuit (88–349, 93+117). The practice of ordering a nonsuit for this cause is the same whether the cause is being tried by court, referee or jury (19–443, 384; 22–287; 24–434; 26–384, 4+620; 31–414, 18+143; 47–546, 50+612; 58–233, 59+1009). The right is properly regarded as a corollary of the right to grant a new trial. If it is perfectly obvious that the court cannot permit a verdict for the plaintiff to stand there is no good reason for giving the jury an opportunity to find such a verdict. Hence the right to take the case from the jury and dispose of it summarily by a dismissal (see 42–5, 43+483). The right to order a dismissal involves the duty to do so. A motion for a dismissal is not addressed to the discretion of the court (62–455, 64+1140. See 61–499, 63+1034). It is the duty of the court to order a dismissal: (1) When the evidence discloses some fact which, as a matter of law, defeats plaintiff's right to recover (46–5, 48+406; 50–320, 52+642; 62–128, 64+143; 89–77, 93+901); (2) when plaintiff fails to produce any evidence of some fact essential to his cause of action (19–443, 384; 24–434; 26–384, 4+620); (3) when plaintiff fails to prove any or all the essential facts of his cause of action by evidence which could reasonably satisfy the jury and it would consequently be the obvious duty of the court to set aside a verdict in his favor as not justified by the evidence (18–316, 285; 19–443, 384; 26–384, 4+620; 30–482, 16+266); (4) when the evidence in favor of defendant so manifestly preponderates that it would be the obvious duty *of the court to set aside a verdict for plaintiff as not* justified by the evidence (see 18–316, 285; 38–394, 38+100); (5) when there is a fatal variance (22–449; 59–329, 61+328; 60–346, 62+391). But the relief sought is no part of the cause of action and does not determine its character. If plaintiff makes out a cause of action, either legal or equitable, within the allegations of his complaint, he cannot be nonsuited (30–316, 15+254; 31–239, 17+385). If there is some evidence tending to prove all the essential facts of a cause of action and on all the evidence adduced the court or jury might reasonably find either for plaintiff or defendant it is error to dismiss the case when plaintiff rests (34–397, 26+8; 35–84, 27+305; 39–254, 39+488; 56–460, 57+1132; 58–233, 59+1009; 60–336, 62+392; 66–72, 68+771; 78–475, 81+526; 80–139, 83+41; 90–43, 95+578; 90–497, 97+379; 95–127, 103+1017). The mere fact that there is a preponderance of evidence in favor of defendant does not authorize a dismissal (38–394, 38+100). When plaintiff has established a cause of action for nominal damages it is error to dismiss where the recovery of nominal damages would carry costs (36–122, 30+438; 37–537, 35+379; 43–459, 45+866. See 65–540, 68+181). Effect of evidence on motion (23–34; 26–384, 4+620; 56–460, 57+1132; 62–455, 64+1140). When there is a counterclaim pleaded (33–438, 23+862). Admitting additional evidence to defeat motion discretionary (8–286, 252; 8–381, 338; 62–60, 64+95). When motion may be made (26–384, 4+620; 36–106, 30+402; 38–394, 38+100). When there are several parties (31–268, 17+387; 50–21, 52+390; 56–8, 57+160; 61–299, 63+723). When all the issues are not submitted to a jury (31–414, 18+143). Motion by intervener (84–200, 87+611). Error in denying motion cured by evidence subsequently introduced (16–182, 161; 22–287; *27–303, 7+268; 32–185, 20+91; 62–310, 64+903; 66–483, 69+*619; 70–102, 72+841). Action cannot be dismissed by court without verdict or findings of fact, unless evidence would not sustain verdict or findings for plaintiff (106–510, 119+244). See 135–471, 160+1032; 145–276, 177+131, 152–557, 188+735, 195+140.

6. Dismissal for failure of plaintiff to appear—44–448, 47+52; 67–111, 69+700.

7. Other modes of dismissal abolished—20–408, 360; 52–127, 53+1068.

8. Effect of dismissal—A dismissal extinguishes action (105–106, 117+244; 128–50, 150+397).

9. See in general—Vacating judgment of dismissal (122–335, 142+818; 123–17, 142+930; 124–421, 145+173; 127–421, 149+737; 128–66, 150+222; 134–464, 157+327).

10. Dismissal against codefendant.

Appellant cannot question the dismissal of the action as against its codefendant in whose favor a verdict had been returned and against whom appellant had asserted no claim. 158–136, 196+929.

11. Stipulation of parties.

The rule that, upon satisfying a judgment for the conversion of chattels, the title vests in the defendant, is without application where, in an action brought against him, the owner of chattels sets up a counterclaim for damages for plaintiff's alleged conversion of the property, and plaintiff denies the conversion, and the parties stipulate for a dismissal of their respective causes of action with prejudice and, pursuant to the stipulation, judgment of dismissal is entered. 161–135, 202+71.

12. Counterclaims.

It was error to dismiss the counterclaim without making findings upon the issues presented. 162–328, 202+734.

13. Divorce cases.

Either party to a divorce proceeding, who asks for an absolute divorce, may withdraw the demand any time before the decree is granted. After such withdrawal, the court has no authority to grant a divorce to such party. 164–102, 204+915.

14. Upon the trial and before final submission.

209+907.

If the evidence when both parties rested justified findings for plaintiff, no reversible error can be asserted upon the court's refusal to dismiss when plaintiff rested. 164–105, 204+550.

The error, if any, in denying a motion to dismiss made when plaintiff rests is cured where the evidence at the end of the trial, taken as whole, is sufficient to sustain findings for plaintiff. 211+673.

9323. Offer of judgment—Costs—At least ten days before the term at which any civil action shall stand for trial the defendant may serve on the adverse party an offer to allow judgment to be taken against him for the sum, or property, or to the effect therein specified, with costs then accrued. If within ten days thereafter such party shall give notice that the offer is accepted, he may file the same, with proof of such *notice, and thereupon the clerk shall enter judgment* accordingly. Otherwise the offer shall be deemed withdrawn, and evidence thereof shall not be given; and if a more favorable judgment be not recovered no costs shall be allowed, but those of the defendant shall be taxed in his favor. (4196) [7826]

12–186, 114; 23–61; 23–71; 38–26, 35+665; 51–341, 53+644; 78–520, 81+520; 84–267, 87+846; 135–346, 160+866.

9324. Tender of money in lieu of judgment—If the action be for the recovery of damages for a tort, instead of the offer of judgment provided for in § 9323, the defendant may tender a sum of money as damages or compensation, together with costs then accrued. If such tender be not accepted, the plaintiff shall have no costs unless he recover more than the sum tendered; and the defendant's costs shall be deducted from the recovery, or, if they exceed the recovery, he shall have judgment for the excess. The fact of such tender having been made shall not be pleaded or given in evidence. (4197) [7827]

NEW TRIALS

9325. Grounds—Presumption on appeal—A verdict, decision, or report may be vacated, and a new trial granted, on motion of an aggrieved party, for any of the following causes materially affecting his rights:

1. Irregularity in the proceedings of the court, referee, jury, or prevailing party, or any order or abuse of discretion, whereby the moving party was deprived of a fair trial;
2. Misconduct of the jury or prevailing party;
3. Accident or surprise which could not have been prevented by ordinary prudence;
4. Material evidence, newly discovered, which with reasonable diligence could not have been found and produced at the trial;
5. Excessive or insufficient damages, appearing to have been given under the influence of passion or prejudice;
6. Errors of law occurring at the trial, and either excepted to at the time, or clearly assigned in the notice of motion;
7. That the verdict, decision, or report is not justified by the evidence, or is contrary to law; but, unless it be so expressly stated in the order granting a new trial, it shall not be presumed, on appeal, to have been made on the ground that the verdict, decision, or report was not justified by the evidence. (4198) [7828]

THE STATUTE GENERALLY

See also notes under § 9285.

½. In general.
165–349, 206+457.

Where an appeal from an order establishing a cartway, is dismissed, there being no determination of the merits of the controversey, there is no basis for a motion for a new trial, and when such motion is made, no appeal lies from the order denying it. Dodge v. Bell, 37 Minn. 382, 34 N. W. 739, followed and applied. 155–456, 194+379.

An order of the court granting a new trial leaves the case as if no trial had ever been had; and upon an appeal from an order denying a new trial after a second trial, none of the proceedings at the first trial are before the court for review. 156–450, 195+488.

An order of the trial court denying a motion for new trial on the ground of irregularity in the proceedings of the court and accident and surprise, held not an abuse of discretion. 156–450, 195+488.

Where a party has tried his case on one theory of the law and consented to its submission to the jury on that theory, he cannot afterwards claim a new trial, at least as a matter of right, on the ground that such theory was erroneous. 158–31, 196+814.

A specification of error in the notice of a motion for judgment or a new trial is waived if not renewed on appeal, unless it involved jurisdiction over the subject-matter of the litigation. 158–62, 196+811.

The issues as to the warranty and a breach of it having been settled in favor of defendant by the jury, the new trial will concern only the amount of defendant's damage; the issue alone not having been properly submitted to the jury. 158–309, 197+265

The reception of plaintiff's Exhibit A in evidence, as part of the cross-examination of the witness Fitzgerald, was prejudicial error for which a new trial should be had. 158–384, 197+747.

Record examined, and found not to disclose any reversible error either in the rulings as to the admissibility or rejection of evidence, or in the charge. 160–6, 199+886.

When the findings are not sufficiently definite and specific to satisfy a party, he should move for an amendment of them rather than for a new trial. 160–264, 199+817.

Characterizing the testimony of a witness as "clear and intelligible" does not transgress the rule prohibiting trial courts from singling out a particular witness and charging as to his credibility. 161–135, 201+537.

The court was within its discretion in confining the new trial to the single issue of damages. 162–436, 203+218.

The fact that a local newspaper published an article at time of trial concerning the case is not sufficient reason for new trial, when the opposing party and his counsel are free from blame and no prejudice is shown. 163–280, 203+985.

Under the record as it stands in this case, a new trial should be granted on account of the omissions in the proofs and findings. 163–422, 204+575.

The evidence showed that the grantee had been damaged by the fraud, but the amount was not definitely established. On a new trial both parties should be permitted to offer evidence on the question of damages. 164–367, 205+262.

Admission of evidence. 165–417, 206+725.

Certain remarks made by counsel for the plaintiff in his argument to the jury, and the statement of the court relative thereto, were not such as to require a new trial upon the ground of misconduct of counsel, or as an incorrect statement of the evidence by the court. 166–45, 207+178.

Where a motion for a new trial is based upon a failure of the evidence to sustain the verdict and such failure is claimed to be due to the absence of proof of an essential fact to establish liability, the application is not addressed to the discretionary power of the court, but rests upon legal principles and involves exclusively a question of law. 167–168, 208+641.

In the absence of a request for a ruling, a mere objection to remarks of counsel to jury in the argument does not present their effect for review upon appeal. 210+55.

Where a motion for a new trial is made on specific grounds, not including the claim that the conclusions of law are not sustained by the findings of fact, such claim cannot be raised on an appeal from the order denying the motion. Holmstrom v. Barstad, 147 Minn. 172, 179 N. W. 737, followed. 210+392.

There was no error in denying a new trial to enable the insurer to try the case on a different theory. 212+451.

1. New trial defined—37–382, 34+739; 60–212, 62+272.

2. A regulation not a grant of power—12–388, 269; 57–443, 59+534; 66–217, 68+973; 78–135, 80+868; 81–333, 84+113; 94–421, 103+502.

3. Court may grant on its own motion—78–135, 80+868.

4. Applicable to both legal and equitable actions—25–234, 244; 26–391, 4+685; 28–251, 9+756; 28–330, 9+876.

5. Motion a matter of right—25–558; 76–391, 79+397; 84–314, 87+919; 134–292, 157+499; 159+623.

6. After trial by court—When an action is tried by the court without a jury a party may move for a new trial and from the order made on his motion appeal to the supreme court (27–143, 6+773; 28–330, 9+876). But this is not necessary in order to question on appeal the sufficiency of the evidence to justify the findings (24–75; 27–143, 6+773; 31–495, 18+450; 34–416, 26+237; 35–408, 29+121). See 123–435, 143+1124.

7. After trial by referee—The district court has power to grant a new trial when the action is tried by a referee (12–502, 406; 25–52; 44–304, 46+354; 69–245, 72+78). But a motion for a new trial is not necessary in order to question on appeal the sufficiency of the evidence to justify the findings (8–226, 195; 11–341, 241).

8. Of less than all the issues—23–563; 32–445, 21+472; 43–527, 46+75; 44–278, 46+364; 45–441, 48+198; 56–364, 57+935; 83–505, 86+465; 122–463, 148+117; 126–275, 148+117; 131–389, 155+391; 133–192, 158+46.

9. Granted only for material error—The statute provides that a new trial may be granted for error "materially affecting" the rights of the aggrieved party (20–139, 122). A new trial will not be granted for a failure to assess merely nominal damages where no question of permanent right is involved (31–421, 18+145, 821; 37–537, 35+379; 59–452, 61+557; 64–511, 67+631; 65–540, 68+181). A new trial will not be granted even where there is error if from the whole case it is apparent that the result will not be changed (16–20, 8; 18–96, 79; 20–260, 234; 20–419, 374; 21–99; 31–401, 18+105; 39–485, 40+613; 69–165, 72+55). It will not be granted

simply to enable a party to litigate a question not raised by the pleadings (36–164, 30+549). The law does not concern itself with trifles and if the verdict is only a trifle more or less than it ought to have been a new trial will not be granted (35–300, 28+510; 47–344, 50+243; 58–505, 60+342; 59–240, 61+23; 68–531, 71+705; 71–230, 73+959, 74+891). Technical defects ought to be disregarded after verdict (1–347, 257; 4–119, 78). It will not be granted where record affirmatively shows error did not result in prejudice (100–178, 110+969; 103–176, 114+750, 115+636). Rule that admission of incompetent evidence is not ground for new trial, where fact which such evidence tends to prove is shown by other competent evidence, applies only where the other evidence conclusively establishes fact (98–414, 108+301; 100–178, 110+969). Failure or inability of reporter to furnish transcript of evidence no ground for new trial (106–339, 119+50). Waiver of error (100–98, 110+346). Motion for new trial as remedy for defendant unable to be present at trial (115–439, 132+915; 123–325, 143+787).

FOR IRREGULARITY OR ABUSE OF DISCRETION

9½. In general.
Remarks of the court held so prejudicial to appellant that a new trial should be had. 156–407, 195+39.

There was no misconduct of counsel of the prevailing party that calls for just criticism. 166–424, 195+141.

The incompetency of a juror does not entitle the defeated party to a new trial as a matter of right. State v. Durnam, 73 Minn. 150, 75 N. W. 1127, 157–374, 196+483.

10. Construction of subd. 1—19–132, 99; 27–415, 6+795, 8+148; 35–379, 28+927; 36–106, 30+402; 43–239, 45+228; 57–443, 59+534; 64–61, 66+132; 64–394, 67+216; 94–461, 103+334; 122–301, 142+812; 122–343, 142+816; 125–291, 146+1104; 125–529, 147+273; 129–14, 151+408; 194+617; 195+41; 136–155, 161+400.

11. Improper remarks of court—7–421, 336; 17–188, 162; 21–187; 22–351; 36–114, 30+404; 47–414, 50+471; 51–558, 53+874; 61–467, 63+1096; 62–402, 64+1136; 62–474, 65+63; 70–453, 73+253; 74–381, 77+293; 84–357, 87+935; 87–388, 92+230; 88–175, 92+965; 88–262, 92+976; 91–346, 98+96; 95–240, 103+1025; 122–302, 142+812; 122–343, 142+816.

12. Other misconduct—3–262, 181; 6–235, 155; 31–504, 18+449; 46–212, 48+909; 122–344, 142+816.

FOR MISCONDUCT OF THE JURY

12½. In general.
164–446, 205+371; 167–84, 208+546.

The attack upon the verdict as being of the quotient variety fails because there is no showing that, in advance of the computation made by the jurors to ascertain the average of sums suggested one by each of them, there was an agreement to be bound by the result. 163–218, 203+958.

A claim of misconduct on the part of one of the jurors, who conversed with one of the attorneys during the progress of the trial, is without foundation. 166–7, 206+934.

The record fails to show misconduct of a juror. 210+55.

13. Discretionary—23–178; 87–40, 91+1; 124–261, 144+750; 142–102, 170+919.

14. Motion disfavored—4–438, 340; 20–139, 122; 23–325; 80–177, 83+135.

15. Necessity of objection on the trial—29–357, 13+153; 41–223, 43+2; 57–307, 59+199; 61–467, 63+1096; 87–40, 91+1.

16. Presumption of prejudice—Burden of proof—23–325; 29–5, 11+112; 52–329, 54+187; 68–14, 70+795; 70–5, 72+733; 80–177, 83+135; 87–40, 91+1; 103–204, 114+654, 837.

17. Affidavits on motion—The affidavits of jurors as to what transpired in the juryroom cannot be received to impeach their verdict (1–156, 131; 13–386, 358; 16–282, 249; 17–241, 218; 26–183, 2+494, 683; 26–505, 5+680; 27–108, 6+456; 45–177, 47+720; 47–295, 50+199; 52–164, 53+1072; 68–14, 70+795; 68–434, 71+616; 70–5, 72+733; 73–150, 162, 75+1127). Affidavits of jurors are inadmissible to show misconduct in the officer having them in charge (13–386, 358; 47–295, 50+199). But the affidavit of such officer may be received to show misconduct in the jury (26–505, 5+680). Affidavits of jurors as to what transpired in the jury-room or to occurrences outside the jury-room during the course of trial may be received to support their verdict (1–156, 131; 20–378, 330; 45–177, 47+720; 52–164, 53+1072; 68–14, 70+795). Affidavits of jurors respecting matters occurring outside the jury-room during the progress of the trial are admissible to impeach their verdict (70–5, 72+733; 80–177, 83+135; 83–422, 86+417). Affidavits of persons other than jurors are admissible to impeach the verdict provided they relate to acts of the jury showing misconduct (26–505, 5+680; 68–14, 70+795). They are inadmissible, however, if they relate to statements of jurors (1–156, 131; 52–164, 53+1072; 68–14, 70+795); except for purposes of impeachment (52–164, 53+1072). See 126–180, 148+51; 134–13, 159+1070.

18. Separation of the jury—3–427, 313; 3–444, 329; 6–82, 32; 13–370, 343; 16–178, 157; 23–291; 41–104, 42+786; 59–514, 61+677; 73–150, 162, 75+1127; 87–40, 91+1; 91–143, 97+652; 124–515, 145+385; 125–399, 147+430.

19. Drinking intoxicating liquors—16–178, 157; 43–196, 45+152; 57–425, 59+490; 87–40, 91+1; 88–175, 92+965; 130–206, 153+526.

20. Visiting locus in quo—19–271, 230; 23–325; 52–164, 53+1072; 52–329, 54+187; 70–5, 72+733; 80–177, 83+135; 83–422, 86+417; 88–490, 93+899; 126–48, 147+716; 126–168, 148+61.

21. Unauthorized communications with jury—3–262, 181; 22–5; 22–305; 29–5, 11+112; 31–504, 18+449; 45–177, 47+720; 61–467, 63+1096.

22. Other misconduct—1–156, 131; 4–438, 340; 6–82, 32; 12–434, 319; 20–378, 330; 26–505, 5+680; 27–108, 6+456; 41–223, 43+2; 42–350, 44+123; 57–307, 59+199; 90–7, 95+578; 102–81, 112+875, 1081; 102–346, 113+690. Where prevailing party attempts to corrupt or improperly influence a juror, new trial should be granted, without reference to whether attempt was successful (103–204, 114+654; 837). See 121–326, 141+300; 124–260, 144+950.

FOR MISCONDUCT OF COUNSEL

22½. In general.
Alleged misconduct of counsel for defendant was not sufficient to warrant a new trial. 155–489, 194+5.

Where it appears that a seemingly excessive verdict probably was contributed to by misconduct of the prevailing party, this court will order a new trial in the interest of orderly administration of justice. 157–83, 195+794.

There was no prejudicial misconduct on the part of plaintiff's attorney. 158–136, 196+929.

An improper statement of counsel in his argument to the jury does not require a new trial unless it results in or excites prejudice. 159–370, 199+108.

The qualified members of the court are equally divided as to whether the improper remarks of plaintiff's counsel in his argument to the jury constituted such misconduct that a new trial should be granted, and therefore the decision of the trial court stands. 159–410, 199+87.

There was no misconduct of counsel calling for a new trial. 161–304, 201+551.

There was no abuse of judicial discretion in refusing to grant a new trial on the ground of the alleged misconduct of counsel for the prevailing party. 162–359, 203+50.

Whether a new trial should be granted on account of improper remarks in the argument to the jury rests largely in the discretion of the trial court. 165–241, 206+393.

The record fails to support an assignment of error of misconduct of counsel in his argument to the jury. 167–263, 209+4.

Misconduct of counsel as disclosed in the opinion is not sufficient to justify granting a new trial. 167–369, 209+33.

Record held insufficient to support the claim that plaintiff's counsel had improperly disclosed to the jury the existence of liability insurance being carried by defendant. 210+396.

There was no misconduct of counsel in asking a certain question of prospective jurors, nor in ascertaining from defendant that it was without insurance on the automobile that caused the injuries for which a recovery was sought. 210+997.

Argument of counsel to jury held not to constitute misconduct requiring a new trial. 211+309.

Upon the record made, the defendants cannot take advantage of the misconduct of plaintiff's counsel in asking a question designed to inform the jury that one of the defendants was protected by insurance. 212+180.

The court did not err in denying the defendants' motion for a new trial upon the ground of the misconduct or fraud of one of their counsel. 212+203.

Statement to jurors that defendant was insured not reversible error. 213+372.

23. Improper remarks on the trial—1–156, 131; 8–140, 110; 12–538, 448; 23–197; 31–193, 17+279; 31–526, 18+651; 36–334, 31+176; 37–519, 35+438; 39–277, 39+796; 42–46, 43+904; 42–407, 44+306; 43–196, 45+152; 43–265, 45+432; 49–457, 52+213; 51–558, 53+874; 61–224, 63+627; 61–467, 63+1096; 71–425, 74+171; 81–42, 83+492; 81–380, 84+119; 87–432, 92+334; 91–143, 97+652; 92–347, 99+1132; 94–496, 103+497; 95–367, 104+233; 96–469, 105+494; 103–400, 115+202. Motion is addressed to discretion of court (103–345, 114+948; 103–530, 115+1135). Assignments of error as to misconduct are not well taken, where no exceptions were taken, nor attention of court called thereto, nor ruling invoked (99–400, 109+832. See 123–177, 143+322; 127–15, 148+476; 128–245, 150+804; 130–80, 153+269; 130–230, 153+532; 133–192, 158+46).

24. Other misconduct—31–193, 17+279; 61–224, 63+627; 81–112, 83+503.

FOR ACCIDENT OR SURPRISE

The failure of plaintiff to adduce proof through a misapprehension of the effect of admissions should not result in judgment non obstante, but a new trial. 210+70.

We find no merit in the contention that appellant is entitled to a new trial on account of surprise occurring a tthe trial. 166-29, 206+950.

25. Discretionary—64-402, 67+218; 106-545, 119+217. Cited (104-198, 116+739; 121-455, 141+803).

26. Necessity of objection on the trial—17-172, 142; 25-100; 30-150, 14+578; 32-7, 19+83; 32-45, 19+86; 34-440, 26+236; 37-283, 34+33; 41-285, 43+5; 53-404, 55+622; 54-90, *55+821; 59-364, 61+135; 61-464, 63+1027;* 68-434, 71+616; 80-430, 83+382; 81-279, 83+1089; 84-221, 87+605.

27. Affidavits on motion—4-515, 402; 17-172, 145; 27-357, 7+688; 34-440, 26+236; 41-285, 43+5; 51-324, 53+545; 57-425, 59+490; 62-528, 64+1132.

28. Motion granted—7-480, 386; 25-100; 32-7, 19+83; 32-45, 19+86; 55-262, 56+896; 84-221, 87+605; 100-127, 110+370.

29. Motion denied—4-515, 42; 2-37; 7-421, 336; 17-172, 145; 19-394, 340; 23-463; 27-357, 7+688; 28-251, 9+756; 34-440, 26+236; 36-336, 31+214; 39-61, 38+777; 50-523, 52+926; 51-324, 53+545; 54-90, 55+821; 57-425, 59+490; 58-126, 59+959; 59-364, 61+135; 61-464, 63+1027; 62-528, 64+1132; 64-402, 67+218; 65-60, 67+808; 68-106, 70+872; 68-434, 71+616; 73-150, 75+1127; 76-90, 78+965; 79-279, 82+587; 80-430, 83+382; 89-426, 94+1093; 88-269, 92+978; 89-212, 94+723; *92-255, 99+809; 92-365, 100+1125; 98-265, 107+815; 101-85,* 111+958; 121-455, 141+803; 134-292, 157+499, 159+623; 134-469, 158+787; 134-481, 159+1095.

FOR NEWLY DISCOVERED EVIDENCE

30. To be granted with extreme caution—28-526, 11+94; 35-465, 29+69; 36-323, 31+513; 54-90, 55+821. Discretionary (97-361, 107+392; 103-41, 114+261; 103-110, 114+647; 105-229, 117+421; 105-393, 117+465); 130-304, 153+613; 130-469, 153+867; 131-3, 154+441; 135-375, 165+130.

31. Necessity of applying for continuance—37-283, 34+33; 41-285, 43+5; 53-404, 55+622.

32. Showing on motion—64-220, 66+966; 67-48, 69+624; 76-326, 79+171; 77-512, 80+629; 88-269, 92+978; 101-476, 112+627; 129-460, 152+872.

33. Affidavits of new witnesses—*6-513, 357; 7-225, 166,* 88-269, 92+978.

34. Counter affidavits—16-355, 315; 30-22, 14+64.

35. Nature of new evidence—Newly discovered evidence is not a ground for a new trial if it could have been discovered before trial by the exercise of due diligence (18-300, 272); or if it is merely contradictory or impeaching (35-465, 29+69; 36-323, 31+513. See 96-274, 104+969); or if it is merely cumulative (8-140, 110; 91-143, 97+652. See 96-274, 104+969); or if it is not so material as to make probable a different result on a new trial (28-526, 11+94; 91-143, 97+652). Not ordinarily be granted to enable party to avail himself of impeaching evidence (99-299, 109+241). See 121-445, 141+795; 122-510, 142+885; 123-319, 143+793; 125-343, 147+111; 125-401, 147+279; 132-114, 155+1074; 133-156, 157+1073; 134-469, 158+787; 135-292, 160+793; 135-9, 159+1075; 136-257, 161+515.

163-476, 204+326; 167-523, 209+313.

No sufficient showing was made to warrant a new trial on the ground of newly discovered evidence. 155-487, 194+19.

A new trial properly refused when the new evidence urged as a ground therefor is equivocal in nature, and not of sufficient probative force to affect the result. 155-307, 194+637.

Discretion of court. 156-501, 194+627.

The court did not err in denying the defendant's motion for a new trial upon the ground of newly discovered evidence.

Quinn, J., dissenting. 157-338, 196+470.

In passing on the question whether newly discovered evidence entitled defendant to a new trial, the court should consider whether such evidence would be likely to change the result on another trial. Here the court might well conclude that it would not, and, furthermore, the alleged newly discovered evidence was merely cumulative and corroborative of what defendant presented at the trial, and the court did not abuse judicial discretion in denying a new trial on the ground urged. 157-362, 196+478.

There was no error in denying a new trial asked upon the ground of newly discovered evidence. 158-122, 197+296

The motion for a new trial on the ground of newly discovered evidence was properly denied. 158-122, 196+936.

Under the facts, there was no abuse of discretion in denying a motion for new trial on the ground of newly discovered evidence. 158-334, 197+738.

Rules adopted in former decisions as to granting new trials on the ground of newly discovered evidence, considered and applied notwithstanding the affidavits filed in support of the motion. 159-292, 198+815.

The motion for a new trial on the ground of newly discovered evidence was correctly denied, as the writing alleged to have been newly discovered was in the possession of the party at the time of the trial. 159-464, 199+110.

The refusal to grant a new trial on account of newly discovered evidence was, under the showing, within the discretion of the trial court. 160-49, 199+889.

Defendant was not entitled to a new trial on the ground of newly discovered evidence. 160-317, 200+295.

A new trial should have been granted upon the ground of newly discovered evidence. 160-463, 200+742.

Whether a new trial should be granted upon the ground of newly discovered evidence was for the trial court. 161-26, 200+746.

The newly discovered evidence urged as ground for a new trial was corroborative and cumulative. There was no abuse of discretion in denying a new trial. 161-28, 200+746.

There was no error in denying a new trial upon the ground of newly discovered evidence. 161-96, 200+933.

The denial of a new trial upon the ground of newly discovered evidence is within the discretion of the trial court, where the new evidence would be furnished by witnesses who testified at the first trial, and who now, by their affidavits, show that their testimony then was perjured, or that they are now tendering perjured evidence for use at a second trial. 162-9, 201+913.

No abuse of discretion occurred in denying a new trial on the ground of newly discovered evidence. 162-447, 203+216.

There was no abuse of discretion in denying a new trial upon the ground of newly discovered evidence; the claim of the plaintiff being that an officer of bank was a subagent of the defendant, and therefore the defendant was charged with such knowledge as its subagent had as to the doings of the misappropriating officer. 163-333, 204+33.

There was no abuse of discretion in denying a new trial on the ground of newly discovered evidence. 164-105, 204+550.

The trial court did not abuse its discretion in refusing a new trial upon the ground of newly discovered evidence. 165-67, 205+628.

Diligence. 165-293, 206+434.

Under the circumstances stated in the opinion, it is held not an abuse of discretion to deny a new trial, notwithstanding some of the new evidence, if believed, would result in an acquittal; one of the grounds for such holding being that such evidence is flatly contrary to the testimony of both defendant and his wife. 210+45.

The defendants claim that they testified falsely on the trial, and they offer to produce evidence tending to show that they are not guilty. *Their showing did not require* the granting of a new trial upon the ground of newly discovered evidence. 212+203.

FOR EXCESSIVE OR INADEQUATE DAMAGES

36. Under either subd. 5 or subd. 7—In actions to recover unliquidated damages, such as actions for personal injuries, libel and slander, and similar actions, where plaintiff's damages cannot be computed by mathematical calculation, are not susceptible of proof by opinion evidence, and are within the discretion of the jury, the motion should be made under subd. 5. In all actions, whether sounding in tort or contract, where the amount of damages depends on opinion evidence, as the value of property converted or destroyed, the nature and extent of injuries to person or property, the motion should be made under subd. 7. *In cases of doubt, or* where both elements of damages are involved, the motion should be made under both subdivisions (95-261, 104+12; 104+886. See 66-217, 68+973; 73-219, 75+1054; 83-409, 86+446; 92-523, 100+365). Order granting new trial, under subd. 5 or subd. 7, in exercise of judicial discretion, should so indicate (116-433, 133+1018). See 121-258, 141+115; 121-327, 141+300; 121-357, 141+491; 121-388, 141+488; 121-445, 141+795; 121-455, 141+803; 121-530, 141+304; 122-39, 141+847; 122-49, 141+849; 122-444, 142+705; 122-510, 142+885; 123-131, 143+117; 123-173, 143+322; 123-218, 143+355; 123-480, 144+149; 123-495, 144+220; 123-498, 144+213; 123-523, 143+411; 124-2, 144+466; 124-19, 144+431; 124-169, 144+745; 124-219, 144+937; 124-246, 144+772; 124-359, 145+115; 124-368, 145+40; 124-374, 145+32; 124-413, 145+161; 124-466, 145+385; 125-7, 145+613; 125-33, 145+626; 125-102, 145+791; 125-401, 147+279; 125-528, 147+273; 126-259, 148+112; 126-350, 148+500; 126-430, 148+309; 126-470, 148+311; 126-488, 148+296; 126-491, 148+304; 126-509, 148+568; 127-1, 148+446; 127-15, 148+476; 127-87, 148+893; 127-381, 149+660; 127-475, 149+938; 127-507, 150+175; 127-519, 148+617; 128-119, 150+382; 128-186, 150+810; 128-228, 150+807; 128-232, 150+897; 128-270, 150+919; 128-283, 150+922; 128-329, 151+124; 128-449, 151+274; 128-505, 151+177;

129–14, 151+408; 129–59, 151+532; 129–70, 151+537; 129–101, 151+894; 129–206, 152+138; 129–506, 152+882; 129–517, 152+880; 129–523, 151+1102; 130–36, 153+317; 130–80, 153+269; 130–134, 153+267; 130–186, 153+323, 593; 130–196, 153+310; 130–229, 153+532; 130–263, 153+525; 130–300, 153+600; 130–314, 153+611; 130–406, 153+848; 130–531, 153+271; 131–112, 154+790; 131–166, 154+957; 131–236, 154+1075; 131–327, 155+104; 131–435, 155+619; 131–475, 155+767; 132–54, 155+1058; 132–238, 156+283; 132–399, 157+640; 133–23, 157+717; 133–41, 157+41; 133–58, 158+721; 133–61, 158+796; 133–367, 158+611; 133–371, 158+623; 134–91, 158+824; 134–114, 158+913; 134–382, 159+828; 134–452, 159+1076; 134–458, 159+1073; 134–477, 159+1095; 134–788, 158+788; 135–38, 159+1087; 135–230, 160+787; 135–372, 160+1020; 135–453, 161+144; 136–155, 161+400; 136–417, 162+520.

165–358, 206+443, 166–7, 206+934; 212+200.

Although the verdict for plaintiff seems wrong, there was no abuse of discretion in denying the motion for a new trial, the verdict being the result of a second trial and having evidence to support it. 212+449.

The verdict, as reduced, is not excessive. 156–247, 194+754.

The award of damages was not so excessive as to *justify an appellate court interfering with the verdict.* 156–211, 194+639.

$8,000 not excessive for loss of leg. 156–218, 194+620.

The verdict, though large, may not be held so excessive that the court must find that the jury were actuated by passion or prejudice. 156–52, 194+752.

$15,000 not excessive for permanent injury to hip and leg. 157–52, 195+629.

Record considered, and it is held, that the verdict is justified by the evidence; that it is not excessive, and dies not appear to have been rendered under the influence of passion and prejudice. 157–184, 195+892.

$6,800 not excessive for death. 157–362, 196+478.

Damages to boat held not excessive. 158–62, 196+811.

A verdict for $2,750 for personal injuries, of which there were almost no external evidences, is excessive. No considerable verdict should be allowed to stand upon proof of subjective symptoms only. 158–69, 196+673.

New trial granted unless plaintiff consents to a reduction of the verdict to $1,750. 158–69, 196+673.

Verdict for $6,688.58, reduced to $5,000 held not excessive for injuries to ribs and vertebra. 158–136, 196+929.

$3,216.50 not excessive for injury to leg of woman 78 years of age. 158–104, 196+932.

$5,750 not excessive for malpractice with respect to broken leg. 158–205, 197+102.

The verdict of $10,000, which the trial court reduced to $6,000, was so large for the injury which plaintiff sustained to his ankle, as to indicate passion and prejudice such as to require a new trial. 158–384, 197+747.

$1,000 not excessive for slander. 158–408, 197+752.

Injuries to automobile. 159–61, 198+137.

$15,000 reduced to $9,000 not excessive for breach of promise. 159–258, 198+669.

Action for personal injuries. The verdict is sustained by the evidence, and the damages are not so clearly excessive as to justify this court in granting a new trial on that ground. 159–326, 198+804.

An award of $7,500 for pain and suffering was excessive, *and should be reduced conditionally to $1,500.* 159–328, 198+999.

$15,000 excessive for injuries to leg and back and reduced to $10,000. 159–388, 199+178.

A verdict of $12,000, reduced to $10,000, to compensate a car repairer for an injury resulting in permanent disability of his right arm, loss of wages, and impaired hearing, is held not excessive. 159–436, 199+20.

$2,500 not excessive for injury to arm. 160–78, 199+513.

$5,000 not excessive for injury to hip and great pain. 160–398, 200+354.

Verdict held not perverse. 161–64, 200+748.

$2,500 not excessive for injuries to leg. 161–125, 201+293.

$15,000 held not excessive for injuries. 161–304, 201+55.

$12,500 held not excessive to permanent total disability. 161–322, 201+606.

$2,500 not excessive for injuries to head and back. 161–440, 201+929.

$3,000 not excessive for injuries to nervous system. 161–487, 202+27.

$15,000 not excessive for loss of arm. 161–535, 201+937.

$1,000 not excessive for automobile destroyed by fire. 162–34, 202+32.

This court will not set aside a verdict of $16,000 on the ground that it is so excessive as to indicate passion and prejudice on the part of the jury, where the plaintiff was a railroad switchman, 39 years old, earning $175 a a month, and suffered a serious injury to his left arm and hand, which was permanent in its nature and will always disable him from following his former occupation. 162–87, 202+275.

Plaintiff was a railroad fireman, 37 years old, earned $200 a month, suffered a serious injury to his left arm, permanent in its nature and will always disable him from following his former occupation. It is held that a verdict of $12,125 is not excessive. 162–96, 202+276.

$4,000, reduced from $7,500, was not excessive for injury to ear and clavicle. 162–114, 202+344.

$17,500 not excessive for injuries. 162–213, 202+485.

$6,000 for death not excessive. 162–419, 203+57.

$4,100 was not excessive for loss of services and society of wife. 162–464, 203+62.

Damages to automobile. 162–509, 202+68.

$3,000 not excessive for injuries to woman causing miscarriage. 163–198, 203+776.

The verdict approved by the trial court, viewed in the light of the record, cannot be held so excessive that the *inference must be that passion or prejudice swayed the* jury. 163–257, 203+969.

$29,940 not excessive for permanent injury to brakeman. 163–457, 204+557.

$26,047.50 was not excessive for death of conductor. 163–460, 204+552.

$1,000 not excessive for injuries to woman. 163–511, 203+983.

A verdict for $10,428 for damages caused by an injury, resulting among other things in the amputation of plaintiff's left leg just below the knee, is not excessive. 164–6, 204+524.

$10,000 not excessive for injuries to ankle. 205+689.

Recovery on fire policy. 165–442, 206+655.

$8,500 not excessive for broken leg and scar over eye. 166–131, 207+188.

The damages awarded for an injury to rug, caused by the negligence of defendants' employee in spilling sulphuric acid on the rug, are not excessive. 166–193, 207+305.

Verdict for injuries to collar bone and arm held inadequate. 166–425, 208+182.

The verdict of $15,000 for the loss by a boy, 11 years old, of practically the entire left leg is not so excessive as to warrant reversal or conditional reduction. 167–211, 208+657.

There should be a new trial as to the amount of damages only. 167–232, 208+808.

The court rightly granted a new trial unless plaintiff consented to reduce his verdict by the amount of the payment. 167–272, 208+804.

Recovery on automobile theft and fire policy held not excessive. 167–362, 209+27.

$3,200 not excessive for nervous shock. 167–437, 209+317.

$1,250 not excessive for assault. 209+624.

A verdict for $14,000 for death of a man 24 years of age, earning $85 per month, under the circumstances stated in the opinion, is not excessive. 209+905.

$8,500 not excessive for permanent injury to arm and leg of man 59 years of age. 210+32.

The damages awarded are not excessive. 210+55.

We cannot pronounce the verdict as reduced excessive. 210+78.

$1,000 for stiffening of thumb not excessive. 210+866.

Damages held not excessive. 210+996.

The verdicts cannot be disturbed as excessive. 210+997.

Verdict for $1 for personal injuries inadequate. 211+471.

$50 was inadequate for injury to arm. 211+472.

$1,400 not excessive for bruises. 212+180.

$2,775 not excessive for injury to hand and leg of woman of 69. 212+186.

$3,000 not excessive for injury incapacitating worker for 11 months. 212+413.

$2,045 not excessive for injury to hand. 212+533.

Under the evidence as to the character and value of respondent's services, the verdict *cannot be interfered* with. 212+815.

Where the jury is permitted to find the reasonable value instead of the agreed price and allows less than the agreed price, defendant cannot complain. 213+47.

$6,000 not excessive for injury to legs and arm. 213+372.

37. General principles—28–232, 9+712; 32–217, 18+836; 20+87; 33–108, 22+127; 45–536, 48+445; 46–439, 49+239; 53–

341, 55+137; 65–18, 67+646; 83–409, 86+446; 95–261, 104+12; 124–368, 145+40; 127–373, 149+544.

38. Necessity of passion or prejudice—When the motion is made under subd. 5 the trial court is not authorized to grant a new trial unless it is manifest that the damages were given under the influence of passion or prejudice (32–217, 18+836, 20+87; 55–497, 57+149; 65–18, 67+646; 83–409, 86+446; 95–261, 104+12). It is not enough that the court would have assessed them differently (32–217, 18+836, 20+87), or believes them unreasonably large (55–497, 57+149). Ordinarily the fact of prejudice or passion appears from the verdict being so large or small, when compared with what the evidence indicates it ought to be, that the court must conclude that the jury did not arrive at the amount upon a fair and impartial consideration of the evidence (42–301, 44+68; 55–497, 57+149. See 102–346, 113+690). Affidavits are inadmissible to prove the existence of passion or prejudice. The court must base its decision solely on the evidence submitted on the trial (32–266, 20+159; 83–409, 86+446). See 122–343, 142+816; 122–400, 142+718; 123–17, 142+930; 126–471, 148+311; 127–373, 149+544; 128–251, 150+805; 128–415, 151+198; 129–372, 152+765; 131–209, 154+960; 131–261, 154+1100; 131–321, 155+205; 131–435, 155+619; 135–248, 160+665; 141–156, 169+542.

39. Remitting excess—28–232, 9+712; 35–251, 28+708; 83–409, 86+446; 90–499, 97+433; 96–480, 105+673; 102–346, 113+690; 123–223, 143+716; 124–421, 145+173.

40. Successive verdicts—65–18, 67+646; 78–272, 80+950; 131–493, 154+943.

41. When granted as of course—Where it is clear that the jury assessed the damages in accordance with an erroneous instruction (36–300, 30+890), or, where they evidently made a miscalculation (35–202, 28+240), or included improper items of damage (34–32, 24+289), a new trial is ordinarily granted as a matter of course unless the error can be corrected by a remittitur (126–430, 148+309).

42. For inadequate damages—35–465, 29+69; 52–479, 55+53; 57–147, 58+870; 80–123, 83+32; 92–182, 99+630; 94–494, 103+499; 98–96, 107+817; 107–457, 120+749; 133–321, 158+419.

FOR ERRORS OF LAW ON THE TRIAL

43. What are errors on the trial—It is only errors of law occurring at the trial that may be made the basis of a motion for a new trial under subd. 6. In case of errors of law occurring before and after trial the remedy is either an appeal from the judgment (27–415, 6+795, 8+148; 29–68, 11+228; 35–379, 28+927; 64–61, 66+132), or a motion for a new trial under subd. 1 (19–132, 99; 43–239, 45–228). The phrase "at the trial" means during the course of the trial. The trial being within the meaning of the statute, when a cause is called for the trial of issues of fact, and any erroneous and prejudicial order overruling thereafter made is a ground for a new trial (37–285, 33+856; 39–535, 41+107; 57–30, 58+821; 60–518, 62+1125). When the trial is by jury the trial continues until the jury are discharged (20–139, 122; 21–506; 30–18, 13+921; 40–547, 42+541; 44–52, 46+314; 46–212, 48+909). When the trial is by court or referee the trial terminates with the final submission of the case (see 25–234). See 121–258, 141+164; 122–39, 141+847; 123–17, 142+930; 123–325, 143+787; 123–435, 143+1124; 123–499, 143+213; 123–523, 143+111; 124–2, 144+466; 124–155, 144+462; 124–359, 145+115; 124–374, 145+32; 127–425, 149+672; 127–490, 150+218; 128–460, 151+275; 128–489; 151+139; 129–8, 151+423; 129–324, 152+755; 129–531, 152+269; 130–285, 153+596, 195+148.

See also notes under §§ 9298, 9327.

163–303, 204+159; 164–401, 205+282; 164–446, 205+371; 164–466, 206+380; 165–262, 206+168; 166–53, 206+929.

Evidence. 155–475, 194+14.

The admission, over objection, of an answer relating to an irrelevant matter having no hearing upon the issues tried does not justify the granting of a new trial. 156–424, 195+141.

Where the defense to a suit on a contract is based upon fraud, and a rescission because of such fraud, it is error not to instruct the jury that the rescission claimed is an essential element of the defense. Such error, being with respect to a principle controlling the case, can be taken advantage of on motion for new trial, even though there was no exception to the charge, and it was not otherwise called to the attention of the trial judge. 156–487, 195+489.

Refusal to withdraw from jury elements of damages unsupported by evidence was error. 157–133, 195+777.

The charge relative to contributory negligence and assumption of risks as applied to interstate commerce was confusing, but it was finally stated correctly. It is held that there was no error requiring a new trial. 159–328, 198+998.

The admission of evidence which should have been rejected must have actually prejudiced the excepting and defeated party, to give him a right to a new trial. 160–326, 200+293.

The errors assigned upon rulings at the trial do not warrant granting a new trial. 161–164, 166, 200+938.

We find no reversible error in the charge of the court to the jury. 162–265, 202+823.

Error in charge. 162–412, 203+59.

An exception is defective when it embraces three separate instructions given to the jury. 162–440, 203+415.

A formal offer of proof is not necessary, when an objection is sustained to a question calling for an answer which would obviously elicit material and relevant evidence. 162–440, 203+415.

An erroneous instruction to the jury, even on a controlling proposition of law, cannot be reviewed upon an appeal from the judgment, when appellant did not take an exception or move for a new trial. 162–486, 203+432.

Failure to instruct. 163–239, 203+785.

Minor complaints regarding the trial are not well taken. 163–257, 203+969.

Defendant cannot complain of an instruction which, under the evidence, was too favorable to him. 163–473, 204+466.

Exclusion of evidence. 163–514, 204+313.

Reception of evidence. 164–425, 205+286.

There is no reversible error in the charge, when read as a whole, nor do we discover any error in the rulings upon the admissibility of evidence. 165–65, 205+701.

The trial court was justified in granting a new trial on account of seemingly contradictory statements and errors in the charge. 165–208, 206+379.

The failure of the court to charge the jury on a particular point is not ground for a new trial, in the absence of a request for an instruction covering it. 165–374, 206+716.

Nor has the court any authority upon its own motion to grant a new trial for such error. 165–374, 206+716.

No error in rejecting testimony for purpose of impeachment upon immaterial matter. 167–362, 209+27.

Where the trial court grants a new trial solely upon an alleged error in the charge to the jury, and the charge given is proper and without error, the order granting a new trial reversed. 210+44.

There was no exception to the charge that if either defendant was liable both were liable, and the oil company cannot now claim that the act of Iverson in making sale of gasoline for kerosene was an intervening cause which relieved it if liability. 210+78.

Where the court in excluding an exhibit intimates that it might later be offered, and no subsequent offer is made, there is no reversible error. 211+952.

No merit in contention that appellant was prejudiced by remark of trial court, nor in rulings upon the admissibility of evidence. 212+167.

Failure to charge that the plaintiff had the burden to show that he was injured was, upon the record, harmless. 212+533.

Record discloses no misconduct on the part of the trial court nor prejudicial error in the rulings as to the admissibility of evidence. 212+599.

The error, in refusing to permit an attorney for plaintiff on cross-examination to answer the question whether he was retained under an agreement that he should have no fee unless there was a recovery, should not result in a new trial, where the attorney was called merely to rebut an immaterial and irrelevant matter which had no bearing on the issues tried and which defendant ought not to have injected into the trial. 212+805.

The record does not disclose that there was reversible error in the rulings upon the admissibility of evidence. 212+815.

The charge is held prejudicial as argumentative against appellant. 213+537.

44. How far discretionary—89–330, 94+888; 143–486, 173+400.

45. Necessity of exceptions—Notice of trial—A party cannot take advantage of any errors occurring at the trial and not excepted to unless he specifies them in his notice of motion (86–156, 90+368; 87–277, 91+1103; 87–398, 92+225; 89–500, 95+323; 91–127, 97+737; 91–137, 97+580; 101+1133). A notice held sufficiently specific (93–288, 101+302; 130–434, 152+262; 153+736).

FOR INSUFFICIENCY OF EVIDENCE

46. General rules—A court ought to exercise not merely a cautious but a strict and sure judgment before setting aside a verdict as not justified by the evidence. A verdict should not be set aside unless palpably against the evidence (29–147, 12+449). If different persons might reasonably draw different conclusions from the evidence the verdict should not be disturbed (11–296, 204; 17–172, 145; 18–297, 270; 19–181, 145; 28–390, 10+418). A new

trial should be granted only in cases of manifest injustice (10–313, 246; 11–296, 204). A new trial should not be granted on conflicting evidence unless the verdict is so manifestly contrary to the preponderance of the evidence as to warrant the inference that the jury failed to consider all the evidence or acted under some mistake or from some improper motive, bias, feeling or caprice, instead of dispassionately and honestly exercising their judgment on all the evidence (11–296, 204; 80–50, 82+1092). A verdict which obviously rests on mere possibility, speculation or conjecture, should be set aside (49–240, 54+918; 83–370, 86+451; 86–263, 90+534; 87–197, 91+487; 89–143, 94+440). Although there may be some evidence reasonably tending to support the verdict it should be set aside if manifestly unreasonable in view of all the evidence (29–147, 12+449; 32–390, 20+379; 74–525, 77+422). It is the duty of the court to weigh the evidence and not to adopt inconsiderately the opinion of the jury (25–558; 76–391, 79+397). It is the duty of the court to consider the credibility of the witnesses (25–558). The court may properly take into consideration the probability that on another trial stronger evidence might be adduced (47–461, 50+603). Where the evidence wholly fails to establish a material issue under the pleadings the motion is not addressed to the discretion of the court and is to be determined by the application of legal principles (92–139, 99+631). If there is not manifest and palpable preponderance of evidence in favor of verdict, order granting a new trial for insufficiency of evidence will not be reversed (13–434, 398; 99–119, 108+824; 99–484, 109+1118; 102–455, 113+1062; 102–511, 113+1133; 103–27, 114+247; 104–178, 116+354; 104–232, 116+482; 105–479, 117+785. And see 97–130, 106+338).

See 121–416, 141+798; 121–439, 141+523; 121–455, 141+803; 121–458, 141+525; 121–505, 141+835; 122–17, 141+789; 122–44, 141+854; 122–66, 141+1099; 122–103, 141+855; 122–241, 142+196; 122–295, 142+710; 122–363, 142+716; 122–400, 142+717; 122–415, 142+804; 122–448, 142+876; 122–510, 142+885; 122–530, 142+1134; 123–52, 142+1042; 123–119, 143+120; 123–141, 143+260; 123–178, 143+324; 123–218, 143+355; 123–264, 143+724; 123–319, 143+793; 123–367, 143+917; 123–480, 144+149; 123–493, 144+137,; 123–495, 144+220; 123–516; 144+407; 123–530, 143+1123; 124–84, 144+450; 124–114, 144+744; 124–125, 144+745; 124–132, 144+472; 124–140, 144+452; 124–141, 144+751; 124–169, 144+745; 124–234, 144+759; 124–260, 144+950; 124–266, 144+954; 124–381, 145+35; 124–411, 145+124; 124–466, 145+385; 124–478, 145+395; 124–487, 145+393; 125–15, 145+402; 125–24, 145+404; 125–49, 145+615; 125–59, 145+617; 125–78, 145+786; 125–122, 145+808; 125–134, 145+803; 125–150, 145+806; 125–155, 145+799; 125–292, 146+1104; 125–308, 146+1107; 125–343, 147+111; 125–365, 147+241; 125–399, 147+430; 125–431, 147+434; 125–469, 147+427; 125–484, 147+655; 125–534, 147+426; 126–52, 147+827; 126–144, 148+108; 126–149, 148+110; 126–169, 148+61; 126–259, 148+112; 126–275, 148+117; 126–340, 148+123; 126–350, 148+500; 126–355, 148+119; 126–359, 148+121; 127–8, 148+518; 127–93, 148+893; 128–106, 150+388; 128–214, 150+786; 128–232, 150+897; 128–252, 150+809; 128–341, 150+1084; 128–488, 151+139; 129–70, 151+537; 129–77, 151+541; 129–81, 151+539; 129–97, 151+895; 129–101, 151+894; 129–141, 151+896; 129–372, 152+765; 129–506, 152+882; 129–517, 152+880; 129–522, 151+273; 129–523, 151+529; 130–196, 153+310; 130–297, 153+616; 130–300, 153+600; 132–321, 156+348; 132–399, 157+640; 133–321, 158+419; 134–91, 158+824; 134–458, 159+1073; 134–467, 158+788; 135–9, 159+1075; 135–292, 160+793; 135–453, 161+144; 142–89, 170+920.

46a. Verdict not justified by evidence.

On appeal from an order denying a new trial, an assignment of error that the verdict is not justified by the evidence, based upon a like assignment in the motion for a new trial, is specific enough to present the question whether the verdict is sufficiently supported by the record. 164–401, 205+282.

Upon the facts stated in the opinion, there is so much indication of contributory negligence that, there having been a substantial verdict for plaintiff, a new trial seems necessary in the interests of justice. 213+44.

46b. Memorandum—When motion is on ground that verdict is not supported by evidence and for errors of law occurring at trial, and order granting new trial does not specify on what ground motion is granted, memorandum of trial court may be referred to, to ascertain on what ground order was granted, notwithstanding omission of word "memorandum" in subdivision 7 (109–101, 123+295). Where it does not appear from memorandum on what ground order is based, new trial cannot be presumed to have been granted on ground that verdict was not justified by evidence (109–323, 123+932). Formal order granting new trial which is responsive to motion cannot be impeached by court's memorandum (109–117, 123+60).

See 122–463, 142+729.

47. Upon a dismissal—A dismissal on the trial for insufficiency of evidence is a "decision" within the meaning of the statute and the motion for a new trial may be made on a settled case (25–234; 34–350, 25+712; 36–106, 30+402).

48. After trial by court—Where a cause is tried by the court without a jury a new trial may be granted on the ground that the findings of fact are not justified by the evidence (7–325, 254; 28–330, 9+876; 40–171, 41+948). In actions of an equitable nature where the main issues are first tried, leaving ancillary issues for future trial, a new trial of the main issues may be granted before a decision on the ancillary issues (28–330, 9+876. See 46–507, 49+207). Erroneous findings afford no ground for a new trial where it is obvious that if such findings had been different the result would necessarily have been the same (45–256, 47+799; 57–180, 58+985; 61–277, 63+734; 71–108, 73+639; 76–450, 79+531).

49. After trial by referee—The district court may vacate the findings of a referee on the ground that they are not justified by the evidence and grant a new trial (12–502, 406; 25–52; 44–304, 46+354). In such a case it is the right and duty of the judge who passes on the motion to exercise the same discretion in determining whether the motion should be granted as if the cause had been tried by himself, except that such discretion must be exercised entirely with reference to the evidence disclosed by the record (69–245, 72+78; 73–219, 75+1054).

50. After denial of motion to dismiss—30–482, 16+266.

51. After successive verdicts—30–93, 14+365; 32–390, 20+379; 38–534, 38+620; 65–80, 67+668, 68+22; 66–355, 68+1099; 75–349, 77+988; 78–272, 80+950; 94–464, 103+332. See 100–198, 110+853; 125–72, 145+798.

52. Remitting excess—69–543, 72+814; 70–193, 72+1074.

53. Presumption on appeal—There is no presumption on appeal that a new trial is granted on the ground that the verdict was not justified by the evidence (87–18, 91+28; 88–392, 93+309; 89–330, 94+888; 91–238, 97+879; 91–335, 97+1055; 93–468, 101+790; 94–23, 101+954; 94–186, 102+393; 95–422, 104+371; 97–161, 106+110; 97–201, 106+311; 101–544, 112+1142; 122–463, 142+729).

WHEN VERDICT CONTRARY TO LAW

54. General statement—A motion for a new trial on the ground that the verdict is contrary to law is somewhat in the nature of a demurrer to the evidence; that is, conceding all that the evidence tends to prove, the verdict is not supported by the principles of law applicable to the facts (71–69, 73+645). On the other hand it has been held that the phrase "contrary to law" means contrary to the instructions and that it is not enough to justify a new trial that a principle of law not embodied in an instruction was disregarded by the jury (57–443, 59+534). An appellate court, when considering the question whether a verdict is contrary to law, must assume that state of facts most favorable to the verdict, which, under the charge, the jury were at liberty to find (24–254). See 122–463, 142+729.

9326. Basis of motion—If the motion be made for a cause mentioned in § 7828, subdivision 1-4 [9325], pertinent facts not appearing of record shall be shown by affidavit; if for any other cause, a case or bill of exceptions shall first be settled, and included in the record, unless the moving party within fifteen days of the rendition of verdict or notice of the filing of the decision or report, notices the motion to be heard on the minutes of the court, in which case the judge shall hear the motion on the minutes of the judge or of the stenographer, but it shall not be necessary for the moving party to furnish the court or the opposing party a transcript of the stenographer's minutes, nor of any part thereof, as a condition to have the motion heard. If the motion is to be heard on the minutes of the court, it shall be heard within thirty days after the coming in of the verdict or notice of the filing of the decision or report, unless the time be extended by written stipulation of the parties or by the court for cause, such extension to be granted without costs to either party. If the motion be on the minutes, and the order be appealed from, a case or bill of exceptions shall be proposed by the appellant, and be settled and returned with the record to the supreme court. The records and files of the court pertaining to the case may be referred to without being mentioned in the notice of motion. (R. L. § 4199, amended '07 c. 450) [7829]

When motion to be based on affidavits (44–52, 46+314; 57–443, 59+534). A motion on the minutes must regularly be made at the term of court at which the trial is had (78–82, 80+840). But the statutory requirement in this regard is waived by failure of the opposite party to make a timely objection (56–74, 57+323; 64–396, 67+213). After moving on the minutes a party cannot renew the motion on a settled case as of right (86–30, 90+5). When a motion is made on the minutes a case or bill of exceptions, in the event of an appeal, must

be proposed and settled within the time prescribed (51–337, 53+643; 74–90, 76+1019). A stay of proceedings with an extension of time within which to propose and settle a case may be obtained as in other cases (51–337, 53+643; 59–259, 61+138). Cited (118–514, 137+291). Motion for new trial after judgment (125–475, 147+654). Motion based on minutes (126–48, 147+716). Service of notice short of due time (129–528, 152+270). Absence of settled case of bill of exceptions (131–249, 154+1072). Urging error as to verdict in favor of co-defendant. (132–195, 156+272). Motion on court's minutes day after verdict. (134–266, 159+564). Necessity of settled case or bill of exceptions for review (135–13, 159+1070). See 195+453.

165–50, 205+691.

Appeal dismissed for failure of appellant to settle a case or bill of exceptions, the attempted appeal being from an order denying a motion for a new trial made upon the minutes of the court. 157–14, 195+453.

Volunteer firemen are entitled to the benefit of the Workmen's Compensation Act. 161–20, 200+927.

When the printed record does not contain all the evidence of the settled case, nor is a fair and full condensation thereof into narrative form, as provided by subd. 2 of rule 9, this court will not consider whether the verdict has sufficient support. 162–447, 203+216.

There was no prejudicial error in the rulings upon the admissibility of evidence. 210+55.

9327. Exceptions to ruling, order, decision or instruction of court—A party may except orally at the trial to any ruling, order, decision or instruction of the court on a matter of law. No particular form of exception is required. A minute of the exception shall be made by the judge or stenographer, and the same may be preserved either in a bill of exceptions or a settled case; provided that in order to obtain a review of any such ruling, order, decision or instruction made or given by the court it shall not be necessary to take an exception thereto, but in lieu of an exception the aggrieved party shall clearly specify the alleged error in his notice of motion for a new trial or other relief therefrom. (R. L. '05 § 4200, G. S. '13 § 7830, amended '19 c. 115 § 1)

See also notes under § 9325.

1. In general.

The provision relieving from the necessity of taking an exception does not relieve from the necessity of calling the attention of the court to any indefinite or inaccurate statement in the charge, where the charge as a whole is correct (85–274, 88+754; 86–174, 90+318; 86–276, 90+532; 87–91, 91+271; 87–242, 91+893; 87–250, 91+1116; 87–277, 91+1103; 87–495, 92+413; 90–36, 95+454; 90–183, 96+330; 91–26, 97+418; 91–249, 97+383; 94–74, 102+397; 94–241, 102+449; 95–408, 104+225; 95–477, 104+443; 96–299, 104+1087. See also 99–110, 108+847; 111–373, 127+391). It does not abrogate the rule that an omission to charge on a particular point is not error in the absence of a request to charge thereon (92–312, 99+1128; 92–470, 100+218; 97–44, 106+86. See 88–151, 92+538). Waiver of claim that instruction was indefinite or misleading not waiver of right to assign error to erroneous instructions deliberately given (109–409, 123+1082). On motion for a new trial a party cannot take advantage of any errors occurring on the trial and not excepted to unless he specifies them in his notice of motion (86–156, 90+368; 87–277, 91+1103; 87–398, 92+225; 89–500, 95+323; 91–127, 97+737; 91–137, 97+580; 93–443, 101+1133; 98–52, 107+824; 105–233, 117+428; 106–47, 118+62; 112–246, 127+924; 113–397, 129+770; 114–371, 131+466). A notice of motion held sufficiently specific (93–288, 101+302; 99–275, 109+232). Assignment that decision is not justified by evidence and is contrary to law insufficient to call in question findings of fact (98–81, 107+733). Granting new trial on court's own motion on return of verdict (113–397, 129+770). See 101–14, 111+651; 101–24, 111+653. Necessity of taking exceptions (121–243, 141+120). Unchallenged instructions deemed law (121–455, 141+803; 121–516, 141+804). Assigned errors reviewable only when discussed (122–419, 142+721). Assigned error to be considered must be raised in motion (122–533, 142+1134). Failure to instruct as to manslaughter (123–276, 143+782). Contents of record on appeal (123–299, 143+741; 123–329, 143+788). Instruction not objected to assigned as error (125–444, 147+445). Duty to request correct instruction (125–466, 147+441). Short notice of interlocutory motion (125–475, 147+654). Questions not objected to cannot be availed of on appeal (126–203, 148+116). Offer of proof to present question on review (126–244, 148+103). Objection to instructions (126–275, 148+118). Failure in applying for leave to answer cannot be heard on appeal (126–367, 148+306). No review of rulings unless trial court is advised of ground of objection (127–86, 148+892). Construction of findings (127–530, 149+1070). Insufficiency of findings may be availed of in first instance on appeal (127–5, 150+214). Review as to objection to admission of communications with persons since deceased. (127–17, 150+213). Findings construed (127–530, 149+1070). No exceptions taken to charge in motion; instruction on appeal deemed law (128–270, 150+919; 128–292, 150+905). Evidence not objected to is before court on appeal (128–311, 150+907). Taxing expert witness fee (128–449, 151+274). When motion non obstante operates as waiver of all errors and bar to new trial (128–514, 151+419; 129–25, 151+421). Excessive damages must be specified as a ground (129–71, 151+537). Grounds not assigned in trial court not available on appeal (129–353, 152+725). Assignments of error must be based on exceptions taken (129–529, 152+270). Improper remarks and misconduct of counsel (130–80, 153+269; 130–242, 153+532). Verbal inaccuracies in instructions not called to court's attention (130–434, 152+262; 153+736; 131–15, 154+514). Errors must be excepted to or specified (131–320, 155+205; 133–73, 157+993; 144–237, 174+892). Without motion for new trial, matters reviewable on appeal (132–307, 156+346). When motion non obstante is appealable (132–467, 155+1039). Remedy for correction of judgment was not by appeal (134–40, 150+810). Matters available to appellee (134–192, 158+967). Record of appellant must indicate his grounds of exception or objection (134–422, 159+948). When aggrieved party is not obliged to take exception to erroneous charge and be entitled to review on appeal (135–5, 159+1072). Review on appeal (135–13, 159+1070; 135–476, 160+79; 139–286, 166+330). Not reviewable on appeal (136–332, 162+354; 136–454, 161+167; 136–477, 162+464). Trial court's failure to call express attention to degree of care, no exception being taken (136–385, 162+470). Instructions to jury, not excepted to, as law of case (136–417, 162+520). When errors in rulings on evidence are not available (152–374, 188+1011).

164–401, 205+282. 165–117, 205+885; 165–482, 205+888; 167–327, 209+16.

Assigments of error not discussed and assignments which do not point out the alleged error in the record will not be considered on appeal. 156–52, 194+752.

If compound interest is included in the judgment, the record does not disclose the amount, nor does it show that any application has been made to the trial court to eliminate the same, hence no redress is available on the appeal. 156–90, 194+109.

Where exception is not taken when a ruling is made, the ruling is not subject to review unless assailed in the motion for a new trial. The record fails to indicate reversible error. 156–332, 194+769.

An assignment of error that the granting of a divorce is not supported by the evidence is too general to reach any of the several findings of fact made by the trial court. 158–296, 137+261.

An objection will not be considered unless it specifies the ground therefor and is preserved by an exception to the ruling. 158–356, 197+743.

An objection that a contract for the sale of real estate is unenforceable for the nonpayment of the mortgage registry tax comes too late, when made for the first time by an objection to the entry of judgment. 162–72, 202+70.

Whether defendant is protected as to payments made subsequent to the filing of the plaintiff's lease is not determined, since the question was not presented in the court below nor argued here. 162–240, 202+445.

An exception is defective when it embraces three separate instructions given to the jury.

A formal offer of proof is not necessary, when an objection is sustained to a question calling for an answer which would obviously elicit material and relevant evidence. 162–440, 203+415.

Point not raised below not considered on appeal. 162–514, 202+441.

The application of the heirs was made and heard upon affidavits without objection, and they cannot now complain of the method of submission. 163–236, 203+786.

Where there is no motion for a new trial, error cannot be assigned upon a ruling to which, when made, no exception was taken. 167–117, 209+1.

Rulings at the trial and instructions to the jury not excepted to and not assigned as error on a motion for a new trial are not reviewable in appeal. 210+626.

No exceptions to rulings being noted when made or taken in the motion for a new trial there is nothing to review on appeal. 210+637.

2. Objections to pleadings.

Objections to the pleadings cannot be raised after the evidence has been received without objection. 209+752.

The ruling permitting an amendment of the answer at the trial cannot be reviewed for there was no objection or exception. 213+539.

3. Appointment of receiver.

On an appeal from an order assessing stockholders it is too late to raise objections to the appointment of the

receiver which should have been made in opposition to that appointment or by motion directly attacking it. 162–83 202+69.

4. Reception of evidence.

When an objection to a question was made upon several grounds but not the one urged on the appeal and it appears that in the subsequent testimony of the witness simliar questions were put and answered without objection no error can be assigned on the ruling. 157–437 196+564.

Error cannot be assigned with respect to the admission of evidence where no objection was taken to its admission. 161–526 201+537.

Defendant moved for judgment notwithstanding the verdict but not for a new trial which was denied. Upon an appeal from the judgment following, assignments of error in the admission of evidence will not be considered. 162–102, 202+345.

Evidence was "received subject to rejection." No motion was made afterwards to strike. Such evidence was in the case without error. 163–83, 203+456.

There was no error in refusing to strike testimony admitted without objection. 165–241, 206+393.

If defendant feared that the language used would mislead the jury in applying the rule to the facts of this case, he should have called attention to it at the trial, and failure to do so precludes him from raising the question now. 165–241, 206+393.

An objection that testimony is incompetnet, irrelevant and immaterial does not present the objection that it is hearsay or self-serving. 165–342, 206+645.

5. Misconduct of counsel.

Misconduct of an attorney in making improper argument to a jury cannot be assigned as error, unless objection was made at the time the improper language was used. 163–389, 204+52.

An assignment of improper remarks by counsel in his argument to the jury fails when the record does not show what was said and an exception thereto. 209+867.

6. Instructions.

Alleged errors in the charge cannot be reviewed on appeal unless excepted to at the trial, or specified as error in a motion for a new trial. 158–356, 197+743.

The general exception to the charge under the evidence is insufficient. 159–308, 199+3.

A verbal inaccuracy in the statement of the falsus in uno rule, not called to the court's attention before the jury retired, is not ground for a reversal. 159–388, 199+178.

Plaintiff took no exceptions to the instructions to the jury and made no request for additional instructions, but, in the notice of motion for a new trial, assigned as error the alleged failure to submit clearly two charges of negligence. There was no fundamental error in the instructions; hence the rule stated in Sassen v. Haegle, 125 Minn. 441, 147 N. W. 445, 52 L. R. A. (N. S.) 1716, is applicable. 160–468, 200+629.

An instruction that plaintiff must prove a specific demand, no exception being taken by either party, became the law of the case. The evidence warranted the jury in finding that a demand had been made. 161–135, 201+537

Where no request to charge was made, and no exceptions taken to charges given, objection to charge made for first time on motion for new trial was too late. 161–533, 201+936.

An erroneous instruction to the jury, even on a controlling proposition of law, cannot be reviewed upon an appeal from the judgment, when appellant did not take an exception or move for a new trial. 162–486, 203+432.

Exceptions to instructions are necessary. 162–513, 202+732.

Inadvertent inaccurate statement by the court in charge to jury calls for prompt action by counsel. 163–280, 203+985.

By failing to call the court's attention to an ambiguity in an instruction, the defendant waived the right to question the instruction. 163–473, 204+466.

An instruction cannot be attacked in this court for the first time, when no exception was taken when it was given or in the notice of motion for a new trial. 164–414, 205+276.

An exception by counsel to the charge of the court claiming "instructions as to first and second causes of action were not accurate or correct, and could not be under the testimony," is ineffectual, because it fails to indicate the alleged error. 165–210, 206+400.

If a party fears that an instruction given at his request was so placed in the charge that it might be misapplied by the jury, he should call attention to it at the time. 165–417, 206+725.

An erroneous statement of fact, made when the instructions to the jury are given; must be called to the attention of the court in order that it may be corrected before the jury retires. An exception taken at the close of the charge was not sufficient to comply with this rule. 166–7, 206+934.

Instructions to the jury not objected to become the law of the case. 210+618.

There was no prejudicial error in the instructions relative to the time when plaintiff might become charged with knowledge of misstatements in the applications for insurance. 210+846.

The erroneous use of the word "and" instead of "or," in charging the jury as to the effect of the alleged misrepresentations, should have been called to the court's attention so that the mistake might be corrected in time, under the rule of Steinbauer v. Stone, 85 Minn. 274, 88 N. W. 754 210+846.

The failure to call the court's attention to an inadvertently erroneous statement in the instructions waived the error. 212+9.

7. Motion for directed verdict.

Where no exception was taken to a denial of the motion for a directed verdict either at the trial or in the motion for a new trial, the ruling cannot be reviewed on appeal. 157–362 196+478.

8. Verdict.

In the record we find nothing justifying an interference with the verdict and cannot consider, as ground for reversal, a proposition which was not even suggested at the trial as having any bearing on the case. 160–433, 200+467.

9. Findings of Fact.

Where a party moves the court below to amend more than one of several findings of fact, an assignment of error in this court is insufficinet which merely states that the court erred in denying the motion to amend the findings 165–266, 206+404.

An assignment of error that the findings of fact art not sustained by the evidence fails to point out the particular finding challenged and is insufficient. 267–101, 208+642.

10. Entry of judgment.

The validity of a judgment entered by the clerk of the district court without an order of the court therefor will not be considered by this court, upon appeal from such judgment, where no application has been made to the court below to have the alleged error corrected. 158–182, 197+100.

9328. "Bill of exceptions" and "case" defined—The term "bill of exceptions," as used herein, shall mean a written statement of exceptions duly taken at the trial, with so much of the evidence and proceedings as may be necessary to explain them. The word "case," as so used, shall mean a like statement of the proceedings in the cause, excluding all pleadings and other papers properly filed with the clerk. A case may contain all the evidence given or offered at the trial and all the proceedings had, or only so much thereof as the parties may choose to present for review. (4201) [7831]

34–330, 26+9; 61–412, 63+1040; 66–179, 68+837; 67–207, 69+895; 106–543, 118+1008; 127–21, 148+478.

Affidavits set forth alleged misconduct of counsel, but, since the settled case does not show facts constituting the alleged misconduct of counsel the matter of misconduct is not before the court. 161–113, 201+296.

An eight year old boy was traveling on the right hand side of a street, with a child's coaster wagon. Defendant was driving his automobile in the same direction but about 20 feet behind the boy. The boy turned to the left, and started to cross the street. Defendant turned to the left to avoid a collision, but at the curb he struck and injured the boy. Held (1) that the questions of negligence and contributory negligence were for the jury; (2) that the facts did not call for an instruction embracing the law of the road governing vehicles when one passes another. 161–113, 201+296.

Documents received in evidence but not included in the settled case are not before the court on appeals. If the settled case shows that documents were received, and the certificate of settlement makes no mention of them, the fact as shown in the settled case prevails over the certificate. 210+282.

9329. Bill of exceptions or case, how and when settled—The party preparing a bill of exceptions or case shall serve the same on the adverse party by copy, within forty days after verdict, or, if the trial be by

the court or a referee, after notice of the filing of the decision or report. The party served in like manner may propose amendments thereto within ten days. And such bill or case, with the amendments, if any, shall, within fifteen days after the service of such amendments, be presented to the judge or referee who tried the cause for allowance or settlement, upon a notice of five days. If a motion be heard on the minutes, the aggrieved party may propose a bill or case within twenty days after notice of the decision thereon. The times herein limited may be extended by agreement of the parties or by order of the court; and the court, in its discretion and upon proper terms, may grant leave to propose a bill or case after the time herein allowed therefor has expired. (4202) [7832]

One of the primary objects of this section is to secure the settlement and allowance of the case or bill when the details of the trial are still fresh in the minds of counsel and the trial judge (51–337, 53+643). The limitation of time applies to all cases. Where a party appeals from a judgment he cannot, as a matter of right, propose a case at any time before the expiration of the six months in which an appeal might have been taken (69–429, 72+705). In the case of trials by the court or a referee the time begins to run from the service of notice of the filing of the decision or report (6–558, 394; 94–407, 103+15; rule 47, district court). The neglect of the adverse party to propose amendments within ten days after the service of the proposed bill or case is a waiver of the right to do so; but it does not extend or enlarge the time within which the party proposing the bill or case is bound, in the absence of an order or stipulation extending the time, to present it to the judge or referee for allowance, that is, within fifteen days after service of amendments or failure to do so within the ten days allowed for that purpose (81–467, 84+324). By participating without objection in the settlement of a case or bill after the statutory time has expired a party waives any objection on that ground (35–451, 29–65). If a case or bill is improperly served after the statutory time it should be refused or promptly returned with the reason stated thereon (51–337, 53+643; 59–259, 61+138). It has been held that if a party admits "due service" he will be deemed to have waived the objection that the case or bill was not served in time (38–137, 36+108. See 69–429, 72+705). Where a party has failed to have a case or bill settled and allowed within the statutory period he may for good cause shown secure an order of court granting an extension of time. The matter of granting or denying such an application lies almost wholly in the discretion of the trial court and its action will not be reversed on appeal except for a palpable abuse of discretion (6–558, 394; 19–407, 350; 25–234; 55–334, 56+1117; 58–72, 59+828; 59–259, 61+138; 69–429, 72+705; 71–230, 73+959, 74+891; 81–467, 84+237; 94–407, 103+15; 102–243, 113+452). The court may allow a case or bill to be settled even after an appeal has been perfected (32–217, 18+826; 20+87; 59–259, 61+138). But the time within which an appeal is allowed by statute cannot be extended by such means (37–461, 35+270). The mere entertaining of a motion to settle and allow a case after the expiration of the statutory period does not in itself constitute an extension of time (51–337, 53+643). By stipulation the parties may extend the time for serving and settling a case or bill (38–137, 36+108; 69–429, 72+705; 94–407, 103+15). In an action to recover possession of personal property, where a claimant intervened, and the court ordered judgment for plaintiff, intervener was not an adverse party required to be served (98–526, 106+1133). Insufficiency of objection to amendment of settled case (124–317, 145+37; 135–477, 160+248). Mandamus to allow and settle case beyond period of stay (124–537, 144+755; 132–146, 155+905). Shortening and extending period for settling case (125–475, 147+654). After time limit, and motion to strike settled case (139–491, 164+365, 165+1073). Suspension of sentence is discretionary and in effect a stay (125–529, 147+273). Defects in evidence and errors in charge not reviewable without settled case or bill of exceptions (127–520, 148+1081). In such case only determination is, do findings sustain judgment (137–179, 162+1073). Settling and allowing case jurisdictional and discretionary (127–533, 149+550; 128–537, 150+924; 136–465, 161+783). Presumption as to findings in absence of settled case (129–156, 151+910). Showing justifiable for settled case (134–276, 159+566). Stipulation for stay of all proceedings is necessarily inclusive of settlement of case *or bill of exceptions; Supreme Court cannot control discretion of trial court* (155–497, 192+937). When stenographer's transcript, if properly settled under this section, may serve as a bill of exceptions, or stand as settled and certified case (197+283).

In an appeal from a judgment, where the trial court has made several findings of fact, an assignment "that the findings of fact are not sustained by the evidence and are contrary to the evidence" is insufficient. 157–1, 195+627.

The stenographer's transcript, if properly settled, may serve as a bill of exceptions, though the court's certificate fails to state that it contains all the eviednce. 158–269, 197+283.

Stenograher's transcript to which the court had appended an order that it should stand for a settled case held insufficient to constitute a properly settled and certified case where the record and files show no proof of service of a copy of the proposed case upon the respondent, and no notice or proof of notice of application to the judge for settlement or allowance thereof under Gen. St. 1913, § 7832. 158–269, 197+283

An order denying a motion for a new trial must be affirmed in the absence of a properly settled and certified case. 158–269, 197+283.

An assignment of error that the evidence does not sustain the findings, there being several, does not challenge any finding. 210+637.

9330. Same—When judge incapacitated, etc.—When the judge who tried the cause ceases to be such, or dies or becomes incapacitated from sickness or other cause, or is without the state at the time limited for such allowance or settlement, such bill may be allowed or case settled by the judge of a district adjoining that in which the action is pending; and when a referee dies, or becomes incapacitated, or is so absent, the bill may be allowed, or case settled, by the judge of the court in which the action is pending. In either case the allowance or settlement shall be made upon the files in the cause, the minutes of the judge or referee, or of the stenographer, if obtainable, and upon such proof of what occurred at the trial as may be presented by affidavit, with like effect as if the allowance or settlement were by the judge or referee who tried the cause. (4203) [7833]

55–334, 56+1117; 125–477, 147+655.

REPLEVIN

9331. Possession of personal property, how claimed —The plaintiff, in an action to recover the possession of personal property, at the time of issuing the summons or at any time before answer may claim the immediate delivery of such property in the manner following. (4204) [7834]

Optional with plaintiff to claim immediate delivery or not (61–219, 63+630; 64–5, 65+959). Demand unnecessary as condition precedent; status of partial payments undetermined (124–426, 145+164). Unavailable against joint owner or tenant in common (128–349, 150+1098; 129–525, 152+1101).

213+40.

Gist of action. 158–396, 197+840.

In replevin for the owner's shares of crops raised by defendant under a cropping contract, it is a defense, nothing else appearing, that before severance plaintiff conveyed the property, absolutely and without reservation of the crops, to a third party. 164–366, 205+262.

In an action in replevin, it is reversible error to direct a verdict in favor of the defendant, where the plaintiff holds a past-due chattel mortgage, given by defendant, upon a part of the property. 164–416, 205+274.

Evidence, held to justify a finding that the horses in question were the property of the plaintiff, that each horse was of the value stated in the verdicts, and that the plaintiff's damages for the detention of the property were as stated in the verdicts. 136–408, 208+135.

A sheriff cannot take property under a writ of replevin which he is holding under a prior writ of attachment; but, if the attachment is released, it then becomes his duty to execute the writ of replevin. 212+593.

Where the pleadings disclose plaintiff's source of title to property in a replevin action as resting on a note and chattel mortgage, the defense of payment must be pleaded. 213+536.

9332. Affidavit—An affidavit shall be made by the plaintiff or some person in his behalf, showing:

1. The particular property claimed, and that plaintiff is the owner thereof, or is lawfully entitled to its

possession by virtue of a special property therein, the facts respecting which shall be set forth;

2. That the property is wrongfully detained by the defendant;

3. That the same was not taken for a tax, assessment, or fine, nor seized under an execution or attachment against plaintiff's property, or, if so seized, that it is by statute exempt from such seizure; and

4. The actual value of the property. (4205) [7835]

Subd. 3 cited (61–219, 63+630; 86–177, 90+316). Burden of proof as to identity of property claimed (123–525, 143+268). Sufficiency of constructive possession (133–202, 158+41; 137–61, 162+1059). When replevin lies as to unlawful severance of trees and their removal (207 Fed. 40).

9333. Bond and sureties—A bond to defendant shall be executed by or in behalf of the plaintiff, with surety approved by the sheriff, in a penal sum at least double the value of the property, conditioned for the return of such property to the defendant, if a return thereof be adjudged, and for the payment to him of such sum as for any cause may be adjudged in his favor. (4206) [7836]

Liability on bond (6–412, 277; 14–554, 422; 17–475, 453; 21–51; 33–253, 22+538; 86–168, 90+376).

While it is the general rule that a plaintiff, defeated in a replevin action, is not relieved of liability on his bond by the loss or destruction of the property while in his possession pending the action, he may show, in mitigation of damages, when sued upon the bond, that the real loss is less than the value of the goods. 213+378.

A defeated plaintiff in a replevin action, who has taken the property under his writ, and given bond for its return, cannot escape liability on the bond by procuring an ex parte order permitting him to deliver the property into court. 213+378.

9334. Requisition to sheriff—Service and return—The plaintiff or his attorney, by an indorsement on the affidavit, may require the sheriff to take the property from the defendant and deliver it to the plaintiff; and upon receipt of the affidavit, indorsement, and bond the sheriff shall forthwith take the property, if in the possession of the defendant or his agent, and retain it in his custody until delivered as hereinafter provided. The affidavit, indorsement, and bond shall be served by the sheriff, without delay, upon the defendant, or upon his agent having the property in charge, as a summons is required to be served; and the originals, with the return of the officer thereon, shall be filed with the clerk within twenty days after the taking. (4207) [7837]

By virtue of process in a replevin action, a court officer has the right to take possession of the property described in the replevin papers and to enter the place of abode of the defendant in the action for that purpose, provided he can enter peaceably. 209+532.

9335. Exception to sureties — Rebonding — Within three days after such service the defendant may give notice to the sheriff that he excepts to the sufficiency of the sureties. If he does not except, he, or some person on his behalf, may give bond to the plaintiff, with surety to be approved by the sheriff, in the same sum as that of the plaintiff, conditioned that the property shall be delivered to the plaintiff, if delivery be adjudged, and for the payment to him of such sum as may be adjudged against the defendant; and thereupon, by written demand to the sheriff, he may require the return to him of the property taken. If he does not so except or demand a return, the property shall be delivered to the plaintiff. Within three days after the approval of the defendant's bond the plaintiff may in like manner except to the sureties thereon. (4208) [7838]

Officer should retain possession for three days to await rebonding (1–242, 171). Assignment of judgment carries bond (36–198, 30+879). Liability on bond (64–256, 66+974; 88–56, 92+506). See 138–177, 149+2.

Where the owner of personal property brings an action in replevin against a party claiming merely a lien thereon, and obtains possession from the officer who executed the writ, by reason of the claimant's failure to rebond, the plaintiff thereby acquires the right to sell and dispose of the property pendente lite and give good title to the purchaser. 158–396, 197+840.

9336. Justification of sureties—Within two days after exception taken to the sureties of either party, he shall serve upon the other not less than two nor more than six days' notice of their justification. If any surety fails to justify at the time appointed, another may be substituted within such time, not exceeding three days, as the judge or officer may appoint; but there shall be only one adjournment, and in case of substitution a new bond shall be executed by all the parties to be bound. (4209) [7839]

9337. Delivery of property—Waiver of justification—Upon justification of plaintiff's sureties, the sheriff shall deliver the property to him, except as otherwise prescribed when claim is made by a third person, and upon like justification of defendant's sureties the property shall be delivered to the defendant. When the sureties fail to justify, or when justification is waived as herein provided, the sheriff shall forthwith deliver the property to the person entitled thereto. The sheriff shall retain the property until the justification is completed or waived, and he shall be liable for the sufficiency of the sureties during such time. Justification of sureties may be waived in writing by either party either before or after notice. (4210) [7840]

9338. Proceedings when property is concealed—If the property, or any of it, be concealed or inclosed in a building or elsewhere, and a public demand made by the sheriff for its delivery be refused, he shall cause the building or inclosure to be broken open and take the property therefrom; and, if necessary to that end, he may call the power of the county to his aid. Whenever it shall be made to appear, by the return of the sheriff or by affidavit, that any of the property sought to be recovered has been concealed, or cannot with reasonable diligence be found, the court may require the defendant, and such other persons as it shall deem proper, to attend and be examined touching the disposition thereof, and may enforce its orders in the premises as in other cases. (4211) [7841]

9339. Property, how kept, and when delivered by sheriff—When the sheriff has taken property as herein provided, he shall keep it in a secure place, and deliver it to the party entitled thereto upon receiving his lawful fees for taking, and necessary expenses for keeping, the same. (4212) [7842]

9340. Claim of property by third person—If any property levied upon or taken by a sheriff by virtue of an execution, writ of attachment, or other process, or in an action of replevin, is claimed by any person other than the defendant or his agent, and such person, his agent or attorney, shall make and serve on the sheriff an affidavit of his title or right to the possession of such property, stating its value and the ground of such title or right, the sheriff may release such levy or taking unless the plaintiff, on demand, shall indemnify him against such claim by a sufficient bond in a penal sum of at least double the value alleged in such affidavit. No claim by any person, other than the defendant or his agent, shall be valid against the sheriff unless so made, and he may retain the property for a reasonable time after such claim to obtain such indemnity. (4213) [7843]

Applicable only to cases where the property seized is found in the possession of the defendant named in the

writ or his agent, so as to create an appearance or presumption of ownership in him (9-97, 87; 14-163, 126; 18-308, 278; 25-432; 26-120, 1+836; 26-172, 2+473; 28-1, 8+825; 28-390, 10+418; 28-526, 11+94; 30-321, 15+309; 32-71, 19+385; 35-248, 28+504; 38-424, 38+110; 49-381, 52+30; 88-123, 92+523; 105-50, 117+231). A statement in the affidavit that the claimant is the owner of the property is a *sufficient statement of the ground of his title or right* to possession, at least where he is the general owner. The affidavit should allege the claimant's ownership as of the time of the levy as well as of the time of the demand. An agent making an affidavit may state the facts as upon information furnished him by his client (36-183, 30+453; 77-124, 79+603). Notice in form of affidavit held *sufficient (112-270, 127+112). The affidavit and notice* may be served on the deputy sheriff who made the levy and has the property in his possession (13-174, 165). Failure to serve affidavit did not avoid verdict, where only issue tried related to other matters (103-459, 115+640). An attorney of a non-resident has implied authority to execute a bond in the name of his client *under this provision (29-367, 13+194). The statute is* designed for the protection of the officer in the discharge of his duties (30-321, 15+309; 47-70, 49+396, 77-124, 79+603). See 153-475, 191+282.

Is without application when the property is in the possession of the claimant and taken from him and not in the possession of the execution defendant. 161-92, 200+930.

The statutory affidavit, claim, and demand by a third party apply only to cases where the property taken is found in possession of the defendant against whom the process is issued. 165-282, 206+446.

9341. Plaintiff and sureties first liable in action for taking—If the person claiming under § 9340 shall begin an action against the sheriff for the taking of such property, the plaintiff in such process or action and the sureties on the indemnity bond so given shall *be impleaded in the action with the sheriff, on* his motion; and, if judgment be rendered against him and his codefendants in such action, execution thereon shall issue forthwith, and the property of such codefendants shall be exhausted before that of the sheriff *shall be subject to sale.* (4214) [7844]

30-321, 15+309; 55-489, 57+210.

ATTACHMENT

9342. When and in what cases allowed—In an action for the recovery of money, other than for libel, slander, seduction, breach of promise of marriage, false imprisonment, malicious prosecution, or assault and battery, the plaintiff, at the time of issuing the summons or at any time thereafter, may have the property of the defendant attached in the manner hereinafter prescribed, as security for the satisfaction of such judgment as he may recover. A writ of attachment shall be allowed by a judge of the court in which the action is brought, or a court commissioner of the county. The action must be begun as provided in § 9199 not later than sixty days after issuance of the writ. (4215) [7845]

1. Nature of proceeding—5-69, 50; 13-205, 192; 29-108, 12+342; 37-194, 33+559; 45-341, 346, 48+187; 50-405, 52-905.

Sale of land under order of probate court where share of heir is attached. 161-252, 201+422.

The property of a foreign railroad company operating no line of railroad in this state is not immune to attachment of its property used in interstate commerce. 162-55 202+56

That land is exempt as a homestead is not a ground for the dissolution of an attachment; and the order dissolving the attachment was not an adjudication that the homestead was on the land attached. 162-176 202+711.

Swaney v. Hasara (Minn.) 205 N. W. 274, followed to the effect that section 67f of the Bankruptcy Act (Mason's Code, 11, 107)) annuls the liens therein referred to only as against the trustee in bankruptcy and those claiming under him. 166-405, 208+21.

2. Statute to be followed strictly—3-406, 300; 78-427, 81+198.

3. A matter of right—18-541, 485; 20-435, 389; 78-427, 81+198.

4. In what actions allowed—5-69, 50; 6-183, 117. Action for alienation of affections is not an exception (149-424, 183+844).

5. At what time may issue—May issue simultaneously with the summons or at any time thereafter (12-420, 305; 13-326, 299; 91-226, 97+974; 91-352, 98+188). Distinction between this section and section 9356 (123-332, 143+792; 147-380, 180+233).

6. Jurisdiction how acquired—The action is not commenced by the attachment but by service of summons and the failure to make such service, actual or constructive, as authorized by statute, leaves the court without jurisdiction (29-108, 12+342; 37-194, 33+559. An action against a non-resident, although in form in personam, is in effect in rem, as it is only by attaching property that the court acquires jurisdiction to proceed further, and then only to the extent of the property attached (36-190, 31+210; 44-505, 47+169; 46-396, 49+190; 51-181, 53+460). Cited and applied (101-110, 111+949). See 147-380, 180+233. Service of non-resident defendant, not doing business within state, under Carnack Amendment (284 Fed. 1009).

7. Who may allow writ—Court commissioner may (91-352, 98+188). Clerk cannot (6-183, 117; 7-421, 336; 8-477, 427; 11-223, 145; 11-408, 301).

8. Effect of bankruptcy—85-105, 88+263.

9343. Contents of affidavit—To obtain such writ, the plaintiff, his agent or attorney, shall make affidavit *that a cause of action exists against the defendant,* specifying the amount of the claim and the ground thereof, and alleging:

1. That the debt was fraudulently contracted; or
2. That defendant is a foreign corporation, or not *a resident of this state; or*
3. That he has departed from the state, as affiant verily believes, with intent to defraud or delay his creditors, or to avoid the service of a summons, or keeps himself concealed therein with like intent; or
4. *That he has assigned, secreted, or disposed of* his property, or is about to do so, with intent to delay or defraud his creditors. (4216) [7846]

1. In general.

Sufficient affidavit jurisdictional. Judgment in an action based on insufficient affidavit void and subject to collateral attack. Affidavit which wholly fails to state grounds of plaintiff's claim fatally defective (78-427, 81+198). Allegations of affidavit must be positive and not on information and belief. Except as expressly authorized it is insufficient to allege facts "as deponent verily believes" (6-183, 117; 13-422, 390; 14-125, 93; 38-341, 37+585). Several grounds not inconsistent may be alleged *(9-68, 57; 23-229), but they must not be stated disjunctively* (14-520, 391; 28-73, 9+79). An allegation "that the defendant has assigned, secreted or disposed of his property with intent to delay or defraud his creditors" is sufficient (14-520, 391; 25-461). An allegation "that the defendant is about to assign, secrete or dispose of his property with intent to delay or defraud his cred*itors" is sufficient (14-520, 391; 25-461). An allegation* "that defendant has disposed of a part of his property with intent thereby to delay and defraud the plaintiff and is about to dispose of the rest of his property with the same intent" is sufficient (23-229; 28-73, 9+79). Not necessary to allege that summons has issued or suit commenced (12-420, 305). Affidavit for attachment against non-resident need not state that he has property in state subject to attachment (36-190, 31+210). Not indispensable that affiant sign the affidavit (47-405, 50+368). When made by agent or attorney it should state or recite that affiant is such agent or attorney (57-425, 59+490; 66-287, 68+1077). May be dated prior to commencement of action (47-581, 50+823). Effect of amendment of complaint and affidavit (61-170, 63+490). Cited (105-286, 117+515). Preferential transfer without actual fraud (124-112, 144+433). Insufficiency of mere constructive fraud in chattel mortgage (130-141, 153+125). Order refusing to vacate writ (155-509, 193+595).

The showing made by defendant justified the conclusion that the grounds stated for the issuance of a writ of attachment were untrue, and the writ was properly vacated. 157-283, 195+1015.

The charge, in an affidavit for attachment, of one ground for attachment cannot be sustained by proof that another ground for attachment existed. 161-358, 201+442.

Record examined and held to justify a finding that the transaction was not of such character as to indicate an intent to defraud 161-358, 201+442.

The truth of an affidavit for attachment should be challenged by motion to vacate the writ. 163-294, 204+38.

2. Departed from state, etc.

An affidavit for attachment, is not sufficient when it *says the defendant is "about" to do the things therein* specified. 160-127, 199+895.

When the affidavit relates to subdivision 4 and states

two distinct grounds for attachment, namely, "that the defendant has or is about to dispose of his property with intent to defraud his creditor, the plaintiff," it is bad. 160–127, 199+895.

3. Transfer with intent to defraud.

A transfer of property to secure a debt, where the value of the property is less than the debt, cannot be considered a transfer with intent to defraud within the spirit of the attachment statute. 164–130, 204+633.

A disposition of property with intent to defraud does not necessarily result, even though the transfer may be preferential. 164–130, 204+633.

4. Homestead.

Const. Art. 1, § 12, although self-executing, without legislation, does not, in itself, create lien in favor of one furnishing material or labor for improvement of exempt property, but such lien claimant secures lien in same manner in which other debts become liens. 167–243, 208+960.

Affidavit of attachment not complying with Gen. St. 1923, § 9343, is insufficient to fix lien on homestead. 167–243, 208+960.

9344. Conditions of required bond—Before allowing the writ, the court shall require of the plaintiff a bond, in the penal sum of at least two hundred and fifty dollars, conditioned that if judgment be given for the defendant, or if the writ be vacated, the plaintiff will pay all costs that may be awarded against him, and all damages caused by the attachment, not exceeding the penalty of the bond. (4217) [7847]

Undertaking sufficient. Defect in bond or undertaking not jurisdictional (78–142, 80+871, 81+529). Sufficient bond may be filed nunc pro tunc (78–142, 80+871, 81+529; 78–427, 81+198). Liability on bond (25–119; 37–544, 36+713; 41–240, 42+1059). Judgment of dismissal pursuant to stipulation releases from liability on bond (132–201, 156+5).

9345. Issuance, contents, and scope of writ—Upon filing the affidavit and bond, with the order allowing such writ, the clerk shall issue the same, stating therein the amount of plaintiff's demand. Several writs may issue at the same time, directed to the sheriffs of different counties. Each shall require the sheriff to attach and safely keep the unexempt property of defendant found in his county, or so much thereof as shall suffice to satisfy the amount claimed, with expenses and costs. All property not exempt from execution under the judgment demanded in the action shall be subject to attachment therein. (4218) [7848]

The lien acquired by a creditor, who causes the land of the debtor to be attached is not affected by bankruptcy proceedings instituted more than four months thereafter. 163–294, 204+38.

1. Form of writ—Must be under seal of court, dated, signed by clerk, and tested in name of presiding judge (§ 146; 20–196, 175; 22–189). Need not show by what officer it was allowed (7–506, 412). Slight variance in amount stated in writ and complaint immaterial (7–506, 412). Signature held sufficient (91–352, 98+188).

2. Held attachable—Interest of partner in firm property (4–217, 156; 13–199, 189; 13–205, 192; 24–20; 24–167; 25–212; 62–258, 64+567); vested equitable interests (45–341, 345, 48+187. See 74–215, 77+44; 88–311, 92+1125); interest of vendee under contract of sale of land (43–513, 45+1099); interest of vendor under contract for sale of land (25–382; 28–408, 10+427; 30–424, 15+869; 42–279, 44+251); property fraudulently transferred by debtor (9–108, 98).

3. Held not attachable—Property in custodia legis (32–496, 21+728; 33–229, 22+388; 41–304, 43+67); equitable interest of residuary legatee in trust fund (74–215, 77+44); interest of mortgagee before foreclosure (34–547, 27+66); interest in profits growing out of use of property (8–75, 51; 25–212); cars of foreign railroad corporation temporarily in state (92–20, 99+365); money or other property on person of debtor (3–406, 300). See 154–257, 191+591.

9346. Execution of writ—The sheriff, on receiving the writ, shall execute the same without delay. Real estate shall be attached by his filing a certified copy of the writ, and of his return of such attachment thereon, containing a description of such real estate, with the register of deeds of the county in which the same is situated, and serving a copy of such writ and return upon the defendant, if he can be found in his county, without any other act or ceremony. Such attachment shall be a lien on the interest of the defendant in such real estate from the time of filing the same. Personal property shall be attached in the manner provided by law for the levy of an execution thereon, and, so far as practicable, the provisions respecting such levy shall govern the execution of the writ of attachment. (4219) [7849]

1. Levy on realty—35–1, 24, 25+457, 30+826; 44–505, 47+169; 55–386, 397, 57+134; 126–176, 148+43.

2. Levy on personalty—3–406, 300; 26–141, 1+830; 27–530, 8+765; 30–191, 196, 14+884; 30–321, 15+309.

3. Lien on realty—44–505, 508, 47+169; 58–550, 60+667.

4. In general—Within the statutory time after the levy of the execution the plaintiffs presented to the sheriff their selection of a homestead. It was ignored. It is held that the defendants cannot contest the selection made. 162–176, 202+711.

Plaintiff caused a writ of attachment to issue and be put in the hands of the sheriff, who seized property, not in the possession of defendant, and sold it on execution. Plaintiff bid in the property at the sale and retained it. This constitutes conversion, and a demand for a return of the property is unnecessary. 165–282, 206+446.

9347. Inventory, service, and return—When an attachment of personal property has been made, the sheriff shall forthwith annex to the writ an inventory of the property attached, and, if the defendant be a resident of his county, shall serve such writ and inventory upon him in the manner prescribed for the service of a summons. When any writ of attachment is fully executed or discharged, he shall return the same, with his doings thereon, to the court. (4220) [7850]

Return (13–199, 189; 25–432; 27–269, 6+790; 40–470, 42+298; 44–505, 47+169; 78–142, 80+871, 81+529).

9348. Perishable property to be sold—Credits, etc., collected—If any of the property attached be perishable, the sheriff shall sell the same in the manner provided for the sale of personal property on execution. He may also take such legal proceedings, either in his own name or in that of the defendant, as may be necessary for the recovery of the credits and effects attached, and may discontinue the same as the court may direct. (4221) [7851]

Sale of perishable property (20–196, 175). Collection of debts (3–406, 300; 4–407, 309).

9349. Judgment for plaintiff, how satisfied—If judgment be recovered by the plaintiff, the sheriff shall satisfy the same out of the property attached, if sufficient, first paying to plaintiff the proceeds of sales of perishable property and of all credits collected by him, or so much thereof as may be required. If a balance remain due and an execution on the judgment be to him issued, he shall sell thereunder so much of the attached property as may be necessary to satisfy such balance. (4222) [7852]

When judgment is recovered the practice is to enter a general money judgment and issue a general execution without referring to attachment (58–550, 60+667). After judgment is entered the lien of the attachment is merged in the judgment (53–230, 54+1118).

9350. Motion to vacate—The defendant, within the time allowed to answer, or, if he has answered, at any time before the trial, may apply to the court, on notice, to vacate the writ of attachment. If the motion be made upon affidavits on the defendant's part, but not otherwise, the plaintiff may oppose the same by affidavits in addition to those upon which the writ was allowed. (4223) [7853]

½. In general.

The truth of an affidavit for attachment should be challenged by motion to vacate the writ. 163–294, 204+38.

Alleged falsehood, in a supporting affidavit to dissolve an attachment, does not justify an order setting aside an order dissolving the attachment, when the burden cast upon the plaintiff, by the absolute denial in defendant's affidavit, has not been met. 164–130, 204+633.

Upon a motion to vacate a writ of attachment, a denial of the allegations of the affidavit for attachment puts the burden upon the attaching party. Upon conflicting affidavits the court found that the burden was not sustained, and vacated the writ and dissolved the levy. 167–23, 208+192.

In a motion to vacate a writ of attachment upon the ground that the defendant was about to transfer property to delay creditors, the burden of proof is upon the plaintiff; and the proof in this case held insufficient. 167–181, 208+759.

1. When may be made—38–382, 37+799; 53–230, 54+1118.

2. Notice—12–420, 305.

3. Who may move—7–345, 271; 38–382, 37+799.

4. Effect of failure to move—11–223, 145.

5. Practice on hearing—Court may determine truth or falsity of allegations of fact in affidavit on which attachment issued (18–541, 485; 20–374, 325). Counter affidavits may be admitted (23–229; 23–571). What affidavits may be received and in what order and whether a continuance shall be granted to give a party opportunity to procure further evidence are matters of discretion (23–571). Defendant may use his verified answer as an affidavit (23–229). Where affidavits offered in opposition to the motion show that the moving party is entitled to the relief sought, though on a ground not stated in the moving papers, he may take advantage of the ground thus shown (7–345, 271). Where defendant traverses facts alleged as grounds of attachment the burden is on plaintiff to prove their truth and this he must do by competent evidence. A mere reiteration of the general statement of his original affidavit in the language of the statute, or a statement of mere opinion or belief, is not sufficient (51–285, 53+634). Where counter affidavits clearly and specifically state a badge of fraud they are not overcome or sufficiently contradicted by the general statements in the moving affidavits denying fraud (60–18, 61+684). Where affidavits are such as might reasonably lead different minds to opposite conclusions (102–466, 113+1061). Burden of proof on plaintiff (135–469, 160+1024).

6. Grounds for vacating—A writ may be vacated either because the statute has not been complied with in its allowance and issuance or because the statements in the affidavit for its allowance are untrue (18–541, 485). It is not a ground for vacating that officer has levied on property not subject to levy. The question on a motion to vacate is the validity of the writ and it cannot be vitiated by any irregularity in the officer executing it (5–69, 50; 60–18, 61+684). Court cannot try question whether plaintiff has or has not a cause of action or defendant a valid defence (5–69, 50. See 7–345, 271; 60–18, 61+684).

7. Motion by non-resident—74–4, 76+787.

8. Appeal from order refusing to dissolve—60–501, 62+1133.

9. Appeal from order dissolving—79–153, 81+830.

10. Question on appeal—14–243, 179; 24–319; 25–461; 26–308, 3+978; 38–382, 37+799; 51–285, 53+634; 60–17, 61+672; 60–18, 61+684; 76–54, 78+878; 102–466, 113+1061.

11. Possession of property pending appeal—40–470, 42+298; 79–153, 81+830.

9351. Attached property retaken, when—Damages—Should any of the attached property belonging to the defendant pass out of the sheriff's hands without being converted by him into money, he may retake the same, and for that purpose shall have all the powers originally conferred by the writ; and any person who shall conceal or wilfully withhold such property from the sheriff shall be liable for double damages, at the suit of the party injured. (4224) [7854]

9352. Satisfaction, discharge, etc.—Real estate—An attachment of real estate may be released by filing for record with the register of deeds:

1. A certified copy of an order of the court vacating the attachment, or of a final judgment in defendant's favor, or a satisfaction of judgment in plaintiff's favor, rendered in such action.

2. A certificate of satisfaction or discharge of the attachment, executed and acknowledged by the plaintiff or his attorney, as required for the satisfaction of a mortgage.

3. A deed of release of the attached premises, or of any part or interest therein, in which case the parts or interests not described in the deed shall remain subject to the attachment lien.

Such attachment may also be released by an entry in the margin of the record, signed by the plaintiff or his attorney, acknowledging such release. (4225) [7855]

9353. Same—Personal property—When an attachment of personal property has been made by filing a copy of the writ with any public official, its discharge shall be effected by filing in the same office any instrument of release mentioned in § 9352. (4226) [7856]

9354. Same, when action is abandoned—If no judgment be entered within three years after the attachment, any party interested in the attached property, whether a party to the action or not, may move the court therein for its release. And if it be made to appear that no proceeding has been taken in the action within the preceding three years, or from other evidence that the action has been abandoned, such motion shall be granted. (4227) [7857]

53–230, 54+1118; 147–381, 180+233.

9355. Attachments and releases—Record and index—All copies of writs of attachment filed for record with the register of deeds, and all satisfactions or releases of attachments of real estate thereunder, shall be recorded in the books provided for the record of mortgages, and shall be indexed as if the defendant in the attachment were a mortgagor and the plaintiff a mortgagee. (4228) [7858]

GARNISHMENT

9356. Affidavit—Garnishee summons—Title of action—In an action in a court of record or justice court for the recovery of money, if the plaintiff, his agent or attorney, at the time of issuing the summons, or at any time during the pendency of the action, or after judgment therein against the defendant, files with the clerk of the court, or, if the action is in a justice court, with the justice, an affidavit stating that he believes that any person (naming him) has property or money in his hands or under his control belonging to the defendant, or that such person is indebted to the defendant, and that the value of such property or the amount of such money or indebtedness exceeds twenty-five dollars, if the action is in the district court, or ten dollars if in a justice court, and if the plaintiff files with such affidavit a copy of the complaint when the complaint has been theretofore either served on the defendant or filed in said action, a summons may be issued against such person, as hereinafter provided, in which summons and all subsequent proceedings in the action the plaintiff and defendant shall be so designated, and the person against whom such summons issues shall be designated as garnishee. (4229) [7859] (Amended '27, c. 300)

Affidavit sufficient if it conforms to statute (55–102, 56+581). While it is somewhat in the nature of a complaint against the garnishee its sufficiency is not to be determined by the ordinary rules of pleading. In an action against two defendants an affidavit that the garnishee "is indebted to the said defendants in an amount exceeding the sum of fifty dollars" is sufficient to charge the garnishee for a debt due from him to one of the defendants alone (61–404, 63+1078). Need not allege that garnishee is corporation (55–102, 56+581). May be dated prior to commencement of action (47–581, 50+823). When jurisdictional (61–404, 63+1078. See 3–360, 253; 5–347, 279; 9–55, 44). Must be filed before the garnishee summons is issued (3–360, 253). Objection to affidavit held waived (61–404, 63+1078). Cited as to affidavit in justice court (77–426, 80+356). Garnishment proceedings authorized in actions in tort (95–118, 106+304). In district

court, on appeal from justice court (103-79, 114+468. See note under § 7887). Cited and applied (103-69, 114+257). Issuance of summons in main action is essential (123-330, 143+792). Garnishee holding claim in excess of judgment is not liable (124-339, 145+26). Garnishment will lie on judgment, on appeal, without supersedeas (132-336, 156+668).

A debt has a situs wherever the debtor can be found. 210+874.

Wherever the creditor might sue for its recovery, there it may be reached by garnishment as his property. 210+874.

This may be done in an action in rem even though all parties are nonresidents of the state, it being immaterial where the debt was contracted or incurred. 210+874.

9357. Proceedings in justice court—If the action is in a justice court, the summons shall be issued by the justice, and shall require the garnishee to appear before him at a time and place specified therein, not less than six nor more than twelve days from the date thereof, to answer under oath such questions as may be put to him touching his indebtedness to the defendant, and any property or money of the defendant in his possession or under his control, which summons shall be served and returned in the same manner as a summons against a defendant, except that the service must be personal. A copy of such summons, together with a notice to the defendant stating the time, place, and manner of service upon the garnishee, and signed by the justice or the officer who served the same, and requiring the defendant to appear and take part in the examination, shall be served upon the defendant at least three days before the time specified in the summons for the appearance of the garnishee. (4230) [7860]

A judgment in a court of a justice of the peace against a garnishee upon his disclosure that he was indebted to the defendant, though his indebtedness was evidenced by a judgment, the justice having jurisdiction of the subject-matter of the action and of the parties, was with jurisdiction, was subject to correction on appeal if erroneous, but was not subject to collateral attack, and the payment by the garnishee of the judgment in the garnishment proceeding discharged pro tanto the judgment in the action against him. 161-374, 201+546.

9358. In district court—In actions in the district court such summons may be issued by the plaintiff or his attorney in the action, and shall be served and returned in the same manner as a summons issued against a defendant, except that the service shall be personal. It shall require the garnishee to appear before the court in which the action is pending, or the judge or clerk thereof, or a court commissioner of the county in which the action is pending, at a time and place specified therein, not less than twenty days from the service thereof, and answer touching his indebtedness to the defendant, and any property or money of the defendant in his possession or under his control. A copy of the summons, together with a notice to the defendant stating the time, place, and manner of service thereof upon the garnishee, signed by the plaintiff or his attorney, or the person or officer who served the summons upon the garnishee, and requiring the defendant to appear and take part in such examination, shall be served upon the defendant at least ten days before the time specified in the summons for the appearance of the garnishee. Such notice and copy of the summons may be served in the same manner as a summons in ordinary cases. (4231) [7861]

Cannot be issued until filing of affidavit (3-360, 253; 9-55, 44). Delivery to officer for service—when deemed to be issued (103-69, 114+257). Issues without order of court (9-55, 44). Need not run in name of state (12-80, 43). Several persons may be included as garnishees in same summons. Summons held to designate sufficiently court or officer before whom returnable (74-448, 77+206). Objection to summons and service held waived (9-55, 44; 55-102, 56+581). District court in which judgment originally entered held to have sole jurisdiction of garnishment proceedings (93-348, 101+502). Cited (30-191, 14+884). Failure to serve on defendant proper copy of the summons and notice not a jurisdictional defect. Proceedings may be dismissed on motion (103-69, 114+257). Service on non-resident by publication (133-326, 158+606).

The record fails to show service of a copy of the garnishee summons on defendant, or the filing of an affidavit with the examining officer that would dispense with such service, or that the garnishee disclosed or was defaulted; but does show that, without objection, the motion to discharge the garnishee was submitted on the sold ground that the funds garnisheed constituted the proceeds of the sale of defendant's homestead. Held, the order discharging the garnishee was not erroneous. 157-283, 195+1015.

When a copy of the garnishee summons was served upon defendant, the blanks in the printed notice to defendant, on the back of the copy of the summons, were not filled in, and it was not signed. The service in that condition did not amount to a service of the required statutory notice. 160-443, 206+468.

Held, following Hudson v. Patterson, 123 Minn. 330, 143 N. W. 792, that service of a garnishee summons before the issuance of a valid summons in the main action is unauthorized and of no effect. 164-363, 205+264.

9359. Effect of service on garnishee—Fees—The service of the summons upon the garnishee shall attach and bind all the property and money in his hands or under his control belonging to the defendant, and all indebtedness owing by him to the defendant at the date of such service, to respond to final judgment in the action. He may be compelled to disclose under oath respecting all matters contained in the affidavit: Provided, that no person shall be obliged to appear as garnishee unless the fees for one day's attendance and mileage allowed by law be paid or tendered in advance. (4232) [7862]

Creditor occupies no better position than would defendant in suit by him against garnishee (103-387, 115+205; 109-468, 124+223). Pendency of garnishee action is defense by way of plea in abatement in action by garnishee's creditor to recover debt sought to be reached by garnishment. Proper practice is to order stay (99-305, 109+403). Does not affect property acquired subsequent to service (2-310, 265; 69-128, 71+925). What constitutes "control" (23-475). Cited (21-42; 30-191, 14+884; 32-66, 19+346; 60-362, 62+396; 75-118, 77+568; 85-313, 88+848). Garnishment creates an inchoate lien (124-256, 144+959). Right of recovery of money subject to undermined garnishment (125-262, 146+1093). Creditor's interest in trust estate (130-395, 153+741). Verdict is not subject to garnishment (148-192, 181+327).

The service of a garnishee summons does not change the rights of the parties except to transfer to the plaintiff whatever claim the defendant had against the garnishee. 166-481, 208+413.

9360. Property subject to garnishment—All moneys and other personal property, including such property of any kind due from or in the hands of an executor or administrator, and all written evidences of indebtedness, whether negotiable or not; or under or over due, may be attached by garnishment; and money or any other thing due or belonging to the defendant may be attached by this process before it has become payable, if its payment or delivery does not depend upon any contingency; but the garnishee shall not be compelled to pay or deliver the same before the time appointed by the contract. (4233) [7863]

1. Held garnishable—Debt owing to a non-resident, the debtor being within the state (30-244, 15+113; 50-405, 52+905. See 72-383, 75+740; 80-478, 83+452; 88-456, 93+520; 103-268, 114+955; 114-27, 130+540); legacy in hands of executor (81-484, 84+332; 84-353, 87+944); indebtedness incurred by receiver operating railroad under federal court (58-145, 59+987); property under "control" of garnishee (23-475); United States voucher (21-42); bond of state deposited with trustee (3-389, 282); money in hands of garnishee which in equity and good conscience belongs to defendant (24-452; 80-473, 83+448); money in hands of stakeholder on bet (80-473, 83+448); stock in foreign corporation (60-362, 62+396); debt due from warehouseman for loss of goods stored (76-8, 78+864); promissory note (33-464, 23+846). Courts of this state have jurisdiction to entertain garnishment against

nonresidents where defendant and garnishee are both personally served within state. 72–383, 75+740; and 80–478, 83+452; distinguished. In such case situs of property, as determined by residence of parties, is immaterial. Nor is place of payment material where garnishee interposes no claim that he cannot be compelled to make payment at place other than agreed on (103–268, 114+955). Debt due from one foreign corporation to another (98–141, 107+966). Ownership of proceeds under bill of sale (123–444, 143+1130).

2. See in general—Assigned estate (130–392, 153+740). Surety company defendant to extent of judgment under its bond to insured co-defendent (132–336, 156+668; 150–506, 185+1022; 151–7, 186+121).

3. Held not garnishable—Debt owing by and to a nonresident (72–383, 75+740; 80–478, 83+452; 88–456, 93+520); property in hands of common carrier for shipment beyond state (61–104, 63+256; 81–247, 83+986. See 86–33, 90+7; 92–20, 99+365); contingent liability (12–279, 183; 23–545; 41–317, 43+65. See 58–145, 59+987; 76–8, 78+864); property in custodia legis (16–210, 184; 32–60, 19+347; 32–65, 19+347; 32–66, 19+346; 33–464, 23+846; 35–194, 28+252; 43–38, 44+524; 49–133, 51+665; 58–145, 59+987; 94–505, 103+711). Debt payable on condition (103–387, 115+205). See 148–192, 181+327. See '19 c. 178, prescribing procedure for garnishing or attaching wages of laborers on public work in counties having an area exceeding 5,000 square miles. '23 c. 204, providing that fire relief pensions are not subject to garnishment.

4. In general—Debt due insolvent bank passed to superintendent of banks. 160–229, 199+575.

The garnishee disclosure of an automobile indemnity insurer does not show that by carrying on the defense for the assured it estopped itself or waived the right to assert nonliability under the policy. 161–61, 200+812.

Property arrested by garnishment is subject to all the rights of the garnishee therein. He cannot be compelled to perform his contract with defendant in a manner otherwise than as provided therein, but the defendant's rights in mortgaged property or property upon which the garnishee has a lien may be attached. 162–139, 202+708.

A promise to apply the proceeds of specified property upon a particular debt does not give a lien upon or right to such proceeds until so applied, and until so applied they may be attached by garnishee process in an action against the promisor. 164–422, 205+268.

Equitable assignment of indebtedness of garnishee. 166–481, 208+413.

Title to money owned by a South Dakota bank, on deposit in a Minnesota bank, passes, by operation of law, to the superintendent of banks in South Dakota upon his officially taking possession of the South Dakota bank. 212+3.

5. Garnishment, attachment, etc., of wages due for labor, etc., on county roads in certain counties—Laws 1919, c. 178, reads as follows: "Section 1. That in any county of this state now or hereafter having an area of over five thousand (5,000) square miles, in order to attach or hold by garnishment, attachment, execution or other process any wages due for labor to any laborers, workmen or other persons who have performed manual labor on any county road, and the claims or wages of any persons who have furnished teams, wagons, scrapers or other tools and machinery in the performance of work on such roads, for the use of such teams and such equipment, when any such claims shall be due and payable under the provisions of chapter 182, General Laws of Minnesota for 1915, as amended by chapter 69, General Laws of Minnesota for 1917, it shall be necessary for the garnishment summons, writ of attachment, writ of execution or other legal process to be personally served upon the county road overseer, superintendent or foreman designated by the county board to have charge of the construction, improvement or maintenance of any such road and also authorized by said county board to issue time checks in payment of said work under the provisions of said chapter 182, General Laws of Minnesota for 1915, as amended, and such personal service of said garnishment summons, writ of attachment, writ of execution or other legal process for the attaching of such wages or money due from any such county must be made upon such county road overseer, superintendent or foreman prior to the issuance and delivery by him of any time check in payment of such wages or money due from said county. That any garnishment summons, writ of attachment, writ of execution or any other legal process served upon any county road overseer, superintendent or foreman, after the issuance and delivery of any such check hereinbefore referred to, shall be of no force or effect whatever to bind or attach any such wages or money due from any such county to any such workman or employe. That on being served with any such garnishment summons, writ of attachment, writ of execution or other process before the issuance or delivery of any such time check for wages or money due such workman or employe and upon the payment of his proper fees therefor, it shall be the duty of said overseer, superintendent or foreman to forthwith make out a time check as provided by section 2 of said chapter 182, as amended, together with an affidavit showing the amount paid to such employe during the period of 30 days next proceeding the service of such summons, execution or attachment, and that the amount set forth in the time check is the whole amount due at the time of such service, and without delay mail the original and duplicate thereof, together with such affidavit, to the county auditor of said county at the county seat, who shall retain such time check, together with such affidavit until the final determination of the action in which said wages or money are involved, and such time check and affidavit so forwarded shall constitute prima facie evidence of the facts therein set forth. That after mailing said time checks together with such affidavits to said county auditor, or in case said time checks shall already have been issued and delivered to said laborer or workman, or in case there shall be no wages or money due to said laborer or workman from said county, said overseer, superintendent or foreman shall make disclosure, whether any money or other property or effects be due said workman or laborer, as required by law and by said garnishment summons or other process so served upon him, provided his legal fees and mileage shall have been first tendered or paid to him. Except as hereinbefore provided in this section, all other provisions of law with reference to the attaching and holding wages or money due to any workman or employe on any county road work, whether by garnishment, writ of attachment, writ of execution or other process, shall apply and be followed in such garnishment, attachment or other execution proceedings." Section 2 of said Laws 1919, c. 178 repeals all inconsistent acts or parts of acts.

Laws 1915, c. 182 was repealed by Laws 1921, c. 323, § 79. See Gen. St. '23, § 2619.

9360-1. Property subject to garnishment—Money due from Highway Department—Procedure—Money due or owing to any corporation or person by the State on account of any employment, work or contract with the State Highway Commissioner shall be liable to garnishment, except as exempted by law. The garnishee summons may be served upon the highway commissioner by registered mail; and the disclosure shall be made by the commissioner or by some person having knowledge of the facts designated by him. The Commissioner, or the person having knowledge of the facts as so designated by the Commissioner, shall not appear before the Court for disclosure, unless the District Court, Municipal Court, or Justice of the Peace otherwise orders and by such order appoints a referee to take the disclosure at the time and place specified in such order upon six days' notice to the garnishee and to the defendant, but the Commissioner shall at least three days before the date of hearing on disclosure on such garnishee summons transmit to the court or officer before whom such disclosure is to be made a duly verified and authenticated statement of the moneys due and owing to the defendant, if any, which statement shall constitute the disclosure, unless otherwise ordered by the court as above specified. Unless the Commissioner, or person having knowledge of the facts disclosed by him, as aforesaid, is actually required to appear in court by the order of the Court no mileage fee shall be charged by the Commissioner, or any other person, on account of any such disclosure but a fee of two dollars ($2.00) shall be allowed for making such disclosure. The examination may proceed without notice to the defendant, if it be made to appear to the referee by affidavit that the defendant is not a resident of the State and cannot be found therein. When payment is made pursuant to judgment against said commissioner as garnishee a certified copy of the judgment with a certificate of satisfaction to the extent of such payment endorsed thereon shall be delivered to the commissioner as his voucher for such payment. ('23, c. 363; amended '25, c. 33)

9361. In what cases garnishment not allowed—No

person or corporation shall be adjudged a garnishee in any of the following cases:

1. By reason of any money or other thing due to the defendant, unless at the time of the service of the summons the same is due absolutely, and without depending on any contingency.

2. By reason of any debt due from such garnishee on a judgment, so long as he is liable to an execution thereon.

3. By reason of any liability incurred, as maker or otherwise, upon any draft, bill of exchange, or promissory note. (4234) [7864]

Cited (99–305, 109+403). Subd. 1 (12–279, 183; 23–545; 41–317, 43+65. See 58–145, 59+987; 76–8, 78+864). Subd. 2 (88–456, 93+520). Subd. 3 (1–54, 37; 5–468, 378; 7–325, 254; 148–191, 181+326).

Money in the possession of a sheriff, paid to him in redemption from a mortgage foreclosure sale, is not subject to garnishment. 164–450, 205+373.

Held to prevent the garnishment of a judgment against a county, even though at the time being execution was stayed by statute until the lapse of sufficient time to enable the county to collect through taxation the funds wherewith to pay the judgment. 166–403, 208+17.

9362. Examination of garnishee—Upon his appearance before the court or officer named in the summons, at the time specified therein, or to which an adjournment may be had, and the filing of proof of the service upon the defendant of such summons and notice, the garnishee shall be examined on oath touching the matters alleged in the affidavit, and full minutes of the examination shall be taken by the examining officer and filed with the clerk. If the defendant does not appear at the time and place specified in the summons for the appearance of the garnishee, and it appears that the plaintiff has been unable to notify him, the examining officer may postpone the examination for such reasonable time as may be necessary for that purpose, and thereupon service of such summons and notice, together with notice of the time to which the examination is postponed, shall be served upon defendant, at least ten days if in the district court, and three days if in justice court, before the day to which the examination is postponed: Provided, that if the plaintiff, his agent or attorney, files with the examining officer an affidavit that the defendant is not a resident of this state, and is not within the same as affiant verily believes, the examination shall proceed as if the summons and notice had been served upon defendant or he had duly appeared. (4235) [7865]

No provision for pleading on part of garnishee. Plaintiff has right to examine garnishee so as to bring out all the facts in order that court and not garnishee may determine latter's liability. Garnishee should be permitted to state matters in defence or setoff (49–521, 52+139; 72–263, 75+375). Disclosure of garnishee conclusive on plaintiff. Evidence in corroboration of garnishee admissible but not evidence in contradiction (3–389, 282, 293; 4–381, 288; 5–468, 378; 21–42; 41–498, 43+331; 96–499, 105+673). Applications for further disclosure on ground of mistake, inadvertence or excusable neglect addressed to discretion of court (49–521, 52+139). Statute does not contemplate findings of fact by court (42–112, 43+794). Cited (103–169, 114+257). Affidavit of defendant's nonresidence (133–326, 158+606). No service of garnishment summons on defendant and no affidavit filed with examining officer (195+1016).

166–481, 208+413; 210+874.

Application to open judgment against garnishee and permit further disclosure was addressed to discretion of court. 155–507, 194+2.

The record fails to show service of a copy of the garnishee summons on defendant, or the filing of an affidavit with the examining officer that would dispense with such service, or that the garnishee disclosed or was defaulted; but does show that, without objection, the motion to discharge the garnishee was submitted on the sole ground that the funds garnisheed constituted the proceeds of the sale of defendant's homestead. Held, the order discharging the garnishee was not erroneous. 157–283, 195+1015.

It is not error to permit the plaintiff to call for cross-examination a person, not an officer or managing agent of a corporate garnishee, who was authorized to make the disclosure and had charge of the papers showing the garnishee's dealings with defendant. 162–139, 202+708.

Jury trial. 165–100, 205+947.

9363. Garnishment of corporations—A corporation may be garnished, and may appear by its cashier, treasurer, or such other officer or person as it shall appoint, and the disclosure of such officer or person shall be considered the disclosure of the corporation; but if it appears to the court that some other person connected with the corporation is better acquainted with the subject matter than the one making the disclosure, such person may be cited to appear and answer in the proceeding, and, if he shall neglect or refuse to attend, judgment may be entered as hereinafter provided upon default. Service upon an agent of a foreign corporation doing business in this state shall be service upon such corporation. (4236) [7866]

72–263, 75+375; 80–73, 82+1108.

9364. Salaries or wages of officers or employees of municipal corporations — Procedure — The salary or wages of any officer of, or person employed by, a county, town, city, village or school district, or by any department thereof, shall be liable to garnishment, attachment and execution, except as exempt by law:

Provided, however, that any officer of, or person employed by a county, town, city, village or school district, or by any department thereof shall have the same right to sell, assign or transfer his salary or wages as is now possessed by any officer of, or person employed by any corporation, firm or person. In the case of such officer, the garnishee summons, writ of attachment, or execution shall be served upon the auditor, treasurer, or clerk of such body, or department thereof of which he is an officer; and in other cases such process shall be served upon the officer in whose office, or the head of the department in which, or the presiding officer of the body by which, such person is employed; and the disclosure, in a case of garnishment, or the certificate, in case of execution, shall be made by the officer or person so served, or by some person having knowledge of the facts designated by him: Provided, that when the garnishee summons is returnable elsewhere than in the town, city, or village where such officer resides, or in which his office is located or his duties are usually performed, he shall not be required to appear at the time and place therein specified, but, upon application of the plaintiff, the court or justice shall by order appoint a referee to take the disclosure at a time and place therein specified, within such town, city, or village, upon six days' written notice to the garnishee and to the defendant. If the Plaintiff, his agent or attorney, files with the referee an affidavit that the defendant is not a resident of this state and cannot be found therein as affiant verily believes, the examination may proceed without notice to the defendant. When payment is made by such debtor pursuant to a judgment against him as garnishee, or upon levy of execution, a certified copy of the judgment or execution, with a certificate of satisfaction to the extent of such payment indorsed thereon, shall be delivered to the treasurer of the debtor as his voucher for such payment. (4237) [7867] (Amended '25, c. 387)

95–62, 103+716. Cited (120–458, 139+947).

There is no power in the district court to authorize a receiver, appointed in proceedings supplementary to execution, to collect the official salary to be earned in the future by the judgment debtor. 166–363, 207+736.

9365. When property garnished exceeds claim—Whenever it appears that the property garnished is more than sufficient to pay the amount claimed in the complaint, and the probable interest and costs which may accrue to the plaintiff, the court, upon motion, may make an order releasing such excess from the garnishment. (4238) [7868]

9366. Claimant of property to be joined—If it appear from the evidence, or otherwise, that any person not a party to the action has or claims an interest in any of the garnished property antedating the garnishment, the examining officer may permit such person to appear in the action and maintain his right; and if he do not so appear, may direct that he be notified to appear or be barred of his claim. The notice in such case may be served in any manner that such officer shall direct, and the person so appearing or notified shall be joined as a party to the action and be bound by the judgment. (4239) [7869]

1. **Statutory procedure exclusive**—54-47, 55+827.

2. **Necessity of summoning claimant**—38-526, 38+700. See 150-235, 185+649; 150-499, 185+1019; 150-505, 185+1022. Garnishee not to be discharged without trial of issues (152-436, 189+433).

3. **Pleading—Burden of proof**—Affirmative on claimant who must serve first pleading in form of complaint in intervention to which plaintiff may answer (22-309; 32-381, 20+334; 54-47, 55+827; 68-325, 71+383). Complaint need not allege matter appearing on record in garnishment proceedings (84-455, 87+1122). May be aided by answer (33-262, 22+543). Claimant may rest his claim on disclosure alone (22-309).

4. **Answer**—Plaintiff has twenty days to answer (55-231, 56+818). Need not allege in answer facts alleged in original complaint or which appear of record in main action (54-47, 55+827; 84-455, 87+1122).

5. **Practice**—Claimants should be brought in or allowed to intervene by formal order (27-85, 6+445; 38-526, 38+700). Personal service of order outside state void (38-526, 38+700). On issues formed by complaint in intervention and answers thereto the parties are entitled to a trial as in ordinary actions (42-112, 43+794; 55-231, 56+818). Neither party entitled to jury trial as of right (see 54-47, 55+827; 61-398, 63+1075). Claimant must have same opportunity to protect his interest as is accorded to party to ordinary action (22-309). On trial by court findings of fact should be made (42-112, 43+794). Claimants may move to discharge garnishee (33-262, 22+543).

The intervener, not being the owner of the property involved, has no right to question the sale thereof to the several garnishees who were the successful bidders therefor at the auction conducted by defendant. 164-446, 205+371.

6. **Evidence**—Disclosure of garnishee admissible in favor of claimant (67-281, 69+909). Under allegation of ownership in complaint of claimant and denial in answer of plaintiff the latter may introduce any evidence to impeach title of claimant (32-381, 20+334; 32-529, 21+733; 54-47, 55+827. See 71-211, 73+729). Claimant's title to bank deposit (128-456, 151+178).

7. **Judgment**—83-394, 86+411.

8. **Costs**—28-63, 9+76; 83-394, 86+411.

9367. Proceedings when debt or title is disputed—If the garnishee hold the garnished property by a title that is void as to defendant's creditors, he may be charged therefor although the defendant could not have maintained an action against him therefor; but in this, and in all other cases where the garnishee, upon full disclosure, denies his liability as such, the plaintiff may move the court at any time before the garnishee is discharged, on notice to both the defendant and garnishee, for leave to file a supplemental complaint making the latter a party to the action, and setting forth the facts upon which he claims to charge him; and, if probable cause is shown, such motion shall be granted. The supplemental complaint shall be served upon both defendant and garnishee, either or both of whom may answer, and the plaintiff may reply. The issues thus made up shall be brought to trial and tried as in other actions. (4240) [7870]

212+3.

A supplemental complaint in a garnishment proceeding is not fatally defective because it merely alleges an indebtedness on the part of the garnishee to the defendant. The garnishee's only remedy is to move that the complaint be made more definite and certian. 162-139, 202+708.

Respondents had the burden of proving that notes and contracts executed in connection with sales of land were accepted in payment of defendant's indebtedness to appellant. 162-139, 202+708.

1. **Exclusive mode of controverting disclosure**—10-396, 315; 21-42; 41-498, 43+331. See 19-149, 113; 96-499, 105+673; 129-189, 152+137; 131-78, 154+741; 150-235, 185+649; 151-3, 186+121.

2. **Not matter of right**—28-63, 9+76.

3. **Diligence—Renewal of motion**—78-480, 81+391.

4. **Waiver**—When plaintiff submits liability of garnishee on disclosure alone he cannot afterwards petition for leave to file supplemental complaint (28-63, 9+76).

5. **Service of notice and complaint**—33-464, 23+846; 133-329, 158+606.

6. **When not allowed**—Will not be allowed if facts disclosed by garnishee in themselves warrant judgment against him (21-42; 23-475; 74-470, 77+409). Statute not applicable when claim made by third party (54-47, 55+827).

7. **Practice**—Supplemental complaint is to be construed in connection with the original complaint and it is not necessary to repeat in the former the allegations of the latter (71-211, 73+729. See 54-47, 55+827; 76-8, 78+864; 84-455, 87+1122). On issues formed by the supplemental complaint and answer thereto the trial is governed by the same rules of procedure and evidence as an ordinary civil action (42-112, 43+794; 71-211, 73+729). Court will take judicial notice of the entry of judgment against the defendant in the main action (76-8, 78+864). Neither party entitled to jury trial as of right (61-398, 63+1075. See 54-47, 55+827). Court should make findings of fact (42-112, 43+794). Proceedings to be deemed a continuation of garnishment proceedings (28-63, 9+76; 33-464, 23+846; 76-8, 78+864). Burden of proof (71-211, 73+729). Impeachment of garnishee (33-464, 23+846). 129-188, 152+136.

8. **Fraudulent conveyances**—22-247; 71-211, 73+729; 73-171, 75+1124; 123-444, 143+1130; 153-216, 190+63.

9. **Judgment**—67-281, 69+909; 131-78, 154+741.

9368. Time for appearance in garnishee proceedings—When any person duly summoned as garnishee neglects to appear at the time specified in the summons, or within one hour thereafter, he shall be defaulted, and a judgment payable in money shall be rendered against him for the amount of damages and costs recovered by the plaintiff in the action against the defendant, and execution may issue therefor directly against the property of such garnishee; but the court, upon good cause shown, may remove such default, and permit the garnishee to appear and answer on such terms as may be just. (R. L. '05 § 4241, G. S. '13 § 7871, amended '19 c. 184 § 1)

Relief from default (10-162, 130; 43-191, 45+427). Denial of relief discretionary (109-299, 123+825). Default held properly entered where garnishee appeared by attorney and merely offered to file affidavit of no indebtedness (72-263, 75+375). Costs include disbursements (23-71). Admissions of and estoppel against defaulting garnishee. Jurisdiction to enter judgment against defendant and garnishee (103-504, 115+649). Cannot make disclosure until default removed on application duly made and good cause shown (103-504, 115+649). Appeal from default judgment (144-227, 174+884).

9369. When rendered—Discharge—Transfer of action—No judgment shall be rendered against a garnishee until after judgment is rendered against the defendant; but a garnishee may be discharged after disclosure, if it appears that he ought not to be held. Whenever he is not so discharged, the cause shall be continued to abide the result in the original action; and in case any such original action, pending in a court not of record, shall be transferred under the provisions of law to any other court except by appeal, any garnishee action, the judgment in which is conditioned on the judgment in said original action, shall be transferred therewith, and written notice of such transfer, specifying the court to which the same is

made and the time, which shall not be less than two days after service of the notice, when such garnishee action will be heard, shall be served by the plaintiff on the garnishee. Such transfer shall carry with it all proceedings already had and any disclosure made therein. (4242) [7872]

Judgment can be rendered against a garnishee on his disclosure only when he admits that he is owing the principal debtor, or that he has in his possession or under his control property belonging to such debtor, or when the facts stated in his disclosure show beyond a reasonable doubt that such is the case (3-389, 282; 4-381, 288; 5-468, 373; 30-387, 15+675; 41-498, 43+331; 49-521, 52+139; 69-128, 71+925). Judgment cannot be ordered until the disclosure is closed (27-85, 6+445). To render the garnishee liable there must be a formal judgment entered (25-509; 96-499, 105+673). When a garnishee is discharged there is no entry of judgment and he is not entitled to costs (41-3, 42+539; 95-118, 103+709). If the debt sought to be reached appears from the disclosure to belong to a third party the garnishee should be discharged, unless the third party is brought in (31-40, 16+455; 38-526, 38+700). Proper tribunal to determine whether garnishee may be charged (99-305, 109+403). Dismissal of main action discharges garnishee (136-356, 162+468).

The levy of an execution upon such a debt by such creditor after the dismissal of the garnishee proceeding was effective, although made during the period of the stay provided in such order of dismissal. 159-263, 198+811.

When a defendant in a garnishee proceeding moves *for a dismissal thereof upon the ground, among others,* that the debt disclosed is not due him unconditionally from the garnishee, he cannot claim the order of dismissal to be res adjudicata that the debt sought to be reached by his creditor did not belong to him. 159-263, 198+811.

There was no laches on the part of the garnishee in applying for the vacation of the order for judgment against it. 166-481, 208+413.

9370. Proceedings when venue is changed—In case of a change of venue, in an action in the district court, before the garnishee has fully disclosed, the disclosure may be taken or completed regardless of such change, unless the defendant at whose instance the change was made shall otherwise require. If the change be ordered by the court, the order, upon request of the moving defendant, shall direct when, where, and before whom the examination shall proceed; otherwise the defendant shall serve, with his demand, written notice of such time and place, and of the court or officer before whom the examination will proceed. If such notice be not given and filed, the clerk shall retain all papers relating to the garnishment until the disclosure is completed. The place of disclosure, when changed, shall be within the county to which the action is transferred, unless the parties otherwise agree, and the time thereof not more than ten days later than that previously fixed; and the plaintiff shall pay to the garnishee additional mileage if the distance be increased. (4243) [7873]

41-552, 53+483.

9371. Who may take disclosure—Court commissioners, clerks of the district court, and referees appointed by the court for that purpose are authorized and required to take the disclosure of any garnishee, together with any other testimony offered by the parties to the action, and report the same to the court. All testimony shall be taken subject to any seasonable objection thereto. Any examining officer, other than the judge, shall receive from the plaintiff ten cents a folio for taking the disclosure, and the fee so paid may be taxed in the judgment against the garnishee. No judgment shall be rendered against the garnishee unless ordered by the court. (4244) [7874]

Order of court for judgment necessary (25-509; 93-348, 101+502). Other testimony on behalf of garnishee (96-499, 105+673).

9372. Disclosure before return day—When any person is summoned as a garnishee in the district court, he may appear before the officer named in the summons at any time before the return day thereof, and with the consent of the plaintiff, to be certified by such officer, make his disclosure with like effect as if made at the time specified in the summons. If the plaintiff will not consent to such disclosure, the garnishee, in case he is compelled to be absent from the county until after the return day of the summons, may make affidavit to that effect, which, with a notice of the time and place of making his disclosure before the same officer, he shall serve on the plaintiff or his attorney at least twenty-four hours before the time therein fixed for taking the same. On proof of such service, his disclosure shall be taken as hereinbefore provided, and with like effect. (4245) [7875]

1. **Application of section**—Intended for convenience of garnishee, but not to do away with service of summons on defendant, nor to prevent defendant from appearing at time specified in summons and insisting on his rights (103-69, 114+257).

2. **Amount of judgment**—Interest (67-365, 69+1100). Disbursements (23-71).

3. **Effect of judgment against garnishee**—On garnishee (3-360, 253; 15-241, 187; 23-239). On claimants (33-262, 22+543; 38-526, 38+700). On the res (see 3-389, 282, 297; 53-327, 55+141; 58-145, 59+987).

9373. Amount of judgment — Effect — Judgment against a garnishee shall be rendered, if at all, for the amount due the defendant, or so much thereof as may be necessary to satisfy the plaintiff's judgment against such defendant, with costs taxed and allowed in the proceeding against the garnishee. Such judgment shall acquit and discharge the garnishee from all claims of all the parties to the process in and to the property or money paid, delivered, or accounted for by such garnishee by force of such judgment. (4246) [7876]

See 126-256, 144+959. Offsetting claims (133-336, 156+668).

155-507, 194+2.

9374. Duty and rights of garnishee—When any person is charged as garnishee by reason of any property in his possession other than an indebtedness payable in money, he shall deliver the same, or so much thereof as may be necessary, to the officer holding the execution, and such property shall be sold and the proceeds accounted for in the same manner as if it had been taken on execution against the defendant; but the garnishee shall not be compelled to deliver any specific articles at any other time or place than as stipulated in the contract between him and the defendant. (4247) [7877]

Not required to deliver contrary to contract (61-104, 63+256; 81-247, 83+986; 86-33, 90+7; 103-387, 115+205).

9375. Court may determine value, make orders, etc.—Upon application of any party in interest, on notice, the court may determine the value of any property so in the hands of the garnishee for delivery, and may make any order relative to the keeping, delivery, and sale thereof, or touching any of the property attached, that is necessary to protect the rights of those interested, and at any time after the service of the garnishee summons may require the property or money so attached to be brought into court or delivered to a receiver by it appointed. (4248) [7878]

25-509.

9376. Proceedings when garnishee has lien—If it appear that the garnishee has a lien on such garnished property, or that it is in any way liable for the payment of a debt due to him, the plaintiff, on motion, may

be permitted to pay the amount thereof, and the amount so paid shall be repaid to plaintiff, with interest, out of the proceeds of the sale of such property. If the garnishee refuses or neglects to comply with any order of the court in the premises, he may be punished for a contempt, and also shall be liable to the plaintiff for the value of such property, less the amount of his lien: Provided, that he may sell the property to satisfy such lien, if a sale be authorized by his contract, at any time before such payment or tender. (4249) [7879]

20–411, 363; 27–32, 6+406; 33–464, 23+846.

Judgment against garnishee properly denied, where garnishee, a pledgor having the right so to do, sold its claim against the defendant, and its lien on the collateral security, and plaintiff has not availed itself of section to protect its own rights, to pay the debt secured by the pledge. 166–379, 208+22.

9377. Garnishee not liable for destruction—If any such garnished property be destroyed without negligence of the garnishee, after judgment and before demand by the officer holding the execution, the garnishee shall be discharged from all liability to the plaintiff for the non-delivery thereof. (4250) [7880]

9378. Fees and allowances of garnishee—A garnishee who appears and submits himself to examination, as herein provided, shall be allowed his fees and mileage for attendance at the rate allowed by law to a witness, and in extraordinary cases, such further sum as the court shall deem reasonable for his counsel fees and other necessary expenses. If he be charged as a garnishee, the amount of such allowances may be retained out of the property in his hands, and, if charged on account of specific articles of personal property, he shall not be required to deliver the same to the officer until payment thereof; and, if he be not held as a garnishee, he may recover judgment therefor against the plaintiff. (4251) [7881]

Counsel fees (19–414, 359). Costs include disbursements (23–71). Cited (23–239; 41–3, 42+539).

9379. Plaintiff's costs limited—Except when the garnishee fails to appear, the plaintiff shall in no case recover a greater sum for costs, including fees and costs allowed the garnishee, than the amount of damages recovered of the defendant. (4252) [7882]

Costs include disbursements (23–71).

The memorandum of a contract for the sale of goods, required by the statute of frauds, is not the contract, but only the written evidence of it. It need not consist of a single paper. It is sufficient if the terms of the contract can be gathered from other writings, provided their connection is obvious without resort to parol evidence. 159–106, 198+312.

The time of delivery of the goods, if agreed upon, is a material term of the contract, and must appear in the memorandum. 159–106, 198+312.

9380. Minimum judgment in justice and district courts—No judgment shall be rendered against a garnishee in a justice court where the judgment against the defendant is less than ten dollars, exclusive of costs, nor where the indebtedness of the garnishee to the defendant, or the value of the property or money of the defendant in the hands of the garnishee or under his control, as proved, is less than ten dollars. If the action is in the district court, no judgment shall be rendered against the garnishee where the indebtedness proved against him, or the value of the money or property of the defendant in his hands or under his control, is less than twenty-five dollars; and in all such cases the garnishee shall be discharged, and shall recover his costs, and have execution therefor against the plaintiff. (4253) [7883]

41–3, 42+539; 77–426, 80+356.

In an action upon a bond in which it was stated that property of defendant in possession of the garnishee had been garnished, the surety is estopped from asserting that there was not garnishable property in the hands of the garnishee. 210+887.

9381. Discharge not a bar—If any person summoned as a garnishee is discharged, the judgment shall be no bar to an action brought against him by the defendant or other claimants for the same demand. (4254) [7884]

9382. Garnishment by defendant—Whenever the defendant shall recover judgment against the plaintiff, or shall set up in his answer a counterclaim exceeding in amount the sum admitted in such answer to be due to the plaintiff, he may institute and prosecute garnishment proceedings under this subdivision as if he were plaintiff. And for the purposes of such proceedings he shall be considered as plaintiff, and the plaintiff as defendant, and his answer shall be deemed a complaint. (4255) [7885]

9383. Discharge of attachment or garnishment—At any time before the entry of judgment, the defendant whose property has been attached or garnished may secure its release by giving a bond, approved by a judge or court commissioner if the action is in the district court, by the judge if in a municipal court, and by the justice if in justice court, in a penal sum at least double the amount claimed in the complaint, or if the value of the property attached or garnished is less than such amount, then in double such value, conditioned to pay any judgment recovered against him in the action, or so much thereof as shall equal such value. The officer approving such bond shall make an order discharging such attachment or garnishment and releasing the property. Such order shall become effective upon filing the same with such bond in the court in which the proceedings are pending, and, in the case of garnishment, serving a copy of the order on the garnishee. (4256) [7886]

1. **Discharge of attachment**—Only defendant can proceed under statute (30–366, 15+673). Obtaining release on bond a waiver of right to move to vacate (46–196, 48+776). Defective bonds (21–434; 31–448, 18+281; 39–174, 39+69). Liability on bond (21–434; 31–448, 18+281). Cited (64–10, 65+949).

2. **Discharge of garnishment**—Liability on bond (64–10, 65+949). Cited (25–509; 38–539, 38+701; 103–79, 114+468).

The value of the property fixes the maximum liability of the surety. 210+887.

In an action upon a bond, in which it was stated that property of defendant in possession of the garnishee had been garnished, the surety is estopped from asserting that there was not garnishable property in the hands of the garnishee. 210+887.

9384. Appeals—Any party to a garnishment proceeding deeming himself aggrieved by any order or final judgment therein may remove the same from a justice's court to the district court, or from the district court to the supreme court, by appeal, in like cases, in the same manner, and with like effect as in a civil action. (4257) [7887]

Order discharging garnishee, whether on examination or not, appealable (41–3, 42+539; 95–118, 103+709). Order against garnishee for judgment not appealable (26–317, 4+45). Order refusing to discharge garnishee not appealable (84–353, 87+944). Order refusing to set aside proceedings not appealable (5–347, 279). Judgment on appeal (22–309). Right of stranger to appeal (4–116, 77). Appeal from justice court to municipal court (40–378, 42+86). After removal from justice court, garnishment may be commenced in district court, notwithstanding that proper appeal bond was given and is in force (103–79, 114+468). Default judgment appealable (144–227, 174+884).

Under the circumstances, the rule that an order refusing to vacate a nonappealable order is not appealable is not applicable. 166–481, 208+413.

INJUNCTION

9385. How issued—Effect on running of time—The writ of injunction shall issue when ordered by the court or a judge thereof, and shall be tested and sealed as other process. The period during which the performance of an act is stayed by injunction shall form no part of the time within which such performance is allowed or required by law. (4258) [7888]

135–47, 159+1083.

Cited (139–46, 165+495; 166+504).

The courts have no authority to enjoin the officials of the executive department from holding an election called by the Governor to fill a vacancy in the representation of this state in the Senate of the United States. 156–270, 194+630.

In calling such an election under the power conferred upon him by the federal Constitution, the Governor is exercising a governmental and political power, over which the courts have no control. 156–270, 194+630.

Under the facts stated in the opinion the plaintiff was not entitled to a mandatory injunction restraining the maintenance of a concrete sidewalk where located, nor to an injunction restraining the levy of assessments to pay for its construction. 161–332 201+550.

Liquidated damages for the breach of a membership contract with an association organized under the Cooperative Marketing Act do not give a full complete, and adequate remedy. The only adequate remedy is an injunction preventing the members from breaching their contracts, and thus indirectly forcing the delivery of the product to the association. 162–471, 203+420.

The plaintiff corporation was not entitled to an injunction restraining the defendant society from publishing Radiology, the name of a journal published by the society after its relations with the plaintiff corporation ceased. 164–167, 204+644.

A district court has jurisdiction to try an action which seeks to restrain the enforcement of a debt, evidenced by a judgment in another district court of the state, by execution when the debt has been satisfied, or when the plaintiff has ceased to be liable upon the judgment. 210+396.

9386. Temporary injunction when authorized—When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief consists wholly or partly in restraining the commission or continuance of some act which, if permitted during the litigation, would work injury to the plaintiff, or when during the litigation it appears that the defendant is about to do, or is doing, or threatening, procuring, or suffering to be done, some act in violation of plaintiff's rights respecting the subject of the action, and tending to make the judgment ineffectual, a temporary injunction may be granted to restrain such act. And where, during the pendency of an action, it appears by affidavit that the defendant threatens or is about to remove or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition. (4259) [7889]

1. In general.

Temporary mandatory injunction may be allowed (56–188, 57+471). Purpose of temporary injunction is to maintain matter in controversy in existing condition until a decree (26–479, 5+365). May be allowed although plaintiff does not ask for permanent injunction in complaint (55–482, 57+208). Granting temporary injunction a matter resting in judicial discretion. Such discretion is to be influenced by a consideration of the relative injury and inconvenience which may be likely to result to the parties, respectively, from the allowance or disallowance of the writ (17–457, 434; 53–335, 55+140; 67–36, 69+478; 80–214, 83+140; 88–372, 93+118). Not granted except for protection of rights which are clear and to avoid irreparable injury. When the answer denies all the equities set up in the complaint and a petition for a temporary injunction discloses no others it is improper to grant the writ (9–103, 93; 70–482, 73+412). Refusal to enjoin, merits evenly balanced (123–232, 143+728). Denied where court was not justified in entertaining action at all (124–10, 144+423). Temporary injunction restraining divorce proceeding in foreign state (127–21, 148+478). Temporary injunction when undisturbed on appeal (129–391, 151+139). Order not disturbed on appeal except for abuse of discretion (130–510, 153+1088). Injunction granted on sworn denial in answer, favorable probability on final hearing appearing (131–337, 155+99). Labor trouble (131–458, 155+638). Order against service of land contract cancellation notice (133–384, 157+587). Restraining sheriff as to county building (134–473, 159+129; 136–167, 161+520, 1055; 136–200, 161+524; 137–109, 162+1062). Municipal officers cannot, unless ultra vires, be enjoined from leasing public building (137–179, 162+1073).

164–519, 204+629; 165–415, 206+654; 209+485; 210+868.

An order granting or refusing a temporary injunction will not be reversed, except when the record shows an abuse of discretion. A positive denial of the equities of the complaint does not preclude the court from granting a temporary injunction. 156–467, 195+145.

This statute is not limited by § 9576, which see 160–307, 200+90.

Record examined, and held, that the trial court abused its discretion in denying an interlocutory injunction. 161–198, 201+324.

Under the facts set out in the opinion, the trial court did not abuse its discretion in granting a temporary injunction. 162–210, 202+484.

Plaintiffs did not shift from one ground to another in their application for an injunction. 162–210, 202+484.

2. Breach of contract.

Plaintiffs can terminate the contract in controversy at will and therefore cannot maintain an action to compel performance by defendant. 164–252, 204+882.

Actions to enjoin breach of a contract are similar to actions for specific performance and are governed by the same rules. 164–252, 204+882.

3. Construction of building.

The order of the trial court denying a temporary injunction against the construction of a building on the property of the defendants within a specified distance of the property line, the plaintiff claiming that an ordinance prohibited the construction within such distance, is sustained as a discretionary one. 157–411, 196+492.

4. Interference with performance of contract.

Application for an injunction, pendente lite, restraining the defendant from interference with the performance of a certain contract which plaintiff claims to have entered into with the defendant; held, that the court below was within its discretion in denying the application. 164–152 204+925.

5. Restraining suit.

Restraining replevin suit. 166–507, 208+408.

6. Calling station.

Taxpayers are entitled to an injunction restraining a public officer from calling an election under an unconstitutional law, because it is an unlawful expenditure of public funds. 167–45, 208+409.

7. Negotiation of note.

The rule that it is largely within the discretion of the trial court to grant or deny an application for a temporary injunction is as applicable in a case where the injunction is sought to restrain the negotiation of a promissory note alleged to be tainted with usury and the enforcement of a mortgage given to secure the note. 167–330, 209+5.

8. Signing public contract.

The trial court did not abuse its discretionary power in denying an application for a temporary injunction restraining the city council from signing a contract for the construction of a public sewerage system and outletting the effluent into Goose Lake. 212+909.

9387. Notice of application — Restraining order — Such injunction shall be granted only upon motion or order to show cause, but the defendant may be restrained by order until the decision of the court or judge granting or refusing the same. It may be granted at the time of commencing the action, or at any time afterwards before judgment, upon its appearing satisfactorily to the court or judge, by affidavit, that sufficient grounds exist therefor. A copy of the affidavit must be served with the injunction. But no order restraining a sale of real estate upon execution or foreclosure by advertisement shall be made unless the rights of the applicant would be prejudiced, nor unless a satisfactory excuse be shown for the failure to apply for the injunction in time for a hearing upon notice before the day of sale. (4260) [7890]

If a complaint is verified and its allegations are positive an injunction may issue thereon without an affidavit (10–23, 8; 32–313, 20+241). Restraining order (47–369, 372, 50+332; 78–464, 81+323; 83–246, 86+83). Execution and

foreclosure sales (17–457, 434; 45–59, 47+316; 114–501, 131+787; 150–443, 185+645).

Enjoining solicitation of patronage of customers of former employer. 156–83, 194+92.

Wehther a restraining order pendente lite shall be made rests in the discretion of the trial court, and, in the absence of an abuse of such discretion, this court will not interfere. 163–278, 203+784.

9388. Bond required—Damages, how ascertained—When not otherwise especially provided by law, the applicant for the writ, before the same issues, shall give a bond in the penal sum of at least two hundred and fifty dollars, executed by him or some person for him as principal, approved by the court or judge, conditioned for the payment to the party enjoined of such damages as he shall sustain by reason of the writ, if the court finally decides that the party was not entitled thereto. The court, on motion, may require additional security, and, upon failure to furnish the same, shall dissolve the injunction. The amount of such damages may be ascertained by a reference or otherwise, as the court shall direct, in which case the sureties shall be concluded as to the amount, but the damages shall be recoverable only in an action on the bond. (4261) [7891]

Remedy on bond exclusive. Objection to sufficiency of bond (32–277, 20+195). Necessity of new bond when additional parties brought in (78–464, 81+323). Liability on bond (32–277, 20+195; 34–329, 25+636; 43–507, 45+1134; 72–185, 75+17; 76–129, 78+970; 87–285, 91+1113; 91–392, 98+197). See 126–470, 148+311; 142–362, 172+218. Counsel fees recoverable on bond (143–177, 173+435).

210+856.

Action on an undertaking. The issues litigated in the injunction suit are conclusive in this action and cannot be relitigated. 208+952

The trial court under our statute has no discretion to grant a prelimirary injunction after a hearing, without exacting a bond. 208+952.

Where two separate issues of fact are pleaded as a defense in a suit fo rinjunction, and findings are made as to each, both must be given effect in the action upno tne bond. 208+952.

RECEIVERS

9389. When authorized—A receiver may be appointed in the following cases:

1. Before judgment, on the application of any party to the action who shall show an apparent right to property which is the subject of such action and is in the possession of an adverse party, and the property, or its rents and profits, are in danger of loss or material impairment, except in cases wherein judgment upon failure to answer may be had without application to the court.

2. By the judgment, or after judgment, to carry the same into effect, or to preserve the property pending an appeal, or when an execution has been returned unsatisfied and the judgment debtor refuses to apply his property in satisfaction of the judgment.

3. In the cases provided by law, when a corporation is dissolved, or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights; and, in like cases, of the property within this state of foreign corporations.

4. In such other cases as are now provided by law, or are in accordance with the existing practice, except as otherwise prescribed in this section. (4262) [7892]

1. In general.

Not exclusive (44–144, 46+297). Cited generally (24–464, 478). Subd. 4 (44–144, 46+297). See 125–283, 146+1101. Ancillary (126–440, 148+449). Discretionary (129–229, 152+264, 537). General equity powers (134–425, 159+949). Foreclosure of mechanic's lien (136–236, 161+407). Appropriation of rents and profits by mortgagor (137–1, 162+674). Misapplication of corporate funds (144–154, 174+733). Dissolution of partnership or joint adventure (151–24, 185+952).

162–521, 203+229; 210+59.

Evidence considered, and held not sufficient to justify the appointment of a receiver under the circumstances. 210+288.

2. Action by corporation against officer.

In this action, brought by a corporation to recover money and property alleged to be retained or converted by its president, the appellant, a receiver was appointed for plaintiff on its motion, and appellant was directed to turn over property and money in his hands to the receiver. There is no claim of insolvency on the part of the corporation, no shares of stock have been issued, or subscribed for, no valid agreement for the acquisition of the money or property in appellant's hands is shown, and its right to any recovery at all appears doubtful. Held, on the showing made the court erred in appointing a receiver. 157–224, 195+922.

3. Controversy between corporation stockholders.

In an action to determine the respective interests of stockholders in the capital stock of a corporation, and for an accounting between themselves, a receiver of the corporation during the pendency of the action will be appointed only when clearly necessary to safeguard property or property rights. 161–6, 200+845.

Showing that there is a controversy between the stockholders concerning their respective interests in the corporation and concerning the profits which one has appropriated to himself, without showing that the business of the corporation has been mismanaged or its property wasted, dissipated, or endangered, will not justify the appointment of a receiver pendente lite. 161–6, 200+845.

4. Insolvent corporations.

On an appeal from an order assessing stockholders, it is too late to raise objections to the appointment of the receiver which should have been made in opposition to that appointment, or by motion directly attacking it. 162–83, 202+69.

11. Foreign receivers.

A receiver appointed by a Texas court to wind up the affairs of a dissolved Texas corporation is permitted to sue in the courts of this state as a matter of comity. His right, however, are subordinate to those of local creditors. 162–397, 203+221.

12. Bond.

Sufficiency of bond. 161–360, 201+618.

13. Collection of assets.

Collection of official salaries. 166–363, 207+736.

An order directing the receiver of an insolvent corporation to refund money to certain stockholders from whom he had collected it does not have the effect of annulling proceedings in other courts, by virtue whereof he obtained the money. 210+38.

The rule that money paid voluntarily cannot be recovered by the payer does not prevent the court from ordering the receiver to refund money so paid. 210+38.

A "receiver" is an officer of the court, and subject to its control. His possession is the possession of the court. Whatever he does under the order of the court regarding property or money in his hands is the act of the court. 210+38.

14. Operation of business.

Court may authorize receiver to operate a private business temporarily. 161–360, 201+618.

15. Claims against receiver.

Preferred claims. 163–214, 203+611.

16. Receiver's certificates. 161–360, 201+618.

Receiver's certificates. 161–360, 201+618.

17. Removal of receiver.

Neither a party nor a creditor can complain of removal of a receiver by the court, of which the latter is an officer and agent. 156–502, 195+273.

18. Accounting.

The sale by the receivers was an advantageous one as the situation then appeared. Under the facts of the case it is held that the trustee in bankruptcy of the debtor in the receivership proceeding is not entitled to relief against the receivers on their accounting. 157–78, 195+770

19. Attorney's fees. 213+550.

20. Fees.

The receiver not being appointed under chapter 90, G. S. 1913, the limitations places upon the fees therein of a receiver and his attorneys (section 8350, G. S. 1913) do not apply. The court could therefore allow what the services were reasonably worth, and the evidence shows the fees fixed by the court to be the reasonable value thereof. 158–256, 197+487.

9390. Court may order deposit, etc.—When it is admitted by the pleading or examination of a party that he has in his possession or control any money or other

thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court or delivered to such other party, with or without security, subject to further direction. If such order be disobeyed, the court may punish the disobedience as a contempt, and may also require the sheriff or other proper officer to take the money or property and deposit or deliver it in accordance with the direction given. (4263) [7893]

9391. Receivers Bonds to run to state—Bonds given by receivers and trustees appointed by the district court in any action or proceeding shall run to the State of Minnesota for the benefit of all persons in interest. Any person interested may maintain an action in his own name upon any such bond. ('21 c. 17 § 1)

'13 c. 346, legalizes and validates all receivers' deeds to realty with certain error in discription prior to January, 1893; inapplicable to then pending actions.

'21 c. 67, legalizes and validates all receivers deeds to realty by receiver appointed by court outside of state, prior to January 1896; inapplicable to then pending actions.

JUDGMENT

9392. Measure of relief granted—As against a defendant who does not answer, the relief granted to plaintiff shall not exceed that demanded in the complaint. Against all others, he may have any relief consistent with the complaint and within the issue actually tried. (4264) [7896]

1. On default—On default the relief which may be awarded the plaintiff is strictly limited in nature and degree to the relief specifically demanded in the complaint and it matters not that the allegations and proof would justify different or greater relief (32-193, 20+85; 32-293, 20+234; 34-395, 26+122; 37-182, 33+567; 47-464, 50+601; 55-53, 56+463; 68-112, 71+9; 89-470, 95+320). In action to determine adverse claims, plaintiff is entitled, on default, to such relief only as he demands in his complaint, or as comes within its allegations, where demand is imperfectly framed. Judgment awarding excessive relief, so appearing from face of the record, is void for want of jurisdiction, and is open to attack before or after time of appeal, even by one not party, affected thereby in his property rights (101-169, 112+386).

2. After answer—In case there is an answer the court may grant any relief consistent with the case made by the complaint and embraced within the issue (19-17, 1; 21-332; 22-92; 22-564; 28-116, 9+584; 28-450, 10+773; 30-399, 16+462; 32-92, 19+393; 35-451, 29+65; 37-455, 35+178; 39-54, 38+763; 42-526, 44+1030; 43-459, 45+866; 45-203, 47+642; 46-277, 48+1113; 46-548, 49+323, 646; 47-464, 50+601; 58-39, 59+822; 58-149, 59+988; 69-543, 72+814; 73-58, 75+756; 74-484, 77+298, 539; 78-221, 80+970; 81-272, 83+1084). Relief must be granted on issues litigated by consent (see § 9311 note 3). In actions for damages greater damages than prayed cannot be recovered, although there is an answer, but this limitation may always be avoided by amendment (1-126, 101; 3-134, 80; 57-234, 59+304; 72-344, 75+208, 76+41). When a court once takes jurisdiction of a cause it is its duty to determine all rights and obligations pertaining to the subject matter and to grant full measure of relief (5-304, 240; 8-87, 62; 20-511, 459; 24-4; 26-179, 2+489; 32-445, 21+472; 40-184, 41+815; 47-179, 49+739; 51-300, 53+638; 73-474, 76+268; 92-306, 99+886). The prevailing party *must be given such relief, either legal or equitable, as* he proves himself entitled to, without regard to the prayer for relief. A plaintiff cannot be thrown out of court because he has mistaken the character of his cause of action and remedial right, but only when he has failed to show himself entitled to any relief on the facts proved within the allegations of his complaint. The court, disregarding plaintiff's theory of the case and prayer for relief, should consider the facts proved within the allegations of the complaint in connection with the whole body of the substantive and remedial law of the state and grant relief accordingly—either legal or equitable (30-316, 15+254; 31-239, 17+385; 47-137, 49+693) or a blending of both (31-173, 17+282; 46-422, 49+237; 51-300, 53+638; 71-331, 73+1086; 73-6, 75+759; 86-365, 90+767). Relief of an equitable nature may be awarded in an action of a legal nature and vice versa (20-178, 163; 31-173, 17+282; 47-131, 49+688; 47-179, 49+739; 51-300, 53+638). Interest is a legal incident of damages though not asked for in complaint (124-266, 144+954). Relief governed by facts proved and not prayer 124-281, 144+953). Power to allow alimony despite want of prayer therefor and want of answer (130-472, 153+864; 147-165, 180+238). Relief based on issues litigated and not on prayer (150-332, 185+291). Relief varying from prayer (152-390, 188+1002). Any relief consistent with complaint and within issues subsequently tried may be granted (156- , 194+405).

In discharging an order to show cause why defendants should not be punished for disobeying a temporary restraining order, the court may permit an amendment *to the complaint, and, as a condition for the discharge* of the order, may require defendants to refrain from doing the act pleaded by the amendment. 156-171, 194+404.

The court is not justified in making a decision in a civil action against a party to the action as a deterrent to others who may seek the aid of the court in protection of their statutory rights. 157-422, 196+646.

In this action for specific performance, the court by the decree properly retained jurisdiction of the parties after its rendition for the purpose of enforcing it; hence a notice, subsequently served upon the attorney who appeared for a nonresident party at the trial of an application for enforcement against him, authorized the court *to enforce the same.* 160-238, 199+751.

But the court could not by a supplemental decree authorize a personal judgment to be entered for more than the original decree directed or mature a mortgage payable in the future, which the party was to assume and agree to pay so as to include that in the personal judgment. 160-238 199+751.

Res adjudicata. 213+53.

9393. Judgment between parties and against several defendants—Judgment may be given for or against one or more of several plaintiffs, or of several defendants, and, when justice so requires, it shall determine the ultimate rights of the parties on each side as between themselves. When two or more are sued as joint defendants, and the plaintiff fails to prove a joint cause of action against all, judgment may be given against those as to whom the cause of action is proved. And, when a several judgment is proper, the court in its discretion may give judgment for or against one or more of the defendants, leaving the action to proceed against the others. (4265) [7897]

209+871.

1. Between several parties—Object of statute to abolish common law rules and make equity rules applicable to all actions (7-217, 159; 50-157, 52+527). It did not abolish the common law rule that judgment must follow the complaint and that in an action against several defendants on a joint contract the plaintiff must recover against all or none (1-103, 81; 7-217, 159; 11-138, 87; 65-402, 67+1015). This rule, however, was abolished by 1897 c. 303. Judgment may be rendered against part of several defendants (66-487, 69+610, 1069; 73-454, 76+254).

2. Determining ultimate rights of parties—The statute provides that the court may "determine the ultimate rights of the parties on each side" (37-49, 33+544; 60-418, 62+543. See 22-1) but this determination must be confined to the issues presented by the complaint. The relief which the defendants may have, as against each other, must be framed on the facts involved in the litigation of the plaintiff's claim, and as a part of the adjustment of that claim, and not on claims with which plaintiff has nothing to do and are properly the subject of an independent action (50-157, 52+527; 55-489, 57+210; 64-531, 67+639). If new issues are to be formed it must be by means of a cross-complaint and even then the new issues must have relation to the subject of the original action (69-319, 72+129).

3. On joint obligation—This provision was enacted for the purpose of abrogating the common law rule that in an action on a joint obligation against several defendants the plaintiff must recover against all or none. It overruled a line of early cases (1-103, 81; 7-217, 159; 11-138, 87; 11-331, 234; 22-203; 60-418, 62+543). Plaintiff may now allege a joint contract and recover on proof of a joint and several contract or a joint contract as to part of the defendants (22-540; 27-56, 6+417; 47-574, 50+823; 56-8, 57+160; 57-140, 58+872; 60-336, 62+392; 60-418, 62+543; 83-346; 86+344). See 127-167, 149+22.

4. Against one or more of several defendants—Provision held inapplicable to action on joint obligation (65-402, 67+1015). In action against maker, and guarantors of payment, of a promissory note, plaintiff may enter several judgment on verdict against maker without waiting until trial of issues with other defendants (57-374, 59+311; 71-185, 73+858). Matter rests in the discretion of the court and judgment cannot regularly be entered without an order (57-267, 59+195). Sued jointly plaintiff may prevail against one defendant, though failing against other (123-43, 142+932).

9394. Same, how signed and entered—Contents—The judgment in all cases shall be entered and signed by the clerk in the judgment book. A copy thereof, also signed by the clerk, shall be attached to the judgment roll. It shall conform to the verdict or decision, and clearly specify the relief granted, or other determination of the case. (4266) [7898]

1. Entry by clerk—In all actions whether of a legal or equitable nature, whether the trial is by jury, court or referee, the judgment is entered by the clerk (12-60, 27; 15-102, 77). He acts in a ministerial rather than a judicial capacity (13-46, 39; 69-491, 72+694). His act is the act of the court and the judgment entered is the judgment of the court (3-67, 30; 4-473, 366; 10-178, 144; 15-102, 77; 36-341, 31+56).

2. Signing—It is provided by rule of court that "judgments and copies to annex to the judgment roll shall in all cases be signed by the clerk, and no other signature thereto shall be required" (rule 45, district court. See 3-67, 30; 11-45, 24). Failure of clerk to sign judgment renders it irregular but not void (14-464, 346; 14-537, 408). Judgment signed by judge and not by clerk is merely irregular in form (135-235, 159+566, 160+765).

3. What constitutes judgment book—The statutes provide that the clerk shall keep a judgment book in which shall be entered the judgment in each action (10-303, 238; 14-464, 346; 19-17, 1), and that the judgment so entered shall specify clearly the relief granted or other determination of the case (13-46, 39, 37-533, 35+377; 69-491, 72+694). The writing out of the judgment in full by the clerk in the judgment book constitutes the entry of judgment (10-303, 238; 13-46, 39; 15-63, 43; 19-452, 393; 37-533, 35+377). Regularly the judgment in the judgment roll is a copy of the judgment in the judgment book (37-533, 35+377); but if the clerk irregularly enters the original judgment in the judgment roll instead of in the judgment book the judgment is not void (73-361, 76+199. See 77-54, 79+594).

4. Judgment must conform to decision—69-491, 72+694; 122-163, 142+152.

9395. Judgment in replevin—In an action to recover the possession of personal property, judgment may be rendered for the plaintiff and for the defendant, or for either. Judgment for either, if the property has not been delivered to him, and a return is claimed in the complaint or answer, may be for the possession, or the value thereof in case possession cannot be obtained, and damages for the detention, or the taking and withholding thereof. When the prevailing party is in possession of the property, the value thereof shall not be included in the judgment. If the property has been delivered to the plaintiff, and the action be dismissed before answer, or if the answer so claim, the defendant shall have judgment for a return, and damages, if any, for the detention, or the taking and withholding, of such property; but such judgment shall not be a bar to another action for the same property or any part thereof. (4267) [7899]

Where the prevailing party is not in possession at the time of the trial the judgment must always be in the alternative, that is, for the possession of the property, or the value thereof in case possession cannot be obtained (14-343, 460; 14-554, 422; 21-51; 24-37; 24-383; 57-264, 59+189; 64-256, 66+974; 68-293, 71+384; 68-303, 71+273; 83-351, 86+350; 88-56, 92+506). Neither party has a right to take a mere money judgment (57-264, 59+189; 64-256, 66+974). When the prevailing party is in possession it is error to insert the value of the property (34-506, 26+733; 78-1, 80+693). Successful party has right to judgment for possession although he is in possession, for such judgment determines the title (12-186, 114; 34-506, 26+733; 86-168, 90+376). Alternative judgment for value of property is a money judgment which authorizes interest on amount from date of order for judgment (90-336, 96+915). Where property has been delivered to plaintiff and on the trial the action is dismissed for failure of proof defendant is entitled to judgment for a return of the property or for its value, if in his answer he has demanded such return (68-303, 71+273). Where plaintiff's title is divested after suit brought or before trial he can, as against the owner or person entitled to the possession, recover only damages from unlawful detention up to the time his title or right of possession was divested. He is not entitled to judgment for the return of the property or for its value (42-102, 43+835). Right to alternative judgment may be waived (37-509, 35+372; 39-102, 38+801; 51-460, 53+761. See 60-525, 63+103). Judgment for value as a bar (61-401, 63+1039).

The party entitled to possession of property in an action of replevin may waive the right to an alternative judgment for its value. 159-345, 198+1003.

Where a plaintiff obtains possession of property in replevin he is estopped from denying it was of the value which he alleged in the proceedings by which he obtained such possession. 162-40, 202+27.

9396. Treble damages for trespass—Whoever shall carry away, use or destroy any wood, timber, lumber, hay, grass, or other personal property of another person, without lawful authority, shall be liable to the owner thereof for treble the amount of damages assessed therefor in an action to recover such damages. But if he shall show, upon the trial, that he had probable cause to believe that such property was his own, or was owned by the person for whom he acted, judgment shall be given for the actual damages only, and for costs. (4268) [7900]

The phrase "or other personal property" is limited to products of the soil (31-541, 18+821; 38-154, 36+102). Not applicable to master for trespass by servant (37-517, 35+379). Good faith as defense (58-84, 59+831).

166-215 208+3.

The verdict was amply warranted by the evidence. 165-65, 205+701.

The evidence did not require the jury to find that the defendant had good cause to believe that he owned certain lumber which was taken from the plaintiff by one of defendant's employees, but warranted the jury in awarding plaintiff treble damages. 165-358, 206+443.

9397. Damages for libel—In an action for damages for the publication of a libel in a newspaper, the plaintiff shall recover no more than special damages, unless a retraction be demanded and refused as hereinafter provided. He shall serve upon the publisher at the principal place of publication, a notice, specifying the statements claimed to be libelous, and requesting that the same be withdrawn. And if a retraction thereof be not published in as conspicuous a place and type in said newspaper as were the statements complained of, in a regular issue thereof published within one week after such service, he may allege such notice, demand, and failure to retract in his complaint, and may recover both special and general damages if his cause of action be maintained. And, if such retraction be so published, he may still recover general damages, unless the defendant shall show that the libelous publication was made in good faith and under a mistake as to the facts. If the plaintiff was a candidate for office at the time of the libelous publication, no retraction shall be available unless published in a conspicuous place on the editorial page, nor if the libel was published within one week next before the election: Provided, that this section shall not apply to any libel imputing unchastity to a woman. (4269) [7901]

40-117, 41+936; 45-303, 47+781; 46-432, 49+203; 63-384, 65+652; 74-452, 77+204; 81-333, 84+113. Sufficiency of notice (99-246, 109+231). Misconduct in office (109-341, 124+229). "Unchastity" (114-179, 130+850). Notice of retraction (126-239, 148+102). Demand for retraction inapplicable to those neither owners nor publishers of newspaper (131-355, 155+212).

Plaintiff was directly disparaged in his calling as a renter of farms by the following statement made to the person from whom he rented a farm: "What did you rent it to him for? He isn't any good He beat my brother out of some hay and he lost some of his cattle, and I can tell you a lot more." These words bore directly upon plaintiff's integrity and character as a farm tenant and were actionable per se. 156-85, 194+101.

The letter was libelous per se. There was evidence, extrinsic and intrinsic, of actual malice. An award of punitive damages was justified. 156-247, 194+754.

A communication, made in good faith upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, public or private, either legal, moral, or social, if made to a person having a corresponding interest or duty, is privileged. 163-226, 203+974.

A newspaper article, which is not self-evidently defamatory, is not libelous per se. 166–173, 207+497.

9398. Judgment after death of party—Judgment may be entered after the death of a party upon a verdict, or decision upon an issue of fact, rendered in his lifetime. Such judgment shall not be a lien on real property of the decedent, but shall be payable, in the course of administration of his estate, as if allowed by the probate court against his estate. (4270) [7902]

13–46, 39; 27–475, 8+383.

Proceedings to forfeit automobile used in violation of liquor laws did not abate on death of the owner. 157–138, 195+778.

Under the facts stated in the opinion, an order should not have been made directing the filing of findings of fact and conclusions of law and entry of judgment nunc pro tunc after the death of one of the parties. 213+35.

9399. Judgment roll, how made up—Upon entering the judgment, the clerk shall forthwith attach together and file the following papers, which shall constitute the judgment roll:

1. If the complaint be not answered, the summons and proof of its service, the complaint, proof that no answer has been received, any report, decision or order filed in the case, and a copy of the judgment.

2. In all other cases, the summons and pleadings, notices of motion and orders made thereon, a copy of the judgment, the verdict, decision, or report, all offers of the defendant, and all orders involving the merits of the action and affecting the judgment. If any original paper be lost or withheld, the court may permit a copy to be filed and used in its stead. A settled case or bill of exceptions, if one be filed, shall be attached to the judgment roll upon the request of either party. (4271) [7903]

Regularly the making and filing of the judgment roll immediately follows the entry of judgment in the judgment book and the judgment in the roll is a copy of the judgment in the judgment book (13–46, 39; 37–533, 35+377), but this order of entry is not jurisdictional. Entry of the original judgment in the roll prior to its entry in the judgment book does not render the subsequent proceedings void (73–361, 76+199; 77–54, 79+594). Proof of service of summons is included in the judgment roll (39–336, 40+163). Bond for costs not included (7–506, 412).

Cited (101–180, 112+12).

Malicious prosecution of civil suit not maintainable wherein claim is reduced to judgment (145–452, 177+634).

The district court has the inherent power to replace its records when lost or destroyed by accident, negligence, or wantonness. 163–114, 203+614.

The substituted papers become of equal validity to those which have disappeared. 163–114, 203+614.

9400. Lien of judgment—Every judgment requiring the payment of money shall be docketed by the clerk upon the entry thereof, and, upon a transcript of such docket being filed with the clerk in any other county, such clerk shall also docket the same. From the time of such docketing the judgment shall be a lien, to the amount unpaid thereon, upon all real property in the county then or thereafter owned by the judgment debtor. Such judgment shall survive, and the lien thereof continue, for the period of ten years next after its entry, and no longer. Provided, that no judgment, except for taxes, shall be docketed until the judgment creditor, or his agent or attorney, shall have filed with the clerk an affidavit, stating the full name, occupation, place of residence, and postoffice address of the judgment debtor, to the best of affiant's information and belief; and, if such residence be within an incorporated place having more than five thousand inhabitants, the street number of both his place of residence and place of business, if he have one, shall be stated. If the clerk shall violate this provision, neither the judgment nor the docketing thereof shall be invalid, but he shall be liable to any person damaged thereby in the sum of five dollars. (R. L. § 4272, amended '13 c. 112 § 1) [7905]

DOCKETING JUDGMENT

Cited (102–245, 113+450; 99–433, 109+1001).

1. **A ministerial duty**—13–46, 39.

2. **Time—Necessity of prior judgment**—Regularly the docketing of a judgment follows immediately the filing of the judgment roll. These three acts follow in regular sequence: (1) entry of judgment in the judgment book; (2) making up and filing the judgment roll; (3) docketing the judgment (37–533, 35+377; 50–310, 52+864). Until there is a judgment there can be no valid docketing (31–505, 18+645; 37–533, 35+377; 73–361, 76+199). The docketing must follow the entry of judgment. Formerly it was held that there could be no valid docketing until after the entry of judgment in the judgment book (37–533, 35+377). It is now held that a prior entry of the judgment in the judgment roll alone will sustain a docketing (73–361, 76+199; 77–54, 79+594). There may be a valid docketing without a judgment roll if there is a prior entry of the judgment in the judgment book (13–46, 39). A judgment may be docketed before the taxation of costs (37–461, 35+270).

3. **Necessity and object of**—50–264, 52+862; 50–310, 52+864; 58–365, 59+1086.

4. **Docket entries unimpeachable collaterally**—25–183. See 31–505, 18+645.

5. **As evidence of judgment**—A transcript of the docket of a judgment is prima facie evidence of the docketing (13–46, 39; 19–17, 1), but not of the judgment (10–303, 238). Docket entries which are merely minutes of proceedings are not admissible as evidence of a judgment (50–310, 52+864).

6. **Misnomer**—11–78, 45; 19–17, 1; 35–213, 28+511; 52–443, 54+484; 68–4, 70+777.

7. **Effect of appeal**—4–318, 235; 22–81.

JUDGMENT LIEN

8. **Nature of lien**—1–275, 210; 12–572, 486; 15–245, 190; 19–347, 300; 29–322, 13+145; 58–365, 59+1086; 85–283, 88+755.

9. **Duration of lien**—The ten year limitation is absolute and cannot be extended by means of a levy or action (19–347, 300; 28–248, 9+732; 39–330, 40+161; 45–231, 47+794; 51–406, 53+717; 56–390, 57+938; 94–216, 102+453). In calculating the ten years the first day should be excluded and the last day included (16–230, 202; 45–231, 47+794). The death of a judgment debtor does not extend the life of the lien (22–380).

10. **Upon what estates and interests**—Interest of obligor under bond to convey real estate (25–382; 28–408, 10+427; 30–424, 15+869; 36–314, 31+51; 42–279, 44+251; 92–303, 100+4). The interest of a mortgagee where the mortgage is in the form of an absolute deed (34–547, 27+66). The interest of a vendee under a subsisting contract for the sale of land under which he has entered and paid part of the purchase price (43–513, 45+1099; 91–482, 98+463; 140+132). The interest of a trustee who, without the knowledge of his cestui que trust, purchases real estate with trust funds (30–537, 16+449). The interest of a debtor in real estate fraudulently conveyed (32–84, 19+390; 36–494, 32+852; 43–137, 45+4; 88–311, 92+1125). A bare legal title unaccompanied by any beneficial interest (92–303, 100+4). Statutory interest of one spouse in property of the other (§ 7238; 89–432, 95+216, 769. See 92–527, 100+366). A mortgagor's equity of redemption (45–116, 47+644). Creditor of one selected as medium of conveyance by husband to wife acquires no interest in land by a judgment against such person, though conveyance was made in fraud of creditors (98–177, 107+961). Reversionary interest of assignor for benefit of creditors is subject to lien of judgment entered and docketed against him pending insolvency proceedings, subject to be defeated by sale of the land by assignee before proceedings terminated (103–104, 114+360). On sale by order of probate court to pay debts or expenses, surplus belonging to heir must be applied to payment of judgment against him, docketed after death of ancestor and before sale (108–60, 121+229).

See 115–508, 133+75; 121–48, 140+132.

Status as to deed adjudged an equitable mortgage (128–126, 150+396). Person acting as medium of conveyance (130–365, 153+861).

The plaintiff was the owner of the legal title, and the defendant of the equitable title under a contract of purchase. The intervener docketed a judgment against the defendant which became a lien upon his equitable title. To enable the defendant to obtain a loan, pay the amount due on the contract of purchase, and acquire the legal title, the plaintiff made and recorded a deed to the defendant, without consideration. The intervener's judgment became an apparent lien upon the legal title in the defendant. The loan failing the defendant had no greater interest in the land than he had before. 161–413, 201+612.

A judgment is a lien upon the title of the judgment debtor holding under an unrecorded deed, though, by the recording act, a judgment does not take precedence *of an unrecorded deed when the title to the land is not* of record in the name of the judgment debtor. 165–198 206+170.

11. Conflicting liens—Successive judgment liens take effect in the order of the docketing and a junior judgment creditor cannot secure a preference merely by virtue of superior diligence in taking steps to enforce his lien (36–494, 32+852). Where one conveys land and at the same time takes back a mortgage for a part of the purchase money the lien of the mortgage takes precedence of a lien for the prior judgment against the mortgagor (6–402, 270. See 8–207, 178; 36–82, 30+430; 71–319, 73+976). Priority where transcripts of two judgments were filed at the same time (95–286, 104+7). Subsequently docketed judgment against grantor of absolute deed given as security (123–293, 143+720).

12. Limitation of lien—In all cases the lien of the judgment is limited to the actual interest of the judgment debtor in the land (6–402, 270. See 1–275, 210; 30–537, 16+449). Tax certificates (146–212, 178+499).

13. Debtor cannot defeat—30–177, 14+806.

14. Death of debtor—A judgment lien cannot be acquired on the land of the judgment debtor after his death (62–135, 64+155; 77–138, 79+660). The death of a judgment debtor does not extend the life of a lien (22–380).

15. Priority of liens as affected by recording act—Aside from the recording act judgment creditors are not regarded as bona fide purchasers (2–264, 226; 30–537, 16+449; 74–122, 76+1126). The recording act gives a judgment lien priority over unrecorded conveyances of which the judgment creditor had no notice at the time of the docketing (11–104, 62; 28–408, 10+427; 31–66, 16+468; 43–213, 45+157; 43–541, 45+1136; 64–91, 66+131; 73–467, 76+263; 74–122, 76+1126; 87–348, 92+8); otherwise when he had notice either actual or constructive (24–281; 29–322, 13+145; 35–534, 29+345; 36–314, 31+51; 43–213, 45+157; 50–234, 52+651; 58–359, 59+1085). A judgment takes precedence of unrecorded conveyances only as to such titles as appear of record (5–409, 332; 20–453, 407; 29–322, 13+145; 37–56, 33+213; 59–285, 61+144; 72–420, 75+720; 74–122, 76+1126; 75–207, 77+828). The recording act does not give judgment liens precedence over resulting trusts (74–122, 76+1126).

9401. New county—Docketing old judgments—Real estate tax judgments—When a new county is created, the clerk of the district court thereof shall transcribe into his records all the docket entries relative to judgments for the payment of money, including real estate tax judgments, against lands situated in such new county, rendered within the ten years next preceding such creation and docketed in the counties from which such new county was set off, and such transcribed entries shall have the same effect as transcripts of dockets of judgments made by the clerk of court of the county where the originals were docketed and filed in another county. For such transcription the clerk shall receive from the new county fifteen cents for each judgment. (R. L. § 4273, amended '07 c. 159 § 1) [7906]

9402. Same—Federal court judgment—Every judgment requiring the payment of money rendered in a circuit or district court of the United States within this state shall be, from the docketing thereof in said court, a lien upon the real property of the judgment debtor situated in the county in which it is so docketed, the same as a judgment of the state court. And a transcript of such docket may be filed with the clerk of the district court of any other county, and shall be docketed in his office as in the case of judgments of the state courts, and with like effect. (4274) [7907]

244 Fed. 915.

9403. Lien discharged by deposit of money, when—Whenever an appeal shall be taken from a docketed judgment, or any motion shall be pending to set the same aside or for a new trial, the judgment debtor may deposit in court an amount sufficient to secure the payment of such judgment, with all interest and costs likely to accrue thereon pending the appeal or motion. The court shall make an order approving such deposit, and thereupon the judgment lien upon the real estate of the debtor shall cease and be transferred to the money so deposited. A certified copy of such order may be filed with the clerk in any county in which a transcript of the judgment shall have been docketed. (4275) [7908]

127–43, 148+1068.

9404. Assignment of judgment—Mode and effect—Every assignment of a judgment shall be in writing, signed and acknowledged by the assignor, and no such assignment shall be valid as against a subsequent purchaser of the judgment in good faith for value, or against a creditor levying upon or attaching the same, unless it is filed with the clerk and an entry thereof made in the docket. When so filed and entered, none but the assignee, his agent or attorney, shall be authorized to collect or enforce such judgment: Provided, that the lien of an attorney thereon shall not be affected by the assignment. (4276) [7909]

Applicable to an assignment of a part of a judgment (52–417, 54+372). As between the parties an assignment is valid though not filed and entered (70–380, 73+165). Effect of attorney's lien (39–373, 40+254). Validity affects subsequent purchasers and attaching auditors (127–205, 149+200; 154–257, 191+591).

Evidence held to show assignment. 156–30, 194+93.

The mode of assigning judgments prescribed, is not exclusive. Judgments have the assignable quality of choses in action. An assignment in any form passes an equity which the courts will recognize and protect. An assignment defectively acknowledged, but otherwise regular on its face, gives the assignee the right to have execution to enforce the judgment 159–458, 199+235.

9405. Judgments, procured by fraud, set aside by action—Any judgment obtained in a court of record by means of perjury, subornation of perjury, or any fraudulent act, practice, or representation of the prevailing party, may be set aside in an action brought for that purpose by the aggrieved party in the same judicial district within three years after the discovery by him of such perjury or fraud. In such action the court may either enjoin the enforcement of the judgment or command the satisfaction thereof, may compel the party procuring the same to restore any property received by virtue thereof, and may make such other or further order or judgment as justice shall require; but no right or interest of a third party acquired under such judgment in good faith, and without knowledge of the wrong complained of, shall be affected by the action herein provided for: Provided, that if during the pendency of such action the enforcement of such judgment or an action thereon shall become barred by the statute of limitations, and such judgment is sustained, the same may be enforced, or an action commenced thereon, within one year after such action is finally determined. (4277) [7910]

1. **Nature of action**—The action is in the nature of a bill of equity to set aside judgment and the relief asked is of an extraordinary character (69–418, 72+702; 88–431, 93+310). The statute is not designed to give an action which will take the place of a motion for a new trial (60–21, 61+672).

2. **Statute constitutional**—24–345; 26–137, 1+838.

3. **Concurrent with remedy by motion**—88–431, 93+310; 140–285, 167+1029.

4. ***Statute construed strictly***—40–410, 42+89; 42–63, 43+797; 67–136, 69+711; 71–371, 74+148; 89–300, 94+885; 120–493, 139+1061.

5. **Stranger to action cannot maintain**—40–410, 42+89.

6. **Complaint**—It must clearly point out the act of perjury or subornation thereof or the fraudulent acts or practices relied on and show on its face that it is brought within the statutory time. A general charge of fraud is insufficient (38–230, 36+341; 42–63, 43+797; 55–154, 56+591). Where it is claimed that the plaintiff was prevented from defending by the fraud of the prevailing party the plaintiff in his complaint must state facts from which it affirmatively appears that he was entirely free from contributory negligence in suffering

judgment to be taken against him (69–418, 72+702; 71–371, 74+148). The complaint should show that the plaintiff has suffered damage (21–175). A complaint held sufficient (59–432, 61+460). See 135–433, 161+143; 151–302, 186+694, 194+944.

7. For perjury—Where the pleadings disclose the fact to be proved so that the opposite party knows what the pleader will attempt to prove and is not under any necessity to depend on the other party to prove the fact as he himself claims it, an action will not lie under the statute to set aside a judgment procured by perjury committed in proving such fact (42–63, 43+797; 55–154, 56+591; 59–432, 61+460; 67–136, 69+711; 89–300, 94+885; 115–439, 132+915). When issues were defined by pleadings and no deceit was practiced as to proofs to be offered, action will not lie under G. S. 1894, c. 5434 to vacate judgment on ground that it was obtained by fraud and perjury (99–481, 109+1115). Action cannot be maintained on bare allegation that on issue of fact, so made that each party knows what the other will attempt to prove, and where neither has right, or is under necessity, to depend on other to prove fact to be as he himself claims it, there was false or perjured testimony by successful party or his witnesses (106–210, 118+795). See 120–380, 139+708; 126–414, 148+455; 134–341, 159+836.

The complaint in an action to set aside a judgment claimed to have been procured by perjury, which shows that the alleged perjury was directed to an issue squarely made by the pleadings, and that in respect thereto neither party depended upon the other for any of his proof, does not state a cause of action. The construction with respect to such a case was settled by Hass v. Billings, 42 Minn 63, 43 N. W. 797, and the rule there adopted controls this case. 156–403, 194+944.

A party cannot set aside a judgment upon the ground that it was obtained by perjury, when he is advised by his adversary's pleading what he will prove, is in position to investigate and meet his claim, is not misled, and is not dependent upon him for proof. 161–367, 201+434.

8. For fraudulent practices on adverse party—59–432, 61+460; 62–160, 64+157; 80–32, 82+1088; 89–300, 94+885; 120–493, 139+1061. Cited (114–454, 131+627). 140–285, 167+1029.

9. For fraud on court—93–195, 101+163; 120–380, 139+708.

10. In action for divorce—38–230, 36+341; 64–549, 67+663; 93–195, 101+163; 120–380, 139+708; 127–411, 149+667; 133–148, 157+1086.

11. Laches—59–432, 61+460; 120–380, 139+708; 133–148, 157+1086; 142–103, 170+919.

12. Relief which may be awarded—26–137, 1+838; 29–235, 12+704; 46–548, 49+323, 646; 64–549, 67+663; 88–431, 93+310.

Section was not intended to give a retrial of the same issues tried and determined in the original action. 167–424, 209+325.

Under the law of Iowa, judgments rendered in its courts are subject to attack for fraud in instituting the suit or giving the court jurisdiction, but not for fraud or perjury in determining the merits of the cause of action. Whether plaintiff can produce sufficient evidence of such fraud and conspiracy as will suffice to invalidate the judgment will be for the determination of the trial court. 210+70.

See in general—133–463, 157+1069; 136–57, 161+259.

9406. How discharged of record—Upon the satisfaction of a judgment, whether wholly or in part, or as to all or any of several defendants, the clerk shall enter such satisfaction in the judgment book, and note the same, with the date thereof, on the docket. If the docketing be upon a transcript from another county, the entry on the docket shall be sufficient. A judgment shall be deemed satisfied when there is filed with the clerk:

1. An execution satisfied, to the extent stated in the sheriff's return thereon.

2. A certificate of satisfaction signed and acknowledged by the judgment creditor.

3. A like certificate signed and acknowledged by the attorney of such creditor, unless his authority as such has previously been revoked and an entry of such revocation made upon the register; but the authority of an attorney to satisfy a judgment shall cease at the end of two years from its entry.

4. An order of the court, made on motion, requiring the execution of a certificate of satisfaction, or directing satisfaction to be entered without it.

5. Where a judgment is docketed on transcript, a copy of either of the foregoing documents, certified by the clerk of the court in which the judgment was originally entered and in which the originals were filed.

A satisfaction made in the name of a partnership shall be valid if executed by a member thereof while the partnership continues. The judgment creditor, or his attorney while his authority continues, may also satisfy a judgment of record by a brief entry on the register, signed by him and dated and witnessed by the clerk, who shall thereupon note such satisfaction on the margin of the docket. And, whenever a judgment is satisfied otherwise than by return of execution, the judgment creditor or his attorney shall give a certificate thereof. (4278) [7911]

Whenever a judgment is satisfied in fact otherwise than on execution it is the duty of the party or attorney to give an acknowledgment of satisfaction, and, on motion, the court may compel it, or may order the entry of satisfaction to be made without it. If the facts are in dispute the court may deny the motion and relegate the parties to an action (16–451, 407; 26–345, 4+229; 36–155, 30+757; 91–254, 97+886). Inapplicability to actions in ejectment (110–6, 124+446).

A district court has jurisdiction to try an action which seeks to restrain the enforcement of a debt, evidenced by a judgment in another district court of the state, by execution when the debt has been satisfied, or when the plaintiff has ceased to be liable upon the judgment. 210+396.

9407. Satisfaction and assignment by state—The state auditor may execute satisfactions and assignments of judgments in behalf of the state. (4279) [7912]

9408. Payment and satisfaction by clerk—Whenever a judgment debtor or other person whose property is subject to the lien of a money judgment shall file with the clerk an affidavit that he has made diligent search and inquiry and is unable to find any person having authority to receive payment and give satisfaction of such judgment, he may pay the amount due thereon to the clerk, who, upon receipt thereof, shall note satisfaction of such judgment on the docket and register of the action wherein it was entered, and issue under his seal to the person paying the same a certificate reciting such payment and satisfaction. The clerk shall at once notify all persons appearing of record to have an interest in such judgment, including the attorney of the judgment creditor, of its payment and satisfaction, and upon demand shall pay such money to the person entitled thereto, taking duplicate receipts therefor, one of which he shall retain, and file the other in the case. (4280) [7913]

154–38, 191+259.

The defendant stood ready to pay the judgment at all times after it was entered, but the father did not furnish bond required by section 7681, G. S. 1913, until some time later. Under these circumstances defendant was not chargeable with interest on the judgment prior to the approval and filing of the bond, and section 7913, G. S. 1913, providing for the deposit in certain cases of the amount of the judgment, was without application. 160–122, 199+579.

9409. Discharge of judgments against bankrupts—Any person discharged from his debts pursuant to the act of Congress known as "An act to establish a uniform system of bankruptcy throughout the United States, approved July first, eighteen hundred and ninety-eight," and all amendments thereto, may, after the expiration of one year from the date of such discharge, apply to any court of record in which a judgment shall have been rendered or a transcript thereof filed against him, for the discharge thereof from record, and if it shall appear to the court that he has thus been discharged from the payment of such judgment, the court may order and direct that such judg-

ment be discharged and satisfied of record, and thereupon the clerk of such court shall enter a satisfaction thereof; provided, however, that no such application shall be made or order granted except upon ten days' notice of such application to the judgment creditor whose judgment is sought thereby to be satisfied of record, his executors, administrators or assigns, served in the manner provided for the service of notices in civil actions, or in case such creditor, or his executors, administrators or assigns, shall not reside within the state of Minnesota, in such manner as the court shall provide by order; provided, further, that nothing in this act shall be construed to apply to judgments not listed among the liabilities of the bankrupt in his petition to be adjudged a bankrupt under the act of July first, eighteen hundred ninety-eight and all amendments thereto. ('09 c. 230 § 1) [7914]

125-286, 146+1098; 137-364, 163+672; 142-87, 170+918.

9410. Joint debtors—Contribution and subrogation—Whenever a judgment against two or more persons shall be enforced against or paid by one of them, or one of them shall pay more than his proper share as between himself and the other judgment debtors, he may continue the judgment in force for the purpose of compelling contribution; and if, within ten days after such enforcement or payment, he shall file with the clerk a notice of the amount paid by or collected from him in excess of his proper share, and of his claim for contribution, the clerk shall make a note thereof on the margin of the docket. Thereupon the judgment shall remain in effect in favor of the party filing such notice for the amount and against the party in such notice specified. (4281) [7915]

37-109, 33+320; 101-290, 112+223. Cited (103-204, 114+654, 837). See 125-478, 145+163.

9411. Several judgments against joint debtors—All parties to a joint obligation, including negotiable paper, copartnership debts, and all contracts upon which they are liable jointly, shall be severally liable also for the full amount thereof. They may be sued thereon jointly, or separate actions may be brought against each or any of them, and judgment rendered in each, without barring an action against any of those not included in such judgment, or releasing any of those not sued: Provided, that the court, upon its own motion or on application of any interested party, may require the plaintiff to bring in as defendants all the parties jointly liable on the obligation in suit. (4282) [7916]

84-251, 87+776; 92-143, 99+638; 97-201, 106+311; 104-247, 116+490; 106-58, 118+63. Action may be maintained on contract or for tort, against one of several jointly liable (101-39, 111+727). Rule that lex fori governs in matters of procedure applies (101-37, 111+727). See 125-266, 146+1094. Common law rule abrogated (141-47, 169+274). A several judgment on partnership obligation against one partner (150-227, 184+1024).

9412. Discharge of joint debtor—A creditor who has a debt, demand, or judgment against a copartnership, or several joint obligors, promisors, or debtors, may discharge one or more of such copartners, obligors, promisors, or debtors, without impairing his right to recover the residue of his debt or demand against the others, or preventing the enforcement of the proportionate share of any undischarged under such judgment. The discharge shall have the effect of a payment by the party discharged of his equal share of the debt, according to the number of debtors, aside from sureties: Provided, that such discharge shall not affect the liability of such copartners, obligors, promisors, or debtors to each other. In an action by the creditor to recover against those not discharged, the complaint shall set forth that the contract was made with the defendants and the party discharged, and that such party has been discharged. (4283) [7917]

83-21, 85+824; 86-16, 89+1129.

9413. By confession—On statement—A judgment for money due or to become due, or to secure any person against a contingent liability on behalf of the defendant, or for both, may be entered in the district court by confession and without action, upon filing with the clerk a statement, signed and verified by the defendant, authorizing the entry of judgment for a specified sum. If the judgment be for money due or to become due, the writing shall state concisely the facts out of which the debt arose, and show that the sum confessed is justly due or to become due. If the judgment be for the purpose of securing the plaintiff against a contingent liability, the writing shall state concisely the facts constituting the liability, and show that the sum confessed does not exceed the same. The clerk shall enter judgment for the amount specified, as in other cases, and shall attach a copy of the judgment to the statement, which shall constitute the judgment roll. The judgment shall be final, and, unless special provision be made for a stay, execution may issue immediately. (4284) [7918]

Sufficiency of signing (7-487, 393). Sufficiency of statement (7-487, 393; 27-177, 6+628; 27-478, 8+380; 45-341, 48+187; 73-114, 75+1037; 101-290, 112+223). Effect of insufficient statement (27-478, 8+380; 30-424, 15+869; 73-114, 75+1037). Who may attack judgment (4-450, 352; 7-487, 393; 27-177, 6+628; 27-478, 8+380; 30-424, 15+869; 40-258, 41+946; 45-341, 48+187; 73-114, 75+1037). Mode of attack (27-177, 6+628; 73-114, 75+1037). Amendment nunc pro tunc (27-478, 8+380; 40-258, 41+946). Vacation in part (7-487, 393; 27-478, 8+380). Duty of clerk (101-290, 112+223). See 135-432, 161+143.

By personally signing an answer, interposed to a complaint for the recovery of a stated sum upon an official bond, defendants appeared in the action; and since such answer admitted the amount claimed in the complaint to be due and authorized the clerk of court to enter judgment against defendants for such amount, without application to the court, the judgment entered was valid, and defendants were not entitled to have it vacated as a matter of right. 211+5.

9414. On plea—Judgment in the cases mentioned in § 9413 may also be entered in the district court in the manner therein provided, and with like effect, upon filing with the clerk a plea of confession signed by an attorney of such court, together with an instrument signed by the debtor authorizing such confession; but such instrument must be distinct from that containing the bond, contract, or other evidence of the demand for which judgment is confessed. (4285) [7919]

9415. Submission without action—Parties to a controversy which might be the subject of a civil action may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real, and that the proceedings are had in good faith to determine the rights of the parties. The court shall thereupon hear and determine the case at a general or special term, and order judgment thereon as in a civil action. Judgment shall be entered as in other cases, and the case, submission, and a copy of the judgment shall constitute the judgment roll. The judgment may be enforced, and shall be subject to appeal, as in other cases. (4286) [7920]

Cited (100-85, 110+355; 108-142, 121+628; 112-167, 127+569; 115-102, 132+8; 115-460, 133+169; 135-314, 160+792; 145-322, 177+135). '17 c. 12, authorizes clerks of the district court in counties of a population not less than 45,000 nor more than 50,000, to transcribe the judgments

in force in their office into a new judgment docket, prescribing the conditions in reference thereto, same to be completed by June 1, 1917; inapplicable to any county where salary is fixed by any special law.

EXECUTIONS

9416. When enforced—The party in whose favor a judgment is given, or the assignee of such judgment, may proceed to enforce the same, at any time within ten years after the entry thereof, in the manner provided by law. (4287) [7921]

An execution issued more than ten years from entry of judgment is void and not merely voidable (20–194, 172). An action will not lie to enforce the lien of a judgment where the time prescribed for enforcing it by execution has expired (19–347, 300; 39–330, 40+161. See 35–493, 29+193). It is not enough to initiate proceedings in execution prior to the expiration of the statutory period. They must be completed (28–248, 9+732; 45–231, 47+794). In computing the period of ten years the day upon which the judgment is entered is to be excluded (45–231, 47+794). Execution may issue before costs are inserted in the judgment (37–461, 35+270).

9417. Judgments, how enforced—Where a judgment requires the payment of money, or the delivery of real or personal property, it may be enforced in those respects by execution. Where it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, or the person or officer who is required thereby or by law to obey the same; and, if he refuses, he may be punished by the court as for contempt, and his obedience thereto enforced. (4288) [7922]

16–230, 202.

As to real property (122–163, 142+152). See 126–332, 148+279.

9418. Kinds of execution—There shall be two kinds of executions, one against the property of the judgment debtor, and the other for the delivery of real or personal property, or such delivery with damages for detaining, or for taking and withholding, the same. (4289) [7923]

An alias execution may issue under our practice as at common law (29–87, 12+145). A writ of assistance may issue in an action to foreclose a mortgage (76–268, 79+103). Cited (19–347, 300).

9419. Execution, how issued—Contents—The execution shall be under the seal of the court, subscribed by the clerk, tested in the name of the district judge, directed to the sheriff, or to the coroner if the sheriff be a party or interested, and indorsed by the party applying therefor or his attorney. It shall refer intelligibly to the judgment, stating the court, the county where the judgment roll or transcript is filed, the names of the parties, the amount of the judgment, if it be for money, the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer substantially as follows:

1. If it be against the property of the judgment debtor, to satisfy the judgment, with interest, out of his personal property, and, if sufficient personal property cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter not exceeding ten years.

2. If real property has been attached, and judgment rendered in favor of the plaintiff in the same action, the execution thereon may also direct a sale of all the property which the defendant had in such real estate at the time it was so attached, or at any time after entry of judgment not exceeding ten years. In such case, if after the attachment the judgment creditor has paid taxes on the real property and filed with the clerk the tax receipt, it shall be attached to the judgment roll, and the execution shall also state that it has been filed, and the date and amount thereof, and the date of filing; and, if the property be sold under the execution, the proceeds, after deducting the expenses of sale, shall be first applied to the payment of the amount so paid for taxes, with interest.

3. If it be against real or personal property in the hands of personal representatives, heirs, devisees, legatees, trustees, or tenants of real property, it shall require the officer to satisfy the judgment, with interest, out of such property.

4. If it be against defendants jointly indebted on a contract, a part of whom only have been summoned in the action, it shall issue in form against all; but the party causing it to be issued, or his attorney, shall indorse thereon the names of those defendants who have not been summoned, and it shall not be levied upon the sole property of any such defendant; but it may be levied upon the personal property owned by such defendant as a partner with any or all of the other defendants.

5. If it be for delivery of the possession of real or personal property, it shall require the officer to deliver possession of the same, particularly describing it, to the party entitled thereto; and it may, at the same time, require the officer to satisfy, out of the personal property of the party against whom the judgment was rendered, any costs, charges, damages, rents, or profits recovered thereby, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery thereof cannot be had; and if sufficient personal property cannot be found, then out of the real property, as provided in the first subdivision of this section, and in that respect it shall be deemed an execution against property. (4290) [7924]

The writ must be dated as of the day on which it is issued from the clerk's office and not as of the day on which it is delivered to the sheriff (16–426, 383). It must be under the seal of the court (see 20–196, 175). The fact that it does not run in the name of the state does not render it void (19–17, 1). A misrecital of the date of the judgment is immaterial if the judgment is otherwise sufficiently identified (32–259, 20+187). If an attachment has issued it is not necessary for the execution to refer to the attachment proceedings, but it may be in the ordinary form (58–550, 60+667). Under an execution in which an officer is commanded to satisfy the same out of the property of A and B, judgment debtors, he may seize and sell the separate property of either or the joint property of both (75–275, 77+964). Necessity of exhausting personal property first (24–479; 52–6, 53+1016; 74–282, 77+137). Cited (19–347, 300; 20–194, 172; 25–432; 50–264, 52+862). Alias writ (127–206, 149+201).

9420. When returnable—Inventory—The execution shall be made returnable, within sixty days after its receipt by the officer, to the clerk with whom the judgment roll is filed; but if the officer having such execution shall have levied upon any property before the expiration of such sixty days, he may retain the execution in his hands until he shall have sold such property in the manner prescribed by law: Provided that, upon demand of the judgment creditor or his attorney within such sixty days, the officer shall pay to him all moneys collected upon execution in his hands, after deducting his fees. The officer shall make a full inventory of the property levied on, and return it with the execution. (4291) [7925]

163–114, 203+614.

1. **When returnable**—An officer who knows or has reasonable ground for knowing of the existence of property out of which the execution may be made acts at his peril in not making immediate levy (46–183, 48+780). Where a levy has been made before the return day it may be completed by sale after such day and the officer

may retain the writ in his possession for that purpose (24–20; 24–479; 45–231, 47+794; 66–40, 68+321).

2. **Return**—A return which certifies in general terms that the officer "levied" on certain property is sufficient; *it is not necessary to state the particulars of the levy* (3–277, 191; 4–407; 309; 5–333, 264; 16–13, 1; 28–469, 10+781). A return of "unsatisfied" is not equivalent to a return that the party had no property, personal or real, out of which the amount specified in the execution, or any part of the same, could be collected. The reasons for the non-satisfaction of the writ ought to be stated (35–540, 29+322). It need not be made within sixty days of its issuance (24–20; 24–479; 45–231, 47+794; 66–40, 68+321). It may be made by an officer after the expiration of his term of office (24–479). In construing the return it is to be presumed in the absence of a contrary showing on its face that the officer has done all that was required of him, both in the prosecution of the case and in the return thereto (3–277, 191; 27–269, 6+790). No formal levy is necessary on real estate (127–206, 149+201).

9421. Execution after death—After the expiration of one year from the death of a party against whom judgment has been rendered, execution thereon may be issued against any property upon which such judgment was a lien at the time of his death, and may be executed in the same manner and with like effect as if he were living. (4292) [7926]

Applicable only to cases where lien has been acquired on real property prior to the death of the party. Not applicable to personal property. A judgment creditor who has acquired no lien prior to the death of the debtor must proceed to establish and collect his claim as a general creditor in the due course of administration (62–135, 64+155). A judgment creditor may take advantage of this provision although he has presented his claim to the probate court (39–28, 38+634). Cited (29–295, 13+131).

9422. To what county, etc.—When the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county where the judgment is docketed. When it requires the delivery of real or personal property, it shall be issued to the sheriff of the county where the property or some part thereof is situated. Executions may be issued at the same time to different counties. (4293) [7927]

In issuing execution to another county it is common practice for the clerk of the county where the judgment was rendered to deliver to the attorney a transcript of the original docket and an execution with the date of the docketing in the other county left blank, with the understanding that the attorney will have the judgment properly docketed in the latter county and the date of the docketing inserted in the execution before it is delivered to the sheriff of such county; and if this is done an execution so issued is valid (9–97, 87; 16–426, 383; 50–264, 52+862). If in such cases the execution is delivered to the sheriff before the judgment is docketed in his county the subsequent docketing of the judgment will cure the defect as against the judgment creditor and all who are not bona fide purchasers. It is not necessary to withdraw the writ and redeliver it to the sheriff or issue a new writ (77–228, 79+964).

9423. Execution against property, how executed—The officer shall execute the writ against the property of the judgment debtor by levying upon the same, collecting the things in action, or selling the same if the court so orders, selling the other property, except as provided in § 9424, and paying to the judgment creditor the proceeds, or so much thereof as will satisfy the execution. (4294) [7928]

A sheriff may bring an action in his own name for the collection of things in action on which he has levied (4–407, 309; 5–397, 321; 10–323, 253). A sheriff selling real estate on execution may maintain an action in his own name against the purchaser for the amount bid at the sale (11–220, 142; 54–499, 56+172; 62–455, 64+1140). Where a satisfaction of judgment has been improperly entered of record the sheriff may have the same vacated on motion (42–234, 44+11). On a levy good as against an assignee in insolvency under 1881 c. 148 it was held that the sheriff might bring an action against the assignee to recover money or property in his hands (43–505, 46+72). If a person unlawfully interferes with property in the custody of the sheriff or receiptor under him an action by the sheriff will lie (59–217, 60+1099). Things in action can only be sold if the court so orders. A judgment is a thing in action within the meaning of this rule (23–50; 42–234, 44+11). Within reasonable limits the sheriff has discretionary power to put personal property into shape for sale, as for example, to cause grain to be threshed (34–107, 24+366). He may bring an action against a receiptor (39–342, 40+354). Cited (19–347, 300). Right to levy on a judgment (154–257, 191+491).

9424. Levy on money—When coin of the United States, or bills or other evidence of debt issued by the United States or by any moneyed corporation and circulated as money, are seized upon execution, the officer shall pay and return the same as so much money collected. (4295) [7929]

9425. What may be levied on, etc.—All property, real and personal, including rights and shares in the stock of corporations, money, book accounts, credits, negotiable instruments, and other evidences of indebtedness, may be levied upon and sold on execution. Until a levy, property not subject to the lien of the judgment is not affected by the execution. (4296) [7930]

¼. **In general.**

A judgment creditor, who claims that his debtor has conveyed real estate for the purpose of defrauding his creditors, may disregard such conveyance and levy upon and sell the real estate under execution, leaving the claim of fraud to be litigated later. 156–238, 194+636.

The levy of an execution upon such a debt by such creditor after the dismissal of the garnishee proceeding was effective, although made during the period of the stay provided in such order of dismissal.

When a defendant in a garnishee proceeding moves for a dismissal thereof upon the ground, among others, that the debt disclosed is not due him unconditionally from the garnishee, he cannot claim the order of dismissal to be res adjudicata that the debt sough to be reached by his creditor did not belong to him. 159–263, 193+811.

The provisions of section 67, subd. (f), of the federal Bankruptcy Act of July 1, 1898 (Mason's Code, 11:107) do not annual an execution lien, where the bankrupt's property does not pass to the trustee. 164–416, 205+274.

1. **Held subject to levy**—A judgment for money (42–234, 44+11; 52–417, 54+372); equitable interests in land (43–513, 45+1099; 45–341, 48+187; 91–482, 98+463. See 88–311, 92+1125); interest of obligor under bond for a deed (1–275, 210; 25–382; 28–408, 10+427; 30–424, 15+869; 42–279, 44+251); interest of obligee under bond for a deed (43–513, 45+1099); interest of pledgor in promissory note (5–397, 321); land transferred by debtor in fraud of creditors (9–108, 98; 25–155; 36–494, 32+852); interest of one member of firm in action against such member alone (4–217, 156; 13–199, 189; 13–205, 192; 24–20; 24–167; 25–212; 62–258, 64+567); the property of one partner to satisfy a partnership debt (46–396, 49+190); the interest of a beneficiary in an unauthorized trust who takes the legal title by virtue of the statute of uses (30–165, 14+805); an unpublished book (3–94, 46); interest of judgment debtor during period of redemption from sale of his land on execution (29–434, 13+668); interest of a purchaser at an execution sale even before period of redemption expires (31–232, 17+372); property of the judgment debtor conveyed by him to another in fraud of creditors (25–155; 62–399, 64+1138; 68–226, 71+29); right to cut timber on land (56–288, 57+796); a vested interest of a legatee (93–361, 101+497). Non-resident's stock exchange seat (147–382, 180+233). Judgment (154–257, 191+491).

2. **Held not subject to levy**—The interest of a mortgagee in either real or personal property, so long, at least, as he holds it in good faith as security and has not applied it to the satisfaction of the debt by foreclosure or otherwise, and it is immaterial whether there has been a breach in the conditions of the mortgage or not (34–547, 27+66); interest of agent holding property for sale on commission (8–75, 51; 24–169); interest of bailee (13–174, 165; 47–70, 49+396); interest of partner in profits only (25–212); a claim for unliquidated damages (25–513; 60–257, 62+280); a mortgage never recorded not accompanied by any evidence of personal liability, and which has been lost (16–148, 133); a mere equitable lien *(62–399, 64+1138); property in custodia legis (7–310, 238;* 16–210, 184; 25–509; 32–66, 19+346; 32–496, 21+728; 33–229, 22+388; 41–150, 42+862; 41–304, 43+67; 43–38, 44+524; 52–417, 54+372; 79–272, 82+632; 86–177, 90+316); the equitable interest of a residuary legatee in trust fund (74–215, 77+44); money or other personal property on the debtor's person and all personal property not in view (3–406, 300); contingent interest in nature of lien created by reservation in a deed (88–311, 92+1125). An equitable conversion of realty into personalty, in future, sold under will (126–22, 147+812).

See in general—Garnishment lien and judgment cannot be tacked (124–254, 144+959).

9426. Levy on property subject to judgment lien—Release—It shall be deemed a sufficient levy upon property subject to the lien of the judgment if the officer make a minute on the execution, stating the time when it was delivered to him, and that at such time he levied upon such property, describing it. At the time of or during the progress of the execution sale, or prior thereto on the request of the judgment creditor, the officer may release such property, or so much thereof as has not been actually sold, from such levy, before full satisfaction of the judgment; and the judgment, or such part thereof as has not been actually satisfied by a payment or sale, and the lien thereof, shall not be affected by such levy and release, but shall remain in force as if no levy had been made. (4297) [7931]

No formal levy on real property is necessary (3–277, 191; 4–407, 309; 5–333, 264; 11–78, 45; 11–113, 70; 16–13, 1; 24–479). The validity of a sale does not depend on an exact compliance with this section as to the "minute" to be made on the writ (16–13, 1). Cited (27–269, 6+790; 43–26, 44+522; 45–231, 47+794).

9427. Levy on personalty—Personal property capable of manual delivery shall be levied upon by the officer taking it into custody. (4298) [7932]

The officer must take the property into his actual possession and out of the possession of the debtor (21–193; 52–358, 54+733). A levy may be good as against the debtor or a trespasser and not good as against other creditors and bona fide purchasers (59–217, 60+1099). As against the debtor and trespassers, a levy may be good although the property is left in the possession of the debtor (59–217, 60+1099. See 15–132, 99). After the officer has taken property into his custody he may leave it in charge of a receiptor (22–426; 39–342, 40+354; 59–217, 60+1099). Where an officer has an execution against one part owner he must seize the whole chattel, though he can sell only the interest of the judgment debtor (4–217,). In levying on the interest of one partner in partnership property the officer may take actual possession of the property to the exclusion of the other partners and retain the same while the levy continues. But the purchaser at the sale does not acquire any right of possession, but only the right to an accounting (see 4–217, 156; 13–199, 189; 13–205, 192; 24–20; 24–167; 25–212; 62–258, 64+567).

9428. Levy on bulky articles—When personal property, by reason of its bulk or other cause, cannot be immediately removed, it shall be a sufficient levy thereon if the officer, within three days thereafter, file with the city clerk if such property is situated within the limits of a city of the first class or with the register of deeds of the county in which the same is situated a certified copy of the execution, and of his return and levy thereon. The clerk of any such city of the first class or register of deeds shall endorse upon such copy the time of filing, and shall preserve the same, and make an entry in the chattel mortgage book, showing the names of the parties and the date of filing. He shall receive twenty-five cents for such service, which shall be paid by the officer and included in his charges. (R. L. '05 § 4299, G. S. '13 § 7933, amended '23 c. 420 § 1)

A wrongful levy under this section constitutes a conversion for which an action will lie against the officer (28–469, 10+781; 35–388, 29+63). Cited (21–193).

9429. On other personal property—Other personal property shall be levied on by leaving a certified copy of the execution, and a notice specifying the property levied on, with the person holding the same; or, if a debt, with the debtor; or, if stock or an interest in stock of a corporation, with the president, secretary, treasurer, cashier, or managing agent thereof. (4300) [7934]

This section provides the mode of levying on all debts except those which pass by delivery of the instruments on which they rest such as promissory notes, bills of exchange and negotiable bonds. Book accounts cannot be levied on by the officer merely taking the books in which they are entered into his custody. For the purpose of a levy they stand just as debts of which there is no written evidence and must be levied on under this section (3–277, 191; 26–141, 1+830; 30–191, 14+884; 30–321, 15+309). A judgment may be levied on without leaving a copy of the execution and a notice with the clerk of the court where the judgment is docketed (52–417, 54+372). Form of copy and notice (60–257, 62+280). See 195+629, 227 Fed. 976.

The judgment creditor acquires a lien by levy where he serves a certified copy of an execution upon the person holding personal property belonging to the judgment debtor and makes application to such person for a certificate showing the description and amount of the property of the judgment debtor held by her, and is furnished with a false certificate to the effect that she had no personal property in her hands belonging to the debtor, and that she owed him no money. 157–1, 195+627.

9430. Certificate to be furnished officer—When the officer, with a writ of attachment or an execution against the defendant, applies to any person mentioned in § 9429 for the purpose of attaching or levying upon property mentioned therein, such person shall furnish him with a certificate showing the description and amount of the property of the judgment debtor held by such person or corporation, the number of rights or shares of such debtor in the stock of the corporation, with any dividend thereon, or the debt owing to the judgment debtor, with any incumbrance upon the property; and, on refusal so to do, such person may be required by the court to attend before it and be examined on oath concerning the same. (4301) [7935]

When levy becomes ineffectual as a lien (136–354, 162+468; 147–378, 180+232). Person holding judgment debtor's personal property furnishing false certificate (195+629).

157–1, 195+627, note under § 9429.

9431. On pledged or mortgaged chattels—When personal property is pledged or mortgaged for the payment of money or the performance of any contract or agreement, the right and interest of the pledgor or mortgagor in such property may be sold on execution against him, and the purchaser shall acquire all his right and interest therein, and be entitled to the possession of such property, on complying with the terms and conditions of the pledge or mortgage. (4302) [7936]

When levying after default but before possession has been taken by the mortgagee the officer may take the chattels into his actual possession, and, as against the mortgagee, detain them for the purposes of the sale under the writ (52–358, 54+733. See 4–533, 418). In the absence of a showing of prejudice a levy will not be set aside for failure of the sheriff to seize all the mortgaged property (72–248, 75+219). A railroad, with its rolling stock, and personal property belonging to the road and appertaining thereto, is, in favor of the mortgagees, one property, and the different items cannot, as to such mortgagees, be levied on separately (56–188, 57+471). The levy must in all cases be confined to the "right and interest" of the mortgagor (42–117, 43+791). See also (114–174, 130+995). If a mortgagee or pledgee takes possession of the mortgaged or pledged chattels before any other lien attaches thereto, his title is valid as against subsequent attachment or execution creditors, there being no fraud in fact, although the mortgage was not filed nor the chattels delivered when the contract of pledge was made (74–130, 76+946). In the case of a contract, for work and payment therefor, between employer and employe, secured by the former by chattel mortgage, the right of the employe to go on under the contract and hold and enforce the mortgage as security therefor, is not affected by a levy by a creditor of the mortgagor on the mortgaged property (30–419, 15+687). If the maker of a pledged note pays it to the pledgee, after it has been levied on by the sheriff, with notice of the levy, he is not thereby discharged as to the balance above the debt for which it was pledged (5–397, 321). Assignment of bankrupt's equity in pledged securities (180 Fed. 229).

Where an officer levies upon mortgaged property, his return and notice of sale should show that the property is mortgaged. A failure in this respect renders the sale voidable but not void, the remedy being an application to the court to vacate the sale. 161–416, 205+274.

9432. On growing crops, etc.—A levy may be made upon growing grain or grass, and upon any other unharvested crops; but no sale shall be made thereunder until the same is ripe or fit to be harvested; and any levy thereon under an execution issued by a justice of the peace or any court of record shall be continued beyond the return day thereof, if necessary, and its execution may be completed at any time within thirty days after the same is ripe or fit to be harvested. (4303) [7937]

Growing grain may be levied on at any period of its growth whether the growth is going on below or above the surface of the soil (27–528, 8+767). Blackberries, while growing on the bushes, are not subject to levy as personal property. It is only annual crops, that is, crops requiring fresh planting or sowing each year, that are subject to levy as personalty (49–412, 52+36). Effect of fraudulent transfer by judgment debtor of exempt real property with growing crops thereon subject to levy (47–525, 50+699). The mode of levying on growing crops (see 28–469, 10+781; 35–388, 29+63). Cited (90–299, 96+705).

9433. Notice of sale—Before the sale of property on execution notice shall be given as follows:

1. If the sale be of personal property, by giving ten days' posted notice of the time and place thereof.

2. If the sale be of real property, on execution or on judgment, by six weeks' posted and published notice of the time and place thereof, describing the property with sufficient certainty to enable a person of common understanding to identify it.

An officer who sells without such notice shall forfeit one hundred dollars to the party aggrieved, in addition to his actual damages; and a person who before the sale or the satisfaction of the execution, and without the consent of the parties, takes down or defaces the notice posted, shall forfeit fifty dollars; but the validity of the sale shall not be affected by either act, either as to third persons or parties to the action. (4304) [7938]

1. **Notice**—Description of property (16–13, 1; 32–544, 21+836; 37–250, 33+849). Place of sale (31–125, 16+849). Cited (43–26, 44+522).

2. **Liability of officer**—Under this provision the failure of the sheriff to give the proper notice of sale does not affect the validity of the sale, either as to third parties or as to parties to the action (21–175; 72–352, 75+761, 595; 51 Fed. 614, 2 C. C. A. 402). Under a former statute it was held that a judgment creditor purchasing at the sale was charged with notice of defects in the notice of sale (3–222, 151). Cited (43–26, 44+522).

3. **Adjournment of sale**—A sheriff making a sale of real property under a decree of foreclosure, in the absence of a statute authorizing the adjournment of the sale, possesses the power, for good cause shown, in the exercise of a sound discretion, subject to the control of the court over the whole matter of the sale, to adjourn the sale from time to time. 167–208, 208+654.

9434. Service on judgment debtor—At or before the time of posting notice of sale, the officer shall serve a copy of the execution and inventory, and of such notice, upon the judgment debtor, if he be a resident of the county, in the manner required by law for the service of a summons in a civil action. (4305) [7939]

Failure of sheriff to comply with this provision does not affect title of purchaser (43–26, 44+522). Such failure held to relieve judgment debtor from making demand on sheriff before bringing suit to recover money collected on exempt judgment (51–360, 53+805). Copy of execution served, without signature or seal of clerk of court, does not invalidate sale (127–203, 149+200).

9435. Sale, when and how—The sale shall be by auction, between 9 o'clock a. m. and sunset, in the county where the property or some part thereof is situated. If the sale is of personal property capable of manual delivery, it shall be within view of those who attend, and shall be sold in such parcels as are likely to bring the highest price. If of real property consisting of several known parcels, the parcels shall be sold separately; and, if a portion thereof is claimed by a third person who requires it to be sold separately, it shall be so sold. No more shall be sold than is sufficient to satisfy the execution, and neither the officer nor his deputy may purchase. (4306) [7940]

Sale of several parcels in gross not void but only voidable on a showing of actual fraud or material prejudice (1–183, 157; 6–192, 123; 10–379, 304; 18–366, 335; 24–281; 32–445, 21+472; 33–215, 22+386; 35–499, 29+194; 42–476, 44+985; 43–26, 44+522; 44–353, 46+559; 51–444, 53+706). Sale must be for cash (39–59, 38+704; 54–499, 56+172); and to the highest bidder (1–183, 157). Attorney of debtor has no implied authority to stipulate that property levied on shall be sold at private sale or by a person other than sheriff (21–56). The execution creditor may bid off the property and so may his assignee. If one of two joint judgment creditors bids off the property he will be held a trustee for the other (10–401, 320). Sale not set aside merely because price realized is far below the real value of the property (32–445, 21+472; 72–352, 75+595, 761). Sale upon conditions (38–534, 38+620). Application of proceeds (100–327, 111+259).

A cotenant is not prevented, by the fact of his cotenancy, from buying at an execution sale on a judgment which is a lien only on the undivided interest of his cotenant. 159–111, 198+307.

9436. Sale of corporate stock, etc.—In case of the sale of any rights or shares in the stock of a corporation, the sheriff shall execute to the purchaser a certificate of such sale, which shall transfer to him all the rights of the judgment debtor in respect thereto. (4307) [7941]

9437. Certificate of sale of realty—When a sale of real property is made upon execution, or pursuant to a judgment or order of a court, unless otherwise specified therein, the officer shall execute to the purchaser a certificate containing:

1. A description of the execution, judgment, or order.

2. A description of the property.

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

4. The price paid for each parcel separately.

5. If subject to redemption, the time allowed by law therefor.

Such certificate shall be executed, acknowledged, and recorded in the manner provided by law for a conveyance of real property, shall be prima facie evidence of the facts therein stated, and, upon expiration of the time for redemption, shall operate as a conveyance to the purchaser of all the right, title, and interest of the person whose property is sold in and to the same, at the date of the lien upon which the same was sold. (4308) [7942]

1. **The certificate**—A description which fairly identifies the execution is sufficient. A false particular may be disregarded as in case of deeds and other instruments (30–161, 14+795). Description of interest sold (27–184, 6+625; 43–513, 45+1099). Description of property sold (31–500, 18+452; 32–544, 21+836; 35–234, 28+220; 37–250, 33+849). If there is any discrepancy between the return and the certificate the latter controls, at least, as to the purchaser (45–231, 47+794). When a sale is regularly made its validity is not affected by omission of sheriff to make a certificate (7–82, 55. See 35–234, 28+220; 54–499, 56+172). On sale by deputy sheriff certificate should be executed and acknowledged by him rather than by sheriff (37–250, 33+849). Statutory certificate satisfies statute of frauds (11–220). Certificate essential to passage of legal title (35–234, 28+220). Certificate executed by sheriff as such is good although it does not state that he made the sale as sheriff (18–366, 335). The provision requiring certificate to state that the property is subject to redemption is directory. A recital that "the above described premises are subject to redemption within the time and according to the statute in such case made and provided" is sufficient (24–161). Sheriff may be compelled to execute certificate (54–499, 56+172). Certificate issued without payment in cash is valid, remedy being by action against sheriff (100–327, 111+259). Cited (34–458, 26+631; 43–26, 44+522).

2. **Rights of purchaser**—Under a former statute all the interest of the execution debtor passed to the purchaser at once on the sale subject to the right of redemption (5–409, 332; 22–81; 25–305; 50–454, 52+966; 91–

60, 97+449). Under the present statute the title of the debtor does not pass until the time to redeem expires (29–434, 13+668; 31–232, 17+372; 34–458, 26+631; 91–60, 97+449). But the purchaser acquires an interest which is conveyable before the expiration of the redemption period (22–81; 25–305; 31–232, 17+372; 38–2, 35+469; 43–172, 45+11; 53–350, 55+555). Such interest held real estate within the meaning of a will (91–60, 97+449). If the execution debtor is a married person the purchaser acquires the land free from statutory interest of other spouse (89–432, 95+216, 769). Purchaser succeeds to all the interest of execution debtor although such interest is not described in the notice of sale or certificate (43–513, 45+1099). If the interest of a vendee in a contract for sale of land is sold on execution the purchaser succeeds to the interest subject to its being defeated by laches on the part of the vendee (27–184, 6+625; 43–513, 45+1099). Where a sale and transfer of property is void as to a creditor it is also void as to the purchaser on an execution sale based on a judgment recovered by such creditor (32–259, 20+187). Purchaser acquires interest of debtor not only in the land but also in buildings and trees on land (34–458, 26+631). He stands in the shoes of the judgment debtor and acquires his title as it stood at the time the execution creditor's lien was acquired (1–275, 210; 6–402, 270). When the period of redemption has expired without redemption the execution debtor is a mere stranger to the property and cannot raise objection to subsequent proceedings (22–81). The title acquired by the purchaser cannot be defeated or impaired by the subsequent acts or omissions of sheriff (32–259, 20+187; 54–499, 56+172). It is unaffected by defects or informalities in the return of the sheriff (32–259, 20+187). Origin of title by execution sale (1–275, 210. See 34–458, 464, 26+631). Merger (95–286, 104+7). Cited (43–26, 44+522).

9438. Certificates of sale legalized—In all sales of real property under judgments and decrees of the district court wherein the sheriffs' certificates of sale were filed for record and recorded in the office of the proper registers of deeds prior to October 1, 1921, and within thirty days, but not within twenty days after the dates of the respective orders confirming such sales, such certificates of sale and the records thereof are hereby legalized and validated to the same extent and with the same effect as though such certificates had been so filed for record and recorded within twenty days after the dates of such respective orders of confirmation. Provided, that the provisions of this act shall not apply to or affect any action or proceeding now pending involving the validity of such certificates or the records thereof. ('23 c. 368 § 1)

9439. Interest of purchaser subject to attachment or judgment—The interest acquired upon any sale is subject to the lien of an 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. (4309) [7943]

31–232, 17+372.

9440. Redemption of realty—Upon the sale of real property, where the estate sold is less than a leasehold of two years' unexpired term, the sale is absolute; in all other cases the property sold, or any portion thereof which has been sold separately, is subject to redemption:

1. By the judgment debtor, his heirs or assigns.
2. By a creditor having a lien, legal or equitable, on the property or some part thereof, subsequent to that on which it was sold.

Creditors shall redeem in the order of their respective liens. (4310) [7944]

1. **Construction of statute**—8–496, 441; 21–132; 27–18, 6+373; 26–100, 1+834; 28–345, 9+868; 51–417, 53+719.

2. **Who may redeem**—A grantee or successor in interest of the execution debtor redeems on the same terms as execution debtor himself (7–432, 347; 8–47, 28). To entitle a creditor to redeem he must have something more than the general right common to all creditors to have the general property of the debtor applied to the payment of his debts; he must have a right, either in law or in equity, to have the specific property appropriated to the satisfaction of his claim in exclusion of other claims subsequent in date to his (28–48, 8+905; 29–203, 12+530; 43–172, 45+11; 65–246, 68+18). An attaching creditor in an action on contract may redeem (45–341, 48+187). A subsequent judgment creditor may redeem (29–434, 13+668. See 29–226, 13+34). A general creditor of a deceased person, although his claim has been allowed against the estate, is not entitled to redeem (29–203, 12+530; 65–246, 68+18). One having a lien on "an undivided interest" in the land may redeem (27–18, 6+373). Mortgagees whose liens are subsequent may redeem (see 20–268, 239; 21–132; 37–71, 33+123; 48–223, 50+1038; 77–54, 79+594). A creditor obtaining a judgment after the property of the debtor has passed into the hands of a receiver cannot redeem from a sale made by the receiver under direction of court (41–150, 42+862). A person having a lien on a part of the land sold may redeem the whole (36–136, 30+458; 115–290, 132+210). A judgment creditor who has levied on sufficient personal property to satisfy his judgment cannot redeem (13–407, 376). Owner of separate part or of interest therein may redeem whole tract as owner. Such redemption annuls sale, but he is entitled to lien on part not owned for amount necessarily paid to redeem, if whole of original lien was as to him equitably chargeable on that part; otherwise, for equitable pro rata share of amount (115–290, 132+210).

3. **Plan of redemption by creditors**—28–345, 9+868; 29–226, 13+34.

4. **When right of creditor begins**—Right of creditor to redeem does not begin until right of debtor to redeem has expired (28–345, 9+868; 37–71, 33+123).

5. **A vested right**—27–18, 6+373; 36–136, 30+458.

6. **Redemptioner a bona fide purchaser**—46–156, 48+677. See 27–396, 7+826; 72–352, 75+595, 761.

9441. Order of redemption, etc.—Within one year after the day of sale the judgment debtor, his heirs or assigns, may redeem by paying to the purchaser the amount for which the property was sold, with interest, and, if the purchaser be a creditor having a prior lien, the amount thereof, with interest. If no such redemption be made, the senior creditor may redeem within five days after the expiration of such year, and each subsequent creditor within five days after the time allowed all prior lienholders, by paying the aforesaid amount, and all liens prior to his own, held by the party from whom he redeems: Provided, that no creditor can redeem unless within such year he file notice of his intention so to do with the clerk of the court where the judgment is entered. (4311) [7945]

1. **Time to redeem**—Court cannot extend the time. Right of redemption is a strict legal right to be exercised, if at all, in accordance with the terms of the statute unless waived or extended by the party whose interests are to be affected (16–230, 202; 51–417, 53+719). If the last day of the year from the sale falls on Sunday owner may redeem on Monday (48–223, 50+1038). Five-day limitation is not inflexible (80–76, 82+1103).

The time to redeem from a foreclosure sale under a mechanic's lien dates from the confirmation of the sale and not from the day of sale. 157–369, 196+468.

2. **Notice of intention—Tacking**—Where a mortgagee who has filed notice of intention to redeem assigns the mortgage the assignee may redeem under the notice so filed (48–223, 50+1038). Waiver of defective notice (50–310, 52+864).

3. **Necessity of paying prior liens**—29–434, 13+668; 41–156, 42+867; 41–163, 42+870.

4. **Effect of sale in cutting off liens**—The sale on a second lien, whether made before or after that on a first lien, has the effect, unless it is itself cut off by the first sale, or unless it is redeemed from, to cut off all liens and interests subject to it (30–161, 14+795; 50–508, 52+922; 54–308, 56+34; 72–287, 75+376; 73–236, 75+1046; 95–286, 104+7).

5. **Effect on lien**—While there are still rights of redemption outstanding, the lien on which a redemption is made is not merged and extinguished in the title of the purchaser at the sale redeemed from, but it passes by subrogation to any subsequent redemptioner. The lien on which a redemption is made is not extinguished by the fact that the value of the property is equal to the amount of the lien with the amount paid for redemption added (50–508, 52+922).

6. **Attacking subsequent liens**—48–223, 50+1038.

7. **Waiver of defects**—43–66, 44+886; 50–310, 52+864; 70–380, 73+165. See 28–267, 9+772; 47–434, 50+475; 51–417, 53+719.

8. **Effect of redemption on invalid lien**—56–60, 57+320.

9. **Effect of premature redemption**—54–308, 56+34; 90–114, 95+762.

10. **See in general**—154–368, 191+821.

9442. Redemption, how made—The person desiring to redeem shall pay to the person holding the right acquired under such sale, or for him to the sheriff or the clerk of the district court of the county in which the real property is situated, the amount required by law for such redemption, and shall produce to such person or officer the same documents required by law to be produced by a person desiring to redeem from a sale of real property under foreclosure of a mortgage by advertisement; and the person redeeming shall cause such documents to be filed with the register of deeds as required in the case of redemption from such foreclosure sale. (4312) [7946]

Cited (100-367, 111+302).

9443. Certificate of redemption—Effect of redemption—The person or officer from whom such redemption is made shall execute to the person redeeming a certificate in substantially the same form as the certificate required by law to be executed on redemption from a sale of real property under foreclosure of a mortgage by advertisement; and all the provisions of law applicable to the recording and to the effect of such certificate, and to the effect of redemption of the property sold on such foreclosure sale, by the owner, his heirs, personal representatives, or assigns, or by creditors, shall be applicable to the certificate required by this section, and to redemption made under this chapter. (4313) [7947]

Cited (129-358, 152+727).

9444. Sale irregular or judgment reversed—If the purchaser of real property sold on execution, or his successor in interest, be evicted therefrom in consequence of irregularities in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover from the judgment creditor the price paid, with interest. When such recovery is had in consequence of irregularity, the judgment creditor shall thereupon be entitled, within ten years after such eviction, to a new execution on the judgment for the price paid on the sale, with interest; and for that purpose the judgment shall be deemed valid against the judgment debtor, his personal representatives, heirs, or devisees, but not against a purchaser or incumbrancer in good faith who became such before a levy on such new execution. (4314) [7948]

9445. Redemption pending action to set aside execution sale—When an action is brought to set aside an execution sale of land, and the time of redemption from such sale may expire before final judgment therein, any person having the right to redeem therefrom, for the purpose of saving such right, may deposit with the sheriff, before the time of redemption expires, the amount that will be necessary to redeem such premises at the date of such expiration, together with a bond in an amount and with sureties to be approved by such sheriff, conditioned to pay all interest that may accrue or be allowed on such deposit until final redemption as hereinafter provided. Such deposit and bond shall operate to extend the time of redemption for thirty days after the final determination of such action, during which time any person entitled by law to redeem may do so by paying to the sheriff the amount of such deposit with accrued interest. The deposit and bond shall be brought to the attention of the court by supplemental complaint in the action, and the judgment shall determine the validity of the execution sale, and the right of the parties to the moneys and bonds so deposited, which shall be paid and delivered by the sheriff as directed by such judgment, upon delivery to him of a certified copy thereof. The remedy herein provided shall be in addition to other remedies now existing. (4315) [7949]

75-153, 77+793. Where plaintiffs complied with 1895 c. 326, it was not necessary also to produce to sheriff or clerk deed under which they claimed to redeem, as required by G. S. 1894 § 5474. Whether so under R. L. not determined (100-367, 111+302). Cited (123-297, 143+722).

167-208, 208+654.

9446. Stay of execution on money judgment—Execution of a judgment for the payment of money only shall be stayed for six months, if within ten days after the entry thereof the judgment debtor shall file with the clerk a bond, running to the judgment creditor, his personal representatives and assigns, in double the amount of the judgment, to be approved by the court, and conditioned for the payment of the judgment, with interest at the rate of eight per cent. per annum during the time for which the stay is granted. Within two days thereafter notice that such bond has been filed, with a copy of the same, shall be served on the judgment creditor if he be a resident of the county, or upon his agent or attorney, if he have one, and the judgment creditor may except to the sufficiency of the bond; and, upon his application upon notice or order to show cause, the court, if it find the bond insufficient, may order execution to issue notwithstanding the same, unless the judgment debtor give such further bond as it shall deem sufficient. If the condition of any such bond be not performed, the execution shall issue for the amount of the judgment, with interest and costs, against the judgment debtor and the sureties. When an execution issues against sureties, the officer shall certify in his return what amount, if any, was collected from them, and the date thereof. If a stay be granted after execution issued, any levy made thereon shall be released, and the execution shall be returned and the reason noted by the officer. (4316) [7950]

Cited (133-64, 157+904).

9447. Property exempt—No property hereinafter mentioned shall be liable to attachment, or sale on any final process, issued from any court:

1. The family Bible.
2. Family pictures, school books or library, and musical instruments for the use of the family.
3. A seat or pew in any house or place of public worship.
4. A lot in any burial ground.
5. All wearing apparel of the debtor and his family; all beds, bedsteads, and bedding kept and used by the debtor and his family; all stoves and appendages put up or kept for the use of the debtor and his family; all cooking utensils; and all other household furniture not herein enumerated, not exceeding five hundred dollars in value.
6. Three cows, ten swine, one yoke of oxen and a horse, or in lieu of such oxen and horse, a span of horses or mules, one hundred chickens, fifty turkeys, twenty sheep, and the wool from the same, either in raw material or manufactured into yarn or cloth; food for all the stock above mentioned necessary for one year's support, either provided or growing, or both, as the debtor may choose; one wagon, cart, or dray, one sleigh, two plows, one drag; and other farming utensils, including tackle for teams, not exceeding three hundred dollars in value.
7. Provisions for the debtor and his family necessary for one year's support, either provided or growing, or both, and fuel necessary for one year.
8. The tools and instruments of a mechanic, miner, or other person, used and kept for the purpose of carrying on his trade; and, in addition thereto, stock

in trade, including goods manufactured in whole or in part by him, not exceeding four hundred dollars in value; and the library and implements of a professional man.

9. The presses, stones, type, cases, and other tools and implements used by any person or copartnership in printing or publishing a newspaper, or by any person hired by him to use them, not exceeding two thousand dollars in value, together with stock in trade not exceeding four hundred dollars in value.

10. One watch, one sewing machine, one typewriting machine, and one bicycle.

11. Necessary seed for the actual personal use of the debtor for one season, not to exceed in any case the following amounts: One hundred bushels of wheat, one hundred bushels of rye, one hundred bushels of barley, one hundred bushels of potatoes, one hundred bushels of oats, one hundred bushels of flax, one hundred bushels of corn; and binding material sufficient for use in harvesting the crop raised from such seed.

12. The library and philosophical and chemical or other apparatus belonging to, and used for the instruction of youth in, any university, college, seminary of learning, or school which is indiscriminately open to the public.

13. All moneys arising from fire or other insurance upon any property exempt from sale on execution.

14. All moneys received by, or payable to, a surviving wife or child from insurance upon the life of a deceased husband or father, not exceeding ten thousand dollars.

15. All moneys, relief, or other benefits payable or to be rendered by any police department association, fire department association, beneficiary association, or fraternal benefit association to any person entitled to assistance therefrom, or to any certificate holder thereof or beneficiary under any such certificate.

16. The wages of any person, not exceeding thirty-five dollars, due for any services rendered by him for another during thirty days preceding any attachment, garnishment or the levy of any execution against him, provided, that all wages paid to such person, and earned within said thirty day period, shall be deemed and considered a part of, or all, as the case may be, of said exemption of thirty-five dollars.

17. The earnings of the minor child of any debtor or the proceeds thereof, by reason of any liability of such debtor not contracted for the special benefit of such minor child.

18. The claim for damages recoverable by any person by reason of a levy upon or sale under execution of his exempt personal property, or by reason of the wrongful taking or detention of such property by any person, and any judgment recovered for such damages.

All articles exempted by this section shall be selected by the debtor, his agent, or legal representative. The exemptions provided for in subdivisions 6-18 hereof, shall extend only to debtors having an actual residence in the state. No property exempted hereby shall be exempt from attachment or execution in an action for the recovery of the purchase money of the same property. (R. L. § 4317, amended '09 c. 12 § 1; '13 c. 375 § 1; '15, c. 202, § 1; '23, c. 154, § 1; '23, c. 350, § 1; as to subd. 6, '27, c. 272)

Explanatory note—Subd. 6 only of this section is amended by Laws 1927, c. 272.

Subd. 3—Piano, throw and stool are exempt (122-234, 142+307).

Subd. 5—16-487, 441; 18-361, 331; 62-471, 64+1150.

Subd. 6—A buggy or carriage is exempt as coming within the term "wagon" (29-46, 11+132; 41-318, 43+74). A bicycle is not exempt as a "wagon" under this subdivision (72-520, 75+717. See subd. 10). Whether a horse kept for racing purposes is exempt is an open question (44-216, 46+362). Two year old steers are exempt (31-541, 18+821). In order to have the benefit of the exemption of food for stock it is not necessary that the debtor should own all of the stock (79-459, 82+858). The question how much food is "necessary" is for the jury (35-388, 29+63; 57-170, 58+988). A horse delivered to the keeper of a livery or boarding stable is subject to a lien for his keep (66-57, 68+514). An automobile is not exempt (153-163, 190+57).

Food for stock was exempt though debtor owned no stock. 17, F (2d) 495.

Subd. 7—74-272, 77+4.

Subd. 8—One carrying on the trade of tailor may be entitled to exemption of two sewing machines, if kept and personally used for the purposes of his trade and if reasonably necessary therefor (50-327, 52+857). The ordinary stock in trade of merchant not exempt (2-90, 72; 42-254, 44+116). Meaning of phrase "stock in trade" (27-134, 6+479; 35-340, 29+156). Unfinished burial caskets held exempt (27-134, 6+479). Stock in trade of partnership is not exempt (29-235, 12+704; 35-340, 29+156). The "tools" of a mechanic or other person, in order to be exempt, must be held for the purpose of carrying on his trade (35-340, 29+156). Exemption under G. S. 1894 § 5459 loss by abandonment of trade or occupation (98-143, 107+967).

Subd. 11—Owner of farm may claim exemption of seed grain when renting the farm on shares and furnishing seed (80-340, 83+153). Whether grain exempt is ordinarily a question for the jury (35-388, 29+63; 57-170, 58+988).

Subd. 13—62-471, 64+1150. Proceeds of fire insurance resulting from destruction of homestead are exempt from garnishment (132-372, 157+504).

Subd. 14—146-6, 177+658.

Subd. 15—146-6, 177+658.

Subd. 16—Under former statute exemption was limited to those engaged in manual labor (42-112, 43+794). Present statute designed to extend exemption to all who work for wages—to servants, employees, clerks, etc., as well as to laboring men (45-31, 47+396. See 77-426, 80+356; 80-497, 83+449). The thirty days are to be computed from the levy and not from the issuance of writ from clerk's office (54-366, 56+127). Proviso violative of constitution; remainder is valid (129-184, 152+135).

Subd. 18—42-234, 44+11; 51-360, 53+805.

Action for purchase money—16-487, 441; 34-279, 25+601; 69-22, 71+697.

General rules—Policy of exemption laws (2-90, 72; 31-541, 18+821; 74-272, 77+4). To be construed liberally (18-361, 331; 31-541, 18+821; 72-520, 75+717; 74-272, 77+4; 79-459, 82+858). Exemption a personal privilege (8-50, 30; 22-485; 69-22; 71+697). Absconding debtor cannot have benefit of statute (22-485). Exemption laws not applicable to partnership property except as expressly stated (29-235, 12+704; 35-340, 29+156; 37-527, 35+435). Voluntary transfer of exempt property vests good title in donee as against creditors of donor (28-77, 9+172). Where debtor sold nonexempt property and started for another state, with the intention of establishing residence there, and while within this state an attachment was levied on his horse, held that he was still a resident, and entitled to claim exemptions (105-286, 117+515). See 122-228, 142+307; 133-380, 158+614; 137-226, 163+294; 153-162, 190+57.

Crops growing on homestead are not exempt. 10 F (2d) 747.

As a general rule, the validity of a transfer of property given by a debtor to a creditor to secure or pay his claim, in consideration for which he agrees to advance to the debtor sufficient to enable him to live during the season depends upon the bona fides and fairness of the transaction. 158-305, 197+259.

Lien of boarding house keeper. 163-253, 203+968.

The statute exempting "the library and implements of a professional man" from sale on execution does not exempt the equipment and apparatus of a private hospital owned and operated by a practicing physician. 213+538.

9448. Levy on property in excess of exemption—When the officer holding an execution is of the opinion that the judgment debtor has more property of the classes specified in § 9447 than is exempt, he may levy upon the whole of any one class, and make an inventory thereof, and cause the same to be appraised on oath by two disinterested persons. If such appraisal exceeds the amount exempt of that class, the debtor may forthwith select of such property an amount not exceeding in appraised value the amount exempt, and the balance shall be applied by the officer as in other cases. If the debtor does not make such selection, the officer

may make the same. If one or more indivisible articles of such class is of greater value than the whole amount exempt of that class, the officer shall sell the same, and, after paying to the debtor the amount thereof exempt, shall apply the residue in discharge of the process. (4318) [7952]

5-377, 305; 27-134, 6+479; 35-388, 29+63; 44-216, 46+362; 122-228, 142+307.

SUPPLEMENTARY PROCEEDINGS

9449. Person indebted may pay sheriff—After the issuing of an execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount so paid. (4319) [7953]

9450. Order for examination of debtor—When an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, is issued to the sheriff of the county where he resides, or, if he does not reside in the state, to the sheriff of a county where the judgment roll, or a transcript of a judgment, is filed, is returned unsatisfied in whole or in part, the judgment creditor is entitled to an order from the judge of the district court of the district where the debtor resides, or, if the debtor be not a resident of the state, then from the district where such judgment roll or transcript of the justice's judgment is filed, requiring the judgment debtor, or, if a corporation, any officer thereof, to appear and answer concerning his or its property, at a time and place specified in the order, before such judge or a referee therein named: Provided, that if the person required to answer is, at the time of the service of the order, a resident of the state, or has an office in the state for the regular transaction of his business in person, he cannot be compelled to attend, pursuant to the order or to any adjournment, at a place without the county where his residence or place of business is situated. (4320) [7954]

1. General nature and object of proceeding—Supplementary proceedings are intended to furnish a speedy, inexpensive and adequate remedy for discovering and reaching all equitable interests of the debtor not liable to seizure and sale on execution, and also all property so liable which an officer holding such process has been unable to find, and to compel the application of the same towards the satisfaction of the judgment. They not only perform the office of a creditor's bill, but have a somewhat enlarged scope and purpose (9-270, 254; 25-263; 35-231, 28+254; 65-64, 67+805; 76-109, 78+964; 81-368, 84+123). The remedy afforded by the statute is in the nature of an equitable execution (65-64, 67+805).

212+455.

In proceedings supplementary to execution there was no showing that the defendant had money in his personal possession or concealed, and an order directing him to pay the plaintiff a specified amount was erroneous. 161-251, 201+613.

A judgment creditor without proceeding under G. S. 1923, § 9450. et seq., or after proceeding thereunder, and without the appointment of a receiver or other action of the court, may bring an action to set aside a conveyance as fraudulent, or may proceed by execution. 212+455.

2. A matter of right—Showing necessary—A judgment creditor is entitled as a matter of right to an order upon compliance with the provisions of this section (9-270, 254; 25-263; 34 Fed. 380). It is customary practice to make the facts appear by affidavit. The affidavit need not state the nature of relief sought (22-452).

3. Judgment basis of proceedings—28-248, 9+732.

4. Effect of proceedings to give lien—The proceedings give the creditor an equitable lien on the assets discovered, if he proceeds with proper diligence to apply the same to the payment of his judgment; that is, they give him priority over other creditors (65-156, 68+2; 66-66, 68+771). The lien is dissolved by an assignment for the benefit of creditors (65-156, 68+2; 67-35, 69+477).

5. Officer's return conclusive—25-263. See 35-540, 29+322; 44-401, 46+848.

6. Service of order on non-resident—66-66, 68+771.

9451. Warrant against debtor—Instead of the order provided for in § 9450, upon proof by affidavit that there is danger that the debtor will leave the state or conceal himself, the judge may issue a warrant requiring the sheriff of any county where the debtor is to arrest him and bring him before such judge to answer concerning his property. Upon being brought before the judge, he may be examined on oath, and ordered to give bond that he will attend from time to time before the judge or referee, as he shall direct, during the pendency of the proceeding, and will not in the meantime dispose of any portion of his property not exempt from execution; and, in default of giving such bond, he may be committed to jail as for a contempt. (4321) [7955]

9452. Examination — Upon appearing or being brought before the judge or referee, the judgment debtor, or officer required to answer for a corporation, may be examined under oath, and witnesses may be required to appear and testify on behalf of either party, and the debtor may be represented by counsel; and no person, on such examination, shall be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud, but his answer shall not be used as evidence against him in any criminal proceeding. If the examination is before a referee, he shall certify the testimony and proceedings to the judge. (4322) [7956]

The examination should be strictly limited to the discovery of property and should not be permitted to uncover private family affairs needlessly (81-368, 84+123). The provision as to criminating evidence is insufficient (12 S. Ct. 195, 142 U. S. 547, 35 L. Ed. 1110).

212+455.

9453. Property applied to judgment—Receiver, etc.—The judge may order any property of the judgment debtor in the hands of himself or of any other person, or due to him, not exempt from execution, to be applied toward the satisfaction of the judgment: Provided, that his earnings for his personal services within thirty days preceding the order cannot be so applied, when it appears by his affidavit that they are necessary for the use of a family supported wholly or partly by his labor. The judge may appoint a receiver of the debtor's unexempt property, or forbid a transfer or other disposition thereof, or any interference therewith, until his further order therein. (4323) [7957]

1. Order for application of property—An order under this section is discretionary where property is disclosed on an examination which may be reached by execution. The court is not required to make an order for its application to the judgment. Ordinarily the creditor should be left to his simple remedy of another execution (9-270, 254). To justify an order under this section the evidence must be direct, clear and convincing (81-368, 84+123). The debtor may be ordered to convey to a receiver an interest in real property situated in another state (35-231, 28+254; 34 Fed. 380). He may be ordered to assign to a receiver a claim against a municipal corporation although the latter denies the indebtedness (22-452). In an early case since overruled by statute an order directing a judgment debtor to turn over his watch was sustained (18-361, 331). It has been held that officer of a municipal corporation cannot be compelled to assign to a receiver his salary (33-132, 22+177). Where a judgment creditor let a portion of a building occupied by him as a homestead it was held that he could not be ordered to assign the lease to a receiver (26-286, 3+341). The judgment debtor cannot be ordered to pay over a specific sum of money received by him after the service of the order for examination, but paid out by him before the disclosure (51-230, 53+461. See 52-433, 54+482). It has been held that a city treasurer cannot be compelled to pay over the salary of a city fireman (66-110, 68+606).

2. Appointment of receiver—The appointment of a receiver is a matter of discretion with the trial court to be cautiously exercised (22-452; 25-263; 27-353, 7+364;

36–106, 30+402; 52–433, 54+482; 65–64, 67+805; 66–66, 68+771; 70–346, 73+175; 76–109, 78+964). A receiver should not be appointed where the creditor has a mortgage amply sufficient to satisfy the whole debt (65–64, 67+805). A receiver may be appointed although the only property disclosed is an interest in real estate situated in another state, and the debtor may be required to convey such interest to the receiver (35–231, 28+254). A receiver may be appointed immediately after granting an order for the examination of the debtor (25–263). The receiver may maintain an action to avoid a fraudulent conveyance of real estate by the judgment debtor, although there has been no transfer of the title to him (35–543, 29+349; 36–106, 30+402). In bringing an action the receiver must allege his appointment with sufficient fullness to show that he has authority (39–527, 40+831; 67–24, 69+475; 73–198, 75+1053). A judgment in favor of defendant in action by receiver binding on creditor at whose instance he was appointed (103–283, 114+961).

3. **In general.**

There is no power in the district court to authorize a receiver, appointed in proceedings supplementary to execution, to collect the official salary to be earned in the future by the judgment debtor. 166–363, 207+736.

Whether a receiver shall be appointed rests in the discretion of the trial court, and this court interferes only when necessary to correct an abuse of discretion. 209+754.

Whether a receiver shall be appointed in a proceeding supplementary to execution, is largely within the discretion of the trial court. 212+455.

9454. Adverse claimants, etc.—If it appears that any person alleged to have property of, or to be indebted to, the judgment debtor, claims an adverse interest therein, or denies the debt, such interest or debt may be recovered only in an action against such person by the receiver; but the judge may by order forbid a transfer or other disposition of such property or interest until a sufficient opportunity is given to the receiver to prosecute the action to judgment and execution, and may vacate or modify such order at any time on such security as he may direct. (4324) [7958]

22–452.

9455. Person indebted may be examined—After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, upon proof, by affidavit or otherwise, to the satisfaction of the judge, that any person has property of the judgment debtor, or is indebted to him in an amount exceeding ten dollars, the judge may require such person, or any officer thereof if a corporation, upon such notice to any party as may seem proper, to appear and answer concerning the same. (4325) [7959]

30–487, 16+398; 66–66, 68+771.

CHAPTER 78

JURIES

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9456. Petit jury—A petit jury is a body of twelve men or women, or both, impaneled and sworn in the district court to try and determine, by a true and unanimous verdict, any question or issue of fact in a civil or criminal action or proceeding, according to law and the evidence as given them in court. (R. L. '05 § 4326, G. S. '13 § 7960, amended '21 c. 365 § 1)

65–196, 68+53; 192+194.

213+545 note under § 9468.

9457. No sex disqualification—Laws relating to jury service to apply to both women and men—The provisions of statute relating to the qualifications of jurors in all cases, as well as those relating to exemption from jury duty, are hereby amended to include women as well as men, and any and all sex qualification is hereby removed. ('21 c. 365 § 3)

213+545, note under § 9468.

9458. Number to be drawn—Except as hereinafter provided, a number of petit jurors, not less than twenty-four, shall be drawn for each general term of the district court; but in his discretion the judge, by order filed with the clerk at least thirty days before any term, may direct that a greater number be drawn, not exceeding thirty-six in all, or that no petit jury be drawn for such term. (4327) [7961]

9459. Qualifications, disabilities, and exemptions—The qualifications, disabilities, and exemptions of petit jurors shall be the same as those prescribed by law in the case of grand jurors. (4328) [7962]

40–65, 41+459; 155–37, 192+194.

9460. How drawn and summoned—Petit jurors shall be drawn and summoned at the same time and in the same manner as is provided by law in the case of grand jurors. They shall be summoned to appear on the second day of the term, unless the judge or judges, by an order filed with the clerk at least fifteen days before the term, fix a different day in the term for their appearance, in which case they shall be summoned for the day so fixed. And the court in any district may fix such day, for any or all counties therein, by orders which shall remain in force until altered or annulled. (4329) [7963]

16–282, 249; 195+890.

9461. How drawn and summoned in counties having more than 200,000 inhabitants—The judge or judges of any judicial district may, by order filed with the clerk of the court of any county having a population of more than two hundred thousand, where a term of court is to be held at least fifteen days before the sitting of such court, direct that the petit jurors for such or any subsequent term or terms be summoned for any day of the term fixed by such order other than the day now fixed by law. Such order may be at any time modified or vacated by the court by an order in like manner made and filed with the clerk at any time. When such order has been made, the clerk of the district court in such county shall, in the presence

1940 Supplement

To

Mason's Minnesota Statutes

1927

(1927 to 1940)

(Superseding Mason's 1931, 1934, 1936 and 1938 Supplements)

Containing the text of the acts of the *1929, 1931, 1933, 1935, 1937* and *1939* General Sessions, and the 1933-34, 1935-36, 1936 and 1937 Special Sessions 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 digest of all common law decisions.

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1940

4. When action will lie.
Force is not a necessary element to authorize action. 178M282, 226NW847.
To render a constructive eviction a defense tenant must abandon or surrender premises on account thereof. Leifman v. P., 186M427, 243NW446. See Dun. Dig. 6425.
Description of property in lease and in contract for deed held substantially same and sufficient to readily identify property. Gruenberg v. S., 188M568, 248NW724. See Dun. Dig. 3785.
Mortgagee in possession is entitled to hold it as against mortgagor in action of forcible entry and detainer, mortgagor being in default. Schmit v. D., 189M420, 249NW580. See Dun. Dig. 6242.
In a proceeding under §2188, plaintiff's tax title being found defective, a lien was adjudged against premises and judgment entered, execution levied, and sale made to plaintiff pursuant thereto, held, no confirmation of sale was necessary under §§2185, 2186, and an unlawful detainer action was proper action to recover possession during existence of defendant's life estate, which was subject to specific lien of tax judgment. Trask v. R., 193M213, 258NW164. See Dun. Dig. 9531.
All that is necessary to entitle lessor to summary relief is to show that rent is unpaid. State v. Brown, 203M505, 282NW136. See Dun. Dig. 5449.

5. Who may maintain.
Lessee held real party in interest as against one in possession of property holding over after cancellation of a contract for deed. Gruenberg v. S., 188M568, 248NW724. See Dun. Dig. 3783.
Sheriff may maintain action against tenant on land bid in by state for non-payment of taxes. Op. Atty. Gen. Sept. 3, 1929.
In unlawful detainer action to recover land acquired by state for taxes, county attorney may appear as sole counsel, but there can be no eviction for two years after forfeiture for taxes for 1926 or 1927. Op. Atty. Gen. (525), Sept. 12, 1937.

6. Parties defendant.
Husband of person holding under contract for deed could be ejected in separate action against him alone. 178M282, 226NW847.
In forcible entry, evidence held to sustain finding that defendant was mortgagee in possession. Schmit v. D., 189M420, 249NW580. See Dun. Dig. 6238.

7. Demand—notice to quit.
Where a tenant is in default in the payment of rent, the landlord's right of action for forcible entry and unlawful detainer is complete notwithstanding the lease contains a right to terminate optional with the landlord and effective upon sixty days' notice. First Minneapolis Trust Co. v. L., 185M121, 240NW459. See Dun. Dig. 5440(88).

10. Transfer to district court.
In action in justice court under unlawful detainer statute, cause is not removable to district court, on ground that title to real estate is involved, unless and until such title comes in issue on evidence presented in that court. Minneapolis Sav. & Loan Ass'n v. K., 198M420, 270NW148. See Dun. Dig. 3784.

9151. Complaint and summons.
A party who appeals from justice court to district court upon questions of law and fact waives objections to irregularities in proceedings in justice court, including failure to file complaint. Schutt v. B., 201M106, 275NW413. See Dun. Dig. 5331.

9152. Summons—How served.
Herreid v. D., 193M618, 259NW189; note under §9155.

9153. Answer—Trial.
In forcible entry and unlawful detainer cases, municipal court of Minneapolis has no power to entertain a motion for a new trial or a motion for judgment in favor of defendant notwithstanding decision for plaintiff. Olson v. L., 196M352, 265NW25. See Dun. Dig. 3784.

9155. Judgment—Fine—Execution.
Judgment in previous action for wrongful detainer, held not estoppel in second action for same relief. Steinberg v. S., 186M640, 244NW105. See Dun. Dig. 5159, 5163, 5167.

Judgment for vendor in unlawful detainer was res judicata in action to recover purchase money paid on theory that vendor repudiated contract for deed. Herreid v. D., 193M618, 259NW189. See Dun. Dig. 5161, 5162, 5163.

In action for damages for being kept out of possession, finding that, in a former action to vacate a judgment for restitution entered in municipal court district court had found that said judgment has never been vacated or modified and that plaintiff has not waived his right to proceed thereunder, is decisive against defendants. Hermann v. K., 198M331, 269NW836. See Dun. Dig. 3783.

Reasonable value of seed used for sowing a crop upon a farm by occupant who has vacated same, for which there can be no recovery quasi ex contractu, cannot be allowed in mitigation of damages recovered by owner against occupant for a violation of his covenant to surrender possession of premises in good repair at expiration of term. Mehl v. N., 201M203, 275NW843. See Dun. Dig. 5471.

9157. Writ of restitution.
Defendant evicted from premises under a writ of restitution has a right to appeal and have a trial de novo. 178M460, 227NW656.

Injunction of federal court restraining enforcement of a judgment of restitution in unlawful detainer action pending review of order of referee in bankruptcy did not give defendant any rights as an occupant of land except that it prevented plaintiff from enforcing restitution, as affecting right of defendant to recover value of seed planted by him during operation of restraining order. Mehl v. N., 201M203, 275NW843. See Dun. Dig. 5473.

An owner who obtains possession of his land acquires title to all crops growing on land at time. Id.

9158. Appeal.
178M460, 227NW656; note under §9157.
Roehrs v. T., 185M154, 240NW111; note under §9277.

9163. Execution of the writ of restitution.
A tenant in default in payment of rent is entitled to remain in possession until dispossessed by writ of restitution. State v. Brown, 203M505, 282NW136. See Dun. Dig. 5473.

One moving back day following his removal under writ of restitution and using seed and grain belonging to owner is not guilty of trespass but may be prosecuted for larceny and also for unlawful entry. Op. Atty. Gen. (494b-20), Nov. 26, 1934.

CHAPTER 77

Civil Actions

9164. One form of action—Parties, how styled.
In an action to recover damages for the failure of a bank to perform an agreement with a customer to pay, out of funds placed in its hands, an existing mortgage upon the customer's real property, general damages for injury to the customer's credit standing and for mental suffering are not recoverable. Swanson v. F., 185M89, 239NW900. See Dun. Dig. 2559-2569.

Forms of action being abolished, nature of a cause of action is to be determined by facts alleged and not by formal character of complaint. Walsh v. M., 201M58, 275NW377. See Dun. Dig. 7526a, 7528b.

While law and equity are under the code only within jurisdiction of and administered by the same court, there still remains substantial remnants of old systems. Lind v. O., 204M30, 282NW661. See Dun. Dig. 94.

A party is put to election only between inconsistent remedies, and there is no occasion for election when remedies are consistent with one another and there is no inconsistency between remedy on note of one guilty of tort and cause of action in tort against maker of the note and joint tort feasor. Penn Anthracite Mining Co. v. C., 287NW15. See Dun. Dig. 2910.

COMMON LAW DECISIONS RELATING TO ACTIONS IN GENERAL

1. Election of remedy.
Election of remedies. 171M65, 212NW738.
Action to recover on an express contract, held not an election of remedies so as to bar a subsequent action in conversion. 178M93, 226NW417.

A judgment entered on a verdict directed for the defendant on the ground that the defendant was not authorized by the law under which it was organized to execute the promissory notes alleged as causes of action by the receiver of the payee bank is not a bar to action for money had and received. Turner v. V., 182M115, 233NW856. See Dun. Dig. 5169.

Where the party defrauded has performed his contract to a substantial extent before discovering the fraud, he may elect to continue performance and sue for the fraud, without attempting to rescind. Osborn v. W., 183M205, 236NW197. See Dun. Dig. 10092(61), (62).

If the defrauded party relies solely on a guaranty or warranty, there can be no recovery on the ground of

fraud, but that is ordinarily a question of fact. Osborn v. W., 183M205, 236NW197. See Dun. Dig. 10100(55).

Where mortgagee of chattels obtained judgment and levied upon mortgaged property under execution, release of levy was not an election of remedies so as to bar right to proceed under mortgage. First Nat. Bank v. F., 190M102, 250NW806. See Dun. Dig. 2914.

Doctrine of election of remedies is an application of law of estoppel. Id.

Premature suit by lessor for damages to property, held only mistaken bona fide effort to pursue an available remedy and not to bar a subsequent suit for rent. Donaldson v. M., 190M231, 251NW272. See Dun. Dig. 2914, n. 56.

Summary proceeding against attorney to compel repayment of embezzled funds did not preclude action against bank for improper payment of check with forged indorsement. Rosacker v. C., 191M553, 254NW824. See Dun. Dig. 2914.

Where plaintiff converted defendant's money sent him for deposit in bank by purchasing bonds and promising "I will guaranty this bonds any time you don't want them I'll take them over," there was no error in trial court's refusal to require defendant, early in trial, to elect whether he would rely upon guaranty or promise to purchase bonds, defenses not being inconsistent. Wigdale v. A., 193M384, 258NW726. See Dun. Dig. 2912.

A bank in which a check drawn on another bank is deposited is only a collecting agent, and such agency is revoked where bank goes into hands of commissioner before check is collected, and commissioner has no authority to collect the check, and having done so the money does not become an asset of the bank but belongs to the depositor, who is entitled to a preferred claim, which he does not lose through election of remedy by filing only general claim under advice of the department. Bethesda Old People's Home v. B., 193M589, 259NW384. See Dun. Dig. 2914.

If, for same wrong, one is liable both for breach of contract and conversion, injured party may elect his remedy. If he sues for tort, and there have been successive and distinct conversions, he has right to sue upon them separately as independent causes of action. Lloyd v. F., 197M387, 267NW204. See Dun. Dig. 5167.

Seller's suit for price, under a conditional sales contract, is not inconsistent with his reserved title and right to repossess upon buyer's default, and is not such an election of remedies as to bar a subsequent exercise of right of repossession. Midland Loan Finance Co. v. O., 201M210, 275NW681. See Dun. Dig. 2914.

Court, on plaintiffs' motion for a new trial, rightly refused to amend complaint for specific performance by substituting either a complaint for reformation of contract or one for money had and received, since dismissal is not a bar. Martineau v. C., 201M342, 276NW232. See Dun. Dig. 2914.

Doctrine of election of remedies applies only where the creditor makes final and effective election between inconsistent remedies, and it has no effect on his choice between concurrent and consistent remedies. Mantz v. S., 203M412, 281NW764. See Dun. Dig. 2910.

Prosecution to judgment against client of attorney's claim for compensation for his services merges debt in judgment but does not extinguish security of attorneys' lien. Id. See Dun. Dig. 2912.

Where injured party accepts a note from one of two joint tortfeasors for amount of debt, and then procures judgment thereon, under which there is a futile receivership, there has been no election of remedies so as to bar cause of action against other tortfeasors. Penn Anthracite Mining Co. v. C., 287NW15. See Dun. Dig. 2910.

Effect of levy on mortgaged property by mortgagee. 18MinnLawRev353.

Entry of judgment against agent as an election barring subsequent suit against undisclosed principal. 19 MinnLawRev813.

2. Conflict of laws.

See notes under §154.

In action in federal court for injuries caused by breach of statutory duty, question whether assumption of risk is a defense is controlled by law of the state. Montgomery Ward & Co. v. S., (CCA8), 103F(2d)458.

Law of state to which letter containing check was addressed governs matter of accord and satisfaction. Wunderlich v. N., (DC-Minn), 24FSupp640.

An issue of title to real estate in this state must be determined under local law. Stipe v. J., 192M504, 257NW 99. See Dun. Dig. 1554.

Where situs of stock certificate at time of transfer is in another jurisdiction and no proof is made at trial as to law of that jurisdiction, common-law rule applies. American Surety Co. v. C., 200M566, 275NW1. See Dun. Dig. 1536, 1553.

State court had no jurisdiction of an action by an applicant for a patent against another applicant filing for a patent, resulting in an interference in patent office to recover damages for conspiracy to steal plaintiff's property rights by means of fraud and perjury, at least pending determination of interference by patent office. Grob v. C., 204M459, 283NW774. See Dun. Dig. 7419.

Lex fori and lex loci—what law determines whether question is for jury. 12MinnLawRev263.

Conflict of laws as to contracts: The restatement and Minnesota decisions compared. 13MinnLawRev538.

What law governs the measure of damages? 14MinnLawRev665.

Jurisdiction to annul marriage. 16MinnLawRev398.

Conflict of laws—what law governs the burden of proving contributory negligence. 16MinnLawRev586.

Does lex loci delicti or lex domicilii govern right of action for tort? 16MinnLawRev704.

Choice of law in administration of testamentary noncharitable trusts or movables. 23MinnLawRev527.

3. Contract or tort.

Action to recover purchase price of unregistered stock is in tort for fraud. Shepard v. C., (DC-Minn), 24FSupp 682.

Where defendant counterclaims for money or property wrongfully obtained, he waives tort and elects to rely on implied contract of plaintiff to repay money or pay value of property taken. Kubat v. Z., 186M122, 242 NW477. See Dun. Dig. 88.

Action by purchasers of stock sold in violation of Blue Sky Law is not one in quasi contract for money had and received but for recovery on ground of tort. Drees v. M., 189M608, 250NW563. See Dun. Dig. 1125a.

4. Criminal acts.

That defendant's conduct is criminal does not preclude civil remedy by injunction. State v. Nelson, 189M87, 248 NW751. See Dun. Dig. 4190, 7271.

5. Abatement of actions.

Abatement of action for former action pending. 172 M8, 214NW669.

Where laundry building was leased and personal property therein concurrently sold under conditional sales contract, pendency of replevin action and retaking of personal property did not abate unlawful detainer under lease. Steinberg v. S., 186M640, 244NW105. See Dun. Dig. 5.

Right of buyer after repossession to recover for injuries occurring to the property before repossession. 17 MinnLawRev103.

6. Common counts.

A sale in violation of the Securities Act gives rise to cause of action for money had and received. Vogel v. C., (DC-Minn), 19FSupp564.

An action for money had and received did not lie to recover money paid to purchaser at foreclosure, but owner could recover from such purchaser money received by the latter from the sheriff on a subsequent redemption by a creditor who was entitled to the land because the owner failed to file his certificate. 177M563, 225NW815.

Where a contract is completed, an action will lie on the common counts for the balance due. 178M275, 226 NW933.

A bank guilty of conversion in crediting check to wrong person, but receiving nothing for itself out of the transaction, is not liable in indebitatus assumpsit for money had and received. Northwestern Upholstering Co. v. F., 193M333, 258NW724. See Dun. Dig. 619.

An action in indebitatus assumpsit for money had and received will not lie against one who has not been personally enriched. Id.

Where plaintiff's husband, who was a partner with defendant, died and defendant asked plaintiff to advance money to meet certain checks that had been issued by partnership on promise that plaintiff would be taken into partnership, and no partnership was formed, plaintiff held entitled to recover money advanced as for money had and received. Kingsley v. A., 193M505, 259NW7. See Dun. Dig. 6129.

A municipality may not exact more from one charged with an assessment for extension of its gas and water mains than is permissible under terms of ordinance under which extension was made, and where excess payments have been exacted, municipality may be held as for money had and received. Sloan v. C., 194M48, 259NW 393. See Dun. Dig. 7461, 9114.

Recovery cannot be had as for money had and received where there is no unjust or other enrichment going to one sought to be charged. Judd v. C., 198M590, 272NW 577. See Dun. Dig. 6128(77).

Recovery as for unjust enrichment may not be had in action on express contract. Swenson v. G., 274NW222. See Dun. Dig. 7671.

7. Equitable remedies.

In an action for equitable relief on account of the breach of a contract for maintenance and care of an aged person, given to him in consideration of a deed of his property, the court may grant such relief as the facts will in equity and good conscience justify. Johnson v. J., 183M262, 238NW483. See Dun. Dig. 3142(60).

Where relief is sought for alleged excessive corporation salaries, and plaintiff is barred by covenant not to sue for original corporate act fixing such salaries, equity will not afford relief against their continuance. Butler v. B., 186M144, 242NW701. See Dun. Dig. 3142 (58).

An action between claimants to determine which one is entitled to a fund deposited in court is governed by equity principles and rules. Brajovich v. M., 189M123, 248NW711. See Dun. Dig. 4893.

Where judgment against member of school board for amount of money expended without legal authority provided that such member should be entitled to a conveyance of property purchased on tender of amount of judgment and on tender it appeared that school district had sold and conveyed property to third person, member was entitled to bring equitable action for relief. Johnson v. I., 189M293, 249NW177.

Mere delay does not constitute laches unless it is culpable under circumstances, important question in such case being whether there has been such unreasonable delay in a known right, resulting in prejudice to others, as would make it inequitable to grant desired relief. Peterson v. S., 192M315, 256NW308. See Dun. Dig. 5351.

Court of equity has broad discretion to mold its relief to fit exigencies of a particular case. Young v. P., 193M578, 259NW405. See Dun. Dig. 3141.

Trial of action to set aside and invalidate a trust deposit in a savings account in a bank is not a jury case, even if relief asked is recovery of money in such account. Coughlin v. F., 199M102, 272NW166. See Dun. Dig. 9835.

Relief by way of reformation is given solely to make instrument express intent of parties. Papke v. P., 203M 130, 280NW183. See Dun. Dig. 8328.

There is no statute of limitations governing action for reformation of instrument upon ground of mistake; lapse of time in such cases operating as a bar only by equitable doctrine of laches. Id. See Dun. Dig. 8343.

An equitable lien is merely a charge or an encumbrance imposed on specifically described property by a court of equity, and it is not required that property be in possession of person in whose favor lien is declared, and it is immaterial that lienor also has title. National Cash Register Co. v. N., 204M148, 282NW827. See Dun. Dig. 5577a.

In an action for an accounting covering dealings over a long period, fact that some entries made by defendant are false is some evidence that there is a general scheme to defraud broad enough to comprehend particular entry under consideration, but this is not a substitute for proof with respect to particular items. Keough v. S., 285NW 809. See Dun. Dig. 64.

In an action for an accounting verity of each item is to be determined. Id. See Dun. Dig. 64.

In action against corporation for salary, involving fraud in keeping of accounts, equity had jurisdiction of an accounting, especially where accounts were mutual. Id. See Dun. Dig. 3139.

Theory of the pleadings—right to jury trial. 13MinnLawRev601.

The jurisdiction of a court of equity over persons to compel the doing of acts outside of the territorial limits of the state. 14MinnLawRev494.

Prevention of multiplicity of suits. 16MinnLawRev 679.

Is equity decadent? 22MinnLawRev479.

8. ——Maxims.

Equity regards that as done which ought to have been done. Garrey v. N., 185M487, 242NW12. See Dun. Dig. 3142.

Equity seeks to discover and carry into effect real intention of parties. Garrey v. N., 185M487, 242NW12.

In equity form always gives way to substance. Garrey v. N., 185M487, 242NW12.

Equity regards as done that which should have been done. Brajovich v. M., 189M123, 248NW711. See Dun. Dig. 4813.

Equity aids vigilant, not those who sleep upon their rights. Jordan's Estate, 199M53, 271NW104. See Dun. Dig. 3142(59).

Equity proceeds upon maxim that it ought to do justice completely and not by halves. Jannetta v. J., 285NW619. See Dun. Dig. 3138.

Application of clean hands doctrine to legal defense. 23MinnLawRev382.

9. ——Adequacy of legal remedy.

Penn Mut. L. I. Co. v. J. (DC-Minn), 5FSupp1003; note under §3417, note 1½.

In an action to recover on an insurance policy not under seal, brought after the incontestability period had expired, to which defendant answered alleging fraud in the application, the remedy at law was adequate precluding the federal district court from transferring the cause to equity, although the defendant sought by amendment to cancel the policy. Dunn v. Prudential I. Co. (DC-Minn), 8FSupp799. See Dun. Dig. 3137.

Where terms of deed from mother and children to one son did not give her an adequate remedy at law in case of failure to support as required by the deed, a suit for annulment was proper. 172M8, 214NW669.

A remedy at law which is practically ineffective will not bar equitable relief. Ostrander v. O., 190M547, 252 NW449. See Dun. Dig. 3137.

Extent to which equity will go to provide relief where legal remedy is wanting or inadequate is not a matter of fixed rule. Rather it rests in sound discretion of court. Whether decree so to be made will prove so useless as to lead a court to refuse to give it is a matter of judgment to be exercised with reference to special circumstances of each case rather than to general rules, which at most are but guides to exercise of discretion. Schaefer v. T., 199M610, 273NW190. See Dun. Dig. 3137.

Adequacy of ineffective remedy at law. 16MinnLawRev 233.

10. ——Cancellation of instruments.

To justify setting aside a release on the ground of mutual mistake, the mistake must be to a past or present fact material to the contract. That injuries for which settlement was made resulted in disabilities not anticipated at the time it was made, is not such a mistake. Dolgner v. D., 182M588, 235NW275. See Dun. Dig. 8375(50).

Equity aims to afford relief to parties who have bound themselves by a written contract executed in justifiable ignorance of a past or existing fact which is so material to subject-matter that if it had been known contract would not have been made. Serr v. B., 202M165, 278NW 355. See Dun. Dig. 1192.

11. ——Specific performance.

Specific performance will not be decreed to compel one party to a contract to approve a proposed licensing contract where each party had reserved the right to veto any such proposed contract. 181M606, 233NW870. See Dun. Dig. 8780.

One is not entitled to enforce the specific performance of a contract which he has procured by fraud or when he himself is insolvent and financially unable to perform the contract. Thompson v. C., 182M433, 234NW688. See Dun. Dig. 8792, 8778.

One may contract with another to give him his property at his death, and if he fails to do so, and the circumstances are such that compensation cannot be made justly in money, an action in the nature of one of specific performance may be maintained and the property vested in the promisee or charged in his favor with a trust. Simonson v. M., 183M525, 237NW413. See Dun. Dig. 8789a(21).

Evidence held to show that one to whom intestate promised to will property could be compensated adequately in money, and specific performance should not be decreed. Simonson v. M., 183M525, 237NW413. See Dun. Dig. 8776(16).

Complaint in an action for specific performance of an oral contract to leave property to plaintiff, not a child of decedent, in consideration of her caring for and rendering services to him as a daughter full performance of the contract being alleged, held good against a general demurrer. Smithers v. B., 183M608, 237NW420. See Dun. Dig. 8789a(21).

In action for specific performance, finding that there was no agreement to convey land sustained by evidence. Arntson v. A., 184M60, 237NW820. See Dun. Dig. 8811 (25).

In action for specific performance, evidence held to show that one of the alleged grantors was afflicted with senile dementia. Arntson v. A., 184M60, 237NW820. See Dun. Dig. 8811(25).

Court will not specifically enforce contract for management of boxing bouts or prize fights. Safro v. L., 184M336, 238NW641. See Dun. Dig. 8775, 8776.

Son of decedent held not entitled to specific performance of a verbal agreement to convey land. Happel v. H., 184M377, 238NW783. See Dun. Dig. 8788.

Complaint held bad as one in specific performance for failure to allege sufficiently either substance or terms of supposed contract. Mundinger v. B., 188M621, 248NW 47. See Dun. Dig. 8802.

Where plaintiff's father and mother made mutual and reciprocal wills devising to survivor a life estate with remainder over to plaintiff and others, plaintiff is entitled to specific performance regardless of fact that after death of mother, father remarried and changed his will. Mosloski v. G., 191M170, 253NW378. See Dun. Dig. 10207a.

Equity may refuse a decree for specific performance of a contract where there is obligation on both sides and consideration, but no mutuality of remedy. Thorpe Bros. v. W., 192M432, 256NW729. See Dun. Dig. 8774.

Whether or not specific performance of contract to exchange lands should be granted rests in the sound discretion of trial court, but discretion exercised, however, must be judicial discretion, not arbitrary or capricious, and if contract has been entered into by a competent party, and is unobjectionable in its nature and circumstances, specific performance thereof is a matter of right. Twin City Bldg. & Loan Ass'n v. J., 194M1, 259 NW551. See Dun. Dig. 8777.

A court of equity may decline to enforce a contract to convey real estate if it is shown that enforcement would be unconscionable or inequitable, or if because of mistake or misapprehension plaintiff has gained an unconscionable advantage of defendant. Id. See Dun. Dig. 8792.

Whether specific performance should be granted rests largely in sound discretion of trial court. Schultz v. B., 195M301, 262NW877. See Dun. Dig. 8777.

Agreement of principal beneficiary of will to give dissatisfied heir one-half of property in consideration of his refraining from contesting will on ground of undue influence will be specifically enforced if dissatisfied heir acted in good faith. Id. See Dun. Dig. 8790.

An oral contract to adopt may be specifically enforced, if partially performed, upon establishment by clear and convincing evidence. Firle's Estate, 197M1, 265NW818. See Dun. Dig. 8790.

Oral contract to be entitled to specific performance must be established by clear, positive and convincing proof Anderson v. A., 197M252, 266NW841. See Dun. Dig. 8806.

In action for specific performance of contract to will or leave property, burden is upon plaintiff to show by full and satisfactory proof fact of contract and its terms. Hauge v. N., 197M493, 267NW432. See Dun. Dig. 8806.

In action for specific performance of a contract to leave property by will, evidence held to sustain finding that contract was made in writing between decedent and plaintiff, through his father, was performed by plaintiff, and was of such domestic and personal character that it could not be liquidated in money. Hanson v. B., 199M70, 271NW127. See Dun. Dig. 10207.

Court, on plaintiffs' motion for a new trial, rightly refused to amend complaint for specific performance by substituting either a complaint for reformation of contract or one for money had and received, since dismissal is not a bar. Martineau v. C., 201M342, 276NW232. See Dun. Dig. 8802.

Specific performance will be granted of a contract but not of negotiations for a contract. Bjerke v. A., 203M 501, 281NW865. See Dun. Dig. 8785.

If a contract is supported by a valid consideration, and there is no other good reason why it should not be specifically enforced except want of mutuality of remedy, it will be enforced, want of mutuality of remedy being addressed only to discretion of court. Peterson v. J., 204M300, 283NW561. See Dun. Dig. 8774.

Specific performance of oral contract to adopt. 16 MinnLawRev578.

Mutuality of remedy—negative mutuality rule rejected. 23MinnLawRev530.

12. ——Abatement of nuisances.

Equity has jurisdiction to enjoin and abate nuisances, without jury trial. 174M457, 219NW770.

13. Torts.

A minor may not sue his parent for tort unless emancipated. Eschenbach v. B., 195M378, 263NW154. See Dun. Dig. 7308.

Where lessor covenanted for a specified time not to enter into a business competitive with that of lessee, and during term of lease conveyed property and assigned reversion to plaintiff, and thereafter breached his covenant with the lessee, who rescinded lease, to plaintiff's damage, plaintiff has no cause of action either in tort for wrongful interference with his business or in contract for breach of defendant's covenant with lessee. Dewey v. K., 200M289, 274NW161. See Dun. Dig. 9637.

No man can justify an interference with another's business through fraud or misrepresentation, nor by intimidation, obstruction, or molestation. Johnson v. G., 201M629, 277NW252. See Dun. Dig. 9637.

Tort action by minor child against parent. 15MinnLawRev126.

Publication of picture of deceased child as invasion of parents' right of privacy. 15MinnLawRev610.

Tort liability of administrative officers. 21 MinnLaw Rev 263.

Tort liability of insane persons. 22MinnLawRev853.

Intentional infliction of mental suffering. 22MinnLaw Rev1030.

14. ——Negligence

Electricity; see notes under §7536.

Negligent fires, see §4031-28.

Wickstrom v. T., 191M327, 254NW1; note under §4174.

In action by customer for injuries sustained when falling in defendant's store, evidence that the place was cleaned every morning, and that a state inspector had complimented defendant on its cleanliness, held not to controvert question of negligence. Sears Roebuck & Co. v. P. (USCCA8), 76F(2d)243.

In action by customer to recover for personal injuries sustained when falling over twine on floor of defendant's seed store, held on issues of whether defendant or its employee left twine in aisle, and whether it constituted negligence, there was substantial evidence to sustain verdict in favor of plaintiff. Id.

Property owner is charged with notice of any structural defect therein. Id.

In action by customer for injuries sustained when falling over twine on the floor of defendant's seed store, held the jury was warranted in inferring that the twine had been removed from one of the evergreen trees in the store by a clerk of defendant, and thrown or left in the aisle by him. Id.

Customer enters store as an invitee to whom proprietor owes a continuing duty of exercising reasonable or ordinary care. Id.

Evidence not showing knowledge or realization of danger held insufficient to justify finding that plaintiff in action for injuries in department store assumed risk. Montgomery Ward & Co. S., (CCA8), 103F(2d)458.

In action in Minnesota federal court for injuries received in that state, question whether assumption of risk is a defense where negligence charged is breach of statutory duty, held controlled by law in Minnesota. Id.

Where injuries received while descending department store steps was caused by absence of handrail required by city ordinance together with presence of liner of cracker jack box on steps, owner was liable, it not being necessary that violation of ordinance was the sole proximate cause. Id.

Question of proximate cause is question for jury unless reasonable minds can draw but one conclusion under the evidence, in which case it becomes a question of law. Id.

In action for injuries received while descending department store steps, contributory negligence, held question for jury. Id.

Negligence of attendant of mud baths held not shown as to one who fell when getting out of mud, and defendant was entitled to judgment notwithstanding verdict. Johnson v. M., 182M476, 234NW680. See Dun. Dig. 6987.

If negligence of city and heavy rainfall, though of such character as to come within the meaning of act of God or vis major, combined and caused the damage, each participating proximately, the city was liable. National Weeklies, Inc., v. J., 183M150, 235NW905. See Dun. Dig. 7007(23), 10172.

That defendant's farm team had run away some two years previously, together with evidence of an admission by defendant that at an undisclosed time they had injured a cow, was not sufficient evidence of negligence to sustain a verdict for an employee, injured in a runaway, who had worked with the team two and a half months and who based his action on failure to furnish a safe team or to warn of their alleged propensity to run away. Johnson v. A., 183M366, 236NW628. See Dun. Dig. 6884-5915.

Owner of pop corn wagon permitting oil station attendant to put gasoline in tank while taper was in flame held guilty of contributory negligence as matter of law. Nick v. S., 183M573, 237NW607. See Dun. Dig. 3699.

Death from falling down stairs by one injured in automobile accident seven months before was not proximately caused by the negligence of the automobile driver. Sporna v. K., 184M89, 237NW841. See Dun. Dig. 7005 (15).

One injured in automobile accident held guilty of negligence in attempting to go down stairs seven months later while in a crippled condition, which negligence was the proximate cause of death. Sporna v. K., 184M89, 237 NW841. See Dun. Dig. 7005(15).

It is only in the clearest of cases, when the facts are undisputed, and it is plain that all reasonable men can draw but one conclusion, that the question of contributory negligence becomes one of law. Horsman v. B., 184M514, 239NW250. See Dun. Dig. 7033.

Test of proximate cause is not whether injury could have been anticipated, but whether there was direct causal connection between negligent act and injury. *Hamilton v. V., 184M580, 239NW659. See Dun. Dig.* 7001(1).

Violation of a statutory duty to another is negligence per se as to him. Mechler v. M., 184M607, 239NW605. See Dun. Dig. 6976(19).

A private school held not negligent as to a spectator at a football game injured when players accidentally rolled out of bounds. Ingerson v. S., 185M16, 239NW667. See Dun. Dig. 6988, 8673.

Whether one whose automobile stopped at two o'clock in the morning was an implied invitee in going to a nearby garage for gas or for service held for jury, though such garage did not sell gas nor furnish towing service. Tierney v. G., 185M114, 239NW905. See Dun. Dig. 6985, 7048.

Whether garage was negligent in maintaining a small door constructed in a large door so as not to reach the bottom of the door held for jury. Tierney v. G., 185M114, 239NW905. See Dun. Dig. 7048.

Whether plaintiff was guilty of contributory negligence in entering a small door within a large door of a garage and stumbling over the lower frame held for jury. Tierney v. G., 185M114, 239NW905. See Dun. Dig. 7048.

Spectator at baseball game sitting behind third base, assumed risk of injury from foul balls. Brisson v. M., 185M507, 240NW903. See Dun. Dig. 9623b.

In action against street railway for injuries to bicycle rider, it was error to exclude proof of failure to warn by bell even though boy testified that he heard car start up behind him. Newton v. M., 186M439, 243NW684. See Dun. Dig. 9033.

There was no issue for jury upon contributory negligence of plaintiff, who was riding as a guest in an auto and was injured when auto struck ridge in city street. Hoffman v. C., 187M320, 245NW373. See Dun. Dig. 6842, 7037, 7038.

Backing of truck into wood pile in farm yard while turning around, resulting in injury to child, could be found to be negligence, in absence of explanation. Rye v. K., 187M587, 246NW256. See Dun. Dig. 6998d.

Instruction that child was required to exercise degree of care which children of same age ordinarily exercise under same circumstances, held not to submit issue of contributory negligence. Borowski v. S., 188M102, 246 NW540. See Dun. Dig. 7029.

To recover damages for injuries received when automobile slipped off steam cleaning rack, plaintiff must show not only defect alleged in rack but also that accident was caused thereby. Vardolos v. P., 188M405, 246 NW467. See Dun. Dig. 6999.

In action for damages for injury to hand caught between swinging vestibule doors of store, negligence and contributory negligence, held for jury. Carr v. W., 188M 216, 246NW743. See Dun. Dig. 6987.

An employee failing to report defect in valve could not recover for disabling sickness occasioned by escaping gas. Cedergren v. M., 188M331, 247NW235. See Dun. Dig. 6014.

An employee is bound to obey all reasonable rules or orders of his employer, and if his disobedience is proximate cause of injury, recovery is barred. Id.

Trainmen owe no duty to unknown and unexpected trespassers on track until they become aware of them, and then they owe duty of exercising ordinary care not to do them harm. Denzer v. G., 188M580, 248NW44. See Dun. Dig. 8164.

A shopkeeper or merchant owes to customers upon his premises duty of ordinary care in respect of safe con-

dition of premises. Hastings v. W., 189M523, 250NW362. See Dun. Dig. 6984-6987, 9765, 9766.

Whether storekeeper was negligent in having small hole in floor and whether it was proximate cause of injury to woman whose heel caught therein, held for jury. Id.

Where servant through sudden illness or accident becomes helpless and is in peril of life or serious injury unless immediate care is given, it is duty of master when apprised of servant's condition to furnish proper care. Wilke v. C., 190M89, 251NW11. See Dun. Dig. 5862.

Due care is a degree of care commensurate to the danger. Dragotis v. K., 190M128, 250NW804. See Dun. Dig. 6970, 6972, n. 94.

It is not due care to rely on exercise of due care by others when such reliance is itself attended by obvious danger. Id.

Doctrine of res ipsa loquitur does not apply where all facts and circumstances as to cause of failure of dam and the resulting injury are fully shown. Willie v. M., 190M95, 250NW809. See Dun. Dig. 7044.

Court placed a greater burden on defendant than law required to establish the defense of contributory negligence or assumption of risk, by stating that a plaintiff is guilty of negligence and cannot recover if he "rashly and recklessly and unnecessarily exposes himself to an imminent and known danger in a manner that a person of ordinary prudence would not under the same or similar circumstances." Engstrom v. D., 190M 208, 251NW134. See Dun. Dig. 7012.

Evidence held insufficient to show negligence of department store as to customer who fell over four-inch platform in or near aisle. Smith v. E., 190M294, 251NW 265. See Dun. Dig. 6987.

It is duty of a shopkeeper to keep and maintain passageways in a reasonably safe condition for use of customers and invitees, but he is not an insurer of the safety of customers. Id.

Where an ordinary device, such as a platform customarily used in stores for display of goods, is placed in a well-lighted position, is plainly observable, with nothing to conceal its presence and outlines, and with sufficient passageways going by it, shopkeeper should not be held negligent as to one heedlessly colliding therewith. Id. See Dun. Dig. 6987.

Under ordinary circumstances, a street railway company is not responsible for injuries to passengers caused by obvious street dangers. Fox v. M., 190M343, 251NW 916. See Dun. Dig. 1278.

Street railway held not liable for injury to passenger on steps when automobile collided with street car. Fox v. M., 190M343, 251NW916. See Dun. Dig. 1266.

A street railway company is not an insurer of safety of its passengers. Id. See Dun. Dig. 1261, n. 91.

In action against street railway for injuries received in collision between automobile and street car, negligence and contributory negligence, held for jury. Holt v. S., 190M441, 252NW76. See Dun. Dig. 9023a.

Evidence sustained verdict that defendant was negligent in permitting its employees to drop substances, of substantial weight, down onto a passageway in its laundry where invitees might be without giving latter timely warning. Cleland v. A., 190M593, 252NW453. See Dun. Dig. 6996.

The rule of res ipsa loquitur applies where the specific cause of an accident is not shown by the evidence of either party, the plaintiff has no knowledge of the exact cause, it does not appear that plaintiff has or knows of any evidence to show the specific cause, and the facts and circumstances shown are such as to justify the jury in finding that the defendant, having full control of the operation of the thing which caused the injury, has given no explanation or evidence as to the cause. Cullen v. P., 191M136, 253NW117. See Dun. Dig. 7044.

Negligence may be proved by circumstantial evidence. Id. See Dun. Dig. 1123, 1124, 7047.

Burden of proof on question of negligence rests upon plaintiff claiming it and does not shift. Cullen v. P., 191M136, 254NW631. See Dun. Dig. 7043.

Doctrine that there are three degrees of negligence, slight, ordinary and gross, does not prevail in this state. Peet v. R., 191M151, 253NW546. See Dun. Dig. 6971.

In action for death of one struck both by automobile and street car while waiting to become passenger upon street car, evidence held not to show any negligence on part of motorman. Kruchowski v. S., 191M454, 254NW 587. See Dun. Dig. 9033a.

If an injury be caused by the concurring negligence of defendant and a third person, defendant is liable to same extent as though it had been caused by his negligence alone. Luck v. M., 191M503, 254NW609. See Dun. Dig. 7006.

Contributory negligence on part of an injured plaintiff prevents recovery against a negligent defendant, absent willful or wanton negligence. Id. See Dun. Dig. 7035.

Record found to sustain right of recovery as to those who were guests or passengers in driver's car when same was crushed between two street cars operated by defendant. Id. See Dun. Dig. 9023a.

In action for injuries and death in collision between two street cars and automobile, court properly refused to submit question of willful and wanton negligence on part of motorman. Id. See Dun. Dig. 9029.

On issue of defendant's negligence in operation of its street car, court submitted to jury under proper instructions questions of whether car ran through stop signal, rate of speed, and failure of motorman to give warning, to have his car under proper control, and to keep proper lookout. Id. See Dun. Dig. 9015.

Where several persons are engaged in same work, in which negligent or unskillful performance of his part by one may cause danger to others, and in which each must necessarily depend for his safety upon good faith, skill, and prudence of each of others, it is duty of each to exercise care and skill ordinarily employed by prudent men in similar circumstances, and he is liable for any injury occurring by reason of a neglect to use such care and skill. Builders & M. M. C. Co. v. B., 192M 254, 255NW851. See Dun. Dig. 6975.

A general contractor in charge of a building in the course of construction, knowing that workmen of other contractors are working in or about the building, is bound to exercise reasonable care to avoid injuring them. Id. See Dun. Dig. 6975.

In action against general contractor by compensation insurer of subcontractor, negligence of general contractor and contributory negligence of employee held for jury. Id. See Dun. Dig. 6975, 10408.

Neighbor of farmer assisting in construction of barn without compensation, except understanding that he in turn might receive aid when needed, was an invitee on barn to whom foreman and owner owed ordinary care. Gilbert v. M., 192M495, 257NW73. See Dun. Dig. 6984.

Whether foreman in construction of barn was negligent with respect to construction of scaffold and overloading, held for jury. Id. See Dun. Dig. 7048.

In action by farmer for personal injuries suffered when scaffold fell while aiding neighbor in construction of barn under supervision of building contractor, it was not error to refuse an instruction based on claim that there was testimony to go to jury that plaintiff knew as much about construction of scaffold as the foreman. Id. See Dun. Dig. 6984.

In action for personal injuries by farmer injured by falling of scaffold while assisting a neighbor, record held not to warrant an instruction in respect to latent defects. Id. See Dun. Dig. 6984.

A private institution of learning was not negligent in placing small cedar stakes about three inches long at edges of roadway to beautify same, and was not liable for injury to one whose toboggan struck a stake, since no person of ordinary prudence could anticipate injury. Gallo v. B., 192M530, 257NW336. See Dun. Dig. 7002.

Storekeeper was not liable for injuries to a patron who slipped on a green bean pod, where evidence showed that storekeeper swept aisle every night and in morning after merchandise had been placed in position, and that strict orders were enforced to remove chance matters that might fall upon floors. Penny v. S., 193M65, 258NW522. See Dun. Dig. 6987.

Burden of establishing contributory negligence is upon defendant in negligence case. Gordon v. F., 193M97, 258 NW19. See Dun. Dig. 7032.

Contributory negligence of patron of filling station falling into greasing pit, held for jury. Id. See Dun. Dig. 7033.

In action against filling station for injuries received by invitee falling into greasing pit located in building, whether defendant was negligent, held for jury. Id. See Dun. Dig. 6987.

In action against owner of filling station for personal injuries sustained from fall into automobile greasing pit located inside building, whether plaintiff was an invitee, held for jury. Id. See Dun. Dig. 6987.

Where father went to garage office to talk with proprietor, taking his 2½ year old son with him, and child wandered into other part of garage and fell into a grease pit and was injured, regardless of whether child was in first instance an invitee or licensee, when he wandered off into other part of garage he became merely a licensee toward whom no duty was owed to keep premises safe. Mosher v. A., 193M115, 258NW158. See Dun. Dig. 6984, 6985.

Contributory negligence is always question of fact, unless reasonable minds could reach but one conclusion. Hogle v. C., 193M326, 258NW721. See Dun. Dig. 7033, 7048.

Contributory negligence of one slipping on oily store floor was for jury. McIntyre v. H., 193M439, 258NW832, 6987.

General rule is that a shopkeeper is under legal obligation to keep and maintain his premises in reasonably safe condition for use as to all whom he expressly or impliedly invites to enter same. Id.

Trial court properly submitted to jury shopkeeper's negligence respecting failure adequately to remove from surface of floor oily and slippery substances remaining thereon from oiling of floor night before. Id.

In action by passenger on street car for injuries received when she fell on stopping of car while she was in aisle preparing to get off, negligence and contributory negligence held for jury. Underdahl v. M., 193M548, 259 NW78. See Dun. Dig. 1278.

General rule is that a shopkeeper is under legal obligation to keep and maintain his premises in reasonably safe condition for use as to all whom he expressly or impliedly invites to enter the same. Dickson v. E., 193M 629, 259NW375. See Dun. Dig. 6987.

Storekeeper was not negligent in maintaining floor level in lavatory 6½ inches above floor level in hall leading to lavatory and was not guilty of negligence in hav-

ing doorway open outward into hall so that one leaving lavatory might not be able to see difference in floor level. Id. See Dun. Dig. 6987.

Contributory negligence is want of ordinary or reasonable care on the part of a person injured by negligence of another directly contributing to injury, as a proximate cause thereof, without which injury would not have occurred. Johnston v. T., 193M635, 259NW187. See Dun. Dig. 7012, 7013.

In action by farm hand for injuries while riding as a passenger in automobile driven by farm manager, evidence held to justify verdict and judgment for plaintiff. Eichler v. E., 194M8, 259NW545. See Dun. Dig. 5857d.

In action for death by falling into elevator shaft to which there was no eye witness, it is not absolutely necessary for plaintiff to prove precise manner in which deceased came to fall into pit, even if any of alleged negligent acts or omissions have been proven, which reasonably may be found to be cause of fall. Gross v. G., 194 M23, 259NW557. See Dun. Dig. 7043.

That elevator gate not complying with ordinance was installed before ordinance was enacted does not excuse noncompliance with its provisions. Id. See Dun. Dig. 6976.

In action for death in elevator shaft to which there were no eye witnesses, sentence at end of charge "with reference to the presumption of due care that accompanied the plaintiff, the burden of overcoming that presumption rests upon the defendant" held not prejudicial in view of accurate and more complete instruction in body of charge. Id. See Dun. Dig 7032(99).

In action for death of roofing contractor for negligent maintenance of elevator gate and approach, evidence that gates of elevator on floor above one where fatal fall happened were of different construction than gate in question was admissible. Id. See Dun. Dig. 6994(19).

In action for death of roofer against owner of business building, evidence held to sustain verdict that defendant's negligence in respect to elevator gate violating city ordinance, in connection with darkness of room, was proximate cause of death. Id. See Dun. Dig. 6987.

In action for death of contractor repairing roof of business building by falling into elevator shaft, defenses of assumption of risk and contributory negligence held for jury. Id. See Dun. Dig. 6994(19), 7023, 7041a.

Doctrine of res ipsa loquitur is that when a thing, which has caused an injury, is shown to be under management of defendant charged with negligence, and accident is such as in ordinary course of things would not happen if those who have control use proper care, accident itself affords reasonable evidence, in absence of explanation by defendant, that it arose from want of care. Borg & Powers Furn Co. v. C., 194M305, 260NW 316. See Dun. Dig. 7044.

Where agency of injury is not shown and is not within knowledge or reach of plaintiff, doctrine of res ipsa loquitur applies, and an unsuccessful attempt by plaintiff to show cause of injury does not weaken or displace presumption of negligence on part of defendant. Id. See Dun. Dig. 7044.

Doctrine of res ipsa loquitur applied where a taxicab rolled backwards down hill, driverless, and crashed into and broke a plate glass window. Id. See Dun. Dig. 7044, 7047.

To give rise to res ipsa loquitur it must appear, among other things, that the instrumentality inflicting the injury was under control of defendant, and where there is dispute as to this factor, it is proper to submit this issue to jury under instructions, such that if they find defendant to be in control of instrumentality, then they may apply res ipsa loquitur, otherwise not. Hector Const. Co. v. B., 194M310, 260NW496. See Dun. Dig. 7044.

One who loses his life in an accident is presumed to have exercised due care for his own safety, but presumption may be overcome by ordinary means of proof that due care was not exercised. Oxborough v. M., 194 M335, 260NW305. See Dun. Dig. 3431, 7032.

Burden is upon defendant to establish an injured plaintiff's contributory negligence, and unless evidence conclusively establishes it, such issue is for jury. Id. See Dun. Dig. 2616, 7032.

Idea that attractive nuisance doctrine involves an invitation or anything akin thereto should be discarded, liability resulting notwithstanding trespass by one of tender years with consequence lack of perception and responsibility. Gimmestad v. R., 194M531, 261NW194. See Dun. Dig. 6989.

One who maintains without adequate safeguards, upon his own premises dangerous instrumentalities attractive to young children is bound to exercise reasonable care to protect them from injury therefrom. Id.

Whether wrecking company storing lumber and materials in insecure piles on vacant property in process of sorting it were guilty of negligence in failing to maintain adequate safeguard for protection of children, held for jury. Id.

Evidence made question of negligence of motorman, in operating street car, a question of fact for jury, in action by sideswiped intending passenger. Mardorf v. D., 194M537, 261NW177. See Dun. Dig. 1276.

Evidence does not establish that sideswiped intending passenger was guilty of contributory negligence as a matter of law. Id.

It is duty of street car motorman to exercise care to see that prospective passengers have time and opportunity to safely reach an inner door of car before starting. Id.

A guest in a hotel, injured by stumbling down a short, unlighted stairway in hallway just outside door of his room, held entitled to recover as for negligence. Gustafson v. A., 194M575, 261NW447. See Dun. Dig. 4513, 6987.

Host was not liable for death of guest who slipped upon wet floor and beans caused by children playing about premises. Page v. M., 194M607, 261NW443. See Dun. Dig. 6984.

When a guest is invited to come upon premises of his host for purely social purposes, relation created is not that of invitee and invitor in a business sense, but that of licensee and licensor, and host is under no liability to his guest unless proximate cause of injury is something in nature of a trap or he is guilty of some active negligence. Id.

Recovery by employee being predicated solely upon violation of ventilating statutes, defense of assumption of risk is not available. Clark v. B., 195M44, 261NW596. See Dun. Dig. 5969.

Wilful or wanton negligence does not necessarily mean an operation of mind, intending to injure anyone; is satisfied by conduct that is reckless, regardless of welfare or safety of those who may be around. Raths v. S., 195M225, 262NW563. See Dun. Dig. 6971.

Contributory negligence on part of mother of a child seven years old, which was killed by an automobile on a public highway, held question of fact for jury. Dickey v. H., 195M292, 262NW869. See Dun. Dig. 2616(10).

Neither wife nor minor child may recover damages for personal injuries to husband and father, remedy being solely in husband and father. Eschenbach v. B., 195M 378, 263NW154. See Dun. Dig. 3288b, 7305b.

Whether, in constructing a pipe line for transmission of natural gas through farm of plaintiff's father, defendant was negligent in using a paint contained in steel drums and which, at a temperature above 90 degrees Fahrenheit inside drum, would generate explosive gas, and leaving empty can where boy could get it, held for jury. Reichert v. M., 195M387, 263NW297. See Dun. Dig. 3699, 7000.

Where in action for wrongful death representative of estate of deceased would be sole beneficiary of any recovery, his contributory negligence bars recovery against defendant whose negligence caused death. Jenson v. G., 195M556, 263NW624. See Dun. Dig. 2616(6).

Evidence does not justify a jury to find that defendant through negligence caused alleged ice ridge or hummock upon which plaintiff fell to form on walk. Abar v. R., 195M597, 263NW917. See Dun. Dig. 6845.

Condition of driveway over sidewalk was not a nuisance which abutting owner was in duty bound to abate. Id.

Where a taxicab of a common carrier stops on a street to let off a passenger in a place where it is likely that a vehicle coming from behind will be unable to pass to left thereof or to stop, because of street car rails and icy ruts, it is for jury to determine whether driver of cab was negligent and whether such negligence proximately caused or contributed to injury received by plaintiff, when a car coming up from behind struck cab as she was in act of alighting. Paulos v. K., 195M603, 263NW913. See Dun. Dig. 1291a.

In order for rule of res ipsa loquitur to apply, instrumentality causing injury must be exclusively and wholly under control of defendant. Heidemann v. C., 195M611, 264NW212. See Dun. Dig. 7044.

One suddenly confronted by a peril, through no fault of his own, who, in attempt to escape, does not choose best or safest way, should not be held negligent because of such choice, unless it was so hazardous that ordinarily prudent person would not have made it under similar conditions. Cosgrove v. M., 196M6, 264NW134. See Dun. Dig. 6969.

In reviewing a verdict, supreme court cannot count witnesses or weigh their testimony, but is governed by what is obvious to an unprejudiced mind sitting in judgment, and if physical or demonstrable facts are such as to negate truthfulness or reliability of testimony of a witness, a verdict based on such testimony is without foundation and must be set aside. Id. See Dun. Dig. 7160a, 9764, 10344.

Action, where legal duty requires no action, is no worse than inaction where legal duty requires actions. Taylor v. N., 196M22, 264NW139. See Dun. Dig. 6969.

In action for personal injuries received when slipping on floor in place of business, court erred in refusing to permit testimony of one of plaintiff's witnesses to effect that a short time after plaintiff had fallen witness entered same room and slipped and nearly fell at substantially same place. Id. See Dun. Dig. 6987.

One operating a public place of business is not an insurer of safety of customers, but is required to exercise the degree of care of ordinarily prudent person. Id.

The use of a waxed floor or mere use of marble, tile, hardwood or any other commonly employed floor material in construction of a floor in a place of business is not negligence, but there was a question for the jury where a highly waxed floor was permitted to become wet from ice and snow brought in on feet of patrons. Id.

Contributory negligence of one who slipped and fell upon wet waxed linoleum floor held for jury. Id.

Where plaintiff was injured at night by driving his automobile against carcass of a horse which had just

been killed in a collision with a truck, jury might find that negligent permitting of horse at large was a proximate cause of injury to plaintiff. Wedel v. J., 196M170, 264NW689. See Dun. Dig. 7011.

Whether a child just past age of six was chargeable with contributory negligence was for jury. Eckhardt v. H., 196M270, 264NW776. See Dun. Dig. 7029.

Whether employees of a utility company put plugs in pipes from water front in range, which they replaced with a gas stove, and whether this negligence was proximate cause of an explosion after range was moved to a cabin, held for jury. Mattson v. N., 196M334, 265NW51. See Dun. Dig. 7048.

Where in action for personal injuries caused by moving a one-man street car on a curve so that plaintiff was struck by swinging rear end of car while he was seeking passage thereon, a passenger on car stated that she informed motorman-conductor of presence of plaintiff coming to car, it was error to exclude her following statement that plaintiff must "have gone the other way"; night being dark and rainy, and she being in a position for observation superior to that of motorman. Mardorf v. D., 196M347, 265NW32 See Dun. Dig. 1276.

Negligence is failure to exercise such care as persons of ordinary prudence usually exercise under similar circumstances. Beckjord v. F., 196M474, 265NW336. See Dun. Dig. 6969.

Church was not negligent with respect to entry to stage where a member of ladies society was injured while leaving stage where a moonlight scene was being depicted, requiring turning out of lights in such entrance. Id. See Dun. Dig 6988.

Defense of contributory negligence is generally an issue of fact and not to be determined as a matter of law unless evidence is such that reasonable men can draw but one conclusion. Vogel v. N., 196M509, 265NW350. See Dun. Dig. 7033.

When through negligence of another a person is suddenly placed in a position of great and imminent peril, he is not chargeable as a matter of law with contributory negligence if he puts himself into a position of still greater peril and is injured. Anderson v. K., 196M578, 265NW821. See Dun. Dig. 7020.

Before court should direct verdict for defendant on ground of contributory negligence, facts and inferences establishing contributory negligence must be made to appear in such fashion as to leave no reasonable doubt in mind of judge that field of jury cannot embrace particular facts presented. Id. See Dun. Dig. 7033.

If occurrence of intervening cause might reasonably have been anticipated, such intervening cause will not interrupt connection between original cause and injury. Ferraro v. T., 197M5, 265NW829. See Dun. Dig. 7005.

An injured plaintiff is not deprived of benefit of doctrine of res ipsa loquitur from mere introduction of evidence which does not clearly establish facts or leaves matter doubtful. An unsuccessful attempt on part of plaintiff to show negligent act does not weaken or displace presumption. Anderson v. E., 197M144, 266NW702. See Dun. Dig. 7044.

Evidence held to sustain verdict based on storekeeper's negligence in not maintaining floor in reasonably safe condition. Driscoll v. B., 197M313, 266NW879. See Dun. Dig. 6987.

A storekeeper is under a legal duty to keep and maintain his premises in reasonably safe condition for use of customers. Id.

If an inference of negligence from part of facts is inconsistent with and repelled by other facts conclusively shown, negligence is not proved. Bauer v. M., 197M352, 267NW206. See Dun. Dig. 7047(72).

No recovery can be had for negligence if it is more probable that accident was produced by some cause for which defendant was not liable. Id.

Where defendant, a common carrier of passengers, owned and operated both street car and motor bus involved in a collision causing injury to the plaintiff, jury could draw an inference that collision occurred due to defendant's negligence under doctrine of res ipsa loquitor. Birdsall v. D., 197M411, 267NW363. See Dun. Dig. 1296.

Whenever a person is placed in such a position with regard to another that it is obvious that if he does not use due care in his own conduct he will cause injury to that person, duty at once arises to exercise care commensurate with situation in which he thus finds himself to avoid such injury. Wells v. W., 197M464, 267NW379. See Dun. Dig. 6974.

Failure to keep elevator gate closed or to warn visitor to warehouse that it was not closed and contributory negligence of plaintiff in walking into elevator shaft relying upon gate being closed, held for jury. Smith v. K., 197M558, 267NW478. See Dun. Dig. 6987.

Burden rests upon plaintiff to prove that harm resulted from negligence of defendants rather than from some other cause. Yates v. G., 198M7, 268NW670. See Dun. Dig. 7011.

Proof of causal connection between injury and claimed negligence must be something more than consistent with plaintiff's theory of how injury was caused. Id.

Evidence held not to support a finding that lobar pneumonia, from which plaintiff's intestate died, was caused by collision, occurring over five weeks prior to pneumonia, connection as proximate cause lacking as a matter of law. Honer v. N., 198M55, 268NW852. See Dun. Dig. 6999.

In action by one injured while riding as a passenger in a street car, in a collision with a coal truck, making left turn, evidence sustained a verdict against both defendants. Useman v. M., 198M79, 268NW866. See Dun. Dig. 1266.

A very strong presumption arises that deceased exercised due care to save himself from personal injury or death, and the question is always one of fact for jury unless undisputed evidence so conclusively and unmistakenly rebuts presumption that honest and fair-minded men could not reasonably draw different conclusions therefrom. Szyperski v. S., 198M154, 269NW401. See Dun. Dig. 2616.

One need not anticipate negligence of another until he becomes aware of such negligence. Pearson v. N., 198M303, 269NW643. See Dun. Dig. 7022.

Burden is on plaintiff to show that harm resulted from negligence of defendant rather than from some other cause. Williamson v. A., 198M349, 270NW6. See Dun. Dig. 7491a.

Whether plaintiff was guilty of contributory negligence as she slipped and fell due to an icy running board while entering cab, held for jury. Finney v. N., 198M 554, 270NW592. See Dun. Dig. 1291a.

Whether passenger on street car used ordinary care, if, with bundles in her arms, she arose to alight before car had come to a stop, held for jury. Doody v. S., 198 M573, 270NW583. See Dun. Dig. 1278.

Where defendant rented a hall on third floor of its building to company in order that latter might display its wares, and also furnished chairs for occasion, and a chair collapsed, doctrine of res ipsa loquitur is not applicable, since chair was not under control of defendant. Szyca v. N., 199M99, 271NW102. See Dun. Dig. 7044.

Whether filling station operator holding light for persons repairing truck on highway was an invitee or a volunteer, held for jury. Guild v. M, 199M141, 271NW 332. See Dun. Dig. 5857.

Whether inadequate blocking of wheels of truck being repaired on highway was proximate cause of injury to filling station operator holding light, held for jury. Id. See Dun. Dig. 7002, 7003.

Where two negligent causes combine to produce injuries, neither author can escape liability because he is responsible for only one of them. Id. See Dun. Dig. 7006, 7007.

Whether filling station operator assumed risk or was guilty of contributory negligence in getting into a place of danger while holding a light for men repairing a truck on the highway held for jury. Id. See Dun. Dig. 7023.

Whether truck owner and garage man repairing truck on highway were guilty of negligence by reason of inadequate blocking of wheels, whereby filling station employee holding light was injured, held for jury. Id. See Dun. Dig. 7023a.

Action arising out of a collision between an automobile and a street car, just as former was about across street car tracks, testimony indicating that street car was at a stop taking on or discharging passengers as plaintiff approached tracks to cross them and from a dead stop, raised question of fact for jury. Drown v. M., 199M193, 271NW586. See Dun. Dig. 9023a.

Where negligence of several combine to produce injuries to another, any or all of authors of such negligent cause may be held to liability for entire harmful result directly flowing therefrom. Findley v. B., 199M 197, 271NW449. See Dun. Dig. 7006.

Motion of a defendant in a personal injury action for a directed verdict should be granted only in cases where evidence against plaintiff is clear, whether basis of motion be want of negligence in defendant or contributory negligence in the plaintiff. Jude v. J., 199M217, 271NW475. See Dun. Dig. 9843.

Contributory negligence of hotel guest in going down unlighted steps at entrance held for jury. Jewell v. B., 199M267, 271NW461. See Dun. Dig. 4513.

A carrier is bound to exercise highest degree of care toward its passengers. Mardorf v. D., 199M325, 271NW 588. See Dun. Dig. 1261.

Whether passenger intending to take street car was guilty of contributory negligence in not knowing or taking notice of fact that there would be an outswing of street car as it went around corner, held for jury. Id. See Dun. Dig. 1276.

One standing near track intending to take street car is to be considered as standing in same relation to street railway as a passenger actually aboard street car, as affecting duty of carrier to exercise highest degree of care toward its passengers. Id.

Where department store had on display several cedar chests, on some of which covers were open, and a seven-year-old child, in company with his parents, who had come to view a Christmas display in another part of store, was injured when top of one of these cedar chests fell upon his hand as he was playing, there was no liability because there was no reasonable ground to anticipate that display of cedar chests in this manner would or might result in injury to anybody. Pepperling v. E., 199M328, 271NW584. See Dun. Dig. 6987.

Automobile guest's act in placing hand upon door latch handle was not a material element in happening of accident and did not contribute to collision by street car from rear, and defense of contributory negligence was erroneously submitted to jury. Larsen v. M., 199 M501, 272NW595. See Dun. Dig. 7015.

One cannot recover damages for an injury to the commission of which he has directly contributed, and it matters not whether contribution consists in his participation in direct cause of injury, or in his omission of duty, which, if performed, would not have prevented it. Thorstad v. D., 199M543, 273NW255. See Dun. Dig. 7012(37, 38, 39).

Contributory negligence is a want of ordinary or reasonable care on part of a person injured by negligence of another directly contributing to injury, as a proximate cause thereof, without which the injury would not have occurred. Id. See Dun. Dig. 7012, 7013.

Ordinary care is exercise of a degree of care commensurate with circumstances. Carlson v. S., 200M177, 273NW665. See Dun. Dig. 6970.

Where children are known or may reasonably be expected to be in vicinity, a high degree of vigilance is required of driver to measure up to standard of what law regards as ordinary care. Id. See Dun. Dig. 6980.

Willful or wanton negligence of truck driver establishes liability irrespective of contributory negligence. Id. See Dun. Dig. 7036.

To hold a person's recovery barred by his own negligence, there must be a causal connection between act of negligence and happening of accident. Butcher v. T., 200M262, 273NW706. See Dun. Dig. 7015.

Res ipsa loquitur doctrine did not apply to falling of light dome in a church while children attending a carnival were jumping for balloons on strings attached to such dome. Ewald v. H., 200M226, 274NW170. See Dun. Dig. 7044.

Doctrine of res ipsa loquitur does not apply where it appears that an accident was due to a cause beyond control of defendant. Id.

Where driver of automobile was killed in a collision at a street intersection, with a street car, presumption of due care of plaintiff's decedent is conclusively overcome by evidence which discloses that as a matter of law his negligence contributed to cause his death. Geldert v. B., 200M332, 274NW245. See Dun. Dig. 2616(12).

A carrier is liable for the negligence of its employees, in performance of their duties, in jostling, pushing, falling upon or stumbling against passengers. Benson v. N., 200M445, 274NW532. See Dun. Dig. 1261.

A common carrier is required to exercise reasonable care not to injure a passenger while in depot or station waiting to depart on a train or bus. Id. See Dun. Dig. 1268.

Owner and operator of a union bus station is liable to a passenger, about to take passage on a bus from station, injured when negligently pushed from a loading platform by defendant's servant while carrying baggage through a crowd of passengers. Id. See Dun. Dig. 1291a.

Degree of care to be exercised in case of person under physical or mental disability is that which is reasonably necessary for safety of such person in view of his condition. Id. See Dun. Dig. 6972.

One who permits another to come upon his property must exercise due care to warn such person of risks of hidden dangers to which he will be exposed by coming there pursuant to invitation, and whether the warning is sufficient is for the jury. Theisen v. M., 200M515, 274NW617. See Dun. Dig. 6984.

Contributory negligence is not established merely by showing that deceased worked in a place of danger, it being necessary to show that his conduct was negligent in face of danger, which is a question for jury. Id. See Dun. Dig. 7023, 7033.

Rule that it is only in clearest of cases when facts are undisputed that question of contributory negligence becomes one of law operates impartially upon both parties, and it cannot be said that it was improper to submit issue to jury returning verdict for defendant unless it can be said as matter of law that plaintiff was free of contributory negligence, or that such negligence was not shown. Hack v. J., 201M9, 275NW381. See Dun. Dig. 7033.

It is only in clearest of cases, where facts are undisputed, that question of contributory negligence becomes one of law. Id.

Burning brush while wind was in direction which caused smoke to cross highway, causing a collision of automobiles, constituted negligence, especially where no means were taken to guide traffic through smoke. Becker v. N., 200M272, 275NW510. See Dun. Dig. 6974a.

Measurements did not demonstrate that plaintiff's injury was not caused by being swept off a load of hay upon which he was riding by a telephone wire of defendant, negligently permitted to hang unreasonably low over plaintiff's indrive. Nelson v. G., 201M198, 275NW612. See Dun. Dig. 9594.

Upon charge as a whole and circumstances, an instruction that a passenger was "presumably negligent" in boarding a trolley bus while in motion, held without prejudice. Ensor v. D., 201M152, 275NW618. See Dun. Dig. 292.

Whether or not thirteen year old plaintiff was guilty of contributory negligence held for jury. McCarthy v. C., 201M276, 276NW1. See Dun. Dig. 7029.

Where plaintiff shows cause of accident, or has means of learning cause equal to those of defendant, rule of res ipsa loquitur does not apply. State v. Sprague, 201M415, 276NW744. See Dun. Dig. 7444.

Since railroad car door falling on grain inspector was not under exclusive control of defendants, doctrine of res ipsa loquitur does not apply. Id. See Dun. Dig. 7044.

A party is not liable for negligence unless the alleged injuries are the proximate result of negligent acts complained of. Nelson v. N., 201M505, 276NW801. See Dun. Dig. 6999.

Poles, upon which were strung high tension wires, held not alluring, or peculiarly attractive to children; *and a slightly loose ground wire thereon was not a* thing or instrumentality involving any inherent risk of injury, or probability of harm, to any one. Keep v. O., 201M475, 277NW213. See Dun. Dig. 2996.

In action by car owner against garage for injuries suffered when he attempted to enter car while several feet above floor on hydraulic hoist, car tipping over, negligence, contributory negligence, and assumption of risk, held for jury. Bisping v. K., 202M19, 277NW255. See Dun. Dig. 7048.

In action for injuries suffered by car owner when he attempted to enter car on request of garage mechanic while it was several feet from floor on hydraulic hoist, court did not err in receiving plaintiff's testimony that at a prior time he had at same mechanic's request safely entered same car on same hoist at same elevation. Id. See Dun. Dig. 3252, 3253.

In action by car owner against garage for injuries received when plaintiff attempted to enter car on request of mechanic while it was elevated several feet upon hydraulic hoist, car tipping over, court did not err in excluding testimony that rules and instructions of garage corporation strictly prohibited any one from entering a car when elevated on a hoist, plaintiff having no knowledge of such rules or instructions. Id. See Dun. Dig. 5839a.

Employer violating statute intended to safeguard employee may not assert that employee assumed risk by continuing to work with knowledge of employer's failure. Fredrickson v. A., 202M12, 277NW345. See Dun. Dig. 5969.

In collision between street car and automobile at intersection, negligence and contributory negligence held for jury. Drown v. M., 202M66, 277NW423. See Dun. Dig. 9023a.

A custom, however well established, will not be recognized if it is contrary to common sense. Murray v. A., 202M62, 277NW424. See Dun. Dig. 7049.

One entering dimly lighted office building lobby after elevator service had terminated for night was guilty of contributory negligence as matter of law in further opening elevator door and stepping into shaft without ascertaining whether elevator was at floor, though he relied on custom of leaving shaft door ajar when car was at that door. Id. See Dun. Dig. 7022.

Res ipsa loquitur doctrine permits inference of fact from an occurrence when there is no other probable cause of occurrence. Collings v. N., 202M139, 277NW910. See Dun. Dig. 7044.

When injury might, with equal probability, have resulted from acts of others as well as from acts of defendant, proof of facts, other than that of injury, from which defendant's negligence can be inferred must be made before question can be submitted to jury. Id. See Dun. Dig. 7047.

Legal responsibility must be limited to those causes which are so close to result, or of such significance as causes that law is justified in imposing liability. Butler v. N., 202M282, 278NW37. See Dun. Dig. 6999.

An intervening force is one which comes into active operation in producing result, after the defendant's negligence, and conditions existing and forces already in operation at time of defendant's conduct are not included within term. Id. See Dun. Dig. 7005.

Defendant's negligence may be a proximate cause of an accident, though not sole cause. Munkel v. C., 202M264, 278NW41. See Dun. Dig. 7006.

One is liable for negligence which is a proximate cause of injury though it concurs with negligence of third party. Id.

Performance of a lawful act in a manner so as to endanger another is negligence. Id. See Dun. Dig. 6970.

Proximate cause of an injury is that which causes it directly and immediately, or through a natural sequence of events without intervention of another independent and efficient cause. Serr v. B., 202M165, 278NW355. See Dun. Dig. 6999.

Defendant has burden of establishing contributory negligence. Forseth v. D., 202M447, 278NW904. See Dun. Dig. 7032.

A child under 7 years may be charged with contributory negligence. Id. See Dun. Dig. 7029.

Negligence of those having custody of a child non sui juris is not imputable to child. Id. See Dun. Dig. 7041 (43).

Proximate results of a wrongful act are not limited to those harms which defendants intended or foresaw. Hanson v. H., 202M381, 279NW227. See Dun. Dig. 7002.

In case of willful and criminal invasion of another's right, plaintiff's fault must be of a culpability equal to that of defendant in order to bar recovery. Id. See Dun. Dig. 7036.

Where an action is based on an unintentional invasion of another's right, contributory negligence of plaintiff is a proper offset to defendant's liability, but where action is based on an invasion which is both intentional and criminal, mere negligence of person whose rights are invaded is no adequate defense. Id. See Dun. Dig. 7036.

Plaintiff had affirmative on issue of proximate cause, and burden of proof rested upon him. Paine v. G., 202M 462, 279NW257. See Dun. Dig. 2620.

Circumstantial evidence was sufficient to sustain finding that missing rail was proximate cause of death of person using sidewalk and falling into pit. Id. See Dun. Dig. 2620.

Duty of owner of real property to maintain premises in such condition as not to render use of abutting public ways unsafe or dangerous, and consequent liability for breach of this duty, continues after a lease of premises, where lease reserves a right of entry in owner for purpose of making repairs. Id. See Dun. Dig. 5365, 5369.

Negligence of street railway in striking city employee removing blocks from pavement and contributory negligence of employee held for jury. Peterson v. M., 202M630, 279NW588. See Dun. Dig. 9013.

City employee picking up old block paving near car tracks had a right to assume that street cars would be driven through area with care commensurate to circumstances, and until he observed otherwise he had a right to rely upon gongs or whistles being sounded and upon cars being driven at such a moderate rate of speed as to permit almost instantaneous stoppage thereof. Id. See Dun. Dig. 9026.

In action by city employee against street railway company for personal injuries, evidence in regard to workmen's compensation received by plaintiff was properly excluded. Id. See Dun. Dig. 9033.

Negligence must be predicated on what one should have anticipated and not merely on what happened. Dunham v. H., 203M82, 279NW839. See Dun. Dig. 6969.

An owner in treating a floor may use wax or oil or other substance in the customary manner without incurring liability to one who slips and falls thereon, unless negligent in materials he uses or in manner of applying them. Id. See Dun. Dig. 6987.

One who keeps a store or shop is bound to exercise reasonable care to keep it in a safe condition for his customers. Id.

A superseding cause is an act of a third person or other force which by its intervention prevents actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about. Shuster v. V., 203M76, 279NW841. See Dun. Dig. 7005.

Where two negligent causes combine to produce injuries, neither author can escape liability because he is responsible for only one of them. Id. See Dun. Dig. 7006.

Where an injury is caused by the concurrent negligence of several persons, negligence of each is deemed a proximate cause of injury, and each is liable for all resultant damages. Id.

What constitutes proximate cause is a question for jury, unless evidence is conclusive, to be determined by them in exercise of practical common sense, rather than by application of abstract definitions. Id. See Dun. Dig. 7011(33).

Street cars have no superior right over other traffic, and generally speaking it is duty of those in charge of street cars to keep a lookout for persons and vehicles on street and to exercise ordinary care to avoid injury to them. Charles P. Anderson v. S., 203M119, 280NW3. See Dun. Dig. 9013.

Where two negligent causes combine to produce injuries, neither author can escape liability because he is responsible for only one of them. Kulla v. E., 203M105, 280NW16. See Dun. Dig. 7006.

Where injury is caused by concurrent negligence of several persons, negligence of each is deemed a proximate cause of injury and each is liable for all resultant damages. Id.

Question as to what constitutes proximate cause of an injury is usually one for jury; and, unless evidence is conclusive, is to be determined by them in exercise of practical common sense rather than by application of abstract definitions. Id. See Dun. Dig. 7011(33).

A given act is proximate cause of a given result where that act is a material element or a substantial factor of happening of that result. Draxton v. K., 203M161, 280NW 288. See Dun. Dig. 7000.

In action against club by one whose dress caught fire at New Year's Eve party, circumstantial evidence held insufficient to show that any negligence in club in failing to provide receptacles for used matches, cigar stubs, and other refuse, caused the injury to plaintiff. Smock v. M., 203M265, 280NW851. See Dun. Dig. 6999.

Plaintiff seeking to recover damages for negligence upon circumstantial evidence must establish connection as cause between alleged negligence and her injury by circumstances something more than consistent with her theory of case. Reasonable minds must be able to conclude that theory of plaintiff outweighs and preponderates over theory though it need not exclude every reasonable conclusion other than that contended for or arrived at by the jury. Id. See Dun. Dig. 7011.

Trap door in lavatory in restaurant held not a nuisance, nor so faulty in design or construction that landlord could be held responsible for creation of an unreasonable risk to patrons of lessee. Lyman v. H., 203M 225, 280NW862. See Dun. Dig. 5369(39).

Doctrine of res ipsa loquitur is properly applicable to a case involving a violation of the Federal Safety Appliance Act. Ross v. D., 203M321, 281NW76. See Dun. Dig. 7044.

Negligence without injury or damage gives no cause of action, since there must be not only the negligent act, but a consequential injury, injury being gravamen of charge, and this is true where harm comes to an employee by slow processes of accumulations of silica dust in lungs over a long period of time before disease became an active agency in development of tuberculosis. Golden v. L., 203M211, 281NW249. See Dun. Dig. 6999.

Whether a given act of negligence is proximate cause of a given injury depends upon peculiar circumstances of each case. Id. See Dun. Dig. 7011.

It is not due care to depend upon exercise of care by another when such dependence is itself accompanied by obvious danger. Haeg v. S., 202M425, 281NW261. See Dun. Dig. 7022.

As to children of tender years doctrine of attractive nuisance excuses the trespass of one injured or killed. Ekdahl v. M., 203M374, 281NW517. See Dun. Dig. 6989.

Court should not set age limit at which, as a matter of law, an attractive nuisance ceases to allure a youth, depending a great deal upon what contrivance is, where located, and development and understanding of youth or child involved. Id. See Dun. Dig. 6989.

A technical trespass does not always affect a recovery or charge one injured or killed in trespass with contributory negligence. Id. See Dun. Dig. 7027.

One suddenly confronted by a peril, through no fault of his own, who in attempt to escape does not choose best or safest way, should not be held negligent because of such choice unless it was so hazardous that ordinarily prudent person would not have made it under similar conditions. Farwell v. S., 203M392, 281NW526. See Dun. Dig. 7020.

Negligence is breach of legal duty, and it is immaterial whether duty is one imposed by common law or by a statute designed for protection of others. Middaugh v. W., 203M456, 281NW818. See Dun. Dig. 6969.

Coupling of two loaded wagons together drawn by a tractor created an alluring peril to children which ordinarily careful persons would anticipate. Id. See Dun. Dig. 6980.

As a general rule contributory negligence of a child ten years of age is for jury. Id. See Dun. Dig. 7029.

Even trespassing children are entitled to protection against hazards created by one having knowledge of their presence and peril. Id. See Dun. Dig. 7029.

It is only in the clearest of cases, when facts are undisputed, and it is plain that all reasonable persons can draw but one conclusion from them, that contributory negligence becomes a question of law. Spencer v. J., 203M402, 281NW879. See Dun. Dig. 7033.

Abutting landowner or tenant owed no common law duty to pedestrian to remove object dropped upon sidewalk by third person. O'Hara v. M., 203M541, 282NW274. See Dun. Dig. 6845.

There is good authority for proposition that a violation of an ordinance prohibiting the leaving or throwing of material upon sidewalk does not establish liability of violator to one injured thereby, but to municipality alone. Id. See Dun. Dig. 6845.

An ordinance, being an evidentiary fact in a negligence case, may be proved without having been pleaded, like any other fact tending to prove or disprove ultimate fact of negligence. Larson v. L., 204M80, 282NW669. See Dun. Dig. 7061.

That a person was under influence of liquor does not of itself constitute contributory negligence, but such a person is bound to exercise same degree of care as that required of a sober person and if his intoxication proximately contributes to his death or injury it is admissible as evidence of contributory negligence. Olstad v. F., 204M118, 282NW694. See Dun. Dig. 7028.

Defendant is liable if its negligence, although not sole cause of injury of death, contributed thereto proximately, as a substantial factor of causation, and plaintiff is under no necessity of negativing other possible contributing causes. McDermott v. M., 204M215, 283NW116. See Dun. Dig. 7007.

Negligence is not ground for recovery unless it is proximate cause of injury. Weinstein v. S., 204M189, 283 NW127. See Dun. Dig. 6999.

Proximate cause of an injury is that which causes it directly and immediately, or through a natural sequence of events, without intervention of another independent and efficient cause, the predominant cause. Sworski v. C., 204M474, 283NW778. See Dun. Dig. 7000(84, 85).

Test of proximate cause is not whether particular injury or any injury could or should have been anticipated, but whether there was a direct causal connection between alleged negligent act or omission and resulting injury. Bartley v. F., 285NW484. See Dun. Dig. 7002.

It is only in the clearest of cases where facts are undisputed and it is plain that all reasonable men can draw only one conclusion that question of negligence becomes one of law. Id. See Dun. Dig. 7048.

When an injury is caused by concurrent negligence of several, negligence of each is deemed to be a proximate cause of the injury, and each is liable for the resultant damage. Id. See Dun. Dig. 7006.

There is a distinction between "emergency" and "distracting circumstances", though frequently same facts will be susceptible to application of both rules. Dreyer v. O., 285NW707. See Dun. Dig. 7020.

A city or village maintaining a public park is discharging a governmental function and is not responsible for negligence in maintenance of a slide, unless so maintained as to constitute a nuisance. Op. Atty. Gen. (844b-1), Aug. 9, 1937.

Board cannot pay expenses of person injured at school play. Op. Atty. Gen. (844f-3), Aug. 11, 1937.

Village operating a water plant is acting in a proprietary and not governmental capacity, and is liable for negligence in shutting off water without notifying merchants operating electrical refrigeration machine cooled by water. Op. Atty. Gen. (476b-15), Sept. 18, 1937.

Though in maintaining water plant for use by fire department in extinguishing fires municipality is performing a public or governmental function and is not liable for negligence of its officers and employees, such is not true when a municipality undertakes to furnish water or light to individuals and makes a charge therefor. Op. Atty. Gen. (469a-8), Mar. 1, 1938.

County was liable to telephone company for negligence of its employees in setting fire to poles while burning weeds on county aid road. Op. Atty. Gen. (125a-29), June 30, 1939.

County is not liable for negligent operation of personal automobile by county officer while on county business. Op. Atty. Gen. (844c), March 31, 1939.

Assumption of risk as defense where master violates statutory duty. 15MinnLawRev121.

Misrepresentation to secure employment as bar to recovery for injuries received in course of employment. 15MinnLawRev123.

Degree of care required of an infant defendant. 15 MinnLawRev834.

Liability of amusement park owner to patron for negligence of concessionaire. 16MinnLawRev321.

Escalator owners as common carriers. 16MinnLawRev 585.

Rules governing proximate cause in Minnesota. 16 MinnLawRev829.

Liability of gas company for injury caused by escaping gas. 17MinnLawRev518.

Liability of vendors of defective articles causing injury—Second hand seller's duty to third parties. 18Minn LawRev91.

The degree of danger and the degree of difficulty of removal of the danger as factors in "attractive nuisance" cases. 18MinnLawRev523.

Violation of statute or ordinance as negligence or evidence of negligence. 19MinnLawRev666.

Procedural effect of res ipsa loquitur. 20MinnLawRev 241.

Loss distribution by comparative negligence. 21Minn LawRev1.

Minnesota court on proximate cause. 21MinnLawRev 19.

Liability in tort for innocent misrepresentation. 21 MinnLawRev434.

Occupational diseases. 22MinnLawRev77.

Contributory negligence and causal relation and apportionment of damages. 22MinnLawRev410.

The riddle of the Palsgraf case. 23MinnLawRev46.

Upper age limit of applicability of attractive nuisance doctrine. 23MinnLawRev241.

Duty of owner or occupier of land to third person accompanying invitee. 23MinnLawRev502.

Negligence—knowledge—minimum standard of knowledge—duty to know. 23MinnLawRev628.

When carrier-passenger relation arises. 23MinnLaw Rev668.

15. ——False imprisonment and malicious prosecution.

Mere dropping of prosecution was not such termination favorable to accused as would permit the successful maintenance of an action for malicious prosecution. Friedman v. G., 182M396, 234NW596. See Dun. Dig. 5727.

All those who by direct act, or indirect procurement, participate in or proximately cause false imprisonment or unlawful detention, are joint tort-feasors. Anderson v. A., 189M224, 248NW719. See Dun. Dig. 3728.

Even though an arrest is lawful, detention of a prisoner for unreasonable time without taking him before a committing magistrate will constitute false imprisonment. Anderson v. A., 189M224, 248NW719. See Dun. Dig. 3728 (86).

In action for damages for malicious interference with business, evidence held not to show wrongful foreclosure of a mortgage. Hayward Farms Co. v. U., 194M473, 260 NW868. See Dun. Dig. 5750.

Burden of proving malice and lack of probable cause is upon plaintiff, and termination of original action in favor of plaintiff, either by a jury verdict or a directed verdict, standing alone, is insufficient to make out a prima facie case. Bredehorst v. R., 195M595, 263NW609. See Dun. Dig. 5743.

Malice is immaterial where probable cause exists. Windgarden v. G., 201M554, 277NW202. See Dun. Dig. 5734.

Malice and want of probable cause are essential. Id. See Dun. Dig. 5730.

Probable cause is made by any set of facts sufficient to excite belief in a reasonable mind actuated thereby that person charged was guilty of offense charged. Id.

A game warden who heard gun fire out of season and saw fallen bird, and saw plaintiff, gun in hand, run away and scale a fence, and went into field, followed plaintiff's tracks and found two shot guns and numerous empty shells, had reasonable cause for arresting plaintiff as a matter of law. Id.

In malicious prosecution, question is not as to guilt or innocence of accused, but whether, acting reasonably on the facts, arresting officer believed him guilty. Id. See Dun. Dig. 5730(61).

Sanitary district in conducting a condemnation proceeding does so as an arm of state in discharge of a sovereign legislative function, and is not liable in tort for alleged malicious prosecution of such proceeding. Barmel v. M., 201M622, 277NW208. See Dun. Dig. 5750.

In action for false arrest and malicious prosecution, uncorroborated testimony of plaintiff made a case for the jury, but a new trial was granted in interest of justice in view of convincing evidence of defendant as to probable cause. Hallen v. M., 203M349, 281NW291. See Dun. Dig. 3732, 5744.

There is no occasion to ward large punitive damages for malicious prosecution where there is no evidence warranting a finding of actual malice. Id. See Dun. Dig. 5745.

Liability of corporation for malicious prosecution. 16 MinnLawRev207.

False imprisonment—Elements which must be pleaded. 17MinnLawRev214.

Juvenile delinquency proceedings as basis for action for malicious prosecution. 22MinnLawRev1060.

16. ——Wrongful execution.

Judgment creditor suing on execution is not liable for wrongful levy made thereunder unless he directs such levy or ratifies it by refusing to permit a release. Lundgren v. W., 189M476, 250NW1. See Dun. Dig. 3553.

17. ——Assault.

Evidence held sufficient to sustain finding that blacksmith was assaulted when attempting to collect bill. Farrell v. K., 189M165, 248NW720. See Dun. Dig. 529.

Chauffeur of a bus, who, after passing another vehicle, leaves his own and assaults driver whose machine he has just passed, is not within scope of his employment. Plotkin v. N., 204M422, 283NW758. See Dun. Dig. 522.

Consent to mutual combat as defense. 22MinnLawRev 546.

Consent as a defense where obtained by misrepresentation. 23MinnLawRev521.

18. ——Conversion.

A surety may be subrogated to the right of the obligee on a bond given by a permittee to cut timber from state land without a showing of culpable negligence of a third party purchasing timber from the permittee. Martin v. Federal Surety Co., (CCA8), 58F(2d)79.

If one in possession of personal property belonging to another disposes of it in violation of the owner's instructions, it is a conversion. General Electric Co. v. F., 183M178, 235NW876. See Dun. Dig. 1926.

The evidence did not require a finding of the conversion of plaintiff's merchandise by the defendants. Without a conversion there was no quasi contractual obligation such as arises upon the waiver of a tort and suit in assumpsit. Great Lakes Varnish Works v. B., 184M25, 237NW609. See Dun. Dig. 1926.

Evidence held to sustain finding of conversion of motor truck purchased from agent of plaintiff. International Harvester Co. of America v. N., 184M548, 239 NW663. See Dun. Dig. 1951(91).

In action against assignee of chattel mortgage for conversion, it was proper to permit defendant to show that the mortgagee imparted to it information obtained as to disappearance of some of the mortgaged property and the danger threatening the balance. Rahn v. F., 185M246, 240NW529. See Dun. Dig. 1474.

In action against chattel mortgagee for conversion of goods, whether plaintiff made default in conditions of mortgage held for jury. Rahn v. F., 185M246, 240NW 529. See Dun. Dig. 1474.

In conversion of live stock, evidence held insufficient to identify subject matter. Spicer Land Co. v. H., 187M 142, 244NW553. See Dun. Dig. 1951.

Sale of automobiles by mortgagee without a foreclosure was a conversion. McLeod Nash Motors v. C., 187 M452, 246NW17. See Dun. Dig. 1463.

Measure of damages was correctly submitted as market value of cars at place where they were converted by mortgagee, less amount due on time draft. McLeod Nash Motors v. C., 187M452, 246NW17. See Dun. Dig 1955.

Evidence warranted finding collision insurer, after car was repaired, wrongfully withheld use and possession thereof from plaintiff, thereby converting it. Breuer v. C., 188M112, 246NW533. See Dun. Dig. 1935.

There was no waiver of conversion by collision insurer of automobile, which it agreed to repair and return, by submission of another proof of loss. Id. See Dun. Dig. 1947.

Unconditional resale of furnace by conditional vendee constituted conversion. Pennig v. S., 189M262, 249 NW39. See Dun. Dig. 1932.

Evidence held sufficient to support a finding that sheriff's levy amounted to a conversion. Lundgren v. W., 189M476, 250NW1. See Dun. Dig. 3551(65).

To constitute conversion, party must exercise dominion over property inconsistent with or in repudiation of owner's right, or destroy property or make such change in quality thereof as to constitute a constructive destruction. Dow-Arneson Co. v. C., 191M28, 253NW6. See Dun. Dig. 1926.

Evidence held not to show that city taking possession of condemned real property was guilty of conversion of personal property thereon. Id.

Sale of personal property by vendor-mortgagee after repossessing it, without giving notices required by §8353 does not foreclose vendee-mortgagor's right of redemption, but constitutes a conversion. Kettwig v. A., 191M 500, 254NW629. See Dun. Dig. 8652a.

Evidence held to show conclusively that plaintiff bank, mortgagee, by its conduct relative to mortgaged personal property in possession of mortgagor, authorized sale by mortgagor to good-faith purchasers, and is estopped from maintaining action for conversion of property or proceeds therefrom. First & Farmers' S. B. v. C., 191M566, 256NW315. See Dun. Dig. 1931.

Mortgagee of personalty by accepting part of proceeds of sale by mortgagor, with knowledge of transaction, ratified sale and was estopped from asserting sale was invalid. Id. See Dun. Dig. 1931.

Where a check made to A was, through error or otherwise, received by B, and C endorsed the check as receiver of A, and C was in fact receiver of B and had no connection with A, and gave check to defendant bank for collection, and check was subsequently collected and paid by defendant bank to C as receiver of B, as a matter of law bank had knowledge that B, whom it knew C to represent, was not the payee, and was guilty of conversion. Northwestern Upholstering Co. v. F., 193M333, 258 NW724. See Dun. Dig. 794.

One who bought bonds with money sent him for deposit in a bank was guilty of conversion. Wigdale v. A., 193M384, 258NW726. See Dun. Dig. 196.

A trustee in bankruptcy, who brings suit in state court alleging conversion of property of bankrupt estate by reason of an invalid foreclosure of chattel mortgage, is bound by measure of damages in state jurisdiction and is entitled to recover only difference between value of property and amount of lien, and where property converted was worth less than amounts of chattel mortgage liens, judgments were rightly entered for defendants. Ingalls v. E., 194M332, 260NW302. See Dun. Dig. 1956.

In action for conversion of newspapers, instruction that jury could find a verdict at rate of three cents per copy was not prejudicial where amount of verdict indicated that it was based upon cost of printing and materials. Fryberger v. A., 194M443, 260NW625. See Dun. Dig. 1955.

In order to recover for conversion, plaintiff need prove only that he was owner of property taken, that it was taken by defendant and converted, and that it had value. Id. See Dun. Dig. 1949.

In action by holder of trust certificates against trustee for conversion because it foreclosed and bid in trust property without plaintiff's knowledge or consent thereby releasing guarantors, plaintiff is not entitled to recover where guarantors were insolvent at time their obligation matured. Sneve v. F., 195M77, 261NW700. See Dun. Dig. 1955.

Distinction noted between act of conversion and demand for and refusal to deliver subject of a bailment as mere evidence of conversion. Johnson v. B., 196M436, 265NW297. See Dun. Dig. 1942.

Where conversion is accidental and under belief that person has right to property, and acts with no wrongful purpose or intent, measure of damages is value of property at time of actual taking and conversion; but where original taking and conversion is willful and without color or claim of right, measure of damages is value of property at time and in condition it is when demand for its return is made. Thoen v. F., 199M47, 271NW111. See Dun. Dig. 1928, 1955.

Conversion action arising out of partnership between two attorneys held properly dismissed on pleadings by municipal court, since rights of parties must be determined by an accounting action and conversion will not lie until termination of partnership. Grimes v. T., 200M 321, 273NW816. See Dun. Dig. 1926.

Fact that one converting personal property was mistaken as to his legal right to keep property on account of debts due him by the owner would not necessarily charge him with bad faith, as affecting damages. Stark v. S., 201M491, 276NW820. See Dun. Dig. 1959.

Wrongful taking of possession of personal property, either by force or fraud, generally amounts to a conversion. Roehrich v. H., 201M586, 277NW274. See Dun. Dig. 1926.

Proprietor of an apartment hotel, who prevented tenant from entering rooms, let by the week, for purpose of removing personal property, was not an innkeeper having a lien against property but was a landlord, and was guilty of coercion. State v. Bowman, 202M44, 279NW 214. See Dun. Dig. 2848, 4514, 5361, 5382.

Evidence of wilful trespass and conversion of trees cut from premises held to justify verdict. Harrington v. L., 203M575, 282NW461. See Dun. Dig. 9693a.

If an unauthorized sale by pledgee to himself is disaffirmed, contract of pledge remains in force, and pledgee retains right of possession, and cannot be charged with conversion or embezzlement. Erickson v. M., 285NW611. See Dun. Dig. 1935.

In action for conversion of mortgaged cattle, evidence held to support finding that plaintiff was at all times owner of mortgage and note. Mason City Production Cr. Ass'n v. S., 286NW713. See Dun. Dig. 1478.

10. ——Respondeat Superior.

An employer is not liable for injuries to a third person resulting from the act of an employee outside the scope of his employment. Liggett & Myers Tob. Co. v. D. (CCA8), 66F(2d)678.

Master is liable to third persons injured by negligent acts done by his servant in the course of his employment, although the master did not authorize or know of the servant's act or neglect, or even if he disapproved or forbade it. P. F. Collier & Son v. H. (USCCA8), 72F(2d) 625. See Dun. Dig. 5833.

Relation of master and servant exists whenever employer retains right to direct not only what shall be done but how it shall be done. Id. See Dun. Dig. 5801.

One whom employer does not control, and has no right to control, as to method or means by which he produces results contracted for, is an independent contractor. Id. See Dun. Dig. 5835.

In personal injury action, whether employee of corporate defendant had implied and apparent authority to carry passengers, held for jury. De Parcq v. L. (USCC A8), 81F(2d)777. Cert. den., 298US680, 56SCR947.

Driver of delivery truck on his way home to dinner, according to custom, was within the scope of his employment as regarded liability of employer for his negligence. Free Press Co. v. B., 183M286, 236NW306. See Dun. Dig. 5833, 5842.

Dealer selling milking machines held not shown to be an agent or servant of manufacturer so as to make it liable for dealer's negligence resulting in electrocution of cows. Diddams v. E., 185M270, 240NW895. See Dun. Dig. 145(67), 5834.

Family car doctrine does not apply to a motorboat furnished by head of family. Felcyn v. G., 185M357, 241 NW37. See Dun. Dig. 5834b.

A public officer is not responsible for torts of his subordinates or employees, unless he cooperates with them. Nelson v. B., 188M584, 248NW49. See Dun. Dig. 8001.

Garage employee taking repaired car out for road test on request of owner was still employee of garage as regards its liability for negligent destruction of car. Phoenix Assur. Co. v. P., 189M586, 250NW455. See Dun. Dig. 732.

An employer who provides means of transportation for his employees from place to place where work is to be performed is not liable for damages to a third party who suffers injury because of negligence of employee, where employee, exclusively for his own convenience, uses his own means of transportation. Erickson v. G., 191M285, 253NW770. See Dun. Dig. 5833, 5843.

Whether building contractor being paid hourly wage for supervising construction of barn, owner paying his men direct, was an independent contractor or an employee of owner, held for jury, as affecting liability for injury to invitee neighbor injured by falling of scaffold. Gilbert v. M., 192M495, 257NW73. See Dun. Dig. 5835.

Negligence of building contractor acting as foreman and servant of farmer in construction of a barn was negligence of farmer. Id. See Dun. Dig. 5833.

Act of foreman and employee supervising construction of barn for farmer in inviting neighbor to assist was act of owner, on issue whether plaintiff was invitee. Id. See Dun. Dig. 6984.

Where defendant asserted defense that negligent person was independent contractor and not employee, court did not err in charging jury that burden was upon defendant to prove that negligent person was an independent contractor. Id. See Dun. Dig. 5839.

In action by corporation against its president to recover for negligence of driver of truck owned by defendant in negligently setting fire through use of gasoline in cleaning motor, doctrine of res ipsa loquitur could have no application as against defendant's president if driver was an employee of plaintiff and under its control. Hector Const. Co. v. B., 194M310, 260NW496. See Dun. Dig. 7044.

In action by corporation against its president for negligence of driver of truck owned by defendant, whether driver was employee of plaintiff or defendant, held for jury. Id. See Dun. Dig. 5834a.

Burden of proof is on one who asserts that under facts of case a judgment in favor of his servant is a bar to recovery against master. Berry v. D., 195M366, 263NW 115. See Dun. Dig. 5842.

Gas pipe line company could not relieve itself of liability by delegating duty of removal of cans containing remnants of explosive paints to an independent contractor. Reichert v. M., 195M366, 263NW297. See Dun. Dig. 3699, 5835.

Immunity of husband from suit in tort on part of his wife does not inure to benefit of owner of automobile driven by husband. Miller v. J., 196M438, 265NW324. See Dun. Dig. 6975a.

Where a servant without authority from master permits stranger to assist him in his work for master and stranger in presence of servant and with his consent negligently does such work, master is liable for such negligence. Szyperski v. S., 198M154, 269NW401. See Dun. Dig. 5857.

When master intrusts performance of an act to a servant, he is liable for negligence of one who, though not a servant of master, in presence of his servant and with his consent, negligently does act which was intrusted to servant. Guild v. M., 199M141, 271NW332. See Dun. Dig. 5834.

Burning of brush near highway was not such an ultra hazardous activity that risk could not have been eliminated by exercise of a high degree of care, and highway contractor was not liable for negligence of persons employed by him to burn the brush in such a manner that smoke passed over highway and resulted in collision of motor vehicles. Becker v. N., 200M272, 274NW 180. See Dun. Dig. 5835.

Work of burning brush near state highway was not necessarily so hazardous to public that principal contractor must provide either in contract or otherwise that special precautions would be taken by independent contractor, though such independent contractor was negligent in permitting smoke to cross highway in such manner as to cause collision of vehicles thereon. Becker v. N., 200M272, 275NW510. See Dun. Dig. 5835.

Burden of proof is upon one injured by negligence of independent contractor to show claimed lack of care in selecting independent contractor. Id.

A contractor owes contractee a duty to use due care in performance of contract, and, although he delegates performance to an independent subcontractor, his duty to use due care still subsists so as to subject him to liability for harm to contractee caused by negligent performance of sub-contractor. Pacific Fire Ins. Co. v. K., 201M500, 277NW226. See Dun. Dig. 5835.

A master is liable for negligence of a servant. Bisping v. K., 202M19, 277NW255. See Dun. Dig. 5833.

Where wrongdoer causes harm to another by negligent use of property converted by him, liability cannot be fastened upon owner. Roehrich v. H., 201M586, 277NW 274.

Court's instructions, relative to defendant's liability for failure to keep a borrowed horse off a much-used highway at night held proper. Serr v. B., 202M328, 278 NW355. See Dun. Dig. 276.

One injured through negligence of servant of another can sue either the master or servant, or both. Id. See Dun. Dig. 6023.

Where plaintiff was injured through negligence of servant, and plaintiff and servant later entered into purported settlement whereby both servant and master were by its terms relieved of liability, and, thereafter, plaintiff sued master for servant's negligence, plaintiff could plead and prove existence of mutual mistake at time of making of release in avoidance thereof, although servant was not party to suit, as master's liability was derivative only, and, as such, release was subject to direct attack; defense being dependent upon validity of instrument. Id. See Dun. Dig. 8375.

Evidence held to sustain finding that employer and owner of automobile had waived rule prohibiting carrying of passengers in so far as transportation of salesmen off duty was concerned. Pettit v. S., 203M270, 281 NW44. See Dun. Dig. 5833.

Whether city exercised such control over WPA employes engaged in blasting operations in improvement of its streets as to justify application of doctrine of respondeat superior held for jury. Hughes v. C., 204M1, 281NW871. See Dun. Dig. 6815.

Where a joint enterprise is found to exist, every member thereof is liable to an injured third party where injury is caused by negligence of one of them within scope of enterprise. Murphy v. K., 204M269, 283NW389. See Dun. Dig. 5833.

Where two or more principals employ same agent, whether as a means of dealing with one another or to protect their common interests, one cannot charge other not actually at fault with misconduct of common agent. Id. See Dun. Dig. 7037.

If one coadventurer establishes actionable negligence against another of them, injured party may recover from such negligent coadventurer because no one can avoid consequences of his own negligence resulting in harm to another. Id. See Dun. Dig. 7037.

Chauffeur of a bus, who, after passing another vehicle, leaves his own and assaults driver whose machine he has just passed, is not within scope of his employment. Plotkin v. N., 204M422, 283NW758. See Dun. Dig. 5833.

A person is liable only for the proximate or immediate and direct results of his acts. Sworski v. C., 204M474, 283 NW778. See Dun. Dig. 6999(80).

Proof of actual authority is needed to make master liable for tortious injury to a third party unless there is reliance by third party upon appearance of master servant relationship and injury is induced by reliance. Schlick v. B., 286NW356. See Dun. Dig. 5833.

Where injury is caused to the bailor's reversionary interest in a chattel bailed, the bailee is liable to the bailor, if the damage is done by his servants, and third persons are liable to the bailor, if the damage is done by their servants. Wicklund v. N., 287NW7. See Dun. Dig. 5833.

The fellow servant rule applies only where there is a common master and a common employment. Id. See Dun. Dig. 5947.

Liability of master for defamation published by a servant. 20 MinnLawRev 805.

Independent contractors—liability to third persons for injuries resulting from completed work. 22MinnLawRev 709.

20. ——Damages.

Lessee whose property was willfully damaged by lessor who entered to make major improvement and virtually evicted the lessee held entitled to exemplary damages. Bronson Steel Arch Shoe Co. v. K., 183M135, 236 NW204. See Dun. Dig. 2540, 5365, 5366.

Court did not err in receiving testimony of value of motor vehicle before and after collision and also evidence of reasonable cost of restoring damaged car to its former condition. Engholm v. N., 184M349, 238NW 795. See Dun. Dig. 2576a.

Where injuries to car in a collision are of such character that the car may be repaired, the reasonable cost of restoring the car to its former condition is the proper measure of damages. Engholm v. N., 184M349, 238N W795. See Dun. Dig. 2576a.

There was no error in permitting jury to award damages for lost time although plaintiff was not employed at time of his injury. Martin v. T., 187M529, 246NW6. See Dun. Dig. 2576.

Negligence of employer in discharging steam and water upon employee, held not proximate cause of asthma where such employee stood around for some 20 minutes and then went to work without making any attempt to change clothing. Keisich v. O., 188M173, 246NW672. See Dun. Dig. 2532.

Exemplary damages may be awarded in assault and battery action. Farrell v. K., 189M165, 248NW720. See Dun. Dig. 532(64).

Court did not err in refusing to charge that no damages should be allowed for traumatic neurosis. Orth v. W., 190M193, 251NW127. See Dun. Dig. 2528.

Mental suffering from libel is an element of general damage. Thorson v. A., 190M200, 251NW177. See Dun. Dig. 2563.

Mental suffering is presumed to have naturally resulted from publication of a libelous article. Id. See Dun. Dig. 2563.

If plaintiff in libel believed that members of his family suffered because of publication and he himself suffered as a consequence of such belief, it could make no difference that his belief was erroneous or that it was true. Id. See Dun. Dig. 2563.

Where plaintiff at time of accident was employed part of days of each week, court was justified in submitting loss of earning as an element of damages. Johnston v. S., 190M269, 251NW525. See Dun. Dig. 2576.

While difficulty in assessing damages is not ground for denying plaintiff relief, yet where there is no evidence of value, jury will not be allowed to return verdict based merely on conjecture. Dreelan v. K., 190M330, 254NW433. See Dun. Dig. 2534, 2591.

Recovery *cannot be had as for permanent injuries* unless there is proof to a reasonable certainty that injuries are permanent. Romann v. B., 190M419, 252NW 80. See Dun. Dig. 2530, 2591(93).

Increased workmen's compensation insurance premiums which plaintiff had to pay in consequence of an employee's death caused by a negligent act of defendant, a subcontractor, are too remote and indirect results of such wrongful act to be recoverable. Northern States Contracting Co. v. O., 191M88, 253NW371. See Dun. Dig. 7003, 10408.

In determining *damages for future pain and permanent* disability, evidence should disclose a reasonable probability that such will result. Howard v. V., 191M245, 253 NW766. See Dun. Dig. 2530, 2591.

General rule of damages to property is diminution in value resulting from injury, but when cost of restoring property to its former condition is less than difference in value, such cost is proper measure. Waldron v. P., 191M302, 253NW894. See Dun. Dig. 2576a.

It is loss of plaintiff's own earnings resulting from personal injuries, or value of time lost, that should measure special damages, and not earnings of others on *job in which injuries occurred.* Gilbert v. M., 257NW73, 192M495. See Dun. Dig. 2576.

One injured in assault and battery was not obliged to submit to an operation in order to mitigate his damages. Butler v. W., 193M150, 258NW165. See Dun. Dig. 2532.

Punitive damages may be awarded for an unprovoked malicious assault. Id. See Dun. Dig. 532, 2558(76).

Verdict for $2,160 held not excessive for injury to nose in an assault and battery. Id. See Dun. Dig. 2570.

In measuring loss of earning power of one engaged in business for himself, no evidence is admissible concerning profits from capital invested in that business or from labor of others employed therein, but nature and extent of business in question may be considered, and services of plaintiff therein, in order to ascertain value of such lost services, for value of such personal services are properly considered. Fredhom v. S., 193M569, 259NW 80. See Dun. Dig. 2576.

Cost of manufacture or production of property is generally held admissible as tending in some degree to es-

tablish value. Fryberger v. A., 194M443, 260NW625. See Dun. Dig. 2576a.

Measure of damages for wrongful detention of personal property is value of its use while so detained where it does not appear that property is of such nature that it necessarily or in fact perishes, or wears out, or becomes impaired in value in using. Bergquist v. S., 194 M480, 260NW871. See Dun. Dig. 2570, 8420.

One deprived of use of washing machine over a period of nearly three years by reason of defendant's wrongful taking and detention thereof, was entitled to verdict for $116.13. Id. See Dun. Dig. 2570, 8420.

Test of extent of liability for damages is in causation and not in probability or foreseeability. Goin v. P., 196 M74, 264NW219. See Dun. Dig. 2550, 2552.

Expenses of medical treatment are proper items to be considered in assessing compensatory damages for assault. Id. See Dun. Dig. 2572.

Argument rejected that, because earnings of an able-bodied man have been much reduced by adverse general economic conditions, there must be a corresponding reduction of recovery by his dependents for his wrongful death. Hoppe v. P., 196M538, 265NW338. See Dun. Dig. 2570.

In determining damages for death of a parent, consideration should be given to elements of loss which arise from deprivation of counsel, guidance and aid given to family. Id.

Fact that plaintiff's son, driver of his automobile, paid for repair of plaintiff's car, for payment of which he was not legally liable, did not inure to benefit of defendants. Lavelle v. A., 197M169, 266NW445. See Dun. Dig. 8373.

Exemplary damages of $600 to dentist unlawfully evicted from his office for two weeks is a matter emphatically reserved to jury, and unless so excessive as to indicate that jurors were actuated by passion or prejudice, it will not be disturbed. Sweeney v. M., 199M21, 270NW 906. See Dun. Dig. 2548.

Where a practicing dentist with a good standing in his community was unlawfully evicted from his office for a period of almost two weeks, a verdict of $300 for actual damages on a showing of a specific loss of at least $245 in addition to that which might have been received from patients that called at his office is not excessive, nor can it be said to have been based on pure speculation or guess. Id. See Dun. Dig. 2597.

Plaintiff's net earnings from a farm, owned and equipped by his father but operated by plaintiff in return for a half share in earnings, represented compensation to plaintiff for his personal services and not a return on invested capital, and evidence of such earnings is admissible in an action for personal injuries, in order that jury might consider them in determining plaintiff's loss of earning capacity. Piche v. H., 199M526, 272NW 591. See Dun. Dig. 2570.

Verdict based on testimony of two medical witnesses, contradicted by five medical witnesses, to effect that there was a fracture of lamina of second cervical vertebra and a crushing fracture of odontoid process, could not be held unsupported by evidence, though injured person walked around and went about his affairs for a day before calling upon a doctor. Wyatt v. W., 200M106, 273 NW600. See Dun. Dig. 3324(31).

Where a person is injured by wrong or neglect of another, and is not himself negligent in selection of a medical attendant, wrongdoer is liable for all proximate results of his own act, although consequences of injury would have been less serious if medical attendant had exercised proper professional skill. Ahlsted v. H., 201M 82, 275NW404. See Dun. Dig. 2573.

Only such damages are recoverable as are natural and proximate result of wrong, whether action is ex contractu or ex delicto. Johnson v. G., 201M629, 277NW252. See Dun. Dig. 2528.

Where a commercial vehicle is damaged as the result of a collision, measure of damages properly includes cost of repair, together with value of its use while repairs are being made if it can be substantially restored to its former condition by repair. Hanson v. H., 202M381, 279 NW227. See Dun. Dig. 2577b.

To be entitled to cost of repair as measure of damages for injuries to a truck, owner was not bound to put truck into substantially the same condition that it was before collision prior to commencing his action. Id. See Dun. Dig. 2577b.

Persons intending an unlawful invasion of rights of another are liable for all of the proximate results of their intentionally unlawful conduct, forseeable or unforseeable. Id. See Dun. Dig. 7002.

Assessment of damages in personal injury actions. 14 MinnLawRev216.

Recovery of damages by foster-parent without alleging or proving loss of services of abducted child. 15Minn LawRev125.

Necessity of actual damages to support award of exemplary damages. 16MinnLawRev438.

Measure of damages for injury to property which has peculiar value to owner. 16MinnLawRev708.

Rule precluding recovery for loss avoidable by reasonable efforts or expenditure by person damaged is not applicable either to threatened, or to willful torts. 16 MinnLawRev859.

Recovery for physical injury consequent upon mental anguish where no impact. 16MinnLawRev860.

Nervous shock due to fear for safety of another. 19 MinnLawRev806.

Intentional infliction of mental suffering. 22MinnLaw Rev1030.

Apportioning damages where defendant's negligence concurs with Act of God. 23MinnLawRev91.

20½. ——Contribution.

Where an action for personal injuries against two alleged tort-feasors resulted in a verdict for plaintiff against one of them and in favor of other and against plaintiff, judgment entered on that verdict held not res adjudicata in a subsequent action for contribution by unsuccessful against successful defendant in first action. Hardware Mut. Casualty Co. v. A., 191M158, 253NW374. See Dun. Dig. 1920, 5176.

Right to contribution in case of joint tort-debtor depends on fact of common indebtedness. Id. See Dun. Dig. 1924.

Where issue of contribution arises between judgment debtors nature of original cause of action may be examined in order to adjust their rights between themselves. Kemerer v. S., 201M239, 276NW228. See Dun. Dig. 1924.

It is not the rule that there can be no contribution between tort-feasors, such rule applying only where person seeking contribution was guilty of an intentional wrong, or must be presumed to have known that he was doing an illegal act. Id.

Section 9410 was intended to make no change in substantive law of contribution, but only to provide a summary method for obtaining it. Id.

Right of contribution between insurers of joint tort feasors. 20MinnLawRev236.

Loss distribution by comparative negligence. 21Minn LawRev1.

21. ——Fraud.

Unfulfilled promises of future action will not constitute fraud, unless, when the promises were made, the promisor did not intend to perform. Cannon Falls Holding Co. v. P., 184M294, 238NW487. See Dun. Dig. 3827.

Evidence held to sustain award of damages in action by purchaser of land contracts for fraud. Investment Associates v. H., 187M555, 246NW364. See Dun. Dig. 3839.

Evidence held to support finding that bank induced plaintiff by fraudulent representations to purchase bond to his damage. Ebacher v. F., 188M268, 246NW903. See Dun. Dig. 3839.

In action against bank to recover damages for fraud in sale of bond, it was prejudicial error to receive in evidence a decree appointing a receiver, in action to foreclose mortgage securing bond, which recited that mortgagor was insolvent. Id. See Dun. Dig. 5156.

Complaint based on act of surgeon in representing that a sterilization operation upon plaintiff would prevent conception by his wife did not state a cause of action where it did not allege that the representation was fraudulent or that it was deceitfully made. Christensen v. T., 192M123, 255NW620. See Dun. Dig. 7489.

Liability in tort for innocent misrepresentation. 21 MinnLawRev434.

A synthesis of the law of misrepresentation. 22Minn LawRev939.

22. ——Libel and slander.

See notes under §§9397, 10112.

Whether statements made were qualifiedly privileged held for jury. McLaughlin v. Q., 184M28, 237NW598. See Dun. Dig. 5560(89).

Evidence made an issue of fact whether the defamatory statements complained of by plaintiff were true. McLaughlin v. Q., 184M28, 237NW598. See Dun. Dig. 5557, 5560(89).

An ordinary notice of foreclosure of a mortgage by advertisement is not libelous per se. Swanson v. F., 185M89, 239NW900. See Dun. Dig. 5517.

Spoken words, even if calculated to expose one to public contempt, hatred or ridicule, in absence of allegation of special damages, are not actionable, though such words, if published, are. Gaare v. M., 186M96, 242 NW466 See Dun. Dig. 5508.

Complaint that defendant said that bank would not have failed if plaintiff had not been "crooked" person, held not to state cause of action. Gaare v. M., 186M96, 242NW466. See Dun. Dig. 5518.

Newspaper article erroneously stating that one was arrested for violation of liquor laws was libelous per se. Thorson v. A., 190M200, 251NW177. See Dun. Dig. 5515.

In libel action by one erroneously reported to have been arrested on liquor charge that members of plaintiff's family suffered because of publication was wholly immaterial. Id. See Dun. Dig. 5550.

Statements published in a newspaper which are not defamatory on their face are not libelous per se. Echternacht v. K., 194M92, 259NW684. See Dun. Dig. 5501 (37).

An allegation that plaintiff as a farmer suffered loss of trade with merchants and neighbors to his damage in a specified sum is insufficient to permit proof of special damages, where gist of action is not for loss of trade but for injury to reputation. Id. See Dun. Dig. 5550.

Construction placed by innuendo on newspaper publications held strained and not warranted by language used. Id. See Dun. Dig. 5539.

Where newspaper articles are not libelous per se plaintiff must allege extrinsic cimcumstances which show them to be libelous in fact. Id. See Dun. Dig. 5539.

In order to prevent a surprise on a defendant in a libel case, plaintiff is required to allege particular instances of loss which he has sustained. Id. See Dun. Dig. 5550.

Statement by mortgagee that mortgagor had been unable to pay interest and taxes and had lost land on foreclosure did not constitute slander of title, although at the time year of redemption had not run and land was not lost. Hayward Farms Co. v. U., 194M473, 260NW868. See Dun. Dig. 5538.

Slander of title is not an ordinary action for defamation, but is in nature a trespass on the case for recovery of special damages, and special damages should be alleged. Id. See Dun. Dig. 5550.

Words "actual malice", "ill will", "ill feeling", "bad faith", are so well understood by every juror that it was not necessary to define them in a libel case. Clancy v. D., 201M1, 277NW264. See Dun. Dig. 5506.

In action by candidate for office against newspaper for libel, court properly placed burden of proving malice upon *plaintiff, and burden of proof of publications upon* defendant. Id. See Dun. Dig. 5559.

In action by candidate to office against newspaper for libel it was proper to instruct "Proof of actual malice may be made by showing bad faith in the defendants. It may appear that the occasion was made use of as camouflage behind which to hide for the purpose of maligning plaintiff in a way not justified by the facts. Malice may be proved by extrinsic evidence of personal ill feeling or otherwise, or by intrinsic evidence, such as exaggerated language of the libel, the mode and extent of publication and repetition, or other matters in excess of the qualified privilege." Id. See Dun. Dig. 5562.

It is not a malicious act to publish in a newspaper information relative to unfitness of a candidate for office which publisher has reasonable ground to believe is true. Id. See Dun. Dig. 5525.

Malice of newspaper cannot be established by merely showing purpose of publication was to prevent election of candidate to public office. Id. See Dun. Dig. 5525.

Falsity of publications concerning private citizens raises a presumption of malice. Id. See Dun. Dig. 5528b.

Publications by newspaper concerning candidate for public office are conditionally privileged, and their falsity is not alone enough to authorize a recovery, but plaintiff must in addition prove malice. Id. See Dun. Dig. 5528c.

There being no inconsistency between them in point of fact, defendant in a slander suit may join with his general denial the plea in justification that, whether he did or did not use words charged, they spoke the truth. Woost v. H., 204M192, 283NW121. See Dun. Dig. 7580.

Excessive publication in defamation. 16MinnLawRev 160.

Information supplied by a commercial agency as a privileged communication. 16MinnLawRev715.

Report of judicial proceeding as qualifiedly privileged. 16MinnLawRev867.

Insanity as defense to civil liability for libel and slander. 18MinnLawRev356.

Defamation by radio. 19MinnLawRev611.

Liability of master for defamation published by a servant. 20MinnLawRev805.

Radio broadcast of trial. 23MinnLawRev100.

23. ——Hospitals.

Where a hospital maid was received as a patient and discharged as such, but permitted to remain temporarily in the room she formerly occupied as a maid, and during which time she fell from the window while walking in her sleep, held she was a mere licensee, the hospital was required to exercise only reasonable care, and the evidence on the question of negligence was insufficient for the jury. St. Mary's Hospital v. S. (USCCA8), 71F (2d)739.

In action for injuries to nervous patient who jumped out window on third floor of general hospital, facts held not such as to charge hospital with negligence in not anticipating that plaintiff was contemplating escape or self-destruction. Mesedahl v. S., 194M198, 259NW819. See Dun. Dig. 4250a.

Nurses and internes at a general hospital are charged with duty of carrying out instructions of attending physician only, except in cases of emergency. Id. See Dun. Dig. 4250a.

Evidence held sufficient to sustain verdict for plaintiff in action against hospital for negligence in bringing new mother wrong baby to feed, as a result of which her own baby subsequently contracted a disease from which other baby was suffering. Kirchoff v. S., 194M436, 260NW509. See Dun. Dig. 4250a(44).

Evidence held to justify finding that child contracted tuberculosis from nurse and that hospital was guilty of negligence in allowing nurse to attend child. Taaje v. S., 199M113, 271NW109. See Dun. Dig. 4250a.

Where administration of a hypodermoclysis was followed by necrosis of tissue into which solution was introduced, jury could not infer from fact that necrosis occurred that defendant used a solution other than normal saline solution. Collings v. N., 202M139, 277NW910. See Dun. Dig. 4250a, 7044, 7491.

If an article was furnished by hospital which was obviously unfit for use for which intended, and patient's nurse used same in violation of usual standards of due care of nursing practice, negligent hospital cannot be charged with injurious effects therefrom, but where defect was not patent, nurse was not required to examine into its mechanical parts for discovery of possible defects. Butler v. N., 202M382, 278NW37. See Dun. Dig. 4250a.

Where hospital furnished faulty equipment to a patient who suffered burns proximately resulting therefrom, liability could be imposed for negligence. Id.

In action against hospital evidence held not to show negligence of hospital in communicating impetigo to a baby. Stone v. L., 203M124, 280NW178. See Dun. Dig. 4250a.

24. ——Interference with contract rights.

Full, fair, and free competition is necessary to economic life of a community, but under its guise no man can by unlawful means prevent another from obtaining fruits of his labor. Johnson v. G., 201M629, 277NW252. See Dun. Dig. 9637.

Interference with contract relations includes not merely procurement of a breach of contract, but all invasion of contract relations, so that any act injuring or destroying persons, or property which retards, makes more difficult, or prevents performance, or makes performance of a contract of less value to promisee, may fall within its scope. Id.

Where owner of property entered into non-exclusive contract with real estate agent and prospective purchaser became interested in property through agent's efforts and then induced third person to purchase property from owner for his benefit and to save payment of commission, there was a fraudulent and collusive interference with contract right, entitling agent to recovery of damages from purchaser and his dummy. Id.

Effect of motive on liability for interference with contract. 12MinnLawRev147, 162.

PARTIES

9165. Real party in interest to sue—When one may sue or defend for all.

Correction—Citation to annotations under note 8 in main edition should read *"160M1, 199NW887."*

½. In general.

Where the national guard had been used to close plaintiff's manufacturing plant to avoid mob violence, in an action to restrain such interference, governor, adjutant general, and mayor of city were necessary and proper parties. Strutwear Knitting Co. v. O. (USDCMinn), 13F Supp384.

In equity proceedings, all persons whose rights may be adversely affected by the proposed decree should be made parties to the action, and when a stockholder sues to cancel stock of a corporation, the corporation should be made a party. 172M110, 215NW192.

In the absence of special circumstances, the representative of the estate of a deceased person is the only one who may maintain an action to recover a debt owing to the estate. 172M274, 215NW176.

Third party for whose benefit a contract is made, has a right of action on it. 174M297, 219NW180.

Persons promising to pay debt of another in consideration of conveyances to them may be sued by the creditor, or the debtor may sue, though he has not paid his debt. 174M350, 219NW237.

Any recovery in an action to have the purposes of a trust carried out must be for the benefit of the trust estate as such and not for the benefit of the plaintiff personally. Whitcomb v. W., 176M280, 223NW296.

Where covenant runs with land and covenantee, without having been evicted or having suffered any loss, and, without bringing action on the covenant, conveys the land to another, the covenant passes with the conveyance, and the original covenantee cannot thereafter sue thereon unless he has been required to pay or make good on account of a breach of the covenant. 177M606, 225 NW902.

City was a necessary party to an action to restrain officers from revoking taxicab licenses. National Cab Co. v. K., 182M152, 233NW838. See Dun. Dig. 7316(66).

In action to temporarily or permanently enjoin a sheriff from selling on execution certain real estate of which plaintiff claims to be the owner, execution creditor is a necessary party defendant. Cheney v. B., 193M586, 259 NW59. See Dun. Dig. 3552.

In action in behalf of a minor, title should be in his name as plaintiff by his guardian, not in name of guardian as plaintiff. Gimmestad v. R., 194M531, 261NW194. See Dun. Dig. 4455, 7509.

In action by minority stockholder to cancel stock issued to an officer of corporation, it was not necessary for plaintiff to allege that he before suit requested corporation to sue and that it refused, where complaint stated that defendant was president and general manager and that a demand would have been futile. Welland v. N., 203M600, 281NW364. See Dun. Dig. 2069.

Two separate and distinct judgment creditors, or one person acting in several capacities, may bring a joint suit against a judgment debtor and numerous grantees or transferees who rendered aid and assistance to debtor in attempting to place his property beyond reach of plaintiffs. Lind v. O., 204M30, 282NW661. See Dun. Dig. 7505.

As to whether another, not a party to the suit, is the real one in interest, held, upon facts appearing, to raise an issue of fact to be determined as such. Peterson v. J., 204M300, 283NW561. See Dun. Dig. 7315.

In equity it is general rule that all persons materially interested, either legally or beneficially, in subject-matter of suit, are to be made parties, either as plaintiffs or defendants, however numerous they may be, so that there may be a complete decree that shall bind them all. As to who shall be made parties is a question of convenience and discretion rather than of absolute right. Id. See Dun. Dig. 7316.

Class suits and the Federal rules. 22MinnLawRev34.

1. Held real party in interest.

Parties in quo warranto, see §§132, 156.

One to whom promissory note has been transferred by delivery without endorsement may maintain an action thereon in his own name. 176M246, 223NW287.

Stockholder of corporation which has been defrauded may maintain an action in the name of the corporation for rescission without making futile demand upon corporation to do so. 176M411, 223NW624.

Automobile owner could maintain an action in his own name where automobile was lost through theft, though the insurance company has paid the amount remaining due on the sales contract to the holder of the vendor's right, where there still remains an amount due after such payment. 177M10, 224NW271.

Lessee held real party in interest as against one in possession of property holding over after cancellation of a contract for deed. Gruenberg v. S., 188M568, 248 NW724. See Dun. Dig. 7315.

Where surety on elevator owner's bond purchased, for owner, assignments of outstanding storage tickets which covered converted grain bought by such owner, and he agreed to pay surety proceeds of his recovery upon such assignments, such owner might bring suit as real party in interest. Christensen v. S., 190M299, 251NW686. See Dun. Dig. 7315.

Wife as beneficiary in life policy was proper party plaintiff in action on policy though insured had failed to schedule policy as an asset or claim it as exempt in bankruptcy. Kassmir v. P., 191M340, 254NW446. See Dun. Dig. 4734.

Where a contract was made with employers by representatives of certain labor unions on behalf of employees in stated services, one of such employees may sue on contract as a party thereto. Mueller v. C., 194M83, 259 NW798. See Dun. Dig. 1896.

Assignee of a claim must stand in shoes of assignor as affecting right of set-off. Campbell v. S., 194M502, 261NW1. See Dun. Dig. 572(47).

Where plaintiff's husband had lived apart from her for five years, during which time she had received no support from him, and she alone requested service of nurse, doctor, and hospital for which she alleged special damages, she is liable therefor and may recover from wrongdoer who necessitated her incurring liability. Paulos v. K., 195M603, 263NW913. See Dun. Dig. 2572, 7315.

Owner of damaged automobile was real party in interest though action was instituted in his name without any direct authority by his son, father ratifying act of the son. Lavelle v. A., 197M169, 266NW445. See Dun. Dig. 7315.

An indorsee "for collection" of a negotiable instrument is real party in interest who may bring action. Farmers Nat. Bank v. B., 198M195, 269NW409. See Dun. Dig. 7315.

Lessees obligated by leases to pay all taxes may petition and claim invalidity of tax, and it is not necessary to make landowners parties. Internationaal Harvester Co. v. S., 200M242, 274NW217. See Dun. Dig. 7315.

Action on a bill or note payable to bearer, or endorsed in blank, may be maintained in name of nominal holder, possession being prima facie evidence of his right to sue, and cannot be rebutted by proof that plaintiff has no beneficial interest, or that others are interested in the proceeds, or by anything else but proof of mala fides. Northwestern Nat. Bank & Tr. Co. v. H., 286NW717. See Dun. Dig. 7315.

Where bank pledges bills payable to secure a loan, and is closed, the pledgee is the real party in interest in action on the bills payable, but he may consent to suit by the pledgor. Op. Atty. Gen., May 22, 1929.

2. Held not real party in interest.

One not a party to a contract of pledge, but who possibly and at best is merely an incidental beneficiary thereof, cannot base any cause of action thereon. Lincoln Finance Corp. v. D., 183M19, 235NW392. See Dun. Dig. 7315.

Widow accepting compensation for death of husband under Workmen's Compensation Act is not real party in interest in action against third party. Prebeck v. V., 185M303, 240NW890. See Dun. Dig. 7315.

In action by minority stockholder against officers in control of affairs of a corporation, to recover funds for use and benefit of corporation and its stockholders, corporation, joined as a defendant, is only a nominal party, and cannot, by answer, interpose such affirmative defenses as the officers and directors may have or claim. Meyers v. S., 190M157, 251NW20.

Neither wife nor minor child may recover damages for personal injuries to husband and father, remedy being solely in husband and father. Eschenbach v. B., 195M 378, 263NW154. See Dun. Dig. 4288b, 7305b.

3. Pleading.

If county attorney is not proper party to maintain action for the state, it constitutes only a defect of parties, and objection must be taken by demurrer and not by prohibition out of supreme court. State v. District Court, 204M415, 283NW738. See Dun. Dig. 7323.

4. Assignments.

Assignee of cause of action is the real party in interest. 176M315, 233NW614.

Assignee of mortgage, held not entitled to sue mortgagor for damages for fraudulent representations as to character of land. 178M574, 228NW152.

Where suit on a mechanic's lien claim is brought in name of two partners and it develops that one has assigned all of his interest in claim to his copartner, court may properly decree foreclosure in behalf of assignee. Blatterman v. C., 188M95, 246NW532. See Dun. Dig. 571, 7407.

In action by partially paid insured to recover damages to automobile, it was error to reject offer of defendant to prove that plaintiff had transferred cause of action to insurer, thereby ceasing to be real party in interest. Flor v. B., 189M131, 248NW743. See Dun. Dig. 7315.

Where after commencement of action against bailee, plaintiff's claim was assigned to an insurer who had made good loss, defendant's remedy was by motion for substitution of plaintiff's assignee and not contention on trial that plaintiff could not recover because not real party in interest. Peet v. R., 191M151, 253NW546. See Dun. Dig. 13.

Where assignment of rents by mortgagor to secure payment of past due interest was executed in form to a company acting as agent for mortgagee, latter was real party in interest who could sue thereon. Prudential Ins. Co. v. A., 196M154, 264NW576. See Dun. Dig. 7315.

An assignment in furtherance of an attorney's lien and to secure other indebtedness does not impose liability for costs and disbursements upon the assignee. Dreyer v. O., 287NW13. See Dun. Dig. 575.

5. One or more suing for many.

Attorneys at law have such a property right in privilege of practicing law that they may maintain action to restrain layman from practice. Fitchette v. T., 191M 582, 254NW910. See Dun. Dig. 4499a.

6. Action by taxpayer.

Taxpayer may sue to restrain disbursement of money by city to one unlawfully employed. 174M410, 219NW 760.

One or more taxpayers may enjoin the unauthorized acts of city officials, seeking to impose liability upon the city or to pay out its funds. 177M44, 224NW261.

The city is not an indispensable party to a suit by taxpayers to enjoin unauthorized acts of city officials. 177M44, 224NW261.

One having only a purported contract, signed by a city official, is not an indispensable party. 177M44, 224 NW261.

A demand by taxpayers upon state officials to bring actions to annul and cancel invalid highway contracts held unnecessary. Regan v. B., 188M92, 247NW12. See Dun. Dig. 4480.

Payment of automobile license fees and of state gasoline tax gives taxpayer a special interest in honest expenditure of highway funds entitling him to maintain an action to restrain payment of such funds upon void contracts. Id. See Dun. Dig. 4480, 7316.

A state taxpayer may question, by a bill for an injunction, a proposed new issue of state bonds. Rockne v. O., 191M310, 254NW5. See Dun. Dig. 4499a.

A taxpayer of county has an interest in use of its property and the right to have it devoted to lawful and not diverted to unlawful uses, but one who is not a taxpayer has no such right because he does not have an interest in the subject matter of dispute, and even a taxpayer must show that he will suffer an injujry differing in kind, not merely in degree, from that suffered by the public generally. Schultz v. K., 204M585, 284NW 782. See Dun. Dig. 4480.

7. Bonds.

Ward may sue on depository bond in which guardian or judge was named as obligee. 176M541, 224NW152.

A bailee may maintain an action on a replevin bond. 177M515, 225NW425.

A bondholder is real party in interest, and may maintain action to foreclose mortgage given to secure bonds issued by mortgagor defendant. Townsend v. M., 194M 423, 260NW525. See Dun. Dig. 7315.

8. Waiver of objections.

Objection of lack of capacity to sue must be taken by demurrer or answer, or it is waived. 175M226, 220NW 822.

Corporate beneficiary under a will not making motion to dismiss action of certain heirs for specific performance of an agreement to distribute part of estate to heirs of deceased, waived defect in parties from omission of certain nieces and nephews of decedent, it appearing that enforcement of agreement was for benefit of all heirs, who otherwise would have received nothing, and there being no foundation for claim that corporation might be compelled to defend other litigation, and there having been no motion to have other parties brought in as additional parties. Schaefer v. T., 199M610, 273NW190. See Dun. Dig. 7323, 7328, 7329.

9166. Action by assignee—Set-off saved.

1. General rule.

When rights arising out of contract are coupled with obligations to be performed by contractor, and involve such a relation of personal confidence that it must have been intended that rights should be exercised and obligations performed by him alone, contract, including both his rights and his obligations cannot be assigned without consent of other party to original contract. Smith v. Z., 203M535, 282NW269. See Dun. Dig. 570.

Assignment of bank account. 22MinnLawRev1044.

6. Negotiable paper.

Where collection bank becomes insolvent on day it sends draft for proceeds to bank in which it has deposit, latter bank is entitled to set-off deposit against collection. Storing v. F. (USCCA8), 28F(2d)587.

It is a breach of plain legal duty for a school district treasurer to make a payment on a warrant not presented to him for such payment and a payment without such presentation to a former holder of a warrant held not to be payment of the warrant and assignee may recover notwithstanding. 173M383, 217NW366.

An assignee of a chose in action, not a negotiable instrument, takes it subject to all defenses and equities which the obligor has against the assignor or a prior holder before such obligor has any notice or knowledge of any assignment thereof. First Nat. Bank of Windom v. C., 184M635, 240NW662. See Dun. Dig. 571 (40).

This section is not rendered inapplicable to school district warrants by the fact that such warrants are generally dealt in by banks and investors. First Nat. Bank of Windom v. C., 184M635, 240NW662. See Dun. Dig. 572.

School district warrants are nonnegotiable instruments and are subject to defenses and set-off in the hands of an assignee. First Nat. Bank of Windom v. C., 184M635, 240NW662. See Dun. Dig. 886.

9167. Executor, trustee, etc., may sue alone.

½. In general.

Where administrator forecloses mortgage and buys it in his own name as administrator, an action to set aside the foreclosure and sale on the ground that no default had occurred is properly brought in the district court and against the administrator as sole defendant. 171M469, 214NW472.

A judgment is conclusive, as between parties, of facts upon which it is based and all legal consequences resulting from its rendition, and it may be enforced by parties thereto, though judgment may be also for benefit of a third party. Ingelson v. O., 199M422, 272NW270. See Dun. Dig. 1895, 5154, 5155, 5161, 5162.

A beneficiary may sue in his own name to enforce his rights under a trust where trustee fails or neglects to do so, and he may be permitted to intervene where trustee is a party and fails or neglects to protect his interest as beneficiary. Veranth v. M., 284NW849. See Dun. Dig. 7318.

1. Statute permissive.

A creditor may sue on his own behalf to set aside a fraudulent conveyance made by decedent prior to his death, right of personal representative of fraudulent debtor to bring suit not being exclusive. Lind v. O., 204M 30, 282NW661. See Dun. Dig. 3587.

9168. Married women may sue or be sued.

Where wife is injured, the wife and husband may maintain separate actions for damages. 175M247, 221 NW8.

9169. Infants and insane persons—Guardians ad litem.

2. Effect of not appointing.

Where personal service is made upon insane person, mere failure to appoint guardian ad litem does not render judgment void. Schultz v. O., 202M237, 277NW918. See Dun. Dig. 4531.

9. Guardian for insane person.

An insane person may sue and be sued, though he should appear by a next friend, general guardian, or guardian ad litem, but power of district court to appoint guardian and hear cases is not taken away by statute authorizing probate courts to appoint general guardian. Schultz v. O., 202M237, 277NW918. See Dun. Dig. 4529.

Law respecting guardians aims to protect property and estate of one who is in fact incapable of doing so for himself, but his incapacity cannot be changed from a shield of protection to a rapier of offense. Id.

9172. Parent or guardian may sue for injury to child or ward—Bond—Settlement.—A father, or, in case of his death or desertion of his family, the mother, may maintain an action for the injury of a minor child, and a general guardian may maintain an action for the injury of his ward. Provided, that if no such action is brought by the father or mother, an action for such injury may be maintained by a guardian ad litem, either before or after the death of such parent. Before any such parent shall receive any money or other property in settlement or compromise of any action so brought, or in satisfaction of any judgment obtained therein, such parent shall file a bond as security therefor, in such form and with such sureties as the court shall prescribe and approve; Provided, however, that upon petition of such parent, the court may, in its discretion, order that in lieu of such bond, any money so received, shall be deposited as a savings account in a banking institution or trust company, together, with a copy of the court's order and the deposit book filed with the Clerk of Court, subject to the order of the court, and no settlement or compromise of any such action shall be valid unless the same shall be approved by, a judge of the court in which such action is pending. (R. L. '05, §4060; '07, c. 58; G. S. '13, §7681; Mar. 30, 1929, c. 113.)

In action in behalf of a minor, title shuold be in his name as plaintiff by his guardian ad litem and not in name of guardian ad litem as plaintiff. Lund v. S., 187 M577, 246NW116. See Dun. Dig. 4461.

In action in behalf of a minor, title should be in his name as plaintiff by his guardian, not in name of guardian as plaintiff. Gimmestad v. R., 194M531, 261NW194. See Dun. Dig. 4455, 7509.

This section is constitutional. Ernst v. D., 202M358, 278NW516.

A father may with approval of district court settle a minor's cause of action for personal injuries without suit actually begun, and such a settlement may not be attacked collaterally. Id. See Dun. Dig. 2759.

Judge of probate has jurisdiction under §8992-135 to enter an order authorizing a general guardian to compromise and settle a claim for injuries sustained by a minor ward as a result of an automobile accident, which claim has not been sued and is not therefore pending in district court. Op. Atty. Gen. (346d), Mar. 3, 1938.

9174. Joinder of parties to instrument.

The assignor of the balance owing upon a claim for goods sold and delivered, who guarantees payment of the same to his assignee, may be joined as defendant in an action with the principal debtor. 173M57, 214NW 778.

A party who is properly made defendant cannot object by demurrer that other parties are improperly joined with him as defendants. 173M57, 214NW778.

The words "obligation or instrument" mean engagements, contracts, agreements, stipulations, bonds, and covenants, as well as negotiable instruments. 173M57, 214NW778.

The general policy of this section is to avoid multiplicity of suits. 173M57, 216NW789.

In construing this section words are to be considered in their ordinary and popular sense. 173M57, 216NW789.

This section is remedial and should be liberally construed so as to carry out the purpose sought. 173M57, 216NW789.

Sections 9174 and 9411 are in pari materia. 173M57, 216 NW789.

Whether bank is entitled to subrogation as against successor to mortgagor's interest as vendor in contract for deed, vendee's interest being held as security, cannot be decided in action to which successor is not party. Nippolt v. F., 186M325, 243NW136. See Dun. Dig. 9052a.

When there is an allegation of a joint contract with two or more defendants and proof is of a several contract with one, there may be a recovery against one liable; and in such case there is not a failure of proof. Schmidt v. A., 190M585, 252NW671. See Dun. Dig. 5043, 7674.

Section applies to all contracts and agreements and not merely to negotiable instruments. Id.

An absolute guarantor may be joined as defendant in the same action with principal obligor. Townsend v. M., 194M423, 260NW525. See Dun. Dig. 4093a(60).

Trial court did not err in consolidating action for cancellation of contract brought by appelant and actions to enjoin cancellation proceedings and for specific performance brought by respondents, and in granting specific performance. Schultz v. U., 199M131, 271NW249. See Dun. Dig. 8788.

Two separate and distinct judgment creditors, or one person acting in several capacities, may bring a joint suit against a judgment debtor and numerous grantees or transferees who rendered aid and assistance to debtor in attempting to place his property beyond reach of plaintiff. Lind v. O., 204M30, 282NW661. See Dun. Dig. 7505.

An executrix represented estate in her official capacity, and there is no defect of parties defendant in an action against her in that capacity to enforce a lien upon property of the estate, notwithstanding that she is the widow, no question of homestead being involved. Marquette Nat. Bank v. M., 287NW233. See Dun. Dig. 3558.

9175. Surety may bring action.

In view of §106, this section does not authorize a suit for exoneration by sureties against commissioner of

banks or the receiver or trustee of an insolvent bank. 174M583, 219NW916.

This section, held inapplicable to surety on depository bond covering state funds in proceedings under Mason's Minn. St., §106. 179M143, 228NW613.

Where defendant took deed from bank, and executed note and mortgage, and then reconveyed land to bank, he could not compel the holder of the note to sue the bank. 181M82, 231NW403.

Circumstances under which a surety may compel creditor to resort to security. 15MinnLawRev95.

9176. Action not to abate by death, etc.—Torts.

Judgment against employer for lump compensation to injured employee survived employee's death. Employers' Mut. L. Ins. Co. v. E., 192M398, 256NW663. See Dun. Dig. 14, 564.

Dependent widow of employee of a partnership could recover compensation from partnership and insurer, notwithstanding that she is a member of the partnership. Keegan v. K., 194M261, 260NW318. See Dun. Dig. 7406.

1. Effect of death on jurisdiction.

When, on motion to substitute, personal representative of a deceased defendant appears and raises no objection on ground that jurisdiction had not been obtained of deceased, but answers and tries case on merits, it is too date to move to vacate judgment rendered after trial, especially when it is disclosed that representative knew all facts which might defeat substitution at time of hearing of motion therefor. O'Keefe v. S., 201M51, 275NW370. See Dun. Dig. 7331.

1½. Transfer of interest in subject matter.

Where after commencement of action against bailee, plaintiff's claim was assigned to an insurer who had made good loss, defendant's remedy was by motion for substitution of plaintiff's assignee and not contention on trial that plaintiff could not recover because not real party in interest. Peet v. R., 191M151, 253NW546. See Dun. Dig. 13.

5. Effect of assignment.

An assignee subrogated to part of a plaintiff's claim or alleged cause of action is not liable for costs and disbursements in a suit brought in the name of the assignor. Dreyer v. O., 287NW13. See Dun. Dig. 13.

9178. Actions against receivers, etc.

One holding a deficiency judgment against a corporation in the hands of a receiver is required to prove its claim within the time fixed by the court for the filing of claims, in order to hold the receivers liable for the deficiency, and where it failed to prove its claim within the time allowed the denial of leave to make the receivers parties to the foreclosure suit is within the discretion of the court, and it is immaterial that the receivers had made payments on the judgment with the approval of the court. Chicago Joint Stock Land Bank v. Minnesota L. & T. Co., (CCA8), 57F(2d)70. See Dun. Dig. 8261.

One holding claim upon which a tort action has been commenced against a receiver of a railway company, is not entitled to share ahead of the mortgage lienholders in the residue remaining from a sale of the railway property. 177M584, 225NW919.

9179. How tried, and judgment, how satisfied.

177M584, 225NW919.

9180. Actions against partnership, etc.

A labor union, an unincorporated voluntary association, held engaged in transacting business in Minnesota, and service of summons and complaint upon member resident in state, held to confer jurisdiction. Bowers v. G., 187M626, 246NW362. See Dun. Dig. 618a, 9674.

Each member of a voluntary unincorporated association organized for business and profit is individually liable for debts contracted. Ford Motor Co. v. S., 188M578, 248NW55. See Dun. Dig. 616.

Members of voluntary unincorporated farmers' cooperative association were individually liable for its debts. Id.

Where a voluntary unincorporated association is sued as such, judgment binds joint property of associates, but not individual property of members other than those served. Id.

A policy of compensation insurance to "A. F. Peavey, doing business as the Northwestern Sand Blast Company," issued after Peavey had taken a partner into business with him, Northwestern Sand Blast Company being maintained as partnership name, intention was to protect all employees working under that firm name. Moreault v. N., 199M96, 271NW246. See Dun. Dig. 10391.

If a person wishes to take advantage of statute and sue a partnership in its firm name, it should somewhere appear in complaint that defendant named is a group of associates doing business under that name. State v. District Court of St. Louis County, 200M207, 273NW701. See Dun. Dig. 7320, 7407a.

Complaint held to allege action against members of firm as individuals and not against firm in its common business name under statute. Id.

9181. Bringing in additional parties.

Quo warranto proceedings, see §§132, 156.

In action on note secured by mortgage on land deeded by bank to maker, and reconveyed by maker to bank, such maker was not entitled to bring in bank as party. 181M82, 231NW403.

In an attorney's lien proceeding, it was proper for the trial court, in order to render a judgment determinative of the whole controversy, to order in as an additional party an attorney admittedly entitled to share in the fund subject to the lien. Meacham v. B., 184M607, 240NW540. See Dun. Dig. 712, 7325.

In action by contractor against surety finishing job under agreement to pay profits to contractor, less expenses, including attorney's fees, where amount of attorney's fees were in dispute, court erred in refusing to bring in attorney as additional party defendant. Johnson v. H., 187M186, 245NW27. See Dun. Dig. 7325.

Court has inherent power to bring into court additional party whenever it is necessary for complete administration of justice. Johnson v. H., 187M186, 245NW 27. See Dun. Dig. 7325.

The district court has the inherent power in an equitable action, even upon its own motion, to bring in additional parties, where it is necessary for complete administration of justice. Sheehan v. H., 187M582, 246NW353. See Dun. Dig. 7328.

Where county petitioned court to interplead various claimants of a portion of damages due by county in establishment of a judicial road, court had jurisdiction to order entry of judgment requiring county to comply with prior order of confirmation of original award of damages, court having jurisdiction of the parties and of the subject matter at time issues were made and trial had. Blue Earth County v. W., 196M501, 265NW329. See Dun. Dig. 7328.

In suit upon a life insurance policy, trial court's refusal to exercise its inherent power to order in as additional defendants four creditors of insured's estate, who claimed that premiums upon policy were paid in fraud of them, was an abuse of judicial discretion. Minnesota Nat. Bank v. E., 197M340, 267NW202. See Dun. Dig. 7324.

Corporate beneficiary under a will not making motion to dismiss action by certain heirs for specific performance of an agreement to distribute part of estate to heirs of deceased, waived defect in parties from omission of certain nieces and nephews of decedent, it appearing that enforcement of agreement was for benefit of all heirs, who otherwise would have received nothing, and there being no foundation for claim that corporation might be compelled to defend other litigation, and there having been no motion to have other parties brought in as additional parties. Schaefer v. T., 199M610, 273NW190. See Dun. Dig. 7323, 7328, 7329.

On appeal from order bringing in an additional party on application of counterclaiming defendant, supreme court will not consider arguments that order would deprive party brought in of right to a change of venue to its place of residence, since matter of venue is in first instance for consideration for trial court and can be properly presented by motion in that court. Lambertson v. W., 200M204, 273NW634. See Dun. Dig. 396.

Independently of statute, district court has inherent power to bring in additional party whenever necessary for complete administration of justice. Rule applied so as to permit counterclaiming defendant to bring in employer of plaintiff. Id. See Dun. Dig. 7328, 7329.

Rule that a cause of action which cannot be determined without bringing in a new party may not, without more, be set up as a counterclaim, is one for testing validity of a counterclaim as such, and is not determinative of right of a counterclaiming defendant to bring in additional parties where they are necessary for full determination of controversy. Id. See Dun. Dig. 7602.

"Necessary parties" are those without whom no decree at all can be effectively made, determining principal issues in cause. Serr v. B., 202M165, 278NW355. See Dun. Dig. 7316.

Who shall be made parties in a given cause is a question of convenience and discretion rather than of absolute right, to be determined according to exigencies of particular case. Id.

"Proper parties" are those without whom a substantial decree may be made, but not a decree which shall completely settle all questions which may be involved in controversy and conclude rights of all persons who have any interest in subject-matter of litigation. Id.

In an equity suit court may on its own motion at trial or otherwise continue or dismiss suit for want of a necessary defendant, or may continue until such party is brought in. Id. See Dun. Dig. 7325.

Upon facts held that only issue for determination was validity of a purported release, not absence or presence of a party to that instrument who was not a party to action. Id. See Dun. Dig. 7325.

By statute, as well as by virtue of inherent power possessed by court, persons who are not parties to a suit may be brought in as additional parties whenever, for complete administration of justice, this is deemed necessary. Id. See Dun. Dig. 7328, 7329.

An order denying a motion to bring an additional party is not appealable. Levstek v. N., 203M324, 281NW260. See Dun. Dig. 309.

A defendant who has not by answer alleged a counterclaim or ground for affirmative relief against the plaintiff is not entitled to an order bringing in an additional party. Id. See Dun. Dig. 7325.

Although beneficial owner of vendee's interest in land contract did not intervene in a special proceedings to terminate the contract under §9263 and was not ordered to intervene upon application of a party under §9181, court had power, unaffected by statute, to bring him before it, or permit him to come in voluntarily, at any stage of the proceedings, as a party necessary for complete administration of justice. Veranth v. M., 284NW849. See Dun. Dig. 7329.

Bringing in third parties by defendant. 19MinnLawRev163.

Interpleader—requirement of privity. 19MinnLawRev812.

9182. Contents of order—How served, etc.

An order bringing in an additional party defendant should ordinarily require complaint to be amended so that new party may plead thereto. Sheehan v. H., 187M582, 246NW353. See Dun. Dig. 7328, 7701.

LIMITATION OF ACTIONS

9185. General rule—Exceptions.

1. In general.

Schmahl v. S., 200M294, 274NW168; note under §9191.

Repeal of a statute of limitations before cause of action arose restored plaintiff and defendant to status existing prior to passage of statute. Wunderlich v. N., (DC-Minn), 24FSupp640.

The effect of a new promise as an agency for the continuance or revival of a cause of action operates only in field of contractual obligation and does not apply to a cause of action in tort. 174M264, 219NW155.

Amendment of complaint, in action against two defendants, by alleging a joint contract with defendant and their partnership relation, held not to state a new cause of action as affecting limitations. 181M381, 232NW708. See Dun. Dig. 5622, 7490d.

The statute of limitation of actions affects the remedy, not the right. If it had run, it could be waived as a defense. 181M523, 233NW802. See Dun. Dig. 5661(83).

Statute of limitations is a statute of repose and courts have no power to extend or modify period of limitation prescribed. Roe v. W., 191M251, 254NW274. See Dun. Dig. 5590, 5591.

A limitation law cannot compel a resort to legal proceedings by one who is already in complete enjoyment of all he claims, nor can such a law compel one party to forfeit his rights to another for failure to bring suit against such other party within the time specified to test validity of claim which latter asserts but takes improper steps to enforce. Hammon v. H., 192M259, 256NW94. See Dun. Dig. 5588.

Statute of limitations is one of repose, with purpose to prescribe a period within which a right may be enforced, afterwards withholding a remedy for reasons of private justice and public policy. Bachertz v. H., 201M171, 275NW694. See Dun. Dig. 5591.

Courts do not volunteer enforcement of statutes of limitation, but they do not refuse to enforce them when they are invoked by parties, or aid or encourage parties in their attempts, by mere strategy or circuitous route of action, to avoid them. Id. See Dun. Dig. 5598.

Where statute of limitations has been set up in bar of a right of action, and plea has been traversed, statute is generally considered an affirmative defense, and burden of proof is on those seeking to avail themselves of its benefit to show that cause of action has been barred thereby, and where part of the plaintiff's demand is barred and part is not, defendant is obliged to prove specifically part that falls within protection of statute. Golden v. L., 203M211, 281NW249. See Dun. Dig. 5667a.

Contracts may be made stipulating a limited time within which an action may be brought thereon provided such stipulated time is not unreasonable under the circumstances. Hayfield Farmers E. & M. Co. v. N., 203M522, 282NW265. See Dun. Dig. 5600(24).

Acquisition of title to stolen property by adverse possession for statutory period. 15MinnLawRev714.

Mistake and statutes of limitation. 20 MinnLawRev481.

2. When action accrues.

Claim for salaries and expenses advanced by president of corporation under agreement, held not barred by any statute of limitation. 177M72, 224NW454.

The claim that an action is prematurely brought, because the recovery claimed is not due, is in the nature of a claim in abatement and must be raised in an appropriate manner in the trial court. Geib v. H., 185M295, 240NW907. See Dun. Dig. 2746b.

Evidence held not to show that the maturity of a debt was deferred by agreement until demand, or any other future event, so as to toll the statute of limitations. Noser v. A., 189M45, 248NW292. See Dun. Dig. 5602.

Where one cares for child of another, quasi contractual obligation of father to pay therefor is a continuing one and limitations does not commence to run until termination of such support, as where child reaches its majority. Knutson v. H., 191M420, 254NW464. See Dun. Dig. 5650.

A promise "I will guaranty this bonds any time you dont want them Ill take them over" was a continuing one and limitations did not begin to run until demand for, and refusal of, performance. Wigdale v. A., 193M384, 258NW726. See Dun. Dig. 4079, 5602.

Statute of limitations against constitutional double liability of stockholders in a state bank begins to run when bank closes its doors and ceases to function as a bank, either because of being taken over by commissioner of banks, or because of absorption by another bank with approval of commissioner. Liquidation of Peoples State Bank, 197M479, 267NW482. See Dun. Dig. 802.

Statute commences to run against a cause of action from time it accrues—from time an action thereon can be commenced. Bachertz v. H., 201M171, 275NW694. See Dun. Dig. 5602.

When a right depends upon some condition or contingency, cause of action accrues and statute runs upon fulfillment of condition or happening of contingency. Id.

A cause of action for breach of contract accrues immediately on a breach, though actual damages resulting therefrom do not occur until afterwards. Id.

Negligence without injury or damage gives no cause of action, since there must be not only the negligent act, but a consequential injury, injury being gravamen of charge, and this is true where harm comes to an employee by slow processes of accumulations of silica dust in lungs over a long period of time before disease became an active agency in development of tuberculosis. Golden v. L., 203M211, 281NW249. See Dun. Dig. 5654.

Statute of limitations does not run against a duly allowed claim in probate while settlement of estate is still pending. Marquette Nat. Bank v. M., 287NW233. See Dun. Dig. 3671.

Statute of limitations begins *to run when cause of* action accrues. Id. See Dun. Dig. 5602.

Limitations does not begin to run against a town, village, school district, or county warrant until there is money available for the payment of the warrant. Op. Atty. Gen., Nov. 18, 1931.

Application of statute of limitations between trustee and cestui que trust. 16MinnLawRev602.

4. Laches.

Laches cannot be imputed to a party to a contract until he has knowledge of facts indicating that fraud existed. Winget v. R. (CCA8), 69F(2d)326. See Dun. Dig. 1810.

Laches will not be imputed to one in the peaceable possession of land under an equitable title, for delay in resorting to a court of equity for protection against the legal title. Pike Rapids Power Co. v. M., (CCA8), 99F(2d)902.

If a rescission has been effected by a party defrauded, *within a reasonable time after discovery of the* right to rescind, he is not bound to bring his action to recover his loss before the time has expired within which he must rescind. Krzyzaniak v. M., 182M83, 233NW595. See Dun. Dig. 5352(91).

Delay in seeking equitable relief, not for such time as to come within statute of limitations, and for which defendant is in part responsible, is not a bar to action. Johnson v. I., 189M293, 249NW177. See Dun. Dig. 5351.

Laches may be asserted as a defense where one willfully sleeps on his rights to another's detriment, but is excused when such person is in ignorance of his rights. Craig v. B., 191M42, 254NW440. See Dun. Dig. 5351.

There is no statute of limitations governing action for reformation of instrument upon ground of mistake; lapse of time in such cases operating as a bar only by equitable doctrine of laches. Papke v. P., 203M130, 280NW183. See Dun. Dig. 8343.

The pith of the doctrine of laches is unreasonable delay in enforcing a known right. Keough v. S., 285NW809. See Dun. Dig. 5351.

A finding of laches involves balancing of prejudice from complainant's delay against reasons given by complainant in explanation, being an equitable defense which ought not to be applied so as to do injustice. Id. See Dun. Dig. 5351.

Death of a material witness is a consideration to be reckoned with in determining whether laches should apply, but is not conclusive. Id. See Dun. Dig. 5351.

Application of doctrine of laches depends largely upon particular facts in each case. Id. See Dun. Dig. 5351.

Where relationship is that of confidence, and fraud has occurred, evidence should be very consistent before defrauded party should be barred by laches. Id. See Dun. Dig. 5351.

Plaintiff in suit against corporation and others for an accounting as to salaries was not guilty of laches because he did not discover fraud at an earlier date. Id. See Dun. Dig. 5351.

9186. Bar applies to state, etc.

180M496, 231NW210.

Schmahl v. S., 200M294, 274NW168; note under §9191.

Does not apply to action on bond of timber permittee in view of Mason's Minn. St. 1927, §§6394-17, 6394-37. 180M160, 230NW484.

The finding that title to no part of the street in controversy was acquired through adverse possession is contrary to the evidence. Doyle v. B., 182M556, 235NW18. See Dun. Dig. 111.

An action in the district court for the enforcement of the lien of the inheritance tax under §2311 is not barred by limitations. State v. Brooks, 183M251, 236NW316. See Dun. Dig. 5656, 9525.

Title to a public road by common-law dedication could not be acquired by adverse possession. Hopkins v. D., 183M393, 236NW706. See Dun. Dig. 111.

Section has no application to proceedings for enforcement of taxes on real estate. Hacklander v. P., 204M 260, 283NW406. See Dun. Dig. 9525.

Record held to establish laying out of highway and its nonabandonment. Freeman v. P., 286NW299. See Dun. Dig. 8449.

School districts may acquire title to school sites by adverse possession and also by condemnation proceedings. Op. Atty. Gen. (622l-14), Apr. 14, 1934.

Where in 1889 an order was made in regular proceedings establishing a county road on a section line, and road as made and traveled deviated from established part of way, because a grove of trees planted by an abutting owner was on section line, the passage of time and use of deviation did not prevent county from straightening the highway, but abutting owner should be given 10 days' notice of intent to remove trees. Op. Atty. Gen. (2291), Oct. 30, 1935.

Township cannot acquire by user or adverse possession roadway across land owned by state. Op. Atty. Gen. (700d-12), Aug. 26, 1937.

Original established right of way remains public property for highway purposes, and fact that road was not maintained exactly on section line for a few years did not prevent straightening of road without payment of damages to adjoining owners. Op. Atty. Gen. (377b-10 (d)), July 15, 1938.

Prior to enactment of Laws 1899, c. 65, a school district could acquire title to public streets by adverse possession. Op. Atty. Gen. (622a-8), Aug. 23, 1938.

9187. Recovery of real estate, fifteen years.

½. In general.

Cause of action to annul an express trust of real and personal property, held to have accrued and to have become barred by six-year statute. 176M274, 223NW294.

The six-year statute of limitations applies to an action to recover damages for an injury to real property caused by a municipality in grading a street. 177M565, 225NW816.

An easement by prescription for the flooding of land may be acquired for limited or seasonable purposes only. Pahl v. L., 182M118, 233NW836. See Dun. Dig. 2853.

2. Essentials of adverse possession.

The requirement of actual and visible occupation is more imperative in an old and populous country than in a new country. 171M410, 214NW271.

Up to the boundary line as claimed in his complaint, the evidence supports the verdict that plaintiff had acquired title by adverse possession. Patnode v. M., 182M 348, 234NW459. See Dun. Dig. 130.

3. Payment of taxes.

Failure to pay taxes on a portion of a lot assessed as one tract does not prevent a person asserting title by adverse possession. 173M145, 216NW782.

3a. Possession must be hostile and under claim of right.

To be hostile, possession must be taken with intent to claim and hold the land against the true owner and the whole world, but in the beginning, adverse possession may be a mere trespass. 171M410, 214NW271.

A disseizor may strengthen his adverse claim by taking as many conveyances from those claiming or having an interest in the land as he sees fit. 171M410, 214NW271.

Fact that fence is shifted from place to place does not destroy continuity of possession of so much as remains within the fence. 171M410, 214NW271.

Payment of taxes, unless the land is separately assessed, is not essential. 171M410, 214NW271.

Title by adverse possession may be acquired, although the parties in interest occupy up to a fence in the mistaken belief that the fence is on the true boundary line. 171M410, 214NW271.

The occupancy and slight use of lands involved by the successor in interest of the grantors in a flowage contract was permissive and not adverse. 176M324, 223 NW612.

The evidence proved title by adverse possession in defendant. Deacon v. H., 182M540, 235NW23. See Dun. Dig. 127(8), 130.

User not adverse in its inception, does not become so until notice or an assertion of an adverse claim. Lustmann v. L., 204M228, 283NW387. See Dun. Dig. 121.

While the acquisition by prescription of a right of way does not exclude use by owner of servient estate or by public, it does require use as of right, and not by favor or permission. Id. See Dun. Dig. 2857(86).

4. Public land.

Title may not be acquired to established highway by adverse possession, though highway has been abandoned and never was used. Op. Atty. Gen., Apr. 28, 1933.

6. Permissive possession.

Undisturbed use of a passway over the uninclosed lands of another raises a rebuttable presumption of a grant, but where the proof shows that use in its inception was permissive, such use is not transformed into adverse or hostile use until the owner has some notice of an intention of the user to assert adverse and hostile dominion. 175M592, 222NW272.

Possession, originally permissive in character, does not become adverse without circumstances or declarations indicating an intent hostile to the true owner. Board of Christian Service v. T., 183M485, 237NW181. See Dun. Dig. 112a(c).

Evidence held sufficient to sustain finding that user of a way for travel was permissive and a mere license revocable at will of landowner. Johnson v. O., 189M183, 248NW700. See Dun. Dig. 2853(77).

Where use of private way originates in agreement between members of same family, there is at least an inference, if not a presumption, that use of one was not adverse to other but by permission. Lustmann v. L., 204 M228, 283NW387. See Dun. Dig. 2857(86).

Where use of private way is permissive in the beginning, strictest proof of hostility of subsequent use is required. Id. See Dun. Dig. 2857(86).

17. Possession must be exclusive.

Easement may be acquired without exclusive possession. 179M228, 228NW755.

Possession of tenants paying rental to third person as well as lessor could not be said to be exclusive possession by lessor. Lamprey v. A., 197M112, 266NW434. See Dun. Dig. 118.

22. Easements.

Evidence held to show right of way acquired by prescription. 171M368, 214NW49.

A user of a way for travel, permissive in its inception, does not ripen into an easement until and unless there is a subsequent distinct and positive assertion of a hostile right by claimant and continued use after such hostile assertion for statutory time to acquire an easement by prescription or adverse possession. Johnson v. O., 189M183, 248NW700. See Dun. Dig. 2853(77).

Fact that claimant ceases to use a way for travel in which he is not shown to have had any easement or right, and is then permitted to use a different route, does not amount to surrender of one easement or right in consideration of granting of an easement in new route. Id. See Dun. Dig. 2862b.

Non-use of road to which plaintiff had prescriptive right for several years on request of owner of servient estate that another road over premises be used was not a legal abandonment of prescriptive right to use old road. Schmidt v. K., 196M178, 265NW347. See Dun. Dig. 121.

In considering proof of a way by prescription, use of a way over vacant and unoccupied land is presumptively permissive, but presumption is reverse where land has continuously been under cultivation. Id.

Cheese factory did not obtain a prescriptive right to pollute creek, pollution not being continuous in substantially same way or with same injurious results during entire statutory period. Satren v. H., 202M553, 279 NW361. See Dun. Dig. 7256.

22½. Pleading.

Title by adverse possession may be proved under a general allegation of ownership. 171M488, 214NW283.

Judgment in action to determine boundaries under §9592 is res adjudicata in a subsequent action in ejectment. 171M488, 214NW283.

25. Burden of proof.

Where claimant of easement shows open and continuous possession for the requisite period the owner of the land has the burden of proving that the possession was permissive merely. 179M228, 228NW755.

27. Facts held sufficient to constitute adverse possession.

179M228, 228NW755.

Evidence held to show open hostile and adverse possession for more than fifteen years of certain lot up to certain line east of house. 173M145, 216NW782.

Finding that defendants' exclusive possession for more than 15 years of part of plaintiff's lot was not with intention to claim adversely and did not constitute adverse possession is not sustained by evidence. Gehan v. M., 189M250, 248NW820. See Dun. Dig. 130.

28. Facts held insufficient.

Evidence did not require finding that defendant acquired title to portion of plaintiff's adjoining lot by adverse possession through occupancy beyond true boundaries. 174M171, 218NW549.

30. Tax sales—short statutes of limitation.

A tax title is a new and original grant from the state as sovereign of title in fee, which is paramount as against world and which supersedes and bars all other titles, claims and equities, including claims by adverse possession. Hacklander v. P., 204M260, 283NW406. See Dun. Dig. 114.

Statutes do not permit a claimant of title to land by adverse possession in a boundary line dispute case to acquire title to the land by adverse possession as against a tax lien or tax title. Id. See Dun. Dig. 114.

9189. When time begins to run.

Mortgage held to show, upon its face, time of maturity, and that limitations ran from that time. 171M 252, 213NW913.

Testimony that a debtor, since deceased, admitted, in 1927, that "she had to pay" a named creditor some money that spring, does not so tend to show that the maturity of the debt, accrued in 1917, was postponed to

1927, as to avoid a plea of the statute of limitations. Noser's Estate, 183M477, 237NW22. See Dun. Dig. 5602 (44).

9190. Judgments, ten years.

The allowance of a claim by a referee in bankruptcy is not a "judgment or a decree of a court of the United States." 173M263, 217NW126.

The approval of a settlement in a workmen's compensation matter under Act of 1913, c. 467, is not a judgment as regards limitations. 176M554, 223NW926.

Section applies to domestic as well as foreign judgments. Blue Earth County v. W., 196M501, 265NW329. See Dun. Dig. 5150.

Order of court confirming award of damages of commissioners in establishment of a judicial road is a judgment and limitation does not run against right of land owner to recover damages until 10 years after entry. Id.

An action on a judgment, if commenced within 10 years, may proceed to trial and judgment thereafter. Id. See Dun. Dig. 5150, 5604.

Without determining whether 10 year limitations is applicable, upon a decree of divorce awarding alimony until child should reach 18 years of age and imposing lien on real estate, a motion for an order requiring execution of a certificate of satisfaction of judgment made more than 6 years after child obtained age of 18 was denied on theory that 6 year limitation was not applicable. Akerson v. A., 202M356, 278NW577. See Dun. Dig. 5150.

In an action founded upon a judgment of a sister state payable in installments, only those installments which fell due more than ten years prior to the commencement of suit are barred by our statute of limitations. Ladd v. M., 285NW281. See Dun. Dig. 5210.

If order allowing a claim in probate has effect of judgment, right of action thereof is not outlawed for 10 years. Marquette Nat. Bank v. M., 287NW233. See Dun. Dig. 5150.

Statute runs against personal property tax judgments. Op. Atty. Gen., Feb. 5, 1929.

9191. Various cases, six years.

* * * *

9. For damages caused by a dam, used for commercial purposes. (Added Apr. 1, 1935, c. 80, §2.)

½. In general.

Minority stockholder's claims—arbitration—laches. Backus-Brooks Co. v. N., (CCA8), 21F(2d)4.

Where purchaser under a contract for a lease attacked Torrens registration decree of vendor after expiration of limitation period, and sought to recover a certain payment alleged to have been obtained by vendor in violation of the agreement, defense of limitations applied to the attempted recovery of the payment and was ground for dismissal as to that item, though case was kept on the equity side of the federal court. Nitkey v. S., (USCCA8), 87F(2d)916. Cert. den., 301US697, 57SCR 925.

Six-year statute held a bar to action by creditors against directors to recover converted funds. Williams v. D., 182M237, 234NW11. See Dun. Dig. 5656(64).

A payment of interest voluntarily made by a debtor to one who had no authority to receive it, but by whom it is immediately turned over to the creditor as the "interest money" in question, held sufficient to toll the running of the statute of limitations against the principal obligation. Kehrer v. W., 182M474, 234NW690 See Dun. Dig. 5632.

The correction of an error in bookkeeping which occurred years before, which correction was made after the statute had run, was not a part payment which tolled the statute. In re Walker's Estate, 184M164, 238NW58. See Dun. Dig. 5646.

The signing of a waiver of notice of first meeting of stockholders upon the forming of a new corporation held not to constitute a written acknowledgment or recognition of a debt which tolled the statute. In re Walker's Estate, 184M164, 238NW58. See Dun. Dig. 5624.

Evidence held not to show that it was contemplated that payment would not be made until an indefinite time in the future so as to affect running of statute. In re Walker's Estate, 184M164, 238NW58. See Dun. Dig. 5602.

Executors could not waive the bar of the statutes of limitations as to a debt of decedent as regards computation of succession tax. In re Walker's Estate, 184 M164, 238NW58. See Dun. Dig. 35931(72).

The six-year statute of limitations applies to an individual indebtedness by one partner to the other. Aab v. S., 184M225, 238NW480. See Dun. Dig. 5648.

Time limited in proviso for commencement of action to enforce stockholder's liability under §8028 is adequate. Sweet v. R., 189M489, 250NW46. See Dun. Dig. 5656.

Time for commencement of action to enforce stockholder's liability is not governed by statutes of limitation in force when order for sequestration was made, but by applicable statute at time action is brought. Id.

In view of Firehammer v. Interstate Securities Co., 170Minn475, 212NW911, proviso added to §8028 by Laws 1931, c. 205, §2, that actions to enforce assessments against stockholders must be brought within two years after order for payment is made, does not apply to an action brought to enforce statutory liability of a stockholder in a foreign corporation. Johnson v. J., 194M617, 261NW450. See Dun. Dig. 2150.

When a right depends upon some condition or contingency, cause of action accrues and statute runs upon fulfillment of condition or happening of contingency. Bachertz v. H., 201M171, 275NW694. See Dun. Dig. 5602.

Statute of limitations begins to run against claim of officer for salary from time it is due and not from the end of his term of office. Op. Atty. Gen., Sept. 13, 1932.

Statute of limitations begins to run against claim of president of village council for salary due him as each monthly or periodic salary becomes due. Op. Atty. Gen., Sept. 23, 1932.

Statute would apply to an action by village treasurer against village for compensation. Op. Atty. Gen., Jan. 25, 1933.

1. Subdivision 1.

Specific performance may be barred by this section, but where equitable owner who seeks specific performance has been in continuous possession of the property covered by the contract from the date of the inception of rights thereunder, the statute does not bar the action. Pike Rapids Power Co. v. M., (CCA8), 99F(2d)902.

In action upon promissory note where statute of limitations is pleaded and it appears from plaintiff's case that action is barred, defendant is entitled to a directed verdict. 175M411, 221NW526.

Statute did not begin to run against action of flowage contract until ascertainment of amount of land that would be flooded by construction of dam. 176M324, 223 NW612.

Paragraph one applies to an application and proceeding to obtain judgment for compensation payments in default in a workmen's compensation matter. 176M554, 223NW926.

The approval of a settlement in a workmen's compensation matter under the Act of 1913, c. 467, is not a judgment, as regards limitations. 176M554, 223NW926.

Cause of action on note payable to third person did not accrue to beneficial owner until maturity of last renewal. 180M1, 230NW260.

Limitations did not begin to run against one entitled to certain excess on sale of land until such money was paid. Ellingson v. S., 182M510, 234NW867. See Dun. Dig. 5606.

Action on demand promissory note is barred within 6 years from date thereof. Fljozdal v. J., 188M612, 248 NW215. See Dun. Dig. 5602.

Practical construction placed by city and gas company upon franchise for period of more than 20 years was admissible, although six-year statute was applicable to cause of action. City of South St. Paul v. N., 189M26, 248 NW288. See Dun. Dig. 1820.

Evidence held to sustain finding that payments made on note before it was barred by limitations were made by a comaker at defendant's request and with his consent. Erickson v. H., 191M177, 253NW361. See Dun. Dig. 5643.

Statute of limitations upon a cause of action upon an insurance policy in a disappearance case commences to run from time when loss becomes due and payable, and not from time when loss occurs. Sherman v. M., 191M 607, 255NW113. See Dun. Dig. 5605.

Limitations did not begin to run against action for care and feeding of lambs until lambs were actually delivered to defendant, though delivery had been delayed beyond time for delivery under original contract. Stebbins v. F., 193M446, 258NW824. See Dun. Dig. 5602.

Where action was brought less than six years from time when payment of cost of electric line was to be made, action was not barred by limitations. Bjornstad v. N., 195M439, 263NW289. See Dun. Dig. 5602.

Time within which to file a claim against estate of a decedent, not barred during his lifetime, is governed by limitation of probate code, and not by the general statute of limitations. Anderson's Estate, 200M470, 274 NW621. See Dun. Dig. 3592a.

A cause of action for breach of contract accrues immediately on a breach, though actual damages resulting therefrom do not occur until afterwards. Bachertz v. H., 201M171, 275NW694. See Dun. Dig. 5602.

Where plaintiff's father in 1894 had certificate for two shares of building and loan association stock issued in name of three year old son, and books of association indicated a retirement of such stock in 1903 and child knew of existence of such stock throughout his lifetime, action on certificate, which for some reason remained in hands of father, was barred by limitations in action commenced in 1934 after death of father. Falkenhagen v. M., 202M278, 278NW32. See Dun. Dig. 5602.

Without determining whether 10 year limitations is applicable, upon a decree of divorce awarding alimony until child should reach 18 years of age and imposing lien on real estate, a motion for an order requiring execution of a certificate of satisfaction of judgment made more than 6 years after child obtained age of 18 was denied on theory that 6 year limitation was not applicable. Akerson v. A., 202M356, 278NW577. See Dun. Dig. 5648.

The statute of limitations commences to run against an action on a bond of an administrator from the time of the entry of the final decree of distribution. Burns v. N., 285NW885. See Dun. Dig. 5602.

In action by township against county to recover tax money withheld by county on apportionment of tax mon-

ey, if fraud is not proved, cause of action would be for money had and received or on implied contract, which must be commenced within six years. Normania Tp. v. Y., 286NW881. See Dun. Dig. 5648.

Certificate of deposit issued by bank outlaws six years after maturity. Op. Atty. Gen., Feb. 25, 1933.

Limitation starts running 30 days after demand on a certificate of deposit payable "30 days after demand." Op. Atty. Gen., Feb. 25, 1933.

Commercial fisherman's license bond held intended to be limited to provisions of §§9700 to 9705 and governed by such sections rather than §9191 with respect to service of notice within 90 days and suit within one year. Op. Atty. Gen., Aug. 28, 1933.

Where court order establishing judicial ditch imposed assessment upon counties benefited, and assessments were erroneously imposed on township later, and were paid, claim of township to reimbursement is one that must be presented to county board for allowance, and general rule is that statute of limitations does not begin to run against such a claim until it is presented and rejected by board. Op. Atty. Gen. (151a), Apr. 10, 1937.

Money paid to county auditor for redemption of land sold for taxes may not be recovered by holder of certificate after expiration of 6 years from date of notice. Op. Atty. Gen. (423i), Dec. 13, 1938.

2. Subdivision 2.

While liability of bank directors for making excessive loans may be barred by the six years limitation in absence of circumstances showing that the statute was tolled, evidence held to show concealment or unusual or extraordinary circumstances which would preclude objection to the taking of testimony before a special master on the ground that the cause of action was barred. Andresen v. Thompson, (DC-Minn), 56F(2d)642. See Dun. Dig. 5608.

If cause of action for double liability of stockholder accrued at time receiver was appointed, action was barred six years thereafter. Miller v. A., 183M12, 235NW622. See Dun Dig. 5656(64).

Limitations was not tolled, as against liability of stockholder accruing at appointment of receiver, by reason of continuances and negotiations, on the theory of estoppel or otherwise. Miller v. A., 183M12, 235NW622. See Dun. Dig. 5656.

Where, in case of death of employee in course of his employment, there are no dependents and employer is obliged to make payment to special compensation fund, his liability is one created by statute, and proceeding to recover same must be commenced within six years from accrual of cause of action. Schmahl v. S., 200M294, 274 NW168. See Dun. Dig. 5656.

The six-year statute of limitation applies to the matter of accounting between a city and a county arising out of errors in apportionment of taxes. Op. Atty. Gen., Apr. 27, 1931.

3. Subdivision 3.

The six-year statute of limitations applies to an action to recover damages for an injury to real property caused by a municipality in grading a street. 177M565, 225NW816.

Where the injury is continuing, the owner may recover such damages as were caused within six years prior to suit. 177M565, 225NW816.

4. Subdivision 4.

Action to recover purchase price of corporate stock not registered in accordance with Blue Sky Laws is based on fraud. Shepard v. C., (DC-Minn), 24FSupp682.

Period of limitation is the same whether fraud is actual or constructive. Id.

The statute of limitation does not begin to run against owner of stolen property while property is kept concealed. Commercial Union Ins. Co. v. 183M1, 235NW 634. See Dun. Dig. 5608(4).

Where executor embezzled trust funds and by final decree and fraudulent representations had himself appointed as trustee and distribution made to himself, limitations did not begin to run against liability on executor's bond until discovery of fraud by beneficiary. Shave v. U., 199M538, 272NW597. See Dun. Dig. 3580l.

Though a simple creditor may bring a suit to set aside a fraudulent conveyance, he is not compelled to do so and may first sue and obtain judgment, and limitations does not begin to run against him in the latter case at least until he has obtained judgment. Lind v. O., 204M 30, 282NW661. See Dun. Dig. 3922.

Where a person misrepresenting law stands in a fiduciary or other similar relation of trust and confidence it is unnecessary to allege in a complaint, predicated on the misrepresentations, facts showing that the plaintiff exercised diligence in attempting to discover the fraud even though fraudulent acts relied upon occurred at a time in excess of that fixed by applicable provisions of statute of limitations. Stark v. E., 285NW466. See Dun. Dig. 5608.

As affecting discovery of fraud in division of corporate stock among members of former partnership plaintiff director is not conclusively presumed to have had knowledge of division actually made by dominant member of a close corporation, no rights of third parties being involved. Keough v. S., 285NW809. See Dun. Dig. 5608.

Action for accounting of salary, involving fraud in keeping accounts and mutual accounts, was not governed by §9197, but was controlled by §9191(6), and cause of action did not accrue until discovery of facts constituting fraud. Id. See Dun. Dig. 5608.

When a confidential relationship exists between stockholder director employee and executor officer conducting corporation as if business were his own, failure to discover fraud with respect to salary is looked upon with more indulgence since generally a false sense of security and trust is present in mind of injured party. Id. See Dun. Dig. 5608.

Applicability of statute of limitations will not be considered on appeal, even though question was raised below, if it was not passed on by trial court, especially where facts upon which application depends are in dispute. Normania Tp. v. Y., 286NW881. See Dun. Dig. 384.

Statute of limitations does not run during time that defendant fraudulently conceals from plaintiff facts constituting cause of action, whether such cause of action be founded on fraud or other grounds. Id. See Dun. Dig. 5608.

Any concealment by positive affirmative act and not mere silence is itself fraudulent so as to prevent running. Id. See Dun. Dig. 5608.

In absence of fraudulent concealment, a party's ignorance of existence of his cause of action does not prevent running of statute of limitations. Id. See Dun. Dig. 5608.

5. Subdivision 5.

This subdivision is in the nature of a residuary clause or provision governing actions for torts not elsewhere enumerated. 177M565, 225NW816.

The six-year statute of limitations applies to an action to recover damages for an injury to real property caused by a municipality in grading a street. 177M565, 225NW816.

Where the injury is continuing the owner may recover such damages as were caused within six years prior to suit. 177M565, 225NW816.

Limitations began to run from time property owner discriminated against paid money to city for water and sewer mains. Op. Atty. Gen. (624d-11), Nov 2, 1938.

6. Subdivision 6.

Suit to cancel transfer of corporate stock on the ground of lack of consideration, fraud, duress, and undue influence is subject to the six year limitation. Winget v. R. (CCA8), 69F(2d)326. See Dun. Dig. 5652.

Though ordinary action based on violation of Blue Sky Law is barred by limitations where sale was made more than six years prior to commencement of action, the running of the statute in action based on affirmative fraud inducing such sale does not commence until the fraud is discovered. Vogel v. C., (USDC-Minn), 19FSupp 564.

Sale of stock in violation of Blue Sky Law may be basis of action for fraud, independent of statute. Stern v. N., (DC-Minn), 25FSupp948.

Cause of action to annul an express trust of real and personal property, held to have accrued and to have become barred by six-year statute. 176M274, 223NW294.

The burden is on plaintiff to plead and prove that the alleged fraud on which it relies was not discovered until within six years of the commencement of the action. Modern Life Ins. Co. of Minn. v. T., 184M36, 237NW686. See Dun. Dig. 5652.

The burden is upon the plaintiff to prove that he did not discover the facts constituting the fraud until within the six years and therefore the statute of limitations does not run. Olesen v. R., 184M624, 238NW12. See Dun. Dig. 5652.

A cause of action alleging items of deposit received in an insolvent bank, the last one on March 7, 1924, is not barred as to such last item on March 7, 1930. The first day is excluded and the last included in the computation of time. Olesen v. R., 184M624, 238NW12. See Dun. Dig. 9625(98).

An action under §10407 is not an action for relief on the ground of fraud within §9191(6), and the six-year limitation applies. Olesen v. R., 184M624, 238NW12. See Dun. Dig. 5652.

Where a party, since deceased, entered into an executory contract, which for more than six years he performed and benefits of which he enjoyed an action to rescind for fraud was barred by statute of limitations before his death, and bar applies equally to a suit by his heir. Rowell v. C., 196M210, 264NW692. See Dun. Dig. 5652.

8. Subdivision 8.

Limitations commenced to run as against principal and sureties on school treasurer's bond from time of expiration of term of office during which closing of bank occurred. Op. Atty. Gen., Sept. 30, 1933.

9192. Against sheriffs and others.

Subdivision 1.

An action against an officer because of an "act done in his official capacity and in virtue of his office" must be brought within three years, even though it involves negligence, and this applies also in actions against individuals for acts done in assisting such officer. 178M 174, 226NW405.

Subdivision 2.

A cause of action by creditors to recover of the directors of a bank because the bank received deposits when insolvent is not barred by the three-year limitations. Olesen v. R., 184M624, 239NW672. See Dun. Dig. 5657.

9193. Two years' limitations.

* * * *

3. For damages caused by a dam, other than a dam used for commercial purposes; but as against one holding under the preemption or homestead laws, such limitations shall not begin to run until a patent has been issued for the land so damaged. (As amended Apr. 1, 1935, c. 80, §1.)

* * * *

In view of §3417(14) action on accident policy was barred after two years. 174M354, 219NW286.

When a party, against whom a cause of action exists in favor of another, by fraudulent concealment prevents such other from obtaining knowledge thereof, limitations will commence to run only from time cause of action is discovered or might have been discovered by exercise of diligence. Schmucking v. M., 183M37, 235NW633. See Dun. Dig. 5608(4).

Subdivision 1.

Limitations do not commence to run against a cause for malpractice until the treatment ends. 178M82, 226 NW196.

Statute does not begin to run against malpractice action until treatment ends. 178M482, 227NW432.

Action against city for wrongful death must be commenced within one year from the occurrence of the loss or injury. 178M489, 227NW653.

Limitations do not begin to run in an action against a physician for malpractice, until the treatment ends. 181M381, 232NW708. See Dun. Dig. 5602, 7409d.

Amendment, in action against two physicians for malpractice, alleging that both defendants were employed to render medical services and that they were copartners, held not to constitute the commencement of a new action. 181M381, 232NW708. See Dun. Dig. 5622.

In an action to recover damages from a physician for malpractice, whether cause of action was barred by the statute of limitation was for the jury. 181M590, 233NW 317. See Dun. Dig. 5655(59), 7490d.

Limitations in malpractice cases begin to run when the treatment ceases. Schmit v. E., 183M354, 236NW622. See Dun. Dig. 7409d.

Evidence is conclusive that more than two years elapsed after alleged cause of action for malpractice accrued, and court did not err in ordering judgment for defendant, notwithstanding verdict. Plotnik v. L., 195M 130, 261NW867. See Dun. Dig. 5654.

When action for malpractice accrues. 15MinnLawRev 245.

Subdivision 3.

Applies to an action to recover damages for flooding caused by a dam erected by a public service corporation for the purpose of generating electric current to be distributed and sold to the public for lighting, heating and power purposes. Zamani v. O., 182M355, 234NW 457. See Dun. Dig. 5605(79), 5655.

9197. Mutual accounts.

Plaintiff's complaint negates theory of an open and running account where main purpose was one to accomplish an accounting. Meyers v. B., 196M276, 264NW 769. See Dun. Dig. 5649.

In order that account may be considered an account current, or running account, it must appear that, by agreement of parties, express or implied, all items thereof are to constitute one demand. Id.

Where transactions are separate and distinct, no open or running account can be claimed. Id. See Dun. Dig. 5950.

Action for accounting of salary, involving fraud in keeping accounts and mutual accounts, was not governed by §9197, but was controlled by §9191(6), and cause of action did not accrue until discovery of facts constituting fraud. Keough v. S., 285NW809. See Dun. Dig. 5608.

9199. When action deemed begun—Pendency.

Laws 1931, c. 240, legalizes service of summons made between Mar. 1, 1931, and Apr. 25, 1931, by one other than proper officer.

173M580, 218NW110.

To constitute "issuance of summons" the summons must be either served or delivered to the proper officer for service. 181M349, 232NW512. See Dun. Dig. 7798.

Amended complaint for compensation for care and feeding of lambs held not to state a new and different cause of action which would be barred by limitations. Stebbins v. F., 193M146, 258NW824. See Dun. Dig. 5622, 7706a, 7709a.

A garnishment action is begun by the service of summons as of date thereof and a supplemental complaint in garnishment is a continuation of garnishment so begun and not commencement of a separate action. Gilloley v. S., 203M233, 281NW3. See Dun. Dig. 5604.

Proceeding by dependent of deceased employee, who had begun proceedings and received compensation, for purpose of securing benefits, is merely a reopening or continuation of proceedings commenced by employee and is not barred by statute of limitations though right asserted by dependent is distinct from that asserted by employee and a full adjudication of latter's rights is no bar to assertion of dependent's right after employee's death. Johnson v. P., 203M347, 281NW290. See Dun. Dig. 5605.

Garnishment action is deemed begun when summons is served upon defendant or is delivered to the proper officer for service. Melin v. A., 285NW830. See Dun. Dig. 5604.

An attorney-at-law, although an officer of the court, stands in no better position in respect of authority to make service of summons than any other private citizen, and he is not a statutory "officer" for the service of summons. Id. See Dun. Dig. 5604.

9200. Effect of absence from state.

The statute requires departure from and residence out of the state as a condition to tolling the statute, and makes no exception in case of withdrawal and appointment of an agent for service of process. Stern v. N., (DC-Minn), 25FSupp948.

The formal withdrawal and departure from the state of a nonresident corporation licensed to do business here as a foreign corporation and as a dealer in securities tolled the statute, notwithstanding that defendant was amenable to process by service upon Commissioner of Securities as to its security business and upon Secretary of State as to actions arising out of business transacted under its license to do business. Id.

9201. When cause of action accrues out of state.

180M560, 231NW239.

A cause of action arising in another state where the parties all reside, is barred in Minnesota if barred in the other state by the laws of that state. Klemme v. L., 184M97, 237NW882. See Dun. Dig. 5612(16).

This section is constitutional. Klemme v. L., 184M97, 237NW882. See Dun. Dig. 5612(22).

Note and mortgage executed in Minnesota and sent to bank in Iowa for purpose of obtaining loan to pay mortgage on land in South Dakota was an Iowa contract and Minnesota statute of limitations did not apply. Andrew v. I., 218Iowa8, 254NW334. See Dun. Dig. 1534.

Statute recognizes limitation laws of any other state whenever a cause of action has come under their operation and been barred by them, following Luce v. Clarke, 49M356, 51NW1162. Pattridge v. P., 201M387, 277NW18. See Dun. Dig. 5610.

9202. Periods of disability not counted.

Where application and accident policy are made part of complaint and application shows that plaintiff was not a minor, it is immaterial that the complaint states that she is a minor. 174M354, 219NW286.

When a party, against whom a cause of action exists in favor of another, by fraudulent concealment prevents such other from obtaining knowledge thereof, limitations will commence to run only from time cause of action is discovered or might have been discovered by exercise of diligence. Schmucking v. M., 183M37, 235NW633. See Dun. Dig. 5608(4).

Effect of disability of infant upon father's cause of action for loss of services. 23MinnLawRev232.

9203. Period between death of party and granting of letters.

Time within which to file a claim against estate of a decedent, not barred during his lifetime, is governed by limitation of probate code, and not by the general statute of limitations. Anderson's Estate, 200M470, 274NW621. See Dun. Dig. 3592a.

9204. New promise must be in writing.

In re Walker's Estate, 184M164, 238NW58. See Dun. Dig. 5624; note under §9191.

1. Acknowledgment or promise.

The effect of a new promise as an agency for the continuance or revival of a cause of action operates only in field of contractual obligation and does not apply to a cause of action in tort. 174M264, 219NW155.

Payment after expiration of limitations, retention of written statement showing such payment and letters written by debtor, held to create new and binding agreement which was properly filed in probate court. Hartnagel v. A., 183M31, 235NW521. See Dun. Dig. 5624(46), 5647.

Though there was technical error in failing to specially plead a letter relied upon as tolling statute of limitations, there was no prejudice to defendant where case had been tried before, and letter was well-known to both parties, and there was a full hearing on the issue. Olson v. M., 195M626, 264NW129. See Dun. Dig. 424, 5661, 7675.

Letter of defendant held to furnish sufficient acknowledgment to toll statute of limitations. Id. See Dun. Dig. 5624.

Though letter written and signed by defendant and addressed to plaintiff sufficiently acknowledges a subsisting indebtedness upon an outlawed promissory note, no promise to pay same can be implied therefrom. Berghuis v. B., 285NW464. See Dun. Dig. 5624.

2. Part payment.

A payment of interest voluntarily made by a debtor to one who had no authority to receive it, but by whom it is immediately turned over to the creditor as the "interest money" in question, held sufficient to toll the running of the statute of limitations against the principal obligation. Kehrer v. W., 182M474, 234NW690. See Dun. Dig. 5632.

Where several sign a note, limitations run in favor of one signer, notwithstanding payments made by other. Kranz v. K., 188M374, 247NW243. See Dun. Dig. 5643.

Use of word "procured" in an instruction concerning payments on note by comaker and thus preventing running or limitation held not misleading. Erickson v. H., 191M177, 253NW361. See Dun. Dig. 9798.

Payment of interest by wife as administratrix of her husband's estate suspended statute of limitations against her personally as co-maker with her husband. Ross v. S., 193M407, 258NW582. See Dun. Dig. 5643.

VENUE

9206. General rule—Exception.

State v. District Court, 186M513, 243NW692; note under §9215.

State v. District Court, 192M541, 257NW277; note under §9215.

A party who goes to trial at Virginia in a case involving title to real estate without objection, cannot complain under Laws 1909, c. 126, that there was no written consent to trial of a case involving title to real estate. 171M475, 214NW469.

A garnishment proceeding is not a suit which is removable to the federal court under Mason's U. S. Code, Tit. 28, §§71, 72. 177M182, 225NW9.

Where a cause has been removed and it afterward appears that suit was not a proper one for removal and is remanded, any act of the state made in the interval is valid. 177M182, 225NW9.

It is the duty of the state court to examine the petition and bond for the removal of a case to the federal court and if they are legally sufficient to accept the same and proceed no further. 177M182, 225NW9.

Where there are more than two defendants, none of whom live in county wherein action is commenced, a change of venue can be had only by majority of defendants uniting in demand. State v. Mills, 187M287, 245NW431. See Dun. Dig. 10125(1).

Where there is a statutory proceeding in nature of interpleader, court in which cause is properly pending, and it alone, may exercise jurisdiction. State v. District Court, 192M602, 258NW7. See Dun. Dig. 4892.

Jurisdiction or venue. 20 MinnLawRev617.

9207. Actions relating to land.

An action against personal representative and heirs to be adjudged owner of two-thirds of lands and personalty of decedent under an oral contract with decedent entitling plaintiff to such property on decedent's death, was a transitory action. State ex rel. Cairney v. Dist. Ct. of Stevens County, 178M342, 227NW202.

Action to annul deed and mortgages and to have title declared to be in plaintiff is local and not transitory. State v. District Court of Anoka County, 184M504, 239 NW143. See Dun. Dig. 10105, 10108.

A suit for fraud in the sale of diseased cows, including damages and depreciation of real estate due to germs, is not wholly a local action, and defendants are entitled to a removal to the county of their residence. State v. Tifft, 184M567, 239NW252. See Dun. Dig. 10105, 10108.

Pleadings held to frame issues properly triable in county where land, which is the subject-matter of suits to determine adverse claims, is located, though adverse claim consisted of notice of attorney's lien, and suit was brought to cancel agreement for fees. State v. District Court, 197M239, 266NW756. See Dun. Dig. 10108.

Though prayer for relief was that one owner be decreed owner in fee and defendants be adjudged to have no interest in or right to land, action was transitory where recovery by plaintiff depended upon enforcement of a contract. State v. District Court of Hennepin County, 202M75, 277NW353. See Dun. Dig. 10105.

An action for specific performance of a contract to convey land is transitory and may be enforced wherever defendants may be found. Id. See Dun. Dig. 10105, 10108.

9208. Official misconduct, etc., where cause arose.

Where a complaint against the sheriff of Blue Earth County and against certain residents of Hennepin County does not clearly set forth a cause of action against the sheriff in connection with the service of judicial process for the performance of an official duty, the venue of the action is not to be determined by this section. 179 M583, 229NW318.

9213-1. Venue in auto vehicle cases.—That an action against the owner, driver or operator of any motor vehicle arising out of and by reason of the negligent driving, operation, management and control of said motor vehicle may be brought in the county where the action arose or in the county of the residence of the defendant or a majority of the defendants against whom such action is brought and when so brought the venue of such action shall not be changed without the written consent of the plaintiff filed with the court or unless changed by order of the court pursuant to Section 9216 of Mason's Minnesota Statutes of 1927. (Act Apr. 8, 1939, c. 148, §1.)

9213-2. Same—Repealer.—All acts or parts of acts now in effect inconsistent with the provisions of this act are hereby superseded, modified or amended to conform to and give full force and effect to the provisions of this act. (Act Apr. 8, 1939, c. 148, §2.)

9214. Other cases—Residence of defendant—Residence of corporations.

Venue of motor vehicle negligence cases. Laws 1939, c. 148.

State v. District Court, 186M513, 243NW692; note under §9215.

State v. District Court, 192M541, 257NW277; note under §9215.

A foreign corporation must be considered as residing in the county where it has an established place of business. 176M78, 222NW524.

Must be construed so as to place foreign corporations within the equal protection clause of the Fourteenth Amendment of the federal Constitution, as held in Power Mfg. Co. v. Saunders, 274US490, 47SCt678, 71LEd1165. Olson v. Osborne & Co., 30M444, 15NW876, and Eickhoff v. Fidelity & Casualty Co., 74M139, 76NW1030, being in conflict with the decision of the Supreme Court of the United States, are overruled. State ex rel. Twin City & So. Bus Co. v. D., 178M19, 225NW915.

This section is not violative of the commerce clause or the Fourteenth Amendment to the federal Constitution in permitting foreign railroad corporation to be sued in any county by a non-resident. 178M261, 226NW934.

Action to enforce contract to will property or leave it to plaintiff at death, was transitory. State ex rel. Cairney v. D., 178M342, 227NW202.

A national bank may be sued in any county where venue would properly lie if such bank were a state institution. De Cock v. O., 188M228, 246NW885. See Dun. Dig. 820.

Garnishee disclosure must be in county wherein action is pending and district court cannot appoint a referee to take the evidence in another county. Maras v. B., 192M18, 255NW83. See Dun. Dig. 3961, 3974.

Provision that all actions not enumerated in certain preceding sections shall be tried "in a county in which one or more of the defendants reside when the action was begun," does not apply to statutory proceeding provided by §9261. State v. District Court, 192M541, 258NW 7. See Dun. Dig. 10104, 10121, 4892, 4893.

Must be construed to accord same treatment to a foreign corporation in matter of change of venue as is accorded to a domestic corporation. State v. Janesville State Bank, 195M504, 263NW460. See Dun. Dig. 10111.

When a proper affidavit and demand for change of venue are seasonably served and filed, case may not be held on county where brought for purpose of traversing facts stated in affidavit. Id. See Dun. Dig. 10122.

An action for personal injuries should be tried in county in which defendant resided when action was begun, and mandamus should be granted to remand actions to such county after change of venue to another county. Newborg v. M., 200M596, 274NW875. See Dun. Dig. 10106.

Where action is transitory and defendant is a domestic corporation, district court of any county has jurisdiction. Ceska Farmarska Vzajemne Pojistujici S. v. P., 203M597, 279NW747. See Dun. Dig. 10110.

Suit to establish an oral gift of personal property in possession of plaintiff is transitory in character, and venue was properly changed to county where administrator of alleged donor resided and was appointed personal representative. State v. District Court, 203M599, 281NW256. See Dun. Dig. 10106.

Mere residence of a director who has power to solicit insurance and collect premiums therefor does not make him resident agent of a township mutual fire insurance company so as to fix residence of company in county where he resides. State v. Gislason, 203M450, 281NW769. See Dun. Dig. 10110.

Generally speaking, a corporation defendant is entitled to be sued in county where its principal place of business is located. Id.

Action against foreign carrier for cause arising outside of state as burden upon interstate commerce. 13 MinnLawRev485.

Jurisdiction or venue. 20MinnLawRev617.

CHANGE OF VENUE

9215. As of right—Demand.

See §9487-1 of Mason's Minnesota Statutes, vol. 2, as to payment of costs.

State v. District Court of Anoka County, 184M504, 239 NW143; note under §9207.

State v. Municipal Court of St. Paul, 204M413, 283NW 560; note under §9219.

1. When applicable.

178M19, 225NW915; 229NW318.

Applicable to action to enforce contract to leave property, real and personal, to plaintiff at death. State ex rel. Cairney v. D., 178M342, 227NW202.

In order to effect a change of venue, the deposit fee prescribed by §6991 must be paid within the prescribed time. 178M617, 225NW926.

Venue cannot be changed in action against sureties upon public contractor's bonds commenced in the county

wherein the construction work is located. 179M94, 228 NW442.

3. Several defendants.

Where there are several defendants residing in different counties, it is necessary for a majority to join in demand for change of venue to residence county of one of them before time for answering expires as to any one of them by joining with codefendants before or after service of summons. State v. District Court, 187M270, 245NW379. See Dun. Dig. 10125(1).

Where there are more than two defendants, none of whom live in county wherein action is commenced, a change of venue can be had only by majority of defendants uniting in demand. State v. Mills, 187M287, 245 NW431. See Dun. Dig. 10125(1).

In action against railroad and an individual, wherein individual had venue changed to county of his residence, and railroad, which did not operate in such individual defendant's county, offered to deposit in court amount claimed by plaintiff and individual, thus becoming only a nominal party, court did not abuse its discretion in denying change of place of trial to county of plaintiff's residence for convenience of witnesses. Fauler v. C., 191M637, 253NW884. See Dun. Dig. 10127.

One sued in county of his residence may join in demand for change of place of trial. State v. District Court, 192M541, 257NW277. See Dun. Dig. 10125.

Inclusion in complaint of a request for appointment of a receiver for one of three defendants does not affect right of other defendants to have venue changed. Id. See Dun. Dig. 10125.

Complaint held to allege action against members of firm as individuals and not against firm in its common business name under statute. State v. District Court of St. Louis County, 200M207, 273NW701. See Dun. Dig. 7320, 7407a.

4. When demand must be made.

Where twentieth day after action commenced falls on Sunday or holiday, demand for change of venue may be made on following day. State v. Mills, 187M287, 245 NW431. See Dun. Dig. 9625, 10123.

On appeal from order bringing in an additional party on application of counterclaiming defendant, supreme court will not consider arguments that order would deprive party brought in of right to a change of venue to its place of residence, since matter of venue is in first instance for consideration for trial court and can be properly presented by motion in that court. Lambertson v. W., 200M204, 273NW634. See Dun. Dig. 396.

Defendant in bastardy is entitled to change of venue, but mother may file complaint in any justice or municipal court in the state, and district court of county to which justice or municipal court binds defendant over has jurisdiction to determine paternity, unless defendant moves for change of venue before trial. State v. Rudolph, 203M101, 280NW1. See Dun. Dig. 833a, 10116, 10117, 10118.

Remedy of one entitled to change of venue is mandamus from supreme court to trial court before trial is had, and the matter cannot be complained of on appeal from judgment following trial. Weiland v. N., 203M600, 281NW 364. See Dun. Dig. 10116.

6. A matter of right—No order of court.

Whether the place of trial should be changed is largely discretionary with trial court. State v. District Court, 186M513, 243NW692. See Dun. Dig. 10126.

Filing of proof of proper demand by majority of defendants ipso facto removes cause to county so demanded. State v. District Court, 192M541, 257NW277. See Dun. Dig. 10124a, 10125.

Where a defendant corporation in a transitory action has within time served and filed a demand for change of venue supported by affidavit of residence in county to which change is demanded, transfer is ipso facto accomplished, and plaintiff's motion to remand can be sustained only upon a traverse of defendant's affidavit of residence, unless demand of change of venue is upon face of record a nullity. State v. District Court of Hennepin County, 199M607, 273NW88. See Dun. Dig. 10122.

Where a defendant corporation in transitory action has served and filed a demand for change of venue supported by affidavit of residence in county to which change is demanded, transfer is ipso facto accomplished, and if plaintiff desires to traverse affidavit as to defendant's residence, it must be done by a motion to remand made in county to which venue has been changed. Pavek v. C., 202M304, 278NW367. See Dun. Dig. 10122.

7. Waiver.

A foreign railroad corporation sued by a non-resident submitted to the jurisdiction of the court where it did not move for a change of venue, though it did move to set aside summons. 178M261, 226NW934.

8. Corporations.

A foreign corporation must be considered as residing in the county where it has an established place of business. 176M78, 222NW524.

9. Review.

Denial of a motion to change place of trial of an action for divorce, brought in proper county, upon ground that convenience of witnesses and ends of justice will be promoted, may be reviewed on mandamus. State v. District Court, 186M513, 243NW692. See Dun. Dig. 5766.

The right of removal depends upon the case disclosed by the pleadings. Maruska v. E., (USDC-Minn), 21FSupp 841.

Where case disclosed by pleadings does not show separable controversy it is not removable though cause of action alleged against resident defendant be defective. Id.

Motion to remand will be disposed of upon complaint alone regardless of court's opinion as to the merits. Id.

Removal of case embracing two causes of action only one of which was removable brings entire case into federal court. Id.

9216. By order of court—Grounds.

½. In general.

State v. Municipal Court of St. Paul, 204M413, 283NW 560; note under §9219.

Where, on motion for change of venue, a fact issue is raised as to the residence of a defendant, determination of that issue by the District Court is final. 181M 517, 233NW9. See Dun. Dig. 410.

2. Subd. 2.

On appeal from order bringing in an additional party on application of counterclaiming defendant, supreme court will not consider arguments that order would deprive party brought in of right to a change of venue to its place of residence, since matter of venue is in first instance for consideration for trial court and can be properly presented by motion in that court. Lambertson v. W., 200M204, 273NW634. See Dun. Dig. 396.

4. Subdivision 4.

178M19, 225NW915.

On motion for change of venue on the grounds of convenience of witnesses, the district court's determination of the fact issue is final. State ex rel. Mpls. N. & S. Ry. v. Dist. Ct., Scott Co., 183M100, 235NW629. See Dun. Dig. 10127(10), 410(5).

Court held to have properly remanded case to county other than that of defendant's residence for convenience of witnesses. State v. District Court, 185M501, 241NW681. See Dun. Dig. 10127.

That manager of corporation was resident out of state held not to render it abuse of discretion to deny motion *for change of venue for delay in moving. De Jardins v.* E., 189M356, 249NW576. See Dun. Dig. 10127.

Trial court has a wide discretion regarding changing place of trial for convenience of witnesses. Fauler v. C., 191M637, 253NW884. See Dun. Dig. 10127.

Where mandamus is used to review an order of trial court on motion to change place of trial to promote convenience of witnesses and ends of justice, only matters presented to trial court can be considered. State v. District Court of Brown County, 194M595, 261NW701. See Dun. Dig. 5764a, 10126, 10127, 10129.

As to whether a change of place of trial should be granted or denied is a matter resting very largely in discretion of trial court and its action will not be reversed on appeal, except for clear abuse of discretion. Id. See Dun. Dig. 10127.

Court held not to have abused its discretion in denying change of venue for convenience of witnesses. State v. District Court, 195M169, 264NW128. See Dun. Dig. 10127.

Change of venue for convenience of witnesses and in interest of justice is largely within discretion of trial court, but court abused its discretion in refusing change of venue where all of witnesses to an accident resided in county where accident occurred and where trial of case was sought, and in this connection consideration should be given fact that jury might be called upon to view place of collision. State v. District Court, 200M632, 274NW623. See Dun. Dig. 10127.

It was an abuse of discretion to refuse application for change of venue for convenience of witnesses and in interest of justice to county where cause of action arose and nearly all of witnesses resided. State v. District Court of Hennepin County, 200M633, 274NW673. See Dun. Dig. 10127.

Court did not abuse its discretion in denying motion for change of venue for convenience of witnesses where motion was not prepared until more than a month after serving of answer and was not served until seven weeks after answer. State v. District Court, 202M519, 279NW 269. See Dun. Dig. 10127.

While trial court is allowed a wide discretion in changing place of trial on ground of convenience of witnesses, there was an erroneous failure to exercise discretion by refusing a change of venue for the convenience of 16 witnesses where there was possibility that a view of place of accident might be asked for. Badger v. K., 203M602, 281NW878. See Dun. Dig. 10127.

Although trial court has wide discretion in decision of motions for change of venue, it abused that discretion in denying plaintiffs change where eleven witnesses for plaintiff resided comparatively near county seat of county wherein accident occurred whereas defendants had only two or a few more witnesses to travel same distance. State v. District Court, 286NW355. See Dun. Dig. 10127.

9218. Interest or bias of judge.

Plaintiff had a fair and impartial jury trial presided over, with consent of both parties, by an unprejudiced,

impartial and disinterested judge. Friedman v. G., 182 M396, 234NW596. See Dun. Dig. 4962.

Affidavit as to interest and bias held insufficient. City of Duluth v. L., 199M470, 272NW389. See Dun. Dig. 4962.

In so far as Mason's Minn. St. 1927, §§158 or 9218, assume to empower Governor to designate a judge of another district to discharge duties of a district judge, it is in contravention of §1 of article 3 and beyond authority of §5 of article 6 of constitution. State v. Day, 200M 77, 273NW684. See Dun. Dig. 4961.

Statute does not disqualify a judge for other than a pecuniary interest in event of action. Id. See Dun. Dig. 4962.

Section 158, authorizing governor to designate a substitute judge, is unconstitutional, at least in its application to cases of alleged bias on part of sitting judge. Op. Atty. Gen. (213B), Jan. 30, 1939.

9219. Actions in municipal court.

Change of venue from municipal court of St. Paul under §9215 should conform to practice of district court, and a motion and order of court is unnecessary, notwithstanding Laws 1889, c. 161. State v. Municipal Court of St. Paul, 204M413, 283NW560. See Dun. Dig. 10121.

Where application was seasonably made under §§9215 and 9219, for change of venue from municipal court of St. Paul to district court of Norman County, on ground that defendant's residence was in that county, case must be transferred to that county as a matter of defendant's right, and any ground for change of venue on grounds stated in §9216 must be presented to district court of Norman County. Id. See Dun. Dig. 10121.

9221. Affidavit of prejudice.—Any party or his attorney to a cause pending in a district court on or before 10 days prior to the first day of a general or five days prior to a special term therefor, in any district having two or more judges within one day after it is ascertained which judge is to preside at the trial or hearing thereof or at the hearing of any motion, order to show cause or argument on demurrer, may make and file with the clerk of the court in which the action is pending and serve on the opposite party an affidavit stating that, on account of prejudice or bias on the part of such judge, he has good reason to believe, and does believe that he cannot have a fair trial or hearing thereof, and thereupon such judge shall forthwith without any further act or proof secure some other judge of the same or another district to preside at the trial of such cause or hearing of motion, demurrer or order to show cause, and shall continue the cause on the calendar, until such judge can be present. In criminal actions such affidavit shall be made and filed with such clerk by the defendant or his attorney not less than two days before the expiration of the time allowed him by law to prepare for trial, and in any of such cases such presiding judge shall be incapacitated to try such cause: Provided, that in criminal cases such judge, for the purpose of securing a speedy trial may, in his discretion, change the place of trial to another county. R. L. '05, §4101; G. S. '13, §7727; '19, c. 92, §1; '27, c. 283; Apr. 18, 1931, c. 200; Apr. 17, 1937, c. 237, §1.)

Fact that a son of the judge appeared for the respondents furnished no legal ground for submitting issues to a jury, nor for a requested change of venue or calling for another judge, there being only one judge in the district. 177M169, 225NW109.

An affidavit of prejudice filed against the trial judge is ineffectual if not filed within the time required by statute. State v. Irish, 183M49, 235NW625. See Dun. Dig. 4962(73).

If seasonably filed, the language of the statute expressed in the affidavit is sufficient. State v. Irish, 183M 49, 235NW625. See Dun. Dig. 4962(73).

Motion for new trial must be heard before judge who tried action unless he is out of office or disabled. State v. Qvale, 187M546, 246NW30. See Dun. Dig. 7085.

Judge who has tried a case cannot be ousted, by an affidavit of prejudice, of his jurisdiction to consider a motion for a new trial. State v. District Court, 195M 169, 263NW908. See Dun. Dig. 4962.

Record sustains trial court in refusing to act upon an affidavit of prejudice on ground that it was not seasonably presented. State v. Olson, 195M493, 263NW437. See Dun. Dig. 4962.

Judge against whom an affidavit of prejudice is filed must determine whether affidavit was filed in time, and determination is sustained that affidavit was not filed within one day after petitioner ascertained that respondent was to preside at trial of case. State v. Enersen, 197M391, 267NW218. See Dun. Dig. 4962.

This section does not appear to cover judges of municipal courts. City of Duluth v. L., 199M470, 272NW389. See Dun. Dig. 4962.

Where trial was set for June 18, and continued to June 19, affidavit of prejudice filed June 19 was too late. Id.

Although one party has disqualified a judge by an affidavit of prejudice, other party may file affidavit of prejudice against substituted judge. State v. Schultz, 200M363, 274NW401. See Dun. Dig. 4962.

By filing of supplemental pleadings subsequent to filing of affidavit of prejudice relator did not waive his right to rely upon his claim of disqualification of substituted judge. Id.

Prohibition is properly used to restrain a judge from hearing a matter in which he is disqualified to sit by reason of filing of affidavit of prejudice. Id.

Whether or not district court practice applies to municipal court of Minneapolis on filing of affidavit of prejudice against judge, judicial propriety dictates that upon filing of such an affidavit or without it, in case of a criminal contempt, another judge should be called in to try case. State v. Laughlin, 204M291, 283NW395. See Dun. Dig. 4962.

Section 158, authorizing governor to designate a substitute judge, is unconstitutional, at least in its application to cases of alleged bias on part of sitting judge. Op. Atty. Gen. (213B), Jan. 30, 1939.

9222-1. Additional costs on change of venue—Taxation.

See Section 9487-1 in the main edition.

SUMMONS—APPEARANCE—NOTICES—ETC.

9224. Actions, how begun.

Prohibiting the printing of documents simulating legal process. Laws 1939, c. 69.

Jurisdiction is acquired by service of summons because legislature has so provided, but legislature could undoubtedly provide that court shall acquire jurisdiction by service of complaint without a summons, or in any other manner by which defendant may be notified that proceedings have been instituted against him. Schultz v. O., 202M234, 277NW918. See Dun. Dig. 7802.

Process of state courts is effective only within the state, and attempted service outside state is of no effect and void. Garber v. B., 285NW723. See Dun. Dig. 7812a.

9225. Requisite of summons—Notice.

1. Not a process.

A summons is not a process within meaning of Const. Art. 6, §14, but a notice to a defendant that an action has been instituted against him by plaintiff to obtain a judgment if he fails to defend. Griffin v. F., 203M97, 280NW7. See Dun. Dig. 7802.

2. Directed to the defendant.

Where inadvertently name of a defendant was omitted from title of action in summons, but appeared in title of action in complaint attached to summons, complaint stating a cause of action against defendant by name, court properly amended summons to conform to complaint on plaintiff's motion made and heard simultaneously with defendant's special appearance to vacate service of summons. Griffin v. F., 203M97, 280NW7. See Dun. Dig. 7805.

4. Signature.

Summons may be subscribed by printed signature of plaintiff or his attorney, and a plaintiff who is not an attorney may sign a summons in his own behalf. Schultz v. O., 202M237, 277NW918. See Dun. Dig. 7804.

5. Irregularities.

Summons directed to United States marshal, rather than defendant, and containing no notice of consequence following failure to answer, held properly quashed. U. S. v. V., (USCCA8), 78F(2d)121.

Default judgment was not void because caption of complaint named wrong court, where summons to which it was attached named proper court. 175M597, 222NW 281.

Statute is to be liberally construed as affecting requisites of a summons. Schultz v. O., 202M237, 277NW918. See Dun. Dig. 7803(29).

Judgment obtained by service of summons upon incompetent alone was voidable and not void, statute being directory and not mandatory. Id. See Dun. Dig. 4531.

Where personal service is made upon insane person, mere failure to appoint guardian ad litem does not render judgment void. Id.

9228. Service of summons—On natural persons.

½. In general.

Service of summons upon a nonresident who comes into state to testify is not void but voidable only and privilege to claim exemption is waived unless promptly asserted. 173M552, 218NW101.

That the summons and complaint, when left at the home of defendant, were enclosed and sealed in an envelope addressed to the defendant, held not to invalidate the service. 181M379, 232NW632. See Dun. Dig. 7810(58).

Jurisdiction over persons by substituted or constructive service. 20MinnLawRev649.

1. Personal service.

Notice of application for extension of period of redemption from mortgage foreclosure is not original process, and may be served as other notices are served in a pending action or proceedings, and may be served by mail on attorney, where both attorney and mortgagee are nonresidents and attorney's residence is known. Rivkin v. N., 195M635, 263NW920. See Dun. Dig. 8731.

2. House of usual abode.

A default judgment rendered in Minnesota based on service of summons by leaving copy of same at usual abode of defendant, held not entitled to recognition in New York unless it is proved that the summons was actually served on defendant. Bissell v. Engle, (CityCt NY), 3NYS(2d)747.

9231. On private corporations.

171M87, 214NW12; notes under §§7493, 9233.

175M138, 220NW423.

Subdivision 3.

Attaching ship of foreign corporation in interstate waters of Duluth-Superior Harbor and serving summons upon master, defendant not maintaining any office in Minnesota, was not unreasonable burden on interstate commerce. International Milling Co. v. C., 292US511, 54 SCR797. See Dun. Dig. 7814.

Service on the Canadian Railroad Company by delivering the summons to an agent in charge of an office maintained in the state for the sole purpose of soliciting business, held not to confer jurisdiction. Maxfield v. C. (CCA8), 70F(2d)982. Cert. den., 293US610, 55SCR140; 293 US632, 55SCR212. See Dun. Dig. 2185.

In order for service of process on a foreign corporation to be valid in the absence of consent, the corporation must be doing business in the state in which service is made. Flour City Ornamental Iron Co. v. G., (USDC-Minn), 21FSupp112.

A corporation, merely by shipping its products to a distributor in another state, was not "doing business within such state," and consequently could not be brought within jurisdiction of the courts of that state by service of process upon its president when he was temporarily in the state to aid the distributor in the conduct of its business. Truck Parts v. B., (DC-Minn), 25FSupp602.

Efforts made on behalf of, and as an aid to distributors and dealers, do not constitute that "doing of business" within the state which subjects the corporation to local jurisdiction for purpose of service of process upon it, nor do solicitations of business within the state where agents have no authority beyond solicitation. Id.

Officers of a corporation temporarily with the state, in an attempt to compromise claims against the corporation, do not subject it to local jurisdiction, nor can corporate presence within a state be inferred from the fact that an officer or agent of a foreign corporation is within the state, or resides there. Id.

Where a foreign corporation is doing business in the state to such an extent as to warrant the inference that it was present here, service of process on a proper officer of the corporation present in the state and representing and acting for it in its business, held sufficient. 172M585, 216NW331.

A beneficiary association with its only offices in another state which does nothing locally but pay resident members their claims for accrued benefits, payment being made from without the state, held not to be "doing business" in the state. 175M284, 221NW21.

Service of summons upon the insurance commissioner is not limited to actions which arise out of business transacted in this state or with residents thereof. 176M 143, 222NW901.

Service upon a foreign railroad company doing business in the state must be had in the manner provided by statute. 176M415, 223NW674.

On motion to set aside service of summons, burden of showing that defendant was not present in Minnesota so as to be subject to service of process was upon the defendant. Massee v. C., 184M196, 238NW327. See Dun. Dig. 7814.

One purchasing hay for a foreign corporation for years held an agent upon whom service of summons could be had. Massee v. C., 184M196, 238NW327. See Dun. Dig. 7814(98).

Foreign corporation in purchasing hay held to be doing business in the state. Massee v. C., 184M196, 238NW 327. See Dun. Dig. 7814(84).

Service of a garnishee summons on a person, described only as an auditor and agent of garnishee, where garnishee is named as Harris, Upham & Co., without any showing whether said garnishee is a corporation or partnership, or, if a corporation, whether foreign or domestic, is defective. Maras v. B., 192M18, 255NW83. See Dun. Dig. 3971, 7814.

Fact that a soliciting agent or agency, doing a general solicitation business in this state for a number of foreign railways and steamship companies, was employed here to solicit passenger traffic on defendant's ocean steamships, and incidentally to sell, but not to issue, tickets for ocean voyages on defendant's boats, was not a sufficient doing of business by defendant in this state to subject it to the jurisdiction of the state court. Gloeser v. D., 192M376, 256NW666. See Dun. Dig. 7814.

To obtain jurisdiction over a foreign corporation operating railways or steamship lines outside of this state, but none in this state, where no property of corporation is attached or seized or present in this state, corporation must be doing business here of such a nature and character as to warrant inference that it has subjected itself to local jurisdiction and is by its duly authorized officer or agent here present. Id. See Dun. Dig. 7814.

Where plaintiff's cause of action arises out of dealings with nonresident defendants and their associates as brokers in stocks, bonds, or securities licensed under §3996-9, and such nonresident defendants have appointed commissioner of securities as their attorney irrevocable upon whom service of process may be made, pursuant to §3996-11, service of summons as therein prescribed conferred jurisdiction of persons of such nonresident defendants. Kaiser v. B., 197M28, 265NW826. See Dun. Dig. 7814.

Where service was made upon defendant, a foreign railroad corporation, by handing a copy of the summons to defendant's freight agent in a county other than the county in which the action was brought, service was null and of no effect, and no jurisdiction was acquired thereby, Section 9233 being a limitation on Section 9231-(3). Aaltio v. C., 197M461, 267NW384. See Dun. Dig. 7814.

Agent of a foreign corporation authorized to solicit orders and to compromise claims held to be proper agent for service upon corporation. Dahl v. C., 202M544, 279NW 561. See Dun. Dig. 7814.

Foreign corporation, engaged in manufacture and sale of butter cartons, regularly and systematically soliciting orders for transmission to its principal place of business located outside state for acceptance or rejection, and whose agent here habitually adjusted and compromised disputes with customers in this state, and whose agents represented it and displayed its wares at conventions in state, held to be doing business in this state, so as to be amenable to process here. Id. See Dun. Dig. 7814.

Whether foreign corporation is doing business in state so as to be subject to state process, and whether agent served with process has representative capacity are federal questions and decisions of U. S. supreme court are controlling. Id. See Dun. Dig. 7814.

Parent foreign corporation of a subsidiary foreign corporation is not doing business in the state by reason of fact that subsidiary is doing business in state, where subsidiary maintains corporate separation from and does not stand in relation of agent to parent. Garber v. B., 285NW723. See Dun. Dig. 7814.

If there is a presumption after six years' absence from state of continuance of agency between a parent and subsidiary corporation, standing alone it does not establish jurisdiction of absent parent, since both doing business and presence of an authorized agent in state at time of service of process is necessary. Id. See Dun. Dig. 7814.

That a parent corporation prepared and circulated consolidated balance and earnings statements, showing separate identity, stock ownership and earnings of two corporations does not show that subsidiary was agent or that parent was conducting subsidiary's business. Id. See Dun. Dig. 7814.

A listing in a telephone directory does not constitute doing business. Id. See Dun. Dig. 7814.

Where a foreign corporation does business in state without being licensed or having appointed an official agent for service of process as required by statute, and service of process is not attempted on state official required to be appointed such agent, no question is presented of estoppel to deny such appointment or that doing business in state under circumstances should be deemed such an appointment. Id. See Dun. Dig. 7814.

Absent consent, state courts may exercise jurisdiction over a foreign corporation if it is doing business in state at time service of summons, but not after it has ceased doing business and withdrawn from state. Id. See Dun. Dig. 7814.

Jurisdiction depends upon both power to act and action, and presence of an agent in the state without the doing of business is not sufficient. Id. See Dun. Dig. 7814.

Service not having been attempted on commissioner of securities or secretary of state as agent for service of process, question of their agency to accept service of process is not in the case so as to affect validity of attempted service upon an alleged agent, doing business in state. Id. See Dun. Dig. 7814.

Jurisdiction must exist as of time summons is served, and that there may have been jurisdiction at some prior time will not suffice. Id. See Dun. Dig. 7814.

Constitutional problems arising from service of process on foreign corporations. 19MinnLawRev375.

Service of process upon foreign corporation—doing of business within state. 19MinnLawRev556.

Subdivision 4.

Secretary of State, to the extent of the agency granted him by power of attorney filed under §7494, is the agent of the corporation appointing him to receive service of process. Flour City Ornamental Iron Co. v. G., (USDC-Minn), 21FSupp112.

Service of summons on a foreign corporation, held valid and effective by service on Commissioner of Securities; it appearing that cause of action was based upon alleged violation of Blue Sky Law in sale of unregistered stock to plaintiff in this state while defendant was therein conducting its business as a licensed stock broker and had appointed commissioner its attorney to receive serv-

ice. Streissguth v. C., 198M17, 268NW638. See Dun. Dig. 7814.

9233. On railway companies.

176M415, 223NW674; note under §9231.

The established policy in this state permits the suing of transitory actions, against foreign corporations, regardless of where the cause of action arose, if they may be reached by process. 171M87, 214NW12.

Decision in Erving v. Chicago & N. W. Ry. Co., 171M 87, 214NW12, followed. 175M96, 220NW429.

This section does not offend the federal Constitution. 177M1, 223NW291.

Service of summons upon a ticket and freight agent at a station of a foreign railroad company is a valid service in an action to recover under the Federal Employers' Liability Act. 177M1, 223NW291.

Rights of foreign railroad sued by non-resident for injuries suffered outside state. 178M261, 226NW934.

Where service was made upon defendant, a foreign railroad corporation, by handing a copy of the summons to defendant's freight agent in a county other than the county in which the action was brought, service was null and of no effect, and no jurisdiction was acquired thereby, Section 9233 being a limitation on Section 9231(3). Aaltio v. C., 197M461, 267NW384. See Dun. Dig. 7814.

9234. Service by publication—Personal service.

See §3230.

174M436, 217NW483.

½. In general.

Affidavit for publication of summons must be filed and publication of summons be commenced within a reasonable time after the sheriff's return of not found is made. A delay of over seven months is unreasonable. 173M580, 218NW110.

Action to cancel an assignment of a note and mortgage is one in personam and service cannot be had on non-resident outside state. 178M379, 227NW429.

9235. In what cases.

See §3230.

That defendant may be at the time present in the state and a resident thereof does not prevent the court from obtaining jurisdiction by publication. 173M580, 218 NW110.

Subdivision 3.

Bearer bonds situated in state may be subjected to jurisdiction of court in proceeding in rem or quasi in rem. First Trust Co. v. M., 187M468, 246NW1. See Dun. Dig. 2346.

State courts have power to proceed in rem or quasi in rem against chattels within state. First Trust Co. v. M., 187M468, 246NW1. See Dun. Dig. 2346.

Subdivision 6.

Affidavit must state that real estate affected is within the state or contain a description thereof showing that it is located within the state and a mere reference to the complaint is not sufficient. 173M580, 218NW110.

9236. When defendant may defend—Restitution.

Nitkey v. S., (USCCA8), 87F(2d)916. Cert. den., 301US 697, 57SCR925. Reh. den., 58SCR5.

173M580, 218NW110.

1. Matter of right.

In proceeding to set aside judgment in equity case cancelling land contract so as to permit defendant to answer and defend, defendant, not alleging any failure of plaintiff to properly apply any payments that had been made, could not raise any question on those provisions of land contract. Madsen v. P., 194M418, 260NW510. See Dun. Dig. 5005.

In proceeding to set aside judgment in equity case cancelling land contract, it was incumbent upon defendant to offer to make payment admittedly in default. Id. See Dun. Dig. 5007a.

A defendant is entitled as a matter of right to answer and defend in an action where summons is served by publication if sufficient cause is shown. Id. See Dun. Dig. 5003.

2. Relief granted liberally.

Fact that notice of motion, duly served, was not filed with clerk of court until after hearing of motion, both parties, by their counsel, being present and taking part in hearing without objection, did not affect jurisdiction of court to hear motion. Wenell v. S., 194M368, 260NW 503. See Dun. Dig. 6497.

Courts should be liberal in relieving from default and allowing defendant to answer. Wilhelm v. W., 201M462, 276NW804. See Dun. Dig. 5013.

Strict rule of res adjudicata does not apply to motions in a pending action, and district court has jurisdiction and may in its discretion allow renewal of a motion to vacate a judgment and relieve from default, and irregularity of failing to procure leave to make it is cured by overruling of objection to hearing of second motion. Id. See Dun. Dig. 5031, 5116a.

4. Diligence in making application.

Section 9405 and not this section applies where more than statutory period of time has run. Jordan's Estate, 199M53, 271NW104. See Dun. Dig. 5006.

6. Action for divorce.

A final judgment in an action for divorce cannot be vacated on ground that defendant failed to answer through mistake or excusable neglect. Wilhelm v. W., 201M462, 276NW804. See Dun. Dig. 2799b, 5025, 5027.

9237. Proof of service.

1. Affidavit of personal service.

An instruction that an affidavit of service, which is part of judgment roll, is entitled to same weight as if party making it had testified personally to fact of service, is not objectionable. Siewert v. O., 202M314, 278NW162. See Dun. Dig. 7816.

3. Return of officer.

Domestic judgment of a court of general jurisdiction may not be attacked collaterally by parties or their privies for want of jurisdiction not affirmatively appearing on face of record, and extrinsic evidence is not permissible to show want of jurisdiction or that proof of service is false. Siewert v. O., 202M314, 278NW162. See Dun. Dig. 5141.

9238. Jurisdiction, when acquired—Appearance.

Section 2684-8 authorizing a substituted service of process upon non-residents using our highways, is constitutional. 177M90, 224NW694.

2. Effect of a general appearance.

District court had jurisdiction of action on note by service of process on defendant, or by appearance and answer of defendant. Anton, (USDC-Minn), 11FSupp345, 29AMB(NS)77.

Service of summons upon a non-resident who comes into state to testify is not void but voidable only and privilege to claim exemption is waived unless promptly asserted. 173M552, 218NW101.

If party for whom a receiver is appointed without notice appears generally and is heard on the merits he cannot complain of earlier order because he was not served with notice. 175M138, 220NW423.

General appearance by corporation precludes objection to jurisdiction. 180M492, 231NW209.

General appearance by motion to set aside writ of attachment does not cure improper issuance of the writ. 181M349, 232NW512. See Dun. Dig. 476.

When, on motion to substitute, personal representative of a deceased defendant appears and raises no objection on ground that jurisdiction had not been obtained of deceased, but answers and tries case on merits, it is too late to move to vacate judgment rendered after trial, especially when it is disclosed that representative knew all facts which might defeat substitution at time of hearing of motion therefor. O'Keefe v. S., 201M51, 275 NW370. See Dun. Dig. 476.

6. What constitutes general appearance.

Motion in district court on appeal from municipal court for judgment against garnishee was a general appearance and that notice of appeal was ineffective was immaterial. 178M366, 227NW200.

If a party so far appears as to call into action powers of court for any purpose, except to decide its own jurisdiction, it is a full appearance. State v. District Court, 192M602, 258NW7. See Dun. Dig. 479.

One seeking a change of venue, entering appearance generally, cannot question jurisdiction. Id. See Dun. Dig. 479, 10104.

Appellants, by serving their answer to complaint and thereafter moving court to strike or amend complaint, made a general appearance, which was not withdrawn or annulled by stipulation subsequently entered. Kaiser v. B., 197M28, 265NW826. See Dun. Dig. 476, 479.

Where defendant appeals from a judgment rendered by a justice court to a superior court for trial de novo, such appeal constitutes a general appearance in action and amounts to a waiver of any previous want of jurisdiction. Minneapolis Sav. & Loan Ass'n v. K., 198M420, 270NW148. See Dun. Dig. 476, 479.

In determining whether an appearance is general or special, court will look to purposes for which it was made rather than to what party labeled it. Van Sloun v. D., 199M434, 272NW261. See Dun. Dig. 479, 481.

Evidence sustains finding that owner of land, through which town board laid a public road, waived service of notice by appearing specially and objecting to jurisdiction of board, but participating in proceedings and presenting manner in which road would be a detriment and damage to his farm. Peterson v. B., 199M455, 272NW391. See Dun. Dig. 482, 8954.

10. Appearance held special.

A special appearance is not made general by a consent to an adjournment. 177M182, 225NW9.

12. Waiver of special appearance.

A party appearing specially and objecting to jurisdiction of court over his person does not waive objection by answering to merits and proceeding with trial, even though objection is overruled. Sellars v. S., 196M143, 264NW425. See Dun. Dig. 482.

9239. Appearance and its effect.

Clerk may enter judgment in action on note without notice to defendant. Anton, (USDC-Minn), 11FSupp345, 29AMB(NS)77.

The parties to a judgment are entitled to notice before an amendment as to a matter of substance can be made. 181M329, 232NW322. See Dun. Dig. 5093.

Defendant against whom a default judgment is entered is out of court, and he is not entitled to notice of further proceedings in the case. Anderson v. G., 183M 336, 236NW483. See Dun. Dig. 486(74).

Appearance to question jurisdiction. Brady v. B. 185 M440, 241NW393.

Service of a complaint in intervention upon attorney for plaintiff in a pending action, if said complaint is otherwise sufficient, confers jurisdiction upon district court to hear case. Scott v. V., 193M465, 258NW817. See Dun. Dig. 4898.

An order of court commissioner and writ of habeas corpus having been issued, it was error for district court judge to vacate one and quash other upon order to show cause directed to and served upon court commissioner alone, without notice to petitioner for writ or his attorney, real party in interest. State v. Hemenway, 194 M124, 259NW687. See Dun. Dig. 4136.

Upon ex parte application for a declaratory judgment for unpaid alimony and for execution, trial court may, in its discretion, require notice of application to be given to other party to proceedings, even though statutes do not require giving of notice in such cases. Kumlin v. K., 200M26, 273NW253. See Dun. Dig. 2811.

Where garnishee voluntarily appears and discloses he thereby waives defects in garnishee affidavit and summons, and irregularities taking place prior thereto are not jurisdictional, but it does not follow that thereby main defendant is prevented from taking advantage of such defects if he acts promptly. Melin v. A., 285NW 830. See Dun. Dig. 3961, (74, 75).

9240. Service of notices, etc.

Scott v. V., 193M465, 258NW817; note under §9239.

Certiorari in compensation proceeding to review decision of the Industrial Commission must be served on the adverse party, but may be served on his attorney who has appeared in the proceeding. 171M519, 214NW 795.

Service of motion for extension of time for redemption from mortgage foreclosure sale upon attorneys who made such foreclosure by advertisement is good and effective service upon mortgagee who bid in premises at sale. Service on mortgagee by mail is not authorized. Swanson v. C., 192M81, 255NW812. See Dun. Dig. 6392, 6400.

Notice of application for extension of period of redemption from mortgage foreclosure is not original process, and may be served as other notices are served in a pending action or proceedings, and may be served by mail on attorney, where both attorney and mortgagee are nonresidents and attorney's residence is known. Rivkin v. N., 195M635, 263NW920. See Dun. Dig. 8731.

Where attorney for mortgagee appoints a resident attorney upon whom mortgagor is directed to serve papers in proceedings, nothing to contrary being shown, presumption is that he had authority to make such appointment. Id.

A notice of appeal from probate court to district court is not "process," and service on election day is not prohibited. Dahmen's Estate, 200M55, 273NW364. See Dun. Dig. 7797.

9242. By mail—When and how made.

Swanson v. C., 192M81, 255NW812; note under §9240.

Service of notice is complete when the notice is properly mailed. 175M112, 220NW435.

"Place of residence" means the municipality wherein the addressee resides and not the house that he occupies as a home. 175M112, 220NW435.

Section 2684-8 authorizing a substituted service of process upon nonresidents using our highways, is constitutional. 177M90, 224NW694.

This section does not apply to proceedings in the probate court. 180M570, 231NW218.

Notice of appeal from probate court actually received through the mail was equivalent of personal service. Devenney's Estate, 192M265, 256NW104. See Dun. Dig. 7789.

A notice of appeal from probate court to district court is not "process," and service on election day is not prohibited. Dahmen's Estate, 200M55, 273NW364. See Dun. Dig. 7797.

9243. Defects disregarded—Amendments, extensions, etc.

See notes under §§9283, 9285.

Motion to open judgment and permitting answer is addressed to the discretion of the court. 176M59, 222NW 520.

This section did not cure fatal defect in notice of appeal specifying wrong county in describing judgment appealed from. 178M601, 228NW174.

A court may correct clerical errors and mistakes to make its judgments and records conform to what it intended, but this does not apply to matters of substance involving judicial consideration or discretion, and in the latter cases notice to the parties involved is necessary. 181M329, 232NW322. See Dun. Dig. 5098.

In actions against two physicians for malpractice court properly permitted amendment alleging employment of both defendants and partnership relation between them. 181M381, 232NW708. See Dun. Dig 7701.

There was a defect fatal to jurisdiction where complaint laid venue in district court but summons incorrectly put it in municipal court. Brady v. B., 185M 440, 241NW393. See Dun. Dig. 7805.

That a return of service described a lessee in possession of a garage as "H. A. Salisbury" when in fact his name was Hector A. Salvail does not invalidate service. Rhode Island Hospital Trust Co. v. C., 191M354, 254NW466. See Dun. Dig. 6326, 6921, 7818.

Court cannot appropriate to itself a jurisdiction which law does not give it by correcting or permitting correction of a notice of appeal after time for taking appeal has expired. Strom v. L., 201M226, 275NW833. See Dun. Dig. 7805, 8947, 8954.

MOTIONS AND ORDERS

9246. Defined—Service of notice.

A motion to strike out evidence must specify the objectionable evidence. 173M501, 217NW601.

An order of court commissioner and writ of habeas corpus having been issued, it was error for district court judge to vacate one and quash other upon order to show cause directed to and served upon court commissioner alone, without notice to petitioner for writ or his attorney, real party in interest. State v. Hemenway, 194 M124, 259NW687. See Dun. Dig. 6497.

Fact that notice of motion, duly served, was not filed with clerk of court until after hearing of motion, both parties, by their counsel, being present and taking part in hearing without objection, did not affect jurisdiction of court to hear motion. Wenell v. S., 194M368, 260NW 503. See Dun. Dig. 6497.

Motion that court withdraw issues from jury and make findings and order for judgment on behalf of appellant on all issues in cause cannot be construed as a motion for direction of verdict. Ydstie's Estate, 195M 501, 263NW447. See Dun. Dig. 6492.

Strict rule of res adjudicata does not apply to motions in a pending action; and district court has jurisdiction and may in its discretion allow renewal of a motion to vacate a judgment and relieve from default, and irregularity of failing to procure leave to make it is cured by overruling of objection to hearing of second motion. Wilhelm v. W., 201M462, 276NW804. See Dun. Dig. 5181.

Municipal court of Worthington organized under Laws 1895, c. 229, has right to issue an order to show cause, thereby shortening time for hearing on motion to vacate a writ of attachment. Op. Atty. Gen. (361a), July 19, 1939.

9247. Motions, etc., where noticed and heard.

174M397, 219NW458.

In action on bond of administratrix against company assuming obligations of surety arising after specified date, answer raising only questions relating to construction of the assumption agreement and the legal effect of order of probate court surcharging account of administratrix presented questions of law only and did not preclude summary judgment on pleadings. National Surety Co. v. E., (USCCA8), 88F(2d)399.

In action on bond of administratrix against company which assumed obligations of surety arising after specified date, answer qualifying charge with reference to extent of liability assumed involved only interpretation of contract and did not preclude summary judgment on pleadings. Id.

Summary judgment on pleadings is precluded where an issue of fact is raised and such a judgment must be sustained by undisputed facts appearing in the pleadings. Id.

Motion for new trial must be heard within judge's judicial district unless consent is given by the parties to hear it outside of district. 173M271, 217NW351.

Motion for judgment presumed truthfulness of answer for writ in mandamus. 178M442, 227NW891.

Judgment on pleadings cannot be granted where the complaint contains material averments which are denied by the answer or where the answer sets up proper affirmative defenses. 180M9, 230NW118.

The rule of practice and procedure in moving for judgment upon the pleadings and upon the opening statement of counsel established by Barret v. M., St. P. & S. S. M. Ry. Co., 106M51, 117NW1047, 18LRA(NS) 416, 130Am.St.Rep.585, and St. Paul Motor Vehicle Co. v. Johnston, 127M443, 149NW667, followed. Mahutga v. M., 182M362, 234NW474. See Dun. Dig. 7689, 9713(27).

For the purpose of motion for judgment upon the pleadings in mandamus, the allegations of the answer must be accepted as true. State ex rel. Erickson v. Magie, 183M60, 235NW526. See Dun. Dig. 7693(99).

Where order on appeal permitted party's right to renew a motion to vacate a judgment on a specified ground, a delay of five years in making such motion was such laches as to justify its denial. Roscoe Black Co. v. A., 185M1, 239NW763. See Dun. Dig. 5360, 6502.

Motion for judgment on the pleadings was properly granted where they showed that plaintiff was not real party in interest. Prebeck v. V., 185M303, 240NW890. See Dun. Dig. 7689.

That other persons, not parties to action in which judgment attacked was rendered, are not made parties defendant, does not prevent judgment on pleadings. Murray v. C., 186M192, 242NW706. See Dun. Dig. 7689.

In a motion for judgment on pleadings, only pleadings can be considered, and a contention supported by affidavits tending to show that a pleading is sham is not for consideration. Bolstad v. H., 187M60, 244NW338. See Dun. Dig. 7692.

Because one motion for judgment on pleadings has been denied, district court is not without power to hear

and grant a second motion for same relief. Lamson v. T., 187M368, 245NW627. See Dun. Dig. 6502, 7694a.

For purposes of a motion for judgment on pleadings, an allegation that there was due, without question, to plaintiff from defendants, a sum liquidated by contract, prevails over a pleaded release, by its terms embracing all plaintiff's demands against defendants and releasing them upon payment of much less than alleged liquidated demand. Hopkins v. H., 189M322, 249NW584. See Dun. Dig. 7693.

A motion for judgment on pleadings is not a favored way of testing sufficiency of a pleading; and if by a liberal construction pleading can be sustained such a motion will not be granted. Gostomezik v. G., 191M119, 253NW 376. See Dun. Dig. 7694.

Motion for judgment on pleadings by plaintiff is in nature of a demurrer, and challenges sufficiency of answer and admits facts therein set out as true. Northwestern Upholstering Co. v. F., 193M333, 258NW724. See Dun. Dig. 7690a, 7693.

In deciding a motion submitted upon affidavits, court is not required to make findings of fact. Streissguth v. C., 198M17, 268NW638. See Dun. Dig. 6499a.

It is permissible in the sound discretion of the court to receive oral testimony upon the hearing of a motion. Meddick v. M., 204M113, 282NW676. See Dun. Dig. 6499.

9248. Ex parte motions.

173M271, 217NW351; note under §9247.

PLEADINGS

9249. Pleadings, etc., how regulated.

Title by adverse possession may be proved under a general allegation of ownership. 171M488, 214NW283.

A demurrer searches all preceding pleadings. 172M 328, 215NW186.

While pleadings are but means to an end to proper administration of substantive law, yet they are to be applied and enforced so as to disclose fully and freely respective claims of parties and thereby facilitate and hasten trial of issues. W. T. Rawleigh Co. v. S., 192M 483, 257NW102. See Dun. Dig. 7498a.

Specific allegations in a pleading prevail over general allegations. Northwestern Upholstering Co. v. F., 193M 333, 258NW724. See Dun. Dig. 7722.

Primary object of pleadings is to appraise each party of grounds of claim or defense asserted by other, in order that he may come to trial with necessary proof and be saved expense and trouble of preparing to prove or disprove facts about which there is no real controversy between parties. Rogers v. D., 196M16, 264NW225. See Dun. Dig. 7498(33).

Object of pleadings is to apprise each party of grounds of claim or defense asserted by other in order that he may come to trial with necessary proof and be saved expense and trouble of preparing to prove or disprove facts about which there is no real controversy between parties. Fortune v. F., 200M367, 274NW524. See Dun. Dig. 7498.

While pleadings are but means to proper administration of substantive law, yet rules thereof are to be applied and enforced so as to disclose fully and freely respective claims of parties and facilitate and hasten trial of issues. Id. See Dun. Dig. 7498a.

An allegation in a petition for a writ of habeas corpus that two criminal informations were based upon exactly same facts is not an allegation of a conclusion of law but one of fact, admission of which by state concedes truth of statement except in so far as statement is contradicted by copies of informations attached to petition. State v. Utrecht, 287NW229. See Dun. Dig. 7517.

9250. Contents of complaint.

½. In general.

The prayer for relief is not a part of the cause of action and is not traversable. 174M410, 219NW760.

Suit held one for rescission and not for damages for fraud notwithstanding reference to recovery sought as damages. 177M256, 225NW12.

Where complaint was broad enough to cover either conversion or replevin, court properly required an election. 181M355, 232NW622. See Dun. Dig. 7508(22).

Special damages must be specially pleaded. Smith v. A., 184M299, 238NW479. See Dun. Dig. 2581.

A common count for money had and received is a good pleading. Olesen v. R., 184M624, 238NW12. See Dun. Dig. 6135(33).

In action for malpractice, evidence as to use of restraint as contributing to cause of death held admissible under general charge of negligence. Brase v. W., 192M304, 256NW176. See Dun. Dig. 7490e.

1. Subdivision 1.

Default judgment was not void because caption of complaint named wrong court, where summons to which it was attached named proper court. 175M597, 222NW281.

In determining who parties to action are, complaint must be taken as an entirety, and allegations in body of complaint control caption. State v. District Court of St. Louis County, 200M207, 273NW701. See Dun. Dig. 7509.

2. Subdivision 2.

Claims of creditors cannot be aggregated to make up amount necessary to federal court's jurisdiction of a creditor's bill, nor will general allegation that the sum involved exceeds such amount avail where bill discloses that it is insufficient. Frank & Lambert, (CCA8), 97F (2d)460.

Foreign laws are facts, and, like other facts, must be pleaded when they are issuable, but not when they are merely prohibitive or evidentiary. 176M406 ,223NW618.

Where newspaper articles complained of were not libelous per se, complaint must state extrinsic facts or circumstances showing that they were libelous in fact. 178M61, 225NW906.

Complaint against bank to recover on note signed by director individually, held not to state a cause of action for money had and received. 181M294, 232NW336. See Dun. Dig. 6128.

Allegation that driver negligently ran car upon and against plaintiff is a sufficient charge of actionable negligence, in the absence of any motion to make the complaint more definite and certain. Saunders v. Y., 182M62, 233NW599. See Dun. Dig. 4166(42), 7058(25), 7718(15)

Complaint held to state a cause of action as against an objection to the introduction of evidence thereunder. Krzyaniak v. M., 182M83, 233NW595. See Dun. Dig. 7528e.

The charge to the jury was erroneous because it permitted the finding of negligence on an independent ground not included in the pleadings. Farnum v. P., 182M338, 234NW646. See Dun. Dig. 7061(61).

Complaints held to charge collusive arrangement among bidders for highway construction following stifling regulations and limitations by highway department resulting in bids so grossly excessive that their acceptance by department amounted to constructive collusion with such contractors. Regan v. B., 188M192, 247NW12. See Dun. Dig. 4480.

Facts constituting fraud must be specifically alleged. Rogers v. D., 196M16, 264NW225. See Dun. Dig. 3836.

Primary function of a complaint is to state facts constituting a cause of action so as to apprise defendants of what plaintiff relies upon and intends to prove. Baker v. H., 202M231, 277NW925. See Dun. Dig. 7526b.

Ultimate, and not evidentiary facts, should be pleaded. Larson v. L., 204M80, 282NW669. See Dun. Dig. 7516.

A demurrer admits all material facts well pleaded, and also all necessary inferences or conclusions of law, whether stated or not, which follow from facts well pleaded. Stark v. E., 285NW466. See Dun. Dig. 7542.

Minnesota pleading as "fact pleading." 13MinnLaw Rev348.

Causes of action blended. 22MinnLawRev498.

3. Subdivision 3.

Labeling of a complaint to characterize it is unnecessary and improper, and nature of cause must be determined by facts alleged and not by formal character of complaint, and may be had if facts proved within allegations of pleading are justified although pleader might be mistaken as to nature of his cause. Equitable Holding Co. v. E., 202M529, 279NW736. See Dun. Dig. 7526a, 7528b.

9251. Demurrer to complaint—Grounds.

½. In general.

Pleading in federal court after removal of cause. Shell Petroleum Corp. v. S., (DC-Minn), 25FSupp879.

Complaint cannot be made for the first time at the close of the case that the complaint does not state a cause of action, where the case has been tried on a definite theory or issues. 171M363, 214NW58.

On demurrer a pleading is to be construed liberally in favor of pleader. 181M261, 232NW324. See Dun. Dig. 7724.

When a complaint states a cause of action resting upon a particular statute, the constitutionality of the statute may be raised by demurrer. 181M427, 232NW 737. See Dun. Dig. 7540.

On demurrer allegations of complaint must be taken as true. Regan v. B., 188M192, 247NW12. See Dun. Dig. 7542.

A judgment entered pursuant to an order sustaining a demurrer to a complaint on ground that it failed to state a cause of action because of defective pleading in that it alleged in alternative facts constituting a good cause and facts which did not is not a bar to a subsequent action in which defective pleading is corrected so as to state a good cause of action. Rost v. K., 195M219, 262NW450. See Dun. Dig. 5183, 7559.

A demurrer raises an issue of law, determination of which constitutes a trial by the court, and does not raise any question of fact, or a mixed question of law and fact. Smith v. S., 204M255, 283NW239. See Dun. Dig. 7540(43).

2. Defect must appear on face of pleading.

In action by wholesaler against retailer and sureties, allegation in answer of sureties that plaintiff and main defendant sold drugs contrary to statute, held a mere conclusion of law. W. T. Rawleigh Co. v. S., 192M483, 257NW102. See Dun. Dig. 7498a, 7517.

Conclusions in a pleading must be justified by particular facts upon which they are based. Aichele Bros. v. S., 194M291, 260NW290. See Dun. Dig. 7722.

Slander of title is not an ordinary action for defamation, but is in nature a trespass on the case for recovery of special damages, and special damages should be alleged. Hayward Farms Co. v. U., 194M473, 260NW868. See Dun. Dig. 5538.

4. For want of capacity to sue.
Objection of lack of capacity to sue must be taken by demurrer or answer, or it is waived. 175M226, 220NW822.

Defendant is not, after consolidation of several suits into one, in a position to urge objection that when two of suits were begun plaintiff had no capacity to sue or that a cause of action was split in one of consolidated suits. E. E. Atkinson & Co. v. N., 193M175, 258NW151. See Dun. Dig. 7678.

5. For pendency of another action.
Demurrer is not available when the pendency of the other action does not appear upon the face of the complaint. 176M529, 224NW149.

6. Defect of parties.
A party who is properly made defendant cannot object by demurrer that other parties are improperly joined with him as defendants. 173M57, 214NW778.

One claiming a defect in parties is required to distinctly raise and specifically show wherein defect consists, naming person or persons that should be joined. Serr v. B., 202M165, 278NW355. See Dun. Dig. 7324.

Action on a bill or note payable to bearer, or endorsed in blank, may be maintained in name of nominal holder, possession being prima facie evidence of his right to sue, and cannot be rebutted by proof that plaintiff has no beneficial interest, or that others are interested in the proceeds, or by anything else but proof of mala fides. Northwestern Nat. Bank & Tr. Co. v. H., 286NW717. See Dun. Dig. 1034, 7315.

7. For misjoinder of causes of action.
Though there may be a misjoinder of causes of action in uniting disconnected contract and tort actions, the misjoinder will not be considered when not urged on appeal by the demurrant. Olesen v. R., 184M624, 238NW12. See Dun. Dig. 366(52).

Bondholders suing trustee in trust deed may combine in one action damages sustained because of excessive price at which trustee bid in property at foreclosure sale with damages sustained for neglect or mismanagement of property after expiration of redemption period. Sneve v. F., 192M355, 256NW730. See Dun. Dig. 7506.

Where demurrers are interposed to a complaint on ground of misjoinder of causes, if no cause of action is stated in matter asserted to constitute wrongful joinder, there is no misjoinder of causes. Aichele Bros. v. S., 194M291, 260NW290. See Dun. Dig. 7554.

Causes of action blended. 22MinnLawRev498.

8. For failure to state a cause of action.
General demurrer on ground that complaint did not state a cause of action was good where upon face of complaint it appeared that cause of action upon an accident policy accrued more than two years prior to the issuing of the summons, the provisions of §3417(14) having been incorporated in the policy. 174M354, 219NW286.

This was true even though plaintiff alleged she was a minor, where application for policy was made part of complaint and showed she was not a minor. 174M354, 219NW286.

When a complaint in which a contract is pleaded in haec verba, is demurred to on ground that it fails to state facts sufficient to constitute a cause of action, and contract is ambiguous as to intent of parties because of uncertainty of language used, construction of party pleading it should be accepted if such construction is reasonable. Anchor Casualty Co. v. C., 200M111, 273NW647. See Dun. Dig. 7542(51).

In determining sufficiency of a complaint when challenged by general demurrer, demurrer will be overruled if, under any view of facts pleaded, a cause of action is stated, and it is immaterial that complaint contains alternative allegations, if complaint taken as a whole contains sufficient unobjectionable allegations to sustain it. Kaiser v. B., 200M545, 274NW680. See Dun. Dig. 7528a, 7549, 7724.

Demurrer was properly sustained where no one could tell from reading complaint what plaintiff intended to prove. Baker v. H., 202M231, 277NW925. See Dun. Dig. 7526b.

Test of sufficiency of a complaint on general demurrer is not whether it states precise cause of action intended, or whether pleader appreciated nature of his remedy, or asked for appropriate relief, but whether facts stated, expressly or inferentially, giving to language benefit of all reasonable intendments, show plaintiff to be entitled to some judicial relief. Hartford Accident & Indemnity Co. v. D., 202M410, 278NW591. See Dun. Dig. 7528a.

On appeal from an order sustaining a demurrer, well pleaded allegations of complaint are to be considered as true. McCarthy v. C., 203M427, 281NW759. See Dun. Dig. 7542.

A party is entitled to definite information as to the theory upon which it is claimed he is liable; but where the pleading is so drawn as to make it impossible to determine definitely what acts or defaults may be claimed to support the final claim of liability, the remedy is not demurrer but a motion to make the pleading more definite and certain. Smith v. S., 204M255, 283NW239. See Dun. Dig. 7528a, 7646, 7648.

A demurrer admits all material facts well pleaded, including all necessary inferences or concusions of law which follow from such facts. Id. See Dun. Dig. 7538(a)(37), 7542(45), 7546.

Test of a complaint on general demurrer is not whether it states precise cause of action intended, or whether pleader appreciated nature of his remedy, or asked for appropriate relief, but whether facts stated, expressed or inferentially, giving to language benefit of all reasonable intendments, show plaintiff entitled to some judicial relief. Id. See Dun. Dig. 7549(77, 78).

A demurrer admits all material facts well pleaded, and also all necessary inferences or conclusions of law, whether stated or not, which follow from facts well pleaded. Stark v. E., 285NW466. See Dun. Dig. 7542.

A demurrer admits all facts well pleaded and all necessary inferences or conclusions of law, whether stated or not, which follow from facts well pleaded. State v. Clousing, 285NW711. See Dun. Dig. 7542.

Admission by demurrer does not extend to facts of which court will take judicial notice. Id. See Dun. Dig. 7520.

9. Not ground for demurrer.
Demurrer will not lie because wrong relief is demanded in the complaint or greater relief than the facts warrant. 174M410, 219NW760.

A complaint is not demurrable because it asks for wrong relief. Johnson v. I., 189M293, 249NW177. See Dun. Dig. 7555(20).

9252. Requisites—Waiver.

½. In general.
Objections on ground of defect of parties must be raised on demurrer or answer and if not so raised, matter is waived. Spinner v. M., 190M390, 251NW908. See Dun. Dig. 7323.

Where complaint on its face does not state cause of action because barred by statute of limitations, defendant may present his defense either by demurrer or by answer. Roe v. W., 191M251, 254NW274. See Dun. Dig. 5659.

4. Objection by answer.
In action for specific performance of a contract to leave property of which deceased died possessed to plaintiff, defect of parties defendant must be raised by answer where complaint does not disclose such defect. Hanson v. B., 199M70, 271NW127. See Dun. Dig. 7551.

5. Waiver.
Northwestern Nat. Bank & Tr. Co. v. H., 286NW717; note under §9251, note 6.

A pleading first attacked on the trial should be liberally construed. 171M358, 214NW49.

Objection to the sufficiency of the facts to constitute a cause of action may be taken for the first time on appeal. 173M198, 217NW119.

Appearance in response to writ of mandamus and asking for an adjournment to enable answer does not waive defective pleading. 173M198, 217NW119.

Objection of lack of capacity to sue must be taken by demurrer or answer, or it is waived. 175M226, 220NW822.

A misjoinder of parties plaintiff not raised by demurrer or answer is waived. First Minneapolis Trust Co. v. L., 185M121, 240NW459. See Dun. Dig. 7323.

Defendant did not waive statute of limitations by pleading guilty after his demurrer to information had been overruled. State v. Tupa, 194M488, 260NW875. See Dun. Dig. 4418.

Corporate beneficiary under a will not making motion to dismiss action by certain heirs for specific performance of an agreement to distribute part of estate to heirs of deceased, waived defect in parties from omission of certain nieces and nephews of decedent, it appearing that enforcement of agreement was for benefit of all heirs, who otherwise would have received nothing, and there being no foundation for claim that corporation might be compelled to defend other litigation, and there having been no motion to have other parties brought in as additional parties. Schaefer v. T., 199M610, 273NW190. See Dun. Dig. 7323, 7328, 7329.

For defect of parties, objection must be raised either by demurrer or answer, and if neither is done, defendant cannot later raise objection by motion for dismissal, for judgment on pleadings, for direction of verdict, or by objection to evidence. Serr v. B., 202M165, 278NW355. See Dun. Dig. 7323, 7508.

Defense that a government corporate instrumentality is immune from suit will be noticed, even if raised for first time after trial on argument of alternative motion for judgment notwithstanding verdict or a new trial. Casper v. R., 202M433, 278NW896. See Dun. Dig. 7681, 7731.

If complaint does not state a cause of action one answering complaint may file objection to introduction of evidence and an adverse ruling will present proper question for review on appeal from judgment. Weiland v. N., 203M600, 281NW364. See Dun. Dig. 7561a.

Any error in overruling demurrer to complaint cannot be considered where defendant availed himself of privilege granted to answer. Id. See Dun. Dig. 7561a.

9253. Contents of answer.

½. In general.
Conclusions. 172M398, 215NW783.

Where collection bank becomes insolvent on day it sends draft for proceeds to bank in which it has deposit, latter bank is entitled to a set-off deposit against collection. Storing v. F. (USCCA8), 28F(2d)587.

In federal court an answer was held sufficient although it did not state the names of those making the warranties upon which the defendant relied, where there was no demand for such names, and if such demand had been made it could not properly be granted under the state practice. Commander Milling Co. v. Westinghouse Elec. & Mfg. Co. (USCCA8), 70F(2d)469.

Where complaint, in a suit for damages and an injunction, alleges fixing of a level and construction and maintenance of a dam which raises above high-water mark level of a navigable lake, major part of which is outside county, such county, when it pleads that it did not construct or maintain dam, may avail itself of defense of ultra vires through it does not specifically plead it, since complaint shows on its face that county was without authority over level of lake in question. Erickson v. C., 190M433, 252NW219. See Dun. Dig. 2288, 2302, 3459, 7574.

In replevin for soda fountain in which defendant pleaded title by purchase and evidence showed that he made down payment of less than value of fountain and gave plaintiff note and chattel mortgage, verdict for defendant was contrary to law where he relied on fraud and deceit but did not counterclaim for damages nor ask for rescission. Knight Soda Fountain Co. v. D., 192M387, 256NW657. See Dun. Dig. 8424.

Court suggests query with respect to whether equities of defendants in tort case may be litigated and a judgment reached to settle whole matter, not only as between plaintiff and defendant, but also as between the latter. Kemerer v. S., 201M239, 276NW228. See Dun. Dig. 1924.

DENIALS

2. Effect of general denial.

Where plaintiff in replevin for mortgaged chattels declares generally as an owner entitled to possession, the defendant, under general denial, may prove payment of the debts secured by the mortgage. 176M406, 223NW618.

Where suit is brought on illegal contract, defense of illegality can be raised under a general denial or by the court on its own motion. Vos v. A., 191M197, 253NW549. See Dun. Dig. 7572.

Where plaintiff in replevin alleged that he was owner and entitled to immediate possession of automobile, describing it by motor and registration number, and answer was a general denial, plaintiff could prove that defendant's sole claim of title and right of possession was based upon documents tainted with usury. Halos v. N., 196M387, 265NW26. See Dun. Dig. 8412.

In action to recover wages under contract of hire, complaint setting out contract and performance thereof, defendant was not entitled to show modification or cancellation of the contract under a general denial. Davis v. R., 197M287, 266NW855. See Dun. Dig. 7574.

Denial of execution of an instrument puts in issue its making, genuineness of signature, and delivery, where alleged signer is dead. O'Hara v. L., 201M618, 277NW232. See Dun. Dig. 1918.

If contributory negligence is made out from plaintiff's proof, defendant may take advantage thereof without pleading it as a defense. Forseth v. D., 202M447, 278 NW904. See Dun. Dig. 7060(56).

While defendant may take advantage of a plaintiff's contributory negligence if it appears in evidence even though not pleaded as a defense, where defendant neither requested issue to be submitted nor took exception to statement in charge that plaintiff was not guilty of contributory negligence, a new trial cannot be awarded, even though that issue might properly have been submitted. Id. See Dun. Dig. 7060(56), 9792.

Bar of statute of limitations is an affirmative defense and must be pleaded by demurrer or answer. Rye v. P., 203M567, 282NW459. See Dun. Dig. 5661.

There being no inconsistency between them in point of fact, defendant in a slander suit may join with his general denial the plea in justification that, whether he did or did not use the words charged, they spoke the truth. Woost v. H., 204M192, 283NW121. See Dun. Dig. 7580.

Where plaintiff in action on note failed to plead that note had been presented for payment, dishonored, and that notice of dishonor had been given to indorser, or that there had been a waiver of presentment and notice of dishonor, or other circumstances showing that presentment and notice was not required, it was enough for indorser to stand upon his general denials. Allen v. C., 204M295, 283NW490. See Dun. Dig. 7572.

Availability of defense of contributory negligence disclosed by plaintiff's evidence but not pleaded in answer. 16MinnLawRev719.

NEW MATTER CONSTITUTING A DEFENSE

12. Defendant must not be a stranger to new matter.

A party may not defend an action by asserting facts or rights which do not concern him and in which he has no lawful interest. Schultz v. K., 204M585, 284NW782. See Dun. Dig. 7582.

13. When one of several obligors is sued.

A counterclaim, good only as against a third party pleaded in a case where the issue could be determined without the presence of the third party, was properly stricken out. 173M183, 217NW106.

14. Must be pleaded specially.

In action to recover interest on awards for taking of land by city, defendant must plead facts showing that tender was made. L. Realty Co. v. C., 183M499, 237NW 192. See Dun. Dig. 3104.

Defendant relying on statute or decisions of another state must plead them unless case is tried by acquiescence as to what law is. Smith v. B., 187M220, 244NW826. See Dun. Dig. 3789.

In action for fraud against co-promoter of corporation, discharge of cause of action by settlement with receiver of corporation was matter of affirmative defense which must be pleaded and proved. Barrett v. S., 187M430, 245 NW830. See Dun. Dig. 7585.

Though there was technical error in failing to specially plead a letter relied upon as tolling statute of limitations, there was no prejudice to defendant where case had been tried, and letter was well-known to both parties, and there was a full hearing on the issue. Olson v. M., 195M626, 264NW129. See Dun. Dig. 424, 7675.

Defense of modification or cancellation of a prior contract is new matter in nature of confession and avoidance and must be pleaded specially in order that evidence thereof can properly be admitted. Davis v. R., 197M287, 266NW855. See Dun. Dig. 7585.

9254. Requisites of a counterclaim.

1. Nature of counterclaim.

Where collection bank becomes insolvent on day it sends draft for proceeds to bank in which it has deposit, latter bank is entitled to set-off deposit against collection. Storing v. F. (USCCA8), 28F(2d)587.

Defenses and set-offs available against an assignor are available against his assignee. Andresen v. Thompson, (DC-Minn), 56F(2d)642. See Dun. Dig. 571, 572.

Pleading in federal court after removal of cause. Shell Petroleum Corp. v. S., (DC-Minn), 26FSupp879.

Probate court has no jurisdiction of claims by personal representatives against creditors of a decedent, but such claims must be enforced in district court. 172M68, 214NW895.

The debtor of an insolvent bank when sued by its receiver, cannot set off his liability as a surety for the bank on a depository bond. 172M80, 214NW792.

A debt due an insolvent bank for borrowed money cannot be offset on a liability which has accrued against the debtor as a surety for the bank on a depository bond. 174M102, 218NW456.

Counterclaim for damages to the business of defendant was properly dismissed in action for the price of milk, defended on the ground that the milk was adulterated, where although the defendant lost some customers there was no proof and no offer of proof of loss of profits. 174M320, 219NW159.

School district held entitled to set-off against warrants the amount of tax funds embezzled by bank's officers and school treasurer. First Nat. Bank of Windom v. C., 184M635, 238NW634.

In action against employee to recover for wrongful appropriation of employer's property, a counterclaim for damages for a discharge without cause before expiration of year for which he was employed may not be stricken as frivolous, merely upon ground that to an attempted counterclaim in original answer a demurrer had been sustained. Danube Farmers Elevator Co. v. M., 197M349, 266NW878. See Dun. Dig. 7670.

2. Compared with defense.

Recoupment is properly pleaded as a defense and need not be pleaded as a counterclaim. Hoppman v. P., 190M480, 252NW229. See Dun. Dig. 351 to 353, 7592.

5. Compared with equitable set-off.

Where directors of a bank are insolvent and nonresidents, and the receiver of the bank brings an action against such directors for making excessive loans, and an assignee of the directors intervenes, and asserts a claim for money paid by the directors in satisfaction of a bond of the bank as depositary, the unliquidated claim of the bank, may be set off in equity against the intervenor's claim. Andresen v. Thompson, (DC-Minn), 56F(2d)642. See Dun. Dig. 572.

7. Must exist in favor of the defendant who pleads it.

Right of surety to set off principal's claim against creditor—effect of principal's insolvency. 16MinnLawRev 217.

8. Must exist against the plaintiff.

Assignee of a claim must stand in shoes of assignor as affecting right of set-off. Campbell v. S., 194M502, 261NW1. See Dun. Dig. 572(47).

A Co-owner of a farm who signed to a note names of all owners as a company, without authority, knowledge, or consent of other co-owners, will be held to have signed note in a name assumed by him, and is personally liable thereon, as affecting right of set-off. Id. See Dun. Dig. 1732, 6915.

10. Must exist against a plaintiff and in favor of a defendant.

Rule that a cause of action which cannot be determined without bringing in a new party may not, without more, be set up as a counterclaim, is one for testing validity of a counterclaim as such, and is not determinative of right of a counterclaiming defendant to bring in additional parties where they are necessary for full determination of controversy. Lambertson v. W., 200M204, 273 NW634. See Dun. Dig. 7602.

11. "Arising out of the contract."
Injury to property caused by servant's negligence a proper counterclaim in action for wages. Magistad v. A., 177M428, 225NW287.

14. A claim on contract in an action on contract.
Where landlord brings suit to recover rent, tenant may recoup damages caused by a wrongful interference by landlord with use or possession, although tenant has not been evicted and has not surrendered premises. Hoppman v. P., 190M480, 252NW229.

15. When a tort may be set up as a counterclaim.
Where suit is on contract for recovery of money, defendant may set up counterclaim for money or property wrongfully obtained or taken from him by plaintiff. Kubat v. Z., 186M122, 242NW477. See Dun. Dig. 7613.

Torts, such as personal injury, libel and slander, seduction, and similar wrongs, cannot be set up as counterclaims in action on contract unless arising out of or connected with subject of action. Kubat v. Z., 186M122, 242 NW477.

Claim for damages for fraud in financial transaction, held not proper counterclaim in action for libel. Habedank v. B., 187M123, 244NW546. See Dun Dig. 7613.

In action to recover damages for libel, defendant may not counterclaim for an alleged libel, theretofore published, by plaintiff of and concerning defendant, as each libel constituted a separate transaction. Skluzacek v. W., 195M326, 263NW95. See Dun. Dig. 7613.

19. Effect of failure to plead counterclaim.
A counterclaim or offset must be pleaded, but if it is such as to constitute a cause of action in favor of a defendant, he may refrain from pleading it and bring suit thereon at a later time. Johnson v. I., 189M293, 249 NW177. See Dun. Dig. 7620.

20. Rules as to pleading counterclaim.
Counterclaim construed to be for damage for breach of warranty. 179M467, 229NW575.

21. Mode of objecting to counterclaim.
Where a counterclaim states a cause of action against the plaintiff, the objection that it is not a proper counterclaim in the particular case is waived by not raising the objection by demurrer or answer. Pruka v. M., 182 M421, 234NW641. See Dun. Dig. 7678(31).

In action by mortgagor to set aside foreclosure, wherein defendant counterclaimed for damages for wrongful detention of possession by mortgagor after expiration of period of redemption, and asked for recovery of possession, objection at trial to litigation of counterclaim was without merit, where there was no demurrer nor reply challenging legal standing of counterclaim. Young v. P., 196M403, 265NW278. See Dun. Dig. 7619.

22. Relief awarded.
In action for reasonable value of attorney's services, where certain sum had been paid, it was proper for court to charge that if value of services was found to be less than sum paid, verdict should be for counterclaiming defendant for difference. Lee v. W., 187M659, 246NW25. *See Dun. Dig. 5044.*

9255. Several defences, etc., how pleaded—Answer and demurrer.

SEVERAL DEFENSES

3. Must be consistent.
It is no proof of inconsistency that establishment of one of two defenses make the other unnecessary, inconsistency coming in only when proof of one necessarily disproves the other, and then defenses must be inconsistent in fact. Woost v. H., 204M192, 283NW121. See Dun. Dig. 7580.

Rule of inconsistency, as applied to pleadings, is meeting with increased disfavor, and is abolished under new federal rules. Id. See Dun. Dig. 7580.

Inconsistent defenses sought to be interposed require an election and upon refusal to make such election court was justified in vacating a previous order permitting an amendment which sought to set up a defense inconsistent with one interposed by original answer. Schochet v. G., 204M610, 284NW886. See Dun. Dig. 7580.

4. Defenses held consistent.
There being no inconsistency between them in point of fact, defendant in a slander suit may join with his general denial the plea in justification that, whether he did or did not use words charged, they spoke the truth. Woost v. H., 204M192, 283NW121. See Dun. Dig. 7580.

DEMURRER

8. To one or more causes of action.
A party cannot answer and demur at the same time and in the same cause. Smith v. S., 204M255, 283NW239. See Dun. Dig. 7562a.

9256. Judgment on defendant's default.

½. In general.
Where general denial was stricken as frivolous and defendant failed to answer within the time limited by the court, entry of judgment as for default was proper. 171M405, 214NW261.

Action for goods sold and delivered and stated to be of a reasonable value was an action on contract for the payment of money only, and judgment should be entered by the clerk without an order of court. 173M606, 218NW127.

3. Necessity of proving cause of action.
In negligence action against both master and servant, it was not error to submit question of servant's negligence to jury even though he was in default. Hector Const. Co. v. B., 194M310, 260NW496. See Dun. Dig. 4995.

9257. Demurrer or reply to answer.

½. In general.
Pleading in federal court after removal of cause. Shell Petroleum Corp. v. S., (DC-Minn), 25FSupp879.

In replevin for capital stock, where counterclaim setting up lien was interposed and plaintiff dismissed complaint, a reply asserting a statutory lien was admissible as a defense to the counterclaim, though a departure from the complaint. 171M65, 212NW738.

In mandamus reply to answer is not necessary. 178M 442, 227NW891.

In action by insurance company to recover money paid to a director, a general demurrer to answer setting up a settlement agreement held properly overruled. Modern Life Ins. Co. of Minn. v. T., 184M36, 237NW686. See Dun. Dig. 7556.

Where statute of limitations has been set up in bar of a right of action, and plea has been traversed, statute is generally considered an affirmative defense, and burden of proof is on those seeking to avail themselves of its benefit to show that cause of action has been barred thereby. And where part of the plaintiff's demand is barred and part is not, defendant is obliged to prove specifically part that falls within protection of statute. Golden v. L., 203M211, 281NW249. See Dun. Dig. 5667a.

1. Demurrer to answer.
When a demurrer to an answer is overruled and plaintiff replies and case is tried upon issues so framed, he cannot assert error in overruling of demurrer; but he may in course of trial contest sufficiency of facts alleged or proved. Wismo Co. v. M., 186M593, 244NW76. See Dun. Dig. 7165a, 7162.

In quo warranto defense of improper motive may not be disposed of by demurrer. State v. Crookston Trust Co., 203M512, 282NW138. See Dun. Dig. 7556.

2. Reply to answer—Departure.
181M115, 231NW790.

Reply held not a departure from complaint; it merely meets an attempted defense in answer. Stebbins v. F., 192M520, 258NW824. See Dun. Dig. 7627.

9258. Failure to reply—Judgment.

4. Judgment on the pleadings.
Where facts appearing from complaint, supplemented by more detailed narrative of opening statement to jury, so require, judgment upon pleadings and statement may be ordered against plaintiff. Plotkin v. N., 204M422, 283 NW758. See Dun. Dig. 7689.

9259. Sham and frivolous pleadings.

½. In general.
Commander Milling Co. v. W. (USCCA8), 70F(2d)469; note under §9267.

Action on bond given under G. S. 1923, §6226, where a surety admitted execution of the bond and offered a settlement exclusive of interest, held that general denial was properly stricken as sham and frivolous. 173M613, 216NW792.

A motion to strike out answer and for judgment was properly granted on facts stated. 173M524, 218NW102.

Court properly struck reply as sham and frivolous in an action for an accounting. 174M111, 218NW459.

On motion to strike, it is the duty of the court to determine whether there is an issue to try, not to try the issue. 174M315, 219NW148.

Answers raising no real issue were properly stricken. 174M496, 219NW764.

Answer admitting execution of note set out in complaint and averring that there was no consideration for note and agreement to execute mortgage to secure it because the lien right which plaintiff released had expired when the agreement was made, was properly stricken as sham. 176M254, 223NW142.

Reply properly stricken as sham. 178M47, 225NW901.

In ejectment by landlord against tenant answer admitting ownership by plaintiff and possession by defendant but denying all other allegations, held sham. 179M 349, 229NW312.

In action on judgment for damages for obtaining property by false pretenses an answer alleging that the judgment was one based on contract and was discharged in bankruptcy, held sham and properly stricken out. 180M 482, 231NW220.

A "sham answer" is a false answer, a "frivolous answer" is one which is insufficient on bare inspection; an "irrelevant answer" is one which has no relation to the issue. 181M47, 231NW393.

Court did not err in striking out paragraphs of answer which were a recital of evidentiary facts admissible in evidence under other allegations of the answer. Habedank v. B., 187M123, 244NW546. See Dun. Dig. 7516, 7656.

Upon dismissing a pleading as sham, court cannot on its own motion dismiss action itself. Long v. M., 191M 163, 253NW762. See Dun. Dig. 7658.

A complaint cannot be stricken as sham. Id. See Dun. Dig. 7657.

Answer properly stricken as sham where the only defensive matter pleaded was shown to be false. Simons v. S., 197M160, 266NW444. See Dun. Dig. 7657.

Paragraphs stricken from plaintiff's replies were palpably sham and frivolous, presenting no grounds for avoiding release. Ahlsted v. H., 201M82, 275NW404. See Dun. Dig. 7657.

In action upon injunction bond to recover damages for improvident issuance of injunction, it was improper to strike whole answer as sham where it contained a qualified general denial and no specific allegation which took the question of damages out of the general denial. Lund v. G., 285NW534. See Dun. Dig. 7657.

An order striking out an answer or part thereof is appealable. Johnson v. K., 285NW715. See Dun. Dig. 7658.

Appeal lies from order denying a motion to vacate order striking out answer as sham, but motion to vacate must be made returnable before expiration of time to appeal from original order. Id. See Dun. Dig. 7658.

1. Defined.

An answer is "sham" when so clearly false that it tenders no real issue; and it is "frivolous" when its insufficiency appears upon mere inspection. 176M360, 223NW677.

In action by baking company against milling company after agricultural adjustment act was declared unconstitutional to recover processing tax, court erred in striking as sham and frivolous an allegation in answer that sale of flour was upon a composite price per barrel and that no particular part of price of flour was allotted to tax. Zinsmaster Baking Co. v. C., 200M128, 273NW673. See Dun. Dig. 7657, 7668.

An answer is sham when clearly false and frivolous when its insufficiency appears from mere inspection. Id. See Dun. Dig. 7667, 7668.

3. Denials may be stricken out.

Where administrator sued widow and widow in answer alleged that matters had all been considered by probate court on hearing of administrator's final account and decree of distribution, reply of administrator in nature of general denial was properly stricken as sham and frivolous. Saunderson v. H., 190M431, 252NW83. See Dun. Dig. 7661, 7667, 7668a.

6. Power to strike out to be exercised sparingly.

On a motion to strike an answer as sham, care must be used so that issues tendered for decision on a trial are not disposed of upon affidavits with no opportunity of confronting and cross-examining witnesses. Zinsmaster Baking Co. v. C., 200M128, 273NW673. See Dun. Dig. 7664.

7. Time of making motion.

Appeal lies from order denying a motion to vacate order striking out answer as sham, but motion to vacate must be made returnable before expiration of time to appeal from original order. Johnson v. K., 285NW715. See Dun. Dig. 7663.

8. Affidavits on motion.

In action for damages for failure to furnish a title to real estate consistent with terms of purported agreement, unverified replies denying generally matters of public record set up in verified answers may be stricken and judgment ordered entered for defendants on a showing, by affidavits, that allegations therein were sham. Berger v. F., 198M513, 270NW589. See Dun. Dig. 7664.

9. Amendment.

Where it is not made to appear that defendant has any meritorious defense, there is no abuse of judicial discretion in ordering judgment on striking out a sham answer without leave to amend same. Simons v. S., 197M160, 266NW444. See Dun. Dig. 7666.

Plaintiff suing from a judgment entered on pleadings after order striking reply as sham and frivolous cannot complain that he was given no opportunity to amend his reply because judge immediately left for his summer vacation, where no attempt was made to vacate judgment nor leave to amend asked. Berger v. F., 198M513, 270NW589. See Dun. Dig. 7666, 7668a.

10. Motion to strike out granted.

Plaintiff appealing from an order granting a motion to strike reply as sham and frivolous cannot complain that no copy of the order was ever mailed to plaintiff as required by rules of district court, in absence of showing of prejudice. Berger v. F., 198M513, 270NW589. See Dun. Dig. 7666.

11. Motion to strike out denied.

Denial of motion to strike out complaint as sham and frivolous did not bar a subsequent motion to strike out reply as sham and frivolous. Berger v. F., 198M513, 270NW589. See Dun. Dig. 7657.

12. Irrelevant pleadings.

Partial defense stricken as irrelevant: 176M254, 223NW142.

It was error to strike as irrelevant and immaterial certain paragraphs of a complaint, where with them complaint stated a cause of action, but with them stricken it did not. Sneve v. F., 192M355, 256NW730. See Dun. Dig. 7653.

16. Frivolous answer or reply.

173M18, 216NW329.

180M480, 231NW224.

General denial stricken as frivolous. 171M405, 214NW261.

An answer is "sham" when so clearly false that it tenders no real issue; and it is "frivolous" when its insufficiency appears upon mere inspection. 176M360, 223NW677.

Defect in answer must be clear and indisputable, every doubt being resolved in its favor. 180M356, 230NW811.

In action by employee charging disease contracted because of fumes and gases from dynamite used in blasting a tunnel, wherein defendant denied all negligence and denied praticability of installing adequate ventilating facilities, court erred in striking out as frivolous defense of assumption of risk. Wickstrom v. T., 191M327, 254NW1. See Dun. Dig. 5973, 5978, 7668a.

In action against employee to recover for wrongful appropriation of employer's property, a counterclaim for damages for a discharge without cause before expiration of year for which he was employed may not be stricken as frivolous, merely upon ground that to an attempted counterclaim in original answer a demurrer had been sustained. Danube Farmers Elevator Co. v. M., 197M349, 266NW878. See Dun. Dig. 7670.

Reply setting up incompetency of plaintiff as a ground for avoiding release, held properly stricken. Hanson v. N., 198M24, 268NW642. See Dun. Dig. 7658.

Answer conatining a general denial cannot be stricken as frivolous. Zinsmaster Baking Co. v. C., 273NW673. See Dun. Dig. 7661.

Answer is "frivolous" when insufficiency appears from mere inspection. Id. See Dun. Dig. 7667, 7668.

9261. Interpleader.

Since association is powerless to waive the statute in regard to the beneficiary, a rightful claimant may successfully contest the right of the beneficiary named in the certificate, even though the association does not question such right. 175M462, 221NW721.

An order permitting defendant to pay the amount into court and directing another claimant to be substituted as defendant does not finally determine any substantial right of plaintiff and is not appealable. 176M11, 222NW295.

It was not error for the court to grant defendant's motion to have another interpleaded and substituted as the defendant with directions that appropriate pleadings be made. Burt v. C., 183M109, 235NW620. See Dun. Dig. 4892(23).

Section 9214, providing that all actions not enumerated in certain preceding sections shall be tried "in a county in which one or more of the defendants reside when the action was begun," does not apply to statutory proceeding provided by §9261. State v. District Court, 192M602, 258NW7. See Dun. Dig. 10104, 10121, 4892, 4893.

Where there is a statutory proceeding in nature of interpleader, court in which cause is properly pending, and it alone, may exercise jurisdiction. Id. See Dun. Dig. 4892.

Requirement of identity of claim. 23MinnLawRev231.

9263. Intervention.

½. In general.

176M11, 222NW295.

Intervention is permissible in a special proceeding. Veranth v. M., 284NW849. See Dun. Dig. 4898a.

Courts look with favor upon intervention in proper cases. Id. See Dun. Dig. 4898.

Although beneficial owner of vendee's interest in land contract did not intervene in a special proceedings to terminate the contract under §9263 and was not ordered to intervene upon application of a party under §9181, court had power, unaffected by statute, to bring him before it, or permit him to come in voluntarily, at any stage of the proceedings, as a party necessary for complete administration of justice. Id. See Dun. Dig. 7329.

Where beneficial owner's rights in vendee's interest under contract depend upon continued existence of that contract, and named vendee defaults and fails to defend against cancellation, denial of beneficial owner's petition to intervene is an abuse of discretion. Id. See Dun. Dig. 4898.

Intervention may be allowed in a proceeding to terminate a contract for deed. Id. See Dun. Dig. 4898a.

2. Interest entitling party to intervene.

Quo warranto, see §§132, 156.

In suit to enjoin enforcement of order of state industrial commission establishing minimum wages for women and minors employers directly affected by such order were permitted to intervene as parties plaintiff. Western Union Telegraph Co. v. I., (DC-Minn), 24FSupp370.

State federation of labor was permitted to intervene on condition that it conform its intervention to requirements of equity rule 37. Id.

A third party having levied under execution upon property claimed to be involved in garnishment proceedings has such an interest in the matter that he may intervene. First State Bank of New York Mills v. W., 185M225, 240NW892. See Dun. Dig. 3999.

In action to recover rent and for use and occupation of land, one claiming ownership of the land could intervene. Scott v. V., 193M465, 258NW817. See Dun. Dig. 4899.

An intervener may not introduce new and foreign issues into action as joined by original parties in suit for declaratory judgment. Twin City Milk Producers Ass'n v. H., 199M124, 271NW253. See Dun. Dig. 4901a.

A highway condemnation proceeding is in rem, and no question of jurisdiction is presented if, without formal intervention under statute, interested taxpayers are permitted to appear and to apply for and procure injunc-

tional relief appropriate to proceeding. State v. Werder, 200M148, 273NW714. See Dun. Dig. 3177.

Where intervention is made under leave of court, applicant must show an interest in the litigation and that he will either gain or lose by the judgment between the original parties. Veranth v. M., 284NW849. See Dun. Dig. 4899.

It is generally held that a beneficial interest in the subject matter in suit is a sufficient right to intervene, even though intervener may have another remedy. Id. See Dun. Dig. 4899.

A beneficiary may sue in his own name to enforce his rights under a trust where trustee fails or neglects to do so, and he may be permitted to intervene where trustee is a party and fails or neglects to protect his interest as beneficiary. Id. See Dun. Dig. 4899.

One adjudged to be beneficial owner of vendee's rights under a contract for deed has sufficient interest in the subject matter of a suit seeking to cancel the interest of the vendee, that he may intervene. Id. See Dun. Dig. 4899.

Court may permit intervention though defendant is in default. Id. See Dun. Dig. 4899.

2½. Time of application.

Intervention was not available after closing of condemnation proceedings by approval of certificate in state highway establishment. State v. Hall, 195M79, 261NW874. See Dun. Dig. 4897a.

3. Complaint.

In partnership receivership, court did not err in granting leave to assignee of land contract to file a supplemental complaint in intervention as against contention of receiver that original complaint did not state a cause of action, nor because it was sought to recover unpaid portion of purchase price of land under a contract of sale with dependent covenants. Zuelke v. P., 185M457, 241NW577. See Dun. Dig. 7636(75).

Service of a complaint in intervention upon attorney for plaintiff in a pending action, if said complaint is otherwise sufficient, confers jurisdiction upon district court to hear case. Scott v. V., 193M465, 258NW817. See Dun. Dig. 4898.

6. Order of court unnecessary.

It is not necessary to obtain leave of court in order to serve and file a complaint in intervention and thus become a party to suit. Scott v. V., 193M465, 258NW817. See Dun. Dig. 4898.

7. Remedy for wrong intervention.

Attempted dismissal of action by plaintiff, after complaint in intervention had been served did not affect intervener's rights. Scott v. V., 193M465, 258NW817. See Dun. Dig. 2741.

8. Waiver of objection to intervention.

The court acted well within its discretion in denying plaintiff's motion for leave to open up judgment and permit her to answer intervener's complaint after default judgment. Scott v. V., 193M465, 258NW817. See Dun. Dig. 5015.

10. Intervener liable for statutory costs.

Where state intervenes and joins plaintiffs in suits in equity by taxpayers to cancel contracts for paving of state trunk highways, entered into by commissioner of highways, and for injunctions to restrain contractors and commissioner from proceeding with carrying out of such contracts, and for purpose of recovering for state moneys illegally paid out or to be paid out under such contracts, state subjects itself to jurisdiction of court and may be required by court to pay to plaintiffs, taxpayers, out of funds recovered and saved to state, reasonable and necessary expenditures and attorneys' fees incurred by such plaintiffs in carrying on litigation. Regan v. B., 196M243, 264NW803. See Dun. Dig. 4901a.

9264. Consolidation—Separate trials—Actions triable together.

Granting of separate trial is discretionary with trial court. Bergheim v. M., 190M571, 252NW833. See Dun. Dig. 9705.

Defendant is not, after consolidation of several suits into one, in a position to urge objection that when two of suits were begun plaintiff had no capacity to sue or that a cause of action was split in one of consolidated suits. E. E. Atkinson & Co. v. N., 193M175, 258NW151. See Dun. Dig. 7671.

Where actions for assault and for slander were consolidated for trial, and defendant consented thereto but asserted that there should be separate verdicts, there was no error where court directed jury to return but one verdict and to assess therein general damages for defamation of character and special damages for mental and nervous shock affecting plaintiff's health, trial developing facts showing slander but not a sufficient basis for assault. Gendler v. S., 195M578, 263NW925. See Dun. Dig. 91.

In separate suits arising out of same automobile collision by which passengers and driver of one of automobiles sought to recover damages of owner of other, court had inherent power, over objection of all plaintiffs, to order actions tried together. Ramswick v. M., 200M299, 274NW179. See Dun. Dig. 91.

Causes of action blended. 22MinnLawRev498.

9266. Pleadings liberally construed.

On an objection to the introduction of evidence under a pleading, it should receive the most liberal construction. Krzyzaniak v. M., 182M83, 233NW595. See Dun. Dig. 7718(16).

9267. Irrelevant, redundant, and indefinite pleadings.

½. In general.

Amended complaint, held properly stricken out as containing irrelevant matter. 179M475, 229NW583.

Remedy for inconsistent defenses, pleaded by answer, is by motion to compel an election, not by motion to strike. Woost v. H., 204M192, 283NW121. See Dun. Dig. 7580.

3. Indefinite pleading.

In an action to recover reasonable value of labor, services and material furnished defendant by plaintiff in the repair of a turbine, where the defense was in recoupment and a counterclaim which alleged breaches of warranty, held the allegations were amply sufficient to apprise plaintiff of the nature of the defense and were not indisputably false, lacking in a substantial relation to the controversy, obscure, or mere conclusions of law. Commander Milling Co. v. W. (USCCA8), 70F(2d) 469. See Dun. Dig. 7596, 7617.

Amended complaint, held properly stricken out as indefinite. 179M475, 229NW583.

Order on motion to require complaint to be made more definite and certain is largely discretionary and will not be disturbed where substantial rights on the merits have not been affected. Cullen v. P., 191M136, 253NW117. See Dun. Dig. 7647.

Motion to make complaint more definite and certain should not be granted for purpose of requiring party to plead evidentiary facts. Id. See Dun. Dig. 7646.

6. Remedy.

Whether or not part of a complaint may be stricken as sham, part of a complaint which neither states a cause of action nor assists other parts in so stating may properly be stricken on motion as irrelevant and redundant. Hayward Farms Co. v. U., 194M473, 260NW868. See Dun. Dig. 7653, 7656.

A party is entitled to definite information as to the theory upon which it is claimed he is liable; but where the pleading is so drawn as to make it impossible to determine definitely what acts or defaults may be claimed *to support the final claim of liability, the remedy is not* demurrer but a motion to make the pleading more definite and certain. Smith v. S., 204M255, 283NW239. See Dun. Dig. 7528a, 7646, 7648.

9268. Averments, when deemed admitted.

Demurrer to reply presents nothing for review on appeal. Sutton v. B., 180M417, 231NW10.

If a fact is admitted in pleadings on which case is tried, it is, in general, assumed without other evidence to be conclusively established for purposes of trial, because a party is estopped by allegations in his own pleading. Fortune v. F., 200M367, 274NW524. See Dun. Dig. 7498.

One of primary rules of pleading is that where there is material averment, which is traversable, but which is not traversed by other party, it is admitted. Id. See Dun. Dig. 7576.

9270. Ordinances and local statutes.

Complaint for violating a city ordinance may be made orally and entered in the court record. 172M130, 214NW778.

The courts take judicial notice of statutes of the state as well as the common law. Saunders v. Y., 182M62, 233NW599. See Dun. Dig. 3452(98).

District courts take judicial notice of provisions of city charters. City of St. Paul v. T., 189M612, 250NW572. See Dun. Dig. 3452, notes 6, 9.

An ordinance, being an evidentiary fact in a negligence case, may be proved without having been pleaded, like any other fact tending to prove or disprove ultimate fact of negligence. Larson v. L., 204M80, 282NW669. See Dun. Dig. 6793.

In action by police officers specially appointed to serve process for a justice of peace it was probably unnecessary to plead parts of city charter authorizing his appointment. Russ v. K., 285NW472. See Dun. Dig. 7520.

9273. Conditions precedent.

Guaranty contract held absolute and not conditional. 176M529, 224NW149.

9275. Pleadings in slander and libel.

1. Alleging extrinsic facts.

The allegations in complaint in libel by way of innuendo and inducement were proper and did not place an unreasonable, forced, or unnatural construction on the language used in the publication. Rudawsky v. N., 133M21, 235NW523. See Dun. Dig. 5539(16).

3. Counterclaim.

In action to recover damages for libel, defendant may not counterclaim for an alleged libel, therefore published, by plaintiff of and concerning defendant, as each libel constituted a separate transaction. Skluzacek v. W., 195M326, 263NW95. See Dun. Dig. 7613.

4. Defenses.

There being no inconsistency between them in point of fact, defendant in a slander suit may join with his general denial the plea in justification that, whether he did or did not use the words charged, they spoke the

truth. Woost v. H., 204M192, 283NW121. See Dun. Dig. 7580.

9277. Joinder of causes of action.

½. In general.

Trial court did not err in consolidating action for cancellation of contract brought by appellant and actions to enjoin cancellation proceedings and for specific performance brought by respondents, and in granting specific performance. Schultz v. U., 199M131, 271NW249. See Dun. Dig. 8788.

Where two causes of action are pleaded but the facts in each are same, there is only one cause to be heard, and determined. Smith v. S., 204M255, 283NW239. See Dun. Dig. 7499c.

In representative suit by stockholder against majority stockholders this section did not make it erroneous to add by amendment several counts in conversion to a complaint alleging fraud and conspiracy by majority resulting in illegal accumulation of surplus, excessive salaries, and mismanagement of a subsidiary, and ultra vires investment of income in bonds. Keough v. S., 285NW809. See Dun. Dig. 7503.

1. Subd. 1.

Automobile owner and insurer under ordinary liability policy cannot be jointed in a single action. Charlton v. Van Etten, (DC-Minn), 55F(2d)418. See Dun. Dig. 4875c, 7327.

In an equitable action the test whether several causes of action are improperly united is whether they could have been included in a bill in equity under the old practice without making it multifarious. 173M538, 217NW930.

Stockholders sued in right of corporation to annul the unlawful issue of stock whereby there was accomplished an unlawful sale of assets, held that there was but one equitable cause of action. 173M538, 217NW931.

Contractor and assignee of portion of earnings under contract could join in an action to recover thereon notwithstanding that their interests are distinct and severable. 175M236, 220NW946.

Amended complaint, held properly stricken out as containing more than one cause of action not separately stated. 179M475, 229NW583.

In an unlawful detainer action, defendant gave two appeal and stay bonds, one on appeal from justice to district court, and the other on appeal to the Supreme Court. Held, that the two sets of sureties were so affected as to justify a joinder of the obligee's causes of action in one suit. Roehrs v. T., 185M154, 240NW111. See Dun. Dig. 7500(63).

Cause of action, for damages arising out of breach of statute intended for benefit of plaintiff, against local brokerage association and one copartnership, held properly joined with action against second copartnership on its undertaking to account to plaintiff for stocks and moneys delivered by plaintiff to association in part payment of bucketed orders and delivered to second copartnership on transfer of association's account from first copartnership, and received by second copartnership with full knowledge of the bucketing activities of association. Kaiser v. B., 200M545, 274NW680. See Dun. Dig. 7504.

Two separate and distinct judgment creditors, or one person acting in several capacities, may bring a joint suit against a judgment debtor and numerous grantees or transferees who rendered aid and assistance to debtor in attempting to place his property beyond reach of plaintiff. Lind v. O., 204M30, 282NW661. See Dun. Dig. 7505.

2. Subd. 2.

Broker failing to perform original express contract might recover on an implied contract where he performed services. Benedict v. P., 183M396, 237NW2. See Dun. Dig. 1793(50).

In a proper case, the plaintiff may declare on an express contract and also in a second cause of action on a subsequent, different contract covering the same claim or transaction and implied as of fact. Benedict v. P., 183M396, 237NW2. See Dun. Dig. 7500(99).

3. Subd. 3.

A city discharging sewage into a stream and another city discharging sewage into a tributary stream acted as independent and not joint tort feasors and could not be joined in one action for damages to farm owner. Shuster v. C., 203M518, 282NW135. See Dun. Dig. 7261.

8. Pleading.

In an action against an insurance company and one alleged to be its agent to recover for slander plaintiff may plead composite facts including elements both of fact and law tending to show a joint cause of action against defendants. Simon v. Stangl, (DC-Minn), 54F(2d)73. See Dun. Dig. 5503, 5547.

9. Must affect all the parties.

In equity causes of action may be joined if they might have been included in a bill in equity under the old practice without making it multifarious, and a bill in equity is not multifarious, where one general right only is claimed by it, though defendants have only separate interests in distinct questions which rise out of or are connected with such rights, but all of the defendants must be affected in some respect by the action, or by some part thereof. Lind v. O., 204M30, 282NW661. See Dun. Dig. 7505.

15. Splitting cause of action.

Where wife is injured, the wife and husband may maintain separate actions for damages. 175M247, 221NW8.

A single cause of action cannot be split or divided and independent actions brought upon each part. Myhra v. P., 193M290, 258NW515. See Dun. Dig. 2531.

All items of damage resulting from a single tort form an indivisible cause of action and must be included in one suit; and if any item be voluntarily omitted no further action can be maintained thereon, absent fraud on part of adversary or mutual mistake. Id.

If, for same wrong, one is liable both for breach of contract and conversion, injured party may elect his remedy. If he sues for tort, and there have been successive and distinct conversions, he has right to sue upon them separately as independent causes of action. Lloyd v. F., 197M387, 267NW204. See Dun. Dig. 5167.

9280. Amendment by order.

½. In general.

A motion to amend the answer, after the trial and determination of the case, by alleging facts upon which a reformation of the contract sued on might be had, was properly denied. 172M214, 214NW780.

Failure to strike out evidence introduced before amendment of answer, held prejudicial error. 181M285, 232NW325. See Dun. Dig. 422, 9742.

Where defendant recognized action as one in conversion, it could not claim surprise in the allowance of an amendment of the complaint to state a cause of action in conversion. Nygaard v. M., 183M388, 237NW7. See Dun. Dig. 7122.

Appellant's motion to vacate an order amending complaint so as to make defendant city a party plaintiff instead of a party defendant was timely under Barrett v. Smith, 183M431, 237NW15, and U. S. Roofing & Paint Co. v. Melin, 160M530, 200NW807. Id. See Dun. Dig. 7711.

Order amending complaint so as to make city a party plaintiff instead of a party defendant was not an order involving merits of cause of action or any part thereof and is not appealable, neither is order denying motion to vacate order granting amendment. Gilmore v. C., 198M148, 269NW113. See Dun. Dig. 298.

Any error in permitting an amendment to a complaint is eliminated by subsequently striking out amendment and taking from consideration of jury all matter embraced in it. Baker v. C., 202M491, 279NW211. See Dun. Dig. 423.

Inconsistent defenses sought to be interposed require an election and upon refusal to make such election court was justified in vacating a previous order permitting an amendment which sought to set up a defense inconsistent with one interposed by original answer. Schochet v. G., 204M610, 284NW886. See Dun. Dig. 7711.

Amendment and aider of pleadings. 12MinnLawRev97.

1. A matter of discretion.

Amendment of pleadings on trial is matter lying almost wholly in the discretion of the trial court. 174M297, 219NW180.

Within discretion of court to direct that reply to an answer should stand as reply to amended answer. Manufacturers' & Dealers' Discount Corp. v. M., 177M388, 225NW283.

The granting of or refusal to grant a motion to amend the complaint rests largely within the discretion of the trial court. Agricultural Credit Corp v. S., 184M68, 237NW823. See Dun. Dig. 7696.

Allowance at the trial of amendment of complaint held within discretion of trial judge. Bowen v. B., 185M35, 239NW774. See Dun. Dig. 7696.

Motion to amend answer held addressed to sound discretion of trial court. De Jardins v. E., 189M356, 249NW576. See Dun. Dig. 7696.

In refusing to continue to later date hearing on order to show cause why a receiver should not be appointed to collect rents on mortgaged property, and in allowing an amendment to complaint, court did not abuse its discretion. Minneapolis Sav. & Loan Ass'n v. Y., 193M632, 259NW382. See Dun. Dig. 1710.

Court did not abuse judicial discretion in refusing plaintiff in negligence case leave to amend complaint by alleging a new ground of liability. Abar v. R., 195M597, 263NW917. See Dun. Dig. 7709.

There was no abuse of judicial discretion in refusing motion to amend answer by pleading defect of parties defendant, where defense could neither be harmed nor aided by amendment. Hanson v. B., 199M70, 271NW127. See Dun. Dig. 7696.

A motion to amend usually presents a matter for judicial discretion. Melgaard's Will, 204M194, 283NW112. See Dun. Dig. 7696.

2. Amendments on the trial held discretionary.

Court did not abuse its discretion in denying application to amend complaint by changing name of corporate defendant. 171M209, 213NW742.

Allowance of amendment at trial held not an abuse of discretion. 172M524, 215NW851.

Court held not to have abused its discretion in denying leave to amend answer to set up usury. 173M14, 216NW314.

In an action against automobile repairer for injuries caused by back-fire, court properly permitted plaintiff to amend to show that negligence was with respect to

repairing "timer" and not "carburetor," as alleged. 175 M216, 220NW565.

In action against village for injuries occasioned by snow and ice on sidewalk, court properly refused, after plaintiff had rested, to permit defendant to amend so as to show that plaintiff had failed to remove the ice and snow from the sidewalk, as required by a village ordinance. 175M361, 221NW241.

Granting of amendments of pleading during trial is well within the discretion of the trial court. 176M331, 223NW605.

Granting of amendments of pleadings during trial is within discretion of trial court. D. M. Gilmore Co. v. D., 187M132, 244NW557. See Dun. Dig. 7696, 7697.

Failure to plead affirmative defense of settlement and release until trial was well advanced is disapproved, but allowance of amendment held not abuse of discretion. Barrett v. S., 187M430, 245NW830. See Dun. Dig. 7711.

Allowance of amendment to complaint near end of case is within discretion of trial court. Ross v. D., 203M321, 281NW76. See Dun. Dig. 7696.

4. Amendments after trial held discretionary.

179M266, 229NW128.

There was no abuse of discretion in refusing leave to file a proposed amended answer alleging a counterclaim after the trial was concluded. Gibbons v. H., 185M290, 240NW901. See Dun. Dig. 7713a.

5. Amendments conforming the pleadings to the proof held discretionary.

Amendment of pleading to conform to proof as to plaintiff's condition during a certain period of time, held properly allowed. 179M19, 228NW440.

Discretion not abused in allowing amendment in course of trial. Sigvertsen v. M., 182M433, 234NW688. See Dun. Dig. 7708.

Answer alleging a counterclaim may be amended to correspond to proof. Lee v. W., 187M659, 246NW25. See Dun. Dig. 7713.

Trial court rightly allowed an amendment of pleadings to conform to proof. Erickson v. E., 188M269, 258NW736. See Dun. Dig. 7713.

It was well within trial court's discretion to deny defendant's motion to amend answer by changing admission of execution of contract to a denial thereof. Fisher v. R., 196M409, 265NW43. See Dun. Dig. 7708(54).

Where the question of amendment of answer was raised for first time in defendants' motion for a new trial, trial court did not abuse its discretion in not allowing defendants to amend. Davis v. R., 197M287, 266NW855. See Dun. Dig. 7698, 7713a.

Trial court did not abuse its discretion in allowing amendment of complaint to conform to proof. Birdsall v. D., 197M411, 267NW363. See Dun. Dig. 7713.

Where complaint in action on industrial policy made no reference to nature of plaintiff's insurable interest, and insurable interest was not challenged by any specific allegations in answer, court did not abuse its discretion at end of trial in amending complaint to conform with proof showing that plaintiff was a creditor of insured. Dight v. P., 201M247, 276NW3. See Dun. Dig. 7713.

8. Must be material.

It is an abuse of discretion to permit a wholly futile amendment. Melgaard's Will, 204M194, 283NW112. See Dun. Dig. 7702.

10. Motion.

While practice of amending pleadings so as to conform with proof by court on its own motion in its memorandum attached to findings and conclusions is not to be commended, court may do so within its discretion. Dight v. P., 201M247, 276NW3. See Dun. Dig. 7703.

12. Scope of allowable amendment of complaint.

Application for amendment of complaint stating cause of action under Federal Safety Appliance Act to one under Federal Employers' Liability Act properly denied. Meisenholder v. B., 178M409, 227NW426.

Plaintiff suing upon contract was properly permitted to amend so as to base cause of action upon quasi contract. Seifert v. U., 191M362, 254NW273. See Dun. Dig. 7696.

13. Scope of allowable amendment of answer.

Court did not abuse its discretion in refusing to allow an amendment to answer near close of trial which would be a complete about face from defense pleaded in action on note. First & Farmers' State Bank v. V., 190M331, 251NW669. See Dun. Dig. 7711.

15. Amendment of parties.

An amendment of the name of a party is in the discretion of the court. Mullany v. F., 287NW118. See Dun. Dig. 7701.

Where a motor truck was purchased for use in a business but title was taken in name of father of man in business, and theft policy was issued in name of father, by agents having knowledge of real ownership, and action was brought upon policy in name of father, court did not abuse its discretion in permitting an amendment so as to name real owner as plaintiff. Id. See Dun. Dig. 7701.

18. Amendment after judgment.

Court, on plaintiffs' motion for a new trial, rightly refused to amend complaint for specific performance by substituting either a complaint for reformation of contract or one for money had and received, since dismissal is not a bar. Martineau v. C., 201M342, 276NW232. See Dun. Dig. 7715.

19. Amendment after appeal.

Melgaard's Will, 204M194, 283NW112.

9281. Variance—Amendment—Exceptions.

1. Proof must follow pleadings.

A pleading, first attacked on the trial, should be liberally construed. 171M358, 214NW49.

Motions to amend pleadings, after verdict, to comply with proofs, usually rest in the discretion of the trial court. 181M471, 233NW14. See Dun. Dig. 7713, 7713a.

Where defendant dentist voluntarily asserted that his attempted removal of impacted tooth from the inside of the mouth was good practice, he raised the issue as to whether or not it was good practice, so that it was competent to receive evidence from qualified experts that it was not good practice. Prevey v. W., 182M332, 234NW470. See Dun. Dig. 3332, 7494.

In action on contract for radio advertising by seller of petroleum to one agreeing to purchase exclusively from plaintiff and to pay certain sum per gallon for radio advertising recovery could not be had for advertising on petroleum products purchased from others than plaintiff, action not being for damages. House of Gurney v. R., 187M150, 245NW30. See Dun. Dig. 88.

Under complaint, which alleged sale and delivery of goods, wares, and merchandise at special instance and request of defendant, and alleged reasonable value thereof and a promise to pay therefor, plaintiff was entitled to prove either an express or an implied contract. Krocak v. K., 189M346, 249NW671. See Dun. Dig. 8640.

A defendant which does not allege or offer to prove that it was misled cannot avail itself of a variance. Schmidt v. A., 190M585, 252NW671. See Dun. Dig. 7672.

Under allegations in action for damages for failure to give tenant possession of premises under lease from month to month, court could not permit proof of oral lease for one year without amendment of pleadings. Vethourlkas v. S., 191M573, 254NW909. See Dun. Dig. 7673, 8857.

When a case is tried on a stipulation of facts, any issue so presented is for decision even though not presented by the pleadings. Miller v. P., 191M586, 254 NW915.

On motion for directed verdict all evidence admitted must be considered as properly received, and motion should not be denied because defense established by evidence was neither pleaded nor litigated by consent. Robbins v. N., 195M205, 262NW872. See Dun. Dig. 9764.

A stipulation in open court eliminating issue of whether plaintiff was an employee of defendant company, and consequently subject to workmen's compensation act left case where court properly submitted it on question whether plaintiff was an invitee and entitled to ordinary care for his safety. Anderson v. H., 198M509, 270NW 146. See Dun. Dig. 9005.

Where it is apparent, both as to form of action and course and theory of trial, that liability was predicated solely upon express contract, enforcement of liability as for unjust enrichment cannot be had. Swenson v. G., 200M354, 274NW222. See Dun. Dig. 7671.

Recovery may be had either for tort or breach of contract if facts proved within allegations of pleading justify it, though pleader was mistaken as to nature of his cause of action. Walsh v. M., 201M58, 275NW377. See Dun. Dig. 7526a, 7528b.

Fact that defendants may have mistaken their remedy does not permit court to grant them relief upon some theory other than one pleaded and proved. Minneapolis Discount Co. v. C., 201M111, 275NW511. See Dun. Dig. 7671.

Plaintiff must recover, if at all, upon claims presented by his complaint. Houchin v. B., 202M540, 279NW370. See Dun. Dig. 7671.

Plaintiff is not entitled in an action in deceit for damages for fraud in procurement of a contract for deed to recover as for money had and received upon showing rescission of contract by parties, where pleadings and evidence did not present a claim for money had and received and that ground of recovery is asserted for first time on appeal. Id. See Dun. Dig. 10092.

Where the defense of breach of implied warranty is neither pleaded nor litigated by consent, it comes too late when suggested for first time by defendant's motion for amended findings or a new trial. Allen v. C., 204M295, 283 NW490. See Dun. Dig. 7675, 7713a.

2. Immaterial variance.

Complaint considered in connection with the contract and bond sued upon, held to state a cause of action against the surety, the issues being fully understood and no one being misled. 171M305, 214NW47.

Where complaint alleged sale to defendant, proof of order from defendant for delivery to third person on credit of defendant, held not a variance. 180M467, 231 NW194.

The complaint alleged that the arresting officer was a deputy sheriff. The proofs showed that he was a constable. Held not a fatal variance. Evans v. J., 182M 282, 234NW292. See Dun. Dig. 512, 3731.

In action against drug company for damages from taking cold tablets containing poison, held that there was no material variance between plaintiff's pleading and proof. Tiedje v. H., 184M569, 239NW611. See Dun. Dig. 7673.

Where plaintiff proves essential fact necessary to sustain recovery, he is not defeated because he has failed to prove other allegations. Chicago Flexotile Floor Co. v. L., 188M422, 247NW517. See Dun. Dig. 7672.

Defendant cannot complain of variance between pleading and proof which does not mislead nor prejudice him. Id.

3. Material variance.

A litigant who claims prejudice from a variance has no standing to complain without the proof required by this section that he has been misled and "in what respect he has been misled." 175M443, 221NW682.

4a. Discretion of court.

Granting of amendments of pleading during trial is well within the discretion of the trial court. 176M331, 223NW605.

9282. Failure of proof.

When there is an allegation of a joint contract with two or more defendants and proof is of a several contract with one, there may be a recovery against one liable; and in such case there is not a failure of proof. Schmidt v. A., 190M585, 252NW671. See Dun. Dig. 7674.

9283. Extensions of time—Mistakes, etc.

THE STATUTE GENERALLY

1. Application in general.

There must be a showing of some mistake, inadvertence, surprise, or inexcusable neglect. 173M606, 218NW127.

Provision permitting relief from judgments within one year, applies in workmen's compensation cases. 176M554, 223NW926.

This section is not confined to default judgment and plaintiff may have relief against judgment rendered against him. 178M556, 228NW150.

Probate court, like district court, may, within one year after notice thereof, correct its records and decrees and relieve a party from his mistake, inadvertence, surprise, or excusable neglect. Simon, 187M263, 246NW31. See Dun. Dig. 7784.

When application for relief is based exclusively upon legal right, time in which such application may be made is limited to time in which an appeal may be taken. Simon, 187M263, 246NW31. See Dun. Dig. 7784(4).

In case of fraud or mistake of fact probate court has jurisdiction to vacate or set aside orders or judgments, or to correct its own clerical mistakes or misprision, even after time allowed for appeal. Simon, 187M263, 246NW31. See Dun. Dig. 7784(5).

It was not error for the court to extend reasonable time, fixed by order conditionally denying defendant's motion for a new trial, within which plaintiff might file his consent to a reduction of verdict. Jasinuk v. L., 189M594, 250NW568. See Dun. Dig. 7138.

Power of court to grant relief against judgments or stipulations is not based solely on statute, but also on equity powers of court to annul judgments or set aside stipulations in cases proper for such relief. Orfield v. M., 199M466, 272NW260. See Dun. Dig. 5109, 9005.

AMENDMENT OF JUDGMENTS AND JUDICIAL RECORDS

3½. In general.

This section applies to the granting of amendments to pleadings. Stebbins v. F., 178M556, 228NW150.

Court properly reopened judgment for new findings of fact and conclusions of law to correct inadvertent mistake of deceased trial judge. Fagerstrom v. C., 188M245, 246NW884. See Dun. Dig. 5101.

Court cannot appropriate to itself a jurisdiction which law does not give it by correcting or permitting correction of a notice of appeal after time for taking appeal has expired. Strom v. L., 201M226, 275NW833. See Dun. Dig. 7805, 8947, 8954.

4. To be made with caution.

Error in admitting incompetent testimony was cured by subsequent proof of same facts by competent and undisputed evidence. Donlin v. W., 176M234, 223NW98.

6. When may be made.

Motion to reopen and amend judgment made after satisfaction thereof, held too late. 177M369, 225NW282.

Delay of 6 months before correcting judgment nunc pro tunc, held prejudicial. 180M168, 230NW464.

Improper directions to probate court in conclusion of law may be remedied by application to trial court before entry of judgment. Anderson v. A., 197M252, 266NW841. See Dun. Dig. 9873.

After judgment in favor of school district brought by taxpayers was satisfied, court lost jurisdiction to order school district to pay fees to attorney employed by taxpayers. Op. Atty. Gen. (779n), June 7, 1934.

7. Notice of motion.

181M329, 232NW322.

11. Clerical mistakes of clerk.

Judgment entered by clerk contrary to findings and conclusions may be corrected nunc pro tunc. 180M168, 230NW464.

12. Mistakes of judge.

181M329, 232NW322.

An obvious clerical error in decision of trial judge may and should be corrected by his successor. Lustmann v. L., 204M228, 283NW387. See Dun. Dig. 4961.

18. Modification of judgments.

181M329, 232NW322.

Where federal circuit court of appeals affirmed federal district court's judgment of $5,000 to insured, that being amount contended by insurer as recoverable under policy, insurer could not later maintain a bill of review to have state court judgment of $1,800 deducted from $5,000 judgment, where it had satisfied state court judgment pending appeal of federal court case, and did not obtain federal court's permission to file its equitable action. Simonds v. N. (USCCA8), 73F(2d)412. Cert. den. 294US711, 55SCR507. See Dun. Dig. 5088.

Court cannot change or modify sentence after expiration of term. 178M626, 228NW173.

To obtain a modification of a decree for a limited divorce, proper practice is to move to open decree and present proof warranting a decree in a modified form. Feltmann v. F., 187M591, 246NW360. See Dun. Dig. 2799b.

Where there was no objection made to hearing of motion for modification of divorce decree or its determination upon affidavits, and order made merely required plaintiff to join in execution of a mortgage on defendant's land so as to enable him to comply with decree, order should stand, except mortgage should be no larger than needed to discharge plaintiff's lien and expenses connected with obtaining mortgage. Feltmann v. F., 187M591, 246NW360. See Dun. Dig. 2799b, 2805.

Motion to amend judgment of divorce in favor of husband by allowing wife an interest in homestead property and a larger amount for permanent alimony than was awarded was properly denied. Wilson v. W., 188M23, 246NW476. See Dun. Dig. 2805.

A motion, after judgment was entered, to set aside or reduce amount of verdict and judgment on a ground presented to and passed upon at trial and again in an alternative motion for judgment or a new trial, cannot be maintained, and an order denying such motion is not appealable. Such question can be raised on appeal from an order denying the alternative motion, or on appeal from judgment. Lavelle v. A., 197M169, 266NW445. See Dun. Dig. 5090a.

25. Rights of third parties to be saved.

Correction of judgment nunc pro tunc, held not to have prejudiced third persons not parties. 180M168, 230NW464.

VACATION OF JUDGMENTS AND ORDERS

25½. In general.

Where client settled suit without knowledge of attorney and the action was dismissed the attorney was entitled to have the judgment set aside with right to intervene for the purpose of enforcing his lien for services. Bynam v. M. (USCCA8), 47F(2d)112.

Grounds of impeachment of a judgment or decree in the nature of a bill of review are fraud, accident, surprise, or mistake. Simonds v. N. (USCCA8), 73F(2d)412. Cert. den. 294US711, 55SCR507. See Dun. Dig. 5122, 5123, 5123a.

Court did not err in refusing to set aside a judgment in personal injury action upon ground that a release alleged in answer was executed under mistake and induced by fraud. 174M197, 219NW85.

This section is not confined to default judgment or judgments that are erroneous, and is applicable to a plaintiff against whom judgment has been rendered. Stebbins v. F., 178M556, 228NW150.

Failure to introduce evidence through mere inadvertence of counsel, held not ground for release. 179M99, 228NW447.

Court, held justified in vacating stipulation and amended judgment because procured by undue influence and overreaching. 179M488, 229NW791.

Court may in its discretion vacate findings and reopen case for further evidence. 181M71, 231NW397.

Court did not abuse its discretion in denying application to vacate the order of the probate court on the ground of laches and long acquiescense in the order after having actual notice thereof. In re Butler's Estate, 183M591, 237NW592. See Dun. Dig. 7784, 10255.

Applies to an order of the probate court admitting a will to probate, and limits the time, within which such order may be vacated, to one year from the time the applicant has actual notice of the order, unless want of jurisdiction appears on the face of the record, or there are other circumstances making the limitation inapplicable. In re Butler's Estate, 183M591, 237NW592. See Dun. Dig. 7784.

Decision of motion, based on conflicting affidavits, will not be disturbed on appeal. Mason v. M., 186M300, 243NW129. See Dun. Dig. 410.

A judgment having been entered without notice, it was error to vacate it on ground that through excusable neglect of opposing counsel, there was no stay of proceedings when motion for vacation was not made or based upon that ground. Wilcox v. H., 186M504, 243NW709. See Dun. Dig. 5108(62).

Affidavits are construed as insufficient to warrant the granting of a motion to vacate a judgment on the theory that they establish excusable neglect. Wilcox v. H., 186M504, 243NW709, See Dun. Dig. 5108.

Court properly refused to consider second motion to set aside judgment, no leave being asked or given. Universal Ins. Co. v. B., 186M648, 243NW393. See Dun. Dig. 1516a.

After one year and after expiration of time for appeal, probate court could not modify or vacate its final order settling account on showing that deceased personal representative had embezzled money. Simon, 187M399, 246NW31. See Dun. Dig. 7784(4).

Rules applicable to motion to strike a pleading as sham or frivolous do not control a motion to vacate

judgment supported by affidavits. Ramsay v. B., 189M 333, 249NW192. See Dun. Dig. 5011.

Trial court has absolute power to vacate prior order and to make contrary findings where controlling statute, previously overlooked, is called to court's attention, even though moving party produces no newly discovered evidence. Lehman v. N., 191M211, 253NW663. See Dun. Dig. 5121a.

Trial court did not abuse its discretion in refusing to set aside orders allowing and confirming annual account of a trustee in order that beneficiary, who had consented to such order, could file objections to the account. Fleischmann v. N., 194M227, 234, 260NW310. See Dun. Dig. 5108.

A judgment may not be vacated and set aside where only objections thereto are based upon matters that might have been raised by an appeal. Johnson v. U., 196 M588, 266NW169. See Dun. Dig. 5108a.

That plaintiff thought he had 40 days in which to appeal from an order sustaining a demurrer because of fact that district court granted a forty-day stay after judgment furnished no ground for vacation of judgment or order sustaining demurrer. Id. See Dun. Dig. 5114.

Section 9405 and not this section applies where more than statutory period of time has run. Jordan's Estate, 199M53, 271NW104. See Dun. Dig. 5007.

Jurisdiction of probate court to vacate its orders and judgment is as great as power possessed and exercised by district court in like or similar matters. Id. See Dun. Dig. 5129.

An application to vacate an order or judgment upon ground of mistake is addressed to sound discretion of court. Orfield v. M., 199M466, 272NW260. See Dun. Dig. 5123a.

An appeal, writ or error, or other proper motion is a direct attack upon an order or a judgment, as is also a bill in equity to annul judgment, or a proper action under the statute (§§9283, 9405), but latter remedy is not exclusive, and is only concurrent with remedy by motion. Melgaard's Will, 200M493, 274NW641. See Dun. Dig. 5108a.

Proceedings to vacate judgment on ground that court was misled may be by action under §9405 or motion under §9283. Nichols v. V., 204M212, 283NW748. See Dun. Dig. 5108a.

32. Diligence.

179M315, 229NW133.

35. Jurisdictional defects.

A motion to vacate a judgment is usually based upon a jurisdictional defect, and is a matter of right. 176M 59, 222NW520.

Section authorizes district court to set aside order extending time to redeem under §9633-5 and a subsequent order declaring a default by mortgagor of terms of extension order, where proceedings are had under a mistake of fact that mortgage foreclosure was valid, when foreclosure was void because of failure to file power of attorney to foreclose prior to mortgage foreclosure sale. Orfield v. M., 199M466, 272NW260. See Dun. Dig. 5117, 5123a.

40. Fraud.

Stipulation for dismissal of personal injury case on the merits, with prejudice, may be set aside for fraud. Becker v. M., 175M626, 221NW724.

To set aside any final order or judgment is not justifiable unless fraud is established by strong, clear and satisfactory evidence. Fleischmann v. N., 194M227, 234, 260NW310. See Dun. Dig. 5122, 5124.

Where an action has been fully litigated and upon appeal the decisions affirmed, the defeated party may not again have a new trial on the ground that witnesses made mistakes or wilfully testified falsely in the trial. Nichols v. V., 204M212, 283NW748. See Dun. Dig. 5127, 5128, 5129.

45. Vacation of orders.

Order of dismissal cannot be set aside after term has expired where the dismissal was made for want of prosecution, though parties had stipulated for continuance of case without the approval of the court. New England F. & C. Co. v. U. S. (DS-Minn), 2FSupp648.

District court had no power to vacate an intermediate order sustaining a demurrer after judgment had been entered. Johnson v. U., 196M588, 266NW169. See Dun. Dig. 5108a.

OPENING DEFAULTS

45½. In general.

173M580, 218NW110.

Generally, the grounds for the granting of relief by a court of equity against the enforcement of a judgment are that the party seeking the relief had a good defense and that he was prevented by fraud, concealment, accident, or mistake from presenting such defense, and that he has been free from negligence in failing to avail himself of the defense. Simonds v. N. (USCCA8), 73F(2d) 412. Cert. den. 294US711, 55SCR507. See Dun. Dig. 5125.

Strict rule of res adjudicata does not apply to motions in pending action, and the district court has jurisdiction and in its discretion may allow renewal of motion to vacate a judgment. 174M344, 219NW184.

Motion by defendant, himself an attorney at law, to vacate a judgment of divorce and for leave to answer, held properly denied. 175M71, 220NW546.

The probate court has power to vacate its final decree on the ground of fraud, mistake, inadvertence or excusable neglect upon proper application seasonably made. 175M524, 222NW68.

Motions to set aside and vacate default judgments are addressed to the judicial discretion of the trial court. Child v. H., 183M170, 236NW202. See Dun. Dig. 5012.

This section governs the vacation of judgments and order of the probate court as well as those of the district courts. Walker's Estate v. M., 183M325, 236NW485. See Dun. Dig. 7784.

In determining whether judicial discretion should relieve executor against a claim allowed as on default, it is proper to consider the statement of claim as filed and the objections or defense proposed thereto. Walker's Estate v. M., 183M325, 236NW485. See Dun. Dig. 7784.

No abuse of discretion in refusing to set aside default judgment where defendant returned summons and complaint to lawyer with letter explaining his side of controversy. Lodahl v. H., 184M154, 238NW41. See Dun. Dig. 5025(10).

In proceeding to set aside judgment in equity case cancelling land contract, it was incumbent upon defendant to offer to make payments admittedly in default. Madsen v. P., 194M418, 260NW510. See Dun. Dig. 5007a.

Strict rule of res adjudicata does not apply to motions in a pending action, and district court has jurisdiction and may in its discretion allow renewal of a motion to vacate a judgment and relieve from default, and irregularity of failing to procure leave to make it is cured by overruling of objection to hearing of second motion. Wilhelm v. W., 201M462, 276NW804. See Dun. Dig. 5031, 5116a.

48. To what applicable.

Where there has been award of compensation in installments, which have been paid, and then issue is formally made whether there is right to additional compensation, decision of commission that right has terminated is final, subject only to review (by certiorari), as distinguished from rehearing. Rosenquist v. O., 187M 375, 245NW621. See Dun. Dig. 10421.

A final judgment in an action for divorce cannot be vacated on ground that defendant failed to answer through mistake or excusable neglect. Wilhelm v. W., 201M462, 276NW804. See Dun. Dig. 2799b, 5025, 5027.

49. Relief granted liberally.

Courts should be liberal in relieving from default and allowing defendant to answer. Wilhelm v. W., 201M462, 276NW804. See Dun. Dig. 5013.

Where appellant, on appeal from probate court to district court, can be relieved of his defaults in failing to serve appeal bond, which had been filed, and to file and serve within time limited a concise statement of propositions of law and fact upon which he relies for reversal without prejudice to other party, it appearing that appeal was taken in good faith and that defaults were due to mistake, court should grant an amendment relieving party of his defaults. Dahn v. D., 203M19, 279 NW715. See Dun. Dig. 7796.

50. Discretionary.

Vacating judgment and permitting interposition of answer and setting case for trial was discretionary. 173M606, 218NW127.

Denial of defendant's motion to vacate various proceedings prior to default judgment of foreclosure was within the discretion of the trial court. 174M46, 218NW 170.

Court did not abuse discretion in denying application to vacate a default judgment. 175M112, 220NW435.

Matter of opening default lies almost wholly in discretion of trial court. Johnson v. H., 177M388, 225NW 283.

Opening default. Held not abuse of discretion. Wagner v. B., 180M557, 231NW241(2).

An order denying a motion to open a default judgment, made on conflicting affidavits, held not an abuse of discretion and not reversible here. Duncan v. R., 182 M445, 234NW638. See Dun. Dig. 5022.

Opening of default judgment for excusable neglect rests almost wholly within discretion of trial court. McMahon v. P., 186M141, 242NW620. See Dun. Dig. 5012.

Refusal to open up default judgment and permit filing of an answer will not be reversed on appeal except for a clear abuse of discretion. Nystrom v. N., 186M490, 243 NW704. See Dun. Dig. 5034.

Vacating a default judgment is largely discretionary. Central Hanover Bank & Trust Co. v. P., 189M36, 248NW 287. See Dun. Dig. 5012, 5019.

It was an abuse of judicial discretion to vacate judgment entered for default of answer, upon proposed answer which stated no defense. Id.

Order made on conflicting affidavits, opening a default judgment and permitting defendant to appear and defend, is almost wholly within discretion of trial court and will not be reversed on appeal, except for a clear abuse of discretion. Roe v. W., 191M251, 254NW274. See Dun. Dig. 399, 5012.

District court has discretionary power to determine whether an appellant from probate court should be relieved of a default for failure to file, within statutory time, statement of propositions of law and fact upon which he is relying for reversal of an order of probate court. Slingerland's Estate, 196M354, 265NW21. See Dun. Dig. 2740, 7499b.

Release from default is almost entirely in sound discretion of trial court, and supreme court will reverse only

in cases in which it appears that there has been an abuse of discretion. Kennedy v. T., 201M422, 276NW650. See Dun. Dig. 399, 5012.

51. Excusable neglect.

181M39, 231NW241(2).

Opening default occasioned by reliance on certain person to take care of litigation and sickness on that person's part, held not an abuse of discretion. 171M327, 214 NW57.

Motion to open judgment and permitting answer is addressed to the discretion of the court. 176M59, 222NW 520.

Incapacitating progressive illness of defendant from which he died, held excusable neglect. 180M36, 230NW 122.

Inadvertent neglect of attorneys for executors in failing to ascertain the filing of a claim and the date of hearing was excusable. Walker's Estate v. M., 183M325, 236NW485. See Dun. Dig. 7784.

Where an employer left to its insurer defense of a petition for compensation, after an award was made and reduced to judgment, insurer having become insolvent, district court had power to set aside judgment for "excusable neglect" of employer so that it might petition industrial commission for a rehearing of matter on merits. Meehan v. M., 191M411, 254NW584. See Dun. Dig. 5123.

Court did not abuse judicial discretion in removing a default and permitting defendant to answer where it could be found that, in ignorance of law, he let time for answer pass while he was negotiating a settlement of action with plaintiff. Tiden v. S., 191M518, 254NW617. See Dun. Dig. 5025.

A party will be relieved from default of his attorney when it can be done without substantial prejudice to the party affected. Kennedy v. T., 201M422, 276NW650. See Dun. Dig. 5025.

53. Mistake.

To vacate a judgment entered in district court to enforce an award of industrial commission upon ground of mistake of fact, court must be governed by same considerations and principles that govern vacation of any judgment of district court. Maffett v. C., 198M480, 270 NW596. See Dun. Dig. 5123a.

54. Fraud.

Motion to vacate divorce decree and grant leave to answer based upon alleged fraud held properly denied. Wilhelm v. W., 201M462, 276NW804. See Dun. Dig. 5028, 5122.

54½. Insufficiency of complaint.

Where judgment on default is entered on a complaint which fails to state a cause of action, trial court is justified in opening judgment and permitting defendant to appear and defend, on motion made for that purpose within time for appeal from judgment. Roe v. W., 191M 251, 254NW274. See Dun. Dig. 5013a.

54¾. False Testimony.

Where affidavits in support of a petition for rehearing indicate strongly that award was based in substantial degree upon false testimony, it is an abuse of discretion not to grant a rehearing. Meehan v. M., 191M411, 254NW584. See Dun. Dig. 5122.

56. Time of application—Diligence.

175M319, 221NW65.

Defendant in default must act with diligence and court cannot entertain motion to open judgment after one year from notice of the judgment. 176M59, 222NW520.

The power of the district court to review and vacate an appealable order made before judgment, or to permit a renewal or repetition of the motion, is not lost because of expiration of the time for appeal. Barrett v. S., 183M431, 237NW15. See Dun. Dig. 6512(38).

Denial of motion to vacate default judgment held not abuse of discretion due to dilatory conduct of defendant. Ramsay v. B., 189M333, 249NW192. See Dun. Dig. 5012.

Whether reasonable diligence was shown in making motion to open judgment was, on record presented, a question for trial court to determine. Roe v. W., 191M 251, 254NW274. See Dun. Dig. 399, 5025.

Court acted well within its discretion in denying plaintiff's motion for leave to open up judgment and permit her to answer intervener's complaint after default judgment. Scott v. V., 193M465, 258NW817. See Dun. Dig. 5015.

Court did not abuse its discretion in reopening default judgment five years after entry thereof. Isensee Motors v. R., 196M267, 264NW782. See Dun. Dig. 5015.

59. Affidavit of merits.

Where on motion to open default, it appears on face of complaint that cause of action is barred by statute of limitations, and hence does not state a cause of action, and judgment is opened and defendant granted leave to defend and to demur, affidavit of merits and proposed demurrer present a meritorious defense. Roe v. W., 191M251, 254NW274. See Dun. Dig. 5020, 5021.

9285. Unimportant defects disregarded.

1. In general.

179M284, 229NW130.

Error in rulings are immaterial where judgment is correct on admitted facts. 179M490, 229NW869.

Failure to strike out evidence rendered immaterial by the amendment of the answer, held prejudicial. 181M 285, 232NW325. See Dun. Dig. 422, 9742.

Since the judgment of the municipal court was proper upon the record, it should not be reversed because the district court assigned a wrong reason for affirming it. 181M477, 233NW18. See Dun. Dig. 421.

No reversible error was made in denying a continuance, nor in refusing to grant a new trial for newly discovered evidence. Miller v. P., 182M108, 233NW855. See Dun. Dig. 424.

"Waiver" rests upon intention, actual or inferable. Farnum v. P., 182M338, 234NW646. See Dun. Dig. 10134.

An order denying a motion to open a default judgment, made on conflicting affidavits, held not an abuse of discretion and not reversible here. Jennrich v. M., 182M404, 234NW638. See Dun. Dig. 424.

An error in a ruling or charge which apparently has not prejudiced appellant is not ground for a retrial of the action. Stead v. E., 182M469, 234NW678. See Dun. Dig. 416.

Order sustaining a demurrer to a complaint showing only nominal damages will not be reversed. Smith v. A., 184M299, 238NW479. See Dun. Dig. 424.

Where a motion for new trial is granted solely for errors of law, the order granting the motion may be sustained for errors prejudicial to respondent, other than those specified by the trial court. Tiedje v. H., 184M569, 239NW611. See Dun. Dig. 394(74).

A mere irregularity of such a nature that it can be corrected below on proper motion is not ground for reversal. Roehrs v. T., 185M154, 240NW111. See Dun. Dig. 416, 424.

Plaintiffs cannot complain of fact that defendant, by his answer, and court, by directed verdict, allowed plaintiffs more than they were entitled to receive. Crain v. B., 192M426, 256NW671. See Dun. Dig. 418.

Court having submitted question of defendant's negligence to jury, on theory of failure to exercise ordinary care, and plaintiff having recovered a verdict on that ground, question whether he occupied position of a passenger and was entitled to care required of common carriers of passengers for hire is not directly involved. Mardorf v. D., 194M537, 261NW177. See Dun. Dig. 424.

In action to enjoin obstruction of certain road over land of another, where plaintiff upon opening of trial explained that road in question was one substituted by agreement of parties for old road over which plaintiff had a prescriptive right, defendant cannot complain that court gave plaintiff relief only as to old road, and not road mentioned in pleading, both parties knowing that main issue was any road by prescription over defendant's land. Schmidt v. K., 196M178, 265NW347. See Dun. Dig. 424.

No substantial right of defendant, a stockholder in insolvent domestic corporation, was adversely affected by failure to file order of assessment of shares of stock until after commencement of action to enforce payment; order being on file before trial began and there being ample itme to commence another action had pending action been dismissed. Hatlestad v. A., 196M230, 265NW 60. See Dun. Dig. 424.

Appellant cannot complain that judgment or order was more favorable to him than case warranted. Walsh v. K., 196M483, 265NW340. See Dun. Dig. 418.

Where defendants prevailed in court below, plaintiffs cannot complain of court's determination that neither party should be allowed costs and disbursements against other. Id.

No prejudice resulted from defendant's bringing out fact that insurance corporation was interested in plaintiff's side of case, where jurors also were informed that one likewise was interested in defendant's claim of no liability. Tri-State Transfer Co. v. N., 198M537, 270NW 684. See Dun. Dig. 422.

Where both parties moved court to make findings upon all issues, and to make conclusions of law therefrom, neither party can complain on ground that case should have been submitted to jury for a general verdict, nor can one party complain that court set aside answer to one of two questions submitted to jury. Coughlin v. F., 199M102, 272NW166. See Dun. Dig. 5234.

Denial of a recess to enable plaintiff to procure attendance of an additional witness held without prejudice. Hack v. J., 201M9, 275NW381. See Dun. Dig. 424.

Where no proof of misrepresentation in application for reinstatement of life policy was adduced, any error in trial of that issue is not ground for a new trial. Schaedler v. N., 201M327, 276NW235. See Dun. Dig. 424.

Court in every stage of an action should disregard all errors or defects in pleadings and proceedings which do not effect substantial rights of adverse party. Shuster v. V., 203M76, 279NW841. See Dun. Dig. 424.

Submission to jury of an unambiguous contract, held, not prejudicial. Davis v. N., 203M295, 281NW272. See Dun. Dig. 424.

A defendant is not prejudiced because some plaintiffs and defendants are dismissed by consent and remaining plaintiff obtains judgment against him for only part of relief demanded under pleadings. Baumann v. K., 204M 240, 283NW242. See Dun. Dig. 424.

Burden rests upon appellant to make a showing of prejudicial error before court will reverse. McDowell v. H., 204M349, 283NW537. See Dun. Dig. 424(9).

It was not reversible error for trial court to permit jury to assess damages for increased construction costs incurred because of injunction. Detroit Lakes Realty Co. v. M., 204M490, 284NW60. See Dun. Dig. 424.

2. Rulings on pleadings.

Complaint, considered in connection with contract and bond sued on held to state a cause of action. 171M305, 214NW47.

A pleading, first attacked on the trial, should be liberally construed. 171M358, 214NW49.

Objection cannot be first raised at the close of the case that the complaint does not state a cause of action, where the case has been tried on a certain theory and issues have been fully understood. 171M363, 214NW58.

Defendant was not prejudiced by the striking of an allegation of the answer where the fact alleged was admissible under the general denial, if relevant. 175M 253, 221NW3.

Amendment of complaint at trial as to amount of prayer, held not prejudicial. 179M19, 228NW440.

Where parties voluntarily litigated breach of warranty in two respects defect in pleading as to one item, held immaterial. 179M467 229NW575.

Though there was technical error in failing to specially plead a letter relied upon as tolling statute of limitations, there was no prejudice to defendant where case had been tried before, and letter was well-known to both parties, and there was a full hearing on the issue. Olson v. M., 195M626, 264NW129. See Dun. Dig. 424, 7675.

Plaintiff appealing from an order granting a motion to strike reply as sham and frivolous cannot complain that no copy of the order was ever mailed to plaintiff as required by rules of district court, in absence of showing of prejudice. Berger v. F., 198M513, 270NW589. See Dun. Dig. 424.

Any error in permitting an amendment to a complaint is eliminated by subsequently striking out amendment, and taking from consideration of jury all matter embraced in it. Baker v. C., 202M491, 279NW211. See Dun. Dig. 423.

Where defense of breach of warranty is fully litigated and by verdict resolved against defendant on his attempt to recoup his damages, error, if any, in ruling out his counterclaim for breach of warranty, is harmless. McConn v. L., 204M198, 283NW112. See Dun. Dig. 422.

4. Reception of evidence.

180M13, 230NW128.
180M221, 230NW639.
181M115, 231NW790.
181M415, 232NW717.

In action on life insurance policy where verdict was directed for insurer, based on conclusive evidence of false statement of insured, testimony of insurer's medical director that he would have declined risk had he known of treatment undergone by insured, held not reversible error. First Trust Co. v. K., (CCA8), 79F(2d)48.

Admission of evidence that car was sold by dealer as "O.K. used car," even if error, was not prejudicial, where defendant's own evidence showed that it was sold as a car which was safe and fit for use. Egan Chevrolet Co. v. B., (CCA8), 102F(2d)373.

Erroneous admission of copy of letters in evidence held harmless where there is sufficient competent evidence to sustain the finding. 173M529, 217NW933.

Receiving in evidence a written contract form made by the broker in the presence of the purchaser and containing the offer then made by the purchaser to the broker but not signed by the purchaser and not shown or disclosed to the principal, held not reversible error. 174M127, 218NW462.

Exclusion of evidence as to possible speed of motor truck held not reversible error, in view of other evidence. 175M449, 221NW715.

Reading of extracts from recognized authorities would not constitute reversible error where their correctness was admitted by complaining party's expert. 176M138, 222NW904.

Admission of evidence was not prejudicial where similar evidence was admitted without objection. Tremont v. G., 176M294, 223NW137.

Where several experts examined testator and only one of them could understand his language and the other interpreted his reply, held that there was no prejudical error in permitting all of the experts to testify. 176M 360, 223NW677.

Admission of exhibit in evidence held not reversible error in view of specific evidence of witness. 176M480, 224NW146.

The admission of immaterial evidence, not prejudicial, is not reversible error. 177M13, 224NW259.

Refusal to strike answer of witness was without prejudice where other similar evidence was received without objection. 177M425, 225NW273.

Prejudicial bias of trial judge was not established by his extensive participation in examination of witnesses in divorce action. Taylor v. T., 177M428, 225NW287.

Rulings on evidence respecting priority between chattel mortgage, were not reversible error. 177M441, 225 NW389.

Exclusion of evidence of inconsistent statements by plaintiff's own witness not prejudicial error. 178M347, 227NW352.

Reception of evidence which could not have harmed appellant will not warrant a new trial. 178M471, 227NW 491.

Admission of net in prosecution for assault on game warden, held not prejudicial. 179M516, 229NW789.

Error in admission as to issue withdrawn from jury, held harmless. 180M298, 230NW823.

Suppression of deposition, held not prejudicial. 181M 217, 232NW1. See Dun. Dig. 422.

Error in receiving evidence as to a subsequent change in the street lighting at place of accident was done away with when the court took from jury question of insufficient lighting and instructed jury that, as a matter of law, the street was properly lighted. 181M450, 232NW795. See Dun. Dig. 423.

Under the circumstances shown by the record, it was not prejudicial error to receive in evidence a small bottle containing brain substance and pieces of bone removed from the brain. Lund v. O., 182M204, 234NW310. See Dun. Dig. 424.

Testimony erroneously received through mistake or inadvertence, but promptly stricken when the court's attention was directed thereto, does not require a new trial, where it is perceived that no prejudice resulted. Drabek v. W., 182M217, 234NW6. See Dun. Dig. 424.

Refusal to permit owners to testify as to value of adjacent property after a funeral home would be established held not prejudicial under the circumstances of this case. O'Malley v. M., 182M294, 234NW323. See Dun. Dig. 421(94).

An error in the reception of certain testimony was deemed cured when the court, on its own motion, struck it from the record and directed the jury to disregard it. Martin v. S., 183M256, 236NW312. See Dun. Dig. 423.

Error in the admission of a medical certificate of death as prima facie evidence of suicide is not cured by the fact that the coroner's verdict that the death wound was self-inflicted attached to plaintiff's proofs of death was excluded. Backstrom v. N., 183M384, 236NW708. See Dun. Dig. 416, 424.

It was not reversible error to permit a witness to testify that he purchased of plaintiff an automobile of the same kind sold to defendant, at about the same time defendant bought his, for $150 less than plaintiff on cross examination testified the witness paid therefor. Baltrusch v. B., 183M470, 236NW924. See Dun. Dig. 424.

Exclusion of evidence of little weight held without prejudice. Metalak v. R., 184M260, 238NW478. See Dun. Dig. 422(94).

It was not reversible error to refuse to strike as a conclusion of a witness her statement that an automobile traveled "just like a flash of lightning." Quinn v. Z., 184M589, 239NW902. See Dun. Dig. 416-424.

No reversible error occurs where respondent is permitted to show facts already testified to by appellant. Rahn v. F., 185M246, 240NW529. See Dun. Dig. 422.

Sustaining objections to certain questions to expert was without prejudice where expert was permitted to fully give his opinion covering matter in question. Peterson v. L., 186M101, 242NW549. See Dun. Dig. 422.

In action against veterinarian for negligently failing to diagnose hog cholera, held not prejudicial error to exclude proof as to reasons for not using serum and virus. Bekkemo v. E., 186M108, 242NW617. See Dun. Dig. 422.

It is not reversible error to exclude the answer to a specific question when answer to substantially same question is later received. Wilcox v. H., 186M500, 243NW 711. See Dun. Dig. 422.

Any error in receiving testimony of witness as found in settled case in prior action was harmless, where matter shown was implied in findings in such case, received without objection. Farmers' State Bank, 187M155, 244 NW550. See Dun. Dig. 422.

Admission of evidence was not reversible where same evidence had been received without objection. Thier v. F., 187M190, 244NW815. See Dun. Dig. 422.

Permitting physician to testify to statement made by deceased relative to past occurrences resulting in injury was not prejudicial, where other similar evidence was not objected to. Strommen v. P., 187M381, 245NW632. See Dun. Dig. 7180.

In action on accident policy by one claiming to be totally disabled by amputation of part of foot, evidence of defendant that it was now more difficult on account of the depression to get a job, held not prejudicial. Wilson v. M., 187M462, 245NW826. See Dun. Dig. 4871C.

No prejudice could result from not striking testimony of plaintiff's witness, called to refute a false issue injected into trial by testimony of defendant's main witness. Cohoon v. L., 188M429, 247NW520. See Dun. Dig. 424.

Error in admitting evidence as to conviction of driver of defendant's truck of crime of driving a motor vehicle while intoxicated, at time of an accident, held not prejudicial where other evidence, not objected to, conclusively showed that driver was intoxicated at time. Mills v. H., 189M193, 248NW705. See Dun. Dig. 422.

Exclusion of evidence of facts shown by other evidence, held not prejudicial. Quarfot v. S., 189M451, 249 NW668. See Dun. Dig. 3250, 4038.

Admission of evidence of conversation between plaintiffs was harmless where it could not have affected result. Stibal v. F., 190M1, 250NW718. See Dun. Dig. 424.

Prejudicial error was not committed in permitting defendant to introduce testimony of fraud sufficient as a defense at common law without first producing affirmative proof that plaintiff was not a holder in due course and so making an issue for jury upon evidence tendered by plaintiff. M & M Securities Co. v. D., 190M57, 250NW 801. See Dun. Dig. 424.

Exclusion of evidence either admitted or substantially proved was not prejudicial error. Elness v. P., 190M169, 251NW183. See Dun. Dig. 424.

Reception of evidence could not have been prejudicial where verdict was very small. Thorson v. A., 190M200, 251NW177. See Dun. Dig. 424.

Error in refusing to strike out a part of an expert's answer which was speculative, indefinite, and uncertain as to an injury to plaintiff's back held without prejudice. Johnston v. S., 190M269, 251NW525. See Dun. Dig. 424.

Admission of copy of original deposition without laying foundation was harmless error where evidence required directed verdict against objecting party. Edward Thompson Co. v. P., 190M566, 252NW438. See Dun. Dig. 422, 7180.

No prejudice could result to plaintiff by ruling excluding evidence, where judgment roll conclusively showed complaint failed to state facts to constitute a cause of action. Calhoun Beach Holding Co. v. M., 190M576, 252NW442.

Trial court's erroneous determination as to qualification of an expert witness is not ground for new trial in absence of prejudice to losing party. Palmer v. O., 191M204, 253NW543. See Dun. Dig. 7201.

In action to enjoin violation of seniority rights as employees of a railway, any error in receiving opinion of experienced officers of brotherhoods as to whether any seniority rights were violated was without prejudice where record compelled finding that no rights were violated. George T. Ross Lodge v. B., 191M373, 254NW590. See Dun. Dig. 424.

Admission of expert opinion evidence that repairs and repair parts were minor and incidental only, if error, was not prejudicial. General Motors Truck Co. v. P., 191M467, 254NW580. See Dun. Dig. 424.

Where defendant was permitted to introduce four photographs of two street cars after they had been jacked up to permit release of occupants of automobile, it could not be said that it was error to admit one photograph introduced by plaintiff and described by witness as "the way it looked when they were jacked up." Luck v. M., 191M503, 254NW609. See Dun. Dig. 3260.

There was no harm in admission in evidence of items of hospital and medical expenses where trial court removed them from verdict. Id. See Dun. Dig. 423.

Admission of testimony as to what witness understood was meaning of conversation and words used in negotiations, though conclusions of witness, was without prejudice where trial was before court without jury and court heard what words used in claimed conversation were. Hawkins v. H., 191M543, 254NW809. See Dun. Dig. 416.

Even though a minor defendant were not a proper party defendant, it was not prejudicial error to permit him to be called for cross-examination under the statute, as he could have been called as a witness for plaintiff and court would have permitted a cross-examination irrespective of the statute. Wagstrom v. J., 192M220, 255NW822. See Dun. Dig. 424.

In action for conversion by purchaser of automobile *against finance company, no harm could come to plaintiff* from refusal to let defendant explain letters "C. C. T.," appearing in invoice, plaintiff having admitted that sale had to be financed, and such letters representing initials of finance company. Saunders v. C., 192M272, 256NW142. See Dun. Dig. 424.

Where the evidence is close and conflicting on a vital issue in case, rejection of competent and material testimony bearing on such issue is reversible error. Taylor v. N., 192M415, 256NW674. See Dun. Dig. 422.

In action for personal injuries suffered in construction of barn for farmer, there was no reversible error in admission of evidence as to acreage of defendant's farm, no questions being asked as to value of farm, or as to acreage under cultivation, or as to its productiveness, or as to encumbrances, and record showing no effort to impress upon jury that defendant was well fixed financially. Gilbert v. M., 192M495, 257NW73. See Dun. Dig. 422.

Refusal to strike out testimony of physician that it was possible that decedent had a fracture of the skull was without prejudice where skull fracture was not included as one of facts upon which physician based his opinion that accident aggravated weak heart condition and contributed to cause death. Albrecht v. P., 192M557, 257NW377. See Dun. Dig. 422(94), 3337.

In action against endorser of a promissory note where issue was as to whether words "without recourse" were stricken before or after endorsement and delivery, it was not prejudicial error to admit evidence showing that maker of note was adjudicated a bankrupt shortly after transfer of note, under circumstances of case. Keyser v. R., 192M588, 257NW503. See Dun. Dig. 422(94).

If it was error for truck driver to testify that he had used gasoline before to clean oil filter and motor and that no fire or injury had occurred, it was so inconsequential that it could not have prejudiced plaintiff suing for damages occasioned by fire resulting from use of gasoline. Hector Const. Co. v. B., 194M310, 260NW496. See Dun. Dig. 424.

Denial of motion to exclude X-rays from jury could not have prejudiced defendant where X-rays were received in evidence only in connection with extent of injuries, and defendant is not challenging verdict as excessive. Erickson v. K., 195M164, 262NW56. See Dun. Dig. 424.

Where evidence is finally received, a party may not properly complain of previous rulings excluding it. Cashman v. B., 195M195, 262NW216. See Dun. Dig. 424.

Admission in evidence of privileged communications to physicians was immaterial where other testimony required a directed verdict. Sorenson v. N., 195M298, 262NW868. See Dun. Dig. 422(94).

It was not prejudicial error to admit in evidence a letter relied upon to toll statute of limitations. Olson v. M., 195M626, 264NW129. See Dun. Dig. 424.

Permitting introduction of evidence indicating that defendant was protected by insurance, held without prejudice. Nye v. B., 196M330, 265NW300. See Dun. Dig. 424.

Allowing witness to be impeached on an immaterial point, held not sufficiently substantial to indicate prejudice. Id.

Whether testimony, objected to as conversation with a person since deceased, was improperly admitted, was immaterial, where only conclusion possible under all other evidence in case was that industrial commission properly denied compensation. Anderson v. R., 196M358, 267NW501. See Dun. Dig. 424.

No prejudice resulted from rulings excluding evidence purporting to prove facts which court assumes proven. Newgard v. F., 196M548, 265NW425. See Dun. Dig. 424.

No harm could result to defendant from certain testimony as to services which court instructed jury to not include in verdict. Kolars v. D., 197M183, 266NW705. See Dun. Dig. 424.

A new trial may not be awarded for exclusion of evi*dence not shown to be material. Anderson v. A., 197M* 252, 266NW741. See Dun. Dig. 424.

It is not necessary that ruling of trial court on a question of admission of evidence be sustained on basis of same reason given by court at trial. Davis v. R., 197M287, 266NW855. See Dun. Dig. 421.

Where a nonexpert witness was allowed to express an opinion on mental capacity without first detailing facts upon which his opinion was based, and record is such that trial court could have found for either party, admission of opinion testimony was reversible error even though trial was before a court without a jury. Johnson v. H., 197M496, 267NW486. See Dun. Dig. 424.

Where objectionable evidence is received, but before final submission court perceives error and instructs jury to disregard it, presumption is that no prejudice resulted. Lorberbaum v. C., 198M289, 269NW646. See Dun. Dig. 416, 423, 424.

No reversible error was made in not receiving in evidence a wrist watch worn by the wife, which had stopped at 12:15, for, without objection, witnesses not contradicted testified that watch so indicated, and, moreover, that fact did not tend to prove that she survived her husband. Miller v. M., 198M497, 270NW559. See Dun. Dig. 424.

Admission of evidence as to injury to defendant's leg in collision offered as tending to show that defendant had foot on brake, held not so prejudicial as to require new trial. Dehen v. B., 198M522, 270NW602. See Dun. Dig. 424.

Error in admission of evidence was not prejudicial where matters testified to were shown by other ample evidence. Tri-State Transfer Co. v. N., 198M537, 270NW684. See Dun. Dig. 424.

Error in excluding evidence is cured when the evidence is later received. Bird v. J., 199M252, 272NW168. See Dun. Dig 7192.

Error, if any, in receiving impeachment testimony, is cured by receiving evidence of same facts offered by complaining party. Id.

Where policemen were permitted to testify over objection as to conversations had with motorman 15 to 20 minutes after accident involved, upon theory that statements were within so-called res gestae, and fact sought to be proven by admission of this testimony was established by other evidence as a matter of law, error, if any, was without prejudice. Lacheck v. D., 199M519, 273NW366. See Dun. Dig. 424.

Receipt in evidence of record of appeal proceedings in which part of services sued for were performed held not prejudicial to defendant. Daly v. D., 273NW814. See Dun. Dig. 424.

Improper questions and answers in examination of a physician, were not reversible error where final conclusion of witness was very favorable to appellant. Brossard v. K., 274NW241. See Dun. Dig. 418.

Permitting a witness to state contents of a memorandum renders harmless any error in excluding memorandum itself. Eilola v. O., 201M77, 275NW408. See Dun. Dig. 424.

There was no prejudice in excluding conclusion of witness where jury had benefit of testimony from which witness might have reached conclusion to which he would have testified. Armstrong v. B., 202M26, 277NW348. See Dun. Dig. 424.

No harm was done owner of car by being required to answer that he neither brought a civil suit nor instigated a criminal prosecution against driver for damaging car, where he was permitted to show that driver had paid part of bill for repairs made. Neeson v. M., 202M234, 277NW916. See Dun. Dig. 424.

Admission in evidence of estimate of a non-driving witness as to speed of an automobile held not prejudicial, in view of verdict finding both drivers involved in collision guilty of negligence. Shuster v. V., 203M76, 279 NW841. See Dun. Dig. 424.

Any error with respecting ruling on attempted introduction of evidence was harmless where it appeared that appellant abandoned item of evidence involved. Id.

Rulings sustaining objections to inquiries addressed to experts as to which person died more rapidly after receiving his or her injuries held without prejudice, in view of other evidence. Vaegemast v. H., 203M207, 280NW641. See Dun. Dig. 424.

In action for injuries to one touching cable supporting street lamp, testimony that certain guy wires on pole had insulators should have been stricken, but was harmless since it did show that those who erected pole had some desire to prevent deadly current from escaping. Schorr v. M., 203M384, 281NW523. See Dun. Dig. 424.

It was so obvious that thin skin covering third degree burns is liable to bruise and break so as to afford ready entrance to germ infection that jury could infer it without opinion of medical experts, and it cannot be said that answers expressing such opinion harmed defendant power company. Id. See Dun. Dig. 424.

A new trial should not be granted for error in admitting or excluding evidence unless substantial prejudice appears to the defeated party. Id. See Dun. Dig. 7180, 7181.

It must be assumed on appeal that jury heeded instruction of court to disregard hearsay testimony stricken out. Farwell v. S., 203M392, 281NW526. See Dun. Dig. 380.

Admission of evidence tending to show a fact that was conceded was harmless. Id. See Dun. Dig. 424.

Defendant could not be prejudiced by exclusion of evidence affecting only amount of off-set dependent upon establishment of a contract other than that upon which plaintiff relied, verdict determining that issue for plaintiff. Clark v. Q., 203M452, 281NW815. See Dun. Dig. 424.

Futile attempt of counsel to be permitted to examine a witness as an adverse witness was not prejudicial. Bylund v. C., 203M484, 281NW873. See Dun. Dig. 424.

Admission of statement as part of res gestae, even though it was error, was not prejudicial where fact in question was already in evidence and remained uncontradicted. Young v. G., 204M122, 282NW691. See Dun. Dig. 422.

Exclusion of impeaching testimony was not reversible error where witness was otherwise thoroughly impeached. Weinstein v. S., 204M189, 283NW127. See Dun. Dig. 424.

Where no claim was made that plaintiff's truck was inadequately lighted, and only criticism was that plaintiff did not use his dimmers, admission of improper evidence pending to show that truck was adequately lighted was harmless. Ryan v. I., 204M177, 283NW129. See Dun. Dig. 424.

Reviewing court will not consider question whether or not account books were properly admitted in evidence where appellant could not have been prejudiced. Detroit Lakes Realty Co. v. M., 204M490, 284NW60. See Dun. Dig. 424.

It was technical error to permit a party to testify that he had no conversation with deceased concerning a certain matter, but this would not require a new trial where other evidence compelled conclusion that witness did not participate in corporate affairs involved. Keough v. S., 285NW809. See Dun. Dig. 424.

Exclusion of evidence as to condition of tail light of truck following accident was not prejudicial where it was unlikely that jury attributed any importance to whether or not tail light was burning in view of evidence indicating that a large woman was standing back of the truck at the time of the accident. Johnson v. K., 285NW881. See Dun. Dig. 424.

Plaintiffs in taxpayers' suit to restrain construction of a power plant were not prejudiced by the ruling of the trial court refusing to allow them to call the village attorney for cross-examination under the statute. Davies v. V., 287NW1. See Dun. Dig. 424.

5. Remarks and conduct of court and counsel.

In case tried without jury, an opinion expressed by the court at the close of the trial as to the truthfulness of witnesses presented no grounds for a new trial. 173M529, 217NW933.

A remark of counsel, promptly withdrawn, held not prejudicial misconduct. Dumbeck v. C., 177M261, 225NW111.

Statement of counsel that jurors were apt to fall into error if they did not return verdict against both defendants for damages, held not prejudicial error. 178M353, 227NW203.

Prejudice held not shown by court's answers to questions asked by jury. 181M496, 233NW241. See Dun. Dig. 422.

A reversal will not be had for misconduct of counsel unless the rights of the losing party have been prejudiced thereby. Horsman v. B., 184M514, 239NW250. See Dun. Dig. 424.

Misconduct of counsel cannot be held prejudicial to plaintiff, where defendants were entitled to a verdict and plaintiff offered no evidence as to amount of recovery. Renn v. W., 185M461, 241NW581. See Dun. Dig. 416.

Improper reference to insurance company by plaintiff's attorney, promptly rebuked by court, held not prejudicial. Harris v. R., 189M599, 250NW577. See Dun. Dig. 423, n. 6.

In automobile collision case any misconduct of counsel in overstating width of truck and in demanding verdict for large amount was not prejudicial. Erickson v. K., 195M164, 262NW56. See Dun. Dig. 424.

Experience of undertaker was such that he was properly permitted to testify whether or not water bubbling from mouth of a body found submerged came from lungs; and remark of court in referring to fact of no water issuing from mouth should not result in a new trial because of the addition of words "or lungs." Miller v. M., 198M497, 270NW559. See Dun. Dig. 424.

Alleged improper remarks relative to statements secured from witness prior to trial were not prejudicial where court instructed jury that obtaining of statement was proper. Tri-State Transfer Co. v. N., 198M537, 270NW684. See Dun. Dig. 423.

Repeated reference by plaintiff's counsel to nonresidence of defendant's counsel and that of their expert medical witnesses held not prejudicial. Finney v. N., 198M554, 270NW592. See Dun. Dig. 424.

Judgment will not be reversed for improper argument of plaintiff's counsel which could only affect amount of damages where smallness of verdict indicates that no prejudice resulted. Elkins v. M., 199M63, 270NW914. See Dun. Dig. 424.

In action for death of husband in motor vehicle collision, reference to matter of workman's compensation was not prejudicial to plaintiff where court fully advised jury that it was not to take into consideration fact that plaintiff might be entitled to compensation from her deceased husband's employer, owner of one of the vehicles involved, especially as plaintiff requested that court tell jury why she could not sue her husband's employer. Becker v. N., 200M274, 274NW180. See Dun. Dig. 423.

Improper and prejudicial remarks of plaintiff's counsel in his closing argument were of such a nature as to require supreme court to order a new trial, notwithstanding instructions to jury by court to disregard them. Krenik v. W., 201M255, 275NW849. See Dun. Dig 7102.

As to claimed prejudicial remarks in counsel's closing arguments to the jury, court properly exercised its discretion in holding them to be harmless. Serr v. B., 202M165, 278NW355. See Dun. Dig. 424.

There was no abuse of discretion in refusing to grant a new trial on ground of misconduct of counsel in argument where court gave an instruction effectively designed to forestall prejudice. Santee v. H., 202M361, 278NW520. See Dun. Dig. 423.

Statement made by counsel for plaintiff in presence of men and women from whom jury was selected that it was proven that certain liability insurance company was interested in defense of case was highly improper, but court did not err in refusing to grant a new trial, in view of prompt instruction to jury to disregard it as being improper. Farwell v. S., 203M392, 281NW526. See Dun. Dig. 423.

Statements of plaintiff's attorney in argument appraising professional ability of defendant's attorney that individuals like plaintiff are sometimes obliged to employ lawyers who are not so quickwitted, alert and equipped with financial assistance and ability to rake the countryside and bring in every possible bit of evidence that may favor them was rendered harmless by statement of court that it had nothing to do with lawsuit. Raymond v. K., 204M220, 283NW119. See Dun. Dig. 423.

What otherwise might be misconduct of an attorney in the course of a trial ordinarily will not be ground for a new trial when it is invited by the adversary. Schlick v. B., 286NW356. See Dun. Dig. 419.

Improper argument by plaintiff's counsel invited and provoked by improper argument of defendant's counsel is not reversible error. Hinman v. G., 286NW364. See Dun. Dig. 419.

Charge of court directing jury to ignore improper argument by counsel for both plaintiff and defendant, to decide case on facts without consideration of matters improperly referred to and that failure to decide would be a violation of jurors' oaths, cured misconduct of counsel, if any. Id. See Dun. Dig. 423.

Alleged disparaging remarks by trial judge concerning counsel are not prejudicial where verdict is right as a matter of law. Wentz v. G., 287NW113. See Dun. Dig. 424.

Informing jury of insurance coverage. 23MinnLaw Rev85.

6. Instructions.

Inadvertent failure of court to include a small item in computing amount due was not ground for reversal. 171M461, 214NW288.

Instruction as to application of statutes requiring lights on motor vehicles as applied to a disabled car standing in the street at night held not prejudicial. 172M493, 215NW861.

Objection to charge held immaterial in view of results. 173M443, 217NW505.

Charge held not misleading when considered in connection with entire charge. 177M13, 224NW259.

A party cannot claim error on the ground that the instructions failed to define particular issues specifically

where he made no request for more specific instructions. 177M127, 224NW843.

Where complaint proceeded upon theory of fraudulent misrepresentation that defendant would send competent man to supervise erection of silo, and on the trial, negligence of the person furnished was the only ground upon which a recovery could be had, held that submission was confusing. 177M420, 225NW393.

Use of word "fraud" in connection with defense of prohibited additional insurance held not prejudicial error. 178M305, 227NW39.

Instructions as to proper driving of motor car and allowances for future suffering and medical expenses, held not prejudicial error. 178M353, 227NW203.

Rule as to inadvertent errors of law in charge applies to criminal cases, but does not extend to omission of controlling principles of case. 179M516, 229NW789.

Instruction favorable to party complaining. 180M514, 231NW204.

Failure to instruct concerning future suffering and inconvenience, held not prejudicial. 181M506, 233NW 237. See Dun. Dig. 422(95).

Where defendant admitted he was guilty, instruction failing to tell the jury that they could find him not guilty was harmless. State v. Corey, 182M48, 233NW590. See Dun. Dig. 2490(43).

The reading of part of the pleadings in argument to the jury disapproved, but held not reversible error where the court by its charge, clearly defines and limits the issues for the jury to determine. Bullock v. N., 182M 192, 233NW858. See Dun. Dig. 423, 424.

The use of the words "proper" and "properly" in referring to ventilation are held not to have been misleading to the jury as to the measure of defendant's responsibility in the light of the remainder of the charge. Cargill Grain Co. v. C., 182M516, 235NW268. See Dun. Dig. 416, 422(95), 7074.

Where defendant was entitled to a directed verdict, error in the charge was without prejudice to the plaintiff. Dohs v. K., 183M379, 236NW620. See Dun. Dig. 416-424.

There was no prejudice in an instruction in action for death of passenger in motor vehicle, that, decedent being dead, it is to be presumed that she used ordinary care, there being no evidence of negligence on her part. Kieffer v. S., 184M205, 238NW331. See Dun. Dig. 424.

An unequivocal instruction that a determinative proposition is undisputed on the evidence, the fact being to the contrary, was prejudicial error, which was not cured by an equivocal explanation liable to be misunderstood by the jury. Poppe v. B., 184M415, 238NW890. See Dun. Dig. 424.

Instruction as to duties of automobile owners and drivers on the highways held not prejudicial. Mechler v. M., 184M476, 239NW605. See Dun. Dig. 424.

Any error of court in permitting jury to consider permanent injury was without prejudice where it is apparent from size of verdict that no permanent injuries were found by the jury. Ball v. G., 185M100, 240NW100. See Dun. Dig. 424.

In action by real estate broker for commissions wherein exclusive right of sale was not issue, instruction concerning exclusive right, held not such as to mislead jury. Kaercher v. S., 189M272, 249NW180. See Dun. Dig. 424.

Error of court in reading quotations from reported decision in his charge, held not prejudicial. Christensen v. P., 189M548, 250NW363. See Dun. Dig. 422.

When the charge refers to permanent injuries and goes to amount of damages, and is not otherwise prejudicial, and damages are not claimed to be excessive, an error in charge as to recovery for permanent injuries is not prejudicial. Romann v. B., 190M419, 252NW80. See Dun. Dig. 422.

An error by court in charge, in reference to width of defendant's truck, was corrected and cured when attention thereto was called. Kouri v. O., 191M101, 253NW98. See Dun. Dig. 9796.

Failure of court to mark as given, refused, or modified, requests to charge, no inquiry having been made for information as to what had been done with requests or as to which would be given, was not in and of itself prejudicial error. Kouri v. O., 191M101, 253NW98. See Dun. Dig. 9771a, 9776a.

An instruction in action against hotel as bailee of ring that "it makes no difference what care the defendant may have taken of its own property * * * and the care it may give to its own property is of no importance," if error, was without prejudice. Peet v. R., 191M151, 253NW546. See Dun. Dig. 422.

Any error in instruction as to prima facie case for plaintiffs with respect to endorsements of payments which would extend time for suit was cured by later instructions clearly placing burden upon plaintiffs to show that payments by comaker were directed to be paid by defendant. Erickson v. H., 191M177, 253NW361. See Dun. Dig. 9796.

Instruction in respect to special damages in personal injury case, although not technically accurate, held not prejudicial. Gilbert v. M., 192M495, 257NW73. See Dun. Dig. 422.

Use of expression "loss of earnings" instead of "loss of earning capacity" in an instruction in an action for personal injury, if error, was harmless. Fredhom v. S., 193M569, 259NW80. See Dun. Dig. 2576.

Where there are two or more issues tried and submitted to jury, and verdict is a general one, it cannot be upheld if there was error in instructing jury as to, or in submitting to jury, any one of issues. Goldberg v. G., 193M600, 259NW402. See Dun. Dig. 7168.

In action for death in elevator shaft to which there were no eye witnesses, sentence at end of charge "with reference to the presumption of due care that accompanied the plaintiff, the burden of overcoming that presumption rests upon the defendant" held not prejudicial in view of accurate and more complete instruction in body of charge. Gross v. G., 194M23, 259NW557. See Dun. Dig. 423.

An unnecessary instruction, being correct, was not prejudicial. Hector Const Co. v. B., 194M310, 260NW496. See Dun. Dig. 422.

A party cannot complain of an erroneous instruction which is favorable to it. Id. See Dun. Dig. 418.

Any error of court in not submitting to jury question of whether automobile collision occured within residential portion of village was immaterial if plaintiff was guilty of contributory negligence as matter of law regardless of violation of speed regulation by defendant. Faber v. H., 194M321, 260NW500. See Dun. Dig. 424.

In action for conversion of newspapers, instruction that jury could find a verdict at rate of three cents per copy was not prejudicial where amount of verdict indicated that it was based upon cost of printing and materials. Fryberger v. A., 194M443, 260NW625. See Dun. Dig. 424.

Instruction of court that infant must disaffirm contract promptly within a reasonable time after he reaches his majority was not erroneous though the word "promptly" was inadvisedly used. Kelly v. F., 194M465, 261NW460. See Dun. Dig. 4446.

Error of court in improperly submitting special verdict in connection with wilfullness of negligence for purpose of preventing subsequent discharge in bankruptcy, held not to require reversal of judgment on general verdict for simple negligence. Raths v. S., 195M225, 262NW563. See Dun. Dig. 424.

One cannot complain of a charge which is unduly favorable to him. Union Cent. Life Ins. Co. v. F., 196 M260, 264NW786. See Dun. Dig. 418.

Where two or more material issues are submitted to jury and a general verdict returned, and one issue so submitted is not sustained by any evidence, there must be a new trial unless it conclusively appears that party in whose favor verdict was obtained was entitled thereto as a matter of law on one or more other issues submitted. Cavallero v. T., 197M417, 267NW370. See Dun. Dig. 9783.

Instruction that it is duty of one to left to yield right of way was prejudicial and misleading where there was evidence indicating that one having right of way had forfeited it by unlawful speed. Draxten v. B., 197M511, 267NW498. See Dun. Dig. 416, 424.

In action by guest against driver and owner of automobile, verdict for driver cured any possible error in submitting to jury question of driver's implied authority to invite plaintiff to ride. Manos v. N., 198M347, 269NW 839. See Dun. Dig. 424.

Court's cautionary charge that "the fact that defendant's truck ran out of gas and if that was negligence, it was not such as contributed directly or proximately to the collision, and is not to be considered by you as an act of negligence contributing to this collision in this case," held not prejudicial, where plaintiff then conceded and on appeal asserts that he is not and was not basing right of recovery upon such theory, especially where no suggestion was made at time of trial that such charge was out of place or harmful to his cause. Hartwell v. P., 198M488, 270NW570. See Dun. Dig. 424.

A litigant cannot tacitly consent to a charge and later, when disappointed by verdict, obtain a new trial for mere omission or inadvertence in language omitted or chosen by court in giving such charge. Dehen v. B., 198M522, 270NW602. See Dun. Dig. 424.

Where questions of negligence and proximate cause are properly submitted to jury, it is not prejudicial error to fail to charge that if negligence of a third person was sole proximate cause of accident, its verdict must be for defendant. Lacheck v. D., 199M519, 273NW 366. See Dun. Dig. 9776a.

Defendant may not assign error on a charge concerning construction of a contract which resulted in award to plaintiff of less than latter would have recovered under construction contended for at trial by defendant. Barnard-Curtiss Co. v. M., 200M327, 274NW229. See Dun. Dig. 418.

Technical error in charge, with respect to burden of proof to show excuse for leaving a gauze pack within wound of operation, cannot be held prejudicial to doctors who admitted responsibility for its remaining there and attempted to show that an emergency necessitated such haste as excused care otherwise required. Brossard v. K., 200M410, 274NW241. See Dun. Dig. 7491.

Upon charge as a whole and circumstances, an instruction that a passenger was "presumably negligent" in boarding a trolley bus while in motion, held without prejudice. Ensor v. D., 201M152, 275NW618. See Dun. Dig. 424.

If defendants were entitled to a directed verdict, errors in charge or in submitting issues to jury become immaterial on review of judgment for defendants. Selover v. S., 201M562, 277NW205. See Dun. Dig. 424.

Right of defendant to have plaintiff bear burden of proof is one of substance and not of form, and denial of right in instructions is prejudicial error. O'Hara v. L., 201M618, 277NW232. See Dun. Dig. 424.

Where both parties conceded that plaintiff's contract of employment with defendant entitled him to a commission on sales consummated as result of his efforts, failure to charge jury that plaintiff's efforts must be procuring cause of sales in order to entitle him to commissions was not prejudicial. Armstrong v. B., 202M26, 277NW348. See Dun. Dig. 424.

Person at whose request instruction was given cannot complain thereof. Serr v. B., 202M165, 278NW355. See Dun. Dig. 419.

Appellant cannot complain of error in instruction which was favorable to him. Costello v. B., 202M418, 278NW580. See Dun. Dig. 418.

There could be no reversible error in manner of submission of case to jury where all findings for plaintiff under instructions negatived possibility of a finding for defendant, the appellant. Ranwick v. N., 202M415, 278NW589. See Dun. Dig. 424.

Reversal will not be ordered because court inadvertently used words which could have been better chosen, where it is evident from a consideration of the entire charge that no prejudice resulted. Paine v. G., 202M462, 279NW257. See Dun. Dig. 424.

Refusal to submit question of contributory negligence of child killed by truck requested by defendants, was one as to which plaintiff cannot complain. Vietor v. C., 203M41, 279NW743. See Dun. Dig. 364.

Inadvertent omission of reference to contributory negligence in an instruction relating to concurrent negligence of two drivers involved in action brought by guest was not prejudicial where jury were subsequently twice told what would be effect of contributory negligence. Shuster v. V., 203M76, 279NW841. See Dun. Dig. 424.

Assignments of error to instructions were not meritorious where they were in substance instructions requested by appellant. Ekdahl v. M., 203M374, 281NW517. See Dun. Dig. 419.

Electric company was not harmed by charge on presumption of due care by a deceased. Id. See Dun. Dig. 424.

Since each defendant moved for a directed verdict to which each was entitled, errors assigned on instructions, even if meritorious, would not warrant a new trial. Johnson v. C., 204M115, 282NW693. See Dun. Dig. 422.

Inclusion in instruction of inapplicable statement was immaterial where following provision properly limited issue to be considered by jury. Honan v. K., 286NW404. See Dun. Dig. 9796.

7. Findings of fact and verdicts.

181M132, 231NW798.

Lack of evidence to sustain a finding which does not prejudice appelant will not reverse a decision. 173M468, 217NW593.

Where any one of several independent findings would support judgment, it is immaterial that evidence does not support one finding. 176M225, 222NW926.

Finding of fact having no effect on conclusions of law is immaterial. 180M13, 230NW128.

Trial court can best determine prejudicial effect of errors in charge. 180M395, 230NW895.

In an action against father and son on a note, a finding that father had no knowledge of certain transactions between plaintiff and son, whether supported by evidence or not was immaterial, where court held father bound by what son did as manager of business regardless of knowledge. Kubat v. Z., 193M522, 259NW1. See Dun. Dig. 422(98).

Supreme court having arrived at same construction of trust agreement as court below from consideration of instrument alone, it is immaterial that certain findings of fact were not sustained by evidence. Towle v. F., 194M520, 261NW5. See Dun. Dig. 424.

Where jury awarded $2,000 compensatory damages for willful, wanton and malicious assault, defendant was not prejudiced by cause in verdict "and punitive damages in accordance with Minnesota statutes," plaintiff accepting verdict for compensatory damages only. Goin v. P., 196M74, 264NW219. See Dun. Dig. 418.

Court will not set aside a verdict for purely compensatory damages because jury thought punitive damages should also be assessed. Id. See Dun. Dig. 424.

Failure of court to comply with statute requiring written decision separately stating facts and conclusions was cured by filing of a memorandum, which states facts found and conclusions of law separately. Trones v. O., 197M21, 265NW806. See Dun. Dig. 424.

There being two other findings, each sufficient to sustain conclusions of law and judgment, plaintiffs are not entitled to have judgment reversed for any error in finding of adverse possession. Lamprey v. A., 197M112, 266NW434. See Dun. Dig. 424.

Defendant cannot complain because jury awarded to plaintiff less than evidence would have permitted. Daly v. D., 200M323, 273NW814. See Dun. Dig. 418.

9. Entry of judgment.

Procedural error in permitting defendant to have judgment entered against itself without giving five days notice as required by district court rules, and refusal of court to vacate judgment, was not prejudicial, where judgment was entered for correct amount. Martin Brothers Co. v. L., 198M321, 270NW10. See Dun. Dig. 424.

ISSUES AND TRIAL

9286. Terms defined.

The construction of an ambiguous writing by the decision below held conclusive because, among other things, that interpretation is strongly supported by the personally verified pleading of the litigants now objecting to it. Effengham v. P., 182M586, 235NW278. See Dun. Dig. 401.

An admission of a town in its pleading does not preclude interveners from that town to prove that facts are to contrary in proceeding involving validity of organization and boundaries of a city. State v. City of Chisholm, 199M403, 273NW235. See Dun. Dig. 4901a.

Where the defense of breach of implied warranty is neither pleaded nor litigated by consent, it comes too late when suggested for first time by defendant's motion for amended findings or a new trial. Allen v. C., 204M295, 283NW490. See Dun. Dig. 7675, 7713a.

As to whether another, not a party to the suit, is the real one in interest, held, upon facts appearing, to raise an issue of fact to be determined as such. Peterson v. J., 204M300, 283NW561. See Dun. Dig. 9707.

9287. Issues, how joined.

2. Issues of fact.

Caulfield v. C., 183M503, 237NW190; note under §9498 (19).

9288. Issues, how tried—Right to jury trial.

RIGHT TO JURY TRIAL

½. In general.

Where evidence is conflicting or different, conclusions may reasonably be drawn from it, question of fact for jury is presented. Karlson v. U. S., (USCCA8), 82F(2d)330.

Legal effect of a contract is a matter of law to be determined by court. National Surety Co. v. E., (USCCA8), 88F(2d)399.

Neither court nor jury may credit testimony positively contradicted by physical facts. Walsh v. U. S., (DC-Minn), 24FSupp877.

Where there is no evidence of contributory negligence submitting that question to the jury is error. 173M237, 217NW125.

Where no motion is made to submit issues in court cases to a jury, court is not called upon at trial to exercise its discretion in the matter. 174M241, 219NW76.

Liability on contractor's bond held properly determined by trial court by whom case was tried without a jury. 178M183, 226NW473.

Having made point that question was one of law to be disposed of as such by court, counsel are not estopped to reassert claim on appeal simply because, met by adverse ruling below, they proceeded to ask instruction predicated on theory of that ruling. E. C. Vogt, Inc. v. G., 185M442, 242NW338. See Dun. Dig. 287.

Where without objection a cause properly triable to the court has been tried to a conclusion to a jury, neither party can predicate error upon the refusal of the court to withdraw the case from the jury. Renn v. W., 185M461, 241NW581. See Dun. Dig. 9836(63).

Jury are exclusive judges of all questions of fact, including, as well, inferences to be drawn therefrom. Anderson v. K., 196M578, 265NW821. See Dun. Dig. 9707.

A verdict for a party should be directed by court where it clearly appears upon consideration of all evidence that it would be its duty to set aside a verdict against such party. Yates v. G., 198M7, 268NW670. See Dun. Dig. 9764.

Where both parties moved court to make findings upon all issues, and to make conclusions of law therefrom, neither party can complain that case should have been submitted to jury for a general verdict, nor can one party complain that court set aside answer to one of two questions submitted to jury. Coughlin v. F., 199M102, 272NW166. See Dun. Dig. 5234.

If evidence would not support a verdict for plaintiff, court did not err in directing a verdict for defendant. Phelion v. D., 202M224, 277NW552. See Dun. Dig. 9843.

Jury trial in will cases. 22MinnLawRev513.

Dismissal and directed verdict in Minnesota. 23MinnLawRev363.

2. Statutory provision.

Effect of foreign substantive law in determining whether question is for court or jury. 15MinnLawRev703.

5. Equitable actions.

Equity has jurisdiction to enjoin and abate nuisances, without right of jury trial. 174M457, 219NW770.

6. Mixed actions.

One asking for a money judgment but seeking to have it made a special lien upon real estate was not entitled to a jury trial. Patzwald v. O., 184M529, 239NW771. See Dun. Dig. 5232(67).

Where there was a general verdict on two material issues, it was error to submit one of such issues which should have been decided for plaintiff as matter of law. First Nat. Bank v. F., 190M102, 250NW806.

Where record contains no objection or exception to dismissal of jury and trial of issues to court, error assigned that plaintiff was deprived of a jury trial may not be considered. Nordby v. C., 201M375, 276NW278. See Dun. Dig. 5234.

7. Held not entitled to jury trial.

Defendants were entitled to the instruction that plaintiff had not proved negligence on the part of certain defendant. Zobel v. B., 184M172, 238NW49. See Dun. Dig. 7048.

Trial of action to set aside and invalidate a trust deposit in a savings account in a bank is not a jury case, even if relief asked is recovery of money in such account. Coughlin v. F., 199M102, 272NW166. See Dun. Dig. 9835.

7½. Questions for jury.

For the purpose of a motion for a directed verdict interposed by defendant plaintiff's evidence must be accepted as true, though disputed by defendant's witnesses. Jacobson v. C. (CCA8), 66F(2d)688.

It is only where facts are such that all reasonable men must draw same conclusion from them that a question of negligence becomes one of law for court. Sears, Roebuck & Co. v. P. (USCCA8), 76F(2d)243.

Trial court properly denied motion for a directed verdict and motion for judgment notwithstanding verdict where there was evidence that would justify a partial recovery. Millers' Mut. Fire Ins. Ass'n v. W., (CCA8), 94F(2d)741.

In determining whether verdict was supported by any substantial evidence, all facts that appellee's evidence reasonably tends to prove must be assumed to have been established, with all reasonable favorable inferences therefrom; also effect must be given to rules that credibility of witnesses and weight of evidence is for jury and that oral evidence opposed to physical facts is not substantial evidence. Egan Chevrolet Co. v. B., (CCA8), 102 F(2d)373.

It is the right and duty of the trial court to direct a verdict when the state of the evidence is such as not to warrant a verdict for a party, and if he fails to do so the other party is entitled to a new trial. 173M402, 217NW377.

Instructed verdict would be error where evidence is conflicting upon issue tried. 174M297, 219NW180.

It is the duty of trial court to direct a verdict at the close of the evidence if it would be its duty to set aside a contrary verdict returned by the jury. 174M339, 219 NW185.

Issues as to which there is no conflict in the evidence should not be submitted to the jury. 180M6, 230NW120.

Litigant cannot complain of submission of issue made by pleadings. 180M78, 230NW259.

Trial court should not hesitate in taking question from jury where recovery cannot be had as matter of law. 180M252, 230NW776.

The opinion of the owner of personal property as to its value is admissible. Its weight is for the jury. 181 M603, 233NW313. See Dun. Dig. 3322(4).

Evidence held such as to justify submitting to the jury, question whether defendant represented that mortgagor lived upon mortgaged land. Gunnerson v. M., 182M480, 235NW909. See Dun. Dig. 8612a.

Where the evidence for the plaintiff is sufficient to sustain a verdict in his favor, it is error for the court to direct a verdict at the close of plaintiff's evidence. Osborn v. W., 183M205, 236NW197. See Dun. Dig. 9764.

If the evidence is such that a verdict in plaintiff's favor would have to be set aside by the court, not as a matter of discretion, but as a matter of law, because plaintiff has failed to establish any cause of action, the court may properly direct a verdict for defendant. Dorgelôh v. M., 183M265, 236NW325. See Dun. Dig. 9764 (34).

Whether malpractice action was barred by limitations, held for jury. Schmit v. E., 183M354, 236NW622. See Dun. Dig. 7492.

Where there was no evidence justifying an inference that the plaintiff did not exercise ordinary care in alighting from a street car, it was error to submit the question of her contributory negligence to the jury. Bakkensen v. M., 184M274, 238NW489. See Dun. Dig. 9707.

It is error to submit a case to a jury upon a point as to which there is no evidence or when the evidence will admit of but one reasonable inference. Cannon Falls Holding Co. v. P., 184M294, 238NW487. See Dun. Dig. 9707.

It was prejudicial error to direct a verdict for plaintiff before defendants had rested. Grossman v. L., 184 M446, 238NW893. See Dun. Dig. 9843.

The question of proximate cause is not for the jury, if, viewing the facts in the most favorable light for plaintiff, there is no sufficient evidence to sustain a finding of proximate cause. Hamilton v. V., 184M580, 239NW659. See Dun. Dig. 7011.

It is only in clearest of cases, when facts are undisputed and it is plain that all reasonable men can draw but one conclusion from them, that question of contributory negligence becomes one of law. Eckman v. L., 187M437, 245NW638. See Dun. Dig. 4167b, 7033, 7048.

It is error to submit to a jury an issue as to which there is no evidence, or which must be decided one way or the other as matter of law on uncontradicted proof. Hall v. G., 188M20, 246NW466. See Dun. Dig. 7174, 9707.

On a motion for a directed verdict, evidence is to be viewed in most favorable light for adverse party. Bayerkohler v. C., 189M22, 248NW294. See Dun. Dig. 9764(43).

Dentist in malpractice action was not entitled to directed verdict if evidence justified recovery under correct principles of law, though insufficient under erroneous standard set forth in instructions given at defendant's request. Ellering v. G., 189M68, 248NW330. See Dun. Dig. 7486a, 7488.

Court rightly refused to direct verdicts and to grant judgments notwithstanding verdicts if there was evidence to sustain verdicts. Holland v. M., 189M172, 248 NW750. See Dun. Dig. 5082, 9764.

While a jury may not be permitted to guess as between two equally persuasive theories consistent with circumstantial evidence, such evidence in a civil case need not exclude every reasonable conclusion other than that arrived at by jury. It is sufficient if reasonable minds may conclude from circumstances that theory adopted by verdict outweighs and preponderates over any other theory. It need not prove conclusion arrived at beyond a reasonable doubt or demonstrate impossibility of every other reasonable hypothesis. Sherman v. M., 191M607, 255NW113. See Dun. Dig. 3473.

Fact issues properly determinable by a jury may not be taken away from that body and decided by the court when seasonable objection is made. W. T. Rawleigh Co. v. S., 192M483, 257NW102. See Dun. Dig. 5230.

Court can take question of negligence from jury only where reasonable minds could not differ as to inference to be drawn from proof. Guile v. G., 192M548, 257NW 649. See Dun. Dig. 7048.

To give rise to res ipsa loquitur it must appear, among other things, that the instrumentality inflicting the injury was under control of defendant, and where there is dispute as to this factor, it is proper to submit this issue to jury under instructions, such that if they find defendant to be in control of instrumentality, then they may apply res ipsa loquitur, otherwise not. Hector Const. Co. v. B., 194M310, 260NW496. See Dun. Dig. 9788.

On motion for directed verdict all evidence admitted must be considered as properly received, and motion should not be denied because defense established by evidence was neither pleaded nor litigated by consent. Robbins v. N., 195M205, 262NW872. See Dun. Dig. 9764.

It is for jury to determine facts where medical experts give contradictory opinions as to cause of a death. Jorstad v. B., 196M568, 265NW814. See Dun. Dig. 9707.

A verdict cannot be based on mere possibilities, speculation or conjecture. Bauer v. M., 197M352, 267NW206. See Dun. Dig. 7047(72).

Question of speed is one peculiarly for jury. Polchow v. C., 199M1, 270NW673. See Dun. Dig. 9707.

Motion of a defendant in a personal injury action for a directed verdict should be granted only in cases where evidence against plaintiff is clear, whether basis of motion be want of negligence in defendant or contributory negligence in the plaintiff. Jude v. J., 199M217, 271 NW475. See Dun. Dig. 9843.

Question if for jury where fair-minded men might reasonably draw different conclusions from evidence. Benson v. N., 200M445, 274NW532. See Dun. Dig. 9707.

A plaintiff, at beginning, must establish the truth of his averments by evidence, competent and sufficient, if uncontradicted, and if his evidence is contradicted, issue is for jury. Id.

There was a question for the jury where fair-minded men might differ. Theisen v. M., 200M515, 274NW617. See Dun. Dig. 9707.

It is only in clearest of cases when facts are undisputed and it is plain that all reasonable men can draw but one conclusion that question of contributory negligence becomes one of law. Champion v. C., 202M136, 277 NW422. See Dun. Dig. 7033.

While it is common practice for a court to direct a verdict for defendant when plaintiff rests where a cause of action is not proved, yet such practice is not authorized by statute and is objectionable. Willard v. M., 202M 626, 279NW553. See Dun. Dig. 9751.

Credibility of witnesses is ordinarily for the jury, and it is for them to choose not only between conflicting evidence but also between opposing inferences. Weinstein v. S., 204M189, 283NW127. See Dun. Dig. 10344.

A motion for a directed verdict presents a question of law only, admitting, for purposes of motion, credibility of evidence for adverse party, and every inference which may be fairly drawn from such evidence. Bartley v. F., 285NW484. See Dun. Dig. 9764.

A verdict may be directed in those unequivocal cases where it clearly appears to the court on trial that it would be its duty to set aside a contrary verdict as not justified by the evidence or as contrary to law applicable to case. Id. See Dun. Dig. 9764.

ISSUES TO THE JURY IN EQUITABLE ACTIONS

8. Waiver.

Right to jury trial is waived by proceeding to trial without protest. Patzwald v. O., 184M529, 239NW771. See Dun. Dig. 5234(25).

10. How far discretionary.

Where complaint in replevin was dismissed and only issues of an equitable nature were raised by counterclaim and reply, defendant was not entitled to a jury trial. 171M65, 212NW738.

Since, in a case triable to the court, the court, on its own motion, may submit an issue to a jury, no reversible error results from such a submission without there having been a motion for settling a jury issue as prescribed by the rules of the district court. 171M475, 214NW469.

Where complaint set forth an action in equity to compel the issuance to plaintiff of certificates for stock, defendant is not entitled to a jury trial. 174M219, 219NW82.

Granting or refusal of a request for submission of issues to a jury lies within the sound discretion of the court. 176M550, 224NW237.

Submission of issues to a jury was discretionary in action to enjoin trespassers and for equitable relief. Doyle v. B., 182M556, 235NW18. See Dun. Dig. 9835, 9837 (66), 9838.

Determination of an application to submit special issues in an equity case to a jury rests in the sound discretion of the trial court. Westberg v. W., 185M307, 241NW315. See Dun. Dig. 9838.

17. Findings of jury how far conclusive on court.

Verdict of jury upon specific question of fact submitted in an equity action is as binding as general verdict in a legal action. Ydstie's Estate, 195M501, 263NW447. See Dun. Dig. 415.

9290. Of law, how brought to trial.

Motion for new trial must be heard within judge's judicial district unless consent is given by the parties to hear it outside of district. 173M271, 217NW351.

9292. Continuance.

Generally the granting of a continuance lies wholly in the discretion of the trial court. 174M297, 219NW180.

The court ruled correctly when denying plaintiff's motion to amend complaint to allege a practical construction of a contract and in denying defendant's motion for a continuance to meet the evidence on that issue. Hayday v. H., 184M8, 237NW600. See Dun. Dig. 1721.

In refusing to continue to later date hearing on order to show cause why a receiver should not be appointed to collect rents on mortgaged property, and in allowing an amendment to complaint, court did not abuse its discretion. Minneapolis Sav. & Loan Ass'n v. Y., 193M632, 259NW382. See Dun. Dig. 7708.

Ordinarily when action is brought to reform an instrument set up as a defense in action at law for damages, court should stay latter action to abide a decision in former, but this is not necessary where from undisputed facts disclosed upon hearing of motions involved in appeal it satisfactorily appears that release cannot be reformed upon legal or equitable grounds so as not to bar plaintiff's recovery in her malpractice action. Ahlsted v. H., 201M82, 275NW404. See Dun. Dig. 1710.

JURY TRIALS

9293. Jury, how impaneled—Ballots—etc.

Jurors may be examined before being sworn as to their interest in insurance company defending suit. 181M4, 231NW714.

Parties in an automobile accident case have the right in impaneling the jury to ascertain whether a prospective juror is interested in an insurer. Martin v. S., 183M256, 236NW312. See Dun. Dig. 5252.

9294. Challenges.

See §9469-3, relating to juries in counties of over 400-000 population.

3. Implied bias.

Evidence does not support charge of misconduct of a juror in failing to disclose acquaintance with defendant. Carl Lindquist & Carlson, Inc., v. J., 182M529, 235NW267. See Dun. Dig. 5253.

5. Joinder of defendants in challenge.

Master and servant as defendants whose interests are not adverse are allowed three peremptory challenges as a side in which they are required to join. Eilola v. O., 201M77, 275NW408. See Dun. Dig. 5254(37).

6. Waiver of right.

Failure to examine juror as to relationship with opposing counsel is a waiver of statutory right to challenge the juror for implied bias. 178M296, 226NW938.

9295. Order of trial.

1. Right to open and close.

The order in which the closing argument shall be made is largely discretionary with the court, and its action will not be reversed except for a clear abuse of discretion. Bullock v. N., 182M192, 233NW858. See Dun. Dig. 9712(21).

Where only issue in action to recover real estate was usury in mortgage set up by defendant, court properly permitted defendants to have closing argument to jury. Clausen v. S., 187M534, 246NW21. See Dun. Dig. 9712.

Defendant insurer was not entitled to closing argument to jury, its concession of total disability not having gone to issue that total disability did not arise from ailments occurring prior to issue of policy. Schaedler v. N., 201M327, 276NW235. See Dun. Dig. 9799.

In condemnation owner occupies position of ordinary *plaintiff in action for recovery of damages, and as such* has right to open and close case, and upon him rests burden of proof to establish his damages. Minneapolis-St. Paul Sanitary Dist. v. F., 201M442, 277NW394. See Dun. Dig. 3111, 9788.

Plaintiff's counsel foreclosed himself from right to have closing argument to jury by agreeing at beginning of trial that defendant should go ahead and that determination of counterclaim would settle all disputed questions. Dickinson & Gillespie v. K., 204M401, 283NW725. See Dun. Dig. 9712.

A defendant is under no obligation to introduce evidence but may submit its case to decision on plaintiff's evidence. Gans v. C., 284NW844. See Dun. Dig. 9712.

1½. What constitutes resting case.

Where plaintiff introduces sufficient evidence upon which findings can be made in favor of defendants, but neither formally rests nor asks for permission to dismiss, court is justified in concluding that cause was submitted for findings and decision. Calhoun Beach Holding Co. v. M., 190M576, 252NW442.

1¾. Reception of evidence.

In automobile accident case, where defendant claimed that driver of car owned half interest therein, court did not err in permitting plaintiff to inquire in respect to defendant's application for insurance to rebut the defense of joint ownership, though it showed that an insurance company was the real defendant. Martin v. S., 183M256, 236NW312. See Dun. Dig. 3232(67).

Error in exclusion of evidence was not reviewed where there was no offer of proof. Tierney v. G., 185M114, 239NW905. See Dun. Dig. 9717.

After objections to questions, obviously asked for purpose of insinuating that plaintiff was malingering, were sustained, court should also have admonished jury to disregard insinuation implied by questions. Hill v. R., 198M199, 269NW397. See Dun. Dig. 9789.

Where defendant asked to see statement which was property of plaintiff, and counsel for plaintiff voluntarily handed it over to defendant's counsel without any direction from court, plaintiff cannot complain that defendant's counsel had no right to possession of same. Tri-State Transfer Co. v. N., 198M537, 270NW684. See Dun. Dig. 9721a.

Court did not err in sustaining objection to question which was mere repetition of a question previously answered. Hughes v. H., 204M592, 284NW781. See Dun. Dig. 9719.

1⅞. Disclosing protection by insurance.

In action against owners of three motor vehicles, it was inexcusable for plaintiff's attorney at opening of trial while veniremen were in box to elicit testimony that certain defendants were not protected by insurance. Brown v. M., 190M81, 251NW5. See Dun. Dig. 5252.

In automobile case, if insurance company is defending, *counsel for plaintiff may inquire of prospective jurors* whether they are connected with or interested in insurer. Id. See Dun. Dig. 5252.

No prejudice resulted from defendant's bringing out fact that insurance corporation was interested in plaintiff's side of case, where jurors also were informed that one likewise was interested in defendant's claim of no liability. Tri-State Transfer Co. v. N., 198M537, 270NW684. See Dun. Dig. 422.

It was not error to permit counsel to interrogate prospective jurors for purpose of discovering whether they were interested in defendant's insurer, there being no evidence of bad faith. Santee v. H., 202M361, 278NW520. See Dun. Dig. 5252.

Plaintiff's counsel was not guilty of misconduct in impaneling of a jury in inquiring whether any of jurors were interested in an insurance company which had undertaken defense of action. McKeown v. A., 202M595, 279NW402. See Dun. Dig. 5252.

Plaintiff's counsel was not guilty of misconduct in his argument in answering an argument of defendant's counsel that a verdict against him would hurt and penalize insured defendant, by pointing out that a verdict in favor of plaintiff would not have that effect. Id. See Dun. Dig. 9799.

Statement made by counsel for plaintiff in presence of men and women from whom jury was selected that it was proven that certain liability insurance company was interested in defense of case was highly improper, but court did not err in refusing to grant a new trial, in view of prompt instruction to jury to disregard it as being improper. Farwell v. S., 203M392, 281NW526. See Dun. Dig. 423.

Informing jury of insurance coverage. 23MinnLawRev 85.

2. Effect of admission in opening.

In the second trial of a case, a party is not concluded by his counsel's opinion of the legal effect of the contract, expressed during the course of the first trial. Hayday v. H., 184M8, 237NW600. See Dun. Dig. 688(34), 9792, 9793.

3. Order of proof.

Where case was closed except for testimony of a physician to be called by the defendant and such other evidence as might be given in rebuttal of his testimony, it was not error to reject testimony called in rebuttal

when it did not appear that it would rebut that of the physician. 174M131, 218NW455.

Where defendants at trial contradicted a very material part of testimony of certain man and wife, virtually asserting that they were not at scene of accident, court did not err in permitting plaintiff on rebuttal to introduce testimony of a little girl merely for purpose of showing that witnesses were at place of accident. Luck v. M., 191M503, 254NW609. See Dun. Dig. 9715.

Trial court has large discretion in permitting evidence to go in on rebuttal even though not proper rebuttal. Id.

Trial court may in his discretion direct order of trial of issues raised by pleading. Detwiler v. L., 198M185, 269NW838. See Dun. Dig. 9715.

Where one of defendant's witnesses was discredited on cross-examination through showing of inconsistent statements, it was not proper on redirect to show that other statements made by witness were consistent with his testimony upon direct examination. Tri-State Transfer Co. v. N., 198M537, 270NW684. See Dun. Dig. 10351.

Excluding offers of proof before proof of facts that would show collateral matters offered might be material, was not an abuse of judicial discretion. Exsted v. O., 202M644, 279NW559. See Dun. Dig. 9717.

Matter of admitting evidence in rebuttal is within the discretion of trial court. Noetzelman v. W., 204M26, 283NW481. See Dun. Dig. 9715.

3¼. Misconduct of counsel and argument.

While it is ordinarily improper for either court or counsel to read pleadings to jury, yet, even without its introduction in evidence, an admission in a pleading may be read to jury in argument for adversary of pleader. Hork v. M., 193M366, 258NW576. See Dun. Dig. 3424, 9783a.

In automobile collision case any misconduct of counsel in overstating width of truck and in demanding verdict for large amount was not prejudicial. Erickson v. K., 195M623, 262NW56. See Dun. Dig. 9799.

Reference in closing argument to a colloquy had in court's chambers was not prejudicial error where there was no attempt to get inadmissible evidence before jury. Tri-State Transfer Co. v. N., 198M537, 270NW684. See Dun. Dig. 424.

Emphasis by defendant's counsel that witness for defendant had sustained severe injuries in accident held not objectionable as conveying to jurors impression that unless defendant prevailed witness might be hampered in an action he was bringing on his own behalf. Id. See Dun. Dig. 3230.

Repeated reference in argument to fact that counsel for opponent had made numerous objections to admission of testimony was not prejudicial, argument merely recounting that which actually took place. Id. See Dun. Dig. 9799.

It was never intended that an attorney taking exception to charge should have opportunity of making an argument to jury to prove that court stated law incorrectly. Vondrashek v. D., 200M530, 274NW609. See Dun. Dig. 9799.

Reference by plaintiff's counsel to large wealth of defendant and poor financial circumstances of plaintiff and to fact that firm representing defendant was composed of twenty-two lawyers was prejudicial error rendering it an abuse of discretion to deny new trial. Anderson v. H., 202M580, 277NW259. See Dun. Dig. 7102.

Consideration of that which court had kept out of case should not be argued to jury. Minneapolis-St. Paul Sanitary Dist. v. F., 201M442, 277NW394. See Dun. Dig. 9799.

Where defendant conductor testified that there were 35 or 40 persons on street car involved in collision, it was improper for plaintiff's counsel to call attention to the fact only three of them were called by defendant as witnesses, there being nothing to indicate that any of other passengers possessed any peculiar knowledge of facts. Drown v. M., 202M66, 277NW423. See Dun. Dig. 3444.

An appeal by counsel for plaintiff for a verdict which would enable the plaintiff to do something for his invalid wife, widowed daughter and grandchildren was improper and should have been restrained by trial court had it been seasonably objected to. Ross v. D., 203M321, 281NW76. See Dun. Dig. 9799.

Counsel have a right in the closing argument to comment upon all the evidence and to present to the jury all arguments and inferences which may be drawn therefrom. Scott v. P., 203M547, 282NW467. See Dun. Dig. 9799.

Statements of plaintiff's attorney in argument appraising professional ability of defendant's attorney that individuals like plaintiff are sometimes obliged to employ lawyers who are not so quickwitted, alert and equipped with financial assistance and ability to rake the countryside and bring in every possible bit of evidence that may favor them was rendered harmless by statement of court that it had nothing to do with lawsuit. Raymond v. K., 204M220, 283NW119. See Dun. Dig. 423.

Matter of determining whether a new trial should be granted for misconduct of prevailing party is primarily for trial court's discretionary determination. Ryan v. I., 204M177, 283NW129. See Dun. Dig. 9706.

New trial will be granted where testimony or evidence is adduced by attorney in his argument, without having taken the witness stand and subjecting himself to cross examination. Noesen v. M., 204M233, 283NW246. See Dun. Dig. 9799.

3½. Instructions.

In action for injuries received while descending stairway in department store, where there was evidence to show that injury was caused by absence of handrail required by city ordinance and presence on steps of crackerjack box-liner on steps, defendant held entitled to instruction that if plaintiff's fall was solely attributable to the presence of the liner, the verdict must be for defendant. Montgomery Ward & Co. v. S., (CCA8), 103F(2d)458.

That giving defendant's request may have placed his contention before the jury more prominently than the plaintiff's will not justify a reversal. 173M250, 217NW127.

The reading of part of the pleadings in argument to the jury disapproved, but held not reversible error where the court, by its charge, clearly defines and limits the issues for the jury to determine. Bullock v. N., 182M192, 233NW858. See Dun. Dig. 9783a(71).

In action by guest against automobile owner, where driver testified that he was a half owner and was not under the control of the defendant, an instruction that defendant's liability rested on her right of control rather than upon the ownership of the car was as favorable to her as she could demand. Martin v. S., 183M256, 236NW312. See Dun. Dig. 6983a.

Instructions to jury held not misleading. Hayday v. H., 184M8, 237NW600.

An unequivocal instruction that a determinative proposition is undisputed on the evidence, the fact being to the contrary, was prejudicial error, which was not cured by an equivocal explanation liable to be misunderstood by the jury. Poppe v. B., 184M415, 238NW890. See Dun. Dig. 9785.

Where defendants maintained that tail light was burning and there was no effort to show that the light went out suddenly or unexpectedly or that it went out without defendants' fault, court properly refused to instruct that defendants were not negligent if tail light went out suddenly and unexpectedly and without defendants' fault. Mechler v. M., 184M476, 239NW605. See Dun. Dig. 4167c.

A reference to a witness in the charge which neither discredits nor commends the veracity of the witness is not error. Reek v. R., 184M532, 239NW599. See Dun. Dig. 9787.

No reversible error occurred in the charge which stated that the three sons, in the father's gift of 160 acres of land each, had been treated alike, for each had received the same acreage, and the evidence raised no controversy as to inequality in value of the gifts. Reek v. R., 184M532, 239NW599. See Dun. Dig. 1202.

Charge to jury must be construed as whole. Milliren v. F., 185M614, 242NW546. See Dun. Dig. 9781.

Charge on apparent authority held substantially correct, and not to take from jury question of actual authority of collision insurance adjuster. Breuer v. C., 188M112, 246NW533. See Dun. Dig. 1935.

Reading in charge quotations from reported decisions is disapproved. Christensen v. P., 189M548, 250NW363. See Dun. Dig. 9781, n. 49.

Instruction, in substance, that a party to a deal may not rely for a recovery upon fraudulent representations which he knows to be false when made, was correct in view of evidence. Greear v. P., 192M287, 256NW190. See Dun. Dig. 3822.

Additional instructions given in absence of counsel that recovery could only be based on fraud or misrepresentation and not upon breach of contract of exchange were appropriate and correct, in action for damages for conspiracy to defraud. Id. See Dun. Dig. 9790.

A party is not entitled to a new trial merely because his counsel were not afforded opportunity to be present when court instructed jury when jury came into court after submission of case and asked for further instructions. Id. See Dun. Dig. 9790.

In replevin by seller to recover soda fountain sold for small down payment, balance secured by chattel mortgage, an instruction that if jury found that the order, promissory note, and chattel mortgage were obtained by fraud, they were to be considered as waste paper held erroneous and inapplicable under the evidence. Knight Soda Fountain Co. v. D., 192M387, 256NW657. See Dun. Dig. 9781.

In action for injuries received when scaffold fell, court did not err in failing to instruct that a verdict could not be based on mere speculation and conjecture. Gilbert v. M., 192M495, 257NW73. See Dun. Dig. 9774.

In action for death in elevator shaft to which there were no eye witnesses, sentence at end of charge "with reference to the presumption of due care that accompanied the plaintiff, the burden of overcoming that presumption rests upon the defendant" held not prejudicial in view of accurate and more complete instruction in body of charge. Gross v. G., 194M23, 259NW557. See Dun. Dig. 9788.

In action for negligence in setting fire through use of gasoline in cleaning motor of truck, it was unnecessary to instruct jury on question of proximate cause where there was no question but that acts complained of were proximate cause of fire. Hector Const. Co. v. B., 194M310, 260NW496. See Dun. Dig. 9783.

Instruction held to properly define res ipsa loquitur. Id. See Dun. Dig. 7044.

Where words of a statute are plain and easily understood court is not required to explain same further than reading statute to jury; no written requests to charge having been submitted to court. Clark v. B., 195M44, 261 NW596. See Dun. Dig. 9781(48).

In action in state court for damages for death, court in defining wilful and wanton negligence in connection with special verdict submitted to prevent subsequent discharge of defendant in bankruptcy should properly define "wilful and malicious injury" in conformity with decisions of federal court. Raths v. S., 195M225, 262NW 563. See Dun. Dig. 9783.

Instruction that if evidence preponderated in favor of defendant, jury should return a verdict for him, held not erroneous when read in connection with other instructions properly placing burden of proof upon plaintiff. Erickson v. K., 195M623, 262NW56. See Dun. Dig. 9788.

Where there is no evidence from which jury might reasonably infer contributory negligence, it is prejudicial error to submit that question to jury. Cogin v. I., 196M493, 265NW315. See Dun. Dig. 9781(35).

Arguments and tests used in judicial opinions, even though good law, are not written for purpose of being used as instructions to a jury. Vogel v. N., 196M509, 265 NW350. See Dun. Dig. 9781.

In action by employee against benefit association in which defense was that plaintiff was intoxicated at time of accident, court erred in charging that plaintiff's plea of guilty of drunkenness was "not a material thing but merely an item of evidence in the whole case," the plea being a very material item. Holdys v. S., 198M258, 269 NW468. See Dun. Dig. 9784.

In action by guest in automobile for injuries received in collision with straying horse, instruction that fact that owner of horse may have been negligent in allowing it to be loose upon highway did not prevent a recovery by plaintiff, cured any wrong impression that jury might possibly have had from previous mention of horse owner's negligence. Manos v. N., 198M347, 269NW839. See Dun. Dig. 423.

Where court charged that violation of statutory provisions, duly read to jury, was negligence, necessity for *any further charge as to distinction between common-law negligence and violation of statutory duty was unnecessary.* Dehen v. B., 198M522, 270NW602. See Dun. Dig. 4162a.

Charge is to be considered as a whole to determine whether particular matter has been properly covered. Elkins v. M., 199M63, 270NW914. See Dun. Dig. 9781.

A charge should be applicable to facts of case. Bird v. J., 199M252, 272NW168. See Dun. Dig. 9781.

If when examined as a whole a charge is impartial, clear and correct, it is sufficient. Marino v. N., 199M 369, 272NW267. See Dun. Dig. 9781.

A charge stating a fact in alternative leaves it to jury to ascertain fact. Id.

Repetition, at request of jury, of summary of what jury should find on issues of negligence and contributory negligence, furnishes no cause for a new trial. Ames v. C., 273NW361. See Dun. Dig. 9781(45), 9790.

In a collision between two automobiles in intersection of two highways, an instruction correctly defining negligence and contributory negligence and properly placing burden of proof of latter on defendant, and, as a summary, stating, if jury found from all evidence that defendant was negligent proximately causing plaintiff's injuries and that plaintiff was free from contributory negligence, verdict would be for plaintiff; if they did not so find verdict should be for defendant, held not erroneous nor misleading. Id. See Dun. Dig. 9783.

Instruction should be confined to issues actually raised by evidence. Benson v. N., 200M445, 274NW532. See Dun. Dig. 9783.

Scope of an instruction is to be determined not alone by pleadings but also by evidence in support of issues between parties, and even though an issue is raised by pleadings, it is not proper to give an abstract, admittedly correct, instruction on such issue where there is no basis for it in evidence. Id.

If as a matter of law there is no basis for a finding of contributory negligence, it is reversible error to submit that issue over plaintiff's timely objection. Hack v. J., 201M9, 275NW381. See Dun. Dig. 9783.

Upon charge as a whole and circumstances, an instruction that passenger was "presumably negligent" in boarding a trolley bus while in motion, held without prejudice. Ensor v. D., 201M152, 275NW618. See Dun. Dig. 9785.

Giving requested instructions covering seven pages of printed record would have been just cause for complaint that too much prominence was given one side of controversy. Clancy v. D., 202M1, 277NW264. See Dun. Dig. 9774.

Words "actual malice", "ill will", "ill feeling", "bad faith", are so well understood by every juror that it was not necessary to define them in a libel case. Clancy v. D., 202M1, 277NW264. See Dun. Dig. 9781.

After court in charge had limited negligence claimed by plaintiff to failure to keep a proper lookout ahead, any subsequent reference to negligence could not have been understood by jury as submitting any other negligence than as first limited. Forseth v. D., 202M447, 278 NW904. See Dun. Dig. 9781.

Instructions are to be considered as a whole in determining whether they are contradictory or inconsistent. Larson v. L., 204M80, 282NW669. See Dun. Dig. 9781(26).

A too restricted instruction was remedied by other instructions containing proper qualifications. Honan v. K., 286NW404. See Dun. Dig. 9796.

Right of trial judge to comment on evidence in charge to jury in civil and criminal cases. 18MinnLawRev441.

4. Re-opening case.

Court may in its discretion vacate findings and reopen case for further evidence. 181M71, 231NW397.

Whether a defendant is permitted, at close of plaintiff's testimony, to rest for purpose of moving for a directed verdict, with understanding that, if motion is denied, he may reopen case and put in his evidence, rests within discretion of trial court. 181M471, 233NW 14. See Dun. Dig. 9716.

It is discretionary with the trial court to allow a party to reopen his case after resting. McCartney v. C., 181M555, 233NW465. See Dun. Dig. 9716.

Court did not abuse its discretion in refusing after decision was filed to reopen case to permit defendant to introduce more evidence as to an issue litigated in the case. Tritchler v. B., 185M414, 241NW578. See Dun. Dig. 9716.

Court did not err in refusing plaintiff's motion to reopen the case long after trial had and decision made. Kitzman v. P., 204M343, 283NW542. See Dun. Dig. 9712.

4½. Remarks and conduct of judge.

Court held not in error in asking a question of a witness, nor in saying to jury that counsel acted properly in objecting to question, nor in stating bearing, if any, which answer of witness had upon his credibility. Potter v. I., 190M437, 252NW236. See Dun. Dig. 9706.

Repeated reference by plaintiff's counsel to nonresidence of defendant's counsel and that of their expert medical witness held not prejudicial. Finney v. N., 198 M554, 270NW592. See Dun. Dig. 9799.

Answer to a juror's uncalled for inquiry was no attempt of court to coerce jury to agree on a verdict. Ames v. C., 200M92, 273NW361. See Dun. Dig. 9812.

Record does not sustain contention that trial court coerced jury into a verdict. Osbon's Estate, 286NW306. See Dun. Dig. 9812.

It is good practice for trial judges to be guarded in their remarks and not to say anything which can be construed as disparaging counsel. Wentz v. G., 287NW 113. See Dun. Dig. 9706.

9296. View of premises—Procedure.

Denying a request for the jury to view the premises was within the discretion of the trial court. Carl Lindquist & Carlson, Inc., v. J., 182M529, 235NW267. See Dun. Dig. 9721(81).

9298. Requested instructions.

Boyer v. J., 185M221, 240NW538.

2½. Writing by court of disposition of requests.

Failure of court to mark as given, refused, or modified, requests to charge, no inquiry having been made for information as to what had been done with requests or as to which would be given, was not in and of itself prejudicial error. Kouri v. O., 191M101, 253NW98. See Dun. Dig. 9771a, 9776a.

3. When requests may be refused.

Court erred in not instructing jury that an act of negligence not pleaded nor litigated by consent could not serve as a ground of recovery. 175M96, 220NW429.

In an action against a railroad for injuries at crossing, court erred in refusing to give requested charge relative to action in an emergency. 175M280, 220NW 949.

It is prejudicial error to refuse to give a requested charge which in effect would withdraw from the jury one of a number of charges of negligence upon which no proof was given. 175M280, 220NW949.

There was no error in charge or refusal to charge, respecting priority as between purchase money, chattel mortgage and prior mortgage. 177M441, 225NW389.

Requested instructions not containing proper qualifications properly refused. 178M465, 227NW493.

Request made after jury has retired, held too late. 179M428, 229NW867.

Consideration and denial of request not made before the argument may be assigned as error. 180M163, 230 NW580.

The refusal to give certain requests to charge, and modification of other requests, held not error. Bullock v. N., 182M192, 233NW858. See Dun. Dig. 9774, 9775.

Requested instruction in automobile accident case that jury was to entirely disregard fact that insurance company had any interest in the outcome of the case held properly refused. Arvidson v. S., 183M446, 237NW12. See Dun. Dig. 9774.

It is not error to refuse a requested instruction which is so specific that no evidence can be found which would justify holding it error to refuse to give it. O'Connor v. C., 190M277, 251NW674. See Dun. Dig. 9774.

Where issue was whether plaintiff and defendant insurance company had an oral contract for renewal insurance—not whether an oral contract was made between plaintiff and agent personally; it was not error to refuse to submit to jury whether there was a con-

tract between plaintiff and agent personally. Schmidt v. A., 190M585, 252NW671. See Dun. Dig. 4647, 4691a.

Where suit was based exclusively upon fraudulent misrepresentation made to induce purchase, court did not err in refusing in its charge to discuss written contract of purchase, suit not being for breach of any warranty. Nat. Equipment Corp. v. V., 190M596, 252NW835. See Dun. Dig. 8612.

There was no error in refusing certain requested instructions which were either confusing or inapplicable under evidence, or misleading. Palmer v. O., 191M204, 253NW543. See Dun. Dig. 9781.

Plaintiff, a passenger on street car standing on rear platform ready to alight, was thrown against sides of platform and injured. Evidence made it a jury question whether she lost her balance from sudden stopping of street car or from impact of automobile against rear doors of street car; hence plaintiff was not entitled to an instruction that street car company, not a party to the action, was free from negligence. Jannette v. M., 193M153, 258NW31. See Dun. Dig. 9781, 7000.

Requested instructions either inaccurate or not pertinent under the evidence were rightly refused. Gross v. G., 194M23, 259NW557. See Dun. Dig. 9774.

Where there was some reference in evidence to an alleged justice court judgment in unlawful detainer no claim was pleaded or presented by plaintiff at trial that this alleged judgment was a bar to any defense, and plaintiff was asked to produce this judgment, and declined so to do, court did not err in failing to charge as to something not pleaded or litigated and not even suggested to trial court. Pettersen v. F., 194M265, 260NW225. See Dun. Dig. 9774.

Where there was no evidence of contributory negligence, court did not err in refusing to submit such defense to jury. Paulos v. K., 195M603, 263NW913. See Dun. Dig. 9774(86).

Certain requested instructions were either sufficiently covered in the charge, or were properly denied because the evidence was such that the jury could not apply them. Kolars v. D., 197M183, 266NW705. See Dun. Dig. 9774.

A requested instruction was properly denied because not applicable under the evidence. Lorentz v. A., 197M205, 266NW699. See Dun. Dig. 9774.

A requested instruction with regard to rule covering emergencies was properly refused because it failed to state complete rule as stated in Johnson v. Townsend, 195M107, 110, 261NW859, 861. Carlson v. S., 200M177, 273NW665. See Dun. Dig. 7020.

Where there was no claim in evidence that operator of bus station was negligent in construction or maintenance of depot, and court very carefully instructed that only issue to be considered was whether porter negligently pushed plaintiff off platform while carrying baggage, there was no error in refusing requested instruction that defendant was not negligent with respect to construction and maintenance of depot. Benson v. N., 200M445, 274NW532. See Dun. Dig. 9774.

It was not error to refuse to read statute as to brakes of motor vehicles, there being no evidence of faulty brakes or of negligence of driver in their application. Forseth v. D., 202M447, 278NW904. See Dun. Dig. 9774.

A blanket exception to five requests to charge, four of which are correct, is too general to bring up such exception for review on appeal from an order denying a motion for a new trial under an assignment of errors of law occurring at the trial. Strand v. B., 203M9, 279NW746. See Dun. Dig. 9797.

It was not error to refuse requested instructions covered by given instructions. Schorr v. M., 203M384, 281NW523. See Dun. Dig. 9777.

Court did not err in refusing to instruct on an issue not in the case, even when requested by jury. Bylund v. C., 203M484, 281NW873. See Dun. Dig. 9774.

Requested instructions not applicable to evidence are properly refused. Johnson v. K., 285NW881. See Dun. Dig. 9774.

5½. Informing jury that instruction was given on request.

Court disapproves of action of a trial court in announcing that any portion of its charge is given at request of either party. Carlson v. S., 200M177, 273NW665. See Dun. Dig. 9781.

6. Request covered by the general charge.

181M245, 232NW38.

Where instructions were fair, accurate and complete, refusal of requested instruction, substance of which was covered in charge, was not error. Egan Chevrolet Co. v. B., (CCA8), 102F(2d)373.

The charge being complete, it was not error to refuse to give certain requests for instructions. Quinn v Z., 184M589, 239NW902. See Dun. Dig. 9777.

Where court instructed adequately regarding contributory negligence, there was no error in refusing request for further instructions thereon. Olson v. P., 185M571, 242NW283. See Dun. Dig. 9777.

There is no prejudice in refusing instruction where charge as a whole is sufficiently favorable. Dickinson v. L., 188M130, 246NW669. See Dun. Dig. 9777.

Court having given correct general charge as to damages did not err in refusing to instruct that jury could not consider contention that condition of kidney was result of accident. Orth v. W., 190M193, 251NW127. See Dun. Dig. 9777.

Having given fair charge as to damages, court was not required to instruct jury that they were not to speculate upon what evidence excluded by court might have been. Id.

There is no error in refusing requested instruction where its equivalent has been given in slightly different form. O'Connor v. C., 190M277, 251NW674. See Dun. Dig. 9775, n. 8.

It is no error to refuse requested instructions sufficiently covered by general charge. Kouri v. O., 191M101, 253NW98. See Dun. Dig. 9777.

Refusal of requested instruction was proper where court had already given instructions more applicable to evidence. Erickson v. H., 191M177, 253NW361. See Dun. Dig. 9777.

Instruction on reasonable care to be exercised by motorman of street car held to correctly cover situation and to substantially conform with instruction requested. Luck v. M., 191M503, 254NW609. See Dun. Dig. 9015.

A requested instruction sufficiently covered in general charge need not be given. Jensvold v. M., 192M475, 257NW86. See Dun. Dig. 9777.

Refusal of court to give instructions presented orally at conclusion of charge is not ground for a new trial, charge given being adequate. Erickson v. K., 195M623, 262NW56. See Dun. Dig. 9777.

It is not error to refuse a requested instruction fully covered by court in given instruction. Vogel v. N., 196M509, 265NW350. See Dun. Dig. 9777.

Certain requested instructions were either sufficiently covered in the charge, or were properly denied because the evidence was such that the jury could not apply them. Kolars v. D., 197M183, 266NW705. See Dun. Dig. 9774.

Requested instruction respecting an alleged protruding plank upon defendants' truck as cause of plaintiff's injuries, held adequately covered in court's general charge, and refusal to give request was not error. Ohad v. R., 197M483, 267NW490. See Dun. Dig. 9777.

No reversible error occurs in refusing to give a requested instruction adequately covered in given instructions in different language. Doody v. S., 198M573, 270NW583. See Dun. Dig. 9777.

Where charge as given properly stated law, there was no error in refusal of court to give a requested instruction to effect that to permit recovery upon claim "the evidence must be clear, satisfactory and convincing." Hage v. C., 199M533, 272NW777. See Dun. Dig. 9777.

It was not reversible error to deny a request to charge as to a matter which must have been fully understood by jury from tenor of general charge. Becker v. N., 200M272, 274NW180. See Dun. Dig. 9777.

There was no error in refusing requested instruction, where instruction given was more appropriate than one requested. Nelson v. G., 201M198, 275NW612. See Dun. Dig. 9777.

It is not error to refuse requested instructions where given instructions are adequate. Bylund v. C., 203M484, 281NW873. See Dun. Dig. 9777.

Where court clearly charged jury, in weighing testimony of a witness, to consider interest of such witness in outcome of case, it was proper to refuse a requested instruction singling out plaintiff's testimony. Johnson v. K., 285NW881. See Dun. Dig. 9777.

It was not error to refuse requested instructions covered in substance by given instructions. Honan v. K., 286NW404. See Dun. Dig. 9777.

6½. Necessity for request.

180M264, 230NW778.

Instruction as to right of way at street intersection, held sufficient in absence of request for more definite and detailed instruction. 175M449, 221NW715.

A party cannot claim error on the ground that the instructions failed to define particular issues specifically where he made no request for more specific instructions. 177M127, 224NW843.

Failure to define "proximate cause," held not reversible error in absence of request for instruction. 181M109, 231NW716.

A new trial will not be granted for failure to instruct in respect to the presumption of due care of one killed in an accident where no request was made for such instruction. Boyer v. J., 185M221, 240NW538. See Dun. Dig. 9771.

A party requesting no instructions and offering no suggestions on inquiry by court at close of charge cannot assign error upon any faulty statement in charge or failure to instruct upon some particular phase. Carlson v. S., 188M204, 246NW746. See Dun. Dig. 9780.

Failure to charge on a particular point of law is not reversible error, in absence of a timely request therefor from counsel. Dwyer v. I., 190M616, 252NW837. See Dun. Dig. 7179, 9771.

Where words of a statute are plain and easily understood court is not required to explain same further than reading statute to jury; no written requests to charge having been submitted to court. Clark v. B., 195M44, 261NW596. See Dun. Dig. 9782.

Plaintiff appellant is not entitled as to have considered a claim that it was error for court to fail to submit to jury question of defendant's negligence as a matter of law if he violated right of way statute, in that verdict of jury as to contributory negligence might be affected by such failure, where there was no exception to

the charge as to common law negligence, no request to charge more fully as to effect of any violation of the statute, and no assignment in motion for new trial or in appeal of any error on that ground. Cogin v. I., 196 M493, 265NW315. See Dun. Dig. 9772.

Where plaintiff alleged that defendants' conduct respecting happening of accident was willful, court's instructions on willfulness was not prejudicial to plaintiff's claims, especially where he made no objection or suggestion that charge given was not appropriate, although the court, after giving charge, had asked for suggestions of counsel. Ohad v. R., 197M483, 267NW490. See Dun. Dig. 9792.

Where court charge as to negligence of a defendant confronted with an emergency was not complete, but was proper so far as it went, plaintiff cannot claim error in absence of request or suggestion for further instructions. Dehen v. B., 198M522, 270NW602. See Dun. Dig. 9771.

In action for injuries received as result of nuisance at filling station, wherein defendant's possession of station was in issue, failure to instruct on question of agency was not error where no requests were formulated. Noetzelman v. W., 204M26, 283NW481. See Dun. Dig. 9771.

9300. Verdict, when received—Correcting, etc.

The court may refuse to receive a verdict deemed inadequate, but, in a case of assessing damages in a tort action, it is error to send the jury out to deliberate on another verdict with the statement that the one returned, being in a substantial amount for a tort, was not compensatory. Peterson v. A., 183M86, 235NW534. See Dun. Dig. 9823.

1. Court always open.

An accused at liberty on bail is chargeable with knowledge that the court is always considered open for all purposes connected with the cause submitted. 175M 573, 222NW277.

2. Polling the jury.

The polling of the jury is for the purpose of ascertaining for a certainty that each juror agrees upon verdict and not to determine whether verdict presented was reached by quotient process. Hoffman v. C., 187M320, 245NW373. See Dun. Dig. 9822.

3. Correction of verdict.

It was error for trial court to direct judgment in a less amount than the verdicts where the evidence warranted a greater recovery than that directed, the proper order being to award a new trial on condition of consent to reduction of verdict. 180M540, 231NW222.

A verdict in an action upon a note was not perverse because jurors intentionally refrained from allowing plaintiff interest, and court committed no error in adding interest, though it probably should have instructed jury to correct verdict itself in open court. Olson v. M., 195M626, 264NW129. See Dun. Dig. 9823, 9828.

There was no error in having jury correct verdict consisting of general verdict and special verdict in court room without having jury sent out of room. Id.

In action against two joint tort-feasors wherein jury filed in separate verdicts against each of defendants for a certain sum, court could not consider affidavits of jurors on motion to correct verdict that total verdict against defendants was intended to be twice amount specified. Cullen v. C., 201M102, 275NW414. See Dun. Dig. 9829.

Affidavits of jurors which indicate a misconception of legal effect of verdicts rather than mere clerical error in recording actual verdict arrived at tend to impeach verdict and are inadmissible. Id.

4. Informal verdict.

Verdict for defendant in action on note assessing as damages on counterclaim $100, "and value of note," held not indefinite or perverse. Donaldson v. C., 188M443, 247 NW522. See Dun. Dig. 9817.

9302. How signed.

A five-sixth verdict signed by foreman, followed by names of nine jurors as "jurors concurring", was effective where no objection was made to its form when returned. Santee v. H., 202M361, 278NW520. See Dun. Dig. 9813b.

9303. Verdict, general and special.

The answer to an interrogatory not material to the issues tried and so stated to the jury cannot be considered a special verdict affecting the general verdict. Rahn v. F., 185M246, 240NW529. See Dun. Dig. 9830.

A general verdict where there are two rights of recovery will be sustained if there is evidence supporting one ground of recovery. Berg v. U., 186M529, 243NW 696. See Dun. Dig. 9815.

In a suit against a railroad company and its switch foreman, a verdict against company only is in effect a verdict for switch foreman. Ayer v. C., 187M169, 244NW 681. See Dun. Dig. 5045, 6027a, 9817a.

In action against automobile livery company renting defective car and driver of such car, a verdict for the driver did not make perverse verdict against livery company. Ferraro v. T., 197M5, 265NW829. See Dun. Dig. 7115b.

9304. Interrogatories—Special findings.

1. Must cover all the issues to authorize a judgment.

Special verdict upon pivotal point involved in case was determinative of judgment that would be entered by judge succeeding trial judge, though trial judge made no findings of fact. Osbon v. H., 201M347, 276NW270. See Dun. Dig. 9830, 9831, 9832.

2. Effect of failure to cover all the issues.

Failure of court to make findings on issues not covered by special verdict is not ground for a new trial of whole cause, remedy being motion to make necessary findings. Osbon v. H., 201M347, 276NW270. See Dun. Dig. 9832, 9842.

3½. Interrogatories in general.

A special verdict that there was a settlement with one negligent person, held inconsistent with general verdict against others. 172M171, 215NW225.

In this state, the verdict on a special question submitted to a jury in an equity case is not merely advisory. First Nat. Bk. v. Quevli, 182M238, 234NW318. See Dun. Dig. 9808(41).

4. Discretionary.

Refusal to require special verdict on issue whether driver of automobile in which intestate was riding was *his agent was not abuse of discretion.* Harris v. R., 189 M599, 250NW577. See Dun. Dig. 9802.

Trial court may refuse to submit special interrogatories to jury within its discretion, and there is no reversible error in absence of abuse of discretion. Halos v. N., 196M387, 265NW26. See Dun. Dig. 9802.

9307. Verdict in replevin.

Where plaintiff seeking to recover possession of property under two chattel mortgages, holds only one valid mortgage, defendant is not entitled to a general verdict in his favor on a finding that the other mortgage was *procured by fraud.* 175M341, 221NW62.

In replevin where neither party is in possession of chattel at time of trial, verdict in alternative for possession of property or value thereof is not violative of statutory requirements. Breitman Auto Finance Co. v. B., 196M369, 265NW36. See Dun. Dig. 8403, 8425.

Where losing party in replevin action no longer has possession of chattel, he has right to be discharged from liability upon payment into court of amount found by jury to be value thereof, plus interest and costs. Id. See Dun. Dig. 8425.

9308. Receiving verdict.

Verdict is not vitiated by failure to read it to jury as recorded. 178M564, 227NW893.

Where jury brought in separate verdicts against two defendants charged as joint tort-feasors, trial court should have sent jury back to reconsider case and to bring in a proper verdict. Cullen v. C., 201M102, 275NW 414. See Dun. Dig. 9823.

9309. Entries on receiving verdict—Reserving case —Stay.

Correction of a mere arithmetical error, plainly ap*pearing, in reckoning amount found by jury to be due* plaintiff, should be made in trial court, and not on appeal. Barnard-Curtiss Co. v. M., 200M327, 274NW229. See Dun. Dig. 384.

9310. Trial by jury, how waived.

Where both parties moved court to make findings upon all issues, and to make conclusions of law therefrom, neither party can complain on ground that case should have been submitted to jury for a general verdict, nor can one party complain that court set aside answer to one of two questions submitted to jury. Coughlin v. F., 199M102, 272NW166. See Dun. Dig. 5234.

TRIAL BY THE COURT

9311. Decision, how and when made.

Canfield v. J., 183M503, 237NW190; note under §9498.

Provision that a judge shall file his decision within five months after a matter has been submitted to him, is directory and not mandatory. Wenger v. W., 200M436, 274NW517. See Dun. Dig. 8954(86).

FINDINGS AND CONCLUSIONS

1. Definitions and distinctions.

Where the issues of fact were all tried to the court, the plaintiff was entitled to have the facts found and the conclusions of law separately stated in writing, and judgment entered accordingly. 172M72, 214NW783.

Court is not bound by testimony containing improbabilities, contradictions, inconsistences, or irreconcilable to the facts shown by the record. Weber v. A., 176M120, 222NW646.

The court is required to strike out a finding of fact only when the finding has no sufficient support in the evidence, or when it goes beyond or outside of any issue actually litigated. Kehrer v. S., 182M596, 235NW386. See Dun. Dig. 9858.

Findings should not contain evidentiary facts. Arntson v. A., 184M60, 237NW820. See Dun. Dig. 9851(33).

Certain statements of trial court held to be improper subjects of findings of fact. State v. Clousing, 198M35, 268NW844. See Dun. Dig. 9847.

3. When findings necessary.

On appeal from an order of probate court admitting a will to probate, the district court must make findings of fact as in other cases, but this may be waived, where

the disputed fact necessarily decided the disputed question. 172M217, 214NW892.

In a trial to the court without a jury there must be findings of fact and conclusions of law if there is a determination on the merits. 175M252, 220NW951.

Where apportionment of amount recovered under Federal Employer's Liability Act, is not made by the jury, and remains for the court on motion, and an issue of fact is raised, which must be determined, the decision should state the findings of fact and conclusions of law separately. 176M130, 222NW643.

There should be no findings of fact when judgment is granted on the pleadings. 180M9, 230NW118.

The refusal to make new or additional findings will not be reversed unless the evidence is conclusive in favor of the proposed findings, nor if the proposed findings are of only evidentiary facts which would not change the conclusions of law. Kehrer v. S., 182M596, 235NW386. See Dun. Dig. 9873.

Court is not required to make an additional specific finding in conflict with those already made. National Surety Co. v. W., 186M93, 242NW545. See Dun. Dig. 9855.

5. Nature of facts to be found.

Practice of making findings of fact consising, by reference alone, of a pleading or any substantial part of it is disapproved. 171M276, 214NW45.

Court did not err in refusing to amend findings to effect that defendants did not have title to lot conveyed at time the deed was delivered or at time action was begun, because proof fails to show lack of title. Baker v. R., 198M437, 271NW241. See Dun. Dig. 2356.

6. Sufficiency of particular findings.

Finding "that the allegations set forth in the complaint of the plaintiff herein are true" was a sufficient basis for a judgment against surety on contractor's bond. 171M305, 214NW47.

Where findings are decisive of all issues presented, new trial will not be granted because more specific findings could have been made. 177M425, 225NW273.

A finding that there was an agreement to pay interest on partnership contributions cannot be contradicted by a memorandum of the trial judge not made a part of the findings. 177M602, 225NW924.

Action of district judge granting new trial cannot be reviewed by another judge to whom the case is sent for the new trial. 178M480, 227NW658.

Finding that all "material" allegations of complaint are true is insufficient. 180M9, 230NW118.

Finding of good faith, coupled with refusal to find insolvency, is equivalent of finding of solvency. National Surety Co. v. W., 186M93, 242NW545. See Dun. Dig. 9852.

Where findings negative those requested, there is no error in failing to find upon the specific issues submitted. Schmidt v. K., 196M178, 265NW347. See Dun. Dig. 9852.

Where court's findings and decision necessarily decide all facts in dispute, findings are sufficient. Lafayette Club v. R., 196M605, 265NW802. See Dun. Dig. 9856.

Where a party moves for amended and additional findings of fact, and court refuses to make them, refusal is equivalent to findings against party so moving. Id. See Dun. Dig. 9866.

Failure of court to comply with statute requiring written decisions separately stating facts and conclusions was cured by filing of a memorandum, which states facts found and conclusions of law separately. Trones v. O., 197M21, 265NW806. See Dun. Dig. 9864.

While part of order which denies amendment of findings is not appealable, part which denies a new trial is, and upon such appeal verdict and any finding may be challenged as not sustained by evidence. Schaedler v. N., 201M327, 276NW235. See Dun. Dig. 395.

7. Findings and conclusions must be stated separately.

A finding that "the evidence fails to establish the cause of action" is a legal conclusion violative of requirement of separate statement. Palmer v. F., 180M 124, 230NW257.

9. Findings must be definite and specific.

Finding of court should definitely determine an issue presented. Smith v. B., 187M202, 244NW817. See Dun. Dig. 9855, 9873.

10. Findings must cover all the issues.

180M168, 230NW464.

Court having made findings upon every ultimate issue of fact necessary to sustain the judgment order, it was not required to find upon issues of fact which could not affect the judgment. 175M115, 220NW551.

While counsel, after trial without jury, are entitled to findings of fact fully responsive to their sincere contentions, there need not be reversal where, although findings leave some controlling things to implication, they fairly negative findings moved for below by defeated litigant. Mienes v. L., 188M162, 246NW667. See Dun. Dig. 9850.

11. Findings must be within the issues.

A claim that a finding is not sustained by the evidence nor within the issues formed by the pleadings cannot be raised on appeal, where the record fails to show that it contains all the evidence bearing thereon. 177M602, 225NW924.

Immaterial findings which do not affect the conclusions of law may be disregarded. 181M570, 233NW243. See Dun. Dig. 985a.

Court erred in finding special damages in a replevin action where pleadings contained no allegations of special damages and no evidence thereof was offered. Brown Sheet Iron & Steel Co. v. W., 183M515, 237NW188. See Dun. Dig. 9858.

Where defense of breach of implied warranty is neither pleaded nor litigated by consent, it comes too late when suggested for first time by defendant's motion for amended finding or a new trial. Allen v. C., 204M295, 283NW490. See Dun. Dig. 9873.

13. Judgment must be justified by the findings.

Court finding upon matters not decisive of the controversy will not overthrow the judgment. 173M145, 216NW782.

In action by state against assisting purchasing agent and surety for conversion of personal property, findings held to support conclusions of law and judgment against defendants. State v. Waddell, 187M647, 246NW471. See Dun. Dig. 9857.

Judgment entered upon findings of fact and conclusions of law must be reversed upon appeal, if findings of fact call for conclusions of law and judgment in favor of party against whom it is rendered. Robitshek v. M., 198M586, 270NW579. See Dun. Dig. 9857.

One moving to amend only conclusions of law cannot recover more than findings of fact warrant, unless facts are admitted in pleadings which, together with those found, require conclusion of law to be amended. Hosford v. B., 203M138, 280NW859. See Dun. Dig. 9857.

14. Construction of findings.

Remarks of court that plaintiff must come into court with clean hands, made at close of testimony, were not such as to indicate that court found facts by wrong application of law. Thorem v. T., 188M153, 246NW674. See Dun. Dig. 9860.

15½. Striking out and modifying.

Where the decisive findings of fact are sustained by the evidence and sustain the conclusions of law, it is not error for the court to refuse to strike out its findings or refuse to make additional, or substituted findings and conclusions. Jarvaise Academy of Beauty Culture v. S., 183M507, 237NW183. See Dun. Dig. 9866.

Denial of motion to alter and amend findings of fact is equivalent to findings negativing facts asked to be found. Sheffield v. C., 186M278, 243NW129. See Dun. Dig. 9873.

Denial of motion for an amended finding upon issue not definitely determined by court is equivalent of finding to contrary of that requested. Smith v. B., 187M202, 244NW817. See Dun. Dig. 9852, 9873.

Where evidence is conflicting in respect to an amended finding asked for, it is not error to refuse it. Chamberlin v. T., 195M58, 261NW577. See Dun. Dig. 9873.

9313. Court always open—Decisions out of term.

To start running time within which plaintiff must consent to reduction of verdict ordered as condition of not granting new trial, adverse party must serve notice upon plaintiff. Turnbloom v. C., 189M588, 250NW570. See Dun. Dig. 7138.

TRIAL BY REFEREES

9317. Compulsory reference, when.

(4).

Referee may find upon every issue raised by pleadings, even though ultimate issue is to be deduced from many facts as to which evidence may be in conflict. State v. City of Chisholm, 199M403, 273NW235. See Dun. Dig. 8318.

9319. Trial and report—Powers—Effect of report.

179M175, 228NW614.

In original proceeding in supreme court where a referee is appointed to make findings of fact, such findings have effect of a special verdict of a jury. State v. City of Chisholm, 199M403, 273NW235. See Dun. Dig. 8318.

Where a case has been settled, findings of referee in a disbarment proceeding are not conclusive, and petitioner or prosecutor may challenge same as contrary to preponderance of evidence. McDonald, 204M61, 282NW677. See Dun. Dig. 8327.

GENERAL PROVISIONS

9321. Dismissal for delay.

179M225, 229NW86.

Plaintiffs' delay for five years is enough to justify dismissal for want of prosecution on motion of defendant, even though there is no showing of actual prejudice resulting from delay to defendant. Conrad v. C., 201M366, 276NW286. See Dun. Dig. 2748(53).

Excuse of plaintiff for not prosecuting action that it considers it unprofitable to continue action demonstrates that neglect was willful and is in itself a good ground for dismissal. Helmer v. N., 202M59, 277NW359. See Dun. Dig. 2742.

Plaintiff's delay for five years is enough to justify dismissal for want of prosecution on motion of defendant, and there need be no showing of actual prejudice resulting from delay to defendant. Id.

9322. Dismissal of action.

1/8. In general.

180M52, 230NW457.

Dismissal, where plaintiff refuses to proceed to trial, does not violate constitutional right to trial by jury.

Hineline v. M., (USCCA8), 78F(2d)854.

The practice of ordering a dismissal with prejudice upon an objection to the introduction of evidence under the complaint is disapproved. Krzyaniak v. M., 182M83, 233NW595. See Dun. Dig. 2748(54).

This section has no application to dismissals on the merits after trial and submission of the case for decision. McElroy v. B., 184M357, 238NW681. See Dun. Dig. 2741(6).

Where both parties rested in a jury trial, and defendant moved for and procured a dismissal, there was a decision on the merits. McElroy v. B., 184M357, 238NW681. See Dun. Dig. 5180(6).

Dismissals are governed by statute. Willard v. M., 202M626, 279NW553. See Dun. Dig. 9750.

1. Dismissal by plaintiff before trial.

Bringing about dismissal by refusing to proceed to trial, held to constitute voluntary dismissal before trial. Hineline v. M., (USCCA8), 78F(2d)854.

Answer in action to adjudge ownership of corporate stock held to contain prayer for affirmative relief such as to prevent ex parte dismissal by plaintiff. Burt v. S., 186M189, 242NW622. See Dun. Dig. 2744(34).

Where, in a title registration proceeding under Torrens Act, an answering defendant seeks to have applicant's title decreed to be subject to defendant's rights as a contract vendee, applicant may dismiss his application at any time during proceedings. Hiller v. S., 191M272, 253M773. See Dun. Dig. 8358.

Attempted dismissal of action by plaintiff, after complaint in intervention had been served did not affect intervener's rights. Scott v. V., 193M465, 258NW817. See Dun. Dig. 2741.

Where plaintiff refused to try first case in federal court and defendant's motion to dismiss was granted, plaintiff could not take another arbitrary dismissal as to his second action; and his failure to appear therein gave court power to dispose of case on merits, except as to defendant joined in second cause only. Id.

Where case was dismissed without prejudice by plaintiff's attorney in open court in the presence of defendant's attorney, no notice of dismissal was required to be served upon them. Hoffer v. F., 204M612, 284NW873. See Dun. Dig. 2741.

Plaintiff's counsel may move for a dismissal in open court when defendants are present ready for trial, and plaintiff cannot be found. Id. See Dun. Dig. 2741.

Effect of a second voluntary dismissal before trial. 20 MinnLawRev 228.

2. Dismissal by court before trial.

Trial court may not dismiss on its own motion before all pleadings are in. Long v. M., 191M163, 253NW762. See Dun. Dig. 2742.

3. Dismissal by consent before trial.

Dismissal of case by stipulation on settlement while section. Muellenberg v. J., 188M398, 247NW570. See Dun. Dig. 2743.

Filing of stipulation of dismissal on settlement while action was pending ousted court of jurisdiction to enter judgment on merits. Id.

A defendant is not prejudiced because some plaintiffs and defendants are dismissed by consent and remaining plaintiff obtains judgment against him for only part of relief demanded under pleadings. Baumann v. K., 204M240, 283NW242. See Dun. Dig. 2743.

5. Dismissal for failure to prove cause of action.

Court may dismiss at close of plaintiff's evidence, if plaintiff has failed to substantiate or establish cause of action or right to recover. A. Y. McDonald Mfg. Co. v. N., 187M237, 244NW806. See Dun. Dig. 9752.

Court may dismiss action on trial, after plaintiff has rested, if plaintiff has failed to substantiate or establish his cause of action or right to recover. L'Hommedieu v. W., 187M333, 245NW369. See Dun. Dig. 9752.

Where plaintiff introduces sufficient evidence upon which findings can be made in favor of defendants, but neither formally rests nor asks for permission to dismiss, court is justified in concluding that cause was submitted for findings and decision. Calhoun Beach Holding Co. v. M., 190M576, 252NW442. See Dun. Dig. 9727.

District court has discretionary power to determine whether an appellant from probate court should be relieved of a default for failure to file, within statutory time, a statement of propositions of law and fact upon which he is relying for reversal of an order of probate court, statement constituting pleading and not evidence. Slingerland's Estate, 196M354, 265NW21. See Dun. Dig. 2740.

Court, on plaintiffs' motion for a new trial, rightly refused to amend complaint for specific performance by substituting either a complaint for reformation of contract or one for money had and received, since dismissal is not a bar. Martineau v. C., 201M342, 276NW232. See Dun. Dig. 2750.

While it is common practice for a court to direct a verdict for defendant when plaintiff rests where a cause of action is not proved, yet such practice is not authorized by statute and is objectionable. Willard v. M., 202M626, 279NW553. See Dun. Dig. 9751.

Where plaintiff introduced evidence upon a point vital, in the opinion of the court, to his right of recovery, refused to proceed further with his case although invited by court so to do, did not ask for nonsuit or for leave otherwise to discontinue his cause, took exception to the court's rulings, and defendant thereupon rested and moved for dismissal on the merits, which was granted, decision rendered was necessarily on the merits. Gans v. C., 284NW844. See Dun. Dig. 2750.

Dismissal and directed verdict in Minnesota. 23MinnLawRev363.

8. Effect of dismissal.

Dismissal of part of a claim on ground that the suit as to such part was premature, held not to bar subsequent action on part so dismissed, though the judgment would be conclusive as to defenses interposed and determined. 178M535, 228NW148.

A dismissal of an action on defendant's motion at close of plaintiff's evidence, where defendant has not rested and does not move for a directed verdict or a dismissal on the merits, is not a bar to a second suit on same cause of action. Mardorf v. D., 192M230, 255NW809. See Dun. Dig. 2750, 5180.

Dismissal by plaintiff's counsel in open court when defendants were present ready for trial, entered on the minutes, was effective to terminate action without formal entry of judgment. Hoffer v. F., 204M612, 284NW873. See Dun. Dig. 2750.

9. Vacation of dismissal.

Trial court could vacate dismissal entered by plaintiff while unaware that time had elapsed for bringing another suit. Lilienthal v. C., 189M520, 250NW73. See Dun. Dig. 2750a.

Where plaintiff's counsel when case was ready for trial could not find plaintiff, and had judgment entered without prejudice, plaintiff later had right to move court to vacate dismissal and for reinstatement of action on calendar by another attorney. Hoffer v. F., 204M612, 284NW873. See Dun. Dig. 2750a.

10. Dismissal against co-defendant.

City, sued for injuries from defect in street, cannot question dismissal as to property owners made co-defendants. 179M553, 230NW89.

Defendant could not object to dismissal as to a co-defendant joined by mistake where such dismissal had no effect on the issues. 180M467, 231NW194.

11. Stipulation of parties.

A judgment of voluntary dismissal by agreement of parties to action in which a restraining order has been issued is not an adjudication that restraining order was improvidently or erroneously issued. American Gas Mach. Co. v. V., 204M209, 283NW114. See Dun. Dig. 2737.

14. Upon the trial and before final submission.

Court did not abuse its discretion in denying motion to dismiss without prejudice on the trial, where it stated its willingness to give plaintiff necessary time to secure his evidence. Holleran v. W., 187M490, 246NW23. See Dun. Dig. 2744.

Motion to dismiss without prejudice after trial begins rests in discretion of trial court. Holleran v. W., 187M490, 246NW23. See Dun. Dig. 2744.

No reversible error appears in denial of plaintiff's motion for leave to open case in order to dismiss, made after defendant had moved for a directed verdict. Abar v. R., 195M597, 263NW917. See Dun. Dig. 2744.

An action may be dismissed without final determination on its merits, where, upon trial and before submission of the case, plaintiff abandons it, or fails to substantiate or establish his cause of action or right to recover. Willard v. M., 202M626, 279NW553. See Dun. Dig. 9750.

9323. Offer of judgment—Costs.

Where plaintiff sued for $131 and defendant's answer admitted indebtedness in sum of $61, defendant was not "prevailing party" where judgment was rendered against him for $61, tender by defendant not including accrued costs. Grill v. B., 189M354, 249NW194. See Dun. Dig. 4984, 9619.

9324. Tender of money in lieu of judgment.

Defendant cannot complain of any failure to keep tender good, where tender was and would be futile because defendant had disqualified itself from accepting tender by compliance with condition imposed by court. Johnson v. I., 189M293, 249NW177. See Dun. Dig. 9618.

NEW TRIALS

9325. Grounds—Presumption on appeal.—A verdict, decision, or report may be vacated, and a new trial granted, on motion of an aggrieved party, for any of the following causes materially affecting his rights, except that no order shall be issued granting a new trial unless accompanied by a memorandum stating reasons therefor:

(1) Irregularity in the proceedings of the court, referee, jury, or prevailing party, or any order or abuse of discretion, whereby the moving party was deprived of a fair trial;

(2) Misconduct of the jury or prevailing party;

(3) Accident or surprise which could not have been prevented by ordinary prudence;

(4) Material evidence, newly discovered, which with reasonable diligence could not have been found and produced at the trial;

(5) Excessive or insufficient damages, appearing to have been given under the influence of passion or prejudice;

(6) Errors of law occurring at the trial, and either excepted to at the time, or clearly assigned in the notice of motion;

(7) That the verdict, decision, or report, is not justified by the evidence, or is contrary to law; but, unless it be so expressly stated in the order granting a new trial, it shall not be presumed, on appeal, to have beeen made on the ground that the verdict, decision, or report was not justified by the evidence. (As amended Mar. 7, 1939, c. 52.)

THE STATUTE GENERALLY

½. In general.

Karnofsky v. W., 183M563, 237NW425; note under §9498(13).

Where liability has been admitted and verdict as reduced is plainly not excessive appellate court will not consider assignments of error directed to rulings on evidence and amount of recovery. 173M365, 217NW369.

Court may permit a renewal of motion for a new trial. 174M297, 219NW180.

Where trial judge has become incapacitated and motion for new trial is heard by another judge, the latter has no power to amend findings of fact but he may amend the conclusions of law and may grant a new trial for the same causes which the trial judge may grant it. 175M346, 221NW424.

Mere mistake in form of verdict not fatal if intention clearly appears and verdict assessing damages in sum of "none dollars" is a verdict for the defendant. 177M 408, 225NW291.

Action of district judge granting new trial cannot be reviewed by another judge to whom the case is sent for the new trial. 178M480, 227NW658.

Power of the district court to review and vacate order denying new trial. Barrett v. S., 183M431, 237NW15; note under §9283.

A motion for a new trial may be heard after entry of a judgment without notice. Wilcox v. H., 186M504, 243NW709. See Dun. Dig. 7086-7090.

The pendency of a motion for a new trial does not in itself operate as a stay of proceedings, nor prevent entry of judgment Wilcox v. H., 186M504, 243NW709. See Dun. Dig. 7068.

Giving of candy and cigars to jurors, participation by court officers therein, and talk of a banquet to be given by jurors to defendants were improper. Hillius v. N., 188M336, 247NW385. See Dun. Dig. 7102a.

An order granting a new trial after judgment vacates verdict and judgment. Ayer v. C., 189M359, 249NW581. See Dun. Dig. 7082.

Trial court has power to hear and grant motion for new trial after judgment, within time for appeal therefrom, under limitations stated in Kimball v. Palmerlee, 29Minn302, 13NW129. Id. See Dun. Dig. 7087(87).

Record shows such delay and laches that it was abuse of discretion to hear and grant a motion for a new trial after judgment. Id.

Court did not err in denying defendant's motion for new trial "in the interests of justice." Luck v. M., 191M 503, 254NW609. See Dun. Dig. 7069.

Proceedings under Section 9633-1, et seq., are summary and do not contemplate motions for a new trial, nor may an order denying a new trial be reviewed on certiorari issued prior thereto to review original decision. Young v. P., 192M446, 256NW906. See Dun. Dig. 7071.

There is no sufficient showing to require trial court to grant a new trial on ground of fraud or perjury. Pettersen v. F., 194M265, 260NW225. See Dun. Dig. 7069.

Although a bastardy proceeding has some of the features of a criminal trial, it is substantially a civil action, and, after a verdict of not guilty, court may grant a new trial. State v. Reigel, 194M308, 260NW293. See Dun. Dig. 827, 7075.

Municipal courts organized under Laws 1895, c. 229, or Mason's Minn. St. 1927, §§215 to 228, while courts of record are of special and limited jurisdiction and possess only such authority as is conferred by the particular statute under which organized, and such courts, like courts of justice of the peace, have no authority to grant new trials. Untiedt v. V., 195M239, 262NW568. See Dun. Dig. 7069.

Municipal court of Minneapolis cannot grant new trial in forcible entry and detainer case. Olson v. L., 196M 352, 265NW25. See Dun. Dig. 7070.

Case having been tried by court on an erroneous theory, it is remanded for a new trial. St. Louis County v. M., 198M127, 269NW105. See Dun. Dig. 7069.

When defendants offered no evidence, but deliberately rested their defense upon evidence introduced by plaintiff, no legal ground for reversing order denying a new trial is to be found, either in interest of justice or in contention that clients should not suffer from their attorneys' errors or mistakes. Pearson v. N., 200M58, 273 NW359. See Dun. Dig. 7069(87).

Failure of court to make findings on issues not covered by special verdict is not ground for a new trial of whole cause, remedy being motion to make necessary findings. Osbon v. H., 201M347, 276NW270. See Dun. Dig. 9832, 9842.

Plaintiff, who has made out a prima facie case showing that he is entitled to substantial damages, will, for error in dismissing his case, be granted a new trial of all issues, even though he failed to prove amount of such damages where it appears that deficiency in proof may be supplied on a second trial, following Erickson v. Minnesota & Ontario Power Co., 134Minn209, 158NW979. Gilloley v. S., 203M233, 281NW3. See Dun. Dig. 429, 7068.

3. Court may grant on its own motion.

Granting of new trial upon a ground not assigned upon the motion is objectionable. State v. Moriarty, 203M23, 279NW835. See Dun. Dig. 7069, 7091.

4. Applicable to both legal and equitable actions.

Proceedings for extension of time within which to make redemption of property sold under mortgage foreclosure are summary and do not contemplate a motion for new trial. Hjeltness v. J., 195M175, 262NW158. See Dun. Dig. 7073.

5. Motion a matter of right.

Court held not to have abused its discretion. 172M516, 215NW852.

8. Of less than all the issues.

May be granted on issue of damages alone. 180M185, 230NW473.

Submission to jury of evidence of injuries shown to have resulted from accident together with evidence of injuries not shown to have resulted from accident, held error requiring new trial on issue of damages. Doll v. S., 201M319, 276NW281. See Dun. Dig. 7180.

9. Granted only for material error.

A new trial will not be granted for failure of court to award nominal damages. L'Hommedieu v. W., 187M 333, 245NW369. See Dun. Dig. 429, 7074.

Inquiry of appellate court is not whether upon record a new trial apparently might have been properly granted, but whether refusal of it involved violation of a clear legal right or a manifest abuse of judicial discretion. Victor v. C., 203M41, 279NW743. See Dun. Dig. 7125(43).

FOR IRREGULARITY OR ABUSE OF DISCRETION

9½. In general.

Publication by newspaper of result of previous trial held not to render refusal of court to dismiss jury prejudicial. 176M377, 223NW619.

Appellant is not entitled to a new trial because jury heard discussion between court and counsel on applicability of statute. Paulos v. K., 195M603, 263NW913. See Dun. Dig. 7099.

Whether a mistrial should have been ordered in personal injury action where plaintiff during court's recess became hysterical held to lie within discretion of trial court, and its exercise thereof was proper. Serr v. B., 202M165, 278NW355. See Dun. Dig. 7103a.

11. Improper remarks of court.

In case tried without jury, an opinion expressed by the court at the close of the trial as to the truthfulness of witnesses presented no grounds for a new trial. 173 M529, 217NW933.

Remark of court to objection to language of plaintiff's counsel "That is the law, but it isn't necessary to argue it" was prejudicial error where plaintiff's counsel had stated to the jury that they should pay the plaintiff plenty of damages because the court could cut down the amount if they over-stepped the bounds. 175M96, 220 NW429.

A trial court's talk in open court to a jury seeking further instructions held not to be an "irregularity," but may be reviewed as an "errors of law occurring at the trial" and a settled case or bill of exceptions is necessary. 178M141, 226NW404.

It was not error for court to suggest that counsel "get together" in reference to the use of an audit. Sigvertsen v. M., 182M433, 234NW688. See Dun. Dig. 7098.

Statements made by court in explanation of rulings made, in making rulings on objections to evidence, and remarks made to plaintiffs' counsel in connection with examination of witnesses, do not present reversible error. Kouri v. O., 191M101, 253NW98. See Dun. Dig. 7098.

12. Other misconduct.

Prejudicial bias of trial judge was not established by his extensive participation in examination of witnesses in divorce action. 177M453, 225NW287.

Misconduct of members of family of party, held not established. 179M557, 230NW91.

It was improper for court to absent itself from court room during parts of arguments to jury. Jovaag v. O., 189M315, 249NW676. See Dun. Dig. 9706.

FOR MISCONDUCT OF JURY

12½. In general.

There was no error in denying a new trial on the affidavit of a juror that he did not believe the testimony

in behalf of the state and only agreed to a conviction to put an end to the case. 171M503, 214NW474.

Misconduct of juror, held not shown. 179M557, 230NW 91.

Examination of insurance policy by juror in automobile collision case held not prejudicial in view of court's instruction. Honkomp v. M., 182M445, 234NW 638. See Dun. Dig. 7116.

The purity of jury trials must be jealously guarded; scrupulous conduct on the part of jurors, litigants, and counsel is necessary. Brecht v. T., 182M603, 235NW528. See Dun. Dig. 7100.

Quotient arrived at by jurors in dividing sum of allowances of jurors may be the basis of a valid verdict if agreed upon after consideration. Hoffman v. C., 187 M320, 245NW373. See Dun. Dig. 7115a.

A verdict in an action upon a note was not perverse because jurors intentionally refrained from allowing plaintiff interest, and court committed no error in adding interest, though it probably should have instructed jury to correct verdict itself in open court. Olson v. M., 195M626, 264NW129. See Dun. Dig. 7115b.

Court properly refused to declare mistrial for misconduct of jury which prejudiced neither party. Clancy v. D., 202M1, 277NW264. See Dun. Dig. 7108.

13. Discretionary.

Whether misconduct between counsel and jury requires new trial is a matter within the sound discretion of the trial court. Brecht v. T., 182M603, 235NW528. See Dun. Dig. 7104(99).

Granting of new trial for misconduct of jury rests almost wholly in discretion of trial court, especially when motion is decided on conflicting affidavits, and its action will not be reversed on appeal except for a clear abuse of that discretion. State v. Warren, 201M369, 276NW655. See Dun. Dig. 7105(7).

15. Necessity of objection on the trial.

Claim that verdict was given under passion and prejudice cannot be raised for the first time on appeal. 179 M297, 229NW87.

16. Presumption of prejudice—Burden of proof.

Court has faith in integrity of jurors that when they accept duty of determining issues of a lawsuit according to evidence they will as far as humanly possible put sympathy aside. Forseth v. D., 202M447, 278NW904. See Dun. Dig. 7108.

17. Affidavits on motion.

Affidavits or testimony of jurors as to what transpired in jury room are not admissible to impeach their verdict, even where it is sought to attack a verdict as a quotient one. Hoffman v. C., 187M320, 245NW373. See Dun. Dig. 7109.

A new trial will not be granted on affidavit of members of jury that they misunderstood part of charge. Collings v. N., 202M139, 277NW910. See Dun. Dig. 7109.

Affidavits of jurors tending to show misconduct by jury were inadmissible in support of a motion for a new trial. Id.

20. Visiting locus in quo.

There was misconduct of jurors in privately visiting locus in quo, and particularly in purposely riding upon street cars to determine whether or not witnesses, seated at certain places in car in question, could observe what they testified they did observe. Newton v. M., 186M439, 243NW684. See Dun. Dig. 7114.

There was misconduct requiring new trial where two jurors examined damaged building to ascertain extent of damage and communicated information obtained to other jurors. Spinner v. M., 190M390, 251NW908. See Dun. Dig. 7114.

In action against garage for injuries received by car owner attempting to enter car while on hydraulic hoist on request of mechanic, court did not err in refusing a new trial because jurors visited garage and observed hoist, it appearing that officer of garage knew of the transgression before trial ended and did not ask that a mistrial be declared. Bisping v. K., 202M19, 277NW255. See Dun. Dig. 7114.

21. Unauthorized communication with jury.

Determination of trial court whether there was prejudice because witness mingled with jurors will not be disturbed on appeal. Hillius v. N., 188M336, 247NW385. See Dun. Dig. 399, 7103a, 7104.

Evidence held to sustain finding that witness mingled with jurors throughout long trial and that there should be new trial. Id. See Dun. Dig. 7102a.

Conversations between jurors and litigants or attorneys during a trial may or may not amount to misconduct, depending upon subject touched and object in view. Ryan v. I., 204M177, 283NW129. See Dun. Dig. 7115.

22. Other misconduct.

172M591, 216NW537.

Permitting jury to attend theatrical performance, held not to require new trial. 179M301, 229NW99.

Defendant was entitled to new trial where juror lodged and boarded during trial in home of plaintiff's stepson and witness. Engstrom v. D., 190M208, 251NW134. See Dun. Dig. 7116.

FOR MISCONDUCT OF COUNSEL

22½. In general.

It was the duty of the court on its own motion to stop a jury argument improperly predicated upon personal abuse of opposing counsel or upon matters not pertinent to the issues tried. 171M219, 213NW890.

Verdict could not stand where counsel made abusive personal attack upon opposing counsel in his argument to the jury. 171M219, 213NW890.

Remarks of counsel, while not in good taste, held not so prejudicial as to require a new trial. 171M321, 214 NW52.

In action for indecent assault, statement of attorney in argument "I am glad there is one woman who had the nerve to come into court and face" the defendant, held prejudicial. 174M151, 218NW548.

Misconduct of counsel in presenting evidence held not shown on the record. 177M13, 224NW259.

Improper argument, held ground for reversal. 179M 127, 228NW552.

The asking of a question deemed objectionable should not be considered misconduct of counsel, where the testimony of the witness suggests the inquiry, and no allusion is thereafter made by the counsel to the subject. Harkness v. Z., 182M594, 234NW281. See Dun. Dig. 7103.

Naming of insurance companies by attorney in automobile accident case, held not misconduct. Arvidson v. S., 183M446, 237NW12. See Dun. Dig. 5252(21), (22), (23).

Statement of plaintiff's counsel that defendant's counsel made false statements was serious misconduct and prejudicial in a closely contested case. Romann v. B., 184M586, 239NW596. See Dun. Dig. 7102, 7103, 9799.

Argument of plaintiff's counsel in personal injury action making accusations against defense and its counsel relative to excluded evidence and nonproduction of witnesses held improper and prejudicial. Burmeister v. M., 185M167, 240NW359. See Dun. Dig. 9799(97).

Plaintiff's counsel was guilty of misconduct in repeatedly asking objectionable and prejudicial questions to which objections were being sustained. Campbell v. S., 186M293, 243NW142. See Dun. Dig. 7103.

Argument of counsel accusing opponent of not being a gentleman, and inviting violence, held prejudicial error. Jovaag v. O., 189M315, 249NW676. See Dun. Dig. 9799.

A new trial for misconduct of counsel is not granted as a disciplinary measure, but only because of prejudice resulting. Romann v. B., 190M419, 252NW80. See Dun. Dig. 7102, 7103.

It was misconduct of counsel to make repeated and unfair objections, improper insinuations during trial, and unfair percentage of argument to jury. Id.

Whether new trial should be granted for misconduct of counsel is largely discretionary with trial court. Id.

Counsel in closing argument may make severe comment with respect to obvious partisanship of adverse witness. Kassmir v. P., 191M340, 254NW446. See Dun. Dig. 9799.

Alleged misconduct of counsel held not to warrant a new trial. Clark v. B., 195M44, 261NW596. See Dun. Dig. 7103.

Improper and prejudicial remarks of plaintiff's counsel in his closing argument were of such a nature as to require supreme court to order a new trial, notwithstanding instructions to jury by court to disregard them. Krenik v. W., 201M255, 275NW849. See Dun. Dig. 7102.

Alleged misconduct of counsel for prevailing party held not to have affected result. Munkel v. C., 202M264, 278 NW41. See Dun. Dig. 7074.

Statement made by counsel for plaintiff in presence of men and women from whom jury was selected that it was proven that certain liability insurance company was interested in defense of case was highly improper, but court did not err in refusing to grant a new trial, in view of prompt instruction to jury to disregard it as *being improper. Farwell v. S., 203M392, 281NW526. See* Dun. Dig. 423.

Matter of determining whether a new trial should be granted for misconduct of prevailing party is primarily for trial court's discretionary determination. Ryan v. I., 204M177, 283NW129. See Dun. Dig. 7102.

New trial will be granted where testimony or evidence is adduced by attorney in his argument, without having taken the witness stand and subjecting himself to cross examination. Noesen v. M., 204M233, 283NW246. See Dun. Dig. 7102.

23. Improper remarks on the trial.

172M591, 216NW537.

Anderson v. A., 229NW579(1).

180M340, 230NW792.

Statement concerning interest of insurance company in litigation, held without prejudice where defendant gave ample opportunity for bringing the matter to the attention of the jury. 175M153, 220NW418.

Extended offers and discussions by counsel, in the presence of the jury, of incompetent and prejudicial matter, held not proper. 175M341, 221NW62.

A remark of counsel, promptly withdrawn, held not prejudicial misconduct. Dumbeck v. C., 177M261, 225NW 111.

Statement by counsel of fact shown by document admitted in evidence, held not error. 180M298, 230NW 823.

Improper remarks, held not ground for reversal in absence of objection or exception. Examination of jurors on voir dire as to interest in insurance company defending suit, held not error. 181M4, 231NW714.

The matter of granting a new trial for improper remarks or argument of counsel rests largely in the discretion of the trial court. Horsman v. B., 184M514, 239 NW250. See Dun. Dig. 7102(63).

Argument of plaintiff's counsel in personal injury action making accusations against defense and its counsel relative to excluded evidence and nonproduction of witnesses held improper and prejudicial. Burmeister v. M., 185M167, 240NW359. See Dun. Dig. 9799(97).

Questions and comments of attorney touching certain person and his relation to defendant's liability insurer, held not misconduct warranting new trial. Olson v. P., 185M571, 242NW283. See Dun. Dig. 7102.

Remarks of counsel that if jurors had any doubt as to kind of man a certain witness was to ask certain member of jury, though misconduct, was not such as to require new trial. Marckel Co. v. R., 186M125, 242NW471. See Dun. Dig. 7102.

Plaintiff's counsel was guilty of misconduct in arguing to jury, "They say it is all right to kill this boy because he is guilty of contributory negligence." Campbell v. S., 186M293, 243NW142. See Dun. Dig. 7102.

Statements made by defendants' counsel in arguing objections to evidence offered, or his conduct in asking questions of witnesses, and his statements made in reference to the production of witness, did not constitute misconduct. Kouri v. O., 191M101, 253NW98. See Dun. Dig. 7102.

Where counsel for plaintiff persisted in treating statements procured by defendant's counsel from plaintiff and a witness as having been improperly if not fraudulently procured, although such statements were then demonstrably free from impropriety or fraud, case being close on merits and it being difficult to see how verdict can be sustained, misconduct of counsel held to require a new trial. Swanson v. S., 196M298, 265NW39. See Dun. Dig. 7102.

New trial was granted to where counsel made flagrant appeal to passion and prejudice of jurors, used intemperate language, and made statements of fact not justified by the record. Ferraro v. T., 197M5, 265NW829. See Dun. Dig. 7102.

There was no misconduct of counsel in referring to "high-class" witness of insurance company that warranted supreme court in granting a new trial. Schaedler v. N., 201M327, 276NW235. See Dun. Dig. 7102.

Courts' disapproval in presence of jury to argument of counsel held adequate without formal instruction in charge, evidently omitted through oversight. Id. See Dun. Dig. 9800.

Reference by plaintiff's counsel to large wealth of defendant and poor financial circumstances of plaintiff and to fact that firm representing defendant was composed of twenty-two lawyers was prejudicial error rendering it an abuse of discretion to deny new trial. Anderson v. H., 201M580, 277NW259. See Dun. Dig. 7102.

Improper remarks of plaintiff's counsel held to go beyond bounds of permissible retaliation for previous objectionable conduct of opposing counsel. Id.

Matter of granting a new trial on ground of improper remarks of counsel rests largely in discretion of trial court, but when misconduct appears and prejudice is shown, it is an abuse of discretion not to grant a new trial. Anderson v. H., 201M580, 277NW259. See Dun. Dig. 7102, 7103.

Improper comment by plaintiff's counsel respecting failure of defendant street railway to call more of passengers as witnesses held not to require a new trial in absence of showing of prejudice. Drown v. M., 202M66, 277 NW423. See Dun. Dig. 7102.

Granting of a new trial upon improper argument of counsel rests largely in trial court's discretion. Santee v. H., 202M361, 278NW520. See Dun. Dig. 7102.

24. Other misconduct.

172M543, 216NW233.

Evidence on motion for new trial held not to show misconduct of counsel in suppression of testimony. Peterson v. R., 202M320, 278NW471. See Dun. Dig. 7103.

FOR ACCIDENT OR SURPRISE

28. Motion granted.

Plaintiff held entitled to new trial upon the grounds of accident and surprise. M. J. O'Neil, Inc. v. C., 184M 281, 238NW679. See Dun. Dig. 7118, 7121.

29. Motion denied.

Record does not show any sufficient cause for granting of a new trial on ground of accident and surprise. Pettersen v. F., 194M265, 260NW225. See Dun. Dig. 7117.

FOR NEWLY DISCOVERED EVIDENCE

30. To be granted with extreme caution.

172M368, 215NW516.

Diligence in discovery of new evidence held not shown. 172M516, 215NW852.

New trial rests largely in the discretion of the trial court and is to be granted cautiously and sparingly. 176 M210, 222NW924.

No abuse of discretion in granting new trial for evidence concerning developments subsequent to trial. Gau v. B., 177M276, 225NW22.

Motion rests largely in the discretion of the trial court, and is to be granted with caution. 178M296, 226NW 938.

Grant of new trial is discretionary with trial court. 179M80, 228NW335.

Denial of new trial for newly discovered evidence held not abuse of discretion. Milliren v. F., 186M115, 242NW 546. See Dun. Dig. 7123.

Granting of new trial on ground of newly discovered evidence is very largely discretionary. Donaldson v. C., 188M443, 247NW522. See Dun. Dig. 7123.

To grant a new trial on ground of newly discovered evidence is within discretion of trial court, to be cautiously and sparingly exercised and only in furtherance of substantial justice. Kubat v. Z., 193M522, 259NW 1. See Dun. Dig. 7123.

Granting a new trial on ground of newly discovered evidence is largely within sound judicial discretion of trial court. Johlfs v. C., 193M553, 259NW57. See Dun. Dig. 7123.

Record does not show any sufficient cause for granting of a new trial on ground of newly discovered evidence. Pettersen v. F., 194M265, 260NW225. See Dun. Dig. 7123.

Denial of motion for a new trial on ground of newly discovered evidence was within discretion of trial court. Fredrick v. K., 197M524, 267NW473. See Dun. Dig. 7123.

Courts are cautious in granting new trials on ground of newly discovered evidence. Vietor v. C., 203M41, 279 NW743. See Dun. Dig. 7123(32).

32. Showing on motion.

181M355, 232NW622.

Fact issues, if any, on motion, are for trial court. Gau v. B., 177M276, 225NW22.

Affidavits supporting motion for new trial on ground of newly discovered evidence must show exercise of reasonable diligence. Klugman v. S., 186M139, 242NW 625. See Dun. Dig. 7096.

Lack of a showing of due diligence to obtain alleged newly discovered evidence required a denial of motion for a new trial. State v. Padares, 187M622, 246NW369. See Dun. Dig. 7127.

For lack of due diligence, court rightly denied a new trial on ground of newly discovered evidence. Jeddeloh v. A., 188M404, 247NW512. See Dun. Dig. 7128.

Due diligence was not shown so as to entitle to a new trial on ground of newly discovered evidence. Engstrom v. D., 190M208, 251NW134. See Dun. Dig. 7127 (39).

Denial of new trial was proper where diligence was not exercised in discovering evidence. Whitman v. F., 190 M633, 251NW901. See Dun. Dig. 7128n, 50.

Showing of due diligence was insufficient to entitle plaintiff to a new trial on the ground of newly discovered evidence of statement alleged to have been overheard by another witness. Zane v. H., 191M382, 254 NW453. See Dun. Dig. 7127.

Accident insurance association was not entitled to new trial for newly discovered evidence that plaintiff lost sight of eye through cataract of long standing and not through accident, affidavit not showing any effort or attempt to discover evidence in question before trial. Jensvold v. M., 192M475, 257NW86. See Dun. Dig. 7127.

It was not an abuse of discretion to deny motion for new trial on ground of newly discovered evidence where affidavit purporting to set forth what new witness could testify to did not profess to state that witness knew anything about the only issue in case that would affect result of the action. Kubat v. Z., 193M522, 259NW1. See Dun. Dig. 7127.

Affidavits supporting a motion for new trial on ground of newly discovered evidence found not to support exercise of discretion in granting a new trial. Kruchowski v. S., 195M537, 263NW616. See Dun. Dig. 7127.

In absence of a showing of a clear abuse of judicial discretion, refusal of lower court to grant a new trial on ground of newly discovered evidence will not be disturbed, especially where it appears that there was a failuure to exercise due diligence in discovering new evidence. Jorstad v. B., 196M568, 265NW815. See Dun. Dig. 7123.

Court did not abuse its discretion in refusing to grant a new trial on ground of newly discovered evidence. Stock v. F., 197M399, 267NW368. See Dun. Dig. 7123.

A lack of diligence and effort in attempting to discover and produce evidence at a former trial is a bar to relief by way of a new trial. Clarizio v. C., 201M590, 277NW 262. See Dun. Dig. 7128.

Plaintiff failed to show due diligence in securing testimony of certain person, where defendant's counsel at trial in examining a witness disclosed the presence of such person at scene of accident. Peterson v. R., 202M 320, 278NW471. See Dun. Dig. 7128.

Relief will not be granted even though very material facts have been brought to light, if they could, by exercise of proper diligence, have been discovered and presented on trial. Vietor v. C., 203M41, 279NW743. See Dun. Dig. 7128.

Relief will not be granted, even though very material facts have been brought to light, if they could, by exercise of proper diligence, have been discovered and presented on first trial. State v. Bergeson, 203M88, 279NW 837. See Dun. Dig. 7127.

34. Counter affidavits.

Court did not abuse discretion in denying new trial for newly discovered evidence submitted on conflicting affidavits. Farrell v. K., 189M573, 248NW720. See Dun. Dig. 7127.

35. Nature of new evidence.
179M436, 229NW564.
181M355, 232NW622.
Matter of granting a new trial for newly discovered evidence rests largely in the sound legal discretion of the trial court. 171M515, 213NW923.
A new trial was properly denied for newly discovered evidence which was merely cumulative and corroborative and not of such weight as to induce the belief that it would change the result. 171M345, 214NW262.
Evidence that principal witness for state was reputed to be of unsound mind was not of such a nature as to require a new trial, where the testimony of the witness was full of contradictions. 171M503, 214NW474.
Denial of motion for new trial for newly discovered evidence some months after entry of judgment. 173M250, 217NW127.
Court did not abuse its discretion in denying new trial on affidavits showing that witness perjured himself. 174M545, 219NW866.
Due diligence should have produced the evidence of a son and an employe of the party seeking a new trial. 175M618, 221NW641.
Where existence of facts is asserted by experts or the expert testimony, would be merely cumulative there was no abuse of discretion in denying a new trial. 176M200, 223NW97.
Evidential facts sought to be proved may have arisen after the trial. 177M25, 224NW257.
Court acted within its discretion in denying the state a new trial in condemnation proceedings for evidential fact arising after the trial. 177M25, 224NW257.
Newly discovered evidence held not of sufficient importance to require a new trial. Dumbeck v. C., 177M261, 225NW111.
Newly discovered evidence, held not to require new trial. 177M441, 225NW389.
Documentary evidence, apparently genuine, which would destroy plaintiff's case if authentic, required new trial. 177M444, 225NW399.
New trial was properly denied, where a large part of the evidence was cumulative and due diligence was not shown to obtain it for the trial. 178M87, 226NW208.
Motion is granted only when the evidence is such as will likely change the result, and only to remedy a manifest injustice. 178M296, 226NW938.
Mere inadvertence of counsel in not offering available evidence, held not ground for new trial on the theory of newly discovered evidence. 179M99, 228NW447.
Facts disclosed at trial is not newly discovered evidence. 180M264, 230NW778.
No reversible error was made in denying a continuance, nor in refusing to grant a new trial for newly discovered evidence. Miller v. P., 182M108, 233NW855. See Dun. Dig. 1710, 7123.
A showing that a litigant after trial remembers what he should have remembered at the trial does not constitute newly discovered evidence entitling him to a new trial. Farmers' State Bk. of Eyota v. C., 182M268, 234NW320. See Dun. Dig. 7128(57), (58).
A motion for a new trial on the ground of newly discovered evidence is largely addressed to the discretion of the trial court. Buro v. M., 183M518, 237NW186. See Dun. Dig. 7123.
Denial of new trial on ground of newly discovered evidence held not an abuse of discretion. Zobel v. B., 184M172, 238NW49. See Dun. Dig. 7123.
The granting of a new trial on the ground of newly discovered evidence rests in the sound judicial discretion of the trial court. Stokke v. M., 185M28, 239NW658. See Dun. Dig. 7123(32).
A new policy of liability insurance was not newly discovered evidence requiring new trial with respect to construction of old policy. Wendt v. W., 188M488, 247NW569. See Dun. Dig. 7131.
Court properly refused new trial on ground of newly discovered evidence and fraud where evidence relied upon was that of a physician subject to objection that it was privileged. Stone v. S., 189M47, 248NW285. See Dun. Dig. 7131.
Claimed newly discovered evidence presented no valid grounds for a new trial. State v. City of Eveleth, 189M229, 249NW184.
After trial without jury, there was no error in denial of a motion for a new trial on ground of newly discovered evidence which trial judge considered and yet adhered to his original finding. Skinner v. O., 190M456, 252NW418. See Dun. Dig. 7131.
New trial for newly discovered evidence was properly denied where it was doubtful whether evidence would have been admissible. Whitman v. F., 190M633, 251NW901. See Dun. Dig. 7131.
There was no abuse of discretion in denying motion to amend motion for a new trial by assigning additional ground on newly discovered evidence which was cumulative. King v. M., 192M163, 255NW626. See Dun. Dig. 7092, 7125.
Court did not err in refusing to grant motion for a new trial upon ground of newly discovered evidence. Peterson v. S., 192M315, 256NW308. See Dun. Dig. 7123.
Granting new trials for newly discovered evidence rests very largely in discretion of trial court. Dahmen's Guardianship, 192M407, 256NW891. See Dun. Dig. 7123.
Where both plaintiff and his attorney knew that certain person might be able to testify as to issues on trial, evidence of such witness could not be claimed to be newly discovered. Kubat v. Z., 193M522, 259NW1. See Dun. Dig. 7128.
Upon showing made in respect of alleged newly discovered evidence, trial court was amply justified in denying motions for new trial. Bickle v. B., 194M375, 260NW361. See Dun. Dig. 7123.
There was no abuse of discretion in denying a new trial on ground of newly discovered evidence. Clark v. B., 195M44, 261NW596. See Dun. Dig. 7123.
A motion for new trial upon ground of newly discovered evidence is addressed to sound discretion of trial court and, if such evidence is merely cumulative, contradictory, or impeaching of evidence at trial, and not likely to change result, denial of a new trial is not an abuse of discretion. Merek v. S., 200M418, 274NW402. See Dun. Dig. 7129, 7130, 7131.
Order denying a motion for new trial on ground of newly discovered evidence was not an abuse of discretion, if court might well have considered that there was no likelihood that new evidence would change result on another trial. Szyperski v. S., 201M567, 277NW235. See Dun. Dig. 7131.
Newly discovered evidence which merely contradicts and impeaches evidence adduced at trial is no ground for a new trial, except in extraordinary cases. Peterson v. R., 202M320, 278NW471. See Dun. Dig. 7129.
Newly discovered evidence which is merely cumulative is no ground for a new trial, except in extraordinary cases. Id. See Dun. Dig. 7130.
If new evidence is doubtful in character, not so material as to make probable a different result on a new trial, or merely cumulative or impeaching, relief will be denied. Vietor v. C., 203M41, 279NW743. See Dun. Dig. 7131.
A new trial will not be granted upon claim of newly discovered evidence if such be doubtful in character, not so material as to make probable a different result on a new trial, or merely cumulative or impeaching. State v. Bergeson, 203M88, 279NW837. See Dun. Dig. 7129, 7130, 7131.
It was not an abuse of discretion to deny a new trial for new and additional evidence which was merely cumulative of impeaching evidence. Weinstein v. S., 204M189, 283NW127. See Dun. Dig. 7130.

FOR EXCESSIVE OR INADEQUATE DAMAGES

36. Under either subd. 5 or subd. 7.
172M493, 215NW861; 172M543, 216NW233.
179M411, 229NW566.
$42,500 for fracture of thigh bone of engineer earning over $300 per month, reduced to $36,000. Jennings v. C. (USDC-Minn), 43F(2d)397. See Dun. Dig. 2596.
Verdict for $9,800 for injury to eye and 24 fractured bones was not so excessive as to show passion or prejudice. 171M321, 214NW52.
$10,000 held not excessive for injuries to memory, hearing, sight and other parts of the body of a school teacher. 171M399, 214NW761.
$17,390, reduced to $10,390, was not excessive for permanent injuries to right hand and property. 171M472, 214NW287.
$3,200 was not excessive for death of boy 17 years of age. 172M76, 214NW774.
$10,000 was not excessive to female school teacher receiving broken knee cap and pelvic injury resulting in a tumor and such condition as would render it improbable that she could bear children. 172M134, 215NW198.
$12,500 held not excessive for injuries to jaw and neck of railroad mechanic who was permanently disabled as a mechanic. 172M284, 214NW890.
Verdict held excessive. 172M501, 215NW853. Personal injuries to tenant from defective premises. 172M377, 215NW865.
Verdict for $35,000.00 for death of switchman 30 years old, earning $190 per month and leaving widow and two small children, held not excessive. 172M447, 216NW234.
Verdict for $5,000, reduced to $3,000, held not excessive for death at a railroad crossing. 173M7, 216NW245.
Evidence held to justify finding that fracture of plaintiff's four cervical vertebra was occasioned by the negligence of defendant. 173M163, 216NW803.
$9,500 was not excessive to young woman, 31 years of age, for face blemish and injury to eye. 173M186, 217NW99.
Verdict for $15,000 was excessive for injuries where only permanent injury was "flat feet." 173M239, 217NW128.
Verdict of $7,000, for son and $1,400 for father, reduced to $4,500 and $500, held not excessive for fracture of skull, among other things. 173M365, 217NW369.
Claim of error in the amount of a judgment must first be submitted to the trial court. 173M325, 217NW381.
$1,000 was not excessive for injury to head, causing headaches, dizziness, and disability to do certain work. 173M622, 217NW485.
$2,000 for dislocated ankle was not excessive. 173M439, 217NW493.
$7,500 to woman and $982.96 to husband for injuries to woman resulting in miscarriage and other permanent injuries held not excessive. 174M294, 219NW179.
Injuries to land and crops from flooding. 174M443, 219NW459.
Where in tort action the amount of damages is not based upon estimate of experts or the calculation of other witnesses, the defendant should base his motion

for new trial upon the fifth subdivision of this section. 174M545, 219NW866.

$6,000 was not excessive for brain injury. 174M545, 219NW866.

Verdict for $10,550 for death, medical expenses and suffering in Wisconsin, held not excessive. 175M22, 220NW162.

Verdict for $25,000 reduced to $23,500 was not excessive for injuries to telephone lineman 36 years of age consisting of injuries to vertebra, ribs and leg. 175M150, 220NW412.

Verdict for $7,500, reduced to $5,000, held not excessive for injuries to unmarried woman, 29 years of age. Knopp v. McDonald, 176M83, 222NW580.

Verdict for $3,500 reduced to $1,800 for wrongful arrest and imprisonment, held so excessive as to indicate passion or prejudice. 176M203, 223NW94.

Verdict for $33,000 reduced to $28,000 for injury to leg, was still high and is reduced to $23,000. 176M331, 223NW605.

Verdict for $15,000 held not excessive for shortened leg. 176M377, 223NW619.

Where one verdict has been set aside as excessive the Supreme Court will exercise great caution in setting aside or reducing a second verdict as excessive. 176M437, 223NW675.

$16,000 held excessive and reduced to $12,000 for injury to feet. 176M437, 223NW675.

Plaintiff could recover as damages the value of an automobile lost by a garage through negligence, though plaintiff purchased it under a conditional sale contract and had not paid all of the purchase price. 177M10, 224NW271.

Automobile owner can recover its entire value from garage which lost it by theft through negligence, though the automobile was insured against theft. 177M10, 224NW271.

$8,300 held not excessive for crippled left arm and hand of a farm renter, 42 years of age. 177M13, 224NW259.

$4,200 not excessive for injury to leg. 177M42, 224NW255.

$6,000 was not excessive to woman 70 years of age suffering badly fractured arm and collar bone and ribs. Tegels v. T., 177M222, 225NW85.

$800 for burning barn and other property held not excessive. 177M222, 225NW111.

$4,000 for alienation of wife's affections, held not excessive. 177M270, 224NW839.

Verdict for $5,000 against bank officers inducing deposit, held not supported by the evidence and contrary to the law. 177M354, 225NW276.

Damages for breach of contract of employment, held not speculative or conjectural. 177M383, 225NW275.

Damages to chickens caused by selling poultryman raw linseed oil for cod liver oil were not so conjectural and speculative as to present recovery, and $1,412.30, held not excessive for loss of poultry. 177M390, 225NW395.

Discrepancy in recovery amounting to five days' interest, held within the rule de minimis non curat lex. 177M563, 225NW815.

Where there is error in a charge affecting the amount of a verdict in a definitely ascertainable amount, the prevailing party should be allowed to remit the erroneous excess and there should not be a retrial of the whole case. 178M177, 226NW411.

$7,500 for fracture of leg of 11 year old girl held excessive and reduced to $5,000. 178M353, 227NW203.

Error in instruction as to testimony of only witness testifying as to damages, held to require new trial where verdict was in very large amount. 179M467, 229NW575.

$2,564 for death of child, held not excessive. 179M528, 229NW784.

$3,000 for services of daughter, held not excessive. 180M100, 230NW478.

$2,500, held not excessive for scalp wound requiring surgical treatment. 180M185, 230NW473.

$34,963 for serious burns to fireman earning $150 per month, held excessive. 180M298, 230NW823.

$32,500 for injuries to conductor, held excessive in view of errors in admission of evidence. 180M310, 230NW826.

$6,000, held not excessive for death of girl, 23 years old. Waggoner v. G., 180M391, 231NW10(2).

Where verdict is excessive, and alternative motion for judgment or new trial is filed, proper order is award of new trial on condition that prevailing party consent to reduction. 180M540, 231NW222.

$2,000 for alienation of affections of plaintiff's husband, held not excessive. 181M13, 231NW718.

$17,300, held not excessive for probably permanent injuries to car repairer 49 years old and earning $105 per month. 181M97, 231NW710.

$4,000 for injury to theatre patron, held not excessive. 181M109, 231NW716.

$3,500 for permanent injuries and disfigurement received in automobile accident, held not excessive. 181M180, 232NW3. See Dun. Dig. 2597.

$1,800 to wife and $1,000 to her husband for expenses and loss of services, held not excessive for injury to wife in automobile collision. 181M338, 232NW344. See Dun. Dig. 2597.

$3,000, held not excessive for injury to person fifty-five years old. 181M406, 232NW715. See Dun. Dig. 2597.

$8,000, held not excessive for malpractice by physician in treating fractured limb of farmer thirty-eight years of age. 181M381, 232NW708. See Dun. Dig. 2597, 7493.

$16,800, held not excessive for injury to child nine years old, causing permanent injury to the brain. 181M386, 232NW712. See Dun. Dig. 2597.

$9,690 for knee fracture and other injuries to leg and chest, and damage to automobile, held not excessive. 181M400, 232NW710. See Dun. Dig. 2597.

Verdict for $1,000 for malicious prosecution held not excessive. Miller v. P., 182M108, 233NW855. See Dun. Dig. 5745, 5750a.

Verdict for $20,000 was not excessive for fractured skull. Lund v. O., 182M204, 234NW310. See Dun. Dig. 2597.

Where there is a severe and painful, but probably temporary injury, and there is conflict in the testimony as to its nature and extent, verdict for $2,200 will not be disturbed on appeal. Randall v. G., 182M259, 234NW298. See Dun. Dig. 2597.

A $5,000 verdict for death held excessive where deceased, 76 years old, had retired from all gainful activities and his beneficiaries and next of kin were two adult daughters upon whom he had become largely dependent for support. Nahan v. S., 182M269, 234NW297. See Dun. Dig. 2617(24).

Verdict for $350 held not excessive for cutting of trees. Hansen v. M., 182M321, 234NW462. See Dun. Dig. 2597, 9696(33).

Instruction in malpractice case as to right of recovery for loss of hearing from pulling of impacted tooth, held proper. Prevey v. W., 182M332, 234NW470. See Dun. Dig. 7493.

Verdict for $12,000 for malpractice in removing impacted tooth so as to affect the hearing and ability to swallow, held not excessive. Prevey v. W., 182M332, 234NW470. See Dun. Dig. 7493(17).

Verdict for $7,500 was not excessive to an eighteen-year-old girl receiving a multiple fracture of the bones of the pelvis. Honkomp v. M., 182M445, 234NW638. See Dun. Dig. 2597.

Where stucco workmen caused injury to roof and foundation by carelessness, measure of damages was difference between what building's value would have been had work been done in a workmanlike manner and the value as it was when work was completed. Carl Lindquist & Carlson, Inc., v. J., 182M529, 235NW267. See Dun. Dig. 2567c(20).

Verdict for $3,150 for malicious prosecution was excessive and was reduced to $2,000. Krienke v. C., 182M549, 235NW24. See Dun. Dig. 2596, 2597, 5745, 5750a.

Verdict for $8,000 was not excessive for loss of use of fingers of left hand by farmer's wife. Martin v. S., 183M256, 236NW312. See Dun. Dig. 2597.

Verdict of $4,000 to farmer for consequential damages arising out of injuries to wife's left arm and fingers, which prevented her from doing housework and from helping with the chores, held not excessive. Martin v. S., 183M256, 236NW312. See Dun. Dig. 2597.

Verdict for $3,000.00 held not excessive for death of wife and mother with life expectancy of ten years. Kieffer v. S., 184M205, 238NW331. See Dun. Dig. 2597.

Verdict of $4,000 held not excessive to a ten-year-old boy suffering skull fracture, destruction of eardrum and impairment of hearing. Flink v. Z., 184M376, 238NW791. See Dun. Dig. 2597.

Verdict for $6,950 held not excessive for severe injuries and terrible sufferings, including fractures, burns and ugly scars. Olson v. P., 185M571, 242NW283. See Dun. Dig. 2597.

Verdict for $1,650 for personal injuries and property damage, held not excessive. Marcel v. C., 186M366, 243NW265. See Dun. Dig. 2597.

Verdict for $1,260 held not excessive to father of boy injured by automobile. Ludwig v. H., 187M315, 245NW371. See Dun. Dig. 2597.

$7,000 held not excessive for permanent injuries to leg of 14-year-old boy. Ludwig v. H., 187M315, 245NW371. See Dun. Dig. 2597.

Verdict for $5,200 was not excessive for crushed vertebra, arthritis and pain suffered by woman. Hoffman v. C., 187M320, 245NW373. See Dun. Dig. 2597.

Second verdict for $3,200 for damages to farm by license for 5 structures to support power cables, held not excessive. Northern States Power Co. v. B., 187M353, 245NW609. See Dun. Dig. 2597.

Verdict for $6,500, reduced to $5,900, held not excessive for injury to hand and knee. Martin v. T., 187M529, 246NW6. See Dun. Dig. 2596, 2597.

Verdict for $1,500, reduced to $1,200, held not excessive for injured ligaments in back. Bolster v. C., 188M364, 247NW250. See Dun. Dig. 2597.

Verdict of $3,500 was not excessive for personal injuries to man 79 years old resulting in shortening of leg. Heitman v. K., 188M486, 247NW583. See Dun. Dig. 2597.

Verdict for $4,500 was not excessive for a lascivious assault upon a woman. Patzwald v. P., 188M557, 248NW43. See Dun. Dig. 2597.

Verdict for $4,800 was not excessive for bilateral inguinal hernia and other injuries. Stone v. S., 189M47, 248NW285. See Dun. Dig. 2597.

Verdict for $1,500 against dentist for injury to tissues at base of tongue, held excessive and reduced to $1,000. Ellering v. G., 189M68, 248NW330. See Dun. Dig. 2596.

Verdict for $7,248.60 in favor of husband for injuries to wife 41 years old, held not excessive. Foslien v. S., 189M118, 248NW731. See Dun. Dig. 2597.

Verdict for $3,500, reduced to $3,000, held not excessive for injury by assault upon a blacksmith which resulted in hemorrhage and incapacity. Farrell v. K., 189M165, 248NW720. See Dun. Dig. 531(62).

Verdict for $5,500 was not excessive to a draftsman 35 years of age who suffered 40 per cent injury to eye and disfigurement. Mills v. H., 189M193, 248NW705. See Dun. Dig. 2597.

Verdict for $18,000 held not excessive for total loss of use of right arm of person 56 years old, who also was confined in hospital for 43 days. Brown v. M., 190 M81, 251NW5. See Dun. Dig. 2597.

Verdict for $3500 held not excessive to young woman for injuries in region of kidneys and temporary soreness of head and neck. Orth v. W., 190M193, 251NW127. See Dun. Dig. 2597.

Verdict for $250 held not excessive for libel consisting of erroneous publication that plaintiff was arrested on liquor charge. Thorson v. A., 190M200, 251NW177. See Dun. Dig. 2597, 5564.

Verdict for $5,000 held not excessive for injuries to head of girl resulting in dizziness, headaches, and for injuries to leg and arm. Schreder v. L., 190M264, 251NW 513. See Dun. Dig. 2597.

Verdict for $7500 was not excessive for fracture of skull affecting vision and fracture of shoulder. Johnston v. S., 190M269, 251NW525. See Dun. Dig. 2597.

Verdict for $32,000 reduced to $19,458.18 was not excessive for crushed leg of woman 21 years of age. Fox v. M., 190M343, 251NW916. See Dun. Dig. 2597.

Verdict for $600 was not excessive for burned area about nine or ten inches long on outside of leg. Borwege v. C., 190M394, 251NW915. See Dun. Dig. 2597.

Verdict for $3,500 held not excessive to child suffering traumatic neurosis and compelled to stay out of school for a year. Fryklind v. J., 190M356, 252NW232. See Dun. Dig. 2597.

Verdict for $3,500 held excessive for injuries to hockey player, extent of whose injuries could not be reliably ascertained or diagnosed at time of trial. Howard v. V., 191M245, 253NW766. See Dun. Dig. 2596.

Failure to award nominal damages is not ground for new trial. Dreelan v. K., 191M330, 254NW433. See Dun. Dig. 7074.

Verdict for $7,500 for care and education of child for 10 years, reduced by trial court to $5,500, was still excessive and was further reduced to $4,500. Knutson v. H., 191M420, 254NW464. See Dun. Dig. 2596.

Verdict for $5,169.05 reduced to $5,000 held not excessive for three year old girl suffering permanent deformation of face and shortening of left femur. Luck v. M., 191M503, 254NW609. See Dun. Dig. 2597.

Verdict for $13,741 reduced to $10,000 held not excessive to 26 year old mother who suffered dislocated hips, fracture of head of femur, multiple fractures of pelvis and other injuries of a permanent nature. Id.

Verdicts of $1,250 each for death of children held not excessive. Id.

Verdict for $10,000 reduced to $6,500 by trial court held not excessive to a mother of 36 years who suffered injury to heart which prevented her from doing work in and out of household to any extent. Knudsen v. W., 192 M30, 255NW246. See Dun. Dig. 2597.

Whether or not a new trial should be had because of excessive damages in a personal injury case is a matter for trial court's discretion. Peterson v. F., 192M360; 256 NW901. See Dun. Dig. 7133.

Verdict for $8500 reduced to $7000 held not excessive for a broken back. Id. See Dun. Dig. 7138.

Verdict for $5,000 held not excessive to woman 35 years of age who was suffering a sacroiliac sprain and injuries to nervous system. Johnston v. J., 193M298, 258NW433. See Dun. Dig. 2570.

Verdict for $11,000 for injuries to neck and base of brain held not excessive or to indicate passion or prejudice. Fredhom v. S., 193M569, 259NW80. See Dun. Dig. 2596, 2597.

Verdict for $7,500 for death of roofing contractor regularly contributing $250 each month for maintaining household held not excessive. Gross v. G., 194M23, 259 NW557. See Dun. Dig. 2617.

Judgment for $2500 held not excessive for deformity and lack of function of forearm for improper reduction of fracture by physician. Citrowski v. L., 194M269, 260NW 297. See Dun. Dig. 7133.

Verdict for $6,000 for loss of part of leg held not excessive where plaintiff could not use an artificial limb without submitting to an operation. Gustafson v. A., 194M575, 261NW447. See Dun. Dig. 2597.

A verdict for $3,500 for death of seven year old child held not excessive. Dickey v. H., 195M292, 262NW869. See Dun. Dig. 7133.

Damages of $1,000 for injury to head, held not given under influence of passion or prejudice, and not excessive. Paulos v. K., 195M603, 263NW913. See Dun. Dig. 7134.

Damages of $5,000 held not excessive where a woman 37 years of age suffered injuries which confined her in a hospital for over 7 weeks and left her with a permanently stiff knee joint. Mattson v. N., 196M334, 265NW51. See Dun. Dig. 7134.

A recovery of $6,000 on behalf of a parent for death of a 19 year old daughter held not so excessive as to indicate passion or prejudice. Hartel v. W., 196M465, 265NW282. See Dun. Dig. 7134.

A verdict for $3,750 is not excessive where a girl seven years of age suffers fractures of both arms, many bruises and lacerations of her body, and much loss of blood, all resulting in great pain and suffering for more than three weeks and loss of use of one arm for some three months. Buchanan v. M., 196M520, 265NW319. See Dun. Dig. 7134.

Verdict for $7,500 was not excessive for death of man 48 years old receiving public relief and leaving a wife and three children. Hoppe v. P., 196M538, 265NW338. See Dun. Dig. 7134.

Verdict for $150 for automobile destroyed by fire held not excessive. Hammerstad v. A., 196M561, 265NW433. See Dun. Dig. 2577b.

Verdict for $10,000 held not excessive for injury to head resulting in total and permanent disability. Schmidt v. R., 196M612, 265NW816. See Dun. Dig. 2597.

Verdict for $4,000 was not excessive for a farmer 58 years of age who suffered injury to extent of 50% disability to perform ordinary work to which he was accustomed. Anderson v. E., 197M144, 266NW702. See Dun. Dig. 2597.

Verdicts for $5,000 and $2,500, respectively, for death of elderly retired wealthy parents held excessive. Prescott v. S., 197M325, 267NW251. See Dun. Dig. 2617.

Verdict for $3,000 was not excessive for broken hip bone permanently shortening leg. Callahan v. C., 197M 403, 267NW361. See Dun. Dig. 2597.

Verdict for $1,866.35 to husband, paid for care and treatment of wife's injuries, held not unreasonable. Birdsall v. D., 197M411, 267NW363. See Dun. Dig. 2597.

Verdict for $5,000 held not excessive for injuries to head resulting in unconsciousness for several weeks, followed by convulsions and slow recovery. Wells v. W., 197M464, 267NW379. See Dun. Dig. 2597.

Husband's verdict for $2,000 for injuries to wife, held not excessive. Useman v. M., 198M79, 268NW866. See Dun. Dig. 2597.

Verdict of $5,000 held excessive where five months and one week after injury, there were no objective evidences of injury and prognosis was a complete recovery in a few months. Kemerer v. K., 198M316, 269NW832. See Dun. Dig. 2596.

Verdict of $7,500 is not excessive to single woman twenty-seven years old suffering almost complete paralysis of right side of face. Finney v. N., 198M554, 270NW 592. See Dun. Dig. 2597, 7134.

Where a practicing dentist with a good standing in his community, was unlawfully evicted from his office for a period of almost two weeks, a verdict of $300 for actual damages on a showing of a specific loss of at least $245 in addition to that which might have been received from patients that called at his office is not excessive, nor can it be said to have been based on pure speculation or guess. Sweeney v. M., 199M21, 270NW906. See Dun. Dig. 7133.

Verdict for $15,000 held not excessive where injury resulted in permanent partial blindness to plaintiff who had a probable life expectancy of about 50 years. Arnao v. M., 199M34, 270NW910. See Dun. Dig. 2597.

Verdict for $1,500 held not excessive for death of infant. Taaje v. S., 199M113, 271NW109. See Dun. Dig. 2617.

Verdict for $3,500 was not excessive to married woman suffering two broken collar bones and four fractured ribs and eight weeks hospitalization. Findley v. B., 199 M197, 271NW449. See Dun. Dig. 2597.

Verdict for $9,750 held not excessive for injury to pelvis and leg. Timmerman v. M., 199M376, 271NW697. See Dun. Dig. 2597.

Verdict of $6,300 for 54-year old woman held not excessive where she sustained permanent injuries to both arms, with substantial loss of function, and severe pain and suffering. Olson v. K., 199M493, 272NW381. See Dun. Dig. 2570a.

Verdict for $917 for injuries to girl in hospital three days and losing a tooth held not so excessive as to indicate that it was result of passion and prejudice. Lacheck v. D., 199M519, 273NW366. See Dun. Dig. 7134.

Verdict of $9,000 not excessive, where 22-year-old man capable of earning approximately $1,600 per year received injuries resulting in total permanent disability. Piche v. H., 199M526, 272NW591. See Dun. Dig. 2570.

Verdict of $3,500 for injury to spine held not excessive. Thorstad v. D., 199M543, 273NW255. See Dun. Dig. 2570.

Verdict for $8,000 was not excessive for fracture of lamina of second cervical vertebra and crushing fracture of odontoid process, resulting in limitation of motion of neck. Wyatt v. W., 273NW600. See Dun. Dig. 2597.

A verdict for $4,000 reduced to $3,000 was not excessive for malpractice consisting in leaving gauze pack in wound in gall bladder operation. Brossard v. K., 274NW 241. See Dun. Dig. 2570, 7493.

Verdict for $900 for assault held not excessive. Ellola v. O., 201M77, 275NW408. See Dun. Dig. 531.

Evidence held to sustain a verdict of $7,500 for wrongful death of man 27 years of age, earning $80 a month, who turned practically his entire income over to his parents, with whom he lived and for whose benefit action is brought. Koski v. M., 201M549, 277NW229. See Dun. Dig. 7134.

Verdict for $5140 for scalded leg of a 74-year old patient in a hospital held not excessive. Butler v. N., 202M282, 278NW37. See Dun. Dig. 7134.

In determining whether damages for personal injuries are excessive consideration should be given to changes in economic conditions and purchasing power of money in applying precedents. Turnmire v. J., 202M307, 278NW 159. See Dun. Dig. 2595.

Verdict for $12,000 reduced to $10,000 for fracture of left femur in two places with some comminution, including special damages amounting to $1400, to a man 55 years of age, held not so excessive as to show passion and prejudice. Id. See Dun. Dig. 2595, 2596, 2597.

Verdict of $7,500 for death of wife and mother was not excessive. Doherty v. S., 227Wis661, 278NW437.

Verdict for $2,500 to a man 70 years of age was not excessive for slight concussion of the brain, cuts, bruises, and contusions, five days in hospital, seven weeks confinement at home and resulting in a tremor so severe at time of trial that he was unable to write. Santee v. H., 202M361, 278NW520. See Dun. Dig. 2597.

Verdict of $7,500, reduced by trial court to $5,500, to man 70 years of age was not excessive for cuts and bruises on the head, chest, lower back and knees, two fractured ribs, weakening of voice and general health, together with 20 days in hospital and confinement in home under care of two physicians for five weeks. Id. See Dun. Dig. 2597.

Verdict of $12,000 for loss of leg of a 6 year old boy is not so excessive as to indicate passion or prejudice. Forseth v. D., 202M447, 278NW904. See Dun. Dig. 2597.

Verdict for $5,500 was not excessive for injuries making woman permanently nervous, hysterical, and suffer pain and rapid heartbeat. Baker v. C., 202M491, 279NW 211. See Dun. Dig. 2597.

Verdict for $10,000 for death of manager of a creamery with expectancy of 15 years held not excessive. Paine v. G., 202M462, 279NW257. See Dun. Dig. 2597.

A verdict for $4,800 to a 19-year old girl suffering a broken and displaced nose, with a laceration and scar thereon, loosening of front teeth, displacement of septum of the nose, making her subject to colds and impairing her voice, together with cuts, bruises, severe shock, and pain, held not excessive. Hoge v. T., 202M592, 279NW401. See Dun. Dig. 2597.

Amount of damages for personal injuries is peculiarly within province of jury. Id. See Dun. Dig. 2597.

A verdict for $10,000 for the wrongful death of a physician and surgeon with an expectancy of over 17 years and a well-established practice from which he earned between $5,000 and $6,000 per year, from which he contributed between $40 and $60 a month to each of his two dependents, held not excessive. McKeown v. A., 202M595, 279NW402. See Dun. Dig. 2617.

Verdict for $6,788.75 held not excessive for permanent injuries to leg disabling plaintiff from doing work which required him to be on his feet for any length of time. Peterson v. M., 202M630, 279NW588. See Dun. Dig. 2597.

A verdict of $2500 for a broken leg which included approximately $400 special damages does not indicate passion or prejudice. Hennek v. L., 203M154, 280NW180. See Dun. Dig. 7134.

Verdict for $3,985 was excessive for false arrest and malicious prosecution for shoplifting. Hallen v. M., 203M 349, 281NW291. See Dun. Dig. 7136.

Verdict for $7,500, reduced to $6,250 was not excessive for death of a 15 year old boy. Ekdahl v. M., 203M374, 281NW517. See Dun. Dig. 7136.

Verdict of $1,750 to father of boy receiving a large number of third degree burns by coming in contact with electrically charged wire held not excessive. Schorr v. M., 203M384, 281NW523. See Dun. Dig. 7136.

Verdict of $10,000 reduced to $8,500 to a boy receiving a large number of third degree burns from coming in contact with electrically charged wire held not excessive. Id. See Dun. Dig. 7136.

Verdict of $6,000 was not excessive for death of man 39 years of age leaving wife and six children. Farwell v. S., 203M392, 281NW526. See Dun. Dig. 2617.

Verdict of $7,000 in favor of housewife and $3,053 in favor of husband for personal injuries, loss of services, and damage to house, held not excessive. Hughes v. C., 204M1, 281NW871. See Dun. Dig. 2597.

Where there is an absence of objective symptoms and injured person has been before trial court several days, question of excessiveness of verdict is peculiarly one for that court and supreme court is very reluctant to disturb judgment of trial court. Id. See Dun. Dig. 7136.

Verdict for damage to truck and personal injuries held not excessive. Ryan v. I., 204M177, 283NW129. See Dun. Dig. 7133.

In a case where there are no objective symptoms and word of person injured is only evidence of injury, circumspection will be exercised by courts in sustaining large verdicts. Becker v. M., 204M283, 283NW401. See Dun. Dig. 2570a, 7133.

Verdict for $6,000 for serious and permanent injury to knees, held not so excessive as to permit it to be disturbed on appeal. Anderson v. S., 204M337, 283NW571. See Dun. Dig. 7136.

A verdict of $5,000, in favor of a woman for injury resulting in multiple fractures of pelvic bones and serious complications, is not excessive. Daley v. N., 204M488, 283 NW757. See Dun. Dig. 2570.

Verdict for $5,000 to a harness maker 54 years of age, suffering a fracture of a bone in right hand and fracture of knee cap, resulting in permanent disability to some extent, held not so excessive as to indicate passion and prejudice. Johnson v. K., 285NW881. See Dun. Dig. 7136.

37. General principles.

That disfigurement is concealed goes to amount of damage rather than the right to recover. Carlson v. N., 181M180, 232NW3. See Dun. Dig. 2570a(95).

38. Necessity of passion or prejudice.

172M362, 215NW512.

Amount of verdict in excess of what could be fairly said to be sustained by substantial evidence, most favorably viewed for plaintiff, is attributable to passion and prejudice. Jennings v. C., (USDC-Minn), 43F(2d)397. See Dun. Dig. 7134.

Verdicts against plaintiffs in automobile accident case held not the result of passion and prejudice by reason of the fact that evidence was admitted showing that insurance company had paid medical expenses and compensation provided by Workmen's Compensation Law. Arvidson v. S., 183M446, 237NW12. See Dun. Dig. 7134.

It does not follow from mere fact that trial court considered original verdict excessive and reduced amount of damages that damages awarded were given as a result of passion and prejudice. Birdsall v. D., 197M411, 267NW363. See Dun. Dig. 7134.

Exemplary damages of $600 to dentist unlawfully evicted from his office for two weeks is a matter emphatically reserved to jury, and unless so excessive as to indicate that jurors were actuated by passion or prejudice, it will not be disturbed. Sweeney v. M., 199M21, 270NW906. See Dun. Dig. 7134.

Judgment will not be reversed for improper argument of plaintiff's counsel which could only affect amount of damages where smallness of verdict indicates that no prejudice resulted. Elkins v. M., 199M63, 270NW914. See Dun. Dig. 7134.

On appeal from order denying a new trial, record does not show verdict so excessive as to indicate that passion and prejudice influenced jury. Pearson v. N., 200M58, 273 NW359. See Dun. Dig. 7134.

New trial will not be granted for excessive verdict unless passion or prejudice is indicated. Noetzelman v. W., 204M26, 283NW481. See Dun. Dig. 7134.

39. Remitting excess.

Excessive verdict may be cured by remission. Klaman v. H., 181M109, 231NW716.

Where verdict is excessive, supreme court will order new trial unless plaintiff consents to reduction. Ebacher v. F., 188M268, 246NW903. See Dun. Dig. 437a, 7079.

Verdict for damages in action against bank for fraud in sale of bond, held excessive and it was reduced. Id. See Dun. Dig. 2596, 3841.

Supreme court in reducing verdict because of error in instruction concerning damages may not reduce it below highest amount jury could award under evidence. Hackenjos v. K., 193M37, 258NW433. See Dun. Dig. 427.

Verdict for $5,000 reduced to $4,000 to housewife suffering a complete fracture of left femur at point where it connects with pelvis held not excessive. Birdsall v. D., 197M411, 267NW363. See Dun. Dig. 2597.

Where wife suffered certain injuries to lumbar muscles and sacroiliac joint and a condition of paralysis as a result of traumatic neurosis and the extent of permanency of her injuries could not be definitely determined from the record, verdict for $18,000 is excessive, and is reduced to $13,000. Useman v. M., 198M79, 268NW866. See Dun. Dig. 2596.

Where appeal is based upon excessive damages, there will be an affirmance where it is admitted that damages as reduced by trial court are not excessive. Glubka v. T., 202M594, 279NW567. See Dun. Dig. 7138.

Where a verdict is not only grossly excessive but against great weight of evidence, there should be a new trial rather than an attempt to reduce wrong of jury by cutting verdict in two. Hallen v. M., 203M349, 281NW 291. See Dun. Dig. 7138.

Denial of new trial on plaintiff's consent to remittitur. 16MinnLawRev185.

42. For inadequate damages.

A verdict for less than amount due on conditional contract of sale held not perverse in action against purchasers for conversion of property. Pennig v. S., 189M 262, 249NW39. See Dun. Dig. 7161.

Verdict for $225 for damage to car and personal injuries, held not so inadequate as to lead to conclusion that verdict was perverse. Stone v. K., 190M368, 251NW 665. See Dun. Dig. 2598.

Case held not one where court will reverse an order denying a motion for a new trial on ground that nominal damages should have been allowed to defendants. Hoppman v. P., 190M480, 252NW229. See Dun. Dig. 7141.

Verdict for $1,000 held not inadequate under conflicting evidence for sacroiliac injury. King v. M., 192M163, 255 NW626. See Dun. Dig. 2598.

In action for wrongful death, where amount of general damages is not susceptible to proof by opinion evidence, motion for new trial because verdict is inadequate should be made upon ground specified in this subdivision. Wright v. E., 193M509, 259NW75. See Dun. Dig. 7132.

Granting or refusal of a new trial upon ground of inadequate damages appearing to have been given under

influence of passion or prejudice rests in discretion of trial court. Id. See Dun. Dig. 7136, 7141.

Verdict for $500 for death of a man 74 years of age held not so inadequate as to indicate passion or prejudice. Id. See Dun. Dig. 7141.

Verdict of $500, $150 of which was for special damages, for lumbo-sacrae sprain, was so low as to indicate prejudice on part of jury. Hill v. R., 198M199, 269NW397. See Dun. Dig. 7141.

An award of $2,400 was entirely inadequate for fractured skull and injuries to shoulder. Flaugh v. E., 202M615, 279NW582. See Dun. Dig. 7141.

A new trial may be granted on ground that damages are inadequate. Id. See Dun. Dig. 7141.

Matter of granting a new trial for inadequate damages rests largely within discretion of trial court. Id. See Dun. Dig. 7141.

Any suggestion that inadequate damages were awarded as a compromise required new trial on all issues. Id. See Dun. Dig. 7141.

Where plaintiff in assault case showed undisputed special damages for dental services in amount of $65, a verdict for $50 coupled with a finding of liability required a new trial. Ulrich v. K., 204M74, 282NW801. See Dun. Dig. 7141.

Granting or refusing a new trial for inadequacy of damages rests largely in the discretion of the trial judge. Pye v. D., 204M319, 283NW487. See Dun. Dig. 7141(45).

Inadequate verdict—denial of new trial on defendant's consent to additur. 19MinnLawRev661.

FOR ERRORS OF LAW ON THE TRIAL

43. What are errors on the trial.

Rulings on evidence and instructions cannot be reviewed in absence of proper exceptions. 171M518, 213NW919.

Admission of improper testimony tending to incite prejudice. 172M543, 216NW233.

New trial granted for errors of court with regard to admission of evidence, and court's remarks. 173M158, 217NW146.

The exception of evidence and cross-examination of witnesses held without prejudice. 174M97, 218NW453.

Exclusion of evidence. 174M573, 219NW913.

Control of trial court over matter of allowing leading questions is pratically absolute. 176M210, 222NW924.

The direction of a verdict, if erroneous, is an error of law occurring at the trial. Gale v. F., 176M631, 220NW156.

The admission of immaterial evidence, not prejudicial, is not reversible error. 177M13, 224NW259.

Questioning witnesses as to their interest in an indemnity insurance company, which it was admitted had insured the defendant, was not error. 177M13, 224NW259.

Charge held not misleading when considered in connection with entire charge. 177M13, 224NW259.

Where complaint proceeded upon theory of fraudulent misrepresentation that defendant would send competent man to supervise erection of silo, and on the trial negligence of the person furnished was the only ground upon which a recovery could be had, held that submission was confusing. 177M420, 225NW393.

Refusal to strike answer of witness was without prejudice where other similar evidence was received without objection. 177M425, 225NW273.

Where findings are decisive of all issues presented, new trial will not be granted because more specific findings could have been made. 177M425, 225NW273.

Rulings on evidence respecting priority between chattel mortgage, were not reversible error. 177M441, 225NW389.

Whether sufficient foundation is laid for introduction of written documents and memoranda, is largely within the discretion of the trial court. 177M494, 225NW432.

Error in admitting extrinsic evidence in aid of construction is not ground for a new trial, where the court could not do otherwise than construe the writing as it did. Martin v. F., 177M592, 226NW203.

A trial court's talk in open court to a jury seeking further instructions, held not to be an "irregularity," but may be reviewed as "errors of law occurring at the trial" and a settled case or bill of exceptions is necessary. 178M141, 226NW404.

Reception of evidence which could not have harmed appellant will not warrant a new trial. 178M471, 227NW491.

Testimony erroneously received through mistake or inadvertence, but promptly stricken when the court's attention was directed thereto, does not require a new trial, where it is perceived that no prejudice resulted. Drabek v. W., 182M217, 234NW6. See Dun. Dig. 7074.

The trial court did not err in granting new trials because of erroneous instructions given in cases to recover damages resulting from an automobile accident and relating to the rights and duties of host, the driver, and guests, the passenger, including contributory negligence under the Wisconsin law. Kassmir v. O., 182M324, 234NW473. See Dun. Dig. 7165.

That findings were made, which call for the same judgment called for by the verdict, is not ground for a new trial. Commercial Union Ins. Co. v. C., 183M1, 235NW634. See Dun. Dig. 7074(13).

Where a verdict may have been based upon an erroneous instruction, there must be a new trial, unless it conclusively appears that the verdict is sustained upon other grounds. General Electric Co. v. F., 183M178, 235NW876. See Dun. Dig. 7165.

New trial granted because of reception of hearsay evidence. Edie v. S., 183M522, 237NW177. See Dun. Dig. 7180.

New trial was warranted where charge was confusing and did not state the law applicable. Le Tourneau v. J., 185M46, 239NW768. See Dun. Dig. 7165.

Error in admitting or excluding evidence of fact otherwise satisfactorily proved by admissible evidence, or inadmissible evidence unobjected to, is no ground for new trial. Milliren v. F., 186M115, 242NW546. See Dun. Dig. 7184.

New trial granted because of erroneous reception in evidence of memorandum to corroborate witness when it was not needed by witness. In Re Yiljarvi's Estate, 186M288, 243NW103. See Dun. Dig. 7184.

A charge should point out the issues of fact to be decided by the jury; but failure to do so, where the issues are simple and experienced attorneys have argued the same to the jury, should not call for a new trial, unless the application of some rule of law is so left as to mislead. Newton v. M., 186M439, 243NW684. See Dun. Dig. 7165.

Excluding testimony as to collateral matters not materially bearing upon the main issues, even if error, does not of itself call for a new trial. Newton v. M., 186M439, 243NW684. See Dun. Dig. 7183.

In litigation to determine right of mining corporations to merge over objection of minority stockholders, it was within discretion of court to permit evidence of result of explorations had up to time of trial, but refusal to do so held not so important as to require new trial. Paterson v. S., 186M611, 244NW281. See Dun. Dig. 2014, 2074, 2122.

An erroneous instruction that in levying an attachment of lessee's property, lessor was chargeable with acts of sheriff is ground for new trial on issue of whether defendant lessee actually was evicted in subsequent action for rent. Donaldson v. M., 190M231, 251NW272. See Dun. Dig. 7174.

Where sole claim on trial was that bank cashier cancelled note by mistake, plaintiff could not raise question of authority of cashier on motion for new trial or on appeal. People's State Bank v. D., 191M558, 254NW782. See Dun. Dig. 388a, 425a.

"Errors occurring at the trial" do not include a mistake of jury in disposing of facts, but are those of trial judge in conduct of trial. Roelofs v. B., 194M166, 259NW808. See Dun. Dig. 7162.

A new trial should not ordinarily be granted for erroneous admission of evidence when court distinctly instructs jury to disregard it. Lorberbaum v. C., 198M289, 269NW646. See Dun. Dig. 7207.

Granting of new trial for erroneous instructions is largely a matter of discretion with trial judge, but court erred in granting a new trial for an error which would not have prejudiced moving party. Ensor v. D., 201M152, 275NW618. See Dun. Dig. 7166.

Error in admission in evidence is ground for a new trial if it is obvious from a consideration of whole case that substantial prejudice resulted to adverse party. Doll v. S., 201M319, 276NW281. See Dun. Dig. 7180.

Submission to jury of evidence of injuries shown to have resulted from accident together with evidence of injuries not shown to have resulted from accident, held error requiring new trial on issue of damages. Id.

44. How far discretionary.

Order granting new trial for errors in instructions rests largely in the discretion of the trial court. Naylor v. M., 185M518, 241NW674. See Dun. Dig. 7166.

45. Necessity of exceptions—notice of trial.

Use of wrong word in instruction ought not to result in new trial where no advantage was taken of court's invitation at close of charge to make corrections. 173M186, 217NW99.

Overruling of objections to admission of evidence may not be considered in absence of exceptions. D. M. Gilmore Co. v. D., 187M132, 244NW557. See Dun. Dig. 388a, 7091.

Error not raised in motion for new trial was not subject for review. Thornton Bros. Co. v. R., 188M5, 246NW527. See Dun. Dig. 358, 358a, 388a.

FOR INSUFFICIENCY OF EVIDENCE

46. General rules.

Facts stated by plaintiff in personal injury action were so improbable that new trial granted. 171M164, 213NW738.

Action being based on contract, assignment that verdict was excessive came under this subdivision. 171M518, 213NW919.

Finding that guaranteed note was paid by the giving of a new note held not sustained by the evidence. 172M22, 214NW760.

Where the court erroneously withdraws from the jury the only evidence upon which a verdict in defendant's favor would be predicated the verdict is "not justified by the evidence and contrary to law." 172M598, 216NW333.

In action under Federal Employers' Liability Act, evidence held insufficient to sustain verdict on issue of negligence. 176M575, 224NW241.

Verdict for negative of issue must stand unless the evidence clearly establishes the affirmative. 181M385, 232NW629. See Dun. Dig. 7145.

When the evidence taken as a whole is manifestly contrary to a finding, it is an abuse of discretion not to grant a new trial, even if there be some evidence tending to sustain the finding. National Pole & Treating Co. v. G., 182M21, 233NW810. See Dun. Dig. 7157(19).

On appeal from judgment entered on verdict, no motion for new trial having been made and only assignments of error being that court erred in refusing to direct a verdict or judgment notwithstanding verdict, the one question presented for review is whether evidence reasonably sustains verdict. Freeman v. M., 185M 503, 241NW677. See Dun. Dig. 388a.

A verdict and judgment sustained by great preponderance of evidence cannot be vacated on ground that substantial justice has not been done. Ayer v. C., 189M359, 249NW581. See Dun. Dig. 7142.

Where verdicts in favor of wife and husband for personal injuries sustained by former are opposed by a clear preponderance of evidence and verdicts are excessive, interests of justice require a new trial. Becker v. M., 204M283, 283NW401. See Dun. Dig. 2570a, 7142.

46a. Verdict not justified by evidence.

It is the right and duty of the trial court to direct a verdict when the state of the evidence is such as not to warrant a verdict for a party, and if he fails to do so the other party is entitled to a new trial. 173M402, 217 NW377.

Question of excessiveness of verdict was not raised by assignment that verdict was not justified by the evidence and was contrary to law. 174M545, 219NW866.

Where only evidence of negligence to support a verdict against employer is evidence of negligence of a co-defendant employee, in whose favor jury finds a verdict, verdict against employer is perverse and a new trial is granted. Ayer v. C., 187M169, 244NW681. See Dun. Dig. 6027a, 7161.

Verdict based upon great preponderance of evidence cannot be said to be "perverse." Ayer v. C., 189M359, 249NW581. See Dun. Dig. 7142.

Order denying a new trial reversed because evidence is in manifest preponderance against verdict. Holdys v. S., 198M258, 269NW468. See Dun. Dig. 7142.

48. After trial by court.

Where any one of several independent findings would support judgment, it is immaterial that evidence does not support one finding. 176M225, 222NW926.

51. After successive verdicts.

Anderson v. A., 179M461, 229NW579(1).

52. Remitting excess.

Where a verdict is not only grossly excessive but against great weight of evidence, there should be a new trial rather than an attempt to reduce wrong of jury by cutting verdict in two. Hallen v. M., 203M349, 281NW 291. See Dun. Dig. 7152.

WHEN VERDICT CONTRARY TO LAW

54. General statement.

Ground that verdict was "not justified by the evidence and is contrary to law" did not raise question of excessiveness of damages in tort action. 174M545, 219NW 866.

Where several grounds of negligence are charged and there is a general verdict, a new trial must be granted, if a verdict on any of the grounds is not justified. Gamradt v. D., 176M280, 223NW296.

Verdict for $5,000 against bank officers inducing deposit, held not supported by the evidence and contrary to the law. 177M354, 225NW276.

A verdict against a corporation operating a drug store, and in favor of its managing officer who had sole charge of its business and who personally made the sale complained of, is perverse, and requires a new trial. Tiedje v. H., 184M569, 239NW611. See Dun. Dig. 7115b, 7161.

New trial was not required because verdict was against city and in favor of building owner in action by pedestrian who slipped on ice on sidewalk. Bracke v. L., 187 M585, 246NW249. See Dun. Dig. 5045, 7161(41).

A verdict which on account of mistake or other cause fails to include interest is not perverse. Newberg v. C., 190M459, 252NW221. See Dun. Dig. 7115b, 7141.

Fact that a verdict contrary to law is a statutory ground for a new trial does not require setting aside a verdict on a motion for judgment notwithstanding verdict on such ground. Anderson v. N., 193M157, 258NW 157. See Dun. Dig. 5082.

Verdict exonerating one defendant and finding liability as to other held not perverse where evidence justified finding that latter was guilty of negligence proximately causing fatal injuries to plaintiff's intestate. Szyperski v. S., 198M154, 269NW401. See Dun. Dig. 7161.

Court did not err in refusing new trial where evidence was in conflict. Peterson v. R., 202M320, 278NW471. See Dun. Dig. 7142, 7144, 7154, 7157, 7161.

9326. Basis of motion.

There being no settled case or bill of exceptions the only question for review is whether the findings sustain the conclusions and judgment. 173M625, 217NW597.

Where sum of money was deposited with the clerk of court to await its further order, held that question of title was properly determinable by judgment in a plenary suit or upon issues framed and that trial court rightly refused to grant motion of one party that money be paid to him. 178M161, 226NW410.

Verdict cannot be impeached by affidavit of jurors as to what took place in jury room or by affidavit of person other than juror disclosing statements of juror as to proceedings of jury. 178M564, 227NW893.

In absence of extension of time, court cannot grant motion upon minutes after thirty days from coming in of verdict. 179M136, 228NW558.

Affidavits presented with proposed amended answer on motion for amended findings or new trial cannot be considered. 179M586, 229NW565.

Without a case or bill of exceptions, errors in a charge are not reviewable. Anderson v. C., 182M243, 234NW 289. See Dun. Dig. 344(88).

Affidavits cannot be used on motion for a new trial to show alleged improper remarks of counsel in addressing the jury; the record must be protected at the time. Sigvertsen v. M., 182M387, 234NW688. See Dun. Dig. 7096.

Where party moves only for judgment and does not ask for new trial, he waives errors which might have given him new trial. Yager v. H., 186M71, 242NW469. See Dun. Dig. 7076.

On joint motion for new trial by husband and wife, wife against whom no cause of action was proved was entitled to relief. McDermott v. R., 188M501, 247NW683. See Dun. Dig. 7077(44).

A motion by defendant for judgment notwithstanding verdict will not be granted in a personal injury action, unless evidence of negligence of defendant is wanting or evidence of plaintiff's negligence is clear. Stritzke v. C., 190M323, 251NW532. See Dun. Dig. 5082.

An order made on a motion for a new trial based upon minutes of court, heard more than 30 days after coming in of a verdict or decision, is a nullity, where no stipulation or order extending time is procured. Smith v. W., 192M424, 256NW890. See Dun. Dig. 7096.

Stay of 20 days given by court on rendering decision for plaintiff did not affect defendant's right to move for a new trial and did not operate as an extension of time for motion for new trial on the minutes. Id. See Dun. Dig. 7096.

Correction in finding made by court in its order denying amended finding did not toll time within which a motion for a new trial could be heard on minutes, correction not being one sought by defendants in their motion and being a correction of a mere inadvertence in original finding. Id. See Dun. Dig. 7096.

It was not error to deny motion for new trial upon ground of newly discovered evidence of a certain witness where no request was made for a continuance because of inability to secure attendance of such witness either before or at the trial, at which time it was know that such person might be able to testify on issues in question. Kubat v. Z., 193M522, 259NW1. See Dun. Dig. 7126.

Question of misconduct of counsel in his argument to jury cannot be presented by affidavits on motion for a new trial, where settled case fails to show what was said by counsel, or that there was any objection or exception thereto, or that matter was in any way called to attention of court at trial. Pettersen v. F., 194M265, 260NW225. See Dun. Dig. 384, 9800.

Judge who has tried a case cannot be ousted, by an affidavit of prejudice, of his jurisdiction to consider a motion for a new trial. State v. District Court, 195M169, 263NW908. See Dun. Dig. 7085.

Entry of judgment, time for appeal therefrom not having expired, does not in and of itself bar a motion for a new trial. Id. See Dun. Dig. 7087.

By resting solely upon a motion for judgment, a defeated party waives all errors which would be ground only for a new trial. Guild v. M., 199M141, 271NW332. See Dun. Dig. 5085.

Parts of jurors' affidavits seeking to disclose what took place in jury room should not be considered on motion for new trial. Peterson v. R., 202M320, 278NW471. See Dun. Dig. 7109.

Defense that a government corporate instrumentality is immune from suit will be noticed, even if raised for first time after trial on argument of alternative motion for judgment notwithstanding verdict or a new trial. Casper v. R., 202M433, 278NW896. See Dun. Dig. 2348.

Affidavits supporting motion for new trial on ground of accident or surprise must disclose facts which indicate an abuse of discretion in denial thereof. Noetzelman v. W., 204M26, 283NW481. See Dun. Dig. 7096.

9327. Exceptions to ruling, order, decision, etc.

1. In general.

Rulings on evidence and instructions cannot be reviewed in absence of proper exceptions. 171M518, 213 NW919.

Claim of error in the amount of a judgment must first be submitted to the trial court. 173M325, 217NW381.

A general assignment that the court erred in denying a new trial presents no question for review where such motion is made on numerous distinct grounds. 173M529, 217NW933.

Where the court has jurisdiction and their is no settled case or bill of exceptions there is nothing for

review on appeal where the findings and conclusions sustain the judgment. 173M611, 216NW244.

Supreme Court cannot consider assignments of error involving questions not presented to the trial court. 174 M402, 219NW546.

On appeal, theory of case may not be shifted from that at trial. 174M434, 219NW552.

Supreme court cannot pass upon plaintiff's financial ability to perform a contract, when such question was not raised in the trial court. 175M236, 220NW046.

A trial court's talk in open court to a jury seeking further instructions held not to be an "irregularity," but may be reviewed as "errors of law occurring at the trial" and a settled case or bill of exceptions is necessary. 178M141, 226NW404.

On appeal from judgment without settled case or bill of exceptions, after trial to the court, the only question is whether findings of fact support the judgment. Wright v. A., 178M415, 227NW357.

Where the evidence is not preserved in a settled case objection of insufficiency of evidence is not available on appeal. 179M536, 229NW873.

Failure to object to service on jury panel of one who had a case pending and set for trial at the term, held not waiver of error. 179M557, 230NW91.

Errors assigned but not argued will not be considered. 180M33, 230NW117.

When no ground for new trial is stated in the motion therefor the judgment will be affirmed. 180M93, 230NW 269.

Assignment that court erred in granting new trial for errors occurring at tial, held sufficient. 180M395, 230NW 895.

Claim of prejudice from dismissal as to codefendant will not be considered for first time on appeal. 180M 467, 231NW194.

Theory pursued below must be adhered to on appeal. Gunnerson v. M., 181M37, 231NW415(2).

A question not made by pleadings, evidence, rulings on evidence, requests to charge, or by the specifications of error in the motion for new trial, cannot be raised for the first time on appeal. Duluth, M. & N. Ry. Co. v. M., 183M414, 236NW766. See Dun. Dig. 384.

In an attorney's lien proceeding, it is too late to object, for the first time on appeal, that the lien claimant was not attorney of record and so not entitled to a lien in any event. Meacham v. B., 184M607, 240NW540. See Dun. Dig. 384(39).

Where there is no bill of exceptions or settled case, it must be assumed that all issues and facts determined by the findings were litigated by consent. Rosenfeldt's Will, 185M425, 241NW573. See Dun. Dig. 372(74).

Questions, not jurisdictional, not raised by pleadings or presented to trial court, are not for review on appeal. McCormick v. H., 186M380, 243NW392.

One cannot try a case upon one theory and then shift his position on appeal. Steward v. N., 186M606, 244NW 813. See Dun. Dig. 401.

Where insurer failed to claim right to deduct premiums from benefits on the trial, it cannot claim it on appeal from adverse judgment. Smith v. B., 187M220, 244NW 817. See Dun. Dig. 384.

Defendant, not objecting to plaintiff's claimed measure of damages, consented to try case upon such theory, and cannot object thereto on appeal. Investment Associates v. H., 187M555, 246NW364. See Dun. Dig. 404.

Upon appeal from judgment without a settled case or bill of exceptions, sole question for consideration is sufficiency of facts found to support conclusion of law. State v. Waddell, 187M647, 246NW471. See Dun. Dig. 387.

Where one of defendants in action for death was son and beneficiary of decedent, defendants could not complain of a general verdict for administrator where they did not seek a reduction or appointment below. Anderson v. A., 188M602, 248NW35. See Dun. Dig. 384.

Issues not raised by the pleadings or litigated cannot be raised on appeal. National Equipment Corp., 189M632, 250NW677. See Dun. Dig. 384, n. 38.

Assignment in notice of motion for new trial of "errors of law accruing at the trial, and either excepted to at the time or hereinafter assigned in this notice of motion," is not sufficient to present for review errors not excepted to at trial. First & Farmers' State Bank v. V., 190M331, 251NW669. See Dun. Dig. 388a, 7091.

Whether a sale in partition can be postponed, when farm conditions are bad and farm lands are depressed, to await a more favorable time, and, if so, whether appeal presents a case calling for such relief, were not suggested to trial court and are not considered. Grimm v. G., 190M474, 252NW231. See Dun. Dig. 7343(95).

So strong is the public policy behind homestead statute that, where it appears that one spouse has attempted to alienate an interest in homestead without other's consent, supreme court can, on its own motion, assert this defense even though not properly pleaded or even though raised for first time on appeal. Craig v. B., 191M42, 254NW440. See Dun. Dig. 4211.

Questions not presented at trial by pleadings or otherwise will not be considered on appeal. Livingstone v. H., 191M623, 255NW120. See Dun. Dig. 406.

Where no error is assigned in a motion for new trial nor any assignments of error made, there is nothing for review. White v. M., 192M522, 257NW281. See Dun. Dig. 358a, 7091.

Where trial proceeds without any objection to pleadings and settled case fails to show any misconduct of counsel, assignments of error in this court that reply is a departure or that counsel was guilty of misconduct are not well taken. Hovda v. B., 193M218, 258NW305. See Dun. Dig. 388a, 9723.

Commissioner of banks cannot raise defense for first time on appeal that one suing to have claim determined to be preferred had not complied with statute concerning form and time for proceedings. Bethesda Old People's Home v. B., 193M589, 259NW384. See Dun. Dig. 384.

Supreme court cannot consider complaint upon inclusion in taxation of costs where matter was not presented to trial court. Taylor v. N., 196M22, 264NW139. See Dun. Dig. 384.

Where contributory negligence was clearly submitted to jury, without objection or exception, it was too late after an unfavorable verdict to raise question that there was not sufficient evidence of contributory negligence to go to jury, especially where testimony of defendant's negligence was uncertain. Harris v. E., 196M469, 265NW 322. See Dun. Dig. 388.

Statute does not alter rule that cases will be disposed of on appeal within limits of consideration fixed by theory on which they have been tried. Id. See Dun. Dig. 401.

It is duty of trial court, on its own motion, to prevent counsel from making remarks that obviously tend to arouse passion or prejudice in minds of jurors. Prescott v. S., 197M325, 267NW251. See Dun. Dig. 9800.

Litigants cannot sleep on their rights until they reach supreme court, and then, for the first time, object to an irregularity occurring in tribunal below. Foster v. S., 197M602, 268NW630. See Dun. Dig. 9724.

Where record contains no objection or exception to dismissal of jury and trial of issues to court, error assigned that plaintiff was deprived of a jury trial may not be considered. Nordby v. C., 201M378, 276NW278. See Dun. Dig. 5234.

No error in a ruling on trial may be reviewed on appeal from a judgment if appellant did not take an exception on trial or include such in a motion for new trial, whether trial be had to jury or court. Johnson v. G., 201M629, 277NW252. See Dun. Dig. 388.

Plaintiff is not entitled in an action in deceit for damages for fraud in procurement of a contract for deed to recover as for money had and received upon showing rescission of contract by parties, where pleadings and evidence did not present a claim for money had and received and that ground of recovery is asserted for first time on appeal. Houchin v. B., 202M540, 279NW370. See Dun. Dig. 401, 10092.

Where action for loss of property in fire was tried upon theory that defendant was an innkeeper, trial court was correct in holding that claim first made on motion for new trial that plaintiff was a mere boarder and had burden of showing negligence was too late for consideration. Knutson v. F., 202M642, 279NW714. See Dun. Dig. 407.

Where there is a motion for judgment notwithstanding verdict but no motion for new trial, error on appeal can reach only single question of whether there is any substantial evidence in support of judgment; defeated party waives all errors which would be ground only for a new trial. Golden v. L., 203M211, 281NW249. See Dun. Dig. 5082, 5085.

On appeal from an order denying a new trial, the review is limited to errors assigned in the motion for new trial. Parten v. F., 204M200, 283NW408. See Dun. Dig. 395.

2. Objections to pleadings.

Civil case is unnecessary in order to review an order for judgment on the pleadings. 178M442, 227NW891.

Contention that counterclaim could not be maintained cannot be considered on appeal where not made at the trial nor presented as ground for new trial. Renn v. W., 185M461, 241NW581. See Dun. Dig. 384, 388a.

That a complaint fails to state facts sufficient to constitute a cause of action may be raised for first time on appeal. Tjepkes v. S., 193M505, 259NW2. See Dun. Dig. 384, 7732(82).

It is immaterial that complaint did not cover certain ground of negligence where both parties introduced evidence thereon without objection. Dziewczynski v. L., 193M580, 259NW65. See Dun. Dig. 7675.

Defect in pleading, not challenged by demurrer, motion, or specific objection, should not work a reversal where cause of action or defense has been litigated on the merits as if no defects in pleadings existed. Olson v. M., 195M626, 264NW129. See Dun. Dig. 7675.

4. Reception of evidence.

When no exception is taken to ruling on evidence at the trial and there is no motion for new trial with a specification of error, the ruling is not reviewable on appeal from the judgment. 174M131, 218NW455.

Objection to sufficiency of evidence of ownership of land not suggested at trial, comes too late on appeal. Luebke v. C., 178M40, 226NW415.

Where evidence was received subject to objection, to be ruled upon later, and no rulings were so made, there was nothing to be reviewed in absence of a motion for a new trial. 178M120, 226NW516.

Testimony as to conversation with person since deceased cannot be first objected to on motion for new trial or appeal. 178M452, 227NW501.

That hearing should have been on oral evidence cannot be raised for first time on appeal. 179M488, 229NW 791.

A letter of a witness impeaching his testimony was properly received, there being no objection to specific sentences containing irrelevant or immaterial matters. Martin v. S., 183M256, 236NW312. See Dun. Dig. 9728, 10351.

Exclusion of evidence is not reviewed in absence of exception. Mutual Trust Life Ins. Co. v. B., 187M503, 246 NW9. See Dun. Dig. 9728.

Where evidence is received without objection, or objections are withdrawn, no error can be assigned on its reception on appeal. State v. Padares, 187M622, 246NW 369. See Dun. Dig. 384, 9728.

Assignments of error upon rulings excluding or admitting testimony must be sufficiently specific to point out ruling challenged. Carr v. W., 188M216, 246NW743. See Dun. Dig. 362.

It is not sufficient to assign error upon reception of testimony of a named witness, where a large part of testimony of such witness was rightly admitted. Id.

Employee is precluded in supreme court from raising objection to admission of evidence claimed to be incompetent, not objected to below. Cooper v. M., 188M560, 247NW805. See Dun. Dig. 9728.

Inexcusable conduct of plaintiff in examining one of several parties in automobile case and eliciting fact that certain defendants were not represented by insurance companies could not be considered on appeal where no objection to procedure was made at time and it was not specified as error in motion for new trial. Brown v. M., 190M81, 251NW5. See Dun. Dig. 388a.

Where no motion is made to strike out an answer to a proper question, propriety of answer will not be reviewed here. Johnston v. S., 190M269, 251NW525. See Dun. Dig. 384.

Where a motion is made to strike out an answer on one ground only, its propriety as against another and different objection will not be reviewed here. Id. See Dun. Dig. 384.

Where auditor's report of defendant's transactions as trustee was offered in evidence with a reservation of ruling on its admissibility, but no ruling was made, report must be considered in evidence because used throughout trial as if it were, witnesses testifying from and in reference to it without objection. Smith v. T., 190M410, 252NW423. See Dun. Dig. 3227a, 9727.

Court did not err in refusing to strike out part of the testimony of defendant which had been received without objection. Kouri v. O., 191M101, 253NW98. See Dun. Dig. 9728.

Objection that statement was "incompetent, irrelevant, and immaterial" did not involve point that preliminary proof of its execution had not been made. Kassmir v. P., 191M340, 254NW446. See Dun. Dig. 9740.

In absence both of an exception thereto and a clear specification therof in his motion for a new trial, an appellant may not assign as error a ruling on evidence. Clark v. W., 193M525, 259NW62. See Dun. Dig. 7091.

Where evidence is received subject to an objection or motion to strike and no subsequent ruling is made, evidence is considered as received over objection. Johnson v. H., 197M496, 267NW486. See Dun. Dig. 388a.

An exception taken at time evidence is received is sufficient to preserve right of review to objecting party. Exception may also be preserved by motion to strike at a subsequent point of time during trial or in a motion for a new trial. Id.

Incompetent testimony must be kept out by timely objection when it is offered. Peterson v. B., 199M455, 273 NW260. See Dun. Dig. 9728.

Where incompetent testimony comes into record without objection trial court's refusal to strike testimony upon a subsequent motion is not such an abuse of discretion as would require a reversal. Id.

Affidavits stand upon same footing as documentary evidence, and if parties elect to submit their case upon such evidence, they waive their right to object to mode of proceeding which they themselves have adopted. State v. St. Cloud Milk Producers' Ass'n., 200M1, 273NW603. See Dun. Dig. 411(13).

Objection to admissibility of evidence must be taken at time it is offered and cannot be raised for first time on motion for new trial or appeal. Eilola v. O., 201M77, 275NW408. See Dun. Dig. 9728.

A formal offer of proof is unnecessary when an objection is sustained to a question calling for an answer which would obviously elicit material and relevant evidence. Patterson-Stocking, Inc. v. D., 201M308, 276NW 737. See Dun. Dig. 9717.

Error cannot be assigned in receiving evidence of expert witness as to cause of accident, to which no objection is made upon trial. Baker v. C., 202M491, 279NW 211. See Dun. Dig. 9728.

To secure review of a ruling admitting or excluding evidence, it is indispensable that there should be a bill of exceptions or case containing evidence erroneously admitted or excluded, objection of counsel, ruling of court upon objection, and so much of other evidence in case as may be necessary to enable court to review intelligently. Timm v. S., 203M1, 279NW754. See Dun. Dig. 346(13).

Alleged error in reception of evidence to which no exception was taken and no assignment of error is made in motion for new trial will not be reviewed on appeal. Papke v. P., 203M130, 280NW183. See Dun. Dig. 388a.

Consent by plaintiff's counsel to introduction of ordinance in evidence constituted an express waiver of any objection to it. Draxton v. K., 203M161, 280NW288. See Dun. Dig. 9728.

A party is not only bound to make specific objections at time evidence is offered, but he is also limited on appeal to objections he raised in court below. Becker County Nat. Bank v. D., 204M603, 284NW789. See Dun. Dig. 405(75).

Ordinarily it is enough for a litigant to interpose one objection to a given line of evidence offered or course of conduct pursued by his adversary, and if his objection is overruled, he need not repeat objection in order to save point as basis for an assignment of error on appeal. State v. Saporen, 285NW898. See Dun. Dig. 9738.

4½. ——Offer of proof.

Error in exclusion of evidence was not reviewed where there was no offer of proof. Tierney v. G., 185 M114, 239NW905. See Dun. Dig. 9717.

5. Misconduct of counsel.

179M325, 229NW136.

Improper remarks of counsel, held not ground for reversal in absence of objection or exception. Seitz v. C., 181M4, 231NW714.

Reviewing court will not consider statements of counsel to jury in argument in absence of objection. Olson v. P., 185M571, 242NW283. See Dun. Dig. 384, 388a.

There is nothing to review where at close of argument, not taken down by reporter, defendant's counsel attempted to take exceptions but attorneys could not agree as to what had been said. Adams v. R., 187M209, 244NW810. See Dun. Dig. 384, 388a.

It is duty of trial courts on their own motion to prevent counsel from arousing passion or prejudice in jurors by stopping flagrant appeals to prejudice. Ferraro v. T., 197M5, 265NW829. See Dun. Dig. 9800.

Objections to argument of counsel, taken after jury has retired, are not timely, and will not be reviewed on appeal. Eilola v. O., 201M77, 275NW408. See Dun. Dig. 9800.

An appeal by counsel for plaintiff for a verdict which would enable the plaintiff to do something for his invalid wife, widowed daughter and grandchildren was improper and should have been restrained by trial court had it been seasonably objected to. Ross v. D., 203M 321, 281NW76. See Dun. Dig. 9800.

6. Instructions.

181M400, 232NW710.

Instruction not to be questioned on appeal in absence of exception. 170M175, 213NW899.

An inadvertent statement in the instructions to the jury in a criminal case must be called to the court's attention. 172M139, 214NW785.

Use of wrong word in instruction ought not to result in new trial where no advantage was taken of court's invitation at close of charge to make corrections. 173 M186, 217NW99.

An instruction is not reviewable when no exception has been taken and the same is not assigned as error on a motion for a new trial. 174M216, 218NW891.

Errors assigned as to the charge of the court are held to come within the rule of Steinbauer v. Stone, 85M274, 88NW754, and later cases applying that rule. 175M22, 220NW162.

Objection could not be first made on appeal that charge of court as to damages was not complete. 176M331, 223 NW605.

Appellants not calling court's attention to error in charge, could not complain on appeal, though they specified error in motion for new trial. 178M238, 226NW 702.

Where charge is not excepted to or sufficiently assigned as error in the motion for new trial, it becomes the law of the case on appeal. 178M411, 227NW358.

Instructions, unobjected to, become the law of the case, and the sufficiency of the evidence to sustain the verdict is then to be determined by the application of the rules of law laid down in the charge. Bullock v. N., 182M192, 233NW858. See Dun. Dig. 9792(38).

Where the trial court in its instructions to the jury erroneously states that a particular fact in issue is admitted, it is the duty of the counsel to direct the court's attention thereto if he expects to base error thereon. State v. Solum, 183M36, 235NW390. See Dun. Dig. 9797(75).

If appellant deemed a word used in the instruction ambiguous, he should have directed the court's attention thereto before the jury retired. Zobel v. B., 184M172, 238NW49. See Dun. Dig. 9798(82).

Language of court as to consideration of statements by lawyers if ambiguous or incorrect should have been called to the trial court's attention for correction. Pearson v. N., 184M560, 239NW602. See Dun. Dig. 9798(82).

Errors assigned upon the charge are unavailing where appellant approved the charge when given and did not challenge it in the motion for a new trial. Rahn v. F., 185M246, 240NW529. See Dun. Dig. 287.

Fact that no exceptions were taken to the charge at the trial was immaterial where trial court granted new trial for errors assigned in the motion for a new trial. Naylor v. M., 185M518, 241NW674. See Dun. Dig. 388a.

Instructions not challenged on motion for a new trial cannot be attacked on appeal. Carr v. W., 188M216, 246 NW743. See Dun. Dig. 385.

Where no exceptions are taken to charge which as a whole fairly submits issues, errors cannot be subsequently assigned upon inadvertent or faulty statements which could readily have been corrected if called to attention of court. Donaldson v. C., 188M443, 247NW522. See Dun. Dig. 364.

No instructions were requested and no exceptions taken to charge, which therefore became law of case. Flower v. K., 189M461, 250NW43. See Dun. Dig. 9797.

Where there is an inadvertent or casual erroneous statement in charge, attention of court must be directed to it in order to predicate error upon it. Romann v. B., 190M419, 252NW80. See Dun. Dig. 9797, 9798.

Where case was submitted to jury without request covering point, and no exception was taken on charge, except on statute of limitations, record does not present for review defendant's contention that plaintiff gratuitously assumed responsibility for support of defendant's child without expectation of compensation. Knutson v. H., 191M420, 254NW464. See Dun. Dig. 388a.

Instructions to jury cannot be assailed on appeal where no exceptions to them were taken at trial or in motion for a new trial. Saunders v. C., 192M272, 256NW 142. See Dun. Dig. 388a.

An exception to whole charge that it is argumentative and so worded as to excite prejudice does not avail plaintiff appellant, where there are paragraphs of correct and pertinent instructions. Knight Soda Fountain Co. v. D., 192M387, 256NW657. See Dun. Dig. 364.

Instructions not objected to become the law of the case, and whether verdict is sustained by evidence under the instructions is to be determined by application of such instructions, unless record or evidence conclusively shows that party obtaining verdict is not entitled to recover. Kovaniemi v. S., 192M395, 256NW661. See Dun. Dig. 384.

Instructions become law of case in absence of suggestions of error. Farnham v. P., 193M222, 258NW293. See Dun. Dig. 404.

Instructions not excepted to become law of case. Rochester Bread Co. v. R., 193M244, 258NW302. See Dun. Dig. 404.

Instructions to jury where no objection is made thereto or exception taken become law of the case, whether right or wrong. Oxborough v. M., 194M335, 260NW305. See Dun. Dig. 9792.

On appeal from order denying a motion for a new trial, supreme court cannot consider contention that trial court over emphasized respondent's theory of case, where there was no assignment of error as to such matter in motion for new trial. Delva's Estate, 195M192, 262NW 209. See Dun. Dig. 395.

Denial of motion for directed verdict cannot present for review errors in charge or omission to submit a fact issue presented by evidence. Robbins v. N., 195M205, 262 NW872. See Dun. Dig. 388b.

Where no exception was taken to charge when delivered, and error assigned thereon in motion for a new trial was one as to statement of attorney, which readily could have been corrected had attention thereto been called before the jury retired, there was no error of which complaint may be made. Mattson v. N., 196M334, 265NW51. See Dun. Dig. 388b.

Instructions of trial court with reference to duties of respective defendants in approaching intersection examined and held not prejudicial to either party. Useman v. M., 198M79, 268NW866. See Dun. Dig. 9723.

Court's cautionary charge that "the fact that defendant's truck ran out of gas and if that was negligence, it was not such as contributed directly or proximately to the collision, and is not to be considered by you as an act of negligence contributing to this collision in this case," held not prejudicial, where plaintiff then conceded and on appeal asserts that he is not and was not basing right of recovery upon such theory, especially where no suggestion was made at time of trial that such charge was out of place or harmful to his cause. Hartwell v. P., 198M488, 270NW570. See Dun. Dig. 347.

Right of counsel to call attention to omission or inadvertence in a charge, or to take exception thereto, imposes a duty upon him to exercise such right. Dehen v. B., 198M522, 270NW602. See Dun. Dig. 9797.

There was no reversible error in court's definition of "proximate cause," and, in absence of any objection or exception thereto at time of trial, plaintiff cannot now raise that point. Id. See Dun. Dig. 9798.

Use of an improper word in a sentence of charge should be called to court's attention before jury retires, or it will not be a good ground for a new trial. Doody v. S., 198M573, 270NW583. See Dun. Dig. 9792.

Right possessed by counsel to call attention to omission or inadvertence in court's charge, or to take exception thereto, imposes a corresponding duty to make use thereof. State v. Van Guilder, 199M214, 271NW473. See Dun. Dig. 9797.

While exceptions by plaintiff's counsel to charge were taken in a wholly irregular manner, it is not conceived that defendant was thereby prejudiced. Vondrashek v. D., 200M530, 274NW609. See Dun. Dig. 9797.

Charge not being excepted to when given, may not afterwards be assailed for verbal inaccuracies. Schaedler v. N., 201M327, 276NW235. See Dun. Dig. 9798.

If at time of instruction counsel has in mind objection to charge which he later assigns in support of his motion for a new trial, in good faith and fairness he should call court's attention to it. State v. Sprague, 201M415, 276NW744. See Dun. Dig. 9797.

A technical or formal exception to error contained in instructions is not necessary to save it for a motion for a new trial or for an appeal. Id.

While defendant may take advantage of a plaintiff's contributory negligence if it appears in evidence even though not pleaded as a defense, where defendant neither requested issue to be submitted nor took exception to statement in charge that plaintiff was not guilty of contributory negligence, a new trial cannot be awarded, even though that issue might properly have been submitted. Forseth v. D., 202M447, 278NW904. See Dun. Dig. 7060(56), 9792.

In advertent statements in a charge, not brought to attention of trial court, will not be considered on appeal. Gates v. H., 202M610, 279NW711. See Dun. Dig. 9798.

An exception should single out each instruction challenged and clearly specify alleged error. Strand v. B., 203M9, 279NW746. See Dun. Dig. 9797.

A blanket exception to five requests to charge, four of which are correct, is too general to bring up such exception for review on appeal from an order denying a motion for a new trial under an assignment of errors of law occurring at the trial. Id. See Dun. Dig. 9797.

Whether or not charge given constitutes reversible error, right of counsel to call attention to omission in charge, or take exception thereto, imposes duty upon him to exercise such right. Timm v. S., 203M1, 279NW754. See Dun. Dig. 9797.

7. Motion for directed verdict.

Opposing party not having objected to entertainment of motion for directed verdict which failed to specify the grounds, nor having assigned such defect in motion as a ground for new trial, cannot raise point for first time on appeal. 176M52, 222NW340.

The supreme court cannot order judgment notwithstanding the verdict where no motion to direct a verdict was made at the close of the testimony. 181M347, 232 NW522. See Dun. Dig. 393.

On appeal from a judgment after a jury trial, even though there has been no motion for a new trial, court will consider question of sufficiency of evidence to support verdict, where it has been expressly presented below by motion for directed verdict. Ciresi v. G., 187M 145, 244NW688. See Dun. Dig. 385.

Where defendant relies solely on motion for judgment without asking for new trial, errors at trial cannot be considered on appeal. Mishler v. N., 194M499, 260NW865. See Dun. Dig. 5085.

Motion for directed verdict at close of testimony saved right to attack sufficiency of evidence. Thorsness v. W., 198M270, 269NW637. See Dun. Dig. 7073.

Whether plaintiff is entitled to judgment as a matter of law will not be considered where there was no motion for a directed verdict or for judgment non obstante. Strand v. B., 203M9, 279NW746. See Dun. Dig. 388.

9. Findings of fact.

In case tried to court involving a settlement of accounts, where it is claimed for appellant that alleged errors with respect to minor debits or credits have been made, proper practice requires a motion for amended findings so that error may be corrected in the trial court. 174M507, 219NW758.

In an action tried by the court, an issue upon which the court made no finding, upon which neither party has requested findings and which is not covered by any assignment of error, presents no question for review. 175 M382, 221NW426.

Findings of court presumed to be correct in absence of settled case. 176M588, 224NW245.

Where action was tried upon presumption that plaintiff was owner of mortgaged premises, it is too late upon appeal for defendant to claim that there was no direct proof of ownership. 177M119, 224NW696.

10. Entry of judgment.

Objection to form of judgment cannot be first raised on appeal. 176M254, 223NW142.

Assuming that it was improper to enter judgment on the verdict in ejectment returned without an order of the court, the correction was with the trial court. Deacon v. H., 182M540, 235NW23. See Dun. Dig. 2906, 5040, 5050.

9328. "Bill of exceptions" and "case" defined.

Appeal being from the judgment and there being no settled case or motion for new trial, the record presents only the question as to whether the findings of fact sustains the conclusions of law. 175M619, 221NW648.

Where there is no settled case and the findings of the trial court are not questioned, such findings are controlling on appeal. 178M282, 226NW847.

Without a case or bill of exceptions, errors in a charge are not reviewable. Anderson v. C., 182M243, 234NW 289. See Dun. Dig. 347(22).

Where there is no settled case it is presumed that sufficient evidence was introduced to justify findings. Nichols v. V., 192M510, 257NW82. See Dun. Dig. 372.

An appeal from order denying a new trial will be dismissed where there is no settled case or bill of exceptions. Lund v. J., 195M352, 263NW110. See Dun. Dig. 344a.

Where judgment under attack must stand or fall upon files and records in case, original files and records are sufficient to pass upon questions presented, without a settled case or bill of exceptions. Dahn v. D., 203M19, 279NW715. See Dun. Dig. 344.

Where a case has been settled, findings of referee in a disbarment proceeding are not conclusive, and petitioner or prosecutor may challenge same as contrary to preponderance of evidence. McDonald, 204M61, 282NW677. See Dun. Dig. 9801.

9329. Bill of exceptions or case.

See notes under §9493.

Court properly extended time to settle the case. 174 M97, 218NW453.

Where an appeal has been promptly taken and a settled case is needed to properly present and determine the appeal, and where the hearing of the appeal is not shown to be delayed, and no prejudice shown, the courts are disposed to aid the presentation and hearing of the appeal on the merits. State v. Enersen, 183M341, 236NW 488.

Record held not to show abandonment by defendants of their intention to move for a settled case. State v. Enersen, 183M341, 236NW488.

The fact that the opponent's attorney otherwise acquires knowledge that a decision has been filed, or that a copy of the decision is mailed by the judge to counsel for each party does not take the place of, or dispense with, the notice required by statute. State v. Enersen, 183M341, 236NW488. See Dun. Dig. 317.

Trial judge should have in the exercise of discretion allowed and settled proposed case, though forty days' time stated had expired. State v. Enersen, 183M341, 236 NW488.

Where case is tried to the court and decision later filed, this section requires the party who wishes to start the time running for his opponent to serve a proposed settled case, to serve on his opponent a written notice of the filing of the decision, containing a sufficient description of the decision to identify it. State v. Enersen, 183M341, 236NW488. See Dun. Dig. 317.

When an order is based upon the records, no certificate of settled case is required. First State Bank of New York Mills v. W., 185M225, 240NW892. See Dun. Dig. 339(60).

Financial inability to pay for transcript was not valid excuse for delay of approximately six months in making application for extension of time to procure transcripts and serve proposed case. Elton v. N., 191M636, 253NW 529. See Dun. Dig. 318, 1372(d).

Court has power to extend time limited for proposing and settling a case and to grant leave to propose a case after time limit has expired. Stebbins v. F., 191M 561, 254NW818. See Dun. Dig. 1372(d).

Trial court erred in refusing to permit attorneys to serve proposed case after time limit had expired where they acted diligently, although abortively, to have time extended. Id. See Dun. Dig. 1372(a).

Where no application for extension of time to propose a case had been made, trial court's discretion was not abused in denying application for a settled case made approximately a year after expiration of statutory period for proposing a case and where many months had elapsed after such expiration before a transcript was ordered. State v. Guilford, 192M345, 256NW238. See Dun. Dig. 1372.

Where the trial court has settled and allowed a case in obedience to a peremptory writ of mandamus issued by supreme court after full hearing, case so settled cannot be stricken from record on ground that it was not properly settled, remedy being in mandamus proceeding, within time permitted for petitions for rehearing, for a modification of peremptory writ. Krom v. F., 192M520, 257NW812. See Dun. Dig. 5768.

Where trial proceeds without any objection to pleadings and settled case fails to show any misconduct of counsel, assignments of error in this court that reply is a departure or that counsel was guilty of misconduct are not well taken. Hovda v. B., 193M218, 258NW305. See Dun. Dig. 388a, 9723.

Trial court may grant leave to propose a bill or case even after time allowed by this statute, and may even do so after appeal and remand not based on merits. State v. District Court, 195M169, 263NW908. See Dun. Dig. 1372.

Invoking power of court to grant an extension of time within which to have case settled and allowed, upon ground that court did not allow a sufficient stay for such purpose in its decision, is a waiver of written notice of filing of decision. State v. Wilson, 199M452, 272NW163.

Where party is guilty of unjustified delay in applying to court for extension of time within which to have case settled and allowed so that time allowed for that purpose by statute has expired, and such delay results in prejudice to adverse party, supreme court will not interfere to control discretion of district court. Id. See Dun. Dig. 1372.

Trial court has discretion to permit a case to be settled after a stay has expired, and to extend 40 days provided, but it has no such power if time to appeal has expired under §9497. Id.

On appeal only question that can be raised in absence of bill of exceptions or settled case is that findings of fact do not support judgment. Schaefer v. T., 199M610, 273NW190. See Dun. Dig. 344, 386, 387.

In absence of a bill of exceptions and settled case, error assigned upon dismissing jury and trying case as a court case may not be considered. Nordby v. C., 201M 375, 276NW278. See Dun. Dig. 344.

Exercise of power to extend time in which to prepare and serve a proposed settled case is discretionary. Hartman v. P., 203M388, 281NW364. See Dun. Dig. 1372.

Where, after decision is made and filed by court in case tried without a jury, party against whom decision is made appears and requests a stay, it is not necessary for prevailing party to serve written notice of filing of decision upon him. Doyle v. S., 284NW874. See Dun. Dig. 1372(72).

REPLEVIN

9331. Possession of personal property.

In an action in replevin, immediate delivery of the property need not be asked by plaintiff. 143M200, 173 NW439.

Replevin to recover property sold did not bar a subsequent action for the price on the theory of a rescission or election, the replevin action being dismissed. 171M 483, 214NW284.

Furnace and attachment held not to become part of realty as between seller and owner of realty. 173M121, 216NW795.

Where in an action of replevin under a chattel mortgage given as part of a new contract, constituting an accord and satisfaction, the making of the contract and the default are admitted, a verdict was properly directed for plaintiff. 175M357, 221NW238.

Where plaintiff in replevin for mortgaged chattels declares generally as an owner entitled to possession, the defendant, under general denial, may prove payment of the debts secured by the mortgage. 176M406, 223NW 618.

In replevin for mortgaged chattels, plaintiff has the burden of proof that the goods replevined are those mortgaged. 176M406, 223NW618.

Where merchants made mistake in counting votes in contest for automobile, they could recover the car and give it to the proper person. 176M598, 224NW158.

Plaintiff must be entitled to immediate possession at the commencement of the action, and lessee of farm was not entitled to possession of crops while rent was in default under lease amounting to chattel mortgage. 178 M344, 227NW199.

Lessee suing to recover crops in possession of lessor under lease in effect a chattel mortgage had the burden of showing that rent was not in default at commencement of action. 178M344, 227NW199.

Where complaint was broad enough to cover either replevin or conversion court properly required election. 181M355, 232NW622. See Dun. Dig. 7508(22).

Where owner of property delivers it to another for purpose of having it delivered to a customer, and such other fails to so deliver it, the owner is entitled to recover the property. Holby v. F., 185M361, 241NW58. See Dun. Dig. 8407(51).

Proof of demand before suit is not necessary in a replevin action where it is apparent that a demand would have been futile. Holby v. F., 185M361, 241NW58. See Dun. Dig. 8409.

Evidence sustains verdict that appellant aided and abetted another defendant in fraudulently obtaining possession of plaintiff's stock certificate in a building and loan company. Hovda v. B., 193M218, 258NW305. See Dun. Dig. 3839.

Conditional seller has lien similar to that accorded a chattel mortgagee and may foreclose same by bringing action in equity and may thus secure deficiency judgment, and to protect himself, he may couple foreclosure action with action of replevin, thereby obtaining possession of property while foreclosing. Ahlers v. J., 193M544, 259NW397. See Dun. Dig. 8651.

Where plaintiff in replevin alleged that he was owner and entitled to immediate possession of automobile, describing it by motor and registration number, and answer was a general denial, plaintiff could prove that defendant's sole claim of title and right of possession was based upon documents tainted with usury. Halos v. N., 196M387, 265NW26. See Dun. Dig. 8412.

Replevin cannot be successfully maintained against a public officer, who, in course of his duty, seized liquor possessed for an illegal purpose at time of seizure. Starrett v. P., 198M416, 270NW131. See Dun. Dig. 8405.

In replevin for a diamond ring, alleging title and right of possession in decedent, court did not err in granting defendant's motion for dismissal for failure of proof. Exsted v. O., 202M644, 279NW559. See Dun. Dig. 8423.

Proposition that where a fact of a continuous nature is shown to exist at a certain time, there is a presumption of law that it continues to exist, at least for a reasonable time, does not apply to question of title and possession of a diamond ring, which is too often transferred by gift, pledge, or otherwise. Id. See Dun. Dig. 3438.

Officer in Naval Militia may sue enlisted man in replevin to recover equipment. Op. Atty. Gen.

9332. Affidavit.

Plaintiff manufacturer and owner of cab body and truck body held to have sufficient right of possession to maintain replevin against one in possession. Holby v. F., 185M361, 241NW58. See Dun. Dig. 8406.

9333. Bond and sureties.

A bailee may maintain an action on a replevin bond. 177M515, 225NW425.

Bond in amount of value of property as alleged in complaint, held properly nullified. 179M588, 229NW804.

In action on bond only money judgment can be rendered. 180M168, 230NW464.

9334. Requisition to sheriff—Service and return.

In replevin, the officer's return on the writ held not conclusive as to an issue collateral to the writ and levy, involving the time of seizure only, so as to preclude proof that the seizure was made on a date later than that shown by the return. Grossman v. L., 184M446, 238 NW893. See Dun. Dig. 7818.

The reason of the rule making conclusive an officer's return on a writ extends only to cases where it is collaterally attacked for the purpose of invalidating the officer's proceedings or defeating the writ or some right thereby acquired. Grossman v. L., 184M446, 238NW893. See Dun. Dig. 7818.

9335. Exception to sureties—Rebonding.

Surety on bond in replevin cannot escape liability for damage for retention of property simply because, after bond was given, complaint was amended to increase amount of damages claimed. General Talking Pictures Corp. v. J., 190M236, 251NW270. See Dun. Dig. 8432.

9340. Claim of property by third person.

Failure by a third party to make claim does not relieve judgment creditor from liability for conversion in levy of an execution. Lundgren v. W., 189M476, 250NW1. See Dun. Dig. 3551(65).

Court officer of municipal court of Virginia comes under this section. Op. Atty. Gen., May 17, 1933.

Liability to third parties for wrongful levy. 23MinnLawRev799.

ATTACHMENT

9342. When and in what cases allowed.

½. In general.

Evidence held to sustain finding that property attached was held in trust for defendant. 172M83, 214NW771.

Fraudulent conveyances. 172M355, 215NW517.

Assignment of farm lease whereby lessor assigned all his rights and interest thereunder, held not to constitute a chattel mortgage so as to require filing in order to be valid against creditor attaching lessor's interest subsequent to date of assignment. Federal Land Bank v. S., 192M21, 256NW102. See Dun. Dig. 1426.

1. Nature of proceeding.

An attachment against one having only a bare legal title to land without any beneficial interest therein, does not create any lien thereon where the creditor had knowledge or notice of the facts. 173M225, 217NW136.

Attachment is a provisional remedy, purely statutory, and has for its object the satisfaction of such judgment as plaintiff may recover in his action, and is a purely ancillary remedy. Reiling v. W., 202M576, 279NW579. See Dun. Dig. 622(25, 26).

4. In what actions allowed.

Actions for slander of title are not "actions for libel or slander" within the meaning of this section. 178M 27, 226NW191.

5. At what time may issue.

173M580, 218NW110.

Summons must be issued at or before the time the writ of attachment issues, and there is no "issuance" of summons until it is either served or delivered to the proper officer, and this requirement is not modified by the last sentence of this section. 181M349, 232NW512. See Dun. Dig. 625(34).

6. Jurisdiction, how acquired.

Attaching ship of foreign corporation in interstate waters of Duluth-Superior Harbor was not unreasonable burden on interstate commerce.

9343. Contents of affidavit.

1. In general.

Upon the coming in of a denial it is for plaintiff to prove by affidavit allegations of affidavit. Reiling v. W., 202M576, 279NW579. See Dun. Dig. 657.

Upon compliance with statutory requirements writ issues as a matter of right. Id. See Dun. Dig. 623.

2. Departed from state, etc.

Restatement of conflict of laws as to domicile and Minnesota decisions compared. 15MinnLawRev668.

3. Transfer with intent to defraud.

That defendant is in the act of moving upon land to make the same a statutory homestead, nor that more than a year prior to the attachment defendants had offered and attempted to reconvey land to the creditor in satisfaction of note sued on which was given for part of the purchase price of such land, held not to constitute fraudulent disposition or attempt to dispose of the property so as to justify attachment, there being no circumstances indicating fraudulent intent. 172M547, 216 NW231.

An affidavit for attachment is good which charges that defendant has "disposed of his property and is about to * * * dispose of other property with the intent to delay or defraud his creditors. First State Bank of New Germany v. H., 187M502, 245NW829. See Dun. Dig. 636.

Affidavit for attachment that defendant had assigned and disposed of part of her property with intent to delay and defraud creditors and was about to assign and dispose of rest of her property with like intent, held sufficient. Callanan v. C., 188M609, 248NW45. See Dun. Dig. 623, 636.

An actual personal intent to delay or defraud creditors is necessary to support an attachment. A preferential transfer or payment, without actual fraud, does not constitute a disposition of property with intent to delay and defraud creditors, so as to authorize the issuance of a writ of attachment. Reiling v. W., 202M576, 279NW579. See Dun. Dig. 629(56).

9345. Issuance, contents and scope of writ.

2. Held attachable.

Is interest of conditional buyer of personal property attachable? 13MinnLawRev247.

9346. Execution of writ.

2. Levy on personalty.

Situs of corporate stock under the Uniform Stock Transfer Act for purposes of attachment. 23MinnLaw Rev381.

9347. Inventory, service, and return.

This section is applicable to returns on writs of attachment made under §2150. Op. Atty. Gen. (474b-4), Nov. 14, 1935.

All amounts collected by sheriff pursuant to attachment under §2150 should be turned over to county treasurer at once, such payments to be subsequently shown by return of sheriff. Id.

9350. Motion to vacate.

½. In general.

Where there is conflict in the affidavits or evidence presented on a motion to vacate an attachment, the determination of the trial court will be sustained unless it is manifestly contrary to the affidavits or evidence presented. Phillips Petroleum Co. v. J., 182M237, 234NW 11. See Dun. Dig. 662(51).

A writ may be vacated either because statute has not been complied with in its allowance and issuance or because statements of affidavit for its allowance are untrue. Reiling v. W., 202M576, 279NW579. See Dun. Dig. 653(20).

5. Practice on hearing.

Where affidavit for attachment and defendant's denial of facts set forth were sufficient, burden was upon plaintiff to establish a cause in rebuttal. Callanan v. C., 188M609, 248NW45. See Dun. Dig. 657n40.

9. Appeal from order dissolving.

Determination of trial court dissolving an attachment will not be reversed unless manifestly contrary to evidence. Reiling v. W., 202M576, 279NW579. See Dun. Dig. 662.

GARNISHMENT

9356. Affidavit—Garnishee summons—Title of action.—In an action in a court of record or justice court for the recovery of money, if the plaintiff, his agent or attorney, at the time of issuing the summons, or at any time during the pendency of the action, or after judgment therein against the defendant, files with the clerk of the court, or, if the action is in a justice court, with the justice, an affidavit stating that he believes that any person (naming him) has property or money in his hands or under his control belonging to the defendant, or that such person is indebted to the defendant, and that the value of such property or the amount of such money or indebtedness exceeds twenty-five dollars, if the action is in the District Court, or ten dollars if in a justice court, and if the plaintiff files with such affidavit a copy of the complaint when the complaint has not been theretofore either served on the defendant or filed in said action, and, provided further, that no fee be charged by the Clerk of the Court for filing said copy of complaint, a summons may be issued against such person, as hereinafter provided, in which summons and all subsequent proceedings in the action the plaintiff and defendant shall be so designated, and the person against whom such summons issues shall be designated as garnishee. (R. L. '05, §4229; G. S. '13, §7859; '27, c. 300; Apr. 17, 1929, c. 215.)

Garnishment proceedings usually have to do with personal property only. 176M18, 222NW509.

Title to promissory note in custody of third person may be transferred by oral agreement. 176M18, 222NW 509.

Garnishment does not lie in an action for specific performance, where merely as an incident to the relief asked, an accounting of rents and profits is sought, without allegation as to the probable amounts thereof. 176 M522, 223NW922.

A garnishment proceeding is not a suit which is removable to the federal court under Mason's U. S. Code Tit. 28, §§71, 72. 177M182, 225NW9.

Garnishment was not permitted in action to cancel assignment of note and mortgage. Williamson v. G., 178 M381, 227NW430.

By answering and appearing generally in the main action defendant confers jurisdiction over his person both in the main action and in garnishment proceeding, and garnishee by appearing in garnishment proceeding gives jurisdiction over himself. Chapman v. F., 184M318, 238NW637. See Dun. Dig. 3961.

Requirements that summons in main action must be issued and affidavit with copy of complaint filed before issuance of a garnishee summons are jurisdictional. Chapman v. F., 184M318, 238NW637. See Dun. Dig. 3961.

Garnishment is an ancillary, not an independent action. Gilloley v. S., 203M233, 281NW3. See Dun. Dig. 3949.

From service of summons to entry of judgment, garnishment is but a single proceeding, adversary in character, resulting in a determination of liability of garnishee. Id.

Garnishment may issue "at the time of issuing the summons" in the main action, or "at any time during the pendency of the action, or after judgment therein." Melin v. A., 285NW830. See Dun. Dig. 3969.

Garnishment action is deemed begun when summons is served upon defendant or is delivered to the proper officer for service. Id. See Dun. Dig. 3949.

Where garnishee voluntarily appears and discloses he thereby waives defects in garnishee affidavit and summons, and irregularities taking place prior thereto are not jurisdictional, but it does not follow that thereby main defendant is prevented from taking advantage of such defects if he acts promptly. Id. See Dun. Dig. 3961, (74, 75).

What constitutes issuance of summons. 16MinnLaw Rev441.

9357. Proceedings in justice court.

A justice of the peace is entitled to his fees for preparation of notice to the defendant in garnishment proceedings and for making a copy which is made a part of the notice by reference. Op. Atty. Gen., Sept. 30, 1930.

9358. In district court.

Maras v. B., 192M18, 255NW83; note under §9214.

Wells v. C., 194M275, 260NW520; note under 9359.

The garnishee having failed to make a disclosure under oath, judgment was properly taken against him by default. Security State Bank of Lewiston v. T., 184M156, 238NW52. See Dun. Dig. 4008(62), 4011.

Fatal defect in service of garnishee summons was immaterial where there was general appearance by duly authorized agent of garnishee. Security State Bank of Lewiston v. T., 184M156, 238NW52. See Dun. Dig. 3970 (53).

Service of a garnishee summons on a person, described only as an auditor and agent of garnishee where garnishee is named as Harris, Upham & Co., without any showing whether said garnishee is a corporation or partnership, or, if a corporation, whether foreign or domestic, is defective. Maras v. B., 192M18, 255NW83. See Dun. Dig. 3971, 7814.

Where jurisdiction is obtained of person of defendant in main action steps taken to bring in garnishee are not jurisdictional as to him. Melin v. A., 285NW830. See Dun. Dig. 3961.

A party may institute garnishment proceedings and carry them through the disclosure without leave of court, but proceedings subsequent to disclosure are under control of court. Gudbrandsen v. P., 287NW116. See Dun. Dig. 3970.

9359. Effect of service on garnishee—Fees.

Garnishment attaches and binds all the property and money in the hands of or under the control of the garnishee at the date of the service of the garnishee summons. First State Bank of New York Mills v. W., 185 M225, 240NW892. See Dun. Dig. 3957.

Garnishment against a non-resident is a proceeding in rem, and jurisdiction can be acquired only by seizing property under such process, and then only to the extent of the property seized. First State Bank of New York Mills v. W., 185M225, 240NW892. See Dun. Dig. 3949(33).

Where no property is seized in an action against a nonresident, the proceeding is subject to attack directly or collaterally at any time for want of jurisdiction. First State Bank of New York Mills v. W., 185M225, 240NW 892. See Dun. Dig. 5139.

A third party having levied under execution upon property claimed to be involved in garnishment proceedings has such an interest in the matter that he may intervene. First State Bank of New York Mills v. W., 185M225, 240NW892. See Dun. Dig. 3999.

Where a defendant has deposited money in a Minnesota savings and loan corporation under an agreement entitling her to a certificate for one share of capital stock for each $100 so deposited, and certificate representing such share has not been issued or delivered at time of service of garnishee summons upon corporation, court has jurisdiction to order garnishee to execute certificate and deliver same to sheriff for sale as upon execution to satisfy judgment obtained against defendant in main action. First Nat. Bank & Trust Co. v. M., 193M 626, 259NW546. See Dun. Dig. 3966.

Contents of a safety deposit box which can be opened only by simultaneous use of two keys, one of which depositor has, other of which bank retains, are not subject to garnishment. Wells v. C., 194M275, 260NW520. See Dun. Dig. 3967.

It is not contemplated that garnishee shall interest himself for protection of his creditor, defendant in original action. Knudson v. A., 199M479, 272NW376. See Dun. Dig. 3949, 3951.

It is fundamental that plaintiff can assert rights of defendant against garnishee only as of time of, and not before or after, service of garnishment summons. Gilloley v. S., 202M233, 281NW3. See Dun. Dig. 3957.

9359-1. Garnishee summons—when effective.—No garnishee summons served subsequent to the passage of this act upon the garnishee in any action whereby a sum of less than $100.00 is impounded shall be effective for any purpose after two years from the date of service thereof upon the garnishee unless the plaintiff, or his attorney, shall prior to the expiration of such time serve upon the garnishee an affidavit to the effect that the action against the defendant is being diligently prosecuted and that judgment therein has not been entered, or if entered, that the time to appeal has not expired and that the affidavit is made for the purpose of continuing the force and effect of the summons upon the garnishee for one year. The force and effect of the summons upon the garnishee may be extended from year to year if the facts in the case warrant it by serving a like notice prior to the expiration of the previous notice. No such garnishee summons served prior to the passage of this act upon the garnishee in any action shall be effective for any purpose after two years from the passage of this Act unless its force and effect upon the garnishee is extended prior to the expiration of said time by serving a similar affidavit upon the garnishee as provided for herein. (Act Apr. 20, 1931, c. 213, §§1, 2; Apr. 24, 1935, c. 241.)

9359-2. Same.

Superseded Apr. 24, 1935, c. 241, amending this act to read as set forth in §9359-1.

9360. Property subject to garnishment.

First State Bank v. W., 185M225, 240NW892; notes under §9359.

Wells v. C., 194M275, 260NW520; note under 9359.

1. Held garnishable.

Evidence held to support finding that no relation of trustee and cestui que trust existed between defendant and claimant of garnished funds. Coffin v. P., 190M160, 251NW19.

Money and property in hands of representatives of an estate are subject to garnishment. Fulton v. O., 195 M247, 262NW570. See Dun. Dig. 3966.

Contingency which will prevent garnishment is not presented by mere fact of denial by garnishee of obligation, contingency must affect actual liability of garnishee. Knudson v. A., 199M479, 272NW376. See Dun. Dig. 3949.

Sanatorium employees are not exempt from garnishment. Op. Atty. Gen. (90b), July 25, 1936.

3. Held not garnishable.

Claim under fire policy was not subject to garnishment, in absence of sworn proof of loss, even though there had been an adjustment of the amount of the loss. 172M43, 214NW762.

Where bills for labor and material remain unpaid by a contractor who has agreed to pay all of them as incident to the completion of his contract, money unpaid on such contract, is not subject to garnishment because its payment depends upon a contingency. 175M436, 221 NW677.

A plaintiff may not garnishee property in his hands belonging to defendant. Wood v. B., 199M208, 271NW447. See Dun. Dig. 7837.

Where debtor's automobile was seized and taken to creditor's garage, and garage company assigned its claim to its president, who commenced action, making garage garnishee, there was an abuse of process requiring dismissal of garnishment. Id.

Where there is no insurance coverage, insurer cannot be held liable either in action on policy or as garnishee in action against insured. Giacomo v. S., 203M185, 280 NW653. See Dun. Dig. 3967.

Moneys held by Minnesota Emergency Relief Administration as an agency of the state are not subject to execution or garnishment. Op. Atty. Gen. (843i), Nov. 1, 1934.

Employees of department of rural credit cannot be garnished. Op. Atty. Gen. (843i), Nov. 25, 1936.

4. In general.

Finding that money garnisheed was not a trust fund sustained. 174M504, 219NW765.

Money due to a contractor under a construction contract by terms of which contractor is obligated to pay for labor and materials used in executing the contract, but which contractor by terms of contract is not obligated to pay before he is to receive payment from his employer under contract, is not a contingent liability. Gilloley v. S., 202M233, 281NW3. See Dun. Dig. 3965a.

Garnishment of shares of corporate stock where certificates have not been issued. 19MinnLawRev808.

9360-1. Property subject to garnishment—Etc.

Section is constitutional. Franke v. A., 199M450, 272NW 165.

Statute is not limited to money due at time of passage of act. Id.

Section 9375 gives defendant right to have issue determined as against garnishee. Id. See Dun. Dig. 3982.

9361. In what cases garnishment not allowed.

First State Bank v. W., 185M225, 240NW892; notes under §9359.

Bank, to which depositor's account was pledged as security for loan exceeding value of pledge, with acceleration clause, held not subject to garnishment by creditor of depositor, there being nothing "due absolutely and without depending on any contingency," to the depositor. H. Lang & Co. v. N., (DC-Minn), 22FSupp689.

Claim under fire policy was not subject to garnishment in advance of sworn proof of loss, although there had been an adjustment of the amount of the loss under non-waiver agreement. 172M43, 214NW762.

The relationship between the garnishee and the defendant at the time of the service of the garnishee summons is the test of liability. 173M504, 216NW249.

A party shall not be adjudged a garnishee by reason of any liability incurred, as maker or otherwise upon any check or bill of exchange. 173M504, 216NW249.

Drawer of check was not subject to garnishment though check was given on condition that it should not be presented for payment until deposit was made in the bank. 173M504, 218NW99.

An unpaid check in the hands of a payee attorney, a part of the proceeds of which will, when collected, belong to his client, does not constitute garnishable money or property. Lundstrom v. H., 185M40, 239NW664. See Dun. Dig. 3967.

Contingency which will prevent garnishment is not presented by mere fact of denial by garnishee of obligation, contingency must affect actual liability of garnishee. Knudson v. A., 199M479, 272NW376. See Dun. Dig. 3949.

Subd. 3.

Bearer bonds situated in state may be subjected to jurisdiction of court in proceeding in rem or quasi in rem. First Trust Co. v. M., 187M468, 246NW1. See Dun. Dig. 2346.

9362. Examination of garnishee.

Security State Bank of Lewiston v. T., 184M156, 238 NW52. See Dun. Dig. 4008(62), 4011; notes under §9358.

Failure to present the affidavit of non-residency to the officer taking the disclosure was a mere irregularity not going to the jurisdiction over defendant in respect of the property reached by the garnishment. 171M280, 214NW26.

There was no abuse of judicial discretion in permitting a garnishee who was not represented by an attorney at the disclosure to make a supplemental disclosure. Douglas State Bk. v. M., 182M178, 233NW864. See Dun. Dig. 3985.

The garnishee is not estopped by the facts revealed by first disclosure; and plaintiff, with the information thereby gained, was in position to protect its rights on supplemental disclosure. Douglas State Bk. v. M., 182 M178, 233NW864. See Dun. Dig. 3985.

Refusal of attorney for automobile liability insurer to answer questions rendered judgment against such insurer as garnishee proper, where affidavits filed were not sufficient disclosure. Olds Motor Works v. B., 189M 639, 250NW567. See Dun. Dig. 4008, n. 62.

9364. Municipal corporations, etc.—Procedure.

Assignment of future wages pursuant to this section held not to preclude discharge of the assignor in bankruptcy. Strane v. S., (USCCA8-Minn), 87F(2d)365.

Mason's Stat. 1927, §§4135 to 4137, relating to assignment, apply to salary of elective county commissioner. Murphy v. C., 187M65, 244NW335. See Dun. Dig. 566.

A public school teacher may be garnisheed on open account or note. Op. Atty. Gen., Feb. 17, 1933.

School districts may accept assignments of wages issued by district employees. Op. Atty. Gen. (159a-1), May 2, 1934.

This section does not apply to state officers or state departments. Op. Atty. Gen. (843i), Nov. 1, 1934.

State officers and employees may assign earned salary or wages but cannot assign unearned salary or wages. Op. Atty. Gen. (270m-6), June 5, 1935.

Laws 1937, c. 95 [§§4137, 4137(n)] does not permit contract between state and officer or employee for monthly deduction. Op. Atty. Gen. (707b-11), July 28, 1937.

9366. Claimant of property to be joined.

181M404, 232NW631. See Dun. Dig. 3975.

3. Pleading—Burden of proof.

The use of the word "Bank" instead of "Company" in the name of the claimant did not affect the situation; no one was misled or prejudiced thereby. Hancock-Nelson Mercantile Co. v. M., 182M426, 234NW696. See Dun. Dig. 4001.

5. Practice.

A referee appointed by the court may bring in a claimant without a direct order of the court to do so. Hancock-Nelson Mercantile Co. v. M., 182M426, 234NW696. See Dun. Dig. 8318(42).

Third party claimant failing to appear and intervene in compliance with order held barred. Hancock-Nelson Mercantile Co. v. M., 182M426, 234NW696. See Dun. Dig. 3998.

6. Evidence.

Finding sustained that fund sought to be impounded by garnishment belonged to interveners rather than defendants. Pesis v. B., 190M563, 252NW454. See Dun. Dig. 4005a.

9367. Proceedings when debt or title is disputed.

½. In general.

Hancock-Nelson Mercantile Co. v. M., 182M426, 234NW 696; note under §9366.

Disclosure is not conclusive or final against plaintiff. Gilloley v. S., 203M233, 281NW3. See Dun. Dig. 3986.

1. Exclusive mode of controverting disclosure.

Mere fact that insurer denies liability does not relieve it from duty of responding if and when facts show liability. Knudson v. A., 199M479, 272NW376. See Dun. Dig. 3986.

2. Not matter of right.

When garnishee denies liability upon full disclosure, plaintiff is entitled to file a supplemental complaint against garnishee only by leave of court obtained upon a showing that there is probable cause that garnishee is liable as such. Gudbrandsen v. P., 287NW116. See Dun. Dig. 3991.

6. When not allowed.

Service of garnishment summons does not change rights of parties except insofar as same may transfer to plaintiff whatever claim defendant has against garnishee. Knudson v. A., 199M479, 272NW376. See Dun. Dig. 3955.

Named assured having given due notice of happening of accident, and garnishee liability insurer having defended him in action out of which plaintiff's recovery resulted, garnishee cannot complain of lack of notice from additional assured, absent showing of harmful result to garnishee. Id. See Dun. Dig. 3966.

7. Practice.

Garnishees being liable on public contractor's bond, or not at all, there could be no recovery as against them in absence of compliance with §9705. Shandorf v. S., 198 M92, 268NW841. See Dun. Dig. 3952.

A garnishment action is begun by the service of summons as of date thereof and a supplemental complaint in garnishment is a continuation of garnishment so begun and not commencement of a separate action. Gilloley v. S., 203M233, 281NW3. See Dun. Dig. 3949.

"Probable cause", means some showing by evidence which fairly and reasonably tends to show the existence of facts alleged. Gudbrandsen v. P., 287NW116. See Dun. Dig. 3995.

8. Fraudulent conveyances.

If garnishee holds property by title that is void as to defendant's creditors, he may be charged therefor although defendant could not have maintained such action. Knudson v. A., 199M479, 272NW376. See Dun. Dig. 3966.

10. Appeal.

Order granting plaintiff leave to file a supplemental complaint against a garnishee held not appealable. 172 M368, 215NW516.

9368. Time for appearance in garnishee proceedings.

Removal on default. 177M182, 225NW9.

9373. Amount of judgment.

Judgment may go against garnishee without notice to defendant as to whom jurisdiction has been obtained. Dahl v. N., 180M119, 230NW476(2).

Where such judgment has been paid defendant's motion filed four months later is properly denied. Dahl v. N., 180M119, 230NW476(2).

Insurer defending suit for damages against insured, held liable as garnishee for amount of judgment, in view of its conduct of the defense. 181M138, 231NW817.

9375. Court may determine value, make orders, etc.

Section 9360-1 does not deny to defendant any right it has to cross-examine state as garnishee. Franke v. A., 199M450, 272NW165. See Dun. Dig. 3986.

9376. Proceedings when garnishee has lien.

No judgment against garnishee was warranted where the only property he held was right of redemption from mortgage foreclosure. Douglas State Bk. v. M., 182M178, 233NW864. See Dun. Dig. 3967.

Plaintiff held not entitled to judgment against garnishee holding $10,000 mortgage as security for indebtedness of $5,000 where mortgage was long in default and defendant had notified mortgagor that he would satisfy mortgage if garnishee was paid. Rushford State Bank v. B., 194M414, 260NW873. See Dun. Dig. 4008.

9380. Minimum judgment in justice and district courts.

Where plaintiff abandoned a garnishment proceeding without giving any notice of that fact to the garnishee, who appeared in court on return date ready and willing to make a disclosure, court did not err in awarding costs to garnishee. Physicians and Dentists Ser. Bur. v. L., 196M591, 265NW820. See Dun. Dig. 4016.

9383. Discharge of attachment or garnishment.

Bond to release garnishment, reciting that there is a stated sum of money in the possession of the garnishee, held to estop the principal and sureties from denying that there was any garnishable property in the hands of the garnishee. 181M404, 232NW631. See Dun. Dig. 3975.

After the filing of an approved supersedeas bond in the Supreme Court, a prior garnishment or levy under execution may be vacated and released where respondent's rights are amply protected by the bond. Barrett v. S., 184M107, 237NW881. See Dun. Dig. 333.

INJUNCTION

9385. How issued—Effect on running of time.

Action to restrain interference with plaintiff's lawful use of its manufacturing plant, which had been closed by national guard to avoid mob violence, held not to have become moot though troops had been removed, where executive officers maintained they had right to such procedure. Strutwear Knitting Co. v. O., (USDC-Minn), 13FSupp384.

While courts of equity will not interfere with the action of corporate officers as to acts within their powers and which involve an exercise of discretion committed to them, it will stay those acts which are in excess of authority or in violation of their trust. 172M110, 215NW192.

Equity has jurisdiction to enjoin and abate nuisances, without jury trial. 174M457, 219NW770.

Court did not err in refusing defendant an injunction restraining plaintiff for all time from conducting business or having employment in its stockyards. (Mason's U. S. Code, Title 7, §181, et seq.) 175M294, 221NW20.

A contract whereby a surgeon and physician agrees not to practice his profession within a radius of 25 miles from a small municipality for a period of 5 years, is valid and protection will be given by injunction. 175M431, 221NW642.

Injunction does not lie against a municipality and its officers to restrain enforcement of special assessments after they are certified to county auditor. 176M76, 222NW518.

One or more taxpayers may enjoin the unauthorized acts of city officials, seeking to impose liability upon the city or to pay out its funds. 177M44, 224NW261.

The city is not an indispensable party to a suit by taxpayers to enjoin unauthorized acts of city officials. 177M44, 224NW261.

One having only a purported contract, signed by a city official is not an indispensable party. 177M44, 224NW261.

Injunction was proper remedy to restrain city from improperly revoking taxicab license. National Cab Co. v. K., 182M152, 233NW838. See Dun. Dig. 4480.

Relief by injunction against the laying out of a public street, where nothing has been done except the adoption by the city council of a preliminary resolution appointing commissioners to view the premises and assess benefits and damages, is premature. Heller v. S., 182M353, 234NW461. See Dun. Dig. 4480.

Where no appeal is provided for from an order laying out the street, except on the question of benefits and damages, the landowner whose property is taken or damaged has an adequate remedy at law by certiorari to review all other questions raised. Heller v. S., 182M353, 234NW461. See Dun. Dig. 4472(44).

Court properly refused to enjoin former employee of oil company from taking employment with another oil company. Standard Oil Co. v. B., 186M483, 243NW701. See Dun. Dig. 4479a.

Injunction to restrain spreading of school tax will not issue where taxes involved have been spread and part of them collected. Republic I. & S. Co. v. B., 187M373, 245NW615. See Dun. Dig. 4467, 9535a.

Suit by bondholder prior to demand on trustee to sue. North Shore Co. v. B., 188M433, 247NW505.

District court has no jurisdiction to enjoin administrator from selling land under license of probate court. Mundinger v. B., 188M621, 248NW47. See Dun. Dig. 7770, 7770c.

Easement for highway is sufficient title to support injunction by state. State v. Nelson, 189M87, 248NW751. See Dun. Dig. 4155, 4157, 4180.

Fact that defendant's conduct is criminal is no bar to relief by injunction to which plaintiff would otherwise be entitled. State v. Nelson, 189M87, 248NW751. See Dun. Dig. 4190, 7271.

The criminality of an act, or series of acts, does not bar injunctive relief if otherwise there is ground for it. Fitchette v. T., 191M582, 254NW910. See Dun. Dig. 4483c.

Injunction is a proper remedy to prevent a layman from practicing law. Id. See Dun. Dig. 4483a.

Cheese factory being a lawful business, and entitled to a reasonable use of creek in common with all riparian owners, above and below, court should only enjoin that use thereof which evidence shows to be productive of nuisance. Satren v. H., 202M553, 279NW361. See Dun. Dig. 7271.

Title to public office will not be tried in a suit for injunction against a claimant. Doyle v. R., 285NW480. See Dun. Dig. 4486.

Courts should be reluctant to interfere with political matters by granting equitable relief. Repsold v. I., 285NW827. See Dun. Dig. 4485.

Court will not grant injunctive relief against violators of statutes where there is an adequate remedy at law. State v. O'Neil, 286NW316. See Dun. Dig 4472.

Injunction may be brought against places selling liquor illegally. Op. Atty. Gen. (494b-21), Apr. 30, 1936.

9386. Temporary injunction when authorized.

1. In general.

Injunction granted to enjoin enforcement of order of state industrial commission establishing minimum rates of wages for women and minors upon condition that employers give bond in order to insure employees the minimum wage prescribed in event order should be held valid. Western Union Telegraph Co. v. I., (DC-Minn), 24FSupp370.

When the nature of the questions which arise upon a suit for injunction makes them a proper subject for deliberate examination, and if a stay of proceedings will not result in too great injury to the defendants, it is proper to preserve the existing state of things until the rights of the parties can be fairly and fully determined. Id.

If the questions presented are grave and difficult and the injury to the moving party will be certain, substantial, and irreparable if the motion for temporary injunction is denied and the final decision is favorable, while if the motion is granted and the decision is unfavorable inconvenience and loss to the opposing party will be inconsiderable or he may be protected by a bond, the injunction usually should be granted. Id.

The granting of a temporary injunction rests in the discretion of the trial court. 172M179, 215NW215.

Granting or denial of a temporary injunction against the enforcement of an ordinance, always involves an element of discretion. 175M276, 221NW6.

A temporary injunction should not be made conditional on the surrender by the party to whom it is granted of a substantial cause of action or defense at issue in the suit. 177M318, 225NW150.

Restraining order to prevent city from paying expenses of officers in attending convention, held properly denied. 180M293, 230NW788.

Granting of a temporary injunction lies largely in discretion of trial court. State v. Nelson, 189M87, 248NW751. See Dun. Dig. 4490.

Where, on application for temporary injunction, it appears from verified complaint and supporting and opposing affidavits that a bona fide issue is raised that can be determined only upon a trial of such issue and there is reasonable probability that plaintiff may establish his right to an injunction, trial court may, in its discretion, order issuance of a temporary injunction. Mathwig v. O., 190M262, 251NW518. See Dun. Dig. 4490, 4495.

A temporary injunction should not issue where the complaint is demurrable for want of a necessary or indispensable party defendant. Cheney v. B., 193M586, 259NW59. See Dun. Dig. 4499a.

Trial court held not to have erred in granting a temporary injunction to restrain county board and county auditor from recommending to state tax commission a refundment of taxes on part of personal property owned by a corporation. School Dist. No. 1 v. L., 195M14, 261NW486. See Dun. Dig. 4480.

Generally injunction will not be granted against public officers to restrain them from exercising discretion where they are entrusted with discretionary power, and such officers will not be restrained from performing official acts which they are by law required to perform or acts which are not in excess of the authority and discretion reposed in them, but they may be enjoined where acting in breach of trust, or unlawfully or without authority or threatening to do so, and such acts will result in irreparable injury. Id. See Dun. Dig. 4485.

Object of a temporary injunction is to maintain existing condition until trial and decision of action. Id. See Dun. Dig. 4489.

Granting of a temporary injunction rests largely in discretion of trial court. Id. See Dun. Dig. 4490(89).

A temporary injunction is generally denied where answer fully and positively denies all equities pleaded in complaint, but that rule is not inflexible. Id. See Dun. Dig. 4490(94).

Possession is not essential to action to enjoin obstruction of prescriptive right of way over land. Schmidt v. K., 196M178, 265NW347. See Dun. Dig. 4476a.

Granting or refusal of a temporary injunction is within sound discretion of trial court. State v. Tri-State Telephone & Tel. Co., 198M537, 267NW489. See Dun. Dig. 4490.

Trial court did not abuse its discretion in denying plaintiff's motion for a temporary injunction to restrain a contract with public officials where it appeared that no contract would be entered into pending suit. Id.

Wisdom or expediency of a proposed expenditure of public moneys is to be determined by legislature or local authorities but whether a given expenditure is for a public purpose may be determined by court. Behrens v. C., 199M363, 271NW814. See Dun. Dig. 1589.

Although pleadings in a proceeding to obtain issuance of a temporary injunction will determine, as pleadings, whether case is one in which such a writ may issue, they will, if verified, be considered as affidavits tending to prove or disprove claims of respective parties. Id. See Dun. Dig. 4492.

Denial of equities will not prevent a temporary injunction from issuing. Id. See Dun. Dig. 4495.

On appeal from order granting temporary injunction, court does not go into merits of controversy. Id.

Generally a resident taxpayer has sufficient property interest in municipal funds to seek to enjoin the illegal expenditures thereof by municipal officers. Id. See Dun. Dig. 7315.

Object of a temporary injunction is to maintain matter in controversy in its existing condition until judgment so that effect of judgment shall not be impaired by act of parties during litigation. First Nat. Bank v. S., 201M359, 276NW290. See Dun. Dig. 4489.

Upon a showing that a subsequent encumbrancer has tendered to a prior encumbrancer entire amount due on a mortgage, together with costs, disbursements, and attorney's fees required by statute, court may enjoin foreclosure of mortgage until disputed issues in case are determined. Id. See Dun. Dig. 4493.

While an injunction may issue to protect the possession of office incumbent against a claimant whose title is in dispute, issue of possession pendente lite becomes moot if claimant, under a certificate of election, goes into possession of the office. Doyle v. R., 285NW480. See Dun. Dig. 4486.

Purpose of a temporary injunction is to preserve status quo so that parties may not lose by their acts pendente lite impair effect of judgment to be rendered. Jannetta v. J., 285NW619. See Dun. Dig. 4489.

Where there is reasonable probability that plaintiff may establish a cause of action and the status quo ought to be preserved pending litigation, the issuance of a temporary injunction for such purpose is largely in the discretion of the trial court. Id. See Dun. Dig. 4490.

Where the trial court in issuing a temporary injunction indicated a willingness to modify it upon motion as being excessive in some respects, if the parties did not agree upon the modification themselves, this court will not consider any question of such excessiveness of restraint in the absence of presentation of the question below upon a motion to modify. Id. See Dun. Dig. 384.

When a small loan business, catering to the large class of the poor and necessitous wage earners, is so conducted that in every loan made usury statute is flagrantly and intentionally violated, and there is no adequate or effective remedy which borrowers are willing or able to use to obtain redress for violation, it constitutes a public nuisance which may be enjoined. State v. O'Neil, 286 NW316. See Dun. Dig. 4472, 4473.

Action for injunction being maintainable, interlocutory orders granting ancillary remedy of receiver and a temporary injunction must be upheld, where record shows no abuse of judicial discretion. Id. See Dun. Dig. 4490.

In action to enjoin violation of usury statute by small loan business court did not err in retaining receiver in custody of evidence, notes and documents pertaining to defendant's usury business pending outcome of trial. Id. See Dun. Dig. 4490.

Discretion to deny injunction against trespass and nuisance. 12MinnLawRev565.

2. Breach of contract.

Regardless of lack of mutuality of remedy, injunction will lie if court can by its decree assure parties that its operative effect will be wholly without injustice or oppression to either party. Peterson v. J., 204M300, 283NW 561. See Dun. Dig. 4479.

Where an established business has been sold with its good will and there is a valid covenant not to compete in certain territory, breach is regarded as controlling factor and injunctive relief follows almost as a matter of course. Id. See Dun. Dig. 4479.

5. Restraining suit or proceeding.

In action to enjoin foreclosure of $2,300 mortgage on ground that $1,500 thereof has been paid, it is held that mortgagor is entitled to relief asked. Granberg v. P., 195M137, 262NW166. See Dun. Dig. 4477.

Our district courts are courts of concurrent jurisdiction, and when one acquires jurisdiction over an action and parties thereto, it is an excess of jurisdiction for another, by injunctional proceedings against parties, to attempt to restrain further proceedings in court first acquiring jurisdiction. State v. District Court, 195M 169, 262NW155. See Dun. Dig. 2758, 4477.

9. Issuance of bonds.

Since legislature has provided an exclusive remedy for contesting validity of "elections" called and conducted in an illegal manner, a prayer for equitable relief premised solely upon alleged invalidity of school bond "election" was properly denied. Repsold v. I., 285NW 827. See Dun. Dig. 4480.

9387. Notice of application—Restraining order.

Issues of fact in a pending action are not triable on a motion for a temporary injunction. 177M318, 225NW 150.

In action to temporarily or permanently enjoin a sheriff from selling on execution certain real estate of which plaintiff claims to be the owner, execution creditor is a necessary party defendant. Cheney v. B., 193M 586, 259NW59. See Dun. Dig. 4499a.

9388. Bond required—Damages.

Where a bond is given on the issuance of a temporary injunction the court may permit the dismissal of the suit without prejudice, and leave the defendant to its remedy at law for damages on the injunction bond. United Motors Service v. Tropic-Aire, (CCA8), 57F(2d) 479.

Where temporary injunction was dissolved by order, and, without a vacation of that order or a reinstatement of the injunction, another order was made purporting to stay proceedings, held that surety was released. 177M103, 224NW700.

State is not required to furnish a bond in order to procure a temporary writ of injunction. State v. Nelson, 189M87, 248NW751. See Dun. Dig. 4499.

A judgment of voluntary dismissal by agreement of parties to action in which a restraining order has been issued is not an adjudication that restraining order was improvidently or erroneously issued. American Gas Mach. Co. v. V., 204M209, 283NW114. See Dun. Dig. 4499.

In suit on injunction bond, reasonable rental value of buildings during period when they would have been completed but for injunction is a proper measure of damages. Detroit Lakes Realty Co. v. M., 204M490, 284NW60. See Dun. Dig. 4499.

It was not reversible error for trial court to permit jury to assess damages for increased construction costs incurred because of injunction. Id. See Dun. Dig. 4499.

In suit on injunction bond, actual payment of attorney's fees is not a condition precedent to recovery therefor. Id. See Dun. Dig. 4499.

In action upon injunction bond to recover damages for improvident issuance of injunction, it was improper to strike whole answer as sham where it contained a qualified general denial and no specific allegation which took the question of damages out of the general denial. Lund v. G., 285NW534. See Dun. Dig. 4499.

RECEIVERS

9389. When authorized.

1. In general.

The appointment of a receiver does not affect the rights of parties who dealt with each other in good faith before notice of the appointment. 172M24, 214NW750.

Contempt in failing to convey property to receiver. 172M102, 214NW776.

Propriety of ex parte appointment cannot be questioned in subsequent proceedings, where no appeal was taken from order denying motion to vacate the appointment. 172M193, 214NW886.

Directions in order appointing receiver in mortgage foreclosure must be construed in harmony with law pertaining to foreclosures, and a receiver was not authorized to pay taxes or interest on prior incumbrances falling due subsequent to sale, and no income derived during the year of redemption could be applied to the payment of taxes or interest. 172M193, 214NW886.

Receiver could apply rents and profits to payment of such taxes and interest prior to foreclosure sale. 172 M193, 214NW886.

The duties of a receiver are to preserve the property pending receivership and all expenses as well as compensation for services are payable out of income and if that is insufficient out of the property itself. 173M10, 216NW252.

The selection of the receiver lies with the court appointing him. 173M493, 217NW940.

The appointment of a receiver where the court has jurisdiction is not subject to collateral attack. 175M47, 220NW400.

The propriety of making an appointment of a receiver is in a measure within the discretion of the trial court. 175M138, 220NW423.

In a proper case a receiver may be appointed without notice. 175M138, 220NW423.

If a party for whom a receiver is appointed without notice appears generally and is heard on the merits he cannot complain of earlier order because he was not served with notice. 175M138, 220NW423.

Without proof of insolvency or inadequacy of security, the non-payment of taxes, not shown to jeopardize title or security during year of redemption, does not warrant appointment of receiver in action to foreclose mortgage. 176M71, 222NW516.

Appointment of receiver held sufficient judicial determination of insolvency. Miller v. A., 183M12, 235NW 622. See Dun. Dig. 4573.

The management of the company, a foreign corporation, having been found diligent, efficient, and honest, and guilty only of mistakes which have been corrected and are not likely to be repeated, the business being large, going, and solvent, with nothing in its nature or condition to require such action, it was not an abuse of discretion to refuse to appoint a receiver to wind up its business in this state. Barrett v. S., 183M431, 237NW 15. See Dun. Dig. 8248.

Statute is not exclusive as to appointment of receivers and court may under its general equity powers appoint receivers in other cases in accordance with existing practice. Asleson v. A., 188M496, 247NW579. See Dun. Dig. 8248(31).

A receiver is not to be appointed when moving party has an adequate remedy at law. Id. See Dun. Dig. 8248 (33).

Purchasers of muskrats held not entitled to receivership against purchaser of land from fur farm company. Id.

Contract of purchase of muskrats in pairs held not to give purchasers lien upon property of fur farm company which was sold to a third party. Id.

When a creditor applying for appointment of receiver has no right to, interest in, or lien upon property in question, appointment will be refused. Id.

Appointment of a receiver for a judgment debtor's nonexempt property in proceeding supplementary to execution is discretionary with court. Ginsberg v. D., 191 M12, 252NW669. See Dun. Dig. 3549.

Matter of appointing a receiver lies largely in sound discretion of trial court. Schultz v. B., 195M301, 262NW 877. See Dun. Dig. 8248.

Appointment of a receiver is largely a matter of discretion to be cautiously and sparingly exercised, and action of court will not be reversed on appeal except for a clear abuse of discretion. House v. A., 197M283, 266 NW739. See Dun. Dig. 6460.

A district court has the power to appoint a receiver "ex parte" only in cases of extreme emergency. State v. District Court, 204M415, 283NW738. See Dun. Dig. 8249.

Court appointing receiver in mortgage foreclosure proceedings had jurisdiction of the reciever following sale under mortgage, receiver being an officer of the court. Fredin v. C., 285NW615. See Dun. Dig. 6463.

By two hearings upon notice and orders to show cause why receiver erroneously appointed ex parte should not continue pendente lite, error was cured or rendered innocuous. State v. O'Neil, 286NW316. See Dun. Dig. 8249.

Action for injunction being maintainable, interlocutory orders granting ancillary remedy of receiver and a temporary injunction must be upheld, where record shows no abuse of judicial discretion. Id. See Dun. Dig. 8249a.

2. Action by corporation against officer.

In a proper case a receiver may be appointed without notice. 175M138, 220NW423.

3. Controversy between corporation stockholders.

Miller v. A., 183M12, 235NW622; note under §9191.

A court of equity will protect minority stockholders against the fraud of a majority and preferred stockholders without voting power against stockholders having the sole voting power. 175M138, 220NW423.

Stockholders of a foreign corporation, which has forfeited its charter and terminated its existence, may prosecute an action for appointment of a receiver (and for judgment for money due to be entered in the name of the receiver) to marshal corporate assets in state, and to pay creditors and distribute residue to stockholders. Such an action does not seek the exercise of any visitorial power over the corporation. Lind v. J., 183M239, 236NW317. See Dun. Dig. 2185.

This section held without application in an action by stockholders of a foreign corporation which has forfeited its charter for the appointment of a receiver and the marshaling of assets and distribution thereof. Lind v. J., 183M239, 236NW317. See Dun. Dig. 2185.

That but three of ten directors, and one of three liquidating committeemen, were indebted to corporation, nothing more appearing, held not to show conflicting interests of such nature as to justify appointment of receiver. Zwick v. S., 186M308, 243NW140.

In absence of imminent danger of loss, or need for summary relief, a receiver should not be appointed for solvent corporation on petition of minority stockholders. Rule applied to banking corporation in voluntary liquidation and without creditors. Zwick v. S., 186M308, 243NW140. See Dun. Dig. 2138.

Right of minority stockholders to have a receiver appointed. 19MinnLawRev703.

4. Insolvent corporations.

A general creditor, by virtue of the power of equity or by virtue of this section, has a standing before the court equal to that of a judgment creditor as contemplated by section 8013, except as to the burden of proof. 173M493, 217NW940.

11. Foreign receivers.

Local receiver for foreign corporation. 16MinnLawRev 204.

13. Collection of assets.

A receiver cannot attack a chattel mortgage as void as to creditor because not recorded, without showing that he occupies a status to assail it. 175M47, 220NW 400.

G. S. 1923, §8345, does not apply to general creditor, but to such as are armed with process, or to a receiver representing creditors and vested with the right to attack. 175M47, 220NW400.

15. Claims against receiver.

A receiver cannot assert that the rights of creditors have intervened to defeat a claim of duress and undue influence, since the receiver has no greater right than the defendant in receivership. Winget v. R. (CCA8), 69F(2d)326. See Dun. Dig. 8247.

When receivers take over mortgaged real estate for the benefit of their trust estate, they are ordinarily obliged to pay current taxes as they accrue, whether the taxes are mere charges against and liens upon the property, or are the personal obligations of the owners. Hennepin County v. M. (USCCA8), 83F(2d)453, 31AmB(NS)89. Cert. den., 299US555, 57SCR16.

Preferences in prereceivership claims in equity receiverships. 15MinnLawRev261.

18. Accounting.

In receivership matter, evidence held insufficient to sustain order surcharging receiver's account in amount of $5,181.25, incident to conducting business of corporation. Dissolution of Fairmont Auto & Realty Co., 191 M603, 254NW907. See Dun. Dig. 2138, 2158.

19. Attorney's fees.

General counsel of lessee of railroad in receivership held properly denied an allowance from receivership estate for services rendered. Mitchell v. Whitman, (CCA 8), 94F(2d)917.

The fixing and allowance of fees of an attorney for a receiver are largely in the discretion of the trial court and will not be disturbed except for an abuse of such discretion. 173M619, 216NW784.

20. Fees.

Where there is due notice and opportunity to be heard, the court having jurisdiction and control over a receivership proceeding has power and jurisdiction to fix the fees of receivers and attorneys employed therein, so long as the proceeding is pending before the court. Todd v. H., 185M44, 240NW110. See Dun. Dig. 110.

9391–1. Deeds and conveyances validated.—That all deeds to real property within this State, heretofore given by a receiver or receivers appointed in another state where the sale was confirmed by a court of such state, be, and the same hereby are, declared to be in all respects legal and valid conveyances. This act shall not apply to any action now pending. (Act Mar. 12, 1935, c. 41.)

JUDGMENT

9392. Measure of relief granted.

½. In general.

Res judicata. 172M290, 215NW211.

A judgment entered in a default case did not exceed the prayer in the complaint. 181M559, 233NW586. See Dun. Dig. 4996(70).

A judgment entered on a verdict directed for the defendant on the ground that the defendant was not authorized by the law under which it was organized to execute the promissory notes alleged as causes of action by the receiver of the payee bank, is not a bar to action for money had and received. Turner v. V., 182 M115, 233NW856. See Dun. Dig. 5184(18).

One obtaining a judgment in an action to cancel a deed for costs and disbursements could not maintain a subsequent action to recover damages for expenses incurred, disbursements made and attorney's fees, etc. Benton v. B., 183M584, 237NW424. See Dun. Dig. 5163.

1. On default.

Where judgment is entered against a defendant by default, relief granted must be within allegations of complaint and within demand for relief. Union Central Life Ins. Co. v. P., 190M360, 251NW911. See Dun. Dig. 4996.

2. After answer.

Rule that court is without jurisdiction to dispose of issues not tendered by the complaint, or toward relief beyond its scope, does not apply where issue is joined and there is a trial resulting in judgment. 176M117, 222NW527.

Judgment for defendant on action on contract, held not bar in subsequent action in conversion. 178M93, 226NW417.

Where proof shows a right of recovery under allegations of a complaint it should be had, even though it falls short of establishing all its averments. Cashman v. B., 195M195, 262NW216. See Dun. Dig. 5041.

Where a contract for sale of a burglar alarm system guaranteed efficient operation of system and agreed to return to vendee full purchase price if vault of vendee was entered and loss sustained, system failing to respond, and a money loss considerably less than purchase price was sustained when burglars entered vault and system failed to warn of burglary, and trial court found that damages were liquidated by contract and defendant does not appeal nor plaintiff complain of that feature of case, question of liquidated damages is not determined, but trial court erred in requiring return of property on repayment of purchase price, since it was not a suit for rescission. Satanta State Bank v. O., 196M430, 265NW303. See Dun. Dig. 8624.

In action for damages for failure to furnish a title to real estate consistent with terms of purported agree-

ment, unverified replies denying generally matters of public record set up in verified answers may be stricken and judgment ordered entered for defendants on a showing, by affidavits, that allegations therein were sham. Berger v. F., 198M513, 270NW589. See Dun. Dig. 7664.

A judgment is conclusive, as between parties, of facts upon which it is based and all legal consequences resulting from its rendition, and it may be enforced by parties thereto, though judgment may be also for benefit of a third party. Ingelson v. O., 199M422, 272NW270. See Dun. Dig. 1895, 5154, 5155, 5161, 5162.

Recovery cannot be had in an action for malpractice for technical assault upon ground that patient did not consent to treatment administered by physician and surgeon, where upon trial negligence was only ground of recovery asserted, and right of recovery for such assault and battery was asserted for first time on motion for new trial. Nelson v. N., 207M505, 276NW801. See Dun. Dig. 5041.

3. Conclusiveness and collateral attack.

Where action was dismissed in this state on the ground of rendition of judgment in another state intervention of attorneys after such dismissal to vacate order of dismissal and permit enforcement of lien of attorney, held not a collateral attack on the foreign judgment. Bynam v. M., (USCCA8), 47F(2d)112. Cert. den. 283US854, 51SCR648.

A plea of nolo contendere is an admission of guilt only for the purpose of the case, and the defendants are not estopped to deny the facts upon which the prosecution was based in a subsequent civil proceeding. Twin Ports Oil Co. v. F., (DC-Minn), 26FSupp366.

Plaintiff's attorney held not concluded by a dismissal secured by plaintiff pursuant to a settlement. Id.

Oral evidence tending to show that summons had never in fact been served on corporation was a collateral attack on judgment, and was properly excluded in receivership proceeding. Miller v. A., 183M12, 235NW622. See Dun. Dig. 5141(7).

Judgment creditor having proven that the claim upon which the judgment rests existed prior to the conveyance, he need not prove that it was a valid claim. Larson v. T., 185M366, 241NW43. See Dun. Dig. 3908.

A judgment creditor attacking a conveyance as fraudulent cannot, as against the grantee, prove by the judgment roll or by the proceedings in the case that the judgment is upon a claim existing prior to the conveyance. Larson v. T., 185M366, 241NW43. See Dun. Dig. 3920(30), 5171.

In corporation mismanagement suit, plaintiff is barred from relief for matters covered by previous suit dismissed upon merits and for matters within scope of covenant not to sue. Butler v. B., 186M144, 242NW701. See Dun. Dig. 5159.

Judgment in prior case between same parties was conclusive as to findings. Farmers' State Bank, 187M155, 244NW550. See Dun. Dig. 5163.

Appointment of special administrator cannot be collaterally attacked in action by him to recover damages for death of decedent. Peterson v. C., 187M228, 244NW 823. See Dun. Dig. 3563.

A judgment against receiver is res judicata as against creditors. Lamson v. T., 187M368, 245NW627. See Dun. Dig. 5177.

A judgment in action between owner in possession of real property and one claiming rights therein under a void foreclosure sale, when such judgment is properly registered and declares foreclosure void and adjudges title in such owner, becomes a link in owner's chain of title, and is admissible in evidence even against a stranger to judgment. Fuller v. M., 187M447, 245NW617. See Dun. Dig. 5171, 5191.

Judgment, entered long after date when title is in issue, does not bar a stranger thereto from showing, if he can, that, on prior material date, adjudged owner had no title. Fuller v. M., 187M447, 245NW617. See Dun. Dig. 5171, 5191.

Judgment roll entered upon insured's plea of guilty to charge of arson of property insured, is not admissible in action to which insured is not a party to establish defense pleaded, that he willfully set fire to such property with a criminal purpose. True v. C., 187M636, 246 NW474. See Dun. Dig. 5156.

Where a court has no jurisdiction to determine a particular issue in the action, its final order therein does not operate as res judicata. Muellenberg v. J., 188M398, 247NW570. See Dun. Dig. 5194a.

Court by affirming judgment, but stating that it was "without prejudice to appellant's (plaintiff) right formally to apply to the trial court for credit in the amount that the district has received for his land and the building thereon," did not bar plaintiff of any other remedy which he might have. Johnson v. I., 189M293, 249NW177. See Dun. Dig. 5168.

No litigated issue becomes res judicata until final judgment. Hallbom, 189M383, 249NW417. Aff'd 291US 473, 54SCR497. See Dun. Dig. 398, 5159, 5163.

Decision of state Supreme Court on federal issue vacated by United States Supreme Court on certiorari is of no effect whatever as law of case. Id. See Dun. Dig. 5187.

Judgment for defendant in action by remainderman to enforce oral remainder in personal property did not operate as estoppel against remainderman in second action to recover property under conveyance by donor after death of donee, first judgment being based on unenforcibility of oral remainder. Mowry v. T., 189M479, 250NW52. See Dun. Dig. 5159.

Where an action for personal injuries against two alleged tort-feasors resulted in a verdict for plaintiff against one of them and in favor of other and against plaintiff, judgment entered on that verdict held not res adjudicata in a subsequent action for contribution by unsuccessful against successful defendant in first action. Hardware Mut. Casualty Co. v. A., 191M158, 253NW374. See Dun. Dig. 1920, 5176.

Where facts are stipulated and no objection is made to consideration of such facts under pleadings, whatever issues are justified by stipulated facts must be considered litigated by consent. Engel v. S., 191M324, 254 NW2. See Dun. Dig. 5184a.

A dismissal of an action on defendant's motion at close of plaintiff's evidence, where defendant has not rested and does not move for a directed verdict or a dismissal on the merits, is not a bar to a second suit on same cause of action. Mardorf v. D., 192M230, 255NW 809. See Dun. Dig. 2750, 5180.

Finding of district court in one proceeding to have one adjudged feeble-minded that defendant was not so feeble-minded as to justify committing him to the custody of the board of control was not res adjudicata in a subsequent proceeding, the proceeding not being an action at law or governed strictly by rules applicable in a law suit. State Board of Control v. F., 192M412, 256 NW662. See Dun. Dig. 5160a.

Findings of industrial commission in proceeding against building contractor were not admissible in action at law against farmer and building contractor, who was acting as foreman in supervising construction of barn, plaintiff seeking recovery on theory that he was invitee while aiding farmer in construction, and the only material finding by the industrial commission being that plaintiff was not an employee of the building contractor, one ending commissioner's power to proceed further. Gilbert v. M., 192M495, 257NW73. See Dun. Dig. 5160a.

If, even by motion and order, an issue has been litigated and decided on merits in one action, judgment therein raises estoppel against again litigating same issue in a later action between same parties. Spears v. D., 193M149, 258NW149. See Dun. Dig. 5162.

Where administratrix brought action in another state upon life insurance policy and, before rendition of judgment for plaintiff therein, insurer was sued in this state by one claiming to be assignee of policy, payment of judgment to administratrix was no defense to suit by assignee who was not a party in other suit. Redden v. P., 193M228, 258NW300. See Dun. Dig. 4693, 4812, 5174.

Beneficiaries were bound by judgment authorizing testamentary trustees to exchange stock. Ferguson's Will, 193M235, 258NW295. See Dun. Dig. 9893.

A judgment in an action against principal for acts of his servant, rendered upon a trial of merits, is a bar to a suit against servant for same act. Myhra v. P., 193M 290, 258NW515. See Dun. Dig. 2531, 5161, 5162.

Judgment in negligence action precludes parties as to all issues and questions, all items of injury or damage, which were or could have been litigated therein. Id.

Plaintiff having sued for damages to his person and his car, cannot bring a later action to recover damages suffered by him by reason of injuries to his wife. Id. See Dun. Dig. 2531.

In a proceeding to examine and allow accounts of trustees, a decree of final distribution of probate court entered two years earlier cannot be collaterally attacked. Trust Created in and By Fogg's Will, 193M397, 259NW 6. See Dun. Dig. 7784, 9945.

Litigating with sheriff alone validity of lien of judgment upon land does not in any manner conclude judgment creditor. Cheney v. B., 193M586, 259NW59. See Dun. Dig. 5171.

Foundation principle upon which doctrine of res judicata rests is that parties ought not to be permitted to litigate same issue more than once; that when a right or fact has been judically tried and determined by a court of competent jurisdiction, judgment thereon, as long as it remains unreversed, shall be conclusive upon parties, and those in privity with them in law or estate. Herreid v. D., 193M618, 259NW189. See Dun. Dig. 5161, 5162, 5163.

A bank suing co-owners of a farm as partners on a note purporting to be signed by them as a partnership was not thereafter estopped in a suit by a third party to claim that there was no partnership and that certain co-owner was alone liable on theory of having signed under an assumed name, first action being settled and there being no findings or judgment. Campbell v. S., 194M502, 261NW1. See Dun. Dig. 5203.

Where, by stipulation, record, with objections and rulings, in election contest is made a part of case in action to set aside contract, and errors assigned therein are again assigned on appeal, affirmance of order denying a new trial in election contest precludes re-examination of questions settled therein, or questions that could have been therein adjudicated. Ahlquist v. C., 194M598, 261NW 452. See Dun. Dig. 5173(65).

Denial of a prior application to reduce alimony is not a bar to a subsequent application, if a change of financial ability is shown to have occurred after denial of first. Erickson v. E., 194M634, 261NW397. See Dun. Dig. 5166.

A judgment entered pursuant to an order sustaining a demurrer to a complaint on ground that it failed to state

a cause of action because of defective pleading in that it alleged in alternative facts constituting a good cause and facts which did not is not a bar to a subsequent action in which defective pleading is corrected so as to state a good cause of action. Rost v. K., 195M219, 262 NW450. See Dun. Dig. 5183.

Jurisdiction of district court over parties and subject-matter will be presumed unless want of jurisdiction affirmatively appears on face of record, or is shown by extrinsic evidence in a direct attack. Fulton v. O., 195 M247, 262NW570. See Dun. Dig. 2347.

A judgment for drug clerk who sold contaminated mineral oil from a dispensing jug is not a bar to recovery of damages from proprietor of a drug store who, jury might have found, either by himself or by his servants had permitted contamination of mineral oil, for quality of which he is responsible under Mason's Minn. St. 1927, §5813, there being no evidence that selling clerk was solely responsible for contamination. Berry v. D., 195M 366, 263NW115. See Dun. Dig. 5173.

Where action was started under moratorium statute to permanently postpone mortgage foreclosure by advertisement, and on order being granted ex parte, mortgagee made publication of no more notices of sale, and mortgagors did not appear at hearing and court dismissed their complaint and ordered the property to be sold on the date originally noticed, and no appeal was taken and property was sold, order dismissing complaint and authorizing sale was a barrier to a subsequent action by mortgagors to set aside sale because notice of sale had been published only four times. Tankel v. U., 196M165, 264NW693. See Dun. Dig. 6337.

A judgment or order, in proceedings for appointment of a guardian of an incompetent person and taking from such person the management of his property, is admissible in evidence in any litigation whatever, but not conclusive, to prove that person's mental condition at time order or judgment is made or at any time during which judgment finds person incompetent. Champ v. B., 197M49, 266NW94. See Dun. Dig. 4524.

Decree of partial distribution determines validity of bequest and power of legatee to take and use it for purpose directed by decree, and decree becomes final in absence of appeal, and only open question is proper construction and scope of decree. Wyman v. T., 197M62, 266 NW165. See Dun. Dig. 3660, 5137.

A release of liability on lump sum settlement of total disability liability under life policy, and judgment of dismissal based thereon, could not be set aside on ground of mistake in that all parties to agreement believed that insured was only temporarily disabled, there being no liability in absence of permanent total disability. Rusch v. P., 197M81, 266NW86. See Dun. Dig. 5123a.

A decree registering title is somewhat more conclusive and better protected from attack or opening up than an ordinary judgment. Lamprey v. A., 197M112, 266NW434. See Dun. Dig. 8363.

If, for same wrong, one is liable both for breach of contract and conversion, injured party may elect his remedy. If he sues for tort, and there have been successive and distinct conversions, he has right to sue upon them separately as independent causes of action. Lloyd v. F., 197M387, 267NW204. See Dun. Dig. 5167.

On appeal from a judgment in favor of a police officer for salary following improper discharge, a claim that writ of certiorari issued by district court to review proceedings before civil service commission was unauthorized and improper cannot be considered, no review having been sought of order or judgment entered in that proceeding. Sjoberg v. C., 197M406, 267NW374. See Dun. Dig. 398, 5159.

Where old widowed father conveys valuable property to daughter and son-in-law, consideration being to a substantial amount an agreement to furnish support by a way of board, room and washing during his lifetime, there is an element of confidence and expectation which will entitle the grantor to equitable relief for value of loss of board, room and washing, together with lien on property, where such differences have arisen between the parties that it would be unsafe to continue to be a member of the family, and it is no bar to such relief that prior action of the father for cancellation of the contract has been dismissed. Priebe v. S., 197M453, 267NW376. See Dun. Dig. 5159.

In state court under federal employers' liability act, wherein defendant alleged contract to sue only in state where injury occurred and asked for determination of validity of contract and its specific performance, fact that in an action for same injuries federal district court upon similar pleadings and order, not appealed from, removed cause from law to equity side to first determine existence and validity of contract, was not res adjudicata. Detwiler v. L., 198M185, 107ALR1054n, 269NW367. See Dun. Dig. 5163.

In action for damages for being kept out of possession, finding that, in a former action to vacate a judgment for restitution entered in municipal court district court had found that said judgment has never been vacated or modified and that plaintiff has not waived his right to proceed thereunder, is decisive against defendants. Hermann v. K., 198M331, 269NW836. See Dun. Dig. 5163.

Denial of motion to strike out complaint as sham and frivolous did not bar a subsequent motion to strike out reply as sham and frivolous. Berger v. F., 198M513, 270 NW589. See Dun. Dig. 5159.

In action to determine adverse claims to real property, where plaintiff pleaded a judgment in a former action as a bar to defendants' claim of title through a deed, allegations in complaint in former action were sufficient to support action to quiet title and on authority of Mitchell v. McFarland, 47M535, 50NW610, and it was not necessary that complaint in former action allege that plaintiff was in possession of land or that it was vacant property. Whitney v. C., 199M312, 271NW589. See Dun. Dig. 5163.

A motion to vacate an extension order under moratorium statute and an order of default on ground of invalidity of foreclosure due to failure to file power of attorney was a direct and not a collateral attack. Orfield v. M., 199M466, 272NW260. See Dun. Dig. 5139a.

Where rights of parties to a contract are settled by a judgment, legislature cannot, by subsequent enactment, change such rights. Twenty Associates v. F., 200M211, 273NW696. See Dun. Dig. 1622.

Whenever a cause of action has been reduced to judgment and such judgment remains in full force and unreversed, original cause of action is merged therein and gone forever. Id. See Dun. Dig. 5170.

While, in order that attack thereon may be considered direct, vacation of questioned judgment need not be sole purpose of litigant objecting thereto, such vacation must be initial and primary objective, as distinguished from one which is incidental and secondary, i.e., collateral to another purpose. Melgaard's Will, 200M493, 274NW641. See Dun. Dig. 5138.

An appeal, writ of error, or other proper motion is a direct attack upon an order or a judgment, as is also a bill in equity to annul judgment, or a proper action under the statute (§§9283, 9405), but latter remedy is not exclusive, and is only concurrent with remedy by motion. Id.

A judgment procured with jurisdiction but by fraud is voidable, not void. It stands until vacated in a proceeding adequate to the purpose; that is, by direct attack. The distinction between fraud intrinsic to judgment is irrelevant to question whether an attack is collateral or direct. Rule of some cases that orders of district court respecting annual accounts of trustees have only prima facia effect is applicable only where orders are made ex parte; that is, without notice and opportunity for hearing. Id. See Dun. Dig. 5143.

In certiorari to review conviction for contempt in violating a temporary injunction, latter is under collateral attack which must fail unless injunction is shown to be a nullity. Reid v. I., 200M599, 275NW300. See Dun. Dig. 5138.

If injunction suit be erroneously decided and, without findings of fact, an injunction issues upon ground that no labor dispute is presented, decision, even though erroneous, is not subject to collateral attack in proceedings to punish a violator for contempt. Id. See Dun. Dig. 5139.

While a judgment is res judicata as to issues between judgment creditor and judgment debtors, it is not so as to those between the latter which were not litigated and so not settled by judgment. Kemerer v. S., 201M239, 276 NW228. See Dun. Dig. 5186.

Court, on plaintiffs' motion for a new trial, rightly refused to amend complaint for specific performance by substituting either a complaint for reformation of contract or one for money had and received, since dismissal is not a bar. Martineau v. C., 201M342, 276NW 232. See Dun. Dig. 5180.

If probate court lacked power to permit filing of outlawed claim and power to allow claim so filed, its action in so doing was invalid and subject to directed attack even after time for review by appeal or motion had expired. Flewell, 201M407, 276NW732. See Dun. Dig. 5142.

Strict rule of res adjudicata does not apply to motions in a pending action, and district court has jurisdiction and may in its discretion allow renewal of a motion to vacate a judgment and relieve from default, and irregularity of failing to procure leave to make it is cured by overruling of objection to hearing of second motion. Wilhelm v. W., 201M462, 276NW804. See Dun. Dig. 5181.

Judgment in proceedings for appointment of a guardian of an incompetent person is admissible in evidence, but not conclusive, in any litigation, to prove mental condition of person at time judgment is rendered, or at any time during which judgment finds person incompetent, though an adjudication of insanity and commitment to an insame asylum is evidence of insanity. Schultz v. O., 202M237, 277NW918. See Dun. Dig. 4517.

Domestic judgment of a court of general jurisdiction may not be attacked collaterally by parties or their privies for want of jurisdiction not affirmatively appearing on face of record, and extrinsic evidence is not permissible to show want of jurisdiction or that proof of service is false. Siewert v. O., 202M314, 278NW162. See Dun. Dig. 5141.

An instruction that an affidavit of service, which is part of judgment roll, is entitled to same weight as if party making it had testified personally to fact of service, is not objectionable. Siewert v. O., 202M314, 278NW 162. See Dun. Dig. 5058.

District court having jurisdiction to create a trust in favor of a minor who had no general guardian and to

approve settlement in behalf of a minor by his father, its action in approving settlement could not be attacked collaterally in a suit by a general guardian subsequently appointed. Ernst v. D., 202M358, 278NW516. See Dun. Dig. 5137.

A judgment recovered against a principal in a bond for a breach of its conditions, in an action in which surety is not a party, is not evidence against surety of any fact except its rendition. Gilloley v. S., 203M233, 281NW3. See Dun. Dig. 5176.

Probate courts are courts of record and their orders and judgments are not subject to collateral attack in field entrusted to them by constitution, but a motion by a ward to expunge erroneous statements from record is not a collateral attack. Carpenter's Guardianship, 203 M477, 281NW867. See Dun. Dig. 7774.

One not a party is not bound by anything that might be determined in suit to quiet title. Kohrt v. M., 203M494, 282NW129. See Dun. Dig. 8058.

A final decree of distribution of probate court is not subject to collateral attack and void for uncertainty of description, where it assigns all property of deceased to heir entitled thereto without having described property with particularity, even though such property is not described in inventory. Baumann v. K., 204M240, 283NW242. See Dun. Dig. 3660.

A judgment is not binding upon one not a party or in privity with a party. Dart v. M., 204M363, 283NW538. See Dun. Dig. 5172.

Judgment in favor of husband was not res judicata or binding as to wife in subsequent suit by her against judgment debtor, she not being party to first action. Id. See Dun. Dig. 5173.

Decision of commissioner of patent office granting an application for patent is presumed to be correct. Grob v. C., 204M459, 283NW774. See Dun. Dig. 7419a.

Where decree of mortgage forclosure was granted, appointing a receiver of rents and profits, and mortgagee purchased land for full amount of mortgage indebtedness, a motion by defendant for an order requiring receiver to file his account and surrender the property during period of redemption was not objectionable as an attack upon the judgment, only directing court's attention to facts subsequently occurring. Fredin v. C., 285NW615. See Dun. Dig. 5166.

A decree of distribution, including construction of a will, is conclusive upon heirs, devisees, legatees, creditors' of decedent, and personal representative. Marquette Nat. Bank v. M., 287NW233. See Dun. Dig. 3660, 3778(23, 24).

Successive suits for installments under contract. 23 MinnLawRev99.

4. Foreign judgments—full faith and credit.

A judgment of the highest court of state as to meaning and effect of its own constitution is decisive and controlling everywhere. Western Union Telegraph Co. v. I., (DC-Minn), 24FSupp370.

Where both parties in divorce action in another state voluntarily appear and submit to jurisdiction of court, they are bound by judgment as to all matters litigated therein and cannot avoid it in a collateral proceeding in this state by proof that when action was brought and judgment rendered neither of them was a resident in that state, and that both were residents in this state, following in re Ellis' Estate, 55M401, 56NW1056, 23LRA287, 49 AmStRep514. Id.

Full faith and credit is not denied by requiring defendant railroad to dismiss suit which it began in courts of another state to restrain administratrix there from assisting in maintaining action for death of deceased in this state on ground that to do so would be violation of public policy of foreign state and would burden interstate commerce. Peterson v. C., 187M228, 244NW823. See Dun. Dig. 1698.

Where divorce decree of Iowa awarded custody of minor child to each parent alternately for six months of each year and mother subsequently established her domicile in Minnesota, Minnesota court has jurisdiction to determine minor's custody during mother's six months and is not bound by full faith and credit clause of federal constitution. State v. Larson, 190M489, 252NW329. See Dun. Dig. 5207.

Obligation imposed upon a divorced husband by a South Dakota decree to pay alimony to the divorced wife will be considered here as remaining one for alimony and not an ordinary debt. Ostrander v. O., 190M 547, 252NW449. See Dun. Dig. 2811, 5207.

A local statute authorizing resort to sequestration and contempt proceedings to compel payment of alimony includes an action brought to compel payment of unpaid installments under a foreign judgment for alimony; local action on that judgment being itself a case where "alimony" is decreed. Id.

Judgment of disbarment entered by supreme court of another state should be given full faith and credit, unless procedure therein was wanting in due process or court of that state committed a probable error. Leverson, 195M42, 261NW480. See Dun. Dig. 678, 5207.

Whether attorney disbarred in another state was properly served in that state with notice and pleadings is a matter that cannot be determined by court of this state where exemplified record indicates that service of process was duly made. Id. See Dun. Dig. 5207.

Where plaintiff's right to alimony was litigated in a divorce action brought against her in another state, she cannot thereafter maintain an action therefor in this state. Norris v. N., 200M246, 273NW708. See Dun. Dig. 5192.

A minor child's domicile follows that of his divorced parent to whom his custody was awarded by decree of divorce, and a judgment of a court of this state decreeing adoption of such child by his stepfather does not impair full faith and credit of divorce decree entered in court of another state, permitting father to see child. Buckman v. H., 202M460, 278NW908. See Dun. Dig. 5207.

So long as a judgment payable in installments is absolute in its terms and remains unmodified, or at least until an application for modification has been made, it is final as to installments which have accrued and is entitled to full faith and credit in the courts of a sister state in an action founded upon it. Ladd v. M., 285NW 281. See Dun. Dig. 5207.

A judgment of a sister state entered in pursuance of its illegitimacy statutes and intended for the support of the mother and child will be enforced by the courts of this state. Id. See Dun. Dig. 5207.

A judgment rendered by a state court without jurisdiction acquired by service of process upon defendant within the state is lacking in due process of law and is absolutely void, even in state of its rendition. Garber v. B., 285NW723. See Dun. Dig. 5207.

Judicial notice of public acts under the full faith and credit clause. 12MinnLawRev439.

Full faith and credit in a federal system. 20MinnLaw Rev140.

Extrastate enforcement of a tax judgment. 20Minn LawRev431.

5. Precedents.

Decision of district judge is decisive in his judicial district until it has been reversed by the supreme court. Op. Atty. Gen., Dec. 22, 1933.

Construction of bankruptcy act by United States Supreme Court prevails over any contrary interpretation by state courts. Landy v. M., 193M252, 258NW573. See Dun. Dig. 738.

Judicial construction of a statute, so long as it is unreversed, is as much a part thereof as if it had been written into it originally. Roos v. C., 199M284, 271NW582. See Dun. Dig. 8936b.

Rule of stare decisis is never properly invoked unless in decision put forward as precedent judicial mind has been applied to and passed upon precise question. Fletcher v. S., 201M609, 277NW270. See Dun. Dig. 8820.

Courts are as competent to get rid of groundless judge-made rules as the legislature, no vested rights depending on it. Rye v. P., 203M567, 282NW459. See Dun. Dig. 8819.

Doctrine of stare decisis, wise or unwise in its origin, has worked itself by common acquiescence into tissues of our law, and is too deeply rooted to be ignored. Melin v. A., 285NW830. See Dun. Dig. 8819.

9393. Judgment between parties and against several defendants.

4. Against one or more of several defendants.

When there is an allegation of a joint contract with two or more defendants and proof is of a several contract with one, there may be a recovery against one liable; and in such case there is not a failure of proof. Schmidt v. A., 190M585, 252NW671. See Dun. Dig. 5043, 7674.

Verdict establishes fact that driver of plaintiff's automobile was not a joint tort-feasor with driver of defendant's truck, with which automobile collided, as affecting effect of payment of damages by plaintiff's driver. Lavelle v. A., 197M169, 266NW445. See Dun. Dig. 8373.

9394. Same, how signed and entered—Contents.

½. In general.

Findings and conclusions of court held not to constitute judgment, and an appeal would lie from an order denying motion for new trial entered more than six months after entry of such findings and conclusions. Salo v. S., 188M614, 248NW39. See Dun. Dig. 316.

A judgment or decree if ambiguous will be given that construction which makes it such as ought to have been rendered in the light of the whole record, and where the parties have placed a practical construction upon a judgment or decree, that construction will not be changed except for strong reasons. Parten v. F., 204M200, 283NW 408. See Dun. Dig. 5049.

5. Notice.

A prevailing party may cause judgment to be entered without notice. Wilcox v. H., 186M504, 243NW709. See Dun. Dig. 5037.

9395. Judgment in replevin.—In an action to recover the possession of personal property, judgment may be rendered for the plaintiff and for the defendant, or for either. Judgment for either, if the property has not been delivered to him, and a return is claimed in the complaint or answer, may be for the possession or the value thereof in case possession cannot be obtained, and damages for the detention, or the taking and withholding. If possession cannot be obtained of the whole of such property but may be obtained for part thereof then the party entitled

thereto may have possession of the part which may be obtained and recover the value of the remainder or may elect to take judgment for the value of the whole of such property. When the prevailing party is in possession of the property, the value thereof shall not be included in the judgment. If the property has been delivered to the plaintiff, and the action be dismissed before answer, or if the answer so claim, the defendant shall have judgment for a return, and damages, if any, for the detention, or the taking and withholding, of such property; but such judgment shall not be a bar to another action for the same property or any part thereof; provided that in an action for the recovery of specific personal property by the vendor in a conditional sale contract therefor, or by his successor in interest, by reason of default in the terms of such conditional sale contract, where it shall appear that the defendant in said action is an innocent purchaser for value of said property and without actual knowledge of the existence of such conditional sale contract, in the event that the plaintiff shall prevail in said action, the measure of his recovery shall be the balance unpaid on said conditional sale contract with interest thereon at the rate fixed in said conditional sale contract, if any, reasonable attorney's fees to be approved by the court and the costs and disbursements of said action. (R. L. '05, §4267; G. S. '13, §7899; Apr. 18, 1931, c. 202, §1.)

Evidence held to sustain verdict of value of automobile at time action was brought. 172M16, 214NW479.

Judgment in former action in replevin for possession of threshing rig, held not bar to action for damages arising from fraud inducing signing of contract for purchase of the outfit. 178M40, 226NW415.

Retail price not conclusive as to value. 180M264, 230 NW778.

On replevin by mortgagee of chattel, where it appeared that property was in custody of federal court, and mortgagor a bankrupt, defendant was not entitled to a judgment for the value of the property. Security State Bk. of Ellendale v. A., 183M322, 236NW617. See Dun. Dig. 8425.

Where mortgaged property was worth more than amount of mortgage lien, defendant in replevin cannot justly complain of direction to enter judgment against him for amount of plaintiff's lien if possession of property cannot be had. Miller Motor Co. v. J., 193M85, 257 NW653. See Dun. Dig. 1480.

Measure of damages for wrongful detention of personal property is value of its use while so detained where it does not appear that property is of such nature that it necessarily or in fact perishes, or wears out, or becomes impaired in value in using. Bergquist v. S., 194 M480, 260NW871. See Dun. Dig. 8420.

One deprived of use of washing machine over a period of nearly three years by reason of defendant's wrongful taking and detention thereof, was entitled to verdict for $116.13. Id. See Dun. Dig. 8420.

Where losing party in replevin action no longer has possession of chattel, he has right to be discharged from liability upon payment into court of amount found by jury to be value thereof, plus interest and costs. Breitman Auto Finance Co. v. B., 196M369, 265NW36. See Dun. Dig. 8425.

9397. Damages for libel.—In an action for damages for the publication of a libel in a newspaper, the plaintiff shall recover no more than special damages, unless a retraction be demanded and refused as hereinafter provided. He shall serve upon the publisher at the principal place of publication, a notice, specifying the statements claimed to be libelous, and requesting that the same be withdrawn. And if a retraction thereof be not published on the same page and in the same type and said statement headed in 18 point type or larger "RETRACTION", as were the statements complained of, in a regular issue thereof published within one week after such service, he may allege such notice, demand and failure to retract in his complaint and may recover both special and general damages if his cause of action be maintained. And, if such retraction be so published, he may still recover general damages, unless the defendant shall show that the libelous publication was made in good faith and under a mistake as to the facts. If the plaintiff was a candidate for office at the time of the libelous publication, no retraction shall be available unless published on the same page and in the same type and said statement headed in 18 point type or larger "RETRACTION", as were the statements complained of, in a regular issue thereof published within one week after such service, and also in a conspicuous place on the editorial page, nor if the libel was published within one week next before the election: Provided, that this section shall not apply to any libel imputing unchastity to a woman. (Apr. 19, 1937, c. 299, §1.)

See notes under §9164.

An article falsely accusing a traveling salesman of being a bankrupt, taken in connection with the remainder of the article and the innuendoes set forth in the complaint, held libelous. Rudawsky v. N., 183M21, 235 NW523. See Dun. Dig. 5519(64).

Newspaper may be liable for general damages for libel, though it believed news article to be true and published a retraction, if it was negligent in not ascertaining truth. Thorson v. A., 190M200, 251NW177. See Dun. Dig. 5537.

Whether newspaper was negligent in publishing statement that plaintiff living at certain address had been arrested on a liquor charge, when person arrested was another person of same name residing out of county, held for jury. Id.

Where a demand is made on a newspaper to retract certain portions of a claimed libelous article and no retraction is made, plaintiff's cause of action for general damages is limited to such statements as are specified in demand. Echternacht v. K., 194M92, 259NW684. See Dun. Dig. 5537.

Statute does not affect recovery of special damages, but only recovery of general damages. Id.

9399. Judgment roll, how made up.

An affidavit of service which is part of judgment roll is admissible as part of judgment roll in action to renew a judgment. Siewert v. O., 202M314, 278NW162. See Dun. Dig. 5148, 5154, 5155.

9400. Lien of judgment.

8. Nature of lien.

Lien of judgment upon real estate is not affected by discharge in bankruptcy, although judgment debtor is relieved of personal liability. Rusch v. L., 194M469, 261 NW186. See Dun. Dig. 5068.

9. Duration of lien.

Lien of a judgment procured less than four months preceding filing of petition in bankruptcy is annulled thereby, even as to homestead set aside as exempt. Landy v. M., 193M252, 258NW573. See Dun. Dig. 741.

Without determining whether 10 year limitations is applicable, upon a decree of divorce awarding alimony until child should reach 18 years of age and imposing lien on real estate, a motion for an order requiring execution of a certificate of satisfaction of judgment made more than 6 years after child obtained age of 18 was denied on theory that 6 year limitation was not applicable. Akerson v. A., 202M356, 278NW577. See Dun. Dig. 5067.

Personal property tax judgment outlaws in ten years. Op. Atty. Gen. (421a-8), Dec. 31, 1937.

10. Upon what estates and interests.

Where by descent, plaintiff acquired his interest in real estate upon death of his mother, based upon her right to take title upon performance of conditions of an escrow agreement which were performed after her death and deed delivered, plaintiff got an equitable interest in property upon her death which was subject to lien of defendant's judgment against him. Rusch v. L., 194M469, 261NW186. See Dun. Dig. 5068.

A judgment lien on real property is not defeated by a homestead right acquired by judgment debtor after docketing judgment. Id.

A judgment for recovery of money, when docketed becomes a lien upon non-exempt real estate of judgment debtor in county "then or thereafter owned" by him within statutory lifetime of judgment. Lowe v. R., 201 M280, 276NW224. See Dun. Dig. 5070(61).

Personal property tax judgment is not a lien against judgment debtor's statutory homestead. Op. Atty. Gen. (421a-9). Sept. 14, 1934.

Land forfeited to state for taxes is not subject to lien of judgment entered against state pursuant to Laws 1933, c. 213, §11. Op. Atty. Gen. (425d-2), Apr. 26, 1938.

11. Conflicting liens.

Where owner gives mortgage and thereafter conveys away part of land, one who obtains judgment lien upon part retained has no right to require that tract conveyed away be first sold on foreclosure of mortgage. 175M541, 222NW71.

Judgment creditor of vendee in land contract loses his lien upon cancellation of contract by vendor. Peterson v. S., 188M272, 247NW6. See Dun. Dig. 5069.

Successive judgments take effect in order in which docketed and a junior judgment creditor cannot secure a preference by merely exercising superior diligence in taking steps to enforce it. Lowe v. R., 201M280, 276NW 224. See Dun. Dig. 5070(61).

Judgment creditors who have caused judgments to be entered and docketed against one who has no real estate

in county when judgments are so docketed, but who later acquires such, stand in same relative position to each other as would they if such property were his when docket entries were made. Id.

Priorities of judgment liens on after-acquired property—diligence of junior judgment creditors. 23MinnLawRev97.

9404. Assignment of judgment—Mode and effect.

A past-due sum or installment of alimony payable to a divorced wife is assignable. Cederberg v. G., 193M421, 258NW574. See Dun. Dig. 569.

9405. Judgments, procured by fraud, set aside.

Nystrom v. N., 186M490, 243NW704; note under §9283.

1. Nature of action.

Action does not lie to attack final and incontestable judgments. Hawley v. K., 178M209, 226NW697.

This statute gives remedy where none existed before. Murray v. C., 186M192, 242NW706. See Dun. Dig. 7689.

Neither decree in mechanic's lien foreclosure sale nor order confirming sale can be attacked in action to set aside judgment, remedy, if any, being in action in which decree was entered. Calhoun Beach Holding Co. v. M., 190M576, 252NW442. See Dun. Dig. 5125, 5138.

Trial court did not abuse its discretion in refusing to set aside orders allowing and confirming annual account of a trustee in order that beneficiary, who had consented to such order, could file objections to account. Fleischmann v. N., 194M227, 234, 260NW310. See Dun. Dig. 5108.

There can be no distinction made between a case in which a defense is actually made, but proves unsuccessful, and one in which there is a total failure to defend. Jordan's Estate, 199M53, 271NW104. See Dun. Dig. 5130.

Jurisdiction of probate court to vacate its orders and judgment is as great as power possessed and exercised by district court in like or similar matters. Id. See Dun. Dig. 7784.

Section held to have no application to an action upon bond of executor who had embezzled trust fund and had led beneficiary to believe that he was holding fund as trustee under decree of distribution. Shave v. U., 199M 538, 272NW597. See Dun. Dig. 3580i.

Proceedings to vacate judgment on ground that court was misled may be by action under §9405 or motion under §9283. Nichols v. V., 204M212, 283NW748. See Dun. Dig. 5108a.

3. Concurrent with remedy by motion.

An appeal, writ of error, or other proper motion is a direct attack upon an order or a judgment, as is also a bill in equity to annul judgment, or a proper action under the statute (§§9283, 9405), but latter remedy is not exclusive, and is only concurrent with remedy by motion. Melgaard's Will, 200M493, 274NW641. See Dun. Dig. 5126.

6. Complaint.

Complaint failing to show that there are facts substantiating charges of false testimony and fraud which were not known or available at the trial, fails to state cause of action for setting aside the judgment. 173M 149, 216NW800.

No prejudice could result to plaintiff by ruling excluding evidence, where judgment roll conclusively showed complaint failed to state facts to constitute a cause of action. Calhoun Beach Holding Co. v. M., 190M 576, 252NW442. See Dun. Dig. 422.

7. For perjury.

In action to set aside probate judgment for fraud and perjury, judgment held properly ordered on pleadings. Murray v. C., 186M192, 242NW706. See Dun. Dig. 7689.

Equity does not grant relief against a judgment simply upon ground that it was obtained by perjured testimony, there having been an extended trial and no claim that plaintiffs (who did not appear in proceeding) were, by fraud of defendants, prevented from appearing, presenting their claims, and having them litigated. Murray v. C., 191M460, 254NW605. See Dun. Dig. 5122, 5125.

Where an action has been fully litigated and upon appeal the decision affirmed, the defeated party may not again have a new trial on the ground that witnesses made mistakes or wilfully testified falsely in the trial. Nichols v. V., 204M212, 283NW748. See Dun. Dig. 5127, 5128, 5129.

8. For fraudulent practices on adverse party.

Fraud which will warrant court of equity in setting aside judgment relates to fraud, extrinsic or collateral, to matter tried by first court, and not to a fraud in matter on which decree was rendered. Jordan's Estate, 199M 53, 271NW104. See Dun. Dig. 5129.

10. In action for divorce.

In action to set aside decree of divorce on ground that it was obtained by fraud, burden of proof rested upon plaintiff. Osbon v. H., 201M347, 276NW270. See Dun. Dig. 5129.

In suit to set aside divorce judgment, whether defendant's decedent falsely represented to plaintiff that district judge stated that he would only allow $500 alimony, held for jury. Id. See Dun. Dig. 5131.

11. Laches.

Equity aids the vigilant, not those who sleep upon their rights. Jordan's Estate, 199M53, 271NW104. See Dun. Dig. 5134.

12. Relief which may be awarded.

Remedy afforded by this section may be put into effect either by motion or by an original action. Jordan's Estate, 199M53, 271NW104. See Dun. Dig. 5108a.

A motion to amend and substitute a new pleading calculated to present a direct attack on orders involved in former appeal but which states no cause of action, was properly denied by trial court. Melgaard's Will, 204M194, 283NW112. See Dun. Dig. 458.

Attack on decrees of divorce. 34MichLawRev749.

13. Limitations.

Section is a statute of creation, so that commencement of action within period fixed is condition precedent to right of action, and the period is not one of mere limitation upon remedy and need not be pleaded. Murray v. C., 191M460, 254NW605. See Dun. Dig. 5660.

This section is not applicable to a decree in land registration proceedings. Lamprey v. A., 198M112, 266NW 434. See Dun. Dig. 5126.

9406. How discharged of record.

A sale on execution and resulting satisfaction of judgment cannot be vacated on ground of mistake simply because a mortgage, subject to which property was purchased, was thereafter foreclosed, and property lost. Ridgway v. M., 194M216, 260NW303. See Dun. Dig. 3537a.

Where losing party in replevin action no longer has possession of chattel, he has right to be discharged from liability upon payment into court of amount found by jury to be value thereof, plus interest and costs. Breitman Auto Finance Co. v. B., 196M369, 265NW36. See Dun. Dig. 8426.

Without determining whether 10 year limitations is applicable, upon a decree of divorce awarding alimony until child should reach 18 years of age and imposing lien on real estate, a motion for an order requiring execution of a certificate of satisfaction of judgment made more than 6 years after child obtained age of 18 was denied on theory that 6 year limitation was not applicable. Akerson v. A., 202M356, 278NW577. See Dun. Dig. 5073.

9407. Satisfaction and assignment by state.—The state auditor of the attorney general may execute satisfactions and assignments of judgments in behalf of the state. (R. L. '05, §4280; G. S. '13, §7913; Apr. 15, 1929, c. 186.)

State auditor may not properly transfer unexpended balances appropriated to him after amendment of 1931 in timber, mineral and testing of low grade ore divisions to department of conservation without legislative enactment. Op. Atty. Gen., Mar. 9, 1933.

9408. Payment and satisfaction by clerk.

Where losing party in replevin action no longer has possession of chattel, he has right to be discharged from liability upon payment into court of amount found by jury to be value thereof, plus interest and costs. Breitman Auto Finance Co. v. B., 196M369, 265NW36. See Dun. Dig. 8426.

9410. Joint debtors—Contribution and subrogation.

Where one seeking contribution has intentionally violated a statute or ordinance, thereby causing injury to a third party, he is guilty of an intentional wrong and illegal act, and is not entitled to contribution from one whose mere negligence contributed to cause the injury. Fidelity Casualty Co. of New York v. C., 183M182, 236 NW618. See Dun. Dig. 1924.

Establishment of the common liability and its liquidation by judgment in favor of the injured party are not conditions precedent to recovery by one wrongdoer who has made a fair and provident settlement of the claim and then seeks contribution from a joint tortfeasor. Duluth, M. & N. Ry. Co. v. M., 183M414, 236NW 766. See Dun. Dig. 1920, 1922.

Judgment in former case held to bar action by former surety seeking indemnity. Maryland Casualty Co. v. B., 184M550, 239NW598. See Dun. Dig. 5176.

Statute was intended to make no change in substantive law of contribution, but only to provide a summary method for obtaining it. Kemerer v. S., 201M239, 276NW 228. See Dun. Dig. 5045.

Contribution and indemnity between joint tort-feasors. 16MinnLawRev73.

9411. Several judgments against joint debtors.

Maryland Casualty Co. v. B., 184M550, 239NW598; note under §9410.

The word "obligation" must be held to include parol as well as documentary contracts. 173M57, 216NW789.

Sections 9174 and 9411 are in pari materia. 173M57, 216NW789.

Liability for tort. 181M13, 231NW718.

Where a single injury is suffered as a consequence of wrongful acts of several persons, all who contribute directly to cause injury are jointly or severally liable, although there be no conspiracy or joint concert of action between them. De Cock v. O., 188M228, 246NW885. See Dun. Dig. 9643.

A canning company and city were not jointly liable for damages occasioned to farm by sewage dumped by

each respectively into a stream. Johnson v. C., 188M451, 247NW572. See Dun. Dig. 9643.

When there is an allegation of a joint contract with two or more defendants and proof is of a several contract with one, there may be a recovery against one liable; and in such case there is not a failure of proof. Schmidt v. A., 190M585, 252NW671. See Dun. Dig. 7674.

In action for death of one who was struck by both automobile and street car, which she was intending to board, jury's wrongful verdict for automobile driver would not entitle street railway to reversal of judgment against it. Kruchowski v. S., 191M454, 254NW587. See Dun. Dig. 9643.

One unconditionally guaranteeing payments of a note or bond or other obligations is primarily liable thereon. State v. Fosseen, 192M108, 255NW816. See Dun. Dig. 4076.

Failure of trustee for bondholders to file a claim in probate court against estate of a deceased cosurety within time specified by statute does not relieve other surety from liability. First Minneapolis Trust Co. v. N., 192M 307, 256NW240. See Dun. Dig. 9104.

Under a note reading "I promise to pay" etc., there is a several obligation, and a several judgment could be entered against person signing for partnership. Campbell v. S., 194M502, 261NW1. See Dun. Dig. 874.

Where negligence of several combine to produce injuries to another, any or all of authors of such negligent cause may be held to liability for entire harmful result directly flowing therefrom. Thorstad v. D., 199M543, 273 NW255. See Dun. Dig. 9643.

Rule that all parties jointly liable may be sued applies in tort as well as contract. Kemerer v. S., 201M239, 276NW228. See Dun. Dig. 5045.

Court suggests query with respect to whether equities of defendants in a tort case may be litigated and a judgment reached to settle whole matter, not only as between plaintiff and defendants, but also as between latter. Id.

Merger of a cause of action in a judgment thereon in favor of plaintiff has no effect upon liabilities as between codefendants, where such liabilities have not been made an issue and so not adjudicated by judgment. Id. See Dun. Dig. 5186.

Complaint alleging that tavern keeper unlawfully sold intoxicating liquor to a minor, that minor was arrested by a police officer, and was handed over to private individuals to be taken to jail, and by them beaten so that he died by reason of his intoxicated and weakened condition, held not to present proper basis for joint tort liability on part of tavern keeper, police officer and others. Sworski v. C., 204M474, 283NW778. See Dun. Dig. 9643.

One who has obtained separate judgments against joint tort-feasors may pursue one as far as he likes, and, failing to procure satisfaction, have execution against one or more of the other judgment debtors, or he may sue one and then another, until he obtains satisfaction. Penn Anthracite Mining Co. v. C., 287NW15. See Dun. Dig. 9643.

Release of one joint tort-feasor as a bar to right of action against others—judgments. 22MinnLawRev692.

9412. Discharge of joint debtor.

A judgment for drug clerk who sold contaminated mineral oil from a dispensing jug is not a bar to recovery of damages from proprietor of a drug store who, jury might have found, either by himself or by his servants had permitted contamination of mineral oil, for quality of which he is responsible under Mason's Minn. St. 1927, §5813, there being no evidence that selling clerk was solely responsible for contamination. Berry v. D., 196M 366, 263NW115. See Dun. Dig. 5043.

Release of one trustee as affecting other's liability for breach of trust. 23MinnLawRev550.

9414. On plea.

Section 7048 which declares that an instrument is none the less negotiable because it contains a provision authorizing entry of judgment on confession, in no way conflicts with this section. Keyes v. P., 194M361, 260NW 518. See Dun. Dig. 4973.

Section must be strictly complied with, and where instrument authorizing confession refers to note attached thereto and is not, in and of itself, sufficient to have any legal significance except when considered with and by reference to note, it is not a "distinct" instrument within statute and judgment attempted to be entered by confession thereunder is void. Id. See Dun. Dig. 4973.

9415. Submission without action.

State v. White, 176M183, 222NW918.

Distinction noted between submission on agreed case and trial on stipulated facts. Co. of Todd v. Co. of M., 182M375, 234NW593.

EXECUTIONS

9416. When enforced.

Material and labor lien upon motor vehicle is superior to the title acquired through an execution sale upon a levy made before the filing of the lien statement but after the furnishing of labor or material. Stegmeir v. L., 184M194, 238NW328. See Dun. Dig. 5579a, 5584a.

A judgment is conclusive, as between parties, of facts upon which it is based and all legal consequences resulting from its rendition, and it may be enforced by parties thereto, though judgment may be also for benefit of a third party. Ingelson v. O., 199M422, 272NW270. See Dun. Dig. 1895, 5154, 5155, 5161, 5162.

Without determining whether 10 year limitations is applicable, upon a decree of divorce awarding alimony until child should reach 18 years of age and imposing lien on real estate, a motion for an order requiring execution of a certificate of satisfaction of judgment made more than 6 years after child obtained age of 18 was denied on theory that 6 year limitation was not applicable. Akerson v. A., 202M356, 278NW577. See Dun. Dig. 3506.

Set-off of judgment. 20MinnLawRev435.

9417. Judgments, how enforced.

A judgment debtor is not guilty of contempt for making to convey to receiver pending appeal from order appointing receiver, but is guilty for failure to convey after affirmance and remittitur. 172M102, 214NW776.

A sheriff cannot enter a home by force for purpose of levying an execution, but debtor is guilty of resisting an officer in refusing to given up the property. Op. Atty. Gen. (390a-6), Feb. 7, 1935.

9419. Execution, how issued—Contents.

Interest may be allowed on a judgment for alimony. Bickle v. B., 196M392, 265NW276. See Dun. Dig. 4883.

In proceeding to establish a judicial road award of damages by commissioners bears interest from entry of order of court confirming it, as in case of any other judgment. Blue Earth County v. W., 196M501, 265NW329. See Dun. Dig. 4883.

9423. Execution against property, how executed.

Sheriff in levying on and selling land under execution under a judgment is merely a ministerial officer of the law, and is not agent of either party to the action. Cheney v. B., 193M586, 259NW59. See Dun. Dig. 3531.

In action to temporarily or permanently enjoin a sheriff from selling on execution certain real estate of which plaintiff claims to be the owner, execution creditor is a necessary party defendant. Id. See Dun. Dig. 4499a.

Sheriff, with execution, may break open garage doors for purpose of making levy on automobile after having first made demand for possession. Op. Atty. Gen., Aug. 2, 1932.

9425. What may be levied on, etc.

½. In general.

Where sheriff levied execution on certain personal property and thereafter attachment issued in action by another creditor and execution issued thereunder, proceeds of personal property attached and sold under second execution could not be applied upon execution first issued. Reaume v. W., 192M1, 255NW81. See Dun. Dig. 3523.

2. Held not subject to levy.

It appearing that judgment debtor had assigned debt of third person to him before levy, debtor cannot be charged with a debt in action by judgment creditor. 176 M461, 233NW776.

Alimony judgment cannot be taken on execution by wife's pre-existing creditor. Bensel v. H., 177M178, 225 NW104.

Money held by Minnesota Emergency Relief Administration as an agency of the state are not subject to execution or garnishment. Op. Atty. Gen. (843i), Nov. 1, 1934.

9429. On other personal property.

Where a levy has been made on alleged debt to a judgment debtor and debt is denied, recovery may be had only in an action and district court may not order a judgment against debtor on evidence taken at an examination held in supplementary proceedings. Freeman v. L., 199M446, 272NW155. See Dun. Dig. 3548.

Situs of corporate stock under the Uniform Stock Transfer Act for purposes of attachment. 23MinnLaw Rev381.

9431. On pledged or mortgaged chattels.

Where mortgagee of chattels obtained judgment and levied upon mortgaged property under execution, release of levy was not an election of remedies so as to bar right to proceed under mortgage. First Nat. Bank v. F., 190M102, 250NW806. See Dun. Dig. 2914.

9432. On growing crops, etc.

176M37, 222NW292.

9435. Sale, when and how.

Where owner gives mortgage and thereafter conveys away part of land, one who obtains judgment lien upon part retained has no right to require that tract conveyed away be first sold on foreclosure of mortgage. 175M541, 222NW71.

9437. Certificate of sale of realty.

2. Rights of purchaser.

A sale on execution and resulting satisfaction of judgment cannot be vacated on ground of mistake simply because a mortgage, subject to which property was purchased, was thereafter foreclosed, and property lost. Ridgway v. M., 194M216, 260NW303. See Dun. Dig. 3537a.

9438-1. Sale of real property under judgments legalized in certain cases.—In all sales of real property under judgments and decrees of the district court wherein the sheriff's certificates of sale were filed for record and recorded in the office of the proper registers of deeds prior to October 1, 1928, and within forty-five days, but not within twenty days after the dates of the respective orders confirming such sales, such certificates of sale and the records thereof are hereby legalized and validated to the same extent and with the same effect as though such certificates had been so filed for record and recorded within twenty days after the dates of such respective orders of confirmation. Provided, that the provisions of this act shall not apply to or affect any action or proceeding now pending involving the validity of such certificates or the records thereof. (Act Apr. 23, 1929, c. 294.)

9441. Order of redemption, etc.

½. In general.

Rule that priority of lien for purpose of redemption is determined by time of record, without reference to nature of estates in land owned by mortgagor or judgment debtor, was applied in determining priority of lien as between docketing of successive judgments. Lowe v. R., 201M280, 276NW224. See Dun. Dig. 3540, 3541c, 6415, 6416.

9443. Certificate of redemption—Effect.

Where sum of money was deposited with the clerk of court to await its further order, held that question of title was properly determinable by judgment in a plenary suit or upon issues framed and that trial court rightly refused to grant motion of one party that money be paid to him. 178M161, 226NW410.

9445-1. Creditor may redeem in certain cases.—That any creditor whose claim shall have been proved and allowed by a probate court of this state against the estate of a deceased debtor shall have the right, as a creditor of such decedent, to redeem the lands of the decedent from a sale thereof upon the foreclosure of a mortgage, or upon an execution, in the order and in the manner herein provided. (Act Apr. 15, 1929, c. 195, §1.)

9445-2. Creditor to file order with register of deeds.—For the purpose of such redemption a creditor whose claim against the estate of a decedent shall have been so allowed shall file for record in the office of the register of deeds of the county in which the real estate sought to be redeemed is situated, within the year of redemption, a certified copy of the order of the probate court allowing such claim, and thereupon such claim shall constitute a lien upon the unexempt real estate of the decedent sold upon foreclosure or execution. The creditor shall also within such time file a notice in the office of such register of deeds briefly describing the sale of the decedent's lands, a description of the lands sold, and stating, in a general way, the nature, date and amount of the claim of the creditor, and that he intends to redeem such lands from the sale thereof described in such notice. In the case of redemption from execution sales such notice shall also be filed in the office of the clerk of the district court in which such lands are situated. (Act Apr. 15, 1929, c. 195, §2.)

9445-3. Filing to determine priority.—In the event more than one such proved and allowed claim shall be so filed and recorded for the purposes of such redemption, then, as between the owners of such claims, their right to redeem shall be in the order in which such claims were originally filed, succession commencing with the oldest in point of time; that as to the creditors of the decedent having a lien or liens, either legal or equitable, upon the lands of a decedent and existing otherwise than by allowance in probate, the creditors of the decedent whose claims have been allowed in probate shall be subsequent or junior thereto. (Act Apr. 15, 1929, c. 195, §3.)

9445-4. Creditor may redeem when.—If no redemption is made by the personal representative of the deceased debtor, or by the assigns of such decedent, within one year after the date of such sale, or within one year after the date of the confirmation of such sale, as the case may be, the senior creditor having a lien, legal or equitable, upon the premises sold upon the foreclosure of a mortgage or upon execution, and subsequent to the mortgage or judgment lien under or by reason of which the premises were sold, including the creditors of a deceased debtor whose claims have been perfected and recorded as herein provided, may redeem within five days after the expiration of said twelve months by payment of the amount required by law for that purpose; and each subsequent creditor having a lien in succession, according to priority of liens, within five days after the time allowed the prior lienholder, respectively, may redeem by paying the amount aforesaid and all liens prior to his own held by the person from whom redemption is made. (Act Apr. 15, 1929, c. 195, §4.)

9445-5. Probate Court to determine amount.—Whenever any such creditor redeems from the foreclosure of a mortgage under the provisions of this act the probate court shall determine the amount that shall be credited on his claim against the estate. (Act Apr. 15, 1929, c. 195, §5.)

9445-6. Not to affect present law—Exception.—Except as in this act provided all such redemption shall have the force, and be governed by and subject to all of the requirements, of the statutes relating to the redemption of real estate from mortgage and execution sales now or hereafter in force. (Act Apr. 15, 1929, c. 195, §6.)

9447. Property exempt.

* * * * * * *

16. The wages of any person not exceeding thirty-five dollars, plus five dollars additional for each actual dependent of such person, due for any services rendered by him or her for another during thirty days preceding any attachment, garnishment or the levy of any execution against him or her, provided, that all wages paid to such person, and earned within said thirty day period, shall be deemed and considered a part of, or all, as the case may be, of said exemption of thirty-five dollars, plus five dollars additional for each dependent. Said exemption above referred to shall be allowed out of the wages of any such person as a right whether claimed or not, unless said employee, his agent or attorney, shall file with the court in which said action is pending his written waiver of all or part of such exemption; in the absence of proof of dependents he shall be entitled to an exemption of $35.00, in any event; and if proof is made by affidavit or testimony of additional dependents he shall be entitled to such additional exemption as provided by this Act; provided, that the party instituting garnishment proceedings shall pay the cost of any garnishment where the amount in the hands of the garnishee is wholly exempt. The exemption shall be allowed out of the wages of any such person and paid when due by the employer, as if no garnishment summons had been served. The spouse of such person, all minor children under the age of eighteen years and all other persons wholly dependent upon him or her for support are to be classed as dependents within the meaning of this Act, provided, however, that the maximum exemption in any case shall not exceed $50.00. The salary or wages of any debtor who is or has been a recipient of relief based on need shall, upon his return to private employment after having been a recipient of public relief, be exempt from attachment, garnishment or levy of execution for a period of six months after his return to employment, provided, however, that he may take advantage of such exemption provisions only once in every three years, provided, however, that agencies distributing relief shall at the request of creditors, or their agents or attorneys, inform them whether or not any debtor has been a recipient of relief based on need within

such period of six months. (As amended Apr. 21, 1933, c. 350, §1; Apr. 15, 1939, c. 263.)

16a. **Effective July 1, 1933.**—This Act shall not be effective until July, 1933. (Act Apr. 21, 1933, c. 350, §2.)

* * * * * * *

Subd. 14.
179M402, 229NW344. Certiorari granted, 51SCR25. Judgment vacated, 283US266, 51SCR416.
Applies to all beneficiaries whether resident or nonresident. 179M255, 228NW919.
Creditors could not impress proceeds of life insurance policies with claims based on fraud of insured after issuance of policies. Cook v. P., 182M496, 235NW9. See Dun. Dig. 3689.
Statutory exemption of proceeds of life insurance does not extend to property purchased therewith. Ross v. S., 193M407, 258NW582. See Dun. Dig. 3689.

Subd. 15.
Applies to all beneficiaries whether resident or nonresident. 179M255, 228NW919.
The United Mutual Life Insurance Company, insofar as it is transacting the insurance business of the Knights of Pythias, is to be regarded as a fraternal beneficiary association. Op. Atty. Gen., May 19, 1931.

Subd. 16.
Amended. Laws 1939, c. 263.
Defendant was entitled to exemption of $35 from wages earned 30 days preceding garnishment, but amount already paid covering such period must be included in amount claimed to be exempt. Op. Atty. Gen., May 10, 1933.
It is duty of officer making levy upon wages to determine amount of exemption to which an employee is entitled, and such exemption must be allowed out of the wages as a matter of right, whether claimed or not, and officer failing to ascertain the exemption is liable to the judgment debtor. Op. Atty. Gen. (843k), Apr. 20, 1935.

Subd. 18.
Set-off of judgment. 20MinnLawRev435.

Personal property taxes.
No personal property is exempt from seizure or sale under personal property tax judgment. Op. Atty. Gen., July 19, 1933.

General rules.
179M255, 228NW919.

9447-1. Veteran's pension, bonus, or compensation.—All moneys paid to any person as a Veteran's pension, bonus, adjusted compensation, allotment or other benefit by the State of Minnesota or by the United States are exempt from and shall not be liable to attachment, garnishment, seizure or sale on any final process issued out of any Court, for the period of one year after receipt thereof. (Jan. 27, 1936, Ex. Ses., c. 112.)

Sec. 2 of Act Jan. 27, 1936, cited, repeals all laws in conflict.
Fact that veteran is receiving money from federal government under adjusted service certificate is only a fact to be considered in determining whether veteran is entitled to relief. Op. Atty. Gen. (339q), June 27, 1936.

9447-2. Exemption of insurance policies.—The net amount payable to any insured or to any beneficiary under any policy of accident or disability insurance, or under accident or disability clauses attached to any policy of life insurance, shall be exempt and free and clear from the claims of all creditors of such insured or such beneficiary, and from all legal and judicial processes of execution, attachment, garnishment, or otherwise whatsoever. (Apr. 12, 1937, c. 191, §1.)

SUPPLEMENTARY PROCEEDINGS

9450. Order for examination of debtor.

1. General nature and object of proceeding.
Necessity of judgment at law and return of execution thereon as condition precedent to creditor's bill. 15MinnLawRev592.

9452. Examination.
A defendant who refused to testify or answer proper questions in a hearing before a referee in proceedings supplementary to execution is guilty of constructive contempt, and repeated evasions and untrue answers amount to a refusal to answer. 178M158, 226NW188.
The disclosure in proceedings supplementary to execution cannot be used in a criminal proceeding against the judgment debtor; but a fact shown in it may be considered in determining want of probable cause. Krienke v. C., 182M549, 235NW24. See Dun. Dig. 10339.
In proceedings supplementary to execution court did not have jurisdiction summarily on order to show cause to adjudicate as to rights of property not in possession or control of judgment debtor at time of appointment of receiver. Northern Nat. Bank v. M., 203M253, 280NW852. See Dun. Dig. 3543.

9453. Property applied to judgment—Receiver.
Punishment for contempt in failing to convey property to receiver. 172M102, 214NW776.

2. Appointment of receiver.
Appointment of a receiver for a judgment debtor's nonexempt property in proceedings supplementary to execution is discretionary with court. Ginsberg v. D., 191M12, 252NW669. See Dun. Dig. 3549.

2½. Injunction.
Evidence held insufficient to support a finding of violation of restraining order in supplementary proceedings. Ryan v. C., 185M347, 241NW388. See Dun. Dig. 3548, 4504.

9454. Adverse claimants, etc.
Where a levy has been made on alleged debt to a judgment debtor and debt is denied, recovery may be had only in an action, and district court may not order a judgment against debtor on evidence taken at an examination held in supplementary proceedings. Freeman v. L., 199M446, 272NW155. See Dun. Dig. 3548.

UNIFORM DECLARATORY JUDGMENTS ACT

The Uniform Declaratory Judgments Act has been adopted by: Alabama, Arizona, Colorado, District of Columbia, Idaho, Indiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Puerto Rico, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin, Wyoming.

9455-1. Courts to construe rights.—Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree. (Act Apr. 17, 1933, c. 286, §1.)

Declaratory Judgments Act authorizes a proceeding which amounts to a justiciable controversy. Reed v. B., 191M254, 253NW102.
In a proceeding under declaratory judgments act, it is essential that there be adversary interests and parties; that there be a real issue for determination; that there is an actual and legal, and not merely an academic issue; and that the decision rendered will be such as to finally settle and determine the controversy. County Board v. B., 193M525, 257NW92.
An intervener may not introduce new and foreign issues into action as joined by original parties in suit for declaratory judgment. Twin City Milk Producers Ass'n v. H., 199M124, 271NW253. See Dun. Dig. 4901a.
Where service of notices to terminate right of redemption were invalid, mandamus was proper remedy by landowner to secure from county auditor official certificate of amount required to be paid to redeem. Farmers & Merchants Bank v. B., 204M224, 283NW138. See Dun. Dig. 9432.
Constitutionality of declaratory judgments statutes. 16MinnLawRev559.
The Uniform Declaratory Judgments Act. 18MinnLawRev239.
Scope of declaratory judgment procedure in federal courts. 21MinnLawRev424.

9455-2. May have instruments construed.—Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder. (Act Apr. 17, 1933, c. 286, §2.)

9455-3. Contract may be construed—when.—A contract may be construed either before or after there has been a breach thereof. (Act Apr. 17, 1933, c. 286, §3.)

9455-4. Who may ask for construction.—Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto:

(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or other; or

(b) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings. (Act Apr. 17, 1933, c. 286, §4.)

9455-5. Not restricted.—The enumeration in Sections 2, 3, and 4 does not limit or restrict the exercise of the general powers conferred in Section 1, in any proceeding where declaratory relief is sought, in which judgment or decree will terminate the controversy or remove an uncertainty. (Act Apr. 17, 1933, c. 286, §5.)

9455-6. Court may refuse to enter decree.—The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding. (Act Apr. 17, 1933, c. 286, §6.)

9455-7. Orders, judgments and decrees may be reviewed.—All orders, judgments and decrees under this Act may be reviewed as other orders, judgments and decrees. (Act Apr. 17, 1933, c. 286, §7.)

Supreme court having arrived at same construction of trust agreement as court below from consideration of instrument alone, it is immaterial that incompetent evidence was introduced. Towle v. F., 194M520, 261NW5. See Dun. Dig. 424.

Order amending complaint so as to make city a party plaintiff instead of a party defendant was not an order involving merits of cause of action or any part thereof *and is not appealable, neither is order denying motion* to vacate order granting amendment. Gilmore v. C., 198 M148, 269NW113.

9455-8. Application to court for relief.—Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith. (Act Apr. 17, 1933, c. 286, §8.)

9455-9. Issues of fact may be tried.—When a proceeding under this Act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. (Act Apr. 17, 1933, c. 286, §9.)

9455-10. Costs.—In any proceeding under this Act the court may make such award of costs as may seem equitable and just. (Act Apr. 17, 1933, c. 286, §10.)

In action against trustee by beneficiaries under a trust created in a will, alleging negligence and wrongdoing in administration thereof and requesting a new interpretation of a provision of will and a surcharging of trustee's account, in which trustee prevailed in every respect, trustee was entitled to recover reasonable attorneys' fees paid in conduct of its defense. Andrist v. F., 194M 209, 260NW229. See Dun. Dig. 9944.

9455-11. Parties.—When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney-General of the State shall also be served with a copy of the proceeding and be entitled to be heard. (Act Apr. 17, 1933, c. 286, §11.)

Appellant's motion to vacate an order amending complaint so as to make defendant city a party plaintiff instead of a party defendant was timely under Barrett v. Smith, 183M431, 237NW15, and U. S. Roofing & Paint Co. v. Melin, 160M530, 200NW807. Gilmore v. C., 198M148, 269 NW113.

Upon ex parte application for a declaratory judgment for unpaid alimony and for execution trial court may, in its discretion, require notice of application to be given to other party to proceedings, even though statutes do not require giving of notice in such cases. Kumlin v. K., 273NW253. See Dun. Dig. 2811.

Courts do not hesitate to declare unconstitutional a statutory provision which arbitrarily and without reasonable justification prohibits a person from pursuing a lawful calling. Johnson v. E., 285NW77. See Dun. Dig. 1655.

9455-12. Act to be remedial.—This Act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered. (Act Apr. 17, 1933, c. 286, §12.)

9455-13. Definition.—The word "person" wherever used in this Act, shall be construed to mean any person, partnership, joint stock company, unincorporated association, or society, or municipal or other corporation of any character whatsoever. (Act Apr. 17, 1933, c. 286, §13.)

9455-14. Provisions separable.—The several sections and provisions of this Act except sections 1 and 2, are hereby declared independent and severable, and the invalidity, if any, of any part or feature thereof shall not effect or render the remainder of the Act invalid or inoperative. (Act Apr. 17, 1933, c. 286, §14.)

9455-15. To make law uniform.—This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees. (Act Apr. 17, 1933, c. 286, §15.)

9455-16. Uniform declaratory judgments act.—This Act may be cited as the Uniform Declaratory Judgments Act. (Act Apr. 17, 1933, c. 286, §16.)

Sec. 17 of act Apr. 17, 1933, cited, provides that the act shall take effect from its passage.

CHAPTER 78

Juries

9458. Number to be drawn.

Trial court did not abuse discretion in discharging entire jury panel and drawing new venire in murder case. State v. Waddell, 187M191, 245NW140. See Dun. Dig. 5239a.

9460. How drawn and summoned.

Laws 1929, c. 7, repeals Sp. Laws 1883, c. 314, as to making up jury lists in Washington county.

9468. Selection of jurors.—The county board, at its annual session in January, shall select, from the qualified voters of the county, seventy-two persons to serve as grand jurors, and one hundred and forty-four persons to serve as petit jurors, and make separate lists thereof, which shall be certified and signed by the chairman, attested by the auditor, and forthwith delivered to the clerk of the district court. If in any county the board is unable to select the required number, the highest practicable number shall be sufficient. In counties where population exceeds ten thousand no person on such list drawn for service shall be placed