1941 Supplement

To

Mason's Minnesota Statutes

1927

1939 to 1941

(Supplementing Mason's 1940 Supplement)

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

Edited by
the
Publisher's
Editorial Staff

MASON PUBLISHING CO.
SAINT PAUL, MINNESOTA
1941

order made in said probate proceedings and every conveyance of real estate made pursuant thereto and every decree of distribution made therein are hereby legalized and validated, as against the objection that a copy of the notice of any hearing, or hearings in said proceedings, was not mailed as above provided, or that proof of mailing such notice was not filed in the probate court. (Act Mar. 28, 1941, c. 79, §1.)

8992-188b. Same—Proceedings prior to June 1, 1939.—Nothing herein contained shall apply to any probate proceedings held subsequent to June 1, 1939, or affect any action now pending to determine the validity of any instrument validated hereby. (Act Mar. 28, 1941, c. 79, §2.)

CHAPTER 75

Courts of Justices of the Peace

GENERAL PROVISIONS

8993. Jurisdiction limited to county.

Justices of the peace are state officers and their courts are state courts, and city council of home rule charter city cannot remove a justice of the peace, regardless of charter provision. State v. Hutchinson, 288NW845. See Dun. Dig. 5263.

Alexandria being a home-rule charter city and its charter providing for justice of the peace courts, such justice courts have both criminal and civil jurisdiction within the city, notwithstanding that it also has a municipal court. State v. Weed, 294NW370. See Dun. Dig. 5263.

8994. Place of holding court.

Justice of the peace at Wayzata has no authority to hold court in city of Minneapolis for convenience of parties or an accused, but if he holds court in a town, village, or ward within his county adjoining the town or ward in which he resides, or in any village located within his town, he is entitled to 10 cents a mile for travel to and from place of holding trial. Op. Atty. Gen., (266a-13), Oct. 23, 1939.

COMMENCEMENT OF ACTIONS

9002. Actions, how commenced.

When a complaint is made to a justice for purpose of having a summons issued, issuance of summons is a ministerial duty, and it is not his duty at such time to determine whether or not a cause of action exists, though he may refuse to issue summons if the action is not one within his jurisdiction. Op. Atty. Gen. (266B-4), Oct. 31, 1940.

9003. Security for costs.

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

9012. Transfer of action.

A justice of the peace is not allowed a specific fee of $2.00 for transferring venue of a case, civil or criminal, to another justice. Op. Atty. Gen. (266B-25), Dec. 21, 1940.

JUDGMENTS

9046. Time of entry.

Editorial note.—The Soldiers' and Sailors' Civil Relief Act of March 8, 1918, has been revived. See Soldiers' and Sailors' Civil Relief Act of 1940, Mason's U. S. C. A., current pamphlet, Title 50. For cases under the old act see Mason's U. S. C. A., Appendix 1, Act 2151.

9047. For costs on dismissal.

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

CRIMINAL PROCEEDINGS

9110. Jurisdiction.

Justice of peace has no right to specify type of labor to be performed by prisoner. Op. Atty. Gen., (266B-20), March 6, 1940.

(4).

Alexandria being a home-rule charter city and its charter providing for justice of the peace courts, such justice courts have both criminal and civil jurisdiction within the city, notwithstanding that it also has a municipal court. State v. Weed, 294NW370. See Dun. Dig. 5340.

9127. Judgment on conviction.

Power to suspend sentence must be exercised at time of imposition of sentence. Op. Atty. Gen., (266B-21), Feb. 5, 1940.

9136. Certificate of conviction, etc.

Taxing jurors' fees as items of costs to be charged against county where jury failed to agree on verdict and justice dismissed case, discussed. Op. Atty. Gen., (266B-8), Dec. 28, 1939.

Municipal court need not file certificate of conviction under this section. Op. Atty. Gen. (306a), Aug. 9, 1940.

CHAPTER 76

Forcible Entry and Unlawful Detainer

Editorial note.—Remedies against soldiers and sailors, including draftees, are affected by the Selective Training and Service Act of 1940, §13, and the Soldiers' and Sailors' Civil Relief Act of 1940. See Mason's U. S. Code, October, 1940, Pamphlet, Title 50.

CHAPTER 77

Civil Actions

9164. One form of action—Parties, how styled.

COMMON LAW DECISIONS RELATING TO ACTIONS IN GENERAL

1. Election of remedy.

A frustrated attempt to pursue a wrong remedy is not an election which will bar one otherwise right. Heibel v. U., 288NW393. See Dun. Dig. 2914.

2. Conflict of laws.

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

Question whether court erred in denying motion for a directed verdict in action for personal injuries in federal district court of Minnesota must be determined by the law of Minnesota. Champlin Refining Co. v. W., (CCA8), 113F(2d)844.

The substantive rights of parties to an action are governed by the lex loci, that is, the law of the place where

the right was acquired or the liability was incurred which constitutes the claim or cause of action, while law of jurisdiction in which relief is sought controls as to all matter pertaining to remedial as distinguished from substantive rights. U. S. v. Rogers & Rogers, (DC-Minn)36FSupp79.

Creation and extent of tort liability is governed by law of place where tort was committed. Id.

Right of United States to maintain action against commission merchants for conversion in Minnesota of cattle covered by chattel mortgage to Farm Security Administration, filed in Wisconsin, depended on Wisconsin law. Id.

There is a presumption that party intended to contract with reference to law of state that would uphold their contract rather than one that would nullify it. State v. Rivers, 287NW790. See Dun. Dig. 1532.

Lex loci governs in all matters relating to right and lex fori in all matters relating to remedy. Daniel's Estate, 294NW465. See Dun. Dig. 1528.

Where cause of action does not survive under law of place where wrongful injury was cause, no action may be maintained although under law of forum such actions do survive. Id. See Dun. Dig. 1541.

Limitation of time within which an action may be brought relates to the remedy and is governed by law of forum. Id. See Dun. Dig. 1546.

State law that increase in interest after default is usurious and unlawful must give way before federal statute requiring Federal Farm Loan mortgages to bear increased rate of interest after default. McGovern v. F., 296NW473. See Dun. Dig. 1528.

6. Common counts.

One who pays money to a village under such circumstances that exaction is unlawful may recover as for money had and received. Moore v. V., 289NW837. See Dun. Dig. 6129.

The equitable doctrine of permitting recovery where there has been an unjust enrichment should have greater weight in determining rights of parties where postal money orders are issued than the doctrine of Price v. Neal, namely, that when the drawee of a bill of exchange, not knowing that the bill is forged, pays the same to an innocent holder, the drawee cannot recover the payments made. U. S. v. Northwestern Bank & Trust Co., (DC-Minn), 35FSupp484.

Equity recognizes the right to recover money paid through mistake, and negligence of the payor does not affect the right of such recovery. Id.

Where property has been sold on contract for deed, vendee may recover payments made prior to cancellation of contract as for money had and received when such fraud has been practiced upon him in procurement of contract as would have entitled him to rescind. Gable v. N., 296NW525. See Dun. Dig. 6128.

7. Equitable remedies.

In action by one trading an old car for breach of contract to sell a new car, wherein it appeared that there was a unilateral mistake on the part of the defendant as to encumbrance on old car and knowledge thereof on part of plaintiff, defendant would be entitled to reformation, but plaintiff's right to be put in status quo should be protected, the old car having been resold by defendant. Rigby v. N., 292NW751. See Dun. Dig. 8334a.

A mistake of one contracting party, with knowledge of it by the other, is as much a ground for relief as mutual mistake. Rigby v. N., 292NW751. See Dun. Dig. 8329.

8. ——Maxims.

Equity aids the vigilant and not the negligent. Sinell v. T., 289NW44. See Dun. Dig. 3142.

9. ——Adequacy of legal remedy.

Each person paying unconstitutional processing taxes has a speedy and adequate remedy at law, and the complaint fails to state facts entitling plaintiffs to maintain an action in equity for any equitable relief either for themselves or others similarly situated. Thorn v. G., 289 NW516. See Dun. Dig. 6126.

12. ——Abatement of nuisances.

See notes under §9580.

13. Torts.

Before a tort can be committed there must be an invasion of a legal right. U. S. v. Rogers & Rogers, (DC-Minn), 36FSupp79.

In tort actions for conspiracy, the conspiracy does not of itself furnish a cause of action since no damage results, but rather it is the overt acts committed in pursuance thereof that serve as footing for recovery. Cashman v. B., 288NW732. See Dun. Dig. 1562.

Where plaintiff sued for breach of contract and recovered a judgment which was satisfied, and assigned his claim for breach of another contract and assignee recovered judgment, which, in turn, was assigned to plaintiff, and not satisfied, plaintiff could not then institute an action for conspiracy and include among allegations as "actionable wrongs" two paragraphs embodying the acts causing the breach of contract included as acts done by defendants in "furtherance of the conspiracy." Id. See Dun. Dig. 1567c.

Embalming of a body without authority of persons entitled to possession gives cause of action for damages. Sworski v. S., 293NW309. See Dun. Dig. 2599.

The rights of privacy. 25MinnLawRev619.

14. ——Negligence.

Injuries to hotel guests, see also §5907.

Law does not require one to choose best way of escape from an imminent peril suddenly created by negligence of another. Stolte v. L., (CCA8), 110F(2d)226.

Owner of gasoline filling station was not an insurer of safety of invitee on his premises but was liable only for injury resulting from a breach of his duty of exercising ordinary care. Champlin Refining Co. v. W., (CCA 8), 113F(2d)844.

In action for injuries to invitee at filling station questions of negligence and contributory negligence held for the jury. Id.

If negligence of defendant was not a proximate cause of injury, plaintiff cannot prevail. Krtinich v. D., 287NW 870. See Dun. Dig. 6999.

In action by passenger on a street car which collided with a large truck coming out of an alley, negligence of motorman held for jury. Reiton v. S., 288NW155. See Dun. Dig. 1266.

Evidence warranted submission to jury of actionable negligence of operator of a public roller skating rink, for failure to use ordinary care in supervising lobby of rink so as to restrain young and thoughtless skaters from there playing tag, endangering others lawfully in use thereof. Johnson v. A., 288NW386. See Dun. Dig. 6988.

Instruction that "the care to be exercised by defendant is a care commensurate with the risks and dangers known or in the exercise of reasonable care to be anticipated" was not erroneous in action for injuries from thoughtless skaters on skating rink operated by defendant. Id.

Operator of a public amusement place is not an insurer of safety of patrons and is not responsible for unanticipated dangers created by some one of patrons to injury of another. Id.

There was negligence as a matter of law on part of a licensee who was injured by a fall down a dark basement stairs when she mistook door thereof to be entrance to lavatory. Plahn v. M., 288NW575. See Dun. Dig. 7023.

The standard of conduct as applied to contributory negligence takes no account of personal equasion of the man concerned. Peterson v. M., 288NW588. See Dun. Dig. 7012.

Negligence must be determined upon facts as they appeared at time, and not by a judgment from actual consequences which then were not to be apprehended by a prudent and competent man. Id. See Dun. Dig. 7021.

It is only when a defendant has been placed in imminent peril by some other person's negligence that emergency instruction may be given; not when he confronts danger by reason of his own conduct. Anderson v. G., 288NW704. See Dun. Dig. 7020.

Complaint showing knowledge of danger and intent to conceal it alleged a case of "wilful" negligence, though word "negligently" and "carelessly" were used as general characterization. Murphy v. B., 289NW563. See Dun. Dig. 7058.

Ordinary negligence is not an intentional tort. Id. See Dun. Dig. 6969.

Jury was warranted in finding no liability where abutting land owner built retaining wall so low that a blind man fell over it. Kooreny v. D., 291NW611. See Dun. Dig. 4190.

Holes placed by an abutting property owner in a retaining wall built and maintained by him, in the light of the evidence, did not as a matter of law present a link in the chain of negligent causation, such holes not being involved in blind man falling over wall. Id. See Dun. Dig. 6999.

Control within meaning res ipsa loquitur is not necessarily a control exercised at time of injury, but may be one exerecised at time of negligent act which subsequently resulted in an injury. Peterson v. M., 291NW 705. See Dun. Dig. 7044.

Res ipsa loquitur doctrine is essentially one of evidence rather than of tort law, and whether it should apply is largely a question of how justice in such cases is most practically and fairly administered. Id. See Dun. Dig. 7044.

Where housewife was temporarily blinded by an electric flash while operating an electric stove in usual manner, court properly applied res ipsa loquitur doctrine in action against power company which had installed stove a few days prior thereto. Id. See Dun. Dig. 7044.

An assurance of safety to a servant by his master is important only insofar as it induces servant to act in reasonable reliance on master's judgment as to safety of doing certain work rather than his own. Blume v. B., 291NW906. See Dun. Dig. 5986.

A servant assumes risk of injuries from dangers incident to work which he knows and appreciates, and danger of unsupported objects, such as a chimney, falling are obvious, imminent and apparent to the ordinary mind. Id. See Dun. Dig. 5974, 5986.

A verdict must stand where a jury could properly find that plaintiff had made an error in judgment which a reasonable man might make. Norling v. S., 293NW250. See Dun. Dig. 6020.

Servant using carbon tetrachloride to clean floors did not assume risk of death from fumes unless he was chargeable with knowledge of the danger. Symons v. G., 293NW303. See Dun. Dig. 5970.

Whether employee was guilty of contributory negligence in using carbon tetrachloride to clean floors, resulting in his death, held for jury. Symons v. G., 293 NW303. See Dun. Dig. 2616.

Where employer promises by repair, to remove danger, he assumes risk of injury to servant for a reasonable time thereafter, but under a promise by a wife "to tell" her husband and have him remove defect (an obstacle on floor of basement laundry in defendant's home) promise not being brought home to him so as to be binding, husband is not liable for having, by promise, assumed risk. Liptak v. K., 293NW612. See Dun. Dig. 5964.

Where a condition of danger is obvious, known to, and appreciated by, employee, and he continues work without protest, risk of danger is assumed by him. Id.

Where danger, if any, is obvious to sense of one of ordinary intelligence, discernable and open to employee, employer is under no duty to instruct or warn concerning it. Id.

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. Anderson v. J., 294NW224. See Dun. Dig. 7000(84, 85).

A given act is proximate cause of a given result where that act is a material element or a substantial factor in happening of that result. Id.

Where an injury is caused by concurrent negligence of several persons, negligence of each is proximate cause of injury and each is liable for all resulting damages. Id.

Burden of proving contributory negligence rests upon defendant, and it is ordinarily a fact question for the jury. Id. See Dun. Dig. 7032.

In action for property damages to an automobile for negligence in connection with servicing and greasing car, whether seller of car was guilty of negligence in not discovering loose studbolts in wheel and tightening them, held for jury. McLeod v. H., 294NW479. See Dun. Dig. 7033.

A retail dealer of automobiles who undertakes to repair and recondition them owes a duty to public and purchaser to use reasonable care in making of tests for purpose of detecting defects. Id. See Dun. Dig. 6974.

Gist of an action for recovery of damages for personal injuries received from a kick by a horse is neglect of owner or keeper of animal, known to be vicious and liable to attack, to restrain it. Lee v. S., 294NW842. See Dun. Dig. 275.

In action for injury to one kicked by a horse near sales ring, evidence held insufficient to show any connection between intoxication of owner of horse and injury to plaintiff. Id.

Negligence is presumed where an injury follows keeping of an animal known to be vicious. Id.

Evidence that horse, while being sold in sales ring, appeared nervous and, when subjected to a "hitch test," jumped, bucked, kicked up and was inclined to be balky, did not warrant finding that horse possessed vicious propensities towards human beings. Id.

Where evidence is such that reasonable minds might reach opposite conclusions as to defense of contributory negligence, it is error to direct a verdict against plaintiff. Fickling v. N., 294NW848. See Dun. Dig. 7033.

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 circumstances. Dahlstrom v. H., 295NW508. See Dun. Dig. 7020.

Evidence that hotelkeeper permitted presence of ice on foot mat in lobby entrance on which guest slipped, held sufficient to show negligence. Green v. E., 295NW 905. See Dun. Dig. 4513.

Negligence which is a material element or substantial factor in producing or happening of an injury is proximate cause although there is no physical contact or impact. Smith v. C., 296NW132. See Dun. Dig. 7000.

An act done in normal response to stimulus of situation created by actor's negligence is a substantial factor in bringing about injury and not an independent intervening cause. Id. See Dun. Dig. 7005.

Contributory negligence in an emergency is to be determined by whether or not plaintiff exercised the caution and judgment which could reasonably be expected from an ordinarily prudent person under the circumstances. Id. See Dun. Dig. 7020, 7021.

In action against gas company which installed a heater in a brooder with propane gas for fuel without installing a pipe to carry off flue product, whether there was contributory negligence in failing to open ventilator on hunting trip, held for jury. Ruth v. H., 296NW136. See Dun. Dig. 7033.

If all members of a hunting party were engaged in a joint enterprise in obtaining and using a Radiantfire heater with propane gas for fuel a warning to one of the hunters to keep place well ventilated was a warning to all, as affecting contributory negligence. Id. See Dun. Dig. 7037.

As to third persons, each member of a joint enterprise is agent of others, and act of one within scope of enterprise are acts of all. Id. See Dun. Dig. 7037.

Whether a party of hunters were engaged in a joint enterprise in obtaining a brooder house and having installed therein a Radiantfire heater with propane gas for fuel without a pipe to carry off gases, held for jury. Id. See Dun. Dig. 7037.

Negligence consists of breach of duty to injury of another. Id. See Dun. Dig. 6969.

Where evidence supports an inference that harm on which accident is based was caused by negligence of party injured, question of contributory negligence is one of fact. Id. See Dun. Dig. 7033.

Parties are engaged in a joint enterprise where all parties have a community of interest in purposes and objects of undertaking and an equal right in its control and management. Id. See Dun. Dig. 7037.

In action by city street employee struck by a street car, negligence and contributory negligence held for jury. Schuman v. M., 296NW174. See Dun. Dig. 9023.

When an event is followed in natural sequence by a result it is adapted to produce or aid in producing, that result is a consequence of the event, and the event is the cause of the result. Stenberg v. R., 296NW498. See Dun. Dig. 7003.

One faced with an emergency is bound to exercise only that caution and judgment which could be reasonably expected from an ordinarily prudent person under circumstances. Blom v. W., 296NW502. See Dun. Dig. 7020.

Where plaintiff was invited to bring her child to a theatre to try out in a "talent contest," and girl in box office directed her to go to stage entrance down an alley and she stepped into a hole covered by a piece of composboard upon which was placed pipes and two-by-fours by workmen who had temporarily left for lunch, negligence and contributory negligence were for jury. Radle v. H., 296NW510. See Dun. Dig. 9623b.

Doctrine of res ipsa loquitur asserts that whenever a thing which produced an injury is shown to have been under control and management of defendant, and occurrence is such as in ordinary course of events does not happen if due care has been exercised, fact of injury itself will be deemed to afford sufficient evidence to support a recovery in absence of any explanation by defendant tending to show that injury was not due to his want of care. Klingman v. L., 296NW528. See Dun. Dig. 7044.

Res ipsa loquitur doctrine did not apply in action by automobile guest who sat in front seat with driver and had full knowledge as to dangerous curve and speed and every movement of car during progress of trip until accident occurred. Id.

Where plaintiff by proving particulars of accident revealed its cause by competent and sufficient proof of negligence, he cannot invoke res ipsa rule, since rule falls where necessity is absent. Id.

Res ipsa loquitur doctrine rests upon inference and not presumption. Id.

It is not the accident but the circumstances that justify application of doctrine of res ipsa loquitur, and where plaintiff makes a prima facie case by showing accident with its attendant circumstances he thereby destroys application of it. Id.

Question of causal relation is ordinarily one of fact and should be determined by jury in exercise of practical common sense rather than by application of abstract principles. Sankiewicz v. S., 296NW909. See Dun. Dig. 7011.

Last clear chance doctrine and wilful and wanton negligence. 24MinnLawRev81.

Intervening crime and liability for negligence. 24Minn LawRev635.

Proximate cause and intervening criminal act. 24Minn LawRev666.

Collateral negligence. 25MinnLawRev399.

15. ——False imprisonment and malicious prosecution and abuse of process.

Where plaintiff sued for breach of contract and recovered a judgment which was satisfied, and assigned his claim for breach of another contract and assignee recovered judgment, which, in turn, was assigned to plaintiff, and not satisfied, plaintiff could not then institute an action for conspiracy and include among allegations as "actionable wrongs" two paragraphs embodying the acts causing the breach of contract included as acts done by defendants in "furtherance of the conspiracy." Cashman v. B., 288NW732. See Dun. Dig. 5745.

Before action for malicious prosecution can be maintained complaint must allege a termination in plaintiff's favor of original proceeding, and no such action will arise where it appears that proceeding was for insanity and plaintiff was submitted to insane asylum, though plaintiff were restored to capacity later. Linder v. F., 295NW299. See Dun. Dig. 5741(3).

Immunity of judicial officers to civil action for judicial acts cannot be avoided by pleading that acts complained of were results of a conspiracy previously entered into. Id. See Dun. Dig. 4959.

Where judgment was obtained without service of process and execution issued and levy made, actionable wrong was tortious taking of property notwithstanding that there were allegations of malice and other wrongful conduct, and rule that an action for malicious prosecution will not lie unless there has been a termination of action on merit favorable to plaintiff and dismissal solely upon jurisdictional grounds is not such termination, had no application. Beede v. N., 296NW413. See Dun. Dig. 7838.

17. ——Assault.

Defendant in action for assault and battery is not prejudiced by refusal of trial court to instruct jury concerning right of liquor establishment to eject unruly patrons where use of force by defendant was prompted by a motive other than that of removing party assaulted

from premises. Symalla v. D., 288NW385. See Dun. Dig. 9783.

License to use reasonable force to eject unruly customers from liquor establishments does not include privilege of brutally beating those reluctant to depart. Id. See Dun. Dig. 521.

Evidence that a party exhibited anger, used violent language and threatened to strike another while in his presence under circumstances indicating a present ability to carry out the threats is sufficient to show an assault. Dahlin v. F., 288NW851. See Dun. Dig. 521.

Intent to commit an assault may be inferred where defendant was angry, threatened to strike plaintiff, came toward her with clenched fists and she fainted and keeled over within defendant's reach before she hit the floor. Id. See Dun. Dig. 521.

In action for assault and battery upon a boy looking for golf balls on a golf link owned by defendant, evidence held to sustain finding that blow was not struck in self defense but as part of use of unreasonable force, either in course of ejecting boy or as a product of anger. Ness v. F., 292NW196. See Dun. Dig. 523.

18. ——Conversion.

Sig Ellingson & Co. v. M., 286NW713. Cert. den., 60SCR 130. Reh. den., 60SCR178.

Right of mortgagee to maintain action in conversion against vendee of mortgaged property goes to substantive rights of the parties, and, hence, was governed by law of state where property was located and mortgage executed and filed, notwithstanding that property was sold elsewhere. U. S. v. Rogers & Rogers, (DC-Minn), 36FSupp79.

The gist of an action in conversion is a wrongful assumption of dominion and control over property. Id.

Where chattel mortgagee forecloses and sells automobile in exclusion and defiance of lien rights of one furnishing storage or repairs, he may be held in conversion. Conner v. C., 294NW650. See Dun. Dig. 1934.

19. ——Respondeat superior.

An independent contractor, who through wilful negligence rebuilds portions of a damaged building so that it is intrinsically dangerous and an object of peril to those whom it is known will make use of it, is liable to such persons for injuries or death notwithstanding that building had been accepted by owners who knew of dangerous condition. Murphy v. B., 289NW563. See Dun. Dig. 5835.

20. ——Damages.

Surviving parents of minor unmarried son had a legal right to possession of corpse for purposes of preservation and burial and a right of action for substantial damages for mental suffering for any interference with their right of possession. Sworski v. S., 293NW309. See Dun. Dig. 2599.

In connection with actual physical injuries sustained, it is not error to allow jury to consider plaintiff's testimony regarding subjective symptoms of other injuries claimed to have been sustained. Schuman v. M., 296NW174. See Dun. Dig. 2570a.

21. ——Fraud.

Collusion is a secret agreement and cooperation for a fraudulent or deceitful purpose, and implies a secret understanding whereby one party plays into another's hands for fraudulent purposes, and in its legal significance it involves an agreement between two or more persons to defraud another of his rights by forms of law or to obtain an object forbidden by law. Turner v. E., 292NW257. See Dun. Dig. 3816.

It is sufficient if representation, although not sole cause, constituted one of several inducements and had a material influence upon the plaintiff suing for damages for fraud. Rother v. H., 294NW644. See Dun. Dig. 3821.

Statement that a farm is a "money maker" is not a statement of fact. Id. See Dun. Dig. 3824.

Civil actions require proof of fraud by a fair preponderance of evidence. Id. See Dun. Dig. 3839.

The question of fraud is for jury unless evidence is conclusive. Bulau v. B., 294NW845. See Dun. Dig. 3840.

22. ——Libel and slander.

Liability of radio broadcaster for defamatory utterances made by one not in its employ. 24MinnLawRev118.

Legal immunity for defamation. 24MinnLawRev607.

Defamation or disparagement? 24MinnLawRev625.

Publication of inadvertent defamatory material. 25 MinnLawRev495.

PARTIES

9165. Real party in interest to sue—When one may sue or defend for all.

½. In general.

Where voters of school district voted to exclude children of orphan home from school, and school board acted thereon, board was proper party defendant in action in mandamus to compel admission of children to school. State v. School Board of Consol. School Dist. No. 3, 287 NW625. See Dun. Dig. 5769.

A promise of a contractor with a city to pay damages to third persons arising from work of sewer construction may be enforced by any third person injured by the work. La Mourea v. R., 295NW304. See Dun. Dig. 1896.

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

Where sub-contractor decided to stop work because of doubts about getting paid and continued to work upon promise that owner would satisfy his claims, sub-contractor had a cause of action against a title insurance company which promised owner to satisfy the claims, as a third party contract beneficiary. Schau v. B., 295 NW910. See Dun. Dig. 7315.

4. Assignments.

Test of assignability of a claim is whether cause of action it represents survives to personal representative of claimant in event of latter's death. Leuthold v. R., 288NW165. See Dun. Dig. 564.

An assignment is a transfer or making over to another of the whole of any property, in possession or in action. Cashman v. B., 288NW732. See Dun. Dig. 553.

Assignee of judgment is "real party interest", within meaning of federal rules of civil procedure, for purpose of bringing suit upon judgment. Larson v. H., (DC-Minn), 1FRD109.

5. One or more suing for many.

A class suit cannot be maintained where relief sought is recovery of money or damages arising out of distinct and separate transactions of each of several plaintiffs with defendant. Thorn v. G., 289NW516. See Dun. Dig. 7502.

6. Action by taxpayer.

Where an auditorium is conveyed to a city, either under a charitable trust or as a gift on condition for public purposes, and instrument conveying property requires that all income be used only for auditorium purposes, a citizen and taxpayer of the city cannot maintain a representative suit to compel restoration of misapplied income to auditorium fund, attorney general being the only proper plaintiff. Longcor v. C., 289NW570. See Dun. Dig. 7315.

9166. Action by assignee; etc.

1. General rule.

Collection of assigned receivables. 25MinnLawRev201.

9172. Parent or guardian may sue for injury to child or ward—Bond—Settlement.

Where property near which nuisance is maintained is owned jointly by husband and wife, husband and he alone may recover for injury to members of his family. King v. S., 292NW198. See Dun. Dig. 7274.

Investment of fiduciary funds in life insurance policies and annuities. 25MinnLawRev298.

9175. Surety may bring action.

Where an auditorium is conveyed to a city either under a charitable trust or as a gift on condition for public purposes, and instrument conveying property requires that all income be used only for auditorium purposes, a citizen and taxpayer of the city cannot maintain a representative suit to compel restoration of misapplied income to auditorium fund, attorney general being the only proper plaintiff. Longcor v. C., 289NW570. See Dun. Dig. 7315.

9181. Bringing in additional parties.

Surety, against whom judgment was rendered, held entitled to recover from principal obligor who was brought in as third party defendant. U. S. v. U., (DC-Minn), 1FRD112.

In action by assignee of vendors' interest in a conditional sales contract, trial court's statutory power to order parties brought in when necessary for a full determination of a pending action was not exceeded by an order bringing in vendors upon a showing by affidavit that assignment was made in order to avoid a counterclaim by defendant. Kavli v. L., 292NW210. See Dun. Dig. 7328.

One who appears as an actor in a litigation or proceeding claiming or asserting an interest in subject matter is a party though he has filed no written pleading. State v. Rock Island Motor Transit Co., 295NW519. See Dun. Dig. 7329.

In action by sub-contractor against general contractor, and home owner whose liability was based upon promises made to plaintiff after he stated that he had decided to quit work, court did not abuse its discretion in adding title insurance company as an additional party upon motion of plaintiff based upon an affidavit of owner averring that title company had promised him to satisfy plaintiff's claim. Schau v. B., 295NW910. See Dun. Dig. 7328.

Whether source of power for exercise of discretion in adding additional parties is statutory or inherent, problem of joinder should be resolved by a consideration of the public and judicial interest in administration of justice, through economy of litigation but without prejudice to parties, to end that determination of principal claims shall be full and complete Id.

LIMITATION OF ACTIONS

9185. General rule—Exceptions.

1. In general.

Departure of foreign corporation from Minnesota, subsequent absence therefrom and residence elsewhere, held to have tolled Minnesota Statute of Limitations with respect to action against such corporation. City Co. of New York v. S., (CCA8), 110F(2d)601, aff'g (DC-Minn), 25FSupp948; Chase Securities Corp. v. V., (CCA8), 110F (2d)607.

The provision of a bond of a contractor for a public improvement, and of the statute under which it was given, that suit on the bond must be brought within 60 days after accrual of cause of action, gave the surety on the bond a vested right in the limitation provided, and the repeal of the statute could not destroy such right and permit the claimant to bring the action within the time prescribed by the general limitation statute. Nat'l Sur. Corp. v. W., (CCA8), 111F(2d)622, rev'g 24FSupp640.

A general statute of limitations does not condition rights, but simply prescribes time within which rights may be enforced. Daniel's Estate, 294NW465. See Dun. Dig. 5587.

Where facts pleaded in complaint show cause to be barred by statute of limitations and no facts are shown to forestall its operation, demurrer should be sustained. Parsons v. T., 295NW907. See Dun. Dig. 5659.

Ordinarily, defense of statute of limitations is an affirmative one that should be specially pleaded. Id. See Dun. Dig. 5666.

Where facts pleaded in complaint and reply show that case is within statute of limitations and nothing is shown to forestall its operation, judgment on pleading for defendant may be granted. Parsons v. T., 295NW909. See Dun. Dig. 7689.

General statutes of limitation, although making no mention of foreign corporation, apply thereto notwithstanding. Pomeroy v. N., 296NW513. See Dun. Dig. 5597.

2. When action accrues.

Statutes of limitations commence to run when right of action has accrued in shape to be enforced. Pettibone v. C., (DC-Minn), 31FSupp881.

Acceleration clause in a note, "shall forthwith be due", is for benefit of creditor, and gives him option of proceeding against debtor upon happening of contingencies comprehended in acceleration clause, and prior to due date set out in notes, if he so desires, but if creditor fails to take any action upon happening of such contingencies prior to due date of note, limitations does not commence to run until due date. Chase Nat. Bank v. B., (DC-Minn), 32FSupp230.

Where county condemning land entered into settlement agreement under which it paid cash and agreed to vacate another street abutting on property and give landowner 20 feet thereof, and landowner went into possession of strip of land, contention of land owner that he was rightfully in possession under claim of title and that no cause of action accrued against county in his favor for breach of its contract to vacate until his possession was disturbed by township authorities was without merit, since he did not acquire any title from county as it had no title to convey, and county could not even vacate street. Parsons v. T., 295NW907. See Dun. Dig. 5602.

4. Laches.

Laches in equity is unreasonable delay in seeking relief or asserting one's right. It is a strictly equitable defense as distinguished from the absolute defense afforded by statute of limitations. Sinell v. T., 289NW44. See Dun. Dig. 5350 (67, 68).

Where facts pleaded fail to show any excuse for a delay of more than 62 years in bringing mandamus to open and grade a township road, laches appears as a matter of law, for equity aids the vigilant, and not the negligent. Id. See Dun. Dig. 5359.

Pith and substance of doctrine of laches is unreasonable delay in enforcing a known right, and practical question in each case is whether there has been such unreasonable delay resulting in prejudice to others as would make it inequitable to grant the relief sought. Cantieny v. B., 296NW491. See Dun. Dig. 5350.

Basis of laches is public policy which requires for peace of society discouragement of stale demands. Id.

9186. Bar applies to state, etc.

Individual maintaining water supply system along highway could not claim authority or franchise on ground of municipal acquiescence since no prescriptive right may be gained in a public street or highway. Kuehn v. V., 292NW187. See Dun. Dig. 8446.

Individual maintaining water supply system along highway could not claim authority or franchise on ground of municipal acquiescence since no prescriptive right may be gained in a public street or highway. Id. See Dun. Dig. 8448.

Long delay occurring between establishment of ditch and institution of proceedings to restore lake level does not limit right of state so to proceed since no prescriptive right can be obtained against sovereign, absent any statutory time limit within which to act. Lake Elysian High Water Level, 293NW140. See Dun. Dig. 5601.

Use by abutting owners of part of platted streets for garden purposes was not of much legal significance as affecting duty of city not to permit an abandoned street to become a trap for motorists, since the public easement may not be acquired by adverse possession. Ollgaard v. C., 294NW228. See Dun. Dig. 111.

Six-year statute of limitations applies to any loans made by Division of Vocational Rehabilitation. Op. Atty. Gen. (170h), Mar. 13, 1941.

9187. Recovery of real estate, fifteen years.

Actual possession in adverse possession of land. 25 IowaLawRev78.

3. Payment of taxes.

While nonpayment of taxes by school district is probably not evidence against adverse possession, payment of taxes by individual constitutes evidence of claim of title by such individual and permissive possession by school district. Op. Atty. Gen., (622i-16), Dec. 27, 1939.

4. Public land.

Individual maintaining water supply system along highway could not claim authority or franchise on ground of municipal acquiescence since no prescriptive right may be gained in a public street or highway. Kuehn v. V., 292NW187. See Dun. Dig. 8446.

6. Permissive possession.

Possession of land by school district for school house site cannot ripen into title so long as possession is permissive. Op. Atty. Gen., (622i-16), Dec. 27, 1939.

30. Tax sales—Short statutes of limitation.

As affecting purchase by school district of tax title lands, a tax title is not a good marketable title until title has been quieted by action, since a tax title is subject to many errors and mistakes, which might be raised at any time within 15 years by original owner. Op. Atty. Gen. (425c-12), Sept. 12, 1940.

9189-1. Limitation of action for damages caused by dams.—No action or proceeding against the state of Minnesota, its officers or agents, shall be maintained on account of the construction, reconstruction, operation or maintenance of any dam or appurtenant structures designed to maintain water levels above natural ordinary high or on account of the maintenance of such levels, where such levels have been maintained for a period of 15 years or more, prior to January 1, 1941. (Act Apr. 24, 1941, c. 409, §1.)

Section 2, Act Apr. 24, 1941, c. 409 provides that the act takes effect on Sept. 1, 1941.

9190. Judgments, ten years.

Judgments—limitations upon actions, executions and liens. 24MinnLawRev660.

9191. Various cases, six years.

½. In general.

Shepard v. C., (DC-Minn), 24FSupp682. App. dis., (CCA 8), 106F(2d)994.

Survey made in 1929, pursuant to Rott-Bryce Treaty, (35 Stat. 2003) established boundary between United States and Canada, and cause of action to recover taxes assessed by Cook County, Minnesota, on lands lying within Dominion of Canada, accrued as of that date, notwithstanding that official government plat was not filed in land office until August 15, 1934. Pettibone v. C., (DC-Minn), 31FSupp881.

Plaintiff could not successfully maintain that they did not have available evidence to sustain proof that the lands were without the United States until filing of corrected plat, since availability of evidence is not determinative of time when an action accrues. Id.

Claims as to which Minnesota statute of limitations had not run at time of filing of petition in bankruptcy, remained valid and enforceable throughout entire bankruptcy proceedings. Berg, (DC-Minn), 33FSupp700.

Running of limitations is not tolled by departure of foreign corporation from state so long as there is a process agent in state. Pomeroy v. N., 296NW513. See Dun. Dig. 5610.

It is doubtful if this section would apply to any proceedings under the Workmen's Compensation Act. Op. Atty. Gen. (523a-20), Dec. 18, 1940.

1. Subdivision 1.

Pike Rapids Power Co. v. M., (CCA8), 99F(2d)902. Cert. den., 59SCR362, 488. Reh. den., 59SCR487. Judgment conforming to mandate aff'd, 106F(2d)891.

Evidence held to sustain finding that no payment had been made upon note within six years of action. Campbell v. L., 288NW833. See Dun. Dig. 5647.

Where grantees assume and agree to pay an encumbrance, their liability accrues when they fail to pay encumbrance as it falls due, and from that time statute of limitations runs. Johnson v. F., 289NW835. See Dun. Dig. 5605.

Where county condemning land entered into settlement agreement under which it paid cash and agreed to vacate another street abutting on property and give landowner 20 feet thereof, and landowner went into possession of strip of land, contention of land owner that he was rightfully in possesion under claim of title and that no cause of accrued against county in his favor for breach of its contract to vacate until his possession was disturbed by township authorities was without merit, since he did not acquire any title from county as it had no title to convey, and county could not even vacate street. Parsons v. T., 295NW907. See Dun. Dig. 5648.

Period of limitations on breach by county of contract to vacate street is 6 years. Id. See Dun. Dig. 5605.

In absence of an agreement as to time of performance, law requires that a contract be performed within a reasonable time. Id. See Dun. Dig. 1785.

Complaint stated a cause of action for negligence making 6-year statute applicable where it alleged that defendants "wrongfully, unlawfully, willfully, and maliciously" set afire to a wooden structure and "wrongfully, unlawfully, carelessly and negligently" left a can of in-

flammable oil near burning building, though there was allegation of facts constituting arson as a setting for tort. Villaume v. W., 296NW176. See Dun. Dig. 5654.

Six-year statute of limitations applies to any loans made by Division of Vocational Rehabilitation. Op. Atty. Gen. (170h), Mar. 13, 1941.

4. Subdivision 4.

Where embezzlement and alienation of property of a decedent was fraudulent, statute of limitations did not begin to run until discovery of cause of action. Owens v. O., 292NW89. See Dun. Dig. 5608.

5. Subdivision 5.

Statute of limitations of Minnesota for actions founded on injuries to the person as the law of the forum governs as to time within which an action for damages for death may be brought in Minnesota for death occurring in Iowa. Daniel's Estate, 294NW465. See Dun. Dig. 1546, 5654.

Complaint stated a cause of action for negligence making 6-year statute applicable where it alleged that defendants "wrongfully, unlawfully, willfully, and maliciously" set afire to a wooden structure and "wrongfully, unlawfully, carelessly and negligently" left a can of inflammable oil near burning building, though there was allegation of facts constituting arson as a setting for tort. Villaume v. W., 296NW176. See Dun. Dig. 5654.

6. Subdivision 6.

Stern v. N., (DC-Minn), 25FSupp948. Aff'd, (CCA8), 110F(2d)601.

Departure of foreign corporation from Minnesota, subsequent absence therefrom and residence elsewhere, held to have tolled Minnesota Statute of Limitations with respect to action against such corporation. City Co. of New York v. S., (CCA8), 110F(2d)601, aff'g (DC-Minn), 25FSupp948; Chase Securities Corp. v. V., (CCA8), 110F (2d)607.

If plaintiff's claim (as holder and payee of a check made and delivered as a gift) be considered an implied trust, the statute of limitations began to run from time when act was done by which decedent (maker of check) became chargeable as trustee. Burton's Estate, 289NW66. See Dun. Dig. 5653(41).

7. Subdivision 7.

Evidence sustains findings that claim on check did not accrue within six years next preceding date of death of decedent against whose estate claim was sought to be enforced. Burton's Estate, 289NW66. See Dun. Dig. 5653.

8. Subdivision 8.

Limitations against action against village treasurer and surety begins to run at end of term during which money is lost through failure of a bank, notwithstanding that treasurer has held office continuously since and same sureties have appeared on all his official bonds. Op. Atty. Gen., (140B-9), Jan. 24, 1940.

9192. Against sheriffs and others.

2. Subdivision 2.

Section 8992-96, giving double damages for conversion of property of a deceased person, is not a penal statute since it gives same right as existed at common law and merely increases damages payable to party aggrieved. Owens v. O., 292NW89. See Dun. Dig. 5657.

9193. Two years' limitations.

2. Subdivision 2.

Two-year statute of limitations against actions for penalties or forfeitures is not applicable to a tax penalty, and especially a tax penalty upon a privilege tax such as gross premium taxes. Op. Atty. Gen. (254d), Nov. 7, 1940.

9200. Effect of absence from state.

Foreign corporation which ceased to do business in Minnesota, cancelled its license, filed its resolution of withdrawal and removed its offices and representatives from the state, held to have departed from the state, being absent therefrom and residing in the state of its creation within this section though the Secretary of State and Commissioner of Securities continued to be its designated attorneys for service of profit. City of New York v. S., (CCA8), 110F(2d)601, aff'g (DC-Minn), 25F Supp948.

Departure of foreign corporation from Minnesota, subsequent absence therefrom and residence elsewhere, held to have tolled Minnesota Statute of Limitations with respect to action against such corporation. City Co. of New York v. S., (CCA8), 110F(2d)601, aff'g (DC-Minn), 25FSupp948; Chase Securities Corp. v. V., (CCA8), 110F (2d)607.

Running of limitations is not tolled by departure of foreign corporation from state so long as there is a process agent in state. Pomeroy v. N., 296NW513. See Dun. Dig. 5610.

9201. When cause of action accrues out of state.

Statute of limitations of Minnesota for actions founded on injuries to the person as the law of the forum governs as to time within which an action for damages for death may be brought in Minnesota for death occurring in Iowa. Daniel's Estate, 294NW465. See Dun. Dig. 1546, 5654.

Where an action is brought by a legal representative who has sole right to sue, his citizenship as a party is determined by his citizenship as an individual and not by that of beneficiaries of the action. Id. See Dun. Dig. 5612.

9204. New promise must be in writing.

1. Acknowledgment or promise.

An unqualified and unconditional acknowledgment of a debt implies a promise to pay it, effect of which is to place debt on footing of one contracted at time of such acknowledgment, whether acknowledgment precedes or follows bar of statute of limitations. Reconstruction Finance Corp. v. O., 290NW230. See Dun. Dig. 5623.

Giving of a chattel mortgage in usual form to secure a note after its due date was an acknowledgment and tolled statute so that it began to run from date of such acknowledgment. Id. See Dun. Dig. 5624.

2. Part payment.

Evidence held to sustain finding that no payment had been made upon note within six years of action. Campbell v. L., 288NW833. See Dun. Dig. 5624.

VENUE

9206. General rule—Exception.

Statutes governing venue confer a personal privilege upon the defendant which may be waived. Duval v. B., (DC-Minn), 31FSupp510.

9208. Official misconduct, etc., where cause arose.

An action against members of state industrial commission to compel reinstatement of a dismissed employe is triable in Ramsey county where commission maintains its office. State v. District Court of St. Louis County, 287 NW601. See Dun. Dig. 10113.

9214. Other cases—Residence of defendant—Residence of corporations.

Action of tort is transitory and may be brought wherever wrongdoer may be found and jurisdiction obtained, but law of place where right was acquired or liability incurred will control as to right of action. U. S. v. Rogers & Rogers, (DC-Minn)36FSupp79.

CHANGE OF VENUE

9215. As of right—Demand.

1. When applicable.

An action against members of state industrial commission to compel reinstatement of a dismissed employe is triable in Ramsey county where commission maintains its office. State v. District Court of St. Louis County, 287NW601. See Dun. Dig. 10113.

9. Review.

Suit for death of a seaman under Jones Act, Mason's U.S.C.A., 46:688, cannot be removed to federal court. Fiolat v. M., (DC-Minn), 31FSupp219.

9216. By order of court—Grounds.

4. Subdivision 4.

Where a change of venue will result in continuing a case over a regular term of the district court and there is no explanation of a delay of 2 months in making motion it is not an abuse of discretion to deny it. Sworski v. S., 295NW62. See Dun. Dig. 10119.

9221. Affidavit of prejudice.

Correction:—"therefor" in the fourth line of this section as it appears in the 1940 Supplement should read "thereof or."

An affidavit of prejudice, which by its terms is limited to matters to be heard on motion before trial, does not disqualify a district judge from presiding at the trial of the action. Locksted v. L., 289NW55. See Dun. Dig. 4962.

Section 9221, Mason's Minn. Stat. 1938 Supp., is not applicable to an action or proceeding pending in the municipal court of the city of Minneapolis. State v. Anderson, 289NW883. See Dun. Dig. 4962.

This section requires filing of affidavit five days before a motion is to be heard at special terms in district having only one judge. State v. Moriarity, 294NW473. See Dun. Dig. 4962.

Amendment of 1937 made section applicable to all districts, even where there was but one judge. Id.

SUMMONS—APPEARANCE—NOTICES—ETC.

9224. Actions, how begun.

In proceeding against church for permission to disinter a body, defendant had a sufficient adverse interest so that it should have been served with a summons instead of a notice. Uram v. S., 292NW200. See Dun. Dig. 89.

Parties may not be brought into court by mere amendment of pleadings. Guy v. D., 294NW877. See Dun. Dig. 89.

A personal judgment entered without service of process was absolutely void, not merely irregular or erroneous, and a levy of execution under it constituted a tort in nature of tresspass rendering plaintiff liable for damages, irrespective of malice or other wrongful conduct on part of plaintiff. Beede v. N., 296NW413. See Dun. Dig. 7837.

9228. Service of summons—On natural persons.

3. Persons with whom summons may be left.

Running of limitations is not tolled by departure of foreign corporation from state so long as there is a

process agent in state. Pomeroy v. N., 296NW513. See Dun. Dig. 5610.

9230. On the state.

Where land is purchased by the state for taxes, and state has lien on land for old age assistance, notice of expiration of redemption should be served upon the state through the attorney general. Op. Atty. Gen., (419f), May 4, 1940.

9231. On private corporations.

3. Subdivision 3.

When a foreign social and charitable corporation pursues within our limits purposes for which it is organized, it is doing business in Minnesota, and amenable to process here, and chief local officer, appointed by and responsible to the foreign corporation, is a proper person to serve as agent of the corporation. High v. S., 289NW519. See Dun. Dig. 7814.

9236. When defendant may defend—Restitution.

1. Matter of right.

A defendant not personally served is given a right to defend within one year from judgment by §9236, but thereafter application for relief from judgment must be made to trial court in its discretion under §9283. Kane v. S., 296NW1. See Dun. Dig. 5003.

Right to have default judgment set aside, though qualified in certain respects, is not discretionary with trial court. Id.

Federal Soldiers and Sailors Civil Relief Act of 1940 will apply to actions in state court which come within its terms. (Mason's USCA, Title 50, end.) Op. Atty. Gen. (310), Nov. 6, 1940.

3. A good defense sufficient cause.

Though a verified and specific general denial is perhaps "technically sufficient," good practice requires full and frank statement of facts relative to all asserted defenses. Kane v. S., 296NW1. See Dun. Dig. 5005.

4. Diligence in making application.

A non-resident's application to set aside judgment taken by default and for leave to defend was properly denied for unexcused lack of diligence. Kane v. S., 296 NW1. See Dun. Dig. 5006.

Though no written notice was ever given to defendant or counsel of entry of judgment, this omission does not absolve defendant from his obligation of diligence where he has actual knowledge of proceedings. Id.

9238. Jurisdiction, when acquired—Appearance.

APPEARANCE

1. Definition.

In determining whether an appearance is general or special, court looks to purposes for which it was made rather than to what moving party labels it. Guy v. D., 294NW877. See Dun. Dig. 479.

4. Appearance in foreign court.

In suit by local division of foreign corporation to enjoin cancellation of charter of local division, defendant by general appearance and prayer for general and affirmative relief gave court jurisdiction of the subject matter. Farmers Educational, Etc. v. F., 289NW884. See Dun. Dig. 477.

6. What constitutes general appearance.

If appearance is made for any purpose other than to question jurisdiction, it is a general, and not a special, appearance and subjects party to jurisdiction of court by consent. Guy v. D., 294NW877. See Dun. Dig. 479.

11. Modes of appearing specially.

Allegations setting forth a special appearance may be made in same instrument that alleges matters going to merits of controversy so long as answer on merits is made conditionally on loss of jurisdictional point. Uram v. S., 292NW200. See Dun. Dig. 482.

12. Waiver of special appearance.

A special appearance is not waived by answering and defending on merits after special appearance has been overruled. Uram v. S., 292NW200. See Dun. Dig. 482.

Where action was brought against a corporation to recover for services rendered, and it appeared at the close of plaintiff's case that company was not a corporation at time services were rendered, and court permitted defendants over objections to amend so as to make partners and partnership defendants, and counsel again objected to joining of partners as defendants as an improper method of service upon them as individuals, such partners did not waive their objections to jurisdiction of court by permitting themselves to be called and put in their testimony on the merits. Guy v. D., 294NW 877. See Dun. Dig. 482.

9239. Appearance and its effect.

A party who interposes a demurrer is entitled to notice of all subsequent proceedings even though demurrer is overruled and no leave to plead over is obtained. Kemerer v. S., 288NW719. See Dun. Dig. 476.

Failure to give defendant notice of application for an order for judgment following overruling of demurrer is an irregularity which rendered judgment vulnerable on direct attack. Id. See Dun. Dig. 476.

By a demurrer, defendant made a general appearance. Id. See Dun. Dig. 479.

Since judgment entered without notice following overruling of demurrer was unauthorized rather than merely erroneous, it may be vacated, and it is immaterial that six months time for appeal from judgment expired before any application for relief was made. Id. See Dun. Dig. 5114.

MOTIONS AND ORDERS

9247. Motions, etc., where noticed and heard.

Well-pleaded facts are admitted by motion for judgment on the pleadings. Sullivan v. N., (CCA8), 104F(2d) 517, aff'g (DC-Minn), 24FSupp822.

In action to quiet title, defendant probably should have challenged the plaintiff's title by answer rather than by motion to dismiss complaint, but plaintiff is in no position to challenge procedure where he stipulated judgment roll in registration proceedings into the record, showing title in defendant, and did not challenge procedure until motion for new trial and rehearing. Dean v. R., 292NW765. See Dun. Dig. 8049.

PLEADINGS

9250. Contents of complaint.

2. Subdivision 2.

Facts showing a right to recover on any theory suffice. Cashman v. B., 288NW732. See Dun. Dig. 7528d.

If a complaint in an equitable case discloses delay in asserting a right which, remaining unexplained, amounts to laches it is necessary for plaintiff to allege facts excusing the delay. Sinell v. T., 289NW44. See Dun. Dig. 5359.

General allegations in a complaint must be regarded as limited and controlled by particular allegations. Murphy v. B., 289NW563. See Dun. Dig 7722.

Where contract exhibits are very foundation of cause of action to which they relate, and are made part of complaint by its allegations, sufficiency of pleading as matter of law may be determined by terms of exhibits if they are plain and unambiguous, even though inconsistent with allegations in complaint. Markwood v. O., 289NW830. See Dun. Dig. 7526.

9251. Demurrer to complaint—Grounds.

½. In general.

Where facts pleaded in complaint show cause to be barred by statute of limitations and no facts are shown to forestall its operation, demurrer should be sustained. Parsons v. T., 295NW907. See Dun. Dig. 5659.

7. For misjoinder of causes of action.

A demurrer for misjoinder was properly sustained to a complaint by husband and wife, joint owners of a home, to recover for depreciation of value of use thereof by defendant's wrongful maintenance of a nuisance upon adjacent property, and by husband alone to recover damages sustained by his family from noxious odors members thereof were subjected to from the same nuisance. King v. S., 292NW198. See Dun. Dig. 7554.

8. For failure to state a cause of action.

A demurrer merely admits facts for purpose of testing validity of pleadings, and is not an admission of them for all purposes. Kemerer v. S., 288NW719. See Dun. Dig. 7542.

Sufficiency of a complaint making plain and unambiguous contract exhibits a part of the complaint, may be determined upon demurrer, even though exhibits constituting foundation of cause of action are not consistent with allegations in complaint. Markwood v. O., 289NW 830. See Dun Dig. 7549.

If complaint construed liberally states facts entitling plaintiff to any relief, whether legal or equitable, it states a cause of action, although plaintiff may have misconceived nature of his cause or demanded inappropriate relief. Lucas v. M., 291NW892. See Dun. Dig. 7549(77).

A liberal rule prevails as to construction of pleadings, and one of primary objects of reformed procedure was to enable courts to give judgment according to facts stated and proved without reference to form used or to legal conclusions adopted by pleader, and a complaint is not demurrable because it proceeds on a wrong theory. Villaume v. W., 296NW176. See Dun. Dig. 7549.

9252. Requisites—Waiver.

5. Waiver.

Presence of a misjoined party is not objectionable in appellate court for the first time. State v. Rock Island Motor Transit Co., 295NW519. See Dun. Dig. 384.

Overruling of a demurrer to complaint does not bar defendant from questioning sufficiency of complaint to state a cause of action by motion for judgment on pleadings after answer and reply are filed. Parsons v. T., 295 NW909. See Dun. Dig. 7562.

9253. Contents of answer.

DENIALS

2. Effect of general denial.

Whatever tends to controvert directly allegations in a complaint may be shown defensively under a general denial. Lawrenz v. L., 288NW727. See Dun. Dig. 7574.

Where owner is sued in tort for result of negligently constructing a concealed trap on premises, evidence that some wrong of lessee rather than that of owner is cause of plaintiff's injury is admissible under a general denial, and an allegation that lessee had in lease assumed liability to indemnify lessor for any damage either to per-

son or property due to demised premises, regardless of cause, was properly stricken. Murphy v. B., 289NW567. See Dun. Dig. 7574, 7578.

NEW MATTER CONSTITUTING A DEFENSE

14. Must be pleaded specifically.

Necessity for a defendant to specifically plead payment where complaint alleges nonpayment, discussed. Shapiro v. L., 289NW48. See Dun. Dig. 7468.

When a writing is introduced in support of an allegation in a pleading which does not in any way indicate the existence thereof, it cannot be required that the opposite party shall anticipate its production and allege in his pleading fraud in its procurement in order to introduce evidence of such fraud. Turner v. E., 292NW257. See Dun. Dig. 3826, 7585.

Ordinarily, defense of statute of limitations is an affirmative one that should be specially pleaded. Parsons v. T., 295NW907. See Dun. Dig. 5666.

Fact that a foreign corporation, party to an action, has not been licensed to do business in state is, as against it, a defense to be affirmatively pleaded and may not be taken advantage of by motion to dismiss not made until the trial. Risvold v. G., 296NW411. See Dun. Dig. 7585.

A defendant need not plead laches in his answer in order to avail himself of that defense. Cantieny v. B., 296NW491. See Dun. Dig. 7585.

9254. Requisites of a counterclaim—Pleading does not admit.

9. Must exist in defendant at commencement of action.

A party cannot avail himself of a matter as a setoff unless it is a legally subsisting cause of action in his favor upon which he could maintain an independent action. State v. Tri-State Tel. & Tel. Co., 295NW511. See Dun. Dig. 7605.

9256. Judgment on defendant's default.

Editorial note.—The Soldiers and Sailors Civil Relief Act of 1940 is set out in full in Mason's U.S.C.A., current pamphlet Title 50, and for cases under old Act of Mar. 8, 1918, see Mason's U.S.C.A., Appendix 1, Act 2151.

½. In general.

A cause of action based on a complaint showing on its face that alleged claim for reasonable value of services rendered is subject to dispute and that facts alleged are controverted is not one wherein a default judgment may be entered by clerk without an order of court. High v. S., 290NW425. See Dun. Dig. 4995.

Federal Soldiers and Sailors Civil Relief Act of 1940 will apply to actions in state court which come within its terms. (Mason's USCA, Title 50, end.) Op. Atty. Gen. (310), Nov. 6, 1940.

1. Notice.

Section 9312 has reference not to notice but to method of establishing plaintiff's claim under §9256. Kemerer v. S., 288NW719. See Dun. Dig. 4991.

3. Necessity of proving cause of action.

Failure to apply for leave to plead over after overruling of a demurrer is not a concession of facts alleged, but plaintiff must show proof to satisfaction of court, with right of defendant to cross-examine plaintiff's witnesses. Kemerer v. S., 288NW719. See Dun. Dig. 7561.

In action for reasonable value of services rendered, whether it was error for clerk to enter judgment by default without receiving proof of damages will not be decided where it was not presented for decision below. Kane v. S., 296NW1. See Dun. Dig. 4995.

Whether an action for recovery of reasonable value of services rendered is within provision relating to contract for payment of money owing is not foreclosed by High v. Supreme Lodge, 207Minn228, 290NW425. Id.

Clerk cannot refuse to enter default judgment because it appears upon face of complaint that claim is outlawed. Op. Atty. Gen. (144B-5), July 10, 1940.

9257. Demurrer or reply to answer.

½. In general.

In action for personal injuries wherein answer alleged that plaintiff was an employee of defendant and that his injuries arose out of and in course of his employment, a general denial in the reply served to deny allegations of employment and the injuries in scope thereof contained in the answer. Hasse v. V., 294NW475. See Dun. Dig. 7626.

9259. Sham and frivolous pleadings.

SHAM PLEADINGS

½. In general.

Allegations of answer shown to be false in fact may be stricken as sham on motion. Ind. School Dist. v. C., 292 NW777. See Dun. Dig. 7657.

A sham or frivolous answer may be stricken on motion and judgment rendered notwithstanding same as for want of an answer. Neefus v. N., 296NW579. See Dun. Dig. 7658, 7668a.

1. Defined.

A sham pleading is one that is false. Hasse v. V., 294 NW574. See Dun. Dig. 7657.

A sham answer is one which is sufficient on its face but which is false in fact. Neefus v. N., 296NW579. See Dun. Dig. 7657.

2. Verified pleading may be stricken out.

Where allegations of fact in a pleading are shown to be false the pleading should be stricken as sham. Neefus v. N., 296NW579. See Dun. Dig. 7658.

6. Power to strike out to be exercised sparingly.

Every reasonable doubt should be resolved against striking out a pleading as sham. Hasse v. V., 294NW475. See Dun. Dig. 7658.

8. Affidavits on motion.

Where fact of falsity of pleading is established by a clear and unequivocal showing, failure of opposing party to answer and contradict showing must be taken as admitting its truth. Ind. School Dist. v. C., 292NW777. See Dun. Dig. 7665.

Falsity of a pleading may be established by affidavit. Ind. School Dist. v. C., 292NW777. See Dun. Dig. 7664.

Upon motion to strike out a pleading as sham, it is duty of court to determine whether there is an issue to try, not to try the issue. Hasse v. V., 294NW475. See Dun. Dig. 7664.

Falsity of a pleading may be shown by affidavit. Neefus v. N., 296NW579. See Dun. Dig. 7664.

10. Motion to strike out granted.

Failure to answer and contradict a showing that allegations of an answer are false must be taken as admitting truth of showing. Neefus v. N., 296NW579. See Dun. Dig. 7665.

FRIVOLOUS PLEADINGS

16. Frivolous answer or reply.

An answer is frivolous where it appears from bare inspection to be lacking in legal sufficiency and which in any view of facts pleaded does not present a defense. Ind. School Dist. v. C., 292NW777. See Dun. Dig. 7668.

Allegations of answer that land of a school district was subject to special assessment for a local improvement may be stricken as frivolous, where such land is not subject to such assessment as a matter of law. Id.

A frivolous pleading is one which does not in any view of facts pleaded present a defense to action, and an essential fact issue being raised, the reply should not have been stricken as frivolous. Hasse v. V., 294NW475. See Dun. Dig. 7668.

Where part of the pleading is frivolous but another part is good and puts in issue material allegations of complaint or answer, court cannot strike out whole and order judgment. Id. See Dun. Dig. 7668b.

An answer is frivolous which appears from a mere inspection to be lacking in legal sufficiency and which in any view of facts pleaded does not present a defense. Neefus v. N., 296NW579. See Dun. Dig. 7668.

9263. Intervention.

2. Interest entitling party to intervene.

Where creditor enters into a compromise agreement with federal land bank and land bank commissioner and farmer under Emergency Farm Mortgage Act, any contemporary agreement whereby farmer assumes additional obligation to creditor is in fraud of law and unenforceable, and federal land bank and land bank commissioner may intervene in action to enforce obligation, though they would not suffer any pecuniary loss by reason of the fraud. Kniefel v. K., 290NW218. See Dun. Dig. 4899.

9266. Pleadings liberally construed.

A liberal rule prevails as to construction of pleadings, and one of primary objects of reformed procedure was to enable courts to give judgment according to facts stated and proved without reference to form used or to legal conclusions adopted by pleader, and a complaint is not demurrable because it proceeds on a wrong theory. Villaume v. W., 296NW176. See Dun. Dig. 7723b.

9277. Joinder of causes of action.

9. Must affect all the parties.

Processing taxes sought to be recovered is not a trust fund in which all similarly situated with plaintiffs share, so that an accounting in equity could be maintained; and, whether the recovery is sought upon the thory of unjust enrichment or for money had and received, each plaintiff's cause of action is one at law separate and not in common with the others, improperly joined. Thorn v. G., 289NW516. See Dun. Dig. 7502.

A demurrer for misjoinder was properly sustained to a complaint by husband and wife, joint owners of a home, to recover for depreciation of value of use thereof by defendant's wrongful maintenance of a nuisance upon adjacent property, and by husband alone to recover damages sustained by his family from noxious odors members thereof were subjected to from the same nuisance. King v. S., 292NW198. See Dun. Dig. 7502.

15. Splitting cause of action.

A single indivisible cause of action in tort or contract cannot be divided and made subject of several actions. Doyle v. C., 289NW784, 785. See Dun. Dig. 5167. Aff'd 60 SCR1102.

9280. Amendment by order.

AMENDMENT OF PLEADINGS

4. Amendments after trial held discretionary.

It was within discretion of trial court to refuse to permit an amendment of answer to allege defense of contributory negligence after evidence was closed. Guin v. M., 288NW716. See Dun. Dig. 7713a.

15. Amendment of parties.
Where action was brought against a corporation to recover for services rendered, and it appeared at the close of plaintiff's case that company was not a corporation at time services were rendered, and court permitted defendants over objections to amend so as to make partners and partnership defendants, and counsel again objected to joining of partners as defendants as an improper method of service upon them as individuals, such partners did not waive their objections to jurisdiction of court by permitting themselves to be called and put in their testimony on the merits. Guy v. D., 294NW877. See Dun. Dig. 7701.

OTHER AMENDMENTS

21. Amendment to an answer.
Statute of limitations was properly in case where plaintiff had been permitted to amend his complaint by striking from it allegation showing running of statute against his cause and defendant was thereupon given right to amend his answer by pleading statute. First State Bank of Correll, 288NW709. See Dun. Dig. 5661, 7498a(38).

9281. Variance—Amendment—Exceptions.

1. Proof must follow pleadings.
Where plaintiff's complaint in suit for trespass alleged only fact of title generally and without disclosing means by which acquired, and defendant's answer pleaded generally that its alleged acts of trespass were consented to by plaintiff but without pleading anything more, plaintiff, under his reply denying all new matter, could assail a written grant of easement, introduced by defendant defensively against the charged trespass, upon ground that grant was result of a mutual mistake between parties thereto, defendant being in privity with grantee therein named. Lawrenz v. L., 288NW727. See Dun. Dig. 7626.

Pleading may be waived where there is a voluntary trial of issue which pleading could have raised. State v. Rock Island Motor Transit Co., 295NW519. See Dun. Dig. 7675.

2. Immaterial variance.
Where defendant asked reformation of a contract sued on for "mutual mistake", and evidence established a unilateral mistake which was known at all times by other party, there was "mere variance" and the defendant was entitled to judgment, or at least a new trial, though theory of unilateral mistake was not raised until case reached supreme court. Rigby v. N., 292NW751. See Dun. Dig. 384.

Where case was tried and determined on theory of breach of contract appellant is not in position to claim that complaint sounded in conversion. Stanton v. M., 296NW521. See Dun. Dig. 7675.

9283. Extension of time—Mistakes, etc.

THE STATUTE GENERALLY

1. Application in general.
Since judgment entered without notice following overruling of demurrer was unauthorized rather than merely erroneous, it may be vacated, and it is immaterial that six months time for appeal from judgment expired before any application for relief was made. Kemerer v. S., 288 NW719. See Dun. Dig. 5114.

Section applies to all judgments and not simply to default judgments or judgments that are erroneous. Holmes v. C., 295NW649. See Dun. Dig. 5108a.

Statute is applicable to tax proceedings. Id.

AMENDMENT OF JUDGMENTS AND JUDICIAL RECORDS

11. Clerical mistakes of clerk.
Error of clerk of trial court in failing to file affidavit upon which temporary restraining order was based could be corrected by trial court nunc pro tunc, by endorsing upon affidavit a certificate that it was considered by court. McFadden Lamber Co. v. W., 296NW18. See Dun. Dig. 5099.

VACATION OF JUDGMENTS AND ORDERS

25½. In general.
A mistake of law may furnish a ground for vacation of a judgment entered without notice following overruling of a demurrer. Kemerer v. S., 288NW719. See Dun. Dig. 5123a.

An order adjusting and allowing final account of an executor is equivalent of a judgment or decree adjudging amount due estate from executor, and may not be vacated, after expiration of time for appeal therefrom, except under §§9283 or 9405. Woodworth's Estate, 292NW 192. See Dun. Dig. 5108a.

Court has power to open its judgments and to correct or modify them upon presentation of newly discovered evidence when manifest wrong has been done upon substantially same principle on which rests its inherent power to grant a new trial. Holmes v. C., 295NW649. See Dun. Dig. 5121a.

32. Diligence.
In case of judicial error, motion to set aside must be made within time limited to appeal, but where it is sought to modify or vacate a judgment "for good cause shown," statutory limitation is one year after notice of its entry. Holmes v. C., 295NW649. See Dun. Dig. 5114.

Within one year party seeking to vacate judgment "for good cause shown" must act with diligence. Id.

37. Unauthorized action.
Probate court has power to vacate a previous order allowing a final account where it is made to appear that the order was procured without a hearing because of mistake and inadvertance on the part of the court, and such power does not terminate upon the expiration of the time to appeal from the order sought to be vacated. Henry's Estate, 292NW249. See Dun. Dig. 7784.

40. Fraud.
Self or double dealing by a fiduciary renders transaction voidable by beneficiary, but where facts were fully disclosed to court, and action of guardian was on advice of independent counsel whose only duty was to, and whole whole interest was that of, the ward, and transaction was approved by court, it cannot thereafter be disaffirmed by ward. Fiske's Estate, 291NW289. See Dun. Dig. 5122.

OPENING DEFAULTS

56. Time of application—Diligence.
Trial court acted within its discretionary power when after seven months it vacated a judgment entered by clerk in favor of plaintiff and permitted defendant to answer upon showing facts constituting a defense. High v. S., 290NW425. See Dun. Dig. 5009 to 5014.

Where parties, for about one year through no fault of theirs, had no knowledge of pendency of probate proceedings or of an order made therein and moved to vacate such order promptly upon discovery of the order, they are not guilty of laches barring right to have order vacated. Daniel's Estate, 294NW465. See Dun. Dig. 7784(2).

A defendant not personally served is given a right to defend within one year from judgment by §9236, but thereafter application for relief from judgment must be made to trial court in its discretion under §9283. Kane v. S., 296NW1. See Dun. Dig. 5012.

57. Meritorious defense necessary.
A discharge in bankruptcy is a meritorious defense. Davenport v. S., 288NW167. See Dun. Dig. 5019.

59. Affidavit of merits.
Where motion to vacate default judgment is based on record as well as affidavits, both may be examined to determine whether there was an abuse of discretion. High v. S., 290NW425. See Dun. Dig. 5018.

Affiant on motion to vacate default judgment may be an attorney who has personal knowledge of the facts. Id. See Dun. Dig. 5020.

64. Who may apply.
Affiant on motion to vacate default judgment may be an attorney who has personal knowledge of the facts. High v. S., 290NW425. See Dun. Dig. 5018.

9285. Unimportant defects disregarded.

1. In general.
A correct ruling though placed upon untenable grounds will not be reversed. Beck v. N., 288NW217. See Dun. Dig. 421.

Where hearing before board of medical examiners was adjourned without taking testimony of three witnesses for doctor and there was no showing that testimony would have been relevant to his methods of diagnosis, there was no prejudicial error in denying a continuance in order to take it. Minnesota State Board of Medical Examiners v. Schmidt, 292NW255. See Dun. Dig. 424. App. dis'md and cert. den. 61SCR135.

Where plaintiff as a matter of law was not entitled to recover, court need not consider any error in denying plaintiff a jury trial. Gilbertson v. I., 293NW129. See Dun. Dig. 424.

In action for property damages to a car brought on theory of breach of warranty and also negligence in connection with tires and servicing, any error of court in requiring plaintiff to elect whether she would proceed in tort or for damages for breach of warranty was without prejudice where plaintiff elected to proceed in tort for negligence and the written warranty excluded specifically the tires. McLeod v. H., 294NW479. See Dun. Dig. 424.

Court will not reverse for error where it is apparent that error did not materially prejudice appellant. Dahlstrom v. H., 295NW508. See Dun. Dig. 416(50, 52).

4. Reception of evidence.
Ruling which is correct in excluding evidence will be upheld though reason given by trial court for exclusion is erroneous. Stolte v. L., (CCA8), 110F(2d)226.

In hearing on claim of son against estate of mother for improvements made on mother's farm, there was no prejudicial error in exclusion of evidence that plaintiff had not kept records of his expenditures because he had learned that stores where he purchased material kept records. Sickmann's Estate, 280NW832. See Dun. Dig. 424.

In action by employer against employee for an accounting, refusal of court to permit defendant to testify as to his good faith and intentions in entering into certain transactions on his own behalf was not considered on appeal, where testimony received was in detail and covered entire affair to the extent that trial court could conclude fairly and justly matters involved. Raymond Farmers Elevator Co. v. A., 290NW231. See Dun. Dig. 424.

Exclusion of evidence on a matter fully covered by other evidence is not prejudicial. Scott v. P., 290NW431. See Dun. Dig. 424.

Reception of medical testimony based on part of patient's statement as to "past transactions" is not ground for reversal where facts asserted in statement were already in evidence. Ferch v. G., 292NW424. See Dun. Dig. 424.

There was not reversible error in excluding expert opinion evidence where a specialist in field was permitted to give his expert favorable opinion on the subject. Rhoads v. R., 292NW760. See Dun. Dig. 424.

In action for divorce on ground of cruel and inhuman treatment, court might well have permitted testimony as to disposition and temperament of defendant, but it was not reversible error to exclude where relationship of parties over a long period of time was dwelt upon at length. Locksted v. L., 295NW402. See Dun. Dig. 424.

Any error which existed in overruling objection to reference by physician to a medical textbook was harmless in absence of motion to strike reference to textbook in previous answer. Wolfangel v. P., 296NW576. See Dun. Dig. 424.

5. Remarks and conduct of court and counsel.

In action for assault and battery, gratuitous statement of plaintiff counsel with respect to maintenance of slot machines by defendant in his place of business held not prejudicial where objection was sustained. Ness v. F., 292NW196. See Dun. Dig. 424.

6. Instructions.

Defendant in action for assault and battery is not prejudiced by refusal of trial court to instruct jury concerning right of liquor establishment to eject unruly patrons where use of force by defendant was prompted by a motive other than that of removing party assaulted from premises. Symalla v. D., 288NW385. See Dun. Dig. 424.

Vigorous instruction by court cured misconduct of counsel in argument as to what damages should be. Symons v. G., 293NW303. See Dun. Dig. 423, 9800.

Error in instruction on presumption of due care by a deceased person did not require a new trial where there was no evidence upon which jury could base a finding of contributory negligence of deceased. Lang v. C., 295 NW57. See Dun. Dig. 424.

Erroneous instruction in respect to emergency rule was harmless where plaintiff's theory at trial was that the emergency had been successfully met and avoided, and court submitted that issue as a question of fact to jury under appropriate instructions, and verdict was for defendant. Dahlstrom v. H., 295NW508. See Dun. Dig. 416.

Where instruction submitted without definition term "active negligence," "trap," and "concealed dangers," to be applied only if jury found plaintiff to be a licensee, any error was without prejudice where jury by special verdict found plaintiff to be an invitee. Radle v. H., 296 NW510. See Dun. Dig. 424.

7. Findings of fact and verdicts.

Where inadequate damages are awarded, plaintiff cannot prevail on appeal if record shows no right of recovery. Blume v. B., 291NW906. See Dun. Dig. 418.

ISSUES AND TRIAL

9286. Terms defined.

An order granting a new trial wipes slate clean except insofar as testimony given on first trial may be introduced to confront a witness testifying differently on second trial, and testimony on first trial should not be taken into consideration, directly or indirectly, by trial court in disposing of matters raised on second trial. Salters v. U., 292NW762. See Dun. Dig. 7082.

9287. Issues, how joined.

1. Issue of law.

Overruling of a demurrer to complaint does not bar defendant from questioning sufficiency of complaint to state a cause of action by motion for judgment on pleadings after answer and reply are filed. Parsons v. T., 295 NW909. See Dun. Dig. 7562.

Where facts pleaded in complaint and reply show that case is within statute of limitations and nothing is shown to forestall its operation, judgment on pleadings for defendant may be granted. Id. See Dun. Dig. 7689.

A motion for a directed verdict presents only a question of law to be determined by court, a right to be cautiously and sparingly exercised. Applequist v. O., 296NW 13. See Dun. Dig. 9764.

9288. Issues, how tried—Right to jury trial.

RIGHT TO JURY TRIAL

½. In general.

Walsh v. U. S., (DC-Minn), 24FSupp877. App. dism'd, (CCA8), 106F(2d)1021.

A suit against a surety on contract of fidelity is an action for recovery based upon promise to pay and is triable by a jury ordinarily, but this may be qualified by nature of surety contract. Raymond Farmers Elevator Co. v. A., 290NW231. See Dun. Dig. 5233.

1. Constitutional provision.

Where plaintiff as a matter of law was not entitled to recover, court need not consider any error in denying plaintiff a jury trial. Gilbertson v. I., 293NW129. See Dun. Dig. 5227.

5. Equitable actions.

In action by elevator company against manager for an accounting and a money judgment, in which surety on fidelity bond was named as a defendant; manager was not entitled to a jury trial, and surety could not complain that trial court withdrew case from jury and tried it as a court case, acts committed by manager during his employment coming within provisions of surety bond. Raymond Farmers Elevator Co. v. A., 290NW231. See Dun. Dig. 5231.

On trial of a claim against estate based upon a trust relationship, neither party was entitled to a jury as a matter of right. Halweg's Estate, 290NW577. See Dun. Dig. 9707.

7½. Questions for jury.

Physical facts, where inconsistent with testimony necessary to plaintiff's case, are controlling, and jury cannot be allowed to return verdict flatly opposed thereto, but test for determining duty to direct verdict is not whether court is convinced of truth of defendant's theory but whether physical facts make plaintiff's theory impossible. Stolte v. L., (CCA8), 110F(2d)226.

On motion of defendant for directed verdict it must be assumed that all facts shown by plaintiff's evidence are established, together with all fair inferences. Walkup v. B., (CCA8), 111F(2d)789.

Ordinarily, an issue of negligence is a question for the jury unless under the evidence all reasonable minds must reach the same conclusion, when it becomes a question of law to be determined by the court. Champlin Refining Co. v. W., (CCA8), 113F(2d)844.

If evidence is such that reasonable men might reach different conclusions the case is for the jury. Id.

A motion for a directed verdict raises a question of law only, and admits credibility of evidence for adverse party and every inference which may clearly be drawn from such evidence, and that view of the evidence most favorable to the adversary must be accepted. Reiton v. S., 288NW155. See Dun. Dig. 9764.

When facts relative to negligence are clear, and reasonable men could reach but one conclusion, a directed verdict is proper. Behr v. S., 288NW722. See Dun. Dig. 9764.

Although the evidence on the part of plaintiff standing alone might justify submitting a case to the jury, yet the court should direct a verdict for defendants if, upon all the evidence, it would be its manifest duty to set aside a verdict against them. Brulla v. C., 289NW404. See Dun. Dig. 9764.

Court properly directed a verdict for defendant where evidence would not sustain a verdict to the contrary. Sickmann's Estate, 289NW832. See Dun. Dig. 9764.

On review of a verdict directed for defendant at close of a plaintiff's testimony on ground of contributory negligence, unless most favorable evidence justifies conclusion that contributory negligence existed, there is no alternative but to reverse. Salters v. U., 292NW762. See Dun. Dig. 9707.

Where evidence of a fact is conflicting, issue is for jury. Symons v. G., 293NW303. See Dun. Dig. 9707.

Question of what constitutes proximate cause is usually for jury unless evidence is conclusive, and should be determined by them in exercise of practical common sense, rather than by application of abstract principles. Anderson v. J., 294NW224. See Dun. Dig. 9707.

Test to be applied upon motion for a directed verdict is not whether court might in exercise of its discretion grant a new trial, but whether from whole evidence it merely appears that it would be its manifest duty to set aside a contrary verdict. Applequist v. O., 296NW13. See Dun. Dig. 9764.

7¾. Waiver.

When both plaintiff and defendant move for directed verdicts there is not a waiver of right to a jury trial. Lee v. O., 289NW63 See Dun. Dig. 5234.

Defendant having, by motion for directed verdict, insisted that there was no fact issue as to giving of train signals, point was not waived because, motion for directed verdict denied, defendant asked appropriate instructions in submitting case to jury. Engberg v. G., 290NW579. See Dun. Dig. 384.

ISSUES TO THE JURY IN EQUITABLE ACTIONS

17. Findings of jury how far conclusive on court.

A verdict in an equity case upon a special question is determinative and remains so unless vacated. Dose v. I., 287NW866. See Dun. Dig. 9845.

9292. Continuance.

Where hearing before board of medical examiners was adjourned without taking testimony of three witnesses for doctor and there was no showing that testimony would have been relevant to his methods of diagnosis, there was no prejudicial error in denying a continuance in order to take it. Minnesota State Board of Medical Examiners v. Schmidt, 292NW255. See Dun. Dig. 1713. App. dism'd and cert. den. 61SCR135.

JURY TRIALS

9293. Jury, how empaneled—Ballots; etc.

Trial judge may call alternate jurors in district court cases. Laws 1941, c. 256.

9295. Order of trial.

1¾. Reception of evidence.
Trial court has a large measure of discretion in respect to admission and exclusion of evidence. Klingman v. L., 296NW528. See Dun. Dig. 9714.

3¼. Misconduct of counsel and argument.
Where plaintiff had gone to trouble of submitting to examination of three medical experts of defendant's election, and only one was called to give an opinion as to condition found, plaintiff's attorney had right to argue that two not called would have given testimony more favorable to him than defendant. Guin v. M., 288NW716. See Dun. Dig. 9799.

In automobile collision case wherein defendant's counsel objected to argument of plaintiff's counsel in referring to an insurance company, and plaintiff's attorney stated that he did not think he used the words "insurance company", but if he had it was an inadvertence, followed by some statements that defendant and not plaintiffs had brought matter of insurance company into the cases, and court upon request of defendant instructed jury to disregard all mention of an insurance company, there was no misconduct of plaintiff's counsel. Ost v. U., 292NW207. See Dun. Dig. 9800.

Vigorous instruction by court cured misconduct of counsel in argument as to what damages should be. Symons v. G., 293NW303. See Dun. Dig. 423, 9800.

3½. Instructions.
An instruction respecting duty of train crew on approaching a crossing held not to submit any issue of willful or wanton negligence, an issue neither pleaded nor proved. Lang v. C., 295NW57. See Dun. Dig. 9783.

Ordinarily, there is no prejudicial emphasis of one feature of a charge unless it has been given such undue prominence as to obscure other issues. St. George v. L., 296NW523. See Dun. Dig. 9783.

4. Re-opening case.
Trial court did not abuse its discretion in refusing to reopen divorce case for taking of additional testimony or ordering a new trial, where there was opportunity to garner all required witnesses during long pendency of matter, though defendant complained of attorneys employed by him at time of trial. Locksted v. L., 295NW 402. See Dun. Dig. 9716.

Reopening of divorce case for taking of additional testimony or to order a new trial is a matter primarily for trial court. Id.

9296. View of premises—Procedure.
Where upon stipulation of counsel in open court, jury is permitted to view stairway and premises, where plaintiff fell and sustained personal injuries, and to consider whatever they saw there as evidence, we cannot say that there was insufficient evidence to sustain their verdict against storekeeper. Smith v. O., 292NW745. See Dun. Dig. 9721.

9298. Requested instructions.

3. When requests may be refused.
A trial court is justified in disregarding a request that it instruct jury under the res ipsa loquitur doctrine where such request is made orally after arguments to jury and where no request is formulated in language suitable for the charge. Pettit v. N., 288NW223. See Dun. Dig. 9772, 9773.

Presumption against suicide is not evidence in action on accident policy, and so plaintiff was not entitled to an instruction that "there is in law a presumption against suicide". Ryan v. M., 289NW557. See Dun. Dig. 9774.

6. Request covered by the general charge.
Refusal of requested instructions substantially embraced in charge given was not error. Stolte v. L., (CCA 8), 110F(2d)226.

6½. Necessity for request.
Failure to instruct jury on a particular point is not ground for a new trial in absence of a timely request. Ness v. F., 292NW196. See Dun. Dig. 7179(46).

In action to set aside a deed as forgery, no reversible error was present where counsel failed to request an instruction that evidence must be clear and convincing and express satisfaction with a charge that burden of proving forgery may be satisfied by a fair preponderance of evidence. Amland v. G., 296NW170. See Dun. Dig. 9780.

9303. Verdict, general and special.
If reference be to report facts, report has effect of a special verdict, which so presents findings of fact as established by evidence that nothing remains for court to do but to draw therefrom conclusions of law. Ferch v. H., 295NW504. See Dun. Dig. 8318.

9304. Interrogatories—Special findings.

INTERROGATORIES—SPECIAL FINDINGS

3½. Interrogatories in general.
In action to recover rent for use of machine, wherein there was counterclaim for damages for breach of warranty and issue as to time for which rent was due, trial court properly required special verdict. Jaeger Mach. Co. v. M., 289NW51. See Dun. Dig. 9830.

Credibility of witnesses and inferences to be drawn from testimony were matters entirely for jury under special interrogatories. Amland v. G., 296NW170. See Dun. Dig. 9809.

TRIAL BY THE COURT

9311. Decision, how and when made.

FINDINGS AND CONCLUSIONS

2. Object of statute.
Objects of section are to abolish doctrine of implied findings; to make definite and certain just what is decided, not only for purposes of particular action, but also for purpose of applying doctrine of estoppel to future actions; and, finally, to separate questions of law and fact so that they may be more conveniently, intelligently, and fairly considered and reviewed on a motion for a new trial or on appeal. Fredsall v. M., 289NW780. See Dun. Dig. 9847(7).

3. When findings necessary.
Statute, by reason of existence of several fact issues held applicable, to a contested claim against an insolvent corporation. Fredsall v. M., 289NW780. See Dun. Dig. 9849.

Where order appealed from discloses that fact issues were tried and determined, court should have made its decision in writing, found the facts and conclusions of law, "separately stated", in conformity with this section. State v. Anderson, 291NW605. See Dun. Dig. 9849.

Where appellant moved that cause be remanded to trial court so as to permit a hearing on his motion for amended findings or, if that be denied, for permission to move court to make its memorandum part of order for review, no complaint could be made of failure of trial court to make findings upon all determinative fact issues, separately stated, court having granted alternative asked for. State v. Anderson, 294NW219. See Dun. Dig. 9849.

5. Nature of facts to be found.
Statute requires court to make findings upon all determinative fact issues. State v. Anderson, 294NW219. See Dun. Dig. 9851.

7. Findings and conclusions must be stated separately.
Whenever an issue of fact or of law and fact is tried and determined by the judge, statute requires separately stated findings of fact. Midland Loan Finance Co. v. T., 288NW853. See Dun. Dig. 9853.

Where an issue of fact is tried by court sitting without a jury, there is required a decision separately stating facts found and conclusions of law following therefrom. State v. Riley, 293NW95. See Dun. Dig. 9853.

13. Judgment must be justified by the findings.
In absence of separately stated findings of fact and conclusions of law required by statute, case will be remanded to trial court. State v. Riley, 293NW95. See Dun. Dig. 9853.

16. When findings become part of record.
Supreme Court has jurisdiction to remand a case to trial court to enable appellant to move that court that its memorandum be made a part of order pending on appeal. State v. Anderson, 291NW605. See Dun. Dig. 438a.

19. Reopening case.
A court may vacate findings and reopen a case for further evidence. Holmes v. C., 295NW649. See Dun. Dig. 9716.

9312. Proceedings on decision of issue of law.
A party who interposes a demurrer is entitled to notice of all subsequent proceedings even though demurrer is overruled and no leave to plead over is obtained. Kemerer v. S., 288NW719. See Dun. Dig. 476.

Failure to give defendant notice of application for an order for judgment following overruling of demurrer is an irregularity which rendered judgment vulnerable on direct attack. Id. See Dun. Dig. 476.

Section 9312 has reference not to notice but to method of establishing plaintiff's claim under §9256. Id. See Dun. Dig. 4991.

TRIAL BY REFEREES

9319. Trial and report—Powers—Effect of report.
If reference be to report facts, report has effect of a special verdict, which so presents findings of fact as established by evidence that nothing remains for court to do but to draw therefrom conclusions of law. Ferch v. H., 295NW504. See Dun. Dig. 8318.

GENERAL PROVISIONS

9322. Dismissal of action.

½. In general.
Generally, judgment of dismissal made at trial would be requisite before appeal could be taken, but where gist of dismissal is want of jurisdiction, an appeal from the order may be allowed. Bulau v. B., 294NW845. See Dun. Dig. 301.

5. Dismissal for failure to prove cause of action.
When plaintiff's case has disclosed a good defense a dismissal is justified at end of plaintiff's testimony. Beck v. N., 288NW217. See Dun. Dig. 9758.

NEW TRIALS

9325. Grounds—Presumption on appeal.

THE STATUTE GENERALLY

½. In general.
Where money was paid into court under an award in a highway condemnation proceeding and a contest ensued over ownership of the property and the fund, and on appeal it appeared that one contestant might not be entitled to any part of the fund, and the other contestant only a small part thereof, case was remanded for new trial of all the issues to prevent a gross miscarriage of justice, and for participation therein of the state, if attorney general elects to apply to intervene to obtain a possible recovery for the state. State v. Riley, 293NW95. See Dun. Dig. 7069.

In action to set aside a deed as forgery, wherein issue was close on facts an order denying a new trial was reversed in interest of justice. Amland v. G., 296NW170. See Dun. Dig. 429.

1. New trial defined.
An order granting a new trial wipes slate clean except insofar as testimony given on first trial may be introduced to confront a witness testifying differently on second trial, and testimony of first trial should not be taken into consideration, directly or indirectly, by trial court in disposing of matters raised on second trial. Salters v. U., 292NW762. See Dun. Dig. 7082.

9. Granted only for material error.
Section authorizes the supreme court to grant a new trial only for causes materially affecting rights of an appellant. Dahlstrom v. H., 295NW508. See Dun. Dig. 7074.

FOR MISCONDUCT OF JURY

17. Affidavits on motion.
A juror's affidavit is not admissible to impeach verdict of jury. Dahlin v. F., 288NW851. See Dun. Dig 7109.

FOR ACCIDENT OR SURPRISE

24½. In general.
After answer set up running of statute of limitations plaintiff could not successfully claim surprise in not expecting that payment on note within six years of action would be denied. Campbell v. L., 288NW833. See Dun. Dig. 7117.

FOR NEWLY DISCOVERED EVIDENCE

30. To be granted with extreme caution.
Granting of new trial on ground of newly discovered evidence involves exercise of discretion. Amland v. G., 296NW170. See Dun. Dig. 7123.

32. Showing on motion.
Trial court did not abuse its discretion in refusing to reopen divorce case for taking of additional testimony or ordering a new trial, where there was opportunity to garner all required witnesses during long pendency of matter, though defendant complained of attorneys employed by him at time of trial. Locksted v. L., 295NW402. See Dun. Dig. 7127.

35. Nature of new evidence.
Court was justified in denying motion for new trial on ground of newly discovered evidence consisting of bank records of deposit of check and collection thereof on account of lack of diligence, though there was a misapprehension as to whether banks kept records of checks transmitted for collection at the time of the trial. Campbell v. L., 288NW833. See Dun. Dig. 7128.

FOR EXCESSIVE OR INADEQUATE DAMAGES

36. Under either subd. 5 or subd. 7.
Instruction in connection with permanent injury that jury should consider what the evidence shows is reasonably certain that plaintiff will sustain was not erroneous. Guin v. M., 288NW716. See Dun. Dig. 2570.

Evidence held to justify submission of permanent injuries to plaintiff's neck to jury. Id. See Dun. Dig. 2570.

A verdict for $6,347.50 for injury to neck held not so excessive as to indicate passion or prejudice. Id. See Dun. Dig. 2597, 7134.

A verdict is not as a matter of law excessive where there is sufficient evidence to go to the jury that actual damages as distinguished from treble damages amounted to $1300, verdict being for actual damages of $400 and treble damages of $1200. Lawrenz v. L., 288NW727. See Dun. Dig. 2597.

Verdict for $1,000 to a 17 year old boy who lost several teeth by assault and battery held not excessive. Ness v. F., 292NW196. See Dun. Dig. 7134.

Verdict for $6575 for death of a 48 year old owner of a pool hall who supported his family of wife and 6 children well was not excessive. Ost v. U., 292NW207. See Dun. Dig. 7134.

A verdict for $3800.00, reduced to $3000.00, was not excessive for severe head and brain injuries. Kraus v. S., 293NW253. See Dun. Dig. 2597.

Verdict for $7500 held not excessive for death of clerk 67 years of age. Symons v. G., 293NW303. See Dun. Dig. 2617.

In connection with actual physical injuries sustained, it is not error to allow jury to consider plaintiff's testimony regarding subjective symptoms of other injuries claimed to have been sustained. Schuman v. M., 296NW 174. See Dun. Dig. 2570a.

A verdict for $3400, reduced to $2500 by court, held not excessive for severe bruises and scars on forehead, bridge of nose and left side of face with some deafness, dizzy spells and headaches. Id. See Dun. Dig. 7138.

38. Necessity of passion or prejudice.
While a memorandum not expressly made a part of an order granting a new trial unless plaintiff consents to reduction in verdict may be referred to for purpose of throwing light upon or explaining the decision, it may not be referred to for purpose on impeaching, contradicting or overcoming express findings or conclusions necessarily following from decision, but may be referred to to ascertain that verdict was not result of passion or prejudice. Ross v. D., 290NW566, 291NW610. See Dun. Dig. 2597. Cert. den. 61SCR9.

Verdict for $18,000 reduced to $15,000 was not excessive where plaintiff's loss of earnings alone exceeded amount allowed. Id. See Dun. Dig. 2597.

42. For inadequate damages.
Given a case for nominal damages and no more, there should be no reversal for denial of any recovery. Hardware Mut. Casualty Co. v. F., 294NW213. See Dun. Dig. 417a.

FOR ERRORS OF LAW ON THE TRIAL

43. What are errors on the trial.
Ruling which is correct in excluding evidence will be upheld though reason given by trial court for exclusion is erroneous. Stolte v. L., (CCA8), 110F(2d)226.

The admission of expert testimony is largely a matter of discretion for the trial judge, and he may upon motion for a new trial decide that he abused that discretion and order a new trial on the ground of error of law occurring at the trial. Simon v. L., 292NW270. See Dun. Dig. 7201.

Where a fireman was asked whether certain merchandise could have been destroyed by fire without burning off supports upon which it rested, and objection thereto did not challenge question as outside scope of opinion testimony, error, if any, in allowing an answer, was harmless. Supornick v. N., 296NW904. See Dun. Dig. 7180.

FOR INSUFFICIENCY OF EVIDENCE

46. General rules.
Order granting new trial for insufficiency of evidence must be affirmed where it is impossible to say upon the record that evidence is "manifestly and palpably in favor of verdict". Halweg's Estate, 290NW577. See Dun. Dig. 7142.

9326. Basis of motion.

Unless objections to misconduct in argument are taken before jury retires, they cannot be reviewed on motion for new trial or appeal, although record contains argument in full. Symons v. G., 293NW303. See Dun. Dig. 388a, 9800.

9327. Exceptions to ruling, order, decision, etc.

See also notes under §9493.

1. In general.
Reviewing court will not consider points in brief which were not presented to trial court on motion for new trial. Ness v. F., 292NW196. See Dun. Dig. 385.

Only errors assigned below are reviewable on appeal from an order denying a motion for a new trial. Geo. Benz & Sons v. H., 293NW133. See Dun. Dig. 384.

Scope of review on appeal is limited by assignments of error in motion for a new trial on appeal from order denying new trial. Amland v. G., 296NW170. See Dun. Dig. 358a.

An assignment of error that court erred in denying a motion for a new trial, without more, raises no question of law, since it is duty of appellant to put finger on specific error. Slawik v. C., 296NW496. See Dun. Dig. 360 (94, 96).

Where case was tried and determined on theory of breach of contract appellant is not in position to claim that complaint sounded in conversion. Stanton v. M., 296NW521. See Dun. Dig. 7675.

Where question of waiver by insurer of its defense of attempted fraud was not presented to lower court and did not appear in specifications of error in motion for new trial, that question will not be considered on appeal. Supornick v. N., 296NW904. See Dun. Dig. 384.

4. Reception of evidence.
Where there is no objection to question asked or answer given, there is no basis for a reversal. Ness v. F., 292NW196. See Dun. Dig. 9728.

Counsel cannot on appeal complain that many essential matters were testified to through leading questions, where no objection was made below. Locksted v. L., 295NW402. See Dun. Dig. 9724.

Objection to question that it was "without foundation, no length of time shown," did not challenge examination as going beyond field of opinion testimony. Supornick v. N., 296NW904. See Dun. Dig. 9728.

5. Misconduct of counsel.
There can be no reversal for gratuitous statements of fact by counsel where record discloses that no objection or motion was made to eliminate them. Ness v. F., 292 NW196. See Dun. Dig. 9724.

Unless objections to misconduct in argument are taken before jury retires, they cannot be reviewed on motion for new trial or appeal, although record contains argument in full. Symons v. G., 293NW303. See Dun. Dig. 388a, 9800.

6. Instructions.

Defendant was not in position to assign error on submission of question of permanent injuries to jury where there was no request on the trial that such issue be not submitted, nor any exception taken to its submission. Guin v. M., 288NW716. See Dun. Dig. 9797.

9. Findings of fact.

A failure of trial court to expressly find that transfer was made in good faith cannot be raised for first time on appeal from a judgment for defendant in action to set aside a fraudulent conveyance. Andrews v. W., 292 NW251. See Dun. Dig. 384.

Assignment that court erred in not finding that amount stated to be due in public notice of foreclosure of mortgage was grossly excessive was not open to consideration in absence of a settled case or bill of exceptions. McGovern v. F., 296NW473. See Dun. Dig. 344(87).

Where there is no settled case fact that one finding of fact is inconsistent with others is not ground for relief. Moe v. O., 296NW512. See Dun. Dig. 345.

10. Entry of judgment.

Reduction of verdict for personal injuries by trial court as a separate matter from general assignment of excessive damages, was out of case for failure to assign error on it below in motion for new trial, and in assignments of error on appeal. Kraus v. S., 293NW253. See Dun. Dig. 358.

In action for reasonable value of services rendered, whether it was error for clerk to enter judgment by default without receiving proof of damages will not be decided where it was not presented for decision below. Kane v. S., 296NW1. See Dun. Dig. 384.

9328. "Bill of exceptions" and "case" defined.

A transcript of the evidence which court below refused to allow as a settled case is no substitute for a settled case or bill of exceptions and does not furnish any basis for a review of evidence to determine its sufficiency. Doyle v. S., 288NW152. See Dun. Dig. 1369.

When a case comes up on appeal from an order sustaining a demurrer, no settled case is needed. Keller Corp. v. C., 291NW515. See Dun. Dig. 1368.

9329. Bill of exceptions or case.

Sufficiency of evidence to sustain findings of fact cannot be reviewed on appeal without a settled case or bill of exceptions, in absence of which it is presumed that evidence sustained findings. Doyle v. S., 288NW152. See Dun. Dig. 344.

It is within discretion of trial court to settle a case where an appeal from a judgment has been perfected within six months from entry thereof, even though application to settle was not made until after expiration of said six months. McGovern v. F., 290NW575. See Dun. Dig. 1372.

On appeal from a judgment where bill of exceptions or case is omitted, only question that may be considered is whether conclusions of law embodied in judgment are warranted by findings. State v. Anderson, 294NW219. See Dun. Dig. 344.

REPLEVIN

9333. Bond and sureties.

Fraud of principal in redelivery bond in a replevin action in inducing surety to execute it is not a defense in action by obligee against surety. Neefus v. N., 296NW 579. See Dun. Dig. 8432.

ATTACHMENT

9343. Contents of affidavit.

3. Transfer with intent to defraud.

Fraudulent conveyances of chattels—chattel mortgages —sales—conditional sales. 24 MinnLawRev 832.

9344. Conditions of required bond.

Court erred in vacating writ of attachment and levy without giving plaintiff opportunity to file another bond nunc pro tunc, irregularity being in use of stale bond due in part to court's act in approving it. Ingebretson v. M., 288NW577. See Dun. Dig. 638.

Defect in attachment bond is a mere irregularity in procedure, and not jurisdictional. Id.

9346. Execution of writ.

2. Levy on personalty.

Shares of corporate stock are personal property in the form of a property interest in the corporation, and are subject of attachment, garnishment, and levy of execution. Wackerbarth v. W., 292NW214. See Dun. Dig. 627.

GARNISHMENT

9356. Affidavit—Garnishee summons—Title of action.

Wackerbarth v. W., 292NW214; note under §9360, note 1.

9359. Effect of service on garnishee—Fees.

S. T. McKnight Co. v. T., 296NW569; note under §9361. (1).

A garnishee is regarded as an innocent person owing money to, or having in his possession property of, another, without fault or blame, and he is supposed to stand indifferent as to who shall have money or property. Midland Loan Finance Co. v. K., 287NW869. See Dun. Dig. 3953.

A garnishment proceeding is virtually an action brought by defendant in plaintiff's name against garnishee resulting in subrogating plaintiff to right of defendant against the garnishee, and plaintiff can have no greater rights or remedies than those possessed by his debtor. Id. See Dun. Dig. 3955.

Evidence sustains finding that at time of service of garnishment summons garnishee had no money or property in its hands or under its control belonging to defendant. Id. See Dun. Dig. 3988.

An attaching creditor in garnishment acquires by the garnishment the same, but no greater, right than the debtor has against the garnishee, and this applies to rights of holder of certified check delivered for a special purpose. Gilbert v. P., 288NW153. See Dun. Dig. 3957.

9360. Property subject to garnishment.

S. T. McKnight Co. v. T., 296NW569; note under §9361. (1).

1. Held garnishable.

Shares of stock are personal property and subject to garnishment as property of defendant irrespective of whether or not stock certificates have been delivered to shareholder. Wackerbarth v. W., 292NW214. See Dun. Dig. 3966.

Puget Sound National Bank v. Mather, 60M362, 62NW 396, applies only to stock certificates of a foreign corporation which is not subject to jurisdiction of courts of this state. Id. See Dun. Dig. 3966.

3. Held not garnishable.

If bank honored check and marked it paid, fact that there was an overdraft did not prevent bank from denying liability as a garnishee of depositor on theory that bank had no legal right or authority to cash the check. Midland Loan Finance Co. v. K., 287NW869. See Dun. Dig. 3967.

9361. In what cases garnishment not allowed.

(1).

Where defendant was liable as endorser upon promissory note made by bankrupt third party, payable to garnishee bank, which held as collateral accounts receivable of bankrupt and an "office check" payable to defendant by garnishee, funds represented by office check were payable only upon contingency that pledged receivable would be sufficient to retire principal to garnishee, there was a "contingency" which prevented garnishment. S. T. McKnight Co. v. T., 296NW569. See Dun. Dig. 3965a.

9363. Garnishment of corporations.

Corporate garnishee whose stock is sought to be bound should have been compelled to disclose as to matters dealing with transfers of stock since it was relevant to proceeding and information as to possible claimants who might have rights superior to garnishing creditors. Wakerberth v. W., 292NW214. See Dun. Dig. 3997, 4000.

9364. Municipal corporations, etc.—Procedure.

Unearned compensation of state institutional employees cannot be assigned, and it is not possible to make deductions for insurance premiums from pay roll checks upon written request and authorization by employee. Op. Atty. Gen., (88a-19), Feb. 14, 1940.

City may not adopt and enforce a plan whereby it contracts for a group insurance policy covering all its employees and deduct from salary or wages sum required to pay premium, but this may be done for benefit of all employees consenting thereto. Op. Atty. Gen., (249B-9), Feb. 14, 1940.

Executive council has no authority to approve or put into operation a welfare group plan of accident, health, and surgical benefits sponsored by an insurance company, whereby deductions are to be made from salaries of state employees for payment of premiums. Op. Atty. Gen., (249B-9), Feb. 27, 1940.

City of Minneapolis may not enter into contract with members of police department for assignment of a part of their future wages to Minneapolis police officers group hospitalization service in payment for services in periods in excess of 60 days. Op. Atty. Gen. (249B-9[a]), June 14, 1940.

Board of Education may not contract for group insurance for its employees, but may consent to employees making such a contract and deduct premium from wages with their consent. Op. Atty. Gen. (249B-8), Aug. 27, 1940.

A city is without authority to compel its employees to enter into a group health and accident contract and deduct from their wages or salaries sum required to pay premiums, but may do so with consent of employees. Op. Atty. Gen., (249B-8), Jan. 31, 1941.

9368. Time for appearance in garnishee proceedings.

Federal Soldiers and Sailors Civil Relief Act of 1940 will apply to actions in state court which come within its terms. (Mason's USCA, Title 50, end.) Op. Atty. Gen. (310), Nov. 6, 1940.

9376. Proceedings when garnishee has lien.

S. T. McKnight Co. v. T., 296NW569; note under §9361. (1).

INJUNCTION

9385. How issued—Effect on running of time.

Injunction will lie to restrain illegal practice of law without a license. Cowern v. N., 290NW795. See Dun. Dig. 4483b.

A fraternal organization employing and paying physician to care for members cannot interfere by injunction with any proceedings that may be brought by board of medical examiners to revoke license of physician for unprofessional conduct in being employed by a corporation. Fisch v. S., 292NW758. See Dun. Dig. 7483.

Injunction will not lie against board of medical examiners to prevent threatened hearing that might lead to suspension or revocation of plaintiff's license to practice medicine and thereby interfere with contract relationship between plaintiff and a fraternal corporate organization, there being an adequate remedy in any proceeding that might be initiated before that board. Fisch v. S., 292NW758. See Dun. Dig. 4472.

9386. Temporary injunction when authorized.

1. In general.

Temporary restraining order pending final judgment rests largely upon judicial discretion and should not be reversed in absence of abuse. McFadden Lambert Co. v. W., 296NW18. See Dun. Dig. 4490 (89).

9388. Bond required—Damages.

While damages from a wrongful issuance of injunction may be determined in the injunction suit, they are recoverable (unless the writ was procured by malice) only by action on the bond. Midland Loan Finance Co. v. T., 288NW853. See Dun. Dig. 4499.

RECEIVERS

9390. Court may order deposit, etc.

District court had jurisdiction to enter judgment against vilage and also to determine and enter judgment in favor of attorney for judgment creditor for a certain sum as a lien upon the first judgment, and to permit village to deposit the amount of the judgment with the clerk of court when a judgment creditor of the first judgment creditor attempted to levy execution on the judgment against the village, based upon its judgment, and an assignment of the attorney's judgment, and a receiver of the first judgment creditor was not entitled to prohibition to prevent the court from considering proceedings on order to show cause why money deposited with clerk should not be paid to second judgment creditor. State v. District Court, 287NW491. See Dun. Dig. 8247.

JUDGMENT

9392. Measure of relief granted.

1. On default.

Federal Soldiers and Sailors Civil Relief Act of 1940 will apply to actions in state court which come within its terms. (Mason's USCA, Title 50, end.) Op. Atty. Gen. (310), Nov. 6, 1940.

3. Conclusiveness and collateral attack.

In suit by mortgage trust deed trustees at request of owner of about 90% of mortgage bonds to foreclose such trust deed wherein such owner of bonds was joined as party plaintiff and as defendant to petition of intervention, which suit resulted in decree for defendants, such owner of bonds was concluded by the decree. Phoenix Finance Corp. v. I., (CCA8), 115F(2d)1.

Holding judgment recovered by a claimant against indemnitee in action, pendency of which he gave due notice to indemnitor and which he requested him to defend, conclusive against indemnitor in action by indemnitee to recover indemnity is not a denial of due process of law. State Bank v. A., 288NW7. See Dun. Dig. 1646.

A judgment recovered against an indemnitee upon obligation covered by a contract of indemnity is conclusive against indemnitor in an action by indemnitee to recover indemnity, if indemnitee gave indemnitor notice of pendency of action in which judgment was recovered and requested him to assume defense. Id. See Dun. Dig. 4341.

Where plaintiff sued for breach of contract and recovered a judgment which was satisfied, and assigned his claim for breach of another contract and assignee recovered judgment, which, in turn, was assigned to plaintiff, and not satisfied, plaintiff could not then institute an action for conspiracy and include among allegations as "actionable wrongs" two paragraphs embodying the acts causing the breach of contract included as acts done by defendants in "furtherance of the conspiracy." Cashman v. B., 288NW732. See Dun. Dig. 5163.

Probate court being one of record and of superior jurisdiction, its records import verity and can be impeached only in a direct proceeding. Shapiro v. L., 289NW48. See Dun. Dig. 7769 (33, 34, 35).

Presumption of jurisdiction on collateral attack is conclusive unless want of jurisdiction affirmatively appears from record itself. Id. See Dun. Dig. 5146.

If one sues on a contract, he must litigate all claims he then has thereunder. Such claims constitute but one cause of action. Doyle v. C., 289NW784, 785. See Dun. Dig. 5167. Aff'd 60SCR1102.

Testimony of attorneys not in conflict with court record is competent as explanation of subject matter and as showing their own action with respect thereto. Fiske's Estate, 291NW289. See Dun. Dig. 5138.

An order adjusting and allowing final account of an executor is equivalent of a judgment or decree adjudging amount due estate from executor, and may not be vacated, after expiration of time for appeal therefrom, except under §§9283 or 9405. Woodworth's Estate, 292NW 192. See Dun. Dig. 5114.

Where in neither registration proceedings themselves nor by the record, existence of an unclaimed claimant is shown, want of jurisdiction does not appear from *judgment roll itself, judgment of registration is not* subject to collateral attack in a suit to quiet title. Dean v. R., 292NW765. See Dun. Dig. 8361.

Decree of a federal court in a reorganization proceeding is not res judicata of certain issues expressly stated to be without prejudice to decision of such issues in state courts. First & American Nat. Bank of Duluth v. W., 292NW770. See Dun. Dig. 5164.

A default judgment of a domestic court of superior jurisdiction being immune to collateral attack by a party for fraud, judgment debtor cannot show fraud and that he did not owe debt on which judgment was rendered. Geo. Benz & Sons v. H., 293NW133. See Dun. Dig. 5143.

A third party defrauded by an agreement and judgment pursuant thereto, may attack the judgment collaterally for fraud, but parties to fraud cannot. Id.

A judgment by default is just as conclusive an adjudication between parties as any other. Geo. Benz & Sons v. H., 293NW133. See Dun. Dig. 5181.

A prior judgment or order is not res judicata as to matters not litigated or adjudicated. First & American Nat. Bank of Duluth v. H., 293NW585. See Dun. Dig. 5159.

An order affecting a substantial right, and appealable, made in determining a motion after a full hearing has been had on a controverted question of fact and deciding a point actually litigated, is an adjudication binding upon parties in a subsequent action and conclusive upon point decided, but estoppel applies only to facts actually litigated and not to such as might have been litigated. Bulau v. B., 294NW845. See Dun. Dig. 6510.

Unless one is a party to cause and as such possessed of right to have a voice in proceeding, to examine and cross-examine witnesses, and to appeal from a final order or judgment, he is not bound by result of litigation, being a mere stranger thereto. Midland Loan Finance Co. v. L., 296NW911. See Dun. Dig. 5171.

Judgments of a municipal court attempted to be established by unconstitutional law are valid. Op. Atty. Gen., (306a-4), Feb. 21, 1941.

Failure to plead mistake in action at law as a bar to a subsequent suit in equity. 24MinnLawRev576.

4. Foreign judgments—full faith and credit.

Presumptively Jefferson county court of common claims, Alabama, being a court of record with a seal, had jurisdiction to render judgment as shown by certificate, in absence of evidence demonstrating otherwise in action on such judgment in Minnesota. Patterson v. C., 295NW401. See Dun. Dig. 5208.

Judgment entered only on docket of court of another state would be sufficient to support action in this state if such entry constituted a sufficient judgment under laws of the foreign state. Id. See Dun. Dig. 5209.

In action on a judgment of a foreign state, if defendant had same name as defendant against whom judgment was taken, it was burdened with disproving identity of party. Id. See Dun. Dig. 5209.

In action on judgment of another state there may be no allowance in addition to judgment for costs in action in foreign court. Id. See Dun. Dig. 5210.

5. Precedents.

Doctrine of stare decisis would not be adhered to where it was clear to the court that the decision sought to be followed under the doctrine was erroneous. U. S. v. State of Minnesota, (CCA8), 113F(2d)770.

Decisions of the United States Supreme Court are final as to what constitutes interstate commerce. City of Waseca v. B., 288NW229. See Dun. Dig. 3747.

The law is a practical science, having to do with the affairs of life, and any rule is unwise if, in its general application, it will not, as a usual result, serve the purposes of justice. First State Bank of Correll, 288NW 709. See Dun. Dig. 7498a(38).

Doctrine of stare decisis is declaration of policy rather than rule, and no rule of practice and no rights of property being involved, it can have no restraining effect where erroneous policy of decision law is opposed to a later rule declared by statute. Park Const. Co. v. I., 296 NW475. See Dun. Dig. 8819a.

6. Summary judgment.

Discrepancy between amount sued for and amount for which plaintiff filed its claim in bankruptcy required explanation in the way of evidence, and precluded sum-

mary judgment. Chase Nat. Bank of City of New York v. B., (DC-Minn), 32FSupp230.

In suit on written guaranty of notes, plaintiff was not entitled to summary judgment where an alleged payment, denied by defendant to have been made, would possibly have an important bearing on an acceleration clause in the notes, and in determining as to whether or not statute of limitations had run. Id.

9394. Same, how signed and entered—Contents.

3. What constitutes judgment book.

Probate court's denial of petition to reopen estate does not constitute res judicata on issue of fraud in inducing a party not to file a claim against estate of a deceased person because probate court did not have jurisdiction to determine such issue. Bulau v. B., 294NW845. See Dun. Dig. 5194a.

9396. Treble damages for trespass.

Evidence held to sustain verdict that trespass by electric company was not casual, the result of inadvertence, mistake, or unintentional. Lawrenz v. L., 288NW727. See Dun. Dig. 9696.

9400. Lien of judgment.

8. Nature of lien.

Rights of bona fide purchasers at execution sale. 24 MinnLawRev 805.

9. Duration of lien.

Municipal court judgment docketed by transcript in district court ceases to be a lien 10 years after its entry, rather than 10 years after docketing in district court. Op. Atty. Gen., (520d), Jan. 25, 1940.

Lien of judgment creditor is extinguished by forfeiture to state for delinquent taxes. Op. Atty. Gen., (412a-10), Feb. 13, 1940

Judgments—limitations upon actions, executions and liens. 24MinnLawRev660.

10. Upon what estates and interests.

Where owner repurchases tax-forfeited property and assigns his interest to a third person and deed is issued directly to assignee, judgment docketed against assignor attached to interest of assignee. Op. Atty. Gen. (412a-23), Sept. 13, 1940.

9404. Assignment of judgment—Mode and effect.

Rights of bona fide purchasers at execution sale. 24 MinnLawRev 805.

9405. Judgments, procured by fraud, set aside.

1. Nature of action.

An order adjusting and allowing final account of an executor is equivalent of a judgment or decree adjudging amount due estate from executor, and may not be vacated, after expiration of time for appeal therefrom, except under §§9283 or 9405. Woodworth's Estate, 292NW 192. See Dun. Dig. 5108a.

8. For fraudulent practices on adverse party.

Perjury or fraud must be something that occurs outside the trial and prevents other party from participating in trial or induces him to not appear and present his defense or objections. Woodworth's Estate, 292NW 192. See Dun. Dig. 5122.

9. For fraud on court.

Self or double dealing by a fiduciary renders transaction voidable by beneficiary, but where facts were fully disclosed to court, and action of guardian was on advice of independent counsel whose only duty was to, and whole whole interest was that of, the ward, and transaction was approved by court, it cannot thereafter be disaffirmed by ward. Fiske's Estate, 291NW289. See Dun. Dig. 5126.

13. Limitations.

Probate court has power to vacate a previous order allowing a final account where it is made to appear that the order was procured without a hearing because of mistake and inadvertance on the part of the court, and such power does not terminate upon the expiration of the time to appeal from the order sought to be vacated. Henry's Estate, 292NW249. See Dun. Dig. 7784.

9406. How discharged of record.

Judgments will not be set off upon motion if it will defeat attorney's right to a lien, and this applies as to a judgment for defendant for costs, especially where defendant is without funds and attorney has advanced cost of printing brief. Exsted v. O., 287NW602. See Dun. Dig. 5088.

9409. Discharge of judgments against bankrupts.

Trial court did not abuse its discretion in vacating a judgment proved up as upon default after defendant's counsel answered in court and advised plaintiff's attorney, the court and the clerk that defendant had been adjudicated a bankrupt, and left court room in belief that no proceedings would be had, defendant later obtaining a discharge in bankruptcy. Davenport v. S., 288NW167. See Dun. Dig. 5121.

9410. Joint debtors—Contribution and subrogation.

Kemerer v. S., 288NW719.

9411. Several judgments against joint debtors.

All persons participating in a tort are liable as tort feasors. Lawrenz v. L., 288NW727. See Dun. Dig., 9643 (92, 97).

Where owners and independent contractor agreed upon a repair on rebuilding that they knew would be dangerous to other persons who would use the building, they were joint tort feasors and equally guilty of reprehensible conduct. Murphy v. B., 289NW563. See Dun. Dig. 5835, 9643.

Where an injury is caused by concurrent negligence of several persons, negligence of each is proximate cause of injury and each is liable for all resulting damages. Anderson v. J., 294NW224. See Dun. Dig. 7000(84, 85).

EXECUTIONS

9416. When enforced.

A personal judgment entered without service of process was absolutely void, not merely irregular or erroneous, and a levy of execution under it constituted a tort in nature of trespass rendering plaintiff liable for damages, irrespective of malice or other wrongful conduct on part of plaintiff. Beede v. N., 296NW413. See Dun. Dig. 7837.

Judgments—limitations upon actions, executions and liens. 24MinnLawRev660.

9425. What may be levied on, etc.

½. In general.

Rights of bona fide purchasers at execution sale. 24 MinnLawRev 805.

1. Held subject to levy.

Shares of corporate stock are personal property in the form of a property interest in the corporation, and are subject of attachment, garnishment, and levy of execution. Wackerbarth v. W., 292NW214. See Dun. Dig. 3510.

9429. On other personal property.

Shares of corporate stock are personal property in the form of a property interest in the corporation, and are subject of attachment, garnishment, and levy of execution. Wackerbarth v. W., 292NW214. See Dun. Dig. 3510.

9430. Certificate to be furnished officer.

Shares of corporate stock are personal property in the form of a property interest in the corporation, and are subject of attachment, garnishment, and levy of execution. Wackerbarth v. W., 292NW214. See Dun. Dig. 3510.

9435. Sale, when and how.

A purchaser of property sold on execution under judgment acquires a good title as against claim of fraud and non-indebtedness. Geo. Benz & Sons v. H., 293NW 133. See Dun. Dig. 3536.

9437. Certificate of sale of realty.

2. Rights of purchaser.

Where interest in real estate was sold under execution to holder of an assignment of judgment executed in blank, and thereafter land was condemned by the state and damages deposited with clerk of court, and thereafter sheriff's deed was executed under the execution sale, grantee was entitled to the money deposited. State v. Anderson, 294NW219. See Dun. Dig. 3536.

9447. Property extempt.—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 $500.00 in value.

6. Three cows, ten swine, a span of horses or mules or in lieu of such span of horses or mules, one farm tractor, 100 chickens, 50 turkeys, 20 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 $300.00 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 $400.00 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 co-partnership in printing or publishing a newspaper, or by any person hired by him to use them, not exceeding $2,000 in value, together with stock in trade not exceeding $400.00 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: 100 bushels of wheat, 100 bushels of rye, 100 bushels of barley, 100 bushels of potatoes, 100 bushels of oats, 100 bushels of flax, 100 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 money arising from fire or other insurance upon any property exempt from sale on execution.

14. All money received by, or payable to, a surviving wife or child from insurance upon the life of a deceased husband or father, not exceeding $10,000.

15. All money, 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 $35.00, plus $5.00 additional for each actual dependent of such person, due for any services rendered by him or her for another during 30 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 30 day period, shall be deemed and considered a part of, or all, as the case may be, of said exemption of $35.00, plus $5.00 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 18 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.

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 chaim 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. (As amended Act Apr. 21, 1941, c. 351, §1.)

(4).

Exemption laws relate to debts and obligation voluntarily incurred, and not to taxes. Christgau v. W., 293NW619. See Dun. Dig. 3680.

(6).

An automobile is not exempt from levy and sale as a "wagon". Poznanovic v. M., 296NW415. See Dun. Dig. 3686.

(8.)

A nonresident is not entitled to claim tools of his trade exempt. Ingebretson v. M., 288NW577. See Dun. Dig. 3688.

A farmer is not entitled to an exemption as a "mechanic, miner, or other person". Poznanovic v. M., 296NW415. See Dun. Dig. 3688.

(16).

Workers leaving WPA work for private employment are exempt from attachment and garnishment for six months, but only where employment by WPA was granted for purpose of relieving actual need to a person who would otherwise be compelled to seek direct relief. Op. Atty. Gen., (843k), Oct. 3, 1939.

During the 6-months period following receipt of relief debtor may invoke exemption against as many creditors as he may choose. Op. Atty. Gen. (843k), Oct. 2, 1940.

This sub-section as amended is constitutional. Id.

UNIFORM DECLARATORY JUDGMENTS ACT

9455-1. Courts to construe rights.

In suit for declaratory judgment court could not determine question rendered moot by stipulation that judgment should not be res judicata, as act did not authorize court to give opinion upon hypothetical question not connoting a controversy of a justiciable nature. Imperial Irr. Dist. v. N., (CCA9), 111F(2d)319.

Liability of insurer to defend state court action against insured held a controversy within meaning of act. Maryland Casualty Co. v. U., (CCA1)111F(2d)443, rev'g (DC-Mass)29FSupp986.

The phrase "rights and other legal relations" is broad enough to authorize a declaration of nonliability. Id.

Upon motion to dismiss action for declaratory relief facts alleged in complaint must be taken as true. Consolidation Coal Co. v. M., (CCA6), 113F(2d)813.

Federal Declaratory Judgment Act is operative only as to controversies which are such in a constitutional sense, that is appropriate for judicial determination, the word controversy being less comprehensive than case. Smith v. B., (CCA4), 115F(2d)186, aff'g (DC-SC), 34FSupp 989.

In determining whether there was requisite diversity of citizenship in declaratory judgment suit to give federal court jurisdiction it was duty of court to arrange parties with respect to actual controversy, looking beyond formal arrangement made by the bill, and such realignment should be based upon identity of interests. State Farm Mut. Automobile Ins. Co. v. H., (CCA4), 115F(2d)298, aff'g (DC-SC), 32FSupp665.

A bona fide controversy between citizens of different states is necessary to support federal jurisdiction in declaratory judgment suit depending upon diversity of citizenship. Id.

Relief under federal declaratory judgment statute must be sought within limits of jurisdiction of federal court. Id.

State attorney general is not under a duty to enforce a law which violates federal constitution, and hence suit against him to have the law declared unconstitutional is not a suit against the state; but before he may be proceeded against as an individual there must be some

basis for treating him as a threatened wrongdoer, and suit cannot be maintained against him in face of his express declaration that he would not attempt to enforce the law until he formed an opinion that it was constitutional. Southern Pac. Co. v. C., (CCA9), 115F(2d)746.

Existence of a justiciable controversy is essential to jurisdiction to render declaratory judgment, and such controversy is present when enforcement of statute is sought against one asserting its unconstitutionality, who would sustain irreparable injury by the enforcement. Id.

Where gas company and city disagreed as to former's liability to carry out contract to furnish such city gas from certain field at rate fixed in the contract, the latter claiming that gas was available from field in question and former claiming that it had to be procured from foreign field rendering the rates provided in the contract inapplicable, a justiciable controversy was presented within jurisdiction of federal court, and such jurisdiction was not defeated by Johnson Act prohibiting exercise of federal jurisdiction to restrain the enforcement of orders affecting public utility rates. Mississippi Power & Light Co. v. C., (CCA5), 116F(2d)924.

Availability of another adequate remedy is no ground for refusing relief under federal act, although some support is found for this position in cases arising under state law. Dunleer Co. v. M., (DC-WVa), 33FSupp242.

The Declaratory Judgment Act furnishes an additional remedy, which is not to be denied because of the pendency of another suit. Lehigh Coal & Navigation Co. v. C., (DC-Pa), 33FSupp362.

Suit by dairy proprietor and farmer milk producers for declaratory judgment determining that milk received by such dairy proprietor from his co-plaintiffs and used by him in the manufacture of dairy products should be included in pooling arrangement under milk order promulgated under Agricultural Marketing Agreement Act, held to present an actual controversy. Roloff v. P., (DC-Ia), 33FSupp513.

Act does not add to jurisdiction of court, but is a procedural statute which provides an additional remedy for use in cases where federal courts already have jurisdiction. Mutual Life Ins. Co. of N. Y. v. M., (DC-SC), 34FSupp127. Aff'd (CCA4)116F(2d)434.

A controversy must be definite and concrete. Id.

A declaratory judgment suit is not a suit in equity and the rule that absence of an adequate remedy at law is requisite to a suit in equity is not applicable. Bakelite Corp. v. L., (DC-Del), 34FSupp142.

This act merely affords an additional remedy to one who is not certain of his rights and desires an early adjudication without waiting until his adversary should decide to bring suit. Sunshine Mining Co. v. C., (DC-Idaho), 34FSupp274.

Employer was entitled to declaratory judgment concerning Fair Labor Standards Act and to enjoin prosecutions thereunder threatened to be instituted by employees and their bargaining agents on theory that lunch period may not be deducted in computing working hours. Id.

Availability of another remedy is no bar. Id.

Suit by bishops of Methodist Church, on behalf of themselves and all other members of the church, for a declaratory judgment that the union of three Methodist bodies was legal, involved a real controversy between a vast number of citizens, and the court would have taken jurisdiction but for the pendency of other class suits in state courts. Purcell v. S., (DC-SC), 34FSupp421.

Jurisdiction of court is limited to matters which are in their nature "cases or controversies." Lambert v. D., (DC-Tenn), 34FSupp610.

Purpose of statute is to adjudicate rights of parties who have not otherwise been given opportunity to have those rights determined. Travelers Ins. Co. v. W., (DC-Fla), 34FSupp721.

Where a contract has been entered into because of mistake, fraud or of duress or in violation of some law, annulment therefor may be sought under Declaratory Judgments Act. Macdanz v. N., 289NW58. See Dun. Dig. 4988a.

Judicial power does not extend to giving advisory opinions to other departments of the government. Seiz v. C., 290NW802. See Dun. Dig. 4988a.

A proceeding for a declaratory judgment must be based on a justiciable controversy for lack of which appellate court will reverse for want of jurisdiction of subject matter, although point has nowhere been raised. Id. See Dun. Dig. 4988a.

Though plaintiff really seeks equivalent of a declaratory judgment, supreme court on appeal from order of dismissal based upon pleadings asking only for injunctive relief, cannot determine the question, dismissal being based on adequacy of remedy. Fisch v. S., 292NW 758. See Dun. Dig. 4988a.

Question of respective rights of a lienor who has obtained a judgment for foreclosure of a motor vehicle lien for storage or repairs and a subsequent bona fide chattel mortgagee purchasing it at foreclosure sale under his mortgage, does not by a sale to a third party become moot so as to abate declaratory judgment act. Conner v. C., 294NW650. See Dun. Dig. 4988a.

"Justiciable controversy." Klein v. J., 195So(Ala)593.

Proceeding in declaratory relief is one in equity. Zimmer v. G., 109Pac(2d)(CalApp)34.

Authority given to court of Connecticut to render declaratory judgments was not intended to broaden their function so as to include issues which would not be such as could be determined by courts in ordinary actions. Board of Education v. B., 16Atl(2d)(Conn)601.

One of the conditions for rendering declaratory judgment is that person seeking it must have an interest, legal or equitable, by reason of danger of loss or of uncertainty as to his rights or other jural relations. Id.

Demurrer to complaint in action for declaratory judgment is not "defense" within meaning of Kentucky statute which provides that if no defense be made in action, plaintiff cannot have judgment for any relief not specifically demanded, and plaintiff cannot recover interest where it was not included in prayer for relief. Union Light, Heat & Power Co. v. C., 144SW(2d)(KyApp)1046.

Contention that mortgagors transfer of mortgaged property impaired security of mortgage, held not to present justiciable controversy in absence of showing that mortgagor's personal estate was not sufficient to cover any deficiency judgment. Carolina St. P. Bldg. Ass'n v. S., 13Atl(2d)(Md)616.

The purpose of the act is to afford an immediate remedy where the traditional remedies are not adequate. Where an immediate adequate remedy exists and is available this act is not appropriate. Id.

Where one of common remedies of law or equity was adequate and available, a proceeding for a declaratory judgment was not appropriate. Morgan v. D., 16Atl(2d)(Md)916.

There was no intention to widen traditional remedies of, or distinction between, law and equity. Id.

Complaint in action by taxpayer seeking to have tax status determined, tax statute declared unconstitutional, and injunction against state tax officers, held demurrable where legislature had pointed out definitely certain tribunals and conferred upon them authority to decide tax matters. Williams v. T., 17Atl(2d)(MdApp)137.

Petition for declaratory judgment cannot be maintained where there is available another adequate remedy. Gitsis v. T., 16Atl(2d)(NH)369.

Where liability insurer denies coverage and refuses to defend, insured is not entitled to sue for a declaratory judgment, having adequate remedy by defending action and suing for damages. Dover Boiler Works v. N., 15Atl(2d)(NJ)231.

A declaratory judgment suit will not lie to determine an issue which is pending in a proceeding before another court which presumably has jurisdiction. Freechas Realty Co. v. H., 20NYS(2d)588.

In action against village board for declaratory judgment determining that plaintiff holds office of village justice, board was not required to establish its good faith in abolishing plaintiff's office. O'Connor v. G., 21NYS(2d)631.

Dealer of fish occupying upper floor of building abutting street on which he had a roadway stand was entitled to judgment declaring that market rules restricting issue of permits to tenants of street level stores arbitrarily discriminated against tenants of upper floor in contravention of due process and equal protection clauses of Fourteenth Amendment. Russo v. M., 21NYS(2d)637.

A declaration of rights will not be made where matter has become moot pending the action. Gross, 22NYS(2d)623, 174Misc1086.

A declaratory action is appropriate to determine status of child as to legitimacy, parentage, and the like. Melis v. D., 24NYS(2d)51, 260AppDiv772, aff'g 18NYS(2d)432.

Action in which plaintiff sought declaratory judgment that he was entitled to office of president of common council of city of Mount Vernon was not case for declaratory judgment. Brush v. C., 24NYS(2d)355, 260AppDiv 1048, aff'g 20NYS(2d)455.

Declaratory judgment decreeing that plaintiff and appellant are husband and wife despite divorce procured by wife in Nevada was proper where Nevada court never acquired jurisdiction over husband, and wife, resident of New York, went to Nevada for sole purpose of procuring a divorce. Langsam v. L., 24NYS(2d)510, 260App Div1034.

There can be no declaratory judgment regarding issues not involved in suit. Dry v. B., 11SE(2d)(NC)143.

The nature of an action for a declaratory judgment, whether at law or in chancery, is determined by the relief to which the plaintiff would be entitled. Liberal S. & L. Co. v. F., 28NE(2d)(OhioApp)367.

Cross petition in suit for declaratory judgment which did not constitute a counterclaim or set-off could not be withdrawn and redocketed under statute allowing withdrawal of counterclaim or set-off and permitting it to become subject of another action. Schriber Sheet Metal & Roofers v. S., 28NE(2d)(Ohio)699.

Action will not be defeated merely because plaintiff could have maintained an action at law. Id.

Declaratory judgment held proper remedy to determine priorities between mortgages though determination could have been had by foreclosure, as latter remedy would have been slow, expensive and complicated. Grambo v. S., 14Atl(2d)(Pa)925.

Judgment dismissing action for declaratory judgment was not res judicata where there was no determination with respect to status or rights of plaintiff, dismissal presumably resting on ground of lack of jurisdiction. Gibson v. U., 105Pac(2d)(Utah)353.

Since enactment of Virginia Declaratory Judgment Statute it is as much incumbent upon a wrongdoer to assert his rights in a court of law as it is incumbent upon one whose rights are being violated to assert them in a court of equity. Mullins v. M., 10SE(2d)(Va)593.

An innocent purchaser of real estate subject to a mortgage who claims conveyance to him was fraudulent as to creditors of an ancestor in title and having paid only part of purchase price before learning of fraudulent character of transfer, has a good cause of action for declaratory relief. Angers v. S., 293NW(Wis) 173.

An action for declaratory judgment cannot be joined with an action to review an order of public service commission denying application of railroad for a permit to abandon agency service at a certain city. Thomson v. P., 294NW(Wis)517. See Dun. Dig. 4988a.

9455-2. May have instruments construed.

Complaint for declaratory judgment by insurance company alleging existence of controversy between such company and its insured respecting coverage of policy and as to obligation of company to defend and indemnify insured in actions to recover for injuries caused third party and also disclosing controversy between insurance company and another insurance company as to coverage afforded by latter's policy, held to disclose controversy appropriate for judicial determination. Maryland Casualty Co. v. T., (CCA8), 114F(2d)952.

Suit under Federal Declaratory Judgment Act, held maintainable by insurer for declaration of rights under automobile policy. Maryland Casualty Co. v. T., (DC-Cal), 29FSupp69. Aff'd, (CCA9), 115F(2d)297.

Federal court did not have jurisdiction of declaratory judgment suit by insurer against insured as claimant for damages for injuries by insured where there was no controversy between insurer and insured and insured and claimant were residents of same state. State Farm Mut. Automobile Ins. Co. v. H., (CCA4), 115F(2d)298, aff'g (DC-SC), 32FSupp665.

Neither manufacturer of patented machine for production of paper milk bottles nor manufacturer of such bottles has such a direct interest in question of validity and construction of city ordinance as to support suit for declaratory judgment that such ordinance does not sustain administrative interpretation that it prohibits the use of paper milk containers, of if it does that it is invalid, since the damage accruing to each of such parties is only remotely consequential and incidental. Ex-Cell-O Corp. v. C., (CCA7), 115F(2d)627.

There was no justiciable controversy in action against state attorney general for judgment declaring unconstitutional state statute, enforcement of which would cause irreparable injury, where defendant disclaimed any attempt to enforce the law until he had formed an opinion that it was constitutional. Southern Pac. Co. v. C., (CCA9), 115F(2d)746.

Action by citizens of Florida against Florida corporation for death of plaintiffs' child who was killed by defendant's truck was triable in state court and defendant's insurer, though have an interest in outcome of controversy which involved validity of a release, could not carry it into federal court because of diverse citizenship there being no justiciable controversy between insurer and plaintiffs. Liberty Mutual Ins. Co. v. L., (CCA5), 117F(2d)735.

Controversy as to whether state court action is predicated upon an occupational disease so as to be outside of coverage of insurance policy or upon an accident within state workmens' compensation law covered by policy held to present an issue of fact and not a controversy proper for judicial determination under Declaratory Judgment Act. Maryland Casualty Co. v. T., (CCA8), 117F(2d)905, aff'g (DC-Mo), 30FSupp949.

Allegations that plaintiff and defendant entered into contracts for construction and sale of thirty-four houses on their joint account, that five of the houses had been sold with losses chargeable to defendant, and that defendant denied liability and repudiated the entire contract, entitled plaintiff to declaratory judgment with respect to validity of contracts and rights thereunder. Dunleer Co. v. M., (DC-WVa)33FSupp242.

An action will lie to determine scope of matters to be submitted to arbitration pursuant to agreement in contract. Lehigh Coal & Navigation Co. v. C., (DC-Pa) 33FSupp362.

A submission to arbitration is a contract subject to laws governing contracts in general and must have all elements necessary to a contract, and interpretation and construction of written submissions is a question for the court. Id.

Where insured's son met with accident while using insured's automobile, and actions for injuries were instituted in state court by the son's guests at time of accident, insurer could maintain proceeding under federal declaratory judgment act for determination of liability under policy. Liberty Mut. Ins. Co. v. S., (DC-Minn)34F Supp885.

Automobile liability insurer having doubt as to its obligation to defend a claim made against assured may bring action under the declaratory judgment act against assured, and injured third party. State Farm Mut. Auto Ins. Co. v. S., 294NW413. See Dun. Dig. 4988a.

Action for declaratory judgment to determine whether city could issue additional bonds for sewage disposal system in view of constitutional inhibition held proper remedy. Fuller v. C., 199So(Ala)2.

Question of validity of ordinance levying retail license is not within justiciable controversy where action was brought for declaratory decree concerning license tax for privilege of delivery of motor fuels. City of Enterprise v. F., 199So(Ala)691.

Action could be brought for declaratory judgment determining whether plaintiff was liable for penalty under state tax law. Peterson v. C., 107Pac(2d)(Ariz)205.

Demurrer to complaint was properly sustained where no facts were alleged from which court might assume existence of an actual controversy between parties regarding legal rights under contract involved. City of Alturus v. G., 104Pac(2d)(Cal)810.

Under California Declaratory Judgment Act action may be brought to determine rights under oral contract. Zimmer v. G., 109Pac(2d)(CalApp)34.

In taking steps under zoning regulations property owner did not waive his right to bring action for declaratory judgment to determine whether his property was within zoned area. Kimberly v. T., 17Atl(2d)(Conn)504.

Action for declaratory judgment was not the proper remedy for one who sought a review of certain unemployment compensation awards to determine constitutionality of Unemployment Compensation Law. Stearns Coal & L. Co. v. U., 147SW(2d)(Ky)382.

State supreme court on appeal had jurisdiction of an action by taxpayers to determine constitutionality of a statute. Roberts v. B., 142SW(2d)(Mo)1058.

Where bailee of automobile was sued in separate actions in different counties for damages for negligence for operation of automobile, bailor could not maintain suit for declaratory judgment against plaintiffs where it did not appear that plaintiffs had an adverse claim against him. Gitsis v. T., 16Atl(2d)(NH)369.

Reformation of liability insurance policy because of mutual mistake. Parrette v. C., 15Atl(2d)(NJ)802.

Question of constitutionality of New Mexico Barbers Price Fixing Act held to present a justiciable controversy. Arnold v. B., 109Pac(2d)(NM)779.

Where defendant changed savings account to joint account with plaintiff without surrendering bankbook, no jural relation existed warranting declaratory judgment. Hurley v. M., 21NYS(2d)974.

In an action for declaratory judgment to determine constitutionality of statute regarding licensing of nurses, complaint should point out specifically wherein statute exceeds legislative power, or provisions of federal or state constitution claimed to have been violated. Neyerlin v. M., 24NYS(2d)19.

Declaratory judgment suit to determine validity of ordinance is not maintainable by one who fails to show that his own legal relations will be affected by such ordinance. League for Preservation of Civil Rights v. C., 28NE(2d)(Ohio)660.

Where contractor withheld amount of money from sub-contractor on ground owner had withheld same amount of money from him petition alleging such facts and asking for declaratory judgment determining that deductions were proper held not to state cause of action against owner of building on which work was being done. Schriber Sheet Metal & Roofers v. S., 28NE(2d)(Ohio)699.

Proceedings under statute are not excepted from rule that equity will not enjoin criminal proceedings or stay hands of peace officers in enforcing criminal law except where law attempted to be enforced is unconstitutional and its enforcement will result in irreparable injury to vested property rights. American Federation of Labor v. B., 106Pac(2d)(Ore)544.

Where validity of ordinance is conceded and it is also conceded that ordinance is not ambiguous, allegation that plaintiff is uncertain as to his rights and duties thereunder does not present a justiciable controversy. Hickey v. C., 109Pac(2d)(Ore)594.

A proceeding for a declaratory judgment construing the provision of a will should not be permitted, after the executor's account has been filed, and the jurisdiction of the orphans' court has attached for purposes of distribution. Lochrie's Estate, 16Atl(2d)(Pa)133.

Court correctly refused to adjudge, under allegations in complaint, that proposed gasoline filling and service station in residential area would be a nuisance per se, under city ordinance. Chamberlin v. H., 15Atl(2d)(Vt) 586.

It was proper to bring action to determine constitutionality of city ordinance regarding pensions for city employees. Ayers v. C., 108Pac(2d)(Wash)348.

It was proper to bring action to determine constitutionality of a statute regulating manufacture and sale of confections, where petitioner was threatened with prosecution for violation of statute. Bauer v. S., 110 Pac(2d)(Wash)154.

One may not challenge constitutionality of a statute by action for a declaratory judgment unless it appears that he will be directly damaged in person or in property by its enforcement. De Cano v. S., 110Pac(2d) (Wash)627.

A corporation whose members were all Filipinos could not challenge an anti-alien land statute where corporation did not own any real estate and had not contracted for purchase of any. Id.

Federal declaratory judgments on automobile insurance. 1939WisLawRev496.

9455-3. Contract may be construed—When.

Where holder of automobile liability policy settled suit against third party for damages arising out of collision and paid guests who were riding with him at time of collision to execute releases to such third party, after

which they brought suits against insured, insurer was entitled to declaration of whether insured's collusive conduct effected a cancellation of the policy. American Automobile Ins. Co. v. M., (DC-Ky), 34FSupp224.

Federal court would not declare liability of insurer with respect to disability payments under life policy, where rights of parties had been declared in three suits in state courts, and the same rights were involved in two pending suits filed prior to application for declaratory judgment, and where any judgment of federal court would only determine unadjudicated rights up to date of filing of complaint. Travelers Ins. Co. v. W., (DC-Fla), 34FSupp717, 721.

Lessor had right to determine question of termination of lease of oil lands. Tide Water Associated Oil Co. v. C., 107Pac(2d)(CalApp)945.

Question of whether option to purchase realty had terminated, did not constitute an actual controversy. Kahn v. W., 17Atl(2d)(Pa)340.

9455-4. Who may ask for construction.

An administrator with will annexed may bring an action for a declaratory judgment construing a will under Indiana statutes. Weppler v. H., 29NE(2d)(Ind)204.

District court had no jurisdiction of an action for a declaratory judgment construing wills and determining the beneficiaries, where the wills were before the probate court where probate had administration. Pennington v. G., 107Pac(2d)(Kans)766.

Act was not designed to enable district courts to supersede functions of probate court in probate of wills and the ordinary administration upon estates. Id.

Where estate of testator was before probate court, question of whether or not heir was estopped from claiming that an order made by the testator was a part of codicil to the will could not be determined in action for a declaratory judgment. Morgan v. D., 16Atl(2d)(Md)916.

A daughter, who as trustee, brought an action for a declaratory judgment to determine rights to property left by her father, could bring action in county in which administratrix of father's estate resided, even though estate was being probated in another county. State v. Waltner, 145SW(2d)(Mo)152.

Where estate amounted to less than $500 executor was not justified in bringing action for declaratory judgment to determine whether amount taken by surviving spouse was subject to costs and expenses of administration where same end could have been accomplished by executor filing partial account and asking that allowance be made for attorney's fees and costs to be paid prior to specific exemptions. Schmehl v. S., 31NE(2d)(OhioApp)259.

9455-6. Court may refuse to enter decree.

Declaratory judgment to determine validity of transaction between a county and a corporation concerning construction and renting of a bridge would not be determined where sufficient facts were not placed before the court to ascertain ability of county to meet rental without exceeding constitutional limit of indebtedness. Wells v. P., 142SW(2d)(Ky)178.

Where right of plaintiff husband to rescind a trust agreement made with his wife is established, a declaratory judgment respecting rights under the agreement becomes unnecessary. Mindheim v. M., 21NYS(2d)372.

9455-7. Orders, judgments and decrees may be reviewed.

On appeal from judgment dismissing action by insurer for declaratory judgment respecting coverage of policy, it would be assumed that court below, after issues had been joined and trial had been had, will determine only such questions as properly may be adjudicated. Maryland Casualty Co. v. T., (CCA8), 114F(2d)952.

Granting or refusing declaratory relief is within sound discretion of court, but such discretion is judicial discretion and reviewable on appeal. Creamery Package Mfg. Co. v. C., (CCA3), 115F(2d)980, rev'g (DC-Del), 33FSupp625.

In reviewing judgment dismissing declaratory judgment suit because of lack of jurisdiction court is concerned only with question whether or not court had jurisdiction, and not either with court's right in its discretion to refuse jurisdiction, or the merits of the case. Mississippi Power & Light Co. v. C., (CCA5), 116F(2d)924.

In action to have a written agreement for furnishing electricity to plaintiff's dwelling at prices not exceeding a specified maximum rate, during life of defendant's franchise, adjudged void for want of consideration, judgment of dismissal cannot be reversed where proof fails to show want of consideration. Macdanz v. N., 289NW58. See Dun. Dig. 4988a.

The Kentucky declaratory judgment act provides that appeal must be taken within 60 days after final judgment, and at the expiration of the 60-day period courts are without jurisdiction to set aside, modify, or alter declaratory judgment which has become final. Lexington Ry. System v. L., 146SW(2d)(KyApp)26.

Where suit was brought under declaratory judgment act and throughout proceedings litigants and court treated suit as one for declaration of rights, and court made orders declaring rights, appeal was subject to time limitation provided by statute for declaratory judgments. Id.

Appeal from declaratory judgment was premature where issues raised were still pending. Essex Foundry v. B., 17Atl(2d)(NJApp)568.

Section of declaratory judgment act providing for review must be read in connection with Pennsylvania statute limiting right to appeal to party aggrieved. Musser's Estate, 17Atl(2d)(Pa)411.

Executors of estate were not "aggrieved parties" and could not appeal from declaration of rights under will. Id.

9455-8. Application to court for relief.

Occurrences happening pending appeal from judgment dismissing suit for declaratory judgment because of want of justiciable controversy held not to entitle plaintiff to file a supplemental complaint based upon defendant's undisclosed state of mind and setting forth facts which would authorize no further or different relief from that sought in the complaint. Southern Pac. Co. v. C., (CCA9), 115F(2d)746.

Kentucky statute authorizing supplementary relief does not authorize allowance of interest where it was not prayed for in complaint in action for declaratory judgment for refunds to consumers by public utility company. Union Light, Heat & Power Co. v. C., 144SW(2d)(Ky)1046.

9455-9. Issues of fact may be tried.

Burden of proof rests on the party who must submit to an adverse judgment if no evidence is introduced, in other words, on the party who asserts the affirmative of the issue. If, however, the other party, though seeking no affirmative relief in his pleading, introduces evidence showing a right to recover on the contract set forth in the other party's pleading, the burden of proof shifts accordingly. Reliance Life Ins. Co. v. B., (CCA8)112F(2d)234. Cert. den. 61SCR137. Reh. den. 61SCR391.

Declaratory relief will not be denied under federal act because of a complex factual situation. Dunleer Co. v. M., (DC-WVa)33FSupp242.

Right of jury trial remains inviolate under declaratory judgment statute. State Farm Auto Ins. Co. v. S., 294NW413. See Dun. Dig. 4988a.

Act did not repeal the statutory provisions relating to discovery of assets in probate court. State v. Waltner, 145SW(2d)(Mo)152.

Where parties were not in agreement as to items of account, court did not err in ordering reference, though counterclaim in action was purely a legal one. Andrew County v. M., 146SW(2d)(Mo)621.

In action for declaratory judgment defendant was entitled to examine plaintiff before trial as to act of misfeasance and nonfeasance alleged in defendant's counterclaim. Forman v. F., 22NYS(2d)922.

Where there is no substantial dispute of facts raised by pleadings court may rule on motion and cross-motion for judgment on pleadings without regard for moving affidavits. Muldoon v. M., 25NYS(2d)36, 175Misc700.

Plaintiff may not move for summary judgment in an action in New York for a declaratory judgment. Id.

9455-10. Costs.

In declaratory judgment action by insured against insurer plaintiff's right to attorney's fees held controlled by state law. Continental Cas. Co. v. G., (CCA5), 116F(2d)431.

Where suit is instituted by insurance company upon its liability under accident policy, insurance company is not liable for attorney's fees and expenses incurred in absence of contract, and in absence of fraud, bad faith, and stubborn litigiousness. Maryland Casualty Co. v. S., 11SE(2d)(GaApp)89.

9455-11. Parties.

Dismissal of suit on ground of failure to join necessary or indispensable parties was erroneous where there was no justiciable controversy between any of such parties and plaintiffs and where the legal interests of such absent parties would not be affected by an adjudication. Samuel Goldwyn, Inc. v. U., (CCA3), 113F(2d)703.

Provisions of Civ. Pro. R. 19 of federal district courts relating to indispensable and necessary parties apply to actions under declaratory judgment act. Id.

If necessary parties were before court to enable it to dispose of declaratory judgment suit of which it had jurisdiction, it was immaterial that other persons were made nominal parties since they could be ignored or eliminated at any stage of the proceedings. Maryland Casualty Co. v. T., (CCA8), 114F(2d)952.

Owner and operator of crashed airplane was not entitled to declaratory judgment that it was entitled to recover of its co-defendant, which manufactured plane's engine, which was allegedly defective, such amounts as it might be required to pay as damages for death of passengers and crew, in absence, as parties of representatives of persons other than plaintiff who were killed in the crash. Lewis v. U., (DC-Conn), 34FSupp124.

An exclusive licensee is not an indispensable party defendant in a declaratory judgment proceeding against patent owner. Bakelite Corp. v. L., (DC-Del), 34FSupp142.

Beauty parlor was entitled to declaratory judgment respecting validity and infringement of patent, on behalf of itself and all members of the National Association of Beauty Parlors, as against a defendant who had sent threatening notices to trade and commenced numerous

infringement suits against members of the association. National Hairdressers' & Cosmetologists' Ass'n v. P., (DC-Del), 34FSupp264.

In action by Brotherhood of Locomotive Engineers asking for construction of mediation agreement entered into by plaintiff and defendant railway, Brotherhood of Firemen and Enginemen was permitted to intervene where, because of the interconnection between the two brotherhoods, any change in the engineers' rules, or the interpretation thereof, which would increase the number of miles or days that each engineer might work during the month, would effect a corresponding reduction of the opportunity of firemen to work as engineers. Brotherhood of L. Engineers v. C., (DC-Wis), 34FSupp594.

In action by Federal Deposit Insurance Corporation with respect to liability on claims asserted against it by alleged depositors in closed bank, joinder of the several claimants as defendants was authorized. Federal Deposit Ins. Corp. v. R., (DC-Mo), 34FSupp600.

The rule regarding necessary parties is not relaxed in action brought to obtain declaratory relief. Lloyd v. L., 107Pac(2d)(Cal)622.

Statute allows joinder only of those persons legally affected and does not enlarge procedure as to joining parties defendant. Schriber Sheet Metal & Roofers v. S., 28NE(2d)(Ohio)699.

Where a daughter as trustee, brought an action for a declaratory judgment to determine the rights to property given to her as trustee for benefit of certain beneficiaries, administrator of father's estate, executor of mother's estate, and sister named as sole beneficiary were properly joined as defendants. State v. Waltner, 145SW(2d)(Mo)152.

A daughter who as trustee held certain property given to her by her father for distribution among designated beneficiaries after his decease, was a proper party to petition for declaratory judgment in determining rights and shares of beneficiaries in property. Id.

In a declaratory action to determine legitimacy of child all persons interested or likely to be affected by determination should be joined or impleaded as parties, and infant, whose rights are paramount, should be made a party in the manner provided by law, and guardian ad litem appointed to protect its interests. Melis v. D., 24NYS(2d)51, 260AppDiv772, aff'g 18NYS(2d)432.

Under Utah Declaratory Judgment Act attorney general has right to be and should be served where statute for state franchise or permit is alleged to be invalid. Hemenway & Moser Co. v. F., 106Pac(2d)(Utah)779.

Prayer for declaratory judgment cannot be considered where all parties in interest have not been made parties in action, and executors and trustees are interested parties in the matter of probate and construction of will. State v. Farr, 295NW(Wis)21.

9455-12. Act to be remedial.

This is a remedial statute and should be liberally construed. Continental Casualty Co. v. N., (DC-Wis)32F Supp849.

Purpose of act is to settle and afford relief from uncertainty with respect to rights status, and other legal relations; and it should be liberally construed. Peterson v. C., 107Pac(2d)(Ariz)205.

The only new right created by the declaratory judgment act is to make disputes as to rights or titles justiciable without proof of a wrong. Gitsis v. T., 16Atl(2d)(NH)369.

CHAPTER 78

Juries

9458-1. Alternate jurors.—When in the opinion of the trial judge in any case pending in the district court, the trial is likely to be a protracted one, the court may cause an entry to that effect to be made on the minutes of the court, and immediately after the jury is impaneled and sworn, may direct the calling of not more than two additional jurors, to be known as alternate jurors.

Such jurors must be drawn and have the same qualifications as the jurors already sworn, and be subject to the same examinations and challenges; except, the prosecution or plaintiff shall be entitled to one peremptory challenge and the defendant to two.

Alternate jurors shall be seated near, with equal facilities for seeing and hearing the proceedings, and shall take the same oath as the jurors already selected. They must attend at all times upon the trial of the cause in company, and be admonished and kept in custody with the other jurors.

Alternate jurors shall be discharged upon the final submission of the case to the jury, unless, before the final submission of the case, a juror dies, or becomes ill so as to be unable to perform his duty, the court may order such a juror to be discharged and draw the name of an alternate, who shall then take his place in the jury box and become a member of the jury as though he had been selected as one of the original jurors. (Act Apr. 16, 1941, c. 256, §1.)

CHAPTER 79

Costs and Disbursements

9470. Agreement as to fees of attorney—Etc.

10. Contract with attorney.

Legality of contingent fee contracts to procure "favor" as distinguished from "debt" legislation. 24MinnLaw Rev412.

9477. Interest on verdict, etc.

Personal property and money and credits taxes, upon which penalties have already been imposed, do not bear interest prior to judgment. Op. Atty. Gen., (421-2-8), Jan. 16, 1941.

9482. Chargeable on estate or fund.

An administrator is not personaly liable for costs and disbursements for bringing an action in his representative capacity, except where judgment awarding such costs and disbursements expressly provide that he shall be personally liable or that it shall be enforced against him personally. Minneapolis St. Ry. Co. v. R., 293NW256. See Dun. Dig. 3673.

Rule seems to be that a favorable issue in first instance is decisive that proceeding was not groundless. Id.

Sureties on bond of a special administrator are not liable for costs and disbursements, awarded against him in an action brought by him in his representative capacity, where there were no assets in estate. Minneapolis St. Ry. Co. v. R., 293NW256. See Dun. Dig. 3580s.

9483. Relator entitled to, and liable for.

Board, having acted in behalf of school district in discharge of governmental functions, is not liable for costs or disbursements of mandamus action. State v. School Board of Consol. School Dist. No. 3, 287NW625. See Dun. Dig. 2207.

9486. Supreme court—Costs and disbursements.

2. No costs to defeated party.

Plaintiff on appeal from a judgment denying a divorce was allowed attorney's fees and disbursements, though she was unsuccessful, where appeal appeared to be made in good faith and upon reasonable grounds. Rhoads v. R., 292NW760. See Dun. Dig. 2804.

8. Discretionary—when not allowed.

Where woman obtaining divorce was awarded $650.00 as expense money to procure transcript and pay for necessary printing in presentation of her case on appeal, and there was much needless printing in record that easily could have been avoided in view of narrow issues properly brought up, no statutory costs or disbursements were allowed on appeal. Burke v. B., 292NW426. See Dun. Dig. 2238.

Appellant was denied statutory costs on appeal where reversal was had upon a theory not raised in the court below. Rigby v. N., 292NW751. See Dun. Dig. 2238.