

1934 Supplement
To
Mason's Minnesota Statutes
1927

(1927 to 1934)
(Superseding Mason's 1931 Supplement)

Containing the text of the acts of the 1929, 1931, 1933 and 1933-34 Special Sessions of the Legislature, both new and amendatory, and notes showing repeals, together with annotations from the various courts, state, federal, and the opinions of the Attorney General, construing the constitution, statutes, charters and court rules of Minnesota



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but he has authority to receive the fine at any time. Op. Atty. Gen., Sept. 5, 1931.

Justice of the peace must see that fines are paid or defendant committed to jail, but fines may be collected by execution. Op. Atty. Gen., Aug. 15, 1933.

Successor of deceased justice is not compelled to issue commitment on four-year-old judgment. Op. Atty. Gen., Oct. 3, 1933.

9145. Fines—How collected and paid over.

A justice of the peace, where the prescribed punishment is in the alternative as between a fine or jail

sentence, may impose a straight jail sentence without the option of a fine, but where a defendant is sentenced to pay a fine and an alternative jail sentence is imposed in default of payment of the fine, the commitment should so state because the defendant is entitled to pay his fine to the sheriff any time after he is committed, and thereupon be released. Op. Atty. Gen., Feb. 28, 1931.

A justice of the peace has no authority to permit a defendant to defer payment of any part of the fine, but he has authority to receive the fine at any time. Op. Atty. Gen., Sept. 5, 1931.

CHAPTER 76

Forcible Entry and Unlawful Detainer

9148. Unlawful detention of lands or tenements subject to fine.

In forcible entry and detainer, exclusion of evidence of defendants of nondelivery of quitclaim deed to plaintiffs, held not error in absence of showing that it affected plaintiffs' actual possession. Mutual Trust Life Ins. Co. v. B., 187M503, 246NW9. See Dun. Dig. 3244.

Evidence that plaintiff had been in actual possession of building for over a year and that defendant entered unlawfully, warranted directed verdict for restitution. Mutual Trust Life Ins. Co. v. B., 187M503, 246NW9. See Dun. Dig. 3783.

It is not necessary to prove that detention was forcible, but it is sufficient to prove it to be unlawful. Mutual Trust Life Ins. Co. v. B., 187M503, 246NW9. See Dun. Dig. 3783.

In forcible entry and detainer, court did not err in excluding from evidence decree to which defendants were not parties or privies. Mutual Trust Life Ins. Co. v. B., 187M503, 246NW9. See Dun. Dig. 5156.

9149. Recovery of possession.

Minn' Bldg. & Loan Ass'n. v. C., 182M452, 234NW872.

4. When action will lie.

Force is not a necessary element to authorize action. 178M282, 226NW847.

To render a constructive eviction a defense tenant must abandon or surrender premises on account thereof. Leifman v. P., 186M427, 243NW446. See Dun. Dig. 5425.

Description of property in lease and in contract for deed held substantially same and sufficient to readily identify property. Gruenberg v. S., 248NW724. See Dun. Dig. 3785.

Mortgagee in possession is entitled to hold it as against mortgagor in action of forcible entry and detainer, mortgagor being in default. Schmit v. D., 249NW580. See Dun. Dig. 6242.

5. Who may maintain.

Lessee held real party in interest as against one in possession of property holding over after cancellation of a contract for deed. Gruenberg v. S., 248NW724. See Dun. Dig. 3783.

Sheriff may maintain action against tenant on land bid in by state for non-payment of taxes. Op. Atty. Gen.

6. Parties defendant.

Husband of person holding under contract for deed could be ejected in separate action against him alone. 178M282, 226NW847.

In forcible entry, evidence held to sustain finding that defendant was mortgagee in possession. Schmit v. D., 249NW580. See Dun. Dig. 6238.

7. Demand—notice to quit.

Where a tenant is in default in the payment of rent, the landlord's right of action for forcible entry and unlawful detainer is complete notwithstanding the lease contains a right to terminate optional with the landlord and effective upon sixty days' notice. First Minneapolis Trust Co. v. L., 185M121, 240NW459. See Dun. Dig. 5440(88).

9155. Judgment—Fine—Execution.

Judgment in previous action for wrongful detainer, held not estoppel in second action for same relief. Steinberg v. S., 186M640, 244NW105. See Dun. Dig. 5159, 5163, 5167.

9157. Writ of restitution.

Defendant evicted from premises under a writ of restitution has a right to appeal and have a trial de novo. 178M460, 227NW656.

9158. Appeal.

178M460, 227NW656; note under §9157.
Roehrs v. T., 185M154, 240NW111; note under §9277.

CHAPTER 77

Civil Actions

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

A private school held not negligent as to a spectator at a football game injured when players accidentally rolled out of bounds. Ingerson v. S., 185M16, 239NW667. See Dun. Dig. 6988, 8673.

In an action to recover damages for the failure of a bank to perform an agreement with a customer to pay, out of funds placed in its hands, an existing mortgage upon the customer's real property, general damages for injury to the customer's credit standing and for mental suffering are not recoverable. Swanson v. F., 185M89, 239NW900. See Dun. Dig. 2559-2569.

1. Election of remedy.

Election of remedies. 171M65, 212NW738.

Action to recover on an express contract, held not an election of remedies so as to bar a subsequent action in conversion. 178M93, 226NW417.

A judgment entered on a verdict directed for the defendant on the ground that the defendant was not authorized by the law under which it was organized to execute the promissory notes alleged as causes of action by the receiver of the payee bank is not a bar to action for money had and received. Turner v. V., 182M115, 233NW856. See Dun. Dig. 5169.

Where the party defrauded has performed his contract to a substantial extent before discovering the fraud, he may elect to continue performance and sue for the fraud, without attempting to rescind. Osborn v. W., 183M205, 236NW197. See Dun. Dig. 10092(61), (62).

If the defrauded party relies solely on a guaranty or warranty, there can be no recovery on the ground of fraud, but that is ordinarily a question of fact. Osborn v. W., 183M205, 236NW197. See Dun. Dig. 10100(55).

2. Conflict of laws.

See notes under §154.

3. Contract or tort.

Where defendant counterclaims for money or property wrongfully obtained, he waives tort and elects to

rely on implied contract of plaintiff to repay money or pay value of property taken. Kubat v. Z., 186M122, 242NW477. See Dun. Dig. 88.

4. Criminal acts.

That defendant's conduct is criminal does not preclude civil remedy by injunction. State v. Nelson, 248NW751. See Dun. Dig. 4190, 7271.

5. Abatement of actions.

Abatement of action for former action pending. 172M8, 214NW669.

Where laundry building was leased and personal property therein concurrently sold under conditional sales contract, pendency of replevin action and retaking of personal property did not abate unlawful detainer under lease. Steinberg v. S., 186M640, 244NW105. See Dun. Dig. 5.

6. Common counts.

An action for money had and received did not lie to recover money paid to purchaser at foreclosure, but owner could recover from such purchaser money received by the latter from the sheriff on a subsequent redemption by a creditor who was entitled to the land because the owner failed to file his certificate. 177M563, 225NW815.

Where a contract is completed, an action will lie on the common counts for the balance due. 178M275, 226NW933.

7. Equitable remedies.

In an action for equitable relief on account of the breach of a contract for maintenance and care of an aged person, given to him in consideration of a deed of his property, the court may grant such relief as the facts will in equity and good conscience justify. Johnson v. J., 183M262, 238NW483. See Dun. Dig. 3142(60).

Where relief is sought for alleged excessive corporation salaries, and plaintiff is barred by covenant not to sue for original corporate act fixing such salaries, equity will not afford relief against their continuance.

Butler v. B., 186M144, 242NW701. See Dun. Dig. 3142 (58).

An action between claimants to determine which one is entitled to a fund deposited in court is governed by equity principles and rules. Brajovich v. M., 248NW711. See Dun. Dig. 4893.

Where judgment against member of school board for amount of money expended without legal authority provided that such member should be entitled to a conveyance of property purchased on tender of amount of judgment and on tender it appeared that school district had sold and conveyed property to third person, member was entitled to bring equitable action for relief. Johnson v. I., 249NW177.

S. —Maxims.

Equity regards that as done which ought to have been done. Garrey v. N., 185M487, 242NW12. See Dun. Dig. 3142.

Equity seeks to discover and carry into effect real intention of parties. Garrey v. N., 185M487, 242NW12.

In equity form always gives way to substance. Garrey v. N., 185M487, 242NW12.

Equity regards as done that which should have been done. Brajovich v. M., 248NW711. See Dun. Dig. 4813.

9. —Adequacy of legal remedy.

Where terms of deed from mother and children to one son did not give her an adequate remedy at law in case of failure to support as required by the deed, a suit for annulment was proper. 172M8, 214NW669.

10. —Cancellation of instruments.

To justify setting aside a release on the ground of mutual mistake, the mistake must be to a past or present fact material to the contract. That injuries for which settlement was made resulted in disabilities not anticipated at the time it was made, is not such a mistake. Dolgner v. D., 182M588, 235NW275. See Dun. Dig. 8375(50).

11. —Specific performance.

Specific performance will not be decreed to compel one party to a contract to approve a proposed licensing contract where each party had reserved the right to veto any such proposed contract. 181M606, 233NW870. See Dun. Dig. 8780.

One is not entitled to enforce the specific performance of a contract which he has procured by fraud or when he himself is insolvent and financially unable to perform the contract. Thompson v. C., 182M433, 234NW688. See Dun. Dig. 8792, 8778.

One may contract with another to give him his property at his death, and if he fails to do so, and the circumstances are such that compensation cannot be made justly in money, an action in the nature of one of specific performance may be maintained and the property vested in the promisee or charged in his favor with a trust. Simonson v. M., 183M525, 237NW413. See Dun. Dig. 8789a(21).

Evidence held to show that one to whom intestate promised to will property could be compensated adequately in money, and specific performance should not be decreed. Simonson v. M., 183M525, 237NW413. See Dun. Dig. 8776(16).

Complaint in an action for specific performance of an oral contract to leave property to plaintiff, not a child of decedent, in consideration of her caring for and rendering services to him as a daughter full performance of the contract being alleged, held good against a general demurrer. Smithers v. B., 183M608, 237NW420. See Dun. Dig. 8789a(21).

In action for specific performance, finding that there was no agreement to convey land sustained by evidence. Arntson v. A., 184M60, 237NW820. See Dun. Dig. 8811(25).

In action for specific performance, evidence held to show that one of the alleged grantors was afflicted with senile dementia. Arntson v. A., 184M60, 237NW820. See Dun. Dig. 8811(25).

Court will not specifically enforce contract for management of boxing bouts or prize fights. Safo v. L., 184M336, 238NW641. See Dun. Dig. 8775, 8776.

Son of decedent held not entitled to specific performance of a verbal agreement to convey land. Happel v. H., 184M377, 238NW783. See Dun. Dig. 8788.

Complaint held bad as one in specific performance for failure to allege sufficiently either substance or terms of supposed contract. Mundinger v. B., 248NW47. See Dun. Dig. 8802.

12. —Abatement of nuisances.

Equity has jurisdiction to enjoin and abate nuisances, without jury trial. 174M457, 219NW770.

13. Torts.

14. —Negligence

Negligence of attendant of mud baths held not shown as to one who fell when getting out of mud, and defendant was entitled to judgment notwithstanding verdict. Johnson v. M., 182M476, 234NW680. See Dun. Dig. 6987.

If negligence of city and heavy rainfall, though of such character as to come within the meaning of act of God or vis major, combined and caused the damage, each participating proximately, the city was liable. National Weeklies, Inc. v. J., 183M150, 235NW905. See Dun. Dig. 7007(23), 10172.

That defendant's farm team had run away some two years previously, together with evidence of an admission by defendant that at an undisclosed time they had

injured a cow, was not sufficient evidence of negligence to sustain a verdict for an employee, injured in a run-away, who had worked with the team two and a half months and who based his action on failure to furnish a safe team or to warn of their alleged propensity to run away. Johnson v. A., 183M366, 236NW628. See Dun. Dig. 5884-5915.

Death from falling down stairs by one injured in automobile accident seven months before was not proximately caused by the negligence of the automobile driver. Sporna v. K., 184M89, 237NW841. See Dun. Dig. 7005(15).

One injured in automobile accident held guilty of negligence in attempting to go down stairs seven months later while in a crippled condition, which negligence was the proximate cause of death. Sporna v. K., 184M89, 237NW841. See Dun. Dig. 7005(15).

Owner of pop corn wagon permitting oil station attendant to put gasoline in tank while taper was in flame held guilty of contributory negligence as matter of law. Nick v. S., 183M573, 237NW607. See Dun. Dig. 3699.

It is only in the clearest of cases, when the facts are undisputed, and it is plain that all reasonable men can draw but one conclusion, that the question of contributory negligence becomes one of law. Horsman v. B., 184M514, 239NW250. See Dun. Dig. 7033.

Violation of a statutory duty to another is negligence per se as to him. Mechler v. M., 184M607, 239NW605. See Dun. Dig. 6976(19).

Test of proximate cause is not whether injury could have been anticipated, but whether there was direct causal connection between negligent act and injury. Hamilton v. V., 184M580, 239NW659. See Dun. Dig. 7001(1).

Whether one whose automobile stopped at two o'clock in the morning was an implied invitee in going to a nearby garage for gas or for service held for jury, though such garage did not sell gas nor furnish towing service. Tierney v. G., 185M114, 239NW905. See Dun. Dig. 6985, 7048.

Whether garage was negligent in maintaining a small door constructed in a large door so as not to reach the bottom of the door held for jury. Tierney v. G., 185M114, 239NW905. See Dun. Dig. 7048.

Whether plaintiff was guilty of contributory negligence in entering a small door within a large door of a garage and stumbling over the lower frame held for jury. Tierney v. G., 185M114, 239NW905. See Dun. Dig. 7048.

Spectator at baseball game sitting behind third base, assumed risk of injury from foul balls. Brisson v. M., 185M507, 240NW903. See Dun. Dig. 9623b.

In action against street railway for injuries to bicycle rider, it was error to exclude proof of failure to warn by bell even though boy testified that he heard car start up behind him. Newton v. M., 186M439, 243NW684. See Dun. Dig. 9033.

There was no issue for jury upon contributory negligence of plaintiff, who was riding as a guest in an auto and was injured when auto struck ridge in city street. Hoffman v. C., 187M320, 245NW373. See Dun. Dig. 6842, 7037, 7038.

Backing of truck into wood pile in farm yard while turning around, resulting in injury to child, could be found to be negligence, in absence of explanation. Rye v. K., 187M587, 246NW256. See Dun. Dig. 6998d.

To recover damages for injuries received when automobile slipped off steam cleaning rack, plaintiff must show not only defect alleged in rack but also that accident was caused thereby. Vardolos v. P., 246NW467. See Dun. Dig. 6999.

Instruction that child was required to exercise degree of care which children of same age ordinarily exercise under same circumstances, held not to submit issue of contributory negligence. Borowski v. S., 246NW540. See Dun. Dig. 7029.

In action for damages for injury to hand caught between swinging vestibule doors of store, negligence and contributory negligence, held for jury. Carr v. W., 246NW743. See Dun. Dig. 6987.

An employee failing to report defect in valve could not recover for disabling sickness occasioned by escaping gas. Cedergren v. M., 247NW235. See Dun. Dig. 6014.

An employee is bound to obey all reasonable rules or orders of his employer, and if his disobedience is proximate cause of injury, recovery is barred. Cedergren v. M., 247NW235. See Dun. Dig. 6014.

Trainmen owe no duty to unknown and unexpected trespassers on track until they become aware of them, and then they owe duty of exercising ordinary care not to do them harm. Denzer v. G., 248NW44. See Dun. Dig. 8164.

15. —False imprisonment and malicious prosecution.

Mere dropping of prosecution was not such termination favorable to accused as would permit the successful maintenance of an action for malicious prosecution. Friedman v. G., 182M396, 234NW596. See Dun. Dig. 5727.

All those who by direct act, or indirect procurement, participate in or proximately cause false imprisonment or unlawful detention, are joint tort-feasors. Anderson v. A., 248NW719. See Dun. Dig. 8728.

Even though an arrest is lawful, detention of a prisoner for unreasonable time without taking him before a committing magistrate will constitute false imprisonment.

ment. *Anderson v. A.*, 248NW719. See Dun. Dig. 3728 (86).

16. —Wrongful execution.

Judgment creditor suing on execution is not liable for wrongful levy made thereunder unless he directs such levy or ratifies it by refusing to permit a release. *Lundgren v. W.*, 250NW1. See Dun. Dig. 3553.

17. —Assault.

Evidence held sufficient to sustain finding that blacksmith was assaulted when attempting to collect bill. *Farrell v. K.*, 248NW720. See Dun. Dig. 529.

18. —Conversion.

A surety may be subrogated to the right of the obligee on a bond given by a permittee to cut timber from state land without a showing of culpable negligence of a third party purchasing timber from the permittee. *Martin v. Federal Surety Co.*, (CCA8), 58F(2d)79.

If one in possession of personal property belonging to another disposes of it in violation of the owner's instructions, it is a conversion. *General Electric Co. v. F.*, 185M178, 235NW876. See Dun. Dig. 1926.

The evidence did not require a finding of the conversion of plaintiff's merchandise by the defendants. Without a conversion there was no quasi contractual obligation such as arises upon the waiver of a tort and suit in assumpsit. *Great Lakes Varnish Works v. B.*, 184M26, 237NW609. See Dun. Dig. 1926.

Evidence held to sustain finding of conversion of motor truck purchased from agent of plaintiff. *International Harvester Co. of America v. N.*, 184M548, 239NW663. See Dun. Dig. 1951(91).

In action against assignee of chattel mortgage for conversion, it was proper to permit defendant to show that the mortgagee imparted to it information obtained as to disappearance of some of the mortgaged property and the danger threatening the balance. *Rahn v. F.*, 185M246, 240NW529. See Dun. Dig. 1474.

In action against chattel mortgagee for conversion of goods, whether plaintiff made default in conditions of mortgage held for jury. *Rahn v. F.*, 185M246, 240NW529. See Dun. Dig. 1474.

In conversion of live stock, evidence held insufficient to identify subject matter. *Spicer Land Co. v. H.*, 187M142, 244NW553. See Dun. Dig. 1951.

Sale of automobiles by mortgagee without a foreclosure was a conversion. *McLeod Nash Motors v. C.*, 187M452, 246NW17. See Dun. Dig. 1463.

Measure of damages was correctly submitted as market value of cars at place where they were converted by mortgagee, less amount due on time draft. *McLeod Nash Motors v. C.*, 187M452, 246NW17. See Dun. Dig. 1955.

Evidence warranted finding collision insurer, after car was repaired, wrongfully withheld use and possession thereof from plaintiff, thereby converting it. *Breuer v. C.*, 246NW533. See Dun. Dig. 1935.

There was no waiver of conversion by collision insurer of automobile, which it agreed to repair and return, by submission of another proof of loss. *Breuer v. C.*, 246NW533. See Dun. Dig. 1947.

Unconditional resale of furnace by conditional vendee constituted conversion. *Pennig v. S.*, 249NW39. See Dun. Dig. 1932.

Evidence held sufficient to support a finding that sheriff's levy amounted to a conversion. *Lundgren v. W.*, 250NW1. See Dun. Dig. 3551(65).

19. —Respondent Superior.

Driver of delivery truck on his way home to dinner, according to custom, was within the scope of his employment as regarded liability of employer for his negligence. *Free Press Co. v. B.*, 183M286, 236NW306. See Dun. Dig. 5833, 5842.

Dealer selling milking machines held not shown to be an agent or servant of manufacturer so as to make it liable for dealer's negligence resulting in electrocution of cows. *Diddams v. E.*, 185M270, 240NW895. See Dun. Dig. 145(67), 5834.

Family car doctrine does not apply to a motorboat furnished by head of family. *Felcyn v. G.*, 185M357, 241NW37. See Dun. Dig. 5834b.

A public officer is not responsible for torts of his subordinates or employees, unless he cooperates with them. *Nelson v. B.*, 248NW49. See Dun. Dig. 8001.

20. —Damages.

Lessee whose property was willfully damaged by lessor who entered to make major improvement and virtually evicted the lessee held entitled to exemplary damages. *Bronson Steel Arch Shoe Co. v. K.*, 183M135, 236NW204. See Dun. Dig. 2540, 5365, 5366.

Court did not err in receiving testimony of value of motor vehicle before and after collision and also evidence of reasonable cost of restoring damaged car to its former condition. *Engholm v. N.*, 184M349, 238NW795. See Dun. Dig. 2576a.

Where injuries to car in a collision are of such character that the car may be repaired, the reasonable cost of restoring the car to its former condition is the proper measure of damages. *Engholm v. N.*, 184M349, 238NW795. See Dun. Dig. 2576a.

There was no error in permitting jury to award damages for lost time although plaintiff was not employed at time of his injury. *Martin v. T.*, 187M529, 246NW6. See Dun. Dig. 2576.

Negligence of employer in discharging steam and water upon employee, held not proximate cause of asthma

where such employee stood around for some 20 minutes and then went to work without making any attempt to change clothing. *Keisich v. O.*, 246NW672. See Dun. Dig. 2532.

Exemplary damages may be awarded in assault and battery action. *Farrell v. K.*, 248NW720. See Dun. Dig. 532(64).

21. —Fraud.

Unfulfilled promises of future action will not constitute fraud, unless, when the promises were made, the promisor did not intend to perform. *Cannon Falls Holding Co. v. P.*, 184M294, 238NW487. See Dun. Dig. 3827.

Evidence held to sustain award of damages in action by purchaser of land contracts for fraud. *Investment Associates v. H.*, 187M555, 246NW364. See Dun. Dig. 3839.

Evidence held to support finding that bank induced plaintiff by fraudulent representations to purchase bond to his damage. *Ebacher v. F.*, 246NW903. See Dun. Dig. 3839.

In action against bank to recover damages for fraud in sale of bond, it was prejudicial error to receive in evidence a decree appointing a receiver, in action to foreclose mortgage securing bond, which recited that mortgagor was insolvent. *Ebacher v. F.*, 246NW903. See Dun. Dig. 5156.

22. —Libel and slander.

See, also, §9397.

Whether statements made were qualifiedly privileged held for jury. *McLaughlin v. Q.*, 184M28, 237NW598. See Dun. Dig. 5560(89).

Evidence made an issue of fact whether the defamatory statements complained of by plaintiff were true. *McLaughlin v. Q.*, 184M28, 237NW598. See Dun. Dig. 5557, 5560(89).

An ordinary notice of foreclosure of a mortgage by advertisement is not libelous per se. *Swanson v. F.*, 185M89, 239NW900. See Dun. Dig. 5517.

Spoken words, even if calculated to expose one to public contempt, hatred or ridicule, in absence of allegation of special damages, are not actionable, though such words, if published, are. *Gaare v. M.*, 186M96, 242NW466. See Dun. Dig. 5508.

Complaint that defendant said that bank would not have failed if plaintiff had not been "crooked" person, held not to state cause of action. *Gaare v. M.*, 186M96, 242NW466. See Dun. Dig. 5518.

PARTIES

9165. Real party in interest.

Correction—Citation to annotations under note 8 in main edition should read "160M1, 199NW887."

½. In general.

In equity proceedings, all persons whose rights may be adversely affected by the proposed decree should be made parties to the action, and when a stockholder sues to cancel stock of a corporation, the corporation should be made a party. 172M110, 215NW192.

In the absence of special circumstances, the representative of the estate of a deceased person is the only one who may maintain an action to recover a debt owing to the estate. 172M274, 215NW176.

Third party for whose benefit a contract is made, has a right of action on it. 174M297, 219NW180.

Persons promising to pay debt of another in consideration of conveyances to them may be sued by the creditor, or the debtor may sue, though he has not paid his debt. 174M350, 219NW287.

Any recovery in an action to have the purposes of a trust carried out must be for the benefit of the trust estate as such and not for the benefit of the plaintiff personally. *Whitcomb v. W.*, 176M280, 223NW296.

Where covenant runs with land and covenantee, without having been evicted or having suffered any loss, and without bringing action on the covenant, conveys the land to another, the covenant passes with the conveyance, and the original covenantee cannot thereafter sue thereon unless he has been required to pay or make good on account of a breach of the covenant. 177M606, 225NW902.

City was a necessary party to an action to restrain officers from revoking taxicab licenses. *National Cab Co. v. K.*, 182M152, 233NW838. See Dun. Dig. 7316(66).

1. Held real party in interest.

One to whom promissory note has been transferred by delivery without endorsement may maintain an action thereon in his own name. 176M246, 223NW287.

Stockholder of corporation which has been defrauded may maintain an action in the name of the corporation for rescission without making futile demand upon corporation to do so. 176M411, 223NW624.

Automobile owner could maintain an action in his own name where automobile was lost through theft, though the insurance company has paid the amount remaining due on the sales contract to the holder of the vendor's right, where there still remains an amount due after such payment. 177M10, 224NW271.

Lessee held real party in interest as against one in possession of property holding over after cancellation of a contract for deed. *Gruenberg v. S.*, 248NW724. See Dun. Dig. 7315.

Where bank pledges bills payable to secure a loan, and is closed, the pledgee is the real party in interest

in action on the bills payable, but he may consent to suit by the pledgor. Op. Atty. Gen., May 22, 1929.

2. Held not real party in interest.

One not a party to a contract of pledge, but who possibly and at best is merely an incidental beneficiary thereof, cannot base any cause of action thereon. Lincoln Finance Corp. v. D., 183M19, 235NW392. See Dun. Dig. 7315.

Widow accepting compensation for death of husband under Workmen's Compensation Act is not real party in interest in action against third party. Prebeck v. V., 185M303, 240NW890. See Dun. Dig. 7315.

4. Assignments.

Assignee of cause of action is the real party in interest. 176M315, 233NW614.

Assignee of mortgage, held not entitled to sue mortgagor for damages for fraudulent representations as to character of land. 178M574, 228NW152.

Where suit on a mechanic's lien claim is brought in name of two partners and it develops that one has assigned all of his interest in claim to his copartner, court may properly decree foreclosure in behalf of assignee. Blatterman v. C., 246NW532. See Dun. Dig. 571, 7407.

In action by partially paid insured to recover damages to automobile, it was error to reject offer of defendant to prove that plaintiff had transferred cause of action to insurer, thereby ceasing to be real party in interest. Flor v. B., 248NW743. See Dun. Dig. 7315.

6. Action by taxpayer.

Taxpayer may sue to restrain disbursement of money by city to one unlawfully employed. 174M410, 219NW760.

One or more taxpayers may enjoin the unauthorized acts of city officials, seeking to impose liability upon the city or to pay out its funds. 177M44, 224NW261.

The city is not an indispensable party to a suit by taxpayers to enjoin unauthorized acts of city officials. 177M44, 224NW261.

One having only a purported contract, signed by a city official, is not an indispensable party. 177M44, 224NW261.

A demand by taxpayers upon state officials to bring actions to annul and cancel invalid highway contracts held unnecessary. Regan v. B., 247NW12. See Dun. Dig. 4480.

Payment of automobile license fees and of state gasoline tax gives taxpayer a special interest in honest expenditure of highway funds entitling him to maintain an action to restrain payment of such funds upon void contracts. Regan v. B., 247NW12. See Dun. Dig. 4480, 7316.

7. Bonds.

Ward may sue on depository bond in which guardian or judge was named as obligee. 176M541, 224NW152.

A bailee may maintain an action on a replevin bond. 177M515, 225NW425.

8. Waiver of objections.

Objection of lack of capacity to sue must be taken by demurrer or answer, or it is waived. 175M226, 220NW822.

9166. Action by assignee—Set-off saved.

6. Negotiable paper.

Where collection bank becomes insolvent on day it sends draft for proceeds to bank in which it has deposit, latter bank is entitled to set-off deposit against collection. 28F(2d)587.

It is a breach of plain legal duty for a school district treasurer to make a payment on a warrant not presented to him for such payment and a payment without such presentation to a former holder of a warrant held not to be payment of the warrant and assignee may recover notwithstanding. 173M383, 217NW366.

An assignee of a chose in action, not a negotiable instrument, takes it subject to all defenses and equities which the obligor has against the assignor or a prior holder before such obligor has any notice or knowledge of any assignment thereof. First Nat. Bank of Windom v. C., 184M635, 240NW662. See Dun. Dig. 571 (40).

This section is not rendered inapplicable to school district warrants by the fact that such warrants are generally dealt in by banks and investors. First Nat. Bank of Windom v. C., 184M635, 240NW662. See Dun. Dig. 572.

School district warrants are nonnegotiable instruments and are subject to defenses and set-off in the hands of an assignee. First Nat. Bank of Windom v. C., 184M635, 240NW662. See Dun. Dig. 886.

9167. Executor, trustee, etc., may sue alone.

Where administrator forecloses mortgage and buys it in his own name as administrator, an action to set aside the foreclosure and sale on the ground that no default had occurred is properly brought in the district court and against the administrator as sole defendant. 171M469, 214NW472.

9168. Married women may sue or be sued.

Where wife is injured, the wife and husband may maintain separate actions for damages. 175M247, 221NW8.

9172. Parent or guardian may sue for injury to child or ward—Bond—Settlement.—A father, or, in

case of his death or desertion of his family, the mother, may maintain an action for the injury of a minor child, and a general guardian may maintain an action for the injury of his ward. Provided, that if no such action is brought by the father or mother, an action for such injury may be maintained by a guardian ad litem, either before or after the death of such parent. Before any such parent shall receive any money or other property in settlement or compromise of any action so brought, or in satisfaction of any judgment obtained therein, such parent shall file a bond as security therefor, in such form and with such sureties as the court shall prescribe and approve; Provided, however, that upon petition of such parent, the court may, in its discretion, order that in lieu of such bond, any money so received shall be deposited as a savings account in a banking institution or trust company, together, with a copy of the court's order and the deposit book filed with the Clerk of Court, subject to the order of the court, and no settlement or compromise of any such action shall be valid unless the same shall be approved by a judge of the court in which such action is pending. (R. L. '05, §4060; '07, c. 58; G. S. '13, §7681; Mar. 30, 1929, c. 113.)

In action in behalf of a minor, title should be in his name as plaintiff by his guardian ad litem and not in name of guardian ad litem as plaintiff. Lund v. S., 187M577, 246NW116. See Dun. Dig. 4461.

9174. Joinder of parties to instrument.

The assignor of the balance owing upon a claim for goods sold and delivered, who guarantees payment of the same to his assignee, may be joined as defendant in an action with the principal debtor. 173M57, 214NW778.

A party who is properly made defendant cannot object by demurrer that other parties are improperly joined with him as defendants. 173M57, 214NW778.

The words "obligation or instrument" mean engagements, contracts, agreements, stipulations, bonds, and covenants, as well as negotiable instruments. 173M57, 214NW778.

The general policy of this section is to avoid multiplicity of suits. 173M57, 216NW789.

In construing this section words are to be considered in their ordinary and popular sense. 173M57, 216NW789.

This section is remedial and should be liberally construed so as to carry out the purpose sought. 173M57, 216NW789.

Sections 9174 and 9411 are in pari materia. 173M57, 216NW789.

Whether bank is entitled to subrogation as against successor to mortgagor's interest as vendor in contract for deed, vendee's interest being held as security, cannot be decided in action to which successor is not party. Nippolt v. F., 186M325, 243NW136. See Dun. Dig. 9052a.

9175. Surety may bring action.

In view of §106, this section does not authorize a suit for exoneration by sureties against commissioner of banks or the receiver or trustee of an insolvent bank. 174M583, 219NW916.

This section, held inapplicable to surety on depository bond covering state funds in proceedings under Mason's Minn. St., §106. 179M143, 228NW613.

Where defendant took deed from bank, and executed note and mortgage, and then reconveyed land to bank, he could not compel the holder of the note to sue the bank. 181M82, 231NW403.

9178. Actions against receivers, etc.

One holding a deficiency judgment against a corporation in the hands of a receiver is required to prove its claim within the time fixed by the court for the filing of claims, in order to hold the receivers liable for the deficiency, and where it failed to prove its claim within the time allowed the denial of leave to make the receivers parties to the foreclosure suit is within the discretion of the court, and it is immaterial that the receivers had made payments on the judgment with the approval of the court. Chicago Joint Stock Land Bank v. Minnesota L. & T. Co., (CCA8), 57F(2d)70. See Dun. Dig. 8261.

One holding claim upon which a tort action has been commenced against a receiver of a railway company, is not entitled to share ahead of the mortgage lienholders in the residue remaining from a sale of the railway property. 177M584, 225NW919.

9179. How tried, and judgment, how satisfied.

177M584, 225NW919.

9180. Actions against partnership, etc.

A labor union, an unincorporated voluntary association, held engaged in transacting business in Minne-

sota, and service of summons and complaint upon member resident in state, held to confer jurisdiction. *Bowers v. G.*, 187M626, 246NW362. See Dun. Dig. 618a, 9674.

Each member of a voluntary unincorporated association organized for business and profit is individually liable for debts contracted. *Ford Motor Co. v. S.*, 248NW55. See Dun. Dig. 616.

Members of voluntary unincorporated farmers' cooperative association were individually liable for its debts. *Id.*

Where a voluntary unincorporated association is sued as such, judgment binds joint property of associates, but not individual property of members other than those served. *Id.*

9181. Bringing in additional parties.

In action on note secured by mortgage on land deeded by bank to maker, and reconveyed by maker to bank, such maker was not entitled to bring in bank as party. 181M82, 231NW403.

In an attorney's lien proceeding, it was proper for the trial court, in order to render a judgment determinative of the whole controversy, to order in as an additional party an attorney admittedly entitled to share in the fund subject to the lien. *Meacham v. B.*, 184M607, 240NW540. See Dun. Dig. 712, 7325.

In action by contractor against surety finishing job under agreement to pay profits to contractor, less expenses, including attorney's fees, where amount of attorney's fees were in dispute, court erred in refusing to bring in attorney as additional party defendant. *Johnson v. H.*, 187M186, 245NW27. See Dun. Dig. 7325.

Court has inherent power to bring into court additional party whenever it is necessary for complete administration of justice. *Johnson v. H.*, 187M186, 245NW27. See Dun. Dig. 7325.

The district court has the inherent power in an equitable action, even upon its own motion, to bring in additional parties, where it is necessary for complete administration of justice. *Sheehan v. H.*, 187M582, 246NW353. See Dun. Dig. 7328.

9182. Contents of order—How served, etc.

An order bringing in an additional party defendant should ordinarily require complaint to be amended so that new party may plead thereto. *Sheehan v. H.*, 187M582, 246NW353. See Dun. Dig. 7328, 7701.

LIMITATION OF ACTIONS

9185. General rule—Exceptions.

1. In general.

The effect of a new promise as an agency for the continuance or revival of a cause of action operates only in field of contractual obligation and does not apply to a cause of action in tort. 174M264, 219NW155.

Amendment of complaint, in action against two defendants, by alleging a joint contract with defendant and their partnership relation, held not to state a new cause of action as affecting limitations. 181M381, 232NW708. See Dun. Dig. 5622, 7490d.

The statute of limitation of actions affects the remedy, not the right. If it had run, it could be waived as a defense. 181M523, 233NW802. See Dun. Dig. 5661(83).

2. When action accrues.

Claim for salaries and expenses advanced by president of corporation under agreement, held not barred by any statute of limitation. 177M72, 224NW454.

The claim that an action is prematurely brought, because the recovery claimed is not due, is in the nature of a claim in abatement and must be raised in an appropriate manner in the trial court. *Geib v. H.*, 185M295, 240NW907. See Dun. Dig. 2746b.

Evidence held not to show that the maturity of a debt was deferred by agreement until demand, or any other future event, so as to toll the statute of limitations. *Noser v. A.*, 248NW292. See Dun. Dig. 5602.

Limitations does not begin to run against a town, village, school district, or county warrant until there is money available for the payment of the warrant. *Op. Atty. Gen.*, Nov. 18, 1931.

4. Laches.

If a rescission has been effected by a party defrauded, within a reasonable time after discovery of the right to rescind, he is not bound to bring his action to recover his loss before the time has expired within which he must rescind. *Krzyzaniak v. M.*, 182M83, 233NW595. See Dun. Dig. 5352(91).

Delay in seeking equitable relief, not for such time as to come within statute of limitations, and for which defendant is in part responsible, is not a bar to action. *Johnson v. I.*, 249NW177. See Dun. Dig. 5351.

9186. Bar applies to state, etc.

180M496, 231NW210.

Does not apply to action on bond of timber permittee in view of Mason's Minn. St. 1927, §§6394-17, 6394-37. 180M160, 230NW484.

The finding that title to no part of the street in controversy was acquired through adverse possession is contrary to the evidence. *Doyle v. B.*, 182M556, 235NW18. See Dun. Dig. 111.

An action in the district court for the enforcement of the lien of the inheritance tax under §2311 is not barred by limitations. *State v. Brooks*, 183M251, 236NW316. See Dun. Dig. 5656, 9525.

Title to a public road by common-law dedication could not be acquired by adverse possession. *Hopkins v. D.*, 183M393, 236NW706. See Dun. Dig. 111.

9187. Recovery of real estate, fifteen years.

½. In general.

Cause of action to annul an express trust of real and personal property, held to have accrued and to have become barred by six-year statute. 176M274, 223NW294.

The six-year statute of limitations applies to an action to recover damages for an injury to real property caused by a municipality in grading a street. 177M565, 225NW816.

An easement by prescription for the flooding of land may be acquired for limited or reasonable purposes only. *Pahl v. L.*, 182M118, 233NW836. See Dun. Dig. 2853.

2. Essentials of adverse possession.

The requirement of actual and visible occupation is more imperative in an old and populous country than in a new country. 171M410, 214NW271.

Up to the boundary line as claimed in his complaint, the evidence supports the verdict that plaintiff had acquired title by adverse possession. *Patnode v. M.*, 182M348, 234NW459. See Dun. Dig. 130.

3. Payment of taxes.

Failure to pay taxes on a portion of a lot assessed as one tract does not prevent a person asserting title by adverse possession. 173M145, 216NW782.

3a. Possession must be hostile and under claim of right.

To be hostile, possession must be taken with intent to claim and hold the land against the true owner and the whole world, but in the beginning, adverse possession may be a mere trespass. 171M410, 214NW271.

A disseisor may strengthen his adverse claim by taking as many conveyances from those claiming or having an interest in the land as he sees fit. 171M410, 214NW271.

Fact that fence is shifted from place to place does not destroy continuity of possession of so much as remains within the fence. 171M410, 214NW271.

Payment of taxes, unless the land is separately assessed, is not essential. 171M410, 214NW271.

Title by adverse possession may be acquired, although the parties in interest occupy up to a fence in the mistaken belief that the fence is on the true boundary line. 171M410, 214NW271.

The occupancy and slight use of lands involved by the successor in interest of the grantors in a fowage contract was permissive and not adverse. 176M324, 223NW612.

The evidence proved title by adverse possession in defendant. *Deacon v. H.*, 182M540, 235NW23. See Dun. Dig. 127(8), 130.

4. Public land.

Title may not be acquired to established highway by adverse possession, though highway has been abandoned and never was used. *Op. Atty. Gen.*, Apr. 28, 1933.

6. Permissive possession.

Undisturbed use of a passway over the uninclosed lands of another raises a rebuttable presumption of a grant, but where the proof shows that use in its inception was permissive, such use is not transformed into adverse or hostile use until the owner has some notice of an intention of the user to assert adverse and hostile dominion. 175M592, 222NW272.

Possession, originally permissive in character, does not become adverse without circumstances or declarations indicating an intent hostile to the true owner. *Board of Christian Service v. T.*, 183M485, 237NW181. See Dun. Dig. 112a(c).

Evidence held sufficient to sustain finding that user of a way for travel was permissive and a mere license revocable at will of landowner. *Johnson v. O.*, 248NW700. See Dun. Dig. 2853(77).

17. Possession must be exclusive.

Easement may be acquired without exclusive possession. 179M228, 228NW755.

22. Easements.

Evidence held to show right of way acquired by prescription. 171M358, 214NW49.

A user of a way for travel, permissive in its inception, does not ripen into an easement until and unless there is a subsequent distinct and positive assertion of a hostile right by claimant and continued use after such hostile assertion for statutory time to acquire an easement by prescription or adverse possession. *Johnson v. O.*, 248 NW700. See Dun. Dig. 2853(77).

Fact that claimant ceases to use a way for travel in which he is not shown to have had any easement or right, and is then permitted to use a different route, does not amount to surrender of one easement or right in consideration of granting of an easement in new route. *Johnson v. O.*, 248NW700. See Dun. Dig. 2862b.

22½. Pleading.

Title by adverse possession may be proved under a general allegation of ownership. 171M488, 214NW283.

Judgment in action to determine boundaries under §9592 is res adjudicata in a subsequent action in ejectment. 171M488, 214NW283.

25. Burden of proof.

Where claimant of easement shows open and continuous possession for the requisite period the owner of the land has the burden of proving that the possession was permissive merely. 179M228, 228NW755.

27. Facts held sufficient to constitute adverse possession.

179M228, 228NW755.
Evidence held to show open hostile and adverse possession for more than fifteen years of certain lot up to certain line east of house. 173M145, 216NW782.

Finding that defendants' exclusive possession for more than 15 years of part of plaintiff's lot was not with intention to claim adversely and did not constitute adverse possession is not sustained by evidence. Gehan v. M., 248NW820. See Dun. Dig. 130.

28. Facts held insufficient.

Evidence did not require finding that defendant acquired title to portion of plaintiff's adjoining lot by adverse possession through occupancy beyond true boundaries. 174M171, 218NW549.

9189. When time begins to run.

Mortgage held to show, upon its face, time of maturity, and that limitations ran from that time. 171M252, 213NW913.

Testimony that a debtor, since deceased, admitted, in 1927, that "she had to pay" a named creditor some money that spring, does not so tend to show that the maturity of the debt, accrued in 1917, was postponed to 1927, as to avoid a plea of the statute of limitations. Noser's Estate, 183M477, 237NW22. See Dun. Dig. 5602 (44).

9190. Judgments, ten years.

The allowance of a claim by a referee in bankruptcy is not a "judgment or a decree of a court of the United States." 173M263, 217NW126.

The approval of a settlement in a workmen's compensation matter under Act of 1913, c. 467, is not a judgment as regards limitations. 176M554, 223NW926.

Statute runs against personal property tax judgments. Op. Atty. Gen., Feb. 5, 1929.

9191. Various cases, six years.**½. In general.**

Minority stockholder's claims—arbitration—laches. 21F(2d)4.

Six-year statute held a bar to action by creditors against directors to recover converted funds. Williams v. D., 182M237, 234NW11. See Dun. Dig. 5656(64).

A payment of interest voluntarily made by a debtor to one who had no authority to receive it, but by whom it is immediately turned over to the creditor as the "interest money" in question, held sufficient to toll the running of the statute of limitations against the principal obligation. Kehrer v. W., 182M474, 234NW690. See Dun. Dig. 5632.

The correction of an error in bookkeeping which occurred years before, which correction was made after the statute had run, was not a part payment which tolled the statute. In re Walker's Estate, 184M164, 238NW58. See Dun. Dig. 5646.

The signing of a waiver of notice of first meeting of stockholders upon the forming of a new corporation held not to constitute a written acknowledgment or recognition of a debt which tolled the statute. In re Walker's Estate, 184M164, 238NW58. See Dun. Dig. 5624.

Evidence held not to show that it was contemplated that payment would not be made until an indefinite time in the future so as to affect running of statute. In re Walker's Estate, 184M164, 238NW58. See Dun. Dig. 5602.

Executors could not waive the bar of the statutes of limitations as to a debt of decedent as regards computation of succession tax. In re Walker's Estate, 184M164, 238NW58. See Dun. Dig. 35931(72).

The six-year statute of limitations applies to an individual indebtedness by one partner to the other. Aab v. S., 184M225, 238NW480. See Dun. Dig. 5648.

Time limited in proviso for commencement of action to enforce stockholder's liability under §8023 is adequate. Sweet v. R., 250NW45. See Dun. Dig. 5656.

Time for commencement of action to enforce stockholder's liability is not governed by statutes of limitation in force when order for sequestration was made, but by applicable statute at time action is brought. Id.

Statute of limitations begins to run against claim of officer for salary from time it is due and not from the end of his term of office. Op. Atty. Gen., Sept. 13, 1932.

Statute of limitations begins to run against claim of president of village council for salary due him as each monthly or periodic salary becomes due. Op. Atty. Gen., Sept. 23, 1932.

Statute would apply to an action by village treasurer against village for compensation. Op. Atty. Gen., Jan. 25, 1933.

Subdivision 1.

In action upon promissory note where statute of limitations is pleaded and it appears from plaintiff's case that action is barred, defendant is entitled to a directed verdict. 175M411, 221NW526.

Statute did not begin to run against action of flogage contract until ascertainment of amount of land that would be flooded by construction of dam. 176M324, 223NW612.

Paragraph one applies to an application and proceeding to obtain judgment for compensation payments in default in a workmen's compensation matter. 176M554, 223NW926.

The approval of a settlement in a workmen's compensation matter under the Act of 1913, c. 467, is not a judgment, as regards limitations. 176M554, 223NW926.

Cause of action on note payable to third person did not accrue to beneficial owner until maturity of last renewal. 180M1, 230NW260.

Limitations did not begin to run against one entitled to certain excess on sale of land until such money was paid. Ellingson v. S., 182M510, 234NW867. See Dun. Dig. 5606.

Action on demand promissory note is barred within 6 years from date thereof. Fljozdal v. J., 248NW215. See Dun. Dig. 5602.

Practical construction placed by city and gas company upon franchise for period of more than 20 years was admissible, although six-year statute was applicable to cause of action. City of South St. Paul v. N., 248NW288. See Dun. Dig. 1820.

Certificate of deposit issued by bank outlaws six years after maturity. Op. Atty. Gen., Feb. 25, 1933.

Limitation starts running 30 days after demand on a certificate of deposit payable "30 days after demand." Op. Atty. Gen., Feb. 25, 1933.

Commercial fisherman's license bond held intended to be limited to provisions of §§9700 to 9705 and governed by such sections rather than §9191 with respect to service of notice within 90 days and suit within one year. Op. Atty. Gen., Aug. 28, 1933.

Subdivision 2.

While liability of bank directors for making excessive loans may be barred by the six years limitation in absence of circumstances showing that the statute was tolled, evidence held to show concealment or unusual or extraordinary circumstances which would preclude objection to the taking of testimony before a special master on the ground that the cause of action was barred. Andresen v. Thompson, (DC-Minn), 56F(2d)642. See Dun. Dig. 5608.

If cause of action for double liability of stockholder accrued at time receiver was appointed, action was barred six years thereafter. Miller v. A., 183M12, 235NW622. See Dun. Dig. 5656(64).

Limitations was not tolled, as against liability of stockholder accruing at appointment of receiver, by reason of continuances and negotiations, on the theory of estoppel or otherwise. Miller v. A., 183M12, 235NW622. See Dun. Dig. 5656.

The six-year statute of limitation applies to the matter of accounting between a city and a county arising out of errors in apportionment of taxes. Op. Atty. Gen., Apr. 27, 1931.

Subdivision 3.

The six-year statute of limitations applies to an action to recover damages for an injury to real property caused by a municipality in grading a street. 177M565, 225NW816.

Where the injury is continuing, the owner may recover such damages as were caused within six years prior to suit. 177M565, 225NW816.

Subdivision 4.

The statute of limitation does not begin to run against owner of stolen property while property is kept concealed. Commercial Union Ins. Co. v. 183M1, 235NW634. See Dun. Dig. 5608(4).

Subdivision 5.

This subdivision is in the nature of a residuary clause or provision governing actions for torts not elsewhere enumerated. 177M565, 225NW816.

The six-year statute of limitations applies to an action to recover damages for an injury to real property caused by a municipality in grading a street. 177M565, 225NW816.

Where the injury is continuing the owner may recover such damages as were caused within six years prior to suit. 177M565, 225NW816.

Subdivision 6.

Cause of action to annul an express trust of real and personal property, held to have accrued and to have become barred by six-year statute. 176M274, 223NW294.

The burden is on plaintiff to plead and prove that the alleged fraud on which it relies was not discovered until within six years of the commencement of the action. Modern Life Ins. Co. of Minn. v. T., 184M36, 237NW686. See Dun. Dig. 5652.

The burden is upon the plaintiff to prove that he did not discover the facts constituting the fraud until within the six years and therefore the statute of limitations does not run. Olesen v. R., 184M624, 238NW12. See Dun. Dig. 5652.

A cause of action alleging items of deposit received in an insolvent bank, the last one on March 7, 1924, is not barred as to such last item on March 7, 1930. The first day is excluded and the last included in the computation of time. Olesen v. R., 184M624, 238NW12. See Dun. Dig. 9625(98).

An action under §10407 is not an action for relief on the ground of fraud within §9191(6), and the six-year limitation applies. Olesen v. R., 184M624, 238NW12. See Dun. Dig. 5652.

Subdivision 8.

Limitations commenced to run as against principal and sureties on school treasurer's bond from time of expiration of term of office during which closing of bank occurred. Op. Atty. Gen., Sept. 30, 1933.

9102. Against sheriffs and others.

Subdivision 1.

An action against an officer because of an "act done in his official capacity and in virtue of his office" must be brought within three years, even though it involves negligence, and this applies also in actions against individuals for acts done in assisting such officer. 178M174, 226NW405.

Subdivision 2.

A cause of action by creditors to recover of the directors of a bank because the bank received deposits when insolvent is not barred by the three-year limitations. Olesen v. R., 184M624, 239NW672. See Dun. Dig. 5657.

9193. Two years' limitations.

In view of §3417(14) action on accident policy was barred after two years. 174M354, 219NW286.

When a party, against whom a cause of action exists in favor of another, by fraudulent concealment prevents such other from obtaining knowledge thereof, limitations will commence to run only from time cause of action is discovered or might have been discovered by exercise of diligence. Schmucking v. M., 183M37, 235NW633. See Dun. Dig. 5608(4).

Subdivision 1.

Limitations do not commence to run against a cause for malpractice until the treatment ends. 178M82, 226NW196.

Statute does not begin to run against malpractice action until treatment ends. 178M482, 227NW432.

Action against city for wrongful death must be commenced within one year from the occurrence of the loss or injury. 178M489, 227NW653.

Limitations do not begin to run in an action against a physician for malpractice, until the treatment ends. 181M381, 232NW708. See Dun. Dig. 5602, 7409d.

Amendment, in action against two physicians for malpractice, alleging that both defendants were employed to render medical services and that they were copartners, held not to constitute the commencement of a new action. 181M381, 232NW708. See Dun. Dig. 5622.

In an action to recover damages from a physician for malpractice, whether cause of action was barred by the statute of limitation was for the jury. 181M590, 233NW317. See Dun. Dig. 5655(59), 7490d.

Limitations in malpractice cases begin to run when the treatment ceases. Schmit v. E., 183M354, 236NW622. See Dun. Dig. 7409d.

Subdivision 3.

Applies to an action to recover damages for flooding caused by a dam erected by a public service corporation for the purpose of generating electric current to be distributed and sold to the public for lighting, heating and power purposes. Zamani v. O., 182M355, 234NW457. See Dun. Dig. 5605(79), 5655.

9199. When action deemed begun—Pendency.

Laws 1931, c. 240, legalizes service of summons made between Mar. 1, 1931, and Apr. 25, 1931, by one other than proper officer.

173M580, 218NW110.

To constitute "issuance of summons" the summons must be either served or delivered to the proper officer for service. 181M349, 232NW512. See Dun. Dig. 7798.

9201. When cause of action accrues out of state.

180M560, 231NW239.

A cause of action arising in another state where the parties all reside, is barred in Minnesota if barred in the other state by the laws of that state. Klemme v. L., 184M97, 237NW882. See Dun. Dig. 5612(16).

This section is constitutional. Klemme v. L., 184M97, 237NW882. See Dun. Dig. 5612(22).

9202. Periods of disability not counted.

Where application and accident policy are made part of complaint and application shows that plaintiff was not a minor, it is immaterial that the complaint states that she is a minor. 174M354, 219NW286.

When a party, against whom a cause of action exists in favor of another, by fraudulent concealment prevents such other from obtaining knowledge thereof, limitations will commence to run only from time cause of action is discovered or might have been discovered by exercise of diligence. Schmucking v. M., 183M37, 235NW633. See Dun. Dig. 5608(4).

9204. New promise must be in writing.

In re Walker's Estate, 184M164, 238NW58. See Dun. Dig. 5624; note under §9191.

1. Acknowledgment or promise.

The effect of a new promise as an agency for the continuance or revival of a cause of action operates only in field of contractual obligation and does not apply to a cause of action in tort. 174M264, 219NW155.

Payment after expiration of limitations, retention of written statement showing such payment and letters written by debtor, held to create new and binding agreement which was properly filed in probate court. Hartnagel v. A., 183M31, 235NW521. See Dun. Dig. 5624(46), 5647.

2. Part payment.

A payment of interest voluntarily made by a debtor to one who had no authority to receive it, but by whom it is immediately turned over to the creditor as the "in-

terest money" in question, held sufficient to toll the running of the statute of limitations against the principal obligation. Kehrer v. W., 182M474, 234NW690. See Dun. Dig. 5632.

Where several sign a note, limitations run in favor of one signer, notwithstanding payments made by other. Kranz v. K., 247NW243. See Dun. Dig. 5643.

VENUE

9206. General rule—Exception.

State v. District Court, 186M513, 243NW692; note under §9215.

A party who goes to trial at Virginia in a case involving title to real estate without objection, cannot complain under Laws 1909, c. 126, that there was no written consent to trial of a case involving title to real estate. 171M475, 214NW469.

A garnishment proceeding is not a suit which is removable to the federal court under Mason's U. S. Code, Tit. 28, §§71, 72. 177M182, 225NW9.

Where a cause has been removed and it afterward appears that suit was not a proper one for removal and is remanded, any act of the state made in the interval is valid. 177M182, 225NW9.

It is the duty of the state court to examine the petition and bond for the removal of a case to the federal court and if they are legally sufficient to accept the same and proceed no further. 177M182, 225NW9.

Where there are more than two defendants, none of whom live in county wherein action is commenced, a change of venue can be had only by majority of defendants uniting in demand. State v. Mills, 187M287, 245NW431. See Dun. Dig. 10125(1).

9207. Actions relating to land.

An action against personal representative and heirs to be adjudged owner of two-thirds of lands and personality of decedent under an oral contract with decedent entitling plaintiff to such property on decedent's death, was a transitory action. State ex rel. Cairney v. Dist. Ct. of Stevens County, 178M342, 227NW202.

Action to annul deed and mortgages and to have title declared to be in plaintiff is local and not transitory. State v. District Court of Anoka County, 184M504, 239NW143. See Dun. Dig. 10105, 10108.

A suit for fraud in the sale of diseased cows, including damages and depreciation of real estate due to germs, is not wholly a local action, and defendants are entitled to a removal to the county of their residence. State v. Tift, 184M567, 239NW252. See Dun. Dig. 10105, 10108.

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

Where a complaint against the sheriff of Blue Earth County and against certain residents of Hennepin County does not clearly set forth a cause of action against the sheriff in connection with the service of judicial process for the performance of an official duty, the venue of the action is not to be determined by this section. 179M583, 229NW318.

9214. Other cases—Residence of defendant.

State v. District Court, 186M513, 243NW692; note under §9215.

A foreign corporation must be considered as residing in the county where it has an established place of business. 176M78, 222NW524.

Must be construed so as to place foreign corporations within the equal protection clause of the Fourteenth Amendment of the federal Constitution, as held in Power Mfg. Co. v. Saunders, 274US490, 47SC678, 71LED1165. Olson v. Osborne & Co., 30M444, 15NW876, and Eickhoff v. Fidelity & Casualty Co., 74M139, 76NW1030, being in conflict with the decision of the Supreme Court of the United States, are overruled. State ex rel. Twin City & So. Bus. Co. v. D., 178M19, 225NW915.

This section is not violative of the commerce clause or the Fourteenth Amendment to the federal Constitution in permitting foreign railroad corporation to be sued in any county by a non-resident. 178M261, 226NW934.

Action to enforce contract to will property or leave it to plaintiff at death, was transitory. State ex rel. Cairney v. D., 178M342, 227NW202.

A national bank may be sued in any county where venue would properly lie if such bank were a state institution. De Cock v. O., 246NW885. See Dun. Dig. 820.

CHANGE OF VENUE

9215. As of right—Demand.

See §9487-1 of Mason's Minnesota Statutes, vol. 2, as to payment of costs.

State v. District Court of Anoka County, 184M504, 239NW143; note under §9207.

1. When applicable.

178M19, 225NW915; 229NW318.

In order to effect a change of venue, the deposit fee prescribed by §6991 must be paid within the prescribed time. 178M617, 225NW926.

Applicable to action to enforce contract to leave property, real and personal, to plaintiff at death. State ex rel. Cairney v. D., 178M342, 227NW202.

Venue cannot be changed in action against sureties

upon public contractor's bonds commenced in the county wherein the construction work is located. 179M94, 228 NW442.

3. Several defendants.

Where there are several defendants residing in different counties, it is necessary for a majority to join in demand for change of venue to residence county of one of them before time for answering expires as to any one of them by joining with codefendants before or after service of summons. State v. District Court, 187M270, 245NW379. See Dun. Dig. 10125(1).

Where there are more than two defendants, none of whom live in county wherein action is commenced, a change of venue can be had only by majority of defendants uniting in demand. State v. Mills, 187M287, 245 NW431. See Dun. Dig. 10125(1).

4. When demand must be made.

Where twentieth day after action commenced falls on Sunday or holiday, demand for change of venue may be made on following day. State v. Mills, 187M287, 245 NW431. See Dun. Dig. 9625, 10123.

6. A matter of right—No order of court.

Whether the place of trial should be changed is largely discretionary with trial court. State v. District Court, 186M513, 243NW692. See Dun. Dig. 10126.

7. Waiver.

A foreign railroad corporation sued by a non-resident submitted to the jurisdiction of the court where it did not move for a change of venue, though it did move to set aside summons. 178M261, 226NW934.

8. Corporations.

A foreign corporation must be considered as residing in the county where it has an established place of business. 176M78, 221NW524.

9. Review.

Denial of a motion to change place of trial of an action for divorce, brought in proper county, upon ground that convenience of witnesses and ends of justice will be promoted, may be reviewed on mandamus. State v. District Court, 186M513, 243NW692. See Dun. Dig. 5766.

9216. By order of court—Grounds.

Where, on motion for change of venue, a fact issue is raised as to the residence of a defendant, determination of that issue by the District Court is final. 181M 517, 233NW9. See Dun. Dig. 410.

Subdivision 4.

178M19, 225NW915.
On motion for change of venue on the grounds of convenience of witnesses, the district court's determination of the fact issue is final. State ex rel. Mpls. N. & S. Ry. v. Dist. Ct., Scott Co., 183M100, 235NW629. See Dun. Dig. 10127(10), 410(5).

Court held to have properly remanded case to county other than that of defendant's residence for convenience of witnesses. State v. District Court, 185M501, 241NW681. See Dun. Dig. 10127.

That manager of corporation was resident out of state held not to render it abuse of discretion to deny motion for change of venue for delay in moving. De Jardins v. E., 249NW576. See Dun. Dig. 10127.

9218. Interest or bias of judge.

Plaintiff had a fair and impartial jury trial presided over, with consent of both parties, by an unprejudiced, impartial and disinterested judge. Friedman v. G., 182 M396, 234NW596. See Dun. Dig. 4962.

9221. Affidavit of prejudice.—Any party or his attorney to a cause pending in a district court having two or more judges, on the first day of a general or special term thereof or within one day after it is ascertained which judge is to preside at the trial or hearing thereof or at the hearing of any motion, order to show cause or argument on demurrer, may make and file with the clerk of the court in which the action is pending and serve on the opposite party an affidavit stating that, on account of prejudice or bias on the part of such judge, he has good reason to believe, and does believe that he cannot have a fair trial or hearing thereof, and thereupon such judge shall forthwith without any further act or proof secure some other judge of the same or another district to preside at the trial of such cause or hearing of motion, demurrer or order to show cause, and shall continue the cause on the calendar, until such judge can be present. In criminal actions such affidavit shall be made and filed with such clerk by the defendant or his attorney not less than two days before the expiration of the time allowed him by law to prepare for trial, and in any of such cases such presiding judge shall be incapacitated to try such cause: Provided, that in criminal cases such judge, for the purpose of securing a speedy trial, may, in his discretion, change the place of trial to another county. (R. L. '05, §4101; G. S. '13, §7727; '19, c. 92, §1; '27, c. 283; Apr. 18, 1931, c. 200.)

Fact that a son of the judge appeared for the respondents furnished no legal ground for submitting issues to a jury, nor for a requested change of venue or calling for another judge, there being only one judge in the district. 177M169, 225NW109.

An affidavit of prejudice filed against the trial judge is ineffectual if not filed within the time required by statute. State v. Irish, 183M49, 235NW625. See Dun. Dig. 4962(73).

If seasonably filed, the language of the statute expressed in the affidavit is sufficient. State v. Irish, 183M 49, 235NW625. See Dun. Dig. 4962(73).

Motion for new trial must be heard before judge who tried action unless he is out of office or disabled. State v. Qvale, 187M546, 246NW30. See Dun. Dig. 7085.

9222-1. Additional costs on change of Taxation.

See section 9487-1 in the main edition.

SUMMONS—APPEARANCE—NOTICES—ETC.

9225. Requisite of summons.

5. Irregularities.

Default judgment was not void because caption of complaint named wrong court, where summons to which it was attached named proper court. 175M597, 222NW 281.

9228. Service of summons—On natural persons.

Service of summons upon a nonresident who comes into state to testify is not void but voidable only and privilege to claim exemption is waived unless promptly asserted. 173M552, 218NW101.

That the summons and complaint, when left at the home of defendant, were enclosed and sealed in an envelope addressed to the defendant, held not to invalidate the service. 181M379, 232NW632. See Dun. Dig. 7810(58).

9231. On private corporations.

171M87, 214NW12; notes under §§7493, 9233.

175M138, 220NW423.

Subdivision 3.

Where a foreign corporation is doing business in the state to such an extent as to warrant the inference that it was present here, service of process on a proper officer of the corporation present in the state and representing and acting for it in its business, held sufficient. 172M585, 216NW331.

A beneficiary association with its only offices in another state which does nothing locally but pay resident members their claims for accrued benefits, payment being made from without the state, held not to be "doing business" in the state. 175M284, 221NW21.

Service of summons upon the insurance commissioner is not limited to actions which arise out of business transacted in this state or with residents thereof. 176M 143, 222NW901.

Service upon a foreign railroad company doing business in the state must be had in the manner provided by statute. 176M415, 223NW674.

On motion to set aside service of summons, burden of showing that defendant was not present in Minnesota so as to be subject to service of process was upon the defendant. Masee v. C., 184M196, 238NW327. See Dun. Dig. 7814.

One purchasing hay for a foreign corporation for years held an agent upon whom service of summons could be had. Masee v. C., 184M196, 238NW327. See Dun. Dig. 7814(98).

Foreign corporation in purchasing hay held to be doing business in the state. Masee v. C., 238NW327. See Dun. Dig. 7814(84).

9233. On railway companies.

176M415, 223NW674; note under §9231.

The established policy in this state permits the suing of transitory actions, against foreign corporations, regardless of where the cause of action arose, if they may be reached by process. 171M87, 214NW12.

Decision in Erving v. Chicago & N. W. Ry. Co., 171M 87, 214NW12, followed. 175M96, 220NW429.

This section does not offend the federal Constitution. 177M1, 223NW291.

Service of summons upon a ticket and freight agent at a station of a foreign railroad company is a valid service in an action to recover under the Federal Employers' Liability Act. 177M1, 223NW291.

Rights of foreign railroad sued by non-resident for injuries suffered outside state. 178M261, 226NW934.

9234. Service by publication—Personal service.

See §3230.

174M436, 217NW483.

½. In general.

Affidavit for publication of summons must be filed and publication of summons be commenced within a reasonable time after the sheriff's return of not found is made. A delay of over seven months is unreasonable. 173M580, 218NW110.

Action to cancel an assignment of a note and mortgage is one in personam and service cannot be had on non-resident outside state. 178M379, 227NW429.

9235. In what cases.

See §3230.

That defendant may be at the time present in the state and a resident thereof does not prevent the court from obtaining jurisdiction by publication. 173M580, 218NW110.

Subdivision 3.

Bearer bonds situated in state may be subjected to jurisdiction of court in proceeding in rem or quasi in rem. First Trust Co. v. M., 187M468, 246NW1. See Dun. Dig. 2346.

State courts have power to proceed in rem or quasi in rem against chattels within state. First Trust Co v. M., 187M468, 246NW1. See Dun. Dig. 2346.

Subdivision 6.

Affidavit must state that real estate affected is within the state or contain a description thereof showing that it is located within the state and a mere reference to the complaint is not sufficient. 173M580, 218NW110.

9236. When defendant may defend—Restitution.

173M580, 218NW110.

9238. Jurisdiction, when acquired—Appearance.

Section 2684-8 authorizing a substituted service of process upon non-residents using our highways, is constitutional. 177M90, 224NW694.

2. Effect of a general appearance.

Service of summons upon a non-resident who comes into state to testify is not void but voidable only and privilege to claim exemption is waived unless promptly asserted. 173M552, 218NW101.

If party for whom a receiver is appointed without notice appears generally and is heard on the merits he cannot complain of earlier order because he was not served with notice. 175M138, 220NW423.

General appearance by corporation precludes objection to jurisdiction. 180M492, 231NW209.

General appearance by motion to set aside writ of attachment does not cure improper issuance of the writ. 181M349, 232NW512. See Dun. Dig. 476.

6. What constitutes general appearance.

Motion in district court on appeal from municipal court for judgment against garnishee was a general appearance and that notice of appeal was ineffective was immaterial. 178M366, 227NW200.

10. Appearance held special.

A special appearance is not made general by a consent to an adjournment. 177M182, 225NW9.

9239. Appearance and its effect.

The parties to a judgment are entitled to notice before an amendment as to a matter of substance can be made. 181M329, 232NW322. See Dun. Dig. 5093.

Defendant against whom a default judgment is entered is out of court, and he is not entitled to notice of further proceedings in the case. Anderson v. G., 183M336, 236NW483. See Dun. Dig. 486(74).

Appearance to question jurisdiction. Brady v. B. 185M440, 241NW393.

9240. Service of notices, etc.

Certiorari in compensation proceeding to review decision of the Industrial Commission must be served on the adverse party, but may be served on his attorney who has appeared in the proceeding. 171M519, 214NW795.

9242. By mail—When and how made.

Service of notice is complete when the notice is properly mailed. 175M112, 220NW435.

"Place of residence" means the municipality wherein the addressee resides and not the house that he occupies as a home. 175M112, 220NW435.

Section 2684-8 authorizing a substituted service of process upon nonresidents using our highways, is constitutional. 177M90, 224NW694.

This section does not apply to proceedings in the probate court. 180M570, 231NW218.

9243. Defects disregarded—Amendments, extensions, etc.

See notes under §§9283, 9285.

Motion to open judgment and permitting answer is addressed to the discretion of the court. 176M59, 222NW520.

This section did not cure fatal defect in notice of appeal specifying wrong county in describing judgment appealed from. 178M601, 228NW174.

A court may correct clerical errors and mistakes to make its judgments and records conform to what it intended, but this does not apply to matters of substance involving judicial consideration or discretion, and in the latter cases notice to the parties involved is necessary. 181M329, 232NW322. See Dun. Dig. 5098.

In actions against two physicians for malpractice court properly permitted amendment alleging employment of both defendants and partnership relation between them. 181M381, 232NW708. See Dun. Dig. 7701.

There was a defect fatal to jurisdiction where complaint laid venue in district court but summons incorrectly put it in municipal court. Brady v. B. 185M440, 241NW393. See Dun. Dig. 7805.

MOTIONS AND ORDERS

9246. Defined—Service of notice.

A motion to strike out evidence must specify the objectionable evidence. 173M501, 217NW601.

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

174M397, 219NW458.

Motion for new trial must be heard within judge's judicial district unless consent is given by the parties to hear it outside of district. 173M271, 217NW351.

Motion for judgment presumed truthfulness of answer for writ in mandamus. 178M442, 227NW891.

Judgment on pleadings cannot be granted where the complaint contains material averments which are denied by the answer or where the answer sets up proper affirmative defenses. 180M9, 230NW118.

The rule of practice and procedure in moving for judgment upon the pleadings and upon the opening statement of counsel established by Barret v. M., St. P. & S. S. M. Ry. Co., 106M51, 117NW1047, 18LRA(NS) 416, 130Am.St.Rep.585, and St. Paul Motor Vehicle Co. v. Johnston, 127M443, 149NW667, followed. Mahutga v. M., 182M362, 234NW474. See Dun. Dig. 7689, 9713(27).

For the purpose of motion for judgment upon the pleadings in mandamus, the allegations of the answer must be accepted as true. State ex rel. Erickson v. Magle, 183M60, 235NW526. See Dun. Dig. 7693(99).

Where order on appeal permitted party's right to renew a motion to vacate a judgment on a specified ground, a delay of five years in making such motion was such laches as to justify its denial. Roscoe Black Co. v. A., 185M1, 239NW763. See Dun. Dig. 5360, 6502.

Motion for judgment on the pleadings was properly granted where they showed that plaintiff was not real party in interest. Prebeck v. V., 185M303, 240NW890. See Dun. Dig. 7689.

That other persons, not parties to action in which judgment attacked was rendered, are not made parties defendant, does not prevent judgment on pleadings. Murray v. C., 186M192, 242NW706. See Dun. Dig. 7689.

In a motion for judgment on pleadings, only pleadings can be considered, and a contention supported by affidavits tending to show that a pleading is sham is not for consideration. Bolstad v. H., 187M60, 244NW338. See Dun. Dig. 7692.

Because one motion for judgment on pleadings has been denied, district court is not without power to hear and grant a second motion for same relief. Lamson v. T., 187M368, 245NW627. See Dun. Dig. 6502, 7694a.

For purposes of a motion for judgment on pleadings, an allegation that there was due, without question, to plaintiff from defendants, a sum liquidated by contract, prevails over a pleaded release, by its terms embracing all plaintiff's demands against defendants and releasing them upon payment of much less than alleged liquidated demand. Hopkins v. H., 249NW584. See Dun. Dig. 7693.

9248. Ex parte motions.

173M271, 217NW351; note under §9247.

PLEADINGS

9249. Pleadings, etc., how regulated.

Title by adverse possession may be proved under a general allegation of ownership. 171M438, 214NW283.

A demurrer searches all preceding pleadings. 172M328, 215NW186.

9250. Contents of complaint.

½. In general.

The prayer for relief is not a part of the cause of action and is not traversable. 174M410, 219NW760.

Suit held one for rescission and not for damages for fraud notwithstanding reference to recovery sought as damages. 177M256, 225NW12.

Where complaint was broad enough to cover either conversion or replevin, court properly required an election. 181M355, 232NW622. See Dun. Dig. 7508(22).

A common count for money had and received is a good pleading. Olesen v. R., 184M624, 238NW12. See Dun. Dig. 6135(33).

Special damages must be specially pleaded. Smith v. A., 184M299, 238NW479. See Dun. Dig. 2581.

Subdivision 1.

Default judgment was not void because caption of complaint named wrong court, where summons to which it was attached named proper court. 175M597, 222NW281.

Subdivision 2.

Foreign laws are facts, and, like other facts, must be pleaded when they are issuable, but not when they are merely prohibitive or evidentiary. 176M406, 223NW618.

Where newspaper articles complained of were not libelous per se, complaint must state extrinsic facts or circumstances showing that they were libelous in fact. 178M61, 225NW906.

Complaint against bank to recover on note signed by director individually, held not to state a cause of action for money had and received. 181M294, 232NW336. See Dun. Dig. 6128.

Complaint held to state a cause of action as against an objection to the introduction of evidence thereunder. Krzyaniak v. M., 182M83, 233NW595. See Dun. Dig. 7528e.

Allegation that driver negligently ran car upon and against plaintiff is a sufficient charge of actionable negligence, in the absence of any motion to make the complaint more definite and certain. Saunders v. Y., 182M62, 233NW599. See Dun. Dig. 4166(42), 7058(25), 7718(15).

The charge to the jury was erroneous because it permitted the finding of negligence on an independent

ground not included in the pleadings. *Farnum v. P.*, 182M338, 234NW646. See Dun. Dig. 7061(61).

Complaints held to charge collusive arrangement among bidders for highway construction following stifling regulations and limitations by highway department resulting in bids so grossly excessive that their acceptance by department amounted to constructive collusion with such contractors. *Regan v. B.*, 247NW12. See Dun. Dig. 4480.

9251. Demurrer to complaint—Grounds.

½. In general.

Complaint cannot be made for the first time at the close of the case that the complaint does not state a cause of action, where the case has been tried on a definite theory or issues. 171M363, 214NW58.

On demurrer a pleading is to be construed liberally in favor of pleader. 181M261, 232NW324. See Dun. Dig. 7724.

When a complaint states a cause of action resting upon a particular statute, the constitutionality of the statute may be raised by demurrer. 181M427, 232NW 737. See Dun. Dig. 7540.

On demurrer allegations of complaint must be taken as true. *Regan v. B.*, 247NW12. See Dun. Dig. 7542.

4. For want of capacity to sue.

Objection of lack of capacity to sue must be taken by demurrer or answer, or it is waived. 175M226, 220NW 822.

5. For pendency of another action.

Demurrer is not available when the pendency of the other action does not appear upon the face of the complaint. 176M529, 224NW149.

6. Defect of parties.

A party who is properly made defendant cannot object by demurrer that other parties are improperly joined with him as defendants. 173M57, 214NW778.

7. For misjoinder of causes of action.

Though there may be a misjoinder of causes of action in uniting disconnected contract and tort actions, the misjoinder will not be considered when not urged on appeal by the demurrant. *Olesen v. R.*, 184M624, 238NW 12. See Dun. Dig. 366(52).

8. For failure to state a cause of action.

General demurrer on ground that complaint did not state a cause of action was good where upon face of complaint it appeared that cause of action upon an accident policy accrued more than two years prior to the issuing of the summons, the provisions of §3417(14) having been incorporated in the policy. 174M354, 219 NW286.

This was true even though plaintiff alleged she was a minor, where application for policy was made part of complaint and showed she was not a minor. 174M354, 219NW286.

9. Not ground for demurrer.

Demurrer will not lie because wrong relief is demanded in the complaint or greater relief than the facts warrant. 174M410, 219NW760.

A complaint is not demurrable because it asks for wrong relief. *Johnson v. L.*, 249NW177. See Dun. Dig. 7555(20).

9252. Requisites—Waiver.

5. Waiver.

A pleading first attacked on the trial should be liberally construed. 171M358, 214NW49.

Objection to the sufficiency of the facts to constitute a cause of action may be taken for the first time on appeal. 173M198, 217NW119.

Appearance in response to writ of mandamus and asking for an adjournment to enable answer does not waive defective pleading. 173M198, 217NW119.

Objection of lack of capacity to sue must be taken by demurrer or answer, or it is waived. 175M226, 220NW 822.

A misjoinder of parties plaintiff not raised by demurrer or answer is waived. *First Minneapolis Trust Co. v. L.*, 185M121, 240NW459. See Dun. Dig. 7323.

9253. Contents of answer.

½. In general.

Conclusions. 172M398, 215NW733.

Where collection bank becomes insolvent on day it sends draft for proceeds to bank in which it has deposit, latter bank is entitled to a set-off deposit against collection. 28F(2d)587.

DENIALS

2. Effect of general denial.

Where plaintiff in replevin for mortgaged chattels declares generally as an owner entitled to possession, the defendant, under general denial, may prove payment of the debts secured by the mortgage. 176M406, 223NW618.

NEW MATTER CONSTITUTING A DEFENSE

13. When one of several obligors is sued.

A counterclaim, good only as against a third party pleaded in a case where the issue could be determined without the presence of the third party, was properly stricken out. 173M183, 217NW106.

14. Must be pleaded specially.

In action to recover interest on awards for taking of land by city, defendant must plead facts showing that

tender was made. *L. Realty Co. v. C.*, 183M499, 237NW 192. See Dun. Dig. 3104.

Defendant relying on statute or decisions of another state must plead them unless case is tried by acquiescence as to what law is. *Smith v. B.*, 187M220, 244NW826. See Dun. Dig. 3789.

In action for fraud against co-promoter of corporation, discharge of cause of action by settlement with receiver of corporation was matter of affirmative defense which must be pleaded and proved. *Barrett v. S.*, 187M430, 245 NW830. See Dun. Dig. 7585.

9254. Requisites of a counterclaim.

1. Nature of counterclaim.

Where collection bank becomes insolvent on day it sends draft for proceeds to bank in which it has deposit, latter bank is entitled to set-off deposit against collection. 28F(2d)587.

Defenses and set-offs available against an assignor are available against his assignee. *Andresen v. Thompson*, (DC-Minn), 56F(2d)642. See Dun. Dig. 571, 572.

The debtor of an insolvent bank when sued by its receiver, cannot set off his liability as a surety for the bank on a depository bond. 172M30, 214NW792.

Probate court has no jurisdiction of claims by personal representatives against creditors of a decedent, but such claims must be enforced in district court. 172M68, 214NW895.

A debt due an insolvent bank for borrowed money cannot be offset on a liability which has accrued against the debtor as a surety for the bank on a depository bond. 174M102, 218NW456.

Counterclaim for damages to the business of defendant was properly dismissed in action for the price of milk, defended on the ground that the milk was adulterated, where although the defendant lost some customers there was no proof and no offer of proof of loss of profits. 174M320, 219NW159.

School district held entitled to set-off against warrants the amount of tax funds embezzled by bank's officers and school treasurer. *First Nat. Bank of Windom v. C.*, 238NW634.

5. Compared with equitable set-off.

Where directors of a bank are insolvent and non-residents, and the receiver of the bank brings an action against such directors for making excessive loans, and an assignee of the directors intervenes, and asserts a claim for money paid by the directors in satisfaction of a bond of the bank as depository, the unliquidated claim of the bank, may be set off in equity against the intervenor's claim. *Andresen v. Thompson*, (DC-Minn), 56F(2d)642. See Dun. Dig. 572.

11. "Arising out of the contract."

Injury to property caused by servant's negligence a proper counterclaim in action for wages. *Magistad v. A.*, 177M428, 225NW287.

15. When a tort may be set up as a counterclaim.

Where suit is on contract for recovery of money, defendant may set up counterclaim for money or property wrongfully obtained or taken from him by plaintiff. *Kubat v. Z.*, 186M122, 242NW477. See Dun. Dig. 7613.

Torts, such as personal injury, libel and slander, seduction, and similar wrongs, cannot be set up as counterclaims in action on contract unless arising out of or connected with subject of action. *Kubat v. Z.*, 186M122, 242 NW477.

Claim for damages for fraud in financial transaction, held not proper counterclaim in action for libel. *Habedank v. B.*, 187M123, 244NW546. See Dun. Dig. 7613.

19. Effect of failure to plead counterclaim.

A counterclaim or offset must be pleaded, but if it is such as to constitute a cause of action in favor of a defendant, he may refrain from pleading it and bring suit thereon at a later time. *Johnson v. L.*, 249NW177. See Dun. Dig. 7620.

20. Rules as to pleading counterclaim.

Counterclaim construed to be for damage for breach of warranty. 179M467, 229NW575.

21. Mode of objecting to counterclaim.

Where a counterclaim states a cause of action against the plaintiff, the objection that it is not a proper counterclaim in the particular case is waived by not raising the objection by demurrer or answer. *Pruka v. M.*, 182 M421, 234NW641. See Dun. Dig. 7678(31).

22. Relief awarded.

In action for reasonable value of attorney's services, where certain sum had been paid, it was proper for court to charge that if value of services was found to be less than sum paid, verdict should be for counterclaiming defendant for difference. *Lee v. W.*, 187M659, 246NW25. See Dun. Dig. 5044.

9256. Judgment on defendant's default.

½. In general.

Where general denial was stricken as frivolous and defendant failed to answer within the time limited by the court, entry of judgment as for default was proper. 171M405, 214NW261.

Action for goods sold and delivered and stated to be of a reasonable value was an action on contract for the payment of money only, and judgment should be entered by the clerk without an order of court. 173M606, 218NW127.

9257. Demurrer or reply to answer.

In replevin for capital stock, where counterclaim setting up lien was interposed and plaintiff dismissed complaint, a reply asserting a statutory lien was admissible as a defense to the counterclaim, though a departure from the complaint. 171M65, 212NW738.

In action by insurance company to recover money paid to a director, a general demurrer to answer setting up a settlement agreement held properly overruled. *Modern Life Ins. Co. of Minn. v. T.*, 184M36, 237NW686. See Dun. Dig. 7556.

½. In general.

In mandamus reply to answer is not necessary. 178M442, 227NW391.

1. Demurrer to answer.

When a demurrer to an answer is overruled and plaintiff replies and case is tried upon issues so framed, he cannot assert error in overruling of demurrer; but he may in course of trial contest sufficiency of facts alleged or proved. *Wismo Co. v. M.*, 186M593, 244NW76. See Dun. Dig. 7165a, 7162.

2. Reply to answer—Departure.

181M115, 231NW790.

9259. Sham and frivolous pleadings.

½. In general.

Action on bond given under G. S. 1923, §6226, where a surety admitted execution of the bond and offered a settlement exclusive of interest, held that general denial was properly stricken as sham and frivolous. 173M613, 216NW792.

A motion to strike out answer and for judgment was properly granted on facts stated. 173M524, 218NW102.

Court properly struck reply as sham and frivolous in an action for an accounting. 174M111, 218NW459.

On motion to strike, it is the duty of the court to determine whether there is an issue to try, not to try the issue. 174M315, 219NW148.

Answers raising no real issue were properly stricken. 174M496, 219NW764.

Answer admitting execution of note set out in complaint and averring that there was no consideration for note and agreement to execute mortgage to secure it because the lien right which plaintiff released had expired when the agreement was made, was properly stricken as sham. 176M254, 223NW142.

Reply properly stricken as sham. 178M47, 225NW901. In ejectment by landlord against tenant answer admitting ownership by plaintiff and possession by defendant but denying all other allegations, held sham. 179M349, 229NW312.

In action on judgment for damages for obtaining property by false pretenses an answer alleging that the judgment was one based on contract and was discharged in bankruptcy, held sham and properly stricken out. 180M482, 231NW220.

A "sham answer" is a false answer, a "frivolous answer" is one which is insufficient on bare inspection; an "irrelevant answer" is one which has no relation to the issue. 181M47, 231NW393.

Court did not err in striking out paragraphs of answer which were a recital of evidentiary facts admissible in evidence under other allegations of the answer. *Habedank v. B.*, 187M123, 244NW546. See Dun. Dig. 7516, 7656.

1. Defined.

An answer is "sham" when so clearly false that it tenders no real issue; and it is "frivolous" when its insufficiency appears upon mere inspection. 176M360, 223NW677.

12. Irrelevant pleadings.

Partial defense stricken as irrelevant. 176M254, 223NW142.

16. Frivolous answer or reply.

173M18, 216NW329.

General denial stricken as frivolous. 171M405, 214NW261.

An answer is "sham" when so clearly false that it tenders no real issue; and it is "frivolous" when its insufficiency appears upon mere inspection. 176M360, 223NW677.

Defect in answer must be clear and indisputable, every doubt being resolved in its favor. 180M356, 230NW811.

180M480, 231NW224.

9261. Interpleader.

Since association is powerless to waive the statute in regard to the beneficiary, a rightful claimant may successfully contest the right of the beneficiary named in the certificate, even though the association does not question such right. 175M462, 221NW721.

An order permitting defendant to pay the amount into court and directing another claimant to be substituted as defendant does not finally determine any substantial right of plaintiff and is not appealable. 176M11, 222NW295.

It was not error for the court to grant defendant's motion to have another interpleaded and substituted as the defendant with directions that appropriate pleadings be made. *Burt v. C.*, 183M109, 235NW620. See Dun. Dig. 4892(23).

9263. Intervention.

176M11, 222NW295.

2. Interest entitling party to intervene.

A third party having levied under execution upon property claimed to be involved in garnishment proceedings has such an interest in the matter that he may intervene. *First State Bank of New York Mills v. W.*, 185M225, 240NW892. See Dun. Dig. 3999.

3. Complaint.

In partnership receivership, court did not err in granting leave to assignee of land contract to file a supplemental complaint in intervention as against contention of receiver that original complaint did not state a cause of action, nor because it was sought to recover unpaid portion of purchase price of land under a contract of sale with dependent covenants. *Zuelke v. P.*, 185M457, 241NW577. See Dun. Dig. 7636(75).

9266. Pleadings liberally construed.

On an objection to the introduction of evidence under a pleading, it should receive the most liberal construction. *Krzyzaniak v. M.*, 182M83, 233NW595. See Dun. Dig. 7718(16).

9267. Irrelevant, redundant, and indefinite pleadings.

½. In general.

Amended complaint, held properly stricken out as containing irrelevant matter. 179M475, 229NW583.

3. Indefinite pleading.

Amended complaint, held properly stricken out as indefinite. 179M475, 229NW583.

9268. Averments, when deemed admitted.

Demurrer to reply presents nothing for review on appeal. *Sutton v. B.*, 180M417, 231NW10.

9270. Ordinances and local statutes.

Complaint for violating a city ordinance may be made orally and entered in the court record. 172M130, 214NW778.

The courts take judicial notice of statutes of the state as well as the common law. *Saunders v. Y.*, 182M62, 233NW599. See Dun. Dig. 3452(93).

9273. Conditions precedent.

Guaranty contract held absolute and not conditional. 176M529, 224NW149.

9275. Pleadings in slander and libel.

1. Alleging extrinsic facts.

The allegations in complaint in libel by way of innuendo and inducement were proper and did not place an unreasonable, forced, or unnatural construction on the language used in the publication. *Rudawsky v. N.*, 183M21, 235NW523. See Dun. Dig. 5539(16).

9277. Joinder of causes of action.

1. Subd. 1.

In an equitable action the test whether several causes of action are improperly united is whether they could have been included in a bill in equity under the old practice without making it multifarious. 173M538, 217NW930.

Stockholders sued in right of corporation to annul the unlawful issue of stock whereby there was accomplished an unlawful sale of assets, held that there was but one equitable cause of action. 173M538, 217NW931.

Contractor and assignee of portion of earnings under contract could join in an action to recover thereon notwithstanding that their interests are distinct and severable. 175M236, 220NW946.

Amended complaint, held properly stricken out as containing more than one cause of action not separately stated. 179M475, 229NW583.

In an unlawful detainer action, defendant gave two appeal and stay bonds, one on appeal from justice to district court, and the other on appeal to the Supreme Court. Held, that the two sets of sureties were so affected as to justify a joinder of the obligee's causes of action in one suit. *Roehrs v. T.*, 185M154, 240NW111. See Dun. Dig. 7500(63).

Automobile owner and insurer under ordinary liability policy cannot be joined in a single action. *Charlton v. Van Etten*, (DC-Minn), 55F(2d)418. See Dun. Dig. 4875c, 7327.

2. Subd. 2.

Broker failing to perform original express contract might recover on an implied contract where he performed services. *Benedict v. P.*, 183M396, 237NW2. See Dun. Dig. 1793(50).

In a proper case, the plaintiff may declare on an express contract and also in a second cause of action on a subsequent, different contract covering the same claim or transaction and implied as of fact. *Benedict v. P.*, 183M396, 237NW2. See Dun. Dig. 7500(99).

8. Pleading.

In an action against an insurance company and one alleged to be its agent to recover for slander plaintiff may plead composite facts including elements both of fact and law tending to show a joint cause of action against defendants. *Simon v. Stankl*, (DC-Minn), 54F(2d)73. See Dun. Dig. 5503, 5547.

15. Splitting cause of action.

Where wife is injured, the wife and husband may maintain separate actions for damages. 175M247, 221NW8.

9280. Amendment by order.**½. In general.**

A motion to amend the answer, after the trial and determination of the case, by alleging facts upon which a reformation of the contract sued on might be had, was properly denied. 172M214, 214NW780.

Failure to strike out evidence introduced before amendment of answer, held prejudicial error. 181M285, 232NW325. See Dun. Dig. 422, 9742.

Where defendant recognized action as one in conversion, it could not claim surprise in the allowance of an amendment of the complaint to state a cause of action in conversion. *Nygaard v. M.*, 183M388, 237NW7. See Dun. Dig. 7122.

1. A matter of discretion.

Amendment of pleadings on trial is matter lying almost wholly in the discretion of the trial court. 174M297, 219NW180.

Within discretion of court to direct that reply to an answer should stand as reply to amended answer. *Manufacturers' & Dealers' Discount Corp. v. M.*, 177M388, 225NW283.

The granting of or refusal to grant a motion to amend the complaint rests largely within the discretion of the trial court. *Agricultural Credit Corp. v. S.*, 184M68, 237NW823. See Dun. Dig. 7696.

Allowance at the trial of amendment of complaint held within discretion of trial judge. *Bowen v. B.*, 185M35, 239NW774. See Dun. Dig. 7696.

Motion to amend answer held addressed to sound discretion of trial court. *De Jardins v. E.*, 249NW576. See Dun. Dig. 7696.

2. Amendments on the trial held discretionary.

Court did not abuse its discretion in denying application to amend complaint by changing name of corporate defendant. 171M209, 213NW742.

Allowance of amendment at trial held not an abuse of discretion. 172M524, 215NW851.

Court held not to have abused its discretion in denying leave to amend answer to set up usury. 173M14, 216NW314.

In action against village for injuries occasioned by snow and ice on sidewalk, court properly refused, after plaintiff had rested, to permit defendant to amend so as to show that plaintiff had failed to remove the ice and snow from the sidewalk, as required by a village ordinance. 175M361, 221NW241.

In an action against automobile repairer for injuries caused by back-fire, court properly permitted plaintiff to amend to show that negligence was with respect to repairing "timer" and not "carburetor," as alleged. 175M216, 220NW565.

Granting of amendments of pleading during trial is well within the discretion of the trial court. 176M331, 223NW605.

Granting of amendments of pleadings during trial is within discretion of trial court. *D. M. Gilmore Co. v. D.*, 187M132, 244NW557. See Dun. Dig. 7696, 7697.

Failure to plead affirmative defense of settlement and release until trial was well advanced is disapproved, but allowance of amendment held not abuse of discretion. *Barrett v. S.*, 187M430, 245NW830. See Dun. Dig. 7711.

4. Amendments after trial held discretionary.

179M266, 229NW128.

There was no abuse of discretion in refusing leave to file a proposed amended answer alleging a counterclaim after the trial was concluded. *Gibbons v. H.*, 185M290, 240NW901. See Dun. Dig. 7713a.

5. Amendments conforming the pleadings to the proof held discretionary.

Amendment of pleading to conform to proof as to plaintiff's condition during a certain period of time, held properly allowed. 179M19, 228NW440.

Discretion not abused in allowing amendment in course of trial. *Sigvertsen v. M.*, 182M433, 234NW688. See Dun. Dig. 7708.

Answer alleging a counterclaim may be amended to correspond to proof. *Lee v. W.*, 187M659, 246NW25. See Dun. Dig. 7713.

12. Scope of allowable amendment of complaint.

Application for amendment of complaint stating cause of action under Federal Safety Appliance Act to one under Federal Employers' Liability Act properly denied. *Meisenholder v. B.*, 178M409, 227NW426.

9281. Variance—Amendment—Exceptions.**1. Proof must follow pleadings.**

A pleading, first attacked on the trial, should be liberally construed. 171M358, 214NW49.

Motions to amend pleadings, after verdict, to comply with proofs usually rest in the discretion of the trial court. 181M471, 233NW14. See Dun. Dig. 7713, 7713a.

Where defendant dentist voluntarily asserted that his attempted removal of impacted tooth from the inside of the mouth was good practice, he raised the issue as to whether or not it was good practice, so that it was competent to receive evidence from qualified experts that it was not good practice. *Prevey v. W.*, 182M332, 234NW470. See Dun. Dig. 3332, 7494.

In action on contract for radio advertising by seller of petroleum to one agreeing to purchase exclusively from plaintiff and to pay certain sum per gallon for radio advertising recovery could not be had for advertising on petroleum products purchased from others than plaintiff, action not being for damages. *House of Gurney v. R.*, 187M150, 245NW30. See Dun. Dig. 88.

Under complaint, which alleged sale and delivery of goods, wares, and merchandise at special instance and request of defendant, and alleged reasonable value thereof and a promise to pay therefor, plaintiff was entitled to prove either an express or an implied contract. *Kroac v. K.*, 249NW671. See Dun. Dig. 8640.

2. Immaterial variance.

Complaint considered in connection with the contract and bond sued upon, held to state a cause of action against the surety, the issues being fully understood and no one being misled. 171M305, 214NW47.

Where complaint alleged sale to defendant, proof of order from defendant for delivery to third person on credit of defendant, held not a variance. 180M467, 231NW194.

The complaint alleged that the arresting officer was a deputy sheriff. The proofs showed that he was a constable. Held not a fatal variance. *Evans v. J.*, 182M282, 234NW292. See Dun. Dig. 512, 3731.

In action against drug company for damages from taking cold tablets containing poison, held that there was no material variance between plaintiff's pleading and proof. *Tiedje v. H.*, 184M569, 239NW611. See Dun. Dig. 7673.

Where plaintiff proves essential fact necessary to sustain recovery, he is not defeated because he has failed to prove other allegations. *Chicago Flexotile Floor Co. v. L.*, 247NW517. See Dun. Dig. 7672.

Defendant cannot complain of variance between pleading and proof which does not mislead nor prejudice him. *Id.*

3. Material variance.

A litigant who claims prejudice from a variance has no standing to complain without the proof required by this section that he has been misled and "in what respect he has been misled." 175M443, 221NW682.

4a. Discretion of court.

Granting of amendments of pleading during trial is well within the discretion of the trial court. 176M331, 223NW605.

9283. Extensions of time—Mistakes, etc.**THE STATUTE GENERALLY****1. Application in general.**

There must be a showing of some mistake, inadvertence, surprise, or inexcusable neglect. 173M606, 218NW127.

Provision permitting relief from judgments within one year, applies in workmen's compensation cases. 176M554, 223NW926.

This section is not confined to default judgment and plaintiff may have relief against judgment rendered against him. 178M556, 228NW150.

Probate court, like district court, may, within one year after notice thereof, correct its records and decrees and relieve a party from his mistake, inadvertence, surprise, or excusable neglect. *Simon*, 187M263, 246NW31. See Dun. Dig. 7784.

When application for relief is based exclusively upon legal right, time in which such application may be made is limited to time in which an appeal may be taken. *Simon*, 187M263, 246NW31. See Dun. Dig. 7784(4).

In case of fraud or mistake of fact probate court has jurisdiction to vacate or set aside orders or judgments, or to correct its own clerical mistakes or misprision, even after time allowed for appeal. *Simon*, 187M263, 246NW31. See Dun. Dig. 7784(5).

AMENDMENT OF JUDGMENTS AND JUDICIAL RECORDS**¾. In general.**

This section applies to the granting of amendments to pleadings. *Stebbins v. F.*, 178M556, 228NW150.

Court properly reopened judgment for new findings of fact and conclusions of law to correct inadvertent mistake of deceased trial judge. *Fagerstrom v. C.*, 246NW884. See Dun. Dig. 5101.

4. To be made with caution.

Error in admitting incompetent testimony was cured by subsequent proof of same facts by competent and undisputed evidence. *Donlin v. W.*, 176M234, 223NW98.

6. When may be made.

Motion to reopen and amend judgment made after satisfaction thereof, held too late. 177M369, 225NW282.

Delay of 6 months before correcting judgment nunc pro tunc, held prejudicial. 180M168, 230NW464.

7. Notice of motion.

181M329, 232NW322.

11. Clerical mistakes of clerk.

Judgment entered by clerk contrary to findings and conclusions may be corrected nunc pro tunc. 180M168, 230NW464.

12. Mistakes of judge.

181M329, 232NW322.

18. Modification of judgments.

181M329, 232NW322.

Court cannot change or modify sentence after expiration of term. 178M626, 228NW173.

To obtain a modification of a decree for a limited divorce, proper practice is to move to open decree and present proof warranting a decree in a modified form. *Feltmann v. F.*, 187M591, 246NW360. See Dun. Dig. 2799b.

Where there was no objection made to hearing of motion for modification of divorce decree or its determina-

tion upon affidavits, and order made merely required plaintiff to join in execution of a mortgage on defendant's land so as to enable him to comply with decree, order should stand, except mortgage should be no larger than needed to discharge plaintiff's lien and expenses connected with obtaining mortgage. *Feltmann v. F.*, 187M591, 246NW360. See Dun. Dig. 2799b, 2805.

Motion to amend judgment of divorce in favor of husband by allowing wife an interest in homestead property and a larger amount for permanent alimony than was awarded was properly denied. *Wilson v. W.*, 246NW476. See Dun. Dig. 2805.

25. Rights of third parties to be saved.

Correction of judgment nunc pro tunc, held not to have prejudiced third persons not parties. 180M168, 230NW464.

VACATION OF JUDGMENTS AND ORDERS

25½. In general.

Where client settled suit without knowledge of attorney and the action was dismissed the attorney was entitled to have the judgment set aside with right to intervene for the purpose of enforcing his lien for services. 47F(2d)112.

Court did not err in refusing to set aside a judgment in personal injury action upon ground that a release alleged in answer was executed under mistake and induced by fraud. 174M197, 219NW85.

This section is not confined to default judgment or judgments that are erroneous, and is applicable to a plaintiff against whom judgment has been rendered. *Stebbins v. F.*, 178M556, 228NW150.

Failure to introduce evidence through mere inadvertence of counsel, held not ground for release. 179M99, 228NW447.

Court, held justified in vacating stipulation and amended judgment because procured by undue influence and overreaching. 179M488, 229NW791.

Court may in its discretion vacate findings and reopen case for further evidence. 181M71, 231NW397.

Court did not abuse its discretion in denying application to vacate the order of the probate court on the ground of laches and long acquiescence in the order after having actual notice thereof. In re *Butler's Estate*, 183M591, 237NW592. See Dun. Dig. 7784, 10255.

Applies to an order of the probate court admitting a will to probate, and limits the time, within which such order may be vacated, to one year from the time the applicant has actual notice of the order, unless want of jurisdiction appears on the face of the record, or there are other circumstances making the limitation inapplicable. In re *Butler's Estate*, 183M591, 237NW592. See Dun. Dig. 7784.

Decision of motion, based on conflicting affidavits, will not be disturbed on appeal. *Mason v. M.*, 186M300, 243NW129. See Dun. Dig. 410.

Court properly refused to consider second motion to set aside judgment, no leave being asked or given. *Universal Ins. Co. v. B.*, 186M648, 243NW393. See Dun. Dig. 1516a.

A judgment having been entered without notice, it was error to vacate it on ground that through excusable neglect of opposing counsel, there was no stay of proceedings when motion for vacation was not made or based upon that ground. *Wilcox v. H.*, 186M504, 243NW709. See Dun. Dig. 5103(62).

Affidavits are construed as insufficient to warrant the granting of a motion to vacate a judgment on the theory that they establish excusable neglect. *Wilcox v. H.*, 186M504, 243NW709. See Dun. Dig. 5103.

After one year and after expiration of time for appeal, probate court could not modify or vacate its final order settling account on showing that deceased personal representative had embezzled money. *Simon*, 187M399, 246NW31. See Dun. Dig. 7784(4).

Rules applicable to motion to strike a pleading as sham or frivolous do not control a motion to vacate judgment supported by affidavits. *Ramsay v. B.*, 249NW192. See Dun. Dig. 5011.

32. Diligence.

179M315, 229NW133.

35. Jurisdictional defects.

A motion to vacate a judgment is usually based upon a jurisdictional defect, and is a matter of right. 176M59, 222NW520.

40. Fraud.

Stipulation for dismissal of personal injury case on the merits, with prejudice, may be set aside for fraud. *Becker v. M.*, 175M626, 221NW724.

45. Vention of orders.

Order of dismissal cannot be set aside after term has expired where the dismissal was made for want of prosecution, though parties had stipulated for continuance of case without the approval of the court. *New England F. & C. Co. v. U. S.* (DS-Minn), 2FSupp648.

OPENING DEFAULTS

45½. In general.

173M580, 218NW110.

Strict rule of res adjudicata does not apply to motions in pending action, and the district court has jurisdiction and in its discretion may allow renewal of motion to vacate a judgment. 174M344, 219NW184.

Motion by defendant, himself an attorney at law, to vacate a judgment of divorce and for leave to answer, held properly denied. 175M71, 220NW546.

The probate court has power to vacate its final decree on the ground of fraud, mistake, inadvertence or excusable neglect upon proper application seasonably made. 175M524, 222NW68.

Motions to set aside and vacate default judgments are addressed to the judicial discretion of the trial court. *Child v. H.*, 183M170, 236NW202. See Dun. Dig. 5012.

This section governs the vacation of judgments and order of the probate court as well as those of the district courts. *Walker's Estate v. M.*, 183M325, 236NW485. See Dun. Dig. 7784.

In determining whether judicial discretion should relieve executor against a claim allowed as on default, it is proper to consider the statement of claim as filed and the objections or defense proposed thereto. *Walker's Estate v. M.*, 183M325, 236NW485. See Dun. Dig. 7784.

No abuse of discretion in refusing to set aside default judgment where defendant returned summons and complaint to lawyer with letter explaining his side of controversy. *Lodahl v. H.*, 184M154, 238NW41. See Dun. Dig. 5025(10).

48. To what applicable.

Where there has been award of compensation in installments, which have been paid, and then issue is formally made whether there is right to additional compensation, decision of commission that right has terminated is final, subject only to review (by certiorari), as distinguished from rehearing. *Rosenquist v. O.*, 187M375, 245NW621. See Dun. Dig. 10421.

50. Discretionary.

Vacating judgment and permitting interposition of answer and setting case for trial was discretionary. 173M606, 218NW127.

Denial of defendant's motion to vacate various proceedings prior to default judgment of foreclosure was within the discretion of the trial court. 174M46, 218NW170.

Court did not abuse discretion in denying application to vacate a default judgment. 175M112, 220NW435.

Matter of opening default lies almost wholly in discretion of trial court. *Johnson v. H.*, 177M388, 225NW283.

Opening default. Held not abuse of discretion. *Wagner v. B.*, 180M557, 231NW241(2).

An order denying a motion to open a default judgment, made on conflicting affidavits, held not an abuse of discretion and not reversible here. *Duncan v. R.*, 182M445, 234NW638. See Dun. Dig. 5022.

Opening of default judgment for excusable neglect rests almost wholly within discretion of trial court. *McMahon v. P.*, 186M141, 242NW620. See Dun. Dig. 5012.

Refusal to open up default judgment and permit filing of an answer will not be reversed on appeal except for a clear abuse of discretion. *Nystrom v. N.*, 186M490, 243NW704. See Dun. Dig. 5034.

Vacating a default judgment is largely discretionary. *Central Hanover Bank & Trust Co. v. P.*, 248NW287. See Dun. Dig. 5012, 5019.

It was an abuse of judicial discretion to vacate judgment entered for default of answer, upon proposed answer which stated no defense. *Id.*

51. Excusable neglect.

181M39, 231NW241(2).

Opening default occasioned by reliance on certain person to take care of litigation and sickness on that person's part, held not an abuse of discretion. 171M227, 214NW57.

Motion to open judgment and permitting answer is addressed to the discretion of the court. 176M59, 222NW520.

Incapacitating progressive illness of defendant from which he died, held excusable neglect. 180M36, 230NW122.

Inadvertent neglect of attorneys for executors in failing to ascertain the filing of a claim and the date of hearing was excusable. *Walker's Estate v. M.*, 183M325, 236NW485. See Dun. Dig. 7784.

56. Time of application—Diligence.

175M319, 221NW65.

Defendant in default must act with diligence and court cannot entertain motion to open judgment after one year from notice of the judgment. 176M59, 222NW520.

The power of the district court to review and vacate an appealable order made before judgment, or to permit a renewal or repetition of the motion, is not lost because of expiration of the time for appeal. *Barrett v. S.*, 183M431, 237NW15. See Dun. Dig. 6512(38).

Denial of motion to vacate default judgment held not abuse of discretion due to dilatory conduct of defendant. *Ramsay v. B.*, 249NW192. See Dun. Dig. 5012.

9285. Unimportant defects disregarded.

1. In general.

179M284, 229NW130.

Error in rulings are immaterial where judgment is correct on admitted facts. 179M490, 229NW869.

Failure to strike out evidence rendered immaterial by the amendment of the answer, held prejudicial. 181M285, 232NW325. See Dun. Dig. 422, 9742.

Since the judgment of the municipal court was proper upon the record, it should not be reversed because the district court assigned a wrong reason for affirming it. 181M477, 233NW18. See Dun. Dig. 421.

No reversible error was made in denying a continuance, nor in refusing to grant a new trial for newly

discovered evidence. *Miller v. P.*, 182M108, 233NW855. See Dun. Dig. 424.

An order denying a motion to open a default judgment, made on conflicting affidavits, held not an abuse of discretion and not reversible here. *Jennrich v. M.*, 182M404, 234NW638. See Dun. Dig. 424.

"Waiver" rests upon intention, actual or inferable. *Farnum v. P.*, 182M338, 234NW646. See Dun. Dig. 10134.

An error in a ruling or charge which apparently has not prejudiced appellant is not ground for a retrial of the action. *Stead v. E.*, 182M469, 234NW678. See Dun. Dig. 416.

Order sustaining a demurrer to a complaint showing only nominal damages will not be reversed. *Smith v. A.*, 184M299, 238NW479. See Dun. Dig. 424.

Where a motion for new trial is granted solely for errors of law, the order granting the motion may be sustained for errors prejudicial to respondent, other than those specified by the trial court. *Tiedje v. H.*, 184M569, 239NW611. See Dun. Dig. 394(74).

A mere irregularity of such a nature that it can be corrected below on proper motion is not ground for reversal. *Roehrs v. T.*, 185M154, 240NW111. See Dun. Dig. 416, 424.

2. Rulings on pleadings.

Complaint, considered in connection with contract and bond sued on held to state a cause of action. 171M305, 214NW47.

A pleading, first attacked on the trial, should be liberally construed. 171M358, 214NW49.

Objection cannot be first raised at the close of the case that the complaint does not state a cause of action, where the case has been tried on a certain theory and issues have been fully understood. 171M363, 214NW58.

Defendant was not prejudiced by the striking of an allegation of the answer where the fact alleged was admissible under the general denial, if relevant. 175M253, 221NW3.

Amendment of complaint at trial as to amount of prayer, held not prejudicial. 179M19, 228NW440.

Where parties voluntarily litigated breach of warranty in two respects defect in pleading as to one item, held immaterial. 179M467, 229NW575.

4. Reception of evidence.

180M13, 230NW128.

180M221, 230NW639.

181M115, 231NW790.

181M415, 232NW717.

Erroneous admission of copy of letters in evidence held harmless where there is sufficient competent evidence to sustain the finding. 173M529, 217NW933.

Receiving in evidence a written contract form made by the broker in the presence of the purchaser and containing the offer then made by the purchaser to the broker but not signed by the purchaser and not shown or disclosed to the principal, held not reversible error. 174M127, 218NW462.

Exclusion of evidence as to possible speed of motor truck held not reversible error, in view of other evidence. 175M449, 221NW715.

Reading of extracts from recognized authorities would not constitute reversible error where their correctness was admitted by complaining party's expert. 176M138, 222NW904.

Admission of evidence was not prejudicial where similar evidence was admitted without objection. *Tremont v. G.*, 176M294, 223NW137.

Where several experts examined testator and only one of them could understand his language and the other interpreted his reply, held that there was no prejudicial error in permitting all of the experts to testify. 176M360, 223NW677.

Admission of exhibit in evidence held not reversible error in view of specific evidence of witness. 176M480, 224NW146.

The admission of immaterial evidence, not prejudicial, is not reversible error. 177M13, 224NW259.

Refusal to strike answer of witness was without prejudice where other similar evidence was received without objection. 177M425, 225NW273.

Prejudicial bias of trial judge was not established by his extensive participation in examination of witnesses in divorce action. *Taylor v. T.*, 177M428, 225NW287.

Rulings on evidence respecting priority between chattel mortgage, were not reversible error. 177M441, 225NW389.

Exclusion of evidence of inconsistent statements by plaintiff's own witness not prejudicial error. 178M347, 227NW352.

Reception of evidence which could not have harmed appellant will not warrant a new trial. 178M471, 227NW491.

Admission of net in prosecution for assault on game warden, held not prejudicial. 179M516, 229NW739.

Error in admission as to issue withdrawn from jury, held harmless. 180M298, 230NW823.

Suppression of deposition, held not prejudicial. 181M217, 232NW1.

Error in receiving evidence as to a subsequent change in the street lighting at place of accident was done away with when the court took from jury question of insufficient lighting and instructed jury that, as a matter of law, the street was properly lighted. 181M450, 232NW795. See Dun. Dig. 423.

Testimony erroneously received through mistake or inadvertence, but promptly stricken when the court's

attention was directed thereto, does not require a new trial, where it is perceived that no prejudice resulted. *Drabek v. W.*, 182M217, 234NW6. See Dun. Dig. 424.

Under the circumstances shown by the record, it was not prejudicial error to receive in evidence a small bottle containing brain substance and pieces of bone removed from the brain. *Lund v. O.*, 182M204, 234NW310. See Dun. Dig. 424.

Refusal to permit owners to testify as to value of adjacent property after a funeral home would be established held not prejudicial under the circumstances of this case. *O'Malley v. M.*, 182M294, 234NW323. See Dun. Dig. 421(94).

An error in the reception of certain testimony was deemed cured when the court, on its own motion, struck it from the record and directed the jury to disregard it. *Martin v. S.*, 183M256, 236NW312. See Dun. Dig. 423.

Error in the admission of a medical certificate of death as prima facie evidence of suicide is not cured by the fact that the coroner's verdict that the death wound was self-inflicted attached to plaintiff's proofs of death was excluded. *Backstrom v. N.*, 183M384, 236NW708. See Dun. Dig. 416, 424.

It was not reversible error to permit a witness to testify that he purchased of plaintiff an automobile of the same kind sold to defendant, at about the same time defendant bought his, for \$150 less than plaintiff on cross examination testified the witness paid therefor. *Baltrusch v. B.*, 183M470, 236NW924. See Dun. Dig. 424.

Exclusion of evidence of little weight held without prejudice. *Metalak v. R.*, 184M260, 238NW478. See Dun. Dig. 422(94).

It was not reversible error to refuse to strike as a conclusion of a witness her statement that an automobile traveled "just like a flash of lightning." *Quinn v. Z.*, 184M589, 239NW902. See Dun. Dig. 416-424.

No reversible error occurs where respondent is permitted to show facts already testified to by appellant. *Rahn v. F.*, 185M246, 240NW529. See Dun. Dig. 422.

Sustaining objections to certain questions to expert was without prejudice where expert was permitted to fully give his opinion covering matter in question. *Peterson v. L.*, 186M101, 242NW549. See Dun. Dig. 422.

In action against veterinarian for negligently failing to diagnose hog cholera, held not prejudicial error to exclude proof as to reasons for not using serum and virus. *Bekkemo v. E.*, 186M108, 242NW617. See Dun. Dig. 422.

It is not reversible error to exclude the answer to a specific question when answer to substantially same question is later received. *Wilcox v. H.*, 186M500, 243NW711. See Dun. Dig. 422.

Any error in receiving testimony of witness as found in settled case in prior action was harmless, where matter shown was implied in findings in such case, received without objection. *Farmers' State Bank*, 187M155, 244NW550. See Dun. Dig. 422.

Admission of evidence was not reversible where same evidence had been received without objection. *Thier v. F.*, 187M190, 244NW815. See Dun. Dig. 422.

Permitting physician to testify to statement made by deceased relative to past occurrences resulting in injury was not prejudicial, where other similar evidence was not objected to. *Strommen v. P.*, 187M381, 245NW632. See Dun. Dig. 7180.

In action on accident policy by one claiming to be totally disabled by amputation of part of foot, evidence of defendant that it was now more difficult on account of the depression to get a job, held not prejudicial. *Wilson v. M.*, 187M462, 245NW826. See Dun. Dig. 4871C.

No prejudice could result from not striking testimony of plaintiff's witness, called to refute a false issue injected into trial by testimony of defendant's main witness. *Cohon v. L.*, 247NW520. See Dun. Dig. 424.

Error in admitting evidence as to conviction of driver of defendant's truck of crime of driving a motor vehicle while intoxicated, at time of an accident, held not prejudicial where other evidence, not objected to, conclusively showed that driver was intoxicated at time. *Mills v. H.*, 248NW705. See Dun. Dig. 422.

Exclusion of evidence of facts shown by other evidence, held not prejudicial. *Quarrot v. S.*, 249NW668. See Dun. Dig. 3250, 4038.

5. Remarks of court and counsel.

In case tried without jury, an opinion expressed by the court at the close of the trial as to the truthfulness of witnesses presented no grounds for a new trial. 173M529, 217NW933.

A remark of counsel, promptly withdrawn, held not prejudicial misconduct. *Dumbeck v. C.*, 177M261, 225NW111.

Statement of counsel that jurors were apt to fall into error if they did not return verdict against both defendants for damages, held not prejudicial error. 178M353, 227NW203.

Prejudice held not shown by court's answers to questions asked by jury. 181M496, 233NW241. See Dun. Dig. 422.

A reversal will not be had for misconduct of counsel unless the rights of the losing party have been prejudiced thereby. *Horsman v. B.*, 184M514, 239NW250. See Dun. Dig. 424.

Misconduct of counsel cannot be held prejudicial to plaintiff, where defendants were entitled to a verdict and plaintiff offered no evidence as to amount of re-

covery. *Renn v. W.*, 185M461, 241NW581. See Dun. Dig. 416.

6. Instructions.

Inadvertent failure of court to include a small item in computing amount due was not ground for reversal. 171M461, 214NW288.

Instruction as to application of statutes requiring lights on motor vehicles as applied to a disabled car standing in the street at night held not prejudicial. 172M493, 215NW861.

Objection to charge held immaterial in view of results. 173M443, 217NW505.

Charge held not misleading when considered in connection with entire charge. 177M13, 224NW259.

A party cannot claim error on the ground that the instructions failed to define particular issues specifically where he made no request for more specific instructions. 177M127, 224NW843.

Where complaint proceeded upon theory of fraudulent misrepresentation that defendant would send competent man to supervise erection of silo, and on the trial, negligence of the person furnished was the only ground upon which a recovery could be had, held that submission was confusing. 177M420, 225NW393.

Use of word "fraud" in connection with defense of prohibited additional insurance held not prejudicial error. 178M305, 227NW39.

Instructions as to proper driving of motor car and allowances for future suffering and medical expenses, held not prejudicial error. 178M353, 227NW203.

Rule as to inadvertent errors of law in charge applies to criminal cases, but does not extend to omission of controlling principles of case. 179M516, 229NW789.

Instruction favorable to party complaining. 180M514, 231NW204.

Failure to instruct concerning future suffering and inconvenience, held not prejudicial. 181M506, 233NW237. See Dun. Dig. 422(95).

Where defendant admitted he was guilty, instruction failing to tell the jury that they could find him not guilty was harmless. *State v. Corey*, 182M48, 233NW590. See Dun. Dig. 2490(43).

The reading of part of the pleadings in argument to the jury disapproved, but held not reversible error where the court by its charge, clearly defines and limits the issues for the jury to determine. *Bullock v. N.*, 182M192, 233NW858. See Dun. Dig. 423, 424.

The use of the words "proper" and "properly" in referring to ventilation are held not to have been misleading to the jury as to the measure of defendant's responsibility in the light of the remainder of the charge. *Cargill Grain Co. v. C.*, 182M516, 235NW268. See Dun. Dig. 416, 422(95), 7074.

Where defendant was entitled to a directed verdict, error in the charge was without prejudice to the plaintiff. *Dohs v. K.*, 183M379, 236NW620. See Dun. Dig. 416-424.

There was no prejudice in an instruction in action for death of passenger in motor vehicle, that, decedent being dead, it is to be presumed that she used ordinary care, there being no evidence of negligence on her part. *Kieffer v. S.*, 184M205, 238NW331. See Dun. Dig. 424.

An unequivocal instruction that a determinative proposition is undisputed on the evidence, the fact being to the contrary, was prejudicial error, which was not cured by an equivocal explanation liable to be misunderstood by the jury. *Poppe v. B.*, 184M415, 238NW890. See Dun. Dig. 424.

Instruction as to duties of automobile owners and drivers on the highways held not prejudicial. *Mechler v. M.*, 184M476, 239NW605. See Dun. Dig. 424.

Any error of court in permitting jury to consider permanent injury was without prejudice where it is apparent from size of verdict that no permanent injuries were found by the jury. *Ball v. G.*, 185M100, 240NW100. See Dun. Dig. 424.

In action by real estate broker for commissions where-in exclusive right of sale was not issue, instruction concerning exclusive right, held not such as to mislead jury. *Kaercher v. S.*, 249NW180. See Dun. Dig. 424.

7. Findings of fact.

Lack of evidence to sustain a finding which does not prejudice appellant will not reverse a decision. 173M463, 217NW593.

Where any one of several independent findings would support judgment, it is immaterial that evidence does not support one finding. 176M225, 222NW926.

Finding of fact having no effect on conclusions of law is immaterial. 180M13, 230NW128.

Trial court can best determine prejudicial effect of errors in charge. 180M395, 230NW895.

ISSUES AND TRIAL

9286. Terms defined.

The construction of an ambiguous writing by the decision below held conclusive because, among other things, that interpretation is strongly supported by the personally verified pleading of the litigants now objecting to it. *Effingham v. P.*, 182M586, 235NW278. See Dun. Dig. 401.

9287. Issues, how joined.

2. Issues of fact.

Caulfield v. C., 183M503, 237NW190; note under §9498 (19).

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

RIGHT TO JURY TRIAL

½. In general.

Where there is no evidence of contributory negligence submitting that question to the jury is error. 173M237, 217NW125.

Where no motion is made to submit issues in court cases to a jury, court is not called upon at trial to exercise its discretion in the matter. 174M241, 219NW76.

Liability on contractor's bond held properly determined by trial court by whom case was tried without a jury. 178M183, 226NW473.

Where without objection a cause properly triable to the court has been tried to a conclusion to a jury, neither party can predicate error upon the refusal of the court to withdraw the case from the jury. *Renn v. W.*, 185M461, 241NW581. See Dun. Dig. 9836(63).

Having made point that question was one of law to be disposed of as such by court, counsel are not estopped to reassert claim on appeal simply because, met by adverse ruling below, they proceeded to ask instruction predicated on theory of that ruling. *E. C. Vogt, Inc. v. G.*, 185M442, 242NW338. See Dun. Dig. 287.

5. Equitable actions.

Equity has jurisdiction to enjoin and abate nuisances, without right of jury trial. 174M457, 219NW770.

6. Mixed actions.

One asking for a money judgment but seeking to have it made a special lien upon real estate was not entitled to a jury trial. *Patzwald v. O.*, 184M529, 239NW771. See Dun. Dig. 5232(67).

7. Held not entitled to jury trial.

Defendants were entitled to the instruction that plaintiff had not proved negligence on the part of certain defendant. *Zobel v. B.*, 184M172, 238NW49. See Dun. Dig. 7048.

7½. Questions for jury.

It is the right and duty of the trial court to direct a verdict when the state of the evidence is such as not to warrant a verdict for a party, and if he fails to do so the other party is entitled to a new trial. 173M402, 217NW377.

Instructing verdict would be error where evidence is conflicting upon issue tried. 174M297, 219NW180.

It is the duty of trial court to direct a verdict at the close of the evidence if it would be its duty to set aside a contrary verdict returned by the jury. 174M339, 219NW185.

Issues as to which there is no conflict in the evidence should not be submitted to the jury. 180M6, 230NW120.

Litigant cannot complain of submission of issue made by pleadings. 180M78, 230NW259.

Trial court should not hesitate in taking question from jury where recovery cannot be had as matter of law. 180M252, 230NW776.

The opinion of the owner of personal property as to its value is admissible. Its weight is for the jury. 181M603, 233NW313. See Dun. Dig. 3322(4).

Evidence held such as to justify submitting to the jury, question whether defendant represented that mortgagor lived upon mortgaged land. *Gunnerson v. M.*, 182M480, 235NW909. See Dun. Dig. 8612a.

Where the evidence for the plaintiff is sufficient to sustain a verdict in his favor, it is error for the court to direct a verdict at the close of plaintiff's evidence. *Osborn v. W.*, 183M205, 236NW197. See Dun. Dig. 9764.

If the evidence is such that a verdict in plaintiff's favor would have to be set aside by the court, not as a matter of discretion, but as a matter of law, because plaintiff has failed to establish any cause of action, the court may properly direct a verdict for defendant. *Dorgeloh v. M.*, 183M265, 236NW325. See Dun. Dig. 9764 (34).

Whether malpractice action was barred by limitations, held for jury. *Schmit v. E.*, 183M354, 236NW622. See Dun. Dig. 7492.

It is error to submit a case to a jury upon a point as to which there is no evidence or when the evidence will admit of but one reasonable inference. *Cannon Falls Holding Co. v. P.*, 184M294, 238NW487. See Dun. Dig. 9707.

Where there was no evidence justifying an inference that the plaintiff did not exercise ordinary care in alighting from a street car, it was error to submit the question of her contributory negligence to the jury. *Bakkensen v. M.*, 184M274, 238NW489. See Dun. Dig. 9707.

It was prejudicial error to direct a verdict for plaintiff before defendants had rested. *Grossman v. L.*, 184M446, 238NW893. See Dun. Dig. 9843.

The question of proximate cause is not for the jury, if, viewing the facts in the most favorable light for plaintiff, there is no sufficient evidence to sustain a finding of proximate cause. *Hamilton v. V.*, 184M580, 239NW659. See Dun. Dig. 7011.

It is only in clearest of cases, when facts are undisputed and it is plain that all reasonable men can draw but one conclusion from them, that question of contributory negligence becomes one of law. *Eckman v. L.*, 187M437, 245NW638. See Dun. Dig. 4167b, 7033, 7048.

It is error to submit to a jury an issue as to which there is no evidence, or which must be decided one way or the other as matter of law on uncontradicted proof. *Hall v. G.*, 246NW466. See Dun. Dig. 7174, 9707.

On a motion for a directed verdict, evidence is to be viewed in most favorable light for adverse party. Bayer-kohler v. C., 248NW294. See Dun. Dig. 9764(43).

Dentist in malpractice action was not entitled to directed verdict if evidence justified recovery under correct principles of law, though insufficient under erroneous standard set forth in instructions given at defendant's request. Ellering v. G., 248NW330. See Dun. Dig. 7486a, 7488.

Court rightly refused to direct verdicts and to grant judgments notwithstanding verdicts if there was evidence to sustain verdicts. Holland v. M., 248NW750. See Dun. Dig. 5082, 9764.

ISSUES TO THE JURY IN EQUITABLE ACTIONS

8. Waiver.

Right to jury trial is waived by proceeding to trial without protest. Patzwald v. O., 184M529, 239NW771. See Dun. Dig. 5234(25).

10. How far discretionary.

Where complaint in replevin was dismissed and only issues of an equitable nature were raised by counterclaim and reply, defendant was not entitled to a jury trial. 171M65, 212NW738.

Since, in a case triable to the court, the court, on its own motion, may submit an issue to a jury, no reversible error results from such a submission without there having been a motion for settling a jury issue as prescribed by the rules of the district court. 171M475, 214NW469.

Where complaint set forth an action in equity to compel the issuance to plaintiff of certificates for stock, defendant is not entitled to a jury trial. 174M219, 219NW82.

Granting or refusal of a request for submission of issues to a jury lies within the sound discretion of the court. 176M550, 224NW237.

Submission of issues to a jury was discretionary in action to enjoin trespassers and for equitable relief. Doyle v. B., 182M556, 235NW18. See Dun. Dig. 9835, 9837(66), 9838.

Determination of an application to submit special issues in an equity case to a jury rests in the sound discretion of the trial court. Westberg v. W., 185M307, 241NW315. See Dun. Dig. 9838.

9290. Of law, how brought to trial.

Motion for new trial must be heard within judge's judicial district unless consent is given by the parties to hear it outside of district. 173M271, 217NW351.

9292. Continuance.

Generally the granting of a continuance lies wholly in the discretion of the trial court. 174M297, 219NW180.

The court ruled correctly when denying plaintiff's motion to amend complaint to allege a practical construction of a contract and in denying defendant's motion for a continuance to meet the evidence on that issue. Hayday v. H., 184M8, 237NW600. See Dun. Dig. 1721.

JURY TRIALS

9293. Jury, how impaneled—Ballots—etc.

Jurors may be examined before being sworn as to their interest in insurance company defending suit. 181M4, 231NW714.

Parties in an automobile accident case have the right in impaneling the jury to ascertain whether a prospective juror is interested in an insurer. Martin v. S., 183M256, 236NW312. See Dun. Dig. 5252.

9294. Challenges.

See §9469-3, relating to juries in counties of over 400,000 population.

3. Implied bias.

Evidence does not support charge of misconduct of a juror in failing to disclose acquaintance with defendant. Carl Lindquist & Carlson, Inc., v. J., 182M529, 235NW267. See Dun. Dig. 5253.

6. Waiver of right.

Failure to examine juror as to relationship with opposing counsel is a waiver of statutory right to challenge the juror for implied bias. 178M296, 226NW938.

9295. Order of trial.

In the second trial of a case, a party is not concluded by his counsel's opinion of the legal effect of the contract, expressed during the course of the first trial. Hayday v. H., 184M8, 237NW600. See Dun. Dig. 688(34), 9792, 9793.

1. Right to open and close.

The order in which the closing argument shall be made is largely discretionary with the court, and its action will not be reversed except for a clear abuse of discretion. Bullock v. N., 182M192, 233NW858. See Dun. Dig. 9712(21).

Where only issue in action to recover real estate was usury in mortgage set up by defendant, court properly permitted defendants to have closing argument to jury. Clausen v. S., 187M534, 246NW21. See Dun. Dig. 9712.

1½. Reception of evidence.

In automobile accident case, where defendant claimed that driver of car owned half interest therein, court did not err in permitting plaintiff to inquire in respect to

defendant's application for insurance to rebut the defense of joint ownership, though it showed that an insurance company was the real defendant. Martin v. S., 183M256, 236NW312. See Dun. Dig. 3232(67).

Error in exclusion of evidence was not reviewed where there was no offer of proof. Tierney v. G., 185M114, 239NW905. See Dun. Dig. 9717.

3. Order of proof.

Where case was closed except for testimony of a physician to be called by the defendant and such other evidence as might be given in rebuttal of his testimony, it was not error to reject testimony called in rebuttal when it did not appear that it would rebut that of the physician. 174M131, 218NW455.

3½. Instructions.

That giving defendant's request may have placed his contention before the jury more prominently than the plaintiff's will not justify a reversal. 173M250, 217NW127.

The reading of part of the pleadings in argument to the jury disapproved, but held not reversible error where the court, by its charge, clearly defines and limits the issues for the jury to determine. Bullock v. N., 182M192, 233NW858. See Dun. Dig. 9783a(71).

In action by guest against automobile owner, where driver testified that he was a half owner and was not under the control of the defendant, an instruction that defendant's liability rested on her right of control rather than upon the ownership of the car was as favorable to her as she could demand. Martin v. S., 183M256, 236NW312. See Dun. Dig. 6983a.

Instructions to jury held not misleading. Hayday v. H., 184M8, 237NW600.

An unequivocal instruction that a determinative proposition is undisputed on the evidence, the fact being to the contrary, was prejudicial error, which was not cured by an equivocal explanation liable to be misunderstood by the jury. Poppe v. B., 184M415, 238NW890. See Dun. Dig. 9785.

A reference to a witness in the charge which neither discredits nor commends the veracity of the witness is not error. Reek v. R., 184M532, 239NW599. See Dun. Dig. 9787.

No reversible error occurred in the charge which stated that the three sons, in the father's gift of 160 acres of land each, had been treated alike, for each had received the same acreage, and the evidence raised no controversy as to inequality in value of the gifts. Reek v. R., 184M532, 239NW599. See Dun. Dig. 1202.

Where defendants maintained that tall light was burning and there was no effort to show that the light went out suddenly or unexpectedly or that it went out without defendants' fault, court properly refused to instruct that defendants were not negligent if tall light went out suddenly and unexpectedly and without defendants' fault. Mechler v. M., 184M476, 239NW605. See Dun. Dig. 4167c.

Charge to jury must be construed as whole. Milliren v. F., 185M614, 242NW546. See Dun. Dig. 9781.

Charge on apparent authority held substantially correct, and not to take from jury question of actual authority of collision insurance adjuster. Breuer v. C., 246NW533. See Dun. Dig. 1935.

4. Re-opening case.

Court may in its discretion vacate findings and reopen case for further evidence. 181M71, 231NW397.

Whether a defendant is permitted, at close of plaintiff's testimony, to rest for purpose of moving for a directed verdict, with understanding that, if motion is denied, he may reopen case and put in his evidence, rests within discretion of trial court. 181M471, 233NW14. See Dun. Dig. 9716.

It is discretionary with the trial court to allow a party to reopen his case after resting. McCartney v. C., 181M555, 233NW465. See Dun. Dig. 9716.

Court did not abuse its discretion in refusing after decision was fled to reopen case to permit defendant to introduce more evidence as to an issue litigated in the case. Tritchler v. B., 185M414, 241NW578. See Dun. Dig. 9716.

9296. View of premises—Procedure.

Denying a request for the jury to view the premises was within the discretion of the trial court. Carl Lindquist & Carlson, Inc., v. J., 182M529, 235NW267. See Dun. Dig. 9721(81).

9298. Requested instructions.

Boyer v. J., 185M221, 240NW538.

3. When requests may be refused.

Court erred in not instructing jury that an act of negligence not pleaded nor litigated by consent could not serve as a ground of recovery. 175M96, 220NW429.

In an action against a railroad for injuries at crossing, court erred in refusing to give requested charge relative to action in an emergency. 175M280, 220NW949.

It is prejudicial error to refuse to give a requested charge which in effect would withdraw from the jury one of a number of charges of negligence upon which no proof was given. 175M280, 220NW949.

There was no error in charge or refusal to charge, respecting priority as between purchase money, chattel mortgage and prior mortgage. 177M441, 225NW389.

Requested instructions not containing proper qualifications properly refused. 178M465, 227NW493.

Request made after jury has retired, held too late. 179M428, 229NW867.

Consideration and denial of request not made before the argument may be assigned as error. 180M163, 230NW580.

The refusal to give certain requests to charge, and modification of other requests, held not error. Bullock v. N., 182M192, 233NW858. See Dun. Dig. 9774, 9775.

Requested instruction in automobile accident case that jury was to entirely disregard fact that insurance company had any interest in the outcome of the case held properly refused. Arvidson v. S., 183M446, 237NW12. See Dun. Dig. 9774.

6. Request covered by the general charge.

181M245, 232NW38.

The charge being complete, it was not error to refuse to give certain requests for instructions. Quinn v. Z., 184M589, 239NW902. See Dun. Dig. 9777.

Where court instructed adequately regarding contributory negligence, there was no error in refusing request for further instructions thereon. Olson v. P., 185M571, 242NW283. See Dun. Dig. 9777.

There is no prejudice in refusing instruction where charge as a whole is sufficiently favorable. Dickinson v. L., 246NW669. See Dun. Dig. 9777.

6%. Necessity for request.

180M264, 230NW778.

Instruction as to right of way at street intersection, held sufficient in absence of request for more definite and detailed instruction. 175M449, 221NW715.

A party cannot claim error on the ground that the instructions failed to define particular issues specifically where he made no request for more specific instructions. 177M127, 224NW843.

Failure to define "proximate cause," held not reversible error in absence of request for instruction. 181M109, 231NW716.

A new trial will not be granted for failure to instruct in respect to the presumption of due care of one killed in an accident where no request was made for such instruction. Boyer v. J., 185M221, 240NW538. See Dun. Dig. 9771.

A party requesting no instructions and offering no suggestions on inquiry by court at close of charge cannot assign error upon any faulty statement in charge or failure to instruct upon some particular phase. Carlson v. S., 246NW746. See Dun. Dig. 9780.

9300. Verdict, when received—Correcting, etc.

The court may refuse to receive a verdict deemed inadequate, but, in a case of assessing damages in a tort action, it is error to send the jury out to deliberate on another verdict with the statement that the one returned, being in a substantial amount for a tort, was not compensatory. Peterson v. A., 183M86, 235NW534. See Dun. Dig. 9823.

1. Court always open.

An accused at liberty on bail is chargeable with knowledge that the court is always considered open for all purposes connected with the cause submitted. 175M573, 222NW277.

2. Polling the jury.

The polling of the jury is for the purpose of ascertaining for a certainty that each juror agrees upon verdict and not to determine whether verdict presented was reached by quotient process. Hoffman v. C., 187M320, 245NW373. See Dun. Dig. 9822.

3. Correction of verdict.

It was error for trial court to direct judgment in a less amount than the verdicts where the evidence warranted a greater recovery than that directed, the proper order being to award a new trial on condition of consent to reduction of verdict. 180M540, 231NW222.

4. Informal verdict.

Verdict for defendant in action on note assessing as damages on counterclaim \$100, "and value of note," held not indefinite or perverse. Donaldson v. C., 247NW522. See Dun. Dig. 9817.

9303. Verdict, general and special.

The answer to an interrogatory not material to the issues tried and so stated to the jury cannot be considered a special verdict affecting the general verdict. Rahn v. F., 185M246, 240NW529. See Dun. Dig. 9830.

A general verdict where there are two rights of recovery will be sustained if there is evidence supporting one ground of recovery. Berg v. U., 186M529, 243NW696. See Dun. Dig. 9815.

In a suit against a railroad company and its switch foreman, a verdict against company only is in effect a verdict for switch foreman. Ayer v. C., 187M169, 244NW681. See Dun. Dig. 5045, 6027a, 9817a.

9304. Interrogatories—Special findings.

3%. Interrogatories in general.

A special verdict that there was a settlement with one negligent person, held inconsistent with general verdict against others. 172M171, 215NW225.

In this state, the verdict on a special question submitted to a jury in an equity case is not merely advisory. First Nat. Bk. v. Quevil, 182M238, 234NW318. See Dun. Dig. 9808(41).

9307. Verdict in replevin.

Where plaintiff seeking to recover possession of property under two chattel mortgages, holds only one valid

mortgage, defendant is not entitled to a general verdict in his favor on a finding that the other mortgage was procured by fraud. 175M341, 221NW62.

9308. Receiving verdict.

Verdict is not vitiated by failure to read it to jury as recorded. 178M564, 227NW893.

TRIAL BY THE COURT

9311. Decision, how and when made.

Canfield v. J., 183M503, 237NW190; note under §9498.

FINDINGS AND CONCLUSIONS

1. Definitions and distinctions.

Where the issues of fact were all tried to the court, the plaintiff was entitled to have the facts found and the conclusions of law separately stated in writing, and judgment entered accordingly. 172M72, 214NW783.

Court is not bound by testimony containing improbabilities, contradictions, inconsistencies, or irreconcilable to the facts shown by the record. Weber v. A., 176M120, 222NW646.

The court is required to strike out a finding of fact only when the finding has no sufficient support in the evidence, or when it goes beyond or outside of any issue actually litigated. Kehrer v. S., 182M596, 235NW386. See Dun. Dig. 9858.

Findings should not contain evidentiary facts. Arntson v. A., 184M60, 237NW820. See Dun. Dig. 9851(33).

3. When findings necessary.

On appeal from an order of probate court admitting a will to probate, the district court must make findings of fact as in other cases, but this may be waived, where the disputed fact necessarily decided the disputed question. 172M217, 214NW892.

In a trial to the court without a jury there must be findings of fact and conclusions of law if there is a determination on the merits. 175M252, 220NW951.

Where apportionment of amount recovered under Federal Employer's Liability Act, is not made by the jury, and remains for the court on motion, and an issue of fact is raised, which must be determined, the decision should state the findings of fact and conclusions of law separately. 176M130, 222NW643.

There should be no findings of fact when judgment is granted on the pleadings. 180M9, 230NW118.

The refusal to make new or additional findings will not be reversed unless the evidence is conclusive in favor of the proposed findings, nor if the proposed findings are of only evidentiary facts which would not change the conclusions of law. Kehrer v. S., 182M596, 235NW386. See Dun. Dig. 9873.

Court is not required to make an additional specific finding in conflict with those already made. National Surety Co. v. W., 186M93, 242NW545. See Dun. Dig. 9855.

5. Nature of facts to be found.

Practice of making findings of fact consisting, by reference alone, of a pleading or any substantial part of it is disapproved. 171M276, 214NW45.

6. Sufficiency of particular findings.

Finding "that the allegations set forth in the complaint of the plaintiff herein are true" was a sufficient basis for a judgment against surety on contractor's bond. 171M305, 214NW47.

Where findings are decisive of all issues presented, new trial will not be granted because more specific findings could have been made. 177M425, 225NW273.

A finding that there was an agreement to pay interest on partnership contributions cannot be contradicted by a memorandum of the trial judge not made a part of the findings. 177M602, 225NW924.

Action of district judge granting new trial cannot be reviewed by another judge to whom the case is sent for the new trial. 178M480, 227NW658.

Finding that all "material" allegations of complaint are true is insufficient. 180M9, 230NW118.

Finding of good faith, coupled with refusal to find insolvency, is equivalent of finding of solvency. National Surety Co. v. W., 186M93, 242NW545. See Dun. Dig. 9852.

7. Findings and conclusions must be stated separately.

A finding that "the evidence fails to establish the cause of action" is a legal conclusion violative of requirement of separate statement. Palmer v. F., 180M124, 230NW257.

9. Findings must be definite and specific.

Finding of court should definitely determine an issue presented. Smith v. B., 187M202, 244NW817. See Dun. Dig. 9855, 9873.

10. Findings must cover all the issues.

180M163, 230NW464.
Court having made findings upon every ultimate issue of fact necessary to sustain the judgment order, it was not required to find upon issues of fact which could not affect the judgment. 175M115, 220NW551.

While counsel, after trial without jury, are entitled to findings of fact fully responsive to their sincere contentions, there need not be reversal where, although findings leave some controlling things to implication, they fairly negative findings moved for below by defeated litigant. Mienes v. L., 246NW667. See Dun. Dig. 9850.

11. Findings must be within the issues.

A claim that a finding is not sustained by the evidence nor within the issues formed by the pleadings cannot

be raised on appeal, where the record fails to show that it contains all the evidence bearing thereon. 177M602, 225NW924.

Immaterial findings which do not affect the conclusions of law may be disregarded. 181M570, 233NW243. See Dun. Dig. 985a.

Court erred in finding special damages in a replevin action where pleadings contained no allegations of special damages and no evidence thereof was offered. *Brown Sheet Iron & Steel Co. v. W.*, 183M515, 237NW188. See Dun. Dig. 9858.

13. Judgment must be justified by the findings.

Court finding upon matters not decisive of the controversy will not overthrow the judgment. 173M145, 216NW782.

In action by state against assisting purchasing agent and surety for conversion of personal property, findings held to support conclusions of law and judgment against defendants. *State v. Waddell*, 187M647, 246NW471. See Dun. Dig. 9857.

14. Construction of findings.

Remarks of court that plaintiff must come into court with clean hands, made at close of testimony, were not such as to indicate that court found facts by wrong application of law. *Thorem v. T.*, 246NW674. See Dun. Dig. 9860.

15½. Striking out and modifying.

Where the decisive findings of fact are sustained by the evidence and sustain the conclusions of law, it is not error for the court to refuse to strike out its findings or refuse to make additional, or substituted findings and conclusions. *Jarvaise Academy of Beauty Culture v. S.*, 183M507, 237NW183. See Dun. Dig. 9866.

Denial of motion to alter and amend findings of fact is equivalent to findings negating facts asked to be found. *Sheffield v. C.*, 186M278, 243NW129. See Dun. Dig. 9873.

Denial of motion for an amended finding upon issue not definitely determined by court is equivalent of finding to contrary of that requested. *Smith v. B.*, 187M202, 244NW817. See Dun. Dig. 9852, 9873.

TRIAL BY REFEREES

9319. Trial and report—Powers—Effect of report.

179M175, 228NW614.

GENERAL PROVISIONS

9321. Dismissal for delay.

179M225, 229NW86.

9322. Dismissal of action.

This section has no application to dismissals on the merits after trial and submission of the case for decision. *McElroy v. B.*, 184M357, 238NW681. See Dun. Dig. 2741(6).

Where both parties rested in a jury trial, and defendant moved for and procured a dismissal, there was a decision on the merits. *McElroy v. B.*, 184M357, 238NW681. See Dun. Dig. 5180(6).

½. In general.

The practice of ordering a dismissal with prejudice upon an objection to the introduction of evidence under the complaint is disapproved. *Krzyaniak v. M.*, 182M83, 233NW595. See Dun. Dig. 2748(54).

1. Dismissal by plaintiff before trial.

Answer in action to adjudge ownership of corporate stock held to contain prayer for affirmative relief such as to prevent ex parte dismissal by plaintiff. *Burt v. S.*, 186M189, 242NW622. See Dun. Dig. 2744(34).

3. Dismissal by consent before trial.

Dismissal of case by stipulation on settlement while action was pending was authorized by subd. 2 of this section. *Muellerberg v. J.*, 247NW570. See Dun. Dig. 2743.

Filing of stipulation of dismissal on settlement while action was pending ousted court of jurisdiction to enter judgment on merits. *Id.*

5. Dismissal for failure to prove cause of action.

Court may dismiss at close of plaintiff's evidence, if plaintiff has failed to substantiate or establish cause of action or right to recover. *A. Y. McDonald Mfg. Co. v. N.*, 187M237, 244NW306. See Dun. Dig. 9752.

Court may dismiss action on trial, after plaintiff has rested, if plaintiff has failed to substantiate or establish his cause of action or right to recover. *L'Hommedieu v. W.*, 187M333, 245NW369. See Dun. Dig. 9752.

8. Effect of dismissal.

Dismissal of part of a claim on ground that the suit as to such part was premature, held not to bar subsequent action on part so dismissed, though the judgment would be conclusive as to defenses interposed and determined. 178M535, 228NW148.

9. Vacation of dismissal.

Trial court could vacate dismissal entered by plaintiff while unaware that time had elapsed for bringing another suit. *Lillenthal v. C.*, 250NW73. See Dun. Dig. 2750a.

10. Dismissal against co-defendant.

City, sued for injuries from defect in street, cannot question dismissal as to property owners made co-defendants. 179M553, 230NW89.

Defendant could not object to dismissal as to a co-defendant joined by mistake where such dismissal had no effect on the issues. 180M467, 231NW194.

14. Upon the trial and before final submission.

Court did not abuse its discretion in denying motion to dismiss without prejudice on the trial, where it stated its willingness to give plaintiff necessary time to secure his evidence. *Holleran v. W.*, 187M490, 246NW23. See Dun. Dig. 2744.

Motion to dismiss without prejudice after trial begins rests in discretion of trial court. *Holleran v. W.*, 187M490, 246NW23. See Dun. Dig. 2744.

9323. Offer of judgment—Costs.

Where plaintiff sued for \$131 and defendant's answer admitted indebtedness in sum of \$61, defendant was not "prevailing party" where judgment was rendered against him for \$61, tender by defendant not including accrued costs. *Grill v. B.*, 249NW194. See Dun. Dig. 4984, 9619.

9324. Tender of money in lieu of judgment.

Defendant cannot complain of any failure to keep tender good, where tender was and would be futile because defendant had disqualified itself from accepting tender by compliance with condition imposed by court. *Johnson v. I.*, 249NW177. See Dun. Dig. 9618.

NEW TRIALS

9325. Grounds—Presumption on appeal.

THE STATUTE GENERALLY

½. In general.

Karnofsky v. W., 183M563, 237NW425; note under §9498(13).

Where liability has been admitted and verdict as reduced is plainly not excessive appellate court will not consider assignments of error directed to rulings on evidence and amount of recovery. 173M365, 217NW369.

Court may permit a renewal of motion for a new trial. 174M297, 219NW180.

Where trial judge has become incapacitated and motion for new trial is heard by another judge, the latter has no power to amend findings of fact but he may amend the conclusions of law and may grant a new trial for the same causes which the trial judge may grant it. 175M346, 221NW424.

Mere mistake in form of verdict not fatal if intention clearly appears and verdict assessing damages in sum of "none dollars" is a verdict for the defendant. 177M408, 225NW291.

Action of district judge granting new trial cannot be reviewed by another judge to whom the case is sent for the new trial. 178M480, 227NW658.

Power of the district court to review and vacate order denying new trial. *Barrett v. S.*, 183M431, 237NW15; note under §9283.

A motion for a new trial may be heard after entry of a judgment without notice. *Wilcox v. H.*, 243NW709. See Dun. Dig. 7086-7090.

The pendency of a motion for a new trial does not in itself operate as a stay of proceedings, nor prevent entry of judgment. *Wilcox v. H.*, 186M504, 243NW709. See Dun. Dig. 7068.

Giving of candy and cigars to jurors, participation by court officers therein, and talk of a banquet to be given by jurors to defendants were improper. *Hillius v. N.*, 247NW385. See Dun. Dig. 7102a.

An order granting a new trial after judgment vacates verdict and judgment. *Ayer v. C.*, 249NW581. See Dun. Dig. 7082.

Trial court has power to hear and grant motion for new trial after judgment, within time for appeal therefrom, under limitations stated in *Kimball v. Palmerlee*, 29 Minn., 302, 13NW129. *Id.* See Dun. Dig. 7087(87).

Record shows such delay and laches that it was abuse of discretion to hear and grant a motion for a new trial after judgment. *Id.*

5. Motion a matter of right.

Court held not to have abused its discretion. 172M516, 215NW852.

8. Of less than all the issues.

May be granted on issue of damages alone. 180M185, 230NW473.

9. Granted only for material error.

A new trial will not be granted for failure of court to award nominal damages. *L'Hommedieu v. W.*, 187M333, 245NW369. See Dun. Dig. 429, 7074.

FOR IRREGULARITY OR ABUSE OF DISCRETION

9½. In general.

Publication by newspaper of result of previous trial held not to render refusal of court to dismiss jury prejudicial. 176M377, 223NW619.

11. Improper remarks of court.

In case tried without jury, an opinion expressed by the court at the close of the trial as to the truthfulness of witnesses presented no grounds for a new trial. 173M529, 217NW933.

Remark of court to objection to language of plaintiff's counsel "That is the law, but it isn't necessary to argue it" was prejudicial error where plaintiff's counsel had stated to the jury that they should pay the plaintiff plenty of damages because the court could cut down the amount if they over-stepped the bounds. 175M96, 220 NW429.

A trial court's talk in open court to a jury seeking further instructions held not to be an "irregularity," but may be reviewed as an "error of law occurring at the trial" and a settled case or bill of exceptions is necessary. 178M141, 226NW404.

It was not error for court to suggest that counsel "get together" in reference to the use of an audit. Sigvertsen v. M., 182M433, 234NW688. See Dun. Dig. 7098.

12. Other misconduct.

Prejudicial bias of trial judge was not established by his extensive participation in examination of witnesses in divorce action. 177M453, 225NW287.

Misconduct of members of family of party, held not established. 179M557, 230NW91.

It was improper for court to absent itself from court room during parts of arguments to jury. Jovaag v. O., 249NW676. See Dun. Dig. 9706.

FOR MISCONDUCT OF JURY

12½. In general.

There was no error in denying a new trial on the affidavit of a juror that he did not believe the testimony in behalf of the state and only agreed to a conviction to put an end to the case. 171M503, 214NW474.

Misconduct of juror, held not shown, 179M557, 230NW91.

Examination of insurance policy by juror in automobile collision case held not prejudicial in view of court's instruction. Honkomp v. M., 182M445, 234NW638. See Dun. Dig. 7116.

The purity of jury trials must be jealously guarded; scrupulous conduct on the part of jurors, litigants, and counsel is necessary. Brecht v. T., 182M603, 235NW528. See Dun. Dig. 7100.

Quotient arrived at by jurors in dividing sum of allowances of jurors may be the basis of a valid verdict if agreed upon after consideration. Hoffman v. C., 187M320, 245NW373. See Dun. Dig. 7115a.

13. Discretionary.

Whether misconduct between counsel and jury requires new trial is a matter within the sound discretion of the trial court. Brecht v. T., 182M603, 235NW528. See Dun. Dig. 7104(99).

15. Necessity of objection on the trial.

Claim that verdict was given under passion and prejudice cannot be raised for the first time on appeal. 179M297, 229NW87.

17. Affidavits on motion.

Affidavits or testimony of jurors as to what transpired in jury room are not admissible to impeach their verdict, even where it is sought to attack a verdict as a quotient one. Hoffman v. C., 187M320, 245NW373. See Dun. Dig. 7109.

20. Visiting locus in quo.

There was misconduct of jurors in privately visiting locus in quo, and particularly in purposely riding upon street cars to determine whether or not witnesses, seated at certain places in car in question, could observe what they testified they did observe. Newton v. M., 186M439, 243NW684. See Dun. Dig. 7114.

21. Unauthorized communication with jury.

Determination of trial court whether there was prejudice because witness mingled with jurors will not be disturbed on appeal. Hillius v. N., 247NW385. See Dun. Dig. 399, 7103a, 7104.

Evidence held to sustain finding that witness mingled with jurors throughout long trial and that there should be new trial. Hillius v. N., 247NW385. See Dun. Dig. 7102a.

22. Other misconduct.

172M591, 216NW537.

Permitting jury to attend theatrical performance, held not to require new trial. 179M301, 229NW99.

FOR MISCONDUCT OF COUNSEL

22½. In general.

It was the duty of the court on its own motion to stop a jury argument improperly predicated upon personal abuse of opposing counsel or upon matters not pertinent to the issues tried. 171M219, 213NW890.

Verdict could not stand where counsel made abusive personal attack upon opposing counsel in his argument to the jury. 171M219, 213NW890.

Remarks of counsel, while not in good taste, held not so prejudicial as to require a new trial. 171M321, 214 NW52.

In action for indecent assault, statement of attorney in argument "I am glad there is one woman who had the nerve to come into court and face" the defendant, held prejudicial. 174M151, 218NW548.

Misconduct of counsel in presenting evidence held not shown on the record. 177M13, 224NW259.

Improper argument, held ground for reversal. 179M127, 228NW552.

The asking of a question deemed objectionable should not be considered misconduct of counsel, where the testimony of the witness suggests the inquiry, and no allusion is thereafter made by the counsel to the subject. Harkness v. Z., 182M594, 234NW281. See Dun. Dig. 7103.

Naming of insurance companies by attorney in automobile accident case, held not misconduct. Arvidson v. S., 183M446, 237NW12. See Dun. Dig. 5252(21), (22), (23).

Statement of plaintiff's counsel that defendant's counsel made false statements was serious misconduct and prejudicial in a closely contested case. Romann v. B., 184M586, 239NW596. See Dun. Dig. 7102, 7103, 9799.

Argument of plaintiff's counsel in personal injury action making accusations against defense and its counsel relative to excluded evidence and nonproduction of witnesses held improper and prejudicial. Burmeister v. M., 185M167, 240NW359. See Dun. Dig. 9799(97).

Plaintiff's counsel was guilty of misconduct in repeatedly asking objectionable and prejudicial questions to which objections were being sustained. Campbell v. S., 186M293, 243NW142. See Dun. Dig. 7103.

Argument of counsel accusing opponent of not being a gentleman, and inviting violence, held prejudicial error. Jovaag v. O., 249NW676. See Dun. Dig. 9799.

23. Improper remarks on the trial.

172M591, 216NW537.

Anderson v. A., 229NW579(1).

180M340, 230NW792.

Statement concerning interest of insurance company in litigation, held without prejudice where defendant gave ample opportunity for bringing the matter to the attention of the jury. 175M153, 220NW418.

Extended offers and discussions by counsel, in the presence of the jury, of incompetent and prejudicial matter, held not proper. 175M341, 221NW62.

A remark of counsel, promptly withdrawn, held not prejudicial misconduct. Dumbeck v. C., 177M261, 225NW111.

Statement by counsel of fact shown by document admitted in evidence, held not error. 180M298, 230NW823.

Improper remarks, held not ground for reversal in absence of objection or exception. Examination of jurors on voir dire as to interest in insurance company defending suit, held not error. 181M4, 231NW714.

The matter of granting a new trial for improper remarks or argument of counsel rests largely in the discretion of the trial court. Horsman v. B., 184M514, 239 NW250. See Dun. Dig. 7102(63).

Argument of plaintiff's counsel in personal injury action making accusations against defense and its counsel relative to excluded evidence and nonproduction of witnesses held improper and prejudicial. Burmeister v. M., 185M167, 240NW359. See Dun. Dig. 9799(97).

Questions and comments of attorney touching certain person and his relation to defendant's liability insurer, held not misconduct warranting new trial. Olson v. P., 185M571, 242NW283. See Dun. Dig. 7102.

Remarks of counsel that if jurors had any doubt as to kind of man a certain witness was to ask certain member of jury, though misconduct, was not such as to require new trial. Marckel Co. v. R., 186M125, 242NW471. See Dun. Dig. 7102.

Plaintiff's counsel was guilty of misconduct in arguing to jury, "They say it is all right to kill this boy because he is guilty of contributory negligence." Campbell v. S., 186M293, 243NW142. See Dun. Dig. 7102.

24. Other misconduct.

172M543, 216NW233.

FOR ACCIDENT OR SURPRISE

28. Motion granted.

Plaintiff held entitled to new trial upon the grounds of accident and surprise. M. J. O'Neil, Inc. v. C., 184M281, 238NW679. See Dun. Dig. 7118, 7121.

FOR NEWLY DISCOVERED EVIDENCE

30. To be granted with extreme caution.

172M368, 215NW516.

Diligence in discovery of new evidence held not shown. 172M516, 215NW852.

New trial rests largely in the discretion of the trial court and is to be granted cautiously and sparingly. 176 M210, 222NW924.

No abuse of discretion in granting new trial for evidence concerning developments subsequent to trial. Gau v. B., 177M276, 225NW22.

Motion rests largely in the discretion of the trial court, and is to be granted with caution. 178M296, 226NW938.

Grant of new trial is discretionary with trial court. 179M80, 228NW335.

Denial of new trial for newly discovered evidence held not abuse of discretion. Milliren v. F., 186M115, 242NW546. See Dun. Dig. 7123.

Granting of new trial on ground of newly discovered evidence is very largely discretionary. Donaldson v. C., 247NW522. See Dun. Dig. 7123.

32. Showing on motion.

181M355, 232NW622.

Fact issues, if any, on motion, are for trial court. Gau v. B., 177M276, 225NW22.

Affidavits supporting motion for new trial on ground of newly discovered evidence must show exercise of reasonable diligence. *Klugman v. S.*, 186M139, 242NW 625. See Dun. Dig. 7096.

Lack of a showing of due diligence to obtain alleged newly discovered evidence required a denial of motion for a new trial. *State v. Padares*, 187M622, 246NW369. See Dun. Dig. 7127.

For lack of due diligence, court rightly denied a new trial on ground of newly discovered evidence. *Jeddeloh v. A.*, 247NW512. See Dun. Dig. 7128.

34. Counter affidavits.

Court did not abuse discretion in denying new trial for newly discovered evidence submitted on conflicting affidavits. *Farrell v. K.*, 248NW720. See Dun. Dig. 7127.

35. Nature of new evidence.

179M436, 229NW564.
181M355, 232NW622.

Matter of granting a new trial for newly discovered evidence rests largely in the sound legal discretion of the trial court. 171M515, 213NW923.

A new trial was properly denied for newly discovered evidence which was merely cumulative and corroborative and not of such weight as to induce the belief that it would change the result. 171M345, 214NW262.

Evidence that principal witness for state was reputed to be of unsound mind was not of such a nature as to require a new trial, where the testimony of the witness was full of contradictions. 171M503, 214NW474.

Denial of motion for new trial for newly discovered evidence some months after entry of judgment. 173M250, 217NW127.

Court did not abuse its discretion in denying new trial on affidavits showing that witness perjured himself. 174M545, 219NW366.

Due diligence should have produced the evidence of a son and an employe of the party seeking a new trial. 175M618, 221NW641.

Where existence of facts is asserted by experts or the expert testimony, would be merely cumulative there was no abuse of discretion in denying a new trial. 176M200, 223NW97.

Evidential facts sought to be proved may have arisen after the trial. 177M25, 224NW257.

Court acted within its discretion in denying the state a new trial in condemnation proceedings for evidential fact arising after the trial. 177M25, 224NW257.

Newly discovered evidence held not of sufficient importance to require a new trial. *Dumbeck v. C.*, 177M261, 225NW111.

Newly discovered evidence, held not to require new trial. 177M441, 225NW389.

Documentary evidence, apparently genuine, which would destroy plaintiff's case if authentic, required new trial. 177M444, 225NW399.

New trial was properly denied, where a large part of the evidence was cumulative and due diligence was not shown to obtain it for the trial. 178M37, 226NW208.

Motion is granted only when the evidence is such as will likely change the result, and only to remedy a manifest injustice. 178M296, 226NW938.

Mere inadvertence of counsel in not offering available evidence, held not ground for new trial on the theory of newly discovered evidence. 179M99, 228NW447.

Facts disclosed at trial is not newly discovered evidence. 180M264, 230NW778.

No reversible error was made in denying a continuance, nor in refusing to grant a new trial for newly discovered evidence. *Miller v. P.*, 182M108, 233NW855. See Dun. Dig. 7170, 7123.

A showing that a litigant after trial remembers what he should have remembered at the trial does not constitute newly discovered evidence entitling him to a new trial. *Farmers' State Bk. of Eyota v. C.*, 182M268, 234NW320. See Dun. Dig. 7128(57), (58).

A motion for a new trial on the ground of newly discovered evidence is largely addressed to the discretion of the trial court. *Buro v. M.*, 183M518, 237NW186. See Dun. Dig. 7123.

Denial of new trial on ground of newly discovered evidence held not an abuse of discretion. *Zobel v. B.*, 184M172, 238NW49. See Dun. Dig. 7123.

The granting of a new trial on the ground of newly discovered evidence rests in the sound judicial discretion of the trial court. *Stokke v. M.*, 185M28, 239NW658. See Dun. Dig. 7123(32).

A new policy of liability insurance was not newly discovered evidence requiring new trial with respect to construction of old policy. *Wendt v. W.*, 247NW569. See Dun. Dig. 7131.

Court properly refused new trial on ground of newly discovered evidence and fraud where evidence relied upon was that of a physician subject to objection that it was privileged. *Stone v. S.*, 248NW285. See Dun. Dig. 7131.

Claimed newly discovered evidence presented no valid grounds for a new trial. *State v. City of Eveleth*, 249NW184.

FOR EXCESSIVE OR INADEQUATE DAMAGES

36. Under either subd. 5 or subd. 7.

172M493, 215NW861; 172M543, 216NW233.
179M411, 229NW566.

Verdict for \$9,800 for injury to eye and 24 fractured bones was not so excessive as to show passion or prejudice. 171M321, 214NW52.

\$17,390, reduced to \$10,390, was not excessive for permanent injuries to right hand and property. 171M472, 214NW287.

\$3,200 was not excessive for death of boy 17 years of age. 172M76, 214NW774.

\$10,000 held not excessive for injuries to memory, hearing, sight and other parts of the body of a school teacher. 171M399, 214NW761.

\$12,500 held not excessive for injuries to jaw and neck of railroad mechanic who was permanently disabled as a mechanic. 172M284, 214NW890.

\$10,000 was not excessive to female school teacher receiving broken knee cap and pelvic injury resulting in a tumor and such condition as would render it improbable that she could bear children. 172M134, 215NW198.

Verdict held excessive. 172M501, 215NW853. Personal injuries to tenant from defective premises. 172M377, 215NW865.

Verdict for \$35,000.00 for death of switchman 30 years old, earning \$190 per month and leaving widow and two small children, held not excessive. 172M447, 216NW234.

Verdict for \$5,000, reduced to \$3,000, held not excessive for death at a railroad crossing. 173M7, 216NW245.

Evidence held to justify finding that fracture of plaintiff's four cervical vertebra was occasioned by the negligence of defendant. 173M163, 216NW803.

\$9,500 was not excessive to young woman, 31 years of age, for face blemish and injury to eye. 173M186, 217NW99.

Verdict for \$15,000 was excessive for injuries where only permanent injury was "flat feet." 173M239, 217NW128.

Verdict of \$7,000, for son and \$1,400 for father, reduced to \$4,500 and \$500, held not excessive for fracture of skull, among other things. 173M365, 217NW369.

Claim of error in the amount of a judgment must first be submitted to the trial court. 173M325, 217NW381.

\$1,000 was not excessive for injury to head, causing headaches, dizziness, and disability to do certain work. 173M622, 217NW485.

\$2,000 for dislocated ankle was not excessive. 173M439, 217NW493.

\$7,500 to woman and \$982.96 to husband for injuries to woman resulting in miscarriage and other permanent injuries held not excessive. 174M294, 219NW179.

Injuries to land and crops from flooding. 174M443, 219NW459.

Where in tort action the amount of damages is not based upon estimate of experts or the calculation of other witnesses, the defendant should base his motion for new trial upon the fifth subdivision of this section. 174M545, 219NW866.

\$6,000 was not excessive for brain injury. 174M545, 219NW866.

Verdict for \$10,550 for death, medical expenses and suffering in Wisconsin, held not excessive. 175M22, 220NW162.

Verdict for \$25,000 reduced to \$23,500 was not excessive for injuries to telephone lineman 36 years of age consisting of injuries to vertebra, ribs and leg. 175M150, 220NW412.

Verdict for \$7,500, reduced to \$5,000, held not excessive for injuries to unmarried woman, 29 years of age. 222NW580.

Verdict for \$33,000 reduced to \$28,000 for injury to leg, was still high and is reduced to \$23,000. 176M331, 223NW605.

Verdict for \$15,000 held not excessive for shortened leg. 176M377, 223NW619.

Where one verdict has been set aside as excessive the Supreme Court will exercise great caution in setting aside or reducing a second verdict as excessive. 176M437, 223NW675.

\$16,000 held excessive and reduced to \$12,000 for injury to feet. 176M437, 223NW675.

Verdict for \$3,500 reduced to \$1,800 for wrongful arrest and imprisonment, held so excessive as to indicate passion or prejudice. 176M203, 223NW94.

\$4,200 not excessive for injury to leg. 177M42, 224NW255.

\$8,300 held not excessive for crippled left arm and hand of a farm renter, 42 years of age. 177M13, 224NW259.

Plaintiff could recover as damages the value of an automobile lost by a garage through negligence, though plaintiff purchased it under a conditional sale contract and had not paid all of the purchase price. 177M10, 224NW271.

Automobile owner can recover its entire value from garage which lost it by theft through negligence, though the automobile was insured against theft. 177M10, 224NW271.

\$4,000 for alienation of wife's affections, held not excessive. 177M270, 224NW839.

\$6,000 was not excessive to woman 70 years of age suffering badly fractured arm and collar bone and ribs. *Tegels v. T.*, 177M222, 225NW85.

\$800 for burning barn and other property held not excessive. 177M222, 225NW111.

Damages for breach of contract of employment, held not speculative or conjectural. 177M383, 225NW275.

Verdict for \$5,000 against bank officers inducing deposit, held not supported by the evidence and contrary to the law. 177M354, 225NW276.

Damages to chickens caused by selling poultryman raw linseed oil for cod liver oil were not so conjectural and speculative as to prevent recovery, and \$1,412.30, held not excessive for loss of poultry. 177M390, 225NW395.

Discrepancy in recovery amounting to five days' interest, held within the rule de minimis non curat lex. 177M563, 225NW815.

Where there is error in a charge affecting the amount of a verdict in a definitely ascertainable amount, the prevailing party should be allowed to remit the erroneous excess and there should not be a retrial of the whole case. 178M177, 226NW411.

\$7,500 for fracture of leg of 11 year old girl held excessive and reduced to \$5,000. 178M353, 227NW203.

Error in instruction as to testimony of only witness testifying as to damages, held to require new trial where verdict was in very large amount. 179M467, 229NW575.

\$2,564 for death of child, held not excessive. 179M528, 229NW784.

\$2,500, held not excessive for scalp wound requiring surgical treatment. 180M185, 230NW473.

\$3,000 for services of daughter, held not excessive. 180M100, 230NW478.

\$34,963 for serious burns to fireman earning \$150 per month, held excessive. 180M298, 230NW823.

\$32,500 for injuries to conductor, held excessive in view of errors in admission of evidence. 180M310, 230NW826.

\$6,000, held not excessive for death of girl, 23 years old. Waggoner v. G., 180M391, 231NW10(2).

Where verdict is excessive, and alternative motion for judgment or new trial is filed, proper order is award of new trial on condition that prevailing party consent to reduction. 180M540, 231NW222.

\$17,300, held not excessive for probably permanent injuries to car repairer 49 years old and earning \$105 per month. 181M97, 231NW710.

\$4,000 for injury to theatre patron, held not excessive. 181M109, 231NW716.

\$2,000 for alienation of affections of plaintiff's husband, held not excessive. 181M13, 231NW718.

\$1,800 to wife and \$1,000 to her husband for expenses and loss of services, held not excessive for injury to wife in automobile collision. 181M338, 232NW344. See Dun. Dig. 2597.

\$3,000, held not excessive for injury to person fifty-five years old. 181M406, 232NW715. See Dun. Dig. 2597.

\$3,500 for permanent injuries and disfigurement received in automobile accident, held not excessive. 181M180, 232NW3. See Dun. Dig. 2597.

\$9,690 for knee fracture and other injuries to leg and chest, and damage to automobile, held not excessive. 181M400, 232NW710. See Dun. Dig. 2597.

\$16,800, held not excessive for injury to child nine years old, causing permanent injury to the brain. 181M386, 232NW712. See Dun. Dig. 2597.

\$8,000, held not excessive for malpractice by physician in treating fractured limb of farmer thirty-eight years of age. 181M381, 232NW708. See Dun. Dig. 2597, 7493.

\$42,500 for fracture of thigh bone of engineer earning over \$300 per month, reduced to \$36,000. 43F(2d)397. See Dun. Dig. 2596.

Verdict for \$1,000 for malicious prosecution held not excessive. Miller v. P., 182M108, 233NW855. See Dun. Dig. 5745, 5750a.

A \$5,000 verdict for death held excessive where deceased, 76 years old, had retired from all gainful activities and his beneficiaries and next of kin were two adult daughters upon whom he had become largely dependent for support. Nahan v. S., 182M269, 234NW297. See Dun. Dig. 2617(24).

Where there is a severe and painful, but probably temporary injury, and there is conflict in the testimony as to its nature and extent, verdict for \$2,200 will not be disturbed on appeal. Randall v. G., 182M259, 234NW298. See Dun. Dig. 2597.

Verdict for \$20,000 was not excessive for fractured skull. Lund v. O., 182M204, 234NW310. See Dun. Dig. 2597.

Verdict for \$350 held not excessive for cutting of trees. Hansen v. M., 182M321, 234NW462. See Dun. Dig. 2597, 9696(33).

Instruction in malpractice case as to right of recovery for loss of hearing from pulling of impacted tooth, held proper. Prevey v. W., 182M332, 234NW470. See Dun. Dig. 7493.

Verdict for \$12,000 for malpractice in removing impacted tooth so as to affect the hearing and ability to swallow, held not excessive. Prevey v. W., 182M332, 234NW470. See Dun. Dig. 7493(17).

Verdict for \$7,500 was not excessive to an eighteen-year-old girl receiving a multiple fracture of the bones of the pelvis. Honkomp v. M., 182M445, 234NW638. See Dun. Dig. 2597.

Verdict for \$3,150 for malicious prosecution was excessive and was reduced to \$2,000. Krienke v. C., 182M549, 235NW24. See Dun. Dig. 2596, 2597, 5745, 5750a.

Where stucco workmen caused injury to roof and foundation by carelessness, measure of damages was difference between what building's value would have been had work been done in a workmanlike manner and the value as it was when work was completed. Carl

Lindquist & Carlson, Inc., v. J., 182M529, 235NW267. See Dun. Dig. 2567c(20).

Verdict for \$3,000 was not excessive for loss of use of fingers of left hand by farmer's wife. Martin v. S., 183M256, 236NW312. See Dun. Dig. 2597.

Verdict of \$4,000 to farmer for consequential damages arising out of injuries to wife's left arm and fingers, which prevented her from doing housework and from helping with the chores, held not excessive. Martin v. S., 183M256, 236NW312. See Dun. Dig. 2597.

Verdict for \$3,000.00 held not excessive for death of wife and mother with life expectancy of ten years. Kieffer v. S., 184M205, 238NW331. See Dun. Dig. 2597.

Verdict of \$4,000 held not excessive to a ten-year-old boy suffering skull fracture, destruction of eardrum and impairment of hearing. Flink v. Z., 184M376, 238NW791. See Dun. Dig. 2597.

Verdict for \$6,950 held not excessive for severe injuries and terrible sufferings, including fractures, burns and ugly scars. Olson v. P., 185M571, 242NW283. See Dun. Dig. 2597.

Verdict for \$1,650 for personal injuries and property damage, held not excessive. Marcel v. C., 186M366, 243NW265. See Dun. Dig. 2597.

Verdict for \$1,260 held not excessive to father of boy injured by automobile. Ludwig v. H., 187M315, 245NW371. See Dun. Dig. 2597.

\$7,000 held not excessive for permanent injuries to leg of 14-year-old boy. Ludwig v. H., 187M315, 245NW371. See Dun. Dig. 2597.

Verdict for \$5,200 was not excessive for crushed vertebra, arthritis and pain suffered by woman. Hoffman v. C., 187M320, 245NW373. See Dun. Dig. 2597.

Second verdict for \$3,200 for damages to farm by license for 5 structures to support power cables, held not excessive. Northern States Power Co. v. B., 187M353, 245NW609. See Dun. Dig. 2597.

Verdict for \$6,500, reduced to \$5,900, held not excessive for injury to hand and knee. Martin v. T., 187M529, 246NW6. See Dun. Dig. 2596, 2597.

Verdict for \$1,500, reduced to \$1,200, held not excessive for injured ligaments in back. Bolster v. C., 247NW250. See Dun. Dig. 2597.

Verdict of \$3,500 was not excessive for personal injuries to man 79 years old resulting in shortening of leg. Heitman v. K., 247NW583. See Dun. Dig. 2597.

Verdict for \$4,500 was not excessive for a lascivious assault upon a woman. Patzward v. P., 248NW43. See Dun. Dig. 2597.

Verdict for \$4,800 was not excessive for bilateral inguinal hernia and other injuries. Stone v. S., 248NW285. See Dun. Dig. 2597.

Verdict for \$1,500 against dentist for injury to tissues at base of tongue, held excessive and reduced to \$1,000. Ellering v. G., 248NW330. See Dun. Dig. 2596.

Verdict for \$5,500 was not excessive to a draftsman 35 years of age who suffered 40 per cent injury to eye and disfigurement. Mills v. H., 248NW705. See Dun. Dig. 2597.

Verdict for \$3,500, reduced to \$3,000, held not excessive for injury by assault upon a blacksmith which resulted in hemorrhage and incapacity. Farrell v. K., 248NW720. See Dun. Dig. 531(62).

Verdict for \$7,248.60 in favor of husband for injuries to wife 41 years old, held not excessive. Foslien v. S., 248NW731. See Dun. Dig. 2597.

37. General principles.
That disfigurement is concealed goes to amount of damage rather than the right to recover. Carlson v. N., 181M180, 232NW3. See Dun. Dig. 2570a(95).

38. Necessity of passion or prejudice.
172M362, 215NW512.

Amount of verdict in excess of what could be fairly said to be sustained by substantial evidence, most favorably viewed for plaintiff, is attributable to passion and prejudice. 43F(2d)397. See Dun. Dig. 7134.

Verdicts against plaintiffs in automobile accident case held not the result of passion and prejudice by reason of the fact that evidence was admitted showing that insurance company had paid medical expenses and compensation provided by Workmen's Compensation Law. Arvidson v. S., 183M446, 237NW12. See Dun. Dig. 7134.

39. Remitting excess.
Excessive verdict may be cured by remission. Klamann v. H., 181M109, 231NW716.

Where verdict is excessive, supreme court will order new trial unless plaintiff consents to reduction. Ebacher v. F., 246NW903. See Dun. Dig. 437a, 7079.

Verdict for damages in action against bank for fraud in sale of bond, held excessive and it was reduced. Ebacher v. F., 246NW903. See Dun. Dig. 2596, 3841.

42. For inadequate damages.
A verdict for less than amount due on conditional contract of sale held not perverse in action against purchasers for conversion of property. Pennig v. S., 249NW39. See Dun. Dig. 7161.

FOR ERRORS OF LAW ON THE TRIAL

43. What are errors on the trial.
Rulings on evidence and instructions cannot be reviewed in absence of proper exceptions. 171M518, 213NW919.

Admission of improper testimony tending to incite prejudice. 172M543, 216NW233.

New trial granted for errors of court with regard to admission of evidence, and court's remarks. 173M158, 217NW146.

The exception of evidence and cross-examination of witnesses held without prejudice. 174M97, 218NW453.

Exclusion of evidence. 174M573, 219NW913.

The direction of a verdict, if erroneous, is an error of law occurring at the trial. *Gale v. F.*, 220NW156.

Control of trial court over matter of allowing leading questions is practically absolute. 176M210, 222NW924.

The admission of immaterial evidence, not prejudicial, is not reversible error. 177M13, 224NW259.

Questioning witnesses as to their interest in an indemnity insurance company, which it was admitted had insured the defendant, was not error. 177M13, 224NW259.

Charge held not misleading when considered in connection with entire charge. 177M13, 224NW259.

Refusal to strike answer of witness was without prejudice where other similar evidence was received without objection. 177M425, 225NW273.

Where findings are decisive of all issues presented, new trial will not be granted because more specific findings could have been made. 177M425, 225NW273.

Rulings on evidence respecting priority between chattel mortgage, were not reversible error. 177M441, 225NW389.

Where complaint proceeded upon theory of fraudulent misrepresentation that defendant would send competent man to supervise erection of silo, and on the trial negligence of the person furnished was the only ground upon which a recovery could be had, held that submission was confusing. 177M420, 225NW393.

Whether sufficient foundation is laid for introduction of written documents and memoranda, is largely within the discretion of the trial court. 177M494, 225NW432.

Error in admitting extrinsic evidence in aid of construction is not ground for a new trial, where the court could not do otherwise than construe the writing as it did. *Martin v. F.*, 177M592, 226NW203.

A trial court's talk in open court to a jury seeking further instructions, held not to be an "irregularity," but may be reviewed as "errors of law occurring at the trial" and a settled case or bill of exceptions is necessary. 178M141, 226NW404.

Reception of evidence which could not have harmed appellant will not warrant a new trial. 178M471, 227NW491.

The trial court did not err in granting new trials because of erroneous instructions given in cases to recover damages resulting from an automobile accident and relating to the rights and duties of host, the driver, and guests, the passenger, including contributory negligence under the Wisconsin law. *Kassmir v. O.*, 182M324, 234NW473. See Dun. Dig. 7165.

Testimony erroneously received through mistake or inadvertence, but promptly stricken when the court's attention was directed thereto, does not require a new trial, where it is perceived that no prejudice resulted. *Drabek v. W.*, 182M217, 234NW6. See Dun. Dig. 7074.

That findings were made, which call for the same judgment called for by the verdict, is not ground for a new trial. *Commercial Union Ins. Co. v. C.*, 183M1, 235NW634. See Dun. Dig. 7074(13).

Where a verdict may have been based upon an erroneous instruction, there must be a new trial, unless it conclusively appears that the verdict is sustained upon other grounds. *General Electric Co. v. F.*, 183M178, 235NW876. See Dun. Dig. 7165.

New trial granted because of reception of hearsay evidence. *Edie v. S.*, 183M522, 237NW177. See Dun. Dig. 7180.

New trial was warranted where charge was confusing and did not state the law applicable. *Le Tourneau v. J.*, 185M46, 239NW768. See Dun. Dig. 7165.

Error in admitting or excluding evidence of fact otherwise satisfactorily proved by admissible evidence, or inadmissible evidence unobjected to, is no ground for new trial. *Milliren v. F.*, 186M115, 242NW546. See Dun. Dig. 7184.

New trial granted because of erroneous reception in evidence of memorandum to corroborate witness when it was not needed by witness. In *Re Ylijarvi's Estate*, 186M288, 243NW103. See Dun. Dig. 7184.

A charge should point out the issues of fact to be decided by the jury; but failure to do so, where the issues are simple and experienced attorneys have argued the same to the jury, should not call for a new trial, unless the application of some rule of law is so left as to mislead. *Newton v. M.*, 186M439, 243NW684. See Dun. Dig. 7165.

Excluding testimony as to collateral matters not materially bearing upon the main issues, even if error, does not of itself call for a new trial. *Newton v. M.*, 186M439, 243NW684. See Dun. Dig. 7183.

In litigation to determine right of mining corporations to merge over objection of minority stockholders, it was within discretion of court to permit evidence of result of explorations had up to time of trial, but refusal to do so held not so important as to require new trial. *Paterson v. S.*, 186M611, 244NW281. See Dun. Dig. 2014, 2074, 2122.

44. How far discretionary.

Order granting new trial for errors in instructions rests largely in the discretion of the trial court. *Naylor v. M.*, 185M518, 241NW674. See Dun. Dig. 7166.

45. Necessity of exceptions—notice of trial.

Use of wrong word in instruction ought not to result in new trial where no advantage was taken of court's invitation at close of charge to make corrections. 173M186, 217NW99.

Overruling of objections to admission of evidence may not be considered in absence of exceptions. *D. M. Gilmore Co. v. D.*, 187M132, 244NW557. See Dun. Dig. 388a, 7091.

Error not raised in motion for new trial was not subject for review. *Thornton Bros. Co. v. R.*, 246NW527. See Dun. Dig. 358, 358a, 388a.

FOR INSUFFICIENCY OF EVIDENCE

46. General rules.

Facts stated by plaintiff in personal injury action were so improbable that new trial granted. 171M164, 213NW738.

Action being based on contract, assignment that verdict was excessive came under this subdivision. 171M518, 213NW919.

Finding that guaranteed note was paid by the giving of a new note held not sustained by the evidence. 172M22, 214NW760.

Where the court erroneously withdraws from the jury the only evidence upon which a verdict in defendant's favor would be predicated the verdict is "not justified by the evidence and contrary to law." 172M598, 216NW333.

In action under Federal Employers' Liability Act, evidence held insufficient to sustain verdict on issue of negligence. 176M575, 224NW241.

Verdict for negative of issue must stand unless the evidence clearly establishes the affirmative. 181M385, 232NW629. See Dun. Dig. 7145.

When the evidence taken as a whole is manifestly contrary to a finding, it is an abuse of discretion not to grant a new trial, even if there be some evidence tending to sustain the finding. *National Pole & Treating Co. v. G.*, 182M21, 233NW810. See Dun. Dig. 7157(19).

On appeal from judgment entered on verdict, no motion for new trial having been made and only assignments of error being that court erred in refusing to direct a verdict or judgment notwithstanding verdict, the one question presented for review is whether evidence reasonably sustains verdict. *Freeman v. M.*, 185M503, 241NW677. See Dun. Dig. 388a.

A verdict and judgment sustained by great preponderance of evidence cannot be vacated on ground that substantial justice has not been done. *Ayer v. C.*, 249NW581. See Dun. Dig. 7142.

46a. Verdict not justified by evidence.

It is the right and duty of the trial court to direct a verdict when the state of the evidence is such as not to warrant a verdict for a party, and if he fails to do so the other party is entitled to a new trial. 173M402, 217NW377.

Question of excessiveness of verdict was not raised by assignment that verdict was not justified by the evidence and was contrary to law. 174M545, 219NW866.

Where only evidence of negligence to support a verdict against employer is evidence of negligence of a co-defendant employee, in whose favor jury finds a verdict, verdict against employer is perverse and a new trial is granted. *Ayer v. C.*, 187M169, 244NW681. See Dun. Dig. 6027a, 7161.

Verdict based upon great preponderance of evidence cannot be said to be "perverse." *Ayer v. C.*, 249NW581. See Dun. Dig. 7142.

48. After trial by court.

Where any one of several independent findings would support judgment, it is immaterial that evidence does not support one finding. 176M225, 222NW926.

51. After successive verdicts.

Anderson v. A., 179M461, 229NW579(1).

WHEN VERDICT CONTRARY TO LAW

54. General statement.

Ground that verdict was "not justified by the evidence and is contrary to law" did not raise question of excessiveness of damages in tort action. 174M545, 219NW866.

Where several grounds of negligence are charged and there is a general verdict, a new trial must be granted, if a verdict on any of the grounds is not justified. *Garratt v. D.*, 176M280, 223NW296.

Verdict for \$5,000 against bank officers inducing deposit, held not supported by the evidence and contrary to the law. 177M354, 225NW276.

A verdict against a corporation operating a drug store, and in favor of its managing officer who had sole charge of its business and who personally made the sale complained of, is perverse, and requires a new trial. *Tiedje v. H.*, 184M569, 239NW611. See Dun. Dig. 7115b, 7161.

New trial was not required because verdict was against city and in favor of building owner in action by pedestrian who slipped on ice on sidewalk. *Bracke v. L.*, 187M585, 246NW249. See Dun. Dig. 5045, 7161(41).

9326. Basis of motion.

There being no settled case or bill of exceptions the only question for review is whether the findings sustain the conclusions and judgment. 173M625, 217NW597.

Where sum of money was deposited with the clerk of court to await its further order, held that question of title was properly determinable by judgment in a plenary suit or upon issues framed and that trial court rightly refused to grant motion of one party that money be paid to him. 178M161, 226NW410.

Verdict cannot be impeached by affidavit of jurors as to what took place in jury room or by affidavit of person other than juror disclosing statements of juror as to proceedings of jury. 178M564, 227NW893.

In absence of extension of time, court cannot grant motion upon minutes after thirty days from coming in of verdict. 179M136, 228NW558.

Affidavits presented with proposed amended answer on motion for amended findings or new trial cannot be considered. 179M586, 229NW565.

Without a case or bill of exceptions, errors in a charge are not reviewable. Anderson v. C., 182M243, 234NW289. See Dun. Dig. 344(88).

Affidavits cannot be used on motion for a new trial to show alleged improper remarks of counsel in addressing the jury; the record must be protected at the time. Sigvertsen v. M., 234NW688. See Dun. Dig. 7096.

Where party moves only for judgment and does not ask for new trial, he waives errors which might have given him new trial. Yager v. H., 186M71, 242NW469. See Dun. Dig. 7076.

On joint motion for new trial by husband and wife, wife against whom no cause of action was proved was entitled to relief. McDermott v. R., 247NW683. See Dun. Dig. 7077(44).

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

1. In general.

Rulings on evidence and instructions cannot be reviewed in absence of proper exceptions. 171M518, 213NW919.

Where the court has jurisdiction and their is no settled case or bill of exceptions there is nothing for review on appeal where the findings and conclusions sustain the judgment. 173M611, 216NW244.

Claim of error in the amount of a judgment must first be submitted to the trial court. 173M325, 217NW381.

A general assignment that the court erred in denying a new trial presents no question for review where such motion is made on numerous distinct grounds. 173M529, 217NW933.

Supreme Court cannot consider assignments of error involving questions not presented to the trial court. 174M402, 219NW546.

On appeal, theory of case may not be shifted from that at trial. 174M434, 219NW552.

Supreme court cannot pass upon plaintiff's financial ability to perform a contract, when such question was not raised in the trial court. 175M236, 220NW046.

A trial court's talk in open court to a jury seeking further instructions held not to be an "irregularity," but may be reviewed as "errors of law occurring at the trial" and a settled case or bill of exceptions is necessary. 178M141, 226NW404.

On appeal from judgment without settled case or bill of exceptions, after trial to the court, the only question is whether findings of fact support the judgment. Wright v. A., 178M415, 227NW357.

Where the evidence is not preserved in a settled case objection of insufficiency of evidence is not available on appeal. 179M536, 229NW873.

Failure to object to service on jury panel of one who had a case pending and set for trial at the term, held not waiver of error. 179M557, 230NW91.

Errors assigned but not argued will not be considered. 180M33, 230NW117.

When no ground for new trial is stated in the motion therefor the judgment will be affirmed. 180M93, 230NW269.

Assignment that court erred in granting new trial for errors occurring at trial, held sufficient. 180M395, 230NW895.

Claim of prejudice from dismissal as to codefendant will not be considered for first time on appeal. 180M467, 231NW194.

Theory pursued below must be adhered to on appeal. Gunnerson v. M., 181M37, 231NW415(2).

A question not made by pleadings, evidence, rulings on evidence, requests to charge, or by the specifications of error in the motion for new trial, cannot be raised for the first time on appeal. Duluth, M. & N. Ry. Co. v. M., 183M414, 236NW766. See Dun. Dig. 384.

In an attorney's lien proceeding, it is too late to object, for the first time on appeal, that the lien claimant was not attorney of record and so not entitled to a lien in any event. Meacham v. E., 184M607, 240NW540. See Dun. Dig. 384(39).

Where there is no bill of exceptions or settled case, it must be assumed that all issues and facts determined by the findings were litigated by consent. Rosenfeldt's Will, 185M425, 241NW573. See Dun. Dig. 372(74).

Questions, not jurisdictional, not raised by pleadings or presented to trial court, are not for review on appeal. McCormick v. H., 186M380, 243NW392.

One cannot try a case upon one theory and then shift his position on appeal. Steward v. N., 186M606, 244NW813. See Dun. Dig. 401.

Where insurer failed to claim right to deduct premiums from benefits on the trial, it cannot claim it on appeal from adverse judgment. Smith v. B., 187M220, 244NW817. See Dun. Dig. 384.

Defendant, not objecting to plaintiff's claimed measure of damages, consented to try case upon such theory, and cannot object thereto on appeal. Investment Associates v. H., 187M555, 246NW364. See Dun. Dig. 404.

Upon appeal from judgment without a settled case or bill of exceptions, sole question for consideration is sufficiency of facts found to support conclusion of law. State v. Waddell, 187M647, 246NW471. See Dun. Dig. 387.

Where one of defendants in action for death was son and beneficiary of decedent, defendants could not complain of a general verdict for administrator where they did not seek a reduction or appointment below. Anderson v. A., 248NW35. See Dun. Dig. 384.

2. Objections to pleadings.

Civil case is unnecessary in order to review an order for judgment on the pleadings. 178M442, 227NW891.

Contention that counterclaim could not be maintained cannot be considered on appeal where not made at the trial nor presented as ground for new trial. Renn v. W., 185M461, 241NW581. See Dun. Dig. 384, 388a.

4. Reception of evidence.

When no exception is taken to ruling on evidence at the trial and there is no motion for new trial with a specification of error, the ruling is not reviewable on appeal from the judgment. 174M131, 218NW455.

Objection to sufficiency of evidence of ownership of land not suggested at trial, comes too late on appeal. Luebke v. C., 178M40, 226NW415.

Where evidence was received subject to objection, to be ruled upon later, and no rulings were so made, there was nothing to be reviewed in absence of a motion for a new trial. 178M120, 226NW516.

Testimony as to conversation with person since deceased cannot be first objected to on motion for new trial or appeal. 178M452, 227NW501.

That hearing should have been on oral evidence cannot be raised for first time on appeal. 179M488, 229NW791.

A letter of a witness impeaching his testimony was properly received, there being no objection to specific sentences containing irrelevant or immaterial matters. Martin v. S., 183M256, 236NW312. See Dun. Dig. 9728, 10351.

Exclusion of evidence is not reviewed in absence of exception. Mutual Trust Life Ins. Co. v. B., 187M503, 246NW9. See Dun. Dig. 9728.

Where evidence is received without objection, or objections are withdrawn, no error can be assigned on its reception on appeal. State v. Padares, 187M622, 246NW369. See Dun. Dig. 384, 9728.

Assignments of error upon rulings excluding or admitting testimony must be sufficiently specific to point out ruling challenged. Carr v. W., 246NW743. See Dun. Dig. 362.

It is not sufficient to assign error upon reception of testimony of a named witness, where a large part of testimony of such witness was rightly admitted. Carr v. W., 246NW743. See Dun. Dig. 362.

Employee is precluded in supreme court from raising objection to admission of evidence claimed to be incompetent, not objected to below. Cooper v. M., 247NW805. See Dun. Dig. 9728.

4½. — Offer of proof.

Error in exclusion of evidence was not reviewed where there was no offer of proof. Tierney v. G., 185M114, 239NW905. See Dun. Dig. 9717.

5. Misconduct of counsel.

179M325, 229NW136.
Improper remarks of counsel, held not ground for reversal in absence of objection or exception. Seitz v. C., 181M4, 231NW714.

Reviewing court will not consider statements of counsel to jury in argument in absence of objection. Olson v. P., 185M571, 242NW283. See Dun. Dig. 384, 388a.

There is nothing to review where at close of argument, not taken down by reporter, defendant's counsel attempted to take exceptions, but attorneys could not agree as to what had been said. Adams v. R., 187M209, 244NW810. See Dun. Dig. 384, 388a.

6. Instructions.

181M400, 232NW710.
Instruction not to be questioned on appeal in absence of exception. 170M175, 213NW899.

An inadvertent statement in the instructions to the jury in a criminal case must be called to the court's attention. 172M139, 214NW785.

Use of wrong word in instruction ought not to result in new trial where no advantage was taken of court's invitation at close of charge to make corrections. 173M186, 217NW99.

An instruction is not reviewable when no exception has been taken and the same is not assigned as error on a motion for a new trial. 174M216, 218NW891.

Errors assigned as to the charge of the court are held to come within the rule of Steinbauer v. Stone, 85M274, 88NW754, and later cases applying that rule. 175M22, 220NW162.

Objection could not be first made on appeal that charge of court as to damages was not complete. 176M331, 223NW605.

Appellants not calling court's attention to error in charge, could not complain on appeal, though they specified error in motion for new trial. 178M238, 226NW702.

Where charge is not excepted to or sufficiently assigned as error in the motion for new trial, it becomes the law of the case on appeal. 178M411, 227NW358.

Instructions, unobjected to, become the law of the case, and the sufficiency of the evidence to sustain the verdict is then to be determined by the application of the rules of law laid down in the charge. *Bullock v. N.*, 182M192, 233NW858. See Dun. Dig. 9792(38).

Where the trial court in its instructions to the jury erroneously states that a particular fact in issue is admitted, it is the duty of the counsel to direct the court's attention thereto if he expects to base error thereon. *State v. Solum*, 183M36, 235NW390. See Dun. Dig. 9797(75).

If appellant deemed a word used in the instruction ambiguous, he should have directed the court's attention thereto before the jury retired. *Zobel v. B.*, 184M172, 238NW49. See Dun. Dig. 9798(82).

Language of court as to consideration of statements by lawyers if ambiguous or incorrect should have been called to the trial court's attention for correction. *Pearson v. N.*, 184M560, 239NW602. See Dun. Dig. 9798(82).

Errors assigned upon the charge are unavailing where appellant approved the charge when given and did not challenge it in the motion for a new trial. *Rahn v. F.*, 185M246, 240NW529. See Dun. Dig. 287.

Fact that no exceptions were taken to the charge at the trial was immaterial where trial court granted new trial for errors assigned in the motion for a new trial. *Naylor v. M.*, 185M518, 241NW674. See Dun. Dig. 388a.

Instructions not challenged on motion for a new trial cannot be attacked on appeal. *Carr v. W.*, 246NW743. See Dun. Dig. 385.

Where no exceptions are taken to charge which as a whole fairly submits issues, errors cannot be subsequently assigned upon inadvertent or faulty statements which could readily have been corrected if called to attention of court. *Donaldson v. C.*, 247NW522. See Dun. Dig. 364.

No instructions were requested and no exceptions taken to charge, which therefore became law of case. *Flower v. K.*, 250NW43. See Dun. Dig. 9797.

7. Motion for directed verdict.

Opposing party not having objected to entertainment of motion for directed verdict which failed to specify the grounds, nor having assigned such defect in motion as a ground for new trial, cannot raise point for first time on appeal. 176M52, 222NW340.

The supreme court cannot order judgment notwithstanding the verdict where no motion to direct a verdict was made at the close of the testimony. 181M347, 232NW522. See Dun. Dig. 393.

On appeal from a judgment after a jury trial, even though there has been no motion for a new trial, court will consider question of sufficiency of evidence to support verdict, where it has been expressly presented below by motion for directed verdict. *Ciresi v. G.*, 187M145, 244NW688. See Dun. Dig. 385.

8. Findings of fact.

In case tried to court involving a settlement of accounts, where it is claimed for appellant that alleged errors with respect to minor debits or credits have been made, proper practice requires a motion for amended findings so that error may be corrected in the trial court. 174M507, 219NW758.

In an action tried by the court, an issue upon which the court made no finding, upon which neither party has requested findings and which is not covered by any assignment of error, presents no question for review. 175M382, 221NW426.

Findings of court presumed to be correct in absence of settled case. 176M588, 224NW245.

Where action was tried upon presumption that plaintiff was owner of mortgaged premises, it is too late upon appeal for defendant to claim that there was no direct proof of ownership. 177M119, 224NW696.

10. Entry of judgment.

Objection to form of judgment cannot be first raised on appeal. 176M254, 223NW142.

Assuming that it was improper to enter judgment on the verdict in ejectment returned without an order of the court, the correction was with the trial court. *Deacon v. H.*, 182M540, 235NW23. See Dun. Dig. 2906, 5040, 5050.

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

Appeal being from the judgment and there being no settled case or motion for new trial, the record presents only the question as to whether the findings of fact sustain the conclusions of law. 175M619, 221NW648.

Where there is no settled case and the findings of the trial court are not questioned, such findings are controlling on appeal. 178M282, 226NW847.

Without a case or bill of exceptions, errors in a charge are not reviewable. *Anderson v. C.*, 182M243, 234NW289. See Dun. Dig. 347(22).

9329. Bill of exceptions or case.

Court properly extended time to settle the case. 174M97, 218NW453.

Where an appeal has been promptly taken and a settled case is needed to properly present and determine the appeal, and where the hearing of the appeal is not shown to be delayed, and no prejudice shown, the courts are disposed to aid the presentation and hearing of the appeal on the merits. *State v. Enersen*, 183M341, 236NW488.

Record held not to show abandonment by defendants of their intention to move for a settled case. *State v. Enersen*, 183M341, 236NW488.

The fact that the opponent's attorney otherwise acquires knowledge that a decision has been filed, or that a copy of the decision is mailed by the judge to counsel for each party does not take the place of, or dispense with, the notice required by statute. *State v. Enersen*, 183M341, 236NW488. See Dun. Dig. 317.

Trial judge should have in the exercise of discretion allowed and settled proposed case, though forty days' time stated had expired. *State v. Enersen*, 183M341, 236NW488.

Where case is tried to the court and decision later filed, this section requires the party who wishes to start the time running for his opponent to serve a proposed settled case, to serve on his opponent a written notice of the filing of the decision, containing a sufficient description of the decision to identify it. *State v. Enersen*, 183M341, 236NW488. See Dun. Dig. 317.

When an order is based upon the records, no certificate of settled case is required. *First State Bank of New York Mills v. W.*, 185M225, 240NW892. See Dun. Dig. 339(60).

REPLEVIN

9331. Possession of personal property.

Replevin to recover property sold did not bar a subsequent action for the price on the theory of a rescission or election, the replevin action being dismissed. 171M483, 214NW284.

Furnace and attachment held not to become part of realty as between seller and owner of realty. 173M121, 216NW795.

In an action in replevin, immediate delivery of the property need not be asked by plaintiff. 143M200, 173NW439.

Where in an action of replevin under a chattel mortgage given as part of a new contract, constituting an accord and satisfaction, the making of the contract and the default are admitted, a verdict was properly directed for plaintiff. 175M357, 221NW238.

Where plaintiff in replevin for mortgaged chattels declares generally as an owner entitled to possession, the defendant, under general denial, may prove payment of the debts secured by the mortgage. 176M406, 223NW618.

In replevin for mortgaged chattels, plaintiff has the burden of proof that the goods replevined are those mortgaged. 176M406, 223NW618.

Where merchants made mistake in counting votes in contest for automobile, they could recover the car and give it to the proper person. 176M598, 224NW158.

Plaintiff must be entitled to immediate possession at the commencement of the action, and lessee of farm was not entitled to possession of crops while rent was in default under lease amounting to chattel mortgage. 178M344, 227NW199.

Lessee suing to recover crops in possession of lessor under lease in effect a chattel mortgage had the burden of showing that rent was not in default at commencement of action. 178M344, 227NW199.

Where complaint was broad enough to cover either replevin or conversion court properly required election. 181M355, 232NW622. See Dun. Dig. 7508(22).

Where owner of property delivers it to another for purpose of having it delivered to a customer, and such other fails to so deliver it, the owner is entitled to recover the property. *Hoiby v. F.*, 185M361, 241NW58. See Dun. Dig. 8407(51).

Proof of demand before suit is not necessary in a replevin action where it is apparent that a demand would have been futile. *Hoiby v. F.*, 185M361, 241NW58. See Dun. Dig. 8409.

Officer in Naval Militia may sue enlisted man in replevin to recover equipment. *Op. Atty. Gen.*

9332. Affidavit.

Plaintiff manufacturer and owner of cab body and truck body held to have sufficient right of possession to maintain replevin against one in possession. *Hoiby v. F.*, 185M361, 241NW58. See Dun. Dig. 8406.

9333. Bond and sureties.

A bailee may maintain an action on a replevin bond. 177M515, 225NW425.

Bond in amount of value of property as alleged in complaint, held properly nullified. 179M588, 229NW804.

In action on bond only money judgment can be rendered. 180M163, 230NW464.

9334. Requisition to sheriff—Service and return.
 In replevin, the officer's return on the writ held not conclusive as to an issue collateral to the writ and levy, involving the time of seizure only, so as to preclude proof that the seizure was made on a date later than that shown by the return. *Grossman v. L.*, 184M446, 238 NW893. See Dun. Dig. 7818.

The reason of the rule making conclusive an officer's return on a writ extends only to cases where it is collaterally attacked for the purpose of invalidating the officer's proceedings or defeating the writ or some right thereby acquired. *Grossman v. L.*, 184M446, 238NW893. See Dun. Dig. 7818.

9340. Claim of property by third person.
 Failure by a third party to make claim does not relieve judgment creditor from liability for conversion in levy of an execution. *Lundgren v. W.*, 250NW1. See Dun. Dig. 3551(65).

Court officer of municipal court of Virginia comes under this section. *Op. Atty. Gen.*, May 17, 1933.

ATTACHMENT

9342. When and in what cases allowed.

½. In general.
 Evidence held to sustain finding that property attached was held in trust for defendant. 172M83, 214NW771. Fraudulent conveyances. 172M355, 215NW517.

1. Nature of proceeding.
 An attachment against one having only a bare legal title to land without any beneficial interest therein, does not create any lien thereon where the creditor had knowledge or notice of the facts. 173M225, 217NW136.

4. In what actions allowed.
 Actions for slander of title are not "actions for libel or slander" within the meaning of this section. 178M 27, 226NW191.

5. At what time may issue.
 173M580, 218NW110.

Summons must be issued at or before the time the writ of attachment issues, and there is no "issuance" of summons until it is either served or delivered to the proper officer, and this requirement is not modified by the last sentence of this section. 181M349, 232NW512. See Dun. Dig. 625(34).

9343. Contents of affidavit.

3. Transfer with intent to defraud.
 That defendant is in the act of moving upon land to make the same a statutory homestead, nor that more than a year prior to the attachment defendants had offered and attempted to reconvey land to the creditor in satisfaction of note sued on which was given for part of the purchase price of such land, held not to constitute fraudulent disposition or attempt to dispose of the property so as to justify attachment, there being no circumstances indicating fraudulent intent. 172M547, 216 NW231.

An affidavit for attachment is good which charges that defendant has "disposed of his property and is about to * * * dispose of other property with the intent to delay or defraud his creditors. *First State Bank of New Germany v. H.*, 187M502, 245NW829. See Dun. Dig. 636.

Affidavit for attachment that defendant had assigned and disposed of part of her property with intent to delay and defraud creditors and was about to assign and dispose of rest of her property with like intent, held sufficient. *Callanan v. C.*, 248NW45. See Dun. Dig. 623, 636.

9350. Motion to vacate.

½. In general.
 Where there is conflict in the affidavits or evidence presented on a motion to vacate an attachment, the determination of the trial court will be sustained unless it is manifestly contrary to the affidavits or evidence presented. *Phillips Petroleum Co. v. J.*, 182M237, 234NW 11. See Dun. Dig. 662(51).

5. Practice on hearing.
 Where affidavit for attachment and defendant's denial of facts set forth were sufficient, burden was upon plaintiff to establish a cause in rebuttal. *Callanan v. C.*, 248NW45. See Dun. Dig. 657n40.

GARNISHMENT

9356. Affidavit—Guarantee summons—Title of action.—In an action in a court of record or justice court for the recovery of money, if the plaintiff, his agent or attorney, at the time of issuing the summons, or at any time during the pendency of the action, or after judgment therein against the defendant, files with the clerk of the court, or, if the action is in a justice court, with the justice, an affidavit stating that he believes that any person (naming him) has property or money in his hands or under his control belonging to the defendant, or that such person is indebted to the defendant, and that the value of such property or the amount of

such money or indebtedness exceeds twenty-five dollars, if the action is in the District Court, or ten dollars if in a justice court, and if the plaintiff files with such affidavit a copy of the complaint when the complaint has not been theretofore either served on the defendant or filed in said action, and, provided further, that no fee be charged by the Clerk of the Court for filing said copy of complaint, a summons may be issued against such person, as hereinafter provided, in which summons and all subsequent proceedings in the action the plaintiff and defendant shall be so designated, and the person against whom such summons issues shall be designated as garnishee. (R. L. '05, §4229; G. S. '13, §7859; '27, c. 300; Apr. 17, 1929, c. 215.)

Garnishment proceedings usually have to do with personal property only. 176M18, 222NW509.

Title to promissory note in custody of third person may be transferred by oral agreement. 176M18, 222NW 509.

Garnishment does not lie in an action for specific performance, where merely as an incident to the relief asked, an accounting of rents and profits is sought, without allegation as to the probable amounts thereof. 176 M522, 223NW922.

A garnishment proceeding is not a suit which is removable to the federal court under Mason's U. S. Code Tit. 28, §§71, 72. 177M182, 225NW9.

Garnishment was not permitted in action to cancel assignment of note and mortgage. *Williamson v. G.*, 227 NW420.

By answering and appearing generally in the main action defendant confers jurisdiction over his person both in the main action and in garnishment proceeding, and garnishee by appearing in garnishment proceeding gives jurisdiction over himself. *Chapman v. F.*, 184M318, 238NW637. See Dun. Dig. 3961.

Requirements that summons in main action must be issued and affidavit with copy of complaint filed before issuance of a garnishee summons are jurisdictional. *Chapman v. F.*, 184M318, 238NW637. See Dun. Dig. 3961.

9357. Proceedings in justice court.

A justice of the peace is entitled to his fees for preparation of notice to the defendant in garnishment proceedings and for making a copy which is made a part of the notice by reference. *Op. Atty. Gen.*, Sept. 30, 1930.

9358. In district court.

The garnishee having failed to make a disclosure under oath, judgment was properly taken against him by default. *Security State Bank of Lewiston v. T.*, 184M156, 238NW52. See Dun. Dig. 4008(62), 4011.

Fatal defect in service of garnishee summons was immaterial where there was general appearance by duly authorized agent of garnishee. *Security State Bank of Lewiston v. T.*, 184M156, 238NW52. See Dun. Dig. 3970 (53).

9359. Effect of service on garnishee—Fees.

Garnishment attaches and binds all the property and money in the hands of or under the control of the garnishee at the date of the service of the garnishee summons. *First State Bank of New York Mills v. W.*, 185 M225, 240NW892. See Dun. Dig. 3957.

Garnishment against a non-resident is a proceeding in rem, and jurisdiction can be acquired only by seizing property under such process, and then only to the extent of the property seized. *First State Bank of New York Mills v. W.*, 185M225, 240NW892. See Dun. Dig. 3949(33).

Where no property is seized in an action against a nonresident, the proceeding is subject to attack directly or collaterally at any time for want of jurisdiction. *First State Bank of New York Mills v. W.*, 185M225, 240NW 892. See Dun. Dig. 5139.

A third party having levied under execution upon property claimed to be involved in garnishment proceedings has such an interest in the matter that he may intervene. *First State Bank of New York Mills v. W.*, 185M225, 240NW892. See Dun. Dig. 3999.

9359-1. Garnishee summons—when effective.—No garnishee summons served subsequent to the passage of this act upon the garnishee in any action whereby a sum of less than \$25.00 is impounded shall be effective for any purpose after two years from the date of service thereof upon the garnishee unless the plaintiff, or his attorney, shall prior to the expiration of such time serve upon the garnishee an affidavit to the effect that the action against the defendant is being diligently prosecuted and that judgment therein has not been entered, or if entered, that the time to appeal has not expired and that the affidavit is made for the purpose of continuing the force and effect of the summons upon the garnishee for one

year. The force and effect of the summons upon the garnishee may be extended from year to year if the facts in the case warrant it by serving a like notice prior to the expiration of the previous notice. (Act Apr. 20, 1931, c. 213, §1.)

9359-2. Same.—No garnishee summons served prior to the passage of this act upon the garnishee in any action shall be effective for any purpose after two years from the passage of this act unless its force and effect upon the garnishee is extended prior to the expiration of said year by serving a similar affidavit upon the garnishee as provided for in section one of this act. (Act Apr. 20, 1931, c. 213, §2.)

9360. Property subject to garnishment.

First State Bank v. W., 185M225, 240NW892; notes under §9359.

3. Held not garnishable.

Claim under fire policy was not subject to garnishment, in absence of sworn proof of loss, even though there had been an adjustment of the amount of the loss. 172M43, 214NW762.

Where bills for labor and material remain unpaid by a contractor who has agreed to pay all of them as incident to the completion of his contract, money unpaid on such contract, is not subject to garnishment because its payment depends upon a contingency. 175M436, 221NW677.

4. In general.

Finding that money garnisheed was not a trust fund sustained. 174M504, 219NW504.

9361. In what cases garnishment not allowed.

First State Bank v. W., 185M225, 240NW892; notes under §9359.

Claim under fire policy was not subject to garnishment in advance of sworn proof of loss, although there had been an adjustment of the amount of the loss under non-waiver agreement. 172M43, 214NW762.

The relationship between the garnishee and the defendant at the time of the service of the garnishee summons is the test of liability. 173M504, 216NW249.

A party shall not be adjudged a garnishee by reason of any liability incurred, as maker or otherwise upon any check or bill of exchange. 173M504, 216NW249.

Drawer of check was not subject to garnishment though check was given on condition that it should not be presented for payment until deposit was made in the bank. 173M504, 218NW99.

An unpaid check in the hands of a payee attorney, a part of the proceeds of which will, when collected, belong to his client, does not constitute garnishable money or property. Lundstrom v. H., 185M40, 239NW664. See Dun. Dig. 3967.

Subd. 3.

Bearer bonds situated in state may be subjected to jurisdiction of court in proceeding in rem or quasi in rem. First Trust Co. v. M., 187M468, 246NW1. See Dun. Dig. 2346.

9362. Examination of garnishee.

Security State Bank of Lewiston v. T., 184M156, 238NW52. See Dun. Dig. 4008(62), 4011; notes under §9358.

Failure to present the affidavit of non-residency to the officer taking the disclosure was a mere irregularity not going to the jurisdiction over defendant in respect of the property reached by the garnishment. 171M280, 214NW26.

There was no abuse of judicial discretion in permitting a garnishee who was not represented by an attorney at the disclosure to make a supplemental disclosure. Douglas State Bk. v. M., 182M178, 233NW864. See Dun. Dig. 3985.

The garnishee is not estopped by the facts revealed by first disclosure; and plaintiff, with the information thereby gained, was in position to protect its rights on supplemental disclosure. Douglas State Bk. v. M., 182M178, 233NW864. See Dun. Dig. 3985.

9364. Municipal corporations, etc.—Procedure.

Mason's Stat. 1927, §§4135 to 4137, relating to assignment, apply to salary of elective county commissioner. Murphy v. C., 187M65, 244NW335. See Dun. Dig. 566.

A public school teacher may be garnisheed on open account or note. Op. Atty. Gen., Feb. 17, 1933.

9366. Claimant of property to be joined.

181M404, 232NW631. See Dun. Dig. 3975.

3. Pleading—Burden of proof.

The use of the word "Bank" instead of "Company" in the name of the claimant did not affect the situation; no one was misled or prejudiced thereby. Hancock-Nelson Mercantile Co. v. M., 182M426, 234NW696. See Dun. Dig. 4001.

5. Practice.

A referee appointed by the court may bring in a claimant without a direct order of the court to do so. Hancock-Nelson Mercantile Co. v. M., 182M426, 234NW696. See Dun. Dig. 8318(42).

Third party claimant failing to appear and intervene in compliance with order held barred. Hancock-Nelson Mercantile Co. v. M., 234NW696. See Dun. Dig. 3998.

9367. Proceedings when debt or title is disputed.

Hancock-Nelson Mercantile Co. v. M., 182M426, 234NW696; note under §9366.

10. Appeal.

Order granting plaintiff leave to file a supplemental complaint against a garnishee held not appealable. 172M368, 215NW516.

9368. Time for appearance in garnishee proceedings.

Removal on default. 177M182, 225NW9.

9373. Amount of judgment.

Judgment may go against garnishee without notice to defendant as to whom jurisdiction has been obtained. Dahl v. N., 180M119, 230NW476(2).

Where such judgment has been paid defendant's motion filed four months later is properly denied. Dahl v. N., 180M119, 230NW476(2).

Insurer defending suit for damages against insured, held liable as garnishee for amount of judgment, in view of its conduct of the defense. 181M133, 231NW817.

9376. Proceedings when garnishee has lien.

No judgment against garnishee was warranted where the only property he held was right of redemption from mortgage foreclosure. Douglas State Bk. v. M., 182M178, 233NW864. See Dun. Dig. 3967.

9383. Discharge of attachment or garnishment.

Bond to release garnishment, reciting that there is a stated sum of money in the possession of the garnishee, held to estop the principal and sureties from denying that there was any garnishable property in the hands of the garnishee. 181M404, 232NW631. See Dun. Dig. 3975.

After the filing of an approved supersedeas bond in the Supreme Court, a prior garnishment or levy under execution may be vacated and released where respondent's rights are amply protected by the bond. Barrett v. S., 184M107, 237NW881. See Dun. Dig. 333.

INJUNCTION

9385. How issued—Effect on running of time.

While courts of equity will not interfere with the action of corporate officers as to acts within their powers and which involve an exercise of discretion committed to them, it will stay those acts which are in excess of authority or in violation of their trust. 172M110, 215NW192.

Equity has jurisdiction to enjoin and abate nuisances, without jury trial. 174M457, 219NW770.

Court did not err in refusing defendant an injunction restraining plaintiff for all time from conducting business or having employment in its stockyards. (Mason's U. S. Code, Title 7, §181, et seq.) 175M294, 221NW20.

A contract whereby a surgeon and physician agrees not to practice his profession within a radius of 25 miles from a small municipality for a period of 5 years, is valid and protection will be given by injunction. 175M431, 221NW642.

Injunction does not lie against a municipality and its officers to restrain enforcement of special assessments after they are certified to county auditor. 176M76, 222NW518.

One or more taxpayers may enjoin the unauthorized acts of city officials, seeking to impose liability upon the city or to pay out its funds. 177M44, 224NW261.

The city is not an indispensable party to a suit by taxpayers to enjoin unauthorized acts of city officials. 177M44, 224NW261.

One having only a purported contract, signed by a city official is not an indispensable party. 177M44, 224NW261.

Injunction was proper remedy to restrain city from improperly revoking taxicab license. National Cab Co. v. K., 182M152, 233NW838. See Dun. Dig. 4480.

Relief by injunction against the laying out of a public street, where nothing has been done except the adoption by the city council of a preliminary resolution appointing commissioners to view the premises and assess benefits and damages, is premature. Heller v. S., 182M353, 234NW461. See Dun. Dig. 4480.

Where no appeal is provided for from an order laying out the street, except on the question of benefits and damages, the landowner whose property is taken or damaged has an adequate remedy at law by certiorari to review all other questions raised. Heller v. S., 182M353, 234NW461. See Dun. Dig. 4472(44).

Court properly refused to enjoin former employee of oil company from taking employment with another oil company. Standard Oil Co. v. B., 186M483, 243NW701. See Dun. Dig. 4479a.

Injunction to restrain spreading of school tax will not issue where taxes involved have been spread and part of them collected. Republic I. & S. Co. v. B., 187M373, 245NW615. See Dun. Dig. 4467, 9535a.

Suit by bondholder prior to demand on trustee to sue. North Shore Co. v. B., 247NW505.

District court has no jurisdiction to enjoin administrator from selling land under license of probate court. Munding v. B., 248NW47. See Dun. Dig. 7770, 7770c.

Easement for highway is sufficient title to support injunction by state. State v. Nelson, 248NW751. See Dun. Dig. 4155, 4157, 4180.

Fact that defendant's conduct is criminal is no bar to relief by injunction to which plaintiff would otherwise be entitled. *State v. Nelson*, 248NW751. See Dun. Dig. 4190, 7271.

9386. Temporary injunction when authorized.

1. In general.

The granting of a temporary injunction rests in the discretion of the trial court. 172M179, 215NW215.

Granting or denial of a temporary injunction against the enforcement of an ordinance, always involves an element of discretion. 175M276, 221NW6.

A temporary injunction should not be made conditional on the surrender by the party to whom it is granted of a substantial cause of action or defense at issue in the suit. 177M318, 225NW150.

Restraining order to prevent city from paying expenses of officers in attending convention, held properly denied. 180M293, 230NW788.

Granting of a temporary injunction lies largely in discretion of trial court. *State v. Nelson*, 248NW751. See Dun. Dig. 4490.

9387. Notice of application—Restraining order.

Issues of fact in a pending action are not triable on a motion for a temporary injunction. 177M318, 225NW150.

9388. Bond required—Damages.

Where a bond is given on the issuance of a temporary injunction the court may permit the dismissal of the suit without prejudice, and leave the defendant to its remedy at law for damages on the injunction bond. *United Motors Service v. Tropic-Aire*, (CCA8), 57F(2d) 479.

Where temporary injunction was dissolved by order, and, without a vacation of that order or a reinstatement of the injunction, another order was made purporting to stay proceedings, held that surety was released. 177M103, 224NW700.

State is not required to furnish a bond in order to procure a temporary writ of injunction. *State v. Nelson*, 248NW751. See Dun. Dig. 4499.

RECEIVERS

9389. When authorized.

1. In general.

The appointment of a receiver does not affect the rights of parties who dealt with each other in good faith before notice of the appointment. 172M24, 214NW750.

Contempt in failing to convey property to receiver. 172M102, 214NW776.

Propriety of ex parte appointment cannot be questioned in subsequent proceedings, where no appeal was taken from order denying motion to vacate the appointment. 172M193, 214NW886.

Directions in order appointing receiver in mortgage foreclosure must be construed in harmony with law pertaining to foreclosures, and a receiver was not authorized to pay taxes or interest on prior incumbrances falling due subsequent to sale, and no income derived during the year of redemption could be applied to the payment of taxes or interest. 172M193, 214NW886.

Receiver could apply rents and profits to payment of such taxes and interest prior to foreclosure sale. 172M193, 214NW886.

The duties of a receiver are to preserve the property pending receivership and all expenses as well as compensation for services are payable out of income and if that is insufficient out of the property itself. 173M10, 216NW252.

The selection of the receiver lies with the court appointing him. 173M493, 217NW940.

The appointment of a receiver where the court has jurisdiction is not subject to collateral attack. 175M47, 220NW400.

The propriety of making an appointment of a receiver is in a measure within the discretion of the trial court. 175M138, 220NW423.

In a proper case a receiver may be appointed without notice. 175M138, 220NW423.

If a party for whom a receiver is appointed without notice appears generally and is heard on the merits he cannot complain of earlier order because he was not served with notice. 175M138, 220NW423.

Without proof of insolvency or inadequacy of security, the non-payment of taxes, not shown to jeopardize title or security during year of redemption, does not warrant appointment of receiver in action to foreclose mortgage. 176M71, 222NW516.

Appointment of receiver held sufficient judicial determination of insolvency. *Miller v. A.*, 183M12, 235NW 622. See Dun. Dig. 4573.

The management of the company, a foreign corporation, having been found diligent, efficient, and honest, and guilty only of mistakes which have been corrected and are not likely to be repeated, the business being large, going, and solvent, with nothing in its nature or condition to require such action, it was not an abuse of discretion to refuse to appoint a receiver to wind up its business in this state. *Barrett v. S.*, 183M431, 237NW 15. See Dun. Dig. 8248.

Statute is not exclusive as to appointment of receivers and court may under its general equity powers appoint receivers in other cases in accordance with existing

practice. *Asleson v. A.*, 247NW579. See Dun. Dig. 8248 (31).

A receiver is not to be appointed when moving party has an adequate remedy at law. Id. See Dun. Dig. 8248 (33).

Purchasers of muskrats held not entitled to receivership against purchaser of land from fur farm company. Id.

Contract of purchase of muskrats in pairs held not to give purchasers lien upon property of fur farm company which was sold to a third party. Id.

When a creditor applying for appointment of receiver has no right to, interest in, or lien upon property in question, appointment will be refused. Id.

2. Action by corporation against officer.

In a proper case a receiver may be appointed without notice. 175M138, 220NW423.

3. Controversy between corporation stockholders.

Miller v. A., 183M12, 235NW622; note under §9191.

A court of equity will protect minority stockholders against the fraud of a majority and preferred stockholders without voting power against stockholders having the sole voting power. 175M138, 220NW423.

Stockholders of a foreign corporation, which has forfeited its charter and terminated its existence, may prosecute an action for appointment of a receiver (and for judgment for money due to be entered in the name of the receiver) to marshal corporate assets in state, and to pay creditors and distribute residue to stockholders. Such an action does not seek the exercise of any visitatorial power over the corporation. *Lind v. J.*, 183M239, 236NW317. See Dun. Dig. 2185.

This section held without application in an action by stockholders of a foreign corporation which has forfeited its charter for the appointment of a receiver and the marshaling of assets and distribution thereof. *Lind v. J.*, 183M239, 236NW317. See Dun. Dig. 2185.

That but three of ten directors, and one of three liquidating committeemen, were indebted to corporation, nothing more appearing, held not to show conflicting interests of such nature as to justify appointment of receiver. *Zwick v. S.*, 186M308, 243NW140.

In absence of imminent danger of loss, or need for summary relief, a receiver should not be appointed for solvent corporation on petition of minority stockholders. Rule applied to banking corporation in voluntary liquidation and without creditors. *Zwick v. S.*, 186M308, 243NW140. See Dun. Dig. 2138.

4. Insolvent corporations.

A general creditor, by virtue of the power of equity or by virtue of this section, has a standing before the court equal to that of a judgment creditor as contemplated by section 8013, except as to the burden of proof. 173M493, 217NW940.

13. Collection of assets.

A receiver cannot attack a chattel mortgage as void as to creditor because not recorded, without showing that he occupies a status to assail it. 175M47, 220NW 400.

G. S. 1923, §8345, does not apply to general creditor, but to such as are armed with process, or to a receiver representing creditors and vested with the right to attack. 175M47, 220NW400.

19. Attorney's fees.

The fixing and allowance of fees of an attorney for a receiver are largely in the discretion of the trial court and will not be disturbed except for an abuse of such discretion. 173M619, 216NW784.

20. Fees.

Where there is due notice and opportunity to be heard, the court having jurisdiction and control over a receivership proceeding has power and jurisdiction to fix the fees of receivers and attorneys employed therein, so long as the proceeding is pending before the court. *Todd v. H.*, 185M44, 240NW110. See Dun. Dig. 110.

JUDGMENT

9392. Measure of relief granted.

Res judicata. 172M290, 215NW211.

A judgment entered in a default case did not exceed the prayer in the complaint. 181M559, 233NW586. See Dun. Dig. 4996(70).

A judgment entered on a verdict directed for the defendant on the ground that the defendant was not authorized by the law under which it was organized to execute the promissory notes alleged as causes of action by the receiver of the payee bank, is not a bar to action for money had and received. *Turner v. V.*, 182 M115, 233NW856. See Dun. Dig. 5184(18).

One obtaining a judgment in an action to cancel a deed for costs and disbursements could not maintain a subsequent action to recover damages for expenses incurred, disbursements made and attorney's fees, etc. *Benton v. B.*, 183M584, 237NW424. See Dun. Dig. 5163.

2. After answer.

Rule that court is without jurisdiction to dispose of issues not tendered by the complaint, or toward relief beyond its scope, does not apply where issue is joined and there is a trial resulting in judgment. 176M117, 222NW527.

Judgment for defendant on action on contract, held not bar in subsequent action in conversion. 178M93, 226NW417.

3. Conclusiveness and collateral attack.

Where action was dismissed in this state on the ground of rendition of judgment in another state intervention of attorneys after such dismissal to vacate order of dismissal and permit enforcement of lien of attorney, held not a collateral attack on the foreign judgment. 47F(2d)112.

Plaintiff's attorney held not concluded by a dismissal secured by plaintiff pursuant to a settlement. 47F(2d) 112.

Oral evidence tending to show that summons had never in fact been served on corporation was a collateral attack on judgment, and was properly excluded in receivership proceeding. Miller v. A., 183M12, 235NW622. See Dun. Dig. 5141(7).

Judgment creditor having proven that the claim upon which the judgment rests existed prior to the conveyance, he need not prove that it was a valid claim. Larson v. T., 185M366, 241NW43. See Dun. Dig. 3908.

A judgment creditor attacking a conveyance as fraudulent cannot, as against the grantee, prove by the judgment roll or by the proceedings in the case that the judgment is upon a claim existing prior to the conveyance. Larson v. T., 185M366, 241NW43. See Dun. Dig. 3920(30), 5171.

In corporation mismanagement suit, plaintiff is barred from relief for matters covered by previous suit dismissed upon merits and for matters within scope of covenant not to sue. Butler v. B., 186M144, 242NW701. See Dun. Dig. 5159.

Judgment in prior case between same parties was conclusive as to findings. Farmers' State Bank, 187M155, 244NW550. See Dun. Dig. 5163.

Appointment of special administrator cannot be collaterally attacked in action by him to recover damages for death of decedent. Peterson v. C., 187M228, 244NW 823. See Dun. Dig. 5363.

A judgment in action between owner in possession of real property and one claiming rights therein under a void foreclosure sale, when such judgment is properly registered and declares foreclosure void and adjudges title in such owner, becomes a link in owner's chain of title, and is admissible in evidence even against a stranger to judgment. Fuller v. M., 187M447, 245NW617. See Dun. Dig. 5171, 5191.

Judgment, entered long after date when title is in issue, does not bar a stranger thereto from showing, if he can, that, on prior material date, adjudged owner had no title. Fuller v. M., 187M447, 245NW617. See Dun. Dig. 5171, 5191.

A judgment against receiver is res judicata as against creditors. Lamson v. T., 187M368, 245NW627. See Dun. Dig. 5177.

Judgment roll entered upon insured's plea of guilty to charge of arson of property insured, is not admissible in action to which insured is not a party to establish defense pleaded, that he willfully set fire to such property with a criminal purpose. True v. C., 187M636, 246 NW474. See Dun. Dig. 5156.

Where a court has no jurisdiction to determine a particular issue in the action, its final order therein does not operate as res judicata. Muellenberg v. J., 247NW 570. See Dun. Dig. 5194.

Court by affirming judgment, but stating that it was "without prejudice to appellant's (plaintiff) right formally to apply to the trial court for credit in the amount that the district has received for his land and the building thereon," did not bar plaintiff of any other remedy which he might have. Johnson v. I., 249NW177. See Dun. Dig. 5168.

No litigated issue becomes res judicata until final judgment. Hallbom, 249NW417. See Dun. Dig. 398, 5159, 5163.

Decision of state Supreme Court on federal issue vacated by United States Supreme Court on certiorari is of no effect whatever as law of case. Id. See Dun. Dig. 5187.

Judgment for defendant in action by remainderman to enforce oral remainder in personal property did not operate as estoppel against remainderman in second action to recover property under conveyance by donor after death of donee, first judgment being based on unenforceability of oral remainder. Mowry v. T., 250NW52. See Dun. Dig. 5159.

4. Foreign judgments—full faith and credit.

Full faith and credit is not denied by requiring defendant railroad to dismiss suit which it began in courts of another state to restrain administratrix there from assisting in maintaining action for death of deceased in this state on ground that to do so would be violation of public policy of foreign state and would burden interstate commerce. Peterson v. C., 187M228, 244NW823. See Dun. Dig. 1698.

9894. Same, how signed and entered—Contents.**½. In general.**

Findings and conclusions of court held not to constitute judgment, and an appeal would lie from an order denying motion for new trial entered more than six months after entry of such findings and conclusions. Salo v. S., 248NW39. See Dun. Dig. 316.

5. Notice.

A prevailing party may cause judgment to be entered without notice. Wilcox v. H., 186M504, 243NW709. See Dun. Dig. 5037.

9395. Judgment in replevin.—In an action to recover the possession of personal property, judgment may be rendered for the plaintiff and for the defendant, or for either. Judgment for either, if the property has not been delivered to him, and a return is claimed in the complaint or answer, may be for the possession or the value thereof in case possession cannot be obtained, and damages for the detention, or the taking and withholding. If possession cannot be obtained of the whole of such property but may be obtained for part thereof then the party entitled thereto may have possession of the part which may be obtained and recover the value of the remainder or may elect to take judgment for the value of the whole of such property. When the prevailing party is in possession of the property, the value thereof shall not be included in the judgment. If the property has been delivered to the plaintiff, and the action is dismissed before answer, or if the answer so claim, the defendant shall have judgment for a return, and damages, if any, for the detention, or the taking and withholding, of such property; but such judgment shall not be a bar to another action for the same property or any part thereof; provided that in an action for the recovery of specific personal property by the vendor in a conditional sale contract therefor, or by his successor in interest, by reason of default in the terms of such conditional sale contract, where it shall appear that the defendant in said action is an innocent purchaser for value of said property and without actual knowledge of the existence of such conditional sale contract, in the event that the plaintiff shall prevail in said action, the measure of his recovery shall be the balance unpaid on said conditional sale contract with interest thereon at the rate fixed in said conditional sale contract, if any, reasonable attorney's fees to be approved by the court and the costs and disbursements of said action. (R. L. '05, §4267; G. S. '13, §7899; Apr. 18, 1931, c. 202, §1.)

Evidence held to sustain verdict of value of automobile at time action was brought. 172M16, 214NW479.

Judgment in former action in replevin for possession of threshing rig, held not bar to action for damages arising from fraud inducing signing of contract for purchase of the outfit. 178M40, 226NW415.

Retail price not conclusive as to value. 180M264, 230 NW778.

On replevin by mortgagee of chattel, where it appeared that property was in custody of federal court, and mortgagor a bankrupt, defendant was not entitled to a judgment for the value of the property. Security State Bk. of Ellendale v. A., 183M322, 236NW617. See Dun. Dig. 8425.

9397. Damages for libel.

See notes under §9164.

An article falsely accusing a traveling salesman of being a bankrupt, taken in connection with the remainder of the article and the innuendoes set forth in the complaint, held libelous. Rudawsky v. N., 183M21, 235 NW523. See Dun. Dig. 5519(64).

9400. Lien of judgment.**11. Conflicting liens.**

Where owner gives mortgage and thereafter conveys away part of land, one who obtains judgment lien upon part retained has no right to require that tract conveyed away be first sold on foreclosure of mortgage. 175M541, 222NW71.

Judgment creditor of vendee in land contract loses his lien upon cancellation of contract by vendor. Peterson v. S., 247NW6. See Dun. Dig. 5069.

9405. Judgments, procured by fraud, set aside.

Nystrom v. N., 186M490, 243NW704; note under §9283.

1. Nature of action.

Action does not lie to attack final and incontestable judgments. Hawley v. K., 178M209, 226NW697.

This statute gives remedy where none existed before. Murray v. C., 186M192, 242NW706. See Dun. Dig. 7689.

6. Complaint.

Complaint failing to show that there are facts substantiating charges of false testimony and fraud which were not known or available at the trial, fails to state cause of action for setting aside the judgment. 173M 149, 216NW800.

7. For perjury.

In action to set aside probate judgment for fraud and perjury, judgment held properly ordered on pleadings. Murray v. C., 186M192, 242NW706. See Dun. Dig. 7689.

9407. Satisfaction and assignment by state.—The state auditor of the attorney general may execute satisfactions and assignments of judgments in behalf of the state. (R. L. '05, §4280; G. S. '13, §7913; Apr. 15, 1929, c. 186.)

State auditor may not properly transfer unexpended balances appropriated to him after amendment of 1931 in timber, mineral and testing of low grade ore divisions to department of conservation without legislative enactment. Op. Atty. Gen., Mar. 9, 1933.

9410. Joint debtors—Contribution and subrogation.

Where one seeking contribution has intentionally violated a statute or ordinance, thereby causing injury to a third party, he is guilty of an intentional wrong and illegal act, and is not entitled to contribution from one whose mere negligence contributed to cause the injury. *Fidelity Casualty Co. of New York v. C.*, 183M182, 236NW618. See Dun. Dig. 1924.

Establishment of the common liability and its liquidation by judgment in favor of the injured party are not conditions precedent to recovery by one wrongdoer who has made a fair and provident settlement of the claim and then seeks contribution from a joint tortfeasor. *Duluth, M. & N. Ry. Co. v. M.*, 183M414, 236NW766. See Dun. Dig. 1920, 1922.

Judgment in former case held to bar action by former surety seeking indemnity. *Maryland Casualty Co. v. B.*, 184M550, 239NW598. See Dun. Dig. 5176.

9411. Several judgments against joint debtors.

Maryland Casualty Co. v. B., 184M550, 239NW598; note under §9410.

The word "obligation" must be held to include parol as well as documentary contracts. 173M57, 216NW789.

Sections 9174 and 9411 are in pari materia. 173M57, 216NW789.

Liability for tort. 181M13, 231NW718.

Where a single injury is suffered as a consequence of wrongful acts of several persons, all who contribute directly to cause injury are jointly or severally liable, although there be no conspiracy or joint concert of action between them. *De Cock v. O.*, 246NW885. See Dun. Dig. 9643.

A canning company and city were not jointly liable for damages occasioned to farm by sewage dumped by each respectively into a stream. *Johnson v. C.*, 247NW572. See Dun. Dig. 9643.

9415. Submission without action.

State v. White, 176M183, 222NW918.

Distinction noted between submission on agreed case and trial on stipulated facts. *Co. of Todd v. Co. of M.*, 182M375, 234NW593.

EXECUTIONS

9416. When enforced.

Material and labor lien upon motor vehicle is superior to the title acquired through an execution sale upon a levy made before the filing of the lien statement but after the furnishing of labor or material. *Stegmeir v. L.*, 184M194, 238NW328. See Dun. Dig. 5579a, 5584a.

9417. Judgments, how enforced.

A judgment debtor is not guilty of contempt for making to convey to receiver pending appeal from order appointing receiver, but is guilty for failure to convey after affirmance and remittitur. 172M102, 214NW776.

9423. Execution against property, how executed.

Sheriff, with execution, may break open garage doors for purpose of making levy on automobile after having first made demand for possession. Op. Atty. Gen., Aug. 2, 1932.

9425. What may be levied on, etc.

2. Held not subject to levy.

It appearing that judgment debtor had assigned debt of third person to him before levy, debtor cannot be charged with a debt in action by judgment creditor. 176M461, 233NW776.

9432. On growing crops, etc.

176M37, 222NW292.

9435. Sale, when and how.

Where owner gives mortgage and thereafter conveys away part of land, one who obtains judgment lien upon part retained has no right to require that tract conveyed away be first sold on foreclosure of mortgage. 175M541, 222NW71.

9438-1. Sale of real property under judgments legalized in certain cases.—In all sales of real property under judgments and decrees of the district court wherein the sheriff's certificates of sale were filed for record and recorded in the office of the proper registers of deeds prior to October 1, 1928, and within forty-five days, but not within twenty days after the

dates of the respective orders confirming such sales, such certificates of sale and the records thereof are hereby legalized and validated to the same extent and with the same effect as though such certificates had been so filed for record and recorded within twenty days after the dates of such respective orders of confirmation. Provided, that the provisions of this act shall not apply to or affect any action or proceeding now pending involving the validity of such certificates or the records thereof. (Act Apr. 23, 1929, c. 294.)

9443. Certificate of redemption—Effect.

Where sum of money was deposited with the clerk of court to await its further order, held that question of title was properly determinable by judgment in a plenary suit or upon issues framed and that trial court rightly refused to grant motion of one party that money be paid to him. 178M161, 226NW410.

9445-1. Creditor may redeem in certain cases.—

That any creditor whose claim shall have been proved and allowed by a probate court of this state against the estate of a deceased debtor shall have the right, as a creditor of such decedent, to redeem the lands of the decedent from a sale thereof upon the foreclosure of a mortgage, or upon an execution, in the order and in the manner herein provided. (Act Apr. 15, 1929, c. 195, §1.)

9445-2. Creditor to file order with register of deeds.

—For the purpose of such redemption a creditor whose claim against the estate of a decedent shall have been so allowed shall file for record in the office of the register of deeds of the county in which the real estate sought to be redeemed is situated, within the year of redemption, a certified copy of the order of the probate court allowing such claim, and thereupon such claim shall constitute a lien upon the unexempt real estate of the decedent sold upon foreclosure or execution. The creditor shall also within such time file a notice in the office of such register of deeds briefly describing the sale of the decedent's lands, a description of the lands sold, and stating, in a general way, the nature, date and amount of the claim of the creditor, and that he intends to redeem such lands from the sale thereof described in such notice. In the case of redemption from execution sales such notice shall also be filed in the office of the clerk of the district court in which such lands are situated. (Act Apr. 15, 1929, c. 195, §2.)

9445-3. Filing to determine priority.—In the event more than one such proved and allowed claim shall be so filed and recorded for the purposes of such redemption, then, as between the owners of such claims, their right to redeem shall be in the order in which such claims were originally filed, succession commencing with the oldest in point of time; that as to the creditors of the decedent having a lien or liens, either legal or equitable, upon the lands of a decedent and existing otherwise than by allowance in probate, the creditors of the decedent whose claims have been allowed in probate shall be subsequent or junior thereto. (Act Apr. 15, 1929, c. 195, §3.)

9445-4. Creditor may redeem when.—If no redemption is made by the personal representative of the deceased debtor, or by the assigns of such decedent, within one year after the date of such sale, or within one year after the date of the confirmation of such sale, as the case may be, the senior creditor having a lien, legal or equitable, upon the premises sold upon the foreclosure of a mortgage or upon execution, and subsequent to the mortgage or judgment lien under or by reason of which the premises were sold, including the creditors of a deceased debtor whose claims have been perfected and recorded as herein provided, may redeem within five days after the expiration of said twelve months by payment of the amount required by law for that purpose; and each subsequent creditor having a lien in succession, according to priority of liens, within five days after the time allowed the prior lienholder, respectively, may redeem by paying the amount aforesaid and all liens

prior to his own held by the person from whom redemption is made. (Act Apr. 15, 1929, c. 195, §4.)

9445-5. Probate Court to determine amount.—Whenever any such creditor redeems from the foreclosure of a mortgage under the provisions of this act the probate court shall determine the amount that shall be credited on his claim against the estate. (Act Apr. 15, 1929, c. 195, §5.)

9445-6. Not to affect present law—Exception.—Except as in this act provided all such redemption shall have the force, and be governed by and subject to all of the requirements, of the statutes relating to the redemption of real estate from mortgage and execution sales now or hereafter in force. (Act Apr. 15, 1929, c. 195, §6.)

9447. Property exempt.

* * * * *

16. The wages of any person not exceeding thirty-five dollars, plus five dollars additional for each actual dependent of such person, due for any services rendered by him or her for another during thirty days preceding any attachment, garnishment or the levy of any execution against him or her, provided, that all wages paid to such person, and earned within said thirty day period, shall be deemed and considered a part of, or all, as the case may be, of said exemption of thirty-five dollars, plus five dollars additional for each dependent. Said exemption above rereferred 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 spouse of such person and all minor children under the age of eighteen years 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. (As amended Apr. 21, 1933, c. 350, §1.)

16a. Effective July 1, 1933.—This Act shall not be effective until July, 1933. (Act Apr. 21, 1933, c. 350, §2.)

* * * * *

Subd. 14.
179M402, 229NW344. Certiorari granted, 51SCR25. Judgment vacated, 51SCR416.
Applies to all beneficiaries whether resident or non-resident. 179M255, 228NW919.

Creditors could not impress proceeds of life insurance policies with claims based on fraud of insured after issuance of policies. Cook v. P., 182M496, 235NW9. See Dun. Dig. 3689.

Subd. 15.
Applies to all beneficiaries whether resident or non-resident. 179M255, 228NW919.

The United Mutual Life Insurance Company, insofar as it is transacting the insurance business of the Knights of Pythias, is to be regarded as a fraternal beneficiary association. Op. Atty. Gen., May 19, 1931.

Subd. 16.
Defendant was entitled to exemption of \$35 from wages earned 30 days preceding garnishment, but amount already paid covering such period must be included in amount claimed to be exempt. Op. Atty. Gen., May 10, 1933.

Personal property taxes.
No personal property is exempt from seizure or sale under personal property tax judgment. Op. Atty. Gen., July 19, 1933.

General rules.
179M255, 228NW919.

SUPPLEMENTARY PROCEEDINGS

9452. Examination.
A defendant who refused to testify or answer proper questions in a hearing before a referee in proceedings supplementary to execution is guilty of constructive contempt, and repeated evasions and untrue answers amount to a refusal to answer. 178M158, 226NW188.

The disclosure in proceedings supplementary to execution cannot be used in a criminal proceeding against the judgment debtor; but a fact shown in it may be considered in determining want of probable cause. Krienke v. C., 182M549, 235NW24. See Dun. Dig. 10339.

9453. Property applied to judgment—Receiver.
Punishment for contempt in failing to convey property to receiver. 172M102, 214NW776.

2½. Injunction.
Evidence held insufficient to support a finding of violation of restraining order in supplementary proceedings. Ryan v. C., 185M347, 241NW388. See Dun. Dig. 3548, 4504.

UNIFORM DECLARATORY JUDGMENTS ACT

9455-1. Courts to construe rights.—Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree. (Act Apr. 17, 1933, c. 286, §1.)

9455-2. May have instruments construed.—Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder. (Act Apr. 17, 1933, c. 286, §2.)

9455-3. Contract may be construed—when.—A contract may be construed either before or after there has been a breach thereof. (Act Apr. 17, 1933, c. 286, §3.)

9455-4. Who may ask for construction.—Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto:

(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or other; or

(b) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings. (Act Apr. 17, 1933, c. 286, §4.)

9455-5. Not restricted.—The enumeration in Sections 2, 3, and 4 does not limit or restrict the exercise of the general powers conferred in Section 1, in any proceeding where declaratory relief is sought, in which judgment or decree will terminate the controversy or remove an uncertainty. (Act Apr. 17, 1933, c. 286, §5.)

9455-6. Court may refuse to enter decree.—The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding. (Act Apr. 17, 1933, c. 286, §6.)

9455-7. Orders, judgments and decrees may be reviewed.—All orders, judgments and decrees under this Act may be reviewed as other orders, judgments and decrees. (Act Apr. 17, 1933, c. 286, §7.)

9455-8. Application to court for relief.—Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or de-

cree, to show cause why further relief should not be granted forthwith. (Act Apr. 17, 1933, c. 286, §8.)

9455-9. Issues of fact may be tried.—When a proceeding under this Act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. (Act Apr. 17, 1933, c. 286, §9.)

9455-10. Costs.—In any proceeding under this Act the court may make such award of costs as may seem equitable and just. (Act Apr. 17, 1933, c. 286, §10.)

9455-11. Parties.—When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney-General of the State shall also be served with a copy of the proceeding and be entitled to be heard. (Act Apr. 17, 1933, c. 286, §11.)

9455-12. Act to be remedial.—This Act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect

to rights, status and other legal relations; and is to be liberally construed and administered. (Act Apr. 17, 1933, c. 286, §12.)

9455-13. Definition.—The word "person" wherever used in this Act, shall be construed to mean any person, partnership, joint stock company, unincorporated association, or society, or municipal or other corporation of any character whatsoever. (Act Apr. 17, 1933, c. 286, §13.)

9455-14. Provisions separable.—The several sections and provisions of this Act except sections 1 and 2, are hereby declared independent and severable, and the invalidity, if any, of any part or feature thereof shall not effect or render the remainder of the Act invalid or inoperative. (Act Apr. 17, 1933, c. 286, §14.)

9455-15. To make law uniform.—This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees. (Act Apr. 17, 1933, c. 286, §15.)

9455-16. Uniform declaratory judgments act.—This Act may be cited as the Uniform Declaratory Judgments Act. (Act Apr. 17, 1933, c. 286, §16.)

Sec. 17 of act Apr. 17, 1933, cited, provides that the act shall take effect from its passage.

CHAPTER 78

Juries

9458. Number to be drawn.

Trial court did not abuse discretion in discharging entire jury panel and drawing new venire in murder case. *State v. Waddell*, 187M191, 245NW140. See Dun. Dig. 5239a.

9460. How drawn and summoned.

Laws 1929, c. 7, repeals Sp. Laws 1883, c. 314, as to making up jury lists in Washington county.

9468. Selection of jurors.—The county board, at its annual session in January, shall select, from the qualified voters of the county, seventy-two persons to serve as grand jurors, and one hundred and forty-four persons to serve as petit jurors, and make separate lists thereof, which shall be certified and signed by the chairman, attested by the auditor, and forthwith delivered to the clerk of the district court. If in any county the board is unable to select the required number, the highest practicable number shall be sufficient. In counties where population exceeds ten thousand no person on such list drawn for service shall be placed on the next succeeding annual list, and the clerk shall certify to the board at its annual January session the names on the last annual list not drawn for service during the preceding year, nor shall any juror at any one term serve more than thirty days and until the completion of the case upon which he may be sitting; provided however that the Court may with the consent of any such juror or jurors and with the consent of any parties having matters for trial after such 30 day period has expired hold and use such jurors so consenting to try and determine any jury cases remaining to be tried at such term between parties so consenting. And in counties having two or more terms of court in one year, after the jurors have been drawn for any term of such court, the clerk shall strike from the original list the names of all persons who were drawn for such term, and notify the board thereof, which at its next session shall likewise select and certify an equal number of new names, which shall be added by such clerk to the names in the original list. If such list is not made and delivered at the annual meeting in January, it may be so made and delivered at any regular or special meeting thereafter. Whenever at any term there is an entire absence or deficiency of jurors whether from an omission to draw or to sum-

mon such jurors or because of a challenge to the panel or from any other cause, the court may order a special venire to issue to the sheriff of the county, commanding him to summon from the county at large a specified number of competent persons to serve as jurors for the term or for any specified number of days, provided that before such special venire shall issue the jurors who have been selected by the county board and whose names are still in the box provided for in Section 9462 of said Mason's Minnesota Statutes, shall first be called and upon an order of the court the number of names required for such special venire shall be drawn from said box in the manner required by law and the jurors so drawn, shall be summoned by the sheriff as other jurors; and as additional jurors are needed successive drawings shall be ordered by the court until the names contained in said box have been exhausted. (R. L. '05, §4336; G. S. '13, §7971; '17, c. 485, §1; Feb. 13, 1929, c. 13; Apr. 20, 1931, c. 218.)

Where party to cause was member of jury panel it was error to deny continuance or the calling in of other jurors not on panel. 179M557, 230NW91.

Statute contemplates the striking of the names drawn without regard to actual service. Op. Atty. Gen., April 30, 1931.

9469-1. Juries in certain cities.—In all counties of this state now or hereafter having a population of more than 400,000 the jury in civil actions shall consist of six persons; provided, that any party may have the right to increase the number of jurors to twelve by paying to the clerk a jury fee of two dollars at any time before the trial commences. Failure to pay such jury fee shall be deemed a waiver of a jury of twelve. ('27, c. 345, §1, eff. May 1, 1927; Apr. 18, 1929, c. 236, §1.)

9469-2. Same—Jury of six.

The text of this and the next succeeding section is reenacted by Laws 1929, c. 236, but the title of the act purports to amend "section 1, chapter 345, Laws of 1927," set forth ante as §9469-1. Inasmuch as no change is made in sections 2 and 3, except that the closing words of section 2 are "the jury," instead of "a jury," the insufficiency of the title is probably immaterial.

9469-3. Same—Challenges.

See note under §9469-2.