

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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## CHAPTER 79

## Costs and Disbursements

**9470. Agreement as to fees of attorney—Etc.**

Costs were unknown at common law and depend upon statutory authority. *State v. Tift*, 185M103, 240NW354. See Dun. Dig. 2226.

**10. Contract with attorney.**

Burden was upon attorney to prove that his services were rendered under circumstances from which a promise to pay should be implied. *Ertsgaard v. B.*, 183M339, 237NW1. See Dun. Dig. 702(93).

**9471. Costs in district court.****1. Who prevailing party.**

173M559, 218NW730.

**6. In general.**

A party who succeeds and is awarded and paid his taxable costs and disbursements has no further claim against his adversary for attorney's fees and expenses in excess of taxable costs. 181M322, 232NW515. See Dun. Dig. 2194(4).

Judgment creditor waived payment of dollar fee charged upon writs of execution by stipulation for satisfaction of judgments and discharging them of record. *Stebbins v. F.*, 185M336, 241NW315.

In action by state in its proprietary as distinguished from its sovereign capacity it is liable for costs the same as individuals, but it is not liable when sued, though in its proprietary capacity. *Op. Atty. Gen.*, March 3, 1933.

Plaintiff suing to recover in excess of \$100 but only recovering \$100 is entitled to \$10 costs in county where there is no municipal court. *Op. Atty. Gen.*, July 5, 1933.

**7. State as party.**

State is not liable for costs and disbursements in civil action, whether brought by or against it, in its sovereign capacity, but is liable in actions brought in its proprietary capacity. *Op. Atty. Gen.*, Mar. 3, 1933.

**9473. Disbursements—Taxation and allowance.**

173M559, 218NW730.

Costs were unknown at common law and depend upon statutory authority. *State v. Tift*, 185M103, 240NW354. See Dun. Dig. 2226.

**½. In general.**

Objectors to testamentary trustee's account were entitled to costs and disbursements as the prevailing party. *Rosenfeldt's Will*, 185M425, 241NW573. See Dun. Dig. 2206.

No costs or disbursements should be taxed against secretary of state unsuccessfully defending mandamus proceeding. *State v. Holm*, 186M331, 243NW133. See Dun. Dig. 2207.

**9475. In equitable actions—Several defendants.**

Attorney's fees and expenses were allowed unsuccessful

party in probate proceedings. *Butler v. B.*, 249NW38. See Dun. Dig. 699.

**9478. Taxation—Objections and Appeal.****1. Time.**

Costs cannot be taxed and judgment entered where a verdict has been vacated and a new trial granted. 178M232, 226NW700.

**2. Notice.**

Costs and disbursements may be taxed after entry of judgment without notice. *Wilcox v. H.*, 186M220, 243NW709. See Dun. Dig. 2221.

**9481. To defendant after tender.**

*Grill v. B.*, 249NW194; note under §9323.

**9483. Relator entitled to, and liable for.**

Prevailing defendant was entitled to costs and disbursements without specific directions by the court, and court did not err in denying motion to amend conclusions of law. 178M164, 226NW709.

**9486. Supreme court—Costs and disbursements.**

Prevailing party may collect the expense of the record and briefs only when they are printed. *State v. Tift*, 185M103, 240NW354. See Dun. Dig. 2239(8).

Whether taxation of costs and disbursements is opposed or not, it is the duty of the clerk to satisfy herself that the items are correct and taxable. *State v. Tift*, 185M103, 240NW354. See Dun. Dig. 2226.

**4. Several prevailing parties.**

Where there were three cases by different parties against same defendant, cost of printing evidence which was common to three cases was properly divided and allocated. *Larson v. T.*, 185M652, 242NW378. See Dun. Dig. 2229.

**8. Discretionary—When not allowed.**

Statutory costs denied a successful appellant because of excessive length of his brief. *Peterson v. P.*, 186M583, 244NW68. See Dun. Dig. 2238.

**9. Disbursements allowable.**

Only where transcript is prepared exclusively for use on appeal and is in fact so used can it be taxed or allowed in supreme court. *Larson v. T.*, 185M652, 242NW378. See Dun. Dig. 2239.

When transcript is obtained and necessarily used in lower court in motion for amended findings, matter of expense thereof being allowed as disbursement is before lower court and not before supreme court. *Larson v. T.*, 185M652, 242NW378. See Dun. Dig. 457a.

**10. Liability of United States.**

Where Director of United States Veterans' Bureau brought proceeding against guardian of incompetent veteran and unsuccessfully appealed from an adverse order, the guardian was not entitled to tax costs. *Hines v. T.*, 185M650, 241NW796. See Dun. Dig. 2207.

## CHAPTER 80

## Appeals in Civil Actions

**9490. Appeal from district court.**

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.

The order must finally determine the action or some positive legal right of the appellant relating thereto. 176M11, 222NW295.

District court has no jurisdiction in civil cases to certify questions to the Supreme Court. *Newton v. M.*, 185M189, 240NW470. See Dun. Dig. 2493.

**9492. Requisites of appeal.**

Jurisdiction on appeal cannot be conferred by consent of counsel or litigants. The duty is on appellant to make jurisdiction appear plainly and affirmatively from the printed record. *Elliott v. R.*, 181M554, 233NW316. See Dun. Dig. 286.

Appellant must file with the clerk of the lower court the notice of appeal with proof of service thereof on the adverse party. *Costello v. D.*, 184M49, 237NW690. See Dun. Dig. 321(88).

**9493. Return to Supreme Court.****1. In general.**

In reviewing orders pursuant to motions, and orders to show cause, and other orders based upon the rec-

ord, the rule of *Radel v. Radel*, 123M299, 143NW741, and prior cases, requiring a settled case, bill of exceptions, or a certificate of the trial court as to the papers considered, or a certificate of the clerk of the trial court that the return contains all the files and records in the case, is no longer the rule when all the original files are returned to this court. 181M392, 232NW740. See Dun. Dig. 344a.

A party moving for a certificate, now unnecessary, showing that order was based only upon records and files then in clerk's office, may withdraw such motion at any time before submission. *Wilcox v. H.*, 186M504, 243NW709. See Dun. Dig. 352.

It was not error to exclude certain exhibits which were insufficient to make a prima facie case in support of claim that respondents had made certain agreements, there being no evidence in case to support such claim. *Wilcox v. H.*, 186M500, 243NW711. See Dun. Dig. 3244.

**3. Briefs.**

Instructions assigned as erroneous will not be considered, where brief makes no effort to point out any error therein and no prejudicial error is obvious on mere inspection. *Nelson v. B.*, 248NW49. See Dun. Dig. 364, 366.

**4. Settled case or bill of exceptions.**

Upon an appeal from an order overruling a demurrer there is no place for a bill of exceptions. 174M66, 218NW234.

Findings of court presumed to be correct in absence of settled case. 176M588, 224NW245.

Affidavits not presented by settled case or bill of exceptions cannot be considered. 180M580, 230NW472.

The certification of the pleadings, findings, motion for new trial, and order denying it does not make a settled case. Upon such a record we can review the sufficiency of the findings but not the sufficiency of the evidence to sustain them. *Rea v. K.*, 183M194, 235NW910. See Dun. Dig. 344(87), 344a(88).

A statement, a part of conclusions of law in order for judgment, to effect that amount recovered by state should be held in trust for third parties, is unavailable to appellant on an appeal from judgment without a settled case or bill of exceptions, because (1) there is no finding of fact to support it, and (2) it is no concern of appellant what disposition is made of money after it is received by state. *State v. Waddell*, 187M 647, 246NW471. See Dun. Dig. 344.

In absence of a settled case, only question on appeal after trial without a jury from judgment is whether findings of fact support conclusions of law and judgment. *State v. Juvenile Court of Wadena County*, 246 NW544. See Dun. Dig. 344, 387, 392.

Absence of settled case held not to permit review under record. *Hillius v. N.*, 247NW385. See Dun. Dig. 387.

Where the appeal is from a judgment, validity of which depends upon files and records in case, no settled case or bill of exceptions is necessary. *Muellenberg v. J.*, 247NW570. See Dun. Dig. 387.

#### 6. Assignments of error.

Supreme Court cannot consider assignments of error involving questions not included in the motion for new trial. 174M402, 219NW546.

On appeal theory of case may not be shifted from that at trial. 174M434, 219NW552.

Conclusion of law, not expressly assigned as error, was so closely related to other conclusions assigned as error that it should not be permitted to stand. 177M189, 224NW852.

A ground of negligence not pleaded, not raised in the trial by request to charge or otherwise, and not raised on the motion for a new trial, cannot be presented for the first time on appeal. *Arvidson v. S.*, 183M446, 237NW 12. See Dun. Dig. 384.

Where there are several separate findings of fact and conclusions of law, general assignment of error that findings are not sustained by evidence and are contrary to law is insufficient to challenge any finding. *Warner Hardware Co. v. S.*, 186M229, 242NW718. See Dun. Dig. 361.

Error assigned upon permitting two inconsistent defenses need not be decided, where proof did not establish either defense. *Boeder v. T.*, 187M337, 245NW428. See Dun. Dig. 7580.

Appellate court will not review instructions under brief assigning error upon portions of charge but failing to point out wherein they are faulty. *Cohoon v. L.*, 247NW520. See Dun. Dig. 364.

Assignment of error in motion for new trial held not sufficient to direct trial court's attention to alleged error in instruction claimed not to give proper test as to existence of partnership. *Randall Co. v. B.*, 248NW 752. See Dun. Dig. 337, 388a.

### 9494. Powers of appellate court.

#### 1. In general.

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.

Supreme court cannot conclude that judge below failed to exercise the judicial power and discretion reposed in him in regard to matter presented by motion for new trial. 175M346, 221NW424.

On appeal from a judgment after trial by the court, no motion for a new trial having been made, and no errors in rulings or proceedings at the trial being involved, the questions for review are limited to a consideration of sufficiency of evidence to sustain the decision. 177M53, 224NW461.

An order striking portions of answer is not reviewable on appeal from an order denying motion for new trial. 177M103, 224NW700.

Fact that, in motion to amend findings and conclusions, plaintiff asked for less relief than she was entitled to does not limit the relief that may be granted on an appeal. 177M189, 224NW852.

An order overruling a demurrer to the complaint and an order denying a motion to strike out certain portions of the complaint are not reviewable on an appeal from an order denying an alternative motion for judgment notwithstanding the verdict or for new trial. 177 M240, 225NW84.

Scope of review in absence of bill of exceptions or settled case. *Wright v. A.*, 178M415, 227NW357.

On appeal from judgment any order or part of order subsequent to verdict and affecting the judgment may be reviewed. 180M540, 231NW222.

Case was remanded where all of the issues had not been tried. 181M606, 233NW870. See Dun. Dig. 440.

Affidavits on motion for amended findings and conclusions of law or for a new trial on the ground of newly discovered evidence are considered on appeal only

on the motion for a new trial. *Wheaton v. W.*, 182M212, 234NW14. See Dun. Dig. 300(76), 395.

Supreme Court yields somewhat to trial court's judgment that it erred in its instructions, on review of granting of new trial. *Hector v. R.*, 182M413, 234NW643. See Dun. Dig. 394.

Errors assigned upon parts of the charge not expected to when given nor challenged in the motion for new trial are not reviewable on appeal. *Harrington v. A.*, 183M74, 235NW535. See Dun. Dig. 388a(27).

In action on fire policy by lessee to recover for betterments and loss of use of premises, a verdict finding loss nearly twice amount of cost of restoration and repairs held contrary to evidence and law. *Harrington v. A.*, 183M74, 235NW535. See Dun. Dig. 415(47).

Where it is clear that the court has considered and definitely decided an issue of fact, the case will not be reversed or remanded for more definite findings thereon. *Buro v. M.*, 183M518, 237NW186. See Dun. Dig. 435.

A defect in the complaint, not challenged in the lower court, cannot be urged here after interposed defense has been litigated on the merits as if no such defect existed—the question of liability having been so voluntarily litigated. *Gleason v. D.*, 183M512, 237NW196. See Dun. Dig. 384.

Error in submitting certain questions to jury cannot be considered on appeal in absence of exceptions taken or proper specifications of error in the motion for new trial. *Cannon Falls Holding Co. v. P.*, 184M294, 238NW 487. See Dun. Dig. 388a(27).

Record held not to make applicable rule that verdict cannot stand when case is submitted upon two theories and there was error in one. *Bemis Bros. Bag Co. v. N.*, 183M577, 237NW586. See Dun. Dig. 347.

Plaintiffs on an adverse judgment in an action for specific performance in which no issue was raised on the trial or in the pleadings as to damages could not claim that they were entitled to a money judgment. *Arntson v. A.*, 184M60, 237NW820. See Dun. Dig. 384.

On an appeal from a judgment where there has been no motion for a new trial but where there was a motion by appellant for a directed verdict, the only question presented is whether or not there is evidence to support the judgment. *International Harvester Co. of America v. N.*, 184M548, 239NW663. See Dun. Dig. 388(24).

Whether foundation for experts' opinion of value is laid was for the trial court. *Rahn v. F.*, 185M246, 240 NW529. See Dun. Dig. 399.

Where it appears probable that party has good cause of action or defense, and that deficiency of proof may be remedied on another trial, judgment should not be ordered. *Yager v. H.*, 186M71, 242NW469. See Dun. Dig. 428.

Respondents, after trial on merits in district court and findings and judgment in their favor in that court, are not in a position to urge on appeal that probate court, or district court, was without jurisdiction. *Overvold v. N.*, 186M359, 243NW439. See Dun. Dig. 287.

Refusal to open up default judgment and permit filing of an answer will not be reversed on appeal except for a clear abuse of discretion. *Nystrom v. N.*, 186M490, 243 NW704. See Dun. Dig. 399.

Where decisive facts found by court are sustained by evidence, it is not necessary to specifically discuss other proposed findings of fact which would not change result. *Johnson v. G.*, 187M104, 244NW409.

Where facts well found by court sustain and require conclusions of law in favor of one of parties, errors, if any, in findings on other issues, which, if changed or set aside would not affect result, need not be considered. *McKay v. M.*, 187M521, 246NW12. See Dun. Dig. 416.

Matter of granting change of venue for convenience of witnesses and ends of justice rest within sound discretion of trial court and its action will not be disturbed except for clear abuse of discretion. *De Jardins v. E.*, 249NW576. See Dun. Dig. 10127.

#### 2. Dismissal of appeal.

It appearing that appeal could serve no purposes other than those of delay, it was dismissed. 174M401, 219NW 457.

#### 3. Affirmance.

After affirmance on ground that alleged error was not presented to the court below the trial court is without power to amend the judgment to cure such error. 179M589, 229NW882.

When one justice of court is disqualified and others are equally divided in opinion, order of trial court will be affirmed. *Sig Ellingson & Co. v. P.*, 186M48, 242NW 626.

On appeal from an order granting a motion for new trial for errors of law alone, one being designated by order under review, and others thereby indicated only by a general statement such as "other errors in the reception of testimony," burden is on respondent, needing to do so to secure affirmance, to show error other than one specifically designated. *Peterson v. P.*, 186M 583, 244NW68. See Dun. Dig. 382.

By reason of events transpiring since commencement of action, it having become impossible to grant plaintiffs any relief, judgment for defendants is affirmed. *Republic I. & S. Co. v. B.*, 187M444, 245NW615. See Dun. Dig. 425, 463.

**4. Reversal.**

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

Order consented to cannot be reversed. 173M621, 217NW114.

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

Court may grant new trial on single issue. 180M185, 230NW473.

Where judgment has been entered notwithstanding verdict, the court's denial of a new trial may be regarded as prematurely entered, and is to be entertained and determined on reversal. 180M540, 231NW222.

Judgment was reversed and remanded where court failed to make findings on important disputed questions. National Cab Co. v. K., 182M152, 233NW838. See Dun. Dig. 435, 411(28).

Where motion for new trial challenged verdict as excessive, "appearing to have been given under the influence of passion or prejudice," Supreme Court could not reverse simply because there was no evidence justifying the judgment in the amount rendered, there being insufficient evidence as to certain item of bill of particulars. Anderson's Estate, 184M648, 239NW602. See Dun. Dig. 343.

Reversal of judgment resting upon findings of fact unsupported by evidence inevitably results in new trial without our expressly granting new trial. Yager v. H., 186M71, 242NW469. See Dun. Dig. 441, 456.

Opinion of supreme court, reversing an order granting a new trial on a specific ground, but without prejudice to defendant's right to apply for a rehearing on his motion for a new trial based upon other assignments of error, operates as a stay of proceedings preventing entry of judgment. Wilcox v. H., 186M504, 243NW709. See Dun. Dig. 443a.

Opinion of supreme court should be referred to to determine result of reversal of judgment. Village of Hallock v. P., 250NW4. See Dun. Dig. 441.

**4½. Vacating or modifying opinion or decision.**

Supreme court retains jurisdiction until remittitur goes down, and may modify or vacate opinion and decision. State v. Erickson, 247NW687, vacating judgment 185M60, 239NW908.

**5. Proceedings below on reversal.**

Where judgment is reversed solely upon ground that it was not one which should have been rendered upon verdict or findings of fact, court below is at liberty to proceed in any way not inconsistent with opinion. National Surety Co. v. W., 186M93, 242NW545. See Dun. Dig. 455.

**6. Law of case.**

Questions involved and directly decided on an appeal from a judgment rendered non obstante verdicto are res adjudicata on a subsequent appeal from an order denying a new trial. 171M384, 214NW276.

Decision on former appeal is the law of the case. 173M436, 217NW483.

Where a case has been tried and submitted upon a certain construction of the pleadings, such construction is conclusive on the parties. 174M216, 218NW891.

No question which might have been raised on appeal from an order granting plaintiff a new trial can be raised on plaintiff's appeal from judgment entered in virtue of the reversal of the order granting a new trial. 175M346, 221NW424.

While litigant may not depart from theory upon which case was tried, yet where an issue of law is presented by the pleadings and there is nothing to show that it has been waived, it may be urged by an appellant who on the record was entitled to a verdict and against whom judgment has been ordered notwithstanding the verdict. 177M509, 225NW445.

Where charge is unexcepted to or sufficiently assigned at error in the motion for new trial, it becomes the law of the case. 178M411, 227NW358.

Where the sufficiency or insufficiency of a complaint is determined on one appeal, the decision is the law of the case on a subsequent appeal even if the grounds urged on the second appeal were not presented on the former appeal. Kozisek v. B., 183M457, 237NW25. See Dun. Dig. 398.

The court has the power, on a second appeal, to overrule its own decision on a former appeal in the same case. Kozisek v. B., 183M457, 237NW25. See Dun. Dig. 398.

All questions involved and which might have been raised on a former appeal are concluded by the decision on such appeal. Kozisek v. B., 183M457, 237NW25. See Dun. Dig. 398.

An instruction not objected to was the law of the case. George v. C., 183M610, 237NW876. See Dun. Dig. 404(71).

Where supreme court on first appeal held that plaintiff had not made out a case of liability on the part of a railroad, under the Federal Employer's Liability Act, he cannot prevail on a second appeal unless he has strengthened his case on the second trial. Larsen v. N., 185M313, 241NW312. See Dun. Dig. 398.

All questions involved which might have been raised are concluded by decision on appeal except where court

has expressly directed that its conclusion is without prejudice to party's right to apply for a rehearing on his motion for a new trial. Wilcox v. H., 186M500, 243NW711. See Dun. Dig. 454, 457.

**8. Findings of fact.**

174M442, 219NW457.

Findings as to questions of fact are binding on appeal. 172M436, 217NW483.

Determination of trial court on motion to dissolve an attachment will not be disturbed where it is supported by evidence. 173M584, 218NW99.

Findings of fact having substantial support in the evidence will not be disturbed simply because there is a substantial amount of evidence in opposition. 174M507, 219NW758.

The evidence presenting only a fact issue, the verdict will not be disturbed. 175M617, 221NW240.

Findings of fact in a judicial road proceeding have the same force and effect as findings of fact in an ordinary civil action. 176M94, 222NW578.

The sole issue being of fact and there being substantial evidence in support of a decision below, affirmance must follow. Brodsky v. B., 176M198, 222NW931.

Findings of trial court will not be disturbed unless the evidence does not reasonably sustain them. 176M419, 223NW770.

Findings of court presumed to be correct in absence of settled case. 176M588, 224NW245.

Findings of trial court should not be reversed, if supported by substantial evidence. Alexander v. W., 177M111, 224NW849.

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.

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.

Where there is no settled case and the findings of the trial court are not questioned, findings of fact are controlling on appeal. 178M282, 226NW847.

In order to affirm, it is not necessary to demonstrate the correctness of the trial court's findings, it being enough that they are fairly supported by the evidence. 178M275, 226NW933.

Verdict based on question of fact cannot be disturbed. Wright v. A., 178M400, 227NW356.

Verdict based on conflicting evidence not disturbed. 178M621, 227NW853.

Whether representation was of fact or opinion is question of fact findings on which will not be disturbed on appeal. Gunnerson v. M., 181M37, 231NW415(2).

Rule that court will not disturb findings not manifestly contrary to evidence applies to fact that must be proved by clear and convincing evidence. 181M217, 232NW1. See Dun. Dig. 411 (15).

There being evidence to support the findings and order for judgment, and no question of error, the decision below must be affirmed. 181M436, 232NW789. See Dun. Dig. 411.

There can be no reversal in a strictly fact case where findings were supported by evidence. Lepak v. M., 182M168, 233NW851. See Dun. Dig. 411(12).

There being evidence in reasonable support of the decision below, it cannot be disturbed. Nelson Bros. Road Bldg. Co. v. E., 183M193, 235NW902. See Dun. Dig. 411.

In a negligence case, where there is no prejudicial or available error in the trial or submission of the issue of defendant's negligence, the verdict of the jury on that issue in defendant's favor, when sustained by the evidence, generally ends the case. Arvidson v. S., 183M446, 237NW12. See Dun. Dig. 415.

Findings of trial court will be sustained if they have reasonable support in the evidence and this also applies even though the construction of written or documentary evidence is involved. Somers v. C., 183M545, 237NW427. See Dun. Dig. 411(13).

On appeal from an order denying a motion to set aside service of summons, based upon conflicting affidavits, dispute as to facts must be taken as having been resolved in favor of the plaintiff. Masee v. C., 184M196, 238NW327. See Dun. Dig. 396, 410.

Findings of trial court well supported by evidence will not be disturbed on appeal. Nault v. G., 184M217, 238NW329. See Dun. Dig. 411.

Fact issues having been voluntarily litigated, and there being evidence reasonably supporting the decision, it will not be disturbed on appeal. Meacham v. B., 184M607, 240NW540. See Dun. Dig. 411.

Judgment resting upon findings of fact unsupported by evidence should be reversed. Yager v. H., 186M71, 242NW469. See Dun. Dig. 411.

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

An issue of compromise and settlement, arising on conflicting testimony, is settled finally by verdict. Mid-West Public Utilities v. D., 246NW257. See Dun. Dig. 415.

In applying rule that evidence must be clear, persuasive and convincing to justify reformation, effect must still be given to rule that reviewing court will not disturb findings of trial court unless manifestly contrary to evidence. *Hartigan v. N.*, 246NW477. See Dun. Dig. 411.

Finding of fact based on conflicting evidence will not be disturbed. *Mienes v. L.*, 246NW667. See Dun. Dig. 411.

Evidence will be viewed in light favorable to verdict. *Dickinson v. L.*, 246NW669; *Jacobsen v. A.*, 246NW670. See Dun. Dig. 415.

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.

On appeal from order denying motion to vacate writ of attachment and levy, determination of trial court will not be reversed unless manifestly contrary to evidence. *Callanan v. C.*, 248NW45. See Dun. Dig. 410(5).

**9495. Judgment notwithstanding verdict.**

**1. Prior to amendment—When judgment should be ordered.**

180M578, 230NW585. Certiorari denied. 51 SCR31.

**1½. Applicability.**

Applies to action under federal employers' Liability Act. 133M460, 157NW638; 180M578, 230NW585.

**2. Motion on trial for directed verdict necessary.**

180M1, 230NW260.

Defendant was not entitled to judgment non obstante, not having moved for a directed verdict at the close of the testimony. 175M592, 222NW272.

**3. Motion for judgment.**

*Glynn v. K.*, (CCA8), 60F(2d)406, rev'g 47F(2d)281.

180M305, 230NW793.

*Moquin v. M.*, 231NW920.

In action for damages for injuries inflicted by automobile, defendants were not entitled to judgment non obstante. 171M321, 214NW52.

Questions involved and directly decided on an appeal from a judgment rendered non obstante verdicts are res adjudicata on a subsequent appeal from an order denying a new trial. 171M384, 214NW276.

Conditions under which order granting judgment notwithstanding verdict should be granted. 173M378, 217NW379.

Where evidence was practically conclusive against the verdict judgment was properly ordered notwithstanding the verdict. 173M522, 217NW939.

Where defendant moved in the alternative for judgment notwithstanding verdict or a new trial, and a new trial was granted and the motion for judgment denied, an appeal from the denial of a judgment is ineffectual. 174M237, 219NW149.

In action against an estate for services rendered the decedent, evidence held to justify verdict in plaintiff's favor and defendant was not entitled to judgment non obstante. 174M272, 219NW151.

Where the evidence presented did not establish any defense, judgment in favor of plaintiffs, notwithstanding the verdict, was properly ordered. *Powell v. T.*, 175M361, 221NW241.

An order denying a motion for judgment notwithstanding disagreement of the jury, is not appealable. 176M302, 223NW146.

An order overruling a demurrer to the complaint and an order denying a motion to strike out certain portions of the complaint are not reviewable on an appeal from an order denying an alternative motion for judgment notwithstanding the verdict or for a new trial. 177M240, 225NW84.

Party is not entitled to judgment notwithstanding verdict, if it appears reasonably probable that upon a new trial defects in proof may be supplied. 177M494, 225NW432.

Judgment should have been entered notwithstanding verdict for plaintiff in an action under the Federal Safety Appliance Act. *Meisenhelder v. B.*, 178M409, 227NW426.

Defendant, not being entitled to judgment upon the pleadings was not under common law rule entitled to judgment non obstante. 180M1, 230NW260.

On alternative motion, held error to deny new trial and order judgment for amount less than verdict, where evidence authorizes recovery in amount greater than that ordered, the proper order being award of new trial unless successful party consents to reduction. 180M540, 231NW222.

Evidence found not to disclose any substantial breach of contract on the part of the plaintiff, and no damage to defendant on account of representations made to him as inducements to enter into the contract. 181M433, 232NW739. See Dun. Dig. 1805, 3828, 3839.

Application to Federal court. 47F(2d)281. See Dun. Dig. 5077.

On the issue of conversion, the defendants were not entitled to judgment notwithstanding the verdict. *Hector v. R.*, 182M413, 234NW643. See Dun. Dig. 5082.

In action for malicious prosecution the court rightly denied the motion of defendants for judgment notwithstanding the verdict. *Miller v. P.*, 182M108, 233NW855. See Dun. Dig. 5744, 5077.

The fact that the beneficiaries, the parents of the decedent, violated §§4100 and 4101 does not constitute contributory negligence as a matter of law so as to entitle defendant to judgment non obstante. *Weber v. B.*, 182M486, 234NW682. See Dun. Dig. 2616(10), 5082.

A judgment notwithstanding verdict was properly denied where it was quite possible, that deficiency in evidence in negligence case could be supplied on another trial. *Drake v. C.*, 183M89, 235NW614. See Dun. Dig. 5082(8).

In an action for assault, false imprisonment, and kidnapping, where there is evidence tending to show that defendant participated in the restraint of plaintiff's liberty and in transporting her in an automobile against her will, an order granting judgment in favor of such defendant notwithstanding a verdict in favor of the plaintiff is erroneous. *Jacobson v. S.*, 183M425, 236NW922. See Dun. Dig. 5082.

Motion is properly denied where there is evidence to sustain verdict. *Holland v. M.*, 248NW750. See Dun. Dig. 5082, 9764.

Motion for directed verdict at close of testimony is a condition precedent to granting of motion for judgment notwithstanding verdict. *Krocak v. K.*, 249NW671. See Dun. Dig. 5079.

When court, after charge but before jury retires, permits counsel to move for a directed verdict and denies motion, party may move for judgment notwithstanding verdict, and, on appeal, assign error on rulings below. *Flower v. K.*, 250NW43. See Dun. Dig. 5080, 5082.

**6. Appealability of order on motion.**

This section is controlled by later statute, §9498, in so far as it contemplates an appeal from an order granting a first new trial, not for errors of law alone. 178M286, 226NW846.

Where alternative motion for judgment non obstante or for a new trial is made, an appeal may be taken from the whole order disposing of the motion, but not from only that part granting or denying judgment. 179M392, 229NW557.

Unless first order denying motion for judgment notwithstanding verdict or for a new trial is vacated, order denying subsequent motion for same relief is not appealable. *General Motors Acceptance Corp. v. J.*, 248NW213. See Dun. Dig. 318.

**7. Disposition of case on appeal.**

Judgment not granted except when merits of case are presented fully and it is clear that litigation should end. 177M487, 225NW441.

While litigant may not depart from theory upon which case was tried, yet where an issue of law is presented by the pleadings and there is nothing to show that it has been waived, it may be urged by an appellant who on the record was entitled to a verdict and against whom judgment has been ordered, notwithstanding the verdict. 177M509, 225NW445.

Judgment notwithstanding verdict rendered on appeal where it was reasonably certain that no additional evidence could be produced. *Diddams v. E.*, 185M270, 240NW896. See Dun. Dig. 433.

**9496. Dismissal of appeal in vacation.**

Supreme Court refused to dismiss appeal upon stipulation of two out of three executors. 178M509, 227NW660.

**9497. Appeal, when taken.**

**1. When judgment entered.**

Time to appeal was limited to six months from entry of original judgment, and not amendment thereof. 181M466, 233NW10. See Dun. Dig. 316.

**3. Appeal from order.**

No appeal having been taken to the Supreme Court from an order dismissing an appeal from probate court within statutory time, the attempt to appeal will be dismissed. 174M133, 218NW546.

Amendment after time for appeal is not permissible. 180M344, 230NW787.

Where a second motion for new trial is made after time for appeal has expired, proper practice requires prompt application for a vacation of the first order pending consideration of the second motion, leave to submit the latter being first secured. *Barrett v. S.*, 183M431, 237NW15. See Dun. Dig. 7080, 7081.

Where a motion for a new trial is denied, and, without a vacation of that order and after the time for appeal therefrom has expired, a second motion for a new trial is denied, the last order is, in real substance, nothing more than one refusing to vacate an appealable order and so not appealable. *Barrett v. S.*, 183M431, 237NW15. See Dun. Dig. 309.

Notice in writing of an order from adverse party is premature and ineffectual to limit time to appeal unless order is filed with clerk. *Backstrom v. N.*, 187M35, 244NW64. See Dun. Dig. 317, 6505.

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.

Order denying a motion for judgment notwithstanding verdict or for a new trial must be appealed from within

30 days after written notice. General Motors Acceptance Corp. v. J., 248NW213. See Dun. Dig. 317, 313.

Thirty-day period for appeal from order cannot be extended by agreement of parties or order of court. Id.

#### 9498. Appeals to supreme court. \* \* \* \* \*

4. From an order granting or refusing a new trial, or from an order sustaining a demurrer, providing that when an order granting a new trial is based exclusively upon errors occurring at the trial the court shall expressly state in its order or memorandum the reasons for and the grounds upon which such new trial is granted and in such case an appeal may be taken from such order.

Provided further that when upon the entry of an order overruling a demurrer, the trial court shall certify that the question presented by the demurrer is in his own opinion important and doubtful and such certification is made part of the order overruling the demurrer, an appeal from such order may be taken. (As amended Apr. 20, 1931, c. 252.)

\* \* \* \* \*

### STATUTE GENERALLY

#### ½. In general.

An order for assessment of capital stock under §§8023-8027 is conclusive only as to the amount, priority, and necessity of the assessment, and findings in such order relative to personal defenses which are to be litigated in the action to recover the assessment are not final. 172M33, 214NW764.

No appeal lies from an order for judgment, and it cannot be reviewed by means of an appeal from an order refusing to vacate. 172M51, 215NW180.

Appeal from judgment did not bring up for review denial of motion for new trial for newly discovered evidence. 173M250, 217NW127.

Appeal from an order granting a new trial, held not frivolous. *Gale v. F.*, 175M39, 220NW156.

An order settling the final account of a receiver is a "final" appealable order. The entry of judgment thereon for the purpose of extending the time of appeal is unauthorized and does not extend the time for that purpose. 176M470, 223NW775.

Exclusion of a statement of facts from bill of exceptions as inaccurate is not reviewable on appeal from order denying new trial. 176M472, 223NW912.

An order of clerk of district court denying a motion to tax costs is not appealable. 178M232, 226NW700.

Appeal from order of trial court affirming action of clerk in denying motion to tax costs and enter judgment, held frivolous. 178M232, 226NW700.

No appeal lies to review a decision of a juvenile court acting under Mason's Stat. §§8636 to 8689. *State v. Zenzen*, 178M400, 227NW356.

Jurisdiction on appeal cannot be conferred by consent of counsel or litigants. The duty is on appellant to make jurisdiction appear plainly and affirmatively from the printed record. *Elliott v. R.*, 181M554, 233NW316. See Dun. Dig. 286.

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. 1512(38).

#### ¾. Party aggrieved.

One defendant cannot complain of a verdict in favor of a codefendant. *Erickson v. N.*, 181M406, 232NW715. See Dun. Dig. 310.

Agreement held to commit defendant to amount of verdict if liability existed, and amount cannot be questioned on appeal. *Bashaw Bros. Co. v. C.*, 246NW358. See Dun. Dig. 287.

Where order amending verdicts for husband and wife, by taking medical expenses from wife's verdict and adding to husband's, recited that defendant consented, there is no error for review. *Krinke v. G.*, 246NW376. See Dun. Dig. 237, 9823, 9825, 9828, 9829.

An appellant cannot successfully predicate error on trial procedure in which he acquiesced without objection. *Borowski v. S.*, 246NW540. See Dun. Dig. 287, 384.

County board, acting as tribunal to hear petition to detach land from one school district and attach it to another, has no interest in litigation, and is not an aggrieved party entitled to appeal. *Kirchoff v. B.*, 248NW817. See Dun. Dig. 310.

### SUBDIVISION 1

#### 4. From judgment on appeal to district court.

An order of the district court affirming an order of the probate court is not appealable. *Ahlman's Guardianship*, 185M650, 240NW890. See Dun. Dig. 294.

#### 5. From judgment in action commenced in district court.

Where court grants new trial as to single issue, the order, together with order refusing to vacate same, are

reviewable on appeal from judgment entered after second trial. 180M185, 230NW473.

Review extends to appealable and nonappealable orders, and includes sufficiency of evidence and rulings and proceedings on trial when properly preserved by exception and assigned in motion for new trial. 180M185, 230NW472.

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.

Order granting or refusing inspection of books and documents in hands of adverse party is reviewable on appeal from judgment or from an order denying motion for new trial. *Melgaard*, 187M632, 246NW478. See Dun. Dig. 388b.

Appeal from judgment brings up for review only prior proceedings which resulted in judgment. *Muellenberg v. J.*, 247NW570. See Dun. Dig. 389(30).

Questions raised by motion for judgment or a new trial may be reviewed on appeal from judgment. *General Motors Acceptance Corp. v. J.*, 248NW213. See Dun. Dig. 389b.

### SUBDIVISION 2

#### 7. Orders held appealable.

An order refusing to discharge a garnishee is not appealable except when the motion challenges the jurisdiction of the court. 173M559, 218NW730.

#### 8. Orders held not appealable.

Order impounding sum of money in hands of client to await determination of respective rights of several attorneys, held not appealable. 180M30, 230NW113.

### SUBDIVISION 3

#### 9. Construed strictly.

The order must finally determine the action or some positive legal right of the appellant relating thereto. 176M11, 222NW295.

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.

#### 10. Orders held appealable.

An order determining the amount of default in the payment of alimony and directing the payment thereof within the specified time is not appealable, being conditional and not final, so an order to reduce alimony is appealable. 176M464, 217NW488.

Order granting motion for new trial on minutes after lapse of thirty days from coming in of verdict, held to involve a part of the merits and appealable. 179M136, 228NW558.

An order striking the words "on the merits" from a judgment of dismissal was appealable. *McElroy v. B.*, 184M357, 238NW631. See Dun. Dig. 298.

#### 11. Orders held not appealable.

Order granting plaintiff leave to file a supplemental complaint against a garnishee held not appealable. 172M368, 215NW516.

Neither an order denying a motion to bring in an additional party nor an order denying a motion to strike from the calendar nor an order denying a motion to a judgment on the pleading is appealable. 173M183, 217NW106.

An order denying a motion for judgment notwithstanding disagreement of the jury, is not appealable. 176M302, 223NW146.

Order granting new trial, after reinstatement of action to enforce attorney's lien and entry of order for judgment, held not appealable under this subdivision. 178M230, 226NW699.

Order impounding sum of money in hands of client for payment of fees of several attorneys when amount to which each was entitled was determined, held not appealable. 180M30, 230NW113.

### SUBDIVISION 4

When a trial court grants a new trial "exclusively upon errors occurring at the trial," it should indicate what the errors are. *Hudson-Duluth Furriers, Inc., v. M.*, 182M581, 235NW537. See Dun. Dig. 7084(76), 394.

#### 12. Orders held appealable.

In order to review an order overruling a demurrer, there must be an appeal, and court cannot simply certify the question up. 174M66, 218NW234.

Statute prohibits an appeal from an order granting a new trial unless the trial court expressly states that the new trial was granted exclusively for errors of law. 174M606, 219NW291; 174M611, 219NW928.

Where order granting new trial made January 28, did not state on what grounds the new trial was granted and on February 14, 1928 the court filed a memorandum stating that the order of January 28, was made solely on the ground of errors of law and directing that the memorandum be made a part of that order, the memorandum will be considered on appeal from the order. *Gale v. F.*, 175M39, 220NW156.

An order denying a new trial is appealable. *Andersen v. C.*, 182M243, 234NW289. See Dun. Dig. 300.

**13. Orders held not appealable.**

Where an appeal from probate court is dismissed in the district court for want of jurisdiction, there is no basis for a motion for new trial, and where such motion is made, no appeal lies from the order denying it. 174M 133, 218NW546.

An appeal lies from an order granting a motion for a new trial made on the ground of insufficiency of evidence, if after a former trial a new trial was granted on that ground. 174M237, 219NW149.

Where defendant moved in the alternative for judgment notwithstanding verdict or a new trial, and a new trial was granted and the motion for judgment denied, an appeal from the denial of a judgment is ineffectual. 174M237, 219NW149.

An order denying a motion to vacate an order denying motion for a new trial is not appealable. 177M474, 225NW399.

Order granting new trial after order for judgment enforcing lien of attorney held not appealable under subds. 3 or 7, but one under this subdivision and not appealable in absence of statement that it was based exclusively upon errors of law. 178M230, 226NW699.

An order granting a new trial for insufficiency of evidence, unless there has been a like verdict on a prior trial, is not appealable. 178M232, 226NW700.

This subdivision, as amended by Laws 1913, c. 474, controls §9495 as regards appeals from orders for first new trials. 178M286, 226NW846.

Order granting new trial is not appealable unless trial court expressly states that it is based exclusively on errors of law. 180M344, 230NW787.

Order granting a new trial without stating the ground therefor, held not appealable. *Karnofsky v. W.*, 183M 563, 237NW425. See Dun. Dig. 300.

Amendment by Laws 1931, c. 252, does not authorize an appeal from an order granting a new trial except where based exclusively upon errors occurring at the trial, and the trial court expressly states in its order or memorandum the reason for granting the new trial. *Spicer v. S.*, 237NW844. See Dun. Dig. 300.

An order granting a new trial after verdict is not appealable unless court states therein or in an attached memorandum that it is granted exclusively for errors of law. *Backstrom v. N.*, 187M35, 244NW64. See Dun. Dig. 300.

An order granting a new trial is generally not appealable. *Ayer v. C.*, 249NW581. See Dun. Dig. 300.

**14. Orders sustaining or overruling a demurrer.**

Matters considered on certification of question. 176 M529, 224NW149.

**SUBDIVISION 5**

**15. Orders held appealable.**

Order setting aside an order vacating an order for an amendment to a judgment is appealable. 181M329, 232 NW322. See Dun. Dig. 301.

An order granting a new trial after judgment has been entered is appealable as order vacating judgment. *Ayer v. C.*, 249NW581. See Dun. Dig. 300.

An order vacating a judgment is appealable. *Id.* See Dun. Dig. 308(56).

**16. Orders held not appealable.**

Order granting plaintiff leave to file a supplemental complaint against a garnishee held not appealable. 172 M368, 215NW516.

Order impounding fund in hands of client for distribution among attorneys when their respective shares were determined, held not appealable. 180M30, 230NW113.

An order striking a cause from the calendar is non-appealable, where it appears that it is not a final disposition of the cause in the court making the order. *Stebbins v. F.*, 184M177, 238NW57. See Dun. Dig. 298(30), 301.

**SUBDIVISION 7**

**18. Definitions.**

"Special proceeding" is one which may be commenced independently of pending action by petition or motion, upon notice, to obtain special relief. *Anderson v. L.*, 180 M234, 230NW645(1).

The administration and settlement of a testamentary trust under the orders and supervision of the district court in a special proceeding. *Rosenfeldt's Will*, 184M 303, 238NW687. See Dun. Dig. 302.

**19. Orders held appealable.**

Order annulling an order vacating an order for an amendment to a judgment is appealable. 181M329, 232 NW322. See Dun. Dig. 302.

An order, upon an order to show cause submitted upon affidavits determining right of respondent to an attorney's lien and the amount thereof, held a final order and appealable. *Caulfield v. J.*, 183M503, 237NW190. See Dun. Dig. 302.

An order accepting the resignation of a trustee, settling his account and directing him to pay over funds in his hands to his successor, is a final order affecting substantial rights in a special proceeding and appealable as such. *Rosenfeldt's Will*, 184M303, 238NW687. See Dun. Dig. 302.

The fact that the court appended to an order in a special proceeding a direction that judgment be entered thereon did not render the order nonappealable so as to extend the time to appeal until after entry of judgment. *Rosenfeldt's Will*, 184M303, 238NW687. See Dun. Dig. 302.

An order of the district court denying the petition for discharge from confinement in the state hospital for the insane of one committed thereto as a result of his acquittal, on the ground of insanity, of a criminal charge, is appealable as an order "affecting a substantial right, made in a special proceeding." *State v. District Court*, 185M396, 241NW39. See Dun. Dig. 302(b).

**20. Orders held not appealable.**

Order granting new trial, after reinstatement of case to enforce lien of attorneys, held not appealable under this subdivision. 178M230, 226NW699.

Order impounding attorney's fee in hands of client to await determination of distributive shares of several attorneys, held not appealable. 180M30, 230NW113.

Order in open court, where parties have appeared. Granting motion to dismiss for want of prosecution is nonappealable. *Anderson v. L.*, 180M234, 230NW645(1).

Order in foreclosure directing resale in one parcel, held not appealable. 180M173, 230NW780.

An order denying a motion to dismiss a proceeding for laches in its prosecution is not appealable. *State v. Hansen*, 183M562, 237NW416. See Dun. Dig. 296a, 309.

**APPEALABILITY OF ORDER GENERALLY**

**21. Orders held appealable.**

Where alternative motion for judgment non obstante or for a new trial is made, an appeal may be taken from the whole order disposing of the motion, but not from only that part granting or denying judgment. 179M392, 229NW557.

Order denying new trial is appealable. 180M93, 230 NW269.

Where an order vacates a judgment entered upon verdict and grants a new trial, an appeal lies from that part of order which vacates judgment. *Ayer v. C.*, 248NW749. See Dun. Dig. 300, 308.

**22. Orders held not appealable.**

Order for judgment is not appealable. *Palmer v. F.*, 179 M381, 230NW257(2).

Order denying motion for amended findings and order before judgment granting motion to file supplemental answer, held not appealable. 180M93, 230NW269.

Order directing verdict for plaintiff, order denying directed verdict for defendant, and order opening case for further testimony, held not appealable. 181M627, 231 NW617.

An order refusing to amend findings of fact and conclusions of law by adding to, or striking out, or inserting others in lieu of those made, is not appealable; but the error claimed is reviewable when properly presented on appeal from an appealable order or judgment. *Louis F. Dow Co. v. B.*, 185M499, 241NW569. See Dun. Dig. 309.

Order of district court dismissing appeal from probate court is not appealable. *In re Ploetz' Will*, 186M395, 243 NW383. See Dun. Dig. 294.

An order granting or refusing inspection of books and documents in hands or under control of an adverse party is not appealable. *Melgaard*, 187M632, 246NW478. See Dun. Dig. 296a, 298(49).

**25. Waiver of right to appeal.**

By paying the costs and damages awarded a plaintiff in an action in ejectment, a defendant does not destroy his right to appeal from the judgment of restitution. *Patnode v. M.*, 182M348, 234NW459. See Dun. Dig. 287 (27), 463a.

**26. From order refusing to vacate judgment or order.**

An order refusing to vacate a nonappealable order is not appealable. 174M611, 219NW923.

No appeal lies from an order denying a motion to vacate or modify a judgment; the ground of the motion being that the judgment was erroneous, rather than unauthorized. 176M117, 222NW527.

An order denying a motion to vacate a nonappealable order is not appealable. 178M232, 226NW700.

An order denying a motion to vacate an ex parte order bringing in an additional party defendant is appealable. *Sheehan v. H.*, 187M582, 246NW353. See Dun. Dig. 308.

**34. Contempt proceedings.**

When object of a proceeding in contempt is to impose punishment merely, order adjudging contempt is reviewable on certiorari, but when object is to enforce doing of something in aid of a civil proceeding, order of contempt is reviewable on appeal. *Proper v. P.*, 246NW481. See Dun. Dig. 1395, 1702 to 1708a.

**9499. Bond or deposit for costs.**

*Gruenberg v. S.*, 248NW38; note under §9504. Failure to serve upon respondent a copy of a supersedeas bond filed in Supreme Court was an irregularity which should have been challenged by motion. *Barrett v. S.*, 184M107, 237NW881. See Dun. Dig. 333.

**9500. Appeal from order—Supersedeas.**

*Roehrs v. T.*, 185M154, 240NW111; note under §9277. *Gruenberg v. S.*, 248NW38; note under §9504.

An appeal from an order denying a motion for a new trial unaccompanied by a supersedeas bond, does not prevent entry of judgment. 177M89, 224NW464.

Where district court has reversed a rate-fixing order of Railroad and Warehouse Commission, an appeal by state and applicant does not stay entry of judgment un-

less so directed either by this court or district court. State v. Dist. Court., 250NW7. See Dun. Dig. 8082a.

#### 9504. For sale of real property—Supersedeas.

To effect a stay of proceedings on appeal by defendant from a judgment for restitution in a forcible entry and unlawful detainer case, bond on appeal must conform to provisions of statute. Gruenberg v. S., 248NW38.

Defendant in unlawful detainer may not file a St. Paul city sinking fund certificate in lieu of a bond. Id.

#### 9508. Justification of sureties.

Appeal was not dismissed for failure to furnish bond where appellant had acted in good faith and gone to

considerable expense in preparing his appeal, and he was given ten days in which to file a sufficient bond. 176 M632, 221NW643.

#### 9512. Death of party after submission of appeal.

When the husband dies after the judgment of divorce in his favor, and pending the appeal in this court, and property rights are involved, his personal representative will be substituted and the case reviewed, notwithstanding the general rule as to the abatement of divorce actions by the death of either party. Swanson v. S., 182 M492, 234NW675. See Dun. Dig. 15.

## CHAPTER 81

### Arbitration and Award

#### 9513. What may be submitted—Submission irrevocable.

District court may vacate an award if there is no evidence to sustain it. Borum v. M., 184M126, 238NW4. See Dun. Dig. 509.

Evidence held not to require finding that certain issues were voluntarily submitted for determination before arbitrators. McKay v. M., 187M521, 246NW12. See Dun. Dig. 487a.

#### 9515. Powers and duties of arbitrators—Filing of award.

Agreement to submit to arbitration, account between parties relating to a partnership and all other matters in difference between them, is too indefinite to show that dissolution of partnership, sale of assets thereof to one

or other of partners, leasing by one to other of real property which was not partnership property, and an agreement by one partner not to compete in business with other, were matters within authority of arbitrators to determine. McKay v. M., 187M521, 246NW12. See Dun. Dig. 487a.

#### 9517. Grounds of vacating award.

Where award of referees so links matters submitted to arbitration with matters not so submitted that they cannot be separated without prejudice to parties, court should not sustain a part of award and set aside other parts thereof. McKay v. M., 187M521, 246NW12. See Dun. Dig. 507.

(5).

District court may vacate an award if there is no evidence to sustain it. Borum v. M., 184M126, 238NW4. See Dun. Dig. 509.

## CHAPTER 82

### Actions Relating to Real Property

#### ACTIONS TO TRY TITLE

#### 9556. Actions to determine adverse claims.

##### 1. Nature and object of action.

When the husband dies after the judgment of divorce in his favor, and pending the appeal in this court, and property rights are involved, his personal representative will be substituted and the case reviewed, notwithstanding the general rule as to the abatement of divorce actions by the death of either party. Swanson v. S., 182M492, 234NW675. See Dun. Dig. 15.

##### 7. Answer.

Answer, held not sham. 180M480, 231NW224.

##### 8. Reply.

Where in a legal action to determine adverse claims, the defendants assert a legal title, the plaintiffs may, in their reply, plead facts showing an equitable title that ought to prevail over defendants' legal title. Garrey v. N., 185M487, 242NW12. See Dun. Dig. 3052.

##### 8½. Evidence.

Parol evidence as to land intended to be included in mortgage. 181M115, 231NW790.

##### 9. Judgment.

Value of land involved as affecting jurisdiction of federal court for purpose of removal from state court. 31F(2d)136.

Former judgment between the parties held not res adjudicata on possession. 173M242, 217NW337.

Equitable title of one who purchased fractional interest under deed mistakenly conveying smaller fractional interest and who improved land, held to prevail over legal title in action to determine adverse claims. Garrey v. N., 185M487, 242NW12. See Dun. Dig. 8042.

#### 9563. Ejectment—Damages—Improvements.

Written promise by remaindermen to pay for improvements erected by life tenant, held to create a mere personal obligation and constituted no defense or counterclaim in ejectment. 180M151, 230NW634.

Remaindermen are not liable for improvements made by life tenant, and holding of trial court that there was consideration for the contract is affirmed by equally divided court. 180M151, 230NW634.

#### 9565. Occupying claimant.

One who, through mistake as to the boundary participated in by the adjoining owner, builds a house on the land of such other, remains the owner thereof. 171 M318, 214NW59.

#### 9566. Pleadings—Trial—Verdict.

##### 1. Evidence.

Fraud in obtaining signature of wife to deed. 173M 51, 216NW311.

##### 9. Survey.

If the description in the verdict in ejectment and judgment was not sufficiently definite or certain, the trial

court indicated that on application a survey and plat would be ordered to make it so. Deacon v. H., 182M540, 235NW23. See Dun. Dig. 2905.

#### 9569. May remove crops.

176M37, 222NW292.

#### 9572. Mortgagee not entitled to possession.

An assignment of rents, contained in a real estate mortgage, for the purpose of paying taxes and insurance on the property in case of the failure of the mortgagor or his grantees to pay the same, is held valid, following Cullen v. Minnesota L. & T. Co., 60M6, 61NW318. 178M 150, 226NW406.

The assignee of the rents was entitled to recover same from a tenant of one who acquired title to the property subject to the assignment. 178M150, 226NW406.

Mortgagor is entitled to rents and profits prior to foreclosure, and until the period of redemption has expired after foreclosure, and on the foreclosure of a second mortgage any right of the second mortgagee to have rents applied on the prior liens terminated, and the mortgagor was entitled to the rents and profits during the period of redemption. 179M571, 229NW874.

This section does not deprive mortgagee of former recourse to equitable remedy of a receivership to protect security. Gardner v. W., 185M147, 240NW351. See Dun. Dig. 6456(33).

After foreclosure of mortgage on instalment, mortgage and all its covenants, including that to pay taxes, remain in full force and mortgagee is entitled under assignment of rents as part of security to collect rents to apply upon delinquent taxes, even those accrued at time of foreclosure for instalment. Peterson v. M., 248NW667. See Dun. Dig. 6227n, 26.

#### 9573. Conveyance by mortgagor to mortgagee.

Notwithstanding this section equity may scan a conveyance by mortgagor to mortgagee, and if the transaction is fair it will be given effect as a conveyance. 179 M73, 228NW340.

A building contract, warranty deed, and a contract for deed held a conditional sale, not an equitable mortgage. Westberg v. W., 185M313, 241NW315. See Dun. Dig. 6153.

There is no longer a presumption that a transfer by a mortgagor to his mortgagees is given as further security or as a new form of security, and a mortgagor may eliminate his title by conveying directly to mortgagee. McKinley v. S., 247NW389. See Dun. Dig. 6150, 6166, 6250.

Evidence held to show conveyance to plaintiff and contract by him and wife to reconvey was equitable mortgage. Jeddloh v. A., 247NW512. See Dun. Dig. 6154, 6157.