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1927

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LAWS, THE CONSTITUTION, AND THE STATUTES CONTAINED IN THE GENERAL STATUTES OF 1923, EXCEPT THOSE WHICH HAVE BEEN REPEALED OR SUPERSEDED BY THE SUBSEQUENT LEGISLATION OF 1925 AND 1927

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

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CHAPTER 77

CIVIL ACTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PARTIES

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

5. In general.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Guardian—48–82, 50+1022.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19–174, 137; 68–8, 70+800.

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

Applicable to parties liable on a joint and several obligation (24–116; 40–27, 41+302. See 69–156, 71+1028). The maker and guarantor of an instrument may be joined (31–314, 17+858; 33–21, 21+849; 57–374, 59+311; 71–185, 73+853). Cited (5–333, 264; 48–3, 50+891). Joinder of parties defendant in actions of tort governed by common law (100–79, 110+356). Applicable only to actions on contract (134–462, 159+1082). Assignee's bond (140–71, 167+294).

164–265, 204+938.

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

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

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

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

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

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

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

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

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

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

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

212+196, note under § 9498.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Baseball association. 160–341, 200+300.

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

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

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

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

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

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

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

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

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

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

LIMITATION OF ACTIONS

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

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

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

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

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

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

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

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

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

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

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

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

½. In general.

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

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

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

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

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

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

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

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

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

132–311, 156+350.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

125–484, 147+655; 151–269, 186+691.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Upon a contract or other obligation, express or implied, as to which no other limitation is expressly prescribed.
2. Upon a liability created by statute, other than those arising upon a penalty or forfeiture.
3. For a trespass upon real estate.
4. For taking, detaining, or injuring personal property, including actions for the specific recovery thereof.
5. For criminal conversation, or for any other injury to the person or rights of another, not arising on contract, and not hereinafter enumerated.
6. For relief on the ground of fraud, in which case the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.
7. To enforce a trust or compel a trustee to account, where he has neglected to discharge the trust, or claims to have fully performed it, or has repudiated the trust relation.
8. Against sureties upon the official bond of any public officer, whether of the state or of any county, town, school district, or municipality therein; in which case the limitation shall not begin to run until the term of such officer for which the bond was given shall have expired. (4076) [7701]

½. In general.

209+864, 210+622.

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

Thresher's lien. 160–38, 199+748.

Promissory notes. 160–146, 199+567.

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

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

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

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

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

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

Subd. 3—129–113, 151+968.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

164–81, 204+923.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VENUE

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

Entitling papers after change of venue (68–4, 70+777). See 132–9, 155+754; 150–499, 185+1019.
162–132, 202+482, note under § 9215.

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

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

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

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

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

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

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

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

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

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

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

Action against public officer (92–402, 100+2). Officer may waive privilege (3–277, 191). Not applicable to an action of replevin for property wrongfully taken by an officer (34–506, 26+733; 45–170, 47+655). Not applicable to an action by a creditor against the officers of a corporation (66–213, 68+976). Cited (120–458, 139+947). Statute inapplicable (139–389, 156+534).
Venue. 166–499, 207+648.

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

147–272, 180+199.

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

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

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

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

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

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

139–389, 166+533.
159–355, 200+17.

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

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

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

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

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

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

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

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

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

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

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

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

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

CHANGE OF VENUE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Upon written consent of the parties;

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

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

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

Cited (108–125, 121+428).

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

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

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

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

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

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

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

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

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

Venue, 166–499, 207+648.

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

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

159–403, 199+103, note under § 9221.

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

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

This section overrules 30–473, 16+365.

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

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

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

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

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

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

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

88–130, 92+529; 96–348, 105+68.

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

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

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

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

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

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

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

SUMMONS—APPEARANCE—NOTICES, ETC.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. To the defendant personally.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. If such foreign corporation shall have appointed

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

298 Fed. 977; 165–95, 205+694.

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

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

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

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

162–55, 202+56, note under § 9223.

Service on foreign railroad corporation. 284 Fed. 1007.

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

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

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

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

Subd. 4—84–497, 88+10.

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

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

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

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

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

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

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

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

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

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

½. In general.

212+905.

Service on foreign railroad corporation. 284 Fed. 1007.

The service of a summons upon a nonresident by delivering a copy thereof to him without the state, is a substitute for the publication of the summons, and cannot be made without taking the steps required when the summons is to be published. 161–246, 201+323.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9. Form of summons—43–137, 45+4.

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

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

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

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

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

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

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

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

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

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

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

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

Service on foreign railroad corporation. 284 Fed. 1007.

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

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

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

Subd. 4—135–397, 161+148.

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

Subd. 6—47–581, 50+823.

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

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

See notes under § 9283.

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

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

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

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

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

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

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

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

5. When year begins to run—15–63, 43.

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

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

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

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

2. By the written admission of the party served;

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

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

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

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

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

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

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

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

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

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

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

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

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

APPEARANCE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Notice of appeal. 158–467, 197+847.

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

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

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

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

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

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

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

Notice of appeal. 158–467, 197+847.

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

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

209+868.

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

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

MOTIONS AND ORDERS

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

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

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

An issue of law arising on a demurrer may be noticed for hearing before the court in the county wherein the action is pending at any time, whether it be at a term of court or not (86–46, 90+126). Objection that the court did not fix the time for argument on a demurrer as provided in this section cannot be raised for the first time on appeal (71–238, 73+860). If a motion is made in an adjoining county it is not necessary that the moving papers or the record on appeal show that it is proper to make it there, for the presumption is in favor of the jurisdiction (15–486, 400; 39–367, 40+257. See 36–129, 30+447). If the judge of the district court in the district where an injunction of the court has been disobeyed is disqualified from acting, proceedings for such contempt may be had in an adjoining district (52–283, 53+1157). Where an action was brought in Le Sueur county and the venue was changed to Hennepin county it was held irregular for the plaintiff to notice a demurrer of the defendant for argument in Sibley county after the change of venue, but that it was an irregularity not going to the jurisdiction of the court (66–213, 68+976). Opening judgment on pleadings (122–154, 142+134). Motion upon supplemental action in ejectment (124–538, 144+1090). Every reasonable intendment accorded pleading assailed (125–119, 145+812). Motion in mandamus for judgment on the pleadings (129–183, 151+970). 165–482, 205+888.

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

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

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

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

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

Orders appealable. 212+896.

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

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

PLEADINGS

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

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

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

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

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

9250. Contents of complaint—The complaint shall contain:

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

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

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

½. In general.

Pleading conclusions. 162§139, 202+708.

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

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

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

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

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

Pleading as evidence. 211+463.

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

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

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

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

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

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

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

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

5. That several causes of action are improperly united;

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

½. In general.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

½. In general.

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

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

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

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

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

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

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

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

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

9253. Contents of answer—The answer shall contain:

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

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

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

½. In general.

161–302, 201+431, note under § 9254.

163–481, 204+531, note under § 9254.

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

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

Answer stricken as sham. 210+690.

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

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

DENIALS

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

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

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

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

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

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

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

6. Denials controlled by subsequent admissions—If there is a denial and also an admission the latter controls (4–148, 99; 5–119, 85; 7–494, 401; 21–378; 23–186; 28–526, 11+94; 38–111, 35+728; 71–311, 73+956).

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

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

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

10. Non-traversable allegations—Allegations of immaterial matters (1–170, 144; 9–194, 179; 12–192, 116; 17–123, 98; 20–382, 334; 33–424, 23+837; 47–56, 49+383; 71–69, 73+645), of legal conclusions (9–194, 179; 16–288, 219; 17–493, 470; 39–122, 39+74, 140), of unliquidated damages (34–314, 26+394), of time generally (9–194, 179); and the prayer for relief (32–92, 19+393), are not traversable.

NEW MATTER CONSTITUTING A DEFENCE

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

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

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

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

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

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

EQUITIES

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

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

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

20. Burden of proof—28–418, 10+425.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1½. Against one of two plaintiffs.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24. Recoupment—(121–280, 141+179).

25. Counterclaim against counterclaim.

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

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

167–32, 208+526, notes under § 9699.

SEVERAL DEFENCES

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

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

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

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

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

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

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

DEMURRER

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

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

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

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

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

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

½. In general.

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

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

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

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

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

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

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

4. Reference—18–90, 72.

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

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

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

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

½. In general.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SHAM PLEADINGS

¼. In general.

165–480, 205+889.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Answer stricken as sham. 210+590.

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

The defendant is not prejudiced by striking from an

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

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

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

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

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

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

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

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

6. Power to strike out to be exercised sparingly—To justify a court in striking out a pleading as sham its falsity must be clear and indisputable (29–166, 12+460; 33–505, 24+299; 53–507, 24+300; 61–103, 63+255; 84–224, 87+618; 94–261, 102+700). A sham answer may be stricken out when its falsity is clearly shown, even though interposed in the belief of its truth and in good faith (96–422, 105+490).

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

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

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

10. Motion to strike out granted—13–165, 154; 29–166, 12+460; 31–7, 16+453; 31–267, 17+388; 34–444, 26+601; 35–470, 29+170; 37–509, 35+372; 40–450, 42+352; 53–98, 54+939; 55–144, 56+589; 55–413, 57+139; 56–390, 57+938; 57–140, 58+872; 61–103, 63+255; 68–30, 70+775; 72–111, 75+4; 74–320, 77+232; 93–232, 100+1104; 94–261, 102+700; 101–53, 111+733. Sham reply (125–100, 145+787; 133–240, 158+239; 136–53, 161+257; 150–118, 184+786).

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

IRRELEVANT PLEADINGS

12. Defined—2–219, 180.

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

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

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

FRIVOLOUS PLEADINGS

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

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

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

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

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

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

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

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

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

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

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

159–355, 200+17.

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

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

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

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

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

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

162–132, 202+482, note under § 9181.

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

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

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

4. Demurrer—33–519, 24+291.

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

6. Order of court unnecessary—25–148.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REDUNDANT PLEADINGS

½. In general.

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

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

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

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

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

INDEFINITE PLEADINGS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Subd. 7—10–199, 161.

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

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

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

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

Remedy—Objection to a complaint for misjoinder of

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

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

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

45–357, 47+1064.

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

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

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

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

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

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

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

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

AMENDMENT OF PLEADINGS

½. In general.

164–21, 204+634; 209+868.

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

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

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

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

In an action for divorce started in November, 1921, defendant admitted he was worth $160,000 and plaintiff relied thereon, the court properly, in the exercise of its discretion, refused to permit the withdrawal of the admission on trial. 160–224, 199+908.

There was no error in permitting the amendment, at the trial, of the complaint in a bastardy proceeding, by adding a formal allegation that the child in question was illegitimate. 161–28, 200+746.

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

Action for damages caused by a fire alleged to have been set by defendant's locomotive. The trial court was within its discretion in refusing to permit an amendment to the complaint alleging that the loss was caused by a different fire, starting at a different time and place from that alleged in the original complaint. 162–256, 202+483.

Trial courts not only may, but should, freely permit amendments of complaint to conform to proof. 163–517, 204+326.

There was no abuse of discretion, on the part of the trial court, in permitting plaintiff to amend her complaint during the trial, and in requiring the trial to proceed. 165–67, 205+628.

In an action against a surety company, by indorsee of certain certificates of deposit, to reform certain certificates of deposit, to reform certain surety bonds to assure payment of such certificates, held:

That it was not an abuse of discretion for the trial court to permit plaintiff, after trial, to amend its complaint to conform to the proof. 210+66.

There was no error in refusing the plaintiff permission to amend the complaint by alleging a negligent plan of construction of a sidewalk. 211+819.

There was no error in refusing the plaintiff permission to amend the complaint by alleging that the defendant was negligent in permitting the artificial accumulation of ice and snow upon its sidewalk. 211+819.

The insurer pleaded the limitation in the rider and a cancellation of the policy as defenses. After verdict, it moved to amend by striking out the allegation relative to the rider and substituting an allegation that the policy was void because the insured had taken out additional insurance without the knowledge or consent of the insurer. There was no error in the denial of the motion. 212+451.

The ruling permitting an amendment of the answer at the trial cannot be reviewed, for there was no objection or exception. 213+533.

1. A matter of discretion—The amendment of pleadings is a matter lying almost wholly in the discretion of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion manifestly prejudicial to the appellant (5–505, 399; 10–192, 155; 13–66, 58; 29–68, 11+228). A refusal to allow an amendment held an abuse of discretion (78–394, 81+207).

2. Amendments on the trial held discretionary—6–319, 224; 8–236, 205; 8–324, 284; 10–192, 155; 13–442, 407; 19–32, 14; 37–507, 35+371; 40–273, 41+1040; 47–221, 49+691; 50–429, 52+910; 56–450, 58+35; 62–420, 64+915; 63–5, 65+91; 63–20, 65+86; 70–486, 73+408; 72–169, 75+116; 74–154, 76+68; 75–489, 78+113; 78–210, 80+965; 80–15, 82+978; 84–347, 87+937; 85–363, 88+998; 88–64, 92+512; 96–142, 104+765; 104–476, 116+1116. When, in the course of trial, court grants motion to amend complaint, by tendering new issues, defendant cannot be required to disclose by affidavit names of witnesses, nor what evidence he desires to produce, as a condition to continuance (105–384, 117+506). See 131–10, 154+508; 147–3, 179+369.

3. Amendments before trial held discretionary—5–505, 399; 29–68, 11+228; 72–169, 75+116.

4. Amendments after trial held discretionary—29–68, 11+228; 54–514, 56+173; 61–513, 63+1110; 95–434, 104+304; 97–460, 107+160; 99–457, 109+995; 101–460, 112+865.

5. Amendments conforming the pleadings to the proof held discretionary—37–130, 33+548; 39–326, 40+157; 45–460, 48+197; 51–330, 53+650; 59–375, 61+329; 61–513, 63+1110; 64–505, 67+637; 71–69, 73+645; 73–58, 75+756; 75–489, 78+113; 82–3, 84+460; 92–369, 100+93; 94–23, 101+954; 95–292, 104+4; 96–213, 104+886; 104–476, 116+1116.

6. Statute to be liberally construed and applied—85–359, 88+988.

7. In furtherance of justice—A court may, to a cer-

tain extent, take into account the nature of the defence in determining, in the exercise of its discretion, whether to grant an amendment (62–315, 64+902).

8. Must be material—An amendment introducing immaterial averments will not be allowed (17–123, 98; 32–101, 20+89).

9. Terms—8–286, 252; 36–302, 30+813; 61–513, 63+1110.

10. Motion—The motion for leave to amend, except when made on the trial, is regularly made on notice and "in all cases where an application is made for leave to amend a pleading * * * such application shall be accompanied with a copy of the proposed amendment * * * and an affidavit of merits and be served upon the opposite party" (14–469, 351; 75–138, 77+788).

11. Service of order—An order granting leave to amend need not be served on the opposite party unless it so directs (12–221, 141).

12. Scope of allowable amendment of complaint—Amendment does not mean substitution. A complaint cannot be amended by introducing an entirely new cause of action (39–325, 40+159; 48–366, 51+120; 58–247, 59+1016; 59–325, 61+329; 62–420, 64+915; 63–447, 65+722; 78–210, 80+965; 85–363, 88+998. See 12–221, 141).

13. Scope of allowable amendment of answer—Whether an entirely new defence may be introduced by amendment is an open question. Greater liberality is allowed to defendant than to plaintiff in making amendments (see 5–505, 399; 13–394, 365; 17–123, 98; 54–514, 56+173; 62–315, 64+902).

14. Changing action ex contractu to action ex delicto—30–399, 16+462; 39–54, 38+763; 58–247, 59+1016.

15. Amendment of parties—The court may at any time amend the name of any party except for the purpose of acquiring jurisdiction (9–55, 44; 22–558; 37–402, 34+740. See 32–548, 21+748; 60–485, 62+1130; 61–353, 63+737). The court may strike out the name of a plaintiff improperly joined (50–21, 52+390). In an action brought in favor of a minor in the name of the guardian held allowable to amend the record by adding the name of the ward (48–82, 50+1022; 67–298, 69+923). See 133–434, 158+711.

16. Amendment increasing damages—The court may allow a complaint to be amended on the trial by increasing the amount of damages claimed (34–473, 26+607). An amendment may be allowed increasing damages claimed on appeal from a justice court (14–214, 153; 40–388, 42+83).

17. Amendment after verdict—**A court has no power** to grant an amendment of a complaint after verdict to conform to evidence which was seasonably objected to on the trial as inadmissible under the pleadings and without which the plaintiff could not have recovered (44–20, 46+138). Otherwise if the evidence was not objected to (37–130, 33+548; 64–505, 67+637; 73–58, 75+756; 94–23, 101+954. See cases under Note 5 supra). See 141–151, 169+540; 147–3, 179+369.

18. Amendment after judgment—The court has power to amend pleadings after judgment but it is a power to be exercised sparingly (36–99, 30+429; 64–505, 67+637; 65–429, 68+68; 73–58, 75+756; 79–423, 82+677; 91–161, 97+581). An amendment after judgment of an insufficient statement for judgment by confession will not be allowed to the prejudice of third parties (27–478, 8+380; 40–258, 41+946). 131–159, 154+951; 141–151, 169+540.

19. Amendment after appeal—29–68, 11+228; 54–514, 56+173; 80–466, 83+443; 85–359, 88+988. After affirmance on appeal (102–260, 113+906). See 147–3, 179+369.

OTHER AMENDMENTS

20. Application of statute—It is applicable only to judicial proceedings. It is not applicable to a mechanic's lien statement (83–187, 86+19). It authorizes the *supreme court to reinstate an appeal (28–68, 9+79).* It authorizes the district court to amend its records (21–51; 43–401, 45+715). It is applicable to condemnation proceedings (35–439, 29+148). It does not authorize the bringing in of new parties (20–173, 157. See 32–548, 21+748). Amendment of notice of motion for a new trial (95–367, 104+233). Amendment of summons (116–115, 133+398). Cited (104–165, 116+357). Amendment of findings (121–285, 141+186). Amending summons (131–174, 154+952).

21. Amendment to an answer (126–494, 148+299; 130–152, 153+316; 130–342, 153+745; 132–390, 157+642).

9281. Variance—Amendment—Exceptions—No variance between the allegations in the pleading and the proof is material unless it has actually misled the adverse party to his prejudice in maintaining his action or defence on the merits. Whenever a party alleges that he has been so misled, he shall prove the fact to the satisfaction of the court, showing in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as may be just. When the variance is not material, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs. (4158) [7784]

1. Proof must follow pleadings—The evidence must follow the allegations. In order to recover it is not enough for the plaintiff to prove a cause of action. He must prove the cause of action alleged in his complaint (1–17, 1; 1–87, 65; 2–314, 268; 25–337; 33–189, 22+300; 43–270, 45+443; 47–131, 49+688; 56–52, 57+318; 57–93, 58+825; 57–377, 59+311; 60–346, 62+391; 77–428, 80+364). Plaintiff who has declared on express agreement, cannot recover on proof of implied contract (93–146, 107+1053). See 122–59, 141+1105.

165–67, 205+628.

Plaintiff, who has declared on an express contract, cannot recover on proof of an implied contract. *Having based his claim upon the specified contract he must* prove its performance before he can recover. 166–163, 207+193.

The fact that the complaint alleged that defendant had collected the mortgage, while the proof shows that defendant had not collected it, but had taken it over as its own property, is not a fatal variance under the facts of this case. 209+899.

2. Immaterial variance—When the disagreement between the facts alleged and the facts proved or sought to be proved is so slight that it is perfectly obvious that the adverse party could not have been misled in his preparation for trial, the variance is deemed immaterial, and the court will either disregard it altogether or order an immediate amendment without costs (4–270, 190; 10–350, 277; 13–442, 407; 16–83, 72; 21–358; 22–25; 30–308, 15+252; 31–396, 18+103; 39–54, 38+763; 39–325, 40+159; 42–480, 44+530; 44–441, 46+914; 46–31, 48+446; 61–513, 63+1110; 74–171, 77+26; 75–489, 78+113; 82–116, 84+730; 89–280, 94+871; 89–412, 94+1091; 89–465, 95+316; 94–23, 101+954; 103–173, 114+738; 119–470, 138+694, 139+703).

120–359, 139+703; 121–280, 141+179; 122–295, 142+710; 125–137, 145+304; 128–112, 150+385; 128–304, 150+901; 133–318, 158+424; 135–178, 160+773, 137–457, 163+780; 146–436, 179+47.

3. Material variance—When the disagreement between the facts alleged and the facts proved or sought to be proved is so great that the adverse party might reasonably have been misled in his preparation for trial and such party makes it appear to the court that he was actually misled the variance cannot be disregarded and an amendment will be ordered with costs, or a continuance granted with leave to amend with or without costs in the discretion of the court. It is not enough that there is a material variance appearing on the face of the pleadings and evidence but the fact that the adverse party has been misled must be proved aliunde the pleadings and evidence (4–119, 78; 16–33, 19. See cases under Note 2 supra).

4. Effect of statute on pleadings—This and the following section do not relieve a plaintiff from alleging in his complaint all the essential facts constituting his cause of action (1–176, 150).

5. Complaint ordered amended to conform to the evidence—(146–65, 177+928).

9282. Failure of proof—When the averment to which the proof is directed is unproved, not in some particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within § 9281, but a failure of proof. (4159) [7785]

When the disagreement between the facts alleged and the facts proved is of such a character that a different *cause of action than the one set up in the pleading* is proved the court cannot order or grant an amendment over objection but must dismiss the action. To prove fatal the disagreement need not extend to all the facts. The same facts may enter into two different causes of action. The test is not the extent of the disagreement in the facts, but the different character of the causes of action made out by the facts (1–48, 32; 1–87, 65; 3–332, 232; 10–192, 155; 12–494, 398; 18–176, 163; 20–345, 298; 22–449; 25–337; 30–399, 16+462; 40–445, 42+207; 45–250, 47+795; 58–112, 59+981; 59–329, 61+328; 60–346, 62+391; 64–527, 67+645; 71–69, 73+645; 71–533, 74+891; 77–428, 80+364; 83–336, 86+335). Under an allegation of facts constituting a legal title facts constituting an equitable title cannot be proved (47–137, 49+693; 49–91, 51+662; 50–373, 52+963; 70–203, 72+1068; 89–280, 94+871). Incorporation where not material need not be proved (128–73, 150+226). No fatal variance (128–112, 150+386; 128–332, 150+1088).

9283. Extensions of time—Relief against mistakes, etc.—The court, in its discretion, may likewise permit an answer or reply to be made, or other act to be done, after the time limited therefor by this chapter, or by its order may enlarge such time; or at any time

within one year after notice thereof, in its discretion, may relieve a party from any judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; or may, for good cause shown, modify or set aside its judgments, orders, or proceedings, whether made in or out of term and may supply any omission in any proceeding, or in the record, or by amendment conform any proceeding to the statute under which it was taken: Provided, that this section shall not apply to a final judgment in an action for a divorce, nor shall any relief granted thereunder affect the title to real estate as determined by any final judgment which shall have been of record in the office of the proper register of deeds for three years next prior to the date of application for such relief, as against any bona fide purchaser or incumbrancer thereof; but this shall not prevent the granting of just and equitable relief against any party to any such action affecting real estate, his heirs or devisees. (4160) [7786]

THE STATUTE GENERALLY

1. Application—Applicable only to judicial proceedings; not to proceedings in pais (51–417, 53+719; 84–62, 86+877). Applicable to proceedings in the supreme court (28–68, 9+79); in municipal court of St. Paul (110–107, 124+977). Applicable to cases where a party has failed to take or to take correctly some step pointed out by the statute under which he is proceeding (16–490, 443). Inapplicable to a final judgment in an action for divorce (93–195, 101+163). Where jurisdiction was acquired over a party in the suit in which judgment was obtained, the remedy by motion under this section where applicable is exclusive, except as to judgments obtained by fraud (114–454, 131+627). See 126–156, 147+959; 128–321, 150+906; 131–174, 154+952; 131–374, 155+626; 133–88, 157+999. Action dismissed for want of prosecution reinstated (135–471, 160+1032). Vacating order of dismissal and reinstatement (134–261, 159+272). Injunction against railroad from occupying street may be vacated (136–423, 162+523). Order vacating final order under drainage statute (137–466, 163+126). Applicable to opening decree of probate court (138–99, 163+1031). Apply to ordinary procedure in ditch and other special proceedings (140–236, 167+1043). Vacating order for ditch (144–449, 175+900; 147–335, 181+858). Inapplicable to Torrens proceeding (147–37[illegible], 182+449). No application to limit sum settlement under Workmen's Compensation Act (149–341, 183+837; 151–326, 184+273). Commutation to lump payment under Workmen's Compensation Act (152–12, 187+703; 153–186, 189+1026).

164–443, 205+374; 165–262, 206+168; 209+868.

Where no delay, inconvenience, or prejudice results to a defendant, the court, in the interest of justice, should readily grant a plaintiff's motion to open the case to supply a missing link in the testimony, called to his attention when defendant rested for the purpose of moving for a directed verdict. 161–58, 200+811.

In order to sustain a judgment for the vacation of a part of a street, it was permissible for the district court to receive evidence extranious to the record that notice of the application for the judgment had been given by posting; the judgment roll containing proof of notice by publication only. 163–206, 203+593.

Discretion of court. 163–513, 203+984.

In this case the verdict for the employee and against the employer is so perverse as to require a new trial. 167–84, 208+547.

2. Extension of time—25–234; 51–417, 53+719; 74–508, 77+416; 79–362, 82+686. Enlarging time for demand of jury trial in judicial ditch proceeding (131–374, 155+626). Permission to serve reply (131–490, 154+789).

3. Protection to bona fide purchasers or incumbrancers—39–73, 38+689; 39–481, 40+611; 44–501, 47+158; 51–213, 53+365; 51–421, 53+806; 70–243, 73+161; 88–281, 92+1121; 92–271, 99+889. Purchaser, after entry of judgment in case where lis pendens has been filed, is not affected by proceedings to modify or set aside judgment (110–6, 124+446).

AMENDMENT OF JUDGMENTS AND JUDICIAL RECORDS

3½. In general.

The trial court rightly ordered the dismissal of an action, on the showing made, the clerk having mistakenly entered a memorandum indicating that the case was stricken from the calendar, when in fact it was dismissed by the court on the motion of the defendant. 157–396, 196+486.

Such order, under the circumstances of this case, should not have been entered nunc pro tunc, when the effect of such entry would prevent the plaintiff or the beneficiary of the action from obtaining a reinstatement of the action, so that they might proceed with it as a compensation proceeding, or substantially embarrass him in so doing the time for instituting a proceeding under the Compensation Act having expired. 157–396, 196+486.

Where the sitting judge makes an order in a preliminary hearing in a judicial ditch proceeding, and, through mistake, inserts a finding not intended, such mistake may be corrected by his successor in office. 163–383, 204+318.

Error in findings. 165–293, 206+434.

4. To be made with caution—3–427, 313.

5. Discretionary—3–427, 313; 21–51; 43–401, 45+715.

6. When may be made—It may be made after the expiration of the term (3–427, 313). It cannot be made after an appeal and return to the supreme court so as to affect the rights of the parties on appeal (75–75, 77+537).

7. Notice of motion—21–51; 23–518; 70–243, 73+161; 70–252, 73+155; 79–476, 82+990.

8. Who may oppose motion—21–51.

9. Order of court necessary—37–533, 35+377. Court commission has no power to vacate judgment (131–129, 154+748).

10. Extrinsic evidence admissible—41–508, 43+394; 45–441, 48+198.

11. Clerical mistakes of clerk—1–134, 110; 19–17, 1; 21–51; 24–48; 41–508, 43+394; 63–205, 65+268; 137–153, 163+126. In workmen's compensation cases, same as in others (149–341, 183+837).

12. Mistakes of judge—Clerical mistake (15–185, 142; 43–305, 45+438; 47–491, 50+533; 62–498, 65+84; 84–14, 86+613, 1004). Where a cause is submitted on a stipulation of facts covering certain issues, and by mistake the court determines issues excluded, findings and judgment may be amended to express intention of parties (104–460, 116+940). In workmen's compensation cases same as in others (149–341, 183+837).

13. Amendment of verdict—1–134, 110; 3–134, 80; 4–433, 335; 15–501, 413; 19–79, 54; 21–327; 27–108, 6+456; 45–441, 48+198; 81–312, 84+40.

14. Judgment not authorized by order—41–508, 43+394; 47–257, 49+981; 47–260, 49+980; 66–138, 68+855; 66–487, 69+610, 1069; 68–437, 71+619; 70–71, 72+827, 73+1; 72–16, 74+1016.

15. Judgment not authorized by verdict—3–134, 80; 18–199, 182; 42–179, 43+966; 47–260, 49+980.

16. Judgment not authorized by report of referee—12–60, 27; 47–260, 49+980.

17. Modification of orders—86–26, 90+8. Power of court to correct errors and mistakes, and to modify its judgments and orders is not limited to non-appealable orders (137–153, 163+126). See 147–417, 180+701.

18. Modification of judgments—It was formerly held that after entry of judgment pursuant to order a court had no authority to correct its judicial errors on motion, the only remedy being a new trial or an appeal (22–1; 23–214; 24–43; 28–33, 8+900). It is now the rule that a court may modify its judgments on motion at any time within the period for taking an appeal (79–226, 81+1057; 93–350, 101+496. See 53–54, 54+935; 84–14, 86+613, 1004, 89–297, 94+887). Judgment of dismissal upon stipulation (131–248, 154+1099). Divorce judgment excepted (133–88, 157+999). Power of court to correct errors and mistakes, and to modify its judgments and orders is not limited to non-appealable orders (137–153, 163+126). Court may amend final decree so as to protect right of after-born children (138–99, 163+1031; 147–417, 180+701; 147–335, 181+858). Inapplicable to Torrens proceedings (147–375, 182+449). Judgments for foreclosure of mortgages is no exception (154–312, 193+590).

19. Amendment of proof of service of summons—9–55, 44; 22–178; 43–401, 45+715; 44–56, 46+319; 63–205, 65+268; 81–19, 83+464; 87–271, 92+6.

20. Amendment of false return of sheriff—37–8, 32+786; 53–96, 54+932.

21. Amendment of execution—19–17, 1.

22. Amendment of names of parties—37–402, 34+740; 48–82, 50+1022; 61–353, 63+737; 66–40, 68+321; 67–298, 69+923; 77–543, 80+700; 79–423, 82+677. Amending summons (131–174, 154+952).

23. Supplying omissions in the record—3–427, 313; 6–287, 194; 38–359, 37+455. See 78–427, 81+198; 137–153, 163+126.

24. Replacing lost records—32–95, 20+229.

25. Rights of third parties to be saved—21–51; 27–478, 8+380; 40–258, 41+946; 43–401, 45+715.

VACATION OF JUDGMENTS AND ORDERS

25½. In general.

The court was justified, on the showing made, in refusing to vacate a judgment in favor of the plaintiff and in denying the defendant permission to defend. 157–94, 195+768.

A motion to vacate is not too late, although made after the expiration of the time within which an appeal from the judgment might have been taken, when it is not sought by the motion to accomplish a result which might have been secured by an appeal. 158–391, 197+754.

Where points could have been made by appeal from judgment, they cannot be reviewed by motion to vacate it. 165–479, 205+637.

The trial court did not abuse its discretion in exercising this power when it vacated an order, made three days after the death of the plaintiff, setting aside a verdict in his favor in a personal injury action, and in denying, on a rehearing, the defendant's motion for a new trial. 210+866.

26. Statute a regulation not a grant of power—22–1; 39–305, 40+71.

27. Notice of motion—79–476, 82+990. See note 7 supra.

28. Application by non-resident—Attachment—74–4, 76+787.

29. Application by stranger to judgment—20–173, 157; 31–505, 18+645; 40–410, 42+89; 43–80, 44+675; 46–314, 48+1120; 74–234, 76+1132.

30. Application by assignee—12–375, 251; 137–472, 163+1069.

31. Merits need not be shown—5–367, 296; 20–173, 157; 29–108, 12+342; 52–98, 53+812, 850.

32. Diligence—When the judgment is absolutely void and not merely voidable the moving party need not show diligence (20–173, 157; 29–108, 12+342; 38–341, 37+585; 79–476, 82+990. See 35–207, 28+507). A void judgment never becomes good by lapse of time (61–335, 63+880). When the judgment is merely voidable the applicant must show due diligence (14–464, 346; 22–542; 23–539; 36–341, 31+56; 38–341, 37+585; 42–84, 43+784; 58–72, 59+828). See 132–355, 157+586; 135–290, 160+781.

33. Motion defeated by amendment—43–401, 45+715.

34. Void judgments—A person against whom a void judgment has been entered has an absolute right at any time and without showing diligence or a meritorious defence to have it vacated on motion. An appearance to set aside a void judgment does not validate it (5–367, 296; 20–173, 157; 23–539; 29–108, 12+342; 35–1, 35, 25+457, 30+826; 38–341, 37+585; 39–336, 40+163; 43–80, 44+675; 46–484, 49+247; 48–66, 50+936; 48–521, 51+478; 52–98, 53+812; 55–75, 56+576; 62–18, 63+1117; 74–234, 76+1132; 79–476, 82+990).

35. Jurisdictional defects—The following jurisdictional defects have been held ground for vacating judgments on motion: defective or untrue affidavits for publication of summons (5–367, 296; 35–1, 35, 25+457; 30+826; 38–341, 37+585); defective publication of summons (39–336, 40+163; 87–271, 92+6); improper personal service of summons (52–98, 53+812); service of summons on wrong person (43–80, 44+675; 52–98, 53+812); service by publication on resident of state (23–539; 44–97, 46+315. See 46–174, 48+773; 84–329, 87+838); failure to substitute proper parties after death of defendant (20–173, 157); rendition of judgment in state court after removal to federal court (48–521, 51+478); improper service at house of usual abode (39–305, 40+71); unauthorized appearance (35–207, 28+507. See 82–162, 84+745); no service of summons (47–250, 49+981; 51–363, 53+646; 56–351, 57+1060; 79–476, 82+990); departure from the requirements of the statute in the service of summons (53–315, 55+127); improper service of summons on officer of a foreign corporation (26–233, 2+698).

36. Return of service of summons not conclusive—39–305, 40+71; 40–52, 41+244; 41–12, 42+594; 51–363, 53+246; 56–351, 57+1060; 70–105, 72+835; 78–295, 80+1127.

37. Unauthorized action—35–207, 28+507; 82–162, 84+745.

38. Erroneous judgment—65–90, 67+893.

39. Facts arising after judgment—30–477, 16+269; 33–516, 24+255. See 23–214.

40. Fraud—23–46; 23–227; 24–345; 41–297, 43+67. To vacate default judgment of divorce, the evidence of fraud must be clear and convincing (151–302, 186+694).

41. Surprise—23–227; 23–539. See 58–72, 59+828; 151–326, 184+273.

42. Failure to file or serve complaint—73–167, 75+1043.

43. Judgment against infant—42–84, 43+784.

44. Default judgment prematurely entered—55–75, 56+576.

45. Vacation of orders—86–26, 90+8; 144–449, 175+900.

OPENING DEFAULTS

45½. In general.

There was no abuse of judicial discretion in refusing to open a default judgment and permitting defendant to answer, or, upon the showing made, the court might well conclude that defendant had knowledge of the entry of the judgment for nearly four years before he applied for relief. 160–13, 199+226.

On the facts of this case, it was not an abuse of discretion to refuse to open a default judgment. 160–180, 199+904.

Record examined, and held, that the trial court did not abuse its discretion in relieving parties defendant from default, and permitting one defendant to answer, and as to both defendants permitting a trial upon the merits. 160–181, 199+928.

Abuse of discretion not to open default judgment. 161–94, 200+847.

A judgment entered upon the default of the defendant without due service of process is void for want of jurisdiction, and will be vacated at any time on reasonable notice. Neither diligence nor the showing of a meritorious defense is necessary. 161–246, 201+323.

In an action to quiet title, where the summons was served by publication and judgment entered quieting title in the plaintiff, and the defendant, through whom plaintiff claims title, was known to have died, leaving heirs and devisees, who were not made parties appellant, being one of them, subsequently appears in the action and asks to have the judgment opened as to her, with leave to answer and defend upon the grounds of mistake, inadvertence, and excusable neglect the decision is adverse to her, and she fails to appeal therefrom, the judgment becomes binding against her. 161–372, 201+605.

The court properly vacated a default judgment and permitted the defendants to answer. 161–489, 201+936.

The statute does not require an affidavit of merits as a condition to such relief. The rule of court making such requirement is properly waived when the record shows merits. 161–489, 201+936.

The showing, in opposition to a motion to vacate a default judgment and permit defendant to answer, indicates that, when the service was made upon him, defendant knew perfectly well what was happening. Held not an abuse of discretion to deny his motion for relief. 165–308, 206+447.

A mortgagee, upon whom service has been made by publication, and who has not appeared, applying within one year after judgment, not being guilty of laches and tendering an answer constituting "sufficient cause" because it states a good defense is entitled to have the judgment vacated and be given permission to serve and file her answer. 166–430, 208+136.

Order denying defendant's motion to vacate judgment against him and to permit him to answer and defend, based on ground that defendant did not answer because of promise of plaintiff's attorney to drop action based on conflicting evidence, will not be disturbed on appeal. 166–494, 207+20.

46. Remedy by motion how far exclusive—The exclusive remedy is by motion under this section (88–431, 93+310; 89–300, 94+885; 89–319, 94+1085, 1135; 154–538, 191+816.

47. Statute a regulation not a grant of power—5–23, 10; 40–463, 42+391. See 13–66, 58.

48. To what applicable—Held applicable to foreclosure proceedings (40–463, 42+391); to tax proceedings (62–18, 63+1117); to condemnation proceedings (38–157, 36+105); to habeas corpus proceedings (38–278, 37+338); to garnishment proceedings (10–162, 130); to actions in which the summons was served by publication (39–73, 38+689; 39–481, 40+611; 40–463, 42+391; 44–392, 46+766; 45–252, 47+796; 93–249, 101+304); to actions against "unknown heirs" (44–392, 46+766); to actions against "other persons or parties unknown" (93–249, 101+304); to partition proceedings (39–481, 40+611); to an action of ejectment (35–337, 29+130). Not applicable to judgment in action for divorce (93–195, 101+163. See 102–344, 113+896). Action to annul marriage for fraud and duress is not action for divorce, within proviso (102–405, 113+1013). Workmen's compensation act (134–191, 158+825). Inapplicable to Torrens proceeding (147–375, 182+449). Inapplicable to final judgment in divorce (149–105, 182+955; 154–538, 191+816).

49. Relief granted liberally—Courts are inclined to relieve a party from a default if he furnishes any reasonable excuse for his neglect and makes any fair showing of merits (50–1, 52+219; 70–489, 73+405; 72–393, 75+606; 77–159, 79+669; 81–515, 84+338; 94–437, 103+506; 99–272, 109+248; 104–399, 116+751). It is ordinarily in furtherance of justice that an action should be tried on the merits (11–232, 153; 94–437, 103+506). Different considerations apply when the application is made by a "prowling assignee" or speculative purchaser (84–329, 87+838). Relief should not be allowed in a way to encourage loose practice or a lax administration of the law (7–493, 399; 60–117, 61+910; 94–506, 103+506). When no application to trial court, no consideration will be accorded on appeal (123–352, 143+1123). Discovery of evidence after rendition of judgment; application granted cautiously (134–191, 158+825; 137–472, 163+1069).

50. Discretionary—The matter of opening a default lies almost wholly in the discretion of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion (1–203, 176; 5–65, 47; 6–458, 315; 6–550, 386; 9–181, 166; 10–162, 130; 11–65, 37; 11–232, 153; 16–81, 69; 17–402, 378; 23–518; 28–38, 8+903; 32–266, 20+159; 32–312, 20+238; 34–96, 24+319; 35–212, 28+255; 35–337, 29+130; 36–117, 30+436; 39–315, 40+66; 39–390, 40+518; 40–463, 42+391; 41–526, 43+482; 42–62, 43+782; 43–195, 45+427; 44–392, 46+766; 44–417, 46+854; 45–88, 47+462; 45–252, 47+796; 46–352, 49+60; 46–535, 49+257; 47–245, 49+983; 47–428, 50+530; 50–1, 52+219; 50–258, 52+861; 52–501, 55+58; 55–287, 56+895; 57–267, 59+195; 58–20, 59+629; 58–196, 59+1000; 60–61, 61+824; 61–256, 63+634; 61–271, 63+735; 62–18, 63+1117; 66–54, 68+515; 66–64, 68+604; 66–131, 68+845; 67–131, 69+708; 67–368, 69+1101; 69–176, 71+928; 70–105, 72+835; 70–489, 73+405; 72–393, 75+606; 74–4, 76+787; 77–159, 79+669; 77–543, 80+700; 78–295, 80+1127; 81–372, 84+21; 81–515, 84+338; 82–162, 84+745; 84–329, 87+838; 85–138, 88+411; 86–286, 90+1133; 89–477, 95+310; 90–301, 96+794; 90–517, 97+373; 92–271, 99+889; 101–22, 111+729; 102–405, 113+1013; 108–151, 121+605). Particularly is this true when the determination of the court is made on conflicting affidavits (28–38, 8+903; 32–266, 20+159; 38–359, 37+455; 47–250, 49+981). If it is obvious that the trial court has acted wilfully, arbitrarily, capriciously, or under a misapprehension of the law, and in denial of justice, its action will be reversed on appeal, for its power in this regard is not absolute but judicial and must be judicially exercised (20–100, 83; 28–132, 9+633; 39–481, 40+611; 40–45, 41+243; 50–1, 52+219; 50–164, 52+379; 57–251, 59+297; 60–117, 61+910; 74–508, 77+416; 78–295, 80+1127; 94–37, 101+951). The discretion contemplated by the statute is not the arbitrary and uncontrolled pleasure or caprice of the judge but a sound legal discretion; a discretion in the exercise of which it is his duty to grant the desired relief in a meritorious case (7–493, 399; 24–345; 66–54, 68+515; 74–508, 77+416). The discretion cannot be exercised except in favor of a party who brings himself within the provisions of the statute by a showing of fraud, mistake, inadvertence, surprise or excusable neglect (94–37, 101+951). If a default judgment is entered when in fact there was no default an application to open is not addressed to the discretion of the court but is a matter of right (6–550, 386). See 122–187, 142+144; 123–352, 143+1123; 124–535, 144+1134, 125–475, 147+654; 126–185, 148+57; 127–435, 149+671. Not an abuse of discretion (128–311, 150+907; 129–316, 152+721; 129–316, 152+721; 129–414, 152+772; 130–45, 152+865). Amending summons (131–174, 154+952; 131–248, 154+1099; 131–490, 154+789; 132–355, 157+586; 133–116, 157+1076). No absolute right, and inexcusable neglect of counsel appearing, there is no abuse of discretion (134–328, 159+752; 134–328, 159+752; 136–320, 162+352; 137–472, 163+1069). Vacating judgment and permitting amended complaint (147–3, 179+370; 147–156, 179+902). Inapplicable to Torrens proceeding (147–375, 182+449; 152–12, 187+703; 153–186, 189+1026; 154–538, 191+816).

51. Excusable neglect—7–493, 399; 9–181, 166; 20–100, 83; 20–156, 139; 29–68, 11+228; 35–212, 28+255; 39–390, 40+518; 41–526, 43+482; 42–62, 43+782; 47–428, 50+530; 55–287, 56+895; 60–117, 61+910; 61–256, 63+634; 66–64, 68+604; 66–131, 68+845; 67–368, 69+1101; 70–489, 73+405; 72–393, 75+606; 74–4, 76+789; 77–159, 79+669; 78–295, 80+1127; 81–372, 84+21; 81–515, 84+338; 85–138, 88+411; 89–477, 95+310; 92–271, 99+889; 113–433, 129+853. Default in filing reply (122–155, 141+1134, 142+134; 122–187, 142+144). Delivery of summons outside state (122–399, 142+714; 126–185, 148+57; 133–63, 157+903; 133–116, 157+1076; 137–472, 163+1069).

52. Surprise—16–81, 69; 20–100, 83; 20–156, 139; 42–62, 43+782; 126–185, 148+57.

53. Mistake—9–181, 166; 37–128, 33+546; 47–428, 50+530; 52–501, 55+58; 66–54, 68+515; 67–131, 69+708; 70–489, 73+405; 124–535, 144+1134; 126–185, 148+57; 130–46, 152+865; 136–320, 162+352; 136–428, 162+518; 137–472, 163+1069; 147–156, 179+902.

54. Fraud—6–458, 315; 17–181, 153; 39–390, 40+518; 45–88, 47+462.

55. When year begins to run—23–227; 36–341, 31+56; 39–73, 38+689.

56. Time of application—Diligence—A party must make his application within a reasonable time after notice of the judgment and at all events within one year of such notice (5–23, 10; 7–325, 254; 9–181, 166; 13–66, 58; 28–132, 9+633; 28–251, 9+756; 34–96, 24+319; 36–341, 31+56; 37–514, 35+381; 46–535, 49+257; 47–245, 49+983; 50–258, 52+861; 56–476, 58+38; 58–72, 59+828; 67–131, 69+708; 69–176, 71+928; 81–515, 84+338; 89–477, 95+310). He must proceed with due diligence regardless of the one year limitation (5–23, 10; 7–325, 254; 28–132, 9+633; 39–315, 40+66; 40–45, 41+243; 70–105, 72+835; 84–329, 87+838). It must affirmatively appear, to justify granting such motion, when addressed to discretion of court, that it was made with due diligence and within one year from actual notice of the judgment (97–135, 106+108; 101–48, 111+732). Party who applies, within one year after entry of default judgment on service of summons by publication only, must be permitted to defend as matter of right, provided his motion is accompanied by answer setting up defense on merits, and he has not been guilty of laches (102–374, 113+909). Record of judgment is not "notice" of the entry thereof within this section (113–433, 129+853).

57. Meritorious defence necessary—The applicant must have a good defence on the merits and exhibit it to the court on the motion (15–288, 219; 39–315, 40+66; 44–417, 46+854; 50–1, 52+219; 57–251, 59+297; 70–105, 72+835; 78–295, 80+1127). The proper practice is to exhibit a proposed answer setting forth a good defence (81–515, 84+338). The applicant need not set forth the evidence of his defence and its truth or falsity cannot be tried on affidavits (47–428, 50+530; 81–515, 84+338; 89–477, 95+310). A verified general denial shows a good defence and is ordinarily sufficient (58–20, 59+629; 57–251, 59+297. See 44–514, 47+172; 58–196, 59+1000). See 124–530, 144+1134; 124–535, 144+1134; 124–537, 144+755; 134–328, 159+752; 136–320, 162+352; 136–428, 162+518; 152–12, 187+703.

58. Sufficiency of proposed answer—16–81, 69; 23–518; 47–428, 50+530; 58–196; 59+1000; 66–54, 68+515.

59. Affidavit of merits—23–518; 40–463, 42+391; 50–1, 52+219; 58–196, 59+1000; 66–54, 68+515; 81–515, 84+338; 85–138, 88+411; 90–301, 96+794; 97–135, 106+108. See 127–435, 149+671; 133–116, 157+1076; 136–320, 162+352; 136–428, 162+518. Not a statutory but court requirement (145–75, 176+154). Insufficiency (151–302, 186+694).

60. Counter affidavits—Counter affidavits are not permissible to show want of merits or to controvert the allegations of the proposed answer or affidavit of merits. The court cannot try the merits of the cause on affidavits (47–428, 50+530; 81–515, 84+338; 89–477, 95+310).

61. Notice of motion—A motion should be brought on by a written notice of eight days or by an order to show cause (5–27, 14; 10–162, 130; 55–75, 56+576). Within two years after the entry of judgment notice should be served on the attorney (23–518. See 79–476, 82+990). Purchasers of property affected by the judgment must be served with notice (70–243, 73+161; 92–271, 99+889).

62. Terms—15–63, 43; 36–117, 30+436; 37–128, 33+546; 60–61, 61+824; 71–468, 74+173; 77–543, 80+700.

63. Allowing judgment to stand as security—23–458; 37–128, 33+546.

64. Who may apply—Only parties can apply (7–487, 393. See 22–203; 57–267, 59+195; 84–329, 87+838; 90–517, 97+373), but a grantee or personal representative may be substituted as defendant and then apply (22–542; 44–392, 46+766. See 12–375, 251; 84–329, 87+838; 97–135, 100+108). Authority to vacate and reinstate fraud or collusion appearing (122–355, 142+818; 127–435, 149+671).

65. Application by municipal corporations—66–54, 68+515; 67–368, 69+1101; 89–477, 95+310; 127–435, 149+671.

66. Application by minors—93–249, 101+304.

67. 130–530, 152+866.

9284. Vacating real estate judgment—Within what time—No judgment or decree quieting title to land or determining the title thereto or adverse claims therein heretofore entered or hereafter to be entered shall be adjudged invalid or set aside, unless the action or proceeding to vacate or set aside such judgment or decree shall be commenced, or application for leave to defend be made, within five years from the time of filing a certified copy of such judgment or decree in the office of the register of deeds of the county in which the lands affected by such judgment or decree are situated. ('09 c. 451 § 1) [7787]

Explanatory note—Laws '09, c. 451, § 2 (G. S. '13, § 7788) provides that "nothing herein contained shall apply to any action or proceeding now pending to have any such judgment or decree vacated or set aside or to any application now pending for leave to defendant in any such action, nor shall this act apply to any proceeding under the provisions of chapter 65, Revised Laws 1905." For R. L. '05, c. 65, see c. 65 of this compilation.

Showing not justifying vacation of judgment (154–37, 191+55).

9285. Unimportant defects disregarded—In every stage of an action, the court shall disregard all errors or defects in the pleadings and proceedings which do *not affect the substantial rights of the adverse party*, and no judgment shall be reversed or affected by reason thereof. (4161) [7789]

See also notes under § 9325.

1. In general.

10–423, 340; 12–437, 326; 14–464, 346; 58–514, 60+338;

65–429, 68+68; 75–489, 78+113; 120–52, 139+142; 121–258, 141+164; 121–388, 141+488; 121–395, 141+519; 121–473, 141+843; 122–20, 141+810; 122–130, 141+1118; 122–177, 142+147; 122–209, 142+193; 122–229, 142+307; 122–328, 142+706; 122–346, 142+817; 122–393, 142+803; 123–110, 143+121; 123–191, 143+718; 123–360, 143+973; 123–503, 144+214; 124–53, 144+415; 124–208, 144+940; 124–291, 144+965; 124–357, 145+115; 124–388, 145+117; 124–432, 145+119; 124–437, 145+120; 124–505, 145+381; 125–104, 145+794; 125–318, 146+1113; 125–353, 147+244; 125–431, 147+435; 126–50, 147+717; 126–116, 148+50; 126–154, 158+787; 126–169, 148+62; 126–338, 148+287; 126–339, 148+281; 126–432, 148+309; 127–1, 148+446; 127–15, 148+476; 127–291, 149+467; 127–490, 150+218; 128–18, 150+215; 128–30, 150+229; 128–65, 150+223; 128–129, 150+618; 128–193, 150+800; 128–245, 150+805, 128–277, 150+915; 128–499, 151+201; 129–12; 151+408; 129–129, 151+907; 129–417, 152+833; 130–112, 153+259; 130–329, 153+742; 130–434, 152+262, 153+736; 131–155, 154+956; 131–451, 155+628; 131–453, 155+216; 131–482, 155+758; 132–8, 155+617; 132–128, 155+1078; 132–271, 156+124; 133–423, 158+705; 134–210, 158+979; 134–378, 159+832; 134–394, 159+956; 134–468, 158+787; 135–68, 160+191; 136–20, 161+213; 136–223, 161+413; 136–257, 161+515; 137–62, 162+1059; 142–207, 171+777; 143–316, 173+718; 143–373, 173+719; 148–411, 182+523; 155–348, 193+592. 165–146, 205+948; 164–466, 206+380; 166–374, 208+22; 209+868; 211+311; 167–32, 208+526, note under § 9699; 209+899, note under § 9281.

A decision of the Industrial Commission in a workmen's compensation case will not be reversed on a mere matter of procedure. 157–122, 195+784.

Assessment of stockholders. 157–209, 195+923.

A judgment will not be reversed on account of a harmless error. 160–78, 199+513.

Instructions and admission of evidence. 162–514, 202+441.

2. Rulings on pleadings.

An application for an order directing that a complaint be made more definite and certain is addressed to the discretion of the trial court, and its conclusion will not be reversed where substantial rights upon the merits are not affected. 166–53, 206+929.

3. Clerical errors.

Mere clerical errors will not reverse a case. 167–479, 209+490.

4. Reception of evidence.

160–330, 200+297; 161–440, 201+929; 167–437, 209+317.

No prejudicial error resulted to defendants from rulings complained of in the admission or exclusion of testimony. 156–52, 194+752.

Under the circumstances mentioned in the opinion, error in permitting a layman to testify to the nature of plaintiff's injury was not prejudicial. 156–211; 194+639.

No error in the reception of defendants' evidence prejudiced plaintiff, because the latter failed to prove a case. 157–102, 195+637.

Where documentary evidence is offered to prove a fact admitted, the rejection of the offer is not error. 157–250, 195+901.

In an action tried to the court, even though it appears that certain important facts were shown by evidence to which technically there might be valid objections, still, if it is clear that such facts exist and can be conclusively established were another trial had, there should not be a reversal. 158–14, 196+655.

It is not error to exclude testimony corroborating a telephone talk which is in substance admitted. 158–280, 197+282.

No prejudicial error could result to the county from evidence of representations made by its engineer, who had made a survey and indicated his findings upon a survey map for the use of those invited to bid for the construction of certain bridges. 159–380, 199+104.

The admission of evidence which should have been rejected must have actually prejudiced the excepting and defeated party, to have him a right to a new trial. 160–326, 200+293.

Granting it was error to permit plaintiff to testify what he paid for a dog shot by appellant, no prejudice resulted, for the uncontradicted testimony was that the animal was worth $150 when killed, and the verdict was for $75, the amount plaintiff paid when he bought three years before. 160–402, 200+446.

The exclusion of evidence as to mental condition bearing upon the amount of damage will not be considered, where the jury have found no liability, and there is an affirmance. 161–45, 200+922.

Error in receiving evidence of the rental value of bowling alleys was cured by the instructions to the jury. 161–135, 201+537.

No reversible error is found in the admission of the letters and documentary evidence in the record, nor in the parts of the charge upon which errors are assigned. 164–401, 205+282.

No reversible error is found in the rulings sustaining objections to questions calling for immaterial matters or facts which appeared from documents. The leading questions, to which objections were saved, related to an issue not submitted to the jury. 164–425, 205+286.

There was no reversible error in the rulings upon the admissibility of evidence. 210+394.

There was no prejudicial error in excluding prior appliactions to defendant containing similar misstatements because the answers in the later applications were copies of those in the earlier ones, and the jury gained all the information they would have had if the first applications had been received. 210+846.

5. Remarks of court and counsel.

Substantial rights of the defendant were prejudiced by a statement made by the county attorney in his closing argument to the jury, which was entirely outside the record, and was calculated to place witnesses for the state in a better light and to add to the weight of their testimony. 157–374, 196+483.

A comment by the court was not prejudicial, in view of the evidence. 161–135, 201+537.

6. Instructions.

Instructing the jury that a fair preponderance of the evidence was sufficient to establish the mistake was without prejudice, as the right to avoid the release was conclusively established. 158–259, 197+257.

Defendant was not prejudiced by the submission to the jury of a question which must be resolved in plaintiff's favor as a matter of law. 159–388, 199+178.

Where plaintiff failed to make out a case and defendant was therefore entitled to a directed verdict, any error in confining responsibility for blowing of whistle to railroad engineer was harmless. 161–514, 200+747.

Defendant was not prejudiced by the submission of question to the jury. 162–206, 202+724.

Error in charge. 162–412, 203+59.

Error in charge to jury held to be without prejudice, when considered in connection with verdict and the evidence. 212+605.

7. Findings of fact.

Findings of fact. 157–102, 195+637.

The fact that the jury found that the appellant was entitled to certain specified property not involved in the litigation was without prejudice to the appellant. 159–345, 198+1009.

Although the findings of fact are faulty in not covering every specific issue litigated, appellant is not entitled to a reversal, since his motion for findings did not point out the specific issues upon which findings were desired, and since the findings as made are properly supported by the evidence, and do support the judgment. 160–449, 200+468.

Since the matters of fact admitted constitute no defense, the refusal to embody the same in the findings of fact will not reverse. 161–310, 201+440.

Failure to find value, under the facts stated in opinion, is harmless. 164–136, 204+639.

8. Opening and closing.

There was no reversible error in permitting the defendant to open and close the case. 158–348, 197+489.

ISSUES AND TRIAL

9286. Terms defined—Issues, either of law or of fact, arise upon the pleadings, whenever a fact or conclusion of law is maintained by one party and controverted by the other. A trial is the judicial examination of such issues between the parties. (4162) [7790]

Trial defined (27–29, 6+407; 37–382, 34+739; 68–166, 70+1083; 89–297, 94+887; 135–308, 160+778).

The reasonable value of the services of a real estate broker, who produced a purchaser to whom the owner of the property made a sale thereof, though no in issue under the pleadings, was litigated by consent. 164–207, 204+929.

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

9287. Issues, how joined—An issue of law arises upon a demurrer to the complaint, answer, or reply. An issue of fact arises:

1. Upon a material allegation of the complaint, controverted by the answer;

2. Upon new matter in the answer, controverted by the reply; or,

3. Upon new matter in the reply, except when an issue of law is joined thereon.

Issues both of law and of fact may arise upon different and distinct parts of the pleadings in the same action. (4163) [7791]

1. Issue of law—A demurrer raises an issue of law on which the court is to render judgment (38–459, 38+366).

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

2. Issues of fact—70–471, 73+144; 86–1, 90+3.

Where the parties have, by consent, tried issues not made by the pleadings they are bound by the result the same as if the issues were within the pleadings. 212+16.

9288. Issues, how tried—Right to jury trial—Issues of law, unless referred as provided by the statutes relating to referees, shall be tried by the court. In actions for the recovery of money only, or of specific real or personal property, or for a divorce on the ground of adultery the issues of fact shall be tried by a jury, unless a jury trial be waived or a reference be ordered. All other issues of fact shall be tried by the court, subject to the right of the parties to consent, or of the court to order, that the whole issue or any specific question of fact involved therein, be tried by a jury or referred. (4164) [7792]

RIGHT TO JURY TRIAL

½. In general.
209+907.

Action to recover money and annul a chattel mortgage is triable without jury. 161–519, 200+930.

1. Constitutional provision—The constitution did not *enlarge old rights or create new ones but simply conserved* rights already existing and placed them beyond legislative impairment (4–109, 70; 19–132, 99; 21–241, 292; 22–178; 25–123; 38–403, 38+104; 40–213, 41+1020; 47–451, 50+598; 65–196, 68+53; 85–215, 88+742). The method of selecting the jury is subject to legislative control but the method provided must be reasonably adapted to secure an impartial jury. The legislature may provide for a struck jury (65–196, 68+53). The constitutional right is limited to "cases at law" (40–213, 41+1020). The right depends on the nature of the right to be adjudicated and not on the form of the action or proceeding (22–178. See 119–96, 137+390). See 130–254, 153+528; 131–441, 155+393; 137–187, 163+129; 150–454, 185+935.

2. Statutory provision—This provision was in force at the time of the adoption of the constitution (40–213, 41+1020). Its effect is to preserve in substance the common law distinction between actions at law and suits in equity (14–394, 300). See 131–441, 155+393; 137–187, 163+129.

3. Complaint controls—The decisive test whether an action is triable by the court or by a jury is to be determined on an examination of the complaint (93–414, 101+952).

4. Held entitled to jury trial—An action for the recovery of money only (68–521, 525, 71+701; 85–215, 88+742); an action in the nature of replevin although it involved an issue as to a secret trust (13–326, 299; 35–476, 29+171); an action by an assignee in insolvency to recover money paid by the insolvent to a creditor as an unlawful preference (45–383, 48+4); an action on a policy of insurance for the recovery of a loss (45–441, 48+198. See 66–138, 68+855); an action for conversion although it involved an account (19–132, 99). See 30–316, 15+254; an action by a contractor for labor and material although a long account was involved (79–352, 82+644); an action for trespass on land (34–43, 24+308); an action for money had and received (39–46, 38+762); an action for the recovery of rent (46–115, 48+768); an action on a stated account between partners (93–414, 101+952). See 122–513, 142+883; 123–401, 143+1125; 123–405, 143+1131; 123–468, 143+1134; 123–505, 144+160; 124–65, 144+434; 124–257, 144+955; 124–269, 144+958; 124–433, 145+120; 124–466, 145+385; 124–518, 145+747; 125–7, 145+613; 125–40, 145+613; 125–54, 145+624; 125–137, 145+804; 125–238, 146+353; 125–256, 146+1092; 125–311, 146+1109; 126–144, 148+108; 126–279, 148+101; 126–346, 148+285; 126–389, 148+125; 127–242, 149+285; 127–341, 149+545; 128–14, 150+164; 128–47, 150+221; 128–95, 150+379; 128–144, 150+398; 128–146, 150+395; 128–245, 150+804; 128–360, 150+1091; 128–440, 151+188; 128–491, 151+203; 129–70, 151+537; 129–262, 152+408; 130–406, 153+848; 137–463, 162+1049; 150–454, 185+935.

5. Equitable actions—In equitable actions pure and simple, that is, in actions based on an equitable cause of action, or to obtain equitable relief solely, there is no right to demand a jury trial of any of the issues (20–91, 77; 25–475; 30–380, 15+672; 35–380; 29+49; 46–308, 48+1122; 61–43, 63+3; 93–414, 101+952; 129–59, 151+532; 130–254, 153+528; 135–115, 160+500).

An action on a lease for the recovery of rent is triable by jury, and the fact that defendant pleaded a surrender and release, alleged by plaintiff to have been signed in the mistaken belief that it was a receipt for rent, did not entitle defendant to a trial of the case by the court without a jury. 156–494, 195+450.

5a. Controversies between attorney and client.
Where there has been a settlement between attorney and client, the former retaining from the moneys of his client, with the latter's consent, the amount of his fee, the attorney cannot thereafter force the client into court by the summary, statutory proceeding for the enforcement of attorney's liens, and have the settlement confirmed or the amount of his fee determined anew and by the court. In such a case, if the client should sue the attorney for a part or all of the money retained by him, he would have the constitutional right to trial by jury, *which the attorney's lien statute does not and cannot* impair. 157–379, 197+110.

5b. Municipal ordinances.
A defendant is not entitled to a jury trial when charged with an offense under a municipal ordinance. 157–506, 196+279.

5c. Garnishment.
The issue between a judgment creditor and a garnishee as to whether the latter is under any liability to the judgment debtor which can be subject to garnishment arises under a statutory proceeding which is equitable in nature. In consequence, there is no constitutional right to trial by jury. 165–100, 205+947.

5d. Mental condition of witness.
The mental impairment of a witness is for the consideration of the jury. 210+75.

6. Mixed actions—In mixed actions based on both a legal and an equitable cause of action a party has a constitutional right to have the legal cause submitted to a jury but he is not entitled to a jury trial of both causes and a demand for such a trial is properly denied unless it is strictly limited to the legal cause (30–316, 15+254; 30–380, 15+672; 30–395, 15+676; 34–43, 24+308; 34–547, 27+66; 39–46, 38+762; 46–115, 48+768; 66–138, 68+855; 93–475, 101+610; 109–519, 124+218. See 47–131, 49+688; 63–269, 65+454). In actions not of a strictly legal nature where the plaintiff seeks both legal and equitable relief there is no right to a jury trial (16–355, 315; 109–519, 124+218). See 123–453, 144+218; 127–129, 148+1077; 127–133, 148+1078; 131–231, 154+1081; 130–320, 155+205.

7. Held not entitled to jury trial—Proceedings on information in the nature of quo warranto (40–213, 41+1020); mandamus proceedings (15–221, 172; 25–404; 28–40, 8+899); condemnation proceedings (18–155, 139; 21–241; 30–140, 14+581; 42–262, 44+59); taxation proceedings (22–178; 60–178; 60–164, 62+261); proceedings in laying out highways (25–123); proceedings to enforce a mechanic's lien (27–312, 7+265); proceedings under the insolvency law of 1881 (30–234, 15+109; 38–403, 38+104. See 45–383, 48+4); garnishment proceedings (61–398, 63+1075); proceedings for contempt (23–411); election contests (4–109, 70; 13–518, 480; 26–529, 6+346); proceedings *for the recommitment of a pardoned convict, except on* the question whether he is the same person who was convicted (53–135, 54+1065); on appeal to the district court in proceedings to test the validity of a will (47–451, 50+598. See 26–391, 4+685); proceedings for the commitment of infants to the reform school (50–353, 52+935); an action to determine adverse claims (46–308, 48+1122); an action to remove a cloud (34–547, 27+66; 64–175, 66+198; 82–523, 85+545); an action in the nature of a bill of peace or to prevent multiplicity of suits (85–215, 88+742); an action in the nature of a creditor's bill (61–398, 63+1075); an action to foreclose a mortgage (27–312, 7+265; 30–395, 15+676); an action to have land discharged from the lien of a mortgage (20–91, 77); an action for an accounting (25–475; 30–316, 15+254; 35–380, 29+49; 39–46, 38+762; 61–43, 63+3; 93–414, 101+952); an action for an accounting of a trustee, a partition and the appointment of a receiver (30–380, 15+672); an action to abate a dam and for damages (16–355, 315); an action for an injunction to restrain a trespass on land and to determine that the defendant has no interest or easement therein (34–43, 24+308); an action to reform a written lease (46–115, 48+768); an action to set aside an award and recover on an insurance policy (66–138, 68+855); an action to reform a policy of insurance (17–104, 83); an action for divorce on the ground of cruelty (31–106, 16+513); an action to compel specific performance (20–274, 245; an action for the cancellation of instruments (32–45, 19+86; 70–89, 72+817); an action to restrain the foreclosure of a mortgage (32–45, 19+86); an action for an accounting in a case where a deed absolute in form was in fact a mortgage (31–414, 18+143); an action for the correction of a stated account (44–278, 46+364); an action to

restrain a trespass whereby the flow of a river was obstructed (31–4, 16+425); an action to have a deed absolute in form declared a mortgage (34–118, 24+369); action to set aside deed and mortgage as fraudulent and to subject land to payment of judgment for alimony (96–523, 105+183); proceedings to foreclose mechanic's lien though defendant interposes counterclaim (140+118); proceedings to register land title (119–96, 137+390). See 123–453, 144+218; 124–234, 144+759; 126–128, 147+1093; 130–254, 153+528; 132–36, 155+1048; 132–323, 156+666; 135–115, 160+500; 137–187, 163+129; 139–400, 166+1078.

7½. Questions for jury.

When the evidence concerning a given issue is uncontradicted, there is nothing for the jury unless such evidence in itself is improbable or inconclusive or put in doubt by other circumstances in evidence. The circumstances justifying such a conclusion must appear from the evidence and must be such that reasonable minds upon fair consideration may arrive at different conclusions. 156–446, 195+280.

It is a question of law whether at the close of the evidence there is sufficient proof plaintiff's cause of action to take the case to the jury. 156–446, 195+280.

In actions for malicious prosecution, it is the province of the court to determine whether the established facts constituted probable cause for the prosecution; but it is the province of the jury to determine the facts if in dispute. Plaintiff's testimony made a question for the jury. 164–260, 204+885.

Where verdict is grounded on testimony in the case, it will not be disturbed on appeal. 164–523, 205+63.

It was within the discretion of the court to determine what issue, if any, should be submitted to a jury. 166–328, 207+641.

Triers of fact must accept, as true, positive, uncontradicted, and unimpeached testimony of witnesses, which is neither inherently improbable, nor rendered so by facts and circumstances disclosed. 209+626.

The question of defendant's negligence was for the jury. 210+75.

The evidence was sufficient to take to the jury the question whether the employee was injured by the falling tile, and also whether there was a causal connection between the injury and the act of negligence. 210+75.

ISSUES TO THE JURY IN EQUITABLE ACTIONS

8. Compared with equity practice—14–394, 300.

9. Submission of the "whole issue"—The statute provides for the submission of the "whole issue" (14–394, 300; 94–67, 102+376). This does not mean that the case may be submitted to a jury generally for them to return a general verdict as in a legal action (21–366). Question of law (122–232, 142+309; 122–396, 142+803; 152–473, 189+447).

10. How far discretionary—The court is not authorized to submit issues intrinsically unfit to be tried by a jury (14–394, 300), but when the issues are suitable for submission the discretion of the court is absolute. It may submit all or some of the issues or refuse to do so without regard to the wishes of the parties (20–91, 77; 27–312, 7+265; 32–45, 19+86; 44–278, 46+364; 46–308, 48+1122; 47–451, 50+598; 66–327, 69+31; 70–89, 72+817). Exercising summary jurisdiction (122–87, 141+1103; 129–59, 151+532; 131–439, 155+392; 152–473, 189+447; 126–346, 148+285; 131–65, 154+661; 131–441, 155+393; 131–448, 155+627; 139–460, 166+1078).

11. Issues suitable for submission—14–394, 300; 31–4, 16+425; 35–380, 29+49; 47–451, 50+598; 93–414, 101+952; 120–201, 139+139; 126–389, 148+125; 126–446, 148+302; 127–291, 149+467; 131–441, 155+393; 152–473, 189+447.

12. Order of court—It is the better practice to have the issue submitted by a formal order of court (14–394, 300; 17–104, 83; 131–65, 154+661; 152–473, 189+447.

13. Framing the issues—The court on its own motion may submit issues of its own framing (32–45, 19+86. See 54–47, 55+827).

14. Court must find on reserved issues—If, as is usually the case, the verdict of the jury does not cover all the issues it is the duty of the court to make findings on the reserved issues and order judgment on the verdict and findings (20–274, 245; 27–312, 7+265; 31–106, 16+543). It is not necessary for the court to make an order reserving the cause after the return of the verdict (31–106, 16+543). When the court erroneously orders judgment on the verdict without making findings on the reserved issues the remedy is not a motion for a new trial but a motion for the trial of the reserved issues (44–278, 46+364; 51–48, 52+985; 55–235, 56+828). If all the issues are covered by the special verdict judgment may be ordered thereon (see § 9304 notes 1, 12).

15. Dismissal of action—Directing verdict—31–414, 18+143; 82–523, 85+545; 129–59, 151+532; 132–36, 155+1048.

16. Mode of trial—17–104, 83; 26–391, 410, 4+685; 28–330, 9+876; 31–106, 16+543; 31–414, 18+143.

17. Findings of jury how far conclusive on court—The verdict of the jury on the issues submitted to them is binding on the court until vacated and set aside and cannot be disregarded in the determination of the action (10–216, 174; 26–391, 4+685; 34–118, 24+369; 73–171, 75+1124; 93–399, 101+601). After a court has submitted issues to a jury it may withdraw them before verdict, discharge the jury and determine the issues itself (54–47, 55+827).

18. See in General—122–405, 143+1131; 125–40, 145+623; 125–186, 145+964; 125–431, 147+435; 126–203, 148+113; 126–494, 148+299; 127–122, 149+18; 127–144, 149+14; 127–498, 150+166; 128–43, 150+211; 128–112, 150+385; 129–97, 151+895; 129–328, 152+732; 129–340, 152+724; 130–3, 153+250; 132–452, 157+708, 137–96, 162+1068.

9289. Notice of trial—Notice of issue—Issues of facts may be brought to trial by either party, upon notice served eight or more days before the beginning of a general term. At least seven days before the term one of the parties shall file a note of issue, containing the title of the action and the names of the respective attorneys, and stating the time when the last pleading was served and whether the issue is triable by the court or a jury. The clerk shall thereupon enter the cause on the calendar according to the date of issue, and it shall remain thereon, from term to term, until tried or stricken off by the court. Provided, that in all districts now or hereafter consisting of one county only, wherein but one term of court is or hereafter shall be held annually, no notice of trial need be served, but the party desiring to place a cause upon the calendar thereof for trial, shall, after issue is joined therein, prepare a note of issue containing the title of the cause, a statement as to whether the issue is an issue of law or an issue of fact, and if an issue of fact, whether triable by court or jury, and the names and addresses of the respective counsel, and shall serve the same on opposing counsel, and file such note of issue, with proof of service, with the clerk of court within ten days after such service; and, thereupon, the clerk shall set such cause for trial, in accordance with such rules as the judges of said court may make, but in no event earlier than thirty days after the filing of such note of issue, and shall notify all counsel in said cause by mail of the date of such setting. The judges of said court may, by order or rule of court, provide for the assigning and setting of cases for trial upon such calendar, and the order in which they shall be heard, and the re-setting thereof. All appeals from inferior tribunals, including probate court, justice court, county commissioners, and all boards from the decision of which an appeal lies to such court, shall in like manner be placed upon the calendar for trial. For all purposes, other than those specifically herein provided for, the first Monday in each month of the year, except in the months of July, August and September, shall be deemed the first day of a regular or general term of such district court, held in such county, and all persons committed for trial, or held to appear before such court, shall, unless otherwise provided, appear on such dates. Provided, that when the first Monday of any such month shall be a legal holiday the following day shall be deemed to be the first day of such general term of such district court. (R. L. '05 § 4165, amended '09 c. 221 § 1; '17 c. 6 § 1) [7793]

1. Notice of trial—A party is entitled to a notice of trial as a matter of right. If a new trial is ordered and an appeal taken from the order the cause must be again noticed if the order is affirmed. A right to have a cause stricken from the calendar is not waived by participating in a trial after a refusal of the court to strike from the calendar or to continue the cause (43–239, 45+228; 64–394, 67+216). A notice is not avoided by a subsequent amendment of the pleadings (10–316, 249; 59–485, 61+555). Whether an adjourned term is a "term" within the statute is an open question (86–46, 90+126). The statute was formerly applicable to special terms (19–539, 469).

A defendant is under no obligation to notice a cause for trial (82–278, 84+1008). The erroneous refusal of the court to strike from the calendar a case based on an improper notice is a ground for a new trial (64–394, 67+216). Admission of service of a notice is not a waiver of objection to a want of jurisdiction over the subject matter (71–42, 73+628). In computing the time the day of service is excluded and the first day of the term included (39–426, 40+561).

A party litigant is not entitled to proceed to trial in the absence of proof of service of notice of trial upon parties who have appeared. 160–181, 199+928.

2. ***Note of issue***—*Irregularities in a note of issue held* immaterial (35–401, 29+123). The designation of the case as a "court case" or "jury case" is not conclusive on the court (93–414, 101+952). See 129–528, 152+270; 148–411, 182+523.

9290. Of law, how brought to trial—Issues of law may be brought on for argument by either party, upon eight days' notice, at any general or special term of the court, or before a judge thereof out of term and within the county; or they may be heard, on like notice, out of term, at any time and place within the district which the court shall have fixed therefor. If noticed for a general term, a note of issue shall be filed as provided in § 9289; if for a special term, such note shall be filed at least two days in advance thereof. (4166) [7794]

An issue of law arising on a demurrer may be noticed for hearing before the court in the county wherein the action is pending at any time whether it be at a term of court or not (86–46, 90+126). Objection that the court did not fix the time for argument on a demurrer as provided in this section cannot be raised for the first time on appeal (71–238, 73+860).

Upon the facts stated in the opinion, it is held that there was an abuse of discretion in refusing to permit defendant to amend his answer. 167–323, 209+32.

9291. Order of trial—Absence of parties—The issues on the calendar of a general term shall be disposed of in the following order, unless the court shall otherwise direct:

1. Jury cases;
2. Issues of fact to be tried by the court;
3. Issues of law.

If a party be absent, unless the court for good cause shall otherwise order, the adverse party may proceed with his case, and take a dismissal of the action, or a verdict or judgment, as the case may require. If neither be present, the cause shall be stricken from the calendar. (4167) [7795]

Where the answer denies material allegations in the complaint it is error for the court to order judgment for plaintiff without proof merely because the defendant fails to appear when the cause is called (48–66, 50+936; 68–1, 70+776). The failure of a party demurring to appear at the hearing in the trial court does not prevent him from being heard on appeal (13–260, 242). Cited (106–353, 119+57).

9292. Continuance—A motion to postpone a trial for the absence of evidence can only be made upon affidavit, stating the evidence expected to be obtained, the reasons for its absence and for expecting that it can be procured, and showing its materiality, and that due diligence has been used to procure it; and if the adverse party thereupon admits that such evidence would be given, and that it be considered as actually given on the trial, or offered and rejected as improper, the trial shall not be postponed. (4168) [7796]

22–466; 105–384, 117+506, 118+152; 141–483, 170+693.

JURY TRIALS

9293. Jury, how impaneled — Ballots — Rules of court—Examination—Challenges—When an action is called for trial by jury, the clerk shall draw from the jury box ballots containing the names of jurors, until the jury is completed or the ballots are exhausted. If exhausted, the sheriff, under direction of the court, shall summon from the bystanders, or the body of the county, so many qualified persons as are necessary to complete the jury. The ballots containing the names of jurors sworn to try the case shall not be returned to the box until the jury is discharged. All others so drawn shall be returned as soon as the jury is completed. Provided, it shall be lawful for the judge or judges of any district court in the state to provide by rule that in selecting a jury the clerk shall draw eighteen names from the jury box in the first instance and that the said eighteen shall then be examined as to their qualifications to sit as jurors in the action and if any of said eighteen be excused for any reason whatever, another shall be called in his place until there shall be eighteen jurors in the box qualified to sit in the action; and the parties shall have the right to exercise their peremptory challenges as to these eighteen. When the peremptory challenges have been exhausted, of the remaining men the twelve first called into the jury box shall constitute the jury. (R. L. § 4169, amended '09 c. 417 § 1) [7797]

134–378, 159+832.

9294. Challenges—Either party may challenge the panel, or individual jurors thereon, for the same causes and in the same manner as in criminal trials, except that but three peremptory challenges shall be allowed on either side, and that a full panel shall be called in the first instance, but before challenging a juror either party may examine him in reference to his qualifications to sit as a juror in the cause. If there be more than one party on a side, they shall join in any challenge made; except where the interest of two or more defendants are adverse, or if actions be consolidated for purposes of trial, each such defendant and party shall retain the right to three peremptory challenges. Unless the court shall otherwise direct, challenges shall be made alternately, beginning with the defendant. (R. L. '05, § 4170; amended '13, c. 217, § 1; '27, c. 281) [7798]

1. **Order of challenging**—20–277, 249; 80–56, 82+1093.

2. **Peremptory challenge**—97–269, 105+967; 124–208, 144+938.

3. **Implied bias**—97–217, 106+517; 99–97, 108+891; 111–275, 126+903.

4. **Jury fee**—Prior to the amendment of 1913 the section provided for a jury fee to be paid by the plaintiff. Constitutional (7–456, 365). On new trial (66–281, 68+1080).

5. **Joinder of defendants in challenge.**
Defendants must join in peremptory challenges. 159–485, 199+237.

6. **Waiver of right.**
Where the fact that an outsider has attempted to influence a juror in favor of the accused is made known in open court, and the accused thereafter voluntarily proceeds with the trial to a verdict, he waives any right which he may have had to object to the competency of the jury on the ground that this occurrence may have prejudiced them gaainst him. 160–527, 200+803.

9295. Order of trial—When the jury is completed and sworn, the trial shall proceed in the following order, unless for special reasons the court shall otherwise direct:

1. The plaintiff, after stating the issue, shall produce the evidence on his part.
2. The defendant may then open his defence, and produce his evidence in support thereof.
3. The parties may then respectively offer rebutting evidence only, unless the court, in furtherance of justice, shall permit either to introduce evidence upon his original case.
4. When the evidence is concluded, unless the case be submitted by one side or both without argument,

the defendant shall open and the plaintiff close the argument to the jury: Provided, that if the defendant have the affirmative of the issue to be tried the foregoing order of trial shall be reversed.

5. If several defendants, having separate defences, appear by different counsel, the court shall determine their relative order in respect to both evidence and argument.

6. When the argument is closed the court may charge the jury. (4171) [7799]

1. Right to open and close—17–188, 162; 19–500, 433; 33–495, 24+305; 47–414, 50+471; 53–42, 54+933; 85–369, 88+985; 105–60, 116+1023; 121–170, 141+1.

There was no reversible error in permitting the defendant to open and close the case. 158–348, 197+489.

1½. What constitutes resting case.
Where a plaintiff fairly covers his field of proof and then announces, "That is all the witnesses we have present," and silently permits the other side to offer their proof, held, that he has rested. 157–108, 195+781.

1¾. Reception of evidence.
Practice in the examination of medical experts disapproved. 210+75.

2. Effect of admission in opening—19–449, 388; 127–443, 149+667.

3. Order of proof—It is discretionary with the court to allow evidence in rebuttal which should have been introduced in chief (7–184, 128; 12–502, 406; 14–105, 75; 22–15; 34–1, 24+458; 50–192, 52+385).

The order of proof was for the trial court, and its rulings present no reversible error. 160–162, 199+570.

3½. Instructions.
The court correctly instructed the jury that the burden of proof was upon the answering defendatns, and there was no error in allowing the defendants the closing arguments. 165–82, 205+699.

Dying declarations may be impeached in the same manner as other testimony. The charge to that effect is without error. 210+45.

Instructions held not to be argumentative or too favorable to the party who obtained the verdict. 165–28, 205+639.

4. Re-opening case—2–37, 26; 5–201, 160; 6–220, 142; 8–286, 252; 37–512, 35+370; 53–546, 55+742; 55–417, 57+141; 62–60, 64+95; 82–544, 85+549; 128–498, 151+201.

There was no abuse of discretion in opening the case for additional testimony, or in denying a new trial because of surprise and newly discovered evidence. 166–308, 207+644.

5. See In General—(124–389, 145+117; 126–491, 148+304).

9296. View of premises—Procedure—Whenever the court deems it proper that the jury should view real property which is the subject of litigation, or the place where a material fact occurred, it may order them to be taken, in a body and in the custody of proper officers, to the place, which shall be shown to them by the judge, or by a person appointed by the court for that purpose; and while the jurors are thus absent, no one other than the judge or person so appointed shall speak to them on any subject connected with the trial. (4172) [7800]

The object of a view is not to furnish evidence on which to base a verdict but to enable the jury better to understand and apply the evidence submitted in open court. An instruction that gives the jury to understand that they may take into consideration the knowledge obtained on the view in arriving at their verdict is erroneous and ground for a new trial (19–271, 230; 29–41, 11+124; 57–493, 59+631; 85–65, 88+272). Misconduct of jurors or parties on the view is a ground for a new trial (22–5; 29–5, 11+112; 41–223, 43+2). The objection that only eleven jurors attended the view is waived unless raised as soon as discovered (41–223, 43+2). When a view is ordered it is proper practice for the court to instruct the jury as to the object of the view and their conduct while on the view but this is not indispensable. If a party wishes such instructions given he should make a timely request (19–271, 230). The matter of granting a view lies in the discretion of the trial court (19–271, 230; 61–113, 63+248; 85–65, 88+272). A view is not generally allowed if there has been a material change in the place (85–65, 88+272). See 126–203, 148+113.

9297. Sickness of juror—Food and lodging—If a juror becomes sick or otherwise unable to perform his duty, the court may discharge him. In that case, unless the parties consent to accept the verdict of the remaining jurors, another may be sworn in his place and the trial begun anew, or the jury may be discharged and another then or afterward impaneled. If the court, while a jury is kept together, shall order that they be provided with food and lodging, the sheriff shall furnish the same at the expense of the county. (4173) [7801]

91–419, 98+334.

9298. Requested instructions—Before the argument begins either party may submit to the court written instructions to the jury, opposite each of which the judge shall write the words, "Given," "Given as modified," or "Refused;" and the court, in its discretion, may hear arguments before acting on such requests. And the court of its own motion may, and upon request of either party shall, lay before the parties before the commencement of the argument any instructions which it will give in its charge, and all such instructions may be read to the jury by either party as a part of his argument. But at the close of the argument the court may give, with the instructions so approved, such other instructions as may be necessary fully to present the law of the case. (4174) [7802]

1. Object of statute—84–58, 86+881.

2. Drafting requests—22–152; 71–34, 73+634.

3. When requests may be refused—It is the duty of the court, when requested in a timely and proper manner (12–17, 1; 17–308, 284; 78–487, 81+392), to give in its charge any requested instruction which is correct as a proposition of law and applicable to the issues in the case, and a refusal to do so is ordinarily a ground for a new trial (68–519, 71+664; 71–34, 73+634; 81–434, 84+325; 84–1, 86+616). The court may refuse to give a requested instruction which is not applicable to the case as made out by the evidence however correct it may be as an abstract legal proposition (69–19, 71+698; 73–181, 75+1132); or one which assumes the existence of controverted facts (15–13, 1; 17–322, 299; 21–215; 21–442; 22–152; 22–431; 25–88; 26–172, 2+473; 28–352, 10+18; 29–465, 13+902; 76–461, 79+523); or one which is in part erroneous (18–184, 168); or one which is misleading, indefinite or ambiguous (17–308, 284; 23–430; 68–155, 71+5; 71–34, 73+634); or one embodying no legal proposition but only a logical inference from the facts in the case (34–51, 24+324; 34–132, 24+359; 82–145, 84+659); or one which lays too much emphasis on particular facts (53–551, 55+742; 94–257, 102+451); or one which is argumentative (75–533, 78+98; 82–98, 84+652; 94–257, 102+451); or one which invites the jury to disagree (72–296, 75+235); or one which is inconsistent with the theory on which the case has been tried (48–82, 50+1022); or one which is unduly prolix (94–257, 102+451). Requested instructions may be refused when not seasonably handed to the court (104–476, 116+1116). See 124–155, 144+462; 127–515, 150+177; 128–193, 150+800; 128–491, 151+204.

See notes under § 9325, subd. 6.

165–374, 206+716; 166–487, 208+194.

It is the duty of the trial court to present to the jury the law applicable to the case in clear and intelligent language so that jurors may readily comprehend it; and there must be some latitude in the expression of language so long as he correctly states the substance of the law. 157–187, 195+896.

The record in the case justifies the appellate court considering the assignment of error made as to instructions to the jury. 157–187, 195+896.

Brevity in a charge to a jury is commendable. 157–187, 195+896.

The error in one sentence of the charge relating to usury was sufficiently cured by the following sentence. 158–356, 197+743.

No error is found in the refusal to give requested instructions. 160–162, 199+570.

Where a cause is submitted to the jury under a charge framed as requested by plaintiff, the charge, whether right or wrong, is the law of the case so far as plaintiff is concerned. 167–248, 208+803.

A requested instruction was properly refused because inaccurate. 157–362, 196+478.

Where a requested instruction is inaccurate or inapplicable to the evidence its refusal is not reversible error. 161–480, 201+939.

No error occurred in refusing to instruct that good faith in the instigation of the slander litigation might mitigate damages. 156–62, 194+752.

A charge to the effect that the plaintiff cannot recover if he is "negligent in any degree whatsoever," though accurate enough as an abstract statement of the law, has a tendency to confuse and mislead a jury by the emphasis it places upon the presence of the negligence of the plaintiff and its effect upon the final result; and such a charge, unless the occasion is exceptional so that there are circumstances calling for it, is erroneous, following Craig v. Benedictine Sisters, 88 Minn. 535, 93 N. W. 669. 156–107, 194+322.

When a jury, after deliberating some time on a negligence case in which the law of comparative negligence has no place, returns for further instructions, having a confused notion in its mind as to the application of the rule of comparative negligence, and asks whether it may arrive at a verdict for any amount if it finds that the defendant "was to blame for 75 per cent." and that the plaintiff was to blame "for 25," a further charge that the plaintiff cannot recover if he "was negligent in any degree whatsoever," such charge being fair in tone and further stating that he could not recover if he was "guilty of contributory negligence," and that he could not recover "if the collision was caused by the combined negligence" of both, is not error. 156–107, 194+322.

No error was made in refusing an instruction singling out and indicating the effect of evidentiary matter. 211+306.

The fact that a request is couched in language of an appellate court does not necessarily mean that it must be given to the jury as an instruction. 212+413.

4. Amendment of requests—The court may amend or qualify a request and if the instruction given is substantially as requested there is no error (9–223, 209; 13–326, 299; 15–152, 117; 15–257, 197; 23–314; 25–88; 38–308, 37+580; 51–86, 52+1068; 78–218, 80+962; 77–104, 79+611). A party at whose request an erroneous instruction is given cannot complain of an erroneous qualification of it (18–184, 168). See 125–431, 147+434.

Prejudicial error cannot be predicated on the modification of a proper request for an instruction if the charge, taken as a whole, correctly states the law applicable to the issues to which the requested instruction was directed. 156–211, 194+639.

5. Giving requests with disparaging comment—21–187; 29–336, 13+168.

6. Request covered by the general charge—The failure of the court to give requests is no ground for a new trial if everything of substance in them is fully covered by the general charge. It is neither necessary for the court to adopt the language of the request primarily, nor, after it has fully instructed the jury, to repeat its instructions in the language of the request. A party is entitled to have the jury instructed fully, fairly and correctly, but he is not entitled to have them instructed in any particular language (17–76, 54; 17–241, 218; 21–65; 22–152; 26–183, 2+494, 683; 28–362, 10+21; 31–526, 18+651; 32–133, 19+655; 34–51, 24+324; 34–107, 24+366; 35–485, 29+198; 44–195, 46+329; 55–177, 56+686; 55–199, 56+826; 64–123, 66+139; 68–138, 71+14; 74–146, 76+1032; 77–412, 80+356, 784; 83–180, 86+14; 89–228, 94+1135; 94–257, 102+451). See 121–160, 141+104; 121–258, 141+164; 122–20, 141+810; 124–229, 144+774; 125–150, 145+806; 149–6, 182+774.

No error was made in refusing requests substantially covered in the charge. 162–419, 203+57.

The issues were simple and were presented fully in the general charge. There was no error in refusing the requested instructions. 163–187, 203+782.

The charge of the court to the jury was full and fair, and clearly submitted all of the issues to the jury. There was no error in the refusal of the requested instructions. 166–29, 206+950.

6½. Necessity for request.

In the absence of a request therefor, defendants were not entitled to an instruction that the jury might find that the parties, by their conduct, had placed a practical construction upon the terms of their contract with respect to the measurement of wood plaintiff had furnished to defendants. 156–349, 194+718.

Plaintiff took no exceptions to the instructions to the jury and made no request for additional instructions, but, in the notice of motion for a new trial, assigned as error the alleged failure to submit clearly two charges of negligence. There was no fundamental error in the instructions; hence the rule stated in Sassen v. Haegle, 125 Minn. 441, 147 N. W. 445, 52 L. R. A. (N. S.) 1176, is applicable. 160–468, 200+629.

Where no request to charge was made, and no exceptions taken to charges given, objection to charge made for first time on motion for new trial was too late. 161–533, 201+936.

Failure to charge that defendant had the burden of proof on an affirmative defense is not ground for reversal, where there was no request to so charge. 165–417, 206+725.

7. General charge in language of court preferable—34–51, 24+324; 53–551, 55+742; 64–123, 66+139; 85–142, 88+436; 94–257, 102+451.

8. Expression of opinion as to facts—Court may express to jury in its instructions its opinion of facts in issue, provided their ultimate determination thereof be left to jury. If party be apprehensive that jury may be unduly influenced, he should specially request court to instruct that they, not court, are exclusive judges of all questions of fact (97–227, 106+909).

9. Punitive damages—*Duty of court to explain meaning* (100–5, 110+99).

10. See in General—121–269, 141+175; 122–344, 142+816; 122–517, 142+897; 123–109, 143+121; 121–439, 141+523; 122–344, 142+816; 122–517, 142+897; 123–495, 144+220; 123–110, 143+121; 123–174, 143+322; 123–495, 144+221; 123–516, 144+407; 124–2, 144+466; 124–143, 144+751; 124–245, 144+772; 124–432, 145+118; 125–353, 147+244; 125–441, 147+445; 125–466, 147+441; 126–206, 148+115; 129–71, 151+537; 131–274, 154+1070; 131–482, 155+758; 132–149, 153+514; 134–392, 159+956; 151–394, 186+807.

9299. What papers jurors may take—On retiring for deliberation, the jury may take with them all papers received in evidence except depositions; but the court may direct that copies be made for their use of such records and documents as ought not, in its judgment, to be taken from those entitled to their possession. The jurors may also take with them notes of the testimony and proceedings made by themselves, but none others. All such papers, except the notes aforesaid, shall be returned to the clerk before the jurors are discharged. (4175) [7803]

1–134, 110; 8–236, 205; 95–104, 103+727. Court may, in its discretion, permit jury to take pleadings, but of doubtful propriety, and they should not be given to jury unless there is special reason (98–296, 108+517). See 124–431, 145+118; 125–291, 146+1104; 133–157, 157+1073; 150–178, 184+854.

The court properly permitted the jury to take all the exhibits in evidence to the jury room. 159–346, 198+1009.

9300. Verdict, when received—Correcting same—Polling jury—While the jury are absent the court may adjourn from time to time, in respect to other business, but it shall be considered open, for all purposes connected with the cause submitted, until a verdict is rendered or the jury discharged. A final adjournment shall discharge the jury. Before the verdict is recorded *either party may require the jury to be polled*, whereupon the clerk shall ask each juror if it be his verdict. If any answer in the negative, the jury shall be sent out for further deliberation. If the verdict be defective in form or insufficient, it may be corrected under the advice of the court, or the jury may be again sent out. (4176) [7804]

1. Court always open to receive verdict—46–212, 48+909.

2. Polling the jury—The right to poll a jury is not affected by an agreement that the jury may return a sealed verdict. After a verdict is recorded neither party has a right to poll the jury (15–501, 413). A jury cannot be polled before they have rendered their verdict for the purpose of ascertaining how they stand (61–531, 63+1115).

3. Correction of verdict—8–140, 110; 17–296, 273; 20–130, 122; 46–136, 48+684; 61–531, 63+1115; 123–422, 144+148.

There is no merit in the assignment of error that plaintiff is not entitled to disbursements as taxed, nor in the contention that it was error to deny defendant's application for amended findings. 210+66.

4. Informal verdict—101–180, 112+12.

5. See in General—129–372, 152+765.

9301. Five-sixths of jury may render verdict, etc.—In all civil actions or proceedings in any court of record of this state, after twelve hours' deliberation, the agreement of five-sixths of any jury therein shall be a sufficient and valid verdict; the deliberation of the jury shall be deemed to have commenced when the officer taking charge of the jury has been sworn, and

the clerk shall enter such time in his records. ('13 c. 63 § 1) [7805]

126–180, 148+51; 126–264, 148+107; 128–118, 150+387; 131–231, 154+1075, 131–236, 154+1081; 132–391, 157+650; 135–65, 160+189.

9302. How signed—Where the verdict is agreed to by the full membership of the jury the foreman only shall sign the verdict, when less than the full number agree on the verdict the same shall be signed by all the jurors who concur therein, and the clerk of said court shall enter on his minutes the number of said jurors concurring in said verdict. ('13 c. 63 § 2) [7806]

126–264, 148+107.

9303. Verdict, general and special—A general verdict is one by which the jury find generally upon all the issues in favor of the plaintiff or defendant. A special verdict is one by which they find the facts only, and it shall so present the conclusions of fact as established by the evidence that nothing remains to the court but to draw from them conclusions of law. (4177) [7807]

21–366; 99–357, 109+812; 127–451, 149+951.

9304. Interrogatories—Special findings—In every action for the recovery of money only or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict in writing upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to make a written finding upon any particular question of fact submitted to them in writing. Where the special finding of facts is inconsistent with the general verdict the former shall control the latter, and the court shall give judgment accordingly. (4178) [7808]

SPECIAL VERDICTS

1. Must cover all the issues to authorize a judgment—6–177, 111; 31–4, 16+425; 40–375, 42+84; 44–278, 46+364; 45–441, 48+198; 55–334, 56+1117; 72–403, 75+742.

2. Effect of failure to cover all the issues—The effect of a failure in a special verdict to cover all the issues depends upon whether the action is being tried by the court or the jury, in other words, whether it is an action of legal or equitable nature (20–274, 245; 27–312, 7+265; 31–106, 16+543; 31–268, 17+387; 44–250, 46+403; 44–278, 46+364; 45–441, 48+198; 51–48, 52+985).

3. How far optional with jury—74–480, 77+303. See 36–3, 29+588.

INTERROGATORIES—SPECIAL FINDINGS

3½. In general.

There was no abuse of discretion in denying defendant's request for the submission of special interrogatories to the jury. 156–211, 194+639.

A special verdict sufficinetly indicates that the general verdict for plaintiff was founded thereon, and the presence of another element of alleged negligence, though probably not established by the evidence yet submitted to the jury, will not justify a reversal on the theory of the rule applied in Burmister v. Giguere & Son, 130 Minn. 28, 153 N. W. 134. 156–338, 194+762.

A special finding inconsistent with the general verdict controls. 161–64, 200+748.

The court was within its discretion in submitting specific questions to a jury, and there was no reversible error in the form of such questions. 210+66.

4. Discretionary—The submission of special interrogatories is a matter lying almost wholly in the discretion of the trial court and its action will not be reversed on appeal except for a manifest abuse of discretion (12–530, 438; 17–296, 273; 40–273, 41+1040; 50–429, 52+910). There must be a real exercise of discretion (17–296, 273). The court need not submit interrogatories unless requested (7–267, 207), but it may do so (81–59, 83+490). See 127–475, 149+947; 132–181, 156+251.

5. Withdrawal of interrogatories—81–59, 83+490; 123–353, 143–975; 123–420, 144+148.

6. Character of interrogatories—They should be clear, concise, few in number and capable of categorical answer (17–296, 273; 24–429; 40–273, 41+1040).

7. When request must be made—17–296, 273.

8. Answer compulsory—A party has an absolute right to have his interrogatories answered if they are material and proper and to have them answered clearly and fully. If the jury come in without discharging their duty in this regard they must be sent out again and required to return full and satisfactory answers (20–139, 122; 40–547, 42+541; 67–451, 70+572; 76–430, 79+503; 81–59, 83+490). A failure of the jury to answer immaterial questions is harmless error (16–355, 315; 42–68, 43+783).

9. Objections to answers—Formal defects in answers are waived unless objection is made on the coming in of the verdict (21–506; 24–127; 30–18, 13+921), or at least before the jury are discharged (20–139, 122).

10. Order reserving case—When there is a general verdict and a special finding of fact, if the court desires to reserve the case for further consideration it must at the coming in of the verdict enter an order reserving the case. Unless this is done the party in whose favor the general verdict is may have judgment entered on it (22–19; 31–106, 16+543).

11. Judgment notwithstanding the general verdict—Judgment will not be ordered because special findings are inconsistent with the general verdict unless they are wholly irreconcilable. Every doubt will be resolved in favor of the general verdict (22–55; 24–127; 39–164, 39+402; 42–172, 43+849; 58–10, 59+632; 69–285, 72+111; 84–415, 87+1015; 85–160, 88+443; 85–391, 89+64; 86–77, 90+122; 87–441, 92+406; 89–154, 94+442; 89–160, 94+443; 90–260, 95+1122; 122–171, 142+145).

12. Judgment on findings as on special verdict—If special findings cover all the issues they may be treated as equivalent to a special verdict and judgment may be entered thereon even in the absence of a general verdict (9–356, 341; 27–262, 6+801; 30–209, 14+895; 36–3, 29+588; 38–260, 36+638; 40–375, 42+84; 40–397, 42+202; 45–441, 48+198; 74–480, 77+303. See 87–441, 92+406).

9305. Fellow servant, when named in verdict—In actions for damages resulting from the negligence of a fellow servant or coemployee of the person injured, if either party shall so request before the case is submitted to the jury, the court shall direct the jury, if they find for the plaintiff, to name or otherwise designate, in their verdict such fellow servant or coemployee. If the name be not disclosed by the evidence, he shall be described by the designation of his employment or by such other identification as the case will permit: Provided, that this section shall not apply to cases where the name or description is not so disclosed. (4179) [7809]

82–278, 86+328.

9306. Jury to assess recovery—When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a counterclaim for the recovery of money is established beyond the amount of the plaintiff's claim as established, the jury shall assess the amount of the recovery. (4180) [7810]

30–368, 15+670.

9307. Verdict in replevin—In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff and the jury find that he is entitled to its recovery, or if the property is not in the possession of the defendant, and by his answer he claims a return thereof, and the verdict is in his favor, the jury shall assess the value of the property and the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention, or taking and withholding, of such property. Whenever the verdict is in favor of the party having possession of the property its value shall not be found. (4181) [7811]

If the property is in the possession of the party in whose favor the verdict is given its value need not be assessed and this is true regardless of whether such party is the general or special owner (34–506, 26+733; 76–227, 79+99). Where the plaintiff has only a special interest in the property or lien thereon the alternative

value of the property is assessed, as against the general owner, only to the extent of such interest or lien (13–114, 105; 13–291, 269; 20–196, 175; 42–102, 43+835; 51–546, 53+871; 62–99, 64+81; 66–57, 68+514; 68–293, 71+384; 76–227, 79+99). If the plaintiff recovers the practice is to assess the value as of the time of the wrongful taking or of the commencement of the wrongful detention, as the case may be; and if the defendant recovers, to assess it as of the time when the property is replevied from him (13–501, 462; 24–37, 42; 35–388, 29+63; 50–101, 52+381).

9308. Receiving verdict—When the verdict is given, and is such as the court may receive, the clerk shall immediately record it in full in the minutes, and read it to the jury, and inquire of them whether it is their verdict. If any juror disagrees, the fact shall be entered in the minutes, and the jury again sent out; but if no disagreement is expressed, the verdict is complete, and the jury shall be discharged from the case. (4182) [7812]

20–139, 122; 24–362. Verdict not justified by law or evidence (108–165, 121+625). See 129–372, 152+765; 137–474, 163+527.

9309. Entries on receiving verdict—Reserving case—Stay—Upon receiving the verdict an entry shall be made in the minutes, specifying the time and place of trial, the names of the jurors and witnesses, the verdict, and any order of the court made in reference to the case. The court may reserve the case for argument and further consideration, or, in its discretion and upon the proper terms, may stay the entry of judgment and further proceedings under the verdict until the hearing and determination of a motion for a new trial, in arrest of judgment, for judgment notwithstanding the verdict, to set the verdict aside or to dismiss the action. (4183) [7813]

Reserving case (22–19; 31–106, 16+543). A notice of a motion for a new trial does not constitute per se a stay of proceedings, and does not prevent the entry of judgment. A stay for the purposes of a motion for a new trial is ordinarily granted as a matter of course (3–134, 80; 29–302, 13+129). Terms (55–144, 56+589; 69–532, 72+811). See 123–353, 143+975; 125–529, 147+273.

Findings of fact and conclusions of law should be stated separately. 161–266, 201+423.

The failure of plaintiff to adduce proof through a misapprehension of the effect of admissions should not result in judgment non obstante, but a new trial. 210+70.

9310. Trial by jury, how waived—In actions arising on contract, and by permission of the court in other actions, any party thereto may waive a jury trial in the manner following:

1. By failing to appear at the trial;
2. By written consent, by the party or his attorney, filed with the clerk;
3. By oral consent in open court, entered in the minutes. (4184) [7814]

The waiver of a jury when a cause is called for trial is a waiver only as to issues then formed (53–235, 55+117). A waiver on the first trial of an action in ejectment is not a waiver of a second trial under the statute (66–152, 68+972). The court may in its discretion in actions other than on contract disregard a waiver of a jury by the parties. A waiver not yet acted upon may be withdrawn with the consent of the court. A waiver agreed to with reference to the exigencies of a particular term will not be extended to a subsequent term (78–342, 81+14). In an action of a legal nature the parties may agree, the court consenting, that a part of the issues be tried by the court and a part by the jury (40–375, 42–84). The modes of waiving a jury prescribed by the statute are not exclusive. Waiver by conduct is not favored (19–132, 99; 78–342, 81+14; 85–118, 88+438). A party waives all right to a jury trial by consenting, on the call of the calendar, that the case be set down as a court case (45–215, 47+789); by proceeding to trial before the court without objection (7–414, 328; 21–398; 54–47, 55+827; 70–89, 72+817); by consenting to a reference (19–132, 99; 36–302, 30+813); by consenting that the jury be discharged and the case submitted to the court (66–300, 68+1093). A motion by each party that a verdict be directed in his favor cannot be construed as a waiver of the right to have the facts passed upon by the jury or as an agreement to submit them to the trial judge in case the motion is denied (94–309, 102+694. See 66–300, 68+1093; 85–118, 88+438). Bringing an action for rescission on the ground of fraud is not a waiver of the right to bring a separate action for damages and have them assessed by a jury (47–131, 49+688).

Where plaintiff's counsel on the call of the trial calendar acquiesces in a case being marked for the court calendar, and thereafter requests resetting of the case as a court case, and later consents to the case being set as the last case on the court calender, he waives a jury trial. 160–414, 200+481.

TRIAL BY THE COURT

9311. Decision, how and when made—When an issue of fact has been tried by the court, the decision shall be in writing, the facts found and the conclusions of law shall be separately stated, and judgment shall be entered accordingly. All questions of fact and law, and all motions and matters submitted to a judge for his decision, shall be disposed of and his decision filed with the clerk within five months after such submission, unless sickness or casualty shall prevent, or the time be extended by written consent of the parties. And no part of the salary of any judge shall be paid unless the voucher therefor be accompanied by a certificate of the judge that he has fully complied with the requirements of this section. (4185) [7815]

FINDINGS AND CONCLUSIONS

1. Definitions and distinctions—The findings of fact and conclusions of law together constitute the decision of the court (28–330, 9+876; 69–491, 72+694). They are not the judgment of the court (69–491, 72+694), but rather the authorization or basis of the judgment (33–348, 23+308; 69–491, 72+694. See 25–362). A memorandum attached to, but not expressly made part of, the order or decision, may be referred to when it furnishes a "controlling reason for the court's decision," but not to impeach or contradict express findings of fact, or conclusions necessarily following from the decision (97–135, 106+108).

Section applies to all issues of fact tried in the district court without a jury, and consequently in every such case, however arising, which is tried and disposed of on the merits, there must be a decision in writing, stating separately the findings of fact and conclusions of law. 156–422, 195+140.

Findings of fact. 157–102, 195+637.

Applies only to civil actions. 161–422, 201+933.

The failure to file findings made by a district judge until the day after he ceased to hold office did not affect the validity of the findings. 163–294, 204+38.

Findings should embrace only ultimate facts which relate to the issues to be tried, and should not intermingle evidentiary facts. 163–294, 204+438.

Under the provisions of testator's will and the issues and proofs, appellant was entitled to specific findings as to the income of the entire estate and the disbursements thereof up to the time of the death of testator's surviving widow; she being entitled to the income of the entire estate during her natural life. 166–315, 207+629.

2. Object of statute—3–311, 217; 68–454, 71+676; 195+140.

3. When findings necessary—Whenever the main issues of fact in an action are tried by the court findings of fact must be made (68–1, 70+776. See 74–371, 77+221). It is not alone issues made by the pleadings on which findings must be made. If the parties by consent or without objection litigate issues not made by the pleadings it is the duty of the court to make findings on such issues (28–238, 9+707; 38–479, 38+490; 40–31, 41+240; 40–176, 41+935; 44–451, 47+50; 46–10, 48+416; 46–369, 49+127; 50–438, 52+913; 51–162, 53+196), and to order judgment accordingly, granting as full measure of relief as if the issues had been made by the pleadings (61–346, 63+713). It is not necessary to make findings as to immaterial issues (3–45, 17; 4–32, 15); as to facts admitted by the pleadings (3–45, 17; 5–409, 332; 26–433, 4+1113; 74–1, 76+785); or when judgment is ordered on demurrer (5–409, 332); or as the basis of an interlocutory order (42–112, 43+794, 70–66, 72+816; 73–203, 75+1116; 84–144, 86+872; 86–1, 90+3; 88–105, 92+522). If the action is dismissed by the court for insufficiency of the evidence to warrant findings and judgment for the plaintiff findings are unnecessary (24–4; 47–546, 50+612). But a court has no right to dismiss an action without findings on the ground that the plaintiff has failed to establish a cause of action, except where the evidence adduced by the plaintiff would not have justified findings in his favor (58–233, 59+1009; 66–

72, 68+771; 78–475, 81+526; 80–139, 83+41; 90–497, 97+379; 95–127, 103+1017; 95–301, 104+242). Where the court expressly declines to pass on a question of fact involved, it is unnecessary after decision filed, to apply for amended findings covering the question (103–129, 114+651). See 148–367, 182+438.

4. Waiver of findings—68–1, 70+776.

5. Nature of facts to be found—The facts which the court must find and state separately are the ultimate, issuable facts—the facts put in issue by the pleadings or actually litigated as issuable facts by consent or without objection (2–134, 110; 31–325, 17+862; 36–276, 30+880; 46–467, 49+230; 68–1, 70+776; 93–485, 101+655). The findings should not contain evidentiary facts, argument, explanation, or comment of any kind (20–382, 334; 33–348, 23+308; 36–276, 30+880; 46–467, 49+230; 79–354, 82+649). The test is, would they be sufficient to authorize a judgment if presented in the form of a special verdict (36–276, 30+880). They must include all the facts essential to the judgment and on which it is based (4–32, 15; 45–290, 47+805; 46–338, 48+1109). They must be so full that the facts on which the judgment rests may be ascertained with clearness without resort to the evidence (45–290, 47+805). See 121–285, 141+186; 122–17, 141+789; 122–97, 142+1; 128–5, 150+216; 131–249, 154+1072; 132–144, 155+1038; 132–160, 156+268; 132–321, 156+348; 134–468, 158+787; 135–444, 161+165.

6. Sufficiency of particular findings—When in a pleading facts are specifically set forth, which, if established, would entitle a party to relief as a legal conclusion, a finding by the court of the truth of the allegations in the pleading is sufficient (30–433, 15+873; 31–77, 16+493; 47–27, 49+406; 52–51, 53+1023; 52–203, 53+1114; 68–454, 71+676; 93–411, 101+619). But a finding that the allegations of the complaint are true is insufficient if there are issues formed on new matter in the answer (55–334, 56+1117). Where the complaint does not state facts sufficient to constitute a cause of action a finding that the allegations of the complaint are true is not sufficient to support a judgment for the plaintiff (30–433, 15+873). A finding that all the "material" allegations of the complaint are true is insufficient (68–454, 71+676). A finding "that the allegations of fact in the complaint are not proved" is sufficient to sustain a judgment for the defendant (33–417, 23+858). A general finding that each and all of the allegations of the complaint are untrue is equivalent to a special finding as to each allegation that it is untrue (76–450, 79+531). A finding by the court that the allegations of the complaint are not established by the evidence is equivalent to a general finding that the facts are not as alleged (44–132, 46+236). A finding that there is no evidence as to a particular issue is a finding against the party having the affirmative of the issue (46–321, 48+1129). A finding that the party on whom the burden rests has not proved false representations negatives such representations (20–382, 334). Cited (110–501, 126+133; 127–502, 150+167).

7. Findings and conclusions must be stated separately—3–83, 41; 3–225, 154; 3–311, 217; 20–382, 334; 195+140.

8. Effect of finding a fact as a conclusion of law—49–111, 51+816; 54–6, 55+736; 59–468, 61+560; 81–64, 83+497; 84–254, 87+782.

9. Findings must be definite and specific—28–93, 9+585.

10. Findings must cover all the issues—46–308, 48+1122; 48–325, 51+218.

11. Findings must be within the issues—25–52; 46–369, 49+127; 51–48, 52+985; 55–235, 56+828; 58–385, 59+1038; 77–428, 80+364; 137–71, 162+1054.

12. Effect of finding only evidentiary facts—A judgment based on findings of evidence as distinguished from issuable facts cannot be sustained (33–348, 23+308; 34–426, 26+233; 39–11, 38+702; 89–147, 94+434). All the issuable facts must be found directly and not inferentially. It is insufficient to find the evidentiary facts from which the issuable facts might be inferred (28–93, 9+585; 33–348, 23+308; 43–389, 45+842; 46–338, 48+1109; 60–491, 62+1127).

13. Judgment must be justified by the findings—The findings are the sole authority for the judgment and constitute the basis on which it must rest. If the judgment is not justified by the findings the objection may be raised for the first time on appeal (28–93, 9+585; 30–433, 15+873; 33–348, 23+308; 34–426, 26+233; 39–11, 38+702; 43–389, 45+842; 44–159, 46+295; 45–290, 47+805; 79–486, 82+976; 89–147, 94+434). The supreme court cannot draw inferences of fact in order to sustain a judgment (53–398, 55+560). See 135–444, 161+165; 148–367, 182+438.

14. Construction of findings—40–489, 42+395; 46–467, 49+230; 74–1, 76+785; 80–462, 83+442; 81–388, 84+126; 84–109, 86+894; 88–38, 92+500; 92–167, 99+803; 195+140).

15. By whom made—Only the judge who tried the cause can make or amend findings. There is no exception in the case of death or termination of office (55–334, 56+1117; 73–58, 75+756). After an action was tried but before it was decided the county wherein it was tried was attached to a different judicial district. Held, that the judge who tried the action was authorized to render a decision (74–345, 77+214).

16. When findings become part of record—58–72, 59+828; 195+140.

17. Time within which findings must be filed—5–294, 232.

18. See in General—122–59, 141+1105; 122–295, 142+710; 122–448, 142+876; 122–510, 142+885; 123–231, 143+728; 125–322, 147+107; 126–445, 148+302; 129–181, 151+970; 129–380, 152+774; 129–460, 152+872; 130–450, 153+874; 130–530, 152+866; 131–17, 154+512; 134–276, 159+567; 137–5, 162+679.

9312. Proceedings on decision of issue of law—On the trial of an issue of law, the plaintiff, if the decision be in his favor, may proceed as in the case of the defendant's failure to answer after being personally served with the summons. If in such case the decision be in favor of the defendant, and the taking of an account or the proof of any fact is necessary to enable the court to complete the judgment, a reference may be ordered. (4186) [7816]

2–50, 37; 61–534, 63+1111; 126–370, 148+306.

9313. Court always open—Decisions out of term—The court shall always be open for the transaction of business, for the entries of judgments and orders, and for the hearing and determination of all matters brought before it, except the trial of issues of fact. When any matter is heard, a decision may be made out of term, and such decision may be an order or a direction that an order or judgment be entered, and upon filing the same with the clerk of the county where the action or proceeding is pending an order or judgment, as the case may require, shall be entered by him in conformity therewith. When an order or decision is filed, the clerk shall forthwith mail notice thereof to the attorneys of record in such case, but such notice shall not limit the time for taking an appeal or other proceeding on such order or decision (4187) [7817]

Court always open (11–271, 184; 53–232, 54+1118; 64–226, 66+969; 86–46, 90+126). Orders and directions for orders distinguished (12–437, 326; 25–362). Court commissioner (131–129, 154+748; 147–3, 179+370).

9314. Trial unfinished at end of term—When the trial of any action or proceeding, or of an indictment, is not concluded at the expiration of the term in which it was begun, it may be concluded; and all proceedings may be had in the case in the same manner and with like effect as if it had been concluded within such term. (4188) [7818]

9315. Trial in vacation by consent—With consent of parties the court may try and decide issues of law or fact in vacation, and thereupon judgment may be rendered at any time with the same effect as upon issues tried in term time. (4189) [7819]

TRIAL BY REFEREES

9316. Reference by consent—Fees when paid by the County—By consent of the parties to any civil action or proceeding, the court may appoint one or more referees, not exceeding three in number:

1. To try any or all of the issues therein, whether of law or of fact, except in an action for divorce, and to report judgment thereon;
2. To ascertain and report any fact involved therein;
3. To take and report the evidence therein.

Whenever, in such cases, the court shall state in the order of appointment that the reference is made necessary by press of business, the fees of the referee, as taxed and allowed by the court, shall be paid out of the County treasury, as the salaries of county officers are paid. (R. L. '05 § 4190, G. S. '13 § 7820, amended '21 c. 279, § 2)

Constitutional (5–78, 58; 19–132, 99). Consent to a reference must be explicit (19–132, 99).

9317. Compulsory reference, when—In like actions and proceedings the court may also direct a reference, without the consent of parties:

1. When the trial of an issue of fact, in a case of equitable nature, involves the examination of a long account on either side, in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved;

2. When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect;

3. When a question of fact, other than those raised by the pleadings, arises upon motion or otherwise in any stage of the case;

4. In a special proceeding of a civil nature, when it is necessary for the information of the court. (4191) [7821]

A compulsory reference in a legal action cannot be ordered simply because a long account is involved (19–132, 99; 35–380, 29+49); otherwise in an equitable action (35–380, 29+49; 61–43, 63+3). Under subd. 3 (81–346, 84+46).

9318. Selection of referees—Majority may act—If the parties do not agree upon the persons to be appointed, the selection shall be made by the court from the resident electors of the state. If two be appointed, they shall meet and act together; if three, all shall meet, but two may do any act which might be done by all. (4192) [7822]

9319. Trial and report—Powers—Effect of report—Trials by referee shall be conducted in the same manner and upon like notice as trials by the court. Referees shall have all the powers of the court to preserve order, amend the pleadings, grant adjournments, and enforce the attendance of witnesses. Their rulings and decisions may be reviewed in the same manner, and not otherwise, and they may settle a case or bill of exceptions, but they shall not entertain a motion for a new trial. The report of referees to try and determine the whole issue shall state the facts and conclusions of law separately, and stand as the decision of the court, upon which judgment may be entered in the same manner. If the reference be to report facts, the report shall have the effect of a special verdict. When the report is set aside or a new trial is granted, the case shall stand as though no reference had been ordered. (4193) [7823]

Where by order of reference the whole issues are referred the referee is substituted for the court. The trial is to be conducted in the same manner as a trial by the court and the referee's report stands as the decision of the court. He must make findings in the same manner as the court (20–382, 334; 50–470, 52+918; 86–177, 90+316). He must find on all the material issues (2–134, 110; 19–396, 342; 20–382, 334; 50–470, 52+918), but must not go beyond them (18–176, 163; 25–52; 50–470, 52+918). He need not find on immaterial issues or facts admitted by the pleadings (3–45, 17). He must follow a stipulation of the parties as to the facts (17–231, 207). He must state his findings of fact and conclusions of law separately (2–134, 110, 3–83, 41; 3–311, 217; 20–382, 334). He may dismiss an action on the trial for failure of proof or other cause in the same manner as the court (19–443, 384). His control over the order of proof is the same as that of the court and the rules of evidence and the rules governing the examination and cross-examination of witnesses are the same as on a trial before the court (12–502, 406). He may re-open a case for further evidence (5–201, 160). Where all the issues are submitted to him he must report a judgment, that is, he must specify in his conclusions of law the exact nature of the judgment to which the successful party is entitled and order its entry (8–265, 231; 22–92). He does not lose jurisdiction by the mere fact of filing his findings of fact and conclusions of law. He has authority to revise and amend his findings and conclusions to the same extent possessed by a trial court, until judgment has been entered or until he has been removed as such referee by the court (86–177, 90+316). Judgment may be entered by the clerk on the report of the referee as of course and without notice (12–60, 27; 16–38, 24). In entering judgment the clerk must follow the report with strictness (69–491, 72+694. See 12–60, 27). If the judgment entered by the clerk is not authorized by the report the proper remedy is an application to the court for a correction and not an appeal from the judgment (12–60, 27). See 151–336, 186+809.

Disbarment proceedings. 209+870.

GENERAL PROVISIONS

9320. Minors may be excluded, when—When a cause of a scandalous or obscene nature is to be tried, the court or referee may exclude from the courtroom all minors whose presence is not necessary as parties or witnesses. (4194) [7824]

9321. Dismissal for delay—That any district court may dismiss, upon its own or upon the motion of either party, after such notice as the court shall in each case prescribe, any and all actions or proceedings pending therein in which issue shall have been joined and which shall not be brought to trial within five (5) years from and after the commencement of each action or proceeding. ('19 c. 56 § 1)

Does not affect the inherent power of the district court to dismiss an action for plaintiff's failure to prosecute it with due diligence. 156–362, 194+777.

9322. Dismissal of action—An action may be dismissed, without a final determination of its merits, in the following cases:

1. By the plaintiff at any time before the trial begins, if a provisional remedy has not been allowed, or a counterclaim made or other affirmative relief demanded in the answer: Provided, that an action on the same cause of action against any defendant shall not be dismissed more than once without the written consent of the defendant or an order of the court on notice and cause shown;

2. By either party, with the written consent of the other, or by the court upon the application of either party after notice to the other and sufficient cause shown, at any time before trial;

3. By the court where, upon the trial and before the final submission of the case, the plaintiff abandons it, or fails to substantiate or establish his cause of action or right to recover;

4. By the court when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal;

5. By the court on the application of some of the defendants, when there are others whom the plaintiff fails to prosecute with diligence.

All other modes of dismissing an action are abolished. The dismissal mentioned in the first two subdivisions is made by an entry in the clerk's register and notice to the adverse party. In all cases other than those mentioned in this section, the judgment shall be rendered on the merits. (4195) [7825]

½. In general.

156–422, 195+140, note under § 9311; 165–482, 205+888; 166–507, 203+408.

Upon an uncontradicted affidavit as to the existence of a foreign statute, the court was justified in dismissing the action, although by virtue of an unverified reply the existence of the statute was in issue in the case. 212+3.

Cited (104–84, 116+205; 116–40, 133+67. See 106–353, 119+57, cited under § 7497).

1. Dismissal by plaintiff before trial—At any time before trial the plaintiff may dismiss his action, at least once, if a provisional remedy has not been allowed or counterclaim made or affirmative relief demanded in the answer (1–179, 153; 37–485, 35+273; 40–132, 41+156). He may do so upon an appeal from a justice court (1–179, 153), and after a new trial is granted (37–485, 35+273). He may dismiss his action without the consent of his attorney (86–480, 91+12; 111–183, 126+731). The phrase "before the trial" means before the commencement of the trial and not before the final submission

of the case to the court or jury (31–329, 17+863. See 2–50, 37). When a cause has been called for trial in its order, and a jury has been called to try the cause, the trial has begun, even though the jury has not been sworn (23–186). Merely calling a cause for trial is not the commencement of a trial (see 25–534; 44–400, 46+850). To constitute affirmative relief the answer must be in the nature of a cross-action. Relief which is simply conditioned on recovery by plaintiff is not affirmative (40–132, 41+156. See 54–157, 55+928). A demand for affirmative relief without allegations of facts authorizing it is not enough to defeat the right to a dismissal (36–312, 30+814). Where defendant pleads a counterclaim plaintiff cannot dismiss as of right (22–92). In an action of claim and delivery where the property is taken by plaintiff and returned to defendant on a proper bond a provisional remedy has been allowed (18–82, 65). The rule is otherwise if the property is not taken by plaintiff (14–491, 368). Where in an action to recover personal property defendant obtained an order of interpleader and the appointment of a receiver to take possession of the property the question whether plaintiff could dismiss of right was raised but not determined *(31–276, 17+617). Plaintiff cannot dismiss as of right* after demurrer and the due submission by both parties of the issues presented thereby to the court (89–297, 94+887). The entry of dismissal may be made either by the clerk at the request of the plaintiff or by the attorney of the plaintiff (14–491, 368; 45–102, 47+462). It is not necessary that there should be an entry of judgment or payment of costs (14–491, 368; 37–368, 34+896; 45–102, 47+462; 48–18, 50+1018). An entry in the clerk's register signed by the plaintiff's attorney that, "The above action is hereby dismissed" is sufficient (45–102, 47+462). The proviso in the statute against more than one dismissal as of right is merely prohibitory and a dismissal forbidden thereby does not in itself operate as a determination of the action on the merits (52–127, 53+1068). Where defendant has obtained a decision or verdict on the merits, plaintiff cannot, as matter of right, after obtaining an order granting a new trial, dismiss to the prejudice of defendant's right to review the order on appeal (104–517, 116+107). See 123–532, 144+137.

2. Dismissal by court before trial—2–50, 37; 6–572, 406; 44–400, 46+850; 149–221, 183+145.

3. Dismissal by consent before trial—*14–333, 256*; 17–48, 31; 20–408, 360; 22–1; 30–156, 14+794; 39–398, 40+267; 41–477, 43+329; 51–153, 53+199.

4. Voluntary nonsuit—The right of a plaintiff to take a voluntary nonsuit or in the language of the statute to "abandon" his action is not well defined by the decisions (see 30–501, 16+401). It is settled that if the plaintiff asks the court to be permitted to take a dismissal it is discretionary with the court to grant or deny the application (48–1, 50+828; 81–279, 83+1089. See 51–15, 52+977; 57–338, 59+346). See 124–496, 145+380; 126–15, 147+670; 126–108, 147+822; 127–443, 149+667; 133–435, 158+711; 152–419, 188+1014.

5. Dismissal for failure to prove cause of action—The statutory dismissal for failure of proof is the same as a common law nonsuit (88–349, 93+117). The practice of ordering a nonsuit for this cause is the same whether the cause is being tried by court, referee or jury (19–443, 384; 22–287; 24–434; 26–384, 4+620; 31–414, 18+143; 47–546, 50+612; 58–233, 59+1009). The right is properly regarded as a corollary of the right to grant a new trial. If it is perfectly obvious that the court cannot permit a verdict for the plaintiff to stand there is no good reason for giving the jury an opportunity to find such a verdict. Hence the right to take the case from the jury and dispose of it summarily by a dismissal (see 42–5, 43+483). The right to order a dismissal involves the duty to do so. A motion for a dismissal is not addressed to the discretion of the court (62–455, 64+1140. See 61–499, 63+1034). It is the duty of the court to order a dismissal: (1) When the evidence discloses some fact which, as a matter of law, defeats plaintiff's right to recover (46–5, 48+406; 50–320, 52+642; 62–128, 64+143; 89–77, 93+901); (2) when plaintiff fails to produce any evidence of some fact essential to his cause of action (19–443, 384; 24–434; 26–384, 4+620); (3) when plaintiff fails to prove any or all the essential facts of his cause of action by evidence which could reasonably satisfy the jury and it would consequently be the obvious duty of the court to set aside a verdict in his favor as not justified by the evidence (18–316, 285; 19–443, 384; 26–384, 4+620; 30–482, 16+266); (4) when the evidence in favor of defendant so manifestly preponderates that it would be the obvious duty of the court to set aside a verdict for plaintiff as not justified by the evidence (see 18–316. 285; 38–394, 38+100); (5) when there is a fatal variance (22–449; 59–329, 61+328; 60–346, 62+391). But the relief sought is no part of the cause of action and does not determine its character. If plaintiff makes out a cause of action, either legal or equitable, within the allegations of his complaint, he cannot be nonsuited (30–316, 15+254; 31–239, 17+385). If there is some evidence tending to prove all the essential facts of a cause of action and on all the evidence adduced the court or jury might reasonably find either for plaintiff or defendant it is error to dismiss the case when plaintiff rests (34–397, 26+8; 35–84, 27+305; 39–254, 39+488; 56–460, 57+1132; 58–233, 59+1009; 60–336, 62+392; 66–72, 68+771; 78–475, 81+526; 80–139, 83+41; 90–43, 95+578; 90–497, 97+379; 95–127, 103+1017). The mere fact that there is a preponderance of evidence in favor of defendant does not authorize a dismissal (38–394, 38+100). When plaintiff has established a cause of action for nominal damages it is error to dismiss where the recovery of nominal damages would carry costs (36–122, 30+438; 37–537, 35+379; 43–459, 45+866. See 65–540, 68+181). Effect of evidence on motion (23–34; 26–384, 4+620; 56–460, 57+1132; 62–455, 64+1140). When there is a counterclaim pleaded (33–438, 23+862). Admitting additional evidence to defeat motion discretionary (8–286, 252; 8–381, 338; 62–60, 64+95). When motion may be made (26–384, 4+620; 36–106, 30+402; 38–394, 38+100). When there are several parties (31–268, 17+387; 50–21, 52+390; 56–8, 57+160; 61–299, 63+723). When all the issues are not submitted to a jury (31–414, 18+143). Motion by intervener (84–200, 87+611). Error in denying motion cured by evidence subsequently introduced (16–182, 161; 22–287; *27–303, 7+268; 32–185, 20+91; 62–310, 64+903; 66–483*, 69+619; 70–102, 72+841). Action cannot be dismissed by court without verdict or findings of fact, unless evidence would not sustain verdict or findings for plaintiff (106–510, 119+244). See 135–471, 160+1032; 145–276, 177+131, 152–557, 188+735, 195+140.

6. Dismissal for failure of plaintiff to appear—44–448, 47+52; 67–111, 69+700.

7. Other modes of dismissal abolished—20–408, 360; 52–127, 53+1068.

8. Effect of dismissal—A dismissal extinguishes action (105–106, 117+244; 128–50, 150+397).

9. See in general—Vacating judgment of dismissal (122–335, 142+818; 123–17, 142+930; 124–421, 145+173; 127–421, 149+737; 128–66, 150+222; 134–464, 157+327).

10. Dismissal against codefendant.
Appellant cannot question the dismissal of the action as against its codefendant in whose favor a verdict had been returned and against whom appellant had asserted no claim. 158–136, 196+929.

11. Stipulation of parties.
The rule that, upon satisfying a judgment for the conversion of chattels, the title vests in the defendant, is without application where, in an action brought against him, the owner of chattels sets up a counterclaim for damages for plaintiff's alleged conversion of the property, and plaintiff denies the conversion, and the parties stipulate for a dismissal of their respective causes of action with prejudice and, pursuant to the stipulation, judgment of dismissal is entered. 161–135, 202+71.

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

13. Divorce cases.
Either party to a divorce proceeding, who asks for an absolute divorce, may withdraw the demand any time before the decree is granted. After such withdrawal, the court has no authority to grant a divorce to such party. 164–102, 204+915.

14. Upon the trial and before final submission.
209+907.

If the evidence when both parties rested justified findings for plaintiff, no reversible error can be asserted upon the court's refusal to dismiss when plaintiff rested. 164–105, 204+550.

The error, if any, in denying a motion to dismiss made when plaintiff rests is cured where the evidence at the end of the trial, taken as whole, is sufficient to sustain findings for plaintiff. 211+673.

9323. Offer of judgment—Costs—At least ten days before the term at which any civil action shall stand for trial the defendant may serve on the adverse party an offer to allow judgment to be taken against him for the sum, or property, or to the effect therein specified, with costs then accrued. If within ten days thereafter such party shall give notice that the offer is accepted, he may file the same, with proof of such notice, and thereupon the clerk shall enter judgment accordingly. Otherwise the offer shall be deemed withdrawn, and evidence thereof shall not be given; and if a more favorable judgment be not recovered no costs shall be allowed, but those of the defendant shall be taxed in his favor. (4196) [7826]

12–186, 114; 23–61; 23–71; 38–26, 35+665; 51–341, 53+644; 78–520, 81+520; 84–267, 87+846; 135–346, 160+866.

9324. Tender of money in lieu of judgment—If the action be for the recovery of damages for a tort, instead of the offer of judgment provided for in § 9323, the defendant may tender a sum of money as damages or compensation, together with costs then accrued. If such tender be not accepted, the plaintiff shall have no costs unless he recover more than the sum tendered; and the defendant's costs shall be deducted from the recovery, or, if they exceed the recovery, he shall have judgment for the excess. The fact of such tender having been made shall not be pleaded or given in evidence. (4197) [7827]

NEW TRIALS

9325. Grounds—Presumption on appeal—A verdict, decision, or report may be vacated, and a new trial granted, on motion of an aggrieved party, for any of the following causes materially affecting his rights:

1. Irregularity in the proceedings of the court, referee, jury, or prevailing party, or any order or abuse of discretion, whereby the moving party was deprived of a fair trial;
2. Misconduct of the jury or prevailing party;
3. Accident or surprise which could not have been prevented by ordinary prudence;
4. Material evidence, newly discovered, which with reasonable diligence could not have been found and produced at the trial;
5. Excessive or insufficient damages, appearing to have been given under the influence of passion or prejudice;
6. Errors of law occurring at the trial, and either excepted to at the time, or clearly assigned in the notice of motion;
7. That the verdict, decision, or report is not justified by the evidence, or is contrary to law; but, unless it be so expressly stated in the order granting a new trial, it shall not be presumed, on appeal, to have been made on the ground that the verdict, decision, or report was not justified by the evidence. (4198) [7828]

THE STATUTE GENERALLY

See also notes under § 9285.

¼. In general.
165–349, 206+457.

Where an appeal from an order establishing a cartway, is dismissed, there being no determination of the merits of the controversey, there is no basis for a motion for a new trial, and when such motion is made, no appeal lies from the order denying it. Dodge v. Bell, 37 Minn. 382, 34 N. W. 739, followed and applied. 155–456, 194+379.

An order of the court granting a new trial leaves the case as if no trial had ever been had; and upon an appeal from an order denying a new trial after a second trial, none of the proceedings at the first trial are before the court for review. 156–450, 195+488.

An order of the trial court denying a motion for new trial on the ground of irregularity in the proceedings of the court and accident and surprise, held not an abuse of discretion. 156–450, 195+488.

Where a party has tried his case on one theory of the law and consented to its submission to the jury on that theory, he cannot afterwards claim a new trial, at least as a matter of right, on the ground that such theory was erroneous. 158–31, 196+814.

A specification of error in the notice of a motion for judgment or a new trial is waived if not renewed on appeal, unless it involved jurisdiction over the subject-matter of the litigation. 158–62, 196+811.

The issues as to the warranty and a breach of it having been settled in favor of defendant by the jury, the new trial will concern only the amount of defendant's damage; the issue alone not having been properly submitted to the jury. 158–309, 197+265

The reception of plaintiff's Exhibit A in evidence, as part of the cross-examination of the witness Fitzgerald, was prejudicial error for which a new trial should be had. 158–384, 197+747.

Record examined, and found not to disclose any reversible error either in the rulings as to the admissibility or rejection of evidence, or in the charge. 160–6, 199+886.

When the findings are not sufficiently definite and specific to satisfy a party, he should move for an amendment of them rather than for a new trial. 160–264, 199+817.

Characterizing the testimony of a witness as "clear and intelligible" does not transgress the rule prohibiting trial courts from singling out a particular witness and charging as to his credibility. 161–135, 201+537.

The court was within its discretion in confining the new trial to the single issue of damages. 162–436, 203+218.

The fact that a local newspaper published an article at time of trial concerning the case is not sufficient reason for new trial, when the opposing party and his counsel are free from blame and no prejudice is shown. 163–280, 203+985.

Under the record as it stands in this case, a new trial should be granted on account of the omissions in the proofs and findings. 163–422, 204+575.

The evidence showed that the grantee had been damaged by the fraud, but the amount was not definitely established. On a new trial both parties should be permitted to offer evidence on the question of damages. 164–367, 205+262.

Admission of evidence. 165–417, 206+725.

Certain remarks made by counsel for the plaintiff in his argument to the jury, and the statement of the court relative thereto, were not such as to require a new trial upon the ground of misconduct of counsel, or as an incorrect statement of the evidence by the court. 166–45, 207+178.

Where a motion for a new trial is based upon a failure of the evidence to sustain the verdict and such failure is claimed to be due to the absence of proof of an essential fact to establish liability, the application is not addressed to the discretionary power of the court, but rests upon legal principles and involves exclusively a question of law. 167–168, 208+641.

In the absence of a request for a ruling, a mere objection to remarks of counsel to jury in the argument does not present their effect for review upon appeal. 210+55.

Where a motion for a new trial is made on specific grounds, not including the claim that the conclusions of law are not sustained by the findings of fact, such claim cannot be raised on an appeal from the order denying the motion. Holmstrom v. Barstad, 147 Minn. 172, 179 N. W. 737, followed. 210+392.

There was no error in denying a new trial to enable the insurer to try the case on a different theory. 212+451.

1. New trial defined—37–382, 34+739; 60–212, 62+272.

2. A regulation not a grant of power—12–388, 269; 57–443, 59+534; 66–217, 68+973; 78–135, 80+868; 81–333, 84+113; 94–421, 103+502.

3. Court may grant on its own motion—78–135, 80+868.

4. Applicable to both legal and equitable actions—25–234, 244; 26–391, 4+685; 28–251, 9+756; 28–330, 9+876.

5. Motion a matter of right—25–558; 76–391, 79+397; 84–314, 87+919; 134–292, 157+499; 159+623.

6. After trial by court—When an action is tried by the court without a jury a party may move for a new trial and from the order made on his motion appeal to the supreme court (27–143, 6+773; 28–330, 9+876). But this is not necessary in order to question on appeal the sufficiency of the evidence to justify the findings (24–75; 27–143, 6+773; 31–495, 18+450; 34–416, 26+237; 35–408, 29+121). See 123–435, 143+1124.

7. After trial by referee—The district court has power to grant a new trial when the action is tried by a referee (12–502, 406; 25–52; 44–304, 46+354; 69–245, 72+78). But a motion for a new trial is not necessary in order to question on appeal the sufficiency of the evidence to justify the findings (8–226, 195; 11–341, 241).

8. Of less than all the issues—23–563; 32–445, 21+472; 43–527, 46+75; 44–278, 46+364; 45–441, 48+198; 56–364, 57+935; 83–505, 86+465; 122–463, 148+117; 126–275, 148+117; 131–389, 155+391; 133–192, 158+46.

9. Granted only for material error—The statute provides that a new trial may be granted for error "materially affecting" the rights of the aggrieved party (20–139, 122). A new trial will not be granted for a failure to assess merely nominal damages where no question of permanent right is involved (31–421, 18+145, 821; 37–537, 35+379; 59–452, 61+557; 64–511, 67+631; 65–540, 68+181). A new trial will not be granted even where there is error if from the whole case it is apparent that the result will not be changed (16–20, 8; 18–96, 79; 20–260, 234; 20–419, 374; 21–99; 31–401, 18+105; 39–485, 40+613; 69–165, 72+55). It will not be granted

simply to enable a party to litigate a question not raised by the pleadings (36–164, 30+549). The law does not concern itself with trifles and if the verdict is only a trifle more or less than it ought to have been a new trial will not be granted (35–300, 28+510; 47–344, 50+243; 58–505, 60+342; 59–240, 61+23; 68–531, 71+705; 71–230, 73+959, 74+891). Technical defects ought to be disregarded after verdict (1–347, 257; 4–119, 78). It will not be granted where record affirmatively shows error did not result in prejudice (100–178, 110+969; 103–176, 114+750, 115+636). Rule that admission of incompetent evidence is not ground for new trial, where fact which such evidence tends to prove is shown by other competent evidence, applies only where the other evidence conclusively establishes fact (98–414, 108+301; 100–178, 110+969). Failure or inability of reporter to furnish transcript of evidence no ground for new trial (106–339, 119+50). Waiver of error (100–98, 110+346). Motion for new trial as remedy for defendant unable to be present at trial (115–439, 132+915; 123–325, 143+787).

FOR IRREGULARITY OR ABUSE OF DISCRETION

9½. In general.
Remarks of the court held so prejudicial to appellant that a new trial should be had. 156–407, 195+39.

There was no misconduct of counsel of the prevailing party that calls for just criticism. 166–424, 195+141.

The incompetency of a juror does not entitle the defeated party to a new trial as a matter of right. State v. Durnam, 73 Minn. 150, 75 N. W. 1127, 157–374, 196+483.

10. Construction of subd. 1—19–132, 99; 27–415, 6+795, 8+148; 35–379, 28+927; 36–106, 30+402; 43–239, 45+228; 57–443, 59+534; 64–61, 66+132; 64–394, 67+216; 94–461, 103+334; 122–301, 142+812; 122–343, 142+816; 125–291, 146+1104; 125–529, 147+273; 129–14, 151+408; 194+617; 195+41; 136–155, 161+400.

11. Improper remarks of court—7–421, 336; 17–188, 162; 21–187; 22–351; 36–114, 30+404; 47–414, 50+471; 51–558, 53+874; 61–467, 63+1096; 62–402, 64+1136; 62–474, 65+63; 70–453, 73+253; 74–381, 77+293; 84–357, 87+935; 87–388, 92+230; 88–175, 92+965; 88–262, 92+976; 91–346, 98+96; 95–240, 103+1025; 122–302, 142+812; 122–343, 142+816.

12. Other misconduct—3–262, 181; 6–235, 155; 31–504, 18+449; 46–212, 48+909; 122–344, 142+816.

FOR MISCONDUCT OF THE JURY

12½. In general.
164–446, 205+371; 167–84, 208+546.

The attack upon the verdict as being of the quotient variety fails because there is no showing that, in advance of the computation made by the jurors to ascertain the average of sums suggested one by each of them, there was an agreement to be bound by the result. 163–218, 203+958.

A claim of misconduct on the part of one of the jurors, who conversed with one of the attorneys during the progress of the trial, is without foundation. 166–7, 206+934.

The record fails to show misconduct of a juror. 210+55.

13. Discretionary—23–178; 87–40, 91+1; 124–261, 144+750; 142–102, 170+919.

14. Motion disfavored—4–438, 340; 20–139, 122; 23–325; 80–177, 83+135.

15. Necessity of objection on the trial—29–357, 13+153; 41–223, 43+2; 57–307, 59+199; 61–467, 63+1096; 87–40, 91+1.

16. Presumption of prejudice—Burden of proof—23–325; 29–5, 11+112; 52–329, 54+187; 68–14, 70+795; 70–5, 72+733; 80–177, 83+135; 87–40, 91+1; 103–204, 114+654, 837.

17. Affidavits on motion—The affidavits of jurors as to what transpired in the juryroom cannot be received to impeach their verdict (1–156, 131; 13–386, 358; 16–282, 249; 17–241, 218; 26–183, 2+494, 683; 26–505, 5+680; 27–108, 6+456; 45–177, 47+720; 47–295, 50+199; 52–164, 53+1072; 68–14, 70+795; 68–434, 71+616; 70–5, 72+733; 73–150, 162, 75+1127). Affidavits of jurors are inadmissible to show misconduct in the officer having them in charge (13–386, 358; 47–295, 50+199). But the affidavit of such officer may be received to show misconduct in the jury (26–505, 5+680). Affidavits of jurors as to what transpired in the jury-room or to occurrences outside the jury-room during the course of trial may be received to support their verdict (1–156, 131; 20–378, 330; 45–177, 47+720; 52–164, 53+1072; 68–14, 70+795). Affidavits of jurors respecting matters occurring outside the jury-room during the progress of the trial are admissible to impeach their verdict (70–5, 72+733; 80–177, 83+135; 83–422, 86+417). Affidavits of persons other than jurors are admissible to impeach the verdict provided they relate to acts of the jury showing misconduct (26–505, 5+680; 68–14, 70+795). They are inadmissible, however, if they relate to statements of jurors (1–156, 131; 52–164, 53+1072; 68–14, 70+795); except for purposes of impeachment (52–164, 53+1072). See 126–180, 148+51; 134–13, 159+1070.

18. Separation of the jury—3–427, 313; 3–444, 329; 6–82, 32; 13–370, 343; 16–178, 157; 23–291; 41–104, 42+786; 59–514, 61+677; 73–150, 162, 75+1127; 87–40, 91+1; 91–143, 97+652; 124–515, 145+385; 125–399, 147+430.

19. Drinking intoxicating liquors—16–178, 157; 43–196, 45+152; 57–425, 59+490; 87–40, 91+1; 88–175, 92+965; 130–206, 153+526.

20. Visiting locus in quo—19–271, 230; 23–325; 52–164, 53+1072; 52–329, 54+187; 70–5, 72+733; 80–177, 83+135; 83–422, 86+417; 88–490, 93+899; 126–48, 147+716; 126–168, 148+61.

21. Unauthorized communications with jury—3–262, 181; 22–5; 22–305; 29–5, 11+112; 31–504, 18+449; 45–177, 47+720; 61–467, 63+1096.

22. Other misconduct—1–156, 131; 4–438, 340; 6–82, 32; 12–434, 319; 20–378, 330; 26–505, 5+680; 27–108, 6+456; 41–223, 43+2; 42–350, 44+123; 57–307, 59+199; 90–7, 95+578; 102–81, 112+875, 1081; 102–346, 113+690. Where prevailing party attempts to corrupt or improperly influence a juror, new trial should be granted, without reference to whether attempt was successful (103–204, 114+654; 837). See 121–326, 141+300; 124–260, 144+950.

FOR MISCONDUCT OF COUNSEL

22½. In general.
Alleged misconduct of counsel for defendant was not sufficient to warrant a new trial. 155–489, 194+5.

Where it appears that a seemingly excessive verdict probably was contributed to by misconduct of the prevailing party, this court will order a new trial in the interest of orderly administration of justice. 157–83, 195+794.

There was no prejudicial misconduct on the part of plaintiff's attorney. 158–136, 196+929.

An improper statement of counsel in his argument to the jury does not require a new trial unless it results in or excites prejudice. 159–370, 199+108.

The qualified members of the court are equally divided as to whether the improper remarks of plaintiff's counsel in his argument to the jury constituted such misconduct that a new trial should be granted, and therefore the decision of the trial court stands. 159–410, 199+87.

There was no misconduct of counsel calling for a new trial. 161–304, 201+551.

There was no abuse of judicial discretion in refusing to grant a new trial on the ground of the alleged misconduct of counsel for the prevailing party. 162–359, 203+50.

Whether a new trial should be granted on account of improper remarks in the argument to the jury rests largely in the discretion of the trial court. 165–241, 206+393.

The record fails to support an assignment of error of misconduct of counsel in his argument to the jury. 167–263, 209+4.

Misconduct of counsel as disclosed in the opinion is not sufficient to justify granting a new trial. 167–369, 209+33.

Record held insufficient to support the claim that plaintiff's counsel had improperly disclosed to the jury the existence of liability insurance being carried by defendant. 210+396.

There was no misconduct of counsel in asking a certain question of prospective jurors, nor in ascertaining from defendant that it was without insurance on the automobile that caused the injuries for which a recovery was sought. 210+997.

Argument of counsel to jury held not to constitute misconduct requiring a new trial. 211+309.

Upon the record made, the defendants cannot take advantage of the misconduct of plaintiff's counsel in asking a question designed to inform the jury that one of the defendants was protected by insurance. 212+180.

The court did not err in denying the defendants' motion for a new trial upon the ground of the misconduct or fraud of one of their counsel. 212+203.

Statement to jurors that defendant was insured not reversible error. 213+372.

23. Improper remarks on the trial—1–156, 131; 8–140, 110; 12–538, 448; 23–197; 31–193, 17+279; 31–526, 18+651; 36–334, 31+176; 37–519, 35+438; 39–277, 39+796; 42–46, 43+904; 42–407, 44+306; 43–196, 45+152; 43–265, 45+432; 49–457, 52+213; 51–558, 53+874; 61–224, 63+627; 61–467, 63+1096; 71–425, 74+171; 81–42, 83+492; 81–380, 84+119; 87–432, 92+334; 91–143, 97+652; 92–347, 99+1132; 94–496, 103+497; 95–367, 104+233; 96–469, 105+494; 103–400, 115+202. Motion is addressed to discretion of court (103–345, 114+948; 103–530, 115+1135). Assignments of error as to misconduct are not well taken, where no exceptions were taken, nor attention of court called thereto, nor ruling invoked (99–400, 109+832. See 123–177, 143+322; 127–15, 148+476; 128–245, 150+804; 130–80, 153+269; 130–230, 153+532; 133–192, 158+46).

24. Other misconduct—31–193, 17+279; 61–224, 63+627; 81–112, 83+503.

FOR ACCIDENT OR SURPRISE

The failure of plaintiff to adduce proof through a misapprehension of the effect of admissions should not result in judgment non obstante, but a new trial. 210+70.

We find no merit in the contention that appellant is entitled to a new trial on account of surprise occurring a tthe trial. 166–29, 206+950.

25. Discretionary—64–402, 67+218; 106–545, 119+217. Cited (104–198, 116+739; 121–455, 141+803).

26. Necessity of objection on the trial—17–172, 142; 25–100; 30–150, 14+578; 32–7, 19+83; 32–45, 19+86; 34–440, 26+236; 37–283, 34+33; 41–285, 43+5; 53–404, 55+622; 54–90, *55+821; 59–364*, 61+135; *61–464*, 63+1027; 68–434, 71+616; 80–430, 83+382; 81–279, 83+1089; 84–221, 87+605.

27. Affidavits on motion—4–515, 402; 17–172, 145; 27–357, 7+688; 34–440, 26+236; 41–285, 43+5; 51–324, 53+545; 57–425, 59+490; 62–528, 64+1132.

28. Motion granted—7–480, 386; 25–100; 32–7, 19+83; 32–45, 19+86; 55–262, 56+896; 84–221, 87+605; 100–127, 110+370.

29. Motion denied—4–515, 42; 2–37; 7–421, 336; 17–172, 145; 19–394, 340; 23–463; 27–357, 7+688; 28–251, 9+756; 34–440, 26+236; 36–336, 31+214; 39–61, 38+777; 50–523, 52+926; 51–324, 53+545; 54–90, 55+821; 57–425, 59+490; 58–126, 59+959; 59–364, 61+135; 61–464, 63+1027; 62–528, 64+1132; 64–402, 67+218; 65–60, 67+808; 68–106, 70+872; 68–434, 71+616; 73–150, 75+1127; 76–90, 78+965; 79–279, 82+587; 80–430, 83+382; 89–426, 94+1093; 88–269, 92+978; 89–212, 94+723; *92–255, 99+809; 92–365, 100+1125; 98–265, 107+815; 101–85*, 111+958; 121–455, 141+803; 134–292, 157+499, 159+623; 134–469, 158+787; 134–481, 159+1095.

FOR NEWLY DISCOVERED EVIDENCE

30. To be granted with extreme caution—28–526, 11+94; 35–465, 29+69; 36–323, 31+513; 54–90, 55+821. Discretionary (97–361, 107+392; 103–41, 114+261; 103–110, 114+647; 105–229, 117+421; 105–393, 117+465); 130–304, 153+613; 130–469, 153+867; 131–3, 154+441; 135–375, 165+130.

31. Necessity of applying for continuance—37–283, 34+33; 41–285, 43+5; 53–404, 55+622.

32. Showing on motion—64–220, 66+966; 67–48, 69+624; 76–326, 79+171; 77–512, 80+629; 88–269, 92+978; 101–476, 112+627; 129–460, 152+872.

33. Affidavits of new witnesses—*6–513, 357*; 7–225, *166*, 88–269, 92+978.

34. Counter affidavits—16–355, 315; 30–22, 14+64.

35. Nature of new evidence—Newly discovered evidence is not a ground for a new trial if it could have been discovered before trial by the exercise of due diligence (18–300, 272); or if it is merely contradictory or impeaching (35–465, 29+69; 36–323, 31+513. See 96–274, 104+969); or if it is merely cumulative (8–140, 110; 91–143, 97+652. See 96–274, 104+969); or if it is not so material as to make probable a different result on a new trial (28–526, 11+94; 91–143, 97+652). Not ordinarily be granted to enable party to avail himself of impeaching evidence (99–299, 109+241). See 121–445, 141+795; 122–510, 142+885; 123–319, 143+793; 125–343, 147+111; 125–401, 147+279; 132–114, 155+1074; 133–156, 157+1073; 134–469, 158+787; 135–292, 160+793; 135–9, 159+1075; 136–257, 161+515.

163–476, 204+326; 167–523, 209+313.

No sufficient showing was made to warrant a new trial on the ground of newly discovered evidence. 155–487, 194+19.

A new trial properly refused when the new evidence urged as a ground therefor is equivocal in nature, and not of sufficient probative force to affect the result. 155–307, 194+637.

Discretion of court. 156–501, 194+627.

The court did not err in denying the defendant's motion for a new trial upon the ground of newly discovered evidence.

Quinn, J., dissenting. 157–338, 196+470.

In passing on the question whether newly discovered evidence entitled defendant to a new trial, the court should consider whether such evidence would be likely to change the result on another trial. Here the court might well conclude that it would not, and, furthermore, the alleged newly discovered evidence was merely cumulative and corroborative of what defendant presented at the trial, and the court did not abuse judicial discretion in denying a new trial on the ground urged. 157–362, 196+478.

There was no error in denying a new trial asked upon the ground of newly discovered evidence. 158–122, 197+296

The motion for a new trial on the ground of newly discovered evidence was properly denied. 158–122, 196+936.

Under the facts, there was no abuse of discretion in denying a motion for new trial on the ground of newly discovered evidence. 158–334, 197+738.

Rules adopted in former decisions as to granting new trials on the ground of newly discovered evidence, considered and applied notwithstanding the affidavits filed in support of the motion. 159–292, 198+815.

The motion for a new trial on the ground of newly discovered evidence was correctly denied, as the writing alleged to have been newly discovered was in the possession of the party at the time of the trial. 159–464, 199+110.

The refusal to grant a new trial on account of newly discovered evidence was, under the showing, within the discretion of the trial court. 160–49, 199+889.

Defendant was not entitled to a new trial on the ground of newly discovered evidence. 160–317, 200+295.

A new trial should have been granted upon the ground of newly discovered evidence. 160–463, 200+742.

Whether a new trial should be granted upon the ground of newly discovered evidence was for the trial court. 161–26, 200+746.

The newly discovered evidence urged as ground for a new trial was corroborative and cumulative. There was no abuse of discretion in denying a new trial. 161–28, 200+746.

There was no error in denying a new trial upon the ground of newly discovered evidence. 161–96, 200+933.

The denial of a new trial upon the ground of newly discovered evidence is within the discretion of the trial court, where the new evidence would be furnished by witnesses who testified at the first trial, and who now, by their affidavits, show that their testimony then was perjured, or that they are now tendering perjured evidence for use at a second trial. 162–9, 201+913.

No abuse of discretion occurred in denying a new trial on the ground of newly discovered evidence. 162–447, 203+216.

There was no abuse of discretion in denying a new trial upon the ground of newly discovered evidence; the claim of the plaintiff being that an officer of bank was a subagent of the defendant, and therefore the defendant was charged with such knowledge as its subagent had as to the doings of the misappropriating officer. 163–333, 204+33.

There was no abuse of discretion in denying a new trial on the ground of newly discovered evidence. 164–105, 204+550.

The trial court did not abuse its discretion in refusing a new trial upon the ground of newly discovered evidence. 165–67, 205+628.

Diligence. 165–293, 206+434.

Under the circumstances stated in the opinion, it is held not an abuse of discretion to deny a new trial, notwithstanding some of the new evidence, if believed, would result in an acquittal; one of the grounds for such holding being that such evidence is flatly contrary to the testimony of both defendant and his wife. 210+45.

The defendants claim that they testified falsely on the trial, and they offer to produce evidence tending to show that they are not guilty. *Their showing did not require* the granting of a new trial upon the ground of newly discovered evidence. 212+203.

FOR EXCESSIVE OR INADEQUATE DAMAGES

36. Under either subd. 5 or subd. 7—In actions to recover unliquidated damages, such as actions for personal injuries, libel and slander, and similar actions, where plaintiff's damages cannot be computed by mathematical calculation, are not susceptible of proof by opinion evidence, and are within the discretion of the jury, the motion should be made under subd. 5. In all actions, whether sounding in tort or contract, where the amount of damages depends on opinion evidence, as the value of property converted or destroyed, the nature and extent of injuries to person or property, the motion should be made under subd. 7. *In cases of doubt, or* where both elements of damages are involved, the motion should be made under both subdivisions (95–261, 104+12; 104+886. See 66–217, 68+973; 73–219, 75+1054; 83–409, 86+446; 92–523, 100+365). Order granting new trial, under subd. 5 or subd. 7, in exercise of judicial discretion, should so indicate (116–433, 133+1018). See 121–258, 141+115; 121–327, 141+300; 121–357, 141+491; 121–388, 141+488; 121–445, 141+795; 121–455, 141+803; 121–530, 141+304; 122–39, 141+847; 122–49, 141+849; 122–444, 142+705; 122–510, 142+885; 123–131, 143+117; 123–173, 143+322; 123–218, 143+355; 123–480, 144+149; 123–495, 144+220; 123–498, 144+213; 123–523, 143+411; 124–2, 144+466; 124–19, 144+431; 124–169, 144+745; 124–219, 144+937; 124–246, 144+772; 124–359, 145+115; 124–368, 145+40; 124–374, 145+32; 124–413, 145+161; 124–466, 145+385; 125–7, 145+613; 125–33, 145+626; 125–102, 145+791; 125–401, 147+279; 125–528, 147+273; 126–259, 148+112; 126–350, 148+500; 126–430, 148+309; 126–470, 148+311; 126–488, 148+296; 126–491, 148+304; 126–509, 148+568; 127–1, 148+446; 127–15, 148+476; 127–87, 148+893; 127–381, 149+660; 127–475, 149+938; 127–507, 150+175; 127–519, 148+617; 128–119, 150+382; 128–186, 150+810; 128–228, 150+807; 128–232, 150+897; 128–270, 150+919; 128–283, 150+922; 128–329, 151+124; 128–449, 151+274; 128–505, 151+177;

129–14, 151+408; 129–59, 151+532; 129–70, 151+537; 129–101, 151+894; 129–206, 152+138; 129–506, 152+882; 129–517, 152+880; 129–523, 151+1102; 130–36, 153+317; 130–80, 153+269; 130–134, 153+267; 130–186, 153+323, 593; 130–196, 153+310; 130–229, 153+532; 130–263, 153+525; 130–300, 153+600; 130–314, 153+611; 130–406, 153+848; 130–531, 153+271; 131–112, 154+790; 131–166, 154+957; 131–236, 154+1075; 131–327, 155+104; 131–435, 155+619; 131–475, 155+767; 132–54, 155+1058; 132–238, 156+283; 132–399, 157+640; 133–23, 157+717; 133–41, 157+41; 133–58, 158+721; 133–61, 158+796; 133–367, 158+611; 133–371, 158+623; 134–91, 158+824; 134–114, 158+913; 134–382, 159+828; 134–452, 159+1076; 134–458, 159+1073; 134–477, 159+1095; 134–788, 158+788; 135–38, 159+1087; 135–230, 160+787; 135–372, 160+1020; 135–453, 161+144; 136–155, 161+400; 136–417, 162+520.

165–358, 206+443, 166–7, 206+934; 212+200.

Although the verdict for plaintiff seems wrong, there was no abuse of discretion in denying the motion for a new trial, the verdict being the result of a second trial and having evidence to support it. 212+449.

The verdict, as reduced, is not excessive. 156–247, 194+754.

The award of damages was not so excessive as to *justify* an appellate court *interfering* with the verdict. 156–211, 194+639.

$8,000 not excessive for loss of leg. 156–218, 194+620.

The verdict, though large, may not be held so excessive that the court must find that the jury were actuated by passion or prejudice. 156–52, 194+752.

$15,000 not excessive for permanent injury to hip and leg. 157–52, 195+629.

Record considered, and it is held, that the verdict is justified by the evidence; that it is not excessive, and dies not appear to have been rendered under the influence of passion and prejudice. 157–184, 195+892.

$6,800 not excessive for death. 157–362, 196+478.

Damages to boat held not excessive. 158–62, 196+811.

A verdict for $2,750 for personal injuries, of which there were almost no external evidences, is excessive. No considerable verdict should be allowed to stand upon proof of subjective symptoms only. 158–69, 196+673.

New trial granted unless plaintiff consents to a reduction of the verdict to $1,750. 158–69, 196+673.

Verdict for $6,688.58, reduced to $5,000 held not excessive for injuries to ribs and vertebra. 158–136, 196+929.

$3,216.50 not excessive for injury to leg of woman 78 years of age. 158–104, 196+932.

$5,750 not excessive for malpractice with respect to broken leg. 158–205, 197+102.

The verdict of $10,000, which the trial court reduced to $6,000, was so large for the injury which plaintiff sustained to his ankle, as to indicate passion and prejudice such as to require a new trial. 158–384, 197+747.

$1,000 not excessive for slander. 158–408, 197+752.

Injuries to automobile. 159–61, 198+137.

$15,000 reduced to $9,000 not excessive for breach of promise. 159–258, 198+669.

Action for personal injuries. The verdict is sustained by the evidence, and the damages are not so clearly excessive as to justify this court in granting a new trial on that ground. 159–326, 198+804.

An award of $7,500 for pain and suffering was excessive, *and should be reduced conditionally to $1,500.* 159–328, 198+999.

$15,000 excessive for injuries to leg and back and reduced to $10,000. 159–388, 199+178.

A verdict of $12,000, reduced to $10,000, to compensate a car repairer for an injury resulting in permanent disability of his right arm, loss of wages, and impaired hearing, is held not excessive. 159–436, 199+20.

$2,500 not excessive for injury to arm. 160–78, 199+513.

$5,000 not excessive for injury to hip and great pain. 160–398, 200+354.

Verdict held not perverse. 161–64, 200+748.

$2,500 not excessive for injuries to leg. 161–125, 201+293.

$15,000 held not excessive for injuries. 161–304, 201+55.

$12,500 held not excessive to permanent total disability. 161–322, 201+606.

$2,500 not excessive for injuries to head and back. 161–440, 201+929.

$3,000 not excessive for injuries to nervous system. 161–487, 202+27.

$15,000 not excessive for loss of arm. 161–535, 201+937.

$1,000 not excessive for automobile destroyed by fire. 162–34, 202+32.

This court will not set aside a verdict of $16,000 on the ground that it is so excessive as to indicate passion and prejudice on the part of the jury, where the plaintiff was a railroad switchman, 39 years old, earning $175 a a month, and suffered a serious injury to his left arm and hand, which was permanent in its nature and will always disable him from following his former occupation. 162–87, 202+275.

Plaintiff was a railroad fireman, 37 years old, earned $200 a month, suffered a serious injury to his left arm, permanent in its nature and will always disable him from following his former occupation. It is held that a verdict of $12,125 is not excessive. 162–96, 202+276.

$4,000, reduced from $7,500, was not excessive for injury to ear and clavicle. 162–114, 202+344.

$17,500 not excessive for injuries. 162–213, 202+485.

$6,000 for death not excessive. 162–419, 203+57.

$4,100 was not excessive for loss of services and society of wife. 162–464, 203+62.

Damages to automobile. 162–509, 202+68.

$3,000 not excessive for injuries to woman causing miscarriage. 163–198, 203+776.

The verdict approved by the trial court, viewed in the light of the record, cannot be held so excessive that the *inference must be that passion or prejudice swayed* the jury. 163–257, 203+969.

$29,940 not excessive for permanent injury to brakeman. 163–457, 204+557.

$26,047.50 was not excessive for death of conductor. 163–460, 204+552.

$1,000 not excessive for injuries to woman. 163–511, 203+983.

A verdict for $10,428 for damages caused by an injury, resulting among other things in the amputation of plaintiff's left leg just below the knee, is not excessive. 164–6, 204+524.

$10,000 not excessive for injuries to ankle. 205+689.

Recovery on fire policy. 165–442, 206+655.

$8,500 not excessive for broken leg and scar over eye. 166–131, 207+188.

The damages awarded for an injury to rug, caused by the negligence of defendants' employee in spilling sulphuric acid on the rug, are not excessive. 166–193, 207+305.

Verdict for injuries to collar bone and arm held inadequate. 166–425, 208+182.

The verdict of $15,000 for the loss by a boy, 11 years old, of practically the entire left leg is not so excessive as to warrant reversal or conditional reduction. 167–211, 208+657.

There should be a new trial as to the amount of damages only. 167–232, 208+808.

The court rightly granted a new trial unless plaintiff consented to reduce his verdict by the amount of the payment. 167–272, 208+804.

Recovery on automobile theft and fire policy held not excessive. 167–362, 209+27.

$3,200 not excessive for nervous shock. 167–437, 209+317.

$1,250 not excessive for assault. 209+624.

A verdict for $14,000 for death of a man 24 years of age, earning $85 per month, under the circumstances stated in the opinion, is not excessive. 209+905.

$8,500 not excessive for permanent injury to arm and leg of man 59 years of age. 210+32.

The damages awarded are not excessive. 210+55.

We cannot pronounce the verdict as reduced excessive. 210+78.

$1,000 for stiffening of thumb not excessive. 210+866.

Damages held not excessive. 210+936.

The verdicts cannot be disturbed as excessive. 210+997.

Verdict for $1 for personal injuries inadequate. 211+471.

$50 was inadequate for injury to arm. 211+472.

$1,400 not excessive for bruises. 212+180.

$2,775 not excessive for injury to hand and leg of woman of 69. 212+186.

$3,000 not excessive for injury incapacitating worker for 11 months. 212+413.

$2,045 not excessive for injury to hand. 212+533.

Under the evidence as to the character and value of respondent's services, the verdict cannot be interfered with. 212+815.

Where the jury is permitted to find the reasonable value instead of the agreed price and allows less than the agreed price, defendant cannot complain. 213+47.

$6,000 not excessive for injury to legs and arm. 213+372.

37. General principles—28–232, 9+712; 32–217, 18+836; 20+87; 33–108, 22+127; 45–536, 48+445; 46–439, 49+239; 53–

341, 55+137; 65–18, 67+646; 83–409, 86+446; 95–261, 104+12; 124–368, 145+40; 127–373, 149+544.

38. Necessity of passion or prejudice—When the motion is made under subd. 5 the trial court is not authorized to grant a new trial unless it is manifest that the damages were given under the influence of passion or prejudice (32–217, 18+836, 20+87; 55–497, 57+149; 65–18, 67+646; 83–409, 86+446; 95–261, 104+12). It is not enough that the court would have assessed them differently (32–217, 18+836, 20+87), or believes them unreasonably large (55–497, 57+149). Ordinarily the fact of prejudice or passion appears from the verdict being so large or small, when compared with what the evidence indicates it ought to be, that the court must conclude that the jury did not arrive at the amount upon a fair and impartial consideration of the evidence (42–301, 44+68; 55–497, 57+149. See 102–346, 113+690). Affidavits are inadmissible to prove the existence of passion or prejudice. The court must base its decision solely on the evidence submitted on the trial (32–266, 20+159; 83–409, 86+446). See 122–343, 142+816; 122–400, 142+718; 123–17, 142+930; 126–471, 148+311; 127–373, 149+544; 128–251, 150+805; 128–415, 151+198; 129–372, 152+765; 131–209, 154+960; 131–261, 154+1100; 131–321, 155+205; 131–435, 155+619; 135–248, 160+665; 141–156, 169+542.

39. Remitting excess—28–232, 9+712; 35–251, 28+708; 83–409, 86+446; 90–499, 97+433; 96–480, 105+673; 102–346, 113+690; 123–223, 143+716; 124–421, 145+173.

40. Successive verdicts—65–18, 67+646; 78–272, 80+950; 131–493, 154+943.

41. When granted as of course—Where it is clear that the jury assessed the damages in accordance with an erroneous instruction (36–300, 30+890), or, where they evidently made a miscalculation (35–202, 28+240), or included improper items of damage (34–32, 24+289), a new trial is ordinarily granted as a matter of course unless the error can be corrected by a remittitur (126–430, 148+309).

42. For inadequate damages—35–465, 29+69; 52–479, 55+53; 57–147, 58+870; 80–123, 83+32; 92–182, 99+630; 94–494, 103+499; 98–96, 107+817; 107–457, 120+749; 133–321, 158+419.

FOR ERRORS OF LAW ON THE TRIAL

43. What are errors on the trial—It is only errors of law occurring at the trial that may be made the basis of a motion for a new trial under subd. 6. In case of errors of law occurring before and after trial the remedy is either an appeal from the judgment (27–415, 6+795, 8+148; 29–68, 11+228; 35–379, 28+927; 64–61, 66+132), or a motion for a new trial under subd. 1 (19–132, 99; 43–239, 45–228). The phrase "at the trial" means during the course of the trial. The trial being within the meaning of the statute, when a cause is called for the trial of issues of fact, and any erroneous and prejudicial order overruling thereafter made is a ground for a new trial (37–285, 33+856; 39–535, 41+107; 57–30, 58+821; 60–518, 62+1125). When the trial is by jury the trial continues until the jury are discharged (20–139, 122; 21–506; 30–18, 13+921; 40–547, 42+541; 44–52, 46+314; 46–212, 48+909). When the trial is by court or referee the trial terminates with the final submission of the case (see 25–234). See 121–258, 141+164; 122–39, 141+847; 123–17, 142+930; 123–325, 143+787; 123–435, 143+1124; 123–499, 143+213; 123–523, 143+111; 124–2, 144+466; 124–155, 144+462; 124–359, 145+115; 124–374, 145+32; 127–425, 149+672; 127–490, 150+218; 128–460, 151+275; 128–489; 151+139; 129–8, 151+423; 129–324, 152+755; 129–531, 152+269; 130–285, 153+596, 195+148.

See also notes under §§ 9298, 9327.

163–303, 204+159; 164–401, 205+282; 164–446, 205+371; 164–466, 206+380; 165–262, 206+168; 166–53, 206+929.

Evidence. 155–475, 194+14.

The admission, over objection, of an answer relating to an irrelevant matter having no hearing upon the issues tried does not justify the granting of a new trial. 156–424, 195+141.

Where the defense to a suit on a contract is based upon fraud, and a rescission because of such fraud, it is error not to instruct the jury that the rescission claimed is an essential element of the defense. Such error, being with respect to a principle controlling the case, can be taken advantage of on motion for new trial, even though there was no exception to the charge, and it was not otherwise called to the attention of the trial judge. 156–487, 195+489.

Refusal to withdraw from jury elements of damages unsupported by evidence was error. 157–133, 195+777.

The charge relative to contributory negligence and assumption of risks as applied to interstate commerce was confusing, but it was finally stated correctly. It is held that there was no error requiring a new trial. 159–328, 198+998.

The admission of evidence which should have been rejected must have actually prejudiced the excepting and defeated party, to give him a right to a new trial. 160–326, 200+293.

The errors assigned upon rulings at the trial do not warrant granting a new trial. 161–164, 166, 200+938.

We find no reversible error in the charge of the court to the jury. 162–265, 202+823.

Error in charge. 162–412, 203+59.

An exception is defective when it embraces three separate instructions given to the jury. 162–440, 203+415.

A formal offer of proof is not necessary, when an objection is sustained to a question calling for an answer which would obviously elicit material and relevant evidence. 162–440, 203+415.

An erroneous instruction to the jury, even on a controlling proposition of law, cannot be reviewed upon an appeal from the judgment, when appellant did not take an exception or move for a new trial. 162–486, 203+432.

Failure to instruct. 163–239, 203+785.

Minor complaints regarding the trial are not well taken. 163–257, 203+969.

Defendant cannot complain of an instruction which, under the evidence, was too favorable to him. 163–473, 204+466.

Exclusion of evidence. 163–514, 204+313.

Reception of evidence. 164–425, 205+286.

There is no reversible error in the charge, when read as a whole, nor do we discover any error in the rulings upon the admissibility of evidence. 165–65, 205+701.

The trial court was justified in granting a new trial on account of seemingly contradictory statements and errors in the charge. 165–208, 206+379.

The failure of the court to charge the jury on a particular point is not ground for a new trial, in the absence of a request for an instruction covering it. 165–374, 206+716.

Nor has the court any authority upon its own motion to grant a new trial for such error. 165–374, 206+716.

No error in rejecting testimony for purpose of impeachment upon immaterial matter. 167–362, 209+27.

Where the trial court grants a new trial solely upon an alleged error in the charge to the jury, and the charge given is proper and without error, the order granting a new trial reversed. 210+44.

There was no exception to the charge that if either defendant was liable both were liable, and the oil company cannot now claim that the act of Iverson in making sale of gasoline for kerosene was an intervening cause which relieved it if liability. 210+78.

Where the court in excluding an exhibit intimates that it might later be offered, and no subsequent offer is made, there is no reversible error. 211+952.

No merit in contention that appellant was prejudiced by remark of trial court, nor in rulings upon the admissibility of evidence. 212+167.

Failure to charge that the plaintiff had the burden to show that he was injured was, upon the record, harmless. 212+533.

Record discloses no misconduct on the part of the trial court nor prejudicial error in the rulings as to the admissibility of evidence. 212+599.

The error, in refusing to permit an attorney for plaintiff on cross-examination to answer the question whether he was retained under an agreement that he should have no fee unless there was a recovery, should not result in a new trial, where the attorney was called merely to rebut an immaterial and irrelevant matter which had no bearing on the issues tried and which defendant ought not to have injected into the trial. 212+805.

The record does not disclose that there was reversible error in the rulings upon the admissibility of evidence. 212+815.

The charge is held prejudicial as argumentative against appellant. 213+537.

44. How far discretionary—89–330, 94+888; 143–486, 173+400.

45. Necessity of exceptions—Notice of trial—A party cannot take advantage of any errors occurring at the trial and not excepted to unless he specifies them in his notice of motion (86–156, 90+368; 87–277, 91+1103; 87–398, 92+225; 89–500, 95+323; 91–127, 97+737; 91–137, 97+580; 101+1133). A notice held sufficiently specific (93–288, 101+302; 130–434, 152+262; 153+736).

FOR INSUFFICIENCY OF EVIDENCE

46. General rules—A court ought to exercise not merely a cautious but a strict and sure judgment before setting aside a verdict as not justified by the evidence. A verdict should not be set aside unless palpably against the evidence (29–147, 12+449). If different persons might reasonably draw different conclusions from the evidence the verdict should not be disturbed (11–296, 204; 17–172, 145; 18–297, 270; 19–181, 145; 28–390, 10+418). A new

trial should be granted only in cases of manifest injustice (10–313, 246; 11–296, 204). A new trial should not be granted on conflicting evidence unless the verdict is so manifestly contrary to the preponderance of the evidence as to warrant the inference that the jury failed to consider all the evidence or acted under some mistake or from some improper motive, bias, feeling or caprice, instead of dispassionately and honestly exercising their judgment on all the evidence (11–296, 204; 80–50, 82+1092). A verdict which obviously rests on mere possibility, speculation or conjecture, should be set aside (49–240, 54+918; 83–370, 86+451; 86–263, 90+534; 87–197, 91+487; 89–143, 94+440). Although there may be some evidence reasonably tending to support the verdict it should be set aside if manifestly unreasonable in view of all the evidence (29–147, 12+449; 32–390, 20+379; 74–525, 77+422). It is the duty of the court to weigh the evidence and not to adopt inconsiderately the opinion of the jury (25–558; 76–391, 79+397). It is the duty of the court to consider the credibility of the witnesses (25–558). The court may properly take into consideration the probability that on another trial stronger evidence might be adduced (47–461, 50+603). Where the evidence wholly fails to establish a material issue under the pleadings the motion is not addressed to the discretion of the court and is to be determined by the application of legal principles (92–139, 99+631). If there is not manifest and palpable preponderance of evidence in favor of verdict, order granting a new trial for insufficiency of evidence will not be reversed (13–434, 398; 99–119, 108+824; 99–484, 109+1118; 102–455, 113+1062; 102–511, 113+1133; 103–27, 114+247; 104–178, 116+354; 104–232, 116+482; 105–479, 117+785. And see 97–130, 106+338).

See 121–416, 141+798; 121–439, 141+523; 121–455, 141+803; 121–458, 141+525; 121–505, 141+835; 122–17, 141+789; 122–44, 141+854; 122–66, 141+1099; 122–103, 141+855; 122–241, 142+196; 122–295, 142+710; 122–363, 142+716; 122–400, 142+717; 122–415, 142+804; 122–448, 142+876; 122–510, 142+885; 122–530, 142+1134; 123–52, 142+1042; 123–119, 143+120; 123–141, 143+260; 123–178, 143+324; 123–218, 143+355; 123–264, 143+724; 123–319, 143+793; 123–367, 143+917; 123–480, 144+149; 123–493, 144+137; 123–495, 144+220; 123–516, 144+407; 123–530, 143+1123; 124–84, 144+450; 124–114, 144+744; 124–125, 144+745; 124–132, 144+472; 124–140, 144+452; 124–141, 144+751; 124–169, 144+745; 124–234, 144+759; 124–260, 144+950; 124–266, 144+954; 124–381, 145+35; 124–411, 145+124; 124–466, 145+385; 124–478, 145+395; 124–487, 145+393; 125–15, 145+402; 125–24, 145+404; 125–49, 145+615; 125–59, 145+617; 125–78, 145+786; 125–122, 145+808; 125–134, 145+803; 125–150, 145+806; 125–155, 145+799; 125–292, 146+1104; 125–308, 146+1107; 125–343, 147+111; 125–365, 147+241; 125–399, 147+430; 125–431, 147+434; 125–469, 147+427; 125–484, 147+655; 125–534, 147+426; 126–52, 147+827; 126–144, 148+108; 126–149, 148+110; 126–169, 148+61; 126–259, 148+112; 126–275, 148+117; 126–340, 148+123; 126–350, 148+500; 126–355, 148+119; 126–359, 148+121; 127–8, 148+518; 127–93, 148+893; 128–106, 150+388; 128–214, 150+786; 128–232, 150+897; 128–252, 150+809; 128–341, 150+1084; 128–488, 151+139; 129–70, 151+537; 129–77, 151+541; 129–81, 151+539; 129–97, 151+895; 129–101, 151+894; 129–141, 151+896; 129–372, 152+765; 129–506, 152+882; 129–517, 152+880; 129–522, 151+273; 129–523, 151+529; 130–196, 153+310; 130–297, 153+616; 130–300, 153+600; 132–321, 156+348; 132–399, 157+640; 133–321, 158+419; 134–91, 158+824; 134–458, 159+1073; 134–467, 158+788; 135–9, 159+1075; 135–292, 160+793; 135–453, 161+144; 142–89, 170+920.

46a. Verdict not justified by evidence.

On appeal from an order denying a new trial, an assignment of error that the verdict is not justified by the evidence, based upon a like assignment in the motion for a new trial, is specific enough to present the question whether the verdict is sufficiently supported by the record. 16+401, 205+282.

Upon the facts stated in the opinion, there is so much indication of contributory negligence that, there having been a substantial verdict for plaintiff, a new trial seems necessary in the interests of justice. 213+44.

46b. Memorandum—When motion is on ground that verdict is not supported by evidence and for errors of law occurring at trial, and order granting new trial does not specify on what ground motion is granted, memorandum of trial court may be referred to, to ascertain on what ground order was granted, notwithstanding omission of word "memorandum" in subdivision 7 (109–101, 123+295). Where it does not appear from memorandum on what ground order is based, new trial cannot be presumed to have been granted on ground that verdict was not justified by evidence (109–323, 123+932). Formal order granting new trial which is responsive to motion cannot be impeached by court's memorandum (109–117, 123+60).

See 122–463, 142+729.

47. Upon a dismissal—A dismissal on the trial for insufficiency of evidence is a "decision" within the meaning of the statute and the motion for a new trial may be made on a settled case (25–234; 34–350, 25+712; 36–106, 30+402).

48. After trial by court—Where a cause is tried by the court without a jury a new trial may be granted on the ground that the findings of fact are not justified by the evidence (7–325, 254; 28–330, 9+876; 40–171, 41+948). In actions of an equitable nature where the main issues are first tried, leaving ancillary issues for future trial, a new trial of the main issues may be granted before a decision on the ancillary issues (28–330, 9+876. See 46–507, 49+207). Erroneous findings afford no ground for a new trial where it is obvious that if such findings had been different the result would necessarily have been the same (45–256, 47+799; 57–180, 58+985; 61–277, 63+734; 71–108, 73+639; 76–450, 79+531).

49. After trial by referee—The district court may vacate the findings of a referee on the ground that they are not justified by the evidence and grant a new trial (12–502, 406; 25–52; 44–304, 46+354). In such a case it is the right and duty of the judge who passes on the motion to exercise the same discretion in determining whether the motion should be granted as if the cause had been tried by himself, except that such discretion must be exercised entirely with reference to the evidence disclosed by the record (69–245, 72+78; 73–219, 75+1054).

50. After denial of motion to dismiss—30–482, 16+266.

51. After successive verdicts—30–93, 14+365; 32–390, 20+379; 38–534, 38+620; 65–80, 67+668, 68+22; 66–355, 68+1099; 75–349, 77+988; 78–272, 80+950; 94–464, 103+332. See 100–198, 110+853; 125–72, 145+798.

52. Remitting excess—69–543, 72+814; 70–193, 72+1074.

53. Presumption on appeal—There is no presumption on appeal that a new trial is granted on the ground that the verdict was not justified by the evidence (87–18, 91+28; 88–392, 93+309; 89–330, 94+888; 91–238, 97+879; 91–335, 97+1055; 93–468, 101+790; 94–23, 101+954; 94–186, 102+393; 95–422, 104+371; 97–161, 106+110; 97–201, 106+311; 101–544, 112+1142; 122–463, 142+729).

WHEN VERDICT CONTRARY TO LAW

54. General statement—A motion for a new trial on the ground that the verdict is contrary to law is somewhat in the nature of a demurrer to the evidence; that is, conceding all that the evidence tends to prove, the verdict is not supported by the principles of law applicable to the facts (71–69, 73+645). On the other hand it has been held that the phrase "contrary to law" means contrary to the instructions and that it is not enough to justify a new trial that a principle of law not embodied in an instruction was disregarded by the jury (57–443, 59+534). An appellate court, when considering the question whether a verdict is contrary to law, must assume that state of facts most favorable to the verdict, which, under the charge, the jury were at liberty to find (24–254). See 122–463, 142+729.

9326. Basis of motion—If the motion be made for a cause mentioned in § 7828, subdivision 1-4 [9325], pertinent facts not appearing of record shall be shown by affidavit; if for any other cause, a case or bill of exceptions shall first be settled, and included in the record, unless the moving party within fifteen days of the rendition of verdict or notice of the filing of the decision or report, notices the motion to be heard on the minutes of the court, in which case the judge shall hear the motion on the minutes of the judge or of the stenographer, but it shall not be necessary for the moving party to furnish the court or the opposing party a transcript of the stenographer's minutes, nor of any part thereof, as a condition to have the motion heard. If the motion is to be heard on the minutes of the court, it shall be heard within thirty days after the coming in of the verdict or notice of the filing of the decision or report, unless the time be extended by written stipulation of the parties or by the court for cause, such extension to be granted without costs to either party. If the motion be on the minutes, and the order be appealed from, a case or bill of exceptions shall be proposed by the appellant, and be settled and returned with the record to the supreme court. The records and files of the court pertaining to the case may be referred to without being mentioned in the notice of motion. (R. L. § 4199, amended '07 c. 450) [7829]

When motion to be based on affidavits (44–52, 46+314; 57–443, 59+534). A motion on the minutes must regularly be made at the term of court at which the trial is had (78–82, 80+840). But the statutory requirement in this regard is waived by failure of the opposite party to make a timely objection (56–74, 57+323; 64–396, 67+213). After moving on the minutes a party cannot renew the motion on a settled case as of right (86–30, 90+5). When a motion is made on the minutes a case or bill of exceptions, in the event of an appeal, must

be proposed and settled within the time prescribed (51–337, 53+643; 74–90, 76+1019). A stay of proceedings with an extension of time within which to propose and settle a case may be obtained as in other cases (51–337, 53+643; 59–259, 61+138). Cited (118–514, 137+291). Motion for new trial after judgment (125–475, 147+654). Motion based on minutes (126–48, 147+716). Service of notice short of due time (129–528, 152+270). Absence of settled case of bill of exceptions (131–249, 154+1072). Urging error as to verdict in favor of co-defendant. (132–195, 156+272). Motion on court's minutes day after verdict. (134–266, 159+564). Necessity of settled case or bill of exceptions for review (135–13, 159+1070). See 195+453.

165–50, 205+691.

Appeal dismissed for failure of appellant to settle a case or bill of exceptions, the attempted appeal being from an order denying a motion for a new trial made upon the minutes of the court. 157–14, 195+453.

Volunteer firemen are entitled to the benefit of the Workmen's Compensation Act. 161–20, 200+927.

When the printed record does not contain all the evidence of the settled case, nor is a fair and full condensation thereof into narrative form, as provided by subd. 2 of rule 9, this court will not consider whether the verdict has sufficient support. 162–447, 203+216.

There was no prejudicial error in the rulings upon the admissibility of evidence. 210+55.

9327. Exceptions to ruling, order, decision or instruction of court—A party may except orally at the trial to any ruling, order, decision or instruction of the court on a matter of law. No particular form of exception is required. A minute of the exception shall be made by the judge or stenographer, and the same may be preserved either in a bill of exceptions or a settled case; provided that in order to obtain a review of any such ruling, order, decision or instruction made or given by the court it shall not be necessary to take an exception thereto, but in lieu of an exception the aggrieved party shall clearly specify the alleged error in his notice of motion for a new trial or other relief therefrom. (R. L. '05 § 4200, G. S. '13 § 7830, amended '19 c. 115 § 1)

See also notes under § 9325.

1. In general.

The provision relieving from the necessity of taking an exception does not relieve from the necessity of calling the attention of the court to any indefinite or inaccurate statement in the charge, where the charge as a whole is correct (85–274, 88+754; 86–174, 90+318; 86–276, 90+532; 87–91, 91+271; 87–242, 91+893; 87–250, 91+1116; 87–277, 91+1103; 87–495, 92+413; 90–36, 95+454; 90–183, 96+330; 91–26, 97+418; 91–249, 97+883; 94–74, 102+397; 94–241, 102+449; 95–408, 104+225; 95–477, 104+443; 96–299, 104+1087. See also 99–110, 108+847; 111–373, 127+391). It does not abrogate the rule that an omission to charge on a particular point is not error in the absence of a request to charge thereon (92–312, 99+1128; 92–470, 100+218; 97–44, 106+86. See 88–151, 92+538). Waiver of claim that instruction was indefinite or misleading not waiver of right to assign error to erroneous instructions deliberately given (109–409, 123+1082). On motion for a new trial a party cannot take advantage of any errors occurring on the trial and not excepted to unless he specifies them in his notice of motion (86–156, 90+368; 87–277, 91+1103; 87–398, 92+225; 89–500, 95+323; 91–127, 97+737; 91–137, 97+580; 93–443, 101+1133; 98–52, 107+824; 105–233, 117+428; 106–47, 118+62; 112–246, 127+924; 113–397, 129+770; 114–371, 131+466). A notice of motion held sufficiently specific (93–288, 101+302; 99–275, 109+232). Assignment that decision is not justified by evidence and is contrary to law insufficient to call in question findings of fact (98–81, 107+733). Granting new trial on court's own motion on return of verdict (113–397, 129+770). See 101–14, 111+651; 101–24, 111+653. Necessity of taking exceptions (121–243, 141+120). Unchallenged instructions deemed law (121–455, 141+803; 121–516, 141+804). Assigned errors reviewable only when discussed (122–419, 142+721). Assigned error to be considered must be raised in motion (122–533, 142+1134). Failure to instruct as to manslaughter (123–276, 143+782). Contents of record on appeal (123–299, 143+741; 123–329, 143+788). Instruction not objected to assigned as error (125–444, 147+445). Duty to request correct instruction (125–466, 147+441). Short notice of interlocutory motion (125–475, 147+654). Questions not objected to cannot be availed of on appeal (126–203, 148+116). Offer of proof to present question on review (126–244, 148+103). Objection to instructions (126–275, 148+118). Failure in applying for leave to answer cannot be heard on appeal (126–367, 148+306). No review of rulings unless trial court is advised of ground of objection (127–86, 148+892). Construction of findings (127–530, 149+1070). Insufficiency of findings may be availed of in first instance on appeal (127–5, 150+214). Review as to objection to admission of communications with persons since deceased. (127–17, 150+213). Findings construed (127–530, 149+1070). No exceptions taken to charge in motion; instruction on appeal deemed law (128–270, 150+919; 128–292, 150+905). Evidence not objected to is before court on appeal (128–311, 150+907). Taxing expert witness fee (128–449, 151+274). When motion non obstante operates as waiver of all errors and bar to new trial (128–514, 151+419; 129–25, 151+421). Excessive damages must be specified as a ground (129–71, 151+537). Grounds not assigned in trial court not available on appeal (129–353, 152+725). Assignments of error must be based on exceptions taken (129–529, 152+270). Improper remarks and misconduct of counsel (130–80, 153+269; 130–242, 153+532). Verbal inaccuracies in instructions not called to court's attention (130–434, 152+262; 153+736; 131–15, 154+514). Errors must be excepted to or specified (131–320, 155+205; 133–73, 157+993; 144–237, 174+892). Without motion for new trial, matters reviewable on appeal (132–307, 156+346). When motion non obstante is appealable (132–467, 155+1039). Remedy for correction of judgment was not by appeal (134–40, 150+810). Matters available to appellee (134–192, 158+967). Record of appellant must indicate his grounds of exception or objection (134–422, 159+948). When aggrieved party is not obliged to take exception to erroneous charge and be entitled to review on appeal (135–5, 159+1072). Review on appeal (135–13, 159+1070; 135–476, 160+79; 139–286, 166+330). Not reviewable on appeal (136–332, 162+354; 136–454, 161+167; 136–477, 162+464). Trial court's failure to call express attention to degree of care, no exception being taken (136–385, 162+470). Instructions to jury, not excepted to, as law of case (136–417, 162+520). When errors in rulings on evidence are not available (152–374, 188+1011).

164–401, 205+282. 165–117, 205+885; 165–482, 205+888; 167–327, 209+16.

Assigments of error not discussed and assignments which do not point out the alleged error in the record will not be considered on appeal. 156–52, 194+752.

If compound interest is included in the judgment, the record does not disclose the amount, nor does it show that any application has been made to the trial court to eliminate the same, hence no redress is available on the appeal. 156–90, 194+109.

Where exception is not taken when a ruling is made, the ruling is not subject to review unless assailed in the motion for a new trial. The record fails to indicate reversible error. 156–332, 194+769.

An assignment of error that the granting of a divorce is not supported by the evidence is too general to reach any of the several findings of fact made by the trial court. 158–296, 137+261.

An objection will not be considered unless it specifies the ground therefor and is preserved by an exception to the ruling. 158–356, 197+743.

An objection that a contract for the sale of real estate is unenforceable for the nonpayment of the mortgage registry tax comes too late, when made for the first time by an objection to the entry of judgment. 162–72, 202+70.

Whether defendant is protected as to payments made subsequent to the filing of the plaintiff's lease is not determined, since the question was not presented in the court below nor argued here. 162–240, 202+445.

An exception is defective when it embraces three separate instructions given to the jury.

A formal offer of proof is not necessary, when an objection is sustained to a question calling for an answer which would obviously elicit material and relevant evidence. 162–440, 203+415.

Point not raised below not considered on appeal. 162–514, 202+441.

The application of the heirs was made and heard upon affidavits without objection, and they cannot now complain of the method of submission. 163–236, 203+786.

Where there is no motion for a new trial, error cannot be assigned upon a ruling to which, when made, no exception was taken. 167–117, 209+1.

Rulings at the trial and instructions to the jury not excepted to and not assigned as error on a motion for a new trial are not reviewable in appeal. 210+626.

No exceptions to rulings being noted when made or taken in the motion for a new trial there is nothing to review on appeal. 210+637.

2. Objections to pleadings.

Objections to the pleadings cannot be raised after the evidence has been received without objection. 209+752.

The ruling permitting an amendment of the answer at the trial cannot be reviewed for there was no objection or exception. 213+539.

3. Appointment of receiver.

On an appeal from an order assessing stockholders it is too late to raise objections to the appointment of the

receiver which should have been made in opposition to that appointment or by motion directly attacking it. 162–83 202+69.

4. Reception of evidence.

When an objection to a question was made upon several grounds but not the one urged on the appeal and it appears that in the subsequent testimony of the witness simliar questions were put and answered without objection no error can be assigned on the ruling. 157–437 196+564.

Error cannot be assigned with respect to the admission of evidence where no objection was taken to its admission. 161–526 201+537.

Defendant moved for judgment notwithstanding the verdict but not for a new trial which was denied. Upon an appeal from the judgment following, assignments of error in the admission of evidence will not be considered. 162–102, 202+345.

Evidence was "received, subject to rejection." No motion was made afterwards to strike. Such evidence was in the case without error. 163–83, 203+456.

There was no error in refusing to strike testimony admitted without objection. 165–241, 206+393.

If defendant feared that the language used would mislead the jury in applying the rule to the facts of this case, he should have called attention to it at the trial, and failure to do so precludes him from raising the question now. 165–241, 206+393.

An objection that testimony is incompetnet, irrelevant and immaterial does not present the objection that it is hearsay or self-serving. 165–342, 206+645.

5. Misconduct of counsel.

Misconduct of an attorney in making improper argument to a jury cannot be assigned as error, unless objection was made at the time the improper language was used. 163–389, 204+52.

An assignment of improper remarks by counsel in his argument to the jury fails when the record does not show what was said and an exception thereto. 209+867.

6. Instructions.

Alleged errors in the charge cannot be reviewed on appeal unless excepted to at the trial, or specified as error in a motion for a new trial. 158–356, 197+743.

The general exception to the charge under the evidence is insufficient. 159–308, 199+3.

A verbal inaccuracy in the statement of the falsus in uno rule, not called to the court's attention before the jury retired, is not ground for a reversal. 159–388, 199+178.

Plaintiff took no exceptions to the instructions to the jury and made no request for additional instructions, but, in the notice of motion for a new trial, assigned as error the alleged failure to submit clearly two charges of negligence. There was no fundamental error in the instructions; hence the rule stated in Sassen v. Haegle, 125 Minn. 441, 147 N. W. 445, 52 L. R. A. (N. S.) 1716, is applicable. 160–468, 200+629.

An instruction that plaintiff must prove a specific demand, no exception being taken by either party, became the law of the case. The evidence warranted the jury in finding that a demand had been made. 161–135, 201+537

Where no request to charge was made, and no exceptions taken to charges given, objection to charge made for first time on motion for new trial was too late. 161–533, 201+936.

An erroneous instruction to the jury, even on a controlling proposition of law, cannot be reviewed upon an appeal from the judgment, when appellant did not take an exception or move for a new trial. 162–486, 203+432.

Exceptions to instructions are necessary. 162–513, 202+732.

Inadvertent inaccurate statement by the court in charge to jury calls for prompt action by counsel. 163–280, 203+985.

By failing to call the court's attention to an ambiguity in an instruction, the defendant waived the right to question the instruction. 163–473, 204+466.

An instruction cannot be attacked in this court for the first time, when no exception was taken when it was given or in the notice of motion for a new trial. 164–414, 205+276.

An exception by counsel to the charge of the court claiming "instructions as to first and second causes of action were not accurate or correct, and could not be under the testimony," is ineffectual, because it fails to indicate the alleged error. 165–210, 206+400.

If a party fears that an instruction given at his request was so placed in the charge that it might be misapplied by the jury, he should call attention to it at the time. 165–417, 206+725.

An erroneous statement of fact, made when the instructions to the jury are given; must be called to the attention of the court in order that it may be corrected before the jury retires. An exception taken at the close of the charge was not sufficient to comply with this rule. 166–7, 206+934.

Instructions to the jury not objected to become the law of the case. 210+618.

There was no prejudicial error in the instructions relative to the time when plaintiff might become charged with knowledge of misstatements in the applications for insurance. 210+846.

The erroneous use of the word "and" instead of "or," in charging the jury as to the effect of the alleged misrepresentations, should have been called to the court's attention so that the mistake might be corrected in time, under the rule of Steinbauer v. Stone, 85 Minn. 274, 88 N. W. 754 210+846.

The failure to call the court's attention to an inadvertently erroneous statement in the instructions waived the error. 212+9.

7. Motion for directed verdict.

Where no exception was taken to a denial of the motion for a directed verdict either at the trial or in the motion for a new trial, the ruling cannot be reviewed on appeal. 157–362 196+478.

8. Verdict.

In the record we find nothing justifying an interference with the verdict and cannot consider, as ground for reversal, a proposition which was not even suggested at the trial as having any bearing on the case. 160–433, 200+467.

9. Findings of Fact.

Where a party moves the court below to amend more than one of several findings of fact, an assignment of error in this court is insufficinet which merely states that the court erred in denying the motion to amend the findings 165–266, 206+404.

An assignment of error that the findings of fact art not sustained by the evidence fails to point out the particular finding challenged and is insufficient. 267–101, 208+642.

10. Entry of judgment.

The validity of a judgment entered by the clerk of the district court without an order of the court therefor will not be considered by this court, upon appeal from such judgment, where no application has been made to the court below to have the alleged error corrected. 158–182, 197+100.

9328. "Bill of exceptions" and "case" defined—The term "bill of exceptions," as used herein, shall mean a written statement of exceptions duly taken at the trial, with so much of the evidence and proceedings as may be necessary to explain them. The word "case," as so used, shall mean a like statement of the proceedings in the cause, excluding all pleadings and other papers properly filed with the clerk. A case may contain all the evidence given or offered at the trial and all the proceedings had, or only so much thereof as the parties may choose to present for review. (4201) [7831]

34–330, 26+9; 61–412, 63+1040; 66–179, 68+837; 67–207, 69+895; 106–543, 118+1008; 127–21, 148+478.

Affidavits set forth alleged misconduct of counsel, but, since the settled case does not show facts constituting the alleged misconduct of counsel the matter of misconduct is not before the court. 161–113, 201+296.

An eight year old boy was traveling on the right hand side of a street, with a child's coaster wagon. Defendant was driving his automobile in the same direction but about 20 feet behind the boy. The boy turned to the left, and started to cross the street. Defendant turned to the left to avoid a collision, but at the curb he struck and injured the boy. Held (1) that the questions of negligence and contributory negligence were for the jury; (2) that the facts did not call for an instruction embracing the law of the road governing vehicles when one passes another. 161–113, 201+296.

Documents received in evidence but not included in the settled case are not before the court on appeals. If the settled case shows that documents were received, and the certificate of settlement makes no mention of them, the fact as shown in the settled case prevails over the certificate. 210+282.

9329. Bill of exceptions or case, how and when settled—The party preparing a bill of exceptions or case shall serve the same on the adverse party by copy, within forty days after verdict, or, if the trial be by

the court or a referee, after notice of the filing of the decision or report. The party served in like manner may propose amendments thereto within ten days. And such bill or case, with the amendments, if any, shall, within fifteen days after the service of such amendments, be presented to the judge or referee who tried the cause for allowance or settlement, upon a notice of five days. If a motion be heard on the minutes, the aggrieved party may propose a bill or case within twenty days after notice of the decision thereon. The times herein limited may be extended by agreement of the parties or by order of the court; and the court, in its discretion and upon proper terms, may grant leave to propose a bill or case after the time herein allowed therefor has expired. (4202) [7832]

One of the primary objects of this section is to secure the settlement and allowance of the case or bill when the details of the trial are still fresh in the minds of counsel and the trial judge (51–337, 53+643). The limitation of time applies to all cases. Where a party appeals from a judgment he cannot, as a matter of right, propose a case at any time before the expiration of the six months in which an appeal might have been taken (69–429, 72+705). In the case of trials by the court or a referee the time begins to run from the service of notice of the filing of the decision or report (6–558, 394; 94–407, 103+15; rule 47, district court). The neglect of the adverse party to propose amendments within ten days after the service of the proposed bill or case is a waiver of the right to do so; but it does not extend or enlarge the time within which the party proposing the bill or case is bound, in the absence of an order or stipulation extending the time, to present it to the judge or referee for allowance, that is, within fifteen days after service of amendments or failure to do so within the ten days allowed for that purpose (81–467, 84+324). By participating without objection in the settlement of a case or bill after the statutory time has expired a party waives any objection on that ground (35–451, 29–65). If a case or bill is improperly served after the statutory time it should be refused or promptly returned with the reason stated thereon (51–337, 53+643; 59–259, 61+138). It has been held that if a party admits "due service" he will be deemed to have waived the objection that the case or bill was not served in time (38–137, 36+108. See 69–429, 72+705). Where a party has failed to have a case or bill settled and allowed within the statutory period he may for good cause shown secure an order of court granting an extension of time. The matter of granting or denying such an application lies almost wholly in the discretion of the trial court and its action will not be reversed on appeal except for a palpable abuse of discretion (6–558, 394; 19–407, 350; 25–234; 55–334, 56+1117; 58–72, 59+828; 59–259, 61+138; 69–429, 72+705; 71–230, 73+959, 74+891; 81–467, 84+237; 94–407, 103+15; 102–243, 113+452). The court may allow a case or bill to be settled even after an appeal has been perfected (32–217, 18+826; 20+87; 59–259, 61+138). But the time within which an appeal is allowed by statute cannot be extended by such means (37–461, 35+270). The mere entertaining of a motion to settle and allow a case after the expiration of the statutory period does not in itself constitute an extension of time (51–337, 53+643). By stipulation the parties may extend the time for serving and settling a case or bill (38–137, 36+108; 69–429, 72+705; 94–407, 103+15). In an action to recover possession of personal property, where a claimant intervened, and the court ordered judgment for plaintiff, intervener was not an adverse party required to be served (98–526, 106+1133). Insufficiency of objection to amendment of settled case (124–317, 145+37; 135–477, 160+248). Mandamus to allow and settle case beyond period of stay (124–537, 144+755; 132–146, 155+905). Shortening and extending period for settling case (125–475, 147+654). After time limit, and motion to strike settled case (139–491, 164+365, 165+1073). Suspension of sentence is discretionary and in effect a stay (125–529, 147+273). Defects in evidence and errors in charge not reviewable without settled case or bill of exceptions (127–520, 148+1081). In such case only determination is, do findings sustain judgment (137–179, 162+1073). Settling and allowing case jurisdictional and discretionary (127–533, 149+550; 128–537, 150+924; 136–465, 161+783). Presumption as to findings in absence of settled case (129–156, 151+910). Showing justifiable for settled case (134–276, 159+566). Stipulation for stay of all proceedings is necessarily inclusive of settlement of case or bill of exceptions; Supreme Court cannot control discretion of trial court (155–497, 192+937). When stenographer's transcript, if properly settled under this section, may serve as a bill of exceptions, or stand as settled and certified case (197+283).

In an appeal from a judgment, where the trial court has made several findings of fact, an assignment "that the findings of fact are not sustained by the evidence and are contrary to the evidence" is insufficient. 157–1, 195+627.

The stenographer's transcript, if properly settled, may serve as a bill of exceptions, though the court's certificate fails to state that it contains all the eviednce. 158–269, 197+283.

Stenograher's transcript to which the court had appended an order that it should stand for a settled case held insufficient to constitute a properly settled and certified case where the record and files show no proof of service of a copy of the proposed case upon the respondent, and no notice or proof of notice of application to the judge for settlement or allowance thereof under Gen. St. 1913, § 7832. 158–269, 197+283

An order denying a motion for a new trial must be affirmed in the absence of a properly settled and certified case. 158–269, 197+283.

An assignment of error that the evidence does not sustain the findings, there being several, does not challenge any finding. 210+637.

9330. Same—When judge incapacitated, etc.—When the judge who tried the cause ceases to be such, or dies or becomes incapacitated from sickness or other cause, or is without the state at the time limited for such allowance or settlement, such bill may be allowed or case settled by the judge of a district adjoining that in which the action is pending; and when a referee dies, or becomes incapacitated, or is so absent, the bill may be allowed, or case settled, by the judge of the court in which the action is pending. In either case the allowance or settlement shall be made upon the files in the cause, the minutes of the judge or referee, or of the stenographer, if obtainable, and upon such proof of what occurred at the trial as may be presented by affidavit, with like effect as if the allowance or settlement were by the judge or referee who tried the cause. (4203) [7833]

55–334, 56+1117; 125–477, 147+655.

REPLEVIN

9331. Possession of personal property, how claimed—The plaintiff, in an action to recover the possession of personal property, at the time of issuing the summons or at any time before answer may claim the immediate delivery of such property in the manner following. (4204) [7834]

Optional with plaintiff to claim immediate delivery or not (61–219, 63+630; 64–5, 65+959). Demand unnecessary as condition precedent; status of partial payments undetermined (124–426, 145+164). Unavailable against joint owner or tenant in common (128–349, 150+1098; 129–525, 152+1101).

213+40.

Gist of action. 158–396, 197+840.

In replevin for the owner's shares of crops raised by defendant under a cropping contract, it is a defense, nothing else appearing, that before severance plaintiff conveyed the property, absolutely and without reservation of the crops, to a third party. 164–366, 205+262.

In an action in replevin, it is reversible error to direct a verdict in favor of the defendant, where the plaintiff holds a past-due chattel mortgage, given by defendant, upon a part of the property. 164–416, 205+274.

Evidence, held to justify a finding that the horses in question were the property of the plaintiff, that each horse was of the value stated in the verdicts, and that the plaintiff's damages for the detention of the property were as stated in the verdicts. 136–408, 208+135.

A sheriff cannot take property under a writ of replevin which he is holding under a prior writ of attachment; but, if the attachment is released, it then becomes his duty to execute the writ of replevin. 212+593.

Where the pleadings disclose plaintiff's source of title to property in a replevin action as resting on a note and chattel mortgage, the defense of payment must be pleaded. 213+536.

9332. Affidavit—An affidavit shall be made by the plaintiff or some person in his behalf, showing:

1. The particular property claimed, and that plaintiff is the owner thereof, or is lawfully entitled to its

possession by virtue of a special property therein, the facts respecting which shall be set forth;

2. That the property is wrongfully detained by the defendant;

3. That the same was not taken for a tax, assessment, or fine, nor seized under an execution or attachment against plaintiff's property, or, if so seized, that it is by statute exempt from such seizure; and

4. The actual value of the property. (4205) [7835]

Subd. 3 cited (61–219, 63+630; 86–177, 90+316). Burden of proof as to identity of property claimed (123–525, 143+268). Sufficiency of constructive possession (133–202, 158+41; 137–61, 162+1059). When replevin lies as to unlawful severance of trees and their removal (207 Fed. 40).

9333. Bond and sureties—A bond to defendant shall be executed by or in behalf of the plaintiff, with surety approved by the sheriff, in a penal sum at least double the value of the property, conditioned for the return of such property to the defendant, if a return thereof be adjudged, and for the payment to him of such sum as for any cause may be adjudged in his favor. (4206) [7836]

Liability on bond (6–412, 277; 14–554, 422; 17–475, 453; 21–51; 33–253, 22+538; 86–168, 90+376).

While it is the general rule that a plaintiff, defeated in a replevin action, is not relieved of liability on his bond by the loss or destruction of the property while in his possession pending the action, he may show, in mitigation of damages, when sued upon the bond, that the real loss is less than the value of the goods. 213+378.

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

9334. Requisition to sheriff—Service and return—The plaintiff or his attorney, by an indorsement on the affidavit, may require the sheriff to take the property from the defendant and deliver it to the plaintiff; and upon receipt of the affidavit, indorsement, and bond the sheriff shall forthwith take the property, if in the possession of the defendant or his agent, and retain it in his custody until delivered as hereinafter provided. The affidavit, indorsement, and bond shall be served by the sheriff, without delay, upon the defendant, or upon his agent having the property in charge, as a summons is required to be served; and the originals, with the return of the officer thereon, shall be filed with the clerk within twenty days after the taking. (4207) [7837]

By virtue of process in a replevin action, a court officer has the right to take possession of the property described in the replevin papers and to enter the place of abode of the defendant in the action for that purpose, provided he can enter peaceably. 209+532.

9335. Exception to sureties — Rebonding — Within three days after such service the defendant may give notice to the sheriff that he excepts to the sufficiency of the sureties. If he does not except, he, or some person on his behalf, may give bond to the plaintiff, with surety to be approved by the sheriff, in the same sum as that of the plaintiff, conditioned that the property shall be delivered to the plaintiff, if delivery be adjudged, and for the payment to him of such sum as may be adjudged against the defendant; and thereupon, by written demand to the sheriff, he may require the return to him of the property taken. If he does not so except or demand a return, the property shall be delivered to the plaintiff. Within three days after the approval of the defendant's bond the plaintiff may in like manner except to the sureties thereon. (4208) [7838]

Officer should retain possession for three days to await rebonding (1–242, 171). Assignment of judgment carries bond (36–198, 30+879). Liability on bond (64–256, 66+974; 88–56, 92+506). See 138–177, 149+2.

Where the owner of personal property brings an action in replevin against a party claiming merely a lien thereon, and obtains possession from the officer who executed the writ, by reason of the claimant's failure to rebond, the plaintiff thereby acquires the right to sell and dispose of the property pendente lite and give good title to the purchaser. 158–396, 197+840.

9336. Justification of sureties—Within two days after exception taken to the sureties of either party, he shall serve upon the other not less than two nor more than six days' notice of their justification. If any surety fails to justify at the time appointed, another may be substituted within such time, not exceeding three days, as the judge or officer may appoint; but there shall be only one adjournment, and in case of substitution a new bond shall be executed by all the parties to be bound. (4209) [7839]

9337. Delivery of property—Waiver of justification—Upon justification of plaintiff's sureties, the sheriff shall deliver the property to him, except as otherwise prescribed when claim is made by a third person, and upon like justification of defendant's sureties the property shall be delivered to the defendant. When the sureties fail to justify, or when justification is waived as herein provided, the sheriff shall forthwith deliver the property to the person entitled thereto. The sheriff shall retain the property until the justification is completed or waived, and he shall be liable for the sufficiency of the sureties during such time. Justification of sureties may be waived in writing by either party either before or after notice. (4210) [7840]

9338. Proceedings when property is concealed—If the property, or any of it, be concealed or inclosed in a building or elsewhere, and a public demand made by the sheriff for its delivery be refused, he shall cause the building or inclosure to be broken open and take the property therefrom; and, if necessary to that end, he may call the power of the county to his aid. Whenever it shall be made to appear, by the return of the sheriff or by affidavit, that any of the property sought to be recovered has been concealed, or cannot with reasonable diligence be found, the court may require the defendant, and such other persons as it shall deem proper, to attend and be examined touching the disposition thereof, and may enforce its orders in the premises as in other cases. (4211) [7841]

9339. Property, how kept, and when delivered by sheriff—When the sheriff has taken property as herein provided, he shall keep it in a secure place, and deliver it to the party entitled thereto upon receiving his lawful fees for taking, and necessary expenses for keeping, the same. (4212) [7842]

9340. Claim of property by third person—If any property levied upon or taken by a sheriff by virtue of an execution, writ of attachment, or other process, or in an action of replevin, is claimed by any person other than the defendant or his agent, and such person, his agent or attorney, shall make and serve on the sheriff an affidavit of his title or right to the possession of such property, stating its value and the ground of such title or right, the sheriff may release such levy or taking unless the plaintiff, on demand, shall indemnify him against such claim by a sufficient bond in a penal sum of at least double the value alleged in such affidavit. No claim by any person, other than the defendant or his agent, shall be valid against the sheriff unless so made, and he may retain the property for a reasonable time after such claim to obtain such indemnity. (4213) [7843]

Applicable only to cases where the property seized is found in the possession of the defendant named in the

writ or his agent, so as to create an appearance or presumption of ownership in him (9–97, 87; 14–163, 126; 18–308, 278; 25–432; 26–120, 1+836; 26–172, 2+473; 28–1, 8+825; 28–390, 10+418; 28–526, 11+94; 30–321, 15+309; 32–71, 19+385; 35–248, 28+504; 38–424, 38+110; 49–381, 52+30; 88–123, 92+523; 105–50, 117+231). A statement in the affidavit that the claimant is the owner of the property is a *sufficient statement of the ground of his title or right* to possession, at least where he is the general owner. The affidavit should allege the claimant's ownership as of the time of the levy as well as of the time of the demand. An agent making an affidavit may state the facts as upon information furnished him by his client (36–183, 30+453; 77–124, 79+603). Notice in form of affidavit held *sufficient (112–270, 127+112). The affidavit and notice* may be served on the deputy sheriff who made the levy and has the property in his possession (13–174, 165). Failure to serve affidavit did not avoid verdict, where only issue tried related to other matters (103–459, 115+640). An attorney of a non-resident has implied authority to execute a bond in the name of his client *under this provision (29–367, 13+194).* The statute is designed for the protection of the officer in the discharge of his duties (30–321, 15+309; 47–70, 49+396, 77–124, 79+603). See 153–475, 191+282.

Is without application when the property is in the possession of the claimant and taken from him and not in the possession of the execution defendant. 161–92, 200+930.

The statutory affidavit, claim, and demand by a third party apply only to cases where the property taken is found in possession of the defendant against whom the process is issued. 165–282, 206+446.

9341. Plaintiff and sureties first liable in action for taking—If the person claiming under § 9340 shall begin an action against the sheriff for the taking of such property, the plaintiff in such process or action and the sureties on the indemnity bond so given shall *be impleaded in the action with the sheriff, on* his motion; and, if judgment be rendered against him and his codefendants in such action, execution thereon shall issue forthwith, and the property of such codefendants shall be exhausted before that of the sheriff *shall be subject to sale.* (4214) [7844]

30–321, 15+309; 55–489, 57+210.

ATTACHMENT

9342. When and in what cases allowed—In an action for the recovery of money, other than for libel, slander, seduction, breach of promise of marriage, false imprisonment, malicious prosecution, or assault and battery, the plaintiff, at the time of issuing the summons or at any time thereafter, may have the property of the defendant attached in the manner hereinafter prescribed, as security for the satisfaction of such judgment as he may recover. A writ of attachment shall be allowed by a judge of the court in which the action is brought, or a court commissioner of the county. The action must be begun as provided in § 9199 not later than sixty days after issuance of the writ. (4215) [7845]

1. Nature of proceeding—5–69, 50; 13–205, 192; 29–108, 12+342; 37–194, 33+559; 45–341, 346, 48+187; 50–405, 52–905.

Sale of land under order of probate court where share of heir is attached. 161–252, 201+422.

The property of a foreign railroad company operating no line of railroad in this state is not immune to attachment of its property used in interstate commerce. 162–55 202+56

That land is exempt as a homestead is not a ground for the dissolution of an attachment; and the order dissolving the attachment was not an adjudication that the homestead was on the land attached. 162–176 202+711.

Swaney v. Hasara (Minn.) 205 N. W. 274, followed to the effect that section 67f of the Bankruptcy Act (Mason's Code, 11, 107)) annuls the liens therein referred to only as against the trustee in bankruptcy and those claiming under him. 166–405, 208+21.

2. Statute to be followed strictly—3–406, 300; 78–427, 81+198.

3. A matter of right—18–541, 485; 20–435, 389; 78–427, 81+198.

4. In what actions allowed—5–69, 50; 6–183, 117. Action for alienation of affections is not an exception (149–424, 183+844).

5. At what time may issue—May issue simultaneously with the summons or at any time thereafter (12–420, 305; 13–326, 299; 91–226, 97+974; 91–352, 98+188). Distinction between this section and section 9356 (123–332, 143+792; 147–380, 180+233).

6. Jurisdiction how acquired—The action is not commenced by the attachment but by service of summons and the failure to make such service, actual or constructive, as authorized by statute, leaves the court without jurisdiction (29–108, 12+342; 37–194, 33+559. An action against a non-resident, although in form in personam, is in effect in rem, as it is only by attaching property that the court acquires jurisdiction to proceed further, and then only to the extent of the property attached (36–190, 31+210; 44–505, 47+169; 46–396, 49+190; 51–181, 53+460). Cited and applied (101–110, 111+949). See 147–380, 180+233. Service of non-resident defendant, not doing business within state, under Carnack Amendment (284 Fed. 1009).

7. Who may allow writ—Court commissioner may (91–352, 98+188). Clerk cannot (6–183, 117; 7–421, 336; 8–477, 427; 11–223, 145; 11–408, 301).

8. Effect of bankruptcy—85–105, 88+263.

9343. Contents of affidavit—To obtain such writ, the plaintiff, his agent or attorney, shall make affidavit *that a cause of action exists against the defendant,* specifying the amount of the claim and the ground thereof, and alleging:

1. That the debt was fraudulently contracted; or

2. That defendant is a foreign corporation, or not *a resident of this state; or*

3. That he has departed from the state, as affiant verily believes, with intent to defraud or delay his creditors, or to avoid the service of a summons, or keeps himself concealed therein with like intent; or

4. *That he has assigned, secreted, or disposed of* his property, or is about to do so, with intent to delay or defraud his creditors. (4216) [7846]

1. In general.

Sufficient affidavit jurisdictional. Judgment in an action based on insufficient affidavit void and subject to collateral attack. Affidavit which wholly fails to state grounds of plaintiff's claim fatally defective (78–427, 81+198). Allegations of affidavit must be positive and not on information and belief. Except as expressly authorized it is insufficient to allege facts "as deponent verily believes" (6–183, 117; 13–422, 390; 14–125, 93; 38–341, 37+585). Several grounds not inconsistent may be alleged (9–68, 57; 23–229), but they must not be stated disjunctively (14–520, 391; 28–73, 9+79). An allegation "that the defendant has assigned, secreted or disposed of his property with intent to delay or defraud his creditors" is sufficient (14–520, 391; 25–461). An allegation "that the defendant is about to assign, secrete or dispose of his property with intent to delay or defraud his creditors" *is sufficient (14–520, 391; 25–461).* An *allegation* "that defendant has disposed of a part of his property with intent thereby to delay and defraud the plaintiff and is about to dispose of the rest of his property with the same intent" is sufficient (23–229; 28–73, 9+79). Not necessary to allege that summons has issued or suit commenced (12–420, 305). Affidavit for attachment against non-resident need not state that he has property in state subject to attachment (36–190, 31+210). Not indispensable that affiant sign the affidavit (47–405, 50+368). When made by agent or attorney it should state or recite that affiant is such agent or attorney (57–425, 59+490; 66–287, 68+1077). May be dated prior to commencement of action (47–581, 50+823). Effect of amendment of complaint and affidavit (61–170, 63+490). Cited (105–286, 117+515). Preferential transfer without actual fraud (124–112, 144+433). Insufficiency of mere constructive fraud in chattel mortgage (130–141, 153+125). Order refusing to vacate writ (155–509, 193+595).

The showing made by defendant justified the conclusion that the grounds stated for the issuance of a writ of attachment were untrue, and the writ was properly vacated. 157–283, 195+1015.

The charge, in an affidavit for attachment, of one ground for attachment cannot be sustained by proof that another ground for attachment existed. 161–358, 201+442.

Record examined and held to justify a finding that the transaction was not of such character as to indicate an intent to defraud 161–358, 201+442.

The truth of an affidavit for attachment should be challenged by motion to vacate the writ. 163–294, 204+38.

2. Departed from state, etc.

An affidavit for attachment, is not sufficient when it *says the defendant is "about" to do the things therein* specified. 160–127, 199+895.

When the affidavit relates to subdivision 4 and states

two distinct grounds for attachment, namely, "that the defendant has or is about to dispose of his property with intent to defraud his creditor, the plaintiff," it is bad. 160–127, 199+895.

3. Transfer with intent to defraud.

A transfer of property to secure a debt, where the value of the property is less than the debt, cannot be considered a transfer with intent to defraud within the spirit of the attachment statute. 164–130, 204+633.

A disposition of property with intent to defraud does not necessarily result, even though the transfer may be preferential. 164–130, 204+633.

4. Homestead.

Const. Art. 1, § 12, although self-executing, without legislation, does not, in itself, create lien in favor of one furnishing material or labor for improvement of exempt property, but such lien claimant secures lien in same manner in which other debts become liens. 167–243, 208+960.

Affidavit of attachment not complying with Gen. St. 1923, § 9343, is insufficient to fix lien on homestead. 167–243, 208+960.

9344. Conditions of required bond—Before allowing the writ, the court shall require of the plaintiff a bond, in the penal sum of at least two hundred and fifty dollars, conditioned that if judgment be given for the defendant, or if the writ be vacated, the plaintiff will pay all costs that may be awarded against him, and all damages caused by the attachment, not exceeding the penalty of the bond. (4217) [7847]

Undertaking sufficient. Defect in bond or undertaking not jurisdictional (78–142, 80+871, 81+529). Sufficient bond may be filed nunc pro tunc (78–142, 80+871, 81+529; 78–427, 81+198). Liability on bond (25–119; 37–544, 36+713; 41–240, 42+1059). Judgment of dismissal pursuant to stipulation releases from liability on bond (132–201, 156+5).

9345. Issuance, contents, and scope of writ—Upon filing the affidavit and bond, with the order allowing such writ, the clerk shall issue the same, stating therein the amount of plaintiff's demand. Several writs may issue at the same time, directed to the sheriffs of different counties. Each shall require the sheriff to attach and safely keep the unexempt property of defendant found in his county, or so much thereof as shall suffice to satisfy the amount claimed, with expenses and costs. All property not exempt from execution under the judgment demanded in the action shall be subject to attachment therein. (4218) [7848]

The lien acquired by a creditor, who causes the land of the debtor to be attached is not affected by bankruptcy proceedings instituted more than four months thereafter. 163–294, 204+38.

1. Form of writ—Must be under seal of court, dated, signed by clerk, and tested in name of presiding judge (§ 146; 20–196, 175; 22–189). Need not show by what officer it was allowed (7–506, 412). Slight variance in amount stated in writ and complaint immaterial (7–506, 412). Signature held sufficient (91–352, 98+188).

2. Held attachable—Interest of partner in firm property (4–217, 156; 13–199, 189; 13–205, 192; 24–20; 24–167; 25–212; 62–258, 64+567); vested equitable interests (45–341, 345, 48+187. See 74–215, 77+44; 88–311, 92+1125); interest of vendee under contract of sale of land (43–513, 45+1099); interest of vendor under contract for sale of land (25–382; 28–408, 10+427; 30–424, 15+869; 42–279, 44+251); property fraudulently transferred by debtor (9–108, 98).

3. Held not attachable—Property in custodia legis (32–496, 21+728; 33–229, 22+388; 41–304, 43+67); equitable interest of residuary legatee in trust fund (74–215, 77+44); interest of mortgagee before foreclosure (34–547, 27+66); interest in profits growing out of use of property (8–75, 51; 25–212); cars of foreign railroad corporation temporarily in state (92–20, 99+365); money or other property on person of debtor (3–406, 300). See 154–257, 191+591.

9346. Execution of writ—The sheriff, on receiving the writ, shall execute the same without delay. Real estate shall be attached by his filing a certified copy of the writ, and of his return of such attachment thereon, containing a description of such real estate, with the register of deeds of the county in which the same is situated, and serving a copy of such writ and return upon the defendant, if he can be found in his county, without any other act or ceremony. Such attachment shall be a lien on the interest of the defendant in such real estate from the time of filing the same. Personal property shall be attached in the manner provided by law for the levy of an execution thereon, and, so far as practicable, the provisions respecting such levy shall govern the execution of the writ of attachment. (4219) [7849]

1. Levy on realty—35–1, 24, 25+457, 30+826; 44–505, 47+169; 55–386, 397, 57+134; 126–176, 148+43.

2. Levy on personalty—3–406, 300; 26–141, 1+830; 27–530, 8+765; 30–191, 196, 14+884; 30–321, 15+309.

3. Lien on realty—44–505, 508, 47+169; 58–550, 60+667.

4. In general—Within the statutory time after the levy of the execution the plaintiffs presented to the sheriff their selection of a homestead. It was ignored. It is held that the defendants cannot contest the selection made. 162–176, 202+711.

Plaintiff caused a writ of attachment to issue and be put in the hands of the sheriff, who seized property, not in the possession of defendant, and sold it on execution. Plaintiff bid in the property at the sale and retained it. This constitutes conversion, and a demand for a return of the property is unnecessary. 165–282, 206+446.

9347. Inventory, service, and return—When an attachment of personal property has been made, the sheriff shall forthwith annex to the writ an inventory of the property attached, and, if the defendant be a resident of his county, shall serve such writ and inventory upon him in the manner prescribed for the service of a summons. When any writ of attachment is fully executed or discharged, he shall return the same, with his doings thereon, to the court. (4220) [7850]

Return (13–199, 189; 25–432; 27–269, 6+790; 40–470, 42+298; 44–505, 47+169; 78–142, 80+871, 81+529).

9348. Perishable property to be sold—Credits, etc., collected—If any of the property attached be perishable, the sheriff shall sell the same in the manner provided for the sale of personal property on execution. He may also take such legal proceedings, either in his own name or in that of the defendant, as may be necessary for the recovery of the credits and effects attached, and may discontinue the same as the court may direct. (4221) [7851]

Sale of perishable property (20–196, 175). Collection of debts (3–406, 300; 4–407, 309).

9349. Judgment for plaintiff, how satisfied—If judgment be recovered by the plaintiff, the sheriff shall satisfy the same out of the property attached, if sufficient, first paying to plaintiff the proceeds of sales of perishable property and of all credits collected by him, or so much thereof as may be required. If a balance remain due and an execution on the judgment be to him issued, he shall sell thereunder so much of the attached property as may be necessary to satisfy such balance. (4222) [7852]

When judgment is recovered the practice is to enter a general money judgment and issue a general execution without referring to attachment (58–550, 60+667). After judgment is entered the lien of the attachment is merged in the judgment (53–230, 54+1118).

9350. Motion to vacate—The defendant, within the time allowed to answer, or, if he has answered, at any time before the trial, may apply to the court, on notice, to vacate the writ of attachment. If the motion be made upon affidavits on the defendant's part, but not otherwise, the plaintiff may oppose the same by affidavits in addition to those upon which the writ was allowed. (4223) [7853]

½. In general.

The truth of an affidavit for attachment should be challenged by motion to vacate the writ. 163–294, 204+38.

Alleged falsehood, in a supporting affidavit to dissolve an attachment, does not justify an order setting aside an order dissolving the attachment, when the burden cast upon the plaintiff, by the absolute denial in defendant's affidavit, has not been met. 164–130, 204+683.

Upon a motion to vacate a writ of attachment, a denial of the allegations of the affidavit for attachment puts the burden upon the attaching party. Upon conflicting affidavits the court found that the burden was not sustained, and vacated the writ and dissolved the levy. 167–23, 208+192.

In a motion to vacate a writ of attachment upon the ground that the defendant was about to transfer property to delay creditors, the burden of proof is upon the plaintiff; and the proof in this case held insufficient. 167–181, 208+759.

1. When may be made—38–382, 37+799; 53–230, 54+1118.

2. Notice—12–420, 305.

3. Who may move—7–345, 271; 38–382, 37+799.

4. Effect of failure to move—11–223, 145.

5. Practice on hearing—Court may determine truth or falsity of allegations of fact in affidavit on which attachment issued (18–541, 485; 20–374, 325). Counter affidavits may be admitted (23–229; 23–571). What affidavits may be received and in what order and whether a continuance shall be granted to give a party opportunity to procure further evidence are matters of discretion (23–571). Defendant may use his verified answer as an affidavit (23–229). Where affidavits offered in opposition to the motion show that the moving party is entitled to the relief sought, though on a ground not stated in the moving papers, he may take advantage of the ground thus shown (7–345, 271). Where defendant traverses facts alleged as grounds of attachment the burden is on plaintiff to prove their truth and this he must do by competent evidence. A mere reiteration of the general statement of his original affidavit in the language of the statute, or a statement of mere opinion or belief, is not sufficient (51–285, 53+634). Where counter affidavits clearly and specifically state a badge of fraud they are not overcome or sufficiently contradicted by the general statements in the moving affidavits denying fraud (60–18, 61+684). Where affidavits are such as might reasonably lead different minds to opposite conclusions (102–466, 113+1061). Burden of proof on plaintiff (135–469, 160+1024).

6. Grounds for vacating—A writ may be vacated either because the statute has not been complied with in its allowance and issuance or because the statements in the affidavit for its allowance are untrue (18–541, 485). It is not a ground for vacating that officer has levied on property not subject to levy. The question on a motion to vacate is the validity of the writ and it cannot be vitiated by any irregularity in the officer executing it (5–69, 50; 60–18, 61+684). Court cannot try question whether plaintiff has or has not a cause of action or defendant a valid defence (5–69, 50. See 7–345, 271; 60–18, 61+684).

7. Motion by non-resident—74–4, 76+787.

8. Appeal from order refusing to dissolve—60–501, 62+1133.

9. Appeal from order dissolving—79–153, 81+830.

10. Question on appeal—14–243, 179; 24–319; 25–461; 26–308, 3+978; 38–382, 37+799; 51–285, 53+634; 60–17, 61+672; 60–18, 61+684; 76–54, 78+878; 102–466, 113+1061.

11. Possession of property pending appeal—40–470, 42+298; 79–153, 81+830.

9351. Attached property retaken, when—Damages—Should any of the attached property belonging to the defendant pass out of the sheriff's hands without being converted by him into money, he may retake the same, and for that purpose shall have all the powers originally conferred by the writ; and any person who shall conceal or wilfully withhold such property from the sheriff shall be liable for double damages, at the suit of the party injured. (4224) [7854]

9352. Satisfaction, discharge, etc.—Real estate—An attachment of real estate may be released by filing for record with the register of deeds:

1. A certified copy of an order of the court vacating the attachment, or of a final judgment in defendant's favor, or a satisfaction of judgment in plaintiff's favor, rendered in such action.

2. A certificate of satisfaction or discharge of the attachment, executed and acknowledged by the plaintiff or his attorney, as required for the satisfaction of a mortgage.

3. A deed of release of the attached premises, or of any part or interest therein, in which case the parts or interests not described in the deed shall remain subject to the attachment lien.

Such attachment may also be released by an entry in the margin of the record, signed by the plaintiff or his attorney, acknowledging such release. (4225) [7855]

9353. Same—Personal property—When an attachment of personal property has been made by filing a copy of the writ with any public official, its discharge shall be effected by filing in the same office any instrument of release mentioned in § 9352. (4226) [7856]

9354. Same, when action is abandoned—If no judgment be entered within three years after the attachment, any party interested in the attached property, whether a party to the action or not, may move the court therein for its release. And if it be made to appear that no proceeding has been taken in the action within the preceding three years, or from other evidence that the action has been abandoned, such motion shall be granted. (4227) [7857]

53–230, 54+1118; 147–381, 180+233.

9355. Attachments and releases—Record and index—All copies of writs of attachment filed for record with the register of deeds, and all satisfactions or releases of attachments of real estate thereunder, shall be recorded in the books provided for the record of mortgages, and shall be indexed as if the defendant in the attachment were a mortgagor and the plaintiff a mortgagee. (4228) [7858]

GARNISHMENT

9356. Affidavit—Garnishee summons—Title of action—In an action in a court of record or justice court for the recovery of money, if the plaintiff, his agent or attorney, at the time of issuing the summons, or at any time during the pendency of the action, or after judgment therein against the defendant, files with the clerk of the court, or, if the action is in a justice court, with the justice, an affidavit stating that he believes that any person (naming him) has property or money in his hands or under his control belonging to the defendant, or that such person is indebted to the defendant, and that the value of such property or the amount of such money or indebtedness exceeds twenty-five dollars, if the action is in the district court, or ten dollars if in a justice court, and if the plaintiff files with such affidavit a copy of the complaint when the complaint has been theretofore either served on the defendant or filed in said action, a summons may be issued against such person, as hereinafter provided, in which summons and all subsequent proceedings in the action the plaintiff and defendant shall be so designated, and the person against whom such summons issues shall be designated as garnishee. (4229) [7859] (Amended '27, c. 300)

Affidavit sufficient if it conforms to statute (55–102, 56+581). While it is somewhat in the nature of a complaint against the garnishee its sufficiency is not to be determined by the ordinary rules of pleading. In an action against two defendants an affidavit that the garnishee "is indebted to the said defendants in an amount exceeding the sum of fifty dollars" is sufficient to charge the garnishee for a debt due from him to one of the defendants alone (61–404, 63+1078). Need not allege that garnishee is corporation (55–102, 56+581). May be dated prior to commencement of action (47–581, 50+823). When jurisdictional (61–404, 63+1078. See 3–360, 253; 5–347, 279; 9–55, 44). Must be filed before the garnishee summons is issued (3–360, 253). Objection to affidavit held waived (61–404, 63+1078). Cited as to affidavit in justice court (77–426, 80+356). Garnishment proceedings authorized in actions in tort (95–118, 106+304). In district

court, on appeal from justice court (103–79, 114+468. See note under § 7887). Cited and applied (103–69, 114+257). Issuance of summons in main action is essential (123–330, 143+792). Garnishee holding claim in excess of judgment is not liable (124–339, 145+26). Garnishment will lie on judgment, on appeal, without supersedeas (132–336, 156+668).

A debt has a situs wherever the debtor can be found. 210+874.

Wherever the creditor might sue for its recovery, there it may be reached by garnishment as his property. 210+874.

This may be done in an action in rem even though all parties are nonresidents of the state, it being immaterial where the debt was contracted or incurred. 210+874.

9357. Proceedings in justice court—If the action is in a justice court, the summons shall be issued by the justice, and shall require the garnishee to appear before him at a time and place specified therein, not less than six nor more than twelve days from the date thereof, to answer under oath such questions as may be put to him touching his indebtedness to the defendant, and any property or money of the defendant in his possession or under his control, which summons shall be served and returned in the same manner as a summons against a defendant, except that the service must be personal. A copy of such summons, together with a notice to the defendant stating the time, place, and manner of service upon the garnishee, and signed by the justice or the officer who served the same, and requiring the defendant to appear and take part in the examination, shall be served upon the defendant at least three days before the time specified in the summons for the appearance of the garnishee. (4230) [7860]

A judgment in a court of a justice of the peace against a garnishee upon his disclosure that he was indebted to the defendant, though his indebtedness was evidenced by a judgment, the justice having jurisdiction of the subject-matter of the action and of the parties, was with jurisdiction, was subject to correction on appeal if erroneous, but was not subject to collateral attack, and the payment by the garnishee of the judgment in the garnishment proceeding discharged pro tanto the judgment in the action against him. 161–374, 201+546.

9358. In district court—In actions in the district court such summons may be issued by the plaintiff or his attorney in the action, and shall be served and returned in the same manner as a summons issued against a defendant, except that the service shall be personal. It shall require the garnishee to appear before the court in which the action is pending, or the judge or clerk thereof, or a court commissioner of the county in which the action is pending, at a time and place specified therein, not less than twenty days from the service thereof, and answer touching his indebtedness to the defendant, and any property or money of the defendant in his possession or under his control. A copy of the summons, together with a notice to the defendant stating the time, place, and manner of service thereof upon the garnishee, signed by the plaintiff or his attorney, or the person or officer who served the summons upon the garnishee, and requiring the defendant to appear and take part in such examination, shall be served upon the defendant at least ten days before the time specified in the summons for the appearance of the garnishee. Such notice and copy of the summons may be served in the same manner as a summons in ordinary cases. (4231) [7861]

Cannot be issued until filing of affidavit (3–360, 253; 9–55, 44). Delivery to officer for service—when deemed to be issued (103–69, 114+257). Issues without order of court (9–55, 44). Need not run in name of state (12–80, 43). Several persons may be included as garnishees in same summons. Summons held to designate sufficiently court or officer before whom returnable (74–448, 77+206). Objection to summons and service held waived (9–55, 44; 55–102, 56+581). District court in which judgment originally entered held to have sole jurisdiction of garnishment proceedings (93–348, 101+502). Cited (30–191, 14+884). Failure to serve on defendant proper copy of the summons and notice not a jurisdictional defect. Proceedings may be dismissed on motion (103–69, 114+257). Service on non-resident by publication (133–326, 158+606).

The record fails to show service of a copy of the garnishee summons on defendant, or the filing of an affidavit with the examining officer that would dispense with such service, or that the garnishee disclosed or was defaulted; but does show that, without objection, the motion to discharge the garnishee was submitted on the sold ground that the funds garnisheed constituted the proceeds of the sale of defendant's homestead. Held, the order discharging the garnishee was not erroneous. 157–283, 195+1015.

When a copy of the garnishee summons was served upon defendant, the blanks in the printed notice to defendant, on the back of the copy of the summons, were not filled in, and it was not signed. The service in that condition did not amount to a service of the required statutory notice. 160–443, 200+468.

Held, following Hudson v. Patterson, 123 Minn. 330, 143 N. W. 792, that service of a garnishee summons before the issuance of a valid summons in the main action is unauthorized and of no effect. 164–363, 205+264.

9359. Effect of service on garnishee—Fees—The service of the summons upon the garnishee shall attach and bind all the property and money in his hands or under his control belonging to the defendant, and all indebtedness owing by him to the defendant at the date of such service, to respond to final judgment in the action. He may be compelled to disclose under oath respecting all matters contained in the affidavit: Provided, that no person shall be obliged to appear as garnishee unless the fees for one day's attendance and mileage allowed by law be paid or tendered in advance. (4232) [7862]

Creditor occupies no better position than would defendant in suit by him against garnishee (103–387, 115+205; 109–468, 124+223). Pendency of garnishee action is defense by way of plea in abatement in action by garnishee's creditor to recover debt sought to be reached by garnishment. Proper practice is to order stay (99–305, 109+403). Does not affect property acquired subsequent to service (2–310, 265; 69–128, 71+925). What constitutes "control" (23–475). Cited (21–42; 30–191, 14+884; 32–66, 19+346; 60–362, 62+396; 75–118, 77+568; 85–313, 88+848). Garnishment creates an inchoate lien (124–256, 144+959). Right of recovery of money subject to undermined garnishment (125–262, 146+1093). Creditor's interest in trust estate (130–395, 153+741). Verdict is not subject to garnishment (148–192, 181+327).

The service of a garnishee summons does not change the rights of the parties except to transfer to the plaintiff whatever claim the defendant had against the garnishee. 166–481, 208+413.

9360. Property subject to garnishment—All moneys and other personal property, including such property of any kind due from or in the hands of an executor or administrator, and all written evidences of indebtedness, whether negotiable or not; or under or over due, may be attached by garnishment; and money or any other thing due or belonging to the defendant may be attached by this process before it has become payable, if its payment or delivery does not depend upon any contingency; but the garnishee shall not be compelled to pay or deliver the same before the time appointed by the contract. (4233) [7863]

1. Held garnishable—Debt owing to a non-resident, the debtor being within the state (30–244, 15+113; 50–405, 52+905. See 72–383, 75+740; 80–478, 83+452; 88–456, 93+520; 103–268, 114+955; 114–27, 130+540); legacy in hands of executor (81–484, 84+332; 84–353, 87+944); indebtedness incurred by receiver operating railroad under federal court (58–145, 59+987); property under "control" of garnishee (23–475); United States voucher (21–42); bond of state deposited with trustee (3–389, 282); money in hands of garnishee which in equity and good conscience belongs to defendant (24–452; 80–473, 83+448); money in hands of stakeholder on bet (80–473, 83+448); stock in foreign corporation (60–362, 62+396); debt due from warehouseman for loss of goods stored (76–8, 78+864); promissory note (33–464, 23+846). Courts of this state have jurisdiction to entertain garnishment against

nonresidents where defendant and garnishee are both personally served within state. 72–383, 75+740; and 80–478, 83+452; distinguished. In such case situs of property, as determined by residence of parties, is immaterial. Nor is place of payment material where garnishee interposes no claim that he cannot be compelled to make payment at place other than agreed on (103–268, 114+955). Debt due from one foreign corporation to another (98–141, 107+966). Ownership of proceeds under bill of sale (123–444, 143+1130).

2. See in general—Assigned estate (130–392, 153+740). Surety company defendant to extent of judgment under its bond to insured co-defendant (132–336, 156+668; 150–506, 185+1022; 151–7, 186+121).

3. Held not garnishable—Debt owing by and to a nonresident (72–383, 75+740; 80–478, 83+452; 88–456, 93+520); property in hands of common carrier for shipment beyond state (61–104, 63+256; 81–247, 83+986. See 86–33, 90+7; 92–20, 99+365); contingent liability (12–279, 183; 23–545; 41–317, 43+65. See 58–145, 59+987; 76–8, 78+864); property in custodia legis (16–210, 184; 32–60, 19+347; 32–65, 19+347; 32–66, 19+346; 33–464, 23+846; 35–194, 28+252; 43–38, 44+524; 49–133, 51+665; 58–145, 59+987; 94–505, 103+711). Debt payable on condition (103–387, 115+205). See 148–192, 181+327. See '19 c. 178, prescribing procedure for garnishing or attaching wages of laborers on public work in counties having an area exceeding 5,000 square miles. '23 c. 204, providing that fire relief pensions are not subject to garnishment.

4. In general—Debt due insolvent bank passed to superintendent of banks. 160–229, 199+575.

The garnishee disclosure of an automobile indemnity insurer does not show that by carrying on the defense for the assured it estopped itself or waived the right to assert nonliability under the policy. 161–61, 200+812.

Property arrested by garnishment is subject to all the rights of the garnishee therein. He cannot be compelled to perform his contract with defendant in a manner otherwise than as provided therein, but the defendant's rights in mortgaged property or property upon which the garnishee has a lien may be attached. 162–139, 202+708.

A promise to apply the proceeds of specified property upon a particular debt does not give a lien upon or right to such proceeds until so applied, and until so applied they may be attached by garnishee process in an action against the promisor. 164–422, 205+268.

Equitable assignment of indebtedness of garnishee. 166–481, 208+413.

Title to money owned by a South Dakota bank, on deposit in a Minnesota bank, passes, by operation of law, to the superintendent of banks in South Dakota upon his officially taking possession of the South Dakota bank. 212+3.

5. Garnishment, attachment, etc., of wages due for labor, etc., on county roads in certain counties—Laws 1919, c. 178, reads as follows: "Section 1. That in any county of this state now or hereafter having an area of over five thousand (5,000) square miles, in order to attach or hold by garnishment, attachment, execution or other process any wages due for labor to any laborers, workmen or other persons who have performed manual labor on any county road, and the claims or wages of any persons who have furnished teams, wagons, scrapers or other tools and machinery in the performance of work on such roads, for the use of such teams and such equipment, when any such claims shall be due and payable under the provisions of chapter 182, General Laws of Minnesota for 1915, as amended by chapter 69, General Laws of Minnesota for 1917, it shall be necessary for the garnishment summons, writ of attachment, writ of execution or other legal process to be personally served upon the county road overseer, superintendent or foreman designated by the county board to have charge of the construction, improvement or maintenance of any such road and also authorized by said county board to issue time checks in payment of said work under the provisions of said chapter 182, General Laws of Minnesota for 1915, as amended, and such personal service of said garnishment summons, writ of attachment, writ of execution or other legal process for the attaching of such wages or money due from any such county must be made upon such county road overseer, superintendent or foreman prior to the issuance and delivery by him of any time check in payment of such wages or money due from said county. That any garnishment summons, writ of attachment, writ of execution or any other legal process served upon any county road overseer, superintendent or foreman, after the issuance and delivery of any such check hereinbefore referred to, shall be of no force or effect whatever to bind or attach any such wages or money due from any such county to any such workman or employe. That on being served with any such garnishment summons, writ of attachment, writ of execution or other process before the issuance or delivery of any such time check for wages or money due such workman or employe and upon the payment of his proper fees therefor, it shall be the duty of said overseer, superintendent or foreman to forthwith make out a time check as provided by section 2 of said chapter 182, as amended, together with an affidavit showing the amount paid to such employe during the period of 30 days next proceeding the service of such summons, execution or attachment, and that the amount set forth in the time check is the whole amount due at the time of such service, and without delay mail the original and duplicate thereof, together with such affidavit, to the county auditor of said county at the county seat, who shall retain such time check, together with such affidavit until the final determination of the action in which said wages or money are involved, and such time check and affidavit so forwarded shall constitute prima facie evidence of the facts therein set forth. That after mailing said time checks together with such affidavits to said county auditor, or in case said time checks shall already have been issued and delivered to said laborer or workman, or in case there shall be no wages or money due to said laborer or workman from said county, said overseer, superintendent or foreman shall make disclosure, whether any money or other property or effects be due said workman or laborer, as required by law and by said garnishment summons or other process so served upon him, provided his legal fees and mileage shall have been first tendered or paid to him. Except as hereinbefore provided in this section, all other provisions of law with reference to the attaching and holding wages or money due to any workman or employe on any county road work, whether by garnishment, writ of attachment, writ of execution or other process, shall apply and be followed in such garnishment, attachment or other execution proceedings." Section 2 of said Laws 1919, c. 178 repeals all inconsistent acts or parts of acts.

Laws 1915, c. 182 was repealed by Laws 1921, c. 323, § 79. See Gen. St. '23, § 2619.

9360-1. Property subject to garnishment—Money due from Highway Department—Procedure—Money due or owing to any corporation or person by the State on account of any employment, work or contract with the State Highway Commissioner shall be liable to garnishment, except as exempted by law. The garnishee summons may be served upon the highway commissioner by registered mail; and the disclosure shall be made by the commissioner or by some person having knowledge of the facts designated by him. The Commissioner, or the person having knowledge of the facts as so designated by the Commissioner, shall not appear before the Court for disclosure, unless the District Court, Municipal Court, or Justice of the Peace otherwise orders and by such order appoints a referee to take the disclosure at the time and place specified in such order upon six days' notice to the garnishee and to the defendant, but the Commissioner shall at least three days before the date of hearing on disclosure on such garnishee summons transmit to the court or officer before whom such disclosure is to be made a duly verified and authenticated statement of the moneys due and owing to the defendant, if any, which statement shall constitute the disclosure, unless otherwise ordered by the court as above specified. Unless the Commissioner, or person having knowledge of the facts disclosed by him, as aforesaid, is actually required to appear in court by the order of the Court no mileage fee shall be charged by the Commissioner, or any other person, on account of any such disclosure but a fee of two dollars ($2.00) shall be allowed for making such disclosure. The examination may proceed without notice to the defendant, if it be made to appear to the referee by affidavit that the defendant is not a resident of the State and cannot be found therein. When payment is made pursuant to judgment against said commissioner as garnishee a certified copy of the judgment with a certificate of satisfaction to the extent of such payment endorsed thereon shall be delivered to the commissioner as his voucher for such payment. ('23, c. 363; amended '25, c. 33)

9361. In what cases garnishment not allowed—No

person or corporation shall be adjudged a garnishee in any of the following cases:

1. By reason of any money or other thing due to the defendant, unless at the time of the service of the summons the same is due absolutely, and without depending on any contingency.

2. By reason of any debt due from such garnishee on a judgment, so long as he is liable to an execution thereon.

3. By reason of any liability incurred, as maker or otherwise, upon any draft, bill of exchange, or promissory note. (4234) [7864]

Cited (99–305, 109+403). Subd. 1 (12–279, 183; 23–545; 41–317, 43+65. See 58–145, 59+987; 76–8, 78+864). Subd. 2 (88–456, 93+520). Subd. 3 (1–54, 37; 5–468, 378; 7–325, 254; 148–191, 181+326).

Money in the possession of a sheriff, paid to him in redemption from a mortgage foreclosure sale, is not subject to garnishment. 164–450, 205+373.

Held to prevent the garnishment of a judgment against a county, even though at the time being execution was stayed by statute until the lapse of sufficient time to enable the county to collect through taxation the funds wherewith to pay the judgment. 166–403, 208+17.

9362. Examination of garnishee—Upon his appearance before the court or officer named in the summons, at the time specified therein, or to which an adjournment may be had, and the filing of proof of the service upon the defendant of such summons and notice, the garnishee shall be examined on oath touching the matters alleged in the affidavit, and full minutes of the examination shall be taken by the examining officer and filed with the clerk. If the defendant does not appear at the time and place specified in the summons for the appearance of the garnishee, and it appears that the plaintiff has been unable to notify him, the examining officer may postpone the examination for such reasonable time as may be necessary for that purpose, and thereupon service of such summons and notice, together with notice of the time to which the examination is postponed, shall be served upon defendant, at least ten days if in the district court, and three days if in justice court, before the day to which the examination is postponed: Provided, that if the plaintiff, his agent or attorney, files with the examining officer an affidavit that the defendant is not a resident of this state, and is not within the same as affiant verily believes, the examination shall proceed as if the summons and notice had been served upon defendant or he had duly appeared. (4235) [7865]

No provision for pleading on part of garnishee. Plaintiff has right to examine garnishee so as to bring out all the facts in order that court and not garnishee may determine latter's liability. Garnishee should be permitted to state matters in defence or setoff (49–521, 52+139; 72–263, 75+375). Disclosure of garnishee conclusive on plaintiff. Evidence in corroboration of garnishee admissible but not evidence in contradiction (3–389, 282, 293; 4–381, 288; 5–468, 378; 21–42; 41–498, 43+331; 96–499, 105+673). Applications for further disclosure on ground of mistake, inadvertence or excusable neglect addressed to discretion of court (49–521, 52+139). Statute does not contemplate findings of fact by court (42–112, 43+794). Cited (103–169, 114+257). Affidavit of defendant's nonresidence (133–326, 158+606). No service of garnishment summons on defendant and no affidavit filed with examining officer (195+1016).

166–481, 208+413; 210+874.

Application to open judgment against garnishee and permit further disclosure was addressed to discretion of court. 155–507, 194+2.

The record fails to show service of a copy of the garnishee summons on defendant, or the filing of an affidavit with the examining officer that would dispense with such service, or that the garnishee disclosed or was defaulted; but does show that, without objection, the motion to discharge the garnishee was submitted on the sole ground that the funds garnisheed constituted the proceeds of the sale of defendant's homestead. Held, the order discharging the garnishee was not erroneous. 157–283, 195+1015.

It is not error to permit the plaintiff to call for cross-examination a person, not an officer or managing agent of a corporate garnishee, who was authorized to make the disclosure and had charge of the papers showing the garnishee's dealings with defendant. 162–139, 202+708.

Jury trial. 165–100, 205+947.

9363. Garnishment of corporations—A corporation may be garnished, and may appear by its cashier, treasurer, or such other officer or person as it shall appoint, and the disclosure of such officer or person shall be considered the disclosure of the corporation; but if it appears to the court that some other person connected with the corporation is better acquainted with the subject matter than the one making the disclosure, such person may be cited to appear and answer in the proceeding, and, if he shall neglect or refuse to attend, judgment may be entered as hereinafter provided upon default. Service upon an agent of a foreign corporation doing business in this state shall be service upon such corporation. (4236) [7866]

72–263, 75+375; 80–73, 82+1108.

9364. Salaries or wages of officers or employees of municipal corporations — Procedure — The salary or wages of any officer of, or person employed by, a county, town, city, village or school district, or by any department thereof, shall be liable to garnishment, attachment and execution, except as exempt by law:

Provided, however, that any officer of, or person employed by a county, town, city, village or school district, or by any department thereof shall have the same right to sell, assign or transfer his salary or wages as is now possessed by any officer of, or person employed by any corporation, firm or person. In the case of such officer, the garnishee summons, writ of attachment, or execution shall be served upon the auditor, treasurer, or clerk of such body, or department thereof of which he is an officer; and in other cases such process shall be served upon the officer in whose office, or the head of the department in which, or the presiding officer of the body by which, such person is employed; and the disclosure, in a case of garnishment, or the certificate, in case of execution, shall be made by the officer or person so served, or by some person having knowledge of the facts designated by him: Provided, that when the garnishee summons is returnable elsewhere than in the town, city, or village where such officer resides, or in which his office is located or his duties are usually performed, he shall not be required to appear at the time and place therein specified, but, upon application of the plaintiff, the court or justice shall by order appoint a referee to take the disclosure at a time and place therein specified, within such town, city, or village, upon six days' written notice to the garnishee and to the defendant. If the Plaintiff, his agent or attorney, files with the referee an affidavit that the defendant is not a resident of this state and cannot be found therein as affiant verily believes, the examination may proceed without notice to the defendant. When payment is made by such debtor pursuant to a judgment against him as garnishee, or upon levy of execution, a certified copy of the judgment or execution, with a certificate of satisfaction to the extent of such payment indorsed thereon, shall be delivered to the treasurer of the debtor as his voucher for such payment. (4237) [7867] (Amended '25, c. 387)

95–62, 103+716. Cited (120–458, 139+947).

There is no power in the district court to authorize a receiver, appointed in proceedings supplementary to execution, to collect the official salary to be earned in the future by the judgment debtor. 166–363, 207+736.

9365. When property garnished exceeds claim—Whenever it appears that the property garnished is more than sufficient to pay the amount claimed in the complaint, and the probable interest and costs which may accrue to the plaintiff, the court, upon motion, may make an order releasing such excess from the garnishment. (4238) [7868]

9366. Claimant of property to be joined—If it appear from the evidence, or otherwise, that any person not a party to the action has or claims an interest in any of the garnished property antedating the garnishment, the examining officer may permit such person to appear in the action and maintain his right; and if he do not so appear, may direct that he be notified to appear or be barred of his claim. The notice in such case may be served in any manner that such officer shall direct, and the person so appearing or notified shall be joined as a party to the action and be bound by the judgment. (4239) [7869]

1. **Statutory procedure exclusive**—54–47, 55+827.

2. **Necessity of summoning claimant**—38–526, 38+700. See 150–235, 185+649; 150–499, 185+1019; 150–505, 185+1022. Garnishee not to be discharged without trial of issues (152–436, 189+433).

3. **Pleading—Burden of proof**—Affirmative on claimant who must serve first pleading in form of complaint in intervention to which plaintiff may answer (22–309; 32–381, 20+334; 54–47, 55+827; 68–325, 71+383). Complaint need not allege matter appearing on record in garnishment proceedings (84–455, 87+1122). May be aided by answer (33–262, 22+543). Claimant may rest his claim on disclosure alone (22–309).

4. **Answer**—Plaintiff has twenty days to answer (55–231, 56+818). Need not allege in answer facts alleged in original complaint or which appear of record in main action (54–47, 55+827; 84–455, 87+1122).

5. **Practice**—Claimants should be brought in or allowed to intervene by formal order (27–85, 6+445; 38–526, 38+700). Personal service of order outside state void (38–526, 38+700). On issues formed by complaint in intervention and answers thereto the parties are entitled to a trial as in ordinary actions (42–112, 43+794; 55–231, 56+818). Neither party entitled to jury trial as of right (see 54–47, 55+827; 61–398, 63+1075). Claimant must have same opportunity to protect his interest as is accorded to party to ordinary action (22–309). On trial by court findings of fact should be made (42–112, 43+794). Claimants may move to discharge garnishee (33–262, 22+543).

The intervener, not being the owner of the property involved, has no right to question the sale thereof to the several garnishees who were the successful bidders therefor at the auction conducted by defendant. 164–446, 205+371.

6. **Evidence**—Disclosure of garnishee admissible in favor of claimant (67–281, 69+909). Under allegation of ownership in complaint of claimant and denial in answer of plaintiff the latter may introduce any evidence to impeach title of claimant (32–381, 20+334; 32–529, 21+733; 54–47, 55+827. See 71–211, 73+729). Claimant's title to bank deposit (128–456, 151+178).

7. **Judgment**—83–394, 86+411.

8. **Costs**—28–63, 9+76; 83–394, 86+411.

9367. Proceedings when debt or title is disputed—If the garnishee hold the garnished property by a title that is void as to defendant's creditors, he may be charged therefor although the defendant could not have maintained an action against him therefor; but in this, and in all other cases where the garnishee, upon full disclosure, denies his liability as such, the plaintiff may move the court at any time before the garnishee is discharged, on notice to both the defendant and garnishee, for leave to file a supplemental complaint making the latter a party to the action, and setting forth the facts upon which he claims to charge him; and, if probable cause is shown, such motion shall be granted. The supplemental complaint shall be served upon both defendant and garnishee, either or both of whom may answer, and the plaintiff may reply. The issues thus made up shall be brought to trial and tried as in other actions. (4240) [7870]

212+3.

A supplemental complaint in a garnishment proceeding is not fatally defective because it merely alleges an indebtedness on the part of the garnishee to the defendant. The garnishee's only remedy is to move that the complaint be made more definite and certian. 162–139, 202+708.

Respondents had the burden of proving that notes and contracts executed in connection with sales of land were accepted in payment of defendant's indebtedness to appellant. 162–139, 202+708.

1. **Exclusive mode of controverting disclosure**—10–396, 315; 21–42; 41–498, 43+331. See 19–149, 113; 96–499, 105+673; 129–189, 152+137; 131–78, 154+741; 150–235, 185+649; 151–3, 186+121.

2. **Not matter of right**—28–63, 9+76.

3. **Diligence—Renewal of motion**—78–480, 81+391.

4. **Waiver**—When plaintiff submits liability of garnishee on disclosure alone he cannot afterwards petition for leave to file supplemental complaint (28–63, 9+76).

5. **Service of notice and complaint**—33–464, 23+846; 133–329, 158+606.

6. **When not allowed**—Will not be allowed if facts disclosed by garnishee in themselves warrant judgment against him (21–42; 23–475; 74–470, 77+409). Statute not applicable when claim made by third party (54–47, 55+827).

7. **Practice**—Supplemental complaint is to be construed in connection with the original complaint and it is not necessary to repeat in the former the allegations of the latter (71–211, 73+729. See 54–47, 55+827; 76–8, 78+864; 84–455, 87+1122). On issues formed by the supplemental complaint and answer thereto the trial is governed by the same rules of procedure and evidence as an ordinary civil action (42–112, 43+794; 71–211, 73+729). Court will take judicial notice of the entry of judgment against the defendant in the main action (76–8, 78+864). Neither party entitled to jury trial as of right (61–398, 63+1075. See 54–47, 55+827). Court should make findings of fact (42–112, 43+794). Proceedings to be deemed a continuation of garnishment proceedings (28–63, 9+76; 33–464, 23+846; 76–8, 78+864). Burden of proof (71–211, 73+729). Impeachment of garnishee (33–464, 23+846). 129–188, 152+136.

8. **Fraudulent conveyances**—22–247; 71–211, 73+729; 73–171, 75+1124; 123–444, 143+1130; 153–216, 190+63.

9. **Judgment**—67–281, 69+909; 131–78, 154+741.

9368. Time for appearance in garnishee proceedings—When any person duly summoned as garnishee neglects to appear at the time specified in the summons, or within one hour thereafter, he shall be defaulted, and a judgment payable in money shall be rendered against him for the amount of damages and costs recovered by the plaintiff in the action against the defendant, and execution may issue therefor directly against the property of such garnishee; but the court, upon good cause shown, may remove such default, and permit the garnishee to appear and answer on such terms as may be just. (R. L. '05 § 4241, G. S. '13 § 7871, amended '19 c. 184 § 1)

Relief from default (10–162, 130; 43–191, 45+427). Denial of relief discretionary (109–299, 123+825). Default held properly entered where garnishee appeared by attorney and merely offered to file affidavit of no indebtedness (72–263, 75+375). Costs include disbursements (23–71). Admissions of and estoppel against defaulting garnishee. Jurisdiction to enter judgment against defendant and garnishee (103–504, 115+649). Cannot make disclosure until default removed on application duly made and good cause shown (103–504, 115+649). Appeal from default judgment (144–227, 174+884).

9369. When rendered—Discharge—Transfer of action—No judgment shall be rendered against a garnishee until after judgment is rendered against the defendant; but a garnishee may be discharged after disclosure, if it appears that he ought not to be held. Whenever he is not so discharged, the cause shall be continued to abide the result in the original action; and in case any such original action, pending in a court not of record, shall be transferred under the provisions of law to any other court except by appeal, any garnishee action, the judgment in which is conditioned on the judgment in said original action, shall be transferred therewith, and written notice of such transfer, specifying the court to which the same is

made and the time, which shall not be less than two days after service of the notice, when such garnishee action will be heard, shall be served by the plaintiff on the garnishee. Such transfer shall carry with it all proceedings already had and any disclosure made therein. (4242) [7872]

Judgment can be rendered against a garnishee on his disclosure only when he admits that he is owing the principal debtor, or that he has in his possession or under his control property belonging to such debtor, or when the facts stated in his disclosure show beyond a reasonable doubt that such is the case (3–389, 282; 4–381, 288; 5–468, 373; 30–387, 15+675; 41–498, 43+331; 49–521, 52+139; 69–128, 71+925). Judgment cannot be ordered until the disclosure is closed (27–85, 6+445). To render the garnishee liable there must be a formal judgment entered (25–509; 96–499, 105+673). When a garnishee is discharged there is no entry of judgment and he is not entitled to costs (41–3, 42+539; 95–118, 103+709). If the debt sought to be reached appears from the disclosure to belong to a third party the garnishee should be discharged, unless the third party is brought in (31–40, 16+455; 38–526, 38+700). Proper tribunal to determine whether garnishee may be charged (99–305, 109+403). Dismissal of main action discharges garnishee (136–356, 162+468).

The levy of an execution upon such a debt by such creditor after the dismissal of the garnishee proceeding was effective, although made during the period of the stay provided in such order of dismissal. 159–263, 198+811.

When a defendant in a garnishee proceeding moves for a dismissal thereof upon the ground, among others, that the debt disclosed is not due him unconditionally from the garnishee, he cannot claim the order of dismissal to be res adjudicata that the debt sought to be reached by his creditor did not belong to him. 159–263, 198+811.

There was no laches on the part of the garnishee in applying for the vacation of the order for judgment against it. 166–481, 208+413.

9370. Proceedings when venue is changed—In case of a change of venue, in an action in the district court, before the garnishee has fully disclosed, the disclosure may be taken or completed regardless of such change, unless the defendant at whose instance the change was made shall otherwise require. If the change be ordered by the court, the order, upon request of the moving defendant, shall direct when, where, and before whom the examination shall proceed; otherwise the defendant shall serve, with his demand, written notice of such time and place, and of the court or officer before whom the examination will proceed. If such notice be not given and filed, the clerk shall retain all papers relating to the garnishment until the disclosure is completed. The place of disclosure, when changed, shall be within the county to which the action is transferred, unless the parties otherwise agree, and the time thereof not more than ten days later than that previously fixed; and the plaintiff shall pay to the garnishee additional mileage if the distance be increased. (4243) [7873]

41–552, 53+483.

9371. Who may take disclosure—Court commissioners, clerks of the district court, and referees appointed by the court for that purpose are authorized and required to take the disclosure of any garnishee, together with any other testimony offered by the parties to the action, and report the same to the court. All testimony shall be taken subject to any seasonable objection thereto. Any examining officer, other than the judge, shall receive from the plaintiff ten cents a folio for taking the disclosure, and the fee so paid may be taxed in the judgment against the garnishee. No judgment shall be rendered against the garnishee unless ordered by the court. (4244) [7874]

Order of court for judgment necessary (25–509; 93–348, 101+502). Other testimony on behalf of garnishee (96–499, 105+673).

9372. Disclosure before return day—When any person is summoned as a garnishee in the district court, he may appear before the officer named in the summons at any time before the return day thereof, and with the consent of the plaintiff, to be certified by such officer, make his disclosure with like effect as if made at the time specified in the summons. If the plaintiff will not consent to such disclosure, the garnishee, in case he is compelled to be absent from the county until after the return day of the summons, may make affidavit to that effect, which, with a notice of the time and place of making his disclosure before the same officer, he shall serve on the plaintiff or his attorney at least twenty-four hours before the time therein fixed for taking the same. On proof of such service, his disclosure shall be taken as hereinbefore provided, and with like effect. (4245) [7875]

1. Application of section—Intended for convenience of garnishee, but not to do away with service of summons on defendant, nor to prevent defendant from appearing at time specified in summons and insisting on his rights (103–69, 114+257).

2. Amount of judgment—Interest (67–365, 69+1100). Disbursements (23–71).

3. Effect of judgment against garnishee—On garnishee (3–360, 253; 15–241, 187; 23–239). On claimants (33–262, 22+543; 38–526, 38+700). On the res (see 3–389, 282, 297; 53–327, 55+141; 58–145, 59+987).

9373. Amount of judgment — Effect — Judgment against a garnishee shall be rendered, if at all, for the amount due the defendant, or so much thereof as may be necessary to satisfy the plaintiff's judgment against such defendant, with costs taxed and allowed in the proceeding against the garnishee. Such judgment shall acquit and discharge the garnishee from all claims of all the parties to the process in and to the property or money paid, delivered, or accounted for by such garnishee by force of such judgment. (4246) [7876]

See 126–256, 144+959. Offsetting claims (133–336, 156+668).

155–507, 194+2.

9374. Duty and rights of garnishee—When any person is charged as garnishee by reason of any property in his possession other than an indebtedness payable in money, he shall deliver the same, or so much thereof as may be necessary, to the officer holding the execution, and such property shall be sold and the proceeds accounted for in the same manner as if it had been taken on execution against the defendant; but the garnishee shall not be compelled to deliver any specific articles at any other time or place than as stipulated in the contract between him and the defendant. (4247) [7877]

Not required to deliver contrary to contract (61–104, 63+256; 81–247, 83+986; 86–33, 90+7; 103–387, 115+205).

9375. Court may determine value, make orders, etc. —Upon application of any party in interest, on notice, the court may determine the value of any property so in the hands of the garnishee for delivery, and may make any order relative to the keeping, delivery, and sale thereof, or touching any of the property attached, that is necessary to protect the rights of those interested, and at any time after the service of the garnishee summons may require the property or money so attached to be brought into court or delivered to a receiver by it appointed. (4248) [7878]

25–509.

9376. Proceedings when garnishee has lien—If it appear that the garnishee has a lien on such garnished property, or that it is in any way liable for the payment of a debt due to him, the plaintiff, on motion, may

be permitted to pay the amount thereof, and the amount so paid shall be repaid to plaintiff, with interest, out of the proceeds of the sale of such property. If the garnishee refuses or neglects to comply with any order of the court in the premises, he may be punished for a contempt, and also shall be liable to the plaintiff for the value of such property, less the amount of his lien: Provided, that he may sell the property to satisfy such lien, if a sale be authorized by his contract, at any time before such payment or tender. (4249) [7879]

20–411, 363; 27–32, 6+406; 33–464, 23+846.

Judgment against garnishee properly denied, where garnishee, a pledgor having the right so to do, sold its claim against the defendant, and its lien on the collateral security, and plaintiff has not availed itself of section to protect its own rights, to pay the debt secured by the pledge. 166–379, 208+22.

9377. Garnishee not liable for destruction—If any such garnished property be destroyed without negligence of the garnishee, after judgment and before demand by the officer holding the execution, the garnishee shall be discharged from all liability to the plaintiff for the non-delivery thereof. (4250) [7880]

9378. Fees and allowances of garnishee—A garnishee who appears and submits himself to examination, as herein provided, shall be allowed his fees and mileage for attendance at the rate allowed by law to a witness, and in extraordinary cases, such further sum as the court shall deem reasonable for his counsel fees and other necessary expenses. If he be charged as a garnishee, the amount of such allowances may be retained out of the property in his hands, and, if charged on account of specific articles of personal property, he shall not be required to deliver the same to the officer until payment thereof; and, if he be not held as a garnishee, he may recover judgment therefor against the plaintiff. (4251) [7881]

Counsel fees (19–414, 359). Costs include disbursements (23–71). Cited (23–239; 41–3, 42+539).

9379. Plaintiff's costs limited—Except when the garnishee fails to appear, the plaintiff shall in no case recover a greater sum for costs, including fees and costs allowed the garnishee, than the amount of damages recovered of the defendant. (4252) [7882]

Costs include disbursements (23–71).

The memorandum of a contract for the sale of goods, required by the statute of frauds, is not the contract, but only the written evidence of it. It need not consist of a single paper. It is sufficient if the terms of the contract can be gathered from other writings, provided their connection is obvious without resort to parol evidence. 159–106, 198+312.

The time of delivery of the goods, if agreed upon, is a material term of the contract, and must appear in the memorandum. 159–106, 198+312.

9380. Minimum judgment in justice and district courts—No judgment shall be rendered against a garnishee in a justice court where the judgment against the defendant is less than ten dollars, exclusive of costs, nor where the indebtedness of the garnishee to the defendant, or the value of the property or money of the defendant in the hands of the garnishee or under his control, as proved, is less than ten dollars. If the action is in the district court, no judgment shall be rendered against the garnishee where the indebtedness proved against him, or the value of the money or property of the defendant in his hands or under his control, is less than twenty-five dollars; and in all such cases the garnishee shall be discharged, and shall recover his costs, and have execution therefor against the plaintiff. (4253) [7883]

41–3, 42+539; 77–426, 80+356.

In an action upon a bond in which it was stated that property of defendant in possession of the garnishee had been garnished, the surety is estopped from asserting that there was not garnishable property in the hands of the garnishee. 210+887.

9381. Discharge not a bar—If any person summoned as a garnishee is discharged, the judgment shall be no bar to an action brought against him by the defendant or other claimants for the same demand. (4254) [7884]

9382. Garnishment by defendant—Whenever the defendant shall recover judgment against the plaintiff, or shall set up in his answer a counterclaim exceeding in amount the sum admitted in such answer to be due to the plaintiff, he may institute and prosecute garnishment proceedings under this subdivision as if he were plaintiff. And for the purposes of such proceedings he shall be considered as plaintiff, and the plaintiff as defendant, and his answer shall be deemed a complaint. (4255) [7885]

9383. Discharge of attachment or garnishment—At any time before the entry of judgment, the defendant whose property has been attached or garnished may secure its release by giving a bond, approved by a judge or court commissioner if the action is in the district court, by the judge if in a municipal court, and by the justice if in justice court, in a penal sum at least double the amount claimed in the complaint, or if the value of the property attached or garnished is less than such amount, then in double such value, conditioned to pay any judgment recovered against him in the action, or so much thereof as shall equal such value. The officer approving such bond shall make an order discharging such attachment or garnishment and releasing the property. Such order shall become effective upon filing the same with such bond in the court in which the proceedings are pending, and, in the case of garnishment, serving a copy of the order on the garnishee. (4256) [7886]

1. **Discharge of attachment**—Only defendant can proceed under statute (30–366, 15+673). Obtaining release on bond a waiver of right to move to vacate (46–196, 48+776). Defective bonds (21–434; 31–448, 18+281; 39–174, 39+69). Liability on bond (21–434; 31–448, 18+281). Cited (64–10, 65+949).

2. **Discharge of garnishment**—Liability on bond (64–10, 65+949). Cited (25–509; 38–539, 38+701; 103–79, 114+468).

The value of the property fixes the maximum liability of the surety. 210+887.

In an action upon a bond, in which it was stated that property of defendant in possession of the garnishee had been garnished, the surety is estopped from asserting that there was not garnishable property in the hands of the garnishee. 210+887.

9384. Appeals—Any party to a garnishment proceeding deeming himself aggrieved by any order or final judgment therein may remove the same from a justice's court to the district court, or from the district court to the supreme court, by appeal, in like cases, in the same manner, and with like effect as in a civil action. (4257) [7887]

Order discharging garnishee, whether on examination or not, appealable (41–3, 42+539; 95–118, 103+709). Order against garnishee for judgment not appealable (26–317, 4+45). Order refusing to discharge garnishee not appealable (84–353, 87+944). Order refusing to set aside proceedings not appealable (5–347, 279). Judgment on appeal (22–309). Right of stranger to appeal (4–116, 77). Appeal from justice court to municipal court (40–378, 42+86). After removal from justice court, garnishment may be commenced in district court, notwithstanding that proper appeal bond was given and is in force (103–79, 114+468). Default judgment appealable (144–227, 174+884).

Under the circumstances, the rule that an order refusing to vacate a nonappealable order is not appealable is not applicable. 166–481, 208+413.

INJUNCTION

9385. How issued—Effect on running of time—The writ of injunction shall issue when ordered by the court or a judge thereof, and shall be tested and sealed as other process. The period during which the performance of an act is stayed by injunction shall form no part of the time within which such performance is allowed or required by law. (4258) [7888]

135–47, 159+1083.

Cited (139–46, 165+495; 166+504).

The courts have no authority to enjoin the officials of the executive department from holding an election called by the Governor to fill a vacancy in the representation of this state in the Senate of the United States. 156–270, 194+630.

In calling such an election under the power conferred upon him by the federal Constitution, the Governor is exercising a governmental and political power, over which the courts have no control. 156–270, 194+630.

Under the facts stated in the opinion the plaintiff was not entitled to a mandatory injunction restraining the maintenance of a concrete sidewalk where located, nor to an injunction restraining the levy of assessments to pay for its construction. 161–332 201+550.

Liquidated damages for the breach of a membership contract with an association organized under the Cooperative Marketing Act do not give a full complete, and adequate remedy. The only adequate remedy is an injunction preventing the members from breaching their contracts, and thus indirectly forcing the delivery of the product to the association. 162–471, 203+420.

The plaintiff corporation was not entitled to an injunction restraining the defendant society from publishing Radiology, the name of a journal published by the society after its relations with the plaintiff corporation ceased. 164–167, 204+644.

A district court has jurisdiction to try an action which seeks to restrain the enforcement of a debt, evidenced by a judgment in another district court of the state, by execution when the debt has been satisfied, or when the plaintiff has ceased to be liable upon the judgment. 210+396.

9386. Temporary injunction when authorized—When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief consists wholly or partly in restraining the commission or continuance of some act which, if permitted during the litigation, would work injury to the plaintiff, or when during the litigation it appears that the defendant is about to do, or is doing, or threatening, procuring, or suffering to be done, some act in violation of plaintiff's rights respecting the subject of the action, and tending to make the judgment ineffectual, a temporary injunction may be granted to restrain such act. And where, during the pendency of an action, it appears by affidavit that the defendant threatens or is about to remove or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition. (4259) [7889]

1. In general.

Temporary mandatory injunction may be allowed (56–188, 57+471). Purpose of temporary injunction is to maintain matter in controversy in existing condition until a decree (26–479, 5+365). May be allowed although plaintiff does not ask for permanent injunction in complaint (55–482, 57+208). Granting temporary injunction a matter resting in judicial discretion. Such discretion is to be influenced by a consideration of the relative injury and inconvenience which may be likely to result to the parties, respectively, from the allowance or disallowance of the writ (17–457, 434; 53–335, 55+140; 67–36, 69+478; 80–214, 83+140; 88–372, 93+118). Not granted except for protection of rights which are clear and to avoid irreparable injury. When the answer denies all the equities set up in the complaint and a petition for a temporary injunction discloses no others it is improper to grant the writ (9–103, 93; 70–482, 73+412). Refusal to enjoin, merits evenly balanced (123–232, 143+728). Denied where court was not justified in entertaining action at all (124–10, 144+423). Temporary injunction restraining divorce proceeding in foreign state (127–21, 148+478). Temporary injunction when undisturbed on appeal (129–391, 151+139). Order not disturbed on appeal except for abuse of discretion (130–510, 153+1088). Injunction granted on sworn denial in answer, favorable probability on final hearing appearing (131–337, 155+99). Labor trouble (131–458, 155+638). Order against service of land contract cancellation notice (133–384, 157+587). Restraining sheriff as to county building (134–473, 159+129; 136–167, 161+520, 1055; 136–200, 161+524; 137–109, 162+1062). Municipal officers cannot, unless ultra vires, be enjoined from leasing public building (137–179, 162+1073).

164–519, 204+629; 165–415, 206+654; 209+485; 210+868.

An order granting or refusing a temporary injunction will not be reversed, except when the record shows an abuse of discretion. A positive denial of the equities of the complaint does not preclude the court from granting a temporary injunction. 156–467, 195+145.

This statute is not limited by § 9576, which see 160–307, 200+90.

Record examined, and held, that the trial court abused its discretion in denying an interlocutory injunction. 161–198, 201+324.

Under the facts set out in the opinion, the trial court did not abuse its discretion in granting a temporary injunction. 162–210, 202+484.

Plaintiffs did not shift from one ground to another in their application for an injunction. 162–210, 202+484.

2. Breach of contract.

Plaintiffs can terminate the contract in controversy at will and therefore cannot maintain an action to compel performance by defendant. 164–252, 204+882.

Actions to enjoin breach of a contract are similar to actions for specific performance and are governed by the same rules. 164–252, 204+882.

3. Construction of building.

The order of the trial court denying a temporary injunction against the construction of a building on the property of the defendants within a specified distance of the property line, the plaintiff claiming that an ordinance prohibited the construction within such distance, is sustained as a discretionary one. 157–411, 196+492.

4. Interference with performance of contract.

Application for an injunction, pendente lite, restraining the defendant from interference with the performance of a certain contract which plaintiff claims to have entered into with the defendant; held, that the court below was within its discretion in denying the application. 164–152 204+925.

5. Restraining suit.

Restraining replevin suit. 166–507, 208+408.

6. Calling station.

Taxpayers are entitled to an injunction restraining a public officer from calling an election under an unconstitutional law, because it is an unlawful expenditure of public funds. 167–45, 208+409.

7. Negotiation of note.

The rule that it is largely within the discretion of the trial court to grant or deny an application for a temporary injunction is as applicable in a case where the injunction is sought to restrain the negotiation of a promissory note alleged to be tainted with usury and the enforcement of a mortgage given to secure the note. 167–330, 209+5.

8. Signing public contract.

The trial court did not abuse its discretionary power in denying an application for a temporary injunction restraining the city council from signing a contract for the construction of a public sewerage system and outletting the effluent into Goose Lake. 212+909.

9387. Notice of application — Restraining order — Such injunction shall be granted only upon motion or order to show cause, but the defendant may be restrained by order until the decision of the court or judge granting or refusing the same. It may be granted at the time of commencing the action, or at any time afterwards before judgment, upon its appearing satisfactorily to the court or judge, by affidavit, that sufficient grounds exist therefor. A copy of the affidavit must be served with the injunction. But no order restraining a sale of real estate upon execution or foreclosure by advertisement shall be made unless the rights of the applicant would be prejudiced, nor unless a satisfactory excuse be shown for the failure to apply for the injunction in time for a hearing upon notice before the day of sale. (4260) [7890]

If a complaint is verified and its allegations are positive an injunction may issue thereon without an affidavit (10–23, 8; 32–313, 20+241). Restraining order (47–369, 372, 50+332; 78–464, 81+323; 83–246, 86+83). Execution and

foreclosure sales (17–457, 434; 45–59, 47+316; 114–501, 131+787; 150–443, 185+645).

Enjoining solicitation of patronage of customers of former employer. 156–83, 194+92.

Whether a restraining order pendente lite shall be made rests in the discretion of the trial court, and, in the absence of an abuse of such discretion, this court will not interfere. 163–278, 203+784.

9388. Bond required—Damages, how ascertained—When not otherwise especially provided by law, the applicant for the writ, before the same issues, shall give a bond in the penal sum of at least two hundred and fifty dollars, executed by him or some person for him as principal, approved by the court or judge, conditioned for the payment to the party enjoined of such damages as he shall sustain by reason of the writ, if the court finally decides that the party was not entitled thereto. The court, on motion, may require additional security, and, upon failure to furnish the same, shall dissolve the injunction. The amount of such damages may be ascertained by a reference or otherwise, as the court shall direct, in which case the sureties shall be concluded as to the amount, but the damages shall be recoverable only in an action on the bond. (4261) [7891]

Remedy on bond exclusive. Objection to sufficiency of bond (32–277, 20+195). Necessity of new bond when additional parties brought in (78–464, 81+323). Liability on bond (32–277, 20+195; 34–329, 25+636; 43–507, 45+1134; 72–185, 75+17; 76–129, 78+970; 87–285, 91+1113; 91–392, 98+197). See 126–470, 148+311; 142–362, 172+218. Counsel fees recoverable on bond (143–177, 173+435).

210+856.

Action on an undertaking. The issues litigated in the injunction suit are conclusive in this action and cannot be relitigated. 208+952

The trial court under our statute has no discretion to grant a preliminary injunction after a hearing, without exacting a bond. 208+952.

Where two separate issues of fact are pleaded as a defense in a suit fo rinjunction, and findings are made as to each, both must be given effect in the action upno the bond. 208+952.

RECEIVERS

9389. When authorized—A receiver may be appointed in the following cases:

1. Before judgment, on the application of any party to the action who shall show an apparent right to property which is the subject of such action and is in the possession of an adverse party, and the property, or its rents and profits, are in danger of loss or material impairment, except in cases wherein judgment upon failure to answer may be had without application to the court.

2. By the judgment, or after judgment, to carry the same into effect, or to preserve the property pending an appeal, or when an execution has been returned unsatisfied and the judgment debtor refuses to apply his property in satisfaction of the judgment.

3. In the cases provided by law, when a corporation is dissolved, or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights; and, in like cases, of the property within this state of foreign corporations.

4. In such other cases as are now provided by law, or are in accordance with the existing practice, except as otherwise prescribed in this section. (4262) [7892]

1. In general.

Not exclusive (44–144, 46+297). Cited generally (24–464, 478). Subd. 4 (44–144, 46+297). See 125–283, 146+1101. Ancillary (126–440, 148+449). Discretionary (129–229, 152+264, 537). General equity powers (134–425, 159+949). Foreclosure of mechanic's lien (136–236, 161+407). Appropriation of rents and profits by mortgagor (137–1, 162+674). Misapplication of corporate funds (144–154, 174+733). Dissolution of partnership or joint adventure (151–24, 185+952).

162–521, 203+229; 216+59.

Evidence considered, and held not sufficient to justify the appointment of a receiver under the circumstances. 210+288.

2. Action by corporation against officer.

In this action, brought by a corporation to recover money and property alleged to be retained or converted by its president, the appellant, a receiver was appointed for plaintiff on its motion, and appellant was directed to turn over property and money in his hands to the receiver. There is no claim of insolvency on the part of the corporation, no shares of stock have been issued, or subscribed for, no valid agreement for the acquisition of the money or property in appellant's hands is shown, and its right to any recovery at all appears doubtful. Held, on the showing made the court erred in appointing a receiver. 157–224, 195+922.

3. Controversy between corporation stockholders.

In an action to determine the respective interests of stockholders in the capital stock of a corporation, and for an accounting between themselves, a receiver of the corporation during the pendency of the action will be appointed only when clearly necessary to safeguard property or property rights. 161–6, 200+845.

Showing that there is a controversy between the stockholders concerning their respective interests in the corporation and concerning the profits which one has appropriated to himself, without showing that the business of the corporation has been mismanaged or its property wasted, dissipated, or endangered, will not justify the appointment of a receiver pendente lite. 161–6, 200+845.

4. Insolvent corporations.

On an appeal from an order assessing stockholders, it is too late to raise objections to the appointment of the receiver which should have been made in opposition to that appointment, or by motion directly attacking it. 162–83, 202+69.

11. Foreign receivers.

A receiver appointed by a Texas court to wind up the affairs of a dissolved Texas corporation is permitted to sue in the courts of this state as a matter of comity. His right, however, are subordinate to those of local creditors. 162–397, 203+221.

12. Bond.

Sufficiency of bond. 161–360, 201+618.

13. Collection of assets.

Collection of official salaries. 166–363, 207+736.

An order directing the receiver of an insolvent corporation to refund money to certain stockholders from whom he had collected it does not have the effect of annulling proceedings in other courts, by virtue whereof he obtained the money. 210+38.

The rule that money paid voluntarily cannot be recovered by the payer does not prevent the court from ordering the receiver to refund money so paid. 210+38.

A "receiver" is an officer of the court, and subject to its control. His possession is the possession of the court. Whatever he does under the order of the court regarding property or money in his hands is the act of the court. 210+38.

14. Operation of business.

Court may authorize receiver to operate a private business temporarily. 161–360, 201+618.

15. Claims against receiver.

Preferred claims. 163–214, 203+611.

16. Receiver's certificates. 161–360, 201+618.

Receiver's certificates. 161–360, 201+618.

17. Removal of receiver.

Neither a party nor a creditor can complain of removal of a receiver by the court, of which the latter is an officer and agent. 156–502, 195+273.

18. Accounting.

The sale by the receivers was an advantageous one as the situation then appeared. Under the facts of the case it is held that the trustee in bankruptcy of the debtor in the receivership proceeding is not entitled to relief against the receivers on their accounting. 157–78, 195+770

19. Attorney's fees. 213+550.

20. Fees.

The receiver not being appointed under chapter 90, G. S. 1913, the limitations places upon the fees therein of a receiver and his attorneys (section 8350, G. S. 1913) do not apply. The court could therefore allow what the services were reasonably worth, and the evidence shows the fees fixed by the court to be the reasonable value thereof. 158–256, 197+487.

9390. Court may order deposit, etc.—When it is admitted by the pleading or examination of a party that he has in his possession or control any money or other

thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court or delivered to such other party, with or without security, subject to further direction. If such order be disobeyed, the court may punish the disobedience as a contempt, and may also require the sheriff or other proper officer to take the money or property and deposit or deliver it in accordance with the direction given. (4263) [7893]

9391. Receivers Bonds to run to state—Bonds given by receivers and trustees appointed by the district court in any action or proceeding shall run to the State of Minnesota for the benefit of all persons in interest. Any person interested may maintain an action in his own name upon any such bond. ('21 c. 17 § 1)

'13 c. 346, legalizes and validates all receivers' deeds to realty with certain error in discription prior to January, 1893; inapplicable to then pending actions.

'21 c. 67, legalizes and validates all receivers deeds to realty by receiver appointed by court outside of state, prior to January 1896; inapplicable to then pending actions.

JUDGMENT

9392. Measure of relief granted—As against a defendant who does not answer, the relief granted to plaintiff shall not exceed that demanded in the complaint. Against all others, he may have any relief consistent with the complaint and within the issue actually tried. (4264) [7896]

1. On default—On default the relief which may be awarded the plaintiff is strictly limited in nature and degree to the relief specifically demanded in the complaint and it matters not that the allegations and proof would justify different or greater relief (32–193, 20+85; 32–293, 20+234; 34–395, 26+122; 37–182, 33+567; 47–464, 50+601; 55–53, 56+463; 68–112, 71+9; 89–470, 95+320). In action to determine adverse claims, plaintiff is entitled, on default, to such relief only as he demands in his complaint, or as comes within its allegations, where demand is imperfectly framed. Judgment awarding excessive relief, so appearing from face of the record, is void for want of jurisdiction, and is open to attack before or after time of appeal, even by one not party, affected thereby in his property rights (101–169, 112+386).

2. After answer—In case there is an answer the court may grant any relief consistent with the case made by the complaint and embraced within the issue (19–17, 1; 21–332; 22–92; 22–564; 28–116, 9+584; 28–450, 10+773; 30–399, 16+462; 32–92, 19+393; 35–451, 29+65; 37–455, 35+178; 39–54, 38+763; 42–526, 44+1030; 43–459, 45+866; 45–203, 47+642; 46–277, 48+1113; 46–548, 49+323, 646; 47–464, 50+601; 58–39, 59+822; 58–149, 59+988; 69–543, 72+814; 73–58, 75+756; 74–484, 77+298, 539; 78–221, 80+970; 81–272, 83+1084). Relief must be granted on issues litigated by consent (see § 9311 note 3). In actions for damages greater damages than prayed cannot be recovered, although there is an answer, but this limitation may always be avoided by amendment (1–126, 101; 3–134, 80; 57–234, 59+304; 72–344, 75+208, 76+41). When a court once takes jurisdiction of a cause it is its duty to determine all rights and obligations pertaining to the subject matter and to grant full measure of relief (5–304, 240; 8–87, 62; 20–511, 459; 24–4; 26–179, 2+489; 32–445, 21+472; 40–184, 41+815; 47–179, 49+739; 51–300, 53+638; 73–474, 76+268; 92–306, 99+886). The prevailing party must be given such relief, either legal or equitable, as he proves himself entitled to, without regard to the prayer for relief. A plaintiff cannot be thrown out of court because he has mistaken the character of his cause of action and remedial right, but only when he has failed to show himself entitled to any relief on the facts proved within the allegations of his complaint. The court, disregarding plaintiff's theory of the case and prayer for relief, should consider the facts proved within the allegations of the complaint in connection with the whole body of the substantive and remedial law of the state and grant relief accordingly—either legal or equitable (30–316, 15+254; 31–239, 17+385; 47–137, 49+693) or a blending of both (31–173, 17+282; 46–422, 49+237; 51–300, 53+638; 71–331, 73+1086; 73–6, 75+759; 86–365, 90+767). Relief of an equitable nature may be awarded in an action of a legal nature and vice versa (20–178, 163; 31–173, 17+282; 47–131, 49+688; 47–179, 49+739; 51–300, 53+638). Interest is a legal incident of damages though not asked for in complaint (124–266, 144+954). Relief governed by facts proved and not prayer (124–281, 144+953). Power to allow alimony despite want of prayer therefor and want of answer (130–472, 153+864; 147–165, 180+238). Relief based on issues litigated and not on prayer (150–332, 185+291). Relief varying from prayer (152–390, 188+1002). Any relief consistent with complaint and within issues subsequently tried may be granted (156– , 194+405).

In discharging an order to show cause why defendants should not be punished for disobeying a temporary restraining order, the court may permit an amendment to the complaint, and, as a condition for the discharge of the order, may require defendants to refrain from doing the act pleaded by the amendment. 156–171, 194+404.

The court is not justified in making a decision in a civil action against a party to the action as a deterrent to others who may seek the aid of the court in protection of their statutory rights. 157–422, 196+646.

In this action for specific performance, the court by the decree properly retained jurisdiction of the parties after its rendition for the purpose of enforcing it; hence a notice, subsequently served upon the attorney who appeared for a nonresident party at the trial of an application for enforcement against him, authorized the court to enforce the same. 160–238, 199+751.

But the court could not by a supplemental decree authorize a personal judgment to be entered for more than the original decree directed or mature a mortgage payable in the future, which the party was to assume and agree to pay so as to include that in the personal judgment. 160–238 199+751.

Res adjudicata. 215+53.

9393. Judgment between parties and against several defendants—Judgment may be given for or against one or more of several plaintiffs, or of several defendants, and, when justice so requires, it shall determine the ultimate rights of the parties on each side as between themselves. When two or more are sued as joint defendants, and the plaintiff fails to prove a joint cause of action against all, judgment may be given against those as to whom the cause of action is proved. And, when a several judgment is proper, the court in its discretion may give judgment for or against one or more of the defendants, leaving the action to proceed against the others. (4265) [7897]

209+871.

1. Between several parties—Object of statute to abolish common law rules and make equity rules applicable to all actions (7–217, 159; 50–157, 52+527). It did not abolish the common law rule that judgment must follow the complaint and that in an action against several defendants on a joint contract the plaintiff must recover against all or none (1–103, 81; 7–217, 159; 11–138, 87; 65–402, 67+1015). This rule, however, was abolished by 1897 c. 303. Judgment may be rendered against part of several defendants (66–487, 69+610, 1069; 73–454, 76+254).

2. Determining ultimate rights of parties—The statute provides that the court may "determine the ultimate rights of the parties on each side" (37–49, 33+544; 60–418, 62+543. See 22–1) but this determination must be confined to the issues presented by the complaint. The relief which the defendants may have, as against each other, must be framed on the facts involved in the litigation of the plaintiff's claim, and as a part of the adjustment of that claim, and not on claims with which plaintiff has nothing to do and are properly the subject of an independent action (50–157, 52+527; 55–489, 57+210; 64–531, 67+639). If new issues are to be formed it must be by means of a cross-complaint and even then the new issues must have relation to the subject of the original action (69–319, 72+129).

3. On joint obligation—This provision was enacted for the purpose of abrogating the common law rule that in an action on a joint obligation against several defendants the plaintiff must recover against all or none. It overruled a line of early cases (1–103, 81; 7–217, 159; 11–138, 87; 11–331, 234; 22–203; 60–418, 62+543). Plaintiff may now allege a joint contract and recover on proof of a joint and several contract or a joint contract as to part of the defendants (22–540; 27–56, 6+417; 47–574, 50+823; 56–8, 57+160; 57–140, 58+872; 60–336, 62+392; 60–418, 62+543; 83–346; 86+344). See 127–167, 149+22.

4. Against one or more of several defendants—Provision held inapplicable to action on joint obligation (65–402, 67+1015). In action against maker, and guarantors of payment, of a promissory note, plaintiff may enter several judgment on verdict against maker without waiting until trial of issues with other defendants (57–374, 59+311; 71–185, 73+858). Matter rests in the discretion of the court and judgment cannot regularly be entered without an order (57–267, 59+195). Sued jointly plaintiff may prevail against one defendant, though failing against other (123–43, 142+932).

9394. Same, how signed and entered—Contents— The judgment in all cases shall be entered and signed by the clerk in the judgment book. A copy thereof, also signed by the clerk, shall be attached to the judgment roll. It shall conform to the verdict or decision, and clearly specify the relief granted, or other determination of the case. (4266) [7898]

1. Entry by clerk—In all actions whether of a legal or equitable nature, whether the trial is by jury, court or referee, the judgment is entered by the clerk (12–60, 27; 15–102, 77). He acts in a ministerial rather than a judicial capacity (13–46, 39; 69–491, 72+694). His act is the act of the court and the judgment entered is the judgment of the court (3–67, 30; 4–473, 366; 10–178, 144; 15–102, 77; 36–341, 31+56).

2. Signing—It is provided by rule of court that "judgments and copies to annex to the judgment roll shall in all cases be signed by the clerk, and no other signature thereto shall be required" (rule 45, district court. See 3–67, 30; 11–45, 24). Failure of clerk to sign judgment renders it irregular but not void (14–464, 346; 14–537, 408). Judgment signed by judge and not by clerk is merely irregular in form (135–235, 159+566, 160+765).

3. What constitutes judgment book—The statutes provide that the clerk shall keep a judgment book in which shall be entered the judgment in each action (10–303, 238; 14–464, 346; 19–17, 1), and that the judgment so entered shall specify clearly the relief granted or other determination of the case (13–46, 39, 37–533, 35+377; 69–491, 72+694). The writing out of the judgment in full by the clerk in the judgment book constitutes the entry of judgment (10–303, 238; 13–46, 39; 15–63, 43; 19–452, 393; 37–533, 35+377). Regularly the judgment in the judgment roll is a copy of the judgment in the judgment book (37–533, 35+377); but if the clerk irregularly enters the original judgment in the judgment roll instead of in the judgment book the judgment is not void (73–361, 76+199. See 77–54, 79+594).

4. Judgment must conform to decision—69–491, 72+694; 122–163, 142+152.

9395. Judgment in replevin—In an action to recover the possession of personal property, judgment may be rendered for the plaintiff and for the defendant, or for either. Judgment for either, if the property has not been delivered to him, and a return is claimed in the complaint or answer, may be for the possession, or the value thereof in case possession cannot be obtained, and damages for the detention, or the taking and withholding thereof. When the prevailing party is in possession of the property, the value thereof shall not be included in the judgment. If the property has been delivered to the plaintiff, and the action be dismissed before answer, or if the answer so claim, the defendant shall have judgment for a return, and damages, if any, for the detention, or the taking and withholding, of such property; but such judgment shall not be a bar to another action for the same property or any part thereof. (4267) [7899]

Where the prevailing party is not in possession at the time of the trial the judgment must always be in the alternative, that is, for the possession of the property, or the value thereof in case possession cannot be obtained (14–343, 460; 14–554, 422; 21–51; 24–37; 24–383; 57–264, 59+189; 64–256, 66+974; 68–293, 71+384; 68–303, 71+273; 83–351, 86+350; 88–56, 92+506). Neither party has a right to take a mere money judgment (57–264, 59+189; 64–256, 66+974). When the prevailing party is in possession it is error to insert the value of the property (34–506, 26+733; 78–1, 80+693). Successful party has right to judgment for possession although he is in possession, for such judgment determines the title (12–186, 114; 34–506, 26+733; 86–168, 90+376). Alternative judgment for value of property is a money judgment which authorizes interest on amount from date of order for judgment (90–336, 96+915). Where property has been delivered to plaintiff and on the trial the action is dismissed for failure of proof defendant is entitled to judgment for a return of the property or for its value, if in his answer he has demanded such return (68–303, 71+273). Where plaintiff's title is divested after suit brought or before trial he can, as against the owner or person entitled to the possession, recover only damages from unlawful detention up to the time his title or right of possession was divested. He is not entitled to judgment for the return of the property or for its value (42–102, 43+835). Right to alternative judgment may be waived (37–509, 35+372; 39–102, 38+801; 51–460, 53+761. See 60–525, 63+103). Judgment for value as a bar (61–401, 63+1039).

The party entitled to possession of property in an action of replevin may waive the right to an alternative judgment for its value. 159–345, 198+1003.

Where a plaintiff obtains possession of property in replevin he is estopped from denying it was of the value which he alleged in the proceedings by which he obtained such possession. 162–40, 202+27.

9396. Treble damages for trespass—Whoever shall carry away, use or destroy any wood, timber, lumber, hay, grass, or other personal property of another person, without lawful authority, shall be liable to the owner thereof for treble the amount of damages assessed therefor in an action to recover such damages. But if he shall show, upon the trial, that he had probable cause to believe that such property was his own, or was owned by the person for whom he acted, judgment shall be given for the actual damages only, and for costs. (4268) [7900]

The phrase "or other personal property" is limited to products of the soil (31–541, 18+821; 38–154, 36+102). Not applicable to master for trespass by servant (37–517, 35+379). Good faith as defense (58–84, 59+831).

166–215 208+3.

The verdict was amply warranted by the evidence. 165–65, 205+701.

The evidence did not require the jury to find that the defendant had good cause to believe that he owned certain lumber which was taken from the plaintiff by one of defendant's employees, but warranted the jury in awarding plaintiff treble damages. 165–358, 206+443.

9397. Damages for libel—In an action for damages for the publication of a libel in a newspaper, the plaintiff shall recover no more than special damages, unless a retraction be demanded and refused as hereinafter provided. He shall serve upon the publisher at the principal place of publication, a notice, specifying the statements claimed to be libelous, and requesting that the same be withdrawn. And if a retraction thereof be not published in as conspicuous a place and type in said newspaper as were the statements complained of, in a regular issue thereof published within one week after such service, he may allege such notice, demand, and failure to retract in his complaint, and may recover both special and general damages if his cause of action be maintained. And, if such retraction be so published, he may still recover general damages, unless the defendant shall show that the libelous publication was made in good faith and under a mistake as to the facts. If the plaintiff was a candidate for office at the time of the libelous publication, no retraction shall be available unless published in a conspicuous place on the editorial page, nor if the libel was published within one week next before the election: Provided, that this section shall not apply to any libel imputing unchastity to a woman. (4269) [7901]

40–117, 41+936; 45–303, 47+781; 46–432, 49+203; 63–384, 65+652; 74–452, 77+204; 81–333, 84+113. Sufficiency of notice (99–246, 109+231). Misconduct in office (109–341, 124+229). "Unchastity" (114–179, 130+850). Notice of retraction (126–239, 148+102). Demand for retraction inapplicable to those neither owners nor publishers of newspaper (131–355, 155+212).

Plaintiff was directly disparaged in his calling as a renter of farms by the following statement made to the person from whom he rented a farm: "What did you rent it to him for? He isn't any good He beat my brother out of some hay and he lost some of his cattle, and I can tell you a lot more." These words bore directly upon plaintiff's integrity and character as a farm tenant and were actionable per se. 156–85, 194+101.

The letter was libelous per se. There was evidence, extrinsic and intrinsic, of actual malice. An award of punitive damages was justified. 156–247, 194+754.

A communication, made in good faith upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, public or private, either legal, moral, or social, if made to a person having a corresponding interest or duty, is privileged. 163–226, 203+974.

A newspaper article, which is not self-evidently defamatory, is not libelous per se. 166–173, 207+497.

9398. Judgment after death of party—Judgment may be entered after the death of a party upon a verdict, or decision upon an issue of fact, rendered in his lifetime. Such judgment shall not be a lien on real property of the decedent, but shall be payable, in the course of administration of his estate, as if allowed by the probate court against his estate. (4270) [7902]

13–46, 39; 27–475, 8+383.

Proceedings to forfeit automobile used in violation of liquor laws did not abate on death of the owner. 157–138, 195+778.

Under the facts stated in the opinion, an order should not have been made directing the filing of findings of fact and conclusions of law and entry of judgment nunc pro tunc after the death of one of the parties. 213+35.

9399. Judgment roll, how made up—Upon entering the judgment, the clerk shall forthwith attach together and file the following papers, which shall constitute the judgment roll:

1. If the complaint be not answered, the summons and proof of its service, the complaint, proof that no answer has been received, any report, decision or order filed in the case, and a copy of the judgment.

2. In all other cases, the summons and pleadings, notices of motion and orders made thereon, a copy of the judgment, the verdict, decision, or report, all offers of the defendant, and all orders involving the merits of the action and affecting the judgment. If any original paper be lost or withheld, the court may permit a copy to be filed and used in its stead. A settled case or bill of exceptions, if one be filed, shall be attached to the judgment roll upon the request of either party. (4271) [7903]

Regularly the making and filing of the judgment roll immediately follows the entry of judgment in the judgment book and the judgment in the roll is a copy of the judgment in the judgment book (13–46, 39; 37–533, 35+377), but this order of entry is not jurisdictional. Entry of the original judgment in the roll prior to its entry in the judgment book does not render the subsequent proceedings void (73–361, 76+199; 77–54, 79+594). Proof of service of summons is included in the judgment roll (39–336, 40+163). Bond for costs not included (7–506, 412).

Cited (101–180, 112+12).

Malicious prosecution of civil suit not maintainable wherein claim is reduced to judgment (145–452, 177+634).

The district court has the inherent power to replace its records when lost or destroyed by accident, negligence, or wantonness. 163–114, 203+614.

The substituted papers become of equal validity to those which have disappeared. 163–114, 203+614.

9400. Lien of judgment—Every judgment requiring the payment of money shall be docketed by the clerk upon the entry thereof, and, upon a transcript of such docket being filed with the clerk in any other county, such clerk shall also docket the same. From the time of such docketing the judgment shall be a lien, to the amount unpaid thereon, upon all real property in the county then or thereafter owned by the judgment debtor. Such judgment shall survive, and the lien thereof continue, for the period of ten years next after its entry, and no longer. Provided, that no judgment, except for taxes, shall be docketed until the judgment creditor, or his agent or attorney, shall have filed with the clerk an affidavit, stating the full name, occupation, place of residence, and postoffice address of the judgment debtor, to the best of affiant's information and belief; and, if such residence be within an incorporated place having more than five thousand inhabitants, the street number of both his place of residence and place of business, if he have one, shall be stated. If the clerk shall violate this provision, neither the judgment nor the docketing thereof shall be invalid, but he shall be liable to any person damaged thereby in the sum of five dollars. (R. L. § 4272, amended '13 c. 112 § 1) [7905]

DOCKETING JUDGMENT

Cited (102–245, 113+450; 99–433, 109+1001).

1. A ministerial duty—13–46, 39.

2. Time—Necessity of prior judgment—Regularly the docketing of a judgment follows immediately the filing of the judgment roll. These three acts follow in regular sequence: (1) entry of judgment in the judgment book; (2) making up and filing the judgment roll; (3) docketing the judgment (37–533, 35+377; 50–310, 52+864). Until there is a judgment there can be no valid docketing (31–505, 18+645; 37–533, 35+377; 73–361, 76+199). The docketing must follow the entry of judgment. Formerly it was held that there could be no valid docketing until after the entry of judgment in the judgment book (37–533, 35+377). It is now held that a prior entry of the judgment in the judgment roll alone will sustain a docketing (73–361, 76+199; 77–54, 79+594). There may be a valid docketing without a judgment roll if there is a prior entry of the judgment in the judgment book (13–46, 39). A judgment may be docketed before the taxation of costs (37–461, 35+270).

3. Necessity and object of—50–264, 52+862; 50–310, 52+864; 58–365, 59+1086.

4. Docket entries unimpeachable collaterally—25–183. See 31–505, 18+645.

5. As evidence of judgment—A transcript of the docket of a judgment is prima facie evidence of the docketing (13–46, 39; 19–17, 1), but not of the judgment (10–303, 238). Docket entries which are merely minutes of proceedings are not admissible as evidence of a judgment (50–310, 52+864).

6. Misnomer—11–78, 45; 19–17, 1; 35–213, 28+511; 52–443, 54+484; 68–4, 70+777.

7. Effect of appeal—4–318, 235; 22–81.

JUDGMENT LIEN

8. Nature of lien—1–275, 210; 12–572, 486; 15–245, 190; 19–347, 300; 29–322, 13+145; 58–365, 59+1086; 85–283, 88+755.

9. Duration of lien—The ten year limitation is absolute and cannot be extended by means of a levy or action (19–347, 300; 28–248, 9+732; 39–330, 40+161; 45–231, 47+794; 51–406, 53+717; 56–390, 57+938; 94–216, 102+453). In calculating the ten years the first day should be excluded and the last day included (16–230, 202; 45–231, 47+794). The death of a judgment debtor does not extend the life of the lien (22–380).

10. Upon what estates and interests—Interest of obligor under bond to convey real estate (25–382; 28–408, 10+427; 30–424, 15+869; 36–314, 31+51; 42–279, 44+251; 92–303, 100+4). The interest of a mortgagee where the mortgage is in the form of an absolute deed (34–547, 27+66). The interest of a vendee under a subsisting contract for the sale of land under which he has entered and paid part of the purchase price (43–513, 45+1099; 91–482, 98+463; 140+132). The interest of a trustee who, without the knowledge of his cestui que trust, purchases real estate with trust funds (30–537, 16+449). The interest of a debtor in real estate fraudulently conveyed (32–84, 19+390; 36–494, 32+852; 43–137, 45+4; 88–311, 92+1125). A bare legal title unaccompanied by any beneficial interest (92–303, 100+4). Statutory interest of one spouse in property of the other (§ 7238; 89–432, 95+216, 769. See 92–527, 100+366). A mortgagor's equity of redemption (45–116, 47+644). Creditor of one selected as medium of conveyance by husband to wife acquires no interest in land by a judgment against such person, though conveyance was made in fraud of creditors (98–177, 107+961). Reversionary interest of assignor for benefit of creditors is subject to lien of judgment entered and docketed against him pending insolvency proceedings, subject to be defeated by sale of the land by assignee before proceedings terminated (103–104, 114+360). On sale by order of probate court to pay debts or expenses, surplus belonging to heir must be applied to payment of judgment against him, docketed after death of ancestor and before sale (108–60, 121+229).

See 115–508, 133+75; 121–48, 140+132.

Status as to deed adjudged an equitable mortgage (128–126, 150+396). Person acting as medium of conveyance (130–365, 153+861).

The plaintiff was the owner of the legal title, and the defendant of the equitable title under a contract of purchase. The intervener docketed a judgment against the defendant which became a lien upon his equitable title. To enable the defendant to obtain a loan, pay the amount due on the contract of purchase, and acquire the legal title, the plaintiff made and recorded a deed to the defendant, without consideration. The intervener's judgment became an apparent lien upon the legal title in the defendant. The loan failing the defendant had no greater interest in the land than he had before. 161–413, 201+612.

A judgment is a lien upon the title of the judgment debtor holding under an unrecorded deed, though, by the recording act, a judgment does not take precedence *of an unrecorded deed when the title to the land is not* of record in the name of the judgment debtor. 165–198 206+170.

11. Conflicting liens—Successive judgment liens take effect in the order of the docketing and a junior judgment creditor cannot secure a preference merely by virtue of superior diligence in taking steps to enforce his lien (36–494, 32+852). Where one conveys land and at the same time takes back a mortgage for a part of the purchase money the lien of the mortgage takes precedence of a lien for the prior judgment against the mortgagor (6–402, 270. See 8–207, 178; 36–82, 30+430; 71–319, 73+976). Priority where transcripts of two judgments were filed at the same time (95–286, 104+7). Subsequently docketed judgment against grantor of absolute deed given as security (123–293, 143+720).

12. Limitation of lien—In all cases the lien of the judgment is limited to the actual interest of the judgment debtor in the land (6–402, 270. See 1–275, 210; 30–537, 16+449). Tax certificates (146–212, 178+499).

13. Debtor cannot defeat—30–177, 14+806.

14. Death of debtor—A judgment lien cannot be acquired on the land of the judgment debtor after his death (62–135, 64+155; 77–138, 79+660). The death of a judgment debtor does not extend the life of a lien (22–380).

15. Priority of liens as affected by recording act—Aside from the recording act judgment creditors are not regarded as bona fide purchasers (2–264, 226; 30–537, 16+449; 74–122, 76+1126). The recording act gives a judgment lien priority over unrecorded conveyances of which the judgment creditor had no notice at the time of the docketing (11–104, 62; 28–408, 10+427; 31–66, 16+468; 43–213, 45+157; 43–541, 45+1136; 64–91, 66+131; 73–467, 76+263; 74–122, 76+1126; 87–348, 92+8); otherwise when he had notice either actual or constructive (24–281; 29–322, 13+145; 35–534, 29+345; 36–314, 31+51; 43–213, 45+157; 50–234, 52+651; 58–359, 59+1085). A judgment takes precedence of unrecorded conveyances only as to such titles as appear of record (5–409, 332; 20–453, 407; 29–322, 13+145; 37–56, 33+213; 59–285, 61+144; 72–420, 75+720; 74–122, 76+1126; 75–207, 77+828). The recording act does not give judgment liens precedence over resulting trusts (74–122, 76+1126).

9401. New county—Docketing old judgments—Real estate tax judgments—When a new county is created, the clerk of the district court thereof shall transcribe into his records all the docket entries relative to judgments for the payment of money, including real estate tax judgments, against lands situated in such new county, rendered within the ten years next preceding such creation and docketed in the counties from which such new county was set off, and such transcribed entries shall have the same effect as transcripts of dockets of judgments made by the clerk of court of the county where the originals were docketed and filed in another county. For such transcription the clerk shall receive from the new county fifteen cents for each judgment. (R. L. § 4273, amended '07 c. 159 § 1) [7906]

9402. Same—Federal court judgment—Every judgment requiring the payment of money rendered in a circuit or district court of the United States within this state shall be, from the docketing thereof in said court, a lien upon the real property of the judgment debtor situated in the county in which it is so docketed, the same as a judgment of the state court. And a transcript of such docket may be filed with the clerk of the district court of any other county, and shall be docketed in his office as in the case of judgments of the state courts, and with like effect. (4274) [7907]

244 Fed. 915.

9403. Lien discharged by deposit of money, when—Whenever an appeal shall be taken from a docketed judgment, or any motion shall be pending to set the same aside or for a new trial, the judgment debtor may deposit in court an amount sufficient to secure the payment of such judgment, with all interest and costs likely to accrue thereon pending the appeal or motion. The court shall make an order approving such deposit, and thereupon the judgment lien upon the real estate of the debtor shall cease and be transferred to the money so deposited. A certified copy of such order may be filed with the clerk in any county in which a transcript of the judgment shall have been docketed. (4275) [7908]

127–43, 148+1068.

9404. Assignment of judgment—Mode and effect—Every assignment of a judgment shall be in writing, signed and acknowledged by the assignor, and no such assignment shall be valid as against a subsequent purchaser of the judgment in good faith for value, or against a creditor levying upon or attaching the same, unless it is filed with the clerk and an entry thereof made in the docket. When so filed and entered, none but the assignee, his agent or attorney, shall be authorized to collect or enforce such judgment: Provided, that the lien of an attorney thereon shall not be affected by the assignment. (4276) [7909]

Applicable to an assignment of a part of a judgment (52–417, 54+372). As between the parties an assignment is valid though not filed and entered (70–380, 73+165). Effect of attorney's lien (39–373, 40+254). Validity affects subsequent purchasers and attaching auditors (127–205, 149+200; 154–257, 191+591).

Evidence held to show assignment. 156–30, 194+93.

The mode of assigning judgments prescribed, is not exclusive. Judgments have the assignable quality of choses in action. An assignment in any form passes an equity which the courts will recognize and protect. An assignment defectively acknowledged, but otherwise regular on its face, gives the assignee the right to have execution to enforce the judgment 159–458, 199+235.

9405. Judgments, procured by fraud, set aside by action—Any judgment obtained in a court of record by means of perjury, subornation of perjury, or any fraudulent act, practice, or representation of the prevailing party, may be set aside in an action brought for that purpose by the aggrieved party in the same judicial district within three years after the discovery by him of such perjury or fraud. In such action the court may either enjoin the enforcement of the judgment or command the satisfaction thereof, may compel the party procuring the same to restore any property received by virtue thereof, and may make such other or further order or judgment as justice shall require; but no right or interest of a third party acquired under such judgment in good faith, and without knowledge of the wrong complained of, shall be affected by the action herein provided for: Provided, that if during the pendency of such action the enforcement of such judgment or an action thereon shall become barred by the statute of limitations, and such judgment is sustained, the same may be enforced, or an action commenced thereon, within one year after such action is finally determined. (4277) [7910]

1. Nature of action—The action is in the nature of a bill of equity to set aside judgment and the relief asked is of an extraordinary character (69–418, 72+702; 88–431, 93+310). The statute is not designed to give an action which will take the place of a motion for a new trial (60–21, 61+672).

2. Statute constitutional—24–345; 26–137, 1+838.

3. Concurrent with remedy by motion—88–431, 93+310; 140–285, 167+1029.

4. *Statute construed strictly*—40–410, 42+89; 42–63, 43+797; 67–136, 69+711; 71–371, 74+148; 89–300, 94+885; 120–493, 139+1061.

5. Stranger to action cannot maintain—40–410, 42+89.

6. Complaint—It must clearly point out the act of perjury or subornation thereof or the fraudulent acts or practices relied on and show on its face that it is brought within the statutory time. A general charge of fraud is insufficient (38–230, 36+341; 42–63, 43+797; 55–154, 56+591). Where it is claimed that the plaintiff was prevented from defending by the fraud of the prevailing party the plaintiff in his complaint must state facts from which it affirmatively appears that he was entirely free from contributory negligence in suffering

judgment to be taken against him (69–418, 72+702; 71–371, 74+148). The complaint should show that the plaintiff has suffered damage (21–175). A complaint held sufficient (59–432, 61+460). See 135–433, 161+143; 151–302, 186+694, 194+944.

7. For perjury—Where the pleadings disclose the fact to be proved so that the opposite party knows what the pleader will attempt to prove and is not under any necessity to depend on the other party to prove the fact as he himself claims it, an action will not lie under the statute to set aside a judgment procured by perjury committed in proving such fact (42–63, 43+797; 55–154, 56+591; 59–432, 61+460; 67–136, 69+711; 89–300, 94+885; 115–439, 132+915). When issues were defined by pleadings and no deceit was practiced as to proofs to be offered, action will not lie under G. S. 1894, c. 5434 to vacate judgment on ground that it was obtained by fraud and perjury (99–481, 109+1115). Action cannot be maintained on bare allegation that on issue of fact, so made that each party knows what the other will attempt to prove, and where neither has right, or is under necessity, to depend on other to prove fact to be as he himself claims it, there was false or perjured testimony by successful party or his witnesses (106–210, 118+795). See 120–380, 139+708; 126–414, 148+455; 134–341, 159+836.

The complaint in an action to set aside a judgment claimed to have been procured by perjury, which shows that the alleged perjury was directed to an issue squarely made by the pleadings, and that in respect thereto neither party depended upon the other for any of his proof, does not state a cause of action. The construction with respect to such a case was settled by Hass v. Billings, 42 Minn 63, 43 N. W. 797, and the rule there adopted controls this case. 156–403, 194+944.

A party cannot set aside a judgment upon the ground that it was obtained by perjury, when he is advised by his adversary's pleading what he will prove, is in position to investigate and meet his claim, is not misled, and is not dependent upon him for proof. 161–367, 201+434.

8. For fraudulent practices on adverse party—59–432, 61+460; 62–160, 64+157; 80–32, 82+1088; 89–300, 94+885; 120–493, 139+1061. Cited (114–454, 131+627). 140–285, 167+1029.

9. For fraud on court—93–195, 101+163; 120–380, 139+708.

10. In action for divorce—38–230, 36+341; 64–549, 67+663; 93–195, 101+163; 120–380, 139+708; 127–411, 149+667; 133–148, 157+1086.

11. Laches—59–432, 61+460; 120–380, 139+708; 133–148, 157+1086; 142–103, 170+919.

12. Relief which may be awarded—26–137, 1+838; 29–235, 12+704; 46–548, 49+323, 646; 64–549, 67+663; 88–431, 93+310.

Section was not intended to give a retrial of the same issues tried and determined in the original action. 167–424, 209+325.

Under the law of Iowa, judgments rendered in its courts are subject to attack for fraud in instituting the suit or giving the court jurisdiction, but not for fraud or perjury in determining the merits of the cause of action. Whether plaintiff can produce sufficient evidence of such fraud and conspiracy as will suffice to invalidate the judgment will be for the determination of the trial court. 210+70.

See in general—133–463, 157+1069; 136–57, 161+259.

9406. How discharged of record—Upon the satisfaction of a judgment, whether wholly or in part, or as to all or any of several defendants, the clerk shall enter such satisfaction in the judgment book, and note the same, with the date thereof, on the docket. If the docketing be upon a transcript from another county, the entry on the docket shall be sufficient. A judgment shall be deemed satisfied when there is filed with the clerk:

1. An execution satisfied, to the extent stated in the sheriff's return thereon.

2. A certificate of satisfaction signed and acknowledged by the judgment creditor.

3. A like certificate signed and acknowledged by the attorney of such creditor, unless his authority as such has previously been revoked and an entry of such revocation made upon the register; but the authority of an attorney to satisfy a judgment shall cease at the end of two years from its entry.

4. An order of the court, made on motion, requiring the execution of a certificate of satisfaction, or directing satisfaction to be entered without it.

5. Where a judgment is docketed on transcript, a copy of either of the foregoing documents, certified by the clerk of the court in which the judgment was originally entered and in which the originals were filed.

A satisfaction made in the name of a partnership shall be valid if executed by a member thereof while the partnership continues. The judgment creditor, or his attorney while his authority continues, may also satisfy a judgment of record by a brief entry on the register, signed by him and dated and witnessed by the clerk, who shall thereupon note such satisfaction on the margin of the docket. And, whenever a judgment is satisfied otherwise than by return of execution, the judgment creditor or his attorney shall give a certificate thereof. (4278) [7911]

Whenever a judgment is satisfied in fact otherwise than on execution it is the duty of the party or attorney to give an acknowledgment of satisfaction, and, on motion, the court may compel it, or may order the entry of satisfaction to be made without it. If the facts are in dispute the court may deny the motion and relegate the parties to an action (16–451, 407; 26–345, 4+229; 36–155, 30+757; 91–254, 97+886). Inapplicability to actions in ejectment (110–6, 124+446).

A district court has jurisdiction to try an action which seeks to restrain the enforcement of a debt, evidenced by a judgment in another district court of the state, by execution when the debt has been satisfied, or when the plaintiff has ceased to be liable upon the judgment. 210+396.

9407. Satisfaction and assignment by state—The state auditor may execute satisfactions and assignments of judgments in behalf of the state. (4279) [7912]

9408. Payment and satisfaction by clerk—Whenever a judgment debtor or other person whose property is subject to the lien of a money judgment shall file with the clerk an affidavit that he has made diligent search and inquiry and is unable to find any person having authority to receive payment and give satisfaction of such judgment, he may pay the amount due thereon to the clerk, who, upon receipt thereof, shall note satisfaction of such judgment on the docket and register of the action wherein it was entered, and issue under his seal to the person paying the same a certificate reciting such payment and satisfaction. The clerk shall at once notify all persons appearing of record to have an interest in such judgment, including the attorney of the judgment creditor, of its payment and satisfaction, and upon demand shall pay such money to the person entitled thereto, taking duplicate receipts therefor, one of which he shall retain, and file the other in the case. (4280) [7913]

154–38, 191+259.

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

9409. Discharge of judgments against bankrupts—Any person discharged from his debts pursuant to the act of Congress known as "An act to establish a uniform system of bankruptcy throughout the United States, approved July first, eighteen hundred and ninety-eight," and all amendments thereto, may, after the expiration of one year from the date of such discharge, apply to any court of record in which a judgment shall have been rendered or a transcript thereof filed against him, for the discharge thereof from record, and if it shall appear to the court that he has thus been discharged from the payment of such judgment, the court may order and direct that such judg-

ment be discharged and satisfied of record, and thereupon the clerk of such court shall enter a satisfaction thereof; provided, however, that no such application shall be made or order granted except upon ten days' notice of such application to the judgment creditor whose judgment is sought thereby to be satisfied of record, his executors, administrators or assigns, served in the manner provided for the service of notices in civil actions, or in case such creditor, or his executors, administrators or assigns, shall not reside within the state of Minnesota, in such manner as the court shall provide by order; provided, further, that nothing in this act shall be construed to apply to judgments not listed among the liabilities of the bankrupt in his petition to be adjudged a bankrupt under the act of July first, eighteen hundred ninety-eight and all amendments thereto. ('09 c. 230 § 1) [7914]

125–286, 146+1098; 137–364, 163+672; 142–87, 170+918.

9410. Joint debtors—Contribution and subrogation—Whenever a judgment against two or more persons shall be enforced against or paid by one of them, or one of them shall pay more than his proper share as between himself and the other judgment debtors, he may continue the judgment in force for the purpose of compelling contribution; and if, within ten days after such enforcement or payment, he shall file with the clerk a notice of the amount paid by or collected from him in excess of his proper share, and of his claim for contribution, the clerk shall make a note thereof on the margin of the docket. Thereupon the judgment shall remain in effect in favor of the party filing such notice for the amount and against the party in such notice specified. (4281) [7915]

37–109, 33+320; 101–290, 112+223. Cited (103–204, 114+654, 837). See 125–478, 145+163.

9411. Several judgments against joint debtors—All parties to a joint obligation, including negotiable paper, copartnership debts, and all contracts upon which they are liable jointly, shall be severally liable also for the full amount thereof. They may be sued thereon jointly, or separate actions may be brought against each or any of them, and judgment rendered in each, without barring an action against any of those not included in such judgment, or releasing any of those not sued: Provided, that the court, upon its own motion or on application of any interested party, may require the plaintiff to bring in as defendants all the parties jointly liable on the obligation in suit. (4282) [7916]

84–251, 87+776; 92–143, 99+638; 97–201, 106+311; 104–247, 116+490; 106–58, 118+63. Action may be maintained on contract or for tort, against one of several jointly liable (101–39, 111+727). Rule that lex fori governs in matters of procedure applies (101–37, 111+727). See 125–266, 146+1094. Common law rule abrogated (141–47, 169+274). A several judgment on partnership obligation against one partner (150–227, 184+1024).

9412. Discharge of joint debtor—A creditor who has a debt, demand, or judgment against a copartnership, or several joint obligors, promisors, or debtors, may discharge one or more of such copartners, obligors, promisors, or debtors, without impairing his right to recover the residue of his debt or demand against the others, or preventing the enforcement of the proportionate share of any undischarged under such judgment. The discharge shall have the effect of a payment by the party discharged of his equal share of the debt, according to the number of debtors, aside from sureties: Provided, that such discharge shall not affect the liability of such copartners, obligors, promisors, or debtors to each other. In an action by the creditor to recover against those not discharged, the complaint shall set forth that the contract was made with the defendants and the party discharged, and that such party has been discharged. (4283) [7917]

83–21, 85+824; 86–16, 89+1129.

9413. By confession—On statement—A judgment for money due or to become due, or to secure any person against a contingent liability on behalf of the defendant, or for both, may be entered in the district court by confession and without action, upon filing with the clerk a statement, signed and verified by the defendant, authorizing the entry of judgment for a specified sum. If the judgment be for money due or to become due, the writing shall state concisely the facts out of which the debt arose, and show that the sum confessed is justly due or to become due. If the judgment be for the purpose of securing the plaintiff against a contingent liability, the writing shall state concisely the facts constituting the liability, and show that the sum confessed does not exceed the same. The clerk shall enter judgment for the amount specified, as in other cases, and shall attach a copy of the judgment to the statement, which shall constitute the judgment roll. The judgment shall be final, and, unless special provision be made for a stay, execution may issue immediately. (4284) [7918]

Sufficiency of signing (7–487, 393). Sufficiency of statement (7–487, 393; 27–177, 6+628; 27–478, 8+380; 45–341, 48+187; 73–114, 75+1037; 101–290, 112+223). Effect of insufficient statement (27–478, 8+380; 30–424, 15+869; 73–114, 75+1037). Who may attack judgment (4–450, 352; 7–487, 393; 27–177, 6+628; 27–478, 8+380; 30–424, 15+869; 40–258, 41+946; 45–341, 48+187; 73–114, 75+1037). Mode of attack (27–177, 6+628; 73–114, 75+1037). Amendment nunc pro tunc (27–478, 8+380; 40–258, 41+946). Vacation in part (7–487, 393; 27–478, 8+380). Duty of clerk (101–290, 112+223). See 135–432, 161+143.

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

9414. On plea—Judgment in the cases mentioned in § 9413 may also be entered in the district court in the manner therein provided, and with like effect, upon filing with the clerk a plea of confession signed by an attorney of such court, together with an instrument signed by the debtor authorizing such confession; but such instrument must be distinct from that containing the bond, contract, or other evidence of the demand for which judgment is confessed. (4285) [7919]

9415. Submission without action—Parties to a controversy which might be the subject of a civil action may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real, and that the proceedings are had in good faith to determine the rights of the parties. The court shall thereupon hear and determine the case at a general or special term, and order judgment thereon as in a civil action. Judgment shall be entered as in other cases, and the case, submission, and a copy of the judgment shall constitute the judgment roll. The judgment may be enforced, and shall be subject to appeal, as in other cases. (4286) [7920]

Cited (100–85, 110+355; 108–142, 121+628; 112–167, 127+569; 115–102, 132+8; 115–460, 133+169; 135–314, 160+792; 145–322, 177+135). '17 c. 12, authorizes clerks of the district court in counties of a population not less than 45,000 nor more than 50,000, to transcribe the judgments

in force in their office into a new judgment docket, prescribing the conditions in reference thereto, same to be completed by June 1, 1917; inapplicable to any county where salary is fixed by any special law.

EXECUTIONS

9416. When enforced—The party in whose favor a judgment is given, or the assignee of such judgment, may proceed to enforce the same, at any time within ten years after the entry thereof, in the manner provided by law. (4287) [7921]

An execution issued more than ten years from entry of judgment is void and not merely voidable (20–194, 172). An action will not lie to enforce the lien of a judgment where the time prescribed for enforcing it by execution has expired (19–347, 300; 39–330, 40+161. See 35–493, 29+193). It is not enough to initiate proceedings in execution prior to the expiration of the statutory period. They must be completed (28–248, 9+732; 45–231, 47+794). In computing the period of ten years the day upon which the judgment is entered is to be excluded (45–231, 47+794). Execution may issue before costs are inserted in the judgment (37–461, 35+270).

9417. Judgments, how enforced—Where a judgment requires the payment of money, or the delivery of real or personal property, it may be enforced in those respects by execution. Where it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, or the person or officer who is required thereby or by law to obey the same; and, if he refuses, he may be punished by the court as for contempt, and his obedience thereto enforced. (4288) [7922]

16–230, 202.

As to real property (122–163, 142+152). See 126–332, 148+279.

9418. Kinds of execution—There shall be two kinds of executions, one against the property of the judgment debtor, and the other for the delivery of real or personal property, or such delivery with damages for detaining, or for taking and withholding, the same. (4289) [7923]

An alias execution may issue under our practice as at common law (29–87, 12+145). A writ of assistance may issue in an action to foreclose a mortgage (76–268, 79+103). Cited (19–347, 300).

9419. Execution, how issued—Contents—The execution shall be under the seal of the court, subscribed by the clerk, tested in the name of the district judge, directed to the sheriff, or to the coroner if the sheriff be a party or interested, and indorsed by the party applying therefor or his attorney. It shall refer intelligibly to the judgment, stating the court, the county where the judgment roll or transcript is filed, the names of the parties, the amount of the judgment, if it be for money, the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer substantially as follows:

1. If it be against the property of the judgment debtor, to satisfy the judgment, with interest, out of his personal property, and, if sufficient personal property cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter not exceeding ten years.

2. If real property has been attached, and judgment rendered in favor of the plaintiff in the same action, the execution thereon may also direct a sale of all the property which the defendant had in such real estate at the time it was so attached, or at any time after entry of judgment not exceeding ten years. In such case, if after the attachment the judgment creditor has paid taxes on the real property and filed with the clerk the tax receipt, it shall be attached to the judgment roll, and the execution shall also state that it has been filed, and the date and amount thereof, and the date of filing; and, if the property be sold under the execution, the proceeds, after deducting the expenses of sale, shall be first applied to the payment of the amount so paid for taxes, with interest.

3. If it be against real or personal property in the hands of personal representatives, heirs, devisees, legatees, trustees, or tenants of real property, it shall require the officer to satisfy the judgment, with interest, out of such property.

4. If it be against defendants jointly indebted on a contract, a part of whom only have been summoned in the action, it shall issue in form against all; but the party causing it to be issued, or his attorney, shall indorse thereon the names of those defendants who have not been summoned, and it shall not be levied upon the sole property of any such defendant; but it may be levied upon the personal property owned by such defendant as a partner with any or all of the other defendants.

5. If it be for delivery of the possession of real or personal property, it shall require the officer to deliver possession of the same, particularly describing it, to the party entitled thereto; and it may, at the same time, require the officer to satisfy, out of the personal property of the party against whom the judgment was rendered, any costs, charges, damages, rents, or profits recovered thereby, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery thereof cannot be had; and if sufficient personal property cannot be found, then out of the real property, as provided in the first subdivision of this section, and in that respect it shall be deemed an execution against property. (4290) [7924]

The writ must be dated as of the day on which it is issued from the clerk's office and not as of the day on which it is delivered to the sheriff (16–426, 383). It must be under the seal of the court (see 20–196, 175). The fact that it does not run in the name of the state does not render it void (19–17, 1). A misrecital of the date of the judgment is immaterial if the judgment is otherwise sufficiently identified (32–259, 20+187). If an attachment has issued it is not necessary for the execution to refer to the attachment proceedings, but it may be in the ordinary form (58–550, 60+667). Under an execution in which an officer is commanded to satisfy the same out of the property of A and B, judgment debtors, he may seize and sell the separate property of either or the joint property of both (75–275, 77+964). Necessity of exhausting personal property first (24–479; 52–6, 53+1016; 74–282, 77+137). Cited (19–347, 300; 20–194, 172; 25–432; 50–264, 52+862). Alias writ (127–206, 149+201).

9420. When returnable—Inventory—The execution shall be made returnable, within sixty days after its receipt by the officer, to the clerk with whom the judgment roll is filed; but if the officer having such execution shall have levied upon any property before the expiration of such sixty days, he may retain the execution in his hands until he shall have sold such property in the manner prescribed by law: Provided that, upon demand of the judgment creditor or his attorney within such sixty days, the officer shall pay to him all moneys collected upon execution in his hands, after deducting his fees. The officer shall make a full inventory of the property levied on, and return it with the execution. (4291) [7925]

163–114, 203+614.

1. **When returnable**—An officer who knows or has reasonable ground for knowing of the existence of property out of which the execution may be made acts at his peril in not making immediate levy (46–183, 48+780). Where a levy has been made before the return day it may be completed by sale after such day and the officer

may retain the writ in his possession for that purpose (24–20; 24–479; 45–231, 47+794; 66–40, 68+321).

2. **Return**—A return which certifies in general terms that the officer "levied" on certain property is sufficient; it is not necessary to state the particulars of the levy (3–277, 191; 4–407; 309; 5–333, 264; 16–13, 1; 28–469, 10+781). A return of "unsatisfied" is not equivalent to a return that the party had no property, personal or real, out of which the amount specified in the execution, or any part of the same, could be collected. The reasons for the non-satisfaction of the writ ought to be stated (35–540, 29+322). It need not be made within sixty days of its issuance (24–20; 24–479; 45–231, 47+794; 66–40, 68+321). It may be made by an officer after the expiration of his term of office (24–479). In construing the return it is to be presumed in the absence of a contrary showing on its face that the officer has done all that was required of him, both in the prosecution of the case and in the return thereto (3–277, 191; 27–269, 6+790). No formal levy is necessary on real estate (127–206, 149+201).

9421. Execution after death—After the expiration of one year from the death of a party against whom judgment has been rendered, execution thereon may be issued against any property upon which such judgment was a lien at the time of his death, and may be executed in the same manner and with like effect as if he were living. (4292) [7926]

Applicable only to cases where lien has been acquired on real property prior to the death of the party. Not applicable to personal property. A judgment creditor who has acquired no lien prior to the death of the debtor must proceed to establish and collect his claim as a general creditor in the due course of administration (62–135, 64+155). A judgment creditor may take advantage of this provision although he has presented his claim to the probate court (39–28, 38+634). Cited (29–295, 13+131).

9422. To what county, etc.—When the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county where the judgment is docketed. When it requires the delivery of real or personal property, it shall be issued to the sheriff of the county where the property or some part thereof is situated. Executions may be issued at the same time to different counties. (4293) [7927]

In issuing execution to another county it is common practice for the clerk of the county where the judgment was rendered to deliver to the attorney a transcript of the original docket and an execution with the date of the docketing in the other county left blank, with the understanding that the attorney will have the judgment properly docketed in the latter county and the date of the docketing inserted in the execution before it is delivered to the sheriff of such county; and if this is done an execution so issued is valid (9–97, 87; 16–426, 383; 50–264, 52+862). If in such cases the execution is delivered to the sheriff before the judgment is docketed in his county the subsequent docketing of the judgment will cure the defect as against the judgment creditor and all who are not bona fide purchasers. It is not necessary to withdraw the writ and redeliver it to the sheriff or issue a new writ (77–228, 79+964).

9423. Execution against property, how executed—The officer shall execute the writ against the property of the judgment debtor by levying upon the same, collecting the things in action, or selling the same if the court so orders, selling the other property, except as provided in § 9424, and paying to the judgment creditor the proceeds, or so much thereof as will satisfy the execution. (4294) [7928]

A sheriff may bring an action in his own name for the collection of things in action on which he has levied (4–407, 309; 5–397, 321; 10–323, 253). A sheriff selling real estate on execution may maintain an action in his own name against the purchaser for the amount bid at the sale (11–220, 142; 54–499, 56+172; 62–455, 64+1140). Where a satisfaction of judgment has been improperly entered of record the sheriff may have the same vacated on motion (42–234, 44+11). On a levy good as against an assignee in insolvency under 1881 c. 148 it was held that the sheriff might bring an action against the assignee to recover money or property in his hands (43–505, 46+72). If a person unlawfully interferes with property in the custody of the sheriff or receiptor under him an action by the sheriff will lie (59–217, 60+1099). Things in action can only be sold if the court so orders. A judgment is a thing in action within the meaning of this rule (23–50; 42–234, 44+11). Within reasonable limits the sheriff has discretionary power to put personal property into shape for sale, as for example, to cause grain to be threshed (34–107, 24+366). He may bring an action against a receiptor (39–342, 40+354). Cited (19–347, 300). Right to levy on a judgment (154–257, 191+491).

9424. Levy on money—When coin of the United States, or bills or other evidence of debt issued by the United States or by any moneyed corporation and circulated as money, are seized upon execution, the officer shall pay and return the same as so much money collected. (4295) [7929]

9425. What may be levied on, etc.—All property, real and personal, including rights and shares in the stock of corporations, money, book accounts, credits, negotiable instruments, and other evidences of indebtedness, may be levied upon and sold on execution. Until a levy, property not subject to the lien of the judgment is not affected by the execution. (4296) [7930]

¼. In general.

A judgment creditor, who claims that his debtor has conveyed real estate for the purpose of defrauding his creditors, may disregard such conveyance and levy upon and sell the real estate under execution, leaving the claim of fraud to be litigated later. 156–238, 194+636.

The levy of an execution upon such a debt by such creditor after the dismissal of the garnishee proceeding was effective, although made during the period of the stay provided in such order of dismissal.

When a defendant in a garnishee proceeding moves for a dismissal thereof upon the ground, among others, that the debt disclosed is not due him unconditionally from the garnishee, he cannot claim the order of dismissal to be res adjudicata that the debt sough to be reached by his creditor did not belong to him. 159–263, 198+811.

The provisions of section 67, subd. (f), of the federal Bankruptcy Act of July 1, 1898 (Mason's Code, 11:107) do not annual an execution lien, where the bankrupt's property does not pass to the trustee. 164–416, 205+274.

1. Held subject to levy—A judgment for money (42–234, 44+11; 52–417, 54+372); equitable interests in land (43–513, 45+1099; 45–341, 48+187; 91–482, 98+463. See 88–311, 92+1125); interest of obligor under bond for a deed (1–275, 210; 25–382; 28–408, 10+427; 30–424, 15+869; 42–279, 44+251); interest of obligee under bond for a deed (43–513, 45+1099); interest of pledgor in promissory note (5–397, 321); land transferred by debtor in fraud of creditors (9–108, 98; 25–155; 36–494, 32+852); interest of one member of firm in action against such member alone (4–217, 156; 13–199, 189; 13–205, 192; 24–20; 24–167; 25–212; 62–258, 64+567); the property of one partner to satisfy a partnership debt (46–396, 49+190); the interest of a beneficiary in an unauthorized trust who takes the legal title by virtue of the statute of uses (30–165, 14+805); an unpublished book (3–94, 46); interest of judgment debtor during period of redemption from sale of his land on execution (29–434, 13+668); interest of a purchaser at an execution sale even before period of redemption expires (31–232, 17+372); property of the judgment debtor conveyed by him to another in fraud of creditors (25–155; 62–399, 64+1138; 68–226, 71+29); right to cut timber on land (56–288, 57+796); a vested interest of a legatee (93–361, 101+497). Non-resident's stock exchange seat (147–382, 180+233). Judgment (154–257, 191+491).

2. Held not subject to levy—The interest of a mortgagee in either real or personal property, so long, at least, as he holds it in good faith as security and has not applied it to the satisfaction of the debt by foreclosure or otherwise, and it is immaterial whether there has been a breach in the conditions of the mortgage or not (34–547, 27+66); interest of agent holding property for sale on commission (8–75, 51; 24–169); interest of bailee (13–174, 165; 47–70, 49+396); interest of partner in profits only (25–212); a claim for unliquidated damages (25–513; 60–257, 62+280); a mortgage never recorded not accompanied by any evidence of personal liability, and which has been lost (16–148, 133); a mere equitable lien *(62–399, 64+1138)*; *property in custodia legis* (7–310, 238; 16–210, 184; 25–509; 32–66, 19+346; 32–496, 21+728; 33–229, 22+388; 41–150, 42+862; 41–304, 43+67; 43–38, 44+524; 52–417, 54+372; 79–272, 82+632; 86–177, 90+316); the equitable interest of a residuary legatee in trust fund (74–215, 77+44); money or other personal property on the debtor's person and all personal property not in view (3–406, 300); contingent interest in nature of lien created by reservation in a deed (88–311, 92+1125). An equitable conversion of realty into personalty, in future, sold under will (126–22, 147+812).

See in general—Garnishment lien and judgment cannot be tacked (124–254, 144+959).

9426. Levy on property subject to judgment lien—Release—It shall be deemed a sufficient levy upon property subject to the lien of the judgment if the officer make a minute on the execution, stating the time when it was delivered to him, and that at such time he levied upon such property, describing it. At the time of or during the progress of the execution sale, or prior thereto on the request of the judgment creditor, the officer may release such property, or so much thereof as has not been actually sold, from such levy, before full satisfaction of the judgment; and the judgment, or such part thereof as has not been actually satisfied by a payment or sale, and the lien thereof, shall not be affected by such levy and release, but shall remain in force as if no levy had been made. (4297) [7931]

No formal levy on real property is necessary (3–277, 191; 4–407, 309; 5–333, 264; 11–78, 45; 11–113, 70; 16–13, 1; 24–479). The validity of a sale does not depend on an exact compliance with this section as to the "minute" to be made on the writ (16–13, 1). Cited (27–269, 6+790; 43–26, 44+522; 45–231, 47+794).

9427. Levy on personalty—Personal property capable of manual delivery shall be levied upon by the officer taking it into custody. (4298) [7932]

The officer must take the property into his actual possession and out of the possession of the debtor (21–193; 52–358, 54+733). A levy may be good as against the debtor or a trespasser and not good as against other creditors and bona fide purchasers (59–217, 60+1099). As against the debtor and trespassers, a levy may be good although the property is left in the possession of the debtor (59–217, 60+1099. See 15–132, 99). After the officer has taken property into his custody he may leave it in charge of a receiptor (22–426; 39–342, 40+354; 59–217, 60+1099). Where an officer has an execution against one part owner he must seize the whole chattel, though he can sell only the interest of the judgment debtor (4–217,). In levying on the interest of one partner in partnership property the officer may take actual possession of the property to the exclusion of the other partners and retain the same while the levy continues. But the purchaser at the sale does not acquire any right of possession, but only the right to an accounting (see 4–217, 156; 13–199, 189; 13–205, 192; 24–20; 24–167; 25–212; 62–258, 64+567).

9428. Levy on bulky articles—When personal property, by reason of its bulk or other cause, cannot be immediately removed, it shall be a sufficient levy thereon if the officer, within three days thereafter, file with the city clerk if such property is situated within the limits of a city of the first class or with the register of deeds of the county in which the same is situated a certified copy of the execution, and of his return and levy thereon. The clerk of any such city of the first class or register of deeds shall endorse upon such copy the time of filing, and shall preserve the same, and make an entry in the chattel mortgage book, showing the names of the parties and the date of filing. He shall receive twenty-five cents for such service, which shall be paid by the officer and included in his charges. (R. L. '05 § 4299, G. S. '13 § 7933, amended '23 c. 420 § 1)

A wrongful levy under this section constitutes a conversion for which an action will lie against the officer (28–469, 10+781; 35–388, 29+63). Cited (21–193).

9429. On other personal property—Other personal property shall be levied on by leaving a certified copy of the execution, and a notice specifying the property levied on, with the person holding the same; or, if a debt, with the debtor; or, if stock or an interest in stock of a corporation, with the president, secretary, treasurer, cashier, or managing agent thereof. (4300) [7934]

This section provides the mode of levying on all debts except those which pass by delivery of the instruments on which they rest such as promissory notes, bills of exchange and negotiable bonds. Book accounts cannot be levied on by the officer merely taking the books in which they are entered into his custody. For the purpose of a levy they stand just as debts of which there is no written evidence and must be levied on under this section (3–277, 191; 26–141, 1+830; 30–191, 14+884; 30–321, 15+309). A judgment may be levied on without leaving a copy of the execution and a notice with the clerk of the court where the judgment is docketed (52–417, 54+372). Form of copy and notice (60–257, 62+280). See 195+629, 227 Fed. 976.

The judgment creditor acquires a lien by levy where he serves a certified copy of an execution upon the person holding personal property belonging to the judgment debtor and makes application to such person for a certificate showing the description and amount of the property of the judgment debtor held by her, and is furnished with a false certificate to the effect that she had no personal property in her hands belonging to the debtor, and that she owed him no money. 157–1, 195+627.

9430. Certificate to be furnished officer—When the officer, with a writ of attachment or an execution against the defendant, applies to any person mentioned in § 9429 for the purpose of attaching or levying upon property mentioned therein, such person shall furnish him with a certificate showing the description and amount of the property of the judgment debtor held by such person or corporation, the number of rights or shares of such debtor in the stock of the corporation, with any dividend thereon, or the debt owing to the judgment debtor, with any incumbrance upon the property; and, on refusal so to do, such person may be required by the court to attend before it and be examined on oath concerning the same. (4301) [7935]

When levy becomes ineffectual as a lien (136–354, 162+468; 147–378, 180+232). Person holding judgment debtor's personal property furnishing false certificate (195+629).

157–1, 195+627, note under § 9429.

9431. On pledged or mortgaged chattels—When personal property is pledged or mortgaged for the payment of money or the performance of any contract or agreement, the right and interest of the pledgor or mortgagor in such property may be sold on execution against him, and the purchaser shall acquire all his right and interest therein, and be entitled to the possession of such property, on complying with the terms and conditions of the pledge or mortgage. (4302) [7936]

When levying after default but before possession has been taken by the mortgagee the officer may take the chattels into his actual possession, and, as against the mortgagee, detain them for the purposes of the sale under the writ (52–358, 54+733. See 4–533, 418). In the absence of a showing of prejudice a levy will not be set aside for failure of the sheriff to seize all the mortgaged property (72–248, 75+219). A railroad, with its rolling stock, and personal property belonging to the road and appertaining thereto, is, in favor of the mortgagees, one property, and the different items cannot, as to such mortgagees, be levied on separately (56–188, 57+471). The levy must in all cases be confined to the "right and interest" of the mortgagor (42–117, 43+791). See also (114–174, 130+995). If a mortgagee or pledgee takes possession of the mortgaged or pledged chattels before any other lien attaches thereto, his title is valid as against subsequent attachment or execution creditors, there being no fraud in fact, although the mortgage was not filed nor the chattels delivered when the contract of pledge was made (74–130, 76+946). In the case of a contract, for work and payment therefor, between employer and employe, secured by the former by chattel mortgage, the right of the employe to go on under the contract and hold and enforce the mortgage as security therefor, is not affected by a levy by a creditor of the mortgagor on the mortgaged property (30–419, 15+687). If the maker of a pledged note pays it to the pledgee, after it has been levied on by the sheriff, with notice of the levy, he is not thereby discharged as to the balance above the debt for which it was pledged (5–397, 321). Assignment of bankrupt's equity in pledged securities (180 Fed. 229).

Where an officer levies upon mortgaged property, his return and notice of sale should show that the property is mortgaged. A failure in this respect renders the sale voidable but not void, the remedy being an application to the court to vacate the sale. 161–416, 205+274.

9432. On growing crops, etc.—A levy may be made upon growing grain or grass, and upon any other unharvested crops; but no sale shall be made thereunder until the same is ripe or fit to be harvested; and any levy thereon under an execution issued by a justice of the peace or any court of record shall be continued beyond the return day thereof, if necessary, and its execution may be completed at any time within thirty days after the same is ripe or fit to be harvested. (4303) [7937]

Growing grain may be levied on at any period of its growth whether the growth is going on below or above the surface of the soil (27–528, 8+767). Blackberries, while growing on the bushes, are not subject to levy as personal property. It is only annual crops, that is, crops requiring fresh planting or sowing each year, that are subject to levy as personalty (49–412, 52+36). Effect of fraudulent transfer by judgment debtor of exempt real property with growing crops thereon subject to levy (47–525, 50+699). The mode of levying on growing crops (see 28–469, 10+781; 35–383, 29+63). Cited (90–299, 96+705).

9433. Notice of sale—Before the sale of property on execution notice shall be given as follows:

1. If the sale be of personal property, by giving ten days' posted notice of the time and place thereof.

2. If the sale be of real property, on execution or on judgment, by six weeks' posted and published notice of the time and place thereof, describing the property with sufficient certainty to enable a person of common understanding to identify it.

An officer who sells without such notice shall forfeit one hundred dollars to the party aggrieved, in addition to his actual damages; and a person who before the sale or the satisfaction of the execution, and without the consent of the parties, takes down or defaces the notice posted, shall forfeit fifty dollars; but the validity of the sale shall not be affected by either act, either as to third persons or parties to the action. (4304) [7938]

1. Notice—Description of property (16–13, 1; 32–544, 21+836; 37–250, 33+849). Place of sale (31–125, 16+849). Cited (43–26, 44+522).

2. Liability of officer—Under this provision the failure of the sheriff to give the proper notice of sale does not affect the validity of the sale, either as to third parties or as to parties to the action (21–175; 72–352, 75+761, 595; 51 Fed. 614, 2 C. C. A. 402). Under a former statute it was held that a judgment creditor purchasing at the sale was charged with notice of defects in the notice of sale (3–222, 151). Cited (43–26, 44+522).

3. Adjournment of sale—A sheriff making a sale of real property under a decree of foreclosure, in the absence of a statute authorizing the adjournment of the sale, possesses the power, for good cause shown, in the exercise of a sound discretion, subject to the control of the court over the whole matter of the sale, to adjourn the sale from time to time. 167–208, 208+654.

9434. Service on judgment debtor—At or before the time of posting notice of sale, the officer shall serve a copy of the execution and inventory, and of such notice, upon the judgment debtor, if he be a resident of the county, in the manner required by law for the service of a summons in a civil action. (4305) [7939]

Failure of sheriff to comply with this provision does not affect title of purchaser (43–26, 44+522). Such failure held to relieve judgment debtor from making demand on sheriff before bringing suit to recover money collected on exempt judgment (51–360, 53+805). Copy of execution served, without signature or seal of clerk of court, does not invalidate sale (127–203, 149+200).

9435. Sale, when and how—The sale shall be by auction, between 9 o'clock a. m. and sunset, in the county where the property or some part thereof is situated. If the sale is of personal property capable of manual delivery, it shall be within view of those who attend, and shall be sold in such parcels as are likely to bring the highest price. If of real property consisting of several known parcels, the parcels shall be sold separately; and, if a portion thereof is claimed by a third person who requires it to be sold separately, it shall be so sold. No more shall be sold than is sufficient to satisfy the execution, and neither the officer nor his deputy may purchase. (4306) [7940]

Sale of several parcels in gross not void but only voidable on a showing of actual fraud or material prejudice (1–183, 157; 6–192, 123; 10–379, 304; 18–366, 335; 24–281; 32–445, 21+472; 33–215, 22+386; 35–499, 29+194; 42–476, 44+985; 43–26, 44+522; 44–353, 46+559; 51–444, 53+706). Sale must be for cash (39–59, 38+704; 54–499, 56+172); and to the highest bidder (1–183, 157). Attorney of debtor has no implied authority to stipulate that property levied on shall be sold at private sale or by a person other than sheriff (21–56). The execution creditor may bid off the property and so may his assignee. If one of two joint judgment creditors bids off the property he will be held a trustee for the other (10–401, 320). Sale not set aside merely because price realized is far below the real value of the property (32–445, 21+472; 72–352, 75+595, 761). Sale upon conditions (38–534, 38+620). Application of proceeds (100–327, 111+259).

A cotenant is not prevented, by the fact of his cotenancy, from buying at an execution sale on a judgment which is a lien only on the undivided interest of his cotenant. 159–111, 198+307.

9436. Sale of corporate stock, etc.—In case of the sale of any rights or shares in the stock of a corporation, the sheriff shall execute to the purchaser a certificate of such sale, which shall transfer to him all the rights of the judgment debtor in respect thereto. (4307) [7941]

9437. Certificate of sale of realty—When a sale of real property is made upon execution, or pursuant to a judgment or order of a court, unless otherwise specified therein, the officer shall execute to the purchaser a certificate containing:

1. A description of the execution, judgment, or order.

2. A description of the property.

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

4. The price paid for each parcel separately.

5. If subject to redemption, the time allowed by law therefor.

Such certificate shall be executed, acknowledged, and recorded in the manner provided by law for a conveyance of real property, shall be prima facie evidence of the facts therein stated, and, upon expiration of the time for redemption, shall operate as a conveyance to the purchaser of all the right, title, and interest of the person whose property is sold in and to the same, at the date of the lien upon which the same was sold. (4308) [7942]

1. The certificate—A description which fairly identifies the execution is sufficient. A false particular may be disregarded as in case of deeds and other instruments (30–161, 14+795). Description of interest sold (27–184, 6+625; 43–513, 45+1099). Description of property sold (31–500, 18+452; 32–544, 21+836; 35–234, 28+220; 37–250, 33+849). If there is any discrepancy between the return and the certificate the latter controls, at least, as to the purchaser (45–231, 47+794). When a sale is regularly made its validity is not affected by omission of sheriff to make a certificate (7–82, 55. See 35–234, 28+220; 54–499, 56+172). On sale by deputy sheriff certificate should be executed and acknowledged by him rather than by sheriff (37–250, 33+849). Statutory certificate satisfies statute of frauds (11–220). Certificate essential to passage of legal title (35–234, 28+220). Certificate executed by sheriff as such is good although it does not state that he made the sale as sheriff (18–366, 335). The provision requiring certificate to state that the property is subject to redemption is directory. A recital that "the above described premises are subject to redemption within the time and according to the statute in such case made and provided" is sufficient (24–161). Sheriff may be compelled to execute certificate (54–499, 56+172). Certificate issued without payment in cash is valid, remedy being by action against sheriff (100–327, 111+259). Cited (34–458, 26+631; 43–26, 44+522).

2. Rights of purchaser—Under a former statute all the interest of the execution debtor passed to the purchaser at once on the sale subject to the right of redemption (5–409, 332; 22–81; 25–305; 50–454, 52+966; 91–

60, 97+449). Under the present statute the title of the debtor does not pass until the time to redeem expires (29–434, 13+668; 31–232, 17+372; 34–458, 26+631; 91–60, 97+449). But the purchaser acquires an interest which is conveyable before the expiration of the redemption period (22–81; 25–305; 31–232, 17+372; 38–2, 35+469; 43–172, 45+11; 53–350, 55+555). Such interest held real estate within the meaning of a will (91–60, 97+449). If the execution debtor is a married person the purchaser acquires the land free from statutory interest of other spouse (89–432, 95+216, 769). Purchaser succeeds to all the interest of execution debtor although such interest is not described in the notice of sale or certificate (43–513, 45+1099). If the interest of a vendee in a contract for sale of land is sold on execution the purchaser succeeds to the interest subject to its being defeated by laches on the part of the vendee (27–184, 6+625; 43–513, 45+1099). Where a sale and transfer of property is void as to a creditor it is also void as to the purchaser on an execution sale based on a judgment recovered by such creditor (32–259, 20+187). Purchaser acquires interest of debtor not only in the land but also in buildings and trees on land (34–458, 26+631). He stands in the shoes of the judgment debtor and acquires his title as it stood at the time the execution creditor's lien was acquired (1–275, 210; 6–402, 270). When the period of redemption has expired without redemption the execution debtor is a mere stranger to the property and cannot raise objection to subsequent proceedings (22–81). The title acquired by the purchaser cannot be defeated or impaired by the subsequent acts or omissions of sheriff (32–259, 20+187; 54–499, 56+172). It is unaffected by defects or informalities in the return of the sheriff (32–259, 20+187). Origin of title by execution sale (1–275, 210. See 34–458, 464, 26+631). Merger (95–286, 104+7). Cited (43–26, 44+522).

9438. Certificates of sale legalized—In all sales of real property under judgments and decrees of the district court wherein the sheriffs' certificates of sale were filed for record and recorded in the office of the proper registers of deeds prior to October 1, 1921, and within thirty days, but not within twenty days after the dates of the respective orders confirming such sales, such certificates of sale and the records thereof are hereby legalized and validated to the same extent and with the same effect as though such certificates had been so filed for record and recorded within twenty days after the dates of such respective orders of confirmation. Provided, that the provisions of this act shall not apply to or affect any action or proceeding now pending involving the validity of such certificates or the records thereof. ('23 c. 368 § 1)

9439. Interest of purchaser subject to attachment or judgment—The interest acquired upon any sale is subject to the lien of an attachment or judgment duly made or docketed against the person holding the same, as in case of real property, and may be attached or sold on execution in the same manner. (4309) [7943]

31–232, 17+372.

9440. Redemption of realty—Upon the sale of real property, where the estate sold is less than a leasehold of two years' unexpired term, the sale is absolute; in all other cases the property sold, or any portion thereof which has been sold separately, is subject to redemption:

1. By the judgment debtor, his heirs or assigns.
2. By a creditor having a lien, legal or equitable, on the property or some part thereof, subsequent to that on which it was sold.

Creditors shall redeem in the order of their respective liens. (4310) [7944]

1. Construction of statute—8–496, 441; 21–132; 27–18, 6+373; 26–100, 1+834; 28–345, 9+868; 51–417, 53+719.

2. Who may redeem—A grantee or successor in interest of the execution debtor redeems on the same terms as execution debtor himself (7–432, 347; 8–47, 28). To entitle a creditor to redeem he must have something more than the general right common to all creditors to have the general property of the debtor applied to the payment of his debts; he must have a right, either in law or in equity, to have the specific property appropriated to the satisfaction of his claim in exclusion of other claims subsequent in date to his (28–48, 8+905; 29–203, 12+530; 43–172, 45+11; 65–246, 68+18). An attaching creditor in an action on contract may redeem (45–341, 48+187). A subsequent judgment creditor may redeem (29–434, 13+668. See 29–226, 13+34). A general creditor of a deceased person, although his claim has been allowed against the estate, is not entitled to redeem (29–203, 12+530; 65–246, 68+18). One having a lien on "an undivided interest" in the land may redeem (27–18, 6+373). Mortgagees whose liens are subsequent may redeem (see 20–268, 239; 21–132; 37–71, 33+123; 48–223, 50+1038; 77–54, 79+594). A creditor obtaining a judgment after the property of the debtor has passed into the hands of a receiver cannot redeem from a sale made by the receiver under direction of court (41–150, 42+862). A person having a lien on a part of the land sold may redeem the whole (36–136, 30+458; 115–290, 132+210). A judgment creditor who has levied on sufficient personal property to satisfy his judgment cannot redeem (13–407, 376). Owner of separate part or of interest therein may redeem whole tract as owner. Such redemption annuls sale, but he is entitled to lien on part not owned for amount necessarily paid to redeem, if whole of original lien was as to him equitably chargeable on that part; otherwise, for equitable pro rata share of amount (115–290, 132+210).

3. Plan of redemption by creditors—28–345, 9+868; 29–226, 13+34.

4. When right of creditor begins—Right of creditor to redeem does not begin until right of debtor to redeem has expired (28–345, 9+868; 37–71, 33+123).

5. A vested right—27–18, 6+373; 36–136, 30+458.

6. Redemptioner a bona fide purchaser—46–156, 48+677. See 27–396, 7+826; 72–352, 75+595, 761.

9441. Order of redemption, etc.—Within one year after the day of sale the judgment debtor, his heirs or assigns, may redeem by paying to the purchaser the amount for which the property was sold, with interest, and, if the purchaser be a creditor having a prior lien, the amount thereof, with interest. If no such redemption be made, the senior creditor may redeem within five days after the expiration of such year, and each subsequent creditor within five days after the time allowed all prior lienholders, by paying the aforesaid amount, and all liens prior to his own, held by the party from whom he redeems: Provided, that no creditor can redeem unless within such year he file notice of his intention so to do with the clerk of the court where the judgment is entered. (4311) [7945]

1. Time to redeem—Court cannot extend the time. Right of redemption is a strict legal right to be exercised, if at all, in accordance with the terms of the statute unless waived or extended by the party whose interests are to be affected (16–230, 202; 51–417, 53+719). If the last day of the year from the sale falls on Sunday owner may redeem on Monday (48–223, 50+1038). Five-day limitation is not inflexible (80–76, 82+1103).

The time to redeem from a foreclosure sale under a mechanic's lien dates from the confirmation of the sale and not from the day of sale. 157–369, 196+468.

2. Notice of intention—Tacking—Where a mortgagee who has filed notice of intention to redeem assigns the mortgage the assignee may redeem under the notice so filed (48–223, 50+1038). Waiver of defective notice (50–310, 52+864).

3. Necessity of paying prior liens—29–434, 13+668; 41–156, 42+867; 41–163, 42+870.

4. Effect of sale in cutting off liens—The sale on a second lien, whether made before or after that on a first lien, has the effect, unless it is itself cut off by the first sale, or unless it is redeemed from, to cut off all liens and interests subject to it (30–161, 14+795; 50–508, 52+922; 54–308, 56+34; 72–287, 75+376; 73–236, 75+1046; 95–286, 104+7).

5. Effect on lien—While there are still rights of redemption outstanding, the lien on which a redemption is made is not merged and extinguished in the title of the purchaser at the sale redeemed from, but it passes by subrogation to any subsequent redemptioner. The lien on which a redemption is made is not extinguished by the fact that the value of the property is equal to the amount of the lien with the amount paid for redemption added (50–508, 52+922).

6. Attacking subsequent liens—48–223, 50+1038.

7. Waiver of defects—43–66, 44+886; 50–310, 52+864; 70–380, 73+165. See 28–267, 9+772; 47–434, 50+475; 51–417, 53+719.

8. Effect of redemption on invalid lien—56–60, 57+320.

9. Effect of premature redemption—54–308, 56+34; 90–114, 95+762.

10. See in general—154–368, 191+821.

9442. Redemption, how made—The person desiring to redeem shall pay to the person holding the right acquired under such sale, or for him to the sheriff or the clerk of the district court of the county in which the real property is situated, the amount required by law for such redemption, and shall produce to such person or officer the same documents required by law to be produced by a person desiring to redeem from a sale of real property under foreclosure of a mortgage by advertisement; and the person redeeming shall cause such documents to be filed with the register of deeds as required in the case of redemption from such foreclosure sale. (4312) [7946]

Cited (100–367, 111+302).

9443. Certificate of redemption—Effect of redemption—The person or officer from whom such redemption is made shall execute to the person redeeming a certificate in substantially the same form as the certificate required by law to be executed on redemption from a sale of real property under foreclosure of a mortgage by advertisement; and all the provisions of law applicable to the recording and to the effect of such certificate, and to the effect of redemption of the property sold on such foreclosure sale, by the owner, his heirs, personal representatives, or assigns, or by creditors, shall be applicable to the certificate required by this section, and to redemption made under this chapter. (4313) [7947]

Cited (129–358, 152+727).

9444. Sale irregular or judgment reversed—If the purchaser of real property sold on execution, or his successor in interest, be evicted therefrom in consequence of irregularities in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover from the judgment creditor the price paid, with interest. When such recovery is had in consequence of irregularity, the judgment creditor shall thereupon be entitled, within ten years after such eviction, to a new execution on the judgment for the price paid on the sale, with interest; and for that purpose the judgment shall be deemed valid against the judgment debtor, his personal representatives, heirs, or devisees, but not against a purchaser or incumbrancer in good faith who became such before a levy on such new execution. (4314) [7948]

9445. Redemption pending action to set aside execution sale—When an action is brought to set aside an execution sale of land, and the time of redemption from such sale may expire before final judgment therein, any person having the right to redeem therefrom, for the purpose of saving such right, may deposit with the sheriff, before the time of redemption expires, the amount that will be necessary to redeem such premises at the date of such expiration, together with a bond in an amount and with sureties to be approved by such sheriff, conditioned to pay all interest that may accrue or be allowed on such deposit until final redemption as hereinafter provided. Such deposit and bond shall operate to extend the time of redemption for thirty days after the final determination of such action, during which time any person entitled by law to redeem may do so by paying to the sheriff the amount of such deposit with accrued interest. The deposit and bond shall be brought to the attention of the court by supplemental complaint in the action, and the judgment shall determine the validity of the execution sale, and the right of the parties to the moneys and bonds so deposited, which shall be paid and delivered by the sheriff as directed by such judgment, upon delivery to him of a certified copy thereof. The remedy herein provided shall be in addition to other remedies now existing. (4315) [7949]

75–153, 77+793. Where plaintiffs complied with 1895 c. 326, it was not necessary also to produce to sheriff or clerk deed under which they claimed to redeem, as required by G. S. 1894 § 5474. Whether so under R. L. not determined (100–367, 111+302). Cited (123–297, 143+722).

167–208, 208+654.

9446. Stay of execution on money judgment—Execution of a judgment for the payment of money only shall be stayed for six months, if within ten days after the entry thereof the judgment debtor shall file with the clerk a bond, running to the judgment creditor, his personal representatives and assigns, in double the amount of the judgment, to be approved by the court, and conditioned for the payment of the judgment, with interest at the rate of eight per cent. per annum during the time for which the stay is granted. Within two days thereafter notice that such bond has been filed, with a copy of the same, shall be served on the judgment creditor if he be a resident of the county, or upon his agent or attorney, if he have one, and the judgment creditor may except to the sufficiency of the bond; and, upon his application upon notice or order to show cause, the court, if it find the bond insufficient, may order execution to issue notwithstanding the same, unless the judgment debtor give such further bond as it shall deem sufficient. If the condition of any such bond be not performed, the execution shall issue for the amount of the judgment, with interest and costs, against the judgment debtor and the sureties. When an execution issues against sureties, the officer shall certify in his return what amount, if any, was collected from them, and the date thereof. If a stay be granted after execution issued, any levy made thereon shall be released, and the execution shall be returned and the reason noted by the officer. (4316) [7950]

Cited (133–64, 157+904).

9447. Property exempt—No property hereinafter mentioned shall be liable to attachment, or sale on any final process, issued from any court:

1. The family Bible.
2. *Family pictures, school books or library, and* musical instruments for the use of the family.
3. A seat or pew in any house or place of public worship.
4. A lot in any burial ground.
5. All wearing apparel of the debtor and his family; all beds, bedsteads, and bedding kept and used by the debtor and his family; all stoves and appendages put up or kept for the use of the debtor and his family; all cooking utensils; and all other household furniture not herein enumerated, not exceeding five hundred dollars in value.
6. Three cows, ten swine, one yoke of oxen and a horse, or in lieu of such oxen and horse, a span of horses or mules, one hundred chickens, fifty turkeys, twenty sheep, and the wool from the same, either in raw material or manufactured into yarn or cloth; food for all the stock above mentioned necessary for one year's support, either provided or growing, or both, as the debtor may choose; one wagon, cart, or dray, one sleigh, two plows, one drag; and other farming utensils, including tackle for teams, not exceeding three hundred dollars in value.
7. Provisions for the debtor and his family necessary for one year's support, either provided or growing, or both, and fuel necessary for one year.
8. The tools and instruments of a mechanic, miner, or other person, used and kept for the purpose of carrying on his trade; and, in addition thereto, stock

in trade, including goods manufactured in whole or in part by him, not exceeding four hundred dollars in value; and the library and implements of a professional man.

9. The presses, stones, type, cases, and other tools and implements used by any person or copartnership in printing or publishing a newspaper, or by any person hired by him to use them, not exceeding two thousand dollars in value, together with stock in trade not exceeding four hundred dollars in value.

10. One watch, one sewing machine, one typewriting machine, and one bicycle.

11. Necessary seed for the actual personal use of the debtor for one season, not to exceed in any case the following amounts: One hundred bushels of wheat, one hundred bushels of rye, one hundred bushels of barley, one hundred bushels of potatoes, one hundred bushels of oats, one hundred bushels of flax, one hundred bushels of corn; and binding material sufficient for use in harvesting the crop raised from such seed.

12. The library and philosophical and chemical or other apparatus belonging to, and used for the instruction of youth in, any university, college, seminary of learning, or school which is indiscriminately open to the public.

13. All moneys arising from fire or other insurance upon any property exempt from sale on execution.

14. All moneys received by, or payable to, a surviving wife or child from insurance upon the life of a deceased husband or father, not exceeding ten thousand dollars.

15. All moneys, relief, or other benefits payable or to be rendered by any police department association, fire department association, beneficiary association, or fraternal benefit association to any person entitled to assistance therefrom, or to any certificate holder thereof or beneficiary under any such certificate.

16. The wages of any person, not exceeding thirty-five dollars, due for any services rendered by him for another during thirty days preceding any attachment, garnishment or the levy of any execution against him, provided, that all wages paid to such person, and earned within said thirty day period, shall be deemed and considered a part of, or all, as the case may be, of said exemption of thirty-five dollars.

17. The earnings of the minor child of any debtor or the proceeds thereof, by reason of any liability of such debtor not contracted for the special benefit of such minor child.

18. The claim for damages recoverable by any person by reason of a levy upon or sale under execution of his exempt personal property, or by reason of the wrongful taking or detention of such property by any person, and any judgment recovered for such damages.

All articles exempted by this section shall be selected by the debtor, his agent, or legal representative. The exemptions provided for in subdivisions 6-18 hereof, shall extend only to debtors having an actual residence in the state. No property exempted hereby shall be exempt from attachment or execution in an action for the recovery of the purchase money of the same property. (R. L. § 4317, amended '09 c. 12 § 1; '13 c. 375 § 1; '15, c. 202, § 1; '23, c. 154, § 1; '23, c. 350, § 1; as to subd. 6, '27, c. 272)

Explanatory note—Subd. 6 only of this section is amended by Laws 1927, c. 272.

Subd. 3—Piano, throw and stool are exempt (122–234, 142+307).

Subd. 5—16–487, 441; 18–361, 331; 62–471, 64+1150.

Subd. 6—A buggy or carriage is exempt as coming within the term "wagon" (29–46, 11+132; 41–318, 43+74). A bicycle is not exempt as a "wagon" under this subdivision (72–520, 75+717. See subd. 10). Whether a horse kept for racing purposes is exempt is an open question (44–216, 46+362). Two year old steers are exempt (31–541, 18+821). In order to have the benefit of the exemption of food for stock it is not necessary that the debtor should own all of the stock (79–459, 82+858). The question how much food is "necessary" is for the jury (35–388, 29+63; 57–170, 58+988). A horse delivered to the keeper of a livery or boarding stable is subject to a lien for his keep (66–57, 68+514). An automobile is not exempt (153–163, 190+57).

Food for stock was exempt though debtor owned no stock. 17, F (2d) 495.

Subd. 7—74–272, 77+4.

Subd. 8—One carrying on the trade of tailor may be entitled to exemption of two sewing machines, if kept and personally used for the purposes of his trade and if reasonably necessary therefor (50–327, 52+857). The ordinary stock in trade of merchant not exempt (2–90, 72; 42–254, 44+116). Meaning of phrase "stock in trade" (27–134, 6+479; 35–340, 29+156). Unfinished burial caskets held exempt (27–134, 6+479). Stock in trade of partnership is not exempt (29–235, 12+704; 35–340, 29+156). The "tools" of a mechanic or other person, in order to be exempt, must be held for the purpose of carrying on his trade (35–340, 29+156). Exemption under G. S. 1894 § 5459 loss by abandonment of trade or occupation (98–143, 107+967).

Subd. 11—Owner of farm may claim exemption of seed grain when renting the farm on shares and furnishing seed (80–340, 83+153). Whether grain exempt is ordinarily a question for the jury (35–388, 29+63; 57–170, 58+988).

Subd. 13—62–471, 64+1150. Proceeds of fire insurance resulting from destruction of homestead are exempt from garnishment (132–372, 157+504).

Subd. 14—146–6, 177+658.

Subd. 15—146–6, 177+658.

Subd. 16—Under former statute exemption was limited to those engaged in manual labor (42–112, 43+794). Present statute designed to extend exemption to all who work for wages—to servants, employees, clerks, etc., as well as to laboring men (45–31, 47+396. See 77–426, 80+356; 80–497, 83+449). The thirty days are to be computed from the levy and not from the issuance of writ from clerk's office (54–366, 56+127). Proviso violative of constitution; remainder is valid (129–184, 152+135).

Subd. 18—42–234, 44+11; 51–360, 53+805.

Action for purchase money—16–487, 441; 34–279, 25+601; 69–22, 71+697.

General rules—Policy of exemption laws (2–90, 72; 31–541, 18+821; 74–272, 77+4). To be construed liberally (18–361, 331; 31–541, 18+821; 72–520, 75+717; 74–272, 77+4; 79–459, 82+858). Exemption a personal privilege (8–50, 30; 22–485; 69–22; 71+697). Absconding debtor cannot have benefit of statute (22–485). Exemption laws not applicable to partnership property except as expressly stated (29–235, 12+704; 35–340, 29+156; 37–527, 35+435). Voluntary transfer of exempt property vests good title in donee as against creditors of donor (28–77, 9+172). Where debtor sold nonexempt property and started for another state, with the intention of establishing residence there, and while within this state an attachment was levied on his horse, held that he was still a resident, and entitled to claim exemptions (105–286, 117+515). See 122–228, 142+307; 133–380, 158+614; 137–226, 163+294; 153–162, 190+57.

Crops growing on homestead are not exempt. 10 F (2d) 747.

As a general rule, the validity of a transfer of property given by a debtor to a creditor to secure or pay his claim, in consideration for which he agrees to advance to the debtor sufficient to enable him to live during the season depends upon the bona fides and fairness of the transaction. 158–305, 197+259.

Lien of boarding house keeper. 163–253, 203+968.

The statute exempting "the library and implements of a professional man" from sale on execution does not exempt the equipment and apparatus of a private hospital owned and operated by a practicing physician. 213+538.

9448. Levy on property in excess of exemption—When the officer holding an execution is of the opinion that the judgment debtor has more property of the classes specified in § 9447 than is exempt, he may levy upon the whole of any one class, and make an inventory thereof, and cause the same to be appraised on oath by two disinterested persons. If such appraisal exceeds the amount exempt of that class, the debtor may forthwith select of such property an amount not exceeding in appraised value the amount exempt, and the balance shall be applied by the officer as in other cases. If the debtor does not make such selection, the officer

may make the same. If one or more indivisible articles of such class is of greater value than the whole amount exempt of that class, the officer shall sell the same, and, after paying to the debtor the amount thereof exempt, shall apply the residue in discharge of the process. (4318) [7952]

5–377, 305; 27–134, 6+479; 35–388, 29+63; 44–216, 46+362; 122–228, 142+307.

SUPPLEMENTARY PROCEEDINGS

9449. Person indebted may pay sheriff—After the issuing of an execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount so paid. (4319) [7953]

9450. Order for examination of debtor—When an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, is issued to the sheriff of the county where he resides, or, if he does not reside in the state, to the sheriff of a county where the judgment roll, or a transcript of a judgment, is filed, is returned unsatisfied in whole or in part, the judgment creditor is entitled to an order from the judge of the district court of the district where the debtor resides, or, if the debtor be not a resident of the state, then from the district where such judgment roll or transcript of the justice's judgment is filed, requiring the judgment debtor, or, if a corporation, any officer thereof, to appear and answer concerning his or its property, at a time and place specified in the order, before such judge or a referee therein named: Provided, that if the person required to answer is, at the time of the service of the order, a resident of the state, or has an office in the state for the regular transaction of his business in person, he cannot be compelled to attend, pursuant to the order or to any adjournment, at a place without the county where his residence or place of business is situated. (4320) [7954]

1. General nature and object of proceeding—Supplementary proceedings are intended to furnish a speedy, inexpensive and adequate remedy for discovering and reaching all equitable interests of the debtor not liable to seizure and sale on execution, and also all property so liable which an officer holding such process has been unable to find, and to compel the application of the same towards the satisfaction of the judgment. They not only perform the office of a creditor's bill, but have a somewhat enlarged scope and purpose (9–270, 254; 25–263; 35–231, 28+254; 65–64, 67+805; 76–109, 78+964; 81–368, 84+123). The remedy afforded by the statute is in the nature of an equitable execution (65–64, 67+805).

212+455.

In proceedings supplementary to execution there was no showing that the defendant had money in his personal possession or concealed, and an order directing him to pay the plaintiff a specified amount was erroneous. *161–251, 201+613.*

A judgment creditor without proceeding under G. S. 1923, § 9450, et seq., or after proceeding thereunder, and without the appointment of a receiver or other action of the court, may bring an action to set aside a conveyance as fraudulent, or may proceed by execution. 212+455.

2. A matter of right—Showing necessary—A judgment creditor is entitled as a matter of right to an order upon compliance with the provisions of this section (9–270, 254; 25–263; 34 Fed. 380). It is customary practice to make the facts appear by affidavit. The affidavit need not state the nature of relief sought (22–452).

3. Judgment basis of proceedings—28–248, 9+732.

4. Effect of proceedings to give lien—The proceedings give the creditor an equitable lien on the assets discovered, if he proceeds with proper diligence to apply the same to the payment of his judgment; that is, they give him priority over other creditors (65–156, 68+2; 66–66, 68+771). The lien is dissolved by an assignment for the benefit of creditors (65–156, 68+2; 67–35, 69+477).

5. Officer's return conclusive—25–263. See 35–540, 29+322; 44–401, 46+848.

6. Service of order on non-resident—66–66, 68+771.

9451. Warrant against debtor—Instead of the order provided for in § 9450, upon proof by affidavit that there is danger that the debtor will leave the state or conceal himself, the judge may issue a warrant requiring the sheriff of any county where the debtor is to arrest him and bring him before such judge to answer concerning his property. Upon being brought before the judge, he may be examined on oath, and ordered to give bond that he will attend from time to time before the judge or referee, as he shall direct, during the pendency of the proceeding, and will not in the meantime dispose of any portion of his property not exempt from execution; and, in default of giving such bond, he may be committed to jail as for a contempt. (4321) [7955]

9452. Examination — Upon appearing or being brought before the judge or referee, the judgment debtor, or officer required to answer for a corporation, may be examined under oath, and witnesses may be required to appear and testify on behalf of either party, and the debtor may be represented by counsel; and no person, on such examination, shall be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud, but his answer shall not be used as evidence against him in any criminal proceeding. If the examination is before a referee, he shall certify the testimony and proceedings to the judge. (4322) [7956]

The examination should be strictly limited to the discovery of property and should not be permitted to uncover *private family affairs needlessly (81–368, 84+123).* The provision as to criminating evidence is insufficient (12 S. Ct. 195, 142 U. S. 547, 35 L. Ed. 1110).

212+455.

9453. Property applied to judgment—Receiver, etc.—The judge may order any property of the judgment debtor in the hands of himself or of any other person, or due to him, not exempt from execution, to be applied toward the satisfaction of the judgment: Provided, that his earnings for his personal services within thirty days preceding the order cannot be so applied, when it appears by his affidavit that they are necessary for the use of a family supported wholly or partly by his labor. The judge may appoint a receiver of the debtor's unexempt property, or forbid a transfer or other disposition thereof, or any interference therewith, until his further order therein. (4323) [7957]

1. Order for application of property—An order under this section is discretionary where property is disclosed on an examination which may be reached by execution. The court is not required to make an order for its application to the judgment. Ordinarily the creditor should be left to his simple remedy of another execution (9–270, 254). To justify an order under this section the evidence must be direct, clear and convincing (81–368, 84+123). The debtor may be ordered to convey to a receiver an interest in real property situated in another state (35–231, 28+254; 34 Fed. 380). He may be ordered to assign to a receiver a claim against a municipal corporation although the latter denies the indebtedness (22–452). In an early case since overruled by statute an order directing a judgment debtor to turn over his watch was sustained (18–361, 331). It has been held that officer of a municipal corporation cannot be compelled to assign to a receiver his salary (33–132, 22+177). Where a judgment creditor let a portion of a building occupied by him as a homestead it was held that he could not be ordered to assign the lease to a receiver (26–286, 3+341). The judgment debtor cannot be ordered to pay over a specific sum of money received by him after the service of the order for examination, but paid out by him before the disclosure (51–230, 53+461. See 52–433, 54+482). It has been held that a city treasurer cannot be compelled to pay over the salary of a city fireman (66–110, 68+606).

2. Appointment of receiver—The appointment of a receiver is a matter of discretion with the trial court to be cautiously exercised (22–452; 25–263; 27–353, 7+364;

36–106, 30+402; 52–433, 54+482; 65–64, 67+805; 66–66, 68+771; 70–346, 73+175; 76–109, 78+964). A receiver should not be appointed where the creditor has a mortgage amply sufficient to satisfy the whole debt (65–64, 67+805). A receiver may be appointed although the only property disclosed is an interest in real estate situated in another state, and the debtor may be required to convey such interest to the receiver (35–231, 28+254). A receiver may be appointed immediately after granting an order for the examination of the debtor (25–263). The receiver may maintain an action to avoid a fraudulent conveyance of real estate by the judgment debtor, although there has been no transfer of the title to him (35–543, 29+349; 36–106, 30+402). In bringing an action the receiver must allege his appointment with sufficient fullness to show that he has authority (39–527, 40+831; 67–24, 69+475; 73–198, 75+1053). A judgment in favor of defendant in action by receiver binding on creditor at whose instance he was appointed (103–283, 114+961).

3. In general.

There is no power in the district court to authorize a receiver, appointed in proceedings supplementary to execution, to collect the official salary to be earned in the future by the judgment debtor. 166–363, 207+736.

Whether a receiver shall be appointed rests in the discretion of the trial court, and this court interferes only when necessary to correct an abuse of discretion. 209+754.

Whether a receiver shall be appointed in a proceeding supplementary to execution, is largely within the discretion of the trial court. 212+455.

9454. Adverse claimants, etc.—If it appears that any person alleged to have property of, or to be indebted to, the judgment debtor, claims an adverse interest therein, or denies the debt, such interest or debt may be recovered only in an action against such person by the receiver; but the judge may by order forbid a transfer or other disposition of such property or interest until a sufficient opportunity is given to the receiver to prosecute the action to judgment and execution, and may vacate or modify such order at any time on such security as he may direct. (4324) [7958]

22–452.

9455. Person indebted may be examined—After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, upon proof, by affidavit or otherwise, to the satisfaction of the judge, that any person has property of the judgment debtor, or is indebted to him in an amount exceeding ten dollars, the judge may require such person, or any officer thereof if a corporation, upon such notice to any party as may seem proper, to appear and answer concerning the same. (4325) [7959]

30–487, 16+398; 66–66, 68+771.

CHAPTER 78

JURIES

9456. Petit jury—A petit jury is a body of twelve men or women, or both, impaneled and sworn in the district court to try and determine, by a true and unanimous verdict, any question or issue of fact in a civil or criminal action or proceeding, according to law and the evidence as given them in court. (R. L. '05 § 4326, G. S. '13 § 7960, amended '21 c. 365 § 1)

65–196, 68+53; 192+194.

213+545 note under § 9468.

9457. No sex disqualification—Laws relating to jury service to apply to both women and men—The provisions of statute relating to the qualifications of jurors in all cases, as well as those relating to exemption from jury duty, are hereby amended to include women as well as men, and any and all sex qualification is hereby removed. ('21 c. 365 § 3)

213+545, note under § 9468.

9458. Number to be drawn—Except as hereinafter provided, a number of petit jurors, not less than twenty-four, shall be drawn for each general term of the district court; but in his discretion the judge, by order filed with the clerk at least thirty days before any term, may direct that a greater number be drawn, not exceeding thirty-six in all, or that no petit jury be drawn for such term. (4327) [7961]

9459. Qualifications, disabilities, and exemptions—The qualifications, disabilities, and exemptions of petit jurors shall be the same as those prescribed by law in the case of grand jurors. (4328) [7962]

40–65, 41+459; 155–37, 192+194.

9460. How drawn and summoned—Petit jurors shall be drawn and summoned at the same time and in the same manner as is provided by law in the case of grand jurors. They shall be summoned to appear on the second day of the term, unless the judge or judges, by an order filed with the clerk at least fifteen days before the term, fix a different day in the term for their appearance, in which case they shall be summoned for the day so fixed. And the court in any district may fix such day, for any or all counties therein, by orders which shall remain in force until altered or annulled. (4329) [7963]

16–282, 249; 195+890.

9461. How drawn and summoned in counties having more than 200,000 inhabitants—The judge or judges of any judicial district may, by order filed with the clerk of the court of any county having a population of more than two hundred thousand, where a term of court is to be held at least fifteen days before the sitting of such court, direct that the petit jurors for such or any subsequent term or terms be summoned for any day of the term fixed by such order other than the day now fixed by law. Such order may be at any time modified or vacated by the court by an order in like manner made and filed with the clerk at any time. When such order has been made, the clerk of the district court in such county shall, in the presence