Nineteen Hundred Thirty-One

Supplement

to

Mason's Minnesota Statutes

(1927 thru 1931)

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

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PLEADINGS AND TRIAL

§9029. Title to real estate—Case certified.

Removal to district court from municipal court forcible entry and detainer case. 178M 282, 226NW847.

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§9072. Writ—When returnable.

A writ of replevin issued pursuant to Laws 1895, c. 229, §22, is valid. 178M174, 226NW405.

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§9092. May be taken, when.

Where an appeal is taken on questions of law and the judgment is reversed, the suit is no longer pending so as to bar a second suit on the same cause of action. 173M29, 216NW252.

§9093. Requisites.

½. Time for appeal.

Defaulting defendant in municipal court was not entitled to notice of entry of judgment as respected time for appeal. Anderson v. G., 236 NW483. See Dun. Dig. 486(74).

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Notice of appeal from municipal court cannot be served by mail. 178M366, 227NW200.

3. Miscellaneous.

Though notice of appeal served by mail was ineffective, the district court obtained jurisdiction where appellee moved there for judgment against garnishee. 178M366, 227NW200.

§9099. Return or amendment compelled, when.

Amendment of defective record on appeal from municipal court. Op. Atty. Gen., Dec. 9, 1930.

CRIMINAL PROCEEDINGS

§9110. Jurisdiction.

Justice of the peace in Golden Valley has no jurisdiction to try a criminal case for an offense committed in Minneapolis. 174M608, 219NW452.

Waiver gives no such jurisdiction.—Id.

Village justices and constables have jurisdiction under criminal acts committed outside village boundaries except offenses committed within the limits of any city or village wherein a municipal court is organized and existing. Op. Atty. Gen., May 19, 1931.

§9111. Same—To try and determine.

A municipal court organized under the general law has no jurisdiction of gross misdemeanors punishable by a fine in excess of $100, or by imprisonment in excess of three months. State ex rel. Ryan v. M., 234NW453. See Dun. Dig. 6900b (63).

§9112. Complaint—Warrant.

Labeling complaint and warrant as though state of Minnesota were plaintiff was mere irregularity that did not affect jurisdiction of justice, and additional language "against the form of the statute in such case made and provided," when charging a violation of an ordinance, was mere surplusage. 177M617, 225NW 286.

It is sufficient to state the facts and identify the ordinance by number. 177M617, 225NW286.

Section is not applicable where the charge constitutes a felony. Op. Atty. Gen., Aug. 5, 1930.

§9117. Arraignment.

Right of defendant to appeal after plea of guilty in municipal court. Op. Atty. Gen., Dec. 9, 1930.

§9130. Allowance of appeal.

Where there is an appeal from conviction in justice court for violation of game and fish laws, revocation of defendants license is ineffective until conviction on appeal. Op. Atty. Gen., Dec. 19, 1929.

§9145. Fines—How collected and paid over.

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

CHAPTER 76

Forcible Entry and Unlawful Detainer

§9149. Recovery of possession.

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

4. When action will lie.

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

5. Who may maintain.

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

6. Parties defendant.

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

§9157. Writ of restitution.

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

§9158. Appeal.

178M460, 227NW656; note under §9157.

CHAPTER 77

Civil Actions

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

2. Election of remedy.

Election of remedies. 171M65, 212NW738.

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

A judgment entered on a verdict directed for the defendant on the ground that the defendant was not authorized by the law under which it was organized to execute the promissory notes alleged as causes of action by the receiver of the payee bank is not a bar to action for money

had and received. Turner v. V., 233NW856. See Dun. Dig. 5169.

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

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

2. Abatement of actions.

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

3. Common counts.

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

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

4. Equitable remedies.

5.—Adequacy of legal remedy.

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

6.—Cancellation of instruments.

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

7.—Specific performance.

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

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

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

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

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

8.—Abatement of nuisances.

Equity has jurisdiction to enjoin and abate nuisances, without jury trial. 174M457, 219NW 770.

9. Torts.

10.—Negligence.

Negligence of attendant of mud baths held not shown as to one who fell when getting out of mud, and defendant was entitled to judgment notwithstanding verdict. Johnson v. M., 234NW 680. See Dun. Dig. 6987.

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

That defendant's farm team had run away some two years previously, together with evidence of an admission by defendant that at an undisclosed time they had injured a cow, was not sufficient evidence of negligence to sustain a verdict for an employee, injured in a runaway, who had worked with the team two and a half months and who based his action on failure to furnish a safe team or to warn of their alleged propensity to run away. Johnson v. A., 236NW 628. See Dun. Dig. 5884-5915.

11.—False imprisonment and malicious prosecution.

Mere dropping of prosecution was not such termination favorable to accused as would permit the successful maintenance of an action for malicious prosecution. Friedman v. G., 234NW 596. See Dun. Dig. 5727.

12.—Conversion.

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

13.—Respondeat Superior.

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

14.—Damages.

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

PARTIES

§9165. Real party in interest.

Correction—Citation to annotations under note 8 in main edition should read "160M1, 199NW 887."

½. In general.

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

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

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

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

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

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

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

1. Held real party in interest.

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

Stockholder of corporation which has been defrauded may maintain an action in the name of the corporation for rescission without making futile demand upon corporation to do so. 176M 411, 223NW624.

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

Where bank pledges bills payable to secure a loan, and is closed, the pledgee is the real party in interest in action on the bills payable, but he may consent to suit by the pledgor. Op. Atty. Gen., May 22, 1929.

2. Held not real party in interest.

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

4. Assignments.

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

Assignee of mortgage, held not entitled to sue mortgagor for damages for fraudulent representations as to character of land. 178M574, 228NW 152.

6. Action by taxpayer.

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

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

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

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

7. Bonds.

Ward may sue on depository bond in which guardian or judge was named as obligee. 176M 541, 224NW152.

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

8. Waiver of objections.

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

§9166. Action by assignee—Setoff saved.

6. Negotiable paper.

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

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

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

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

§9168. Married women may sue or be sued.

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

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

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

§9174. Joinder of parties to instrument.

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

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

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

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

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

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

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

§9175. Surety may bring action.

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

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

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

§9178. Actions against receivers, etc.

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

§9179. How tried; and judgment, how satisfied.

177M584, 225NW919.

§9181. Bringing in additional parties.

In action on note secured by mortgage on land deeded by bank to maker, and reconveyed

by maker to bank, such maker was not entitled to bring in bank as party. 181M82, 231NW403.

LIMITATION OF ACTIONS

§9185. General rule—Exceptions.

1. In general.

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

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

The statute of limitation of actions affects the remedy, not the right. If it had run, it could be waived as a defense. 181M523, 233NW 802. See Dun. Dig. 5661(83).

2. When action accrues.

Claim for salaries and expenses advanced by president of corporation under agreement, held not barred by any statute of limitation. 177M 72, 224NW454.

4. Laches.

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

§9186. Bar applies to state, etc.

180M496, 231NW210.

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

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

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

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

§9187. Recovery of real estate, fifteen years.

½. In general.

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

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

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

2. Essentials of adverse possession.

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

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

3. Payment of taxes.

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

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

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

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

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

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

Title by adverse possession may be acquired, although the parties in interest occupy up to a fence in the mistaken belief that the fence is on the true boundary line. 171M410, 214NW 271.

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

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

6. Permissive possession.

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

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

17. Possession must be exclusive.

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

22. Easements.

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

22½. Pleading.

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

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

25. Burden of proof.

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

27. Facts held sufficient to constitute adverse possession.

179M228, 228NW755.

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

28. Facts held insufficient.

Evidence did not require finding that defendant acquired title to portion of plaintiff's adjoining lot by adverse possession through occupancy beyond true boundaries. 174M171, 218NW 549.

§9189. When time begins to run.

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

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

§9190. Judgments, ten years.

The allowance of a claim by a referee in bankruptcy is not a "judgment or a decree of a

court of the United States." 173M263, 217NW126.

The approval of a settlement in a workmen's compensation matter under Act of 1913, c. 467, is not a judgment as regards limitations. 176M 554, 223NW926.

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

§9191. Various cases, six years.

In general.

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

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

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

Subdivision 1.

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

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

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

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

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

Limitations did not begin to run against one entitled to certain excess on sale of land until such money was paid. Ellingson v. S., 234NW 867. See Dun. Dig. 5606.

Subdivision 2.

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

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

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

Subdivision 3.

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

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

Subdivision 4.

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

Subdivision 5.

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

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

Where the injury is continuing the owner may recover such damages as were caused within six years prior to suit. 177M565, 225NW 816.

Subdivision 6.

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

§9192. Against sheriffs and others.

Subdivision 1.

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

§9193. Two years' limitations.

In view of §3417(14) action on accident policy was barred after two years. 174M354, 219NW 286.

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

Subdivision 1.

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

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

Action against city for wrongful death must be commenced within one year from the occurrence of the loss or injury. 178M489, 227NW 653.

Limitations do not begin to run in an action against a physician for malpractice, until the treatment ends. 181M381, 232NW708. See Dun. Dig. §§5602, 7490d.

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

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

Limitations in malpractice cases begins to run when the treatment ceases. Schmit v. E., 236NW622. See Dun. Dig. 7490d.

Subdivision 3.

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

§9199. When action deemed begun—Pendency.

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

173M580, 218NW110.

To constitute "issuance of summons" the summons must be either served or delivered to the proper officer for service. 181M349, 232NW 512. See Dun. Dig. 7798.

§9201. When cause of action accrues out of state.

180M560, 231NW239.

§9202. Periods of disability not counted.

Where application and accident policy are made part of complaint and application shows that plaintiff was not a minor, it is immaterial

that the complaint states that she is a minor. 174M354, 219NW286.

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

§9204. New promise must be in writing.

1. Acknowledgment or promise.

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

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

2. Part payment.

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

VENUE

§9206. General rule—Exception.

A party who goes to trial at Virginia in a case involving title to real estate without objection, cannot complain under Laws 1909, c. 126, that there was no written consent to trial of a case involving title to real estate. 171M 475, 214NW469.

A garnishment proceeding is not a suit which is removable to the federal court under Mason's U. S. Code, Title 28, §§71, 72. 177M182, 225NW 9.

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

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

§9207. Actions relating to land.

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

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

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

§9214. Other cases—Residence of defendant.

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

Must be construed so as to place foreign corporations within the equal protection clause of the Fourteenth Amendment of the federal Constitution, as held in Power Mfg. Co. v. Saunders, 274US490, 47SCt678, 71LEd1165. Olson v. Osborne & Co., 30M444, 15NW876, and Eickhoff v. Fidelity & Casualty Co., 74M139, 76NW1030, being in conflict with the decision of the Supreme Court of the United States, are overruled. State ex rel. Twin City & So. Bus Co. v. D., 225 NW915.

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

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

CHANGE OF VENUE

§9215. As of right—Demand.

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

1. When applicable.

225NW915; 229NW318.

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

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

Venue cannot be changed in action against sureties upon public contractor's bonds commenced in the county wherein the construction work is located. 179M94, 228NW442.

7. Waiver.

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

8. Corporations.

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

§9216. By order of court—Grounds.

Where, on motion for change of venue, a fact issue is raised as to the residence of a defendant, determination of that issue by the district court is final. 181M517, 233NW9. See Dun. Dig. 410.

Subd. 4.

225NW915.

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

§9218. Interest or bias of judge.

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

§9221. Affidavit of prejudice.—Any party or his attorney to a cause pending in a district court having two or more judges, on the first day of a general or special term thereof or within one day after it is ascertained which judge is to preside at the trial or hearing thereof or at the hearing of any motion, order to show cause or argument on demurrer, may make and file with the clerk of the court in which the action is pending and serve on the opposite party an affidavit stating that, on account of prejudice or bias on the part of such judge, he has good reason to believe, and does believe that he cannot have a fair trial or hearing thereof, and thereupon such judge shall forthwith without any further act or proof secure some other judge of the same or another district to preside at the trial of such cause or hearing of motion, demurrer or order to show cause, and shall continue the cause on the calendar, until such

judge can be present. In criminal actions such affidavit shall be made and filed with such clerk by the defendant or his attorney not less than two days before the expiration of the time allowed him by law to prepare for trial, and in any of such cases such presiding judge shall be incapacitated to try such cause: Provided, that in criminal cases such judge, for the purpose of securing a speedy trial, may, in his discretion, change the place of trial to another county. (As amended Apr. 18, 1931, c. 200.)

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

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

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

§9222-1. Additional costs on change of Taxation.

See section 9487-1 in the main edition.

SUMMONS—APPEARANCE—NOTICES—ETC.

§9225. Requisite of summons.

5. Irregularities.

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

§9228. Service of summons—On natural persons.

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

That the summons and complaint, when left at the home of defendant, were enclosed and sealed in an enveleope addressed to the defendant, held not to invalidate the service. 181M 379, 232NW632. See Dun. Dig. 7810(58).

§9231. On private corporations.

171M87, 214NW12; notes under §§7493, 9233. 175M138, 220NW423.

Subdivision 3.

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

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

Service of summons upon the insurance commissioner is not limited to actions which arise out of business transacted in this state or with residents thereof. 176M143, 222NW901.

Service upon a foreign railroad company doing business in the state must be had in the manner provided by statute. 176M415, 223NW 674.

§9233. On railway companies.

176M415, 223NW674; note under §9231.

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

Decision in Erving v. Chicago & N. W. Ry. Co., 171M87, 214NW12, followed. 175M96, 220 NW429.

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

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

Rights of foreign railroad sued by non-resident for injuries suffered outside state. 178M 261, 226NW934.

§9234. Service by publication—Personal service.

See §3230.

174M436, 217NW483.

½. In general.

Affidavit for publication of summons must be filed and publication of summons be commenced within a reasonable time after the sheriff's return of not found is made. A delay of over seven months is unreasonable. 173M580, 218NW 110.

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

§9235. In what cases.

See §3230.

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

Subdivision 6.

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

§9236. When defendant may defend—Restitution.

173M580, 218NW110.

§9238. Jurisdiction, when acquired—Appearance.

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

2. Effect of a general appearance.

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

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

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

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

6. What constitutes general appearance.

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

10. Appearance held special.

A special appearance is not made general by a consent to an adjournment. 177M182, 225NW 9.

§9239. Appearance and its effect.

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

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

§9240. Service of notices, etc.

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

§9242. By mail—When and how made.

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

"Place of residence" means the municipality wherein the addressee resides and not the house that he occupies as a home. 175M112, 220NW 435.

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

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

§9243. Defects disregarded—Amendments, extensions, etc.

See notes under §§9283, 9285.

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

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

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

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

MOTIONS AND ORDERS

§9246. Defined—Service of notice.

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

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

174M397, 219NW458.

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

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

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

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

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

§9248. Ex parte motions.

173M271, 217NW351; note under §9247.

PLEADINGS

§9249. Pleadings, etc., how regulated.

Title by adverse possession may be proved under a general allegation of ownership. 171M 488, 214NW283.

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

§9250. Contents of complaint.

½. In general.

The prayer for relief is not a part of the cause of action and is not traversable. 174M 410, 219NW760.

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

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

Subdivision 1.

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

Subdivision 2.

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

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

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

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

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

The charge to the jury was erroneous because it permitted the finding of negligence on an independent ground not included in the pleadings. Farnum v. P., 234NW646. See Dun. Dig. 7061(61).

§9251. Demurrer to complaint—Grounds.

½. In general.

Complaint cannot be made for the first time at the close of the case that the complaint does not state a cause of action, where the case has been tried on a definite theory or issues. 171M 363, 214NW58.

On demurrer a pleading is to be construed liberally in favor of pleader. 181M261, 232NW 324. See Dun. Dig. 7724.

When a complaint states a cause of action resting upon a particular statute, the constitutionality of the statute may be raised by demurrer. 181M427, 232NW737. See Dun. Dig. 7540.

4. For want of capacity to sue.

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

5. For pendency of another action.

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

6. Defect of parties.

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

8. For failure to state a cause of action.

General demurrer on ground that complaint did not state a cause of action was good where upon face of complaint it appeared that cause of action upon an accident policy accrued more

than two years prior to the issuing of the summons, the provisions of §3417(14) having been incorporated in the policy. 174M354, 219NW286.

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

9. Not ground for demurrer.

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

§9252. Requisites—Waiver.

5. Waiver.

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

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

Appearance in response to writ of mandamus and asking for an adjournment to enable answer does not waive defective pleading. 173M 198, 217NW119.

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

§9253. Contents of answer.

½. In general.

Conclusions. 172M398, 215NW783.

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

DENIALS

2. Effect of general denial.

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

13. When one of several obligors is sued.

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

14. Must be pleaded specially.

In action to recover interest on awards for taking of land by city, defendant must plead facts showing that tender was made. L. Realty Co. v. C., 237NW192. See Dun. Dig. 3104.

§9254. Requisites of a counterclaim.

1. Nature of counterclaim.

The debtor of an insolvent bank when sued by its receiver, cannot set off his liability as a surety for the bank on a depository bond. 172M 80, 214NW792.

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

A debt due an insolvent bank for borrowed money cannot be offset on a liability which has accrued against the debtor as a surety for the bank on a depository bond. 174M102, 218NW 456.

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

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

11. "Arising out of the contract."

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

20. Rules as to pleading counterclaim.

Counterclaim construed to be for damage for breach of warranty. 176M467, 229NW575.

21. Mode of objecting to counterclaim.

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

§9256. Judgment on defendant's default.

½. In general.

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

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

§9257. Demurrer or reply to answer.

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

½. In general.

In mandamus reply to answer is not necessary. 178M442, 227NW891.

2. Reply to answer—Departure.

181M115, 231NW790.

§9259. Sham and frivolous pleadings.

½. In general.

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

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

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

On motion to strike, it is the duty of the court to determine whether there is an issue to try, not to try the issue. 174M315, 219NW 148.

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

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

Reply properly stricken as sham. 178M47, 225NW901.

In ejectment by landlord against tenant answer admitting ownership by plaintiff and possession by defendant but denying all other allegations, held sham. 179M349, 229NW312.

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

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

1. Defined.

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

12. Irrelevant pleadings.

Partial defense stricken as irrelevant. 176M 254, 223NW142.

16. Frivolous answer or reply.

173M18, 216NW329.

General denial stricken as frivolous. 171M 405, 214NW261.

An answer is "sham" when so clearly false

that it tenders no real issue; and it is "frivolous" when its insufficiency appears upon mere inspection. 223NW677.

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

231NW224.

§9261. Interpleader.

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

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

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

§9263. Intervention.

176M11, 222NW295.

§9266. Pleadings liberally construed.

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

§9267. Irrelevant, redundant, and indefinite pleadings.

½. In general.

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

3. Indefinite pleading.

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

§9268. Averments, when deemed admitted.

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

§9270. Ordinances and local statutes.

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

The courts take judicial notice of statutes of the state as well as the common law. Saunders v. Y., 233NW599. See Dun. Dig. 3452(98).

§9273. Conditions precedent.

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

§9275. Pleadings in slander and libel.

1. Alleging extrinsic facts.

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

§9277. Joinder of causes of action.

Subd. 1.

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

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

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

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

Subd. 2.

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

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

Splitting cause of action.

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

§9280. Amendment by order.

½. In general.

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

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

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

1. A matter of discretion.

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

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

2. Amendments on the trial held discretionary.

Court did not abuse its discretion in denying application to amend complaint by changing name of corporate defendant. 171M209, 213NW 742.

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

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

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

In an action against outomobile repairer for injuries caused by back-fire, court properly permitted plaintiff to amend to show that negligence was with respect to repairing "timer" and not "carburetor," as alleged. 175M216, 220NW 565.

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

4. Amendments after trial held discretionary.

179M266, 229NW128.

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

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

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

12. Scope of allowable amendment of complaint.

Application for amendment of complaint stating cause of action under Federal Safety Appliance Act to one under Federal Employers

Liability Act properly denied. Meisenholder v. B., 227NW426.

§9281. Variance — Amendment — Exceptions.

1. Proof must follow pleadings.

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

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

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

2. Immaterial variance.

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

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

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

3. Material variance.

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

4a. Discretion of court.

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

§9283. Extensions of time—Mistakes, etc.

THE STATUTE GENERALLY

1. Application in general.

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

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

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

AMENDMENT OF JUDGMENTS AND JUDICIAL RECORDS

3½. In general.

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

4. To be made with caution.

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

6. When may be made.

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

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

7. Notice of motion.

181M329, 232NW322.

11. Clerical mistakes of clerk.

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

12. Mistakes of judge.

181M329, 232NW322.

18. Modification of judgments.

181M329, 232NW322.

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

25. Rights of third parties to be saved.

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

VACATION OF JUDGMENTS AND ORDERS

25½. In general.

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

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

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

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

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

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

32. Diligence.

179M315, 229NW133.

35. Jurisdictional defects.

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

40. Fraud.

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

OPENING DEFAULTS

45½. In general.

173M580, 218NW110.

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

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

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

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

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

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

50. Discretionary.

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

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

Court did not abuse discretion in denying

application to vacate a default judgment. 175 M112, 220NW435.

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

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

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

51. Excusable neglect.

181M39, 231NW241(2).

Opening default occasioned by reliance on certain person to take care of litigation and sickness on that person's part, held not an abuse of discretion. 171M327, 214NW57.

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

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

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

56. Time of application—Diligence.

175M319, 221NW65.

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

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

§9285. Unimportant defects disregarded.

1. In general.

179M284, 229NW130.

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

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

Since the judgment of the municipal court was proper upon the record, it should not be reversed because the district court assigned a wrong reason for affirming it. 181M477, 233NW 18. See Dun. Dig. 421.

No reversible error was made in denying a continuance, nor in refusing to grant a new trial for newly discovered evidence. Miller v. P., 233NW855. See Dun. Dig. 424.

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

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

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

2. Rulings on pleadings.

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

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

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

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

Amendment of complaint at trial as to amount of prayer, held not prejudicial. 179M 19, 228NW440.

Where parties voluntarily litigated breach of warranty in two respects defect in pleading as to one item, held immaterial. 179M467, 229NW 575.

4. Reception of evidence.

180M13, 230NW128.

180M221, 230NW639.

181M115, 231NW790.

181M415, 232NW717.

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

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

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

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

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

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

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

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

Refusal to strike answer of witness was without prejudice where other similar evidence was received without objection. 177M425, 225N W273.

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

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

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

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

Admission of net in prosecution for assault on game warden, held not prejudicial. 179M516, 229NW789.

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

Suppression of deposition, held not prejudicial. 181M217, 232NW1. See Dun. Dig. 422.

Error in receiving evidence as to a subsequent change in the street lighting at place of accident was done away with when the court took from jury question of insufficient lighting and instructed jury that, as a matter of law, the street was properly lighted. 181M450, 232NW 795. See Dun. Dig. 423.

Testimony erroneously received through mistake or inadvertence, but promptly stricken when the court's attention was directed thereto, does not require a new trial, where it is perceived that no prejudice resulted. Drabek v. W., 234NW6. See Dun. Dig. 424.

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

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

An error in the reception of certain testimony was deemed cured when the court, on its own motion, struck it from the record and directed the jury to disregard it. Martin v. S., 236NW 312. See Dun. Dig. 423.

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

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

5. Remarks of court and counsel.

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

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

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

Prejudice held not shown by court's answers to questions asked by jury. 181M496, 233NW 241. See Dun. Dig. 422.

6. Instructions.

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

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

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

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

A party cannot claim error on the ground that the instructions failed to define particular issues specifically where he made no request for more specific instructions. 177M127, 224NW 843.

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

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

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

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

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

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

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

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

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

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

7. Findings of fact.

181M132, 231NW798.

Lack of evidence to sustain a finding which does not prejudice appellant will not reverse a decision. 173M468, 217NW593.

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

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

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

ISSUES AND TRIAL

§9286. Terms defined.

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

§9287. Issues, how joined.

2. Issues of fact.

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

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

RIGHT TO JURY TRIAL

½. In general.

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

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

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

5. Equitable actions.

Equity has jurisdiction to enjoin and abate nuisances, without right of jury trial. 174M 457, 219NW770.

7½. Questions for jury.

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

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

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

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

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

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

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

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

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

If the evidence is such that a verdict in plaintiff's favor would have to be set aside by the

court, not as a matter of discretion, but as a matter of law, because plaintiff has failed to establish any cause of action, the court may properly direct a verdict for defendant. Dorgeloh v. M., 236NW325. See Dun. Dig. 9764(34).

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

ISSUES TO THE JURY IN EQUITABLE ACTIONS

10. How far discretionary.

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

Since, in a case triable to the court, the court, on its own motion, may submit an issue to a jury, no reversible error results from such a submission without there having been a motion for settling a jury issue as prescribed by the rules of the district court. 171M475, 214NW 469.

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

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

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

§9290. Of law, how brought to trial.

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

§9292. Continuance.

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

JURY TRIALS

§9293. Jury, how impaneled—Ballots—etc.

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

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

§9294. Challenges.

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

3. Implied bias.

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

6. Waiver of right.

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

§9295. Order of trial.

1. Right to open and close.

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

1¾. Reception of evidence.

In automobile accident case, where defendant claimed that driver of car owned half interest therein, court did not err in permitting plaintiff to inquire in respect to defendant's application for insurance to rebut the defense of joint ownership, though it showed that an insurance company was the real defendant. Martin v. S., 236NW312. See Dun. Dig. 3232(67).

3. Order of proof.

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

3½. Instructions.

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

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

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

4. Re-opening case.

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

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

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

§9296. View of premises—Procedure.

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

§9298. Requested instructions.

3. When requests may be refused.

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

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

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

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

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

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

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

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

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

6. Request covered by the general charge.

181M245, 232NW38.

6½. Necessity for request.

180M264, 230NW778.

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

A party cannot claim error on the ground that the instructions failed to define particular issues specifically where he made no request for more specific instructions. 177M127, 224NW 843.

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

§9300. Verdict, when received—Correcting, etc.

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

1. Court always open.

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

3. Correction of verdict.

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

§9304. Interrogatories—Special findings.

3½. Interrogatories in general.

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

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

§9307. Verdict in replevin.

Where plaintiff seeking to recover possession of property under two chattel mortgages, holds only one valid mortgage, defendant is not entitled to a general verdict in his favor on a finding that the other mortgage was procured by fraud. 175M341, 221NW62.

§9308. Receiving verdict.

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

TRIAL BY THE COURT

§9311. Decision, how and when made.

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

FINDINGS AND CONCLUSIONS

1. Definitions and distinctions.

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

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

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

3. When findings necessary.

On appeal from an order of probate court admitting a will to probate, the district court must make findings of fact as in other cases, but this may be waived, where the disputed fact necessarily decided the disputed question. 172M 217, 214NW892.

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

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

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

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

5. Nature of facts to be found.

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

6. Sufficiency of particular findings.

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

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

A finding that there was an agreement to pay interest on partnership contributions cannot be contradicted by a memorandum of the trial judge not made a part of the findings. 177M 602, 225NW924.

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

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

7. Findings and conclusions must be stated separately.

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

10. Findings must cover all the issues.

180M168, 230NW464.

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

11. Findings must be within the issues.

A claim that a finding is not sustained by the evidence nor within the issues formed by the pleadings cannot be raised on appeal, where the record fails to show that it contains all the evidence bearing thereon. 177M602, 225NW924.

Immaterial findings which do not affect the conclusions of law may be disregarded. 181M 570, 233NW243. See Dun. Dig. 985a.

Court erred in finding special damages in a replevin action where pleadings contained no allegations of special damages and no evidence thereof was offered. Brown Sheet Iron & Steel Co. v. W., 237NW188. See Dun. Dig. 9858.

13. Judgment must be justified by the findings.

Court finding upon matters not decisive of the controversy will not overthrow the judgment. 173M145, 216NW782.

15½. Striking out and modifying.

Where the decisive findings of fact are sustained by the evidence and sustain the conclusions of law, it is not error for the court to refuse to strike out its findings or refuse to make additional, or substituted findings and conclusions. Jarvaise Academy of Beauty Culture v. S., 237NW183. See Dun. Dig. 9866.

TRIAL BY REFEREES

§9319. Trial and report—Powers—Effect of report.

179M175, 228NW614.

GENERAL PROVISIONS

§9321. Dismissal for delay.

179M225, 229NW86.

§9322. Dismissal of action.

½. In general.

180M52, 230NW457.

The practice of ordering a dismissal with prejudice upon an objection to the introduction of evidence under the complaint is disapproved. Krzyaniak v. M., 233NW595. See Dun. Dig. 2748 (54).

8. Effect of dismissal.

Dismissal of part of a claim on ground that the suit as to such part was premature, held not to bar subsequent action on part so dismissed, though the judgment would be conclusive as to defenses interposed and determined. 178M535, 228NW148.

10. Dismissal against co-defendant.

City, sued for injuries from defect in street, cannot question dismissal as to property owners made co-defendants. 179M553, 230NW89.

Defendant could not object to dismissal as to a co-defendant joined by mistake where such dismissal had no effect on the issues. 180M467, 231NW194.

NEW TRIALS

§9325. Grounds—Presumption on appeal.

THE STATUTE GENERALLY

½. In general.

Karnofsky v. W., 237NW425; note under §9498(13).

Where liability has been admitted and verdict as reduced is plainly not excessive appellate court will not consider assignments of error directed to rulings on evidence and amount of recovery. 173M365, 217NW369.

Court may permit a renewal of motion for a new trial. 174M297, 219NW180.

Where trial judge has become incapacitated and motion for new trial is heard by another judge, the latter has no power to amend findings of fact but he may amend the conclusions of law and may grant a new trial for the same causes which the trial judge may grant it. 175M346, 221NW424.

Mere mistake in form of verdict not fatal if intention clearly appears and verdict assessing damages in sum of "none dollars" is a verdict for the defendant. 177M408, 225NW291.

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

Power of the district court to review and vacate order denying new trial. Barrett v. S., 237 NW15; note under §9283.

5. Motion a matter of right.

Court held not to have abused its discretion. 172M516, 215NW852.

8. Of less than all the issues.

May be granted on issue of damages alone. 180M185, 230NW473.

FOR IRREGULARITY OR ABUSE OF DISCRETION

9½. In general.

Publication by newspaper of result of previous trial held not to render refusal of court to dismiss jury prejudicial. 176M377, 223NW619.

11. Improper remarks of court.

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

Remark of court to objection to language of plaintiff's counsel "That is the law, but it isn't necessary to argue it" was prejudicial error where plaintiff's counsel had stated to the jury that they should pay the plaintiff plenty of damages because the court could cut down the amount if they over-stepped the bounds. 175M 96, 220NW429.

A trial court's talk in open court to a jury seeking further instructions held not to be an "irregularity," but may be reviewed as an "errors of law occurring at the trial" and a settled case or bill of exceptions is necessary. 178M 141, 226NW404.

It was not error for court to suggest that counsel "get together" in reference to the use of an audit. Sigvertsen v. M., 234NW688. See Dun. Dig. 7098.

12. Other misconduct.

Prejudicial bias of trial judge was not established by his extensive participation in examination of witnesses in divorce action. 225NW 287.

Misconduct of members of family of party, held not established. 179M557, 230NW91.

FOR MISCONDUCT OF JURY

12½. In general.

There was no error in denying a new trial on the affidavit of a juror that he did not believe the testimony in behalf of the state and only agreed to a conviction to put an end to the case. 171M503, 214NW474.

Misconduct of juror, held not shown, 179M 557, 230NW91.

Examination of insurance policy by juror in automobile collision case held not prejudicial in view of court's instruction. Honkomp v. M., 234NW638. See Dun. Dig. 7116.

The purity of jury trials must be jealously guarded; scrupulous conduct on the part of jurors, litigants, and counsel is necessary. Brecht v. T., 235NW528. See Dun. Dig. 7100.

13. Discretionary.

Whether misconduct between counsel and jury requires new trial is a matter within the sound discretion of the trial court. Brecht v. T., 235 NW528. See Dun. Dig. 7104(99).

15. Necessity of objection on the trial.

Claim that verdict was given under passion and prejudice cannot be raised for the first time on appeal. 179M297, 229NW87.

22. Other misconduct.

172M591, 216NW537.

Permitting jury to attend theatrical performance, held not to require new trial. 179M301, 229NW99.

FOR MISCONDUCT OF COUNSEL

22½. In general.

It was the duty of the court on its own motion to stop a jury argument improperly predicated upon personal abuse of opposing counsel or upon matters not pertinent to the issues tried. 171M219, 213NW890.

Verdict could not stand where counsel made abusive personal attack upon opposing counsel in his argument to the jury. 171M219, 213NW 890.

Remarks of counsel, while not in good taste, held not so prejudicial as to require a new trial. 171M321, 214NW52.

In action for indecent assault, statement of attorney in argument "I am glad there is one woman who had the nerve to come into court and face" the defendant, held prejudicial. 174M 151, 218NW548.

Misconduct of counsel in presenting evidence, held not shown on the record. 177M13, 224NW 259.

Improper argument, held ground for reversal. 179M127, 228NW552.

The asking of a question deemed objectionable should not be considered misconduct of counsel, where the testimony of the witness suggests the inquiry, and no allusion is thereafter made by the counsel to the subject. Harkness v. Z., 235NW281. See Dun. Dig. 7103.

Naming of insurance companies by attorney in automobile accident case, held not misconduct. Arvidson v. S., 237NW12. See Dun. Dig. 5252(21), (22), (23).

23. Improper remarks on the trial.

172M591, 216NW537.

Anderson v. A., 229NW579(1).

180M340, 230NW792.

Statement concerning interest of insurance company in litigation, held without prejudice where defendant gave ample opportunity for bringing the matter to the attention of the jury. 175M153, 220NW418.

Extended offers and discussions by counsel, in the presence of the jury, of incompetent and prejudicial matter, held not proper. 175M341, 221NW62.

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

Statement by counsel of fact shown by document admitted in evidence, held not error. 180 M298, 230NW823.

Improper remarks, held not ground for reversal in absence of objection or exception. Examination of jurors on voir dire as to interest in insurance company defending suit, held not error. 181M4, 231NW714.

24. Other misconduct.

172M543, 216NW233.

FOR NEWLY DISCOVERED EVIDENCE

30. To be granted with extreme caution.

172M368, 215NW516.

Diligence in discovery of new evidence held not shown. 172M516, 215NW852.

New trial rests largely in the discretion of the trial court and is to be granted cautiously and sparingly. 176M210, 222NW924.

No abuse of discretion in granting new trial for evidence concerning developments subsequent to trial. Gau v. B., 225NW22.

Motion rests largely in the discretion of the trial court, and is to be granted with caution. 178M296, 226NW938.

Grant of new trial is discretionary with trial court. 179M80, 228NW335.

32. Showing on motion.

181M355, 232NW622.

Fact issues, if any, on motion, are for trial court. Gau v. B., 225NW22.

35. Nature of new evidence.

179M436, 229NW564.

181M355, 232NW622.

Matter of granting a new trial for newly discovered evidence rests largely in the sound legal discretion of the trial court. 171M515, 213 NW923.

A new trial was properly denied for newly discovered evidence which was merely cumulative and corroborative and not of such weight as to induce the belief that it would change the result. 171M345, 214NW262.

Evidence that principal witness for state was reputed to be of unsound mind was not of such a nature as to require a new trial, where the testimony of the witness was full of contradictions. 171M503, 214NW474.

Denial of motion for new trial for newly discovered evidence some months after entry of judgment. 173M250, 217NW127.

Court did not abuse its discretion in denying new trial on affidavits showing that witness perjured himself. 174M545, 219NW866.

Due diligence should have produced the evidence of a son and an employee of the party seeking a new trial. 175M618, 221NW641.

Where existence of facts is asserted by experts or the expert testimony, would be merely cumulative there was no abuse of discretion in denying a new trial. 176M200, 223NW97.

Evidential facts sought to be proved may have arisen after the trial. 177M25, 224NW257.

Court acted within its discretion in denying the state a new trial in condemnation proceedings for evidential fact arising after the trial. 177M25, 224NW257.

Newly discovered evidence held not of sufficient importance to require a new trial. Dumbeck v. C., 225NW111.

Newly discovered evidence, held not to require new trial. 177M441, 225NW389.

Documentary evidence, apparently genuine, which would destroy plaintiff's case if authentic, required new trial. 177M444, 225NW399.

New trial was properly denied, where a large part of the evidence was cumulative and due diligence was not shown to obtain it for the trial. 178M87, 226NW208.

Motion is granted only when the evidence is such as will likely change the result, and only to remedy a manifest injustice. 178M296, 226 NW938.

Mere inadvertence of counsel in not offering available evidence, held not ground for new trial on the theory of newly discovered evidence. 179 M99. 228NW447.

Facts disclosed at trial is not newly discovered evidence. 180M264, 230NW778.

No reversible error was made in denying a continuance, nor in refusing to grant a new trial for newly discovered evidence. Miller v. P., 233NW855. See Dun. Dig. 1710, 7123.

A showing that a litigant after trial remembers what he should have remembered at the trial does not constitute newly discovered evidence entitling him to a new trial. Farmers' State Bk. of Eyota v. C., 234NW320. See Dun. Dig. 7128(57), (58).

A motion for a new trial on the ground of newly discovered evidence is largely addressed to the discretion of the trial court. Buro v. M., 237NW186. See Dun. Dig. 7123.

FOR EXCESSIVE OR INADEQUATE DAMAGES

36. Under either subd. 5 or subd. 7.

172M493, 215NW861; 172M543, 216NW233.

179M411, 229NW566.

Verdict for $9,800 for injury to eve and 24 fractured bones was not so excessive as to show passion or prejudice. 171M321, 214NW52.

$17,390, reduced to $10,390, was not excessive for permanent injuries to right hand and property. 171M472, 214NW287.

$3,200 was not excessive for death of boy 17 years of age. 172M76, 214NW774.

$10,000 held not excessive for injuries to memory, hearing, sight and other parts of the body of a school teacher. 171M399, 214NW761.

$12,500 held not excessive for injuries to jaw and neck of railroad mechanic who was permanently disabled as a mechanic. 172M284, 214 NW890.

$10,000 was not excessive to female school teacher receiving broken knee cap and a pelvic injury resulting in a tumor and such condition as would render it improbable that she could bear children. 172M134, 215NW198.

Verdict held excessive. 172M501, 215NW853. Personal injuries to tenant from defective premises. 172M377, 215NW865.

Verdict for $35,000.00 for death of switchman 30 years old, earning $190 per month and leaving widow and two small children, held not excessive. 172M447, 216NW234.

Verdict for $5,000, reduced to $3,000, held not excessive for death at a railroad crossing. 173 M7, 216NW245.

Evidence held to justify finding that fracture of plaintiff's four cervical vertebra was occasioned by the negligence of defendant. 173M 163, 216NW803.

$9,500 was not excessive to young woman, 31 years of age, for face blemish and injury to eye. 173M186, 217NW99.

Verdict for $15,000 was excessive for injuries where only permanent injury was "flat feet." 173M239, 217NW128.

Verdict of $7,000, for son and $1,400 for father, reduced to $4,500 and $500, held not excessive for fracture of skull, among other things. 173M365, 217NW369.

Claim of error in the amount of a judgment must first be submitted to the trial court. 173 M325, 217NW381.

$1,000 was not excessive for injury to head, causing headaches, dizziness, and disability to do certain work. 173M622, 217NW485.

$2,000 for a dislocated ankle was not excessive. 173M439, 217NW493.

$7,500 to woman and $982.96 to husband for injuries to woman resulting in miscarriage and other permanent injuries held not excessive. 174 M294, 219NW179.

Injuries to land and crops from flooding. 174 M443, 219NW459.

Where in tort action the amount of damages is not based upon estimate of experts or the calculation of other witnesses, the defendant should base his motion for new tiral upon the fifth subdivision of this section. 174M545, 219NW 866.

$6,000 was not excessive for brain injury. 174 M545, 219NW866.

Verdict for $10,550 for death, medical expenses and suffering in Wisconsin, held not excessive. 175M22, 220NW162.

Verdict for $25,000 reduced to $23,500 was not excessive for injuries to telephone lineman 36 years of age consisting of injuries to vertebra, ribs and leg. 175M150, 220NW412.

Verdict for $7,500, reduced to $5,000, held not excessive for injuries to unmarried woman, 29 years of age. 222NW580.

Verdict for $33,000 reduced to $28,000 for injury to leg, was still high and is reduced to $23,000. 176M331, 223NW605.

Verdict for $15,000 held not excessive for shortened leg. 176M377, 223NW619.

Where one verdict has been set aside as excessive the Supreme Court will exercise great caution in setting aside or reducing a second verdict as excessive. 176M437, 223NW675.

$16,000 held excessive and reduced to $12,000 for injury to feet. 176M437, 223NW675.

Verdict for $3,500 reduced to $1,800 for wrongful arrest and imprisonment, held so excessive as to indicate passion or prejudice. 176 M203, 223NW94.

$4,200 not excessive for injury to leg. 177M 42, 224NW255.

$8,300 held not excessive for crippled left arm and hand of a farm renter, 42 years of age. 177M13, 224NW259.

Plaintiff could recover as damages the value of an automobile lost by a garage through negligence, though plaintiff purchased it under a conditional sale contract and had not paid all of the purchase price. 177M10, 224NW271.

Automobile owner can recover its entire value from garage which lost it by theft through negligence, though the automobile was insured against theft. 177M10, 224NW271.

$4,000 for alienation of wife's affections, held not excessive. 177M270, 224NW839.

$6,000 was not excessive to woman 70 years of age suffering badly fractured arm and collar bone and ribs. Tegels v. T., 225NW85.

$800 for burning barn and other property, held not excessive. 177M222, 225NW111.

Damages for breach of contract of employment, held not speculative or conjectural. 177 M383, 225NW275.

Verdict for $5,000 against bank officers inducing deposit, held not supported by the evidence and contrary to the law. 177M354, 225NW 276.

Damages to chickens caused by selling poultryman raw linseed oil for cod ilver oil were not so conjectural and speculative as to present recovery, and $1,412.30, held not excessive for loss of poultry. 177M390, 225NW395.

Discrepancy in recovery amounting to five days' interest, held within the rule de minimis non curat lex. 177M563, 225NW815.

Where there is error in a charge affecting the amount of a verdict in a definitely ascertainable amount, the prevailing party should be allowed to remit the erroneous excess and there should not be a retrial of the whole case. 178M 177, 226NW411.

$7,500 for fracture of leg of 11 year old girl held excessive and reduced to $5,000. 178M353, 227NW203.

Error in instruction as to testimony of only witness testifying as to damages, held to require new trial where verdict was in very large amount. 179M467, 229NW575.

$2,564 for death of child, held not excessive. 229NW784.

$2,500, held not excessive for scalp wound requiring surgical treatment. 180M185, 230NW 473.

$3,000 for services of daughter, held not excessive. 180M100, 230NW478.

$34,963 for serious burns to fireman earning $150 per month, held excessive. 180M298, 230 NW823.

$32,500 for injuries to conductor, held excessive in view of errors in admission of evidence. 180M310, 230NW826.

$6,000, held not excessive for death of girl, 23 years old. Waggoner v. G., 231NW10(2).

Where verdict is excessive, and alternative motion for judgment or new trial is filed, proper order is award of new trial on condition that prevailing party consent to reduction. 180M 540, 231NW222.

$17,300, held not excessive for probably permanent injuries to car repairer 49 years old and earning $105 per month. 181M97, 231NW 710.

$4,000 for injury to theatre patron, held not excessive. 181M109, 231NW716.

$2,000 for alienation of affections of plaintiff's husband, held not excessive. 181M13, 231NW 718.

$1,800 to wife and $1,000 to her husband for expenses and loss of services, held not excessive for injury to wife in automobile collision. 181 M338, 232NW344. See Dun. Dig. 2597.

$3,000, held not excessive for injury to person fifty-five years old. 181M406, 232NW715. See Dun. Dig. 2597.

$3,500 for permanent injuries and disfigurement received in automobile accident, held not excessive. 181M180, 232NW3. See Dun. Dig. 2597.

$9,690 for knee fracture and other injuries to leg and chest, and damage to automobile, held not excessive. 181M400, 232NW710. See Dun. Dig. 2597.

$16,800, held not excessive for injury to child nine years old, causing permanent injury to the brain. 181M386, 232NW712. See Dun. Dig. 2597.

$8,000, held not excessive for malpractice by physician in treating fractured limb of farmer thirty-eight years of age. 181M381, 232NW708. See Dun. Dig. 2597, 7493.

$42,500 for fracture of thigh bone of engineer earning over $300 per month, reduced to $36,000. 43F(2d)397. See Dun. Dig. 2596.

Verdict for $1,000 for malicious prosecution held not excessive. Miller v. P., 233NW855. See Dun. Dig. 5745, 5750a.

A $5,000 verdict for death held excessive where deceased, 76 years old, had retired from all gainful activities and his beneficiaries and next of kin were two adult daughters upon whom he had become largely dependent for support. Nahan v. S., 234NW297. See Dun. Dig. 2617(24).

Where there is a severe and painful, but probably temporary injury, and there is conflict in the testimony as to its nature and extent, verdict for $2,200 will not be disturbed on appeal. Randall v. G., 234NW298. See Dun. Dig. 2597.

Verdict for $20,000 was not excessive for fractured skull. Lund v. O., 234NW310. See Dun. Dig. 2597.

Verdict for $350 held not excessive for cutting of trees. Hansen v. M., 234NW462. See Dun. Dig. 2597, 9696(33).

Instruction in malpractice case as to right of recovery for loss of hearing from pulling of impacted tooth, held proper. Prevey, v. W., 234 NW470. See Dun. Dig. 7493.

Verdict for $12,000 for malpractice in removing impacted tooth so as to affect the hearing and ability to swallow, held not excessive. Prevey v. W., 234NW470. See Dun. Dig. 7493(17).

Verdict for $7,500 was not excessive to an eighteen-year-old girl receiving a multiple frac-

ture of the bones of the pelvis. Honkomp v. M., 234NW638. See Dun Dig. 2597.

Verdict for $3,150 for malicious prosecution was excessive and was reduced to $2,000. Krienke v. C., 235NW24. See Dun. Dig. 2596, 2597, 5745, 5750a.

Where stucco workmen caused injury to roof and foundation by carelessness, measure of damages was difference between what building's value would have been had work been done in a workmanlike manner and the value as it was when work was completed. Carl Lindquist & Carlson, Inc., v. J., 235NW267. See Dun. Dig. 2567c(20).

Verdict for $8,000 was not excessive for loss of use of fingers of left hand by farmer's wife. Martin v. S., 236NW312. See Dun. Dig. 2597.

Verdict of $4.000 to farmer for consequential damages arising out of injuries to wife's left arm and fingers, which prevented her from doing housework and from helping with the chores, held not excessive. Martin v. S., 236 NW312. See Dun. Dig. 2597.

37. General principles.

That disfigurement is concealed goes to amount of damage rather than the right to recover. Carlson v. N., 232NW3. See Dun. Dig. 2570a(95).

38. Necessity of passion or prejudice.

172M332, 215NW512.

Amount of verdict in excess of what could be fairly said to be sustained by substantial evidence, most favorably viewed for plaintiff, is attributable to passion and prejudice. 43F(2d) 397. See Dun. Dig. 7134.

Verdicts against plaintiffs in automobile accident case held not the result of passion and prejudice by reason of the fact that evidence was admitted showing that insurance company had paid medical expenses and compensation provided by Workmen's Compensation Law. Arvidson v. S., 237NW12. See Dun. Dig. 7134.

39. Remitting excess.

Excessive verdict may be cured by remission. Klaman v. H., 231NW716.

FOR ERRORS OF LAW ON THE TRIAL

43. What are errors on the trial.

Rulings on evidence and instructions cannot be reviewed in absence of proper exceptions. 171M518, 213NW919.

Admission of improper testimony tending to incite prejudice. 172M543, 216NW233.

New trial granted for errors of court with regard to admission of evidence, and court's remarks. 173M158, 217NW146.

The exception of evidence and cross examination of witnesses held without prejudice. 174 M97, 218NW453.

Exclusion of evidence. 174M573, 219NW913.

The direction of a verdict, if erroneous, is an error of law occurring at the trial. Gale v. F., 220NW156.

Control of trial court over matter of allowing leading questions is practically absolute. 176M210, 222NW924.

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

Questioning witnesses as to their interest in an indemnity insurance company, which it was admitted had insured the defendant, was not error. 177M13, 224NW259.

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

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

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

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

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

Whether sufficient foundation is laid for introduction of written documents and memoranda, is largely within the discretion of the trial court. 177M494, 225NW432.

Error in admitting extrinsic evidence in aid of construction is not ground for a new trial. were the court could not do otherwise than construe the writing as it did. Martin v. F., 226NW203.

A trial court's talk in open court to a jury seeking further instructions, held not to be an "irregularity," but may be reviewed as an "errors of law occurring at the trial" and a settled case or bill of exceptions is necessary. 178M 141, 226NW404.

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

The trial court did not err in granting new trials because of erroneous instructions given in cases to recover damages resulting from an automobile accident and relating to the rights and duties of host, the driver, and guests, the passenger, including contributory negligence under the Wisconsin law. Kassmir v. O., 234 NW473. See Dun. Dig. 7165.

Testimony erroneously received through mistake or inadvertence, but promptly stricken when the court's attention was directed thereto, does not require a new trial, where it is perceived that no prejudice resulted. Drabek v. W., 234NW6. See Dun. Dig. 7074.

That findings were made, which call for the same judgment called for by the verdict, is not ground for a new trial. Commercial Union Ins. Co. v. C., 235NW634. See Dun. Dig. 7074(13).

Where a verdict may have been based upon an erroneous instruction, there must be a new trial, unless it conclusively appears that the verdict is sustained upon other grounds. General Electric Co. v. F., 235NW876. See Dun Dig. 7165.

New trial granted because of reception of hearsay evidence. Edie v. S., 237NW177. See Dun. Dig. 7180.

45. Necessity of exceptions—notice of trial.

Use of wrong word in instruction ought not to result in new trial where no advantage was taken of court's invitation at close of charge to make corrections. 173M186, 217NW99.

FOR INSUFFICIENCY OF EVIDENCE

46. General rules.

Facts stated by plaintiff in personal injury action were so improbable that new trial granted. 171M164, 213NW738.

Action being based on contract, assignment that verdict was excessive came under this subdivision. 17M518, 213NW919.

Finding that guaranteed note was paid by the giving of a new note held not sustained by the evidence. 172M22, 214NW760.

Where the court erroneously withdraws from the jury the only evidence upon which a verdict in defendant's favor would be predicated the verdict is "not justified by the evidence and contrary to law." 172M598, 216NW333.

In action under Federal Employers' Liability Act, evidence held insufficient to sustain verdict on issue of negligence. 176M575, 224NW241.

Verdict for negative of issue must stand unless the evidence clearly establishes the affirmative. 181M385, 232NW629. See Dun. Dig. 7145.

When the evidence taken as a whole is manifestly contrary to a finding, it is an abuse of discretion not to grant a new trial, even if there be some evidence tending to sustain the finding. National Pole & Treating Co. v. G., 233NW810. See Dun. Dig. 7157(19).

46a. Verdict not justified by evidence.

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

Question of excessiveness of verdict was not raised by assignment that verdict was not justified by the evidence and was contrary to law. 174M545, 219NW866.

48. After trial by court.

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

51. After successive verdicts.

Anderson v. A., 229NW579(1).

WHEN VERDICT CONTRARY TO LAW

54. General statement.

Ground that verdict was "not justified by the evidence and is contrary to law" did not raise question of excessiveness of damages in tort action. 174M545, 219NW866.

Where several grounds of negligence are charged and there is a general verdict, a new trial must be granted, if a verdict on any of the grounds is not justified. Gamradt v. D., 223 NW296.

Verdict for $5,000 against bank officers inducing deposit, held not supported by the evidence and contrary to the law. 177M354, 225NW276.

§9326. Basis of motion.

There being no settled case or bill of exceptions the only question for review is whether the findings sustain the conclusions and judgment. 173M625, 217NW597.

Where sum of money was deposited with the clerk of court to await its further order, held that question of title was properly determinable by judgment in a plenary suit or upon issues framed and that trial court rightly refused to grant motion of one party that money be paid to him. 178M161, 226NW410.

Verdict cannot be impeached by affidavit of jurors as to what took place in jury room or by affidavit of person other than juror disclosing statements of juror as to proceedings of jury. 178M564, 227NW893.

In absence of extension of time, court cannot grant motion upon minutes after thirty days from coming in of verdict. 179M136, 228NW 558.

Affidavits presented with proposed amended answer on motion for amended findings or new trial cannot be considered. 179M586, 229NW 565.

Without a case or bill of exceptions, errors in a charge are not reviewable. Anderson v. C., 234NW289. See Dun Dig. 344(88).

Affidavits cannot be used on motion for a new trial to show alleged improper remarks of counsel in addressing the jury; the record must be protected at the time. Sigvertsen v. M., 234 NW688. See Dun. Dig. 7096.

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

1. In general.

Rulings on evidence and instructions cannot be reviewed in absence of proper exceptions. 171M518, 213NW919.

Where the court has jurisdiction and there is no settled case or bill of exceptions there is nothing for review on appeal where the findings and conclusions sustain the judgment. 173 M611, 216NW244.

Claim of error in the amount of a judgment must first be submitted to the trial court. 173 M325, 217NW381.

A general assignment that the court erred in denying a new trial presents no question for review where such motion is made on numerous distinct grounds. 173M529, 217NW933.

Supreme Court cannot consider assignments of error involving questions not presented to the trial court. 174M402, 219NW546.

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

Supreme court cannot pass upon plaintiff's financial ability to perform a contract, when such question was not raised in the trial court. 175M236, 220NW946.

A trial court's talk in open court to a jury seeking further instructions held not to be an "irregularity," but may be reviewed as an errors of law occurring at the trial" and a settled case or bill of exceptions is necessary. 178M 141, 226NW404.

On appeal from judgment without settled case or bill of exceptions, after trial to the court, the only question is whether findings of fact support the judgment. Wright v. A., 227NW 357.

Where the evidence is not preserved in a settled case objection of insufficiency of evidence is not available on appeal. 179M536. 229NW873.

Failure to object to service on jury panel of one who had a case pending and set for trial at the term, held not waiver of error. 179M557, 230NW91.

Errors assigned but not argued will not be considered. 180M33, 230NW117.

When no ground for new trial is stated in the motion therefor the judgment will be affirmed. 180M93, 230NW269.

Assignment that court erred in granting new trial for errors occurring at trial, held sufficient. 180M395, 230NW895.

Claim of prejudice from dismissal as to codefendant will not be considered for first time on appeal. 180M467, 231NW194.

Theory pursued below must be adhered to on appeal. Gunnerson v. M., 231NW415(2).

A question not made by pleadings, evidence, rulings on evidence, requests to charge, or by the specifications of error in the motion for new trial, cannot be raised for the first time on appeal. Duluth, M. & N. Ry. Co. v. M., 236 NW766. See Dun. Dig. 384.

2. Objections to pleadings.

Civil case is unnecessary in order to review an order for judgment on the pleadings. 178 M442, 227NW891.

4. Reception of evidence.

When no exception is taken to ruling on evidence at the trial and there is no motion for new trial with a specification of error, the ruling is not reviewable on appeal from the judgment. 174M131, 218NW455.

Objection to sufficiency of evidence of ownership of land not suggested at trial, comes too late on appeal. Luebke v. C., 226NW415.

Where evidence was received subject to objection, to be ruled upon later, and no rulings were so made, there was nothing to be reviewed in absence of a motion for a new trial. 178M 120, 226NW516.

Testimony as to conversation with person since deceased cannot be first objected to on motion for new trial or appeal. 178M452, 227 NW501.

That hearing should have been on oral evidence cannot be raised for first time on appeal. 179M488, 229NW791.

A letter of a witness impeaching his testimony was properly received, there being no objection to specific sentences containing irrelevant or immaterial matters. Martin v. S., 236 NW312. See Dun. Dig. 9728, 10351.

5. Misconduct of counsel.

179M325, 229NW136.

Improper remarks of counsel, held not ground for reversal in absence of objection or exception. Seitz v. C., 231NW714.

6. Instructions.

181M400, 232NW710.

Instruction not to be questioned on appeal in absence of exception. 170M175, 213NW899.

An inadvertent statement in the instructions to the jury in a criminal case must be called to the court's attention. 172M139, 214NW785.

Use of wrong word in instruction ought not to result in new trial where no advantage was taken of court's invitation at close of charge to make corrections. 173M186, 217NW99.

An instruction is not reviewable when no exception has been taken and the same is not assigned as error on a motion for a new trial. 174M216, 218NW891.

Errors assigned as to the charge of the court are held to come within the rule of Steinbauer

v. Stone, 85M274, 88NW754, and later cases applying that rule. 175M22, 220NW162.

Objection could not be first made on appeal that charge of court as to damages was not complete. 176M331, 223NW605.

Appellants not calling court's attention to error in charge, could not complain on appeal, though they specified error in motion for new trial. 178M238, 226NW702.

Where charge is not excepted to or sufficiently assigned as error in the motion for new trial, it becomes the law of the case on appeal. 178 M411, 227NW358.

Instructions, unobjected to, become the law of the case, and the sufficiency of the evidence to sustain the verdict is then to be determined by the application of the rules of law laid down in the charge. Bullock v. N., 233NW858. See Dun. Dig. 9792(38).

Where the trial court in its instructions to the jury erroneously states that a particular fact in issue is admitted, it is the duty of the counsel to direct the court's attention thereto if he expects to base error thereon. State v. Solum, 235NW390.[1] See Dun. Dig. 9797(75).

7. Motion for directed verdict.

Opposing party not having objected to entertainment of motion for directed verdict which failed to specify the grounds, nor having assigned such defect in motion as a ground for new trial, cannot raise point for first time on appeal. 176M52, 222NW340.

The supreme court cannot order judgment notwithstanding the verdict where no motion to direct a verdict was made at the close of the testimony. 181M347, 232NW522. See Dun. Dig. 393.

9. Findings of fact.

In case tried to court involving a settlement of accounts, where it is claimed for appellant that alleged errors with respect to minor debits or credits have been made, proper practice requires a motion for amended findings so that error may be corrected in the trial court. 174 M507, 219NW758.

In an action tried by the court, an issue upon which the court made no finding, upon which neither party has requested findings and which is not covered by any assignment of error, presents no question for review. 175M 382, 221NW426.

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

Where action was tried upon presumption that plaintiff was owner of mortgaged premises, it is too late upon appeal for defendant to claim that there was no direct proof of ownership. 177M119, 224NW696.

10. Entry of judgment.

Objection to form of judgment cannot be first raised on appeal. 176M254, 223NW142.

Assuming that it was improper to enter judgment on the verdict in ejectment returned without an order of the court, the correction was with the trial court. Deacon v. H., 235NW23. See Dun. Dig. 2906, 5040, 5050.

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

Appeal being from the judgment and there being no settled case or motion for new trial, the record presents only the question as to whether the findings of fact sustains the conclusions of law. 175M619, 221NW648.

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

Without a case or bill of exceptions, errors in a charge are not reviewable. Anderson v. C., 234NW289. See Dun. Dig. 347(22).

§9329. Bill of exceptions or case.

Court properly extended time to settle the case. 174M97, 218NW453.

Where an appeal has been promptly taken and a settled case is needed to properly present and determine the appeal, and where the hearing of the appeal is not shown to be delayed, and no prejudice shown, the courts are disposed to aid the presentation and hearing of the appeal on the merits. State v. Enersen, 236NW488.

Record held not to show abandonment by defendants of their intention to move for a settled case. State v. Enersen, 236NW488.

The fact that the opponent's attorney otherwise acquires knowledge that a decision has been filed, or that a copy of the decision is mailed by the judge to counsel for each party, does not take the place of, or dispense with, the notice required by statute. State v. Enersen, 236NW488. See Dun. Dig. 317.

Trial judge should have in the exercise of discretion allowed and settled proposed case, though forty days time stated had expired. State v. Enersen, 236NW488.

Where case is tried to the court and decision later filed, this section requires the party who wishes to start the time running for his opponent to serve a proposed settled case, to serve on his opponent a written notice of the filing of the decision, containing a sufficient description of the decision to identify it. State v. Enersen, 236NW488. See Dun. Dig. 317.

REPLEVIN

§9331. Possession of personal property.

Replevin to recover property sold did not bar a subsequent action for the price on the theory of a rescission or election, the replevin action being dismissed. 171M483, 214NW284.

Furnace and attachment held not to become part of realty as between seller and owner of realty. 173M121, 216NW795.

In an action in replevin, immediate delivery of the property need not be asked by plaintiff. 143M200, 173NW439.

Where in an action of replevin under a chattel mortgage given as part of a new contract, constituting an accord and satisfaction, the making of the contract and the default are admitted, a verdict was properly directed for plaintiff. 175M357, 221NW238.

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

In replevin for mortgaged chattels, plaintiff has the burden of proof that the goods replevined are those mortgaged. 176M406, 223NW618.

Where merchants made mistake in counting votes in contest for automobile, they could recover the car and give it to the proper person. 176M598, 224NW158.

Plaintiff must be entitled to immediate possession at the commencement of the action, and lessee of farm was not entitled to possession of crops while rent was in default under lease amounting to chattel mortgage. 178M344, 227 NW199.

Lessee suing to recover crops in possession of lessor under lease in effect a chattel mortgage had the burden of showing that rent was not in default at commencement of action. 178 M344, 227NW199.

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

Officer in Naval Milita may sue enlisted man in replevin to recover equipment. Op. Atty. Gen.

§9333. Bond and sureties.

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

Bond in amount of value of property as alleged in complaint, held properly nullified. 179 M588, 229NW804.

In action on bond only money judgment can be rendered. 180M168, 230NW464.

ATTACHMENT

§9342. When and in what cases allowed.

½. In general.

Evidence held to sustain finding that prop-

erty attached was held in trust for defendant. 172M83, 214NW771.

Fraudulent conveyances. 172M355, 215NW 517.

1. Nature of proceeding.

An attachment against one having only a bare legal title to land without any beneficial interest therein, does not create any lien thereon where the creditor had knowledge or notice of the facts. 173M225, 217NW136.

4. In what actions allowed.

Actions for slander of title are not "actions for libel or slander" within the meaning of this section. 178M27, 226NW191.

5. At what time may issue.

173M580, 218NW110.

Summons must be issued at or before the time the writ of attachment issues, and there is no "issuance" of summons until it is either served or delivered to the proper officer, and this requirement is not modified by the last sentence of this section. 181M349, 232NW512. See Dun. Dig. 625(34).

§9343. Contents of affidavit.

3. Transfer with intent to defraud.

That defendant is in the act of moving upon land to make the same a statutory homestead, nor that more than a year prior to the attachment defendants had offered and attemped to reconvey land to the creditor in satisfaction of note sued on which was given for part of the purchase price of such land, held not to constitute fraudulent disposition or attempt to dispose of the property so as to justify attachment, there being no circumstances indicating fraudulent intent. 172M547, 216NW231.

§9350. Motion to vacate.

½. In general.

Where there is conflict in the affidavits or evidence presented on a motion to vacate an attachment, the determination of the trial court will be sustained unless it is manifestly contrary to the affidavits or evidence presented. Phillips Petroleum Co. v. J., 234NW11. See Dun. Dig. 662(51).

GARNISHMENT

§9356. Affidavit — Guarantee summons — Title of action.—In an action in a court of record or justice court for the recovery of money, if the plaintiff, his agent or attorney, at the time of issuing the summons, or at any time during the pendency of the action, or after judgment therein against the defendant, files with the clerk of the court, or, if the action is in a justice court, with the justice, an affidavit stating that he believes that any person (naming him) has property or money in his hands or under his control belonging to the defendant, or that such person is indebted to the defendant, and that the value of such property or the amount of such money or indebtedness exceeds twenty-five dollars, if the action is in the District Court, or ten dollars if in a justice court, and if the plaintiff files with such affidavit a copy of the complaint when the complaint has not been theretofore either served on the defendant or filed in said action, and, provided further, that no fee be charged by the Clerk of the Court for filing said copy of complaint, a summons may be issued against such person, as hereinafter provided, in which summons and all subsequent proceedings in the action the plaintiff and defendant shall be so designated, and the person against whom such summons issues shall be designated as garnishee. (As amended Apr. 17, 1929, c. 215.)

Garnishment proceedings usually have to do with personal property only. 176M18, 222NW509.

Title to promissory note in custody of third person may be transferred by oral agreement. 176M18, 222NW509.

Garnishment does not lie in an action for specific performance, where, merely as an incident to the relief asked, an accounting of rents and profits is sought, without allegation as to the probable amounts thereof. 176M522, 223NW922.

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

Garnishment was not permitted in action to cancel assignment of note and mortgage. Williamson v. G., 227NW430.

§9357. Proceedings in justice court.

A justice of the peace is entitled to his fees for preparation of notice to the defendant in garnishment proceedings and for making a copy which is made a part of the notice by reference. Op. Atty. Gen., Sept. 30, 1930.

§9359-1. Garnishee summons—when effective.—No garnishee summons served subsequent to the passage of this act upon the garnishee in any action whereby a sum of less than $25.00 is impounded shall be effective for any purpose after two years from the date of service thereof upon the garnishee unless the plaintiff, or his attorney, shall prior to the expiration of such time serve upon the garnishee an affidavit to the effect that the action against the defendant is being diligently prosecuted and that judgment therein has not been entered, or if entered, that the time to appeal has not expired and that the affidavit is made for the purpose of continuing the force and effect of the summons upon the garnishee for one year. The force and effect of the summons upon the garnishee may be extended from year to year if the facts in the case warrant it by serving a like notice prior to the expiration of the previous notice. (Act Apr. 20, 1931, c. 213, §1.)

§9359-2. Same.—No garnishee summons served prior to the passage of this act upon the garnishee in any action shall be effective for any purpose after two years from the passage of this act unless its force and effect upon the garnishee is extended prior to the expiration of said year by serving a similar affidavit upon the garnishee as provided for in section one of this act. (Act Apr. 20, 1931, c. 213, §2.)

§9360. Property subject to garnishment.

3. Held not garnishable.

Claim under fire policy was not subject to garnishment, in absence of sworn proof of loss, even though there had been an adjustment of the amount of the loss. 172M43, 214NW762.

Where bills for labor and material remain unpaid by a contractor who has agreed to pay all of them as incident to the completion of his contract, money unpaid on such contract, is not subject to garnishment because its payment depends upon a contingency. 175M436, 221NW677.

4. In general.

Finding that money garnisheed was not a trust fund sustained. 174M504, 219NW504.

§9361. In what cases garnishment not allowed.

Claim under fire policy was not subject to garnishment in advance of sworn proof of loss, although there had been an adjustment of the amount of the loss under non-waiver agreement. 172M43, 214NW762.

The relationship between the garnishee and

the defendant at the time of the service of the garnishee summons is the test of liability. 173M 504, 216NW249.

A party shall not be adjudged a garnishee by reason of any liability incurred, as maker or otherwise upon any check or bill of exchange. 173M504, 216NW249.

Drawer of check was not subject to garnishment though check was given on condition that it should not be presented for payment until deposit was made in the bank. 173M504, 218 NW99.

§9362. Examination of garnishee.

Failure to present the affidavit of non-residency to the officer taking the disclosure was a mere irregularity not going to the jurisdiction over defendant in respect of the property reached by the garnishment. 171M280, 214NW26.

There was no abuse of judicial discretion in permitting a garnishee who was not represented by an attorney at the disclosure to make a supplemental disclosure. Douglas State Bk. v. M., 233NW864. See Dun. Dig. 3985.

The garnishee is not estopped by the facts revealed by first disclosure; and plaintiff, with the information thereby gained, was in position to protect its rights on supplemental disclosure. Douglas State Bk. v. M., 233NW864. See Dun. Dig. 3985.

§9366. Claimant of property to be joined.

181M404, 232NW631. See Dun. Dig. 3975.

3. Pleading—Burden of proof.

The use of the word "Bank" instead of "Company" in the name of the claimant did not affect the situation; no one was misled or prejudiced thereby. Hancock-Nelson Mercantile Co. v. M., 234NW696. See Dun. Dig. 4001.

5. Practice.

A referee appointed by the court may bring in a claimant without a direct order of the court to so do. Hancock-Nelson Mercantile Co. v. M., 234NW696. See Dun. Dig. 8318(42).

Third party claimant failing to appear and intervene in compliance with order held barred. Hancock-Nelson Mercantile Co. v. M., 234NW696. See Dun. Dig. 3998.

§9367. Proceedings when debt or title is disputed.

Hancock-Nelson Mercantile Co. v. M., 234NW 696; note under §9366.

10. Appeal.

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

§9368. Time for appearance in garnishee proceedings.

Removal on default. 177M182, 225NW9.

§9373. Amount of judgment.

Judgment may go against garnishee without notice to defendant as to whom jurisdiction has been obtained. Dahl v. N., 230NW476(2).

Where such judgment has been paid defendant's motion filed four months later is properly denied. Dahl v. N., 230NW476(2).

Insurer defending suit for damages against insured, held liable as garnishee for amount of judgment, in view of its conduct of the defense. 181M138, 231NW817.

§9376. Proceedings when garnishee has lien.

No judgment against garnishee was warranted where the only property he held was right of redemption from mortgage foreclosure. Douglas State Bk. v. M., 233NW864. See Dun. Dig. 3967.

§9383. Discharge of attachment or garnishment.

Bond to release garnishment, reciting that there is a stated sum of money in the possession of the garnishee, held to estop the principal and sureties from denying that there was any garnishable property in the hands of the garnishee. 181M404, 232NW631. See Dun. Dig. 3975.

INJUNCTION

§9385. How issued—Effect on running of time.

While courts of equity will not interfere with the action of corporate officers as to acts within their powers and which involve an exercise of discretion committed to them, it will stay those acts which are in excess of authority or in violation of their trust. 172M110, 215NW192.

Equity has jurisdiction to enjoin and abate nuisances, without jury trial. 174M457, 219NW 770.

Court did not err in refusing defendant an injunction restraining plaintiff for all time from conducting business or having employment in its stockyards. (Mason's U. S. Code, Title 7, §181, et seq.). 175M294, 221NW20.

A contract whereby a surgeon and physician agrees not to practice his profession within a radius of 25 miles from a small municipality for a period of 5 years, is valid and protection will be given by injunction. 175M431, 221NW642.

Injunction does not lie against a municipality and its officers to restrain enforcement of special assessments after they are certified to county auditor. 176M76, 222NW518.

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

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

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

Injunction was proper remedy to restrain city from improperly revoking taxicab license. National Cab Co. v. K., 233NW838. See Dun. Dig. 4480.

Relief by injunction against the laying out of a public street, where nothing has been done except the adoption by the city council of a preliminary resolution appointing commissioners to view the premises and assess benefits and damages, is premature. Heller v. S., 234NW461. See Dun. Dig. 4480.

Where no appeal is provided for from an order laying out the street, except on the question of benefits and damages, the landowner whose property is taken or damaged has an adequate remedy at law by certiorari to review all other questions raised. Heller v. S., 234NW 461. See Dun. Dig. 4472(44).

§9386. Temporary injunction when authorized.

1. In general.

The granting of a temporary injunction rests in the discretion of the trial court. 172M179, 215 NW215.

Granting or denial of a temporary injunction against the enforcement of an ordinance, always involves an element of discretion. 175M276, 221 NW6.

A temporary injunction should not be made conditional on the surrender by the party to whom it is granted of a substantial cause of action or defense at issue in the suit. 177M318, 225NW150.

Restraining order to prevent city from paying expenses of officers in attending convention, held properly denied. 180M293, 230NW788.

§9387. Notice of application—Restraining order.

Issues of fact in a pending action are not triable on a motion for a temporary injunction. 177M318, 225NW150.

§9388. Bond required—Damages.

Where temporary injunction was dissolved by order, and, without a vacation of that order or a reinstatement of the injunction, another order was made purporting to stay proceedings, held that surety was released. 177M103, 224NW700.

RECEIVERS

§9389. When authorized.

1. In general.

The appointment of a receiver does not affect the rights of parties who dealt with each other in good faith before notice of the appointment. 172M24, 214NW750.

Contempt in failing to convey property to received. 172M102, 214NW776.

Propriety of ex parte appointment cannot be questioned in subsequent proceedings, where no appeal was taken from order denying motion to vacate the appointment. 172M193, 214NW886.

Directions in order appointing receiver in mortgage foreclosure must be construed in harmony with law pertaining to foreclosures, and a receiver was not authoribed to pay taxes or interest on prior incumbrances falling due subsequent to sale, and no income derived during the year of redemption could be applied to the payment of taxes or interest. 172M193, 214NW 886.

Receiver could apply rents and profits to payment of such taxes and interest prior to foreclosure sale. 172M193, 214NW886.

The duties of a receiver are to preserve the property pending recivership and all expenses as well as compensation for services are payable out of income and if that is insufficient out of the property itself. 173M10, 216NW252.

The selection of the receiver lies with the court appointing him. 173M493, 217NW940.

The appointment of a receiver where the court has jurisdiction is not subject to collateral attack. 175M47, 220NW400.

The propriety of making an appointment of a receiver is in a measure within the discretion of the trial court. 175M138, 220NW423.

In a proper case a receiver may be appointed without notice. 175M138, 220NW423.

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

Without proof of insolvency or inadequacy of security, the non-payment of taxes, not shown to jeopardize title or security during year of redemption, does not warrant appointment of receiver in action to foreclose mortgage. 176M 71, 222NW516.

Appointment of receiver held sufficient judicial determination of insolvency. Miller v. A., 235NW 622. See Dun. Dig. 4573.

The management of the company, a foreign corporation, having been found diligent, efficient, and honest, and guilty only of mistakes which have been corrected and are not likely to be repeated, the business being large, going, and solvent, with nothing in its nature or condition to require such action, it was not an abuse of discretion to refuse to appoint a receiver to wind up its business in this state. Barrett v. S., 237NW15. See Dun. Dig. 8248.

2. Action by corporation against officer.

In a proper case a receiver may be appointed without notice. 175M138, 220NW423.

3. Controversy between corporation stockholders.

Miller v. A., 235NW622; note under §9191.

A court of equity will protect minority stockholders against the fraud of a majority and preferred stockholders without voting power against stockholders having the sole voting power. 175M138, 220NW423.

Stockholders of a foreign corporation, which has forfeited its charter and terminated its existence, may prosecute an action for appointment of a receiver (and for judgment for money due to be entered in the name of the receiver) to marshal corporate assets in state, and to pay creditors and distribute residue to stockholders. Such an action does not seek the exercise of any visitorial power over the corporation. Lind v. J., 236NW317. See Dun. Dig. 2185.

This section held without application in an action by stockholders of a foreign corporation which has forfeited its charter for the appointment of a receiver and the marshaling of assets and distribution thereof. Lind v. J., 236NW317. See Dun. Dig. 2185.

4. Insolvent corporations.

A general creditor, by virtue of the power of equity or by virtue of this section, has a standing before the court equal to that of a judgment creditor as contemplated by section 8013, except as to the burden of proof. 173M493, 217NW940.

13. Collection of assets.

A receiver cannot attack a chattel mortgage as void as to creditor because not recorded, without showing that he occupies a status to assail it. 175M47, 220NW400.

G. S. 1923, §8345, does not apply to general creditor, but to such as are armed with process, or to a receiver representing creditors and vested with the right to attack. 175M47, 220NW400.

19. Attorney's fees.

The fixing and allowance of fees of an attorney for a receiver are largely in the discretion of the trial court and will not be disturbed except for an abuse of such discretion. 173M619, 216NW784.

JUDGMENT

§9392. Measure of relief granted.

Res judicata. 172M290, 215UW211.

A judgment entered in a default case did not exceed the prayer in the complaint. 181M559, 233NW586. See Dun. Dig. 4996(70).

A judgment entered on a verdict directed for the defendant on the ground that the defendant was not authorized by the law under which it was organized to execute the promissory notes alleged as causes of action by the receiver of the payee bank, is not a bar to action for money had and received. Turner v. V., 233NW856. See Dun. Dig. 5184(18).

One obtaining a judgment in an action to cancel a deed for costs and disbursements could not maintain a subsequent action to recover damages for expenses incurred, disbursements made and attorney's fees, etc. Benton v. B., 237 NW424. See Dun. Dig. 5163.

2. After answer.

Rule that court is without jurisdiction to dispose of issues not tendered by the complaint, or toward relief beyond its scope, does not apply where issue is joined and there is a trial resulting in judgment. 176M117, 222NW527.

Judgment for defendant on action on contract, held not bar in subsequent action in conversion. 178M93, 226NW417.

3. Conclusiveness and Collateral Attack.

Where action was dismissed in this state on the ground of rendition of judgment in another state intervention of attorneys after such dismissal to vacate order of dismissal and permit enforcement of lien of attorney, held not a collateral attack on the foreign judgment. 47F(2d) 112.

Plaintiff's attorney held not concluded by a dismissal secured by plaintiff pursuant to a settlement. 47F(2d)112.

Oral evidence tending to show that summons had never in fact been served on corporation was a collateral attack on judgment, and was properly excluded in receivership proceeding. Miller v. A., 235NW622. See Dun. Dig. 5141(7).

§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 de-

tention, or the taking and withholding. If possession cannot be obtained of the whole of such property but may be obtained for part thereof then the party entitled thereto may have possession of the part which may be obtained and recover the value of the remainder or may elect to take judgment for the value of the whole of such property. When the prevailing party is in possession of the property, the value thereof shall not be included in the judgment. If the property has been delivered to the plaintiff, and the action be dismissed before answer, or if the answer so claim, the defendant shall have judgment for a return, and damages, if any, for the detention, or the taking and withholding, of such property; but such judgment shall not be a bar to another action for the same property or any part thereof; provided that in an action for the recovery of specific personal property by the vendor in a conditional sale contract therefore, or by his successor in interest, by reason of default in the terms of such conditional sale contract, where it shall appear that the defendant in said action is an innocent purchaser for value of said property and without actual knowledge of the existence of such conditional sale contract, in the event that the plaintiff shall prevail in said action, the measure of his recovery shall be the balance unpaid on said conditional sale contract with interest thereon at the rate fixed in said conditional sale contract, if any, reasonable attorney's fees to be approved by the court and the costs and disbursements of said action. (As amended Apr. 18, 1931, c. 202, §1.)

Evidence held to sustain verdict of value of automobile at time action was brought. 172M16, 214NW479.

Judgment in former action in replevin for possession of threshing rig, held not bar to action for damages arising from fraud inducing signing of contract for purchase of the outfit. 178M40, 226NW415.

Retail price not conclusive as to value. 180 M264, 230NW778.

On replevin by mortgagee of chattel, where it appeared that property was in custody of federal court, and mortgagor a bankrupt, defendant was not entitled to a judgment for the value of the property. Security State Bk. of Ellendale v. A., 236NW617. See Dun. Dig. 8425.

§9397. Damages for libel.

An article falsely accusing a traveling salesman of being a bankrupt, taken in connection with the remainder of the article and the innuendoes set for in the complaint, held libelous. Rudawsky v. N., 235NW523. See Dun. Dig. 5519 (64).

§9400. Lien of judgment.

11. Conflicting liens.

Where owner gives mortgage and thereafter conveys away part of land, one who obtains judgment lien upon part retained has no right to require that tract conveyed away be first sold on foreclosure of mortgage. 175M541, 222NW71.

§9405. Judgments, procured by fraud, set aside.

1. Nature of action.

Action does not lie to attack final and incontestable judgments. Hawley v. K., 226NW697.

6. Complaint.

Complaint failing to show that there are facts substantiating charges of false testimony and fraud which were not known or available at the trial, fails to state cause of action for setting aside the judgment. 173M149, 216NW800.

§9407. Satisfaction and assignment by state.

—The state auditor or the attorney general may execute satisfactions and assignments of judgments in behalf of the state. (As amended Apr. 15, 1929, c. 186.)

§9410. Joint debtors—Contribution and subrogation.

Where one seeking contribution has intentionally violated a statute or ordinance, thereby causing injury to a third party, he is guilty of an intentional wrong and illegal act, and is not entitled to contribution from one whose mere negligence contributed to cause the injury. Fidelity Casualty Co. of New York v. C., 236NW618. See Dun. Dig. 1924.

Establishment of the common liability and its liquidation by judgment in favor of the injured party are not conditions precedent to recovery by one wrongdoer who has made a fair and provident settlement of the claim and then seeks contribution from a joint tortfeasor. Duluth, M. & N. Ry. Co. v. M., 236NW766. See Dun. Dig. 1920, 1922.

§9411. Several judgments against joint debtors.

The word "obligation" must be held to include parol as well as documentary contracts. 173M57, 216NW789.

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

Liability for tort. 181M13, 231NW718.

§9415. Submission without action.

State v. White, 222NW918.

Distinction noted between submission on agreed case and trial on stipulated facts. Co. of Todd v. Co. of M., 234NW593.

EXECUTIONS

§9417. Judgments, how enforced.

A judgment debtor is not guilty of contempt for making to convey to receiver pending appeal from order appointing receiver, but is guilty for failure to convey after affirmance and remittitur. 172M102, 214NW776.

§9425. What may be levied on, etc.

2. Held not subject to levy.

It appearing that judgment debtor had assigned debt of third person to him before levy, debtor cannot be charged with a debt in action judgment creditor. 176M461, 223NW776.

§9432. On growing crops, etc.

176M37, 222NW292.

§9435. Sale, when and how.

Where owner gives mortgage and thereafter conveys away part of land, one who obtains judgment lien upon part retained has no right to require that tract conveyed away be first sold on foreclosure of mortgage. 175M541, 222 NW71.

§9438-1. Sale of real property under judgments legalized in certain cases.

—In all sales of real property under judgments and decrees of the district court wherein the sheriff's certificates of sale were filed for record and recorded in the office of the proper registers of deeds prior to October 1, 1928, and within forty-five days, but not within twenty days after the dates of the respective orders confirming such sales, such certificates of sale and the records thereof are hereby legalized and validated to the same extent and with the same effect as though such certificates had been so filed for record and recorded within twenty days after the dates of such respective orders of confirmation. Provided,

that the provisions of this act shall not apply to or affect any action or proceeding now pending involving the validity of such certificates or the records thereof. (Act Apr. 23, 1929, c. 294.)

§9443. Certificate of redemption—Effect.

Where sum of money was deposited with the clerk of court to await its further order, held that question of title was properly determinable by judgment in a plenary suit or upon issues framed and that trial court rightly refused to grant motion of one party that money be paid to him. 178M161, 226NW410.

§9445-1. Creditor may redeem in certain cases.—That any creditor whose claim shall have been proved and allowed by a probate court of this state against the estate of a deceased debtor shall have the right, as a creditor of such decedent, to redeem the lands of the decedent from a sale thereof upon the foreclosure of a mortgage, or upon an execution, in the order and in the manner herein provided. (Act Apr. 15, 1929, c. 195, §1.)

§9445-2. Creditor to file order with register of deeds.—For the purpose of such redemption a creditor whose claim against the estate of a decedent shall have been so allowed shall file for record in the office of the register of deeds of the county in which the real estate sought to be redeemed is situated, within the year of redemption, a certified copy of the order of the probate court allowing such claim, and thereupon such claim shall constitute a lien upon the unexempt real estate of the decedent sold upon foreclosure or execution. The creditor shall also within such time file a notice in the office of such register of deeds briefly describing the sale of the decedent's lands, a description of the lands sold, and stating, in a general way, the nature, date and amount of the claim of the creditor, and that he intends to redeem such lands from the sale thereof described in such notice. In the case of redemption from execution sales such notice shall also be filed in the office of the clerk of the district court in which such lands are situated. (Act Apr. 15, 1929, c. 195, §2.)

§9445-3. Filing to determine priority.—In the event more than one such proved and allowed claim shall be so filed and recorded for the purposes of such redemption, then, as between the owners of such claims, their right to redeem shall be in the order in which such claims were originally filed, succession commencing with the oldest in point of time; that as to the creditors of the decedent having a lien or liens, either legal or equitable, upon the lands of a decedent and existing otherwise than by allowance in probate, the creditors of the decedent whose claims have been allowed in probate shall be subsequent or junior thereto. (Act Apr. 15, 1929, c. 195, §3.)

§9445-4. Creditor may redeem when.—If no redemption is made by the personal representative of the deceased debtor, or by the assigns of such decedent, within one year after the day of such sale, or within one year after the date of the confirmation of such sale, as the case may be, the senior creditor having a lien, legal or equitable, upon the premises sold upon the foreclosure of a mortgage or upon execution, and subsequent to the mortgage or judgment lien under or by reason of which the premises were sold, including the creditors of a deceased debtor whose claims have been perfected and recorded as herein provided, may redeem within five days after the expiration of said twelve months by payment of the amount required by law for that purpose; and each subsequent creditor having a lien in succession, according to priority of liens, within five days after the time allowed the prior lien holder, respectively, may redeem by paying the amount aforesaid and all liens prior to his own held by the person from whom redemption is made. (Act Apr. 15, 1929, c. 195, §4.)

§9445-5. Probate Court to determine amount.—Whenever any such creditor redeems from the foreclosure of a mortgage under the provisions of this act the probate court shall determine the amount that shall be credited on his claim against the estate. (Act Apr. 15, 1929, c. 195, §5.)

§9445-6. Not to affect present law—Exception.—Except as in this act provided all such redemption shall have the force, and be governed by and subject to all of the requirements, of the statutes relating to the redemption of real estate from mortgage and execution sales now or hereafter in force. (Act Apr. 15, 1929, c. 195, §6.)

§9447. Property exempt.

Subd. 14.

179M402, 229NW344. Certiorari granted, 51 SCR25. Judgment vacated, 51SCR416.

Applies to all beneficiaries whether resident or non-resident. 179M255, 228NW919.

Creditors could not impress proceeds of life insurance policies with claims based on fraud of insured after issuance of policies. Cook v. P., 235NW9. See Dun. Dig. 3689.

Subd. 15.

Applies to all beneficiaries whether resident or non-resident. 179M255, 228NW919.

The United Mutual Life Insurance Company, insofar as it is transacting the insurance business of the Knights of Pythias, is to be regarded as a fraternal beneficiary association. Op. Atty. Gen., May 19, 1931.

General rules.

179M255, 228NW919.

SUPPLEMENTARY PROCEEDINGS

§9452. Examination.

A defendant who refused to testify or answer proper questions in a hearing before a referee in proceedings supplementary to execution is guilty of constructive contempt, and repeated evasions and untrue answers amount to a refusal to answer. 178M158, 226NW188.

The disclosure in proceedings supplementary to execution cannot be used in a criminal proceeding against the judgment debtor; but a fact shown in it may be considered in determining want of probable cause. Krienke v. C., 235NW24. See Dun. Dig. 10339.

§9453. Property applied to judgment—Receiver.

Punishment for contempt in failing to convey property to receiver. 172M102, 214NW776.