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Containing the text of the acts of the 1929, 1931, 1933 and 1935 General Sessions, and the 1933-34 and 1935-36 Special Sessions of the Legislature, both new and amendatory, and notes showing repeals, together with annotations from the various courts, state and federal, and the opinions of the Attorney General, construing the constitution, statutes, charters and court rules of Minnesota together with digest of all common law decisions.

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CHAPTER 80
Appeals in Civil Actions

9490. Appeal from district court.

An appeal does not vacate or annul a judgment, and the matters determined remain res judicata until reversal. Simonds v. N., (USCCA8), 73F(2d)412. Cert. den. 294US711, 55SCR507. See Dun. Dig. 5201.

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. 176 M11, 222NW295.

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

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

Where one party serves notice of appeal on opposing party but takes no further steps to perfect appeal, trial court does not lose jurisdiction to vacate prior order and to amend findings. Lehman v. N., 191M211, 253NW663. See Dun. Dig. 288.

Statutes governing appeals are remedial in their nature and should be liberally construed, particularly when order or judgment appealed from involves finality. Stebbins v. F., 191M561, 254NW818. See Dun. Dig. 285.

9492. Requisites of appeal.

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

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

3. On whom served.

Defendant was not necessarily a party to an appeal by garnishee from judgment against it. Rushford State Bank v. B., 194M414, 260NW873. See Dun. Dig. 310, 3979.

7. Waiver of appeal.

Where one party serves notice of appeal on opposing party but takes no further steps to perfect appeal, trial court does not lose jurisdiction to vacate prior order and to amend findings. Lehman v. N., 191M211, 253NW 663. See Dun. Dig. 288.

10. Dismissal of appeal.

Failure of employee to make deposit of $10 as provided in §4315 did not require industrial commission to grant motion to dismiss appeal from decision of referee. Rutz v. T., 191M227, 253NW665. See Dun. Dig. 8954, 10385.

9493. Return to Supreme Court.

1. In general.

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

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

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

A statement by court, on objection being made to something said by defendant's counsel in his opening statement to jury, where record does not show what counsel said in his opening statement, is too indefinite and incomplete a record to show error. State v. Lynch, 192M 534, 257NW278. See Dun. Dig. 350.

3. Briefs.

Instructions assigned as erroneous will not be considered, where brief makes no effort to point out any error therein and no prejudicial error is obvious on mere inspection. Nelson v. B., 188M584, 248NW49. See Dun. Dig. 364, 366.

Cases must be argued upon appeal upon the theory upon which they were tried. Livingstone v. H., 191M623, 255NW120. See Dun. Dig. 401.

Unless error in admission or exclusion of evidence is manifest from a mere inspection of objection, it will not be considered on appeal where brief presents no argument in support of assignment. Greear v. P., 192M 287, 256NW190. See Dun. Dig. 362.

4. Settled case or bill of exceptions.

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

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

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

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

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

In absence of a settled case, only question on appeal after trial without a jury from judgment is whether findings of fact support conclusions of law and judgment. State v. Juvenile Court of Wadena County, 188M 125, 246NW544. See Dun. Dig. 344, 387, 392.

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

Where the appeal is from a judgment, validity of which depends upon files and records in case, no settled case or bill of exceptions is necessary. Muellenberg v. J., 188M398, 247NW570. See Dun. Dig. 387.

When requests to charge are based on arguments of counsel, not made part of record, there are no means present by which supreme court can determine whether requests are wellfounded or not. Orth v. W., 190M193, 251NW127. See Dun. Dig. 348.

Where there is no settled case or bill of exceptions there is raised on appeal from the judgment the sufficiency of the findings to sustain it but not errors in law or defects in pleadings. Union Central Life Ins. Co. v. P., 190M360, 251NW911. See Dun. Dig. 344.

In action to determine adverse claims, where there is no case or bill of exceptions, a defendant appearing below and appealing from judgment cannot raise question that complaint was insufficient because it showed on its face that land was not in actual possession of plaintiff and was not vacant, but was in possession of those claiming under an executory contract of sale from plaintiff. Id. See Dun. Dig. 344.

On an appeal from a judgment in an action tried without a jury, where there is neither a bill of exceptions nor a settled case, only question that can be raised is that findings of fact by trial judge do not support judgment. Elton v. N., 192M116, 255NW857. See Dun. Dig. 344, 386, 387.

Affidavits attached to respondents' brief setting forth matter not presented to trial court may be stricken on appellant's motion in supreme court. Devenney's Estate, 192M265, 256NW104. See Dun. Dig. 354b.

6. Assignments of error.

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

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

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

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

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

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

Appellate court will not review instructions under brief assigning error upon portions of charge but failing to point out wherein they are faulty. Cohoon v. L., 188M429, 247NW520. See Dun. Dig. 364.

Assignment of error in motion for new trial held not sufficient to direct trial court's attention to alleged error in instruction claimed not to give proper test as

to existence of partnership. Randall Co. v. B., 189M175, 248NW752. See Dun. Dig. 337, 388a.

Where there is more than one finding of fact, an assignment of error that the evidence does not sustain the findings of fact is insufficient. Jordan v. J., 192M617, 256 NW169. See Dun. Dig. 361.

Ordinarily supreme court will permit an amendment of assignments of error even as late as the oral argument of the case, but where defective assignments are called to attention of appellant by earlier motion, court will fix an earlier date within which amendments may be allowed. Id. See Dun. Dig. 367.

Where no error is assigned in a motion for new trial nor any assignments of error made, there is nothing for review. White v. M., 192M522, 257NW281. See Dun. Dig. 358a, 7091.

Where findings of fact and conclusions of law are made by trial court, defeated party, by moving for a new trial on ground "that the decision is not justified by the evidence and is contrary to law," and, on appeal, by assigning as error "the denial of his motion for a new trial," does not properly raise any question for review. North Central Pub. Co. v. S., 193M120, 258NW22. See Dun. Dig. 361.

Only errors assigned below may be made bases for assignments of error upon appeal. Hendrickson v. B., 194M528, 261NW189. See Dun. Dig. 358a, 359.

9494. Powers of appellate court.

1. In general.

The fixing and allowance of fees of an attorney for a receiver are largely in the discretion of the trial court and will not be disturbed except for an abuse of such discretion. 173M619, 216NW784.

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

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

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

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

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

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

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

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

Affidavits on motion for amended findings and conclusions of law or for a new trial on the ground of newly discovered evidence are considered on appeal only on the motion for a new trial. Wheaton v. W., 182M212, 234NW14. See Dun. Dig. 300(76), 395.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Matter of granting change of venue for convenience of witnesses and ends of justice rest within sound discretion of trial court and its action will not be disturbed except for clear abuse of discretion. De Jardins v. E., 189M356, 249NW576. See Dun. Dig. 10127.

This court will not review correctness of the instructions or failure to give them to commissioners appointed by district court to reassess benefits in a proceeding for the acquisition and improvement of property under c. 185, Laws 1911, as amended (Elwell Law, Mason's Minn. St., §§1552 to 1558). Board of Park Com'rs v. B., 190M 534, 252NW451. See Dun. Dig. 3131.

Sufficiency of evidence, rulings made, and proceedings had upon trial, if properly raised below and exception taken, or if properly raised by assignment of error on motion for new trial may also be reviewed. W. T. Rawleigh Co. v. S., 192M483, 257NW102. See Dun. Dig. 384.

Error in instructions which permitted jury to return a larger verdict than evidence warranted may be rectified by a reduction thereof. Hackenjos v. K., 193M37, 257NW 518. See Dun. Dig. 437a.

Where there is a motion for judgment notwithstanding verdict but no motion for a new trial, only objections that can be raised on appeal are (1) whether court had jurisdiction; (2) whether court erred in denying motion for a directed verdict; and (3) whether evidence is sufficient to justify verdict. Eichler v. E., 194M8, 259NW545. See Dun. Dig. 385, 5085(46).

Question of qualification of expert witness is one of fact for trial court whose action in this respect will not be reversed unless clearly contrary to evidence. Backstrom v. N., 194M67, 259NW681. See Dun. Dig. 3335.

Where defendant relies solely on motion for judgment without asking for new trial, errors at trial cannot be considered on appeal. Mishler v. N., 194M499, 260NW 865. See Dun. Dig. 5085.

Jurisdiction of appellate court after remand—Power to recall mandate. 16MinnLawRev700.

1½. Persons entitled to allege error.

Finding of payment of purchase price of corporate stock stands as verity on appeal of defendant where plaintiff did not appeal. Stolp v. R., 190M382, 251NW903. See Dun. Dig. 361.

1¾. Scope and extent of review.

Where an order is in part appealable, the entire order can be reviewed. Long v. M., 191M163, 253NW762. See Dun. Dig. 396.

In action involving negligent injury to property, "repair" rule was applied on appeal where it was tried upon that theory in court below and no other measure of damages was suggested. Waldron v. P., 191M302, 253NW 894. See Dun. Dig. 401.

Where sole claim on trial was that cancellation of note by bank cashier was by mistake, plaintiff could not on motion for new trial or on appeal raise question of authority of cashier to cancel. People's State Bank v. D., 191M558, 254NW782. See Dun. Dig. 388a, 425a.

Where all evidence on question in dispute is not included in record, there will be no review upon fact questions. Safro v. L., 191M532, 255NW94. See Dun. Dig. 343, 346.

Point not raised in court below nor by assignment of error directed thereto, need not be considered on appeal. City of Canby v. B., 192M571, 257NW520. See Dun. Dig. 358, 388a.

Where a defendant rests upon its motion for judgment without asking for a new trial, errors at trial cannot be reviewed or considered on appeal. Oxborough v. M., 194M 335, 260NW305. See Dun. Dig. 5085.

Where defendant rests upon motion for judgment without asking for a new trial, errors at trial cannot be reviewed or considered on appeal. Gimmestad v. R., 194M531, 261NW194. See Dun. Dig. 5085.

Matters not urged at trial and not argued by counsel on appeal are deemed abandoned. Ahlquist v. C., 194M 598, 261NW452. See Dun. Dig. 384.

Issues not raised by pleadings nor litigated by consent will not be considered on appeal. Id.

2. Dismissal of appeal.

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

Both parties deeming an appeal moot, it ought to be dismissed. Ridgway v. M., 192M618, 256NW521. See Dun. Dig. 463.

3. Affirmance.

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

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

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

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

Where one member of court was incapacitated by illness and remainder of court were equally divided, order appealed from must be affirmed. Hunt v. W., 193M168, 258NW145. See Dun. Dig. 9074.

4. Reversal.

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

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

Matter of opening default lies almost wholly in discretion of trial court. Johnson v. H., 177M388, 225NW 283.

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

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

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

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

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

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

Opinion of supreme court should be referred to to determine result of reversal of judgment. Village of Hallock v. P., 189M469, 250NW4. See Dun. Dig. 441.

Where trial occurred barely ten weeks after injury, and medical experts estimated needed healing period will run from six weeks to ten months longer; and they were unable to give a reliable prognosis as to future pain and disability, it is more advisable to order a new trial solely of issue of damages, than to reduce a verdict which must be regarded as excessive unless some permanent injury results. Howard v. V., 191M245, 253NW766. See Dun. Dig. 437a.

Trial judge having apparently been in doubt as to sufficiency of evidence to show negligence on part of defendant, on reversal of order for judgment notwithstanding verdict, trial court should be given opportunity to pass upon motion for new trial. Mardorf v. D., 194M 537, 261NW177. See Dun. Dig. 5086.

4½. Vacating or modifying opinion or decision.

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

4¾. Discretionary rulings.

Order on motion to require complaint to be made more definite and certain is largely discretionary and will not be disturbed where substantial rights on the merits have not been affected. Cullen v. P., 191M136, 253NW117. See Dun. Dig. 399, 7647.

Order made on conflicting affidavits, opening a default judgment and permitting defendant to appear and defend, is almost wholly within discretion of trial court and will not be reversed on appeal, except for a clear abuse of discretion. Roe v. W., 191M251, 254NW274. See Dun. Dig. 399, 5012.

Selection of a guardian of an incompetent is a matter peculiarly within discretion of appointing court, and an appellant who seeks to overthrow decision is required clearly to establish error. Dahmen's Guardianship, 192M 407, 256NW891. See Dun. Dig. 399.

Order granting temporary injunction will not be reversed in supreme court unless it is made to appear that action of court below was an abuse of discretion, especially where it does not appear that any injury will result to party restrained by maintaining status quo until trial and determination of action. School Dist. No. 1 v. L., —M—, 261NW486. See Dun. Dig. 4490(89).

As to whether a change of place of trial should be granted or denied is a matter resting very largely in discretion of trial court and its action will not be reversed on appeal, except for clear abuse of discretion. State v. District Court of Brown County, 194M595, 261 NW701. See Dun. Dig. 399.

5. Proceedings below on reversal.

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

On reversal supreme court may exclude from new trial issues which have been determined. Stolp v. R., 190M382, 251NW903. See Dun. Dig. 7079.

On reversal of judgment for plaintiff, defendant was refused permission to try issue raised by counterclaim as to which he offered no testimony on first trial. Id. See Dun. Dig. 7079.

Supreme court will not amend its order so as to instruct trial court that plaintiff should be permitted to amend her pleading so as to seek specific performance of contract, allowance of such amendment being a matter properly directed to trial court's discretion and it being assumed that question would be decided in accordance with established rules of practice by that court. Craig v. B., 191M42, 254NW440. See Dun. Dig. 429, 432.

General rule is that issues that have been satisfactorily determined upon a fair trial need not be retried when a new trial is granted if in holding their determination final no prejudice results. Sleeter v. P., 191M108, 253NW 531. See Dun. Dig. 7082, 7099.

Where only error related to evidence concerning damages for personal injuries, a new trial could be had only as to damages. Neuleib v. A., 193M248, 258NW309. See Dun. Dig. 430.

6. Law of case.

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

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

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

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

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

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

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

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

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

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

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

All questions involved which might have been raised are concluded by decision on appeal except where court has expressly directed that its conclusion is without prejudice to party's right to apply for a rehearing on his motion for a new trial. Wilcox v. H., 186M500, 243NW711. See Dun. Dig. 454, 457.

Instructions of court become law of case in absence of suggestions of error or inaccuracy. Farnham v. P., 193M222, 258NW293. See Dun. Dig. 404.

A verdict returned in conformity with charge to which no exceptions were taken either on the trial or in motion for new trial, may not be set aside unless it conclusively appears that party in whose favor verdict was rendered was not entitled to recover on one or more of issues submitted to jury. Rochester Bread Co. v. R., 193 M244, 258NW302. See Dun. Dig. 415.

In absence of objection or exception to charge, charge becomes law of case and sufficiency of evidence to sustain verdict is to be determined by application to evidence of instructions and rules of law given in charge. Id. See Dun. Dig. 404.

Decision upon a former appeal in same cause becomes law of case on retrial if evidence is substantially same. Donaldson v. M., 193M283, 258NW504. See Dun. Dig. 398.

7. Moot questions.

An appeal by plaintiff from an order discharging garnishee became moot where plaintiff gave no supersedeas bond. Ridgway v. M., 192M618, 256NW521. See Dun. Dig. 463.

Appeal from an order became moot where trial judge after appeal vacated the order. Id. See Dun. Dig. 463.

7½. Presumptions.

It will be presumed in support of judgment that facts found, if not within issues, were voluntarily litigated. Union Central Life Ins. Co. v. P., 190M360, 251NW911. See Dun. Dig. 372, n. 74.

8. Findings of fact.

174M442, 219NW457.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

There can be no reversal in a strictly fact case where findings were supported by evidence. Lepak v. M., 182M 168, 233NW851. See Dun. Dig. 411(12).

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

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

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

On appeal from an order denying a motion to set aside service of summons, based upon conflicting affidavits, dispute as to facts must be taken as having been resolved in favor of the plaintiff. Massee v. C., 184M 196, 238NW327. See Dun. Dig. 396, 410.

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

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

Judgment resting upon findings of fact unsupported by evidence should be reversed. Yager v. H., 186M71, 242NW 469. See Dun. Dig. 411.

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

An issue of compromise and settlement, arising on conflicting testimony, is settled finally by verdict. Mid-West Public Utilities v. D., 187M580, 246NW257. See Dun. Dig. 415.

In applying rule that evidence must be clear, persuasive and convincing to justify reformation, effect must still be given to rule that reviewing court will not disturb findings of trial court unless manifestly contrary to evidence. Hartigan v. N., 188M48, 246NW477. See Dun. Dig. 411.

Finding of fact based on conflicting evidence will not be disturbed. Mienes v. L., 188M162, 246NW667. See Dun. Dig. 411.

Evidence will be viewed in light favorable to verdict. Dickinson v. L., 246NW669; Jacobsen v. A., 188M179, 246 NW670. See Dun. Dig. 415.

Determination of trial court whether there was prejudice because witness mingled with jurors will not be disturbed on appeal. Hillius v. N., 188M386, 247NW 385. See Dun. Dig. 399, 7103a, 7104.

On appeal from order denying motion to vacate writ of attachment and levy, determination of trial court will not be reversed unless manifestly contrary to evidence. Callanan v. C., 188M609, 248NW45. See Dun. Dig. 410(5).

Finding will not be set aside on appeal except where there is no evidence reasonably tending to sustain it. Holtorf v. R., 190M44, 250NW816. See Dun. Dig. 411.

Rejection by a city council of application of one claiming under soldier's preference law on adequate evidence having been found not arbitrary, will not be disturbed on appeal. State v. Barker, 190M370, 251NW673. See Dun. Dig. 6560.

Verdict based on conflicting evidence will not be disturbed on appeal. Klimes v. H., 190M634, 252NW219. See Dun. Dig. 415.

Verdict being in defendant's favor, supreme court is required to view evidence in light most favorable to him. McIlvaine v. D., 190M401, 252NW234. See Dun. Dig. 415.

Supreme court will interfere with verdicts only in those cases where there is no evidence reasonably tending to support verdict or it is manifestly and palpably against weight of evidence. Spates v. G., 191M1, 252NW 835. See Dun. Dig. 415.

Evidence must, on appeal, be regarded in light most favorable to prevailing party. Dow-Arneson Co. v. C., 191M28, 253NW6. See Dun. Dig. 378.

On review of verdict for plaintiff, evidence must be considered in most favorable light for plaintiff. Cullen v. P., 191M136, 253NW117. See Dun. Dig. 415.

Where a fact issue has been determined by trial court upon conflicting evidence, this court's inquiry is limited to an examination of record to ascertain whether such finding is reasonably supported. Waldron v. P., 191M 302, 252NW894. See Dun. Dig. 411.

Fact issues when determined by jury upon conflicting evidence (especially where approved by trial court) will not be disturbed on appeal if record discloses that there is evidence reasonably sustaining same. Luck v. M., 191M503, 254NW609. See Dun. Dig. 415.

In reviewing findings of fact of a trial court, evidence is viewed in light most favorable to prevailing party. Weese v. W., 191M526, 254NW816. See Dun. Dig. 411.

On appeal, when fact issues alone are involved, inquiry is directed only to an examination of record to determine whether there is evidence reasonably sustaining conclusion reached. S. Bader & Sons v. G., 191M571, 255 NW97. See Dun. Dig. 411.

Issues of fact are exclusively for the determination of trier of fact. Id.

Where there is no motion for new trial, no errors in the trial, no objections or exceptions to the charge, and issue has been submitted to jury, verdict must stand unless evidence against it is conclusive, or shows as matter of law that opposite party should recover. Matz v. K., 191M580, 254NW912. See Dun. Dig. 388a.

On appeal evidence must be reviewed in light most favorable to prevailing party. Matlincky v. C., 192M166, 255NW625. See Dun. Dig. 411, 415.

Jury's finding, based upon conflicting evidence, will not be disturbed on appeal, especially where verdict has approval of trial court. Farnham v. P., 193M222, 258NW 293. See Dun. Dig. 415.

On appeal evidence is to be viewed in light most favorable to party in whose favor verdict was rendered. Rochester Bread Co. v. R., 193M244, 258NW302. See Dun. Dig. 415.

Supreme court will not interfere with verdict based on conflicting testimony where verdict has been approved by trial court, unless testimony in support of verdict is demonstrably false or mistaken. State v. Rasmussen, 193M374, 258NW503. See Dun. Dig. 415, 7157.

Where a trial is had to a court without a jury, a reversal will not be granted on ground that findings are not justified by evidence, unless findings are clearly against weight of evidence or without any reasonable support therein. Miller v. N., 193M423, 258NW747. See Dun. Dig. 411.

Where fact issues alone are involved and same have been submitted to and determined by triers of fact, nothing remains for review on appeal except to determine whether result reached is reasonably sustained by evidence. Harris v. N., 193M480, 259NW16. See Dun. Dig. 415.

To reverse a refusal to make requested amended findings, it is not enough to show that there is evidence that would justify them, had they been made. Johlfs v. C., 193M553, 259NW57. See Dun. Dig. 411.

Conflict in evidence in a court case is not for solution of appellate court. Id. See Dun. Dig. 411.

On review, evidence is to be considered in a light most favorable to verdict. Wright v. E., 193M509, 259NW75. See Dun. Dig. 415.

On review of a verdict for personal injuries claimed to be excessive, approved by the court, every presumption is in favor of verdict. Fredhom v. S., 193M569, 259NW80. See Dun. Dig. 415, 2596, 2597.

Supreme court cannot help an appellant in action for accounting on a question of fact, where evidence permits a finding either way. Young v. T., 193M576, 259NW404. See Dun. Dig. 411.

Where a case is submitted for decision upon a stipulation of all facts, neither party will be heard on appeal to suggest that facts were other than as stipulated, or that any material fact was omitted. Monfort's Estate, 193M594, 259NW554. See Dun. Dig. 9004.

Verdict having reasonable support in the evidence will not be disturbed on appeal. Citrowski v. L., 194M269, 260NW297. See Dun. Dig. 415.

Trial court's determination based on conflicting affidavits in proceeding by beneficiary to reopen and set aside orders allowing and confirming annual accounts of trustee will not be disturbed on appeal. Fleischmann v. N., 194M227, 234, 260NW310. See Dun. Dig. 410.

On appeal from an order granting judgment for defendant notwithstanding verdict, evidence is to be reviewed in light most favorable to plaintiff. Mardorf v. D., 194M537, 261NW177. See Dun. Dig. 415.

On review of an order made on motion for judgment notwithstanding verdict, evidence most favorable to party obtaining verdict is to be given its full effect. Paulson v. F., 194M507, 261NW182. See Dun. Dig. 415.

On review of a verdict directed for defendant, court will adopt those facts favorable to plaintiff. Montague v. L., 194M546, 261NW188. See Dun. Dig. 415.

Supreme court is bound by jury's findings on fact issues where evidence permits a finding either way. Walsh v. D., ——M——, 261NW476. See Dun. Dig. 415.

Supreme court will not interfere with action of trial court in granting or refusing a temporary injunction where there is a conflict of the facts. School Dist. No. 1 v. L., ——M——, 261NW486. See Dun. Dig. 4490(92).

9. Rehearing.

There is a distinction between this section and §10752 and supreme court in criminal case has no power to recall case for rehearing after a remittitur is regularly sent down. State v. Waddell, 191M475, 254NW627. See Dun. Dig. 2501.

9495. Judgment notwithstanding verdict.

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

180M578, 230NW585. Cert. den. 282US854, 51SCR31.

1½. Applicability.

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

2. Motion on trial for directed verdict necessary.

180M1, 230NW260.

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

Motion for judgment notwithstanding verdict does not lie unless there is a motion to direct a verdict at close of testimony. Romann v. B., 190M419, 252NW80. See Dun. Dig. 5079.

Judgment notwithstanding verdict cannot be granted unless there was a motion for directed verdict when evidence was closed, nor, in any event, where record warrants a verdict in a substantial amount. Olson v. H., 194M280, 260NW227. See Dun. Dig. 5079.

3. Motion for judgment.

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

180M305, 230NW793.

Moquin v. M., 231NW920.

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

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

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

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

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

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

Where the evidence presented did not establish any defense, judgment in favor of plaintiffs, notwithstanding the verdict, was properly ordered. Powell v. T., 175M 361, 221NW241.

An order denying a motion for judgment notwithstanding disagreement of the jury, is not appealable. 176M 302, 223NW146.

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

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

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

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

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

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

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

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

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

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

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

In an action for assault, false imprisonment, and kidnapping, where there is evidence tending to show that defendant participated in the restraint of plaintiff's liberty and in transporting her in an automobile against her will, an order granting judgment in favor of such defendant notwithstanding a verdict in favor of the plaintiff is erroneous. Jacobson v. S., 183M425, 236NW 922. See Dun. Dig. 5082.

Motion is properly denied where there is evidence to sustain verdict. Holland v. M., 189M172, 248NW750. See Dun. Dig. 5082, 9764.

Motion for directed verdict at close of testimony is a condition precedent to granting of motion for judgment notwithstanding verdict. Krocak v. K., 189M346, 249NW671. See Dun. Dig. 5079.

When court, after charge but before jury retires, permits counsel to move for a directed verdict and denies motion, party may move for judgment notwithstanding verdict, and, on appeal, assign error on rulings below. Flower v. K., 189M461, 250NW43. See Dun. Dig. 5080, 5082.

To grant motion for judgment notwithstanding verdict for plaintiff, evidence must be so conclusive as to compel as matter of law a contrary result. Thom v. N., 190M 622, 252NW660. See Dun. Dig. 5082.

On motion for judgment notwithstanding verdict for plaintiff, view of evidence most favorable to plaintiff must be accepted. Id.

Presumption of due care of deceased automobile driver held so overcome by testimony of eyewitnesses as to justify judgment notwithstanding verdict for plaintiff. Williams v. J., 191M16, 252NW658. See Dun. Dig. 7032.

Judgment notwithstanding the verdict is to be granted with due care and caution, but should be granted where right thereto is clear. First Nat. Bank v. F., 191M318, 254NW8. See Dun. Dig. 5082.

It was not error for trial court to order judgment for defendant notwithstanding verdict in action for services alleged to have been rendered where plaintiff failed to prove value of such services. Dreelan v. K., 191M330, 254NW433. See Dun. Dig. 5082.

Plaintiff's motion for judgment notwithstanding the verdict was properly denied; evidence not being practically conclusive against verdict, and no motion for new trial having been made. Donnelly v. S., 193M11, 257NW505. See Dun. Dig. 5080, 5082.

At common law, judgment non obstante could be entered only where plea of defendant confessed plaintiff's cause of action and set up in defense insufficient matters of avoidance, which, if found true, would not constitute a defense or bar to the action, common law basing motion on pleadings. Anderson v. N., 193M157, 258NW157. See Dun. Dig. 5076.

Fact that a verdict contrary to law is a statutory ground for a new trial does not require setting aside a verdict on a motion for judgment notwithstanding verdict on such ground. Id. See Dun. Dig. 5082.

Where a party does not move for a directed verdict at close of testimony, he cannot move for judgment notwithstanding an adverse verdict after trial, nor can court under such circumstances enter judgment nowithstanding on a motion to "vacate and set aside" verdict. Id. See Dun. Dig. 5079.

An order for judgment in favor of defendant notwithstanding verdict for plaintiff could only be granted in case there was no evidence in any way reasonably tending to sustain the verdict, or in case evidence presented by plaintiff was wholly incredible and unworthy of belief or so conclusively overcome by other uncontradicted evidence as to leave nothing upon which verdict could stand. Kingsley v. A., 193M503, 259NW7. See Dun. Dig. 5082.

Where respondents, according to settled case, acquiesced in court's charge that damages ascertained, whether from fraud respecting personal property or real property sold, might be applied or offset upon note in suit, they cannot have judgment notwithstanding verdict. Olson v. H., 194M280, 260NW227. See Dun. Dig. 5077.

Judgment notwithstanding verdict should not be ordered unless evidence is practically conclusive against verdict. Mardorf v. D., 194M537, 261NW177. See Dun. Dig. 5082.

It is not sufficient to authorize order for judgment notwithstanding verdict that evidence was such that trial court in its discretion ought to have granted a new trial. Id.

If there is evidence reasonably sufficient to sustain verdict, judgment notwithstanding verdict should not be ordered. Id.

In four car collision wherein plaintiff's car contacted a light car and a truck, light car owner was properly ordered judgment notwithstanding verdict, but such order was properly denied as to owner of truck. Paulson v. F., 194M507, 261NW182. See Dun. Dig. 5082.

On review of an order made on motion for judgment notwithstanding verdict, evidence most favorable to party obtaining verdict, is to be given its full effect. Id. See Dun. Dig. 5086.

Evidence is conclusive that more than two years elapsed after alleged cause of action for malpractice accrued, and court did not err in ordering judgment for defendant notwithstanding verdict. Plotnik v. L., ——M ——, 261NW867. See Dun. Dig. 5082.

6. Appealability of order on motion.

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

Where alternative motion for judgment non obstante or for a new trial is made, an appeal may be taken from the whole order disposing of the motion, but not from only that part granting or denying judgment. 179M 392, 229NW557.

Unless first order denying motion for judgment notwithstanding verdict or for a new trial is vacated, order denying subsequent motion for same relief is not appealable. General Motors Acceptance Corp. v. J., 188 M598, 248NW213. See Dun. Dig. 318.

Where an alternative motion for judgment notwithstanding or for a new trial is made, an appeal may be taken from whole order disposing of motion, but not from only that part granting or denying judgment. Mallery v. N., 194M236, 259NW825. See Dun. Dig. 5084.

7. Disposition of case on appeal.

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

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

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

Judgment notwithstanding verdict should not be granted if it appears probable from record that a party has a good cause of action or defense and that deficiency of proof may be remedied on another trial. First Nat. Bank v. F., 191M318, 254NW8. See Dun. Dig. 5082.

Judgment notwithstanding will not be entered where it appears that any deficiency in pleading or proof can be supplied if a new trial is had. Dreelan v. K., 191M 330, 254NW433. See Dun. Dig. 5078.

For appellant to prevail on appeal from an order overruling a motion for a judgment notwithstanding verdict, evidence must be so conclusive as to compel a finding contrary to verdict. Reynolds v. G., 192M37, 255NW249. See Dun. Dig. 5085.

On appeal from judgment for defendant in replevin wherein defendant purchaser claimed neither rescission nor counterclaim for damages for fraud and deceit, merely claiming title, though he had not paid for the fountain, plaintiff should not have judgment notwithstanding verdict, as defendant might obtain some relief on a retrial. Knight Soda Fountain Co. v. D., 192M387, 256NW657. See Dun. Dig. 433.

Judgment notwithstanding verdict will not be ordered where there is any probability that deficiency in either pleadings or proof can be supplied if another trial is had. Anderson v. N., 193M157, 258NW157. See Dun. Dig. 5082.

Judgment notwithstanding verdict should not be ordered if it appears probable from record that party obtaining verdict has a good cause of action and that sufficiency of proof may be remedied on another trial. Rochester Bread Co. v. R., 193M244, 258NW302. See Dun. Dig. 5082.

Where a defendant rests upon its motion for judgment without asking for a new trial, errors at trial cannot be reviewed or considered on appeal. Oxborough v. M., 194 M335, 260NW305. See Dun. Dig. 5085.

Where there is a motion for judgment notwithstanding verdict but no motion for a new trial, only objections that can be raised on appeal are (1) whether court had jurisdiction; (2) whether court erred in denying motion for a directed verdict; and (3) whether evidence is sufficient to justify verdict. Eichler v. E., 194M8, 259NW545. See Dun. Dig. 5085(46).

Where defendant relies solely on motion for judgment without asking for new trial, errors at trial cannot be considered on appeal. Mishler v. N., 194M499, 260NW865. See Dun. Dig. 5085.

On appeal from an order granting judgment for defendant notwithstanding verdict, evidence is to be reviewed in light most favorable to plaintiff. Mardorf v. D., 194M537, 261NW177. See Dun. Dig. 5082.

8. Scope of review on appeal from judgment.

Where only motion made by defendant was for judgment notwithstanding verdict, only question on an appeal from a judgment entered after denial of that motion is whether evidence clearly shows that plaintiff was not entitled to recover. Thom v. N., 190M622, 252NW660. See Dun. Dig. 5085.

Where defendant rests upon motion for judgment without asking for a new trial, errors at trial cannot be reviewed or considered on appeal. Gimmestad v. R., 194M 531, 261NW194. See Dun. Dig. 5085.

9496. Dismissal of appeal in vacation.

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

9497. Appeal, when taken.

1. When judgment entered.

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

3. Appeal from order.

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

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

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

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

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

Findings and conclusions of court held not to constitute judgment, and an appeal would lie from an order denying motion for new trial entered more than six months after entry of such findings and conclusions. Salo v. S., 188M614, 248NW39. See Dun. Dig. 316.

Order denying a motion for judgment notwithstanding verdict or for a new trial must be appealed from within 30 days after written notice. General Motors Acceptance Corp. v. J., 188M598, 248NW213. See Dun. Dig. 317, 318.

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

An appeal from an order taken after expiration of thirty days from date of service of written notice of filing of order upon appellant's attorney does not give court jurisdiction. Johnson v. U., 193M357, 258NW504. See Dun. Dig. 317.

Neither stipulation of parties nor stay of proceedings ordered by court can extend time to appeal from an order. Id. See Dun. Dig. 318.

9498. Appeals to supreme court. * * * * * * *

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

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

* * * * * * *

STATUTE GENERALLY

½. In general.

The finality of a judgment for purposes of appeal in the federal court, is not controlled by state procedure. U. S. v. N., (USCCA8), 75F(2d)744.

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

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

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

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

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

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

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

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

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

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

The power of the district court to review and vacate an appealable order made before judgment, or to permit a renewal or repetition of the motion, is not lost because of expiration of the time for appeal. Barrett v. S., 183M 431, 237NW15. See Dun. Dig. 1512(38).

¾. Party aggrieved.

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

Agreement held to commit defendant to amount of verdict if liability existed, and amount cannot be questioned on appeal. Bashaw Bros. Co. v. C., 187M548, 246 NW358. See Dun. Dig. 287.

Where order amending verdicts for husband and wife, by taking medical expenses from wife's verdict and adding to husband's, recited that defendant consented, there is no error for review. Krinke v. G., 187M595, 246 NW376. See Dun. Dig. 287, 9823, 9825, 9828, 9829.

An appellant cannot successfully predicate error on trial procedure in which he acquiesced without objection. Borowski v. S., 188M102, 246NW540. See Dun. Dig. 287, 384.

County board, acting as tribunal to hear petition to detach land from one school district and attach it to another, has no interest in litigation, and is not an aggrieved party entitled to appeal. Kirchoff v. B., 189 M226, 248NW817. See Dun. Dig. 310.

SUBDIVISION 1

4. From judgment on appeal to district court.

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

5. From judgment in action commenced in district court.

Where court grants new trial as to single issue, the order, together with order refusing to vacate same, are reviewable on appeal from judgment entered after second trial. 180M185, 230NW473.

Review extends to appealable and nonappealable orders, and includes sufficiency of evidence and rulings and proceedings on trial when properly preserved by exception and assigned in motion for new trial. 180M 185, 230NW472.

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

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

Appeal from judgment brings up for review only prior proceedings which resulted in judgment. Muellenberg v. J., 188M398, 247NW570. See Dun. Dig. 389(30).

Questions raised by motion for judgment or a new trial may be reviewed on appeal from judgment. General Motors Acceptance Corp. v. J., 188M598, 248NW213. See Dun. Dig. 389b.

On appeal from a judgment court may review any intermediate order involving merits or necessarily affecting judgment. W. T. Rawleigh Co. v. S., 192M483, 257 NW102. See Dun. Dig. 389.

Several appeals from orders will not be separately considered because appeal from judgment searches whole record. Spears v. D., 193M162, 258NW149. See Dun. Dig. 389.

On appeal after a third trial, court's alleged error in granting or in manner of granting, third trial cannot be reviewed. Backstrom v. N., 194M67, 259NW681. See Dun. Dig. 393a.

SUBDIVISION 2

7. Orders held appealable.

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

8. Orders held not appealable.

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

SUBDIVISION 3

9. Construed strictly.

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

An order permitting defendant to pay the amount into court and directing another claimant to be substituted as defendant does not finally determine any substantial right of plaintiff and is not appealable. 176M11, 222NW 295.

10. Orders held appealable.

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

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

An order striking the words "on the merits" from a judgment of dismissal was appealable. McElroy v. B., 184M357, 238NW681. See Dun. Dig. 298.

11. Orders held not appealable.

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

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

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

Order granting new trial, after reinstatement of action to enforce attorney's lien and entry of order for

judgment, held not appealable under this subdivision. 178M230, 226NW699.

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

SUBDIVISION 4

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

12. Orders held appealable.

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

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

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

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

13. Orders held not appealable.

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

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

Where defendant moved in the alternative for judgment not withstanding verdict or a new trial, and a new trial was granted and the motion for judgment denied, an appeal from the denial of a judgment is ineffectual. 174M237, 219NW149.

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

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

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

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

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

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

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

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

An order granting a new trial is generally not appealable. Ayer v. C., 189M359, 249NW581. See Dun. Dig. 300.

No appeal may be taken from an order denying a motion for a new trial based upon minutes of court heard more than 30 days after decision, order being a nullity. Smith v. W., 192M424, 256NW890. See Dun. Dig. 300.

Inadequacy of damages awarded by jury is not an error of law, and where only ground assigned for an order granting a new trial is inadequacy of damages, order is not appealable. Roelofs v. B., 194M166, 259NW808. See Dun. Dig. 300.

14. Orders sustaining or overruling a demurrer.

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

SUBDIVISION 5

15. Orders held appealable.

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

An order granting a new trial after judgment has been entered is appealable as order vacating judgment. Ayer v. C., 189M359, 249NW581. See Dun. Dig. 300.

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

16. Orders held not appealable.

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

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

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

SUBDIVISION 7

18. Definitions.

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

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

An order discharging an order to show cause why trustee could not render account to beneficiary was not appealable. Fleischmann v. N., 194M227, 234, 260NW313. See Dun. Dig. 298.

19. Orders held appealable.

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

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

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

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

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

20. Orders held not appealable.

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

Order impounding attorney's fee in hands of client to await determination of distributive shares of several attorneys, held ont appealable. 180M30, 230NW113.

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

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

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

APPEALABILITY OF ORDER GENERALLY

21. Orders held appealable.

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

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

Where an order vacates a judgment entered upon verdict and grants a new trial, an appeal lies from that part of order which vacates judgment. Ayer v. C., 189M359, 248NW749. See Dun. Dig. 300, 308.

Though an appeal will not lie from order dismissing an action, but only from judgment entered pursuant thereto, order striking complaint as sham is appealable, as such is an order striking a pleading or a portion of a pleading. Long v. M., 191M163, 253NW762. See Dun. Dig. 301.

An order of the probate court denying a motion to revoke a prior order appointing an administrator is not appealable. Firle, 191M233, 253NW889. See Dun. Dig. 7786.

A separate order of probate court, made after appointment of administrator and prior to petition for a final decree, purporting to determine who is sole heir of decedent, is not final or appealable, and may be reviewed on appeal from final decree of distribution. Id. See Dun. Dig. 389, 7786.

Order appointing an administrator is not a final judgment or determination of who are heirs of decedent or entitled to receive estate after administration is completed so as to bar review of that question on appeal from final decree. Id. See Dun. Dig. 389, 3563.

Order appointing an administrator is appealable. Id.

Where an alternative motion for judgment notwithstanding or for a new trial is made, an appeal may be taken from whole order disposing of motion, but not from only that part granting or denying judgment. Mallery v. N., 194M236, 259NW825. See Dun. Dig. 5084.

Where an order does not involve the merits of the action, or is not a final order affecting a substantial right in a special proceeding, it is not appealable. Fleischmann v. N., 194M227, 234, 260NW313. See Dun. Dig. 298.

22. Orders held not appealable.

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

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

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

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

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

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

Order denying motion for judgment, notwithstanding findings and decision, is not appealable. Gunderson v. A., 190M245, 251NW515. See Dun. Dig. 309.

25. Waiver of right to appeal.

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

26. From order refusing to vacate judgment or order.

An order refusing to vacate a nonappealable order is not appealable. 174M611, 219NW928.

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

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

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

31. From order on motion to amend findings or conclusions.

An order denying a motion to correct a verdict so as to include erroneously omitted interest is not appealable. Newberg v. C., 190M459, 252NW221. See Dun. Dig. 309.

Order refusing findings is not appealable. Nichols v. V., 192M510, 257NW82. See Dun. Dig. 309.

An appeal does not lie from an order denying a motion for amended finding. White v. M., 192M522, 257NW281. See Dun. Dig. 309.

34. Contempt proceedings.

When object of a proceeding in contempt is to impose punishment merely, order adjudging contempt is reviewable on certiorari, but when object is to enforce doing of something in aid of a civil proceeding, order of contempt is reviewable on appeal. Proper v. F., 188M15, 246 NW481. See Dun. Dig. 1395, 1702 to 1708a.

9499. Bond or deposit for costs.

Gruenberg v. S., 188M566, 248NW38; note under §9504.

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

9500. Appeal from order—Supersedeas.

Roehrs v. T., 185M154, 240NW111; note under §9277.

Gruenberg v. S., 188M566, 248NW38; note under §9504.

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

Where district court has reversed a rate-fixing order of Railroad and Warehouse Commission, an appeal by state and applicant does not stay entry of judgment unless so directed either by this court or district court. State v. Dist. Court, 189M487, 250NW7. See Dun. Dig. 8082a.

By not giving a supersedeas bond on appeal, garnishee proceedings were not stayed and no rights against garnishee were preserved, appeal being from order discharging garnishee. Ridgway v. M., 192M618, 256NW521. See Dun. Dig. 334.

9504. For sale of real property—Supersedeas.

To effect a stay of proceedings on appeal by defendant from a judgment for restitution in a forcible entry and unlawful detainer case, bond on appeal must conform to provisions of statute. Gruenberg v. S., 188M566, 248 NW38.

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

9508. Justification of sureties.

Appeal was not dismissed for failure to furnish bond where appellant had acted in good faith and gone to considerable expense in preparing his appeal, and he was given ten days in which to file a sufficient bond. 176 M632, 221NW643.

9512. Death of party after submission of appeal.

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

CHAPTER 81

Arbitration and Award

9513. What may be submitted—Submission irrevocable.

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

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

An arbitration at common law eliminates certain questions which might be present if an award is result of statutory arbitration. Mueller v. C., 194M83, 259NW 798. See Dun. Dig. 499.

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

Agreement to submit to arbitration, account between parties relating to a partnership and all other matters in difference between them, is too indefinite to show that dissolution of partnership, sale of assets thereof to one or other of partners, leasing by one to other of real property which was not partnership property, and an agreement by one partner not to compete in business with other, were matters within authority of arbitrators to determine. McKay v. M., 187M521, 246NW12. See Dun. Dig. 487a.

9517. Grounds of vacating award.

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

Where a controversy between employer and employee is submitted to arbitrators for their decision upon two or more determinative issues, favorable decision of both of which for employee is essential to his cause of action, he cannot recover where decision of arbitrators ignores one of determinative issues so submitted. An award so unresponsive to submission is void. Mueller v. C., 194M 83, 259NW798. See Dun. Dig. 499.

Arbitration, particularly in disputes between employers and employees, is a favorite of law, and award, if any, will ordinarily be final. Id. See Dun. Dig. 488.

(5).

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

CHAPTER 82

Actions Relating to Real Property

ACTIONS FOR PARTITION

9544. Final judgment on confirming report.

Order of the court confirming a sale in partition sustained against objection that the price was inadequate. Grimm v. G., 190M474, 252NW231. See Dun. Dig. 7343(95).

ACTIONS TO TRY TITLE

9556. Actions to determine adverse claims.

1. Nature and object of action.

When the husband dies after the judgment of divorce in his favor, and pending the appeal in this court, and