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Containing the text of the acts of the 1929, 1931, 1933, 1935, and 1937 General Sessions, and the 1933-34, 1935-36, 1936, and 1937 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 76

Forcible Entry and Unlawful Detainer

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

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

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

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

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

9149. Recovery of possession.

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

4. When action will lie.

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

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

Description of property in lease and in contract for deed held substantially same and sufficient to readily identify property. Gruenberg v. S., 188M568, 248NW724. See Dun. Dig. 3785.

Mortgagee in possession is entitled to hold it as against mortgagor in action of forcible entry and detainer, mortgagor being in default. Schmit v. D., 189M 420, 249NW580. See Dun. Dig. 6242.

In a proceeding under §2188, plaintiff's tax title being found defective, a lien was adjudged against premises and judgment entered, execution levied, and sale made to plaintiff pursuant thereto, held, no confirmation of sale was necessary under §§2185, 2186, and an unlawful detainer action was proper action to recover possession during existence of defendant's life estate, which was subject to specific lien of tax judgment. Trask v. R., 193M213, 258NW164. See Dun. Dig. 9531.

5. Who may maintain.

Lessee held real party in interest as against one in possession of property holding over after cancellation of a contract for deed. Gruenberg v. S., 188M568, 248NW 724. See Dun. Dig. 3783.

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

6. Parties defendant.

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

In forcible entry, evidence held to sustain finding that defendant was mortgagee in possession. Schmit v. D., 189M420, 249NW580. See Dun. Dig. 6238.

7. Demand—notice to quit.

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

10. Transfer to district court.

In action in justice court under unlawful detainer statute, cause is not removable to district court, on ground that title to real estate is involved, unless and until such title comes in issue on evidence presented in that court. Minneapolis Sav. & Loan Ass'n v. K., 198M420, 270NW148. See Dun. Dig. 3784.

9152. Summons—How served.

Herreid v. D., 193M618, 259NW189; note under §9155.

9153. Answer—Trial.

In forcible entry and unlawful detainer cases, municipal court of Minneapolis has no power to entertain a motion for a new trial or a motion for judgment in favor of defendant notwithstanding decision for plaintiff. Olson v. L., 196M352, 265NW25. See Dun. Dig. 3784.

9155. Judgment—Fine—Execution.

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

Judgment for vendor in unlawful detainer was res judicata in action to recover purchase money paid on theory that vendor repudiated contract for deed. Herreid v. D., 193M618, 259NW189. See Dun. Dig. 5161, 5162, 5163.

In action for damages for being kept out of possession, finding that, in a former action to vacate a judgment for restitution entered in municipal court district court had found that said judgment has never been vacated or modified and that plaintiff has not waived his right to proceed thereunder, is decisive against defendants. Hermann v. K., 198M331, 269NW836. See Dun. Dig. 3783.

9157. Writ of restitution.

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

9158. Appeal.

178M460, 227NW656; note under §9157.

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

9163. Execution of the writ of restitution.

One moving back day following his removal under writ of restitution and using seed and grain belonging to owner is not guilty of trespass but may be prosecuted for larceny and also for unlawful entry. Op. Atty. Gen. (494b-20), Nov. 26, 1934.

CHAPTER 77

Civil Actions

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

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

COMMON LAW DECISIONS RELATING TO ACTIONS IN GENERAL

1. Election of remedy.

Election of remedies. 171M65, 212NW738.

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

A judgment entered on a verdict directed for the defendant on the ground that the defendant was not authorized by the law under which it was organized to execute the promissory notes alleged as causes of action by the receiver of the payee bank is not a bar to action for money had and received. Turner v. V., 182M115, 233 NW856. 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., 183 M205, 236NW197. See Dun. Dig. 10092(61), (62).

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

Where mortgagee of chattels obtained judgment and levied upon mortgaged property under execution, release of levy was not an election of remedies so as to bar right to proceed under mortgage. First Nat. Bank v. F., 190M102, 250NW806. See Dun. Dig. 2914.

Doctrine of election of remedies is an application of law of estoppel. Id.

Premature suit by lessor for damages to property, held only mistaken bona fide effort to pursue an available remedy and not to bar a subsequent suit for rent. Donaldson v. M., 190M231, 251NW272. See Dun. Dig. 2914, n. 56.

Summary proceeding against attorney to compel repayment of embezzled funds did not preclude action against bank for improper payment of check with forged indorsement. Rosacker v. C., 191M553, 254NW824. See Dun. Dig. 2914.

Where plaintiff converted defendant's money sent him for deposit in bank by purchasing bonds and promising "I will guaranty this bonds any time you don't want them I'll take them over," there was no error in trial court's refusal to require defendant, early in trial, to elect whether he would rely upon guaranty or promise to purchase bonds, defenses not being inconsistent. Wigdale v. A., 193M384, 258NW726. See Dun. Dig. 2912.

A bank in which a check drawn on another bank is deposited is only a collecting agent, and such agency is revoked where bank goes into hands of commissioner before check is collected, and commissioner has no authority to collect the check, and having done so the money does not become an asset of the bank but belongs to the depositor, who is entitled to a preferred claim, which he does not lose through election of remedy by filing only general claim under advice of the department. Bethesda Old People's Home v. B., 193M589, 259NW384. See Dun. Dig. 2914.

If, for same wrong, one is liable both for breach of contract and conversion, injured party may elect his remedy. If he sues for tort, and there have been successive and distinct conversions, he has right to sue upon them separately as independent causes of action. Lloyd v. F., 197M387, 267NW204. See Dun. Dig. 5167.

Effect of levy on mortgaged property by mortgagee. 18MinnLawRev353.

Entry of judgment against agent as an election barring subsequent suit against undisclosed principal. 19 MinnLawRev813.

2. Conflict of laws.

See notes under §154.

An issue of title to real estate in this state must be determined under local law. Stipe v. J., 192M504, 257NW 99. See Dun. Dig. 1554.

Jurisdiction to annul marriage. 16MinnLawRev398.

Conflict of laws—what law governs the burden of proving contributory negligence. 16MinnLawRev586.

Does lex loci delicti or lex domicilii govern right of action for tort? 16MinnLawRev704.

3. Contract or tort.

Where defendant counterclaims for money or property wrongfully obtained, he waives tort and elects to rely on implied contract of plaintiff to repay money or pay value of property taken. Kubat v. Z., 186M122, 242 NW477. See Dun. Dig. 88.

Action by purchasers of stock sold in violation of Blue Sky Law is not one in quasi contract for money had and received but for recovery on ground of tort. Drees v. M., 189M608, 250NW563. See Dun. Dig. 1125a.

4. Criminal acts.

That defendant's conduct is criminal does not preclude civil remedy by injunction. State v. Nelson, 189M87, 248 NW751. See Dun. Dig. 4190, 7271.

5. Abatement of actions.

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

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

Right of buyer after repossession to recover for injuries occurring to the property before repossession. 17 MinnLawRev103.

6. Common counts.

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

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

A bank guilty of conversion in crediting check to wrong person, but receiving nothing for itself out of the transaction, is not liable in indebitatus assumpsit for money had and received. Northwestern Upholstering Co. v. F., 193M333, 258NW724. See Dun. Dig. 619.

An action in indebitatus assumpsit for money had and received will not lie against one who has not been personally enriched. Id.

Where plaintiff's husband, who was a partner with defendant, died and defendant asked plaintiff to advance money to meet certain checks that had been issued by partnership on promise that plaintiff would be taken into partnership, and no partnership was formed, plaintiff held entitled to recover money advanced as for money had and received. Kingsley v. A., 193M505, 259NW7. See Dun. Dig. 6129.

A municipality may not exact more from one charged with an assessment for extension of its gas and water mains than is permissible under terms of ordinance under which extension was made, and where excess payments have been exacted, municipality may be held as for money had and received. Sloan v. C., 194M48, 259NW 393. See Dun. Dig. 7461, 9114.

Recovery cannot be had as for money had and received where there is no unjust or other enrichment going to one sought to be charged. Judd v. C., 198M590, 272NW 577. See Dun. Dig. 6128(77).

Recovery as for unjust enrichment may not be had in action on express contract. Swenson v. G., 274NW222. See Dun. Dig. 7671.

7. Equitable remedies.

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

Where relief is sought for alleged excessive corporation salaries, and plaintiff is barred by covenant not to sue for original corporate act fixing such salaries, equity will not afford relief against their continuance. Butler v. B., 186M144, 242NW701. See Dun. Dig. 3142 (58).

An action between claimants to determine which one is entitled to a fund deposited in court is governed by equity principles and rules. Brajovich v. M., 189M123, 248NW711. See Dun. Dig. 4893.

Where judgment against member of school board for amount of money expended without legal authority provided that such member should be entitled to a conveyance of property purchased on tender of amount of judgment and on tender it appeared that school district had sold and conveyed property to third person, member was entitled to bring equitable action for relief. Johnson v. I., 189M293, 249NW177.

Mere delay does not constitute laches unless it is culpable under circumstances, important question in such case being whether there has been such unreasonable delay in a known right, resulting in prejudice to others, as would make it inequitable to grant desired relief. Peterson v. S., 192M315, 256NW308. See Dun. Dig. 5351.

Court of equity has broad discretion to mold its relief to fit exigencies of a particular case. Young v. P., 193M578, 259NW405. See Dun. Dig. 3141.

Trial of action to set aside and invalidate a trust deposit in a savings account in a bank is not a jury case, even if relief asked is recovery of money in such account. Coughlin v. F., 199M102, 272NW166. See Dun. Dig. 9835.

Prevention of multiplicity of suits. 16MinnLawRev 679.

8. ——Maxims.

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

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

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

Equity regards as done that which should have been done. Brajovich v. M., 189M123, 248NW711. See Dun. Dig. 4813.

Equity aids vigilant, not those who sleep upon their rights. Jordan's Estate, 199M53, 271NW104. See Dun. Dig. 3142(59).

9. ——Adequacy of legal remedy.

Penn Mut. L. I. Co. v. J. (DC-Minn), 5FSupp1003; note under §3417, note 1½.

In an action to recover on an insurance policy not under seal, brought after the incontestability period had expired, to which defendant answered alleging fraud in the application, the remedy at law was adequate precluding the federal district court from transferring the cause to equity, although the defendant sought by amendment to cancel the policy. Dunn v. Prudential I. Co. (DC-Minn), 8FSupp799. See Dun. Dig. 3137.

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.

A remedy at law which is practically ineffective will not bar equitable relief. Ostrander v. O., 190M547, 252 NW449. See Dun. Dig. 3137.

Extent to which equity will go to provide relief where legal remedy is wanting or inadequate is not a matter of fixed rule. Rather it rests in sound discretion of court. Whether decree so to be made will prove so useless as to lead a court to refuse to give it is a matter of judgment to be exercised with reference to special circumstances of each case rather than to general rules, which at most are but guides to exercise of discretion. Schaefer v. T., 199M610, 273NW190. See Dun. Dig. 3137.

Adequacy of ineffective remedy at law. 16MinnLawRev 233.

10. ——Cancellation of instruments.

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

11. ——Specific performance.

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

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

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

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

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

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

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

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

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

Complaint held bad as one in specific performance for failure to allege sufficiently either substance or terms of supposed contract. Mundinger v. B., 188M621, 248NW 47. See Dun. Dig. 8802.

Where plaintiff's father and mother made mutual and reciprocal wills devising to survivor a life estate with remainder over to plaintiff and others, plaintiff is entitled to specific performance regardless of fact that after death of mother, father remarried and changed his will. Mosloski v. G., 191M170, 253NW378. See Dun. Dig. 10207a.

Equity may refuse a decree for specific performance of a contract where there is obligation on both sides and consideration, but no mutuality of remedy. Thorpe Bros. v. W., 192M432, 256NW729. See Dun. Dig. 8774.

Whether or not specific performance of contract to exchange lands should be granted rests in the sound discretion of trial court, but discretion exercised, however, must be judicial discretion, not arbitrary or capricious, and if contract has been entered into by a competent party, and is unobjectionable in its nature and circumstances, specific performance thereof is a matter of right. Twin City Bldg. & Loan Ass'n v. J., 194M1, 259 NW551. See Dun. Dig. 8777.

A court of equity may decline to enforce a contract to convey real estate if it is shown that enforcement would be unconscionable or inequitable, or if because of mistake or misapprehension plaintiff has gained an unconscionable advantage of defendant. Id. See Dun. Dig. 8792.

Whether specific performance should be granted rests largely in sound discretion of trial court. Schultz v. B., 195M301, 262NW877. See Dun. Dig. 8777.

Agreement of principal beneficiary of will to give dissatisfied heir one-half of property in consideration of his refraining from contesting will on ground of undue influence will be specifically enforced if dissatisfied heir acted in good faith. Id. See Dun. Dig. 8790.

An oral contract to adopt may be specifically enforced, if partially performed, upon establishment by clear and convincing evidence. Firle's Estate, 197M1, 265NW818. See Dun. Dig. 8790.

Oral contract to be entitled to specific performance must be established by clear, positive and convincing proof. Anderson v. A., 197M252, 266NW841. See Dun. Dig. 8806.

In action for specific performance of contract to will or leave property, burden is upon plaintiff to show by full and satisfactory proof fact of contract and its terms. Hauge v. N., 197M493, 267NW432. See Dun. Dig. 8806.

In action for specific performance of a contract to leave property by will, evidence held to sustain finding that contract was made in writing between decedent and plaintiff, through his father, was performed by plaintiff, and was of such domestic and personal character that it could not be liquidated in money. Hanson v. B., 199M70, 271NW127. See Dun. Dig. 10207.

Specific performance of oral contract to adopt. 16 MinnLawRev578.

12. ——Abatement of nuisances.

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

13. Torts.

A minor may not sue his parent for tort unless emancipated. Eschenbach v. B., 195M378, 263NW154. See Dun. Dig. 7308.

Where lessor covenanted for a specified time not to enter into a business competitive with that of lessee, and during term of lease conveyed property and assigned reversion to plaintiff, and thereafter breached his covenant with the lessee, who rescinded lease, to plaintiff's damage, plaintiff has no cause of action either in tort for wrongful interference with his business or in contract for breach of defendant's covenant with lessee. Dewey v. K., 274NW161. See Dun. Dig. 9637.

Tort action by minor child against parent. 15Minn LawRev126.

Publication of picture of deceased child as invasion of parents' right of privacy. 15MinnLawRev610.

Tort liability of administrative officers. 21 MinnLaw Rev 263.

14. ——Negligence

Electricity; see notes under §7536.

Negligent fires, see §4031-28.

Wickstrom v. T., 191M327, 254NW1; note under §4174.

In action by customer for injuries sustained when falling in defendant's store, evidence that the place was cleaned every morning, and that a state inspector had complimented defendant on its cleanliness, held not to controvert question of negligence. Sears Roebuck & Co. v. P. (USCCA8), 76F(2d)243.

In action by customer to recover for personal injuries sustained when falling over twine on floor of defendant's seed store, held on issues of whether defendant or its employee left twine in aisle, and whether it constituted negligence, there was substantial evidence to sustain verdict in favor of plaintiff. Id.

Property owner is charged with notice of any structural defect therein. Id.

In action by customer for injuries sustained when falling over twine on the floor of defendant's seed store, held the jury was warranted in inferring that the twine had been removed from one of the evergreen trees in the store by a clerk of defendant, and thrown or left in the aisle by him. Id.

Customer enters store as an invitee to whom proprietor owes a continuing duty of exercising reasonable or ordinary care. Id.

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

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

That defendant's farm team had run away some two years previously, together with evidence of an admission by defendant that at an undisclosed time they had injured a cow, was not sufficient evidence of negligence to sustain a verdict for an employee, injured in a 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., 183M366, 236NW628. See Dun. Dig. 5884-5915.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Instruction that child was required to exercise degree of care which children of same age ordinarily exercise under same circumstances, held not to submit issue of contributory negligence. Borowski v. S., 188M102, 246 NW540. See Dun. Dig. 7029.

To recover damages for injuries received when automobile slipped off steam cleaning rack, plaintiff must show not only defect alleged in rack but also that accident was caused thereby. Vardolos v. P., 188M405, 246 NW467. See Dun. Dig. 6999.

In action for damages for injury to hand caught between swinging vestibule doors of store, negligence and contributory negligence, held for jury. Carr v. W., 188M 216, 246NW743. See Dun. Dig. 6987.

An employee failing to report defect in valve could not recover for disabling sickness occasioned by escaping gas. Cedergren v. M., 188M331, 247NW235. See Dun. Dig. 6014.

An employee is bound to obey all reasonable rules or orders of his employer, and if his disobedience is proximate cause of injury, recovery is barred. Id.

Trainmen owe no duty to unknown and unexpected trespassers on track until they become aware of them, and then they owe duty of exercising ordinary care not to do them harm. Denzer v. G., 188M580, 248NW44. See Dun. Dig. 8164.

A shopkeeper or merchant owes to customers upon his premises duty of ordinary care in respect of safe condition of premises. Hastings v. W., 189M523, 250NW362. See Dun. Dig. 6984-6987, 9765, 9766.

Whether storekeeper was negligent in having small hole in floor and whether it was proximate cause of injury to woman whose heel caught therein, held for jury. Id.

Where servant through sudden illness or accident becomes helpless and is in peril of life or serious injury unless immediate care is given, it is duty of master when apprised of servant's condition to furnish proper care. Wilke v. C., 190M89, 251NW11. See Dun. Dig. 5862.

Due care is a degree of care commensurate to the danger. Dragotis v. K., 190M128, 250NW804. See Dun. Dig. 6970, 6972, n. 94.

It is not due care to rely on exercise of due care by others when such reliance is itself attended by obvious danger. Id.

Doctrine of res ipsa loquitur does not apply where all facts and circumstances as to cause of failure of dam and the resulting injury are fully shown. Willie v. M., 190M95, 250NW809. See Dun. Dig. 7044.

Court placed a greater burden on defendant than law required to establish the defense of contributory negligence or assumption of risk, by stating that a plaintiff is guilty of negligence and cannot recover if he "rashly and recklessly and unnecessarily exposes himself to an imminent and known danger in a manner that a person of ordinary prudence would not under the same or similar circumstances." Engstrom v. D., 190M 208, 251NW134. See Dun. Dig. 7012.

Evidence held insufficient to show negligence of department store as to customer who fell over four-inch platform in or near aisle. Smith v. E., 190M294,, 251NW 265. See Dun. Dig. 6987.

It is duty of a shopkeeper to keep and maintain passageways in a reasonably safe condition for use of customers and invitees, but he is not an insurer of the safety of customers. Id.

Where an ordinary device, such as a platform customarily used in stores for display of goods, is placed in a well-lighted position, is plainly observable, with nothing to conceal its presence and outlines, and with sufficient passageways going by it, shopkeeper should not be held negligent as to one heedlessly colliding therewith. Id. See Dun. Dig. 6987.

Under ordinary circumstances, a street railway company is not responsible for injuries to passengers caused by obvious street dangers. Fox v. M., 190M343, 251NW 916. See Dun. Dig. 1278.

Street railway held not liable for injury to passenger on steps when automobile collided with street car. Fox v. M., 190M343, 251NW916. See Dun. Dig. 1266.

A street railway company is not an insurer of safety of its passengers. Id. See Dun. Dig. 1261, n. 91.

In action against street railway for injuries received in collision between automobile and street car, negligence and contributory negligence, held for jury. Holt v. S., 190M441, 252NW76. See Dun. Dig. 9023a.

Evidence sustained verdict that defendant was negligent in permitting its employees to drop substances, of substantial weight, down onto a passageway in its laundry where invitees might be without giving latter timely warning. Cleland v. A., 190M593, 252NW453. See Dun. Dig. 6996.

The rule of res ipsa loquitur applies where the specific cause of an accident is not shown by the evidence of either party, the plaintiff has no knowledge of the exact cause, it does not appear that plaintiff has or knows of any evidence to show the specific cause, and the facts and circumstances shown are such as to justify the jury in finding that the defendant, having full control of the operation of the thing which caused the injury, has given no explanation or evidence as to the cause. Cullen v. P., 191M136, 253NW117. See Dun. Dig. 7044.

Negligence may be proved by circumstantial evidence. Id. See Dun. Dig. 1123, 1124, 7047.

Burden of proof on question of negligence rests upon plaintiff claiming it and does not shift. Cullen v. P., 191M136, 254NW631. See Dun. Dig. 7043.

Doctrine that there are three degrees of negligence, slight, ordinary and gross, does not prevail in this state. Peet v. R., 191M151, 253NW546. See Dun. Dig. 6971.

In action for death of one struck both by automobile and street car while waiting to become passenger upon street car, evidence held not to show any negligence on part of motorman. Kruchowski v. S., 191M454, 254NW 587. See Dun. Dig. 9033a.

If an injury be caused by the concurring negligence of defendant and a third person, defendant is liable to same extent as though it had been caused by his negligence alone. Luck v. M., 191M503, 254NW609. See Dun. Dig. 7006.

Contributory negligence on part of an injured plaintiff prevents recovery against a negligent defendant, absent willful or wanton negligence. Id. See Dun. Dig. 7035.

Record found to sustain right of recovery as to those who were guests or passengers in driver's car when same was crushed between two street cars operated by defendant. Id. See Dun. Dig. 9023a.

In action for injuries and death in collision between two street cars and automobile, court properly refused to submit question of willful and wanton negligence on part of motorman. Id. See Dun. Dig. 9029.

On issue of defendant's negligence in operation of its street car, court submitted to jury under proper instructions questions of whether car ran through stop signal, rate of speed, and failure of motorman to give warning, to have his car under proper control, and to keep proper lookout. Id. See Dun. Dig. 9015.

Where several persons are engaged in same work, in which negligent or unskillful performance of his part by one may cause danger to others, and in which each must necessarily depend for his safety upon good faith, skill, and prudence of each of others, it is duty of each to exercise care and skill ordinarily employed by prudent men in similar circumstances, and he is liable for any injury occurring by reason of a neglect to use such care and skill. Builders & M. M. C. Co. v. B., 192M 254, 255NW851. See Dun. Dig. 6975.

A general contractor in charge of a building in the course of construction, knowing that workmen of other contractors are working in or about the building, is bound to exercise reasonable care to avoid injuring them. Id. See Dun. Dig. 6975.

In action against general contractor by compensation insurer of subcontractor, negligence of general contractor and contributory negligence of employee held for jury. Id. See Dun. Dig. 6975, 10408.

Neighbor of farmer assisting in construction of barn without compensation, except understanding that he in turn might receive aid when needed, was an invitee on barn to whom foreman and owner owed ordinary care. Gilbert v. M., 192M495, 257NW73. See Dun. Dig. 6984.

Whether foreman in construction of barn was negligent with respect to construction of scaffold and overloading, held for jury. Id. See Dun. Dig. 7048.

In action by farmer for personal injuries suffered when scaffold fell while aiding neighbor in construction of barn under supervision of building contractor, it was not error to refuse an instruction based on claim that there was testimony to go to jury that plaintiff knew as much about construction of scaffold as the foreman. Id. See Dun. Dig. 6984.

In action for personal injuries by farmer injured by falling of scaffold while assisting a neighbor, record held not to warrant an instruction in respect to latent defects. Id. See Dun. Dig. 6984.

A private institution of learning was not negligent in placing small cedar stakes about three inches long at edges of roadway to beautify same, and was not liable for injury to one whose toboggan struck a stake, since no person of ordinary prudence could anticipate injury. Gallo v. B., 192M530, 257NW336. See Dun. Dig. 7002.

Storekeeper was not liable for injuries to a patron who slipped on a green bean pod, where evidence showed that storekeeper swept aisle every night and in morning after merchandise had been placed in position, and that strict orders were enforced to remove chance matters that might fall upon floors. Penny v. S., 193M65, 258NW522. See Dun. Dig. 6987.

Burden of establishing contributory negligence is upon defendant in negligence case. Gordon v. F., 193M97, 258 NW19. See Dun. Dig. 7032.

Contributory negligence of patron of filling station falling into greasing pit, held for jury. Id. See Dun. Dig. 7033.

In action against filling station for injuries received by invitee falling into greasing pit located in building, whether defendant was negligent, held for jury. Id. See Dun. Dig. 6987.

In action against owner of filling station for personal injuries sustained from fall into automobile greasing pit located inside building, whether plaintiff was an invitee, held for jury. Id. See Dun. Dig. 6987.

Where father went to garage office to talk with proprietor, taking his 2½ year old son with him, and child wandered into other part of garage and fell into a grease pit and was injured, regardless of whether child was in first instance an invitee or licensee, when he wandered off into other part of garage he became merely a licensee toward whom no duty was owed to keep premises safe. Mosher v. A., 193M115, 258NW158. See Dun. Dig. 6984, 6985.

Contributory negligence is always question of fact, unless reasonable minds could reach but one conclusion. Hogle v. C., 193M326, 258NW721. See Dun. Dig. 7033, 7048.

Contributory negligence of one slipping on oily store floor was for jury. McIntyre v. H., 193M439, 258NW832, 6987.

General rule is that a shopkeeper is under legal obligation to keep and maintain his premises in reasonably safe condition for use as to all whom he expressly or impliedly invites to enter same. Id.

Trial court properly submitted to jury shopkeeper's negligence respecting failure adequately to remove from surface of floor oily and slippery substances remaining *thereon from oiling of floor night before.* Id.

In action by passenger on street car for injuries received when she fell on stopping of car while she was in aisle preparing to get off, negligence and contributory negligence held for jury. Underdahl v. M., 193M548, 259 NW78. See Dun. Dig. 1278.

General rule is that a shopkeeper is under legal obligation to keep and maintain his premises in reasonably safe condition for use as to all whom he expressly or impliedly invites to enter the same. Dickson v. E., 193M 629, 259NW375. See Dun. Dig. 6987.

Storekeeper was not negligent in maintaining floor level in lavatory 6½ inches above floor level in hall leading to lavatory and was not guilty of negligence in having doorway open outward into hall so that one leaving lavatory might not be able to see difference in floor level. Id. See Dun. Dig. 6987.

Contributory negligence is want of ordinary or reasonable care on the part of a person injured by negligence of another directly contributing to injury, as a proximate cause thereof, without which injury would not have occurred. Johnston v. T., 193M635, 259NW187. See Dun. Dig. 7012, 7013.

In action by farm hand for injuries while riding as a passenger in automobile driven by farm manager, evidence held to justify verdict and judgment for plaintiff. Eichler v. E., 194M8, 259NW545. See Dun. Dig. 5857d.

In action for death by falling into elevator shaft to which there was no eye witness, it is not absolutely necessary for plaintiff to prove precise manner in which deceased came to fall into pit, even if any of alleged negligent acts or omissions have been proven, which reasonably may be found to be cause of fall. Gross v. G., 194 M23, 259NW557. See Dun. Dig. 7043.

That elevator gate not complying with ordinance was installed before ordinance was enacted does not excuse noncompliance with its provisions. Id. See Dun. Dig. 6976.

In action for death in elevator shaft to which there were no eye witnesses, sentence at end of charge "with reference to the presumption of due care that accompanied the plaintiff, the burden of overcoming that presumption rests upon the defendant" held not prejudicial in view of accurate and more complete instruction in body of charge. Id. See Dun. Dig. 7032(99).

In action for death of roofing contractor for negligent maintenance of elevator gate and approach, evidence that gates of elevator on floor above one where fatal fall happened were of different construction than gate in question was admissible. Id. See Dun. Dig. 6994(19).

In action for death of roofer against owner of business building, evidence held to sustain verdict that defendant's negligence in respect to elevator gate violating city ordinance, in connection with darkness of room, was proximate cause of death. Id. See Dun. Dig. 6987.

In action for death of contractor repairing roof of business building by falling into elevator shaft, defenses of assumption of risk and contributory negligence held for jury. Id. See Dun. Dig. 6994(19), 7023, 7041a.

Doctrine of res ipsa loquitur is that when a thing, which has caused an injury, is shown to be under management of defendant charged with negligence, and accident is such as in ordinary course of things would not happen if those who have control use proper care, accident itself affords reasonable evidence, in absence of explanation by defendant, that it arose from want of care. Borg & Powers Furn Co. v. C., 194M305, 260NW 316. See Dun. Dig. 7044.

Where agency of injury is not shown and is not within knowledge or reach of plaintiff, doctrine of res ipsa loquitur applies, and an unsuccessful attempt by plaintiff to show cause of injury does not weaken or displace presumption of negligence on part of defendant. Id. See Dun. Dig. 7044.

Doctrine of res ipsa loquitur applied where a taxicab rolled backwards down hill, driverless, and crashed into and broke a plate glass window. Id. See Dun. Dig. 7044, 7047.

To give rise to res ipsa loquitur it must appear, among other things, that the instrumentality inflicting the injury was under control of defendant, and where there is dispute as to this factor, it is proper to submit this issue to jury under instructions, such that if they find defendant to be in control of instrumentality, then they may apply res ipsa loquitur, otherwise not. Hector Const. Co. v. B., 194M310, 260NW496. See Dun. Dig. 7044.

One who loses his life in an accident is presumed to have exercised due care for his own safety, but presumption may be overcome by ordinary means of proof that due care was not exercised. Oxborough v. M., 194 M335, 260NW305. See Dun. Dig. 3431, 7032.

Burden is upon defendant to establish an injured plaintiff's contributory negligence, and unless evidence conclusively establishes it, such issue is for jury. Id. See Dun. Dig. 2616, 7032.

Idea that attractive nuisance doctrine involves an invitation or anything akin thereto should be discarded, liability resulting notwithstanding trespass by one of tender years with consequence lack of perception and responsibility. Gimmestad v. R., 194M531, 261NW194. See Dun. Dig. 6989.

One who maintains without adequate safeguards, upon his own premises dangerous instrumentalities attractive to young children is bound to exercise reasonable care to protect them from injury therefrom. Id.

Whether wrecking company storing lumber and materials in insecure piles on vacant property in process of sorting it were guilty of negligence in failing to maintain adequate safeguard for protection of children, held for jury. Id.

Evidence made question of negligence of motorman, in operating street car, a question of fact for jury, in action by sideswiped intending passenger. Mardorf v. D., 194M537, 261NW177. See Dun. Dig. 1276.

Evidence does not establish that sideswiped intending passenger was guilty of contributory negligence as a matter of law. Id.

It is duty of street car motorman to exercise care to see that prospective passengers have time and opportunity to safely reach an inner door of car before starting. Id.

A guest in a hotel, injured by stumbling down a short, unlighted stairway in hallway just outside door of his room, held entitled to recover as for negligence. Gustafson v. A., 194M575, 261NW447. See Dun. Dig. 4513, 6987.

Host was not liable for death of guest who slipped upon wet floor and beans caused by children playing about premises. Page v. M., 194M607, 261NW443. See Dun. Dig. 6984.

When a guest is invited to come upon premises of his host for purely social purposes, relation created is not that of invitee and invitor in a business sense, but that of licensee and licensor, and host is under no liability to his guest unless proximate cause of injury is something in nature of a trap or he is guilty of some active negligence. Id.

Recovery by employee being predicated solely upon violation of ventilating statutes, defense of assumption of risk is not available. Clark v. B., 195M44, 261NW596. See Dun. Dig. 5969.

Wilful or wanton negligence does not necessarily mean an operation of mind, intending to injure anyone; is satisfied by conduct that is reckless, regardless of welfare or safety of those who may be around. Raths v. S., 195M225, 262NW563. See Dun. Dig. 6971.

Contributory negligence on part of mother of a child seven years old, which was killed by an automobile on a public highway, held question of fact for jury. Dickey v. H., 195M292, 262NW869. See Dun. Dig. 2616(10).

Neither wife nor minor child may recover damages for personal injuries to husband and father, remedy being solely in husband and father. Eschenbach v. B., 195M 378, 263NW154. See Dun. Dig. 3288b, 7305b.

Whether, in constructing a pipe line for transmission of natural gas through farm of plaintiff's father, defendant was negligent in using a paint contained in steel drums and which, at a temperature above 90 degrees Fahrenheit inside drum, would generate explosive gas, and leaving empty can where boy could get it, held for jury. Reichert v. M., 195M387, 263NW297. See Dun. Dig. 3699, 7000.

Where in action for wrongful death representative of estate of deceased would be sole beneficiary of any recovery, his contributory negligence bars recovery against defendant whose negligence caused death. Jenson v. G., 195M556, 263NW624. See Dun. Dig. 2616(6).

Evidence does not justify a jury to find that defendant through negligence caused alleged ice ridge or hummock upon which plaintiff fell to form on walk. Abar v. R., 195M597, 263NW917. See Dun. Dig. 6845.

Condition of driveway over sidewalk was not a nuisance which abutting owner was in duty bound to abate. Id.

Where a taxicab of a common carrier stops on a street to let off a passenger in a place where it is likely that a vehicle coming from behind will be unable to pass to left thereof or to stop, because of street car rails and icy ruts, it is for jury to determine whether driver of cab was negligent and whether such negligence proximately caused or contributed to injury received by plaintiff, when a car coming up from behind struck cab as she was in act

of alighting. Paulos v. K., 195M603, 263NW913. See Dun. Dig. 1291a.

In order for rule of res ipsa loquitur to apply, instrumentality causing injury must be exclusively and wholly under control of defendant. Heidemann v. C., 195M611, 264NW212. See Dun. Dig. 7044.

One suddenly confronted by a peril, through no fault of his own, who, in attempt to escape, does not choose best or safest way, should not be held negligent because of such choice, unless it was so hazardous that ordinarily prudent person would not have made it under similar conditions. Cosgrove v. M., 196M6, 264NW134. See Dun. Dig. 6969.

In reviewing a verdict, supreme court cannot count witnesses or weigh their testimony, but is governed by what is obvious to an unprejudiced mind sitting in judgment, and if physical or demonstrable facts are such as to negate truthfulness or reliability of testimony of a witness, a verdict based on such testimony is without foundation and must be set aside. Id. See Dun. Dig. 7160a, 9764, 10344.

Action, where legal duty requires no action, is no worse than inaction where legal duty requires actions. Taylor v. N., 196M22, 264NW139. See Dun. Dig. 6969.

In action for personal injuries received when slipping on floor in place of business, court erred in refusing to permit testimony of one of plaintiff's witnesses to effect that a short time after plaintiff had fallen witness entered same room and slipped and nearly fell at substantially same place. Id. See Dun. Dig. 6987.

One operating a public place of business is not an insurer of safety of customers, but is required to exercise the degree of care of ordinarily prudent person. Id.

The use of a waxed floor or mere use of marble, tile, hardwood or any other commonly employed floor material in construction of a floor in a place of business is not negligence, but there was a question for the jury where a highly waxed floor was permitted to become wet from ice and snow brought in on feet of patrons. Id.

Contributory negligence of one who slipped and fell upon wet waxed linoleum floor held for jury. Id.

Where plaintiff was injured at night by driving his automobile against carcass of a horse which had just been killed in a collision with a truck, jury might find that negligent permitting of horse at large was a proximate cause of injury to plaintiff. Wedel v. J., 196M170, 264NW689. See Dun. Dig. 7011.

Whether a child just past age of six was chargeable with contributory negligence was for jury. Eckhardt v. H., 196M270, 264NW776. See Dun. Dig. 7029.

Whether employees of a utility company put plugs in pipes from water front in range, which they replaced with a gas stove, and whether this negligence was proximate cause of an explosion after range was moved to a cabin, held for jury. Mattson v. N., 196M334, 265NW51. See Dun. Dig. 7048.

Where in action for personal injuries caused by moving a one-man street car on a curve so that plaintiff was struck by swinging rear end of car while he was seeking passage thereon, a passenger on car stated that she informed motorman-conductor of presence of plaintiff coming to car, it was error to exclude her following statement that plaintiff must "have gone the other way"; night being dark and rainy, and she being in a position for observation superior to that of motorman. Mardorf v. D., 196M347, 265NW32. See Dun. Dig. 1276.

Negligence is failure to exercise such care as persons of ordinary prudence usually exercise under similar circumstances. Beckjord v. F., 196M474, 265NW336. See Dun. Dig. 6969.

Church was not negligent with respect to entry to stage where a member of ladies society was injured while leaving stage where a moonlight scene was being depicted, requiring turning out of lights in such entrance. Id. See Dun. Dig. 6988.

Defense of contributory negligence is generally an issue of fact and not to be determined as a matter of law unless evidence is such that reasonable men can draw but one conclusion. Vogel v. N., 196M509, 265NW350. See Dun. Dig. 7033.

When through negligence of another a person is suddenly placed in a position of great and imminent peril, he is not chargeable as a matter of law with contributory negligence if he puts himself into a position of still greater peril and is injured. Anderson v. K., 196M578, 265NW821. See Dun. Dig. 7020.

Before court should direct verdict for defendant on ground of contributory negligence, facts and inferences establishing contributory negligence must be made to appear in such fashion as to leave no reasonable doubt in mind of judge that field of jury cannot embrace particular facts presented. Id. See Dun. Dig. 7033.

If occurrence of intervening cause might reasonably have been anticipated, such intervening cause will not interrupt connection between original cause and injury. Ferraro v. T., 197M5, 265NW829. See Dun. Dig. 7005.

An injured plaintiff is not deprived of benefit of doctrine of res ipsa loquitur from mere introduction of evidence which does not clearly establish facts or leaves matter doubtful. An unsuccessful attempt on part of plaintiff to show negligent act does not weaken or displace presumption. Anderson v. E., 197M144, 266NW702. See Dun. Dig. 7044.

Evidence held to sustain verdict based on storekeeper's negligence in not maintaining floor in reasonably safe condition. Driscoll v. B., 197M313, 266NW879. See Dun. Dig. 6987.

A storekeeper is under a legal duty to keep and maintain his premises in reasonably safe condition for use of customers. Id.

If an inference of negligence from part of facts is inconsistent with and repelled by other facts conclusively shown, negligence is not proved. Bauer v. M., 197M352, 267NW206. See Dun. Dig. 7047(72).

No recovery can be had for negligence if it is more probable that accident was produced by some cause for which defendant was not liable. Id.

Where defendant, a common carrier of passengers, owned and operated both street car and motor bus involved in a collision causing injury to the plaintiff, jury could draw an inference that collision occurred due to defendant's negligence under doctrine of res ipsa loquitor. Birdsall v. D., 197M411, 267NW363. See Dun. Dig. 1296.

Whenever a person is placed in such a position with regard to another that it is obvious that if he does not use due care in his own conduct he will cause injury to that person, duty at once arises to exercise care commensurate with situation in which he thus finds himself to avoid such injury. Wells v. W., 197M464, 267NW379. See Dun. Dig. 6974.

Failure to keep elevator gate closed or to warn visitor to warehouse that it was not closed and contributory negligence of plaintiff in walking into elevator shaft relying upon gate being closed, held for jury. Smith v. K., 197M558, 267NW478. See Dun. Dig. 6987.

Burden rests upon plaintiff to prove that harm resulted from negligence of defendants rather than from some other cause. Yates v. G., 198M7, 268NW670. See Dun. Dig. 7011.

Proof of causal connection between injury and claimed negligence must be something more than consistent with plaintiff's theory of how injury was caused. Id.

Evidence held not to support a finding that lobar pneumonia, from which plaintiff's intestate died, was caused by collision, occurring over five weeks prior to pneumonia, connection as proximate cause lacking as a matter of law. Honer v. N., 198M55, 268NW852. See Dun. Dig. 6999.

In action by one injured while riding as a passenger in a street car, in a collision with a coal truck, making left turn, evidence sustained a verdict against both defendants. Useman v. M., 198M79, 268NW866. See Dun. Dig. 1266.

A very strong presumption arises that deceased exercised due care to save himself from personal injury or death, and the question is always one of fact for jury unless undisputed evidence so conclusively and unmistakenly rebuts presumption that honest and fair-minded men could not reasonably draw different conclusions therefrom. Szyperski v. S., 198M154, 269NW401. See Dun. Dig. 2616.

One need not anticipate negligence of another until he becomes aware of such negligence. Pearson v. N., 198M303, 269NW643. See Dun. Dig. 7022.

Burden is on plaintiff to show that harm resulted from negligence of defendant rather than from some other cause. Williamson v. A., 198M349, 270NW6. See Dun. Dig. 7491a.

Whether plaintiff was guilty of contributory negligence as she slipped and fell due to an icy running board while entering cab, held for jury. Finney v. N., 198M 554, 270NW592. See Dun. Dig. 1291a.

Whether passenger on street car used ordinary care, if, with bundles in her arms, she arose to alight before car had come to a stop, held for jury. Doody v. S., 198 M573, 270NW583. See Dun. Dig. 1278.

Where defendant rented a hall on third floor of its building to company in order that latter might display its wares, and also furnished chairs for occasion, and a chair collapsed, doctrine of res ipsa loquitur is not applicable, since chair was not under control of defendant. Szyca v. N., 199M99, 271NW102. See Dun. Dig. 7044.

Whether filling station operator holding light for persons repairing truck on highway was an invitee or a volunteer, held for jury. Guild v. M, 199M141, 271NW 332. See Dun. Dig. 5857.

Whether inadequate blocking of wheels of truck being repaired on highway was proximate cause of injury to filling station operator holding light, held for jury. Id. See Dun. Dig. 7002, 7003.

Where two negligent causes combine to produce injuries, neither author can escape liability because he is responsible for only one of them. Id. See Dun. Dig. 7006, 7007.

Whether filling station operator assumed risk or was guilty of contributory negligence in getting into a place of danger while holding a light for men repairing a truck on the highway held for jury. Id. See Dun. Dig. 7023.

Whether truck owner and garage man repairing truck on highway were guilty of negligence by reason of inadequate blocking of wheels, whereby filling station employee holding light was injured, held for jury. Id. See Dun. Dig. 7023a.

Action arising out of a collision between an automobile and a street car, just as former was about across street car tracks, testimony indicating that street car was at

a stop taking on or discharging passengers as plaintiff approached tracks to cross them and from a dead stop, raised question of fact for jury. Drown v. M., 199M193, 271NW586. See Dun. Dig. 9023a.

Where negligence of several combine to produce injuries to another, any or all of authors of such negligent cause may be held to liability for entire harmful result directly flowing therefrom. Findley v. B., 199M 197, 271NW449. See Dun. Dig. 7006.

Motion of a defendant in a personal injury action for a directed verdict should be granted only in cases where evidence against plaintiff is clear, whether basis of motion be want of negligence in defendant or contributory negligence in the plaintiff. Jude v. J., 199M217, 271NW475. See Dun. Dig. 9843.

Contributory negligence of hotel guest in going down unlighted steps at entrance held for jury. Jewell v. B., 199M267, 271NW461. See Dun. Dig. 4513.

A carrier is bound to exercise highest degree of care toward its passengers. Mardorf v. D., 199M325, 271NW 588. See Dun. Dig. 1261.

Whether passenger intending to take street car was guilty of contributory negligence in not knowing or taking notice of fact that there would be an outswing of street car as it went around corner, held for jury. Id. See Dun. Dig. 1276.

One standing near track intending to take street car is to be considered as standing in same relation to street railway as a passenger actually aboard street car, as affecting duty of carrier to exercise highest degree of care toward its passengers. Id.

Where department store had on display several cedar chests, on some of which covers were open, and a seven-year-old child, in company with his parents, who had come to view a Christmas display in another part of store, was injured when top of one of these cedar chests fell upon his hand as he was playing, there was no liability because there was no reasonable ground to anticipate that display of cedar chests in this manner would or might result in injury to anybody. Pepperling v. E., 199M328, 271NW584. See Dun. Dig. 6987.

Automobile guest's act in placing hand upon door latch handle was not a material element in happening of accident and did not contribute to collision by street car from rear, and defense of contributory negligence was erroneously submitted to jury. Larsen v. M., 199 M501, 272NW595. See Dun. Dig. 7015.

One cannot recover damages for an injury to the commission of which he has directly contributed, and it matters not whether contribution consists in his participation in direct cause of injury, or in his omission of duty, which, if performed, would not have prevented it. Thorstad v. D., 199M543, 273NW255. See Dun. Dig. 7012(37, 38, 39).

Contributory negligence is a want of ordinary or reasonable care on part of a person injured by negligence of another directly contributing to injury, as a proximate cause thereof, without which the injury would not have occurred. Id. See Dun. Dig. 7012, 7013.

Ordinary care is exercise of a degree of care commensurate with circumstances. Carlson v. S., 273NW665. See Dun. Dig. 6970.

Where children are known or may reasonably be expected to be in vicinity, a high degree of vigilance is required of driver to measure up to standard of what law regards as ordinary care. Id. See Dun. Dig. 6980.

Willful or wanton negligence of truck driver establishes liability irrespective of contributory negligence. Id. See Dun. Dig. 7036.

To hold a person's recovery barred by his own negligence, there must be a causal connection between act of negligence and happening of accident. Butcher v. T., 273NW706. See Dun. Dig. 7015.

Res ipsa loquitur doctrine did not apply to falling of light dome in a church while children attending a carnival were jumping for balloons on strings attached to such dome. Ewald v. H., 274NW170. See Dun. Dig. 7044.

Doctrine of res ipsa loquitur does not apply where it appears that an accident was due to a cause beyond control of defendant. Id.

Where driver of automobile was killed in a collision at a street intersection, with a street car, presumption of due care of plaintiff's decedent is conclusively overcome by evidence which discloses that as a matter of law his negligence contributed to cause his death. Geldert v. B., 274NW245. See Dun. Dig. 2616(12).

Assumption of risk as defense where master violates statutory duty. 15MinnLawRev121.

Misrepresentation to secure employment as bar to recovery for injuries received in course of employment. 15MinnLawRev123.

Degree of care required of an infant defendant. 15 MinnLawRev834.

Liability of amusement park owner to patron for negligence of concessionaire. 16MinnLawRev321.

Escalator owners as common carriers. 16MinnLawRev 585.

Rules governing proximate cause in Minnesota. 16 MinnLawRev829.

Liability of gas company for injury caused by escaping gas. 17MinnLawRev518.

Liability of vendors of defective articles causing injury—Second hand seller's duty to third parties. 18Minn LawRev91.

The degree of danger and the degree of difficulty of removal of the danger as factors in "attractive nuisance" cases. 18MinnLawRev523.

Violation of statute or ordinance as negligence or evidence of negligence. 19MinnLawRev666.

Procedural effect of res ipsa loquitur. 20MinnLawRev 241.

Loss distribution by comparative negligence. 21Minn LawRev1.

Minnesota court on proximate cause. 21MinnLawRev 19.

Liability in tort for innocent misrepresentation. 21 MinnLawRev434.

15. ——False imprisonment and malicious prosecution.

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

All those who by direct act, or indirect procurement, participate in or proximately cause false imprisonment or unlawful detention, are joint tort-feasors. Anderson v. A., 189M224, 248NW719. See Dun. Dig. 3728.

Even though an arrest is lawful, detention of a prisoner for unreasonable time without taking him before a committing magistrate will constitute false imprisonment. Anderson v. A., 189M224, 248NW719. See Dun. Dig. 3728 (86).

In action for damages for malicious interference with business, evidence held not to show wrongful foreclosure of a mortgage. Hayward Farms Co. v. U., 194M473, 260 NW868. See Dun. Dig. 5750.

Burden of proving malice and lack of probable cause is upon plaintiff, and termination of original action in favor of plaintiff, either by a jury verdict or a directed verdict, standing alone, is insufficient to make out a prima facie case. Bredehorst v. R., 195M595, 263NW609. See Dun. Dig. 5743.

Liability of corporation for malicious prosecution. 16 MinnLawRev207.

False imprisonment—Elements which must be pleaded. 17MinnLawRev214.

16. ——Wrongful execution.

Judgment creditor suing on execution is not liable for wrongful levy made thereunder unless he directs such levy or ratifies it by refusing to permit a release. Lundgren v. W., 189M476, 250NW1. See Dun. Dig. 3553.

17. ——Assault.

Evidence held sufficient to sustain finding that blacksmith was assaulted when attempting to collect bill. Farrell v. K., 189M165, 248NW720. See Dun. Dig. 529.

18. ——Conversion.

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

If one in possession of personal property belonging to another disposes of it in violation of the owner's instructions, it is a conversion. General Electric Co. v. F., 183M178, 235NW876. See Dun. Dig. 1926.

The evidence did not require a finding of the conversion of plaintiff's merchandise by the defendants. Without a conversion there was no quasi contractual obligation such as arises upon the waiver of a tort and suit in assumpsit. Great Lakes Varnish Works v. B., 184M25, 237NW609. See Dun. Dig. 1926.

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

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

In action against chattel mortgagee for conversion of goods, whether plaintiff made default in conditions of mortgage held for jury. Rahn v. F., 185M246, 240NW 529. See Dun. Dig. 1474.

In conversion of live stock, evidence held insufficient to identify subject matter. Spicer Land Co. v. H., 187M 142, 244NW553. See Dun. Dig. 1951.

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

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

Evidence warranted finding collision insurer, after car was repaired, wrongfully withheld use and possession thereof from plaintiff, thereby converting it. Breuer v. C., 188M112, 246NW533. See Dun. Dig. 1935.

There was no waiver of conversion by collision insurer of automobile, which it agreed to repair and return, by submission of another proof of loss. Id. See Dun. Dig. 1947.

Unconditional resale of furnace by conditional vendee constituted conversion. Pennig v. S., 189M262, 249 NW39. See Dun. Dig. 1932.

Evidence held sufficient to support a finding that sheriff's levy amounted to a conversion. Lundgren v. W., 189M476, 250NW1. See Dun. Dig. 3551(65).

To constitute conversion, party must exercise dominion over property inconsistent with or in repudiation of owner's right, or destroy property or make such change in quality thereof as to constitute a constructive destruction. Dow-Arneson Co. v. C., 191M28, 253NW6. See Dun. Dig. 1926.

Evidence held not to show that city taking possession of condemned real property was guilty of conversion of personal property thereon. Id.

Sale of personal property by vendor-mortgagee after repossessing it, without giving notices required by §8353 does not foreclose vendee-mortgagor's right of redemption, but constitutes a conversion. Kettwig v. A., 191M 500, 254NW629. See Dun. Dig. 8652a.

Evidence held to show conclusively that plaintiff bank, mortgagee, by its conduct relative to mortgaged personal property in possession of mortgagor, authorized sale by mortgagor to good-faith purchasers, and is estopped from maintaining action for conversion of property or proceeds therefrom. First & Farmers' S. B. v. C., 191M566, 256NW315. See Dun. Dig. 1931.

Mortgagee of personalty by accepting part of proceeds of sale by mortgagor, with knowledge of transaction, ratified sale and was estopped from asserting sale was invalid. Id. See Dun. Dig. 1931.

Where a check made to A was, through error or otherwise, received by B, and C endorsed the check as receiver of A, and C was in fact receiver of B and had no connection with A, and gave check to defendant bank for collection, and check was subsequently collected and paid by defendant bank to C as receiver of B, as a matter of law bank had knowledge that B, whom it knew C to represent, was not the payee, and was guilty of conversion. Northwestern Upholstering Co. v. F., 193M333, 258 NW724. See Dun. Dig. 794.

One who bought bonds with money sent him for deposit in a bank was guilty of conversion. Wigdale v. A., 193M384, 258NW726. See Dun. Dig. 196.

A trustee in bankruptcy, who brings suit in state court alleging conversion of property of bankrupt estate by reason of an invalid foreclosure of chattel mortgage, is bound by measure of damages in state jurisdiction and is entitled to recover only difference between value of property and amount of lien, and where property converted was worth less than amounts of chattel mortgage liens, judgments were rightly entered for defendants. Ingalls v. E., 194M332, 260NW302. See Dun. Dig. 1956.

In action for conversion of newspapers, instruction that jury could find a verdict at rate of three cents per copy was not prejudicial where amount of verdict indicated that it was based upon cost of printing and materials. Fryberger v. A., 194M443, 260NW625. See Dun. Dig. 1955.

In order to recover for conversion, plaintiff need prove only that he was owner of property taken, that it was taken by defendant and converted, and that it had value. Id. See Dun. Dig. 1949.

In action by holder of trust certificates against trustee for conversion because it foreclosed and bid in trust property without plaintiff's knowledge or consent thereby releasing guarantors, plaintiff is not entitled to recover where guarantors were insolvent at time their obligation matured. Sneve v. F., 195M77, 261NW700. See Dun. Dig. 1955.

Distinction noted between act of conversion and demand for and refusal to deliver subject of a bailment as mere evidence of conversion. Johnson v. B., 196M436, 265NW297. See Dun. Dig. 1942.

Where conversion is accidental and under belief that person has right to property, and acts with no wrongful purpose or intent, measure of damages is value of property at time of actual taking and conversion; but where original taking and conversion is willful and without color or claim of right, measure of damages is value of property at time and in condition it is when demand for its return is made. Thoen v. F., 199M47, 271NW111. See Dun. Dig. 1928, 1955.

Conversion action arising out of partnership between two attorneys held properly dismissed on pleadings by municipal court, since rights of parties must be determined by an accounting action and conversion will not lie until termination of partnership. Grimes v. T., 273 NW816. See Dun. Dig. 1926.

19. ——Respondeat Superior.

An employer is not liable for injuries to a third person resulting from the act of an employee outside the scope of his employment. Liggett & Myers Tob. Co. v. D. (CCA8), 66F(2d)678.

Master is liable to third persons injured by negligent acts done by his servant in the course of his employment, although the master did not authorize or know of the servant's act or neglect, or even if he disapproved or forbade it. P. F. Collier & Son v. H. (USCCA8), 72F(2d) 625. See Dun. Dig. 5833.

Relation of master and servant exists whenever employer retains right to direct not only what shall be done but how it shall be done. Id. See Dun. Dig. 5801.

One whom employer does not control, and has no right to control, as to method or means by which he produces results contracted for, is an independent contractor. Id. See Dun. Dig. 5835.

In personal injury action, whether employee of corporate defendant had implied and apparent authority to carry passengers, held for jury. De Parcq v. L. (USCC A8), 81F(2d)777. Cert. den., 298US680, 56SCR947.

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

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

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

A public officer is not responsible for torts of his subordinates or employees, unless he cooperates with them. Nelson v. B., 188M584, 248NW49. See Dun. Dig. 8001.

Garage employee taking repaired car out for road test on request of owner was still employee of garage as regards its liability for negligent destruction of car. Phoenix Assur. Co. v. P., 189M586, 250NW455. See Dun. Dig. 732.

An employer who provides means of transportation for his employees from place to place where work is to be performed is not liable for damages to a third party who suffers injury because of negligence of employee, where employee, exclusively for his own convenience, uses his own means of transportation. Erickson v. G., 191M285, 253NW770. See Dun. Dig. 5833, 5843.

Whether building contractor being paid hourly wage for supervising construction of barn, owner paying his men direct, was an independent contractor or an employee of owner, held for jury, as affecting liability for injury to invitee neighbor injured by falling of scaffold. Gilbert v. M., 192M495, 257NW73. See Dun. Dig. 5835.

Negligence of building contractor acting as foreman and servant of farmer in construction of a barn was negligence of farmer. Id. See Dun. Dig. 5833.

Act of foreman and employee supervising construction of barn for farmer in inviting neighbor to assist was act of owner, on issue whether plaintiff was invitee. Id. See Dun. Dig. 6984.

Where defendant asserted defense that negligent person was independent contractor and not employee, court did not err in charging jury that burden was upon defendant to prove that negligent person was an independent contractor. Id. See Dun. Dig. 5839.

In action by corporation against its president to recover for negligence of driver of truck owned by defendant in negligently setting fire through use of gasoline in cleaning motor, doctrine of res ipsa loquitur could have no application as against defendant's president if driver was an employee of plaintiff and under its control. Hector Const. Co. v. B., 194M310, 260NW496. See Dun. Dig. 7044.

In action by corporation against its president for negligence of driver of truck owned by defendant, whether driver was employee of plaintiff or defendant, held for jury. Id. See Dun. Dig. 5834a.

Burden of proof is on one who asserts that under facts of case a judgment in favor of his servant is a bar to recovery against master. Berry v. D., 195M366, 263NW 115. See Dun. Dig. 5842.

Gas pipe line company could not relieve itself of liability by delegating duty of removal of cans containing remnants of explosive paints to an independent contractor. Reichert v. M., 195M366, 263NW297. See Dun. Dig. 3699, 5835.

Immunity of husband from suit in tort on part of his wife does not inure to benefit of owner of automobile driven by husband. Miller v. J., 196M438, 265NW324. See Dun. Dig. 6975a.

Where a servant without authority from master permits stranger to assist him in his work for master and stranger in presence of servant and with his consent negligently does such work, master is liable for such negligence. Szyperski v. S., 198M154, 269NW401. See Dun. Dig. 5857.

When master intrusts performance of an act to a servant, he is liable for negligence of one who, though not a servant of master, in presence of his servant and with his consent, negligently does act which was intrusted to servant. Guild v. M., 199M141, 271NW332. See Dun. Dig. 5834.

Burning of brush near highway was not such an ultra hazardous activity that risk could not have been eliminated by exercise of a high degree of care, and highway contractor was not liable for negligence of persons employed by him to burn the brush in such a manner that smoke passed over highway and resulted in collision of motor vehicles. Becker v. N., 274NW180. See Dun. Dig. 5835.

Liability of master for defamation published by a servant. 20 MinnLawRev 805.

20. ——Damages.

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

Court did not err in receiving testimony of value of motor vehicle before and after collision and also evidence of reasonable cost of restoring damaged car to its former condition. Engholm v. N., 184M349, 238NW 795. See Dun. Dig. 2576a.

Where injuries to car in a collision are of such character that the car may be repaired, the reasonable cost of restoring the car to its former condition is the proper measure of damages. Engholm v. N., 184M349, 238N W795. See Dun. Dig. 2576a.

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

Negligence of employer in discharging steam and water upon employee, held not proximate cause of asthma where such employee stood around for some 20 minutes and then went to work without making any attempt to change clothing. Keisich v. O., 188M173, 246NW672. See Dun. Dig. 2532.

Exemplary damages may be awarded in assault and battery action. Farrell v. K., 189M165, 248NW720. See Dun. Dig. 532(64).

Court did not err in refusing to charge that no damages should be allowed for traumatic neurosis. Orth v. W., 190M193, 251NW127. See Dun. Dig. 2528.

Mental suffering from libel is an element of general damage. Thorson v. A., 190M200, 251NW177. See Dun. Dig. 2563.

Mental suffering is presumed to have naturally resulted from publication of a libelous article. Id. See Dun. Dig. 2563.

If plaintiff in libel believed that members of his family suffered because of publication and he himself suffered as a consequence of such belief, it could make no difference that his belief was erroneous or that it was true. Id. See Dun. Dig. 2563.

Where plaintiff at time of accident was employed part of days of each week, court was justified in submitting loss of earning as an element of damages. Johnston v. S., 190M269, 251NW525. See Dun. Dig. 2576.

While difficulty in assessing damages is not ground for denying plaintiff relief, yet where there is no evidence of value, jury will not be allowed to return verdict based merely on conjecture. Dreelan v. K., 190M330, 254NW433. See Dun. Dig. 2534, 2591.

Recovery cannot be had as for permanent injuries unless there is proof to a reasonable certainty that injuries are permanent. Romann v. B., 190M419, 252NW 80. See Dun. Dig. 2530, 2591(93).

Increased workmen's compensation insurance premiums which plaintiff had to pay in consequence of an employee's death caused by a negligent act of defendant, a subcontractor, are too remote and indirect results of such wrongful act to be recoverable. Northern States Contracting Co. v. O., 191M88, 253NW371. See Dun. Dig. 7003, 10408.

In determining damages for future pain and permanent disability, evidence should disclose a reasonable probability that such will result. Howard v. V., 191M245, 253 NW766. See Dun. Dig. 2530, 2591.

General rule of damages to property is diminution in value resulting from injury, but when cost of restoring property to its former condition is less than difference in value, such cost is proper measure. Waldron v. P., 191M302, 253NW894. See Dun. Dig. 2576a.

It is loss of plaintiff's own earnings resulting from personal injuries, or value of time lost, that should measure special damages, and not earnings of others on job in which injuries occurred. Gilbert v. M., 257NW73, 192M495. See Dun. Dig. 2576.

One injured in assault and battery was not obliged to submit to an operation in order to mitigate his damages. Butler v. W., 193M150, 258NW165. See Dun. Dig. 2532.

Punitive damages may be awarded for an unprovoked malicious assault. Id. See Dun. Dig. 532, 2558(76).

Verdict for $2,160 held not excessive for injury to nose in an assault and battery. Id. See Dun. Dig. 2570.

In measuring loss of earning power of one engaged in business for himself, no evidence is admissible concerning profits from capital invested in that business or from labor of others employed therein, but nature and extent of business in question may be considered, and services of plaintiff therein, in order to ascertain value of such lost services, for value of such personal services are properly considered. Fredhom v. S., 193M569, 259NW 80. See Dun. Dig. 2576.

Cost of manufacture or production of property is generally held admissible as tending in some degree to establish value. Fryberger v. A., 194M443, 260NW625. See Dun. Dig. 2576a.

Measure of damages for wrongful detention of personal property is value of its use while so detained where it does not appear that property is of such nature that it necessarily or in fact perishes, or wears out, or becomes impaired in value in using. Bergquist v. S., 194 M480, 260NW871. See Dun. Dig. 2570, 8420.

One deprived of use of washing machine over a period of nearly three years by reason of defendant's wrongful taking and detention thereof, was entitled to verdict for $116.13. Id. See Dun. Dig. 2570, 8420.

Test of extent of liability for damages is in causation and not in probability or foreseeability. Goin v. P., 196 M74, 264NW219. See Dun. Dig. 2550, 2552.

Expenses of medical treatment are proper items to be considered in assessing compensatory damages for assault. Id. See Dun. Dig. 2572.

Argument rejected that, because earnings of an able-bodied man have been much reduced by adverse general economic conditions, there must be a corresponding reduction of recovery by his dependents for his wrongful death. Hoppe v. P., 196M538, 265NW338. See Dun. Dig. 2570.

In determining damages for death of a parent, consideration should be given to elements of loss which arise from deprivation of counsel, guidance and aid given to family. Id.

Fact that plaintiff's son, driver of his automobile, paid for repair of plaintiff's car, for payment of which he was not legally liable, did not inure to benefit of defendants. Lavelle v. A., 197M169, 266NW445. See Dun. Dig. 8373.

Exemplary damages of $600 to dentist unlawfully evicted from his office for two weeks is a matter emphatically reserved to jury, and unless so excessive as to indicate that jurors were actuated by passion or prejudice, it will not be disturbed. Sweeney v. M., 199M21, 270NW 906. See Dun. Dig. 2548.

Where a practicing dentist with a good standing in his community was unlawfully evicted from his office for a period of almost two weeks, a verdict of $300 for actual damages on a showing of a specific loss of at least $245 in addition to that which might have been received from patients that called at his office is not excessive, nor can it be said to have been based on pure speculation or guess. Id. See Dun. Dig. 2597.

Plaintiff's net earnings from a farm, owned and equipped by his father but operated by plaintiff in return for a half share in earnings, represented compensation to plaintiff for his personal services and not a return on invested capital, and evidence of such earnings is admissible in an action for personal injuries, in order that jury might consider them in determining plaintiff's loss of earning capacity. Piche v. H., 199M526, 272NW 591. See Dun. Dig. 2570.

Verdict based on testimony of two medical witnesses, contradicted by five medical witnesses, to effect that there was a fracture of lamina of second cervical vertebra and a crushing fracture of odontoid process, could not be held unsupported by evidence, though injured person walked around and went about his affairs for a day before calling upon a doctor. Wyatt v. W., 273NW600. See Dun. Dig. 3324(31).

Recovery of damages by foster-parent without alleging or proving loss of services of abducted child. 15MinnLawRev125.

Necessity of actual damages to support award of exemplary damages. 16MinnLawRev438.

Measure of damages for injury to property which has peculiar value to owner. 16MinnLawRev708.

Rule precluding recovery for loss avoidable by reasonable efforts or expenditure by person damaged is not applicable either to threatened, or to willful torts. 16 MinnLawRev859.

Recovery for physical injury consequent upon mental anguish where no impact. 16MinnLawRev860.

Nervous shock due to fear for safety of another. 19 MinnLawRev806.

20½. ——Contribution.

Where an action for personal injuries against two alleged tort-feasors resulted in a verdict for plaintiff against one of them and in favor of other and against plaintiff, judgment entered on that verdict held not res adjudicata in a subsequent action for contribution by unsuccessful against successful defendant in first action. Hardware Mut. Casualty Co. v. A., 191M158, 253NW374. See Dun. Dig. 1920, 5176.

Right to contribution in case of joint tort-debtor depends on fact of common indebtedness. Id. See Dun. Dig. 1924.

Right of contribution between insurers of joint tort feasors. 20MinnLawRev236.

Loss distribution by comparative negligence. 21Minn LawRev1.

21. ——Fraud.

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

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

Evidence held to support finding that bank induced plaintiff by fraudulent representations to purchase bond to his damage. Ebacher v. F., 188M268, 246NW903. See Dun. Dig. 3839.

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

Complaint based on act of surgeon in representing that a sterilization operation upon plaintiff would prevent conception by his wife did not state a cause of action where it did not allege that the representation was fraudulent or that it was deceitfully made. Christensen v. T., 192M123, 255NW620. See Dun. Dig. 7489.

Liability in tort for innocent misrepresentation. 21 MinnLawRev434.

22. ——Libel and slander.

See, also, §9397.

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

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

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

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

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

Newspaper article erroneously stating that one was arrested for violation of liquor laws was libelous per se. Thorson v. A., 190M200, 251NW177. See Dun. Dig. 5515.

In libel action by one erroneously reported to have been arrested on liquor charge that members of plaintiff's family suffered because of publication was wholly immaterial. Id. See Dun. Dig. 5550.

Statements published in a newspaper which are not defamatory on their face are not libelous per se. Echternacht v. K., 194M92, 259NW684. See Dun. Dig. 5501 (37).

An allegation that plaintiff as a farmer suffered loss of trade with merchants and neighbors to his damage in a specified sum is insufficient to permit proof of special damages, where gist of action is not for loss of trade but for injury to reputation. Id. See Dun. Dig. 5550.

Construction placed by innuendo on newspaper publications held strained and not warranted by language used. Id. See Dun. Dig. 5539.

Where newspaper articles are not libelous per se plaintiff must allege extrinsic cimcumstances which show them to be libelous in fact. Id. See Dun. Dig. 5539.

In order to prevent a surprise on a defendant in a libel case, plaintiff is required to allege particular instances of loss which he has sustained. Id. See Dun. Dig. 5550.

Statement by mortgagee that mortgagor had been unable to pay interest and taxes and had lost land on foreclosure did not constitute slander of title, although at the time year of redemption had not run and land was not lost. Hayward Farms Co. v. U., 194M473, 260NW868. See Dun. Dig. 5538.

Slander of title is not an ordinary action for defamation, but is in nature a trespass on the case for recovery of special damages, and special damages should be alleged. Id. See Dun. Dig. 5550.

Excessive publication in defamation. 16MinnLawRev 160.

Information supplied by a commercial agency as a privileged communication. 16MinnLawRev715.

Report of judicial proceeding as qualifiedly privileged. 16MinnLawRev867.

Insanity as defense to civil liability for libel and slander. 18MinnLawRev356.

Defamation by radio. 19MinnLawRev611.

Liability of master for defamation published by a servant. 20MinnLawRev805.

23. Hospitals.

Where a hospital maid was received as a patient and discharged as such, but permitted to remain temporarily in the room she formerly occupied as a maid, and during which time she fell from the window while walking in her sleep, held she was a mere licensee, the hospital was required to exercise only reasonable care, and the evidence on the question of negligence was insufficient for the jury. St. Mary's Hospital v. S. (USCCA8), 71F (2d)739.

In action for injuries to nervous patient who jumped out window on third floor of general hospital, facts held not such as to charge hospital with negligence in not anticipating that plaintiff was contemplating escape or self-destruction. Mesedahl v. S., 194M198, 259NW819. See Dun. Dig. 4250a.

Nurses and internes at a general hospital are charged with duty of carrying out instructions of attending physician only, except in cases of emergency. Id. See Dun. Dig. 4250a.

Evidence held sufficient to sustain verdict for plaintiff in action against hospital for negligence in bringing new mother wrong baby to feed, as a result of which her own baby subsequently contracted a disease from which other baby was suffering. Kirchoff v. S., 194M436, 260NW509. See Dun. Dig. 4250a(44).

Evidence held to justify finding that child contracted tuberculosis from nurse and that hospital was guilty of negligence in allowing nurse to attend child. Taaje v. S., 199M113, 271NW109. See Dun. Dig. 4250a.

PARTIES

9165. Real party in interest to sue—When one may sue or defend for all.

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

½. In general.

Where the national guard had been used to close plaintiff's manufacturing plant to avoid mob violence, in an action to restrain such interference, governor, adjutant general, and mayor of city were necessary and proper parties. Strutwear Knitting Co. v. O. (USDCMinn), 13F Supp384.

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

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

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

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

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

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

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

In action to temporarily or permanently enjoin a sheriff from selling on execution certain real estate of which plaintiff claims to be the owner, execution creditor is a necessary party defendant. Cheney v. B., 193M586, 259 NW59. See Dun. Dig. 3552.

In action in behalf of a minor, title should be in his name as plaintiff by his guardian, not in name of guardian as plaintiff. Gimmestad v. R., 194M531, 261NW194. See Dun. Dig. 4455, 7509.

1. Held real party in interest.

Parties in quo warranto, see §§132, 156.

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

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

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

Lessee held real party in interest as against one in possession of property holding over after cancellation of a contract for deed. Gruenberg v. S., 188M568, 248 NW724. See Dun. Dig. 7315.

Where surety on elevator owner's bond purchased, for owner, assignments of outstanding storage tickets which covered converted grain bought by such owner, and he agreed to pay surety proceeds of his recovery upon such assignments, such owner might bring suit as real party in interest. Christensen v. S., 190M299, 251NW686. See Dun. Dig. 7315.

Wife as beneficiary in life policy was proper party plaintiff in action on policy though insured had failed to schedule policy as an asset or claim it as exempt in bankruptcy. Kassmir v. P., 191M340, 254NW446. See Dun. Dig. 4734.

Where a contract was made with employers by representatives of certain labor unions on behalf of employees in stated services, one of such employees may sue on contract as a party thereto. Mueller v. C., 194M83, 259 NW798. See Dun. Dig. 1896.

Assignee of a claim must stand in shoes of assignor as affecting right of set-off. Campbell v. S., 194M502, 261NW1. See Dun. Dig. 572(47).

Where plaintiff's husband had lived apart from her for five years, during which time she had received no support from him, and she alone requested service of nurse, doctor, and hospital for which she alleged special damages, she is liable therefor and may recover from wrongdoer who necessitated her incurring liability. Paulos v. K., 195M603, 263NW913. See Dun. Dig. 2572, 7315.

Owner of damaged automobile was real party in interest though action was instituted in his name without any direct authority by his son, father ratifying act of the son. Lavelle v. A., 197M169, 266NW445. See Dun. Dig. 7315.

An indorsee "for collection" of a negotiable instrument is real party in interest who may bring action. Farmers Nat. Bank v. B., 198M195, 269NW409. See Dun. Dig. 7315.

Lessees obligated by leases to pay all taxes may petition and claim invalidity of tax, and it is not necessary

to make landowners parties. Internationaal Harvester Co. v. S., 274NW217. See Dun. Dig. 7315.

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

2. Held not real party in interest.

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

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

In action by minority stockholder against officers in control of affairs of a corporation, to recover funds for use and benefit of corporation and its stockholders, corporation, joined as a defendant, is only a nominal party, and cannot, by answer, interpose such affirmative defenses as the officers and directors may have or claim. Meyers v. S., 190M157, 251NW20.

Neither wife nor minor child may recover damages for personal injuries to husband and father, remedy being solely in husband and father. Eschenbach v. B., 195M 378, 263NW154. See Dun. Dig. 4288b, 7305b.

4. Assignments.

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

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

Where suit on a mechanic's lien claim is brought in name of two partners and it develops that one has assigned all of his interest in claim to his copartner, court may properly decree foreclosure in behalf of assignee. Blatterman v. C., 188M95, 246NW532. See Dun. Dig. 571, 7407.

In action by partially paid insured to recover damages to automobile, it was error to reject offer of defendant to prove that plaintiff had transferred cause of action to insurer, thereby ceasing to be real party in interest. Flor v. B., 189M131, 248NW743. See Dun. Dig. 7315.

Where after commencement of action against bailee, plaintiff's claim was assigned to an insurer who had made good loss, defendant's remedy was by motion for substitution of plaintiff's assignee and not contention on trial that plaintiff could not recover because not real party in interest. Peet v. R., 191M151, 253NW546. See Dun. Dig. 13.

Where assignment of rents by mortgagor to secure payment of past due interest was executed in form to a company acting as agent for mortgagee, latter was real party in interest who could sue thereon. Prudential Ins. Co. v. A., 196M154, 264NW576. See Dun. Dig. 7315.

5. One or more suing for many.

Attorneys at law have such a property right in privilege of practicing law that they may maintain action to restrain layman from practice. Fitchette v. T., 191M 582, 254NW910. See Dun. Dig. 4499a.

6. Action by taxpayer.

Taxpayer may sue to restrain disbursement of money by city to one unlawfully employed. 174M410, 219NW 760.

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, 224 NW261.

A demand by taxpayers upon state officials to bring actions to annul and cancel invalid highway contracts held unnecessary. Regan v. B., 188M92, 247NW12. See Dun. Dig. 4480.

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

A state taxpayer may question, by a bill for an injunction, a proposed new issue of state bonds. Rockne v. O., 191M310, 254NW5. See Dun. Dig. 4499a.

7. Bonds.

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

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

A bondholder is real party in interest, and may maintain action to foreclose mortgage given to secure bonds issued by mortgagor defendant. Townsend v. M., 194M 423, 260NW525. See Dun. Dig. 7315.

8. Waiver of objections.

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

Corporate beneficiary under a will not making motion to dismiss action of certain heirs for specific performance of an agreement to distribute part of estate to heirs of deceased, waived defect in parties from omission of certain nieces and nephews of decedent, it appearing that enforcement of agreement was for benefit of all heirs, who otherwise would have received nothing, and there being no foundation for claim that corporation might be compelled to defend other litigation, and there having been no motion to have other parties brought in as additional parties. Schaefer v. T., 199M610, 273NW190. See Dun. Dig. 7323, 7328, 7329.

9166. Action by assignee—Set-off saved.

6. Negotiable paper.

Where collection bank becomes insolvent on day it sends draft for proceeds to bank in which it has deposit, latter bank is entitled to set-off deposit against collection. Storing v. F. (USCCA8), 28F(2d)587.

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

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

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

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

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

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

A judgment is conclusive, as between parties, of facts upon which it is based and all legal consequences resulting from its rendition, and it may be enforced by parties thereto, though judgment may be also for benefit of a third party. Ingelson v. O., 199M422, 272NW270. See Dun. Dig. 1895, 5154, 5155, 5161, 5162.

9168. Married women may sue or be sued.

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

9172. Parent or guardian may sue for injury to child or ward—Bond—Settlement.—A father, or, in case of his death or desertion of his family, the mother, may maintain an action for the injury of a minor child, and a general guardian may maintain an action for the injury of his ward. Provided, that if no such action is brought by the father or mother, an action for such injury may be maintained by a guardian ad litem, either before or after the death of such parent. Before any such parent shall receive any money or other property in settlement or compromise of any action so brought, or in satisfaction of any judgment obtained therein, such parent shall file a bond as security therefor, in such form and with such sureties as the court shall prescribe and approve; Provided, however, that upon petition of such parent, the court may, in its discretion, order that in lieu of such bond, any money so received shall be deposited as a savings account in a banking institution or trust company, together, with a copy of the court's order and the deposit book filed with the Clerk of Court, subject to the order of the court, and no settlement or compromise of any such action shall be valid unless the same shall be approved by a judge of the court in which such action is pending. (R. L. '05, §4060; '07, c. 58; G. S. '13, §7681; Mar. 30, 1929, c. 113.)

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

In action in behalf of a minor, title should be in his name as plaintiff by his guardian, not in name of guardian as plaintiff. Gimmestad v. R., 194M531, 261NW194. See Dun. Dig. 4455, 7509.

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, 214NW 778.

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

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

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

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

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

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

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

When there is an allegation of a joint contract with two or more defendants and proof is of a several contract with one, there may be a recovery against one liable; and in such case there is not a failure of proof. Schmidt v. A., 190M585, 252NW671. See Dun. Dig. 5043, 7674.

Section applies to all contracts and agreements and not merely to negotiable instruments. Id.

An absolute guarantor may be joined as defendant in the same action with principal obligor. Townsend v. M., 194M423, 260NW525. See Dun. Dig. 4093a(60).

Trial court did not err in consolidating action for cancellation of contract brought by appelant and actions to enjoin cancellation proceedings and for specific performance brought by respondents, and in granting specific performance. Schultz v. U., 199M131, 271NW249. See Dun. Dig. 8788.

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.

Circumstances under which a surety may compel creditor to resort to security. 15MinnLawRev95.

9176. Action not to abate by death, etc.—Torts.

Judgment against employer for lump compensation to injured employee survived employee's death. Employers' Mut. L. Ins. Co. v. E., 192M398, 256NW663. See Dun. Dig. 14, 564.

Dependent widow of employee of a partnership could recover compensation from partnership and insurer, notwithstanding that she is a member of the partnership. Keegan v. K., 194M261, 260NW318. See Dun. Dig. 7406.

1½. Transfer of interest in subject matter.

Where after commencement of action against bailee, plaintiff's claim was assigned to an insurer who had made good loss, defendant's remedy was by motion for substitution of plaintiff's assignee and not contention on trial that plaintiff could not recover because not real party in interest. Peet v. R., 191M151, 253NW546. See Dun. Dig. 13.

9178. Actions against receivers, etc.

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

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

9179. How tried, and judgment, how satisfied.

177M584, 225NW919.

9180. Actions against partnership, etc.

A labor union, an unincorporated voluntary association, held engaged in transacting business in Minnesota, and service of summons and complaint upon member resident in state, held to confer jurisdiction. Bowers v. G., 187M626, 246NW362. See Dun. Dig. 618a, 9674.

Each member of a voluntary unincorporated association organized for business and profit is individually liable for debts contracted. Ford Motor Co. v. S., 188M578, 248NW55. See Dun. Dig. 616.

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

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

A policy of compensation insurance to "A. F. Peavey, doing business as the Northwestern Sand Blast Company," issued after Peavey had taken a partner into business with him, Northwestern Sand Blast Company being maintained as partnership name, intention was to protect all employees working under that firm name. Moreault v. N., 199M96, 271NW246. See Dun. Dig. 10391.

If a person wishes to take advantage of statute and sue a partnership in its firm name, it should somewhere appear in complaint that defendant named is a group of associates doing business under that name. State v. District Court of St. Louis County, 273NW701. See Dun. Dig. 7320, 7407a.

Complaint held to allege action against members of firm as individuals and not against firm in its common business name under statute. Id.

9181. Bringing in additional parties.

Quo warranto proceedings, see §§132, 156.

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

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

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

Court has inherent power to bring into court additional party whenever it is necessary for complete administration of justice. Johnson v. H., 187M186, 245NW 27. See Dun. Dig. 7325.

The district court has the inherent power in an equitable action, even upon its own motion, to bring in additional parties, where it is necessary for complete administration of justice. Sheehan v. H., 187M582, 246N W353. See Dun. Dig. 7328.

Where county petitioned court to interplead various claimants of a portion of damages due by county in establishment of a judicial road, court had jurisdiction to order entry of judgment requiring county to comply with prior order of confirmation of original award of damages, court having jurisdiction of the parties and of the subject matter at time issues were made and trial had. Blue Earth County v. W., 196M501, 265NW329. See Dun. Dig. 7328.

In suit upon a life insurance policy, trial court's refusal to exercise its inherent power to order in as additional defendants four creditors of insured's estate, who claimed that premiums upon policy were paid in fraud of them, was an abuse of judicial discretion. Minnesota Nat. Bank v. E., 197M340, 267NW202. See Dun. Dig. 7324.

Corporate beneficiary under a will not making motion to dismiss action by certain heirs for specific performance of an agreement to distribute part of estate to heirs of deceased, waived defect in parties from omission of certain nieces and nephews of decedent, it appearing that enforcement of agreement was for benefit of all heirs, who otherwise would have received nothing, and there being no foundation for claim that corporation might be compelled to defend other litigation, and there having been no motion to have other parties brought in as additional parties. Schaefer v. T., 199M610, 273NW190. See Dun. Dig. 7323, 7328, 7329.

On appeal from order bringing in an additional party on application of counterclaiming defendant, supreme court will not consider arguments that order would deprive party brought in of right to a change of venue to its place of residence, since matter of venue is in first instance for consideration for trial court and can be properly presented by motion in that court. Lambertson v. W., 273NW634. See Dun. Dig. 396.

Independently of statute, district court has inherent power to bring in additional party whenever necessary for complete administration of justice. Rule applied so as to permit counterclaiming defendant to bring in employer of plaintiff. Id. See Dun. Dig. 7328, 7329.

Rule that a cause of action which cannot be determined without bringing in a new party may not, without more, be set up as a counterclaim, is one for testing validity of a counterclaim as such, and is not determinative of right of a counterclaiming defendant to bring in additional parties where they are necessary for full determination of controversy. Id. See Dun. Dig. 7602.

Bringing in third parties by defendant. 19MinnLawRev 163.

Interpleader—requirement of privity. 19MinnLawRev 812.

9182. Contents of order—How served, etc.

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

LIMITATION OF ACTIONS

9185. General rule—Exceptions.

1. In general.

Schmahl v. S., 274NW168; note under §9191.

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, 232 NW708. See Dun. Dig. 5622, 7490d.

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

Statute of limitations is a statute of repose and courts have no power to extend or modify period of limitation prescribed. Roe v. W., 191M251, 254NW274. See Dun. Dig. 5590, 5591.

A limitation law cannot compel a resort to legal proceedings by one who is already in complete enjoyment of all he claims, nor can such a law compel one party to forfeit his rights to another for failure to bring suit against such other party within the time specified to test validity of claim which latter asserts but takes improper steps to enforce. Hammon v. H., 192M259, 256NW94. See Dun. Dig. 5588.

Acquisition of title to stolen property by adverse possession for statutory period. 15MinnLawRev714.

Mistake and statutes of limitation. 20 MinnLawRev 481.

2. When action accrues.

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

The claim that an action is prematurely brought, because the recovery claimed is not due, is in the nature of a claim in abatement and must be raised in an appropriate manner in the trial court. Geib v. H., 185M 295, 240NW907. See Dun. Dig. 2746b.

Evidence held not to show that the maturity of a debt was deferred by agreement until demand, or any other future event, so as to toll the statute of limitations. Noser v. A., 189M45, 248NW292. See Dun. Dig. 5602.

Where one cares for child of another, quasi contractual obligation of father to pay therefor is a continuing one and limitations does not commence to run until termination of such support, as where child reaches its majority. Knutson v. H., 191M420, 254NW464. See Dun. Dig. 5650.

A promise "I will guaranty this bonds any time you dont want them Ill take them over" was a continuing one and limitations did not begin to run until demand for, and refusal of, performance. Wigdale v. A., 193M384, 258NW726. See Dun. Dig. 4079, 5602.

Statute of limitations against constitutional double liability of stockholders in a state bank begins to run when bank closes its doors and ceases to function as a bank, either because of being taken over by commissioner of banks, or because of absorption by another bank with approval of commissioner. Liquidation of Peoples State Bank, 197M479, 267NW482. See Dun. Dig. 802.

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

Application of statute of limitations between trustee and cestui que trust. 16MinnLawRev602.

4. Laches.

Laches cannot be imputed to a party to a contract until he has knowledge of facts indicating that fraud existed. Winget v. R. (CCA8), 69F(2d)326. See Dun. Dig. 1810.

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

Delay in seeking equitable relief, not for such time as to come within statute of limitations, and for which defendant is in part responsible, is not a bar to action. Johnson v. I., 189M293, 249NW177. See Dun. Dig. 5351.

Laches may be asserted as a defense where one willfully sleeps on his rights to another's detriment, but is excused when such person is in ignorance of his rights. Craig v. B., 191M42, 254NW440. See Dun. Dig. 5351.

9186. Bar applies to state, etc.

180M496, 231NW210.

Schmahl v. S., 274NW168; note under §9191.

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

The finding that title to no part of the street in controversy was acquired through adverse possession is contrary to the evidence. Doyle v. B., 182M556, 235N W18. See Dun. Dig. 111.

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

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

School districts may acquire title to school sites by adverse possession and also by condemnation proceedings. Op. Atty. Gen. (622i-14), Apr. 14, 1934.

Where in 1889 an order was made in regular proceedings establishing a county road on a section line, and road as made and traveled deviated from established part of way, because a grove of trees planted by an abutting owner was on section line, the passage of time and use of deviation did not prevent county from straightening the highway, but abutting owner should be given 10 days' notice of intent to remove trees. Op. Atty. Gen. (229i), Oct. 30, 1935.

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., 182M118, 233NW836. See Dun. Dig. 2853.

2. Essentials of adverse possession.

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

Up to the boundary line as claimed in his complaint, the evidence supports the verdict that plaintiff had acquired title by adverse possession. Patnode v. M., 182M 348, 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, 214NW271.

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

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

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

4. Public land.

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

6. Permissive possession.

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

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

Evidence held sufficient to sustain finding that user of a way for travel was permissive and a mere license revocable at will of landowner. Johnson v. O., 189M183, 248NW700. See Dun. Dig. 2853(77).

17. Possession must be exclusive.

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

Possession of tenants paying rental to third person as well as lessor could not be said to be exclusive possession by lessor. Lamprey v. A., 197M112, 266NW434. See Dun. Dig. 118.

22. Easements.
Evidence held to show right of way acquired by prescription. 171M358, 214NW49.
A user of a way for travel, permissive in its inception, does not ripen into an easement until and unless there is a subsequent distinct and positive assertion of a hostile right by claimant and continued use after such hostile assertion for statutory time to acquire an easement by prescription or adverse possession. Johnson v. O., 189M183, 248NW700. See Dun. Dig. 2853(77).
Fact that claimant ceases to use a way for travel in which he is not shown to have had any easement or right, and is then permitted to use a different route, does not amount to surrender of one easement or right in consideration of granting of an easement in new route. Id. See Dun. Dig. 2862b.
Non-use of road to which plaintiff had prescriptive right for several years on request of owner of servient estate that another road over premises be used was not a legal abandonment of prescriptive right to use old road. Schmidt v. K., 196M178, 265NW347. See Dun. Dig. 121.
In considering proof of a way by prescription, use of a way over vacant and unoccupied land is presumptively permissive, but presumption is reverse where land has continuously been under cultivation. Id.
22½. Pleading.
Title by adverse possession may be proved under a general allegation of ownership. 171M488, 214NW283.
Judgment in action to determine boundaries under §9592 is res adjudicata in a subsequent action in ejectment. 171M488, 214NW283.
25. Burden of proof.
Where claimant of easement shows open and continuous possession for the requisite period the owner of the land has the burden of proving that the possession was permissive merely. 179M228, 228NW755.
27. Facts held sufficient to constitute adverse possession.
179M228, 228NW755.
Evidence held to show open hostile and adverse possession for more than fifteen years of certain lot up to certain line east of house. 173M145, 216NW782.
Finding that defendants' exclusive possession for more than 15 years of part of plaintiff's lot was not with intention to claim adversely and did not constitute adverse possession is not sustained by evidence. Gehan v. M., 189M250, 248NW820. See Dun. Dig. 130.
28. Facts held insufficient.
Evidence did not require finding that defendant acquired title to portion of plaintiff's adjoining lot by adverse possession through occupancy beyond true boundaries. 174M171, 218NW549.

9189. When time begins to run.

Mortgage held to show, upon its face, time of maturity, and that limitations ran from that time. 171M 252, 213NW913.
Testimony that a debtor, since deceased, admitted, in 1927, that "she had to pay" a named creditor some money that spring, does not so tend to show that the maturity of the debt, accrued in 1917, was postponed to 1927, as to avoid a plea of the statute of limitations. Noser's Estate, 183M477, 237NW22. See Dun. Dig. 5602 (44).

9190. Judgments, ten years.

The allowance of a claim by a referee in bankruptcy is not a "judgment or a decree of a court of the United States." 173M263, 217NW126.
The approval of a settlement in a workmen's compensation matter under Act of 1913, c. 467, is not a judgment as regards limitations. 176M554, 223NW926.
Section applies to domestic as well as foreign judgments. Blue Earth County v. W., 196M501, 265NW329. See Dun. Dig. 5150.
Order of court confirming award of damages of commissioners in establishment of a judicial road is a judgment and limitation does not run against right of land owner to recover damages until 10 years after entry. Id.
An action on a judgment, if commenced within 10 years, may proceed to trial and judgment thereafter. Id. See Dun. Dig. 5150, 5604.
Statute runs against personal property tax judgments. Op. Atty. Gen., Feb. 5, 1929.

9191. Various cases, six years.

* * * *

9. For damages caused by a dam, used for commercial purposes. (Added Apr. 1, 1935, c. 80, §2.)

½. In general.
Minority stockholder's claims—arbitration—laches. 21F(2d)4.
Where purchaser under a contract for a lease attacked Torrens registration decree of vendor after expiration of limitation period, and sought to recover a certain payment alleged to have been obtained by vendor in violation of the agreement, defense of limitations applied to the attempted recovery of the payment and was ground for dismissal as to that item, though case was kept on the equity side of the federal court. Nitkey v. S., (USCCA8), 87F(2d)916. Cert. den., 301US697, 57SCR 925.
Six-year statute held a bar to action by creditors against directors to recover converted funds. Williams v. D., 182M237, 234NW11. See Dun. Dig. 5656(64).
A payment of interest voluntarily made by a debtor to one who had no authority to receive it, but by whom it is immediately turned over to the creditor as the "interest money" in question, held sufficient to toll the running of the statute of limitations against the principal obligation. Kehrer v. W., 182M474, 234NW690. See Dun. Dig. 5632.
The correction of an error in bookkeeping which occurred years before, which correction was made after the statute had run, was not a part payment which tolled the statute. In re Walker's Estate, 184M164, 238NW58. See Dun. Dig. 5646.
The signing of a waiver of notice of first meeting of stockholders upon the forming of a new corporation held not to constitute a written acknowledgment or recognition of a debt which tolled the statute. In re Walker's Estate, 184M164, 238NW58. See Dun. Dig. 5624.
Evidence held not to show that it was contemplated that payment would not be made until an indefinite time in the future so as to affect running of statute. In re Walker's Estate, 184M164, 238NW58. See Dun. Dig. 5602.
Executors could not waive the bar of the statutes of limitations as to a debt of decedent as regards computation of succession tax. In re Walker's Estate, 184 M164, 238NW58. See Dun. Dig. 35931(72).
The six-year statute of limitations applies to an individual indebtedness by one partner to the other. Aab v. S., 184M225, 238NW480. See Dun. Dig. 5648.
Time limited in proviso for commencement of action to enforce stockholder's liability under §8028 is adequate. Sweet v. R., 189M489, 250NW46. See Dun. Dig. 5656.
Time for commencement of action to enforce stockholder's liability is not governed by statutes of limitation in force when order for sequestration was made, but by applicable statute at time action is brought. Id.
In view of Firehammer v. Interstate Securities Co., 170Minn475, 212NW911, proviso added to §8028 by Laws 1931, c. 205, §2, that actions to enforce assessments against stockholders must be brought within two years after order for payment is made, does not apply to an action brought to enforce statutory liability of a stockholder in a foreign corporation. Johnson v. J., 194M617, 261NW450. See Dun. Dig. 2150.
Statute of limitations begins to run against claim of officer for salary from time it is due and not from the end of his term of office. Op. Atty. Gen., Sept. 13, 1932.
Statute of limitations begins to run against claim of president of village council for salary due him as each monthly or periodic salary becomes due. Op. Atty. Gen., Sept. 23, 1932.
Statute would apply to an action by village treasurer against village for compensation. Op. Atty. Gen., Jan. 25, 1933.
1. 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, 223 NW612.
Paragraph one applies to an application and proceeding to obtain judgment for compensation payments in default in a workmen's compensation matter. 176M554, 223NW926.
The approval of a settlement in a workmen's compensation matter under the Act of 1913, c. 467, is not a judgment, as regards limitations. 176M554, 223NW926.
Cause of action on note payable to third person did not accrue to beneficial owner until maturity of last renewal. 180M1, 230NW260.
Limitations did not begin to run against one entitled to certain excess on sale of land until such money was paid. Ellingson v. S., 182M510, 234NW867. See Dun. Dig. 5606.
Action on demand promissory note is barred within 6 years from date thereof. Fljozdal v. J., 188M612, 248 NW215. See Dun. Dig. 5602.
Practical construction placed by city and gas company upon franchise for period of more than 20 years was admissible, although six-year statute was applicable to cause of action. City of South St. Paul v. N., 189M26, 248 NW288. See Dun. Dig. 1820.
Evidence held to sustain finding that payments made on note before it was barred by limitations were made by a comaker at defendant's request and with his consent. Erickson v. H., 191M177, 253NW361. See Dun. Dig. 5643.
Statute of limitations upon a cause of action upon an insurance policy in a disappearance case commences to run from time when loss becomes due and payable, and not from time when loss occurs. Sherman v. M., 191M 607, 255NW113. See Dun. Dig. 5605.
Limitations did not begin to run against action for care and feeding of lambs until lambs were actually delivered to defendant, though delivery had been delayed beyond time for delivery under original contract. Stebbins v. F., 193M446, 258NW824. See Dun. Dig. 5602.
Where action was brought less than six years from time when payment of cost of electric line was to be made, action was not barred by limitations. Bjornstad v. N., 195M439, 263NW289. See Dun. Dig. 5602.

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

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

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

Where court order establishing judicial ditch imposed assessment upon counties benefited, and assessments were erroneously imposed on township later, and were paid, claim of township to reimbursement is one that must be presented to county board for allowance, and general rule is that statute of limitations does not begin to run against such a claim until it is presented and rejected by board. Op. Atty. Gen. (151a), Apr. 10, 1937.

2. Subdivision 2.

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

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

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

Where, in case of death of employee in course of his employment, there are no dependents and employer is obliged to make payment to special compensation fund, his liability is one created by statute, and proceeding to recover same must be commenced within six years from accrual of cause of action. Schmahl v. S., 274NW168. See Dun. Dig. 5656.

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

3. Subdivision 3.

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

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

4. Subdivision 4.

The statute of limitation does not begin to run against owner of stolen property while property is kept concealed. Commercial Union Ins. Co. v. 183M1, 235NW 634. See Dun. Dig. 5608(4).

Where executor embezzled trust funds and by final decree and fraudulent representations had himself appointed as trustee and distribution made to himself, limitations did not begin to run against liability on executor's bond until discovery of fraud by beneficiary. Shave v. U., 199M538, 272NW597. See Dun. Dig. 3580*l*.

5. Subdivision 5.

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

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

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

6. Subdivision 6.

Suit to cancel transfer of corporate stock on the ground of lack of consideration, fraud, duress, and undue influence is subject to the six year limitation. Winget v. R. (CCA8), 69F(2d)326. See Dun. Dig. 5652.

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

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

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

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

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

Where a party, since deceased, entered into an executory contract, which for more than six years he performed and benefits of which he enjoyed an action to rescind for fraud was barred by statute of limitations before his death, and bar applies equally to a suit by his heir. Rowell v. C., 196M210, 264NW692. See Dun. Dig. 5652.

8. Subdivision 8.

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

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. 178M 174, 226NW405.

Subdivision 2.

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

9193. Two years' limitations.

* * * *

3. For damages caused by a dam, other than a dam used for commercial purposes; but as against one holding under the preemption or homestead laws, such limitations shall not begin to run until a patent has been issued for the land so damaged. (As amended Apr. 1, 1935, c. 80, §1.)

* * * *

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

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

Subdivision 1.

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

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

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

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

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

In an action to recover damages from a physician for malpractice, whether cause of action was barred by the statute of limitation was for the jury. 181M590, 233NW 317. See Dun. Dig. 5655(59), 7490d.

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

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., 195M 130, 261NW867. See Dun. Dig. 5654.

When action for malpractice accrues. 15MinnLawRev 245.

Subdivision 3.

Applies to an action to recover damages for flooding caused by a dam erected by a public service corporation for the purpose of generating electric current to be distributed and sold to the public for lighting, heating and power purposes. Zamani v. O., 182M355, 234NW 457. See Dun. Dig. 5605(79), 5655.

9197. Mutual accounts.

Plaintiff's complaint negates theory of an open and running account where main purpose was one to accomplish an accounting. Meyers v. B., 196M276, 264NW 769. See Dun. Dig. 5649.

In order that account may be considered an account current, or running account, it must appear that, by agreement of parties, express or implied, all items thereof are to constitute one demand. Id.

Where transactions are separate and distinct, no open or running account can be claimed. Id. See Dun. Dig. 5950.

9199. When action deemed begun—Pendency.

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

173M580, 218NW110.
To constitute "issuance of summons" the summons must be either served or delivered to the proper officer for service. 181M349, 232NW512. See Dun. Dig. 7798.
Amended complaint for compensation for care and feeding of lambs held not to state a new and different cause of action which would be barred by limitations. Stebbins v. F., 193M146, 258NW824. See Dun. Dig. 5622, 7706a, 7709a.

9201. When cause of action accrues out of state.
180M560, 231NW239.
A cause of action arising in another state where the parties all reside, is barred in Minnesota if barred in the other state by the laws of that state. Klemme v. L., 184M97, 237NW882. See Dun. Dig. 5612(16).
This section is constitutional. Klemme v. L., 184M97, 237NW882. See Dun. Dig. 5612(22).
Note and mortgage executed in Minnesota and sent to bank in Iowa for purpose of obtaining loan to pay mortgage on land in South Dakota was an Iowa contract and Minnesota statute of limitations did not apply. Andrew v. I. (Iowa), 254NW334. See Dun. Dig. 1534.

9202. Periods of disability not counted.
Where application and accident policy are made part of complaint and application shows that plaintiff was not a minor, it is immaterial that the complaint states that she is a minor. 174M354, 219NW286.
When a party, against whom a cause of action exists in favor of another, by fraudulent concealment prevents such other from obtaining knowledge thereof, limitations will commence to run only from time cause of action is discovered or might have been discovered by exercise of diligence. Schmucking v. M., 183M37, 235NW633. See Dun. Dig. 5608(4).

9204. New promise must be in writing.
In re Walker's Estate, 184M164, 238NW58. See Dun. Dig. 5624; note under §9191.
1. Acknowledgment or promise.
The effect of a new promise as an agency for the continuance or revival of a cause of action operates only in field of contractual obligation and does not apply to a cause of action in tort. 174M264, 219NW155.
Payment after expiration of limitations, retention of written statement showing such payment and letters written by debtor, held to create new and binding agreement which was properly filed in probate court. Hartnagel v. A., 183M31, 235NW521. See Dun. Dig. 5624(46), 5647.
Though there was technical error in failing to specially plead a letter relied upon as tolling statute of limitations, there was no prejudice to defendant where case had been tried before, and letter was well-known to both parties, and there was a full hearing on the issue. Olson v. M., 195M626, 264NW129. See Dun. Dig. 424, 5661, 7675.
Letter of defendant held to furnish sufficient acknowledgment to toll statute of limitations. Id. See Dun. Dig. 5624.
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., 182M474, 234NW690. See Dun. Dig. 5632.
Where several sign a note, limitations run in favor of one signer, notwithstanding payments made by other. Kranz v. K., 188M374, 247NW243. See Dun. Dig. 5643.
Use of word "procured" in an instruction concerning payments on note by comaker and thus preventing running of limitation held not misleading. Erickson v. H., 191M177, 253NW361. See Dun. Dig. 9798.
Payment of interest by wife as administratrix of her husband's estate suspended statute of limitations against her personally as co-maker with her husband. Ross v. S., 193M407, 258NW582. See Dun. Dig. 5643.

VENUE

9206. General rule—Exception.
State v. District Court, 186M513, 243NW692; note under §9215.
State v. District Court, 192M541, 257NW277; note under §9215.
A party who goes to trial at Virginia in a case involving title to real estate without objection, cannot complain under Laws 1909, c. 126, that there was no written consent to trial of a case involving title to real estate. 171M475, 214NW469.
A garnishment proceeding is not a suit which is removable to the federal court under Mason's U. S. Code, Tit. 28, §§71, 72. 177M182, 225NW9.
Where a cause has been removed and it afterward appears that suit was not a proper one for removal and is remanded, any act of the state made in the interval is valid. 177M182, 225NW9.
It is the duty of the state court to examine the petition and bond for the removal of a case to the federal court and if they are legally sufficient to accept the same and proceed no further. 177M182, 225NW9.
Where there are more than two defendants, none of whom live in county wherein action is commenced, a change of venue can be had only by majority of defendants uniting in demand. State v. Mills, 187M287, 245NW431. See Dun. Dig. 10125(1).
Where there is a statutory proceeding in nature of interpleader, court in which cause is properly pending, and it alone, may exercise jurisdiction. State v. District Court, 192M602, 258NW7. See Dun. Dig. 4892.
Jurisdiction or venue. 20 MinnLawRev617.

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, 178M342, 227NW202.
Action to annul deed and mortgages and to have title declared to be in plaintiff is local and not transitory. State v. District Court of Anoka County, 184M504, 239 NW143. See Dun. Dig. 10105, 10108.
A suit for fraud in the sale of diseased cows, including damages and depreciation of real estate due to germs, is not wholly a local action, and defendants are entitled to a removal to the county of their residence. State v. Tifft, 184M567, 239NW252. See Dun. Dig. 10105, 10108.
Pleadings held to frame issues properly triable in county where land, which is the subject-matter of suits to determine adverse claims, is located, though adverse claim consisted of notice of attorney's lien, and suit was brought to cancel agreement for fees. State v. District Court, 197M239, 266NW756. See Dun. Dig. 10108.

9208. Official misconduct, etc., where cause arose.
Where a complaint against the sheriff of Blue Earth County and against certain residents of Hennepin County does not clearly set forth a cause of action against the sheriff in connection with the service of judicial process for the performance of an official duty, the venue of the action is not to be determined by this section. 179 M583, 229NW318.

9214. Other cases—Residence of defendant—Residence of corporations.
State v. District Court, 186M513, 243NW692; note under §9215.
State v. District Court, 192M541, 257NW277; note under §9215.
A foreign corporation must be considered as residing in the county where it has an established place of business. 176M78, 222NW524.
Must be construed so as to place foreign corporations within the equal protection clause of the Fourteenth Amendment of the federal Constitution, as held in Power Mfg. Co. v. Saunders, 274US490, 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., 178M19, 225NW915.
This section is not violative of the commerce clause or the Fourteenth Amendment to the federal Constitution in permitting foreign railroad corporation to be sued in any county by a non-resident. 178M261, 226NW934.
Action to enforce contract to will property or leave it to plaintiff at death, was transitory. State ex rel. Cairney v. D., 178M342, 227NW202.
A national bank may be sued in any county where venue would properly lie if such bank were a state institution. De Cock v. O., 188M228, 246NW885. See Dun. Dig. 820.
Garnishee disclosure must be in county wherein action is pending and district court cannot appoint a referee to take the evidence in another county. Maras v. B., 192M18, 255NW83. See Dun. Dig. 3961, 3974.
Provision that all actions not enumerated in certain preceding sections shall be tried "in a county in which one or more of the defendants reside when the action was begun," does not apply to statutory proceeding provided by §9261. State v. District Court, 192M541, 258NW 7. See Dun. Dig. 10104, 10121, 4892, 4893.
Must be construed to accord same treatment to a foreign corporation in matter of change of venue as is accorded to a domestic corporation. State v. Janesville State Bank, 195M504, 263NW460. See Dun. Dig. 10111.
When a proper affidavit and demand for change of venue are seasonably served and filed, case may not be held on county where brought for purpose of traversing facts stated in affidavit. Id. See Dun. Dig. 10122.
Jurisdiction or venue. 20MinnLawRev617.

CHANGE OF VENUE

9215. As of right—Demand.
See §9487-1 of Mason's Minnesota Statutes, vol. 2, as to payment of costs.
State v. District Court of Anoka County, 184M504, 239 NW143; note under §9207.
1. When applicable.
178M19, 225NW915; 229NW318.
Applicable to action to enforce contract to leave property, real and personal, to plaintiff at death. State ex rel. Cairney v. D., 178M342, 227NW202.

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

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

3. Several defendants.

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

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

In action against railroad and an individual, wherein individual had venue changed to county of his residence, and railroad, which did not operate in such individual defendant's county, offered to deposit in court amount claimed by plaintiff and individual, thus becoming only a nominal party, court did not abuse its discretion in denying change of place of trial to county of plaintiff's residence for convenience of witnesses. Fauler v. C., 191M637, 253NW884. See Dun. Dig. 10127.

One sued in county of his residence may join in demand for change of place of trial. State v. District Court, 192M541, 257NW277. See Dun. Dig. 10125.

Inclusion in complaint of a request for appointment of a receiver for one of three defendants does not affect right of other defendants to have venue changed. Id. See Dun. Dig. 10125.

Complaint held to allege action against members of firm as individuals and not against firm in its common business name under statute. State v. District Court of St. Louis County, 273NW701. See Dun. Dig. 7320, 7407a.

4. When demand must be made.

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

On appeal from order bringing in an additional party on application of counterclaiming defendant, supreme court will not consider arguments that order would deprive party brought in of right to a change of venue to its place of residence, since matter of venue is in first instance for consideration for trial court and can be properly presented by motion in that court. Lambertson v. W., 273NW634. See Dun. Dig. 396.

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

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

Filing of proof of proper demand by majority of defendants ipso facto removes cause to county so demanded. State v. District Court, 192M541, 257NW277. See Dun. Dig. 10124a, 10125.

Where a defendant corporation in a transitory action has within time served and filed a demand for change of venue supported by affidavit of residence in county to which change is demanded, transfer is ipso facto accomplished, and plaintiff's motion to remand can be sustained only upon a traverse of defendant's affidavit of residence, unless demand of change of venue is upon face of record a nullity. State v. District Court of Hennepin County, 199M607, 273NW88. See Dun. Dig. 10122.

7. Waiver.

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

8. Corporations.

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

9. Review.

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

9216. By order of court—Grounds.

½. In general.

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

1. Subd. 2.

On appeal from order bringing in an additional party on application of counterclaiming defendant, supreme court will not consider arguments that order would deprive party brought in of right to a change of venue to its place of residence, since matter of venue is in first instance for consideration for trial court and can be properly presented by motion in that court. Lambertson v. W., 273NW634. See Dun. Dig. 396.

4. Subdivision 4.

178M19, 225NW915.

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

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

That manager of corporation was resident out of state held not to render it abuse of discretion to deny motion for change of venue for delay in moving. De Jardins v. E., 189M356, 249NW576. See Dun. Dig. 10127.

Trial court has a wide discretion regarding changing place of trial for convenience of witnesses. Fauler v. C., 191M637, 253NW884. See Dun. Dig. 10127.

Where mandamus is used to review an order of trial court on motion to change place of trial to promote convenience of witnesses and ends of justice, only matters presented to trial court can be considered. State v. District Court of Brown County, 194M595, 261NW701. See Dun. Dig. 5764a, 10126, 10127, 10129.

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. Id. See Dun. Dig. 10127.

Court held not to have abused its discretion in denying change of venue for convenience of witnesses. State v. District Court, 195M169, 264NW128. See Dun. Dig. 10127.

9218. Interest or bias of judge.

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

Affidavit as to interest and bias held insufficient. City of Duluth v. L., 199M470, 272NW389. See Dun. Dig. 4962.

In so far as Mason's Minn. St. 1927, §§158 or 9218, assume to empower Governor to designate a judge of another district to discharge duties of a district judge, it is in contravention of §1 of article 3 and beyond authority of §5 of article 6 of constitution. State v. Day, 273 NW684. See Dun. Dig. 4961.

Statute does not disqualify a judge for other than a pecuniary interest in event of action. Id. See Dun. Dig. 4962.

9221. Affidavit of prejudice.—Any party or his attorney to a cause pending in a district court on or before 10 days prior to the first day of a general or five days prior to a special term therefor, in any district having two or more judges within one day after it is ascertained which judge is to preside at the trial or hearing thereof or at the hearing of any motion, order to show cause or argument on demurrer, may make and file with the clerk of the court in which the action is pending and serve on the opposite party an affidavit stating that, on account of prejudice or bias on the part of such judge, he has good reason to believe, and does believe that he cannot have a fair trial or hearing thereof, and thereupon such judge shall forthwith without any further act or proof secure some other judge of the same or another district to preside at the trial of such cause or hearing of motion, demurrer or order to show cause, and shall continue the cause on the calendar, until such judge can be present. In criminal actions such affidavit shall be made and filed with such clerk by the defendant or his attorney not less than two days before the expiration of the time allowed him by law to prepare for trial, and in any of such cases such presiding judge shall be incapacitated to try such cause: Provided, that in criminal cases such judge, for the purpose of securing a speedy trial may, in his discretion, change the place of trial to another county. R. L. '05, §4101; G. S. '13, §7727; '19, c. 92, §1; '27, c. 283; Apr. 18, 1931, c. 200; Apr. 17, 1937, c. 237, §1.)

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

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

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

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

Judge who has tried a case cannot be ousted, by an affidavit of prejudice, of his jurisdiction to consider a

motion for a new trial. State v. District Court, 195M 169, 263NW908. See Dun. Dig. 4962.

Record sustains trial court in refusing to act upon an affidavit of prejudice on ground that it was not seasonably presented. State v. Olson, 195M493, 263NW437. See Dun. Dig. 4962.

Judge against whom an affidavit of prejudice is filed must determine whether affidavit was filed in time, and determination is sustained that affidavit was not filed within one day after petitioner ascertained that respondent was to preside at trial of case. State v. Enersen, 197M391, 267NW218. See Dun. Dig. 4962.

This section does not appear to cover judges of municipal courts. City of Duluth v. L., 199M470, 272NW389. See Dun. Dig. 4962.

Where trial was set for June 18, and continued to June 19, affidavit of prejudice filed June 19 was too late. Id.

9222-1. Additional costs on change of venue—Taxation.

See Section 9487-1 in the main edition.

SUMMONS—APPEARANCE—NOTICES—ETC.

9225. Requisite of summons.

5. Irregularities.

Summons directed to United States marshal, rather than defendant, and containing no notice of consequence following failure to answer, held properly quashed. U. S. v. V., (USCCA8), 78F(2d)121.

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

9228. Service of summons—On natural persons.

½. In general.

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

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

Jurisdiction over persons by substituted or constructive service. 20MinnLawRev649.

1. Personal service.

Notice of application for extension of period of redemption from mortgage foreclosure is not original process, and may be served as other notices are served in a pending action or proceedings, and may be served by mail on attorney, where both attorney and mortgagee are nonresidents and attorney's residence is known. Rivkin v. N., 195M635, 263NW920. See Dun. Dig. 8731.

9231. On private corporations.

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

175M138, 220NW423.

Subdivision 3.

Attaching ship of foreign corporation in interstate waters of Duluth-Superior Harbor and serving summons upon master, defendant not maintaining any office in Minnesota, was not unreasonable burden on interstate commerce. International Milling Co. v. C., 292US511, 54 SCR797. See Dun. Dig. 7814.

Service on the Canadian Railroad Company by delivering the summons to an agent in charge of an office maintained in the state for the sole purpose of soliciting business, held not to confer jurisdiction. Maxfield v. C. (CCA8), 70F(2d)982. Cert. den., 293US610, 55SCR140; 293 US632, 55SCR212. See Dun. Dig. 2185.

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

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

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

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

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

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

Foreign corporation in purchasing hay held to be doing business in the state. Massee v. C., 184M196, 238NW 327. See Dun. Dig. 7814(84).

Service of a garnishee summons on a person, described only as an auditor and agent of garnishee, where garnishee is named as Harris, Upham & Co., without any showing whether said garnishee is a corporation or partnership, or, if a corporation, whether foreign or domestic, is defective. Maras v. B., 192M18, 255NW83. See Dun. Dig. 3971, 7814.

Fact that a soliciting agent or agency, doing a general solicitation business in this state for a number of foreign railways and steamship companies, was employed here to solicit passenger traffic on defendant's ocean steamships, and incidentally to sell, but not to issue, tickets for ocean voyages on defendant's boats, was not a sufficient doing of business by defendant in this state to subject it to the jurisdiction of the state court. Gloeser v. D., 192M376, 256NW666. See Dun. Dig. 7814.

To obtain jurisdiction over a foreign corporation operating railways or steamship lines outside of this state, but none in this state, where no property of corporation is attached or seized or present in this state, corporation must be doing business here of such a nature and character as to warrant inference that it has subjected itself to local jurisdiction and is by its duly authorized officer or agent here present. Id. See Dun. Dig. 7814.

Where plaintiff's cause of action arises out of dealings with nonresident defendants and their associates as brokers in stocks, bonds, or securities licensed under §3996-9, and such nonresident defendants have appointed commissioner of securities as their attorney irrevocable upon whom service of process may be made, pursuant to §3996-11, service of summons as therein prescribed conferred jurisdiction of persons of such nonresident defendants. Kaiser v. B., 197M28, 265NW826. See Dun. Dig. 7814.

Where service was made upon defendant, a foreign railroad corporation, by handing a copy of the summons to defendant's freight agent in a county other than the county in which the action was brought, service was null and of no effect, and no jurisdiction was acquired thereby, Section 9233 being a limitation on Section 9231-(3). Aaltio v. C., 197M461, 267NW384. See Dun. Dig. 7814.

Constitutional problems arising from service of process on foreign corporations. 19MinnLawRev375.

Service of process upon foreign corporation—doing of business within state. 19MinnLawRev556.

Subdivision 4.

Service of summons on a foreign corporation, held valid and effective by service on Commissioner of Securities; it appearing that cause of action was based upon alleged violation of Blue Sky Law in sale of unregistered stock to plaintiff in this state while defendant was therein conducting its business as a licensed stock broker and had appointed commissioner its attorney to receive service. Streissguth v. C., 198M17, 268NW638. See Dun. Dig. 7814.

9233. On railway companies.

176M415, 223NW674; note under §9231.

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

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

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

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

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

Where service was made upon defendant, a foreign railroad corporation, by handing a copy of the summons to defendant's freight agent in a county other than the county in which the action was brought, service was null and of no effect, and no jurisdiction was acquired thereby, Section 9233 being a limitation on Section 9231(3). Aaltio v. C., 197M461, 267NW384. See Dun. Dig. 7814.

9234. Service by publication—Personal service.

See §3230.

174M436, 217NW483.

½. In general.

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

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

9235. In what cases.

See §3230.

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

Subdivision 3.

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

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

Subdivision 6.

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

9236. When defendant may defend—Restitution.

Nitkey v. S., (USCCA8), 87F(2d)916. Cert. den., 301US 697, 57SCR925. Reh. den., 58SCR5.
173M580, 218NW110.

1. Matter of right.

In proceeding to set aside judgment in equity case cancelling land contract so as to permit defendant to answer and defend, defendant, not alleging any failure of plaintiff to properly apply any payments that had been made, could not raise any question on those provisions of land contract. Madsen v. P., 194M418, 260NW510. See Dun. Dig. 5005.

In proceeding to set aside judgment in equity case cancelling land contract, it was incumbent upon defendant to offer to make payment admittedly in default. Id. See Dun. Dig. 5007a.

A defendant is entitled as a matter of right to answer and defend in an action where summons is served by publication if sufficient cause is shown. Id. See Dun. Dig. 5003.

2. Relief granted liberally.

Fact that notice of motion, duly served, was not filed with clerk of court until after hearing of motion, both parties, by their counsel, being present and taking part in hearing without objection, did not affect jurisdiction of court to hear motion. Wenell v. S., 194M368, 260NW 503. See Dun. Dig. 6497.

4. Diligence in making application.

Section 9405 and not this section applies where more than statutory period of time has run. Jordan's Estate, 199M53, 271NW104. See Dun. Dig. 5006.

9238. Jurisdiction, when acquired—Appearance.

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

2. Effect of a general appearance.

District court had jurisdiction of action on note by service of process on defendant, or by appearance and answer of defendant. Anton, (USDC-Minn), 11FSupp345, 29AMB(NS)77.

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

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

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

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

6. What constitutes general appearance.

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

If a party so far appears as to call into action powers of court for any purpose, except to decide its own jurisdiction, it is a full appearance. State v. District Court, 192M602, 258NW7. See Dun. Dig. 479.

One seeking a change of venue, entering appearance generally, cannot question jurisdiction. Id. See Dun. Dig. 479, 10104.

Appellants, by serving their answer to complaint and thereafter moving court to strike or amend complaint, made a general appearance, which was not withdrawn or annulled by stipulation subsequently entered. Kaiser v. B., 197M28, 265NW826. See Dun. Dig. 476, 479.

Where defendant appeals from a judgment rendered by a justice court to a superior court for trial de novo, such appeal constitutes a general appearance in action and amounts to a waiver of any previous want of jurisdiction. Minneapolis Sav. & Loan Ass'n v. K., 198M420, 270NW148. See Dun. Dig. 476, 479.

In determining whether an appearance is general or special, court will look to purposes for which it was made rather than to what party labeled it. Van Sloun v. D., 199M434, 272NW261. See Dun. Dig. 479, 481.

Evidence sustains finding that owner of land, through which town board laid a public road, waived service of notice by appearing specially and objecting to jurisdiction of board, but participating in proceedings and presenting manner in which road would be a detriment and damage to his farm. Peterson v. B., 199M455, 272NW391. See Dun. Dig. 482, 8954.

10. Appearance held special.

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

12. Waiver of special appearance.

A party appearing specially and objecting to jurisdiction of court over his person does not waive objection by answering to merits ,and proceeding with trial, even though objection is overruled. Sellars v. S., 196M143, 264NW425. See Dun. Dig. 482.

9239. Appearance and its effect.

Clerk may enter judgment in action on note without notice to defendant. Anton, (USDC-Minn), 11FSupp345, 29AMB(NS)77.

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., 183M 336, 236NW483. See Dun. Dig. 486(74).

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

Service of a complaint in intervention upon attorney for plaintiff in a pending action, if said complaint is otherwise sufficient, confers jurisdiction upon district court to hear case. Scott v. V., 193M465, 258NW817. See Dun. Dig. 4898.

An order of court commissioner and writ of habeas corpus having been issued, it was error for district court judge to vacate one and quash other upon order to show cause directed to and served upon court commissioner alone, without notice to petitioner for writ or his attorney, real party in interest. State v. Hemenway, 194 M124, 259NW687. See Dun. Dig. 4136.

Upon ex parte application for a declaratory judgment for unpaid alimony and for execution, trial court may, in its discretion, require notice of application to be given to other party to proceedings, even though statutes do not require giving of notice in such cases. Kumlin v. K., 273NW253. See Dun. Dig. 2811.

9240. Service of notices, etc.

Scott v. V., 193M465, 258NW817; note under §9239.

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, 214NW 795.

Service of motion for extension of time for redemption from mortgage foreclosure sale upon attorneys who made such foreclosure by advertisement is good and effective service upon mortgagee who bid in premises at sale. Service on mortgagee by mail is not authorized. Swanson v. C., 192M81, 255NW812. See Dun. Dig. 6392, 6400.

Notice of application for extension of period of redemption from mortgage foreclosure is not original process, and may be served as other notices are served in a pending action or proceedings, and may be served by mail on attorney, where both attorney and mortgagee are nonresidents and attorney's residence is known. Rivkin v. N., 195M635, 263NW920. See Dun. Dig. 8731.

Where attorney for mortgagee appoints a resident attorney upon whom mortgagor is directed to serve papers in proceedings, nothing to contrary being shown, presumption is that he had authority to make such appointment. Id.

A notice of appeal from probate court to district court is not "process," and service on election day is not prohibited. Dahmen's Estate, 273NW364. See Dun. Dig. 7797.

9242. By mail—When and how made.

Swanson v. C., 192M81, 255NW812; note under §9240.

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

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

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

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

Notice of appeal from probate court actually received through the mail was equivalent of personal service. Devenney's Estate, 192M265, 256NW104. See Dun. Dig. 7789.

A notice of appeal from probate court to district court is not "process," and service on election day is not prohibited. Dahmen's Estate, 273NW364. See Dun. Dig. 7797.

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, 222NW 520.

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

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

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

There was a defect fatal to jurisdiction where complaint laid venue in district court but summons incorrectly put it in municipal court. Brady v. B., 185M 440, 241NW393. See Dun. Dig. 7805.

That a return of service described a lessee in possession of a garage as "H. A. Salisbury" when in fact his name was Hector A. Salvail does not invalidate service. Rhode Island Hospital Trust Co. v. C., 191M354, 254NW466. See Dun. Dig. 6326, 6921, 7818.

MOTIONS AND ORDERS

9246. Defined—Service of notice.

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

An order of court commissioner and writ of habeas corpus having been issued, it was error for district court judge to vacate one and quash other upon order to show cause directed to and served upon court commissioner alone, without notice to petitioner for writ or his attorney, real party in interest. State v. Hemenway, 194 M124, 259NW687. See Dun. Dig. 6497.

Fact that notice of motion, duly served, was not filed with clerk of court until after hearing of motion, both parties, by their counsel, being present and taking part in hearing without objection, did not affect jurisdiction of court to hear motion. Wenell v. S., 194M368, 260NW 503. See Dun. Dig. 6497.

Motion that court withdraw issues from jury and make findings and order for judgment on behalf of appellant on all issues in cause cannot be construed as a motion for direction of verdict. Ydstie's Estate, 195M 501, 263NW447. See Dun. Dig. 6492.

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

174M397, 219NW458.

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

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

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

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

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

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

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

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

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

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

For purposes of a motion for judgment on pleadings, an allegation that there was due, without question, to plaintiff from defendants, a sum liquidated by contract, prevails over a pleaded release, by its terms embracing all plaintiff's demands against defendants and releasing them upon payment of much less than alleged liquidated demand. Hopkins v. H., 189M322, 249NW584. See Dun. Dig. 7693.

A motion for judgment on pleadings is not a favored way of testing sufficiency of a pleading; and if by a liberal construction pleading can be sustained such a motion will not be granted. Gostomezik v. G., 191M119, 253NW 376. See Dun. Dig. 7694.

Motion for judgment on pleadings by plaintiff is in nature of a demurrer, and challenges sufficiency of answer and admits facts therein set out as true. Northwestern Upholstering Co. v. F., 193M333, 258NW724. See Dun. Dig. 7690a, 7693.

In deciding a motion submitted upon affidavits, court is not required to make findings of fact. Streissguth v. C., 198M17, 268NW638. See Dun. Dig. 6499a.

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. 171M488, 214NW283.

A demurrer searches all preceding pleadings. 172M 328, 215NW186.

While pleadings are but means to an end to proper administration of substantive law, yet they are to be applied and enforced so as to disclose fully and freely respective claims of parties and thereby facilitate and hasten trial of issues. W. T. Rawleigh Co. v. S., 192M 483, 257NW102. See Dun. Dig. 7498a.

Specific allegations in a pleading prevail over general allegations. Northwestern Upholstering Co. v. F., 193M 333, 258NW724. See Dun. Dig. 7722.

Primary object of pleadings is to appraise each party of grounds of claim or defense asserted by other, in order that he may come to trial with necessary proof and be saved expense and trouble of preparing to prove or disprove facts about which there is no real controversy between parties. Rogers v. D., 196M16, 264NW225. See Dun. Dig. 7498(33).

9250. Contents of complaint.

½. In general.

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

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

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

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

A common count for money had and received is a good pleading. Olesen v. R., 184M624, 238NW12. See Dun. Dig. 6135(38).

In action for malpractice, evidence as to use of restraint as contributing to cause of death held admissible under general charge of negligence. Brase v. W., 192M304, 256NW176. See Dun. Dig. 7490e.

1. 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.

In determining who parties to action are, complaint must be taken as an entirety, and allegations in body of complaint control caption. State v. District Court of St. Louis County, 273NW701. See Dun. Dig. 7509.

2. 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.

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

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

The charge to the jury was erroneous because it permitted the finding of negligence on an independent ground not included in the pleadings. Farnum v. P., 182M338, 234NW646. See Dun. Dig. 7061(61).

Complaints held to charge collusive arrangement among bidders for highway construction following stifling regulations and limitations by highway department resulting in bids so grossly excessive that their acceptance by department amounted to constructive collusion with such contractors. Regan v. B., 188M192, 247NW12. See Dun. Dig. 4480.

Facts constituting fraud must be specifically alleged. Rogers v. D., 196M16, 264NW225. See Dun. Dig. 3836.

9251. Demurrer to complaint—Grounds.

½. In general.

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

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

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

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

A judgment entered pursuant to an order sustaining a demurrer to a complaint on ground that it failed to state a cause of action because of defective pleading in that it alleged in alternative facts constituting a good cause and facts which did not is not a bar to a subsequent action in which defective pleading is corrected so as to state a good cause of action. Rost v. K., 195M219, 262NW450. See Dun. Dig. 5183, 7559.

2. Defect must appear on face of pleading.
In action by wholesaler against retailer and sureties, allegation in answer of sureties that plaintiff and main defendant sold drugs contrary to statute, held a mere conclusion of law. W. T. Rawleigh Co. v. S., 192M483, 257NW102. See Dun. Dig. 7498a, 7517.

Conclusions in a pleading must be justified by particular facts upon which they are based. Aichele Bros. v. S., 194M291, 260NW290. See Dun. Dig. 7722.

Slander of title is not an ordinary action for defamation, but is in nature a trespass on the case for recovery of special damages, and special damages should be alleged. Hayward Farms Co. v. U., 194M473, 260NW868. See Dun. Dig. 5538.

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

Defendant is not, after consolidation of several suits into one, in a position to urge objection that when two of suits were begun plaintiff had no capacity to sue or that a cause of action was split in one of consolidated suits. E. E. Atkinson & Co. v. N., 193M175, 258NW151. See Dun. Dig. 7678.

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

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

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

Bondholders suing trustee in trust deed may combine in one action damages sustained because of excessive price at which trustee bid in property at foreclosure sale with damages sustained for neglect or mismanagement of property after expiration of redemption period. Sneve v. F., 192M355, 256NW730. See Dun. Dig. 7506.

Where demurrers are interposed to a complaint on ground of misjoinder of causes, if no cause of action is stated in matter asserted to constitute wrongful joinder, there is no misjoinder of causes. Aichele Bros. v. S., 194 M291, 260NW290. See Dun. Dig. 7554.

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

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

When a complaint in which a contract is pleaded in haec verba, is demurred to on ground that it fails to state facts sufficient to constitute a cause of action, and contract is ambiguous as to intent of parties because of uncertainty of language used, construction of party pleading it should be accepted if such construction is reasonable. Anchor Casualty Co. v. C., 273NW647. See Dun. Dig. 7542(51).

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

A complaint is not demurrable because it asks for wrong relief. Johnson v. I., 189M293, 249NW177. See Dun. Dig. 7555(20).

9252. Requisites—Waiver.

½. In general.
Objections on ground of defect of parties must be raised on demurrer or answer and if not so raised, matter is waived. Spinner v. M., 190M390, 251NW908. See Dun. Dig. 7323.

Where complaint on its face does not state cause of action because barred by statute of limitations, defendant may present his defense either by demurrer or by answer. Roe v. W., 191M251, 254NW274. See Dun. Dig. 5659.

4. Objection by answer.
In action for specific performance of a contract to leave property of which deceased died possessed to plaintiff, defect of parties defendant must be raised by answer where complaint does not disclose such defect. Hanson v. B., 199M70, 271NW127. See Dun. Dig. 7551.

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

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

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

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

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

Defendant did not waive statute of limitations by pleading guilty after his demurrer to information had been overruled. State v. Tupa, 194M488, 260NW875. See Dun. Dig. 4418.

Corporate beneficiary under a will not making motion to dismiss action by certain heirs for specific performance of an agreement to distribute part of estate to heirs of deceased, waived defect in parties from omission of certain nieces and nephews of decedent, it appearing that enforcement of agreement was for benefit of all heirs, who otherwise would have received nothing, and there being no foundation for claim that corporation might be compelled to defend other litigation, and there having been no motion to have other parties brought in as additional parties. Schaefer v. T., 199M610, 273NW190. See Dun. Dig. 7323, 7328, 7329.

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. Storing v. F. (USCCA8), 28F(2d)587.

In federal court an answer was held sufficient although it did not state the names of those making the warranties upon which the defendant relied, where there was no demand for such names, and if such demand had been made it could not properly be granted under the state practice. Commander Milling Co. v. Westinghouse Elec. & Mfg. Co. (USCCA8), 70F(2d)469.

Where complaint, in a suit for damages and an injunction, alleges fixing of a level and construction and maintenance of a dam which raises above high-water mark level of a navigable lake, major part of which is outside county, such county, when it pleads that it did not construct or maintain dam, may avail itself of defense of ultra vires through it does not specifically plead it, since complaint shows on its face that county was without authority over level of lake in question. Erickson v. C., 190M433, 252NW219. See Dun. Dig. 2288, 2302, 3459, 7574.

In replevin for soda fountain in which defendant pleaded title by purchase and evidence showed that he made down payment of less than value of fountain and gave plaintiff note and chattel mortgage, verdict for defendant was contrary to law where he relied on fraud and deceit but did not counterclaim for damages nor ask for rescission. Knight Soda Fountain Co. v. D., 192M387, 256NW657. See Dun. Dig. 8424.

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.

Where suit is brought on illegal contract, defense of illegality can be raised under a general denial or by the court on its own motion. Vos v. A., 191M197, 253NW549. See Dun. Dig. 7572.

Where plaintiff in replevin alleged that he was owner and entitled to immediate possession of automobile, describing it by motor and registration number, and answer was a general denial, plaintiff could prove that defendant's sole claim of title and right of possession was based upon documents tainted with usury. Halos v. N., 196M387, 265NW26. See Dun. Dig. 8412.

In action to recover wages under contract of hire, complaint setting out contract and performance thereof, defendant was not entitled to show modification or cancellation of the contract under a general denial. Davis v. R., 197M287, 266NW855. See Dun. Dig. 7574.

Availability of defense of contributory negligence disclosed by plaintiff's evidence but not pleaded in answer. 16MinnLawRev719.

NEW MATTER CONSTITUTING A DEFENSE

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

14. Must be pleaded specially.
In action to recover interest on awards for taking of land by city, defendant must plead facts showing that tender was made. L. Realty Co. v. C., 183M499, 237NW 192. See Dun. Dig. 3104.

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

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

Though there was technical error in failing to specially plead a letter relied upon as tolling statute of limitations, there was no prejudice to defendant where case had been tried, and letter was well-known to both

parties, and there was a full hearing on the issue. Olson v. M., 195M626, 264NW129. See Dun. Dig. 424, 7675.

Defense of modification or cancellation of a prior contract is new matter in nature of confession and avoidance and must be pleaded specially in order that evidence thereof can properly be admitted. Davis v. R., 197M287, 266NW855. See Dun. Dig. 7585.

9254. Requisites of a counterclaim.

1. Nature of counterclaim.

Where collection bank becomes insolvent on day it sends draft for proceeds to bank in which it has deposit, latter bank is entitled to set-off deposit against collection. Storing v. F. (USCCA8), 28F(2d)587.

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

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.

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. 172M80, 214NW792.

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

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

School district held entitled to set-off against warrants the amount of tax funds embezzled by bank's officers and school treasurer. First Nat. Bank of Windom v. C., 184M635, 238NW634.

In action against employee to recover for wrongful appropriation of employer's property, a counterclaim for damages for a discharge without cause before expiration of year for which he was employed may not be stricken as frivolous, merely upon ground that to an attempted counterclaim in original answer a demurrer had been sustained. Danube Farmers Elevator Co. v. M., 197M349, 266NW878. See Dun. Dig. 7670.

2. Compared with defense.

Recoupment is properly pleaded as a defense and need not be pleaded as a counterclaim. Hoppman v. P., 190M480, 252NW229. See Dun. Dig. 351 to 353, 7592.

5. Compared with equitable set-off.

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

7. Must exist in favor of the defendant who pleads it.

Right of surety to set off principal's claim against creditor—effect of principal's insolvency. 16MinnLawRev 217.

8. Must exist against the plaintiff.

Assignee of a claim must stand in shoes of assignor as affecting right of set-off. Campbell v. S., 194M502, 261NW1. See Dun. Dig. 572(47).

A Co-owner of a farm who signed to a note names of all owners as a company, without authority, knowledge, or consent of other co-owners, will be held to have signed note in a name assumed by him, and is personally liable thereon, as affecting right of set-off. Id. See Dun. Dig. 1732, 6915.

10. Must exist against a plaintiff and in favor of a defendant.

Rule that a cause of action which cannot be determined without bringing in a new party may not, without more, be set up as a counterclaim, is one for testing validity of a counterclaim as such, and is not determinative of right of a counterclaiming defendant to bring in additional parties where they are necessary for full determination of controversy. Lambertson v. W., 273NW634. See Dun. Dig. 7602.

11. "Arising out of the contract."

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

14. A claim on contract in an action on contract.

Where landlord brings suit to recover rent, tenant may recoup damages caused by a wrongful interference by landlord with use or possession, although tenant has not been evicted and has not surrendered premises. Hoppman v. P., 190M480, 252NW229.

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

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

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

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

In action to recover damages for libel, defendant may not counterclaim for an alleged libel, theretofore published, by plaintiff of and concerning defendant, as each libel constituted a separate transaction. Skluzacek v. W., 195M326, 263NW95. See Dun. Dig. 7613.

19. Effect of failure to plead counterclaim.

A counterclaim or offset must be pleaded, but if it is such as to constitute a cause of action in favor of a defendant, he may refrain from pleading it and bring suit thereon at a later time. Johnson v. I., 189M293, 249 NW177. See Dun. Dig. 7620.

20. Rules as to pleading counterclaim.

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

21. Mode of objecting to counterclaim.

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

In action by mortgagor to set aside foreclosure, wherein defendant counterclaimed for damages for wrongful detention of possession by mortgagor after expiration of period of redemption, and asked for recovery of possession, objection at trial to litigation of counterclaim was without merit, where there was no demurrer nor reply challenging legal standing of counterclaim. Young v. P., 196M403, 265NW278. See Dun. Dig. 7619.

22. Relief awarded.

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

9256. Judgment on defendant's default.

½. In general.

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

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

3. Necessity of proving cause of action.

In negligence action against both master and servant, it was not error to submit question of servant's negligence to jury even though he was in default. Hector Const. Co. v. B., 194M310, 260NW496. See Dun. Dig. 4995.

9257. Demurrer or reply to answer.

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

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

½. In general.

In mandamus reply to answer is not necessary. 178M 442, 227NW891.

1. Demurrer to answer.

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

2. Reply to answer—Departure.

181M115, 231NW790.

Reply held not a departure from complaint; it merely meets an attempted defense in answer. Stebbins v. F., 192M520, 258NW824. See Dun. Dig. 7627.

9259. Sham and frivolous pleadings.

½. In general.

Commander Milling Co. v. W. (USCCA8), 70F(2d)469; note under §9267.

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

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

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

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

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

Answer admitting execution of note set out in complaint and averring that there was no consideration for note and agreement to execute mortgage to secure it because the lien right which plaintiff released had ex-

pired 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. 179M 349, 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. 180M 482, 231NW220.

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

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

Upon dismissing a pleading as sham, court cannot on its own motion dismiss action itself. Long v. M., 191M 163, 253NW762. See Dun. Dig. 7658.

A complaint cannot be stricken as sham. Id. See Dun. Dig. 7657.

Answer properly stricken as sham where the only defensive matter pleaded was shown to be false. Simons v. S., 197M160, 266NW444. See Dun. Dig. 7657.

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, 223 NW677.

In action by baking company against milling company after agricultural adjustment act was declared unconstitutional to recover processing tax, court erred in striking as sham and frivolous an allegation in answer that sale of flour was upon a composite price per barrel and that no particular part of price of flour was allotted to tax. Zinsmaster Baking Co. v. C., 273NW673. See Dun. Dig. 7657, 7668.

An answer is sham when clearly false and frivolous when its insufficiency appears from mere inspection. Id. See Dun. Dig. 7667, 7668.

3. Denials may be stricken out.

Where administrator sued widow and widow in answer alleged that matters had all been considered by probate court on hearing of administrator's final account and decree of distribution, reply of administrator in nature of general denial was properly stricken as sham and frivolous. Saunderson v. H., 190M431, 252NW83. See Dun. Dig. 7661, 7667, 7668a.

6. Power to strike out to be exercised sparingly.

On a motion to strike an answer as sham, care must be used so that issues tendered for decision on a trial are not disposed of upon affidavits with no opportunity of confronting and cross-examining witnesses. Zinsmaster Baking Co. v. C., 273NW673. See Dun. Dig. 7664.

8. Affidavits on motion.

In action for damages for failure to furnish a title to real estate consistent with terms of purported agreement, unverified replies denying generally matters of public record set up in verified answers may be stricken and judgment ordered entered for defendants on a showing, by affidavits, that allegations therein were sham. Berger v. F., 198M513, 270NW589. See Dun. Dig. 7664.

9. Amendment.

Where it is not made to appear that defendant has any meritorious defense, there is no abuse of judicial discretion in ordering judgment on striking out a sham answer without leave to amend same. Simons v. S., 197 M160, 266NW444. See Dun. Dig. 7666.

Plaintiff suing from a judgment entered on pleadings after order striking reply as sham and frivolous cannot complain that he was given no opportunity to amend his reply because judge immediately left for his summer vacation, where no attempt was made to vacate judgment nor leave to amend asked. Berger v. F., 198M513, 270 NW589. See Dun. Dig. 7666, 7668a.

10. Motion to strike out granted.

Plaintiff appealing from an order granting a motion to strike reply as sham and frivolous cannot complain that no copy of the order was ever mailed to plaintiff as required by rules of district court, in absence of showing of prejudice. Berger v. F., 198M513, 270NW589. See Dun. Dig. 7666.

11. Motion to strike out denied.

Denial of motion to strike out complaint as sham and frivolous did not bar a subsequent motion to strike out reply as sham and frivolous. Berger v. F., 198M513, 270 NW589. See Dun. Dig. 7657.

12. Irrelevant pleadings.

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

It was error to strike as irrelevant and immaterial certain paragraphs of a complaint, where with them complaint stated a cause of action, but with them stricken it did not. Sneve v. F., 192M355, 256NW730. See Dun. Dig. 7653.

16. Frivolous answer or reply.

173M18, 216NW329.

180M480, 231NW224.

General denial stricken as frivolous. 171M405, 214NW 261.

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

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

In action by employee charging disease contracted because of fumes and gases from dynamite used in blasting a tunnel, wherein defendant denied all negligence and denied praticability of installing adequate ventilating facilities, court erred in striking out as frivolous defense of assumption of risk. Wickstrom v. T., 191M 327, 254NW1. See Dun. Dig. 5973, 5978, 7668a.

In action against employee to recover for wrongful appropriation of employer's property, a counterclaim for damages for a discharge without cause before expiration of year for which he was employed may not be stricken as frivolous, merely upon ground that to an attempted counterclaim in original answer a demurrer had been sustained. Danube Farmers Elevator Co. v. M., 197M349, 266NW878. See Dun. Dig. 7670.

Reply setting up incompetency of plaintiff as a ground for avoiding release, held properly stricken. Hanson v. N., 198M24, 268NW642. See Dun. Dig. 7658.

Answer conatining a general denial cannot be stricken as frivolous. Zinsmaster Baking Co. v. C., 273NW673. See Dun. Dig. 7661.

Answer is "frivolous" when insufficiency appears from mere inspection. Id. See Dun. Dig. 7667, 7668.

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. 176M 11, 222NW295.

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

Section 9214, providing that all actions not enumerated in certain preceding sections shall be tried "in a county in which one or more of the defendants reside when the action was begun," does not apply to statutory proceeding provided by §9261. State v. District Court, 192M602, 258NW7. See Dun. Dig. 10104, 10121, 4892, 4893.

Where there is a statutory proceeding in nature of interpleader, court in which cause is properly pending, and it alone, may exercise jurisdiction. Id. See Dun. Dig. 4892.

9263. Intervention.

176M11, 222NW295.

2. Interest entitling party to intervene.

Quo warranto, see §§132, 156.

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

In action to recover rent and for use and occupation of land, one claiming ownership of the land could intervene. Scott v. V., 193M465, 258NW817. See Dun. Dig. 4899.

An intervener may not introduce new and foreign issues into action as joined by original parties in suit for declaratory judgment. Twin City Milk Producers Ass'n v. H., 199M124, 271NW253. See Dun. Dig. 4901a.

A highway condemnation proceeding is in rem, and no question of jurisdiction is presented if, without formal intervention under statute, interested taxpayers are permitted to appear and to apply for and procure injunctional relief appropriate to proceeding. State v. Werder, 273NW714. See Dun. Dig. 3177.

2½. Time of application.

Intervention was not available after closing of condemnation proceedings by approval of certificate in state highway establishment. State v. Hall, 195M79, 261NW874. See Dun. Dig. 4897a.

3. Complaint.

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

Service of a complaint in intervention upon attorney for plaintiff in a pending action, if said complaint is otherwise sufficient, confers jurisdiction upon district court to hear case. Scott v. V., 193M465, 258NW817. See Dun. Dig. 4898.

6. Order of court unnecessary.

It is not necessary to obtain leave of court in order to serve and file a complaint in intervention and thus become a party to suit. Scott v. V., 193M465, 258NW817. See Dun. Dig. 4898.

7. Remedy for wrong intervention.
Attempted dismissal of action by plaintiff, after complaint in intervention had been served did not affect intervener's rights. Scott v. V., 193M465, 258NW817. See Dun. Dig. 2741.

8. Waiver of objection to intervention.
The court acted well within its discretion in denying plaintiff's motion for leave to open up judgment and permit her to answer intervener's complaint after default judgment. Scott v. V., 193M465, 258NW817. See Dun. Dig. 5015.

10. Intervener liable for statutory costs.
Where state intervenes and joins plaintiffs in suits in equity by taxpayers to cancel contracts for paving of state trunk highways, entered into by commissioner of highways, and for injunctions to restrain contractors and commissioner from proceeding with carrying out of such contracts, and for purpose of recovering for state moneys illegally paid out or to be paid out under such contracts, state subjects itself to jurisdiction of court and may be required by court to pay to plaintiffs, taxpayers, out of funds recovered and saved to state, reasonable and necessary expenditures and attorneys' fees incurred by such plaintiffs in carrying on litigation. Regan v. B., 196M243, 264NW803. See Dun. Dig. 4901a.

9264. Consolidation—Separate trials—Actions triable together.

Granting of separate trial is discretionary with trial court. Bergheim v. M., 190M571, 252NW833. See Dun. Dig. 9705.

Defendant is not, after consolidation of several suits into one, in a position to urge objection that when two of suits were begun plaintiff had no capacity to sue or that a cause of action was split in one of consolidated suits. E. E. Atkinson & Co. v. N., 193M175, 258NW151. See Dun. Dig. 7671.

Where actions for assault and for slander were consolidated for trial, and defendant consented thereto but asserted that there should be separate verdicts, there was no error where court directed jury to return but one verdict and to assess therein general damages for defamation of character and special damages for mental and nervous shock affecting plaintiff's health, trial developing facts showing slander but not a sufficient basis for assault. Gendler v. S., 195M578, 263NW925. See Dun. Dig. 91.

In separate suits arising out of same automobile collision by which passengers and driver of one of automobiles sought to recover damages of owner of other, court had inherent power, over objection of all plaintiffs, to order actions tried together. Ramswick v. M., 274NW179. See Dun. Dig. 91.

9266. Pleadings liberally construed.

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

9267. Irrelevant, redundant, and indefinite pleadings.

½. In general.
Amended complaint, held properly stricken out as containing irrelevant matter. 179M475, 229NW583.

3. Indefinite pleading.
In an action to recover reasonable value of labor, services and material furnished defendant by plaintiff in the repair of a turbine, where the defense was in recoupment and a counterclaim which alleged breaches of warranty, held the allegations were amply sufficient to apprise plaintiff of the nature of the defense and were not indisputably false, lacking in a substantial relation to the controversy, obscure, or mere conclusions of law. Commander Milling Co. v. W. (USCCA8), 70F(2d) 469. See Dun. Dig. 7596, 7617.

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

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. 7647.

Motion to make complaint more definite and certain should not be granted for purpose of requiring party to plead evidentiary facts. Id. See Dun. Dig. 7646.

6. Remedy.
Whether or not part of a complaint may be stricken as sham, part of a complaint which neither states a cause of action nor assists other parts in so stating may properly be stricken on motion as irrelevant and redundant. Hayward Farms Co. v. U., 194M473, 260NW868. See Dun. Dig. 7653, 7656.

9268. Averments, when deemed admitted.

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

9270. Ordinances and local statutes.

Complaint for violating a city ordinance may be made orally and entered in the court record. 172M130, 214NW 778.

The courts take judicial notice of statutes of the state as well as the common law. Saunders v. Y., 182M62, 233 NW599. See Dun. Dig. 3452(98).

District courts take judicial notice of provisions of city charters. City of St. Paul v. T., 189M612, 250NW572. See Dun. Dig. 3452, notes 6, 9.

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., 183 M21, 235NW523. See Dun. Dig. 5539(16).

3. Counterclaim.
In action to recover damages for libel, defendant may not counterclaim for an alleged libel, therefore published, by plaintiff of and concerning defendant, as each libel constituted a separate transaction. Skluzacek v. W., 195 M326, 263NW95. See Dun. Dig. 7613.

9277. Joinder of causes of action.

½. In general.
Trial court did not err in consolidating action for cancellation of contract brought by appellant and actions to enjoin cancellation proceedings and for specific performance brought by respondents, and in granting specific performance. Schultz v. U., 199M131, 271NW249. See Dun. Dig. 8788.

1. Subd. 1.
Automobile owner and insurer under ordinary liability policy cannot be jointed in a single action. Charlton v. Van Etten, (DC-Minn), 55F(2d)418. See Dun. Dig. 4875c, 7327.

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, 217 NW930.

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

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

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

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

2. Subd. 2.
Broker failing to perform original express contract might recover on an implied contract where he performed services. Benedict v. P., 183M396, 237NW2. See Dun. Dig. 1793(50).

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

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

15. Splitting cause of action.
Where wife is injured, the wife and husband may maintain separate actions for damages. 175M247, 221 NW8.

A single cause of action cannot be split or divided and independent actions brought upon each part. Myhra v. P., 193M290, 258NW515. See Dun. Dig. 2531.

All items of damage resulting from a single tort form an indivisible cause of action and must be included in one suit; and if any item be voluntarily omitted no further action can be maintained thereon, absent fraud on part of adversary or mutual mistake. Id.

If, for same wrong, one is liable both for breach of contract and conversion, injured party may elect his remedy. If he sues for tort, and there have been successive and distinct conversions, he has right to sue upon them separately as independent causes of action. Lloyd v. F., 197M387, 267NW204. See Dun. Dig. 5167.

9280. Amendment by order.

½. In general.
A motion to amend the answer, after the trial and determination of the case, by alleging facts upon which a reformation of the contract sued on might be had, was properly denied. 172M214, 214NW780.

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

Where defendant recognized action as one in conversion, it could not claim surprise in the allowance of an amendment of the complaint to state a cause of

action in conversion. Nygaard v. M., 183M388, 237NW7. See Dun. Dig. 7122.

Appellant's motion to vacate an order amending complaint so as to make defendant city a party plaintiff instead of a party defendant was timely under Barrett v. Smith, 183M431, 237NW15, and U. S. Roofing & Paint Co. v. Melin, 160M530, 200NW807. Id. See Dun. Dig. 7711.

Order amending complaint so as to make city a party plaintiff instead of a party defendant was not an order involving merits of cause of action or any part thereof and is not appealable, neither is order denying motion to vacate order granting amendment. Gilmore v. C., 198M148, 269NW113. See Dun. Dig. 298.

1. A matter of discretion.

Amendment of pleadings on trial is matter lying almost wholly in the discretion of the trial court. 174M 297, 219NW180.

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

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

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

Motion to amend answer held addressed to sound discretion of trial court. De Jardins v. E., 189M356, 249NW 576. See Dun. Dig. 7696.

In refusing to continue to later date hearing on order to show cause why a receiver should not be appointed to collect rents on mortgaged property, and in allowing an amendment to complaint, court did not abuse its discretion. Minneapolis Sav. & Loan Ass'n v. Y., 193M632, 259NW382. See Dun. Dig. 1710.

Court did not abuse judicial discretion in refusing plaintiff in negligence case leave to amend complaint by alleging a new ground of liability. Abar v. R., 195M597, 263NW917. See Dun. Dig. 7709.

There was no abuse of judicial discretion in refusing motion to amend answer by pleading defect of parties defendant, where defense could neither be harmed nor aided by amendment. Hanson v. B., 199M70, 271NW127. See Dun. Dig. 7696.

2. Amendments on the trial held discretionary.

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

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

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

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

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

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

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

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

4. Amendments after trial held discretionary.

179M266, 229NW128.

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

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

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

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

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

Trial court rightly allowed an amendment of pleadings to conform to proof. Erickson v. E., 188M269, 258NW736. See Dun. Dig. 7713.

It was well within trial court's discretion to deny defendant's motion to amend answer by changing admission of execution of contract to a denial thereof. Fisher v. R., 196M409, 265NW43. See Dun. Dig. 7708(54).

Where the question of amendment of answer was raised for first time in defendants' motion for a new trial, trial court did not abuse its discretion in not allowing defendants to amend. Davis v. R., 197M287, 266NW855. See Dun. Dig. 7698, 7713a.

Trial court did not abuse its discretion in allowing amendment of complaint to conform to proof. Birdsall v. D., 197M411, 267NW363. See Dun. Dig. 7713.

12. Scope of allowable amendment of complaint.

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

Plaintiff suing upon contract was properly permitted to amend so as to base cause of action upon quasi contract. Seifert v. U., 191M362, 254NW273. See Dun. Dig. 7696.

13. Scope of allowable amendment of answer.

Court did not abuse its discretion in refusing to allow an amendment to answer near close of trial which would be a complete about face from defense pleaded in action on note. First & Farmers' State Bank v. V., 190M331, 251NW669. See Dun. Dig. 7711.

9281. Variance—Amendment—Exceptions.

1. Proof must follow pleadings.

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

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

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

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

Under complaint, which alleged sale and delivery of goods, wares, and merchandise at special instance and request of defendant, and alleged reasonable value thereof and a promise to pay therefor, plaintiff was entitled to prove either an express or an implied contract. Krocak v. K., 189M346, 249NW671. See Dun. Dig. 8640.

A defendant which does not allege or offer to prove that it was misled cannot avail itself of a variance. Schmidt v. A., 190M585, 252NW671. See Dun. Dig. 7672.

Under allegations in action for damages for failure to give tenant possession of premises under lease from month to month, court could not permit proof of oral lease for one year without amendment of pleadings. Vethourlkas v. S., 191M573, 254NW909. See Dun. Dig. 7673, 8857.

When a case is tried on a stipulation of facts, any issue so presented is for decision even though not presented by the pleadings. Miller v. P., 191M586, 254 NW915.

On motion for directed verdict all evidence admitted must be considered as properly received, and motion should not be denied because defense established by evidence was neither pleaded nor litigated by consent. Robbins v. N., 195M205, 262NW872. See Dun. Dig. 9764.

A stipulation in open court eliminating issue of whether plaintiff was an employee of defendant company, and consequently subject to workmen's compensation act left case where court properly submitted it on question whether plaintiff was an invitee and entitled to ordinary care for his safety. Anderson v. H., 198M509, 270NW 146. See Dun. Dig. 9005.

Where it is apparent, both as to form of action and course and theory of trial, that liability was predicated solely upon express contract, enforcement of liability as for unjust enrichment cannot be had. Swenson v. G., 274 NW222. See Dun. Dig. 7671.

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, 231 NW194.

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., 182M 282, 234NW292. See Dun. Dig. 512, 3731.

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

Where plaintiff proves essential fact necessary to sustain recovery, he is not defeated because he has failed to prove other allegations. Chicago Flexotile Floor Co. v. L., 188M422, 247NW517. See Dun. Dig. 7672.

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

3. Material variance.

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

4a. Discretion of court.
Granting of amendments of pleading during trial is well within the discretion of the trial court. 176M331, 223NW605.

9282. Failure of proof.
When there is an allegation of a joint contract with two or more defendants and proof is of a several contract with one, there may be a recovery against one liable; and in such case there is not a failure of proof. Schmidt v. A., 190M585, 252NW671. See Dun. Dig. 7674.

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, 218NW 127.

Provision permitting relief from judgments within one year, applies in workmen's compensation cases. 176M 554, 223NW926.

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

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

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

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

It was not error for the court to extend reasonable time, fixed by order conditionally denying defendant's motion for a new trial, within which plaintiff might file his consent to a reduction of verdict. Jasinuk v. L., 189 M594, 250NW568. See Dun. Dig. 7138.

Power of court to grant relief against judgments or stipulations is not based solely on statute, but also on equity powers of court to annul judgments or set aside stipulations in cases proper for such relief. Orfield v. M., 199M466, 272NW260. See Dun. Dig. 5109, 9005.

AMENDMENT OF JUDGMENTS AND JUDICIAL RECORDS

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

Court properly reopened judgment for new findings of fact and conclusions of law to correct inadvertent mistake of deceased trial judge. Fagerstrom v. C., 188M245, 246NW884. See Dun. Dig. 5101.

4. To be made with caution.
Error in admitting incompetent testimony was cured by subsequent proof of same facts by competent and undisputed evidence. Donlin v. W., 176M234, 223NW98.

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

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

Improper directions to probate court in conclusion of law may be remedied by application to trial court before entry of judgment. Anderson v. A., 197M252, 266NW841. See Dun. Dig. 9873.

After judgment in favor of school district brought by taxpayers was satisfied, court lost jurisdiction to order school district to pay fees to attorney employed by taxpayers. Op. Atty. Gen. (779n), June 7, 1934.

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.

Where federal circuit court of appeals affirmed federal district court's judgment of $5,000 to insured, that being amount contended by insurer as recoverable under policy, insurer could not later maintain a bill of review to have state court judgment of $1,800 deducted from $5,000 judgment, where it had satisfied state court judgment pending appeal of federal court case, and did not obtain federal court's permission to file its equitable action. Simonds v. N. (USCCA8), 73F(2d)412. Cert. den. 294US 711, 55SCR507. See Dun. Dig. 5088.

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

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

Where there was no objection made to hearing of motion for modification of divorce decree or its determination upon affidavits, and order made merely required plaintiff to join in execution of a mortgage on defendant's land so as to enable him to comply with decree, order should stand, except mortgage should be no larger than needed to discharge plaintiff's lien and expenses connected with obtaining mortgage. Feltmann v. F., 187M591, 246NW360. See Dun. Dig. 2799b, 2805.

Motion to amend judgment of divorce in favor of husband by allowing wife an interest in homestead property and a larger amount for permanent alimony than was awarded was properly denied. Wilson v. W., 188M23, 246NW476. See Dun. Dig. 2805.

A motion, after judgment was entered, to set aside or reduce amount of verdict and judgment on a ground presented to and passed upon at trial and again in an alternative motion for judgment or a new trial, cannot be maintained, and an order denying such motion is not appealable. Such question can be raised on appeal from an order denying the alternative motion, or on appeal from judgment. Lavelle v. A., 197M169, 266NW445. See Dun. Dig. 5090a.

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

VACATION OF JUDGMENTS AND ORDERS

25½. In general.
Where client settled suit without knowledge of attorney and the action was dismissed the attorney was entitled to have the judgment set aside with right to intervene for the purpose of enforcing his lien for services. Bynam v. M. (USCCA8), 47F(2d)112.

Grounds of impeachment of a judgment or decree in the nature of a bill of review are fraud, accident, surprise, or mistake. Simonds v. N. (USCCA8), 73F(2d)412. Cert. den. 294US711, 55SCR507. See Dun. Dig. 5122, 5123, 5123a.

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

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

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

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

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

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

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

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

A judgment having been entered without notice, it was error to vacate it on ground that through excusable neglect of opposing counsel, there was no stay of proceedings when motion for vacation was not made or based upon that ground. Wilcox v. H., 186M504, 243 NW709. See Dun. Dig. 5108(62).

Affidavits are construed as insufficient to warrant the granting of a motion to vacate a judgment on the theory that they establish excusable neglect. Wilcox v. H., 186 M504, 243NW709, See Dun. Dig. 5108.

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

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

Rules applicable to motion to strike a pleading as sham or frivolous do not control a motion to vacate judgment supported by affidavits. Ramsay v. B., 189M 333, 249NW192. See Dun. Dig. 5011.

Trial court has absolute power to vacate prior order and to make contrary findings where controlling statute, previously overlooked, is called to court's attention, even though moving party produces no newly discovered evidence. Lehman v. N., 191M211, 253NW663. See Dun. Dig. 5121a.

Trial court did not abuse its discretion in refusing to set aside orders allowing and confirming annual account of a trustee in order that beneficiary, who had consented to such order, could file objections to the account. Fleischmann v. N., 194M227, 234, 260NW310. See Dun. Dig. 5108.

A judgment may not be vacated and set aside where only objections thereto are based upon matters that

might have been raised by an appeal. Johnson v. U., 196 M588, 266NW169. See Dun. Dig. 5108a.

That plaintiff thought he had 40 days in which to appeal from an order sustaining a demurrer because of fact that district court granted a forty-day stay after judgment furnished no ground for vacation of judgment or order sustaining demurrer. Id. See Dun. Dig. 5114.

Section 9405 and not this section applies where more than statutory period of time has run. Jordan's Estate, 199M53, 271NW104. See Dun. Dig. 5007.

Jurisdiction of probate court to vacate its orders and judgment is as great as power possessed and exercised by district court in like or similar matters. Id. See Dun. Dig. 5129.

An application to vacate an order or judgment upon ground of mistake is addressed to sound discretion of court. Orfield v. M., 199M466, 272NW260. See Dun. Dig. 5123a.

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. 176M 59, 222NW520.

Section authorizes district court to set aside order extending time to redeem under §9633-5 and a subsequent order declaring a default by mortgagor of terms of extension order, where proceedings are had under a mistake of fact that mortgage foreclosure was valid, when foreclosure was void because of failure to file power of attorney to foreclose prior to mortgage foreclosure sale. Orfield v. M., 199M466, 272NW260. See Dun. Dig. 5117, 5123a.

40. Fraud.

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

To set aside any final order or judgment is not justifiable unless fraud is established by strong, clear and satisfactory evidence. Fleischmann v. N., 194M227, 234, 260NW310. See Dun. Dig. 5122, 5124.

45. Vacation of orders.

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

District court had no power to vacate an intermediate order sustaining a demurrer after judgment had been entered. Johnson v. U., 196M588, 266NW169. See Dun. Dig. 5108a.

OPENING DEFAULTS

45½. In general.

173M580, 218NW110.

Generally, the grounds for the granting of relief by a court of equity against the enforcement of a judgment are that the party seeking the relief had a good defense and that he was prevented by fraud, concealment, accident, or mistake from presenting such defense, and that he has been free from negligence in failing to avail himself of the defense. Simonds v. N. (USCCA8), 73F(2d) 412. Cert. den. 294US711, 55SCR507. See Dun. Dig. 5125.

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

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

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

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

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

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

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

In proceeding to set aside judgment in equity case cancelling land contract, it was incumbent upon defendant to offer to make payments admittedly in default. Madsen v. P., 194M418, 260NW510. See Dun. Dig. 5007a.

48. To what applicable.

Where there has been award of compensation in installments, which have been paid, and then issue is formally made whether there is right to additional compensation, decision of commission that right has terminated is final, subject only to review (by certiorari), as distinguished from rehearing. Rosenquist v. O., 187M 375, 245NW621. See Dun. Dig. 10421.

50. Discretionary.

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

Denial of defendant's motion to vacate various proceedings prior to default judgment of foreclosure was within the discretion of the trial court. 174M46, 218NW 170.

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

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

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

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

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

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

Vacating a default judgment is largely discretionary. Central Hanover Bank & Trust Co. v. P., 189M36, 248NW 287. See Dun. Dig. 5012, 5019.

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

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.

District court has discretionary power to determine whether an appellant from probate court should be relieved of a default for failure to file, within statutory time, statement of propositions of law and fact upon which he is relying for reversal of an order of probate court. Slingerland's Estate, 196M354, 265NW21. See Dun. Dig. 2740, 7499b.

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, 214 NW57.

Motion to open judgment and permitting answer is addressed to the discretion of the court. 176M59, 222NW 520.

Incapacitating progressive illness of defendant from which he died, held excusable neglect. 180M36, 230NW 122.

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

Where an employer left to its insurer defense of a petition for compensation, after an award was made and reduced to judgment, insurer having become insolvent, district court had power to set aside judgment for "excusable neglect" of employer so that it might petition industrial commission for a rehearing of matter on merits. Meehan v. M., 191M411, 254NW584. See Dun. Dig. 5123.

Court did not abuse judicial discretion in removing a default and permitting defendant to answer where it could be found that, in ignorance of law, he let time for answer pass while he was negotiating a settlement of action with plaintiff. Tiden v. S., 191M518, 254NW617. See Dun. Dig. 5025.

53. Mistake.

To vacate a judgment entered in district court to enforce an award of industrial commission upon ground of mistake of fact, court must be governed by same considerations and principles that govern vacation of any judgment of district court. Maffett v. C., 198M480, 270 NW596. See Dun. Dig. 5123a.

54½. Insufficiency of complaint.

Where judgment on default is entered on a complaint which fails to state a cause of action, trial court is justified in opening judgment and permitting defendant to appear and defend, on motion made for that purpose within time for appeal from judgment. Roe v. W., 191M 251, 254NW274. See Dun. Dig. 5013a.

54¾. False Testimony.

Where affidavits in support of a petition for rehearing indicate strongly that award was based in substantial degree upon false testimony, it is an abuse of discretion not to grant a rehearing. Meehan v. M., 191M411, 254NW584. See Dun. Dig. 5122.

56. Time of application—Diligence.

175M319, 221NW65.

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

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

Denial of motion to vacate default judgment held not abuse of discretion due to dilatory conduct of defendant. Ramsay v. B., 189M333, 249NW192. See Dun. Dig. 5012.

Whether reasonable diligence was shown in making motion to open judgment was, on record presented, a question for trial court to determine. Roe v. W., 191M 251, 254NW274. See Dun. Dig. 399, 5025.

Court acted well within its discretion in denying plaintiff's motion for leave to open up judgment and permit her to answer intervener's complaint after default judgment. Scott v. V., 193M465, 258NW817. See Dun. Dig. 5015.

Court did not abuse its discretion in reopening default judgment five years after entry thereof. Isensee Motors v. R., 196M267, 264NW782. See Dun. Dig. 5015.

59. Affidavit of merits.

Where on motion to open default, it appears on face of complaint that cause of action is barred by statute of limitations, and hence does not state a cause of action, and judgment is opened and defendant granted leave to defend and to demur, affidavit of merits and proposed demurrer present a meritorious defense. Roe v. W., 191M251, 254NW274. See Dun. Dig. 5020, 5021.

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. 181M 285, 232NW325. See Dun. Dig. 422, 9742.

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

No reversible error was made in denying a continuance, nor in refusing to grant a new trial for newly discovered evidence. Miller v. P., 182M108, 233NW855. See Dun. Dig. 424.

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

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

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

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

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

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

Plaintiffs cannot complain of fact that defendant, by his answer, and court, by directed verdict, allowed plaintiffs more than they were entitled to receive. Crain v. B., 192M426, 256NW671. See Dun. Dig. 418.

Court having submitted question of defendant's negligence to jury, on theory of failure to exercise ordinary care, and plaintiff having recovered a verdict on that ground, question whether he occupied position of a passenger and was entitled to care required of common carriers of passengers for hire is not directly involved. Mardorf v. D., 194M537, 261NW177. See Dun. Dig. 424.

In action to enjoin obstruction of certain road over land of another, where plaintiff upon opening of trial explained that road in question was one substituted by agreement of parties for old road over which plaintiff had a prescriptive right, defendant cannot complain that court gave plaintiff relief only as to old road, and not road mentioned in pleading, both parties knowing that main issue was any road by prescription over defendant's land. Schmidt v. K., 196M178, 265NW347. See Dun. Dig. 424.

No substantial right of defendant, a stockholder in insolvent domestic corporation, was adversely affected by failure to file order of assessment of shares of stock until after commencement of action to enforce payment; order being on file before trial began and there being ample itme to commence another action had pending action been dismissed. Hatlestad v. A., 196M230, 265NW 60. See Dun. Dig. 424.

Appellant cannot complain that judgment or order was more favorable to him than case warranted. Walsh v. K., 196M483, 265NW340. See Dun. Dig. 418.

Where defendants prevailed in court below, plaintiffs cannot complain of court's determination that neither party should be allowed costs and disbursements against other. Id.

No prejudice resulted from defendant's bringing out fact that insurance corporation was interested in plaintiff's side of case, where jurors also were informed that one likewise was interested in defendant's claim of no liability. Tri-State Transfer Co. v. N., 198M537, 270NW 684. See Dun. Dig. 422.

Where both parties moved court to make findings upon all issues, and to make conclusions of law therefrom, neither party can complain on ground that case should have been submitted to jury for a general verdict, nor can one party complain that court set aside answer to one of two questions submitted to jury. Coughlin v. F., 199M102, 272NW166. See Dun. Dig. 5234.

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. 175M 253, 221NW3.

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

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

Though there was technical error in failing to specially plead a letter relied upon as tolling statute of limitations, there was no prejudice to defendant where case had been tried before, and letter was well-known to both parties, and there was a full hearing on the issue. Olson v. M., 195M626, 264NW129. See Dun. Dig. 424, 7675.

Plaintiff appealing from an order granting a motion to strike reply as sham and frivolous cannot complain that no copy of the order was ever mailed to plaintiff as required by rules of district court, in absence of showing of prejudice. Berger v. F., 198M513, 270NW589. See Dun. Dig. 424.

4. Reception of evidence.

180M13, 230NW128.
180M221, 230NW639.
181M115, 231NW790.
181M415, 232NW717.

In action on life insurance policy where verdict was directed for insurer, based on conclusive evidence of false statement of insured, testimony of insurer's medical director that he would have declined risk had he known of treatment undergone by insured, held not reversible error. First Trust Co. v. K., (USCCA8), 79F(2d)48.

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

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

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

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

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

Where several experts examined testator and only one of them could understand his language and the other interpreted his reply, held that there was no prejudical error in permitting all of the experts to testify. 176M 360, 223NW677.

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

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

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

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

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

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, 227NW 491.

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. 181M 217, 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, 232NW795. See Dun. Dig. 423.

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 re-

moved from the brain. Lund v. O., 182M204, 234NW310. See Dun. Dig. 424.

Testimony erroneously received through mistake or inadvertence, but promptly stricken when the court's attention was directed thereto, does not require a new trial, where it is perceived that no prejudice resulted. Drabek v. W., 182M217, 234NW6. See Dun. Dig. 424.

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

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

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

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

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

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

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

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

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

It is not reversible error to exclude the answer to a specific question when answer to substantially same question is later received. Wilcox v. H., 186M500, 243NW 711. See Dun. Dig. 422.

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

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

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

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

No prejudice could result from not striking testimony of plaintiff's witness, called to refute a false issue injected into trial by testimony of defendant's main witness. Cohoon v. L., 188M429, 247NW520. See Dun. Dig. 424.

Error in admitting evidence as to conviction of driver of defendant's truck of crime of driving a motor vehicle while intoxicated, at time of an accident, held not prejudicial where other evidence, not objected to, conclusively showed that driver was intoxicated at time. Mills v. H., 189M193, 248NW705. See Dun. Dig. 422.

Exclusion of evidence of facts shown by other evidence, held not prejudicial. Quarfot v. S., 189M451, 249 NW668. See Dun. Dig. 3250, 4038.

Admission of evidence of conversation between plaintiffs was harmless where it could not have affected result. Stibal v. F., 190M1, 250NW718. See Dun. Dig. 424.

Prejudicial error was not committed in permitting defendant to introduce testimony of fraud sufficient as a defense at common law without first producing affirmative proof that plaintiff was not a holder in due course and so making an issue for jury upon evidence tendered by plaintiff. M & M Securities Co. v. D., 190M57, 250NW 801. See Dun. Dig. 424.

Exclusion of evidence either admitted or substantially proved was not prejudicial error. Elness v. P., 190M169, 251NW183. See Dun. Dig. 424.

Reception of evidence could not have been prejudicial where verdict was very small. Thorson v. A., 190M200, 251NW177. See Dun. Dig. 424.

Error in refusing to strike out a part of an expert's answer which was speculative, indefinite, and uncertain as to an injury to plaintiff's back held without prejudice. Johnston v. S., 190M269, 251NW525. See Dun. Dig. 424.

Admission of copy of original deposition without laying foundation was harmless error where evidence required directed verdict against objecting party. Edward Thompson Co. v. P., 190M566, 252NW438. See Dun. Dig. 422, 7180.

No prejudice could result to plaintiff by ruling excluding evidence, where judgment roll conclusively showed complaint failed to state facts to constitute a cause of action. Calhoun Beach Holding Co. v. M., 190M576, 252 NW442.

Trial court's erroneous determination as to qualification of an expert witness is not ground for new trial in absence of prejudice to losing party. Palmer v. O., 191M204, 253NW543. See Dun. Dig. 7201.

In action to enjoin violation of seniority rights as employees of a railway, any error in receiving opinion of experienced officers of brotherhoods as to whether any seniority rights were violated was without prejudice where record compelled finding that no rights were violated. George T. Ross Lodge v. B., 191M373, 254NW 590. See Dun. Dig. 424.

Admission of expert opinion evidence that repairs and repair parts were minor and incidental only, if error, was not prejudicial. General Motors Truck Co. v. P., 191M467, 254NW580. See Dun. Dig. 424.

Where defendant was permitted to introduce four photographs of two street cars after they had been jacked up to permit release of occupants of automobile, it could not be said that it was error to admit one photograph introduced by plaintiff and described by witness as "the way it looked when they were jacked up." Luck v. M., 191M503, 254NW609. See Dun. Dig. 3260.

There was no harm in admission in evidence of items of hospital and medical expenses where trial court removed them from verdict. Id. See Dun. Dig. 423.

Admission of testimony as to what witness understood was meaning of conversation and words used in negotiations, though conclusions of witness, was without prejudice where trial was before court without jury and court heard what words used in claimed conversation were. Hawkins v. H., 191M543, 254NW809. See Dun. Dig. 416.

Even though a minor defendant were not a proper party defendant, it was not prejudicial error to permit him to be called for cross-examination under the statute, as he could have been called as a witness for plaintiff and court would have permitted a cross-examination irrespective of the statute. Wagstrom v. J., 192 M220, 255NW822. See Dun. Dig. 424.

In action for conversion by purchaser of automobile against finance company, no harm could come to plaintiff from refusal to let defendant explain letters "C. C. T.," appearing in invoice, plaintiff having admitted that sale had to be financed, and such letters representing initials of finance company. Saunders v. C., 192M272, 256NW142. See Dun. Dig. 424.

Where the evidence is close and conflicting on a vital issue in case, rejection of competent and material testimony bearing on such issue is reversible error. Taylor v. N., 192M415, 256NW674. See Dun. Dig. 422.

In action for personal injuries suffered in construction of barn for farmer, there was no reversible error in admission of evidence as to acreage of defendant's farm, no questions being asked as to value of farm, or as to acreage under cultivation, or as to its productiveness, or as to encumbrances, and record showing no effort to impress upon jury that defendant was well fixed financially. Gilbert v. M., 192M495, 257NW73. See Dun. Dig. 422.

Refusal to strike out testimony of physician that it was possible that decedent had a fracture of the skull was without prejudice where skull fracture was not included as one of facts upon which physician based his opinion that accident aggravated weak heart condition and contributed to cause death. Albrecht v. P., 192M557, 257NW377. See Dun. Dig. 422(94), 3337.

In action against endorser of a promissory note where issue was as to whether words "without recourse" were stricken before or after endorsement and delivery, it was not prejudicial error to admit evidence showing that maker of note was adjudicated a bankrupt shortly after transfer of note, under circumstances of case. Keyser v. R., 192M588, 257NW503. See Dun. Dig. 422(94).

If it was error for truck driver to testify that he had used gasoline before to clean oil filter and motor and that no fire or injury had occurred, it was so inconsequential that it could not have prejudiced plaintiff suing for damages occasioned by fire resulting from use of gasoline. Hector Const. Co. v. B., 194M310, 260NW496. See Dun. Dig. 424.

Denial of motion to exclude X-rays from jury could not have prejudiced defendant where X-rays were received in evidence only in connection with extent of injuries, and defendant is not challenging verdict as excessive. Erickson v. K., 195M164, 262NW56. See Dun. Dig. 424.

Where evidence is finally received, a party may not properly complain of previous rulings excluding it. Cashman v. B., 195M195, 262NW216. See Dun. Dig. 424.

Admission in evidence of privileged communications to physicians was immaterial where other testimony required a directed verdict. Sorenson v. N., 195M298, 262 NW868. See Dun. Dig. 422(94).

It was not prejudicial error to admit in evidence a letter relied upon to toll statute of limitations. Olson v. M., 195M626, 264NW129. See Dun. Dig. 424.

Permitting introduction of evidence indicating that defendant was protected by insurance, held without prejudice. Nye v. B., 196M330, 265NW300. See Dun. Dig. 424.

Allowing witness to be impeached on an immaterial point, held not sufficiently substantial to indicate prejudice. Id.

Whether testimony, objected to as conversation with a person since deceased, was improperly admitted, was immaterial, where only conclusion possible under all other evidence in case was that industrial commission properly denied compensation. Anderson v. R., 196M 358, 267NW501. See Dun. Dig. 424.

No prejudice resulted from rulings excluding evidence purporting to prove facts which court assumes proven. Newgard v. F., 196M548, 265NW425. See Dun. Dig. 424.

No harm could result to defendant from certain testimony as to services which court instructed jury to not include in verdict. Kolars v. D., 197M183, 266NW705. See Dun. Dig. 424.

A new trial may not be awarded for exclusion of evidence not shown to be material. Anderson v. A., 197M 252, 266NW741. See Dun. Dig. 424.

It is not necessary that ruling of trial court on a question of admission of evidence be sustained on basis of same reason given by court at trial. Davis v. R., 197 M287, 266NW855. See Dun. Dig. 421.

Where a nonexpert witness was allowed to express an opinion on mental capacity without first detailing facts upon which his opinion was based, and record is such that trial court could have found for either party, admission of opinion testimony was reversible error even though trial was before a court without a jury. Johnson v. H., 197M496, 267NW486. See Dun. Dig. 424.

Where objectionable evidence is received, but before final submission court perceives error and instructs jury to disregard it, presumption is that no prejudice resulted. Lorberbaum v. C., 198M289, 269NW646. See Dun. Dig. 416, 423, 424.

No reversible error was made in not receiving in evidence a wrist watch worn by the wife, which had stopped at 12:15, for, without objection, witnesses not contradicted testified that watch so indicated, and, moreover, that fact did not tend to prove that she survived her husband. Miller v. M., 198M497, 270NW559. See Dun. Dig. 424.

Admission of evidence as to injury to defendant's leg in collision offered as tending to show that defendant had foot on brake, held not so prejudicial as to require new trial. Dehen v. B., 198M522, 270NW602. See Dun. Dig. 424.

Error in admission of evidence was not prejudicial where matters testified to were shown by other ample evidence. Tri-State Transfer Co. v. N., 198M537, 270NW 684. See Dun. Dig. 424.

Error in excluding evidence is cured when the evidence is later received. Bird v. J., 199M252, 272NW168. See Dun. Dig 7192.

Error, if any, in receiving impeachment testimony, is cured by receiving evidence of same facts offered by complaining party. Id.

Where policemen were permitted to testify over objection as to conversations had with motorman 15 to 20 minutes after accident involved, upon theory that statements were within so-called res gestae, and fact sought to be proven by admission of this testimony was established by other evidence as a matter of law, error, if any, was without prejudice. Lacheck v. D., 199M519, 273NW366. See Dun. Dig. 424.

Receipt in evidence of record of appeal proceedings in which part of services sued for were performed held not prejudicial to defendant. Daly v. D., 273NW814. See Dun. Dig. 424.

Improper questions and answers in examination of a physician, were not reversible error where final conclusion of witness was very favorable to appellant. Brossard v. K., 274NW241. See Dun. Dig. 418.

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. 173 M529, 217NW933.

A remark of counsel, promptly withdrawn, held not prejudicial misconduct. Dumbeck v. C., 177M261, 225NW 111.

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. 178M 353, 227NW203.

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

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

Misconduct of counsel cannot be held prejudicial to plaintiff, where defendants were entitled to a verdict and plaintiff offered no evidence as to amount of recovery. Renn v. W., 185M461, 241NW581. See Dun. Dig. 416.

Improper reference to insurance company by plaintiff's attorney, promptly rebuked by court, held not prejudicial. Harris v. R., 189M599, 250NW577. See Dun. Dig. 423, n. 6.

In automobile collision case any misconduct of counsel in overstating width of truck and in demanding verdict for large amount was not prejudicial. Erickson v. K., 195M164, 262NW56. See Dun. Dig. 424.

Experience of undertaker was such that he was properly permitted to testify whether or not water bubbling from mouth of a body found submerged came from lungs; and remark of court in referring to fact of no water issuing from mouth should not result in a new trial because of the addition of words "or lungs." Miller v. M., 198M497, 270NW559. See Dun. Dig. 424.

Alleged improper remarks relative to statements secured from witness prior to trial were not prejudicial where court instructed jury that obtaining of statement was proper. Tri-State Transfer Co. v. N., 198M537, 270 NW684. See Dun. Dig. 423.

Repeated reference by plaintiff's counsel to nonresidence of defendant's counsel and that of their expert medical witnesses held not prejudicial. Finney v. N., 198M554, 270NW592. See Dun. Dig. 424.

Judgment will not be reversed for improper argument of plaintiff's counsel which could only affect amount of damages where smallness of verdict indicates that no prejudice resulted. Elkins v. M., 199M63, 270NW914. See Dun. Dig. 424.

In action for death of husband in motor vehicle collision, reference to matter of workman's compensation was not prejudicial to plaintiff where court fully advised jury that it was not to take into consideration fact that plaintiff might be entitled to compensation from her deceased husband's employer, owner of one of the vehicles involved, especially as plaintiff requested that court tell jury why she could not sue her husband's employer. Becker v. N., 274NW180. See Dun. Dig. 423.

6. Instructions.

Inadvertent failure of court to include a small item in computing amount due was not ground for reversal. 171 M461, 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. 172 M493, 215NW861.

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

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

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

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

Use of word "fraud" in connection with defense of prohibited additional insurance held not prejudicial error. 178M305, 227NWJ9.

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

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

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

Failure to instruct concerning future suffering and inconvenience, held not prejudicial. 181M506, 233NW 237. See Dun. Dig. 422(95).

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

The reading of part of the pleadings in argument to the jury disapproved, but held not reversible error where the court by its charge, clearly defines and limits the issues for the jury to determine. Bullock v. N., 182M 192, 233NW858. See Dun. Dig. 423, 424.

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

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

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

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

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

Any error of court in permitting jury to consider permanent injury was without prejudice where it is apparent from size of verdict that no permanent injuries

were found by the jury. Ball v. G., 185M100, 240NW100. See Dun. Dig. 424.

In action by real estate broker for commissions wherein exclusive right of sale was not issue, instruction concerning exclusive right, held not such as to mislead jury. Kaercher v. S., 189M272, 249NW180. See Dun. Dig. 424.

Error of court in reading quotations from reported decision in his charge, held not prejudicial. Christensen v. P., 189M548, 250NW363. See Dun. Dig. 422.

When the charge refers to permanent injuries and goes to amount of damages, and is not otherwise prejudicial, and damages are not claimed to be excessive, an error in charge as to recovery for permanent injuries is not prejudicial. Romann v. B., 190M419, 252NW80. See Dun. Dig. 422.

An error by court in charge, in reference to width of defendant's truck, was corrected and cured when attention thereto was called. Kouri v. O., 191M101, 253NW98. See Dun. Dig. 9796.

Failure of court to mark as given, refused, or modified, requests to charge, no inquiry having been made for information as to what had been done with requests or as to which would be given, was not in and of itself prejudicial error. Kouri v. O., 191M101, 253NW98. See Dun. Dig. 9771a, 9776a.

An instruction in action against hotel as bailee of ring that "it makes no difference what care the defendant may have taken of its own property * * * and the care it may give to its own property is of no importance," if error, was without prejudice. Peet v. R., 191M151, 253NW546. See Dun. Dig. 422.

Any error in instruction as to prima facie case for plaintiffs with respect to endorsements of payments which would extend time for suit was cured by later instructions clearly placing burden upon plaintiffs to show that payments by comaker were directed to be paid by defendant. Erickson v. H., 191M177, 253NW361. See Dun. Dig. 9796.

Instruction in respect to special damages in personal injury case, although not technically accurate, held not prejudicial. Gilbert v. M., 192M495, 257NW73. See Dun. Dig. 422.

Use of expression "loss of earnings" instead of "loss of earning capacity" in an instruction in an action for personal injury, if error, was harmless. Fredhom v. S., 193M569, 259NW80. See Dun. Dig. 2576.

Where there are two or more issues tried and submitted to jury, and verdict is a general one, it cannot be upheld if there was error in instructing jury as to, or in submitting to jury, any one of issues. Goldberg v. G., 193M600, 259NW402. See Dun. Dig. 7168.

In action for death in elevator shaft to which there were no eye witnesses, sentence at end of charge "with reference to the presumption of due care that accompanied the plaintiff, the burden of overcoming that presumption rests upon the defendant" held not prejudicial in view of accurate and more complete instruction in body of charge. Gross v. G., 194M23, 259NW557. See Dun. Dig. 423.

An unnecessary instruction, being correct, was not prejudicial. Hector Const Co. v. B., 194M310, 260NW496. See Dun. Dig. 422.

A party cannot complain of an erroneous instruction which is favorable to it. Id. See Dun. Dig. 418.

Any error of court in not submitting to jury question of whether automobile collision occured within residential portion of village was immaterial if plaintiff was guilty of contributory negligence as matter of law regardless of violation of speed regulation by defendant. Faber v. H., 194M321, 260NW500. See Dun. Dig. 424.

In action for conversion of newspapers, instruction that jury could find a verdict at rate of three cents per copy was not prejudicial where amount of verdict indicated that it was based upon cost of printing and materials. Fryberger v. A., 194M443, 260NW625. See Dun. Dig. 424.

Instruction of court that infant must disaffirm contract promptly within a reasonable time after he reaches his majority was not erroneous though the word "promptly" was inadvisedly used. Kelly v. F., 194M465, 261NW460. See Dun. Dig. 4446.

Error of court in improperly submitting special verdict in connection with wilfullness of negligence for purpose of preventing subsequent discharge in bankruptcy, held not to require reversal of judgment on general verdict for simple negligence. Raths v. S., 195M225, 262NW563. See Dun. Dig. 424.

One cannot complain of a charge which is unduly favorable to him. Union Cent. Life Ins. Co. v. F., 196 M260, 264NW786. See Dun. Dig. 418.

Where two or more material issues are submitted to jury and a general verdict returned, and one issue so submitted is not sustained by any evidence, there must be a new trial unless it conclusively appears that party in whose favor verdict was obtained was entitled thereto as a matter of law on one or more other issues submitted. Cavallero v. T., 197M417, 267NW370. See Dun. Dig. 9783.

Instruction that it is duty of one to left to yield right of way was prejudicial and misleading where there was evidence indicating that one having right of way had forfeited it by unlawful speed. Draxten v. B., 197M511, 267NW498. See Dun. Dig. 416, 424.

In action by guest against driver and owner of automobile, verdict for driver cured any possible error in submitting to jury question of driver's implied authority to invite plaintiff to ride. Manos v. N., 198M347, 269NW 839. See Dun. Dig. 424.

Court's cautionary charge that "the fact that defendant's truck ran out of gas and if that was negligence, it was not such as contributed directly or proximately to the collision, and is not to be considered by you as an act of negligence contributing to this collision in this case," held not prejudicial, where plaintiff then conceded and on appeal asserts that he is not and was not basing right of recovery upon such theory, especially where no suggestion was made at time of trial that such charge was out of place or harmful to his cause. Hartwell v. P., 198M488, 270NW570. See Dun. Dig. 424.

A litigant cannot tacitly consent to a charge and later, when disappointed by verdict, obtain a new trial for mere omission or inadvertence in language omitted or chosen by court in giving such charge. Dehen v. B., 198M522, 270NW602. See Dun. Dig. 424.

Where questions of negligence and proximate cause are properly submitted to jury, it is not prejudicial error to fail to charge that if negligence of a third person was sole proximate cause of accident, its verdict must be for defendant. Lacheck v. D., 199M519, 273NW 366. See Dun. Dig. 9776a.

Defendant may not assign error on a charge concerning construction of a contract which resulted in award to plaintiff of less than latter would have recovered under construction contended for at trial by defendant. Barnard-Curtiss Co. v. M., 274NW229. See Dun. Dig. 418.

Technical error in charge, with respect to burden of proof to show excuse for leaving a gauze pack within wound of operation, cannot be held prejudicial to doctors who admitted responsibility for its remaining there and attempted to show that an emergency necessitated such haste as excused care otherwise required. Brossard v. K., 274NW241. See Dun. Dig. 7491.

7. Findings of fact and verdicts.

181M132, 231NW798.

Lack of evidence to sustain a finding which does not prejudice appelant 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. 176M225, 222NW926.

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

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

In an action against father and son on a note, a finding that father had no knowledge of certain transactions between plaintiff and son, whether supported by evidence or not was immaterial, where court held father bound by what son did as manager of business regardless of knowledge. Kubat v. Z., 193M522, 259NW1. See Dun. Dig. 422(98).

Supreme court having arrived at same construction of trust agreement as court below from consideration of instrument alone, it is immaterial that certain findings of fact were not sustained by evidence. Towle v. F., 194M520, 261NW5. See Dun. Dig. 424.

Where jury awarded $2,000 compensatory damages for willful, wanton and malicious assault, defendant was not prejudiced by cause in verdict "and punitive damages in accordance with Minnesota statutes," plaintiff accepting verdict for compensatory damages only. Goin v. P., 196M74, 264NW219. See Dun. Dig. 418.

Court will not set aside a verdict for purely compensatory damages because jury thought punitive damages should also be assessed. Id. See Dun. Dig. 424.

Failure of court to comply with statute requiring written decision separately stating facts and conclusions was cured by filing of a memorandum, which states facts found and conclusions of law separately. Trones v. O., 197M21, 265NW806. See Dun. Dig. 424.

There being two other findings, each sufficient to sustain conclusions of law and judgment, plaintiffs are not entitled to have judgment reversed for any error in finding of adverse possession. Lamprey v. A., 197M112, 266NW434. See Dun. Dig. 424.

Defendant cannot complain because jury awarded to plaintiff less than evidence would have permitted. Daly v. D., 273NW814. See Dun. Dig. 418.

9. Entry of judgment.

Procedural error in permitting defendant to have judgment entered against itself without giving five days notice as required by district court rules, and refusal of court to vacate judgment, was not prejudicial, where judgment was entered for correct amount. Martin Brothers Co. v. L., 198M321, 270NW10. See Dun. Dig. 424.

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., 182M586, 235NW278. See Dun. Dig. 401.

An admission of a town in its pleading does not preclude interveners from that town to prove that facts are to contrary in proceeding involving validity of organization and boundaries of a city. State v. City of Chisholm, 199M403, 273NW235. See Dun. Dig. 4901a.

9287. Issues, how joined.

2. Issues of fact.

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

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

RIGHT TO JURY TRIAL

½. In general.

Where evidence is conflicting or different, conclusions may reasonably be drawn from it, question of fact for jury is presented. Karlson v. U. S., (USCCA8), 82F(2d) 330.

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.

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

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

Jury are exclusive judges of all questions of fact, including, as well, inferences to be drawn therefrom. Anderson v. K., 196M578, 265NW821. See Dun. Dig. 9707.

A verdict for a party should be directed by court where it clearly appears upon consideration of all evidence that it would be its duty to set aside a verdict against such party. Yates v. G., 198M7, 268NW670. See Dun. Dig. 9764.

Where both parties moved court to make findings upon all issues, and to make conclusions of law therefrom, neither party can complain that case should have been submitted to jury for a general verdict, nor can one party complain that court set aside answer to one of two questions submitted to jury. Coughlin v. F., 199M 102, 272NW166. See Dun. Dig. 5234.

2. Statutory provision.

Effect of foreign substantive law in determining whether question is for court or jury. 15MinnLawRev 703.

5. Equitable actions.

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

6. Mixed actions.

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

Where there was a general verdict on two material issues, it was error to submit one of such issues which should have been decided for plaintiff as matter of law. First Nat. Bank v. F., 190M102, 250NW806.

7. Held not entitled to jury trial.

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

Trial of action to set aside and invalidate a trust deposit in a savings account in a bank is not a jury case, even if relief asked is recovery of money in such account. Coughlin v. F., 199M102, 272NW166. See Dun. Dig. 9835.

7½. Questions for jury.

For the purpose of a motion for a directed verdict interposed by defendant plaintiff's evidence must be accepted as true, though disputed by defendant's witnesses. Jacobson v. C. (CCA8), 66F(2d)688.

It is only where facts are such that all reasonable men must draw same conclusion from them that a question of negligence becomes one of law for court. Sears, Roebuck & Co. v. P. (USCCA8), 76F(2d)243.

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, 219 NW185.

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. 181 M603, 233NW313. See Dun. Dig. 3322(4).

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

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

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

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

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

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

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

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

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

It is error to submit to a jury an issue as to which there is no evidence, or which must be decided one way or the other as matter of law on uncontradicted proof. Hall v. G., 188M20, 246NW466. See Dun. Dig. 7174, 9707.

On a motion for a directed verdict, evidence is to be viewed in most favorable light for adverse party. Bayerkohler v. C., 189M22, 248NW294. See Dun. Dig. 9764(43).

Dentist in malpractice action was not entitled to directed verdict if evidence justified recovery under correct principles of law, though insufficient under erroneous standard set forth in instructions given at defendant's request. Ellering v. G., 189M68, 248NW330. See Dun. Dig. 7486a, 7488.

Court rightly refused to direct verdicts and to grant judgments notwithstanding verdicts if there was evidence to sustain verdicts. Holland v. M., 189M172, 248 NW750. See Dun. Dig. 5082, 9764.

While a jury may not be permitted to guess as between two equally persuasive theories consistent with circumstantial evidence, such evidence in a civil case need not exclude every reasonable conclusion other than that arrived at by jury. It is sufficient if reasonable minds may conclude from circumstances that theory adopted by verdict outweighs and preponderates over any other theory. It need not prove conclusion arrived at beyond a reasonable doubt or demonstrate impossibility of every other reasonable hypothesis. Sherman v. M., 191M607, 255NW113. See Dun. Dig. 3473.

Fact issues properly determinable by a jury may not be taken away from that body and decided by the court when seasonable objection is made. W. T. Rawleigh Co. v. S., 192M483, 257NW102. See Dun. Dig. 5230.

Court can take question of negligence from jury only where reasonable minds could not differ as to inference to be drawn from proof. Guile v. G., 192M548, 257NW 649. See Dun. Dig. 7048.

To give rise to res ipsa loquitur it must appear, among other things, that the instrumentality inflicting the injury was under control of defendant, and where there is dispute as to this factor, it is proper to submit this issue to jury under instructions, such that if they find *defendant to be in control of instrumentality*, then they may apply res ipsa loquitur, otherwise not. Hector Const. Co. v. B., 194M310, 260NW496. See Dun. Dig. 9788.

On motion for directed verdict all evidence admitted must be considered as properly received, and motion should not be denied because defense established by evidence was neither pleaded nor litigated by consent. Robbins v. N., 195M205, 262NW872. See Dun. Dig. 9764.

It is for jury to determine facts where medical experts give contradictory opinions as to cause of a death. Jorstad v. B., 196M568, 265NW814. See Dun. Dig. 9707.

A verdict cannot be based on mere possibilities, speculation or conjecture. Bauer v. M., 197M352, 267NW206. See Dun. Dig. 7047(72).

Question of speed is one peculiarly for jury. Polchow v. C., 270NW673. See Dun. Dig. 9707.

Motion of a defendant in a personal injury action for a directed verdict should be granted only in cases where evidence against plaintiff is clear, whether basis of motion be want of negligence in defendant or contributory negligence in the plaintiff. Jude v. J., 199M217, 271 NW475. See Dun. Dig. 9843.

ISSUES TO THE JURY IN EQUITABLE ACTIONS

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

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

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

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

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

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

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

17. Findings of jury how far conclusive on court.
Verdict of jury upon specific question of fact submitted in an equity action is as binding as general verdict in a legal action. Ydstie's Estate, 195M501, 263NW447. See Dun. Dig. 415.

9290. Of law, how brought to trial.
Motion for new trial must be heard within judge's judicial district unless consent is given by the parties to hear it outside of district. 173M271, 217NW351.

9292. Continuance.
Generally the granting of a continuance lies wholly in the discretion of the trial court. 174M297, 219NW180.

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

In refusing to continue to later date hearing on order to show cause why a receiver should not be appointed to collect rents on mortgaged property, and in allowing an amendment to complaint, court did not abuse its discretion. Minneapolis Sav. & Loan Ass'n v. Y., 193M632, 259NW382. See Dun. Dig. 7708.

JURY TRIALS

9293. Jury, how impaneled—Ballots—etc.
Jurors may be examined before being sworn as to their interest in insurance company defending suit. 181 M4, 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., 183M 256, 236NW312. See Dun. Dig. 5252.

9294. Challenges.
See §9469-3, relating to juries in counties of over 400-000 population.

3. Implied bias.
Evidence does not support charge of misconduct of a juror in failing to disclose acquaintance with defendant. Carl Lindquist & Carlson, Inc., v. J., 182M529, 235NW 267. See Dun. Dig. 5253.

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

9295. Order of trial.
In the second trial of a case, a party is not concluded by his counsel's opinion of the legal effect of the contract, expressed during the course of the first trial. Hayday v. H., 184M8, 237NW600. See Dun. Dig. 688(34), 9792, 9793.

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

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

1½. What constitutes resting case.
Where plaintiff introduces sufficient evidence upon which findings can be made in favor of defendants, but neither formally rests nor asks for permission to dismiss, court is justified in concluding that cause was submitted for findings and decision. Calhoun Beach Holding Co. v. M., 190M576, 252NW442.

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., 183M256, 236NW312. See Dun. Dig. 3232(67).

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

After objections to questions, obviously asked for purpose of insinuating that plaintiff was malingering, were sustained, court should also have admonished jury to disregard insinuation implied by questions. Hill v. R., 198M199, 269NW397. See Dun. Dig. 9789.

Where defendant asked to see statement which was property of plaintiff, and counsel for plaintiff voluntarily handed it over to defendant's counsel without any direction from court, plaintiff cannot complain that defendant's counsel had no right to possession of same. Tri-State Transfer Co. v. N., 198M537, 270NW684. See Dun. Dig. 9721a.

1⅞. Disclosing protection by insurance.
In action against owners of three motor vehicles, it was inexcusable for plaintiff's attorney at opening of trial while veniremen were in box to elicit testimony that certain defendants were not protected by insurance. Brown v. M., 190M81, 251NW5. See Dun. Dig. 5252.

In automobile case, if insurance company is defending, counsel for plaintiff may inquire of prospective jurors whether they are connected with or interested in insurer. Id. See Dun. Dig. 5252.

No prejudice resulted from defendant's bringing out fact that insurance corporation was interested in plaintiff's side of case, where jurors also were informed that one likewise was interested in defendant's claim of no liability. Tri-State Transfer Co. v. N., 198M537, 270NW 684. See Dun. Dig. 422.

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.

Where defendants at trial contradicted a very material part of testimony of certain man and wife, virtually asserting that they were not at scene of accident, court did not err in permitting plaintiff on rebuttal to introduce testimony of a little girl merely for purpose of showing that witnesses were at place of accident. Luck v. M., 191M503, 254NW609. See Dun. Dig. 9715.

Trial court has large discretion in permitting evidence to go in on rebuttal even though not proper rebuttal. Id.

Trial court may in his discretion direct order of trial of issues raised by pleading. Detwiler v. L., 198M185, 269NW838. See Dun. Dig. 9715.

Where one of defendant's witnesses was discredited on cross-examination through showing of inconsistent statements, it was not proper on redirect to show that other statements made by witness were consistent with his testimony upon direct examination. Tri-State Transfer Co. v. N., 198M537, 270NW684. See Dun. Dig. 10351.

3¼. Argument.
While it is ordinarily improper for either court or counsel to read pleadings to jury, yet, even without its introduction in evidence, an admission in a pleading may be read to jury in argument for adversary of pleader. Hork v. M., 193M366, 258NW576. See Dun. Dig. 3424, 9783a.

In automobile collision case any misconduct of counsel in overstating width of truck and in demanding verdict for large amount was not prejudicial. Erickson v. K., 195M623, 262NW56. See Dun. Dig. 9799.

Reference in closing argument to a colloquy had in court's chambers was not prejudicial error where there was no attempt to get inadmissible evidence before jury. Tri-State Transfer Co. v. N., 198M537, 270NW684. See Dun. Dig. 424.

Emphasis by defendant's counsel that witness for defendant had sustained severe injuries in accident held not objectionable as conveying to jurors impression that unless defendant prevailed witness might be hampered in an action he was bringing on his own behalf. Id. See Dun. Dig. 3230.

Repeated reference in argument to fact that counsel for opponent had made numerous objections to admission of testimony was not prejudicial, argument merely recounting that which actually took place. Id. See Dun. Dig. 9799.

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, 217NW 127.

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., 182M 192, 233NW858. See Dun. Dig. 9783a(71).

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

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

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

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

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

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

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

Charge on apparent authority held substantially correct, and not to take from jury question of actual authority of collision insurance adjuster. Breuer v. C., 188M112, 246NW533. See Dun. Dig. 1935.

Reading in charge quotations from reported decisions is disapproved. Christensen v. P., 189M548, 250NW363. See Dun. Dig. 9781, n. 49.

Instruction, in substance, that a party to a deal may not rely for a recovery upon fraudulent representations which he knows to be false when made, was correct in view of evidence. Greear v. P., 192M287, 256NW190. See Dun. Dig. 3822.

Additional instructions given in absence of counsel that recovery could only be based on fraud or misrepresentation and not upon breach of contract of exchange were appropriate and correct, in action for damages for conspiracy to defraud. Id. See Dun. Dig. 9790.

A party is not entitled to a new trial merely because his counsel were not afforded opportunity to be present when court instructed jury when jury came into court after submission of case and asked for further instructions. Id. See Dun. Dig. 9790.

In replevin by seller to recover soda fountain sold for small down payment, balance secured by chattel mortgage, an instruction that if jury found that the order, promissory note, and chattel mortgage were obtained by fraud, they were to be considered as waste paper held erroneous and inapplicable under the evidence. Knight Soda Fountain Co. v. D., 192M387, 256NW657. See Dun. Dig. 9781.

In action for injuries received when scaffold fell, court did not err in failing to instruct that a verdict could not be based on mere speculation and conjecture. Gilbert v. M., 192M495, 257NW73. See Dun. Dig. 9774.

In action for death in elevator shaft to which there were no eye witnesses, sentence at end of charge "with reference to the presumption of due care that accompanied the plaintiff, the burden of overcoming that presumption rests upon the defendant" held not prejudicial in view of accurate and more complete instruction in body of charge. Gross v. G., 194M23, 259NW557. See Dun. Dig. 9788.

In action for negligence in setting fire through use of gasoline in cleaning motor of truck, it was unnecessary to instruct jury on question of proximate cause where there was no question but that acts complained of were proximate cause of fire. Hector Const. Co. v. B., 194M 310, 260NW496. See Dun. Dig. 9783.

Instruction held to properly define res ipsa loquitur. Id. See Dun. Dig. 7044.

Where words of a statute are plain and easily understood court is not required to explain same further than reading statute to jury; no written requests to charge having been submitted to court. Clark v. B., 195M44, 261 NW596. See Dun. Dig. 9781(48).

In action in state court for damages for death, court in defining wilful and wanton negligence in connection with special verdict submitted to prevent subsequent discharge of defendant in bankruptcy should properly define "wilful and malicious injury" in conformity with decisions of federal court. Raths v. S., 195M225, 262NW 563. See Dun. Dig. 9783.

Instruction that if evidence preponderated in favor of defendant, jury should return a verdict for him, held not erroneous when read in connection with other instructions properly placing burden of proof upon plaintiff. Erickson v. K., 195M623, 262NW56. See Dun. Dig. 9788.

Where there is no evidence from which jury might reasonably infer contributory negligence, it is prejudicial error to submit that question to jury. Cogin v. I., 196M493, 265NW315. See Dun. Dig. 9781(35).

Arguments and tests used in judicial opinions, even though good law, are not written for purpose of being used as instructions to a jury. Vogel v. N., 196M509, 265 NW350. See Dun. Dig. 9781.

In action by employee against benefit association in which defense was that plaintiff was intoxicated at time of accident, court erred in charging that plaintiff's plea of guilty of drunkenness was "not a material thing but merely an item of evidence in the whole case," the plea being a very material item. Holdys v. S., 198M258, 269 NW468. See Dun. Dig. 9784.

In action by guest in automobile for injuries received in collision with straying horse, instruction that fact that owner of horse may have been negligent in allowing it to be loose upon highway did not prevent a recovery by plaintiff, cured any wrong impression that jury might possibly have had from previous mention of horse owner's negligence. Manos v. N., 198M347, 269NW839. See Dun. Dig. 423.

Where court charged that violation of statutory provisions, duly read to jury, was negligence, necessity for any further charge as to distinction between common-law negligence and violation of statutory duty was unnecessary. Dehen v. B., 198M522, 270NW602. See Dun. Dig. 4162a.

Charge is to be considered as a whole to determine whether particular matter has been properly covered. Elkins v. M., 199M63, 270NW914. See Dun. Dig. 9781.

A charge should be applicable to facts of case. Bird v. J., 199M252, 272NW168. See Dun. Dig. 9781.

If when examined as a whole a charge is impartial, clear and correct, it is sufficient. Marino v. N., 199M 369, 272NW267. See Dun. Dig. 9781.

A charge stating a fact in alternative leaves it to jury to ascertain fact. Id.

Repetition, at request of jury, of summary of what jury should find on issues of negligence and contributory negligence, furnishes no cause for a new trial. Ames v. C., 273NW361. See Dun. Dig. 9781(45), 9790.

In a collision between two automobiles in intersection of two highways, an instruction correctly defining negligence and contributory negligence and properly placing burden of proof of latter on defendant, and, as a summary, stating, if jury found from all evidence that defendant was negligent proximately causing plaintiff's injuries and that plaintiff was free from contributory negligence, verdict would be for plaintiff; if they did not so find verdict should be for defendant, held not erroneous nor misleading. Id. See Dun. Dig. 9783.

Right of trial judge to comment on evidence in charge to jury in civil and criminal cases. 18MinnLawRev441.

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, 233NW 14. See Dun. Dig. 9716.

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

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

4½. Remarks and conduct of judge.

Court held not in error in asking a question of a witness, nor in saying to jury that counsel acted properly in objecting to question, nor in stating bearing, if any, which answer of witness had upon his credibility. Potter v. I., 190M437, 252NW236. See Dun. Dig. 9706.

Repeated reference by plaintiff's counsel to nonresidence of defendant's counsel and that of their expert medical witness held not prejudicial. Finney v. N., 198 M554, 270NW592. See Dun. Dig. 9799.

Answer to a juror's uncalled for inquiry was no attempt of court to coerce jury to agree on a verdict. Ames v. C., 273NW361. See Dun. Dig. 9812.

9296. View of premises—Procedure.

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

9298. Requested instructions.

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

2½. Writing by court of disposition of requests.

Failure of court to mark as given, refused, or modified, requests to charge, no inquiry having been made for information as to what had been done with requests or as to which would be given, was not in and of itself

prejudicial error. Kouri v. O., 191M101, 253NW98. See Dun. Dig. 9771a, 9776a.

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, 220NW 949.

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

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

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

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

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

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

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

It is not error to refuse a requested instruction which is so specific that no evidence can be found which would justify holding it error to refuse to give it. O'Connor v. C., 190M277, 251NW674. See Dun. Dig. 9774.

Where issue was whether plaintiff and defendant insurance company had an oral contract for renewal insurance—not whether an oral contract was made between plaintiff and agent personally; it was not error to refuse to submit to jury whether there was a contract between plaintiff and agent personally. Schmidt v. A., 190M585, 252NW671. See Dun. Dig. 4647, 4691a.

Where suit was based exclusively upon fraudulent misrepresentation made to induce purchase, court did not err in refusing in its charge to discuss written contract of purchase, suit not being for breach of any warranty. Nat. Equipment Corp. v. V., 190M596, 252NW835. See Dun. Dig. 8612.

There was no error in refusing certain requested instructions which were either confusing or inapplicable under evidence, or misleading. Palmer v. O., 191M204, 253NW543. See Dun. Dig. 9781.

Plaintiff, a passenger on street car standing on rear platform ready to alight, was thrown against sides of platform and injured. Evidence made it a jury question whether she lost her balance from sudden stopping of street car or from impact of automobile against rear doors of street car; hence plaintiff was not entitled to an instruction that street car company, not a party to the action, was free from negligence. Jannette v. M., 193M 153, 258NW31. See Dun. Dig. 9781, 7000.

Requested instructions either inaccurate or not pertinent under the evidence were rightly refused. Gross v. G., 194M23, 259NW557. See Dun. Dig. 9774.

Where there was some reference in evidence to an alleged justice court judgment in unlawful detainer no claim was pleaded or presented by plaintiff at trial that this alleged judgment was a bar to any defense, and plaintiff was asked to produce this judgment, and declined so to do, court did not err in failing to charge as to something not pleaded or litigated and not even suggested to trial court. Pettersen v. F., 194M265, 260NW 225. See Dun. Dig. 9774.

Where there was no evidence of contributory negligence, court did not err in refusing to submit such defense to jury. Paulos v. K., 195M603, 263NW913. See Dun. Dig. 9774(86).

Certain requested instructions were either sufficiently covered in the charge, or were properly denied because the evidence was such that the jury could not apply them. Kolars v. D., 197M183, 266NW705. See Dun. Dig. 9774.

A requested instruction was properly denied because not applicable under the evidence. Lorentz v. A., 197 M205, 266NW699. See Dun. Dig. 9774.

A requested instruction with regard to rule covering emergencies was properly refused because it failed to state complete rule as stated in Johnson v. Townsend, 195M107, 110, 261NW859, 861. Carlson v. S., 273NW665. See Dun. Dig. 7020.

5½. Informing jury that instruction was given on request.

Court disapproves of action of a trial court in announcing that any portion of its charge is given at request of either party. Carlson v. S., 273NW665. See Dun. Dig. 9781.

6. Request covered by the general charge.

181M245, 232NW38.

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

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

There is no prejudice in refusing instruction where charge as a whole is sufficiently favorable. Dickinson v. L., 188M130, 246NW669. See Dun. Dig. 9777.

Court having given correct general charge as to damages did not err in refusing to instruct that jury could not consider contention that condition of kidney was result of accident. Orth v. W., 190M193, 251NW127. See Dun. Dig. 9777.

Having given fair charge as to damages, court was not required to instruct jury that they were not to speculate upon what evidence excluded by court might have been. Id.

There is no error in refusing requested instruction where its equivalent has been given in slightly different form. O'Connor v. C., 190M277, 251NW674. See Dun. Dig. 9775, n. 8.

It is no error to refuse requested instructions sufficiently covered by general charge. Kouri v. O., 191M 101, 253NW98. See Dun. Dig. 9777.

Refusal of requested instruction was proper where court had already given instructions more applicable to evidence. Erickson v. H., 191M177, 253NW361. See Dun. Dig. 9777.

Instruction on reasonable care to be exercised by motorman of street car held to correctly cover situation and to substantially conform with instruction requested. Luck v. M., 191M503, 254NW609. See Dun. Dig. 9015.

A requested instruction sufficiently covered in general charge need not be given. Jensvold v. M., 192M475, 257 NW86. See Dun. Dig. 9777.

Refusal of court to give instructions presented orally at conclusion of charge is not ground for a new trial, charge given being adequate. Erickson v. K., 195M623, 262NW56. See Dun. Dig. 9777.

It is not error to refuse a requested instruction fully covered by court in given instruction. Vogel v. N., 196 M509, 265NW350. See Dun. Dig. 9777.

Certain requested instructions were either sufficiently covered in the charge, or were properly denied because the evidence was such that the jury could not apply them. Kolars v. D., 197M183, 266NW705. See Dun. Dig. 9774.

Requested instruction respecting an alleged protruding plank upon defendants' truck as cause of plaintiff's injuries, held adequately covered in court's general charge, and refusal to give request was not error. Ohad v. R., 197M483, 267NW490. See Dun. Dig. 9777.

No reversible error occurs in refusing to give a requested instruction adequately covered in given instructions in different language. Doody v. S., 198M573, 270 NW583. See Dun. Dig. 9777.

Where charge as given properly stated law, there was no error in refusal of court to give a requested instruction to effect that to permit recovery upon claim "the evidence must be clear, satisfactory and convincing." Hage v. C., 199M533, 272NW777. See Dun. Dig. 9777.

It was not reversible error to deny a request to charge as to a matter which must have been fully understood by jury from tenor of general charge. Becker v. N., 274NW180. See Dun. Dig. 9777.

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. 175M449, 221NW715.

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

Failure to define "proximate cause," held not reversible error in absence of request for instruction. 181M 109, 231NW716.

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

A party requesting no instructions and offering no suggestions on inquiry by court at close of charge cannot assign error upon any faulty statement in charge or failure to instruct upon some particular phase. Carlson v. S., 188M204, 246NW746. See Dun. Dig. 9780.

Failure to charge on a particular point of law is not reversible error, in absence of a timely request therefor from counsel. Dwyer v. I., 190M616, 252NW837. See Dun. Dig. 7179, 9771.

Where words of a statute are plain and easily understood court is not required to explain same further than reading statute to jury; no written requests to charge having been submitted to court. Clark v. B., 195M44, 261 NW596. See Dun. Dig. 9782.

Plaintiff appellant is not entitled as to have considered a claim that it was error for court to fail to submit to jury question of defendant's negligence as a matter of law if he violated right of way statute, in that verdict of jury as to contributory negligence might be affected by such failure, where there was no exception to the charge as to common law negligence, no request to charge more fully as to effect of any violation of the statute, and no assignment in motion for new trial or in appeal of any error on that ground. Cogin v. I., 196 M493, 265NW315. See Dun. Dig. 9772.

Where plaintiff alleged that defendants' conduct respecting happening of accident was willful, court's instructions on willfulness was not prejudicial to plaintiff's claims, especially where he made no objection or suggestion that charge given was not appropriate, although the court, after giving charge, had asked for suggestions of counsel. Ohad v. R., 197M483, 267NW490. See Dun. Dig. 9792.

Where court charge as to negligence of a defendant confronted with an emergency was not complete, but was proper so far as it went, plaintiff cannot claim error in absence of request or suggestion for further instructions. Dehen v. B., 198M522, 270NW602. See Dun. Dig. 9771.

9300. Verdict, when received—Correcting, etc.

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

1. Court always open.

An accused at liberty on bail is chargeable with knowledge that the court is always considered open for all purposes connected with the cause submitted. 175M 573, 222NW277.

2. Polling the jury.

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

3. Correction of verdict.

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

A verdict in an action upon a note was not perverse because jurors intentionally refrained from allowing plaintiff interest, and court committed no error in adding interest, though it probably should have instructed jury to correct verdict itself in open court. Olson v. M., 195M626, 264NW129. See Dun. Dig. 9823, 9828.

There was no error in having jury correct verdict consisting of general verdict and special verdict in court room without having jury sent out of room. Id.

4. Informal verdict.

Verdict for defendant in action on note assessing as damages on counterclaim $100, "and value of note," held not indefinite or perverse. Donaldson v. C., 188M443, 247 NW522. See Dun. Dig. 9817.

9303. Verdict, general and special.

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

A general verdict where there are two rights of recovery will be sustained if there is evidence supporting one ground of recovery. Berg v. U., 186M529, 243NW 696. See Dun. Dig. 9815.

In a suit against a railroad company and its switch foreman, a verdict against company only is in effect a verdict for switch foreman. Ayer v. C., 187M169, 244NW 681. See Dun. Dig. 5045, 6027a, 9817a.

In action against automobile livery company renting defective car and driver of such car, a verdict for the driver did not make perverse verdict against livery company. Ferraro v. T., 197M5, 265NW829. See Dun. Dig. 7115b.

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, 215NW225.

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

4. Discretionary.

Refusal to require special verdict on issue whether driver of automobile in which intestate was riding was his agent was not abuse of discretion. Harris v. R., 189 M599, 250NW577. See Dun. Dig. 9802.

Trial court may refuse to submit special interrogatories to jury within its discretion, and there is no reversible error in absence of abuse of discretion. Halos v. N., 196M387, 265NW26. See Dun. Dig. 9802.

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.

In replevin where neither party is in possession of chattel at time of trial, verdict in alternative for possession of property or value thereof is not violative of statutory requirements. Breitman Auto Finance Co. v. B., 196M369, 265NW36. See Dun. Dig. 8403, 8425.

Where losing party in replevin action no longer has possession of chattel, he has right to be discharged from liability upon payment into court of amount found by jury to be value thereof, plus interest and costs. Id. See Dun. Dig. 8425.

9308. Receiving verdict.

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

9309. Entries on receiving verdict—Reserving case—Stay.

Correction of a mere arithmetical error, plainly appearing, in reckoning amount found by jury to be due plaintiff, should be made in trial court, and not on appeal. Barnard-Curtiss Co. v. M., 274NW229. See Dun. Dig. 384.

9310. Trial by jury, how waived.

Where both parties moved court to make findings upon all issues, and to make conclusions of law therefrom, neither party can complain on ground that case should have been submitted to jury for a general verdict, nor can one party complain that court set aside answer to one of two questions submitted to jury. Coughlin v. F., 199M102, 272NW166. See Dun. Dig. 5234.

TRIAL BY THE COURT

9311. Decision, how and when made.

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

FINDINGS AND CONCLUSIONS

1. Definitions and distinctions.

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

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

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

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

Certain statements of trial court held to be improper subjects of findings of fact. State v. Clousing, 198M35, 268NW844. See Dun. Dig. 9847.

3. When findings necessary.

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

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

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

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

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

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

5. Nature of facts to be found.

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

Court did not err in refusing to amend findings to effect that defendants did not have title to lot conveyed at time the deed was delivered or at time action was begun, because proof fails to show lack of title. Baker v. R., 198M437, 271NW241. See Dun. Dig. 2356.

6. Sufficiency of particular findings.

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

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

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

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

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

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

Where findings negative those requested, there is no error in failing to find upon the specific issues submitted. Schmidt v. K., 196M178, 265NW347. See Dun. Dig. 9852.

Where court's findings and decision necessarily decide all facts in dispute, findings are sufficient. Lafayette Club v. R., 196M605, 265NW802. See Dun. Dig. 9856.

Where a party moves for amended and additional findings of fact, and court refuses to make them, refusal is equivalent to findings against party so moving. Id. See Dun. Dig. 9866.

Failure of court to comply with statute requiring written decisions separately stating facts and conclusions was cured by filing of a memorandum, which states facts found and conclusions of law separately. Trones v. O., 197M21, 265NW806. See Dun. Dig. 9864.

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., 180M 124, 230NW257.

9. Findings must be definite and specific.

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

10. Findings must cover all the issues.

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.

While counsel, after trial without jury, are entitled to findings of fact fully responsive to their sincere contentions, there need not be reversal where, although findings leave some controlling things to implication, they fairly negative findings moved for below by defeated litigant. Mienes v. L., 188M162, 246NW667. See Dun. Dig. 9850.

11. Findings must be within the issues.

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

Immaterial findings which do not affect the conclusions of law may be disregarded. 181M570, 233NW243. See Dun. Dig. 985a.

Court erred in finding special damages in a replevin action where pleadings contained no allegations of special damages and no evidence thereof was offered. Brown Sheet Iron & Steel Co. v. W., 183M515, 237NW188. See Dun. Dig. 9858.

13. Judgment must be justified by the findings.

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

In action by state against assisting purchasing agent and surety for conversion of personal property, findings held to support conclusions of law and judgment against defendants. State v. Waddell, 187M647, 246NW471. See Dun. Dig. 9857.

Judgment entered upon findings of fact and conclusions of law must be reversed upon appeal, if findings of fact call for conclusions of law and judgment in favor of party against whom it is rendered. Robitshek v. M., 198M586, 270NW579. See Dun. Dig. 9857.

14. Construction of findings.

Remarks of court that plaintiff must come into court with clean hands, made at close of testimony, were not such as to indicate that court found facts by wrong application of law. Thorem v. T., 188M153, 246NW674. See Dun. Dig. 9860.

15½. Striking out and modifying.

Where the decisive findings of fact are sustained by the evidence and sustain the conclusions of law, it is not error for the court to refuse to strike out its findings or refuse to make additional, or substituted findings and conclusions. Jarvaise Academy of Beauty Culture v. S., 183M507, 237NW183. See Dun. Dig. 9866.

Denial of motion to alter and amend findings of fact is equivalent to findings negativing facts asked to be found. Sheffield v. C., 186M278, 243NW129. See Dun. Dig. 9873.

Denial of motion for an amended finding upon issue not definitely determined by court is equivalent of finding to contrary of that requested. Smith v. B., 187M202, 244NW817. See Dun. Dig. 9852, 9873.

Where evidence is conflicting in respect to an amended finding asked for, it is not error to refuse it. Chamberlin v. T., 195M58, 261NW577. See Dun. Dig. 9873.

9313. Court always open—Decisions out of term.

To start running time within which plaintiff must consent to reduction of verdict ordered as condition of not granting new trial, adverse party must serve notice upon plaintiff. Turnbloom v. C., 189M588, 250NW570. See Dun. Dig. 7138.

TRIAL BY REFEREES

9317. Compulsory reference, when.

(4).

Referee may find upon every issue raised by pleadings, even though ultimate issue is to be deduced from many facts as to which evidence may be in conflict. State v. City of Chisholm, 199M403, 273NW235. See Dun. Dig. 8318.

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

179M175, 228NW614.

In original proceeding in supreme court where a referee is appointed to make findings of fact, such findings have effect of a special verdict of a jury. State v. City of Chisholm, 199M403, 273NW235. See Dun. Dig. 8318.

GENERAL PROVISIONS

9321. Dismissal for delay.

179M225, 229NW86.

9322. Dismissal of action.

This section has no application to dismissals on the merits after trial and submission of the case for decision. McElroy v. B., 184M357, 238NW681. See Dun. Dig. 2741(6).

Where both parties rested in a jury trial, and defendant moved for and procured a dismissal, there was a decision on the merits. McElroy v. B., 184M357, 238NW 681. See Dun. Dig. 5180(6).

½. In general.

180M52, 230NW457.

Dismissal, where plaintiff refuses to proceed to trial, does not violate constitutional right to trial by jury. Hineline v. M., (USCCA8), 78F(2d)854.

The practice of ordering a dismissal with prejudice upon an objection to the introduction of evidence under the complaint is disapproved. Krzyaniak v. M., 182M83, 233NW595. See Dun. Dig. 2748(54).

1. Dismissal by plaintiff before trial.

Bringing about dismissal by refusing to proceed to trial, held to constitute voluntary dismissal before trial. Hineline v. M., (USCCA8), 78F(2d)854.

Answer in action to adjudge ownership of corporate stock held to contain prayer for affirmative relief such as to prevent ex parte dismissal by plaintiff. Burt v. S., 186M189, 242NW622. See Dun. Dig. 2744(34).

Where, in a title registration proceeding under Torrens Act, an answering defendant seeks to have applicant's title decreed to be subject to defendant's rights as a contract vendee, applicant may dismiss his application at any time during proceedings. Hiller v. S., 191M272, 253M773. See Dun. Dig. 8358.

Attempted dismissal of action by plaintiff, after complaint in intervention had been served did not affect intervener's rights. Scott v. V., 193M465, 258NW817. See Dun. Dig. 2741.

Where plaintiff refused to try first case in federal court and defendant's motion to dismiss was granted, plaintiff could not take another arbitrary dismissal as to his second action; and his failure to appear therein gave court power to dispose of case on merits, except as to defendant joined in second cause only. Id.

Effect of a second voluntary dismissal before trial. 20 MinnLawRev 228.

2. Dismissal by court before trial.

Trial court may not dismiss on its own motion before all pleadings are in. Long v. M., 191M163, 253NW762. See Dun. Dig. 2742.

3. Dismissal by consent before trial.

Dismissal of case by stipulation on settlement while section. Muellenberg v. J., 188M398, 247NW570. See Dun. Dig. 2743.

Filing of stipulation of dismissal on settlement while action was pending ousted court of jurisdiction to enter judgment on merits. Id.

5. Dismissal for failure to prove cause of action.

Court may dismiss at close of plaintiff's evidence, if plaintiff has failed to substantiate or establish cause of action or right to recover. A. Y. McDonald Mfg. Co. v. N., 187M237, 244NW806. See Dun. Dig. 9752.

Court may dismiss action on trial, after plaintiff has rested, if plaintiff has failed to substantiate or establish his cause of action or right to recover. L'Hommedieu v. W., 187M333, 245NW369. See Dun. Dig. 9752.

Where plaintiff introduces sufficient evidence upon which findings can be made in favor of defendants, but neither formally rests nor asks for permission to dismiss, court is justified in concluding that cause was submitted for findings and decision. Calhoun Beach Holding Co. v. M., 190M576, 252NW442. See Dun. Dig. 9727.

District court has discretionary power to determine whether an appellant from probate court should be relieved of a default for failure to file, within statutory time, a statement of propositions of law and fact upon which he is relying for reversal of an order of probate court, statement constituting pleading and not evidence. Slingerland's Estate, 196M354, 265NW21. See Dun. Dig. 2740.

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.

A dismissal of an action on defendant's motion at close of plaintiff's evidence, where defendant has not rested and does not move for a directed verdict or a dismissal on the merits, is not a bar to a second suit on same cause of action. Mardorf v. D., 192M230, 255NW 809. See Dun. Dig. 2750, 5180.

9. Vacation of dismissal.

Trial court could vacate dismissal entered by plaintiff while unaware that time had elapsed for bringing another suit. Lilienthal v. C., 189M520, 250NW73. See Dun. Dig. 2750a.

10. Dismissal against co-defendant.

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

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

14. Upon the trial and before final submission.

Court did not abuse its discretion in denying motion to dismiss without prejudice on the trial, where it stated its willingness to give plaintiff necessary time to secure his evidence. Holleran v. W., 187M490, 246NW23. See Dun. Dig. 2744.

Motion to dismiss without prejudice after trial begins rests in discretion of trial court. Holleran v. W., 187M 490, 246NW23. See Dun. Dig. 2744.

No reversible error appears in denial of plaintiff's motion for leave to open case in order to dismiss, made after defendant had moved for a directed verdict. Abar v. R., 195M597, 263NW917. See Dun. Dig. 2744.

9323. Offer of judgment—Costs.

Where plaintiff sued for $131 and defendant's answer admitted indebtedness in sum of $61, defendant was not "prevailing party" where judgment was rendered against him for $61, tender by defendant not including accrued costs. Grill v. B., 189M354, 249NW194. See Dun. Dig. 4984, 9619.

9324. Tender of money in lieu of judgment.

Defendant cannot complain of any failure to keep tender good, where tender was and would be futile because defendant had disqualified itself from accepting tender by compliance with condition imposed by court. *Johnson v. I.*, 189M293, 249NW177. See Dun. Dig. 9618.

NEW TRIALS

9325. Grounds—Presumption on appeal.

THE STATUTE GENERALLY

½. In general.

Karnofsky v. W., 183M563, 237NW425; note under §9498(13).

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

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

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

Mere mistake in form of verdict not fatal if intention clearly appears and verdict assessing damages in sum of "none dollars" is a verdict for the defendant. 177M 408, 225NW291.

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

Power of the district court to review and vacate order denying new trial. Barrett v. S., 183M431, 237NW15; note under §9283.

A motion for a new trial may be heard after entry of a judgment without notice. Wilcox v. H., 186M504, 243NW709. See Dun. Dig. 7086-7090.

The pendency of a motion for a new trial does not in itself operate as a stay of proceedings, nor prevent entry of judgment Wilcox v. H., 186M504, 243NW709. See Dun. Dig. 7068.

Giving of candy and cigars to jurors, participation by court officers therein, and talk of a banquet to be given by jurors to defendants were improper. Hillius v. N., 188M336, 247NW385. See Dun. Dig. 7102a.

An order granting a new trial after judgment vacates verdict and judgment. Ayer v. C., 189M359, 249NW581. See Dun. Dig. 7082.

Trial court has power to hear and grant motion for new trial after judgment, within time for appeal therefrom, under limitations stated in Kimball v. Palmerlee, 29Minn302, 13NW129. Id. See Dun. Dig. 7087(87).

Record shows such delay and laches that it was abuse of discretion to hear and grant a motion for a new trial after judgment. Id.

Court did not err in denying defendant's motion for new trial "in the interests of justice." Luck v. M., 191M 503, 254NW609. See Dun. Dig. 7069.

Proceedings under Section 9633-1, et seq., are summary and do not contemplate motions for a new trial, nor may an order denying a new trial be reviewed on certiorari issued prior thereto to review original decision. Young v. P., 192M446, 256NW906. See Dun. Dig. 7071.

There is no sufficient showing to require trial court to grant a new trial on ground of fraud or perjury. Pettersen v. F., 194M265, 260NW225. See Dun. Dig. 7069.

Although a bastardy proceeding has some of the features of a criminal trial, it is substantially a civil action, and, after a verdict of not guilty, court may grant a new trial. State v. Reigel, 194M308, 260NW293. See Dun. Dig. 827, 7075.

Municipal courts organized under Laws 1895, c. 229, or Mason's Minn. St. 1927, §§215 to 228, while courts of record are of special and limited jurisdiction and possess only such authority as is conferred by the particular statute under which organized, and such courts, like courts of justice of the peace, have no authority to grant new trials. Untiedt v. V., 195M239, 262NW568. See Dun. Dig. 7069.

Municipal court of Minneapolis cannot grant new trial in forcible entry and detainer case. Olson v. L., 196M 352, 265NW25. See Dun. Dig. 7070.

Case having been tried by court on an erroneous theory, it is remanded for a new trial. St. Louis County v. M., 198M127, 269NW105. See Dun. Dig. 7069.

When defendants offered no evidence, but deliberately rested their defense upon evidence introduced by plaintiff, no legal ground for reversing order denying a new trial is to be found, either in interest of justice or in contention that clients should not suffer from their attorneys' errors or mistakes. Pearson v. N., 273NW359. See Dun. Dig. 7069(87).

4. Applicable to both legal and equitable actions.

Proceedings for extension of time within which to make redemption of property sold under mortgage foreclosure are summary and do not contemplate a motion for new trial. Hjeltness v. J., 195M175, 262NW158. See Dun. Dig. 7073.

5. Motion a matter of right.

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

8. Of less than all the issues.

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

9. Granted only for material error.

A new trial will not be granted for failure of court to award nominal damages. L'Hommedieu v. W., 187M 333, 245NW369. See Dun. Dig. 429, 7074.

FOR IRREGULARITY OR ABUSE OF DISCRETION

9½. In general.

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

Appellant is not entitled to a new trial because jury heard discussion between court and counsel on applicability of statute. Paulos v. K., 195M603, 263NW913. See Dun. Dig. 7099.

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. 173 M529, 217NW933.

Remark of court to objection to language of plaintiff's counsel "That is the law, but it isn't necessary to argue it" was prejudicial error where plaintiff's counsel had stated to the jury that they should pay the plaintiff plenty of damages because the court could cut down the amount if they over-stepped the bounds. 175M96, 220 NW429.

A trial court's talk in open court to a jury seeking further instructions held not to be an "irregularity," but may be reviewed as an "errors of law occurring at the trial" and a settled case or bill of exceptions is necessary. 178M141, 226NW404.

It was not error for court to suggest that counsel "get together" in reference to the use of an audit. Sigvertsen v. M., 182M433, 234NW688. See Dun. Dig. 7098.

Statements made by court in explanation of rulings made, in making rulings on objections to evidence, and remarks made to plaintiffs' counsel in connection with examination of witnesses, do not present reversible error. Kouri v. O., 191M101, 253NW98. See Dun. Dig. 7098.

12. Other misconduct.

Prejudicial bias of trial judge was not established by his extensive participation in examination of witnesses in divorce action. 177M453, 225NW287.

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

It was improper for court to absent itself from court room during parts of arguments to jury. Jovaag v. O., 189M315, 249NW676. See Dun. Dig. 9706.

FOR MISCONDUCT OF JURY

12½. In general.

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

Misconduct of juror, held not shown, 179M557, 230NW 91.

Examination of insurance policy by juror in automobile collision case held not prejudicial in view of court's instruction. Honkomp v. M., 182M445, 234NW 638. See Dun. Dig. 7116.

The purity of jury trials must be jealously guarded; scrupulous conduct on the part of jurors, litigants, and counsel is necessary. Brecht v. T., 182M603, 235NW528. See Dun. Dig. 7100.

Quotient arrived at by jurors in dividing sum of allowances of jurors may be the basis of a valid verdict if agreed upon after consideration. Hoffman v. C., 187 M320, 245NW373. See Dun. Dig. 7115a.

A verdict in an action upon a note was not perverse because jurors intentionally refrained from allowing plaintiff interest, and court committed no error in adding interest, though it probably should have instructed jury to correct verdict itself in open court. Olson v. M., 195M626, 264NW129. See Dun. Dig. 7115b.

13. Discretionary.

Whether misconduct between counsel and jury requires new trial is a matter within the sound discretion of the trial court. Brecht v. T., 182M603, 235NW528. See Dun. Dig. 7104(99).

15. Necessity of objection on the trial.

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

17. Affidavits on motion.

Affidavits or testimony of jurors as to what transpired in jury room are not admissible to impeach their verdict, even where it is sought to attack a verdict as a quotient one. Hoffman v. C., 187M320, 245NW373. See Dun. Dig. 7109.

20. Visiting locus in quo.

There was misconduct of jurors in privately visiting locus in quo, and particularly in purposely riding upon street cars to determine whether or not witnesses, seated at certain places in car in question, could observe what they testified they did observe. Newton v. M., 186M439, 243NW684. See Dun. Dig. 7114.

There was misconduct requiring new trial where two jurors examined damaged building to ascertain extent of damage and communicated information obtained to other jurors. Spinner v. M., 190M390, 251NW908. See Dun. Dig. 7114.

21. Unauthorized communication with jury.

Determination of trial court whether there was prejudice because witness mingled with jurors will not be disturbed on appeal. Hillius v. N., 188M336, 247NW385. See Dun. Dig. 399, 7103a, 7104.

Evidence held to sustain finding that witness mingled with jurors throughout long trial and that there should be new trial. Id. See Dun. Dig. 7102a.

22. Other misconduct.

172M591, 216NW537.

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

Defendant was entitled to new trial where juror lodged and boarded during trial in home of plaintiff's stepson and witness. Engstrom v. D., 190M208, 251NW134. See Dun. Dig. 7116.

FOR MISCONDUCT OF COUNSEL

22½. In general.

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

Verdict could not stand where counsel made abusive personal attack upon opposing counsel in his argument to the jury. 171M219, 213NW890.

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

In action for indecent assault, statement of attorney in argument "I am glad there is one woman who had the nerve to come into court and face" the defendant, held prejudicial. 174M151, 218NW548.

Misconduct of counsel in presenting evidence held not shown on the record. 177M13, 224NW259.

Improper argument, held ground for reversal. 179M 127, 228NW552.

The asking of a question deemed objectionable should not be considered misconduct of counsel, where the testimony of the witness suggests the inquiry, and no allusion is thereafter made by the counsel to the subject. Harkness v. Z., 182M594, 234NW281. See Dun. Dig. 7103.

Naming of insurance companies by attorney in automobile accident case, held not misconduct. Arvidson v. S., 183M446, 237NW12. See Dun. Dig. 5252(21), (22), (23).

Statement of plaintiff's counsel that defendant's counsel made false statements was serious misconduct and prejudicial in a closely contested case. Romann v. B., 184M586, 239NW596. See Dun. Dig. 7102, 7103, 9799.

Argument of plaintiff's counsel in personal injury action making accusations against defense and its counsel relative to excluded evidence and nonproduction of witnesses held improper and prejudicial. Burmeister v. M., 185M167, 240NW359. See Dun. Dig. 9799(97).

Plaintiff's counsel was guilty of misconduct in repeatedly asking objectionable and prejudicial questions to which objections were being sustained. Campbell v. S., 186M293, 243NW142. See Dun. Dig. 7103.

Argument of counsel accusing opponent of not being a gentleman, and inviting violence, held prejudicial error. Jovaag v. O., 189M315, 249NW676. See Dun. Dig. 9799.

A new trial for misconduct of counsel is not granted as a disciplinary measure, but only because of prejudice resulting. Romann v. B., 190M419, 252NW80. See Dun. Dig. 7102, 7103.

It was misconduct of counsel to make repeated and unfair objections, improper insinuations during trial, and unfair percentage of argument to jury. Id.

Whether new trial should be granted for misconduct of counsel is largely discretionary with trial court. Id.

Counsel in closing argument may make severe comment with respect to obvious partisanship of adverse witness. Kassmir v. P., 191M340, 254NW446. See Dun. Dig. 9799.

Alleged misconduct of counsel held not to warrant a new trial. Clark v. B., 195M44, 261NW596. See Dun. Dig. 7103.

23. Improper remarks on the trial.

172M591, 216NW537.

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

180M340, 230NW792.

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

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

A remark of counsel, promptly withdrawn, held not prejudicial misconduct. Dumbeck v. C., 177M261, 225NW 111.

Statement by counsel of fact shown by document admitted in evidence, held not error. 180M298, 230NW 823.

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

The matter of granting a new trial for improper remarks or argument of counsel rests largely in the discretion of the trial court. Horsman v. B., 184M514, 239 NW250. See Dun. Dig. 7102(63).

Argument of plaintiff's counsel in personal injury action making accusations against defense and its counsel relative to excluded evidence and nonproduction of witnesses held improper and prejudicial. Burmeister v. M., 185M167, 240NW359. See Dun. Dig. 9799(97).

Questions and comments of attorney touching certain person and his relation to defendant's liability insurer, held not misconduct warranting new trial. Olson v. P., 185M571, 242NW283. See Dun. Dig. 7102.

Remarks of counsel that if jurors had any doubt as to kind of man a certain witness was to ask certain member of jury, though misconduct, was not such as to require new trial. Marckel Co. v. R., 186M125, 242NW471. See Dun. Dig. 7102.

Plaintiff's counsel was guilty of misconduct in arguing to jury, "They say it is all right to kill this boy because he is guilty of contributory negligence." Campbell v. S., 186M293, 243NW142. See Dun. Dig. 7102.

Statements made by defendants' counsel in arguing objections to evidence offered, or his conduct in asking questions of witnesses, and his statements made in reference to the production of witness, did not constitute misconduct. Kouri v. O., 191M101, 253NW98. See Dun. Dig. 7102.

Where counsel for plaintiff persisted in treating statements procured by defendant's counsel from plaintiff and a witness as having been improperly if not fraudulently procured, although such statements were then demonstrably free from impropriety or fraud, case being close on merits and it being difficult to see how verdict can be sustained, misconduct of counsel held to require a new trial. Swanson v. S., 196M298, 265NW39. See Dun. Dig. 7102.

New trial was granted to where counsel made flagrant appeal to passion and prejudice of jurors, used intemperate language, and made statements of fact not justified by the record. Ferraro v. T., 197M5, 265NW829. See Dun. Dig. 7102.

24. Other misconduct.

172M543, 216NW233.

FOR ACCIDENT OR SURPRISE

28. Motion granted.

Plaintiff held entitled to new trial upon the grounds of accident and surprise. M. J. O'Neil, Inc. v. C., 184M 281, 238NW679. See Dun. Dig. 7118, 7121.

29. Motion denied.

Record does not show any sufficient cause for granting of a new trial on ground of accident and surprise. Pettersen v. F., 194M265, 260NW225. See Dun. Dig. 7117.

FOR NEWLY DISCOVERED EVIDENCE

30. To be granted with extreme caution.

172M368, 215NW516.

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

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

No abuse of discretion in granting new trial for evidence concerning developments subsequent to trial. Gau v. B., 177M276, 225NW22.

Motion rests largely in the discretion of the trial court, and is to be granted with caution. 178M296, 226NW 938.

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

Denial of new trial for newly discovered evidence held not abuse of discretion. Milliren v. F., 186M115, 242NW 546. See Dun. Dig. 7123.

Granting of new trial on ground of newly discovered evidence is very largely discretionary. Donaldson v. C., 188M443, 247NW522. See Dun. Dig. 7123.

To grant a new trial on ground of newly discovered evidence is within discretion of trial court, to be cautiously and sparingly exercised and only in furtherance of substantial justice. Kubat v. Z., 193M522, 259NW 1. See Dun. Dig. 7123.

Granting a new trial on ground of newly discovered evidence is largely within sound judicial discretion of trial court. Johlfs v. C., 193M553, 259NW57. See Dun. Dig. 7123.

Record does not show any sufficient cause for granting of a new trial on ground of newly discovered evidence. Pettersen v. F., 194M265, 260NW225. See Dun. Dig. 7123.

Denial of motion for a new trial on ground of newly discovered evidence was within discretion of trial court. Fredrick v. K., 197M524, 267NW473. See Dun. Dig. 7123.

32. Showing on motion.

181M355, 232NW622.

Fact issues, if any, on motion, are for trial court. Gau v. B., 177M276, 225NW22.

Affidavits supporting motion for new trial on ground of newly discovered evidence must show exercise of reasonable diligence. Klugman v. S., 186M139, 242NW 625. See Dun. Dig. 7096.

Lack of a showing of due diligence to obtain alleged newly discovered evidence required a denial of motion for a new trial. State v. Padares, 187M622, 246NW369. See Dun. Dig. 7127.

For lack of due diligence, court rightly denied a new trial on ground of newly discovered evidence. Jeddeloh v. A., 188M404, 247NW512. See Dun. Dig. 7128.

Due diligence was not shown so as to entitle to a new trial on ground of newly discovered evidence. Engstrom v. D., 190M208, 251NW134. See Dun. Dig. 7127 (39).

Denial of new trial was proper where diligence was not exercised in discovering evidence. Whitman v. F., 190 M633, 251NW901. See Dun. Dig. 7128n, 50.

Showing of due diligence was insufficient to entitle plaintiff to a new trial on the ground of newly discovered evidence of statement alleged to have been overheard by another witness. Zane v. H., 191M382, 254 NW453. See Dun. Dig. 7127.

Accident insurance association was not entitled to new trial for newly discovered evidence that plaintiff lost sight of eye through cataract of long standing and not through accident, affidavit not showing any effort or attempt to discover evidence in question before trial. Jensvold v. M., 192M475, 257NW86. See Dun. Dig. 7127.

It was not an abuse of discretion to deny motion for new trial on ground of newly discovered evidence where affidavit purporting to set forth what new witness could testify to did not profess to state that witness knew anything about the only issue in case that would affect result of the action. Kubat v. Z., 193M522, 259NW1. See Dun. Dig. 7127.

Affidavits supporting a motion for new trial on ground of newly discovered evidence found not to support exercise of discretion in granting a new trial. Kruchowski v. S., 195M537, 263NW616. See Dun. Dig. 7127.

In absence of a showing of a clear abuse of judicial discretion, refusal of lower court to grant a new trial on ground of newly discovered evidence will not be disturbed, especially where it appears that there was a failuure to exercise due diligence in discovering new evidence. Jorstad v. B., 196M568, 265NW815. See Dun. Dig. 7123.

Court did not abuse its discretion in refusing to grant a new trial on ground of newly discovered evidence. Stock v. F., 197M399, 267NW368. See Dun. Dig. 7123.

34. Counter affidavits.

Court did not abuse discretion in denying new trial for newly discovered evidence submitted on conflicting affidavits. Farrell v. K., 189M573, 248NW720. See Dun. Dig. 7127.

35. Nature of new evidence.

179M436, 229NW564.

181M355, 232NW622.

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

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

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

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

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

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

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

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

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

Newly discovered evidence held not of sufficient importance to require a new trial. Dumbeck v. C., 177 M261, 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, 226NW938.

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

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

No reversible error was made in denying a continuance, nor in refusing to grant a new trial for newly discovered evidence. Miller v. P., 182M108, 233NW855. See Dun. Dig. 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., 182M268, 234 NW320. See Dun. Dig. 7128(57), (58).

A motion for a new trial on the ground of newly discovered evidence is largely addressed to the discretion of the trial court. Buro v. M., 183M518, 237NW186. See Dun. Dig. 7123.

Denial of new trial on ground of newly discovered evidence held not an abuse of discretion. Zobel v. B., 184M172, 238NW49. See Dun. Dig. 7123.

The granting of a new trial on the ground of newly discovered evidence rests in the sound judicial discretion of the trial court. Stokke v. M., 185M28, 239NW658. See Dun. Dig. 7123(32).

A new policy of liability insurance was not newly discovered evidence requiring new trial with respect to construction of old policy. Wendt v. W., 188M488, 247NW 569. See Dun. Dig. 7131.

Court properly refused new trial on ground of newly discovered evidence and fraud where evidence relied upon was that of a physician subject to objection that it was privileged. Stone v. S., 189M47, 248NW285. See Dun. Dig. 7131.

Claimed newly discovered evidence presented no valid grounds for a new trial. State v. City of Eveleth, 189M 229, 249NW184.

After trial without jury, there was no error in denial of a motion for a new trial on ground of newly discovered evidence which trial judge considered and yet adhered to his original finding. Skinner v. O., 190M456, 252NW418. See Dun. Dig. 7131.

New trial for newly discovered evidence was properly denied where it was doubtful whether evidence would have been admissible. Whitman v. F., 190M633, 251NW 901. See Dun. Dig. 7131.

There was no abuse of discretion in denying motion to amend motion for a new trial by assigning additional ground on newly discovered evidence which was cumulative. King v. M., 192M163, 255NW626. See Dun. Dig. 7092, 7125.

Court did not err in refusing to grant motion for a new trial upon ground of newly discovered evidence. Peterson v. S., 192M315, 256NW308. See Dun. Dig. 7123.

Granting new trials for newly discovered evidence rests very largely in discretion of trial court. Dahmen's Guardianship, 192M407, 256NW891. See Dun. Dig. 7123.

Where both plaintiff and his attorney knew that certain person might be able to testify as to issues on trial, evidence of such witness could not be claimed to be newly discovered. Kubat v. Z., 193M522, 259NW1. See Dun. Dig. 7128.

Upon showing made in respect of alleged newly discovered evidence, trial court was amply justified in denying motions for new trial. Bickle v. B., 194M375, 260 NW361. See Dun. Dig. 7123.

There was no abuse of discretion in denying a new trial on ground of newly discovered evidence. Clark v. B., 195M44, 261NW596. See Dun. Dig. 7123.

FOR EXCESSIVE OR INADEQUATE DAMAGES

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

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

179M411, 229NW566.

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

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

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

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

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

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

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, 216NW 234.

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

Evidence held to justify finding that fracture of plaintiff's four cervical vertebra was occasioned by the negligence of defendant. 173M163, 216NW803.

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

Verdict for $15,000 was excessive for injuries where only permanent injury was "flat feet." 173M239, 217NW 128.

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

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

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

$2,000 for dislocated ankle was not excessive. 173M 439, 217NW493.

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

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

Where in tort action the amount of damages is not based upon estimate of experts or the calculation of other witnesses, the defendant should base his motion for new trial upon the fifth subdivision of this section. 174M545, 219NW866.

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

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

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. Knopp v. McDonald, 176M83, 222NW580.

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

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. 176M 437, 223NW675.

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

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, 224 NW271.

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

$4,200 not excessive for injury to leg. 177M42, 224NW 255.

$6,000 was not excessive to woman 70 years of age suffering badly fractured arm and collar bone and ribs. Tegels v. T., 177M222, 225NW85.

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

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

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

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

Damages to chickens caused by selling poultryman raw linseed oil for cod liver oil were not so conjectural and speculative as to present recovery, and $1,412.30, held not excessive for loss of poultry. 177M390, 225NW 395.

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

Where there is error in a charge affecting the amount of a verdict in a definitely ascertainable amount, the prevailing party should be allowed to remit the erroneous excess and there should not be a retrial of the whole case. 178M177, 226NW411.

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

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

$2,564 for death of child, held not excessive. 179M528, 229NW784.

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

$2,500, held not excessive for scalp wound requiring surgical treatment. 180M185, 230NW473.

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

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

$6,000, held not excessive for death of girl, 23 years old. Waggoner v. G., 180M391, 231NW10(2).

Where verdict is excessive, and alternative motion for judgment or new trial is filed, proper order is award of new trial on condition that prevailing party consent to reduction. 180M540, 231NW222.

$2,000 for alienation of affections of plaintiff's husband, held not excessive. 181M13, 231NW718.

$17,300, held not excessive for probably permanent injuries to car repairer 49 years old and earning $105 per month. 181M97, 231NW710.

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

$3,500 for permanent injuries and disfigurement received in automobile accident, held not excessive. 181M 180, 232NW3. See Dun. Dig. 2597.

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

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

$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.

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

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

Verdict for $1,000 for malicious prosecution held not excessive. Miller v. P., 182M108, 233NW855. See Dun. Dig. 5745, 5750a.

Verdict for $20,000 was not excessive for fractured skull. Lund v. O., 182M204, 234NW310. See Dun. Dig. 2597.

Where there is a severe and painful, but probably temporary injury, and there is conflict in the testimony as to its nature and extent, verdict for $2,200 will not be disturbed on appeal. Randall v. G., 182M259, 234NW 298. See Dun. Dig. 2597.

A $5,000 verdict for death held excessive where deceased, 76 years old, had retired from all gainful activities and his beneficiaries and next of kin were two adult daughters upon whom he had become largely dependent for support. Nahan v. S., 182M269, 234NW297. See Dun. Dig. 2617(24).

Verdict for $350 held not excessive for cutting of trees. Hansen v. M., 182M321, 234NW462. See Dun. Dig. 2597, 9696(33).

Instruction in malpractice case as to right of recovery for loss of hearing from pulling of impacted tooth, held proper. Prevey v. W., 182M332, 234NW470. See Dun. Dig. 7493.

Verdict for $12,000 for malpractice in removing impacted tooth so as to affect the hearing and ability to swallow, held not excessive. Prevey v. W., 182M332, 234 NW470. See Dun. Dig. 7493(17).

Verdict for $7,500 was not excessive to an eighteen-year-old girl receiving a multiple fracture of the bones of the pelvis. Honkomp v. M., 182M445, 234NW638. See Dun. Dig. 2597.

Where stucco workmen caused injury to roof and foundation by carelessness, measure of damages was difference between what building's value would have been had work been done in a workmanlike manner and the value as it was when work was completed. Carl Lindquist & Carlson, Inc., v. J., 182M529, 235NW267. See Dun. Dig. 2567c(20).

Verdict for $3,150 for malicious prosecution was excessive and was reduced to $2,000. Krienke v. C., 182M 549, 235NW24. See Dun. Dig. 2596, 2597, 5745, 5750a.

Verdict for $8,000 was not excessive for loss of use of fingers of left hand by farmer's wife. Martin v. S., 183 M256, 236NW312. See Dun. Dig. 2597.

Verdict of $4,000 to farmer for consequential damages arising out of injuries to wife's left arm and fingers, which prevented her from doing housework and from helping with the chores, held not excessive. Martin v. S., 183M256, 236NW312. See Dun. Dig. 2597.

Verdict for $3,000.00 held not excessive for death of wife and mother with life expectancy of ten years. Kieffer v. S., 184M205, 238NW331. See Dun. Dig. 2597.

Verdict of $4,000 held not excessive to a ten-year-old boy suffering skull fracture, destruction of eardrum and impairment of hearing. Flink v. Z., 184M376, 238NW791. See Dun. Dig. 2597.

Verdict for $6,950 held not excessive for severe injuries and terrible sufferings, including fractures, burns and ugly scars. Olson v. P., 185M571, 242NW283. See Dun. Dig. 2597.

Verdict for $1,650 for personal injuries and property damage, held not excessive. Marcel v. C., 186M366, 243 NW265. See Dun. Dig. 2597.

Verdict for $1,260 held not excessive to father of boy injured by automobile. Ludwig v. H., 187M315, 245NW 371. See Dun. Dig. 2597.

$7,000 held not excessive for permanent injuries to leg of 14-year-old boy. Ludwig v. H., 187M315, 245NW 371. See Dun. Dig. 2597.

Verdict for $5,200 was not excessive for crushed vertebra, arthritis and pain suffered by woman. Hoffman v. C., 187M320, 245NW373. See Dun. Dig. 2597.

Second verdict for $3,200 for damages to farm by license for 5 structures to support power cables, held not excessive. Northern States Power Co. v. B., 187M 353, 245NW609. See Dun. Dig. 2597.

Verdict for $6,500, reduced to $5,900, held not excessive for injury to hand and knee. Martin v. T., 187M529, 246 NW6. See Dun. Dig. 2596, 2597.

Verdict for $1,500, reduced to $1,200, held not excessive for injured ligaments in back. Bolster v. C., 188M364, 247NW250. See Dun. Dig. 2597.

Verdict of $3,500 was not excessive for personal injuries to man 79 years old resulting in shortening of leg. Heitman v. K., 188M486, 247NW583. See Dun. Dig. 2597.

Verdict for $4,500 was not excessive for a lascivious assault upon a woman. Patzwald v. P., 188M557, 248NW 43. See Dun. Dig. 2597.

Verdict for $4,800 was not excessive for bilateral inguinal hernia and other injuries. Stone v. S., 189M47, 248NW285. See Dun. Dig. 2597.

Verdict for $1,500 against dentist for injury to tissues at base of tongue, held excessive and reduced to $1,000. Ellering v. G., 189M68, 248NW330. See Dun. Dig. 2596.

Verdict for $7,248.60 in favor of husband for injuries to wife 41 years old, held not excessive. Foslien v. S., 189M118, 248NW731. See Dun. Dig. 2597.

Verdict for $3,500, reduced to $3,000, held not excessive for injury by assault upon a blacksmith which resulted in hemorrhage and incapacity. Farrell v. K., 189M165, 248NW720. See Dun. Dig. 531(62).

Verdict for $5,500 was not excessive to a draftsman 35 years of age who suffered 40 per cent injury to eye and disfigurement. Mills v. H., 189M193, 248NW705. See Dun. Dig. 2597.

Verdict for $18,000 held not excessive for total loss of use of right arm of person 56 years old, who also was confined in hospital for 43 days. Brown v. M., 190 M81, 251NW5. See Dun. Dig. 2597.

Verdict for $3500 held not excessive to young woman for injuries in region of kidneys and temporary soreness of head and neck. Orth v. W., 190M193, 251NW127. See Dun. Dig. 2597.

Verdict for $250 held not excessive for libel consisting of erroneous publication that plaintiff was arrested on liquor charge. Thorson v. A., 190M200, 251NW177. See Dun. Dig. 2597, 5564.

Verdict for $5,000 held not excessive for injuries to head of girl resulting in dizziness, headaches, and for injuries to leg and arm. Schreder v. L., 190M264, 251NW 513. See Dun. Dig. 2597.

Verdict for $7500 was not excessive for fracture of skull affecting vision and fracture of shoulder. Johnston v. S., 190M269, 251NW525. See Dun. Dig. 2597.

Verdict for $32,000 reduced to $19,458.18 was not excessive for crushed leg of woman 21 years of age. Fox v. M., 190M343, 251NW916. See Dun. Dig. 2597.

Verdict for $600 was not excessive for burned area about nine or ten inches long on outside of leg. Borwege v. C., 190M394, 251NW915. See Dun. Dig. 2597.

Verdict for $3,500 held not excessive to child suffering traumatic neurosis and compelled to stay out of school for a year. Fryklind v. J., 190M356, 252NW232. See Dun. Dig. 2597.

Verdict for $3,500 held excessive for injuries to hockey player, extent of whose injuries could not be reliably ascertained or diagnosed at time of trial. Howard v. V., 191M245, 253NW766. See Dun. Dig. 2596.

Failure to award nominal damages is not ground for new trial. Dreelan v. K., 191M330, 254NW433. See Dun. Dig. 7074.

Verdict for $7,500 for care and education of child for 10 years, reduced by trial court to $5,500, was still excessive and was further reduced to $4,500. Knutson v. H., 191M420, 254NW464. See Dun. Dig. 2596.

Verdict for $5,169.05 reduced to $5,000 held not excessive for three year old girl suffering permanent deformation of face and shortening of left femur. Luck v. M., 191M503, 254NW609. See Dun. Dig. 2597.

Verdict for $13,741 reduced to $10,000 held not excessive to 26 year old mother who suffered dislocated hips, fracture of head of femur, multiple fractures of pelvis and other injuries of a permanent nature. Id.

Verdicts of $1,250 each for death of children held not excessive. Id.

Verdict for $10,000 reduced to $6,500 by trial court held not excessive to a mother of 36 years who suffered injury to heart which prevented her from doing work in and out of household to any extent. Knudsen v. W., 192 M30, 255NW246. See Dun. Dig. 2597.

Whether or not a new trial should be had because of excessive damages in a personal injury case is a matter for trial court's discretion. Peterson v. F., 192M360, 256 NW901. See Dun. Dig. 7133.

Verdict for $8500 reduced to $7000 held not excessive for a broken back. Id. See Dun. Dig. 7138.

Verdict for $5,000 held not excessive to woman 35 years of age who was suffering a sacroiliac sprain and injuries to nervous system. Johnston v. J., 193M298, 258NW433. See Dun. Dig. 2570.

Verdict for $11,000 for injuries to neck and base of brain held not excessive or to indicate passion or prejudice. Fredhom v. S., 193M569, 259NW80. See Dun. Dig. 2596, 2597.

Verdict for $7,500 for death of roofing contractor regularly contributing $250 each month for maintaining household held not excessive. Gross v. G., 194M23, 259 NW557. See Dun. Dig. 2617.

Judgment for $2500 held not excessive for deformity and lack of function of forearm for improper reduction of fracture by physician. Citrowski v. L., 194M269, 260NW 297. See Dun. Dig. 7133.

Verdict for $6,000 for loss of part of leg held not excessive where plaintiff could not use an artificial limb without submitting to an operation. Gustafson v. A., 194M575, 261NW447. See Dun. Dig. 2597.

A verdict for $3,500 for death of seven year old child held not excessive. Dickey v. H., 195M292, 262NW869. See Dun. Dig. 7133.

Damages of $1,000 for injury to head, held not given under influence of passion or prejudice, and not excessive. Paulos v. K., 195M603, 263NW913. See Dun. Dig. 7134.

Damages of $5,000 held not excessive where a woman 37 years of age suffered injuries which confined her in a hospital for over 7 weeks and left her with a permanently stiff knee joint. Mattson v. N., 196M334, 265NW51. See Dun. Dig. 7134.

A recovery of $6,000 on behalf of a parent for death of a 19 year old daughter held not so excessive as to indicate passion or prejudice. Hartel v. W., 196M465, 265NW282. See Dun. Dig. 7134.

A verdict for $3,750 is not excessive where a girl seven years of age suffers fractures of both arms, many bruises and lacerations of her body, and much loss of blood, all resulting in great pain and suffering for more than three weeks and loss of use of one arm for some three months. Buchanan v. M., 196M520, 265NW319. See Dun. Dig. 7134.

Verdict for $7,500 was not excessive for death of man 48 years old receiving public relief and leaving a wife and three children. Hoppe v. P., 196M538, 265NW338. See Dun. Dig. 7134.

Verdict for $150 for automobile destroyed by fire held not excessive. Hammerstad v. A., 196M561, 265NW433. See Dun. Dig. 2577b.

Verdict for $10,000 held not excessive for injury to head resulting in total and permanent disability. Schmidt v. R., 196M612, 265NW816. See Dun. Dig. 2597.

Verdict for $4,000 was not excessive for a farmer 58 years of age who suffered injury to extent of 50% disability to perform ordinary work to which he was accustomed. Anderson v. E., 197M144, 266NW702. See Dun. Dig. 2597.

Verdicts for $5,000 and $2,500, respectively, for death of elderly retired wealthy parents held excessive. Prescott v. S., 197M325, 267NW251. See Dun. Dig. 2617.

Verdict for $3,000 was not excessive for broken hip bone permanently shortening leg. Callahan v. C., 197M 403, 267NW361. See Dun. Dig. 2597.

Verdict for $1,866.35 to husband, paid for care and treatment of wife's injuries, held not unreasonable. *Birdsall v. D.*, 197M411, 267NW363. See Dun. Dig. 2597.

Verdict for $5,000 held not excessive for injuries to head resulting in unconsciousness for several weeks, followed by convulsions and slow recovery. Wells v. W., 197M464, 267NW379. See Dun. Dig. 2597.

Husband's verdict for $2,000 for injuries to wife, held not excessive. Useman v. M., 198M79, 268NW866. See Dun. Dig. 2597.

Verdict of $5,000 held excessive where five months and one week after injury, there were no objective evidences of injury and prognosis was a complete recovery in a few months. Kemerer v. K., 198M316, 269NW832. See Dun. Dig. 2596.

Verdict of $7,500 is not excessive to single woman twenty-seven years old suffering almost complete paralysis of right side of face. Finney v. N., 198M554, 270NW 592. See Dun. Dig. 2597, 7134.

Where a practicing dentist with a good standing in his community, was unlawfully evicted from his office for a period of almost two weeks, a verdict of $300 for actual damages on a showing of a specific loss of at least $245 in addition to that which might have been received from patients that called at his office is not excessive, nor can it be said to have been based on pure speculation or guess. Sweeney v. M., 199M21, 270NW906. See Dun. Dig. 7133.

Verdict for $15,000 held not excessive where injury resulted in permanent partial blindness to plaintiff who had a probable life expectancy of about 50 years. Arnao v. M., 199M34, 270NW910. See Dun. Dig. 2597.

Verdict for $1,500 held not excessive for death of infant. Taaje v. S., 199M113, 271NW109. See Dun. Dig. 2617.

Verdict for $3,500 was not excessive to married woman suffering two broken collar bones and four fractured ribs and eight weeks hospitalization. Findley v. B., 199 M197, 271NW449. See Dun. Dig. 2597.

Verdict for $9,750 held not excessive for injury to pelvis and leg. Timmerman v. M., 199M376, 271NW697. See Dun. Dig. 2597.

Verdict of $6,300 for 54-year old woman held not excessive where she sustained permanent injuries to both arms, with substantial loss of function, and severe pain and suffering. Olson v. K., 199M493, 272NW381. See Dun. Dig. 2570a.

Verdict for $917 for injuries to girl in hospital three days and losing a tooth held not so excessive as to indicate that it was result of passion and prejudice. Lacheck v. D., 199M519, 273NW366. See Dun. Dig. 7134.

Verdict of $9,000 not excessive, where 22-year-old man capable of earning approximately $1,600 per year received injuries resulting in total permanent disability. Piche v. H., 199M526, 272NW591. See Dun. Dig. 2570.

Verdict of $3,500 for injury to spine held not excessive. Thorstad v. D., 199M543, 273NW255. See Dun. Dig. 2570.

Verdict for $8,000 was not excessive for fracture of lamina of second cervical vertebra and crushing fracture of odontoid process, resulting in limitation of motion of neck. Wyatt v. W., 273NW600. See Dun. Dig. 2597.

A verdict for $4,000 reduced to $3,000 was not excessive for malpractice consisting in leaving gauze pack in wound in gall bladder operation. Brossard v. K., 274NW 241. See Dun. Dig. 2570, 7493.

37. General principles.

That disfigurement is concealed goes to amount of damage rather than the right to recover. Carlson v. N., 181M180, 232NW3. See Dun. Dig. 2570a(95).

38. Necessity of passion or prejudice.

172M362, 215NW512.

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

Verdicts against plaintiffs in automobile accident case held not the result of passion and prejudice by reason of the fact that evidence was admitted showing that insurance company had paid medical expenses and compensation provided by Workmen's Compensation Law. Arvidson v. S., 183M446, 237NW12. See Dun. Dig. 7134.

It does not follow from mere fact that trial court considered original verdict excessive and reduced amount of damages that damages awarded were given as a result of passion and prejudice. Birdsall v. D., 197M411, 267NW363. See Dun. Dig. 7134.

Exemplary damages of $600 to dentist unlawfully evicted from his office for two weeks is a matter emphatically reserved to jury, and unless so excessive as to indicate that jurors were actuated by passion or prejudice, it will not be disturbed. Sweeney v. M., 199M21, 270NW906. See Dun. Dig. 7134.

Judgment will not be reversed for improper argument of plaintiff's counsel which could only affect amount of damages where smallness of verdict indicates that no prejudice resulted. Elkins v. M., 199M63, 270NW914. See Dun. Dig. 7134.

On appeal from order denying a new trial, record does not show verdict so excessive as to indicate that passion and prejudice influenced jury. Pearson v. N., 273NW359. See Dun. Dig. 7134.

39. Remitting excess.

Excessive verdict may be cured by remission. Klaman v. H., 181M109, 231NW716.

Where verdict is excessive, supreme court will order new trial unless plaintiff consents to reduction. Ebacher v. F., 188M268, 246NW903. See Dun. Dig. 437a, 7079.

Verdict for damages in action against bank for fraud in sale of bond, held excessive and it was reduced. Id. See Dun. Dig. 2596, 3841.

Supreme court in reducing verdict because of error in instruction concerning damages may not reduce it below highest amount jury could award under evidence. Hackenjos v. K., 193M37, 258NW433. See Dun. Dig. 427.

Verdict for $5,000 reduced to $4,000 to housewife suffering a complete fracture of left femur at point where it connects with pelvis held not excessive. Birdsall v. D., 197M411, 267NW363. See Dun. Dig. 2597.

Where wife suffered certain injuries to lumbar muscles and sacroiliac joint and a condition of paralysis as a result of traumatic neurosis and the extent of permanency of her injuries could not be definitely determined from the record, verdict for $18,000 is excessive, and is reduced to $13,000. Useman v. M., 198M79, 268NW866. See Dun. Dig. 2596.

Denial of new trial on plaintiff's consent to remittitur. 16MinnLawRev185.

42. For inadequate damages.

A verdict for less than amount due on conditional contract of sale held not perverse in action against purchasers for conversion of property. Pennig v. S., 189M 262, 249NW39. See Dun. Dig. 7161.

Verdict for $225 for damage to car and personal injuries, held not so inadequate as to lead to conclusion that verdict was perverse. Stone v. K., 190M368, 251NW 665. See Dun. Dig. 2598.

Case held not one where court will reverse an order denying a motion for a new trial on ground that nominal damages should have been allowed to defendants. Hoppman v. P., 190M480, 252NW229. See Dun. Dig. 7141.

Verdict for $1,000 held not inadequate under conflicting evidence for sacroiliac injury. King v. M., 192M163, 255 NW626. See Dun. Dig. 2598.

In action for wrongful death, where amount of general damages is not susceptible to proof by opinion evidence, motion for new trial because verdict is inadequate should be made upon ground specified in this subdivision. Wright v. E., 193M509, 259NW75. See Dun. Dig. 7132.

Granting or refusal of a new trial upon ground of inadequate damages appearing to have been given under influence of passion or prejudice rests in discretion of trial court. Id. See Dun. Dig. 7136, 7141.

Verdict for $500 for death of a man 74 years of age held not so inadequate as to indicate passion or prejudice. Id. See Dun. Dig. 7141.

Verdict of $500, $150 of which was for special damages, for lumbo-sacrae sprain, was so low as to indicate prejudice on part of jury. Hill v. R., 198M199, 269NW 397. See Dun. Dig. 7141.

Inadequate verdict—denial of new trial on defendant's consent to additur. 19MinnLawRev661.

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, 213 NW919.

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

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

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

Exclusion of evidence. 174M573, 219NW913.

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

The direction of a verdict, if erroneous, is an error of law occurring at the trial. Gale v. F., 176M631, 220NW 156.

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

Questioning witnesses as to their interest in an indemnity insurance company, which it was admitted had insured the defendant, was not error. 177M13, 224NW 259.

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

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.

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, 225 NW389.

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

Error in admitting extrinsic evidence in aid of construction is not ground for a new trial, where the court could not do otherwise than construe the writing as it did. Martin v. F., 177M592, 226NW203.

A trial court's talk in open court to a jury seeking further instructions, held not to be an "irregularity," but may be reviewed as "errors of law occurring at the trial" and a settled case or bill of exceptions is necessary. 178M141, 226NW404.

Reception of evidence which could not have harmed appellant will not warrant a new trial. 178M471, 227NW 491.

Testimony erroneously received through mistake or inadvertence, but promptly stricken when the court's attention was directed thereto, does not require a new trial, where it is perceived that no prejudice resulted. Drabek v. W., 182M217, 234NW6. See Dun. Dig. 7074.

The trial court did not err in granting new trials because of erroneous instructions given in cases to recover damages resulting from an automobile accident and

relating to the rights and duties of host, the driver, and guests, the passenger, including contributory negligence under the Wisconsin law. Kassmir v. O., 182M324, 234 NW473. See Dun. Dig. 7165.

That findings were made, which call for the same judgment called for by the verdict, is not ground for a new trial. Commercial Union Ins. Co. v. C., 183M1, 235 NW634. See Dun. Dig. 7074(13).

Where a verdict may have been based upon an erroneous instruction, there must be a new trial, unless it conclusively appears that the verdict is sustained upon other grounds. General Electric Co. v. F., 183M178, 235 NW876. See Dun. Dig. 7165.

New trial granted because of reception of hearsay evidence. Edie v. S., 183M522, 237NW177. See Dun. Dig. 7180.

New trial was warranted where charge was confusing and did not state the law applicable. Le Tourneau v. J., 185M46, 239NW768. See Dun. Dig. 7165.

Error in admitting or excluding evidence of fact otherwise satisfactorily proved by admissible evidence, or inadmissible evidence unobjected to, is no ground for new trial. Milliren v. F., 186M115, 242NW546. See Dun. Dig. 7184.

New trial granted because of erroneous reception in evidence of memorandum to corroborate witness when it was not needed by witness. In Re Ylijarvi's Estate, 186M288, 243NW103. See Dun. Dig. 7184.

A charge should point out the issues of fact to be decided by the jury; but failure to do so, where the issues are simple and experienced attorneys have argued the same to the jury, should not call for a new trial, unless the application of some rule of law is so left as to mislead. Newton v. M., 186M439, 243NW684. See Dun. Dig. 7165.

Excluding testimony as to collateral matters not materially bearing upon the main issues, even if error, does not of itself call for a new trial. Newton v. M., 186M439, 243NW684. See Dun. Dig. 7183.

In litigation to determine right of mining corporations to merge over objection of minority stockholders, it was within discretion of court to permit evidence of result of explorations had up to time of trial, but refusal to do so held not so important as to require new trial. Paterson v. S., 186M611, 244NW281. See Dun. Dig. 2014, 2074, 2122.

An erroneous instruction that in levying an attachment of lessee's property, lessor was chargeable with acts of sheriff is ground for new trial on issue of whether defendant lessee actually was evicted in subsequent action for rent. Donaldson v. M., 190M231, 251NW272. See Dun. Dig. 7174.

Where sole claim on trial was that bank cashier cancelled note by mistake, plaintiff could not raise question of authority of cashier on motion for new trial or on appeal. People's State Bank v. D., 191M558, 254NW 782. See Dun. Dig. 388a, 425a.

"Errors occurring at the trial" do not include a mistake of jury in disposing of facts, but are those of trial judge in conduct of trial. Roelofs v. B., 194M166, 259NW808. See Dun. Dig. 7162.

A new trial should not ordinarily be granted for erroneous admission of evidence when court distinctly instructs jury to disregard it. Lorberbaum v. C., 198M289, 269NW646. See Dun. Dig. 7207.

44. How far discretionary.

Order granting new trial for errors in instructions rests largely in the discretion of the trial court. Naylor v. M., 185M518, 241NW674. See Dun. Dig. 7166.

45. Necessity of exceptions—notice of trial.

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

Overruling of objections to admission of evidence may not be considered in absence of exceptions. D. M. Gilmore Co. v. D., 187M132, 244NW557. See Dun. Dig. 388a, 7091.

Error not raised in motion for new trial was not subject for review. Thornton Bros. Co. v. R., 188M5, 246NW 527. See Dun. Dig. 358, 358a, 388a.

FOR INSUFFICIENCY OF EVIDENCE

46. General rules.

Facts stated by plaintiff in personal injury action were so improbable that new trial granted. 171M164, 213NW 738.

Action being based on contract, assignment that verdict was excessive came under this subdivision. 171M518, 213NW919.

Finding that guaranteed note was paid by the giving of a new note held not sustained by the evidence. 172 M22, 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, 216NW 333.

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

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

When the evidence taken as a whole is manifestly contrary to a finding, it is an abuse of discretion not to grant a new trial, even if there be some evidence tending to sustain the finding. National Pole & Treating Co. v. G., 182M21, 233NW810. See Dun. Dig. 7157(19).

On appeal from judgment entered on verdict, no motion for new trial having been made and only assignments of error being that court erred in refusing to direct a verdict or judgment notwithstanding verdict, the one question presented for review is whether evidence reasonably sustains verdict. Freeman v. M., 185M 503, 241NW677. See Dun. Dig. 388a.

A verdict and judgment sustained by great preponderance of evidence cannot be vacated on ground that substantial justice has not been done. Ayer v. C., 189M359, 249NW581. See Dun. Dig. 7142.

46a. Verdict not justified by evidence.

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

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

Where only evidence of negligence to support a verdict against employer is evidence of negligence of a co-defendant employee, in whose favor jury finds a verdict, verdict against employer is perverse and a new trial is granted. Ayer v. C., 187M169, 244NW681. See Dun. Dig. 6027a, 7161.

Verdict based upon great preponderance of evidence cannot be said to be "perverse." Ayer v. C., 189M359, 249NW581. See Dun. Dig. 7142.

Order denying a new trial reversed because evidence is in manifest preponderance against verdict. Holdys v. S., 198M258, 269NW468. See Dun. Dig. 7142.

48. After trial by court.

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

51. After successive verdicts.

Anderson v. A., 179M461, 229NW579(1).

WHEN VERDICT CONTRARY TO LAW

54. General statement.

Ground that verdict was "not justified by the evidence and is contrary to law" did not raise question of excessiveness of damages in tort action. 174M545, 219NW 866.

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., 176M280, 223NW296.

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

A verdict against a corporation operating a drug store, and in favor of its managing officer who had sole charge of its business and who personally made the sale complained of, is perverse, and requires a new trial. Tiedje v. H., 184M569, 239NW611. See Dun. Dig. 7115b, 7161.

New trial was not required because verdict was against city and in favor of building owner in action by pedestrian who slipped on ice on sidewalk. Bracke v. L., 187 M585, 246NW249. See Dun. Dig. 5045, 7161(41).

A verdict which on account of mistake or other cause fails to include interest is not perverse. Newberg v. C., 190M459, 252NW221. See Dun. Dig. 7115b, 7141.

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. Anderson v. N., 193M157, 258NW 157. See Dun. Dig. 5082.

Verdict exonerating one defendant and finding liability as to other held not perverse where evidence justified finding that latter was guilty of negligence proximately causing fatal injuries to plaintiff's intestate. Szyperski v. S., 198M154, 269NW401. See Dun. Dig. 7161.

9326. Basis of motion.

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

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

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

In absence of extension of time, court cannot grant motion upon minutes after thirty days from coming in of verdict. 179M136, 228NW558.

Affidavits presented with proposed amended answer on motion for amended findings or new trial cannot be considered. 179M586, 229NW565.

Without a case or bill of exceptions, errors in a charge are not reviewable. Anderson v. C., 182M243, 234NW 289. See Dun. Dig. 344(88).

Affidavits cannot be used on motion for a new trial to show alleged improper remarks of counsel in address-

ing the jury; the record must be protected at the time. Sigvertsen v. M., 182M387, 234NW688. See Dun. Dig. 7096.

Where party moves only for judgment and does not ask for new trial, he waives errors which might have given him new trial. Yager v. H., 186M71, 242NW469. See Dun. Dig. 7076.

On joint motion for new trial by husband and wife, wife against whom no cause of action was proved was entitled to relief. McDermott v. R., 188M501, 247NW683. See Dun. Dig. 7077(44).

A motion by defendant for judgment notwithstanding verdict will not be granted in a personal injury action, unless evidence of negligence of defendant is wanting or evidence of plaintiff's negligence is clear. Stritzke v. C., 190M323, 251NW532. See Dun. Dig. 5082.

An order made on a motion for a new trial based upon minutes of court, heard more than 30 days after coming in of a verdict or decision, is a nullity, where no stipulation or order extending time is procured. Smith v. W., 192M424, 256NW890. See Dun. Dig. 7096.

Stay of 20 days given by court on rendering decision for plaintiff did not affect defendant's right to move for a new trial and did not operate as an extension of time for motion for new trial on the minutes. Id. See Dun. Dig. 7096.

Correction in finding made by court in its order denying amended finding did not toll time within which a motion for a new trial could be heard on minutes, correction not being one sought by defendants in their motion and being a correction of a mere inadvertence in original finding. Id. See Dun. Dig. 7096.

It was not error to deny motion for new trial upon ground of newly discovered evidence of a certain witness where no request was made for a continuance because of inability to secure attendance of such witness either before or at the trial, at which time it was know that such person might be able to testify on issues in question. Kubat v. Z., 193M522, 259NW1. See Dun. Dig. 7126.

Question of misconduct of counsel in his argument to jury cannot be presented by affidavits on motion for a new trial, where settled case fails to show what was said by counsel, or that there was any objection or exception thereto, or that matter was in any way called to attention of court at trial. Pettersen v. F., 194M265, 260NW225. See Dun. Dig. 384, 9800.

Judge who has tried a case cannot be ousted, by an affidavit of prejudice, of his jurisdiction to consider a motion for a new trial. State v. District Court, 195M169, 263NW908. See Dun. Dig. 7085.

Entry of judgment, time for appeal therefrom not having expired, does not in and of itself bar a motion for a new trial. Id. See Dun. Dig. 7087.

By resting solely upon a motion for judgment, a defeated party waives all errors which would be ground only for a new trial. Guild v. M., 199M141, 271NW332. See Dun. Dig. 5085.

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

1. In general.

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

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

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

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

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

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

Supreme court cannot pass upon plaintiff's financial ability to perform a contract, when such question was not raised in the trial court. 175M236, 220NW046.

A trial court's talk in open court to a jury seeking further instructions held not to be an "irregularity," but may be reviewed as "errors of law occurring at the trial" and a settled case or bill of exceptions is necessary. 178M141, 226NW404.

On appeal from judgment without settled case or bill of exceptions, after trial to the court, the only question is whether findings of fact support the judgment. Wright v. A., 178M415, 227NW357.

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

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

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

When no ground for new trial is stated in the motion therefor the judgment will be affirmed. 180M93, 230NW 269.

Assignment that court erred in granting new trial for errors occurring at tial, held sufficient. 180M395, 230NW 895.

Claim of prejudice from dismissal as to codefendant will not be considered for first time on appeal. 180M 467, 231NW194.

Theory pursued below must be adhered to on appeal. Gunnerson v. M., 181M37, 231NW415(2).

A question not made by pleadings, evidence, rulings on evidence, requests to charge, or by the specifications of error in the motion for new trial, cannot be raised for the first time on appeal. Duluth, M. & N. Ry. Co. v. M., 183M414, 236NW766. See Dun. Dig. 384.

In an attorney's lien proceeding, it is too late to object, for the first time on appeal, that the lien claimant was not attorney of record and so not entitled to a lien in any event. Meacham v. B., 184M607, 240NW540. See Dun. Dig. 384(39).

Where there is no bill of exceptions or settled case, it must be assumed that all issues and facts determined by the findings were litigated by consent. Rosenfeldt's Will, 185M425, 241NW573. See Dun. Dig. 372(74).

Questions, not jurisdictional, not raised by pleadings or presented to trial court, are not for review on appeal. McCormick v. H., 186M380, 243NW392.

One cannot try a case upon one theory and then shift his position on appeal. Steward v. N., 186M606, 244NW 813. See Dun. Dig. 401.

Where insurer failed to claim right to deduct premiums from benefits on the trial, it cannot claim it on appeal from adverse judgment. Smith v. B., 187M220, 244NW 817. See Dun. Dig. 384.

Defendant, not objecting to plaintiff's claimed measure of damages, consented to try case upon such theory, and cannot object thereto on appeal. Investment Associates v. H., 187M555, 246NW364. See Dun. Dig. 404.

Upon appeal from judgment without a settled case or bill of exceptions, sole question for consideration is sufficiency of facts found to support conclusion of law. State v. Waddell, 187M647, 246NW471. See Dun. Dig. 387.

Where one of defendants in action for death was son and beneficiary of decedent, defendants could not complain of a general verdict for administrator where they did not seek a reduction or appointment below. Anderson v. A., 188M602, 248NW35. See Dun. Dig. 384.

Issues not raised by the pleadings or litigated cannot be raised on appeal. National Equipment Corp., 189M632, 250NW677. See Dun. Dig. 384, n. 38.

Assignment in notice of motion for new trial of "errors of law accruing at the trial, and either excepted to at the time or hereinafter assigned in this notice of motion," is not sufficient to present for review errors not excepted to at trial. First & Farmers' State Bank v. V., 190M331, 251NW669. See Dun. Dig. 388a, 7091.

Whether a sale in partition can be postponed, when farm conditions are bad and farm lands are depressed, to await a more favorable time, and, if so, whether appeal presents a case calling for such relief, were not suggested to trial court and are not considered. Grimm v. G., 190M474, 252NW231. See Dun. Dig. 7343(95).

So strong is the public policy behind homestead statute that, where it appears that one spouse has attempted to alienate an interest in homestead without other's consent, supreme court can, on its own motion, assert this defense even though not properly pleaded or even though raised for first time on appeal. Craig v. B., 191M42, 254NW440. See Dun. Dig. 4211.

Questions not presented at trial by pleadings or otherwise will not be considered on appeal. Livingstone v. H., 191M623, 255NW120. See Dun. Dig. 406.

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 trial proceeds without any objection to pleadings and settled case fails to show any misconduct of counsel, assignments of error in this court that reply is a departure or that counsel was guilty of misconduct are not well taken. Hovda v. B., 193M218, 258NW305. See Dun. Dig. 388a, 9723.

Commissioner of banks cannot raise defense for first time on appeal that one suing to have claim determined to be preferred had not complied with statute concerning form and time for proceedings. Bethesda Old People's Home v. B., 193M589, 259NW384. See Dun. Dig. 384.

Supreme court cannot consider complaint upon inclusion in taxation of costs where matter was not presented to trial court. Taylor v. N., 196M22, 264NW139. See Dun. Dig. 384.

Where contributory negligence was clearly submitted to jury, without objection or exception, it was too late after an unfavorable verdict to raise question that there was not sufficient evidence of contributory negligence to go to jury, especially where testimony of defendant's negligence was uncertain. Harris v. E., 196M469, 265NW 322. See Dun. Dig. 388.

Statute does not alter rule that cases will be disposed of on appeal within limits of consideration fixed by theory on which they have been tried. Id. See Dun. Dig. 401.

It is duty of trial court, on its own motion, to prevent counsel from making remarks that obviously tend to arouse passion or prejudice in minds of jurors. Prescott v. S., 197M325, 267NW251. See Dun. Dig. 9800.

Litigants cannot sleep on their rights until they reach supreme court, and then, for the first time, object to an irregularity occurring in tribunal below. Foster v. S., 197M602, 268NW630. See Dun. Dig. 9724.

2. Objections to pleadings.

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

Contention that counterclaim could not be maintained cannot be considered on appeal where not made at the trial nor presented as ground for new trial. Renn v. W., 185M461, 241NW581. See Dun. Dig. 384, 388a.

That a complaint fails to state facts sufficient to constitute a cause of action may be raised for first time on appeal. Tjepkes v. S., 193M505, 259NW2. See Dun. Dig. 384, 7732(82).

It is immaterial that complaint did not cover certain ground of negligence where both parties introduced evidence thereon without objection. Dziewczynski v. L., 193M580, 259NW65. See Dun. Dig. 7675.

Defect in pleading, not challenged by demurrer, motion, or specific objection, should not work a reversal where cause of action or defense has been litigated on the merits as if no defects in pleadings existed. Olson v. M., 195M626, 264NW129. See Dun. Dig. 7675.

4. Reception of evidence.

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

Objection to sufficiency of evidence of ownership of land not suggested at trial, comes too late on appeal. Luebke v. C., 178M40, 226NW415.

Where evidence was received subject to objection, to be ruled upon later, and no rulings were so made, there was nothing to be reviewed in absence of a motion for a new trial. 178M120, 226NW516.

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

That hearing should have been on oral evidence cannot be raised for first time on appeal. 179M488, 229NW 791.

A letter of a witness impeaching his testimony was properly received, there being no objection to specific sentences containing irrelevant or immaterial matters. Martin v. S., 183M256, 236NW312. See Dun. Dig. 9728, 10351.

Exclusion of evidence is not reviewed in absence of exception. Mutual Trust Life Ins. Co. v. B., 187M503, 246 NW9. See Dun. Dig. 9728.

Where evidence is received without objection, or objections are withdrawn, no error can be assigned on its reception on appeal. State v. Padares, 187M622, 246NW 369. See Dun. Dig. 384, 9728.

Assignments of error upon rulings excluding or admitting testimony must be sufficiently specific to point out ruling challenged. Carr v. W., 188M216, 246NW743. See Dun. Dig. 362.

It is not sufficient to assign error upon reception of testimony of a named witness, where a large part of testimony of such witness was rightly admitted. Id.

Employee is precluded in supreme court from raising objection to admission of evidence claimed to be incompetent, not objected to below. Cooper v. M., 188M560, 247NW805. See Dun. Dig. 9728.

Inexcusable conduct of plaintiff in examining one of several parties in automobile case and eliciting fact that certain defendants were not represented by insurance companies could not be considered on appeal where no objection to procedure was made at time and it was not specified as error in motion for new trial. Brown v. M., 190M81, 251NW5. See Dun. Dig. 388a.

Where no motion is made to strike out an answer to a proper question, propriety of answer will not be reviewed here. Johnston v. S., 190M269, 251NW525. See Dun. Dig. 384.

Where a motion is made to strike out an answer on one ground only, its propriety as against another and different objection will not be reviewed here. Id. See Dun. Dig. 384.

Where auditor's report of defendant's transactions as trustee was offered in evidence with a reservation of ruling on its admissibility, but no ruling was made, report must be considered in evidence because used throughout trial as if it were, witnesses testifying from and in reference to it without objection. Smith v. T., 190M410, 252NW423. See Dun. Dig. 3227a, 9727.

Court did not err in refusing to strike out part of the testimony of defendant which had been received without objection. Kouri v. O., 191M101, 253NW98. See Dun. Dig. 9728.

Objection that statement was "incompetent, irrelevant, and immaterial" did not involve point that preliminary proof of its execution had not been made. Kassmir v. P., 191M340, 254NW446. See Dun. Dig. 9740.

In absence both of an exception thereto and a clear specification therof in his motion for a new trial, an appellant may not assign as error a ruling on evidence. Clark v. W., 193M525, 259NW62. See Dun. Dig. 7091.

Where evidence is received subject to an objection or motion to strike and no subsequent ruling is made, evidence is considered as received over objection. Johnson v. H., 197M496, 267NW486. See Dun. Dig. 388a.

An exception taken at time evidence is received is sufficient to preserve right of review to objecting party. Exception may also be preserved by motion to strike at a subsequent point of time during trial or in a motion for a new trial. Id.

Incompetent testimony must be kept out by timely objection when it is offered. Peterson v. B., 199M455, 273 NW260. See Dun. Dig. 9728.

Where incompetent testimony comes into record without objection trial court's refusal to strike testimony upon a subsequent motion is not such an abuse of discretion as would require a reversal. Id.

Affidavits stand upon same footing as documentary evidence, and if parties elect to submit their case upon such evidence, they waive their right to object to mode of proceeding which they themselves have adopted. State v. St. Cloud Milk Producers' Ass'n., 273NW603. See Dun. Dig. 411(13).

4½. ——Offer of proof.

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

5. Misconduct of counsel.

179M325, 229NW136.

Improper remarks of counsel, held not ground for reversal in absence of objection or exception. Seitz v. C., 181M4, 231NW714.

Reviewing court will not consider statements of counsel to jury in argument in absence of objection. Olson v. P., 185M571, 242NW283. See Dun. Dig. 384, 388a.

There is nothing to review where at close of argument, not taken down by reporter, defendant's counsel attempted to take exceptions but attorneys could not agree as to what had been said. Adams v. R., 187M209, 244NW810. See Dun. Dig. 384, 388a.

It is duty of trial courts on their own motion to prevent counsel from arousing passion or prejudice in jurors by stopping flagrant appeals to prejudice. Ferraro v. T., 197M5, 265NW829. See Dun. Dig. 9800.

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. 173 M186, 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, 223 NW605.

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, 226NW 702.

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

Instructions, unobjected to, become the law of the case, and the sufficiency of the evidence to sustain the verdict is then to be determined by the application of the rules of law laid down in the charge. Bullock v. N., 182M192, 233NW858. See Dun. Dig. 9792(38).

Where the trial court in its instructions to the jury erroneously states that a particular fact in issue is admitted, it is the duty of the counsel to direct the court's attention thereto if he expects to base error thereon. State v. Solum, 183M36, 235NW390. See Dun. Dig. 9797(75).

If appellant deemed a word used in the instruction ambiguous, he should have directed the court's attention thereto before the jury retired. Zobel v. B., 184M172, 238NW49. See Dun. Dig. 9798(82).

Language of court as to consideration of statements by lawyers if ambiguous or incorrect should have been called to the trial court's attention for correction. Pearson v. N., 184M560, 239NW602. See Dun. Dig. 9798(82).

Errors assigned upon the charge are unavailing where appellant approved the charge when given and did not challenge it in the motion for a new trial. Rahn v. F., 185M246, 240NW529. See Dun. Dig. 287.

Fact that no exceptions were taken to the charge at the trial was immaterial where trial court granted new trial for errors assigned in the motion for a new trial. Naylor v. M., 185M518, 241NW674. See Dun. Dig. 388a.

Instructions not challenged on motion for a new trial cannot be attacked on appeal. Carr v. W., 188M216, 246 NW743. See Dun. Dig. 385.

Where no exceptions are taken to charge which as a whole fairly submits issues, errors cannot be subsequently assigned upon inadvertent or faulty statements which could readily have been corrected if called to attention of court. Donaldson v. C., 188M443, 247NW522. See Dun. Dig. 364.

No instructions were requested and no exceptions taken to charge, which therefore became law of case. Flower v. K., 189M461, 250NW43. See Dun. Dig. 9797.

Where there is an inadvertent or casual erroneous statement in charge, attention of court must be directed

to it in order to predicate error upon it. Romann v. B., 190M419, 252NW80. See Dun. Dig. 9797, 9798.

Where case was submitted to jury without request covering point, and no exception was taken on charge, except on statute of limitations, record does not present for review defendant's contention that plaintiff gratuitously assumed responsibility for support of defendant's child without expectation of compensation. Knutson v. H., 191M420, 254NW464. See Dun. Dig. 388a.

Instructions to jury cannot be assailed on appeal where no exceptions to them were taken at trial or in motion for a new trial. Saunders v. C., 192M272, 256NW 142. See Dun. Dig. 388a.

An exception to whole charge that it is argumentative and so worded as to excite prejudice does not avail plaintiff appellant, where there are paragraphs of correct and pertinent instructions. Knight Soda Fountain Co. v. D., 192M387, 256NW657. See Dun. Dig. 364.

Instructions not objected to become the law of the case, and whether verdict is sustained by evidence under the instructions is to be determined by application of such instructions, unless record or evidence conclusively shows that party obtaining verdict is not entitled to recover. Kovaniemi v. S., 192M395, 256NW661. See Dun. Dig. 384.

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

Instructions not excepted to become law of case. Rochester Bread Co. v. R., 193M244, 258NW302. See Dun. Dig. 404.

Instructions to jury where no objection is made thereto or exception taken become law of the case, whether right or wrong. Oxborough v. M., 194M335, 260NW305. See Dun. Dig. 9792.

On appeal from order denying a motion for a new trial, supreme court cannot consider contention that trial court over emphasized respondent's theory of case, where there was no assignment of error as to such matter in motion for new trial. Delva's Estate, 195M192, 262NW 209. See Dun. Dig. 395.

Denial of motion for directed verdict cannot present for review errors in charge or omission to submit a fact issue presented by evidence. Robbins v. N., 195M205, 262 NW872. See Dun. Dig. 388b.

Where no exception was taken to charge when delivered, and error assigned thereon in motion for a new trial was one as to statement of attorney, which readily could have been corrected had attention thereto been called before the jury retired, there was no error of which complaint may be made. Mattson v. N., 196M334, 265NW51. See Dun. Dig. 388b.

Instructions of trial court with reference to duties of respective defendants in approaching intersection examined and held not prejudicial to either party. Useman v. M., 198M79, 268NW866. See Dun. Dig. 9723.

Court's cautionary charge that "the fact that defendant's truck ran out of gas and if that was negligence, it was not such as contributed directly or proximately to the collision, and is not to be considered by you as an act of negligence contributing to this collision in this case," held not prejudicial, where plaintiff then conceded and on appeal asserts that he is not and was not basing right of recovery upon such theory, especially where no suggestion was made at time of trial that such charge was out of place or harmful to his cause. Hartwell v. P., 198M488, 270NW570. See Dun. Dig. 347.

Right of counsel to call attention to omission or inadvertence in a charge, or to take exception thereto, imposes a duty upon him to exercise such right. Dehen v. B., 198M522, 270NW602. See Dun. Dig. 9797.

There was no reversible error in court's definition of "proximate cause," and, in absence of any objection or exception thereto at time of trial, plaintiff cannot now raise that point. Id. See Dun. Dig. 9798.

Use of an improper word in a sentence of charge should be called to court's attention before jury retires, or it will not be a good ground for a new trial. Doody v. S., 198M573, 270NW583. See Dun. Dig. 9792.

Right possessed by counsel to call attention to omission or inadvertence in court's charge, or to take exception thereto, imposes a corresponding duty to make use thereof. State v. Van Guilder, 199M214, 271NW473. See Dun. Dig. 9797.

7. Motion for directed verdict.

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

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

On appeal from a judgment after a jury trial, even though there has been no motion for a new trial, court will consider question of sufficiency of evidence to support verdict, where it has been expressly presented below by motion for directed verdict. Ciresi v. G., 187M 145, 244NW688. See Dun. Dig. 385.

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.

Motion for directed verdict at close of testimony saved right to attack sufficiency of evidence. Thorsness v. W., 198M270, 269NW637. See Dun. Dig. 7073.

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. 174M507, 219NW758.

In an action tried by the court, an issue upon which the court made no finding, upon which neither party has requested findings and which is not covered by any assignment of error, presents no question for review. 175 M382, 221NW426.

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

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

10. Entry of judgment.

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

Assuming that it was improper to enter judgment on the verdict in ejectment returned without an order of the court, the correction was with the trial court. Deacon v. H., 182M540, 235NW23. See Dun. Dig. 2906, 5040, 5050.

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

Appeal being from the judgment and there being no settled case or motion for new trial, the record presents only the question as to whether the findings of fact 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, 226NW847.

Without a case or bill of exceptions, errors in a charge are not reviewable. Anderson v. C., 182M243, 234NW 289. See Dun. Dig. 347(22).

Where there is no settled case it is presumed that sufficient evidence was introduced to justify findings. Nichols v. V., 192M510, 257NW82. See Dun. Dig. 372.

An appeal from order denying a new trial will be dismissed where there is no settled case or bill of exceptions. Lund v. J., 195M352, 263NW110. See Dun. Dig. 344a.

9329. Bill of exceptions or case.

See notes under §9493.

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

Where an appeal has been promptly taken and a settled case is needed to properly present and determine the appeal, and where the hearing of the appeal is not shown to be delayed, and no prejudice shown, the courts are disposed to aid the presentation and hearing of the appeal on the merits. State v. Enersen, 183M341, 236NW 488.

Record held not to show abandonment by defendants of their intention to move for a settled case. State v. Enersen, 183M341, 236NW488.

The fact that the opponent's attorney otherwise acquires knowledge that a decision has been filed, or that a copy of the decision is mailed by the judge to counsel for each party does not take the place of, or dispense with, the notice required by statute. State v. Enersen, 183M341, 236NW488. See Dun. Dig. 317.

Trial judge should have in the exercise of discretion allowed and settled proposed case, though forty days' time stated had expired. State v. Enersen, 183M341, 236 NW488.

Where case is tried to the court and decision later filed, this section requires the party who wishes to start the time running for his opponent to serve a proposed settled case, to serve on his opponent a written notice of the filing of the decision, containing a sufficient description of the decision to identify it. State v. Enersen, 183M341, 236NW488. See Dun. Dig. 317.

When an order is based upon the records, no certificate of settled case is required. First State Bank of New York Mills v. W., 185M225, 240NW892. See Dun. Dig. 339(60).

Financial inability to pay for transcript was not valid excuse for delay of approximately six months in making application for extension of time to procure transcripts and serve proposed case. Elton v. N., 191M636, 253NW 529. See Dun. Dig. 318, 1372(d).

Court has power to extend time limited for proposing and settling a case and to grant leave to propose a case after time limit has expired. Stebbins v. F., 191M 561, 254NW818. See Dun. Dig. 1372(d).

Trial court erred in refusing to permit attorneys to serve proposed case after time limit had expired where they acted diligently, although abortively, to have time extended. Id. See Dun. Dig. 1372(a).

Where no application for extension of time to propose a case had been made, trial court's discretion was not abused in denying application for a settled case made approximately a year after expiration of statutory period for proposing a case and where many months had elapsed after such expiration before a transcript was ordered. State v. Guilford, 192M345, 256NW238. See Dun. Dig. 1372.

Where the trial court has settled and allowed a case in obedience to a peremptory writ of mandamus issued by supreme court after full hearing, case so settled cannot be stricken from record on ground that it was not properly settled, remedy being in mandamus proceeding, within time permitted for petitions for rehearing, for a modification of peremptory writ. Krom v. F., 192M520, 257NW812. See Dun. Dig. 5768.

Where trial proceeds without any objection to pleadings and settled case fails to show any misconduct of counsel, assignments of error in this court that reply is a departure or that counsel was guilty of misconduct are not well taken. Hovda v. B., 193M218, 258NW305. See Dun. Dig. 388a, 9723.

Trial court may grant leave to propose a bill or case even after time allowed by this statute, and may even do so after appeal and remand not based on merits. State v. District Court, 195M169, 263NW908. See Dun. Dig. 1372.

Invoking power of court to grant an extension of time within which to have case settled and allowed, upon ground that court did not allow a sufficient stay for such purpose in its decision, is a waiver of written notice of filing of decision. State v. Wilson, 199M452, 272NW163.

Where party is guilty of unjustified delay in applying to court for extension of time within which to have case settled and allowed so that time allowed for that purpose by statute has expired, and such delay results in prejudice to adverse party, supreme court will not interfere to control discretion of district court. Id. See Dun. Dig. 1372.

Trial court has discretion to permit a case to be settled after a stay has expired, and to extend 40 days provided, but it has no such power if time to appeal has expired under §9497. Id.

On appeal only question that can be raised in absence of bill of exceptions or settled case is that findings of fact do not support judgment. Schaefer v. T., 199M610, 273NW190. See Dun. Dig. 344, 386, 387.

REPLEVIN

9331. Possession of personal property.

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

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. 171M 483, 214NW284.

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

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, 223NW 618.

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. 178 M344, 227NW199.

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

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

Where owner of property delivers it to another for purpose of having it delivered to a customer, and such other fails to so deliver it, the owner is entitled to recover the property. Hoiby v. F., 185M361, 241NW58. See Dun. Dig. 8407(51).

Proof of demand before suit is not necessary in a replevin action where it is apparent that a demand would have been futile. Hoiby v. F., 185M361, 241NW58. See Dun. Dig. 8409.

Evidence sustains verdict that appellant aided and abetted another defendant in fraudulently obtaining possession of plaintiff's stock certificate in a building and loan company. Hovda v. B., 193M218, 258NW305. See Dun. Dig. 3339.

Conditional seller has lien similar to that accorded a chattel mortgagee and may foreclose same by bringing action in equity and may thus secure deficiency judgment, and to protect himself, he may couple foreclosure action with action of replevin, thereby obtaining possession of property while foreclosing. Ahlers v. J., 193M544, 259NW397. See Dun. Dig. 8651.

Where plaintiff in replevin alleged that he was owner and entitled to immediate possession of automobile, describing it by motor and registration number, and answer was a general denial, plaintiff could prove that defendant's sole claim of title and right of possession was based upon documents tainted with usury. Halos v. N., 196M387, 265NW26. See Dun. Dig. 8412.

Replevin cannot be successfully maintained against a public officer, who, in course of his duty, seized liquor possessed for an illegal purpose at time of seizure. Starrett v. P., 198M416, 270NW131. See Dun. Dig. 8405.

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

9332. Affidavit.

Plaintiff manufacturer and owner of cab body and truck body held to have sufficient right of possession to maintain replevin against one in possession. Hoiby v. F., 185M361, 241NW58. See Dun. Dig. 8406.

9333. Bond and sureties.

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

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

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

9334. Requisition to sheriff—Service and return.

In replevin, the officer's return on the writ held not conclusive as to an issue collateral to the writ and levy, involving the time of seizure only, so as to preclude proof that the seizure was made on a date later than that shown by the return. Grossman v. L., 184M446, 238 NW893. See Dun. Dig. 7818.

The reason of the rule making conclusive an officer's return on a writ extends only to cases where it is collaterally attacked for the purpose of invalidating the officer's proceedings or defeating the writ or some right thereby acquired. Grossman v. L., 184M446, 238NW893. See Dun. Dig. 7818.

9335. Exception to sureties—Rebonding.

Surety on bond in replevin cannot escape liability for damage for retention of property simply because, after bond was given, complaint was amended to increase amount of damages claimed. General Talking Pictures Corp. v. J., 190M236, 251NW270. See Dun. Dig. 8432.

9340. Claim of property by third person.

Failure by a third party to make claim does not relieve judgment creditor from liability for conversion in levy of an execution. Lundgren v. W., 189M476, 250NW1. See Dun. Dig. 3551(65).

Court officer of municipal court of Virginia comes under this section. Op. Atty. Gen., May 17, 1933.

ATTACHMENT

9342. When and in what cases allowed.

½. In general.

Evidence held to sustain finding that property attached was held in trust for defendant. 172M83, 214NW771.

Fraudulent conveyances. 172M355, 215NW517.

Assignment of farm lease whereby lessor assigned all his rights and interest thereunder, held not to constitute a chattel mortgage so as to require filing in order to be valid against creditor attaching lessor's interest subsequent to date of assignment. Federal Land Bank v. S., 192M21, 256NW102. See Dun. Dig. 1426.

1. Nature of proceeding.

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

4. In what actions allowed.

Actions for slander of title are not "actions for libel or slander" within the meaning of this section. 178M 27, 226NW191.

5. At what time may issue.

173M580, 218NW110.

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

6. Jurisdiction, how acquired.

Attaching ship of foreign corporation in interstate waters of Duluth-Superior Harbor was not unreasonable burden on interstate commerce.

9343. Contents of affidavit.

2. Departed from state, etc.

Restatement of conflict of laws as to domicile and Minnesota decisions compared. 15MinnLawRev668.

3. Transfer with intent to defraud.

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

An affidavit for attachment is good which charges that defendant has "disposed of his property and is about to * * * dispose of other property with the intent to de-

lay or defraud his creditors. First State Bank of New Germany v. H., 187M502, 245NW829. See Dun. Dig. 636.

Affidavit for attachment that defendant had assigned and disposed of part of her property with intent to delay and defraud creditors and was about to assign and dispose of rest of her property with like intent, held sufficient. Callanan v. C., 188M609, 248NW45. See Dun. Dig. 623, 636.

9347. Inventory, service, and return.

This section is applicable to returns on writs of attachment made under §2150. Op. Atty. Gen. (474b-4), Nov. 14, 1935.

All amounts collected by sheriff pursuant to attachment under §2150 should be turned over to county treasurer at once, such payments to be subsequently shown by return of sheriff. Id.

9350. Motion to vacate.

½. In general.

Where there is conflict in the affidavits or evidence presented on a motion to vacate an attachment, the determination of the trial court will be sustained unless it is manifestly contrary to the affidavits or evidence presented. Phillips Petroleum Co. v. J., 182M237, 234NW 11. See Dun. Dig. 662(51).

5. Practice on hearing.

Where affidavit for attachment and defendant's denial of facts set forth were sufficient, burden was upon plaintiff to establish a cause in rebuttal. Callanan v. C., 188M609, 248NW45. See Dun. Dig. 657n40.

GARNISHMENT

9356. Affidavit—Garnishee summons—Title of action.—In an action in a court of record or justice court for the recovery of money, if the plaintiff, his agent or attorney, at the time of issuing the summons, or at any time during the pendency of the action, or after judgment therein against the defendant, files with the clerk of the court, or, if the action is in a justice court, with the justice, an affidavit stating that he believes that any person (naming him) has property or money in his hands or under his control belonging to the defendant, or that such person is indebted to the defendant, and that the value of such property or the amount of such money or indebtedness exceeds twenty-five dollars, if the action is in the District Court, or ten dollars if in a justice court, and if the plaintiff files with such affidavit a copy of the complaint when the complaint has not been theretofore either served on the defendant or filed in said action, and, provided further, that no fee be charged by the Clerk of the Court for filing said copy of complaint, a summons may be issued against such person, as hereinafter provided, in which summons and all subsequent proceedings in the action the plaintiff and defendant shall be so designated, and the person against whom such summons issues shall be designated as garnishee. (R. L. '05, §4229; G. S. '13, §7859; '27, c. 300; Apr. 17, 1929, c. 215.)

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

Title to promissory note in custody of third person may be transferred by oral agreement. 176M18, 222NW 509.

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

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

Garnishment was not permitted in action to cancel assignment of note and mortgage. Williamson v. G., 178 M381, 227NW430.

By answering and appearing generally in the main action defendant confers jurisdiction over his person both in the main action and in garnishment proceeding, and garnishee by appearing in garnishment proceeding gives jurisdiction over himself. Chapman v. F., 184M318, 238NW637. See Dun. Dig. 3961.

Requirements that summons in main action must be issued and affidavit with copy of complaint filed before issuance of a garnishee summons are jurisdictional. Chapman v. F., 184M318, 238NW637. See Dun. Dig. 3961.

What constitutes issuance of summons. 16MinnLaw Rev441.

9357. Proceedings in justice court.

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

9358. In district court.

Maras v. B., 192M18, 255NW83; note under §9214.

Wells v. C., 194M275, 260NW520; note under 9359.

The garnishee having failed to make a disclosure under oath, judgment was properly taken against him by default. Security State Bank of Lewiston v. T., 184M156, 238NW52. See Dun. Dig. 4008(62), 4011.

Fatal defect in service of garnishee summons was immaterial where there was general appearance by duly authorized agent of garnishee. Security State Bank of Lewiston v. T., 184M156, 238NW52. See Dun. Dig. 3970 (53).

Service of a garnishee summons on a person, described only as an auditor and agent of garnishee where garnishee is named as Harris, Upham & Co., without any showing whether said garnishee is a corporation or partnership, or, if a corporation, whether foreign or domestic, is defective. Maras v. B., 192M18, 255NW83. See Dun. Dig. 3971, 7814.

9359. Effect of service on garnishee—Fees.

Garnishment attaches and binds all the property and money in the hands of or under the control of the garnishee at the date of the service of the garnishee summons. First State Bank of New York Mills v. W., 185 M225, 240NW892. See Dun. Dig. 3957.

Garnishment against a non-resident is a proceeding in rem, and jurisdiction can be acquired only by seizing property under such process, and then only to the extent of the property seized. First State Bank of New York Mills v. W., 185M225, 240NW892. See Dun. Dig. 3949(33).

Where no property is seized in an action against a nonresident, the proceeding is subject to attack directly or collaterally at any time for want of jurisdiction. First State Bank of New York Mills v. W., 185M225, 240NW 892. See Dun. Dig. 5139.

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

Where a defendant has deposited money in a Minnesota savings and loan corporation under an agreement entitling her to a certificate for one share of capital stock for each $100 so deposited, and certificate representing such share has not been issued or delivered at time of service of garnishee summons upon corporation, court has jurisdiction to order garnishee to execute certificate and deliver same to sheriff for sale as upon execution to satisfy judgment obtained against defendant in main action. First Nat. Bank & Trust Co. v. M., 193M 626, 259NW546. See Dun. Dig. 3966.

Contents of a safety deposit box which can be opened only by simultaneous use of two keys, one of which depositor has, other of which bank retains, are not subject to garnishment. Wells v. C., 194M275, 260NW520. See Dun. Dig. 3967.

It is not contemplated that garnishee shall interest himself for protection of his creditor, defendant in original action. Knudson v. A., 199M479, 272NW376. See Dun. Dig. 3949, 3951.

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 $100.00 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. No such 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 time by serving a similar affidavit upon the garnishee as provided for herein. (Act Apr. 20, 1931, c. 213, §§1, 2; Apr. 24, 1935, c. 241.)

9359–2. Same.

Superseded Apr. 24, 1935, c. 241, amending this act to read as set forth in §9359-1.

9360. Property subject to garnishment.

First State Bank v. W., 185M225, 240NW892; notes under §9359.

Wells v. C., 194M275, 260NW520; note under 9359.

1. Held garnishable.

Evidence held to support finding that no relation of trustee and cestui que trust existed between defendant and claimant of garnished funds. Coffin v. P., 190M160, 251NW19.

Money and property in hands of representatives of an estate are subject to garnishment. Fulton v. O., 195 M247, 262NW570. See Dun. Dig. 3966.

Contingency which will prevent garnishment is not presented by mere fact of denial by garnishee of obligation, contingency must affect actual liability of garnishee. Knudson v. A., 199M479, 272NW376. See Dun. Dig. 3949.

Sanatorium employees are not exempt from garnishment. Op. Atty. Gen. (90b), July 25, 1936.

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, 221 NW677.

A plaintiff may not garnishee property in his hands belonging to defendant. Wood v. B., 199M208, 271NW447. See Dun. Dig. 7837.

Where debtor's automobile was seized and taken to creditor's garage, and garage company assigned its claim to its president, who commenced action, making garage garnishee, there was an abuse of process requiring dismissal of garnishment. Id.

Moneys held by Minnesota Emergency Relief Administration as an agency of the state are not subject to execution or garnishment. Op. Atty. Gen. (843i), Nov. 1, 1934.

Employees of department of rural credit cannot be garnished. Op. Atty. Gen. (843i), Nov. 25, 1936.

4. In general.

Finding that money garnisheed was not a trust fund sustained. 174M504, 219NW765.

Garnishment of shares of corporate stock where certificates have not been issued. 19MinnLawRev808.

9360-1. Property subject to garnishment—Etc.

Section is constitutional. Franke v. A., 199M450, 272NW 165.

Statute is not limited to money due at time of passage of act. Id.

Section 9375 gives defendant right to have issue determined as against garnishee. Id. See Dun. Dig. 3982.

9361. In what cases garnishment not allowed.

First State Bank v. W., 185M225, 240NW892; notes under §9359.

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

The relationship between the garnishee and the defendant at the time of the service of the garnishee summons is the test of liability. 173M504, 216NW249.

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

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

An unpaid check in the hands of a payee attorney, a part of the proceeds of which will, when collected, belong to his client, does not constitute garnishable money or property. Lundstrom v. H., 185M40, 239NW664. See Dun. Dig. 3967.

Contingency which will prevent garnishment is not presented by mere fact of denial by garnishee of obligation, contingency must affect actual liability of garnishee. Knudson v. A., 199M479, 272NW376. See Dun. Dig. 3949.

Subd. 3.

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

9362. Examination of garnishee.

Security State Bank of Lewiston v. T., 184M156, 238 NW52. See Dun. Dig. 4008(62), 4011; notes under §9358.

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

There was no abuse of judicial discretion in permitting a garnishee who was not represented by an attorney at the disclosure to make a supplemental disclosure. Douglas State Bk. v. M., 182M178, 233NW864. See Dun. Dig. 3985.

The garnishee is not estopped by the facts revealed by first disclosure; and plaintiff, with the information thereby gained, was in position to protect its rights on supplemental disclosure. Douglas State Bk. v. M., 182 M178, 233NW864. See Dun. Dig. 3985.

Refusal of attorney for automobile liability insurer to answer questions rendered judgment against such insurer as garnishee proper, where affidavits filed were not sufficient disclosure. Olds Motor Works v. B., 189M 639, 250NW567. See Dun. Dig. 4008, n. 62.

9364. Municipal corporations, etc.—Procedure.

Assignment of future wages pursuant to this section held not to preclude discharge of the assignor in bankruptcy. Strane v. S., (USCCA8-Minn), 87F(2d)365.

Mason's Stat. 1927, §§4135 to 4137, relating to assignment, apply to salary of elective county commissioner. Murphy v. C., 187M65, 244NW335. See Dun. Dig. 566.

A public school teacher may be garnisheed on open account or note. Op. Atty. Gen., Feb. 17, 1933.

School districts may accept assignments of wages issued by district employees. Op. Atty. Gen. (159a-1), May 2, 1934.

This section does not apply to state officers or state departments. Op. Atty. Gen. (843i), Nov. 1, 1934.

State officers and employees may assign earned salary or wages but cannot assign unearned salary or wages. Op. Atty. Gen. (270m-6), June 5, 1935.

9366. Claimant of property to be joined.

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

3. Pleading—Burden of proof.

The use of the word "Bank" instead of "Company" in the name of the claimant did not affect the situation; no one was misled or prejudiced thereby. Hancock-Nelson Mercantile Co. v. M., 182M426, 234NW696. See Dun. Dig. 4001.

5. Practice.

A referee appointed by the court may bring in a claimant without a direct order of the court to do so. Hancock-Nelson Mercantile Co. v. M., 182M426, 234NW696. See Dun. Dig. 8318(42).

Third party claimant failing to appear and intervene in compliance with order held barred. Hancock-Nelson Mercantile Co. v. M., 182M426, 234NW696. See Dun. Dig. 3998.

6. Evidence.

Finding sustained that fund sought to be impounded by garnishment belonged to interveners rather than defendants. Pesis v. B., 190M563, 252NW454. See Dun. Dig. 4005a.

9367. Proceedings when debt or title is disputed.

Hancock-Nelson Mercantile Co. v. M., 182M426, 234NW 696; note under §9366.

1. Exclusive mode of controverting disclosure.

Mere fact that insurer denies liability does not relieve it from duty of responding if and when facts show liability. Knudson v. A., 199M479, 272NW376. See Dun. Dig. 3986.

6. When not allowed.

Service of garnishment summons does not change rights of parties except insofar as same may transfer to plaintiff whatever claim defendant has against garnishee. Knudson v. A., 199M479, 272NW376. See Dun. Dig. 3955.

Named assured having given due notice of happening of accident, and garnishee liability insurer having defended him in action out of which plaintiff's recovery resulted, garnishee cannot complain of lack of notice from additional assured, absent showing of harmful result to garnishee. Id. See Dun. Dig. 3966.

7. Practice.

Garnishees being liable on public contractor's bond, or not at all, there could be no recovery as against them in absence of compliance with §9705. Shandorf v. S., 198 M92, 268NW841. See Dun. Dig. 3952.

8. Fraudulent conveyances.

If garnishee holds property by title that is void as to defendant's creditors, he may be charged therefor although defendant could not have maintained such action. Knudson v. A., 199M479, 272NW376. See Dun. Dig. 3966.

10. Appeal.

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

9368. Time for appearance in garnishee proceedings.

Removal on default. 177M182, 225NW9.

9373. Amount of judgment.

Judgment may go against garnishee without notice to defendant as to whom jurisdiction has been obtained. Dahl v. N., 180M119, 230NW476(2).

Where such judgment has been paid defendant's motion filed four months later is properly denied. Dahl v. N., 180M119, 230NW476(2).

Insurer defending suit for damages against insured, held liable as garnishee for amount of judgment, in view of its conduct of the defense. 181M138, 231NW817.

9375. Court may determine value, make orders, etc.

Section 9360-1 does not deny to defendant any right it has to cross-examine state as garnishee. Franke v. A., 199M450, 272NW165. See Dun. Dig. 3986.

9376. Proceedings when garnishee has lien.

No judgment against garnishee was warranted where the only property he held was right of redemption from

mortgage foreclosure. Douglas State Bk. v. M., 182M178, 233NW864. See Dun. Dig. 3967.

Plaintiff held not entitled to judgment against garnishee holding $10,000 mortgage as security for indebtedness of $5,000 where mortgage was long in default and defendant had notified mortgagor that he would satisfy mortgage if garnishee was paid. Rushford State Bank v. B., 194M414, 260NW873. See Dun. Dig. 4008.

9380. Minimum judgment in justice and district courts.

Where plaintiff abandoned a garnishment proceeding without giving any notice of that fact to the garnishee, who appeared in court on return date ready and willing to make a disclosure, court did not err in awarding costs to garnishee. Physicians and Dentists Ser. Bur. v. L., 196M591, 265NW820. See Dun. Dig. 4016.

9383. Discharge of attachment or garnishment.

Bond to release garnishment, reciting that there is a stated sum of money in the possession of the garnishee, held to estop the principal and sureties from denying that there was any garnishable property in the hands of the garnishee. 181M404, 232NW631. See Dun. Dig. 3975.

After the filing of an approved supersedeas bond in the Supreme Court, a prior garnishment or levy under execution may be vacated and released where respondent's rights are amply protected by the bond. Barrett v. S., 184M107, 237NW881. See Dun. Dig. 333.

INJUNCTION

9385. How issued—Effect on running of time.

Action to restrain interference with plaintiff's lawful use of its manufacturing plant, which had been closed by national guard to avoid mob violence, held not to have become moot though troops had been removed, where executive officers maintained they had right to such procedure. Strutwear Knitting Co. v. O., (USDC-Minn), 13FSupp384.

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, 215NW 192.

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

Court did not err in refusing defendant an injunction restraining plaintiff for all time from conducting business or having employment in its stockyards. (Mason's U. S. Code, Title 7, §181, et seq.) 175M294, 221NW20.

A contract whereby a surgeon and physician agrees not to practice his profession within a radius of 25 miles from a small municipality for a period of 5 years, is valid and protection will be given by injunction. 175M 431, 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, 222 NW518.

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

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

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

Injunction was proper remedy to restrain city from improperly revoking taxicab license. National Cab Co. v. K., 182M152, 233NW838. See Dun. Dig. 4480.

Relief by injunction against the laying out of a public street, where nothing has been done except the adoption by the city council of a preliminary resolution appointing commissioners to view the premises and assess benefits and damages, is premature. Heller v. S., 182M 353, 234NW461. See Dun. Dig. 4480.

Where no appeal is provided for from an order laying out the street, except on the question of benefits and damages, the landowner whose property is taken or damaged has an adequate remedy at law by certiorari to review all other questions raised. Heller v. S., 182M353, 234NW461. See Dun. Dig. 4472(44).

Court properly refused to enjoin former employee of oil company from taking employment with another oil company. Standard Oil Co. v. B., 186M483, 243NW701. See Dun. Dig. 4479a.

Injunction to restrain spreading of school tax will not issue where taxes involved have been spread and part of them collected. Republic I. & S. Co. v. B., 187M373, 245 NW615. See Dun. Dig. 4467, 9535a.

Suit by bondholder prior to demand on trustee to sue. North Shore Co. v. B., 188M433, 247NW505.

District court has no jurisdiction to enjoin administrator from selling land under license of probate court. Mundinger v. B., 188M621, 248NW47. See Dun. Dig. 7770, 7770c.

Easement for highway is sufficient title to support injunction by state. State v. Nelson, 189M87, 248NW751. See Dun. Dig. 4155, 4157, 4180.

Fact that defendant's conduct is criminal is no bar to relief by injunction to which plaintiff would otherwise be entitled. State v. Nelson, 189M87, 248NW751. See Dun. Dig. 4190, 7271.

The criminality of an act, or series of acts, does not bar injunctive relief if otherwise there is ground for it. Fitchette v. T., 191M582, 254NW910. See Dun. Dig. 4483c.

Injunction is a proper remedy to prevent a layman from practicing law. Id. See Dun. Dig. 4483a.

Injunction may be brought against places selling liquor illegally. Op. Atty. Gen. (494b-21), Apr. 30, 1936.

9386. Temporary injunction when authorized.

1. In general.

The granting of a temporary injunction rests in the discretion of the trial court. 172M179, 215NW215.

Granting or denial of a temporary injunction against the enforcement of an ordinance, always involves an element of discretion. 175M276, 221NW6.

A temporary injunction should not be made conditional on the surrender by the party to whom it is granted of a substantial cause of action or defense at issue in the suit. 177M318, 225NW150.

Restraining order to prevent city from paying expenses of officers in attending convention, held properly denied. 180M293, 230NW788.

Granting of a temporary injunction lies largely in discretion of trial court. State v. Nelson, 189M87, 248NW 751. See Dun. Dig. 4490.

Where, on application for temporary injunction, it appears from verified complaint and supporting and opposing affidavits that a bona fide issue is raised that can be determined only upon a trial of such issue and there is reasonable probability that plaintiff may establish his right to an injunction, trial court may, in its discretion, order issuance of a temporary injunction. Mathwig v. O., 190M262, 251NW518. See Dun. Dig. 4490, 4495.

A temporary injunction should not issue where the complaint is demurrable for want of a necessary or indispensable party defendant. Cheney v. B., 193M586, 259 NW59. See Dun. Dig. 4499a.

Trial court held not to have erred in granting a temporary injunction to restrain county board and county auditor from recommending to state tax commission a refundment of taxes on part of personal property owned by a corporation. School Dist. No. 1 v. L., 195M14, 261NW 486. See Dun. Dig. 4480.

Generally injunction will not be granted against public officers to restrain them from exercising discretion where they are entrusted with discretionary power, and such officers will not be restrained from performing official acts which they are by law required to perform or acts which are not in excess of the authority and discretion reposed in them, but they may be enjoined where acting in breach of trust, or unlawfully or without authority or threatening to do so, and such acts will result in irreparable injury. Id. See Dun. Dig. 4485.

Object of a temporary injunction is to maintain existing condition until trial and decision of action. Id. See Dun. Dig. 4489.

Granting of a temporary injunction rests largely in discretion of trial court. Id. See Dun. Dig. 4490(89).

A temporary injunction is generally denied where answer fully and positively denies all equities pleaded in complaint, but that rule is not inflexible. Id. See Dun. Dig. 4490(94).

Possession is not essential to action to enjoin obstruction of prescriptive right of way over land. Schmidt v. K., 196M178, 265NW347. See Dun. Dig. 4476a.

Granting or refusal of a temporary injunction is within sound discretion of trial court. State v. Tri-State Telephone & Tel. Co., 198M537, 267NW489. See Dun. Dig. 4490.

Trial court did not abuse its discretion in denying plaintiff's motion for a temporary injunction to restrain a contract with public officials where it appeared that no contract would be entered into pending suit. Id.

Wisdom or expediency of a proposed expenditure of public moneys is to be determined by legislature or local authorities but whether a given expenditure is for a public purpose may be determined by court. Behrens v. C., 199M363, 271NW814. See Dun. Dig. 1589.

Although pleadings in a proceeding to obtain issuance of a temporary injunction will determine, as pleadings, whether case is one in which such a writ may issue, they will, if verified, be considered as affidavits tending to prove or disprove claims of respective parties. Id. See Dun. Dig. 4492.

Denial of equities will not prevent a temporary injunction from issuing. Id. See Dun. Dig. 4495.

On appeal from order granting temporary injunction, court does not go into merits of controversy. Id.

Generally a resident taxpayer has sufficient property interest in municipal funds to seek to enjoin the illegal expenditures thereof by municipal officers. Id. See Dun. Dig. 7315.

5. Restraining suit or proceeding.

In action to enjoin foreclosure of $2,300 mortgage on ground that $1,500 thereof has been paid, it is held that mortgagor is entitled to relief asked. Granberg v. B., 195M137, 262NW166. See Dun. Dig. 4477.

Our district courts are courts of concurrent jurisdiction, and when one acquires jurisdiction over an action and parties thereto, it is an excess of jurisdiction for another, by injunctional proceedings against parties, to attempt to restrain further proceedings in court first acquiring jurisdiction. State v. District Court, 195M 169, 262NW155. See Dun. Dig. 2758, 4477.

9387. Notice of application—Restraining order.

Issues of fact in a pending action are not triable on a motion for a temporary injunction. 177M318, 225NW 150.

In action to temporarily or permanently enjoin a sheriff from selling on execution certain real estate of which plaintiff claims to be the owner, execution creditor is a necessary party defendant. Cheney v. B., 193M 586, 259NW59. See Dun. Dig. 4499a.

9388. Bond required—Damages.

Where a bond is given on the issuance of a temporary injunction the court may permit the dismissal of the suit without prejudice, and leave the defendant to its remedy at law for damages on the injunction bond. United Motors Service v. Tropic-Aire, (CCA8), 57F(2d) 479.

Where temporary injunction was dissolved by order, and, without a vacation of that order or a reinstatement of the injunction, another order was made purporting to stay proceedings, held that surety was released. 177M103, 224NW700.

State is not required to furnish a bond in order to procure a temporary writ of injunction. State v. Nelson, 189M87, 248NW751. See Dun. Dig. 4499.

RECEIVERS

9389. When authorized.

1. In general.

The appointment of a receiver does not affect the rights of parties who dealt with each other in good faith before notice of the appointment. 172M24, 214NW750.

Contempt in failing to convey property to receiver. 172M102, 214NW776.

Propriety of ex parte appointment cannot be questioned in subsequent proceedings, where no appeal was taken from order denying motion to vacate the appointment. 172M193, 214NW886.

Directions in order appointing receiver in mortgage foreclosure must be construed in harmony with law pertaining to foreclosures, and a receiver was not authorized to pay taxes or interest on prior incumbrances falling due subsequent to sale, and no income derived during the year of redemption could be applied to the payment of taxes or interest. 172M193, 214NW886.

Receiver could apply rents and profits to payment of such taxes and interest prior to foreclosure sale. 172 M193, 214NW886.

The duties of a receiver are to preserve the property pending receivership and all expenses as well as compensation for services are payable out of income and if that is insufficient out of the property itself. 173M10, 216NW252.

The selection of the receiver lies with the court appointing him. 173M493, 217NW940.

The appointment of a receiver where the court has jurisdiction is not subject to collateral attack. 175M47, 220NW400.

The propriety of making an appointment of a receiver is in a measure within the discretion of the trial court. 175M138, 220NW423.

In a proper case a receiver may be appointed without notice. 175M138, 220NW423.

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

Without proof of insolvency or inadequacy of security, the non-payment of taxes, not shown to jeopardize title or security during year of redemption, does not warrant appointment of receiver in action to foreclose mortgage. 176M71, 222NW516.

Appointment of receiver held sufficient judicial determination of insolvency. Miller v. A., 183M12, 235NW 622. See Dun. Dig. 4573.

The management of the company, a foreign corporation, having been found diligent, efficient, and honest, and guilty only of mistakes which have been corrected and are not likely to be repeated, the business being large, going, and solvent, with nothing in its nature or condition to require such action, it was not an abuse of discretion to refuse to appoint a receiver to wind up its business in this state. Barrett v. S., 183M431, 237NW 15. See Dun. Dig. 8248.

Statute is not exclusive as to appointment of receivers and court may under its general equity powers appoint receivers in other cases in accordance with existing practice. Asleson v. A., 188M496, 247NW579. See Dun. Dig. 8248(31).

A receiver is not to be appointed when moving party has an adequate remedy at law. Id. See Dun. Dig. 8248 (33).

Purchasers of muskrats held not entitled to receivership against purchaser of land from fur farm company. Id.

Contract of purchase of muskrats in pairs held not to give purchasers lien upon property of fur farm company which was sold to a third party. Id.

When a creditor applying for appointment of receiver has no right to, interest in, or lien upon property in question, appointment will be refused. Id.

Appointment of a receiver for a judgment debtor's nonexempt property in proceeding supplementary to execution is discretionary with court. Ginsberg v. D., 191 M12, 252NW669. See Dun. Dig. 3549.

Matter of appointing a receiver lies largely in sound discretion of trial court. Schultz v. B., 195M301, 262NW 877. See Dun. Dig. 8248.

Appointment of a receiver is largely a matter of discretion to be cautiously and sparingly exercised, and action of court will not be reversed on appeal except for a clear abuse of discretion. House v. A., 197M283, 266 NW739. See Dun. Dig. 6460.

2. Action by corporation against officer.

In a proper case a receiver may be appointed without notice. 175M138, 220NW423.

3. Controversy between corporation stockholders.

Miller v. A., 183M12, 235NW622; note under §9191.

A court of equity will protect minority stockholders against the fraud of a majority and preferred stockholders without voting power against stockholders having the sole voting power. 175M138, 220NW423.

Stockholders of a foreign corporation, which has forfeited its charter and terminated its existence, may prosecute an action for appointment of a receiver (and for judgment for money due to be entered in the name of the receiver) to marshal corporate assets in state, and to pay creditors and distribute residue to stockholders. Such an action does not seek the exercise of any visitorial power over the corporation. Lind v. J., 183M239, 236NW317. See Dun. Dig. 2185.

This section held without application in an action by stockholders of a foreign corporation which has forfeited its charter for the appointment of a receiver and the marshaling of assets and distribution thereof. Lind v. J., 183M239, 236NW317. See Dun. Dig. 2185.

That but three of ten directors, and one of three liquidating committeemen, were indebted to corporation, nothing more appearing, held not to show conflicting interests of such nature as to justify appointment of receiver. Zwick v. S., 186M308, 243NW140.

In absence of imminent danger of loss, or need for summary relief, a receiver should not be appointed for solvent corporation on petition of minority stockholders. Rule applied to banking corporation in voluntary liquidation and without creditors. Zwick v. S., 186M308, 243NW140. See Dun. Dig. 2138.

Right of minority stockholders to have a receiver appointed. 19MinnLawRev703.

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.

11. Foreign receivers.

Local receiver for foreign corporation. 16MinnLawRev 204.

13. Collection of assets.

A receiver cannot attack a chattel mortgage as void as to creditor because not recorded, without showing that he occupies a status to assail it. 175M47, 220NW 400.

G. S. 1923, §8345, does not apply to general creditor, but to such as are armed with process, or to a receiver representing creditors and vested with the right to attack. 175M47, 220NW400.

15. Claims against receiver.

A receiver cannot assert that the rights of creditors have intervened to defeat a claim of duress and undue influence, since the receiver has no greater right than the defendant in receivership. Winget v. R. (CCA8), 69F(2d)326. See Dun. Dig. 8247.

When receivers take over mortgaged real estate for the benefit of their trust estate; they are ordinarily obliged to pay current taxes as they accrue, whether the taxes are mere charges against and liens upon the property, or are the personal obligations of the owners. Hennepin County v. M. (USCCA8), 83F(2d)453, 31AmB(NS)89. Cert. den., 299US555, 57SCR16.

Preferences in prereceivership claims in equity receiverships. 15MinnLawRev261.

18. Accounting.

In receivership matter, evidence held insufficient to sustain order surcharging receiver's account in amount of $5,181.25, incident to conducting business of corporation. Dissolution of Fairmont Auto & Realty Co., 191 M603, 254NW907. See Dun. Dig. 2138, 2158.

19. Attorney's fees.

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

20. Fees.

Where there is due notice and opportunity to be heard, the court having jurisdiction and control over a receivership proceeding has power and jurisdiction to fix the fees of receivers and attorneys employed therein, so long as the proceeding is pending before the court. Todd v. H., 185M44, 240NW110. See Dun. Dig. 110.

9391–1. Deeds and conveyances validated.—That all deeds to real property within this State, heretofore given by a receiver or receivers appointed in another state where the sale was confirmed by a court of such state, be, and the same hereby are, declared to be in all respects legal and valid conveyances. This act shall not apply to any action now pending. (Act Mar. 12, 1935, c. 41.)

JUDGMENT

9392. Measure of relief granted.

½. In general.

Res judicata. 172M290, 215NW211.

A judgment entered in a default case did not exceed the prayer in the complaint. 181M559, 233NW586. See Dun. Dig. 4996(70).

A judgment entered on a verdict directed for the defendant on the ground that the defendant was not authorized by the law under which it was organized to execute the promissory notes alleged as causes of action by the receiver of the payee bank, is not a bar to action for money had and received. Turner v. V., 182 M115, 233NW856. See Dun. Dig. 5184(18).

One obtaining a judgment in an action to cancel a deed for costs and disbursements could not maintain a subsequent action to recover damages for expenses incurred, disbursements made and attorney's fees, etc. Benton v. B., 183M584, 237NW424. See Dun. Dig. 5163.

1. On default.

Where judgment is entered against a defendant by default, relief granted must be within allegations of complaint and within demand for relief. Union Central Life Ins. Co. v. P., 190M360, 251NW911. See Dun. Dig. 4996.

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.

Where proof shows a right of recovery under allegations of a complaint it should be had, even though it falls short of establishing all its averments. Cashman v. B., 195M195, 262NW216. See Dun. Dig. 5041.

Where a contract for sale of a burglar alarm system guaranteed efficient operation of system and agreed to return to vendee full purchase price if vault of vendee was entered and loss sustained, system failing to respond, and a money loss considerably less than purchase price was sustained when burglars entered vault and system failed to warn of burglary, and trial court found that damages were liquidated by contract and defendant does not appeal nor plaintiff complain of that feature of case, question of liquidated damages is not determined, but trial court erred in requiring return of property on repayment of purchase price, since it was not a suit for rescission. Satanta State Bank v. O., 196M430, 265NW303. See Dun. Dig. 8624.

In action for damages for failure to furnish a title to real estate consistent with terms of purported agreement, unverified replies denying generally matters of public record set up in verified answers may be stricken and judgment ordered entered for defendants on a showing, by affidavits, that allegations therein were sham. Berger v. F., 198M513, 270NW589. See Dun. Dig. 7664.

A judgment is conclusive, as between parties, of facts upon which it is based and all legal consequences resulting from its rendition, and it may be enforced by parties thereto, though judgment may be also for benefit of a third party. Ingelson v. O., 199M422, 272NW270. See Dun. Dig. 1895, 5154, 5155, 5161, 5162.

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. Bynam v. M., (USCCA8), 47F(2d)112. Cert. den. 283US854, 51SCR648.

Plaintiff's attorney held not concluded by a dismissal secured by plaintiff pursuant to a settlement. Id.

Oral evidence tending to show that summons had never in fact been served on corporation was a collateral attack on judgment, and was properly excluded in receivership proceeding. Miller v. A., 183M12, 235NW622. See Dun. Dig. 5141(7).

Judgment creditor having proven that the claim upon which the judgment rests existed prior to the conveyance, he need not prove that it was a valid claim. Larson v. T., 185M366, 241NW43. See Dun. Dig. 3908.

A judgment creditor attacking a conveyance as fraudulent cannot, as against the grantee, prove by the judgment roll or by the proceedings in the case that the judgment is upon a claim existing prior to the conveyance. Larson v. T., 185M366, 241NW43. See Dun. Dig. 3920(30), 5171.

In corporation mismanagement suit, plaintiff is barred from relief for matters covered by previous suit dismissed upon merits and for matters within scope of covenant not to sue. Butler v. B., 186M144, 242NW701. See Dun. Dig. 5159.

Judgment in prior case between same parties was conclusive as to findings. Farmers' State Bank, 187M155, 244NW550. See Dun. Dig. 5163.

Appointment of special administrator cannot be collaterally attacked in action by him to recover damages for death of decedent. Peterson v. C., 187M228, 244NW 823. See Dun. Dig. 3563.

A judgment against receiver is res judicata as against creditors. Lamson v. T., 187M368, 245NW627. See Dun. Dig. 5177.

A judgment in action between owner in possession of real property and one claiming rights therein under a void foreclosure sale, when such judgment is properly registered and declares foreclosure void and adjudges title in such owner, becomes a link in owner's chain of title, and is admissible in evidence even against a stranger to judgment. Fuller v. M., 187M447, 245NW617. See Dun. Dig. 5171, 5191.

Judgment, entered long after date when title is in issue, does not bar a stranger thereto from showing, if he can, that, on prior material date, adjudged owner had no title. Fuller v. M., 187M447, 245NW617. See Dun. Dig. 5171, 5191.

Judgment roll entered upon insured's plea of guilty to charge of arson of property insured, is not admissible in action to which insured is not a party to establish defense pleaded, that he willfully set fire to such property with a criminal purpose. True v. C., 187M636, 246 NW474. See Dun. Dig. 5156.

Where a court has no jurisdiction to determine a particular issue in the action, its final order therein does not operate as res judicata. Muellenberg v. J., 188M398, 247NW570. See Dun. Dig. 5194a.

Court by affirming judgment, but stating that it was "without prejudice to appellant's (plaintiff) right formally to apply to the trial court for credit in the amount that the district has received for his land and the building thereon," did not bar plaintiff of any other remedy which he might have. Johnson v. I., 189M293, 249NW177. See Dun. Dig. 5168.

No litigated issue becomes res judicata until final judgment. Hallbom, 189M383, 249NW417. Aff'd 291US 473, 54SCR497. See Dun. Dig. 398, 5159, 5163.

Decision of state Supreme Court on federal issue vacated by United States Supreme Court on certiorari is of no effect whatever as law of case. Id. See Dun. Dig. 5187.

Judgment for defendant in action by remainderman to enforce oral remainder in personal property did not operate as estoppel against remainderman in second action to recover property under conveyance by donor after death of donee, first judgment being based on unenforcibility of oral remainder. Mowry v. T., 189M479, 250NW52. See Dun. Dig. 5159.

Where an action for personal injuries against two alleged tort-feasors resulted in a verdict for plaintiff against one of them and in favor of other and against plaintiff, judgment entered on that verdict held not res adjudicata in a subsequent action for contribution by unsuccessful against successful defendant in first action. Hardware Mut. Casualty Co. v. A., 191M158, 253NW374. See Dun. Dig. 1920, 5176.

Where facts are stipulated and no objection is made to consideration of such facts under pleadings, whatever issues are justified by stipulated facts must be considered litigated by consent. Engel v. S., 191M324, 254 NW2. See Dun. Dig. 5184a.

A dismissal of an action on defendant's motion at close of plaintiff's evidence, where defendant has not rested and does not move for a directed verdict or a dismissal on the merits, is not a bar to a second suit on same cause of action. Mardorf v. D., 192M230, 255NW 809. See Dun. Dig. 2750, 5180.

Finding of district court in one proceeding to have one adjudged feeble-minded that defendant was not so feeble-minded as to justify committing him to the custody of the board of control was not res adjudicata in a subsequent proceeding, the proceeding not being an action at law or governed strictly by rules applicable in a law suit. State Board of Control v. F., 192M412, 256 NW662. See Dun. Dig. 5160a.

Findings of industrial commission in proceeding against building contractor were not admissible in action at law against farmer and building contractor, who was acting as foreman in supervising construction of barn, plaintiff seeking recovery on theory that he was invitee while aiding farmer in construction, and the only material finding by the industrial commission being that plaintiff was not an employee of the building contractor, one ending commissioner's power to proceed further. Gilbert v. M., 192M495, 257NW73. See Dun. Dig. 5160a.

If, even by motion and order, an issue has been litigated and decided on merits in one action, judgment therein raises estoppel against again litigating same issue in a later action between same parties. Spears v. D., 193M149, 258NW149. See Dun. Dig. 5162.

Where administratrix brought action in another state upon life insurance policy and, before rendition of judgment for plaintiff therein, insurer was sued in this state by one claiming to be assignee of policy, payment of judgment to administratrix was no defense to suit by assignee who was not a party in other suit. Redden v. P., 193M228, 258NW300. See Dun. Dig. 4693, 4812, 5174.

Beneficiaries were bound by judgment authorizing testamentary trustees to exchange stock. Ferguson's Will, 193M235, 258NW295. See Dun. Dig. 9893.

A judgment in an action against principal for acts of his servant, rendered upon a trial of merits, is a bar to a suit against servant for same act. Myhra v. P., 193M 290, 258NW515. See Dun. Dig. 2531, 5161, 5162.

Judgment in negligence action precludes parties as to all issues and questions, all items of injury or damage, which were or could have been litigated therein. Id.

Plaintiff having sued for damages to his person and his car, cannot bring a later action to recover damages

suffered by him by reason of injuries to his wife. Id. See Dun. Dig. 2531.

In a proceeding to examine and allow accounts of trustees, a decree of final distribution of probate court entered two years earlier cannot be collaterally attacked. Trust Created in and By Fogg's Will, 193M397, 259NW 6. See Dun. Dig. 7784, 9945.

Litigating with sheriff alone validity of lien of judgment upon land does not in any manner conclude judgment creditor. Cheney v. B., 193M586, 259NW59. See Dun. Dig. 5171.

Foundation principle upon which doctrine of res judicata rests is that parties ought not to be permitted to litigate same issue more than once; that when a right or fact has been judically tried and determined by a court of competent jurisdiction, judgment thereon, as long as it remains unreversed, shall be conclusive upon parties, and those in privity with them in law or estate. Herreid v. D., 193M618, 259NW189. See Dun. Dig. 5161, 5162, 5163.

A bank suing co-owners of a farm as partners on a note purporting to be signed by them as a partnership was not thereafter estopped in a suit by a third party to claim that there was no partnership and that certain co-owner was alone liable on theory of having signed under an assumed name, first action being settled and there being no findings or judgment. Campbell v. S., 194M502, 261NW1. See Dun. Dig. 5203.

Where, by stipulation, record, with objections and rulings, in election contest is made a part of case in action to set aside contract, and errors assigned therein are again assigned on appeal, affirmance of order denying a new trial in election contest precludes re-examination of questions settled therein, or questions that could have been therein adjudicated. Ahlquist v. C., 194M598, 261NW 452. See Dun. Dig. 5173(65).

Denial of a prior application to reduce alimony is not a bar to a subsequent application, if a change of financial ability is shown to have occurred after denial of first. Erickson v. E., 194M634, 261NW397. See Dun. Dig. 5166.

A judgment entered pursuant to an order sustaining a demurrer to a complaint on ground that it failed to state a cause of action because of defective pleading in that it alleged in alternative facts constituting a good cause and facts which did not is not a bar to a subsequent action in which defective pleading is corrected so as to state a good cause of action. Rost v. K., 195M219, 262 NW450. See Dun. Dig. 5183.

Jurisdiction of district court over parties and subject-matter will be presumed unless want of jurisdiction affirmatively appears on face of record, or is shown by extrinsic evidence in a direct attack. Fulton v. O., 195 M247, 262NW570. See Dun. Dig. 2347.

A judgment for drug clerk who sold contaminated mineral oil from a dispensing jug is not a bar to recovery of damages from proprietor of a drug store who, jury might have found, either by himself or by his servants had permitted contamination of mineral oil, for quality of which he is responsible under Mason's Minn. St. 1927, §5813, there being no evidence that selling clerk was solely responsible for contamination. Berry v. D., 195M 366, 263NW115. See Dun. Dig. 5173.

Where action was started under moratorium statute to permanently postpone mortgage foreclosure by advertisement, and on order being granted ex parte, mortgagee made publication of no more notices of sale, and mortgagors did not appear at hearing and court dismissed their complaint and ordered the property to be sold on the date originally noticed, and no appeal was taken and property was sold, order dismissing complaint and authorizing sale was a barrier to a subsequent action by mortgagors to set aside sale because notice of sale had been published only four times. Tankel v. U., 196M165, 264NW693. See Dun. Dig. 6337.

A judgment or order, in proceedings for appointment of a guardian of an incompetent person and taking from such person the management of his property, is admissible in evidence in any litigation whatever, but not conclusive, to prove that person's mental condition at time order or judgment is made or at any time during which judgment finds person incompetent. Champ v. B., 197M49, 266NW94. See Dun. Dig. 4524.

Decree of partial distribution determines validity of bequest and power of legatee to take and use it for purpose directed by decree, and decree becomes final in absence of appeal, and only open question is proper construction and scope of decree. Wyman v. T., 197M62, 266 NW165. See Dun. Dig. 3660, 5137.

A release of liability on lump sum settlement of total disability liability under life policy, and judgment of dismissal based thereon, could not be set aside on ground of mistake in that all parties to agreement believed that insured was only temporarily disabled, there being no liability in absence of permanent total disability. Rusch v. P., 197M81, 266NW86. See Dun. Dig. 5123a.

A decree registering title is somewhat more conclusive and better protected from attack or opening up than an ordinary judgment. Lamprey v. A., 197M112, 266NW434. See Dun. Dig. 8363.

If, for same wrong, one is liable both for breach of contract and conversion, injured party may elect his remedy. If he sues for tort, and there have been successive and distinct conversions, he has right to sue upon them separately as independent causes of action. Lloyd v. F., 197M387, 267NW204. See Dun. Dig. 5167.

On appeal from a judgment in favor of a police officer for salary following improper discharge, a claim that writ of certiorari issued by district court to review proceedings before civil service commission was unauthorized and improper cannot be considered, no review having been sought of order or judgment entered in that proceeding. Sjoberg v. C., 197M406, 267NW374. See Dun. Dig. 398, 5159.

Where old widowed father conveys valuable property to daughter and son-in-law, consideration being to a substantial amount an agreement to furnish support by a way of board, room and washing during his lifetime, there is an element of confidence and expectation which will entitle the grantor to equitable relief for value of loss of board, room and washing, together with lien on property, where such differences have arisen between the parties that it would be unsafe to continue to be a member of the family, and it is no bar to such relief that prior action of the father for cancellation of the contract has been dismissed. Priebe v. S., 197M453, 267NW376. See Dun. Dig. 5159.

In state court under federal employers' liability act, wherein defendant alleged contract to sue only in state where injury occurred and asked for determination of validity of contract and its specific performance, fact that in an action for same injuries federal district court upon similar pleadings and order, not appealed from, removed cause from law to equity side to first determine existence and validity of contract, was not res adjudicata. Detwiler v. L., 198M185, 107ALR1054n, 269NW367. See Dun. Dig. 5163.

In action for damages for being kept out of possession, finding that, in a former action to vacate a judgment for restitution entered in municipal court district court had found that said judgment has never been vacated or modified and that plaintiff has not waived his right to proceed thereunder, is decisive against defendants. Hermann v. K., 198M331, 269NW836. See Dun. Dig. 5163.

Denial of motion to strike out complaint as sham and frivolous did not bar a subsequent motion to strike out reply as sham and frivolous. Berger v. F., 198M513, 270 NW589. See Dun. Dig. 5159.

In action to determine adverse claims to real property, where plaintiff pleaded a judgment in a former action as a bar to defendants' claim of title through a deed, allegations in complaint in former action were sufficient to support action to quiet title and on authority of Mitchell v. McFarland, 47M535, 50NW610, and it was not necessary that complaint in former action allege that plaintiff was in possession of land or that it was vacant property. Whitney v. C., 199M312, 271NW589. See Dun. Dig. 5163.

A motion to vacate an extension order under moratorium statute and an order of default on ground of invalidity of foreclosure due to failure to file power of attorney was a direct and not a collateral attack. Orfield v. M., 199M466, 272NW260. See Dun. Dig. 5139a.

Where rights of parties to a contract are settled by a judgment, legislature cannot, by subsequent enactment, change such rights. Twenty Associates v. F., 273NW696. See Dun. Dig. 1622.

Whenever a cause of action has been reduced to judgment and such judgment remains in full force and unreversed, original cause of action is merged therein and gone forever. Id. See Dun. Dig. 5170.

4. Foreign judgments—full faith and credit.

Where both parties in divorce action in another state voluntarily appear and submit to jurisdiction of court, they are bound by judgment as to all matters litigated therein and cannot avoid it in a collateral proceeding in this state by proof that when action was brought and judgment rendered neither of them was a resident in that state, and that both were residents in this state, following In re Ellis' Estate, 55M401, 56NW1056, 23LRA287, 49 AmStRep514. Id.

Full faith and credit is not denied by requiring defendant railroad to dismiss suit which it began in courts of another state to restrain administratrix there from assisting in maintaining action for death of deceased in this state on ground that to do so would be violation of public policy of foreign state and would burden interstate commerce. Peterson v. C., 187M228, 244NW823. See Dun. Dig. 1698.

Where divorce decree of Iowa awarded custody of minor child to each parent alternately for six months of each year and mother subsequently established her domicile in Minnesota, Minnesota court has jurisdiction to determine minor's custody during mother's six months and is not bound by full faith and credit clause of federal constitution. State v. Larson, 190M489, 252NW329. See Dun. Dig. 5207.

Obligation imposed upon a divorced husband by a South Dakota decree to pay alimony to the divorced wife will be considered here as remaining one for alimony and not an ordinary debt. Ostrander v. O., 190M 547, 252NW449. See Dun. Dig. 2811, 5207.

A local statute authorizing resort to sequestration and contempt proceedings to compel payment of alimony includes an action brought to compel payment of unpaid installments under a foreign judgment for alimony; local action on that judgment being itself a case where "alimony" is decreed. Id.

Judgment of disbarment entered by supreme court of another state should be given full faith and credit, un-

less procedure therein was wanting in due process or court of that state committed a probable error. Leverson, 195M42, 261NW480. See Dun. Dig. 678, 5207.

Whether attorney disbarred in another state was properly served in that state with notice and pleadings is a matter that cannot be determined by court of this state where exemplified record indicates that service of process was duly made. Id. See Dun. Dig. 5207.

Where plaintiff's right to alimony was litigated in a divorce action brought against her in another state, she cannot thereafter maintain an action therefor in this state. Norris v. N., 273NW708. See Dun. Dig. 5192.

Full faith and credit in a federal system. 20MinnLaw Rev140.

Extrastate enforcement of a tax judgment. 20Minn LawRev431.

5. Precedents.

Decision of district judge is decisive in his judicial district until it has been reversed by the supreme court. Op. Atty. Gen., Dec. 22, 1933.

Construction of bankruptcy act by United States Supreme Court prevails over any contrary interpretation by state courts. Landy v. M., 193M252, 258NW573. See Dun. Dig. 738.

Judicial construction of a statute, so long as it is unreversed, is as much a part thereof as if it had been written into it originally. Roos v. C., 199M284, 271NW582. See Dun. Dig. 8936b.

9393. Judgment between parties and against several defendants.

4. Against one or more of several defendants.

When there is an allegation of a joint contract with two or more defendants and proof is of a several contract with one, there may be a recovery against one liable; and in such case there is not a failure of proof. Schmidt v. A., 190M585, 252NW671. See Dun. Dig. 5043, 7674.

Verdict establishes fact that driver of plaintiff's automobile was not a joint tort-feasor with driver of defendant's truck, with which automobile collided, as affecting effect of payment of damages by plaintiff's driver. Lavelle v. A., 197M169, 266NW445. See Dun. Dig. 8373.

9394. Same, how signed and entered—Contents.

½. In general.

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

5. Notice.

A prevailing party may cause judgment to be entered without notice. Wilcox v. H., 186M504, 243NW709. See Dun. Dig. 5037.

9395. Judgment in replevin.—In an action to recover the possession of personal property, judgment may be rendered for the plaintiff and for the defendant, or for either. Judgment for either, if the property has not been delivered to him, and a return is claimed in the complaint or answer, may be for the possession or the value thereof in case possession cannot be obtained, and damages for the detention, or the taking and withholding. If possession cannot be obtained of the whole of such property but may be obtained for part thereof then the party entitled thereto may have possession of the part which may be obtained and recover the value of the remainder or may elect to take judgment for the value of the whole of such property. When the prevailing party is in possession of the property, the value thereof shall not be included in the judgment. If the property has been delivered to the plaintiff, and the action 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 therefor, or by his successor in interest, by reason of default in the terms of such conditional sale contract, where it shall appear that the defendant in said action is an innocent purchaser for value of said property and without actual knowledge of the existence of such conditional sale contract, in the event that the plaintiff shall prevail in said action, the measure of his recovery shall be the balance unpaid on said conditional sale contract with interest thereon at the rate fixed in said conditional sale contract, if any, reasonable attorney's fees to be approved by the court and the costs and disbursements of said action. (R. L. '05, §4267; G. S. '13, §7899; Apr. 18, 1931, c. 202, §1.)

Evidence held to sustain verdict of value of automobile at time action was brought. 172M16, 214NW479.

Judgment in former action in replevin for possession of threshing rig, held not bar to action for damages arising from fraud inducing signing of contract for purchase of the outfit. 178M40, 226NW415.

Retail price not conclusive as to value. 180M264, 230 NW778.

On replevin by mortgagee of chattel, where it appeared that property was in custody of federal court, and mortgagor a bankrupt, defendant was not entitled to a judgment for the value of the property. Security State Bk. of Ellendale v. A., 183M322, 236NW617. See Dun. Dig. 8425.

Where mortgaged property was worth more than amount of mortgage lien, defendant in replevin cannot justly complain of direction to enter judgment against him for amount of plaintiff's lien if possession of property cannot be had. Miller Motor Co. v. J., 193M85, 257 NW653. See Dun. Dig. 1480.

Measure of damages for wrongful detention of personal property is value of its use while so detained where it does not appear that property is of such nature that it necessarily or in fact perishes, or wears out, or becomes impaired in value in using. Bergquist v. S., 194 M480, 260NW871. See Dun. Dig. 8420.

One deprived of use of washing machine over a period of nearly three years by reason of defendant's wrongful taking and detention thereof, was entitled to verdict for $116.13. Id. See Dun. Dig. 8420.

Where losing party in replevin action no longer has possession of chattel, he has right to be discharged from liability upon payment into court of amount found by jury to be value thereof, plus interest and costs. Breitman Auto Finance Co. v. B., 196M369, 265NW36. See Dun. Dig. 8425.

9397. Damages for libel.—In an action for damages for the publication of a libel in a newspaper, the plaintiff shall recover no more than special damages, unless a retraction be demanded and refused as hereinafter provided. He shall serve upon the publisher at the principal place of publication, a notice, specifying the statements claimed to be libelous, and requesting that the same be withdrawn. And if a retraction thereof be not published on the same page and in the same type and said statement headed in 18 point type or larger "RETRACTION", as were the statements complained of, in a regular issue thereof published within one week after such service, he may allege such notice, demand and failure to retract in his complaint and may recover both special and general damages if his cause of action be maintained. And, if such retraction be so published, he may still recover general damages, unless the defendant shall show that the libelous publication was made in good faith and under a mistake as to the facts. If the plaintiff was a candidate for office at the time of the libelous publication, no retraction shall be available unless published on the same page and in the same type and said statement headed in 18 point type or larger "RETRACTION", as were the statements complained of, in a regular issue thereof published within one week after such service, and also in a conspicuous place on the editorial page, nor if the libel was published within one week next before the election: Provided, that this section shall not apply to any libel imputing unchastity to a woman. (Apr. 19, 1937, c. 299, §1.)

See notes under §9164.

An article falsely accusing a traveling salesman of being a bankrupt, taken in connection with the remainder of the article and the innuendoes set forth in the complaint, held libelous. Rudawsky v. N., 183M21, 235 NW523. See Dun. Dig. 5519(64).

Newspaper may be liable for general damages for libel, though it believed news article to be true and published a retraction, if it was negligent in not ascertaining truth. Thorson v. A., 190M200, 251NW177. See Dun. Dig. 5537.

Whether newspaper was negligent in publishing statement that plaintiff living at certain address had been arrested on a liquor charge, when person arrested was another person of same name residing out of county, held for jury. Id.

Where a demand is made on a newspaper to retract certain portions of a claimed libelous article and no retraction is made, plaintiff's cause of action for general damages is limited to such statements as are specified in demand. Echternacht v. K., 194M92, 259NW684. See Dun. Dig. 5537.

Statute does not affect recovery of special damages, but only recovery of general damages. Id.

9400. Lien of judgment.

8. Nature of lien.
Lien of judgment upon real estate is not affected by discharge in bankruptcy, although judgment debtor is relieved of personal liability. Rusch v. L., 194M469, 261 NW186. See Dun. Dig. 5068.

9. Duration of lien.
Lien of a judgment procured less than four months preceding filing of petition in bankruptcy is annulled thereby, even as to homestead set aside as exempt. Landy v. M., 193M252, 258NW573. See Dun. Dig. 741.

10. Upon what estates and interests.
Where by descent, plaintiff acquired his interest in real estate upon death of his mother, based upon her right to take title upon performance of conditions of an escrow agreement which were performed after her death and deed delivered, plaintiff got an equitable interest in property upon her death which was subject to lien of defendant's judgment against him. Rusch v. L., 194M469, 261NW186. See Dun. Dig. 5068.

A judgment lien on real property is not defeated by a homestead right acquired by judgment debtor after docketing judgment. Id.

Personal property tax judgment is not a lien against judgment debtor's statutory homestead. Op. Atty. Gen. (421a-9), Sept. 14, 1934.

11. Conflicting liens.
Where owner gives mortgage and thereafter conveys away part of land, one who obtains judgment lien upon part retained has no right to require that tract conveyed away be first sold on foreclosure of mortgage. 175M541, 222NW71.

Judgment creditor of vendee in land contract loses his lien upon cancellation of contract by vendor. Peterson v. S., 188M272, 247NW6. See Dun. Dig. 5069.

9404. Assignment of judgment—Mode and effect.

A past-due sum or installment of alimony payable to a divorced wife is assignable. Cederberg v. G., 193M421, 258NW574. See Dun. Dig. 569.

9405. Judgments, procured by fraud, set aside.

Nystrom v. N., 186M490, 243NW704; note under §9283.

1. Nature of action.
Action does not lie to attack final and incontestable judgments. Hawley v. K., 178M209, 226NW697.

This statute gives remedy where none existed before. Murray v. C., 186M192, 242NW706. See Dun. Dig. 7689.

Neither decree in mechanic's lien foreclosure sale nor order confirming sale can be attacked in action to set aside judgment, remedy, if any, being in action in which decree was entered. Calhoun Beach Holding Co. v. M., 190M576, 252NW442. See Dun. Dig. 5125, 5138.

Trial court did not abuse its discretion in refusing to set aside orders allowing and confirming annual account of a trustee in order that beneficiary, who had consented to such order, could file objections to account. Fleischmann v. N., 194M227, 234, 260NW310. See Dun. Dig. 5108.

There can be no distinction made between a case in which a defense is actually made, but proves unsuccessful, and one in which there is a total failure to defend. Jordan's Estate, 199M53, 271NW104. See Dun. Dig. 5130.

Jurisdiction of probate court to vacate its orders and judgment is as great as power possessed and exercised by district court in like or similar matters. Id. See Dun. Dig. 7784.

Section held to have no application to an action upon bond of executor who had embezzled trust fund and had led beneficiary to believe that he was holding fund as trustee under decree of distribution. Shave v. U., 199M 538, 272NW597. See Dun. Dig. 3580i.

6. Complaint.
Complaint failing to show that there are facts substantiating charges of false testimony and fraud which were not known or available at the trial, fails to state cause of action for setting aside the judgment. 173M 149, 216NW800.

No prejudice could result to plaintiff by ruling excluding evidence, where judgment roll conclusively showed complaint failed to state facts to constitute a cause of action. Calhoun Beach Holding Co. v. M., 190M 576, 252NW442. See Dun. Dig. 422.

7. For perjury.
In action to set aside probate judgment for fraud and perjury, judgment held properly ordered on pleadings. Murray v. C., 186M192, 242NW706. See Dun. Dig. 7689.

Equity does not grant relief against a judgment simply upon ground that it was obtained by perjured testimony, there having been an extended trial and no claim that plaintiffs (who did not appear in proceeding) were, by fraud of defendants, prevented from appearing, presenting their claims, and having them litigated. Murray v. C., 191M460, 254NW605. See Dun. Dig. 5122, 5125.

8. For fraudulent practices on adverse party.
Fraud which will warrant court of equity in setting aside judgment relates to fraud, extrinsic or collateral, to matter tried by first court, and not to a fraud in matter on which decree was rendered. Jordan's Estate, 199M 53, 271NW104. See Dun. Dig. 5129.

11. Laches.
Equity aids the vigilant, not those who sleep upon their rights. Jordan's Estate, 199M53, 271NW104. See Dun. Dig. 5134.

12. Relief which may be awarded.
Remedy afforded by this section may be put into effect either by motion or by an original action. Jordan's Estate, 199M53, 271NW104. See Dun. Dig. 5108a.

Attack on decrees of divorce. 34MichLawRev749.

13. Limitations.
Section is a statute of creation, so that commencement of action within period fixed is condition precedent to right of action, and the period is not one of mere limitation upon remedy and need not be pleaded. Murray v. C., 191M460, 254NW605. See Dun. Dig. 5660.

This section is not applicable to a decree in land registration proceedings. Lamprey v. A., 198M112, 266NW 434. See Dun. Dig. 5126.

9406. How discharged of record.

A sale on execution and resulting satisfaction of judgment cannot be vacated on ground of mistake simply because a mortgage, subject to which property was purchased, was thereafter foreclosed, and property lost. Ridgway v. M., 194M216, 260NW303. See Dun. Dig. 3537a.

Where losing party in replevin action no longer has possession of chattel, he has right to be discharged from liability upon payment into court of amount found by jury to be value thereof, plus interest and costs. Breitman Auto Finance Co. v. B., 196M369, 265NW36. See Dun. Dig. 8426.

9407. Satisfaction and assignment by state.

—The state auditor of the attorney general may execute satisfactions and assignments of judgments in behalf of the state. (R. L. '05, §4280; G. S. '13, §7913; Apr. 15, 1929, c. 186.)

State auditor may not properly transfer unexpended balances appropriated to him after amendment of 1931 in timber, mineral and testing of low grade ore divisions to department of conservation without legislative enactment. Op. Atty. Gen., Mar. 9, 1933.

9408. Payment and satisfaction by clerk.

Where losing party in replevin action no longer has possession of chattel, he has right to be discharged from liability upon payment into court of amount found by jury to be value thereof, plus interest and costs. Breitman Auto Finance Co. v. B., 196M369, 265NW36. See Dun. Dig. 8426.

9410. Joint debtors—Contribution and subrogation.

Where one seeking contribution has intentionally violated a statute or ordinance, thereby causing injury to a third party, he is guilty of an intentional wrong and illegal act, and is not entitled to contribution from one whose mere negligence contributed to cause the injury. Fidelity Casualty Co. of New York v. C., 183M182, 236 NW618. See Dun. Dig. 1924.

Establishment of the common liability and its liquidation by judgment in favor of the injured party are not conditions precedent to recovery by one wrongdoer who has made a fair and provident settlement of the claim and then seeks contribution from a joint tortfeasor. Duluth, M. & N. Ry. Co. v. M., 183M414, 236NW 766. See Dun. Dig. 1920, 1922.

Judgment in former case held to bar action by former surety seeking indemnity. Maryland Casualty Co. v. B., 184M550, 239NW598. See Dun. Dig. 5176.

Contribution and indemnity between joint tort-feasors. 16MinnLawRev73.

9411. Several judgments against joint debtors.

Maryland Casualty Co. v. B., 184M550, 239NW598; note under §9410.

The word "obligation" must be held to include parol as well as documentary contracts. 173M57, 216NW789.

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

Liability for tort. 181M13, 231NW718.

Where a single injury is suffered as a consequence of wrongful acts of several persons, all who contribute directly to cause injury are jointly or severally liable, although there be no conspiracy or joint concert of action between them. De Cock v. O., 188M228, 246NW885. See Dun. Dig. 9643.

A canning company and city were not jointly liable for damages occasioned to farm by sewage dumped by each respectively into a stream. Johnson v. C., 188M451, 247NW572. See Dun. Dig. 9643.

When there is an allegation of a joint contract with two or more defendants and proof is of a several contract with one, there may be a recovery against one liable; and in such case there is not a failure of proof. Schmidt v. A., 190M585, 252NW671. See Dun. Dig. 7674.

In action for death of one who was struck by both automobile and street car, which she was intending to board, jury's wrongful verdict for automobile driver would not entitle street railway to reversal of judgment against it. Kruchowski v. S., 191M454, 254NW587. See Dun. Dig. 9643.

One unconditionally guaranteeing payments of a note or bond or other obligations is primarily liable thereon.

State v. Fosseen, 192M108, 255NW816. See Dun. Dig. 4076.

Failure of trustee for bondholders to file a claim in probate court against estate of a deceased cosurety within time specified by statute does not relieve other surety from liability. First Minneapolis Trust Co. v. N., 192M 307, 256NW240. See Dun. Dig. 9104.

Under a note reading "I promise to pay" etc., there is a several obligation, and a several judgment could be entered against person signing for partnership. Campbell v. S., 194M502, 261NW1. See Dun. Dig. 874.

Where negligence of several combine to produce injuries to another, any or all of authors of such negligent cause may be held to liability for entire harmful result directly flowing therefrom. Thorstad v. D., 199M543, 273 NW255. See Dun. Dig. 9643.

9412. Discharge of joint debtor.

A judgment for drug clerk who sold contaminated mineral oil from a dispensing jug is not a bar to recovery of damages from proprietor of a drug store who, jury might have found, either by himself or by his servants had permitted contamination of mineral oil, for quality of which he is responsible under Mason's Minn. St. 1927, §5813, there being no evidence that selling clerk was solely responsible for contamination. Berry v. D., 196M 366, 263NW115. See Dun. Dig. 5043.

9414. On plea.

Section 7048 which declares that an instrument is none the less negotiable because it contains a provision authorizing entry of judgment on confession, in no way conflicts with this section. Keyes v. P., 194M361, 260NW 518. See Dun. Dig. 4973.

Section must be strictly complied with, and where instrument authorizing confession refers to note attached thereto and is not, in and of itself, sufficient to have any legal significance except when considered with and by reference to note, it is not a "distinct" instrument within statute and judgment attempted to be entered by confession thereunder is void. Id. See Dun. Dig. 4973.

9415. Submission without action.

State v. White, 176M183, 222NW918.

Distinction noted between submission on agreed case and trial on stipulated facts. Co. of Todd v. Co. of M., 182M375, 234NW593.

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9416. When enforced.

Material and labor lien upon motor vehicle is superior to the title acquired through an execution sale upon a levy made before the filing of the lien statement but after the furnishing of labor or material. Stegmeir v. L., 184M194, 238NW328. See Dun. Dig. 5579a, 5584a.

A judgment is conclusive, as between parties, of facts upon which it is based and all legal consequences resulting from its rendition, and it may be enforced by parties thereto, though judgment may be also for benefit of a third party. Ingelson v. O., 199M422, 272NW270. See Dun. Dig. 1895, 5154, 5155, 5161, 5162.

Set-off of judgment. 20MinnLawRev435.

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.

A sheriff cannot enter a home by force for purpose of levying an execution, but debtor is guilty of resisting an officer in refusing to given up the property. Op. Atty. Gen. (390a-6), Feb. 7, 1935.

9419. Execution, how issued—Contents.

Interest may be allowed on a judgment for alimony. Bickle v. B., 196M392, 265NW276. See Dun. Dig. 4883.

In proceeding to establish a judicial road award of damages by commissioners bears interest from entry of order of court confirming it, as in case of any other judgment. Blue Earth County v. W., 196M501, 265NW329. See Dun. Dig. 4883.

9423. Execution against property, how executed.

Sheriff in levying on and selling land under execution under a judgment is merely a ministerial officer of the law, and is not agent of either party to the action. Cheney v. B., 193M586, 259NW59. See Dun. Dig. 3531.

In action to temporarily or permanently enjoin a sheriff from selling on execution certain real estate of which plaintiff claims to be the owner, execution creditor is a necessary party defendant. Id. See Dun. Dig. 4499a.

Sheriff, with execution, may break open garage doors for purpose of making levy on automobile after having first made demand for possession. Op. Atty. Gen., Aug. 2, 1932.

9425. What may be levied on, etc.

½. In general.

Where sheriff levied execution on certain personal property and thereafter attachment issued in action by another creditor and execution issued thereunder, proceeds of personal property attached and sold under second execution could not be applied upon execution first issued. Reaume v. W., 192M1, 255NW81. See Dun. Dig. 3523.

2. Held not subject to levy.

It appearing that judgment debtor had assigned debt of third person to him before levy, debtor cannot be charged with a debt in action by judgment creditor. 176 M461, 233NW776.

Alimony judgment cannot be taken on execution by wife's pre-existing creditor. Bensel v. H., 177M178, 225 NW104.

Money held by Minnesota Emergency Relief Administration as an agency of the state are not subject to execution or garnishment. Op. Atty. Gen. (8431), Nov. 1, 1934.

9429. On other personal property.

Where a levy has been made on alleged debt to a judgment debtor and debt is denied, recovery may be had only in an action and district court may not order a judgment against debtor on evidence taken at an examination held in supplementary proceedings. Freeman v. L., 199M446, 272NW155. See Dun. Dig. 3548.

9431. On pledged or mortgaged chattels.

Where mortgagee of chattels obtained judgment and levied upon mortgaged property under execution, release of levy was not an election of remedies so as to bar right to proceed under mortgage. First Nat. Bank v. F., 190M102, 250NW806. See Dun. Dig. 2914.

9432. On growing crops, etc.

176M37, 222NW292.

9435. Sale, when and how.

Where owner gives mortgage and thereafter conveys away part of land, one who obtains judgment lien upon part retained has no right to require that tract conveyed away be first sold on foreclosure of mortgage. 175M541, 222NW71.

9437. Certificate of sale of realty.

2. Rights of purchaser.

A sale on execution and resulting satisfaction of judgment cannot be vacated on ground of mistake simply because a mortgage, subject to which property was purchased, was thereafter foreclosed, and property lost. Ridgway v. M., 194M216, 260NW303. See Dun. Dig. 3537a.

9438-1. Sale of real property under judgments legalized in certain cases.—In all sales of real property under judgments and decrees of the district court wherein the sheriff's certificates of sale were filed for record and recorded in the office of the proper registers of deeds prior to October 1, 1928, and within forty-five days, but not within twenty days after the dates of the respective orders confirming such sales, such certificates of sale and the records thereof are hereby legalized and validated to the same extent and with the same effect as though such certificates had been so filed for record and recorded within twenty days after the dates of such respective orders of confirmation. Provided, that the provisions of this act shall not apply to or affect any action or proceeding now pending involving the validity of such certificates or the records thereof. (Act Apr. 23, 1929, c. 294.)

9443. Certificate of redemption—Effect.

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

9445-1. Creditor may redeem in certain cases.—That any creditor whose claim shall have been proved and allowed by a probate court of this state against the estate of a deceased debtor shall have the right, as a creditor of such decedent, to redeem the lands of the decedent from a sale thereof upon the foreclosure of a mortgage, or upon an execution, in the order and in the manner herein provided. (Act Apr. 15, 1929, c. 195, §1.)

9445-2. Creditor to file order with register of deeds.—For the purpose of such redemption a creditor whose claim against the estate of a decedent shall have been so allowed shall file for record in the office of the register of deeds of the county in which the real estate sought to be redeemed is situated, within the year of redemption, a certified copy of the order of the probate court allowing such claim, and thereupon such claim shall constitute a lien upon the unexempt real estate of the decedent sold upon foreclosure or execution. The creditor shall also within such time file a notice in the office of such register of deeds

briefly describing the sale of the decedent's lands, a description of the lands sold, and stating, in a general way, the nature, date and amount of the claim of the creditor, and that he intends to redeem such lands from the sale thereof described in such notice. In the case of redemption from execution sales such notice shall also be filed in the office of the clerk of the district court in which such lands are situated. (Act Apr. 15, 1929, c. 195, §2.)

9445-3. Filing to determine priority.—In the event more than one such proved and allowed claim shall be so filed and recorded for the purposes of such redemption, then, as between the owners of such claims, their right to redeem shall be in the order in which such claims were originally filed, succession commencing with the oldest in point of time; that as to the creditors of the decedent having a lien or liens, either legal or equitable, upon the lands of a decedent and existing otherwise than by allowance in probate, the creditors of the decedent whose claims have been allowed in probate shall be subsequent or junior thereto. (Act Apr. 15, 1929, c. 195, §3.)

9445-4. Creditor may redeem when.—If no redemption is made by the personal representative of the deceased debtor, or by the assigns of such decedent, within one year after the date of such sale, or within one year after the date of the confirmation of such sale, as the case may be, the senior creditor having a lien, legal or equitable, upon the premises sold upon the foreclosure of a mortgage or upon execution, and subsequent to the mortgage or judgment lien under or by reason of which the premises were sold, including the creditors of a deceased debtor whose claims have been perfected and recorded as herein provided, may redeem within five days after the expiration of said twelve months by payment of the amount required by law for that purpose; and each subsequent creditor having a lien in succession, according to priority of liens, within five days after the time allowed the prior lienholder, respectively, may redeem by paying the amount aforesaid and all liens prior to his own held by the person from whom redemption is made. (Act Apr. 15, 1929, c. 195, §4.)

9445-5. Probate Court to determine amount.—Whenever any such creditor redeems from the foreclosure of a mortgage under the provisions of this act the probate court shall determine the amount that shall be credited on his claim against the estate. (Act Apr. 15, 1929, c. 195, §5.)

9445-6. Not to affect present law—Exception.—Except as in this act provided all such redemption shall have the force, and be governed by and subject to all of the requirements, of the statutes relating to the redemption of real estate from mortgage and execution sales now or hereafter in force. (Act Apr. 15, 1929, c. 195, §6.)

9447. Property exempt.

* * * * * *

16. The wages of any person not exceeding thirty-five dollars, plus five dollars additional for each actual dependent of such person, due for any services rendered by him or her for another during thirty days preceding any attachment, garnishment or the levy of any execution against him or her, provided, that all wages paid to such person, and earned within said thirty day period, shall be deemed and considered a part of, or all, as the case may be, of said exemption of thirty-five dollars, plus five dollars additional for each dependent. Said exemption above rereferred to shall be allowed out of the wages of any such person as a right whether claimed or not, unless said employee, his agent or attorney shall file with the court in which said action is pending his written waiver of all or part of such exemption; in the absence of proof of dependents he shall be entitled to an exemption of $35.00, in any event; and if proof is made by affidavit or testimony of additional dependents he shall be entitled to such additional exemption as provided by this Act; provided, that the party instituting garnishment proceedings shall pay the cost of any garnishment where the amount in the hands of the garnishee is wholly exempt. The spouse of such person and all minor children under the age of eighteen years dependent upon him or her for support are to be classed as dependents within the meaning of this Act, provided, however, that the maximum exemption in any case shall not exceed $50.00. (As amended Apr. 21, 1933, c. 350, §1.)

16a. **Effective July 1, 1933.**—This Act shall not be effective until July, 1933. (Act Apr. 21, 1933, c. 350, §2.)

* * * * * * *

Subd. 14.

179M402, 229NW344. Certiorari granted, 51SCR25. Judgment vacated, 283US266, 51SCR416.

Applies to all beneficiaries whether resident or nonresident. 179M255, 228NW919.

Creditors could not impress proceeds of life insurance policies with claims based on fraud of insured after issuance of policies. Cook v. P., 182M496, 235NW9. See Dun. Dig. 3689.

Statutory exemption of proceeds of life insurance does not extend to property purchased therewith. Ross v. S., 193M407, 258NW582. See Dun. Dig. 3689.

Subd. 15.

Applies to all beneficiaries whether resident or nonresident. 179M255, 228NW919.

The United Mutual Life Insurance Company, insofar as it is transacting the insurance business of the Knights of Pythias, is to be regarded as a fraternal beneficiary association. Op. Atty. Gen., May 19, 1931.

Subd. 16.

Defendant was entitled to exemption of $35 from wages earned 30 days preceding garnishment, but amount already paid covering such period must be included in amount claimed to be exempt. Op. Atty. Gen., May 10, 1933.

It is duty of officer making levy upon wages to determine amount of exemption to which an employee is entitled, and such exemption must be allowed out of the wages as a matter of right, whether claimed or not, and officer failing to ascertain the exemption is liable to the judgment debtor. Op. Atty. Gen. (843k), Apr. 20, 1935.

Subd. 18.

Set-off of judgment. 20MinnLawRev435.

Personal property taxes.

No personal property is exempt from seizure or sale under personal property tax judgment. Op. Atty. Gen., July 19, 1933.

General rules.

179M255, 228NW919.

9447-1. Veteran's pension, bonus, or compensation.—All moneys paid to any person as a Veteran's pension, bonus, adjusted compensation, allotment or other benefit by the State of Minnesota or by the United States are exempt from and shall not be liable to attachment, garnishment, seizure or sale on any final process issued out of any Court, for the period of one year after receipt thereof. (Jan. 27, 1936, Ex. Ses., c. 112.)

Sec. 2 of Act Jan. 27, 1936, cited, repeals all laws in conflict.

Fact that veteran is receiving money from federal government under adjusted service certificate is only a fact to be considered in determining whether veteran is entitled to relief. Op. Atty. Gen. (339q), June 27, 1936.

9447-2. Exemption of insurance policies.—The net amount payable to any insured or to any beneficiary under any policy of accident or disability insurance, or under accident or disability clauses attached to any policy of life insurance, shall be exempt and free and clear from the claims of all creditors of such insured or such beneficiary, and from all legal and judicial processes of execution, attachment, garnishment, or otherwise whatsoever. (Apr. 12, 1937, c. 191, §1.)

SUPPLEMENTARY PROCEEDINGS

9450. Order for examination of debtor.

1. General nature and object of proceeding.

Necessity of judgment at law and return of execution thereon as condition precedent to creditor's bill. 15Minn LawRev592.

9452. Examination.

A defendant who refused to testify or answer proper questions in a hearing before a referee in proceedings supplementary to execution is guilty of constructive

contempt, and repeated evasions and untrue answers amount to a refusal to answer. 178M158, 226NW188.
The disclosure in proceedings supplementary to execution cannot be used in a criminal proceeding against the judgment debtor; but a fact shown in it may be considered in determining want of probable cause. Krienke v. C., 182M549, 235NW24. See Dun. Dig. 10339.

9453. Property applied to judgment—Receiver.
Punishment for contempt in failing to convey property to receiver. 172M102, 214NW776.
2. Appointment of receiver.
Appointment of a receiver for a judgment debtor's nonexempt property in proceedings supplementary to execution is discretionary with court. Ginsberg v. D., 191M12, 252NW669. See Dun. Dig. 3549.
2½. Injunction.
Evidence held insufficient to support a finding of violation of restraining order in supplementary proceedings. Ryan v. C., 185M347, 241NW388. See Dun. Dig. 3548, 4504.

9454. Adverse claimants, etc.
Where a levy has been made on alleged debt to a judgment debtor and debt is denied, recovery may be had only in an action, and district court may not order a judgment against debtor on evidence taken at an examination held in supplementary proceedings. Freeman v. L., 199M446, 272NW155. See Dun. Dig. 3548.

UNIFORM DECLARATORY JUDGMENTS ACT

9455-1. Courts to construe rights.—Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree. (Act Apr. 17, 1933, c. 286, §1.)
Declaratory Judgments Act authorizes a proceeding which amounts to a justiciable controversy. Reed v. B., 191M254, 253NW102.
In a proceeding under declaratory judgments act, it is essential that there be adversary interests and parties; that there be a real issue for determination; that there is an actual and legal, and not merely an academic issue; and that the decision rendered will be such as to finally settle and determine the controversy. County Board v. B., 193M525, 257NW92.
An intervener may not introduce new and foreign issues into action as joined by original parties in suit for declaratory judgment. Twin City Milk Producers Ass'n v. H., 199M124, 271NW253. See Dun. Dig. 4901a.
Constitutionality of declaratory judgments statutes. 16MinnLawRev559.
The Uniform Declaratory Judgments Act. 18MinnLaw Rev239.
Scope of declaratory judgment procedure in federal courts. 21MinnLawRev424.

9455-2. May have instruments construed.—Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder. (Act Apr. 17, 1933, c. 286, §2.)

9455-3. Contract may be construed—when.—A contract may be construed either before or after there has been a breach thereof. (Act Apr. 17, 1933, c. 286, §3.)

9455-4. Who may ask for construction.—Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto:
(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or other; or
(b) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or
(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings. (Act Apr. 17, 1933, c. 286, §4.)

9455-5. Not restricted.—The enumeration in Sections 2, 3, and 4 does not limit or restrict the exercise of the general powers conferred in Section 1, in any proceeding where declaratory relief is sought, in which judgment or decree will terminate the controversy or remove an uncertainty. (Act Apr. 17, 1933, c. 286, §5.)

9455-6. Court may refuse to enter decree.—The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding. (Act Apr. 17, 1933, c. 286, §6.)

9455-7. Orders, judgments and decrees may be reviewed.—All orders, judgments and decrees under this Act may be reviewed as other orders, judgments and decrees. (Act Apr. 17, 1933, c. 286, §7.)
Supreme court having arrived at same construction of trust agreement as court below from consideration of instrument alone, it is immaterial that incompetent evidence was introduced. Towle v. F., 194M520, 261NW5. See Dun. Dig. 424.
Order amending complaint so as to make city a party plaintiff instead of a party defendant was not an order involving merits of cause of action or any part thereof and is not appealable, neither is order denying motion to vacate order granting amendment. Gilmore v. C., 198 M148, 269NW113.

9455-8. Application to court for relief.—Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith. (Act Apr. 17, 1933, c. 286, §8.)

9455-9. Issues of fact may be tried.—When a proceeding under this Act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. (Act Apr. 17, 1933, c. 286, §9.)

9455-10. Costs.—In any proceeding under this Act the court may make such award of costs as may seem equitable and just. (Act Apr. 17, 1933, c. 286, §10.)
In action against trustee by beneficiaries under a trust created in a will, alleging negligence and wrongdoing in administration thereof and requesting a new interpretation of a provision of will and a surcharging of trustee's account, in which trustee prevailed in every respect, trustee was entitled to recover reasonable attorneys' fees paid in conduct of its defense. Andrist v. F., 194M 209, 260NW229. See Dun. Dig. 9944.

9455-11. Parties.—When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney-General of the State shall also be served with a copy of the proceeding and be entitled to be heard. (Act Apr. 17, 1933, c. 286, §11.)
Appellant's motion to vacate an order amending complaint so as to make defendant city a party plaintiff instead of a party defendant was timely under Barrett v. Smith, 183M431, 237NW15, and U. S. Roofing & Paint Co. v. Melin, 160M530, 200NW807. Gilmore v. C., 198M148, 269 NW113.
Upon ex parte application for a declaratory judgment for unpaid alimony and for execution trial court may, in its discretion, require notice of application to be given to other party to proceedings, even though statutes do not require giving of notice in such cases. Kumlin v. K., 273NW253. See Dun. Dig. 2811.

9455-12. Act to be remedial.—This Act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered. (Act Apr. 17, 1933, c. 286, §12.)

9455-13. Definition.—The word "person" wherever used in this Act, shall be construed to mean any person, partnership, joint stock company, unincorporated association, or society, or municipal or other corporation of any character whatsoever. (Act Apr. 17, 1933, c. 286, §13.)

9455-14. Provisions separable.—The several sections and provisions of this Act except sections 1 and 2, are hereby declared independent and severable, and the invalidity, if any, of any part or feature thereof shall not effect or render the remainder of the Act invalid or inoperative. (Act Apr. 17, 1933, c. 286, §14.)

9455-15. To make law uniform.—This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees. (Act Apr. 17, 1933, c. 286, §15.)

9455-16. Uniform declaratory judgments act.—This Act may be cited as the Uniform Declaratory Judgments Act. (Act Apr. 17, 1933, c. 286, §16.)

Sec. 17 of act Apr. 17, 1933, cited, provides that the act shall take effect from its passage.

CHAPTER 78

Juries

9458. Number to be drawn.

Trial court did not abuse discretion in discharging entire jury panel and drawing new venire in murder case. State v. Waddell, 187M191, 245NW140. See Dun. Dig. 5239a.

9460. How drawn and summoned.

Laws 1929, c. 7, repeals Sp. Laws 1883, c. 314, as to making up jury lists in Washington county.

9468. Selection of jurors.—The county board, at its annual session in January, shall select, from the qualified voters of the county, seventy-two persons to serve as grand jurors, and one hundred and forty-four persons to serve as petit jurors, and make separate lists thereof, which shall be certified and signed by the chairman, attested by the auditor, and forthwith delivered to the clerk of the district court. If in any county the board is unable to select the required number, the highest practicable number shall be sufficient. In counties where population exceeds ten thousand no person on such list drawn for service shall be placed on the next succeeding annual list, and the clerk shall certify to the board at its annual January session the names on the last annual list not drawn for service during the preceding year, nor shall any juror at any one term serve more than thirty days and until the completion of the case upon which he may be sitting; provided however that the Court may with the consent of any such juror or jurors and with the consent of any parties having matters for trial after such 30 day period has expired hold and use such jurors so consenting to try and determine any jury cases remaining to be tried at such term between parties so consenting. And in counties having two or more terms of court in one year, after the jurors have been drawn for any term of such court, the clerk shall strike from the original list the names of all persons who were drawn for such term, and notify the board thereof, which at its next session shall likewise select and certify an equal number of new names, which shall be added by such clerk to the names in the original list. If such list is not made and delivered at the annual meeting in January, it may be so made and delivered at any regular or special meeting thereafter. Whenever at any term there is an entire absence or deficiency of jurors whether from an omission to draw or to summon such jurors or because of a challenge to the panel or from any other cause, the court may order a special venire to issue to the sheriff of the county, commanding him to summon from the county at large a specified number of competent persons to serve as jurors for the term or for any specified number of days, provided that before such special venire shall issue the jurors who have been selected by the county board and whose names are still in the box provided for in Section 9462 of said Mason's Minnesota Statutes, shall first be called and upon an order of the court the number of names required for such special venire shall be drawn from said box in the manner required by law and the jurors so drawn, shall be summoned by the sheriff as other jurors; and as additional jurors are needed successive drawings shall be ordered by the court until the names contained in said box have been exhausted. (R. L. '05, §4336; G. S. '13, §7971; '17, c. 485, §1; Feb. 13, 1929, c. 13; Apr. 20, 1931, c. 218.)

Where party to cause was member of jury panel it was error to deny continuance or the calling in of other jurors not on panel. 179M557, 230NW91.

Statute contemplates the striking of the names drawn without regard to actual service. Op. Atty. Gen., April 30, 1931.

9469-1. Juries in certain cities.—In all counties of this state now or hereafter having a population of more than 400,000 the jury in civil actions shall consist of six persons; provided, that any party may have the right to increase the number of jurors to twelve by paying to the clerk a jury fee of two dollars at any time before the trial commences. Failure to pay such jury fee shall be deemed a waiver of a jury of twelve. ('27, c. 345, §1, eff. May 1, 1927; Apr. 18, 1929, c. 236, §1.)

9469-2. Same—Jury of six.

The text of this and the next succeeding section is reenacted by Laws 1929, c. 236, but the title of the act purports to amend "section 1, chapter 345, Laws of 1927," *set forth ante as* §9469-1. Inasmuch as no change is made in sections 2 and 3, except that the closing words of section 2 are "the jury," instead of "a jury," the insufficiency of the title is probably immaterial.

9469-3. Same—Challenges.

See note under §9469-2.

CHAPTER 79

Costs and Disbursements

9470. Agreement as to fees of attorney—Etc.

2. Right to costs statutory.

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

10. Contract with attorney.

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

Fact that court directed payment of attorney's fees to plaintiffs' attorneys instead of to them for plaintiffs was not error nor important. Regan v. B., 196M243, 264NW 803. See Dun. Dig. 699.

The sovereign may not be sued without its consent, but where government recognized existence of legal claims founded upon obligations imposed by virtue of Transportation Act and while Director General of Railroads was in charge, a remedial act passed to reimburse property owners who had suffered losses because of negligent operation of railroad is "debt legislation" not "favor legis-