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To

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(1927 to 1940)

(Superseding Mason's 1931, 1934, 1936 and 1938 Supplements)

Containing the text of the acts of the *1929, 1931, 1933, 1935, 1937* and *1939* 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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Where there are no affidavits supporting claims that charges for printing records were excessive, there is no basis of appeal from taxation of costs and disbursements by clerk of supreme court. Malcolmson v. G., 199M258, 272NW157. See Dun. Dig. 2239(6).

Disallowance of cost of transcript in taxation of costs was proper, transcript having been ordered for purpose of a second motion for new trial which, under Ross v. D. M. & I. Ry. Co., 201 Minn. 225, 275 N. W. 622, was in effect a motion "to vacate an appealable order," and was not appealable. Ross v. D., 203M312, 281NW271. See Dun. Dig. 2239.

10. Liability of United States.

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

9487. Additional allowance—Costs, when paid, etc.

Where a judgment for costs against plaintiff in this court includes costs in supreme court of United States, reversing judgment this court affirmed, this court has power to grant remittitur without requiring such judgment for costs to be first paid. Rambo v. C., 197M652, 268 NW199, 870. See Dun. Dig. 2231.

9487-1. Additional costs on change of venue—Amount—Payment or waiver of—Taxation.

Phrase "no judgment shall be entered by plaintiff in any cause" refers to a judgment upon the cause of action, and not a judgment for plaintiff as relator in mandamus proceedings in the supreme court compelling a change of venue for convenience of witnesses. Dahl v. S., 202M661, 279NW578.

CHAPTER 80

Appeals in Civil Actions

9490. Appeal from district court.

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

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

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

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

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

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

Although condemnation proceedings may properly include in one petition numerous tracts of land which state desires to take for one highway, state cannot join in one appeal to district court or supreme court separate awards to two property owners, and such appeal must be dismissed for duplicity. State v. May, 204M564, 285 NW834. See Dun. Dig. 312.

9492. Requisites of appeal.

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

½. Notice of appeal.

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

3. On whom served.

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

Where each defendant moved separately for judgment notwithstanding verdict or new trial, fact that one defendant did not make other defendant a party to motion nor to appeal does not entitle plaintiff to a dismissal of appeal. Kemerer v. K., 198M316, 269NW832. See Dun. Dig. 5081.

Failure to join as respondent a party to the action who is the real party in interest and whose interests are vitally affected by the result is fatal to the appeal and it will be dismissed. Long v. R., 203M332, 281NW75. See Dun. Dig. 312.

In suit for temporary injunction against sheriff alone to prevent execution of writ of restitution, on theory that court lost jurisdiction by certification and remand of forcible entry and unlawful detainer action, plaintiff in original action was a necessary party appellee on appeal by plaintiff from order denying injunction, where he was made a party defendant on his own application prior to taking of appeal. Id.

In action against corporation and individual stockholders to compel cancellation of shares of stock fraudulently issued to individual defendant, corporation was a necessary party who must be served with notice of appeal from a judgment in favor of plaintiff on appeal by individual defendant alone. Weiland v. N., 203M600, 281NW364. See Dun. Dig. 312.

7. Waiver of appeal.

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

10. Dismissal of appeal.

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

9493. Return to Supreme Court.

1. In general.

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

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

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

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

With respect to matters not shown by record, only question presented on appeal is whether findings of fact support conclusions of law. Malcolmson v. G., 199M 258, 272NW157.

On appeal from an order entered pursuant to petition by respondent trustee for allowance of final account and discharge, tabular exhibits originally expressly made a part of respondent's petition to resign his trust became a part of the pleadings and were proper matters to be included in record. Id. See Dun. Dig. 337(45).

Error in respect to charge cannot be considered if not discussed in brief or set out in motion for new trial. Pearson v. N., 200M58, 273NW359. See Dun. Dig. 366, 385.

Problem of preserving excluded evidence in the appellate record. 13MinnLawRev169.

3. Briefs.

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

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

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

An unfit and defamatory brief will be stricken on appeal. Senneka v. B., 197M651, 268NW195. See Dun. Dig. 354b.

Appropriate quotations from relevant authority is always welcome, but repetition of same idea by quotation from other authorities is ordinarily futile and not welcome, and labored argument on familiar propositions of

law is neither complimentary nor helpful to the court. McDermott v. M., 204M215, 283NW116. See Dun. Dig. 354b.

Because of disregard of rules of court, successful appellant was not allowed statutory costs. Lestico v. K., 204M125, 283NW122. See Dun. Dig. 2238.

A brief containing unwarranted and scandalous aspersions upon trial court will be stricken from the files. Hughes v. H., 204M592, 284NW781. See Dun. Dig. 354b.

4. Settled case or bill of exceptions.

See notes under §9329.

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

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

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

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

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

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

Absence of settled case held not to permit review under record. Hillius v. N., 188M336, 247NW385. See Dun. Dig. 387.

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

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

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

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

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

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

Where there is no settled case, only question on appeal is whether findings of fact support conclusions of law and judgment. Erickson v. K., 195M164, 263NW795. See Dun. Dig. 344.

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.

On appeal after a second trial, evidence taken at first which is no part of record at second cannot be considered by judicial notice or otherwise. Taylor v. N., 196M22, 264NW139. See Dun. Dig. 393a.

Affidavit of defendant's attorney, to support a motion made after entry of judgment, cannot supply absence of a settled case or bill of exceptions, and judgment being fair on its face must be affirmed. Olson v. L., 196M352, 265NW25. See Dun. Dig. 344.

Where there is neither a bill of exceptions nor settled case, upon trial had before court without a jury, only question presented upon appeal from judgment is whether findings of fact sustain conclusions of law. Miller's Estate, 196M543, 265NW333. See Dun. Dig. 344.

A printed record purported to contain judgment roll and a return to the supreme court of judgment roll is sufficient to raise question of proper allowance of expert fees, as against contention that appeal should be dismissed because there is no settled case. Senneka v. B., 197M651, 268NW195. See Dun. Dig. 344.

Where on appeal there is neither settled case nor bill of exceptions, only question is whether findings of fact justify conclusions of law and order for judgment. St. Louis County v. M., 198M127, 269NW105. See Dun. Dig. 344.

A finding cannot be attacked as not sustained by evidence where there is no settled case or bill of exception. Hermann v. K., 198M331, 269NW836. See Dun. Dig. 343.

Introduction in evidence of an abstract without incorporating in settled case instruments referred to in abstract, which are claimed to create a defect or break in chain of title, is not effective to prove a breach of a covenant of seizin in a deed. Baker v. R., 199M148, 271NW 241. See Dun. Dig. 344.

On appeal from judgment in action tried without jury, where there is neither a bill of exceptions, nor a settled case, only question that can be raised is that findings of fact do not support judgment. No question as to sufficiency of pleadings to support judgment can be raised. Schaefer v. T., 199M610, 273NW190. See Dun. Dig. 344, 386, 387.

A tying agreement which requires lessee or purchaser of motion picture equipment to purchase repair parts from maker of equipment is not necessarily unreasonable restraint of trade since it may reasonably be necessary in order to effect satisfactory service to lessee or buyer, but is a question of fact upon which trial court's finding adverse to defendant is conclusive in absence of a settled case or bill of exceptions. General Talking Picture Corp. v. D., 203M28, 279NW750. See Dun. Dig. 8437.

To secure review of a ruling admitting or excluding evidence, it is indispensable that there should be a bill of exceptions or case containing evidence erroneously admitted or excluded, objection of counsel, ruling of court upon objection, and so much of other evidence in case as may be necessary to enable court to review intelligently. Timm v. S., 203M1, 279NW754. See Dun. Dig. 346(13).

Since there was no settled case on appeal from order denying motion to dismiss divorce action it must be assumed that there was evidence to sustain lower court's determination that plaintiff was a resident of state for required year. Meddick v. M., 204M113, 282NW676. See Dun. Dig. 344.

In absence of settled case or bill of exceptions, appeal is futile if it is necessary to consider oral testimony taken below. Nichols v. V., 204M212, 283NW748. See Dun. Dig. 343.

6. Assignments of error.

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

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

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

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

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

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

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

Assignment of error in motion for new trial held not sufficient to direct trial court's attention to alleged error in instruction claimed not to give proper test as to existence of partnership. Randall Co. v. B., 189M175, 248NW752. See Dun. Dig. 337, 388a.

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

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

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

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

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

On appeal from a judgment, there being a settled case, sufficiency of evidence to sustain findings and judgment will be reviewed on a proper assignment of error. Ad-

justment Service Bureau v. B., 196M563, 265NW659. See Dun. Dig. 388.

If joint judgment against two defendants is, in fact excessive and both defendants file separate appeals, judgment cannot stand even if one of defendants refrained from assigning error on that ground. Kemerer v. K., 198 M316, 269NW832. See Dun. Dig. 358.

Where appeal is from order denying a motion for amended findings of fact and conclusions of law, and, in alternative, for a new trial, an assignment of error challenging conclusions of law as not sustained by findings of fact and evidence is sufficient. C. I. T. Corp. v. C., 198M337, 269NW825. See Dun. Dig. 358a.

Assignment of error "that the finding that conclusions of the industrial commission of Minnesota are contrary to testimony herein" was not in proper form, there being nine specific findings of fact. Skoog v. S., 198M504, 270 NW129. See Dun. Dig. 361.

Portions of a charge claimed to be erroneous should be specified in assignments of error. Doody v. S., 198 M573, 270NW583. See Dun. Dig. 358, 364.

Assignment of error on charge was unavailing where no exception in respect to subject was taken before jury retired nor in motion for new trial. Vondrashek v. D., 200M530, 274NW609. See Dun. Dig. 9797.

Only errors assigned below can be considered on appeal from an order denying a motion for new trial. Martin v. N., 201M469, 276NW739. See Dun. Dig. 395.

Where no assignment of error attacks any portion of court's charge, captious criticism of charge in brief and oral argument is of no avail. Neeson v. M., 202M234, 277 NW916. See Dun. Dig. 358.

Good practice requires that alleged erroneous instructions should be given in haec verba, and there should be a separate assignment as to each instruction claimed to be erroneous. Vietor v. C., 203M41, 279NW743. See Dun. Dig. 364.

An exception should single out each instruction challenged and clearly specify alleged error. Strand v. B., 203M9, 279NW746. See Dun. Dig. 9797.

Ruling of court on motion to strike out evidence of a certain witness was not reviewable in absence of proper assignment of error or reference thereto in motion for new trial. Bylund v. C., 203M484, 281NW873. See Dun. Dig. 358.

Assignment of 112 errors in an automobile case indicated too much abstinence from concise statement required, and it was not proper to state as part of each assignment a summary of argument, later elaborated, in its support. Lestico v. K., 204M125, 283NW122. See Dun. Dig. 357.

Counsel should group under one assignment all challenged rulings concerning a single composition. Id. See Dun. Dig. 357.

An assignment too vague to raise any point will be passed as indefinite. Mullany v. F., 287NW118. See Dun. Dig. 360.

Where assignments of error do not present for review instructions given below, rules stated in charge become law of case by which sufficiency of evidence to sustain verdict is determined. Id. See Dun. Dig. 404.

Assignment that court erred in refusing to order judgment non obstante or a new trial raises only question of sufficiency of evidence. Id. See Dun. Dig. 365.

Assignment that court erred in denying a directed verdict raises only question of sufficiency of evidence to sustain verdict, but not any other question. Id. See Dun. Dig. 365(42).

7. Dismissal of appeal.

One who was not a party to the proceedings below is entitled to dismissal of the appeal as to her. Veranth v. M., 284NW849. See Dun. Dig. 311.

9494. Powers of appellate court.

1. In general.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Where there is a motion for judgment notwithstanding verdict but no motion for a new trial, only objections that can be raised on appeal are (1) whether court had jurisdiction; (2) whether court erred in denying motion for a directed verdict; and (3) whether evidence is suffi-

cient to justify verdict. Eichler v. E., 194M8, 259NW645. See Dun. Dig. 385, 5085(46).

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

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

Motion of appellants as defendants in mortgage foreclosure to remand cause to district court was denied for reason that mortgage foreclosure sale made after entry of judgment appealed from could not affect validity of judgment, and because appellants have a remedy under moratorium act when any attempt is made to enforce judgment against real estate. First Nat. Bank v. C., 195 M144, 262NW222. See Dun. Dig. 439.

Appellate court and lower court from which an appeal is taken in an action for divorce have concurrent jurisdiction to award temporary alimony pending appeal. Bickle v. B., 196M392, 265NW276. See Dun. Dig. 2802.

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

1½. Persons entitled to allege error.

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

State is not in position to question amount of counsel fee allowed landowners in discontinued eminent domain proceeding, having presented no evidence in opposition to that of respondents, and having moved trial court to substitute for its findings proposed findings wherein value of counsel fee is same amount as allowed by court. State v. Lesslie, 195M408, 263NW295. See Dun. Dig. 420.

Plaintiff is not in position to prove an error on admission in evidence of conversations between parties at time contract and deed were made, having opened up that subject himself. Priebe v. S., 197M453, 267NW376. See Dun. Dig. 419.

Plaintiff cannot complain that court improperly permitted him to put in as rebuttal testimony as to a matter that had been gone into by him upon his own side of case and as a part of it. Ohad v. R., 197M483, 267NW 490. See Dun. Dig. 419.

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. 9798.

If complaint does not state a cause of action one answering complaint may file objection to introduction of evidence and an adverse ruling will present proper question for review on appeal from judgment. Weiland v. N., 203M600, 281NW364. See Dun. Dig. 7561a.

In action for a declaratory judgment, wherein judgment went for defendants, and granted them relief as conditionally in their answers, and plaintiff appeals, it is not necessary to pass upon question of sufficiency of complaint for a declaratory judgment. City of Bemidji v. E., 204M90, 282NW683. See Dun. Dig. 416.

Jurisdictional objection may be made for first time on appeal. Lustmann v. L., 204M228, 283NW387. See Dun. Dig. 384.

Where the trial court in issuing a temporary injunction indicated a willingness to modify it upon motion as being excessive in some respects, if the parties did not agree upon the modification themselves, this court will not consider any question of such excessiveness of restraint in the absence of presentation of the question below upon a motion to modify. Jannetta v. J., 285NW 619. See Dun. Dig. 384.

Applicability of statute of limitation will not be considered on appeal, even though question was raised below, if it was not passed on by trial court, especially where facts upon which application depends are in dispute. Normania Tp. v. Y., 286NW881. See Dun. Dig. 384.

1¾. Scope and extent of review.

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

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

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

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

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

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

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

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

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

An order sustaining a demurrer to two of three defenses is not reviewable on appeal from an order denying a new trial after a directed verdict in favor of plaintiff on issue constituting third defense. Northwestern Nat. Bank v. C., 195M98, 262NW161. See Dun. Dig. 395.

On appeal from a judgment where there has been no motion for a new trial, sole question is whether evidence reasonably sustains verdict. Robbins v. N., 195 M205, 262NW210, 872. See Dun. Dig. 388a.

On appeal from order denying a new trial, errors assigned upon denial of an appellant's motion to amend a finding of fact or conclusion of law may be reviewed. Sullivan v. E., 195M232, 262NW574. See Dun. Dig. 395.

On appeal from order of district court dismissing an appeal from orders of probate court dismissing petition for restoration of incompetent to capacity and appointment of a new guardian, supreme court could not consider claim of incompetent's attorney that court erred in not allowing expense money and attorney's fees, record showing no petition for such allowances in either lower court. Foust's Guardianship, 195M289, 262 NW875. See Dun. Dig. 425a.

Question as to allowance of attorney's fees not having been presented to or passed upon by trial court, need not be considered. Farmers State Bank v. A., 195M475, 263NW443. See Dun. Dig. 384.

Sufficiency of evidence to justify verdict cannot be reviewed on appeal from judgment unless a motion was made in trial court for a new trial and motion was denied, or there was a motion under statute for judgment notwithstanding verdict or there was a motion on trial for a directed verdict on ground of insufficiency of evidence. Ydstie's Estate, 195M501, 263NW447. See Dun. Dig. 388, 7073b.

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. Id. See Dun. Dig. 395.

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.

On appeal from a judgment where there has been no motion for a new trial, only question for review is whether there is evidence reasonably supporting verdict. Id. See Dun. Dig. 385.

An appellate court may properly base decision upon a ground not presented to trial court, where question, raised for first time on appeal, is decisive of controversy on merits. Skolnick v. G., 196M318, 265NW44. See Dun. Dig. 384.

Disposition of motion made and submitted several months after entry of judgment cannot be reviewed on appeal from judgment. Liquidation of Peoples State Bank, 197M479, 267NW482. See Dun. Dig. 391.

On appeal from an order denying motion for temporary injunction pending determination of action, court does not try merits or decide disputed questions of law or fact which are for determination, in first instance, by trial court. State v. Tri-State Telephone & Tel. Co., 197 M575, 267NW489. See Dun. Dig. 384.

On appeal by railroads from order of district court denying their motion to vacate findings and orders affirming order of railroad and warehouse commission granting certificate of public necessity and convenience to operators of trucks, insufficiency of findings of commission and trial court is not available where appellant did not request more specific findings or to find upon any certain issues. Chicago & N. W. Ry. Co. v. V., 197M580, 268NW 2. See Dun. Dig. 384, 397b.

Supreme court will not interfere with the practice or procedure of commission unless contrary to statutory direction. Id. See Dun. Dig. 8082a.

Supreme court having reached conclusion that order was not appealable, decision should end there. Detwiler v. L., 198M185, 107ALR1054n, 269NW838. See Dun. Dig. 281.

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., 200M204, 273NW634. See Dun. Dig. 396.

An attorney at law does not have a right, by reason of appearance in litigation for a client, to have a review of a judgment or decision rendered in such litigation. State v. Probate Court of Hennepin County, 199M297, 273NW636. See Dun. Dig. 358, 388a.

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., 200M327, 274NW229. See Dun. Dig. 384.

Claim of estoppel because of acceptance of payments under a contract cannot be first raised on appeal. Id.

There being no motion for a new trial, excessiveness of verdict is not reviewable on appeal from judgment. Nelson v. G., 201M198, 275NW612. See Dun. Dig. 385.

A party cannot change or shift his position on appeal. Lee v. P., 201M266, 276NW214. See Dun. Dig. 401.

While part of order which denies amendment of findings is not appealable, part which denies new trial is, and upon such appeal verdict and any finding may be challenged as not sustained by evidence. Schaedler v. N., 201M327, 276NW235. See Dun. Dig. 395.

Appellant cannot contend on appeal that instrument did not become effective because not signed by all parties contemplated, where case was pleaded, tried and submitted below upon theory that writing was a valid and binding contract, but was modified by a subsequent oral arrangement. Slawson v. N., 201M313, 276NW275. See Dun. Dig. 401.

An appeal from an order which is appealable in part and nonappealable in part brings up for review only that part which is appealable. Martin v. N., 201M469, 276NW 739. See Dun. Dig. 304.

Inadvertent errors in charge not brought to attention of court at trial will not be considered on appeal. State v. Sprague, 201M415, 276NW744. See Dun. Dig. 9797.

An appellate court has no jurisdiction to litigate an issue of which it has no jurisdiction, though parties consent. Peterson's Estate, 202M31, 277NW529. See Dun. Dig. 286.

Probate court has no jurisdiction over proceedings for specific performance of contract to will property, as a specific performance must be sought in district court in equity, and district court upon appeal from probate court has no jurisdiction to decree specific performance, since it may exercise only appellate jurisdiction. Roberts' Estate, 202M217, 277NW549. See Dun. Dig. 3593i, 3658, 7795, 10207.

Supreme court on appeal from district court cannot review a matter of which district court did not have jurisdiction on appeal from probate court. Roberts' Estate, 202M217, 277NW549. See Dun. Dig. 7795.

Action tried below as involving a direct and not a collateral attack on a judgment, will be so regarded on appeal. Siewert v. O., 202M314, 278NW162. See Dun. Dig. 401.

Where plaintiffs alone appealed, only their rights, as opposed to those of defendants, may be adjudicated, and rights as between defendants may not be determined. Dehnhoff v. H., 202M295, 278NW351. See Dun. Dig. 314.

Alleged error in reception of evidence to which no exception was taken and no assignment of error is made in motion for new trial will not be reviewed on appeal. Papke v. P., 203M130, 280NW183. See Dun. Dig. 388a.

Points not raised below cannot be considered on appeal. Gilloley v. S., 203M233, 281NW3. See Dun. Dig. 401.

Only those matters submitted in court below can be considered on appeal. Olson v. G., 203M267, 281NW43. See Dun. Dig. 384.

Where facts and determinative issue are stipulated, only that issue will be considered. Id. See Dun. Dig. 407.

Where a new trial must be ordered, upon other grounds, reviewing court will refrain from passing upon sufficiency of medical testimony to establish connection as cause between injury alleged to have been suffered by plaintiff and his present condition. Ross v. D., 203M321, 281NW76. See Dun. Dig. 429.

Remedy of one entitled to change of venue is mandamus from supreme court to trial court before trial is had, and the matter cannot be complained of on appeal from judgment following trial. Weiland v. N., 203M600, 281NW364. See Dun. Dig. 389.

As a rule, it is inadvisable to consider or decide other questions than those determinative of appeal. City of Bemidji v. E., 204M90, 282NW683. See Dun. Dig. 391.

Supreme court will dispose of a case on the merits where there is a clear demand for that course presented. Lustmann v. L., 204M228, 283NW387. See Dun. Dig. 425.

On appeal from an order denying a new trial, the review is limited to errors assigned in the motion for new trial. Parten v. F., 204M200, 283NW408. See Dun. Dig. 395.

Issues both of law and fact will be considered on appeal in accordance with the theory on which the case was tried and submitted below. Schultz v. K., 204M585, 284 NW782. See Dun. Dig. 407, 408.

A party is not only bound to make specific objections at time evidence is offered, but he is also limited on appeal to objections he raised in court below. Becker County Nat. Bank v. D., 204M603, 284NW789. See Dun. Dig. 405(75).

When any issue is settled as matter of law by record, supreme court will determine the question, thereby avoiding delay and expense of a retrial. Penn Anthracite Mining Co. v. C., 287NW15. See Dun. Dig. 425.

Supreme court has adopted course of determining merits wherever it may be done with due regard to limitations arising from nature of appellate jurisdiction. Id. See Dun. Dig. 425.

If a case has been fully developed at trial and facts are undisputed, the reviewing court, even on reversal, ordinarily will render final judgment, or will remand case to lower court with direction to enter judgment in accordance with opinion, or with specific directions, rather than direct a new trial. Id. See Dun. Dig. 425.

2. Dismissal of appeal.

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

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

An unfit and defamatory brief will be stricken on appeal. Senneka v. B., 197M651, 268NW195. See Dun. Dig. 354b.

3. Affirmance.

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

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

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

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

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

Where court has dismissed an application under mortgage moratorium law and same does not show any equity or right to relief asked, supreme court will not reverse order of dismissal, although order was made on a motion asking for dismissal only on ground of lack of jurisdiction. Petters & Co. v. J., 195M497, 263NW453. See Dun. Dig. 421.

On appeal from an order adjudging defendant guilty of contempt of court, properly entered, supreme court can only sustain order, although counsel for plaintiffs assure court that they have no desire to have defendant punished. Johnson v. F., 196M81, 264NW232. See Dun. Dig. 432.

Parties having stipulated that no remittitur issue if judgment below be affirmed, clerk will enter final judgment in supreme court on affirmance. State v. First Bank Stock Corp., 198M619, 270NW574. Appeal dism., 300US635, 57SCR434. See Dun. Dig. 449.

Although reason given for a decision may be erroneous, it will be affirmed if decision is correct on other grounds. First National Bank & Trust Co., 202M206, 277 NW909. See Dun. Dig. 421.

Where appeal is based upon excessive damages, there will be an affirmance where it is admitted that damages as reduced by trial court are not excessive. Glubka v. T., 202M594, 279NW567. See Dun. Dig. 7138.

One member of court being incapacitated by illness and remaining members being equally divided judgment will be affirmed. State v. Certain Parcel of Land, 204M 605, 282NW658. See Dun. Dig. 290.

Order appealed from will be affirmed where members of court are equally divided. Smith v. S., 204M621, 282 NW819. See Dun. Dig. 290.

Where an action has been fully litigated and upon appeal the decision affirmed, the defeated party may not again have a new trial on the ground that witnesses made mistakes or wilfully testified falsely in the trial. Nichols v. V., 204M212, 283NW748. See Dun. Dig. 5127, 5128, 5129.

Justices of supreme court being equally divided divorce decree awarding custody of a child will be affirmed. Martin v. M., 204M621, 284NW294. See Dun. Dig. 290.

One member of court being incapacitated by illness, and remaining members being equally divided, order appealed from will be affirmed. Field v. L., 285NW615. See Dun. Dig. 290.

Where one justice is incapacitated by illness and other members of court are equally divided on questions presented by appeal, order of trial court will be affirmed without opinion. Sudeith v. R., 287NW7. See Dun. Dig. 290.

On appeal respondent, without a cross appeal, may urge in support of order or judgment, any sound reason for affrmance, even though it is not one assigned by trial judge for his decision. Penn Anthracite Mining Co. v. C., 287NW15. See Dun. Dig. 426(16).

4. Reversal.

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

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

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

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

Where judgment has been entered notwithstanding verdict, the court's denial of a new trial may be regarded

as prematurely entered, and is to be entertained and determined on reversal. 180M540, 231NW222.

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

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

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

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

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

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

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

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., 198 M586, 270NW579. See Dun. Dig. 429.

While it is doubtful if evidence sustains verdict in present state of record, plaintiff should be given opportunity of another trial, rather than have judgment ordered against him. Preveden v. M., 200M523, 274NW685. See Dun. Dig. 428, 433.

A judgment for defendant will not be reversed on appeal simply to allow plaintiff to recover nominal damages. Erickson v. M., 285NW611. See Dun. Dig. 417a.

4½. Vacating or modifying opinion or decision.

Circuit court of appeals cannot entertain petition of trustee in railroad mortgage foreclosure suit for leave to apply to trial court for modification of a final decree of foreclosure which had been modified and affirmed by the circuit court of appeals, after the term at which mandate of court was entered has long expired, notwithstanding provision in decree affirmed extending equity term of district court until after complete execution of the decree, any modification being a matter to be presented to the trial court, though circuit court of appeals is authorized to grant leave, under appropriate circumstances, for filing in lower court of a bill of review to reverse a decree entered persuant to mandate regardless of expiration of term of court. Guaranty Trust Co. v. M., (CCA8), 98F(2d)345.

Supreme court retains jurisdiction until remittitur goes down, and may modify or vacate opinion and decision. State v. Erickson, 188M633, 247NW687, vacating judgment, 185M60, 239NW908.

4¾. Discretionary rulings.

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

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

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

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

Order granting temporary injunction will not be reversed in supreme court unless it is made to appear that action of court below was an abuse of discretion, especially where it does not appear that any injury will result to party restrained by maintaining status quo until trial and determination of action. School Dist. No. 1 v. L., 195M14, 261NW486. See Dun. Dig. 4490(89).

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. 399.

Where findings of fact, based on affidavits made on behalf of plaintiff, amply justify appointment of a receiver pending foreclosure proceedings, appellate court cannot disturb action of trial court, in absence of a showing that it acted arbitrarily or without reasonable cause. Lincoln Nat. Life Ins. Co. v. B., 196M433, 265NW290. See Dun. Dig. 410.

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 failure to exercise due diligence in discovering new evidence. Jorstad v. B., 196M568, 265NW814. See Dun. Dig. 399.

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.

Supreme court will interfere with order of court denying temporary injunction only on a showing of a clear abuse of discretion. State v. Tri-State Telephone & Tel. Co., 197M575, 267NW489. See Dun. Dig. 399.

Supreme court will not disturb an allowance of expert witness fees unless abuse of discretion is apparent. Senneka v. B., 197M651, 271NW813. See Dun. Dig. 10361.

An order granting a temporary injunction, if within limitations imposed by statute, will not be set aside except upon a showing that lower court clearly abused discretion vested in it. Behrens v. C., 199M363, 271NW814. See Dun. Dig. 4490.

Granting of new trial for erroneous instructions is largely a matter of discretion with trial judge, but court erred in granting a new trial for an error which would not have prejudiced moving party. Ensor v. D., 201M152, 275NW618. See Dun. Dig. 7166.

Release from default is almost entirely in sound discretion of trial court, and supreme court will reverse only in cases in which it appears that there has been an abuse of discretion. Kennedy v. T., 201M422, 276NW650. See Dun. Dig. 399, 5012.

Granting of new trial for misconduct of jury rests almost wholly in discretion of trial court, especially when motion is decided on conflicting affidavits, and its action will not be reversed on appeal except for a clear abuse of that discretion. State v. Warren, 201M369, 276NW655. See Dun. Dig. 7105(7).

Matter of granting a new trial on ground of improper remarks of counsel rests largely in discretion of trial court, but when misconduct appears and prejudice is shown, it is an abuse of discretion not to grant a new trial. Anderson v. H., 201M580, 277NW259. See Dun. Dig. 7102.

Supreme court can reverse ruling of trial court refusing to extend time in which to settle a proposed case only when there has been an abuse of discretion. Hartman v. P., 203M388, 281NW364. See Dun. Dig. 1372.

Matter of determining whether a new trial should be granted for misconduct of prevailing party is primarily for trial court's discretionary determination. Ryan v. I., 204M177, 283NW129. See Dun. Dig. 399.

Whether statements following an accident are res gestae is primarily for the trial court. Noesen v. M., 204M233, 283NW246. See Dun. Dig. 3300, 3301.

Only in cases where there is a clear abuse of discretion will court reverse denial of new trial for inadequacy of damages. Pye v. D., 204M319, 283NW487. See Dun. Dig. 7141(45).

Whether a witness offered as an expert possesses requisite qualifications involves so much of element of fact that great consideration must necessarily be given to decision of trial judge. Detroit Lakes Realty Co. v. M., 204 M490, 284NW60. See Dun. Dig. 399.

Whether claim of surprise, made in support of a litigant's request for leave to impeach his own witness, is well founded in fact, is a preliminary question for the trial judge, and his ruling thereon will not be disturbed unless abuse of discretion appears. State v. Saporen, 285 NW898. See Dun. Dig. 10356.

Action for injunction being maintainable, interlocutory orders granting ancillary remedy of receiver and a temporary injunction must be upheld, where record shows no abuse of judicial discretion. State v. O'Neil, 286NW315. See Dun. Dig. 4490.

5. Proceedings below on reversal.

Where judgment is reversed solely upon ground that it was not one which should have been rendered upon verdict or findings of fact, court below is at liberty to proceed in any way not inconsistent with opinion. National Surety Co. v. W., 186M93, 242NW545. See Dun. Dig. 456.

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

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

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

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

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

Trial court may in its discretion grant a new trial to a litigant defeated on appeal, where decision reversed order granting his motion for judgment notwithstanding verdict, there having been no motion for a new trial, merits of case not being determined by appeal. State v. District Court, 195M169, 263NW908. See Dun. Dig. 456.

Where new trial granted by supreme court was limited to question of whether defendant was liable for part of proceeds of furniture sale, trial court did not err in refusing to permit plaintiff to amend complaint asking for an accounting of partnership transactions as a whole. Stolp v. R., 195M372, 263NW118. See Dun. Dig. 447.

Where supreme court reversed decree in partition ordering sale of two farms and determined that one farm must go to each of two parties, a new trial was unnecessary where trial court had made specific findings and values of farms, but referees might value farms and determine owelty. Kauffman v. E., 195M569, 264NW781. See Dun. Dig. 428.

In federal employers' liability cases when a verdict is excessive, due to passion or prejudice, a new trial must be ordered on all issues. Westover v. C., 197M194, 266NW741. See Dun. Dig. 7140.

When a judgment is reversed for insufficiency of evidence to support verdict, a new trial follows as a matter of course, unless reversing tribunal otherwise directs. Rambo v. C., 197M652, 268NW199, 870. See Dun. Dig. 441, 456.

Where United States Supreme Court reversed a judgment affirmed by state supreme court for insufficiency of evidence to support verdict, and remanded case to state supreme court for further proceedings not inconsistent with opinion, state supreme court will not direct judgment in favor of appellant defendant, but will give appellant right to renew motion in trial court, and will order a new trial in case trial court does not grant such motion. Id. See Dun. Dig. 2226.

Plaintiff, who has made out a prima facie case showing that he is entitled to substantial damages, will, for error in dismissing his case, be granted a new trial of all issues, even though he failed to prove amount of such damages, where it appears that deficiency in proof may be supplied on a second trial, following Erickson v. Minnesota & Ontario Power Co., 134Minn209, 158NW979. Gilloley v. S., 203M233, 281NW3. See Dun. Dig. 429, 7068.

It is duty of court below to execute a mandate according to its terms, and supreme court having directed court below to disallow certain items, it was error for court below not to disallow them. Malcolmson v. G., 200M486, 274NW652. See Dun. Dig. 455.

Upon remittitur, a mandate ordering that a trustee's account be surcharged in a principal sum does not authorize court below to add interest to amount surcharged. Id.

Where erroneous admission or exclusion of evidence only when to amount of damage, new trial will be confined to issue of amount of damages. Doll v. S., 201M 319, 276NW281. See Dun. Dig. 430.

A motion to amend and substitute a new pleading calculated to present a direct attack on orders involved in former appeal but which states no cause of action, was properly denied by trial court. Melgaard's Will, 204M194, 283NW112. See Dun. Dig. 458.

A minor and inadvertent error in the decision of trial court should be corrected by motion below rather than by modification on appeal. Clarke's Will, 204M574, 284NW 876. See Dun. Dig. 432.

6. Law of case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Supreme court is compelled to disregard theories of trial where record shows conclusively as a matter of law on merits that relator was not entitled to peremptory writ of mandamus. State v. City of Duluth, 195M563, 263 NW912. See Dun. Dig. 401.

Cases will be disposed of on appeal within limits of consideration fixed by theory upon which they have been tried. Harris v. E., 196M469, 265NW322. See Dun. Dig. 401.

Where, in court case, counsel concur with court upon meaning of issues and questions submitted to jury so as to impress jury with that view, they will be bound thereby, although expression of such meaning may not be legally accurate. Walsh v. K., 196M483, 265NW340. See Dun. Dig. 404.

Court will not review result reached upon former appeal. Pechavar v. O., 198M233, 269NW417. See Dun. Dig. 459.

Determination on former appeal that negligence and contributory negligence were questions for jury are determinative of such questions on subsequent appeal under evidence not differing materially from that on former trial. Mardorf v. D., 199M325, 271NW588. See Dun. Dig. 398.

Questions decided on former appeal became law of case. Pearson v. N., 200M58, 273NW359. See Dun. Dig. 398.

Decision on former appeal is law of case on questions there presented unless clearly erroneous and manifest injustice is wrought, and application of doctrine is not affected by new evidence on second trial which is merely cumulative. Chicago, St. P M. & O. R. R. Co. v. K., (CCA 8), 102F(2d)352.

Where a party acquiesces in statement of law as contained in charge he is precluded from asserting that theory on which case was submitted to jury was erroneous, unless it is conclusively shown by record that successful party was not entitled to recover. State v. Sprague, 201M415, 276NW744. See Dun. Dig. 9792.

Where there are two appeals presenting same questions of fact and law, a decision in one appeal will dispose of other. Marschinke v. E., 202M625, 279NW587. See Dun. Dig. 398.

Where it was shown that a person appearing to be one of makers of a note received no consideration and was not an accommodation party, plaintiff had burden of proving himself a holder in due course, and his acquiescence in an instruction that if defendant received no consideration plaintiff could not recover against her made instruction law of case, it not conclusively appearing that defendant was not entitled to prevail. Parkin v. S., 203M249, 280NW849. See Dun. Dig. 404.

Theory of trial becomes law of case for purposes of appeal. *Allen v. C., 204M295, 283NW490. See Dun. Dig. 407.*

Stipulations as to facts and issues below are controlling upon appeal. Lichterman v. L., 204M75, 283NW752. See Dun. Dig. 356.

Decision on appeal must be considered final on subsequent appeal where same errors are assigned. State v. Illinois Cent. R. Co., 286NW359. See Dun. Dig. 398.

7. Moot questions.

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

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

Determination of whether plaintiff's contributory negligence appears as a matter of law was not necessary to decision where errors complained of by losing party are found not well taken and jury returned general verdict for defendant. Hartwell v. P., 198M488, 270NW570. See Dun. Dig. 425a.

Supreme court does not decide cases merely to make precedents. Doyle v. R., 285NW480. See Dun. Dig. 281.

7½. Presumptions.

Where record on appeal contains no settled case or bill of exceptions, the only question is the sufficiency of the findings to support the judgment, it being presumed that the evidence sustains the findings, and if facts found are not within the issues, that they were litigated by consent. Pike Rapids Power Co. v. M., (CCA8), 99F(2d)902.

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

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. 368b, 2347.

A judgment will not be reversed on appeal unless the record affirmatively shows material error. Johnson v. G., 201M629, 277NW252. See Dun. Dig. 386.

It must be assumed on appeal that jury heeded instruction of court to disregard hearsay testimony stricken out. *Farwell v. S., 203M392, 281NW526.* See Dun. Dig. 423.

8. Findings of fact.

174M442, 219NW457.

On review of actions at law tried to court, its findings upon questions of fact are conclusive no matter how convincing argument that, under evidence, findings should have been different. U. S. v. Gamble-Skogmo, (CCA8), 91F(2d)372.

Finding that contract was one of agency and not a conveyance of an equitable title, held reviewable on appeal, it not being merely a finding of fact but a determination of the legal effect of the contract. Pike Rapids Power Co. v. M., (CCA8), 99F(2d)902.

Court on appeal will not disturb verdict if supported by any substantial evidence, giving it the most favorable view and inferences reasonably to be drawn therefrom. Chicago, St. P., M. & O. R. Co. v. K., (CCA8), 102F(2d) 352.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Evidence will be viewed in light favorable to verdict. Dickinson v. L., 188M130, 246NW669; Jacobsen v. A., 188 M179, 246NW670. See Dun. Dig. 415.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Supreme court will not interfere with action of trial court in granting or refusing a temporary injunction where there is a conflict of the facts. School Dist. No. 1 v. L., 195M14, 261NW486. See Dun. Dig. 4490(92).

Supreme court is bound by jury's findings on fact issues where evidence permits a finding either way. Walsh v. D., 195M36, 261NW476. See Dun. Dig. 415.

Supreme court will not set aside findings of trial court unless manifestly and palpably contrary to evidence. Schultz v. B., 195M301, 262NW877. See Dun. Dig. 411.

Decision of trial court sitting as a fact-finding body must be sustained on appeal if it is one that may reasonably be reached on the evidence. Thornton Bros. v. J., 195M385, 263NW108. See Dun. Dig. 410.

A verdict of a jury upon specific questions of fact submitted to them in an equity action is as binding on court as a general verdict in a legal action, and it is subject to same rules as to setting aside for insufficiency of evidence. Ydstie's Estate, 195M501, 263NW447. See Dun. Dig. 415.

In reviewing findings of fact by trial judge, supreme court will not count witnesses or weigh testimony. Nichols v. V., 195M621, 263NW900. See Dun. Dig. 411.

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. Cosgrove v. M., 196 M6, 264NW134. See Dun. Dig. 7160a, 9764, 10344.

On review of judgment of district court affirming county board finding discharged veteran incompetent, supreme court is limited to a determination of whether there is evidence reasonably sufficient to sustain finding, and it does not weigh the evidence or pass upon credibility of witnesses. State v. Eklund, 196M216, 264NW682. See Dun. Dig. 411.

In respect in which evidence is in conflict it must be resolved in favor of verdict. Nye v. B., 196M330, 265NW 300. See Dun. Dig. 415.

On conflicting evidence, a verdict of damages for conversion of bailed motor boat will not be disturbed. Johnson v. B., 196M436, 265NW297. See Dun. Dig. 415.

Where in an action triable to court, issues of fact are submitted to a jury, such issues will be considered upon review in light treated by court and jury at trial, without arbitrarily applying technical rules of interpretation. Walsh v. K., 196M483, 265NW340. See Dun. Dig. 401.

Credibility of witnesses and weight to be given to their testimony are primarily for jury and trial court to determine. Pellowski v. P., 196M572, 265NW440. See Dun. Dig. 415.

Only in case evidence for prevailing party is clearly false or insufficient will appellate court interfere after two trials and verdicts, each time for prevailing party, and approval of final verdict by trial court. Id.

Supreme court does not review a motion for amended findings and after a blended motion will consider only motion for new trial. Wyman v. T., 197M62, 266NW165. See Dun. Dig. 309(85).

Where, as to reasonable value of an attorney's services, there is expert evidence on part of defendant that value is $1,000 and on part of plaintiff that value is $12,000, this court may not disturb as excessive a verdict of $6,000, approved by trial court. Kolars v. D., 197M 183, 266NW705. See Dun. Dig. 415.

Sole inquiry in reviewing fact issues is whether there is any evidence in record reasonably tending to sustain conclusion reached by trier of facts. House v. A., 197M 283, 266NW739. See Dun. Dig. 411, 415.

In reviewing a verdict for plaintiff, evidence must be viewed in light most favorable to plaintiff. Bauer v. M., 197M352, 267NW206. See Dun. Dig. 415.

It is for triers of fact to choose not only between conflicting evidence but also between opposed inferences. Reinhard v. U., 197M371, 267NW223. See Dun. Dig. 411.

Where fact issues alone are involved, it is duty on appeal to sustain verdict unless it is manifestly contrary to evidence. Stock v. F., 197M399, 267NW368. See Dun. Dig. 415.

Where there is a conflict in evidence and inferences raised thereby, supreme court can pass only upon question of whether or not decision below is reasonably supported by record. Chamberlain v. T., 198M274, 269NW 525. See Dun. Dig. 411.

Supreme court cannot set itself up as a superjury and weigh evidence upon which trier of facts has reached a decision. Hamilton v. W., 198M308, 269NW635. See Dun. Dig. 411.

Rule guiding court in review of findings of trial court in tax proceedings is same as that applied in ordinary civil actions, and to justify interference it must appear that they are clearly and manifestly against evidence. State v. Oliver Iron Mining Co., 198M385, 270NW609. See Dun. Dig. 9535.

Reviewing court cannot disturb a finding of fact based upon flatly contradictory testimony. J. J. Meany Casket Co. v. M., 199M117, 271NW99. See Dun. Dig. 415.

On review of a directed verdict for defendant, only evidence most favorable to plaintiff will be considered. Jude v. J., 199M217, 271NW475. See Dun. Dig. 415.

A matter of intention is entirely one of fact to be determined by trial court, and a finding in this regard will not be set aside unless clearly or manifestly against weight of evidence. Nitkey v. W., 199M334, 271NW873. See Dun. Dig. 411. Cert. den., 58SCR25. Reh. den., 58 SCR134.

Credibility of testimony is for jury and not within province of supreme court. Hage v. C., 199M533, 272NW 777. See Dun. Dig. 415.

In reviewing a directed verdict, evidence will be taken in view most favorable to appellant. Anderson's Estate, 199M588, 273NW89. See Dun. Dig. 9843.

Findings of trial court in election contest are binding on appeal if reasonably sustained by evidence. Pye v. H., 200M135, 273NW611. See Dun. Dig. 411.

It is not for supreme court to determine what is preponderance of evidence. Hughes v. D., 273NW618. See Dun. Dig. 414.

Findings of fact of industrial commission are entitled to very great weight and will not be disturbed unless manifestly contrary to evidence. Colosimo v. G., 199M 600, 273NW632. See Dun. Dig. 10426.

Supreme court may review sufficiency of evidence to justify findings, but trial court's findings are not to be set aside unless clearly or manifestly against weight of evidence or without reasonable support in evidence. Markert v. M., 200M292, 274NW174. See Dun. Dig. 388, 7073.

Findings upon conflicting evidence that a member of a corporation did not by conduct assent to alleged amendment of articles of incorporation are final on appeal. Midland Co-Operative W. v. R., 200M538, 274NW624. See Dun. Dig. 411.

On review court must take that view of all evidence most favorable to verdict. Hack v. J., 201M9, 275NW381. See Dun. Dig. 415.

Supreme Court is bound to view testimony in its aspect most favorable to verdict. Barndt v. S., 202M82, 277NW 363. See Dun. Dig. 415.

Supreme Court is bound by findings of trial court upon contradictory evidence. Busch v. N., 202M290, 278NW34. See Dun. Dig. 411.

In reviewing a verdict, evidence must be considered in light most favorable to prevailing party below, who is entitled to benefit of all inferences reasonably deducible therefrom. Turnmire v. J., 202M307, 278NW159. See Dun. Dig. 415.

It is duty of court to view evidence in light most favorable to party whose claims jury believe. Ranwick v. N., 202M415, 278NW589. See Dun. Dig. 415.

On review of an order denying defendant's alternative motion for judgment or a new trial, view of evidence most favorable to plaintiff must be taken. Hanson v. H., 202M381, 279NW227. See Dun. Dig. 7159.

Verdict based on conflicting testimony will not be disturbed. Goodspeed v. G., 202M660, 279NW265. See Dun. Dig. 415.

Trial court's finding is conclusive where testimony is conflicting and story of neither is inherently improbable. Exsted v. E., 202M521, 279NW554. See Dun. Dig. 411.

Where evidence is conflicting, it is duty of triers to determine facts; and on appeal it is duty of court to view evidence in light most favorable to party whose claims triers of fact believe. Utgard v. H., 202M637, 279NW748. See Dun. Dig. 411, 415.

On review of a verdict the only inquiry is to determine whether result reached is sustained by evidence. Shuster v. V., 203M76, 279NW841. See Dun. Dig. 388.

Testimony must be taken in its most favorable aspect to prevailing parties. Vaegemast v. H., 203M207, 280NW 641. See Dun. Dig. 388.

Where there is an absence of objective symptoms and injured person has been before trial court several days, question of excessiveness of verdict is peculiarly one for that court and supreme court is very reluctant to disturb judgment of trial court. Hughes v. C., 204M1, 281 NW871. See Dun. Dig. 415.

It was for trial judge in action to quiet title to determine disputed issues of fact in view of his opportunity of seeing and hearing the witnesses. Kohrt v. M., 203M 494, 282NW129. See Dun. Dig. 388.

Supreme court interferes with findings of trial court in a case tried without a jury only where evidence, taken as a whole, furnishes no substantial support for them. McCarthy v. F., 204M99, 282NW657. See Dun. Dig. 411(18).

A trial court's determination upon a motion, of a question of fact upon conflicting evidence, oral or written, will not be reversed on appeal unless it is palpably contrary to the evidence. Meddick v. M., 204M113, 282NW676. See Dun. Dig. 410.

It is for triers of fact to choose not only between conflicting evidence but also between opposed inferences, and it is only where inferences upon which challenged finding rests is not itself reasonably supported that there should be a reversal. Kayser v. C., 204M578, 282NW801. See Dun. Dig. 410.

On appeal in suit to cancel a deed supreme court cannot set aside findings supported by abundant evidence. Hughes v. H., 204M592, 284NW781. See Dun. Dig. 411.

Supreme court must adopt theory most favorable to party obtaining verdict. Judge v. E., 204M589, 284NW788. See Dun. Dig. 415.

When action is tried by court without a jury, review may be had on question of sufficiency of evidence to justify findings, there being a settled case containing all evidence introduced on trial. Fitzgerald's Estate, 285NW 285. See Dun. Dig. 388(21), 7073c(10).

Where a verdict is assailed on appeal, evidence will be viewed most favorably to prevailing party, and verdict will be sustained if it is possible to do so on any reasonable theory of evidence. Vorlicky v. M., 287NW109. See Dun. Dig. 415.

9. Rehearing.

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

9495. Judgment notwithstanding verdict.

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

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

1½. Applicability.

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

2. Motion on trial for directed verdict necessary.

180M1, 230NW260.

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

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

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

Supreme court cannot direct judgment notwithstanding verdict in absence from record of motion for a directed verdict. Skolnick v. G., 196M318, 265NW44. See Dun. Dig. 433.

Defendant has no right to judgment notwithstanding verdict where no motion for a directed verdict was made at close of all evidence. Callahan v. C., 197M403, 267NW361. See Dun. Dig. 5070.

Supreme court will not consider motion for judgment notwithstanding verdict, where no motion was made for direction of verdict. Midland Nat. Life Ins. Co. v. W., 199M618, 273NW195. See Dun. Dig. 5079.

3. Motion for judgment.

180M305, 230NW793.

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

Moquin v. M., 181M626, 231NW920.

Application to Federal court. Glynn v. K. (USDC-Minn), 47F(2d)281. See Dun. Dig. 5077.

Trial court properly denied motion for a directed verdict and motion for judgment notwithstanding verdict where there was evidence that would justify a partial recovery. Millers' Mut. Fire Ins. Ass'n v. W., (CCA8), 94F(2d)741.

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

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

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

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

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

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

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

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

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

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

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

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

On alternative motion, held error to deny new trial and order judgment for amount less than verdict, where evidence authorizes recovery in amount greater than that ordered, the proper order being award of new trial

unless successful party consents to reduction. 180M540, 231NW222.

Evidence found not to disclose any substantial breach of contract on the part of the plaintiff, and no damage to defendant on account of representations made to him as inducements to enter into the contract. 181M433, 232NW739. See Dun. Dig. 1805, 3328, 3839.

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

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

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

A judgment notwithstanding verdict was properly denied where it was quite possible, that deficiency in evidence in negligence case could be supplied on another trial. Drake v. C., 183M89, 235NW614. See Dun. Dig. 5032(8).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Evidence is conclusive that more than two years elapsed after alleged cause of action for malpractice accrued, and court did not err in ordering judgment for defendant, notwithstanding verdict. Plotnik v. L., 195M 130, 261NW867. See Dun. Dig. 5082.

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

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

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

Defendant was not entitled to judgment notwithstanding verdict, where there was no motion for a directed verdict at close of testimony. Gendler v. S., 195M578, 263 NW925. See Dun. Dig. 5079.

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. Johnson v. U., 196M588, 266NW169. See Dun. Dig. 5123a.

Where each defendant moved separately for judgment notwithstanding verdict or new trial, fact that one defendant did not make other defendant a party to motion nor to appeal does not entitle plaintiff to a dismissal of appeal. Kemerer v. K., 198M316, 269NW832. See Dun. Dig. 5081.

Order granting judgment notwithstanding verdict, because evidence of a parol modification of a written contract made many years prior to trial was not clear and convincing was proper. Slawson v. N., 201M313, 276NW 275. See Dun. Dig. 5082.

Where defendants were entitled to have their motion for a directed verdict granted, judgment in their favor notwithstanding verdict was properly ordered, unless errors prejudicial to plaintiff occurred in admission or exclusion of evidence. Selover v. S., 201M562, 277NW205. See Dun. Dig. 5082.

Motion for judgment non obstante admits credibility of evidence for adverse party and every inference which may fairly be drawn from such evidence. Fredrickson v. A., 202M12, 277NW345. See Dun. Dig. 9764.

Whether plaintiff is entitled to judgment as a matter of law will not be considered where there was no motion for a directed verdict or for judgment non obstante. Strand v. B., 203M9, 279NW746. See Dun. Dig. 393.

On motion by defendant for judgment notwithstanding verdict evidence must be considered in light most favorable to plaintiff. Haeg v. S., 202M425, 281NW261. See Dun. Dig. 5078.

Jury trial in will cases. 22MinnLawRev513.

6. Appealability of order on motion.

This section is controlled by later statute, §9498, in so far as it contemplates an appeal from an order granting a first new trial, not for errors of law alone. 178 M236, 226NW846.

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

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

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

Order granting judgment notwithstanding verdict is not appealable. Selover v. S., 201M562, 277NW205. See Dun. Dig. 5084.

7. Disposition of case on appeal.

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

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

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

Judgment notwithstanding verdict should not be granted if it appears probable from record that a party has a good cause of action or defense and that deficiency of

proof may be remedied on another trial. First Nat. Bank v. F., 191M318, 254NW8. See Dun. Dig. 5082.

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

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

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

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

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

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

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

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

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

Supreme court ordered entry of judgment in favor of defendant appellant notwithstanding verdict for plaintiff, where record disclosed that there was no available evidence which would refute obvious negligence of plaintiff's decedent in collision with street car. Geldert v. B., 200M332, 275NW299. See Dun. Dig. 433.

8. Scope of review on appeal from judgment.

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

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

Where there is a motion for judgment notwithstanding verdict but no motion for new trial, error on appeal can reach only single question of whether there is any substantial evidence in support of judgment; defeated party waives all errors which would be ground only for a new trial. Golden v. L., 203M211, 281NW249. See Dun. Dig. 5082, 5085.

9496. Dismissal of appeal in vacation.

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

9497. Appeal, when taken.

½. In general.

Period for appeal cannot be extended by agreement of parties or order of court. Jaus' Guardianship, 198M242, 269NW457. See Dun. Dig. 318.

1. When judgment entered.

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

Decision entered pursuant to petition for allowance of final account and discharge from duties as trustee could only be an order despite fact that there was appended to it a direction for entry of judgment, and it could not be considered as a judgment from which appeal is limited to six months after entry. Malcolmson v. G., 199M258, 272NW157. See Dun. Dig. 316.

Actual notice does not take place of written notice. Id. See Dun. Dig. 317.

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, 272NW 163. See Dun. Dig. 317.

2. Appeal from judgment.

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. State v. Wilson, 199M452, 272NW163. 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 by §9329, but it has no such power if time to appeal has expired under §9497. Id.

3. Appeal from order.

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

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

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

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

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

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

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

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

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

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

Appeal must be taken from an order of district court dismissing an appeal from probate court within 30 days. Jaus' Guardianship, 198M242, 269NW457. See Dun. Dig. 318.

Notice of entry of order served by appellant was not from an "adverse party," and did not start statute running as to appellant. Malcolmson v. G., 199M258, 272NW 157. See Dun. Dig. 317.

Service of notice of appeal upon adverse party furnishes no proof of fact that a written notice of entry of order granting new trial had been given and does not constitute waiver of service of such notice to start running of time for appeal. State v. Moriarty, 203M23, 279 NW835. See Dun. Dig. 317.

To set time for appeal running written notice should inform recipient that order has been filed instead of an intention to file it. Id.

Statute placing in hands of a party right by service of written notice of filing of an order to limit time within which an appeal may be taken therefrom must be strictly complied with. Id.

One may not appeal from an order granting a new trial where order is deficient in failing to state that it was granted exclusively for errors of law occurring at the trial upon which motion was based and statutory time for appeal cannot expire until order is amended so as to permit appeal. Id. See Dun. Dig. 318.

Defendants set time running for taking an appeal from an order denying a motion to vacate dismissal entered without prejudice and for reinstatement of action on calendar by service of notice of filing of order on attorney for plaintiff. Hoffer v. F., 204M612, 284NW873. See Dun. Dig. 317.

Where attorney for plaintiff dismissed without prejudice in open court when he could not find plaintiff, and another attorney later moved to vacate dismissal and was served with notice of filing of order denying motion, expiration of 30 days from date of notice without taking of an appeal ended action as to defendants, and it was not again open to plaintiff to apply to discretion of court to vacate dismissal on ground of possible wrong of first attorney, nor on account of any want of diligence of second attorney. Id. See Dun. Dig. 317.

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

4. From an order granting or refusing a new trial, or from an order sustaining a demurrer, providing that when an order granting a new trial is

based exclusively upon errors occurring at the trial the court shall expressly state in its order or memorandum the reasons for and the grounds upon which such new trial is granted and in such case an appeal may be taken from such order.

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

* * * * * * *

STATUTE GENERALLY

½. In general.

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

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

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

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

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

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

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

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

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

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

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

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

An order denying a motion to vacate a prior appealable ofder is not appealable. Jaus' Guardianship, 198M242, 269NW457. See Dun. Dig. 302(a).

Judgment in action by mortgagor under moratorium statute denying relief asked and granting foreclosure is appealable, and is therefore not subject to review on certiorari. Flakne v. M., 198M465, 270NW566. See Dun. Dig. 284.

Ruling granting plaintiff's motion to substitute personal representative of a deceased defendant is appealable. O'Keefe v. S., 201M51, 275NW370. See Dun. Dig. 296a.

An order for inspection of books and papers is an intermediate order and so not reviewable by certiorari. Asplund v. B., 203M571, 282NW473. See Dun. Dig. 1396.

¾. Party aggrieved.

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

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

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

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

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

Administrator may appeal in his representative capacity and without an appeal bond from an order of probate court surcharging and settling his final account. Clover v. P., 197M344, 104ALR1188n, 267NW213. See Dun. Dig. 310.

Daughters of incompetent have such interest in proper care and conservation of property as to entitle them to appeal, as parties aggrieved, from an order of probate court allowing account of guardian. Fredrick v. K., 197 M524, 267NW473. See Dun. Dig. 310.

A trustee, whose resignation has been accepted by court, its final account settled, and a new trustee appointed, in interim between such appointment and qualifying of new trustee is not an aggrieved party entitled to an appeal from order of court requiring it to pay over trust funds in its possession. Malcolmson v. G., 199M258, 271 NW455. See Dun. Dig. 310.

A pretermitted grandchild who by contract with children of testator acquired an interest in residue of his estate is a party aggrieved by an order of probate court allowing a claim against estate, and entitled to appeal to district court. Burton's Estate, 203M275, 281NW1. See Dun. Dig. 7785.

In representative suit by minority stockholders, corporation cannot be regarded as real party adversely affected by a decree in favor of complainant, but corporation should be a party on appeal and a motion to dismiss the appeal of the corporation must be denied. Keough v. S., 285NW809. See Dun. Dig. 310.

SUBDIVISION 1

4. From judgment on appeal to district court.

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

5. From judgment in action commenced in district court.

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

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

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

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

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

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

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

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

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

A direction that writ of mandamus issue was irregular judgment from which an appeal would lie. State v. St. Cloud Milk Producers' Ass'n, 200M1, 273NW603. See Dun. Dig. 295, 5778, 5781(41).

An award for judgment is not appealable. Clarke's Will, 204M574, 284NW876. See Dun. Dig. 295.

SUBDIVISION 2

7. Orders held appealable.

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

An order refusing to discharge a garnishee and dismiss garnishment proceeding on ground that court lacks jurisdiction over subject-matter, property sought to be impounded, is appealable. Fulton v. O., 195M247, 262NW 570. See Dun. Dig. 297.

Even an order in respect to a provisional remedy to be appealable must show that court considered application and either granted or denied it on its merits, and did not merely postpone determination until later date. Detwiler v. L., 198M185, 107ALR1054n, 269NW838. See Dun. Dig. 297.

8. Orders held not appealable.

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

In action under federal employers' liability act, wherein defendant alleged contract to sue only in state where injury was received, an order denying defendant's mo-

tion to have existence and validity of contract first tried and determined and specifically enforced was not appealable. Detwiler v. L., 198M185, 107ALR1054n, 269NW367. See Dun. Dig. 298.

SUBDIVISION 3

9. Construed strictly.

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

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

10. Orders held appealable.

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

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

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

Defendant had right to appeal from order overruling a general demurrer where trial court certified determining question as important and doubtful. Hatlestad v. M., 197M640, 268NW665. See Dun. Dig. 299.

11. Orders held not appealable.

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

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

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

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

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

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

In action under federal employers' liability act, wherein defendant alleged contract to sue only in state where injury was received, an order denying defendant's motion to have existence and validity of contract first tried and determined and specifically enforced was not appealable. Detwiler v. L., 197M185, 107ALR1054n, 269NW367. See Dun. Dig. 298.

No appeal lies from an order granting a new trial except where based evclusively upon errors occurring at trial and trial court expressly states in its order or memorandum reasons for and grounds upon which granted. Olson v. H., 197M441, 267NW425. See Dun. Dig. 300.

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. See Dun. Dig. 298.

An order denying a motion to bring an additional party is not appealable. Levstek v. N., 203M324, 281NW260. See Dun. Dig. 309.

An order for judgment on the pleadings is not appealable. Burns v. N., 204M348, 283NW750. See Dun. Dig. 298.

SUBDIVISION 4

11a. Amendment of 1913.

There may be an appeal from an order granting a new trial only in certain instances. Salters v. U., 196M541, 265NW333. See Dun. Dig. 300.

12. Orders held appealable.

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

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

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

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

An order granting a new trial after entry of judgment is appealable as an order vacating judgment. Kruchowski v. S., 195M537, 265NW303. See Dun. Dig. 300.

Judgment of supreme court directing judgment below was in effect vacated by order of district court granting a new trial, and the order granting a new trial is appealable same as if judgment of district court had been entered pursuant to mandate and had been vacated. Kruchowski v. S., 195M537, 265NW821. See Dun. Dig. 300, 456.

Where new trial was granted exclusively upon errors of law occurring at trial, order is appealable. Great Northern Ry. v. B., 200M258, 274NW522. See Dun. Dig. 300.

While part of order which denies amendment of findings is not appealable, part which denies new trial is, and upon such appeal verdict and any finding may be challenged as not sustained by evidence. Schaedler v. N., 201M327, 276NW235. See Dun. Dig. 300.

Order granting a new trial after verdict is not appealable unless memorandum states that it is granted exclusively for errors of law occurring at the trial and such errors are expressly stated therein. Thompson v. M., 202M318, 278NW153. See Dun. Dig. 300.

Assignment of error on motion for new trial that direction of verdict for defendant was contrary to law and facts, if true, was an error of law occurring at the trial. State v. Moriarty, 203M23, 279NW835. See Dun. Dig. 7162.

An order denying a motion for amended findings or a new trial is appealable. Clarke's Will, 204M574, 284NW 876. See Dun. Dig. 300.

13. Orders held not appealable.

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

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

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

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

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

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

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

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

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

Amendment by Laws 1931, c. 252, does not authorize an appeal from an order granting a new trial except where based exclusively upon errros occurring at the trial, and the trial court expressly states in its order or memorandum the reason for granting the new trial. Spicer v. S., 184M77, 237NW844. See Dun. Dig. 300.

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

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

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

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

Granting of motion for new trial on 38 separately stated grounds, without indicating reasons for so doing, was not an appealable order. Clover v. P., 197M344, 104 ALR1188n, 267NW213. See Dun. Dig. 394.

Where two motions for judgment notwithstanding verdict or a new trial were made and denied, and second was not heard until after time for appeal from first order had expired, and first had not been vacated or suspended, second order denying second motion was in effect an order refusing to vacate an appealable order and was not appealable. Ross v. D., 201M225, 275NW622. See Dun. Dig. 300.

An order granting a new trial upon ground that there was no evidence to justify a finding that defendant converted stock; if stock was converted, evidence did not show that defendants were liable therefor because conversion was by others, that proof of damages was speculative and did not establish damages found by jury, was not appealable, not involving errors of law occurring at the trial, though memoranda attached to order recited that it was granted exclusively for errors of law occurring at the trial. Kelly v. B., 201M365, 276NW274. See Dun. Dig. 300.

Order denying a motion to vacate an order granting plaintiff's motion for new trial on issue of damages only, upon grounds of inadequacy of damages, is not appealable. Martin v. N., 201M469, 276NW739. See Dun. Dig. 304.

Failure of plaintiff to prove that he was administrator constitutes insufficiency of evidence to sustain verdict, which is not an error of law occurring at the trial. Thompson v. M., 202M318, 278NW153. See Dun. Dig. 300.

Dissatisfaction of court with verdict is not an error of law occurring at the trial. Id.

Where an order for new trial is granted pursuant to a motion specifying errors of law occurring at trial exclusively, it is duty of trial court to declare in the order or in a memorandum made a part thereof the grounds upon which new trial is granted. State v. Moriarty, 203 M23, 279NW835. See Dun. Dig. 394, 7084.

Disallowance of cost of transcript in taxation of costs was proper, transcript having been ordered for purpose of a second motion for new trial which, under Ross v. D. M. & I. Ry. Co., 201Minn225, 275NW622, was in effect a motion "to vacate an appealable order," and was not appealable. Ross v. D., 203M312, 281NW271. See Dun. Dig. 300.

14. Orders sustaining or overruling a demurrer.

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

SUBDIVISION 5

15. Orders held appealable.

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

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

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

16. Orders held not appealable.

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

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

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

An order denying a motion for amended findings is not appealable. Dayton-Lee Inc. v. M., 202M656, 279NW 580. See Dun. Dig. 300, 309, 386, 7091.

SUBDIVISION 6

17. Cases.

An order for judgment made in proceedings supplementary to execution is an appealable order. Freeman v. L., 199M446, 272NW155. See Dun. Dig. 306.

An order denying motion for amended findings or a new trial following an order in supplementary proceedings requiring appellants to show cause why they should not pay certain sum was appealable. Northern Nat. Bank v. M., 203M253, 280NW852. See Dun. Dig. 306.

SUBDIVISION 7

18. Definitions.

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

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

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

A "final order" is one that ends a proceeding so far as court making it is concerned. Jaus' Guardianship, 198M 242, 269NW457. See Dun. Dig. 302(a).

19. Orders held appealable.

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

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

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

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

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

An order of district court dismissing an appeal from probate court is a final order in a special proceeding and appealable. Jaus' Guardianship, 198M242, 269NW457. See Dun. Dig. 302(a).

An appeal lies from order of court entered pursuant to petition by trustee for allowance of its final account and discharge from its duties as trustee. Malcolmson v. G., 199M258, 272NW157. See Dun. Dig. 302.

20. Orders held not appealable.

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

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

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

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

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

Order denying motion of attorney general to strike out return made by state auditor to alternative writ of mandamus and to strike names of attorneys appearing for him from record is not appealable; but by certiorari court may review order on its merits. State v. District Court, 196M44, 264NW227. See Dun. Dig. 297.

APPEALABILITY OF ORDER GENERALLY

21. Orders held appealable.

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

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

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

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

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

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

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

Order appointing an administrator is appealable. Id.

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

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

An order of probate court, made on notice and after hearing, allowing account of a guardian covering a period of some thirteen years, is appealable. Fredrick v. K., 197M524, 267NW473. See Dun. Dig. 294.

22. Orders held not appealable.

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

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

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

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

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

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

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

Order granting judgment notwithstanding verdict is not appealable. Selover v. S., 201M562, 277NW205. See Dun. Dig. 5084.

An order discharging an order to show cause and dismissing a criminal contempt proceeding can only be reviewed by certiorari, and fact that trial court may have based its order on mistaken belief that it lacked jurisdiction does not affect mode of review. Spannaus v. L., 202 M497, 279NW216. See Dun. Dig. 309.

25. Waiver of right to appeal.

By paying the costs and damages awarded a plaintiff in an action in ejectment, a defendant does not destroy his right to appeal from the judgment of restitution. Patnode v. M., 182M343, 234NW459. See Dun. Dig. 287 (27), 463a.

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

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

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

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

An order denying a motion to vacate an ex parte order bringing in an additional party defendant is appealable. Sheehan v. H., 187M532, 246NW353. See Dun. Dig. 308.

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 on 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. 308.

Order denying motion to vacate dismissal entered without prejudice and for reinstatement of action on calendar was appealable. Hoffer v. F., 204M612, 284NW873. See Dun. Dig. 308(41).

30. Order striking answer.

Appeal lies from order denying a motion to vacate order striking out answer as sham, but motion to vacate must be made returnable before expiration of time to appeal from original order. Johnson v. K., 285NW715. See Dun. Dig. 308.

An order striking out an answer or part thereof is appealable. Id. See Dun. Dig. 308.

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

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

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

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

34. Contempt proceedings.

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

9499. Bond or deposit for costs.

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

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

Section 9499 is not applicable to bonds required on certiorari issued to industrial commission, which are properly fixed and approved under §4320. Nelson v. K., 201M123, 275NW624. See Dun. Dig. 324, 10426.

Inasmuch as a personal representative, in conduct of an action for wrongful death, acts for district court and not at all for probate court or estate of deceased, he is not acting in his capacity as executor or administrator, and therefore is not relieved by §9692, from necessity of furnishing an appeal bond or undertaking, of depositing cash in lieu thereof imposed by §9499. Sworski v. C., 203M545, 282NW276. See Dun. Dig. 325a.

9500. Appeal from order—Supersedeas.

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

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

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

Where district court has reversed a rate-fixing order of Railroad and Warehouse Commission, an appeal by state and applicant does not stay entry of judgment unless so directed either by this court or district court. State v. Dist. Court, 189M487, 250NW7. See Dun. Dig. 8032a.

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

9504. For sale of real property—Supersedeas.

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

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

9508. Justification of sureties.

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

9512. Death of party after submission of appeal.

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

CHAPTER 81

Arbitration and Award

9513. What may be submitted—Submission irrevocable.—Except as in this section provided, every controversy which can be the subject of a civil action or a labor dispute as defined in the Minnesota Labor Relations Act, may be submitted to the decision of one or more arbitrators in the manner prescribed in this act, but nothing herein shall preclude the arbitration of controversies according to the common law. No submission shall be made of a claim to any estate in fee or for life in real estate, but a claim to an interest for a term of years, or for a lesser term, and controversies respecting a partition of lands, or concerning the boundaries thereof, may be submitted. When a controversy has been submitted, no party thereto shall have power to revoke the submission without the consent of all the others; and, if any of them neglect to appear after due notice, the cause may nevertheless be heard and determined by the arbitrators upon the evidence produced. (As amended Apr. 22, 1939, c. 439.)

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

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

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

Historical development of commercial arbitration in the United States. 12MinnLawRev240.

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

Agreement to submit to arbitration, account between parties relating to a partnership and all other matters