1941 Supplement

To

Mason's Minnesota Statutes, 1927

and

Mason's 1940 Supplement

Containing the text of the acts of the 1941 and 1943 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 Law Review Articles and digest of all common law decisions.

Edited by
the
Publisher's
Editorial Staff

MASON PUBLISHING CO.
SAINT PAUL 1, MINNESOTA

1944

(4).
Articles of incorporation in the Norwegian language cannot be recorded. Op. Atty. Gen. (373B-17(d)), Dec. 18, 1940.
(5).
Where mortgagee has a number of mortgages against one mortgagor, and last mortgage is paid and on satisfaction he sets up mortgage paid and also all other prior mortgages and gives number and date of filing of each instrument, register of deeds is entitled to charge a separate fee for each satisfaction recorded. Op. Atty. Gen., (373B-16), March 19, 1940.

7005. Fees of appraisers, etc.
Where sheriff picks up city police officers and goes to scene of a bank robbery in another town and engage in gun battle and capture and convict the robbers, county board is limited in payment of city officers to three dollars per day and mileage, and is without power to pay reasonable compensation for services rendered. Op. Atty. Gen., (390a-1), Dec. 11, 1939.

7007. Witness fees of officers of municipalities.
Village councilmen of New York Mills attending court in defense of action against village are not entitled to reimbursement for expenses, though they are eligible to receive witness fees and mileage outside of village. Op. Atty. Gen., (469a-8), Jan. 4, 1940.

7009. Expert witnesses.
Fees of all witnesses, expert and otherwise, in a proceeding under the Psychopathic Personality Act are payable by county on order of probate court, and it is immaterial who calls the witnesses. Op. Atty. Gen., (248B-11), April 12, 1940.
A psychiatrist under subpoena as an expert in a psychopathic personality proceeding is entitled to fee fixed by court under general statute, and it is immaterial that he is employed in the service of the state. Op. Atty. Gen. (248B-11), June 1, 1940.

7010. Compensation of jurors.—Each grand and petit juror shall receive $4.00 per day, including Sundays, for attendance in district court, and ten cents for each mile traveled in going to and returning from court in counties having a population of less than 200,000, and $3.00 per day in counties having a population of more than 225,000 and less than 350,000 and $3.00 per day and mileage as above set forth, in counties having a population of over 350,000, the distance to be computed by the usually traveled route, and paid out of the county treasury. The clerk of the district court shall deliver to each juror a certificate for the number of days' attendance and miles traveled for which he is entitled to compensation. Talesmen actually serving upon any petit jury shall receive the sum of $3.00 per day. (As amended Act Apr. 17, 1943, c. 484, §1.)

7014. Fees for services not rendered—Illegal fees.
Constable is only village officer who may charge a fee for serving justice court warrants or attending on justice court, and enforcement of village ordinances, including appearances in justice court in connection with prosecutions thereunder is a part of regular, official duties of village marshal and village policemen, for which their salaries are full compensation. Op. Atty. Gen. (847-2-4), Jan. 21, 1941.

CHAPTER 49A

Trade and Commerce

1. Contracts and written instruments in general.
No particular form of words or of instrument is required to render an assignment valid, but an intent to transfer must be manifested and the assignor must not retain any control over the fund or any power of revocation. Springer v. J. R. Clark Co., (DC-Minn), 46FSupp 54. See Dun. Dig. 554.
There must be an offer and an acceptance and a clear accession on both sides to one and same set of terms. Young v. St. Paul Publishers, 210M346, 298NW251. See Dun. Dig. 1742.
A direction by owner's agent to a contractor drilling a well to bore deeper is not an interference with performance and does not authorize the contractor to abandon work. Ylijarvi v. Brockphaler, 213M385, 7NW(2d) 314. See Dun. Dig. 1790.

2. ——Mutual assent.
Mistake in injuries released: Larson v. Sventek, 211M 385, 1NW(2d)608; note 29. See Dun. Dig. 1742.
Relief from a mutual mistake may be granted defensively as well as offensively. Lawrenz v. L., 206M315, 288 NW727. See Dun. Dig. 8337(30).
A statement of intention is not a promise upon which can be predicated a contract. Sickmann's Estate, 207M 65, 289NW832. See Dun. Dig. 1726.
On a claim by a son against his mother's estate for improvements made to her farm, evidence held insufficient to sustain a finding of a contract to reimburse him therefor. Id. See Dun. Dig. 1742.
A mistake of one contracting party, with knowledge of it by the other, is as much a ground for relief as mutual mistake. Rigby v. N., 208M88, 292NW751. See Dun. Dig. 1743.
Whether performance by an optionee to purchase land has been made or tendered is a question of fact. Ferch v. H., 209M124, 295NW504. See Dun. Dig. 1749a.
If an offer is so indefinite as to make it impossible for a court to decide just what it means and to fix exactly legal liabilities of parties, its acceptance cannot result in an enforceable contract. Young v. St. Paul Publishers, 210M346, 298NW251. See Dun. Dig. 1744.
An expression of mutual and final assent is operation that completes making of a contract. Id. See Dun. Dig. 1742.
Statement in Enge v. John Hancock Mut. L. Ins. Co., 183M117, 123, 236NW207, that a contract "contemplates a meeting of the minds on a proposition" and that "both (parties) must understand the agreement alike" is corrected in so far as it requires that there be a meeting of the minds in all cases in order to establish a contract. Field-Martin Co. v. Fruen Milling Co., 210M388, 298NW 574. See Dun. Dig. 1742.
Where two plans had been prepared for construction by plaintiff for defendant of a building and defendant reasonably interpreted written offer as referring to and incorporating second rather than first of plans, contract covered second plan regardless of intention of plaintiff. Id. See Dun. Dig. 1842.
The undisclosed understanding of the offeror concerning the meaning of his own ambiguous words or conduct is immaterial in so far as offeree, in accepting offer, has, in ignorance of the undisclosed intention of the offeror, reasonably and in good faith construed offer otherwise than as intended. Id. See Dun. Dig. 1742, 1744.
In some cases there may be a contract though the minds of the parties never meet. Id. See Dun. Dig. 1742.
It is not meeting of the minds, but manifestation of mutual assent, which is essential to making of a contract. Id. See Dun. Dig. 1742.
A stockholder authorizing his attorney to offer his stock and that of another at a certain price on condition that purchaser must agree to purchase other stock on the same basis to the extent of a certain number of shares, a letter written by attorney containing the offer and a letter accepting the offer established a contract by such stockholder to sell stock owned by him, though offer was not authorized by the other stockholder. Haglin v. Ashley, 212M445, 4NW(2d)109. See Dun. Dig. 1742, 8499, 8500.
The purpose of confirming oral agreements by writing is to avoid misunderstandings, and all preliminary negotiations are understood to have been waived, abandoned, and merged into the writing. Id. See Dun. Dig. 1723a.
Resolution by a school board providing that a certain system of shorthand should be exclusive system used created no contractual rights in owner of that system, resolution amounting to no more than a statement of policy, and resolution could be reconsidered and rescinded. Caton v. Board of Education, 213M165, 6NW(2d)266. See Dun. Dig. 1742.
The influence must be such that it overcomes the volition of the person influenced. Hafner v. Schmitz, 215M 245, 9NW(2d)713. See Dun. Dig. 9949.
The burden of proof is upon the party asserting undue influence. Id. See Dun. Dig. 9950a.
Unless the evidence is conclusive one way or the other, the question of undue influence is one of fact and, like any other question of fact, is for the jury or trial court. Id. See Dun. Dig. 9952.

3. ——Execution and delivery.
A conditional delivery of an insurance policy by the home office of the company to its agent is not a delivery to an applicant. Rogers v. Great-West Life Assur. Co., (DC-Minn), 48FSupp86. See Dun. Dig. 1736, 4654.
A contract to enter into a future contract of guaranty is binding like any other contract to enter into a particular contract in the future, and upon breach of a contract to guarantee a debt, party entitled to guaranty may recover amount of debt remaining past due and unpaid. Holbert v. Wermerskirchen, 210M119, 297NW327. See Dun. Dig. 1749.
In action by a realtor to recover commission wherein it appeared plaintiff procured a purchaser for two lots, for a price and on terms agreeable to defendant, and defendant signed and delivered to plaintiff an earnest

money contract of sale, it was error to strike evidence tending to show that contract of sale was signed and delivered upon condition that it should not become a contract unless and until effective consent of daughter of defendant was procured. Gustafson v. Elmgren, 211 M82, 300NW203. See Dun. Dig. 1737, 3377.

Evidence held clear and convincing that contract to make a will leaving all property to plaintiff was executed and intended by parties to take effect at once, though duplicate contracts were kept by deceased in his safety deposit box and could not be found after his death. Herman v. Kelehan, 212M349, 3NW(2d)587. See Dun. Dig. 10207.

Estoppel may preclude a party from asserting the lack of a writing required by statute. Albachten v. Bradley, 212M359, 3NW(2d)783. See Dun. Dig. 3185.

Delivery of life insurance policy for conflict of law purposes. 26MinnLawRev50.

3½. ——Parties to contracts.

In action for damages for breach of contract to give certain sales rights, held that there was a fact issue whether defendant or a corporation in which he had a substantial interest was the contracting party. Foster v. B., 207M286, 291NW505. See Dun. Dig. 1901.

Privity, in law of contracts, is merely name for a legal relation arising from right and obligation. La Mourea v. R., 209M53, 295NW304. See Dun. Dig. 1733.

In absence of fraud or undue influence, mere weakness of intellect, resulting from old age or sickness, is not a ground for setting aside an executed instrument. Macklett v. Temple, 211M434, 1NW(2d)415. See Dun. Dig. 2657a.

A person under guardianship is conclusively presumed to be incompetent to make a valid contract or disposition of his property, but this rule is based upon convenience and necessity, for the protection of the guardian, and to enable him to properly discharge his duties as such, and when the reason for the rule ceases the rule does not apply, and convenience and necessity of the guardian extend only to those acts which he is authorized to do on behalf of the ward, such as managing and controlling his property and his estate, and guardian's authority does not extend to the marriage of the ward. Johnson v. Johnson, 214M462, 8NW(2d)620. See Dun. Dig. 1731.

Mere mental weakness does not incapacitate a person from contracting, but it is sufficient if he has enough capacity to understand to a reasonable extent the nature and effect of what he is doing. Parrish v. Peoples, 214M 589, 9NW(2d)225. See Dun. Dig. 1731.

Test of mental capacity applied in suits for appointment of guardians should also be applied in those to avoid deeds and wills. Id. See Dun. Dig. 4519.

In an action on an account evidence held to justify a finding that material and labor was furnished on the order of defendant as well as his wife. O'Neil v. Rueb, 215M296, 10NW(2d)363. See Dun. Dig. 1742.

4. ——Rights of third persons.

Privity of contract, if needed to permit a third person to recover thereon, arises from right of such said third person to recover on promise in his favor. La Mourea v. R., 209M53, 295NW304. See Dun. Dig. 1896.

A promise of a contractor with a city to pay damages to third persons arising from work of sewer construction may be enforced by any third person injured by the work. Id.

A creditor or donee beneficiary of a contract may recover thereon though not a party to it, though promise in his favor is conditioned upon a future event, and he is not identified when contract is made. Id.

Where sub-contractor decided to stop work because of doubts about getting paid and continued to work upon promise that owner would satisfy his claims, sub-contractor had a cause of action against a title insurance company which promised owner to satisfy the claims, as a third party contract beneficiary. Schau v. B., 209M99, 295NW910. See Dun. Dig. 1733, 1896.

4¼. ——Options.

An option contract vests no right, legal or equitable, in the optionee in the subject matter of the contract prior to his acceptance of the terms of the option. Warner & Swasey Co. v. Rusterholz, (DC-Minn), 41FSupp498. See Dun. Dig. 1520, 1749a, 2037, 2040a, 2112a, 3560, 5653, 7480, 9888a, 10258.

4½. ——Modification.

A litigant cannot select one of a series of agreements and maintain an action when agreement sued upon has in law been supplanted by another. Foster v. B., 207M 286, 291NW505. See Dun. Dig. 1778.

A provision in a written contract "therefore this letter upon your accepting and signing and returning a copy to our office will become our final agreement and void all other agreements now in existence" did not merely modify an existing contract of employment but superseded it. Lidenberg v. A., 207M341, 291NW512. See Dun. Dig. 1807.

Where plaintiff entered into contract for a term of three years to purchase from defendant and resell certain petroleum products and after contract had been in force a few months it was modified so that thereafter plaintiff was entitled to certain concessions which would lower price of goods purchased from defendant and such concessions were made and enjoyed by plaintiff but not in as large an amount as was promised, modification was not enforceable in absence of showing of consideration for new promise on part of defendant, and though so far as concessions were actually made by defendant and enjoyed by plaintiff they are controlling, they do not prove element of consideration necessary to make new and modified agreement enforceable as a contract so far as it remains unexecuted. Johnson v. Northern Oil Co., 212M249, 4NW(2d)82. See Dun. Dig. 1776, 1777a.

If an agreement be for modification of a bilateral, executory agreement, there results ordinarily a new contract consisting of the old so far as it remains unchanged and new terms and conditions introduced by the modification, and contract-making process has been repeated, and its essentials must be present. Id.

In order to render it enforceable, an agreement for the modification of a bilateral, executory contract must be for a valuable consideration. Id. See Dun. Dig. 1776.

Fact that owner's son told well-driller when latter considered abandoning contract that there was no alternative for him but to complete performance did not constitute an abandonment of the contract and the making of a new contract to continue the work on some different basis. Ylijarvi v. Brockphaler, 213M385, 7NW (2d)314. See Dun. Dig. 1778a.

Parties to a written contract may impliedly or expressly ignore terms of their contract in their dealings with each other. Trovatten v. Minea, 213M544, 7NW(2d)390, 144ALR263. See Dun. Dig. 1774.

A written contract may be changed by parol. Id. See Dun. Dig. 1774.

4¾. Novation.

There is no novation where a debtor is not released and another substituted in his stead, pursuant to agreement between creditor and debtors. First & American Nat. Bank of Duluth v. W., 207M537, 292NW770. See Dun. Dig. 7238.

Burden of proof of novation is upon debtor who asserts that he has been discharged. First & Am. Nat. Bank of D. v. W., 207M537, 292NW770. See Dun. Dig. 7238a.

5. Quasi contracts.

Claim of quasi contractual liability presupposes the absence of contract in fact, express or implied, and there is no longer any justification in use of term contract to describe obligation. Ind. School Dist. v. C., 208M29, 292 NW777. See Dun. Dig. 1724.

Rights quasi ex contractu are in personam and are enforced by actions in personam. Id.

Whether labor or service is performed by an individual or by a public utility, basis upon which proof must rest is that there be reasonably adequate compensation for that which is furnished. Scandrett v. H., 209M303, 296 NW26. See Dun. Dig. 10366.

Where an implied contract is relied upon, it must be deduced from circumstances, relationship, and conduct of parties, but this does not relieve plaintiff from his burden of establishing all essential contractual ingredients, that services were rendered, under circumstances from which a promise to pay for them should be implied, and their value. High v. Supreme Lodge of World, Loyal Order of Moose, 210M471, 298NW723. See Dun. Dig. 1724, 10368.

Where services have been rendered under a contract void under statute of frauds, and employer refuses to abide by oral agreement, recovery for value of services may be had on theory of quasi contract. Pfuhl v. Sabrowsky, 211M439, 1NW(2d)421. See Dun. Dig. 10376.

Where one performs services for another under an express contract, he may, upon repudiation of breach thereof by the other, stop performance, treat contract as at an end, and recover reasonable value of services rendered. Stark v. Magnuson, 212M167, 2NW(2d)814. See Dun. Dig. 1805a, 10369.

Where one was defrauded and paid money to a person who happened to be general agent of an insurance company, fraud being independent of employment as agent, there existed a constructive trust in favor of defrauded person, but he had no right of action against insurance company to whom agent paid the money to cover up embezzlement of premiums, company having no knowledge of the embezzlement or fraud practiced by agent. Blumberg v. Taggart, 213M39, 5NW(2d)388. See Dun. Dig. 6129a.

Where a claimant's money is wrongfully used in discharge of a debt of the wrongdoer, claimant is not entitled to recover his money from the creditor if creditor had no notice of the wrong, since creditor is then in position of a bona fide purchaser. Id.

Where relatives live together as members of the same household, presumption is that no pecuniary compensation is expected or will be paid for services or support furnished by one member to another, and before this presumption may be overcome, it must appear that when the services were performed or support furnished both parties understood that compensation was to be made therefor. Hirt's Estate, 213M209, 6NW(2d)98. See Dun. Dig. 10375.

A well-driller who drilled well 204 feet and installed the casing and abandoned the work when owner refused to permit substitution of a smaller casing for further drilling, contrary to contract, was not entitled to a recovery upon a quantum meruit for part performance, where it was not shown that driller's part performance was a benefit to owner. Ylijarvi v. Brockphaler, 213M 385, 7NW(2d)314. See Dun. Dig. 10369.

Where a building and construction contract is entire and contractor voluntarily and without excuse abandons it after part performance, he has no claim, equitable or otherwise, to any compensation whatever. Id.

Where plaintiffs, grantors of land transferred, covenanted with their grantors to assume and to pay latters' own personal indebtedness for balances for certain improvements thereon, sold the land under executory contract of sale binding the vendees to assume and pay the balances, and then conveyed land to defendants "subject" to such balances and assigned to defendants their interest as vendors under the contract for deed without an agreement on part of latter to assume and pay the balances, defendants are not personally liable under the deed or the assignment of contract, and plaintiffs' covenants to pay balances did not run with land to that effect, and fact that balances were part of consideration for deed and for assignment of contract for deed was immaterial, and a release, as between them, of the vendees under the contract for deed by the defendants, as assignees thereof, from liability to pay such balances, which the vendees had agreed to pay under the contract, did not render defendants liable to plaintiffs, as vendors, in quasi contract for payment of the same. Peiser v. Gingold, 214M281, 8NW(2d)36. See Dun. Dig. 4303, 6289.

The exercise of a legal right cannot subject a party to liability for unjust enrichment to a party who has not been wronged thereby. Id. See Dun. Dig. 4300.

Where a real estate corporation owned a platted area in which it installed water and sewer facilities at its own expense for purpose of making lots saleable, including cost of installation in purchase price of lots, and formed a service corporation as a convenient legal means by which it could conduct part of its business in connection with such system, no contract, express or implied, or quasi contract, arose from fact that village granted such service corporation a franchise with the "right and privilege to install, maintain and operate" the water and sewer systems and the "right" to errect and maintain fire hydrants approved by said village council, on which village could be held liable for services rendered the community in connection with the systems, though franchise contained a provision that "said hydrants may also be used by the village for fire protection purposes upon such terms as may be mutually agreed upon". Country Club District Service Co. v. Village of Edina, 214M26, 8NW(2d)321. See Dun. Dig. 4303.

A real estate corporation, and a service corporation created by it for the purpose, having installed water, sewer and fire hydrants in a platted area in its own interests and without expectation of reward and having rendered services in its own interest, cannot later, when its own purposes have been served, insist that village accept and pay for services which it thereafter continued to render without any agreement as to compensation. Id.

When services are rendered for another in one's own interest and without expectation of reward, it is not an unjust enrichment for recipient of benefits to retain them without compensation. Id.

When services are rendered for another in one's own interest and without expectation of reward, compensation cannot later be claimed on ground of implied contract. Id.

Rule that one who has a cause of action in tort may waive the tort and sue on an implied contract for money had and received does not apply in cases where there is no unjust enrichment. Soderlin v. Marquette Nat. Bank, 214M408, 8NW(2d)331. See Dun. Dig. 4308.

Dividends paid under mistake of law. 26 Minn. Law Rev. 534.

5½. Contribution.

Right to contribution arises out of the relationship of parties to an original transaction: in contract cases common liability arising out of relationship created by original agreement, express or implied; while in tort cases the original common liability must be established in some way—in contested cases by adjudication of such liability as between the injured person and alleged tortfeasors. American Motorists Ins. Co. v. Vigen, 213M120, 5NW(2d)397, 142ALR722. See Dun. Dig. 1920.

Since payment by a plaintiff of more than his share of a common liability is the basis of an action for contribution, lack of such common liability to injured person on part of parties to contribution action would preclude a right to contribution. Id.

Where one of two defendants makes a provident settlement before trial, the question of common liability is still open and may be determined in an action for contribution. American Motorists Ins. Co. v. Vigen, 213M 120, 5NW(2d)397, 142ALR722. See Dun. Dig. 1924.

Where personal liability for debt in a lien foreclosure action is found against two defendants jointly and severally and judgment is entered against only one of them, latter may not complain since he may seek contribution from other defendant for his proportionate share of any sum he has paid on judgment. Smude v. Amidon, 214M266, 7NW(2d)776. See Dun. Dig. 1920.

In determining whether owner of restaurant sued in federal court for injuries to patron from unwholesome ham was entitled under the federal third party practice rule to have the packer who canned the ham made a third party defendant, fact that state law bars contribution to person who had been guilty of an intentional wrong or who is presumed to have known that he was doing an illegal act, does not warrant the court in indulging in such presumption, where defendant's position is that if the ham was unwholesome the packer was solely to blame since any violation of the state pure food statutes by the restaurant owner is technical only and not an intentional wrong if his position be sustained, and fact that the cause of action asserted by the defendant against the packer rests on a theory different from plaintiff's cause of action against defendant is immaterial. Jeub v. B/G Foods, Inc., (DC-Minn)2FRD238. See Dun. Dig. 1924, 3782, 7328, 7329.

6. Bailment.

Lessee of a machine was not liable for rent for time it was kept in use under promise to comply with representation and warranty. Jaeger Mach. Co. v. M., 206M 468, 289NW51. See Dun. Dig. 731.

In action for rent for use of machines, evidence held to warrant submission of counterclaim for extra expense occasioned by failure of machine to do amount and kind of work represented. Id.

A gas company installing a heater and drums of propane gas for fuel and installing it in a brooder house to be used by a party of hunters, all without any charge of any kind, owed no duty to warn hunters that heater would give off carbon monoxide gas where it had no knowledge that such gas would be given off, and was not liable for not installing a pipe to carry gas to outside. Ruth v. H., 209M248, 296NW136. See Dun. Dig. 731c.

A lender of a chattel for gratuitous use of borrower owes latter duty of warning him of only those defects of which lender is aware and which might imperil borrower by intended use of chattel. Id.

One who shares in gratuitous use of a chattel by consent of a bailee or donee stands in no better position than bailee or donee with respect to his rights against bailor or donor for injuries suffered from defects. Id. See Dun. Dig. 731d.

Where a chattel is delivered to a party for his gratuitous use with authority to consume a part of it by such use and party is to return part which is not consumed, there is a gift of part which is consumed and a bailment for gratuitous use of bailee of part which is to be returned. Id. See Dun. Dig. 728.

Finance company repossessing automobile owed no absolute duty safely to keep personal effect which were entire at time until purchaser exercised his right of redemption, but was only a bailee of the goods and owed merely a duty of due care. Magoon v. Motors Acceptance Corporation, 238Wis1, 298NW191.

Where customer of public parking lot had intrusted his automobile to care and custody of attendant over a period of four years, it was idle for defendant to assert that it leased a mere space on which to park and that it was not a bailee. Dennis v. Coleman's Parking & Greasing Stations, Inc., 211M597, 2NW(2d)33. See Dun. Dig. 728, 5673a.

A "bailment" is the contract or legal relation created by delivery of goods without a transference of ownership, on an agreement, express or implied, that they be returned or accounted for. Id. See Dun. Dig. 728(96).

To constitute a bailment, there must be delivery and acceptance of bailed chattel, but, like any other contract, it may be established by words, written or oral, or by conduct. Id. See Dun. Dig. 728.

Upon bailee is placed burden not merely of going forward with proof, nor a shifting burden, but a burden of establishing before jury that his negligence did not cause loss. Id. See Dun. Dig. 732.

In action against public parking lot for damages for loss of car and its later recovery in bad condition, contributory negligence of plaintiff in driving his car unto lot with the keys in it and walking away when attendant was not immediately available was, at most, a fact issue for jury. Id. See Dun. Dig. 732, 5673a.

While parking lot operator as bailee was not an insurer of an automobile, it was bound to use the quantity and the quality of care which, under similar circumstances, a reasonably careful man would use with respect to his own automobile. Id. See Dun. Dig. 732(12), 5673a.

A bailor-bailee relationship existed between operator of a public parking lot and a customer leaving car there with key in lock. Id. See Dun. Dig. 728, 5673a.

Where oil company leased to storekeeper underground gasoline storage tank holding two grades of gasoline, and lessee discontinued sale of one grade and gave notice to oil company that one of the tanks was no longer of any use to him, from time of such notice relationship between lessee of equipment and oil company as to this particular equipment was no longer that of lessor and lessee, and full responsibility for proper maintenance of abandoned tank devolved upon oil company. Fjellman v. Weller, 213M457, 7NW(2d)521. See Dun. Dig. 731d.

Reason often advanced for protecting lessor against negligence of a lessee of personal property is the former's inability to gain access to premises to make necessary repairs, but this has no application where negligence complained of is repair and maintenance of an underground tank located in a public alley. Id.

General rule is that a bailor or lessor of personal property is not liable to third persons for negligence of his bailee or lessee in use of property, but this rule is strictly limited to cases where lessor or bailor has relinquished all control over the instrumentality lent or leased. Id. See Dun. Dig. 731d, 5369.

Negligence of a lessee under primary duty to keep leased equipment in repair, which is concurrent with negligence of lessor who has assumed responsibility for repairing such equipment, is not an efficient intervening

proximate cause of an accident resulting from the negligence of both. Id. See Dun. Dig. 731d.

It is the duty of owner of an underground gasoline storage tank installed by him in a public alley to remove it within a reasonable time after its use has been abandoned by a lessee thereof, or to seal it so as to remove danger from explosive vapors remaining therein. Id. See Dun. Dig. 731d.

A lessor of a gasoline pump and underground storage tank who installs it in a public street or alley and, in furtherance of his own business, assumes the duty of repairing and maintaining equipment, is liable for his own negligence in maintaining it, notwithstanding that under terms of his lease he was under no obligation to make repairs. Id. See Dun. Dig. 731d.

That a lease of equipment contains a covenant by lessee indemnifying lessor against liability for damage to third persons caused by the use of equipment is no defense to an action against lessor based on the latter's negligence in maintaining the equipment. Id. See Dun. Dig. 731d.

Where tenants moved from house leaving their furniture purchased under conditional sales contract, notifying landlord and seller, landlord was guilty of conversion of furniture if he removed it or caused it to be removed from house and refused to disclose to owner where it was. Borg & Powers Furniture Co. v. Reiling, 213M539, 7NW(2d)310. See Dun. Dig. 733.

A gratuitous bailee is liable for conversion if he *intentionally removes or secretes property.* Id.

When a plaintiff has proved a bailment the defendant has burden of establishing before jury that defendant's negligence did not cause loss of property bailed, and this is not merely the burden of going forward with proof, but the burden of establishing due care on its part by a preponderance of the evidence, and this was true as to a flying field which was shown to be bailee of a light airplane destroyed by wind storm. Zanker v. Cedar Flying Service, 214M242, 7NW(2d)775. See Dun. Dig. 732.

Proprietor of a flying field as bailee of a light airplane must exercise care commensurate with likely changes in weather and effect of high or squally winds upon such a plane must be taken into account by it, as effecting its liability for destruction of the plane by a wind storm. Id.

Changes in weather are conditions which a bailee is bound to anticipate as likely to occur, and care commensurate with such likely changes must be exercised. Id.

Rule that burden of proof is upon a bailee to establish due care on his part by a preponderance of the evidence is *not changed where plaintiff alleges specific acts of* nelgigence. Id.

Ownership of an automobile in which the owner is riding, but which is being driven by another, does not establish as a matter of law right of control in the owner, since right of control may be surrendered where the owner parts with the possession of his car to another, parties then standing in the relationship of bailor and bailee. Christensen v. Hennepin Transp. Co., 215M394, 10NW(2d) 406, 147ALR945. See Dun. Dig. 728.

The negligence of a bailee in operating an automobile is not imputable to the bailor. Id. See Dun. Dig. 731d.

7. Employment.

Peterson v. Johnson Nut Co., 204M300, 283NW561; 209M 470, 297NW178.

There can be no recovery for services performed for benefit of another if idea of charging for them was an after-thought. Sickmann's Estate, 207M65, 289NW832. See Dun. Dig. 1742.

Where railroad company and wholesale grocery company entered into agreement whereby a checker and trucker employed by railroad performed all of his duties at grocery plant and was required to perform such services as should be required by foreman of grocery plant as well as check freight to be shipped by railroad, railroad to be reimbursed for all wages by grocery company, including social security, it being agreed between railroad and employee that he should remain an employee of railroad with all rights pertaining thereto, checker was employee of railroad alone even while doing work for grocery company. Ryan v. Twin City Wholesale Grocer Co., 210M21, 297NW705. See Dun. Dig. 5808.

Where claimant performed services for husband and wife under an agreement that since they held all their property so that it was to go to the survivor, his services should be paid out of estate of survivor, he could file his claim against estate of survivor and court would have jurisdiction to try claims against both husband and wife. Cooke's Estate, 210M397, 298NW571. See Dun. Dig. 3592, 3592a.

Where elderly couple held all their property so that it would go to the survivor, one having claim for services could file it against the estate of the survivor, without having filed any claim against estate of one dying first. Cooke's Estate, 210M400, 298NW572. See Dun. Dig. 3592, 3592a.

Simple fact of benefit without more does not impose contractual liability for services. High v. Supreme Lodge of World, Loyal Order of Moose, 210M471, 298NW723. See Dun. Dig. 1724.

Manager of hotel, whether there was a contract of partnership or employment, receiving as his compensation a share of the profits, could not recover in an action for alleged conspiracy in inducing wrongful breach of contract, if it appeared that he was derelict in performance of duties imposed upon him by agreement and seemed to give his own interests preference in distribution of his efforts and permitted dissipation of funds by an employee of hotel corporation and failed to devote such time and attention and superintendence as was reasonably necessary for successful operation of the business as required by contract. Wolfson v. Northern States Management Co., 210M504, 299NW676. See Dun. Dig. 9637.

Under California law, where one person performs services for another, law implies a promise on part of recipient to pay for them, but where services were rendered for a close relative, normal legal implication of the contractual relationship may be repelled, also where services are such as one friend might perform for another, in which case circumstances must show that compensation was expected or contemplated by parties. Superior's Estate, 211M108, 300NW393. See Dun. Dig. 10367, 10375.

Where company engaged in business of servicing large employers of labor by undertaking to instruct help by furnishing printing matter teaching how services would be more efficient and profitable to employer discounted spurious contracts with finance company and was placed in receivership, meanwhile continuing its business of procuring contracts for services, to wipe out loss of finance company, and profits thereafter to be equally divided between finance company, individual originating the literature, and plaintiff salesman, agreement of finance company to pay plaintiff commissions and expenses owing by *company in receivership if he would continue to sell* contract for finance company was severable from agreement for advances and commissions with respect to a new business, and money paid for commissions on contract subsequently obtained could not be applied upon agreement of finance company to pay what was due from other company, and success of anticipated business *was not condition precedent, and it was immaterial that* new federal legislation led employers of labor to hesitate to contract for services. Smith v. Minneapolis Securities Corp., 211M534, 1NW(2d)841. See Dun. Dig. 5812.

Evidence held sufficient to establish a contract of finance company to pay plaintiff sales commissions and expenses due him from company discounting contract. Id.

In action for damages for wrongful discharge from employment, there could be no estoppel from letters of plaintiff to defendant that he had "made a mess of things" and had disobeyed instructions in several particulars to deny that there had been improper discharge of plaintiff, plaintiff explaining in testimony that he thought he would acknowledge the errors and disobedience as a technique for holding his job. Bang v. International Sisal Co., 212M135, 4NW(2d)113. See Dun. Dig. 3429, 5851.

Refusal of salesman, who was entitled to monthly salary under employment contract breached by employer, to accept sales positions upon straight commission basis, did not constitute a failure by employee to mitigate damages. Id. See Dun. Dig. 2532, 5829, 5850.

Interest as damages was properly allowed from date of breach of employment contract. Id. See Dun. Dig. 2524, 5850.

Amounts received by wrongfully discharged employee during his unemployment from state unemployment compensation fund were not deductible by employer in mitigation of damages. Id. See Dun. Dig. 2532, 5850, 9952a.

An employee is required to obey all reasonable orders of the employer, as affecting right to discharge him. Id. See Dun. Dig. 5824.

Privilege of discharge has been said to exist in those cases where there has been a material breach of the employment contract, and "wilful disobedience" is recognized as such a breach. Id. See Dun. Dig. 5824.

An employee, as an implied condition of his employment and which is as much a part thereof as if stated in express terms, is bound to serve his employer faithfully and honestly. Hlubeck v. Beeler, 214M484, 9NW (2d)252. See Dun. Dig. 5805.

Embezzlement of the employer's funds coming into his hands by an employee is a breach of contract which goes to the very root of subject-matter of the contract of service. Id.

A salesman not hired for any definite time could leave employment at any time without affecting his right to wages and to commissions earned. Id. See Dun. Dig. 5808.

Where an employee with the employer's consent retains money belonging to the employer which came into the employee's hands during the period of service covered by the contract of employment, he is not guilty of unfaithful and dishonest service forfeiting his right to compensation, and a retention of any of an employer's funds by an employee occurring prior to the time covered by the contract is immaterial and irrelevant. Id. See Dun. Dig. 5849.

Faithful and honest service conditions the right of an employee to compensation. Id.

It has been held that where compensation for the service is payable monthly, each month is an entire and separable period of service and that an embezzlement by an employee occurring during one or more months does not prevent recovery of compensation for subsequent months. Id.

Ordinarily, the doctrine of respondeat superior has no application in criminal cases, and criminal liability, ex-

cept in certain offenses, is based upon personal guilt. State v. Burns, 215M182, 9NW(2d)518. See Dun. Dig. 2406, 5833.

Where a specific criminal intent is an essential ingredient of the crime charged, the doctrine of respondeat superior is inapplicable to impute to an employer knowledge of facts known only by his employee. Id. See Dun. Dig. 2409, 5833.

The most common instances where a master, without active participation on his part, is liable for the servant's crime, are those arising under statutes providing, either expressly or impliedly, for a vicarious criminal liability. These relate principally to the sale of liquor and food and similar regulations. Id. See Dun. Dig. 2415, 5833.

Forbearance from work as a contractual consideration is novel. Hafner v. Schmitz, 215M245, 9NW(2d)713. See Dun. Dig. 1760.

The sale by a corporation of its newspaper publishing business in toto to another company amounted to a dismissal of all of its employees engaged in that part of defendant's business and entitled them to severance pay under an employment contract, though it took in exchange part of the stock of the other company and such company reemployed the workers. Matthews v. Minnesota Tribune Co., 215M369, 10NW(2d)230, 147ALR147. See Dun. Dig. 5812.

Evidence held to justify finding that enforceable contract existed between employer and employee establishing employee as the owner of a reserve commission account carried upon the books of the employer. Ickler v. Hilger, 215M82, 10NW(2d)277. See Dun. Dig. 5812.

Where plaintiff had worked for railroad more than 90 days when injured and had not been rejected, he became for positions in its yard service, and, as such, he was Co., 215M442, 10NW(2d)382. See Dun. Dig. 5801.
an employee under rule of railroad relating to applicants under the protection of the Federal Employers' Liability and Safety Appliance Acts. Blanton v. Northern Pac. Ry.

Although the fact that an employee obtains employment by means of false statements may be ground for 7NW(2d)7. See Dun. Dig. 1859, 1866.
rescission of contract of employment, it is insufficient to render such contract void or to terminate the relation of master and servant, as affecting liability of master for negligence. Id. See Dun. Dig. 5801, 5857, 6022d.

Evidence sustained finding that switchman was not guilty of fraud in stating in his application that he had not suffered any physical injury, when in fact he had suffered injury to his nose requiring an operation. Id. See Dun. Dig. 5801, 5857, 6022d.

7½. Building contracts.

Subcontractor doing plastering under contract with general contractor was not entitled to recover from general contractor for extra work required by agent of owner of the building, such agent having no authorization from general contractor to change its contractual relationship. Warner v. A. G. Anderson, Inc., 213M376,

In case of building and construction contracts, duty of full and complete performance is satisfied by substantial performance, for the reasons that in very nature of things literal performance as to all minutiae is often practically impossible and that owner should not have without payment the benefit of, and contractor should not forfeit, labor and materials expended in constructing essentially that for which the parties bargained. Ylijarvi v. Brockphaler, 213M385, 7NW(2d)314. See Dun. Dig. **1850.**

Rules applicable to building and construction contracts apply to those for drilling or boring wells on a farm. Id.

Where a building and construction contract is entire and contractor voluntarily and without excuse abandons it after part performance, he has no claim equitable or otherwise, to any compensation whatever. Id.

Deviations or lack of performance which are either intentional or so material that owner does not get substantially that for which he bargained, are not permissible under the rule of substantial performance. Id.

In action by school district against a building contractor for constructing a gymnasium to recover damages for faulty materials and workmanship, substantial performance of contract held properly submitted to jury. Id.

If there is substantial performance and defects in building are of a character which can be remedied, measure of damages is such amount as will cure the defect, but if defects are such as to prevent a substantial performance, measure of damages is difference between market value of building constructed according to plans and its market value as actually constructed by contractor. Id.

If defects in a building are minor and of a character which may be so remedied that owner will have what he contracted for, contractor may recover agreed price less such sum as will cure the defects. Id.

Whether there is substantial performance of a building contract is usually a question of fact. Id.

A contract provision for arbitration of disputes "at the choice of either party" is not self-executing, and may be modified, rescinded, or waived by agreement or acts and conduct of parties and this notwithstanding a further provision that a "decision" of arbitrators "shall be a condition precedent to any right of legal action." **Id. See Dun. Dig. 1848.**

Architect's letter to school district discouraging an investigation of a building to determine cause of leak in walls and expressing doubt as to success of legal action against contractor "because a careful visual examination of the mortar suggests an A-1 job" was a mere informal expression of opinion and not a "decision" by the architect as contemplated by the building contract. Id. See Dun. Dig. 1853.

A provision of a school gymnasium building contract requiring the contractor to remedy any defects due to faulty materials or workmanship observed within a year after date of substantial completion and to pay for any damage to other work resulting therefrom did not preclude district from asserting a claim for damages, for such faulty materials or workmanship, if it so elects, and this without first procuring architect's decision. Independent School Dist. No. 35 v. A. Hedenberg & Co., 214 M82, 7NW(2d)511. See Dun. Dig. 1859a.

Building contractor's conduct in failing to demand arbitration of dispute for over a year and in proceeding to trial of action for damages without making such demand or asking for a stay to permit arbitration constituted a waiver of its right to arbitration. Id. See Dun. Dig. 1859a.

7¾. Well drilling contracts.

Where well-drilling contract provided for a 4-inch casing, use of a 2½-inch casing after drilling to a depth of 204 feet constituted an intentional violation of contract, as affecting right to recover for substantial per*formance or right of driller to abandon work when owner* gave notice that he would not accept a casing of that size and would not pay for it, and such conduct of owner did not constitute an interference with the work which would excuse full performance. Ylijarvi v. Brockphaler, 213M385, 7NW(2d)314. See Dun. Dig. 1781, 1790.

Rules applicable to building and construction contracts apply to those for drilling or boring wells on a farm. Id. See Dun. Dig. 1781.

An oral contract to drill a well stipulating that the contractor use 4-inch casing, that well produce a sufficient supply of usable water, and that the owner, in addition to furnishing food and lodging to contractor and his crew while work was being done, pay contractor after completion of job at rate of $1.65 per foot, was an entire contract and contractor was not entitled to compensation unless he performed according to his terms. Id. See Dun. Dig. 1782.

Agreement that well-driller should not be paid until after well had been bored and was producing stipulated quantity of usable water made performance, according to terms of contract, a condition precedent to any right to compensation. Id.

A stipulation in a contract to dig or bore a well using a casing of a certain size, being a legitimate matter of agreement, contractor has no right to use a smaller size casing than that provided for in the contract, in the absence of a waiver of performance or a second contract stipulating for a smaller sized casing. Id.

Where a contractor by express stipulation agrees that he will dig, drill, or bore a well which will produce a certain quantity and quality of water, he cannot recover until he has not only dug, drilled, or bored the well, but also until it produces water of quantity and quality stipulated in contract. Id.

That owner's son told contractor when latter considered abandoning contract to drill a well on a farm that there was no alternative for him but to complete performance, did not constitute an abandoning of contract and thereby authorizing further performance on a quantum meruit basis, amounting only to advice that contractor was bound by his contract to perform it. Id. See Dun. Dig. 1790, 1856.

8. Consideration.

There was a consideration for a contract between householder and electric company to supply electric energy during lifetime of franchise, notwithstanding existence of oral contract and the supplying of electricity terminable at will. Macdanz v. N., 206M510, 289NW58. See Dun. Dig. 1764.

It is no objection to an action on a contract by a donee or creditor beneficiary that he did not furnish any of consideration. LaMourea v. R., 209M53, 295NW304. See Dun. Dig. 1755.

Where promisor received that for which he bargained, there is no failure of consideration. Miller v. O. B. McClintock Co., 210M152, 297NW724. See Dun. Dig. 1756, 1809.

There must be valuable consideration in order to make a bilateral, executory agreement an enforceable contract. Johnson v. Northern Oil Co., 212M249, 4NW(2d)82. See Dun. Dig. 1751a.

Forbearance to marry as consideration for a contract is of somewhat dubious legality. Hafner v. S., 215M245, 9NW(2d)713. See Dun. Dig. 1870.

A valuable consideration may consist of some benefit accruing to one party or some detriment suffered by the other, and the tendency, is to emphasize the detriment to the promisee. Estrada v. Hanson, 215M353, 10NW(2d) 223. See Dun. Dig. 1750.

Fact that a borrower is under obligation to repay loans does not invalidate them as consideration in a transaction involving other matters. Id. See Dun. Dig. 1756.

Courts will not inquire into the adequacy of consideration, it being sufficient if it is something which the law regards as of value. Id. See Dun. Dig. 1756.

9. Fraud.

Value of property such as a house and lot which have no market value like property sold on stock of commodity exchanges, where a market value can be ascertained as of any date or hour, is not the subject of actionable misrepresentation. Beck v. N., 206M125, 288 NW217. See Dun. Dig. 3824.

Representation as to what property cost is a representation of fact and not opinion. Id.

Fraud generally renders voidable everything into which it enters, and court will look through any form of instrument or proceeding, no matter how solemn, in order to prevent a party from profiting by his own fraud, and it is immaterial that he has conformed to all formal requirements of law. Turner v. E., 207M455, 292NW257. See Dun. Dig. 3834.

Where it is reasonably clear that parties are not dealing at arm's length and, because of relations of parties and peculiar circumstances of case, a false representation as to value and a reliance thereon had produced a palpable fraud, strict rule that representations of value are mere expressions of opinion and trade talk yields to justice of case and resolves the representation to one of fact. Gable v. N., 209M445, 296NW525. See Dun. Dig. 3824.

While mere matter of disparity of intelligence and business experience is not of itself a sufficient ground for relief from contract, law does not ignore such disparity so as to protect positive, intentional fraud successfully practiced upon the simple-minded or unwary. Id. See Dun. Dig. 3830.

Statement by vendor of a farm in respect to future of a well could not be understood as more than a mere opinion, but statement that there never had been any trouble with well was a representation of a past fact which, if false, would be actionable even though representation was not known to vendor to be false when made. Forsberg v. Baker, 211M59, 300NW371. See Dun. Dig. 3824.

A victim of fraud inducing a contract ordinarily has an election of remedies, and may affirm, and, keeping what he has received, sue at law for what damage he has sustained by reason of fraud, or he may, in equity or by his own act, rescind tainted contract and, returning what he has received, recover all he has parted with under contract. Hatch v. Kulick, 211M309, 1NW(2d)359. See Dun. Dig. 1815.

A charge of fraud can be based only on a material representation, and a representation is not material unless it prejudices the party or is germane to fraud alleged, and depends on circumstances. Rien v. Cooper, 211M517, 1NW(2d)847. See Dun. Dig. 3820.

Fraud cannot be predicated on the truth, and a true representation is not actionable. Id. See Dun. Dig. 3816.

There can be no fraud by means of misrepresentations unless party who claims that he was defrauded acted in reliance on the representation. Id. See Dun. Dig. 3821.

Fraud cannot be predicated upon a representation made subsequent to act claimed to have been induced thereby. Id. See Dun. Dig. 3821.

Fraud in obtaining approval of depositors to plan of reorganization of a bank could not be based upon representation as to value of certain assets made after approval of the plan. Id. See Dun. Dig. 3821.

A representation true in fact is not rendered untrue because false representations are made to support it. Id. See Dun. Dig. 3816.

Where an owner of property who transfers it is induced to do so by the fraud, duress, or undue influence of the transferee, transferee holds property upon a constructive trust for the transferor, and that trust includes proceeds of the property. Blumberg v. Taggart, 213M39, 5NW(2d)388. See Dun. Dig. 3834.

10. ——Action for damages.

Measure of damages for fraud is direct damage for fraud which induces contract, which is difference in value between what party defrauded parted with and what he received, and in addition any consequential damages flowing naturally and proximately from the breach, but this is not measure of recovery in case of rescission for fraud. Hatch v. Kulick, 211M309, 1NW(2d)359. See Dun. Dig. 1203, 3841.

11½. ——Pleading.

In pleading fraud, the material facts constituting the fraud must be specifically alleged, and a general charge of fraud is unavailing. Parrish v. Peoples, 214M589, 9NW (2d)225. See Dun. Dig. 3836.

12. ——Evidence.

Evidence held to sustain finding that written contract to provide home and board was entered into fairly and without fraud or undue influence, and that defendant had not breached it, and plaintiff was not entitled to recover consideration paid. Holzgraver v. S., 207M88, 289 NW881. See Dun. Dig. 1815a.

Admissibility of tax assessment on question of value of farm in an action for damages for fraud in sale. Rother v. H., 208M405, 294NW644. See Dun. Dig. 3247.

Fraud is not presumed but must be affirmatively proved, and one who alleges fraud has the burden of proof and carries this burden throughout the trial. Parrish v. Peoples, 214M589, 9NW(2d)225. See Dun. Dig. 3837.

Evidence of extrinsic fraud must be clear and convincing. Bloomquist v. Thomas, 215M35, 9NW(2d)337. See Dun. Dig. 2799(b), 5129.

13. ——Questions for jury.

Whether a party relied upon false representations is a question for the jury. Bulau v. B., 208M529, 294NW 845. See Dun. Dig. 3821.

The question of fraud is for jury unless evidence is conclusive. Id. See Dun. Dig. 3840.

14. Duress.

Generally speaking, duress may be said to exist whenever one, by unlawful act of another, is induced to make a contract or perform some other act under circumstances which deprive him of exercise of free will. Macklett v. Temple, 211M434, 1NW(2d)415. See Dun. Dig. 2848.

15. Legality.

Lenhart v. Lenhart Wagon Co., 210M164, 298NW37, 135 ALR833.

Arbitration in insurance. Glidden Co. v. Retail Hardware Mut. Fire Ins. Co., 181M518, 233NW310, 77ALR616. Aff'd 284US151, 52SCR69, 76LEd214.

Contracts that obviously and directly tend in a marked degree to bring about results that law seeks to prevent cannot be made ground of a successful suit. Kniefel v. K., 207M109, 290NW218. See Dun. Dig. 1885.

An agreement in fraud of law is unenforceable. Id. See Dun. Dig. 1885.

Where creditor enters into a compromise agreement with federal land bank and land bank commissioner and farmer under Emergency Farm Mortgage Act, any contemporary agreement whereby farmer assumes additional obligation to creditor is in fraud of law and unenforceable, and federal land bank and land bank commissioner may intervene in action to enforce obligation, though they would not suffer any pecuniary loss by reason of the fraud. Id. See Dun. Dig. 1885.

A new and independent contract founded on a new consideration in relation to property which was subject matter of a prior illegal agreement is valid, where new contract does not seek to carry out or enforce any of unexecuted provisions of former agreement. Geo. Benz & Sons v. H., 208M118, 293NW133. See Dun. Dig. 1879.

Courts grant relief against wrongs and to enforce an existing right, although property involved was acquired by some past illegal act. Id.

Doctrine is discarded that general agreement to arbitrate ousts jurisdiction of courts, and are therefore illegal as against public policy. Park Const. Co. v. I., 209M 182, 296NW475. See Dun. Dig. 499.

Agreement between legatees following death of testatrix whereby one legatee agreed to convey an interest in realty in consideration of promise not to contest probate of will on ground of incompetency of maker was not contrary to public policy where there was a good faith belief of incompetency and an unfair distribution of property. Thayer v. Knight, 210M171, 297NW625. See Dun. Dig. 10243k.

Before a charge of invalidity should be upheld on ground of public policy, either law or precedent should mark out clearly that a particlar contract violates public policy, or at least a court of justice should with certainty be able to say that enforcement of the contract would be hurtful to the public welfare. Perkins v. Hegg, 212M377, 3NW(2d)671.

Freedom of contract should not be unduly restricted by ill-advised application of a doctrine of public policy, necessarily rather vague and uncertain in its limitations. Id.

Contracts, the subject, operation or tendency of which violates public policy or the established interest of society, are not enforcible. Id.

It is only those indisputable public interests standing in opposition to what the contract seeks to accomplish that should be permitted to strike down its enforcibility on ground of public policy. Id.

Enrollment agreement containing a promise to pay dues in a Property Tax Reduction Club, organized for the purpose of obtaining legislative support for lower property taxes and the substitution of more equitable methods of taxation, is not violative of public policy. Id.

Contractual limitations and regulations of liability for negligence are valid and binding. Brunswick Corp. v. Northwestern Nat. Bank & Trust Co., 214M370, 8NW (2d)333, 146ALR833. See Dun. Dig. 1872.

Where vendee in contract for a deed desired to exchange her equity for a farm of a third person, agreement of vendor to reinstate vendee in her rights under the contract if third person should default within one year, and if there was no default, to pay vendee a certain monthly sum for several years, the agreement to pay such monthly sum did not evidence a gambling transaction or a "swindle". Estrada v. Hanson, 215M353, 10 NW(2d)223. See Dun. Dig. 1872.

Fact that complaint in action for specific performance of an oral contract to will property stated that part of the consideration for the contract was not to "marry anyone else during decedent's lifetime" furnished no ground for denial of relief where defendant denied any such agreement and there was no evidence to show that such promise was part of the consideration. Downing v. Maag, 215M506, 10NW(2d)778. See Dun. Dig. 1875.

16. ——Penalty or liquidated damages.

Agreement of car dealer to return "deposit" in case of failure to deliver new car, construed as a contract for liquidated damages in amount of allowance made for

old car received and resold by dealer, held not so unreasonable as to constitute a penalty. Stanton v. M., 209 M458, 296NW521. See Dun. Dig. 2537.

Provision in a contract for liquidated damages will be deemed a penalty and therefor unenforceable where liquidated damages so provided are so great as to bear no reasonable relation to amount of actual injury suffered by breach. Id.

18. Construction.

Ambiguity in a contract must be resolved so as to give effect to intent of parties. Farmers & Merchants State Bank, 206M149, 288NW19. See Dun. Dig. 1816.

Construction of a contract is to be avoided which would lead to unjust results. Id. See Dun. Dig. 1824(40).

Words of an instrument are to be taken most strongly against party using them. Id. See Dun. Dig. 1832.

Contract must be construed strictly against drafting party. Miller v. M., 206M221, 289NW399. See Dun. Dig. 4659.

Substantive character of an instrument must govern though it is sprinkled with words which in law are of an inconsistent nature. Minnesota Valley Gun Club v. N., 207M126, 290NW222. See Dun. Dig. 1816.

When terms of a contract are expressed in language which is clear and unambiguous there is no room for construction or interpretation. Lidenberg v. A., 207M341, 291 NW512. See Dun. Dig. 1817, (18).

Construction of a written contract is, as a rule, for the court, and it is only where ambiguity exists which may be solved by a jury's finding on disputed facts or questions surrounding circumstances that a verdict may aid court. Id. See Dun. Dig. 1841.

Cardinal rule in interpretation of written instruments is to ascertain intention of parties and to give effect to that intention if it can be done consistently with legal principles, but rules of interpretation are not inflexible, their purpose being to reach probable intent of parties to instrument. Downing v. I., 207M292, 291NW613. See Dun. Dig. 1816.

In construing written instruments actual intent of parties is to be deduced from entire instrument, taking into consideration, reconciling, and giving meaning to all of its parts so far as possible, including recitals as well as operative clauses; and, when so considered, language which has distinct meaning standing alone may in connection used, become doubtful or its meaning modified by other parts of instrument, including particular recitals. Id. See Dun. Dig. 1816.

There is no practical construction of a written instrument unless parties have adopted an interpretation of instrument to settle meaning as between themselves of ambiguous language. First & American Nat. Bank of Duluth v. H., 208M295, 293NW585. See Dun. Dig. 1820.

When sense of language used in an instrument is made or becomes plain, process of interpretation ends, since extraneous cannot be resorted to refute what is already apparent from instrument itself. State v. Wm. O'Neil Sons Co., 209M219, 296NW7. See Dun. Dig. 1817.

A practical construction of anything written is but an aid to interpretation and is not to be resorted to unless such aid is required. Id. See Dun. Dig. 1820.

A contract is to be construed as a whole. Miller v. O. B. McClintock Co., 210M152, 297NW724. See Dun. Dig. 1823.

Forfeitures are not favored in law. Wait v. Journeymen Barbers' International Union, 210M180, 297NW630. See Dun. Dig. 3793.

In construing a writing such as an offer, determinative question is not just what words mean literally but how they are intended to operate practically on subject matter, and if ambiguity appears in application to subject matter, construction must follow. Field-Martin Co. v. Fruen Milling Co., 210M388, 298NW574. See Dun. Dig. 1833.

There being no manifestation of intention to contrary, parties contracted with reference to existing rules and principles of law applicable to subject matter. Propp v. Johnson, 211M159, 300NW615. See Dun. Dig. 1818.

When reasonably possible, a construction of a writing should be adopted which gives it full force and effect. Mixed Local Etc. v. Hotel & R. Eployees Etc., 212M587, 4 NW(2d)771. See Dun. Dig. 1816.

A construction will be avoided which nullifies or invalidates a writing in whole or in part. Mixed Local Etc. v. Hotel & R. Employees Etc., 212M587, 4NW(2d)771. See Dun. Dig. 1822.

Words in contracts are always to be given the meaning they have in common use, unless there are very strong reasons to the contrary. Bass v. Ring, 215M11, 9NW(2d) 234. See Dun. Dig. 1825.

An instrument must always be construed as a whole, and the particular meaning to be attached to any word or phrase is usually to be ascertained from the context, the nature of the subject treated of, and the purpose or intention of the parties who executed the contract, or the body which enacted or framed the statute or constitution. Merritt v. Stuve, 215M44, 9NW(2d)329. See Dun. Dig. 1823.

The day is past for adhering to technical or literal meaning of particular words in a deed or other contract against the plain intention of the parties as gathered from the entire instrument. Romanchuk v. Plotkin, 215 M156, 9NW(2d)421. See Dun. Dig. 1816.

Rules of construction are mere aids in ascertaining the meaning of writings, whether they are statutes, contracts, deeds, or mortgages, and they are neither ironclad nor inflexible and yield to manifestation of contrary intention. Id.

Use of preambles or recitals in construction. 25Minn LawRev924.

19. Rescission and cancellation.

See notes under §9164, note 10.

Peterson v. Johnson Nut Co., 204M300, 283NW561; 209 M470, 297NW178.

It is duty of party who has been induced to enter into a contract through fraud to act upon first opportunity after discovering such fraud, and to rescind contract by repudiating its obligations and restoring what has been received under it, if he desires to avail himself of his right to rescind. Beck v. N., 206M125, 288NW217. See Dun. Dig. 1188.

Equity will grant rescission of a transaction induced by fraud and false representation, if party injured makes timely application. Id. See Dun. Dig. 1196.

Parties are at liberty by mutual consent to void and terminate a prior unexpired contract of employment. Lidenberg v. A., 207M341, 291NW512. See Dun. Dig. 1807.

A contract may be terminated and discharged by mutual nonperformance clearly showing such an intention. Miller v. O. B. McClintock Co., 210M152, 297NW724. See Dun. Dig. 1807, 10043.

Clauses that a contract may be terminated or cancelled for breach or default are construed as being intended for benefit of party who is not guilty of breach or default, not the one who is. Id. See Dun. Dig. 1729.

Courts are inclined to construe a contract so as not to allow a party to terminate it at will without cause. Id. See Dun. Dig. 1729.

One of the parties to a contract may terminate it if it so provides. Id. See Dun. Dig. 1729.

Unreasonable delay after discovery of fraud ordinarily prevents rescission of a contract. Hatch v. Kulick, 211M 309, 1NW(2d)359. See Dun. Dig. 1196.

Parties to a contract may provide for its annulment or discharge. Kirk v. Welch, 212M300, 3NW(2d)426. See Dun. Dig. 1729.

The party asserting the rescission of a contract of insurance bears the burden of proving it. Merchants & Farmers Mut. C. Co. v. St. Paul-Mercury I. Co., 214M544, 8NW(2d)827. See Dun. Dig. 4659a.

A woman does not become of legal age when she marries. Op. Atty. Gen. (33B-9), Sept. 28, 1940.

20. ——Placing in status quo.

Corporation, not having sought rescission and having recovered secret profits made by its directors, may not mulct person dealing with directors and his non-director associates of their remaining interest in property which was open and apparent on face of contract made with corporation. Risvold v. G., 207M359, 292NW103. See Dun. Dig. 1810.

Rescission for fraud abolishes contract and all its incidents, and what remains is an obligation of parties each to other to restore status quo ante. Hatch v. Kulick, 211M309, 1NW(2d)359. See Dun. Dig. 1810.

Where victim of fraud rescinds contract, he is entitled to no damages, save in sense that any recovery by action at law is loosely termed "damages", being entitled to recover only that which he parted with by reason of contract. Id. See Dun. Dig. 1203, 1810.

Where one party repudiates or breaches a substantial part of his contract, and other party rescinds and sues to recover in quasi contract value of his services, recovery is not limited to value of what he was to receive under contract, theory of recovery not being compensation, as in case of a suit for breach of contract, but restitution. Stark v. Magnuson, 212M167, 2NW(2d)814. See Dun. Dig. 2568a, 10381.

20½. Forfeitures.

Where forfeiture is dependent upon making of a demand and failure to comply with demand, failure to make a proper specific and reasonable demand is fatal to enforcement of forfeiture by a court of law or equity. S. T. McKnight Co. v. Central Hanover Bank & Trust Co., (CCA8), 120F(2d)310.

Contracts are to be so construed as to avoid a forfeiture. Myhre v. Severson, 211M189, 300NW605. See Dun. Dig. 3793.

21. Performance or breach.

Peterson v. Johnson Nut Co., 204M300, 283NW561; 209 M470, 297NW178.

In action for damages for breach of contract to give sales right, evidence held sufficient to show that defendant accepted one of several alternatives mentioned in a memorandum, either by expressed oral acceptance or implied assent to plan. Foster v. B., 207M286, 291NW505. See Dun. Dig. 1805.

In absence of an agreement as to time of performance, law requires that a contract be performed within a reasonable time. Parsons v. T., 209M129, 295NW907. See Dun. Dig. 1785.

A person may not escape liability under an agreement upon condition by preventing happening of condition. Miller v. O. B. McClintock Co., 210M152, 297NW724. See Dun. Dig. 1798.

Wrongful and malicious interference by a stranger with contract relations existing between others, causing one to commit a breach thereof, amounts to an actionable tort and an action against a party to the contract for a breach thereof is not the exclusive remedy but wrongdoer may be pursued. Wolfson v. Northern States Management Co., 210M504, 299NW676. See Dun. Dig. 9637.

Whether there was compliance with building contract held one of fact for trial court. Service & Security v.

St. Paul Federal Sav. & Loan Ass'n, 211M199, 300NW811. See Dun. Dig. 1866b.

Where one performs services for another under an express contract, he may, upon repudiation of breach thereof by the other, stop performance, treat contract as at an end, and recover reasonable value of services rendered. Stark v. Magnuson, 212M167, 2NW(2d)814. See Dun. Dig. 1805a, 10369.

In action for damages for breach of an express contract whereby plaintiff was given exclusive sale rights, and for an accounting of commissions on sales made by defendant, wherein plaintiff sought damages caused by defendant's failure to perform, not the value of services plaintiff performed, and no quantum meruit count could be spelled out of complaint, and defendant did not consent to litigation of that issue, plaintiff was not entitled to recover anything for services rendered on that theory. Universal Co. v. Reel Mop Corp., 212M473, 4NW(2d)86. See Dun. Dig. 7677.

In a suit upon an express contract to purchase merchandise under an agreement that plaintiff was to have exclusive sales rights, and for an accounting of commissions on sales made by defendant, trial court was justified in finding no substantial performance on plaintiff's part and hence that it was not entitled to recover commissions or damages. Id. See Dun. Dig. 1781, 1793.

Where stockholder offered to sell his stock at $21.00 per share if purchaser would agree to buy a certain amount of stock from other persons, buyer made a sufficient tender of performance by tendering cash sufficient to cover stockholder's shares and by indicating a readiness and ability to purchase the other stock if holders thereof decided to sell. Haglin v. Ashley, 212M 445, 4NW(2d)109. See Dun. Dig. 1743, 8499, 8500, 8502.

There is a clear distinction between cases requiring performance of a covenant before contractor shall be entitled to receive payment and in which contractor agrees, as a part of contract, to pay for labor and material before he is to receive payment from his employer and those where nonperformance of an independent covenant merely raises a cause of action for its breach and does not constitute a bar to right of party making it to recover for the breach of the promise made to him. Farmers State Bank v. Burns, 212M455, 4NW (2d)330. Dissenting opinion 5NW(2d)589. See Dun. Dig. 9107c.

The duty under a contract is full and complete performance. Ylijarvi v. Brockphaler, 213M385, 7NW(2d) 314. See Dun. Dig. 1779.

Substantial performance means performance of all essentials necessary to full accomplishment of purposes for which thing contracted for has been constructed, except for some slight and unintentional defects which can be readily remedied or for which an allowance covering cost of remedying the same can be made from the contract price. Id. See Dun. Dig. 1781.

Whenever an entire sum is to be paid for the entire work, performance or service is a condition precedent; being one consideration and one debt, it cannot be divided. Id. See Dun. Dig. 1793.

Where evidence is in conflict, terms of a contract and question whether there was substantial performance of it are fact questions. Id. See Dun. Dig. 1796.

A promisor is not liable for delay in performance of contract for which the promisee is responsible. Adolphson v. Hixon, 215M252, 9NW(2d)719. See Dun. Dig. 1790.

Where parties reduce their mutual engagements to writing, each has the right to expect full and timely performance by the other, which implies such a thorough fulfilment of a duty as puts an end to obligations by leaving nothing more to be done. Schutt Realty Co. v. Mullowney, 215M340, 10NW(2d)273. See Dun. Dig. 1779.

22. ——Damages.

On breach of a contract injured party may sue upon the contract or use the breach as foundation for a tort action, but having recovered in action based upon contract cannot seek other recoveries in tort action. Cashman v. B., 206M301, 288NW732. See Dun. Dig. 1805a.

Invasion of a legal right imports a damage, but damages are susceptible of proof and he who claims them must prove them, and absent proof of actual loss only nominal damages are recoverable for contractual obligation. Geo. Benz & Sons v. H., 208M118, 293NW133. See Dun. Dig. 2561.

In action to enjoin corporation from competing with plaintiff in a certain district in violation of contract, wherein president of defendant admitted that territory protected by covenant had been invaded and goods sold in a certain amount and that six per cent thereof could fairly be taken as profit defendant made, a finding that plaintiff offered no competent evidence of damages cannot be sustained. Peterson v. Johnson Nut Co., 209M470, 297NW178. See Dun. Dig. 8436.

A builder who has in good faith substantially performed, though there are minor defects, may recover on contract agreed price less sum it will take to cure defects if they are of a character which may be remedied so that owner may have that for which he contracted. Service & Security v. St. Paul Federal Sav. & Loan Ass'n, 211M199, 300NW811. See Dun. Dig. 1850.

Where one party repudiates or breaches a substantial part of his contract, and other party rescinds and sues to recover in quasi contract value of his services, recovery is not limited to value of what he was to receive under contract, theory of recovery not being compensation, as in case of a suit for breach of contract, but restitution. Stark v. Magnuson, 212M167, 2NW(2d)814. See Dun. Dig. 2568a, 10381.

Where company engaged in sales promotions was given exclusive sale rights it was bound to set up an organization capable of attaining the objective contemplated in the contract before it could recover damages for breach of contract by other party which had not waived failure to substantially perform. Universal Co. v. Reel Mop Corp., 212M473, 4NW(2d)86. See Dun. Dig. 144.

Question whether mitigation of damages must always be pleaded and set up by defendant in an action for damages for breach of an employment contract where evidence relating to plaintiff's efforts to secure employment is first brought out by plaintiff on direct and developed by defendant on cross-examination was not determined. Bang v. International Sisal Co., 212M135, 4 NW(2d)113. See Dun. Dig. 2584.

Interest as damages was properly allowed from date of breach of employment contract. Id. See Dun. Dig. 2524, 5850.

Fees of attorneys cannot be recovered by plaintiff in any action on contract without a specific agreement to that effect or unless such fees are authorized by statute. U. S. Fidelity & Guaranty Co. v. Falk, 214M138, 7NW(2d) 398. See Dun. Dig. 2219, 2523.

A provision of a school gymnasium building contract requiring the contractor to remedy any defects due to faulty materials or workmanship observed within a year after date of substantial completion and to pay for any damage to other work resulting therefrom did not preclude district from asserting a claim for damages, for such faulty materials or workmanship, if it so elects, and this without first procuring architect's decision. Independent School Dist. No. 35 v. A. Hedenberg & Co., 214 M82, 7NW(2d)511. See Dun. Dig. 1805a.

If there is substantial performance and defects in building are of a character which can be remedied, measure of damages is such amount as will cure the defect, but if defects are such as to prevent a substantial performance, measure of damages is difference between market value of building constructed according to plans and its market value as actually constructed by contractor. Id. See Dun. Dig. 2565a.

In an action to recover damages for breach of an implied warranty of fitness for the purpose, insurance coverage of plaintiff, under which he has been partially paid for his loss, will not relieve the defendant of liability for his wrong. Donohue v. Acme Heating Sheet Metal & Roofing Co., 214M424, 8NW(2d)618. See Dun. Dig. 2533.

The term "liquidated damages" signifies the amount of damages which the parties to a contract stipulate and agree, when the contract is entered into, shall be paid in case of breach. Schutt Realty Co. v. Mullowney, 215M 340, 10NW(2d)273. See Dun. Dig. 2536.

A stipulation for liquidated damages is enforceable, at least in those cases where the damages which result from a breach of a contract are not fixed by law or are in their nature uncertain and where the amount stipulated does not manifestly exceed the injury which will be suffered in case of a breach of contract. Id. See Dun. Dig. 2537.

Stipulation for liquidated damages in case of failure to wreck a large building within a stipulated time, requiring payment of one thousand dollars per month, was valid. Id. See Dun. Dig. 2537.

To determine whether a stipulation for liquidated damages for breach of a contract is a valid agreement so as to bring it within the doctrine of cases upholding such contracts, court must go to the language of the contract itself and the facts and circumstances under which it was made. Id. See Dun. Dig. 2537.

The administration of the rule of avoidable consequences as affected by the degree of blameworthiness of the defendant. 27MinnLawRev483.

23. Agency.

Insurance agents, see §§3348 to 3360.

Record held not to support contention of undisclosed principal in lease. S. T. McKnight Co. v. Central Hanover Bank and Trust Co., (CCA8), 120F(2d)310.

Where, in order to effect a transfer of title from a husband alone to himself and wife as joint tenants, deeds were drawn through a conduit and deed by conduit of title was executed prior to deed from husband and wife to conduit but as a part of same transaction, evidence compelled a finding that deed from conduit to husband and wife as joint tenants was placed in hands of agent to conduit to be delivered after receipt of deed to latter from husband and wife, and that conduit's deed was effectual to convey title to them jointly. Baar v. Baar, 210M384, 298NW455. See Dun. Dig. 145.

Agency is a consensual relationship, and one cannot be agent of another except by his authority, and a donor depositing securities could not appoint depositary to be agent of beneficiaries. Larkin v. McCabe, 211M11, 299NW 649. See Dun. Dig. 141.

Delivery of gift to third party for benefit of donee is sufficient. Id. See Dun. Dig. 147.

Whether sale of land be made to a third person or to agent himself, agent is guilty of fraud where he fails to communicate to his principal fact that a more advantageous price can be procured than that at which sale is actually made, for reason that duty of loyalty imposes upon agent obligation to inform principal of all facts affecting his rights or interests. Doyen v. Bauer, 211M140, 300NW451. See Dun. Dig. 195, 205.

Agency arises when one person, the principal, manifests his consent to another, the agent, that latter should act on former's behalf. Rausch v. Aronson, 211M272, 1NW(2d)371. See Dun. Dig. 141.

When suit is brought against principal, it is not necessary to plead fact of agency or authority of agent. Id. See Dun. Dig. 239.

Contract between seller of goods and assignee of account, requiring seller to endorse over to assignee any checks made payable to seller by buyers constituted seller agent of assignee for purpose of accepting payments on assigned account, so that payments to seller discharged indebtedness of a buyer even though he had notice of assignment. Dworsky v. Unger Furniture Co., 212M244, 3NW(2d)393. See Dun. Dig. 161.

In a suit upon an express contract to purchase merchandise under an agreement that plaintiff was to have exclusive sales rights, and for an accounting of commissions on sales made by defendant, trial court was justified in finding no substantial performance on plaintiff's part and hence that it was not entitled to recover commissions or damages. Universal Co. v. Reel Mop. Corp., 212M473, 4NW(2d)86. See Dun. Dig. 144, 1781, 1793.

Fact that principal conducts his business through subordinates or agents does not relieve surety from liability in absence of an express provision to contrary. Trovatten v. Minea, 213M544, 7NW(2d)390, 144ALR263. See Dun. Dig. 147.

A person is not liable for negligence of a mere guest, absent any relationship of principal and agent, master and servant, partnership, or joint enterprise. American Farmers Mut. Auto Ins. Co. v. Riise, 214M6, 8NW(2d)18. See Dun. Dig. 212.

General rule is that where an application for insurance is made to an agent who represents several companies, no contract of insurance is engendered between insured and any particular company until such company is selected by the agent and designated by him as the one in which the insurance is to be written. Rommel v. New Brunswick Fire Ins. Co., 214M251, 8NW(2d)28. See Dun. Dig. 209.

All transactions between the principal and agent whereby the agent derives advantages beyond legitimate compensation for his services will be closely examined by courts of equity, and set aside if there be any ground to suppose that he has abused the confidence reposed in him. Bentson v. Ellenstein, 215M376, 10NW(2d)282. See Dun. Dig. 192.

An agent is bound to act with absolute good faith toward the principal in respect to every matter intrusted to his care and management. Id.

In accepting a gift from his principal, an agent is under an obligation to withhold no information in his possession respecting the subject of the gift, or the condition of the estate in his hands, which good faith requires to be disclosed, or that may reasonably influence the judgment of the principal in making the gift. Id. See Dun. Dig. 195.

Agency is a matter of contract, either by arrangement expressed in words or by conduct. Darian v. McGrath, 215M389, 10NW(2d)403. See Dun. Dig. 141.

24. ——Evidence.

See also notes under §9905½, note 9.

Successive purchases by an automobile finance company of paper from an automobile dealer do not require an inference that their relationship is that of principal and agent where the transactions between them show the relationship to be that of vendor and vendee, as affecting usury. Dunn v. M., 206M550, 289NW411. See Dun. Dig. 150.

Declarations of an official or agent of a corporation are inadmissible against corporation unless made within scope of authority of official or agent and while transacting business of corporation. Peterson v. Johnson Nut Co., 209M470, 297NW178. See Dun. Dig. 3418.

In action against an alleged agent to recover secret profit, plaintiff's testimony that he employed defendant as his agent upon stated terms and testimony of third person dealing with agent that latter made an explicit admission that he was so employed, supports a finding of such agency. Doyen v. Bauer, 211M140, 300NW451. See Dun. Dig. 149.

Principal's testimony to effect that he employed agent is primary and original evidence of the fact of agency. Id.

Evidence held to sustain finding that one purchasing eggs for a wholesale produce dealer acted as latter's agent. Rausch v. Aronson, 211M272, 1NW(2d)371. See Dun. Dig. 149.

A telephone conversation between agent and principal heard by plaintiff over an extension was properly admissible. Katzmarek v. Weber Brokerage Co., 214M580, 8NW(2d)822. See Dun. Dig. 149.

Where alleged agent of defendant was evasive in his testimony about facts of agency, it was within discretion of court to permit plaintiff to examine alleged agent with aid of a letter written by him with reference to the facts establishing the agency, the witness finally testifying that the facts recited in the letter were true. Id. See Dun. Dig. 151.

25. ——Scope and extent of authority.

Favorable assurance of clerk in post office as to genuineness of postal orders, in response to bank's inquiry when orders were presented to it for payment, did not prejudice government's rights. U. S. v. Northwestern Bank & Trust Co., (DC-Minn), 35FSupp484.

Principal is responsible for representations and warranties made by salesman in connection with lease of machine. Jaeger Mach. Co. v. M., 206M468, 289NW51. See Dun. Dig. 152.

If an agent exceeds his actual authority and person dealing with him has notice of that fact, principal is not bound. Rein v. New York Life Ins. Co., 210M435, 299NW 385. See Dun. Dig. 211.

Authority of an agent to sell or procure a purchaser comprehends transactions only with third persons, and agent may not become a purchaser without principal's consent. Doyen v. Bauer, 211M140, 300NW451. See Dun. Dig. 200.

An agent exercising his authority in furtherance of principal's interests, and making a good faith mistake as to scope of his authority, may bind principal for consequences. Ballman v. Brinker, 211M322, 1NW(2d)365. See Dun. Dig. 211.

Authority is to be determined not by reference to principal's mental reservations, but with reference to his manifestations. Id. See Dun. Dig. 149.

Where authority is proved circumstantially, all inferences of authority must be drawn exclusively from facts for which principal is responsible. Rausch v. Aronson, 211M272, 1NW(2d)371. See Dun. Dig. 150.

Evidence held to sustain finding that plaintiff had no notice or knowledge that agent was acting contrary to instructions or in fraud of his principal's interests. Id. See Dun. Dig. 211.

Authority may be proved circumstantially by showing a course of dealing between alleged principal and agent. Id. See Dun. Dig. 149.

Where one was defrauded and paid money to a person who happened to be general agent of an insurance company, fraud being independent of employment as agent, there existed a constructive trust in favor of defrauded person, but he had no right of action against insurance company to whom agent paid the money to cover up embezzlement of premiums, company having no knowledge of the embezzlement or fraud practiced by agent. Blumberg v. Taggart, 213M39, 5NW(2d)388. See Dun. Dig. 214.

A principal is bound by acts of his agent to extent of authority, expressed or implied, with which he has clothed him. Blumberg v. Taggart, 213M39, 5NW(2d)388. See Dun. Dig. 209.

When an agent is engaged in perpetrating an independent fraud, he is not acting within scope of his employment as affecting liability of principal. Blumberg v. Taggart, 213M39, 5NW(2d)388. See Dun. Dig. 211.

Subcontractor doing plastering under contract with general contractor was not entitled to recover from general contractor for extra work required by agent of owner of the building, such agent having no authorization from general contractor to change its contractual relationship. Warner v. A. G. Anderson, Inc., 213M376, 7NW(2d)7. See Dun. Dig. 165.

Implied authority is the authority which the principal intended his agent to possess, and includes all such things as are directly connected with and essential to the business in hand. Rommel v. New Brunswick Fire Ins. Co., 214M251, 8NW(2d)28. See Dun. Dig. 153.

Apparent authority is not actual authority, while implied authority is actual authority circumstantially proved. Id. See Dun. Dig. 153, 156.

It is unimportant to determine whether an agent's authority is apparent or implied, since in either case authority carries with it agent's power to bind his principal as to such things as are directly connected with and essential to business in hand. Id. See Dun. Dig. 153, 156.

Where an oral contract for present fire insurance was made by one authorized to act for insurer and application was later rejected by company, coverage afforded by oral contract remained in effect until applicant was notified so that he might have reasonable opportunity to get insurance elsewhere. Id. See Dun. Dig. 156.

General rule is that an insurance company which has appointed an agent with general authority to act in its behalf throughout a considerable territory is charged with knowledge of reasonable needs of such agent to appoint assistants or subagents to solicit insurance within the assigned area, and where such assistant or subagent acts within scope of his appointment, his acts bind company to same extent as if his appointment came directly from the company. Id. See Dun. Dig. 4704.

Whether or not an endorsement on a check is sufficient if made by authority of payee, it was no defense to an action against bank cashing check, where evidence did not disclose any such authority from payee, and written endorsement of payee was also forged upon the check by employee of payee who received proceeds from bank. Soderlin v. Marquette Nat. Bank, 214M408, 8NW(2d)331. See Dun. Dig. 161.

26. ——Notice to agent.

Court did not err in submitting to jury salesman's authority to accept notice of termination of lease and disposition of machine let. Jaeger Mach. Co. v. M., 206M 468, 289NW51. See Dun. Dig. 152.

Knowledge of soliciting agent that there had been prior consultation by applicant with doctors could not be charged to insurer where it was acquired outside of scope of his duties. Lawien v. Metropolitan Life Ins. Co., 211M211, 300NW823. See Dun. Dig. 215, 4709.

An agent's knowledge will not be imputed to his principal when he is engaged in an independent fraud, since it cannot be supposed that he will inform his principal of it. Blumberg v. Taggart, 213M39, 5NW(2d)388. See Dun. Dig. 215.

27. ——Ratification and waiver.

Ratification is only effectual when unauthorized act was done by a person professedly acting as agent of person or body sought to be charged as principal. City of Minneapolis v. C., 206M371, 288NW706. See Dun. Dig. 179(37).

In action for damages for fraud in sale of land, plaintiff is entitled to inquire on question of ratification whether defendant ever offered to return purchase price after learning agents made misrepresentations, but counsel should so phrase question that it will not convey that there was a legal duty save to avoid a ratification under the rule that a principal ratified by asserting a right to the fruits of the agents' act when the action was brought. Rother v. H., 208M405, 294NW644. See Dun. Dig. 189.

Principal by electing to recover secret profits which agent derived from sale of land ratified and affirmed contract of exchange entered into between principal and agent, but did not thereby ratify and affirm fraud by which contract of exchange was obtained, or tortious breach of duty owing to him under entirely separate and distinct contract of agency. Doyen v. Bauer, 211M 140, 300NW451. See Dun. Dig. 200.

In action to reform a fire policy by changing name of insured from husband to wife, evidence did not compel a finding that wife ratified husband's alleged fraudulent conduct. Pellicano v. Hartford Fire Ins. Co., 211M314, 1NW(2d)354. See Dun. Dig. 190.

28. ——Liability of agent.

Equity will impose a constructive trust on land acquired by defendant as result of information received at a time when he was, for all practical purposes, an agent for plaintiff and under an obligation, by reason of his employment, to report such information, even though tract was of a type only occasionally purchased by his employer and notwithstanding absence of a finding that plaintiff would have purchased land had he known of it. Whitten v. W., 206M423, 289NW509. See Dun. Dig. 194, 9917.

Principal must establish by a fair preponderance of evidence that agent has actually received particular thing for which he is sought to be held. Raymond Farmers Elevator Co. v. A., 207M117, 290NW231. See Dun. Dig. 206.

In action by elevator company against manager for an accounting, evidence held insufficient to sustain finding that manager converted certain items of grain, in view of defective scales. Id. See Dun. Dig. 206.

An agent cannot deal with his principal as an adverse party in a transaction connected with agency whether damage results or not, and manager of an elevator could not engage in purchasing grain from his principal and in trucking it to other places for sale, notwithstanding that principal did not engage in trucking grain to sell, and manager was liable for gross profit made and could not deduct expense of operating truck owned by him. Id. See Dun. Dig. 194.

Agent authorized to sell land and to purchase land for his principal may purchase from principal or sell to principal where latter knowingly consents, but agent seeking to change relation from principal and agent to that of vendor and vendee is, prior thereto, under duty of bringing fact of intended change to attention of principal in such an unmistakable manner as to avoid all chance of misunderstanding, and disclosure to be effective must lay bare truth, without ambiguity or reservation, in all its stark significance. Doyen v. Bauer, 211M140, 300NW451. See Dun. Dig. 192.

An agent is bound to act solely for benefit of principal in all matters connected with agency, and is not permitted to put himself in an antagonistic relation to his principal and is required to exercise utmost good faith toward his principal in all their dealings. Id. See Dun. Dig. 193.

All profits made in course of agency belong to principal whether they are fruits of performance or violation of agent's duty. Id. See Dun. Dig. 194.

As a matter of good faith, it is duty of an agent to communicate to his principal all facts of which he has knowledge which might affect principal's rights or interests. Id. See Dun. Dig. 195.

An agent is guilty of fraud where he induces his principal to sign an instrument transferring title to property to himself by a false representation relied on by principal that instrument transfers title to an intended purchaser, notwithstanding fact that principal had an opportunity to read instrument before signing it and to determine fact to be otherwise than as represented. Id. See Dun. Dig. 195, 200.

Where agent to sell land has obtained principal's property by fraud, principal has an election of remedies to have transfer set aside or to recover damages, or may affirm and ratify transaction and recover any profits made by agent by sale where agent has transferred property to a third party. Id. See Dun. Dig. 205.

28½. Payment.

When payment of money to a village is made under protest, with possibility of fine or imprisonment if it is not made and in order to protect payor's right to proceed with lawful business, he is not a volunteer in such sense as to prevent recovery. Moore v. V., 207M75, 289 NW837. See Dun. Dig. 7462.

Whether a transfer of money or thing will operate as payment of a debt is determined by intention of parties, and it must be received as well as paid in satisfaction of the debt. State v. Tri-State Tel. & Tel. Co., 209M86, 295 NW511. See Dun. Dig. 7438.

Absent a provision in note or mortgage for application thereof, proceeds of a foreclosure sale are treated as an involuntary payment subject to application by court according to principles of equity and justice, and in absence of controlling equity compelling a different application, such proceeds should be applied first on indebtedness for which personal liability is barred by statute of limitations and then to the balance. Massachusetts Mut. Life Ins. Co. v. Paust, 212M56, 2NW(2d)410, 139ALR473. See Dun. Dig. 6351, 7458.

Where parties had not provided for application of payments, court will make application according to principles of equity and justice. Id. See Dun. Dig. 7458.

Contract between seller of goods and assignee of account, requiring seller to endorse over to assignee any checks made payable to seller by buyers constituted seller agent of assignee for purpose of accepting payments on assigned account, so that payments to seller discharged indebtedness of a buyer even though he had notice of assignment. Dworsky v. Unger Furniture Co., 212M244, 3NW(2d)393. See Dun. Dig. 7439a.

Proof of payment under a general denial in actions on account. 27MinnLawRev318.

29. Release.

If circumstances are such that, despite wording of release construed as covering unknown injuries, parties cannot be said to have contracted with reference to unknown injuries, and a material, unknown injury subsequently develops, mutual mistake exists and parol evidence may be introduced to show it. Larson v. Sventek, 211M385, 1NW(2d)608. See Dun. Dig. 8375.

Where a release is given for personal injuries and subsequently a material unknown injury develops, release is incontestable only if parties expressly and intentionally settled for unknown injuries. Id.

A release may not be avoided on ground of unexpected consequences of known injuries. Id.

Whether release for personal injuries was executed with both parties in ignorance of injuries to head and brain held for jury. Id.

Where doctor's report on which parties acted at time of execution of a release did not disclose any head or brain injuries, a finding might be sustained that release was executed in mutual mistake and in ignorance by both parties of any injury to head or brain. Id.

The only means which a collision insurance company had of recovery on its subrogated right was to have its claim included in insured's cause of action against wrongdoer where there were both personal injuries and property damage, and as against wrongdoer, collision insurer could not be in any better position than the insured, since the cause of action could not be split by the insurer any more than it could by the insured as against wrongdoer. Hayward v. State Farm Mut. Automobile Ins. Co., 212M500, 4NW(2d)316, 140ALR1236. See Dun. Dig. 4875o.

Where plaintiffs, grantors of land transferred, covenanted with their grantors to assume and to pay latters' own personal indebtedness for balances for certain improvements thereon, sold the land under executory contract of sale binding the vendees to assume and pay the balances, and then conveyed land to defendants "subject" to such balances and assigned to defendants their interest as vendors under the contract for deed without an agreement on part of latter to assume and pay the balances, defendants are not personally liable under the deed or the assignment of contract, and plaintiff's covenants to pay balances did not run with land to that effect, and fact that balances were part of consideration for deed and for assignment of contract for deed was immaterial, and a release, as between them, of the vendees under the contract for deed by the defendants, as assignees thereof, from liability to pay such balances, which the vendees had agreed to pay under the contract, did not render defendants liable to plaintiffs, as vendors, in quasi contract for payment of the same. Pelser v. Gingold, 214M281, 8NW(2d)36. See Dun. Dig. 6289, 8371.

Settlement with and release of negligent motorist causing wrongful death did not prevent subsequent suit and recovery of penalty from a liquor dealer and his surety, right of action under death statute and liability created under liquor license statute being wholly unrelated in scope and purpose. Philips v. Aretz, 215M325, 10NW(2d) 226. See Dun. Dig. 8371.

In action to establish ownership of a reserve commission account, evidence held to support finding of fraud on the part of the employer in obtaining a release from the plaintiff employee. Ickler v. Hilger, 215M82, 10NW (2d)277. See Dun. Dig. 8374.

30. Accord and satisfaction and compromise and settlement.

National Sur. Corp. v. Wunderlich, (CCA8), 111F(2d) 622, rev'g on other grounds 24FSupp640.

Where there are bona fide disputes or doubts as to the obligations between parties, a settlement by the parties of those disputes constitutes sufficient consideration for a compromise agreement. Warner & Swasey Co. v. Rusterholz, (DC-Minn), 41FSupp498. See Dun. Dig. 1520, 1749a, 2037, 2040a, 2112a, 3560, 5653, 7480, 9888a, 10258.

Giving of a note and its subsequent payment indicates a settlement of whatever claims there may have been between the parties. Sickmann's Estate, 207M65, 289NW 832. See Dun. Dig. 1525.

In action for damages for breach of contract to give certain sales rights wherein a specific contract was alleged and sought to be established it was prejudicial error to permit proof of a subsequent agreement which in nature closely parallels an offer to settle. Foster v. B., 207M286, 291NW505. See Dun. Dig. 3425.

Pledgee of a chose in action, under extreme circumstances indicating that loss to all concerned would have resulted if it had not accepted exchange of securities provided for by reorganization in bankruptcy of debtor, held properly to have accepted exchange as a compromise where procedure resulting in exchange was participated in by representatives of pledgor's estate without objection either to procedure or result. First & American Nat. Bank of Duluth v. W., 207M537, 292NW770. See Dun. Dig. 1520.

An injured party who has accepted satisfaction, from whatever source it may come, cannot recover again for same injury. Driessen v. M., 208M356, 294NW206. See Dun. Dig. 8371.

Compromise of a disputed claim is supported by valuable consideration. Connors v. U., 209M300, 296NW21. See Dun. Dig. 1520.

An agreement to convey to heir a part of property devised in consideration of an agreement not to contest will was supported by a consideration where will was made after testatrix was treated for insanity and before order was made restoring her to competency and a few months after restoration she hung herself. Thayer v. Knight, 210M171, 297NW625. See Dun. Dig. 1520, 10243k.

If final payment on automobile was made pursuant to original agreement, it did not amount to an adjustment of differences barring action for damages for misrepresentation as to condition of car. Kohanik v. Beckman, 212M11, 2NW(2d)125. See Dun. Dig. 1515.

Assuming that in case a compromise or an offer of compromise is based upon a contract, express or implied, that negotiations are "without prejudice", a plaintiff in a three-car collision case is not entitled to claim benefits of any contract between his witness and defendant's relating to contract privilege of having testimony of the compromise or offer of compromise excluded, since plaintiff was not a party to the contract and the contract was not made for her benefit, and plaintiff can only object on basis of irrelevancy of testimony of a compromise. Esser v. Brophey, 212M194, 3NW(2d)3. See Dun. Dig. 1526, 1733, 3421, 3425.

Exclusion of testimony of a compromise or an offer of compromise cannot rest on theory of privilege where defendant in a three-car automobile accident is seeking to show on cross-examination of witness for plaintiff that witness settled an action brought against him by defendant for damages arising out of the same accident, plaintiff not being a party to the compromise and not being entitled to assert the privilege, and objection by plaintiff must rest on test of relevancy. Id. See Dun. Dig. 1526, 10316.

Testimony that a witness for plaintiff in an automobile accident case settled an action brought against him by the defendant for damages arising out of same accident is irrelevant to show an admission of liability by the witness or the witness's hostility to defendant. Id. See Dun. Dig. 1526, 10350, 10352.

The law favors the settlement of disputed claims without litigation. Id. See Dun. Dig. 1519.

An unaccepted offer to compromise is inadmissible in a subsequent action against party making it. Id. See Dun. Dig. 1526, 3425.

Where there was an accord with respect to amount due on past-due note, reducing the amount of the debt shown by the note and providing for new terms of payment and adjustment of claims of the parties as to credits, makers who fail to comply with the terms of their accord cannot now be heard to deny payee's right to enforce the notes not met by the agreement because they themselves breached its provisions. Minnesota Casket Co. v. Swanson, 215M150, 9NW(2d)324. See Dun. Dig. 40.

31. Gifts.

Legal elements of a gift are delivery, intention to make a gift on part of donor, and absolute disposition by him of thing which he intends to give another. Owens v. O., 207M489, 292NW89. See Dun. Dig. 4020.

Where a chattel is delivered to a party for his gratuitous use with authority to consume a part of it by such use and party is to return part which is not consumed, there is a gift of part which is consumed and a bailment for gratuitous use of bailee of part which is to be returned. Ruth v. H., 209M248, 296NW136. See Dun. Dig. 4020.

A donor of a chattel owes donee duty of warning him of only those defects of which donor is aware and which might imperil donee by intended use of chattel. Id.

Delivery of negotiable bonds to a depositary for named beneficiaries in execution of intention to make gifts without designation of capacity in which depositary receives the same is a valid delivery, since depositary takes as a trustee for beneficiaries. Larkin v. McCabe, 211M11, 299NW649. See Dun. Dig. 4026.

Where gifts have been executed so as to pass title to donees, a return of property to donor for purposes not inconsistent with the continued ownership of donees does not reinvest donor with title. Id. See Dun. Dig. 4023.

A completed gift cannot be revoked by the donor. Id.

Where a mentally competent donor delivers property to donee with intention to make an absolute disposition and donee accepts same, there is a valid and complete gift. Id.

A direction to deliver at death of donor definitely fixes time of delivery. Id. See Dun. Dig. 4026.

A present gift reserving to donor income for life is a valid gift inter vivos although enjoyment is postponed until donor's death. Id. See Dun. Dig. 4033.

Transfer of money in return for a note with understanding that note need not be paid in absence of demand by payee during her lifetime could not constitute a gift inter vivos because money was given on condition and transfer was not absolute and complete, and could not constitute a gift causa mortis where there was no showing that money was given in contemplation of death. Skogberg v. Hjelm, 211M392, 1NW(2d)599. See Dun. Dig. 4020, 4040.

An equitable conversion is a constructive, not an actual, change of realty into personalty or personalty into realty, and is a judicial device for giving effect to the intention of testators, donors, and perhaps others, and doctrine is based on maxim that equity regards that as done which ought to have been done. Hencke's Estate, 212M407, 4NW(2d)353. See Dun. Dig. 3132.

The mere existence of a confidential relationship does not, as a matter of law, operate to bar the right of a beneficiary to receive a gift. If the donor was at the time of sound mind and clearly understood the transaction and exercised a free will in the act, being under no restraint or undue influence, such gift will be supported. Bentson v. Ellenstein, 215M376, 10NW(2d)282. See Dun. Dig. 4035.

The evidentiary inference of undue influence in connection with the making of a gift, arising from confidential relations, does not shift the burden of proof. Id. See Dun. Dig. 4038.

32. Suretyship.

For cases respecting fidelity bonds, see §3710.

Equity of a bank which finances a contractor in street improvement under an agreement whereby it is to make advances and contractor is to pay to it money received from the contract is superior, in respect to a balance remaining in hands of municipality upon completion of contract, to that of surety on contractor's performance bond, although contractor agreed in his application for the bond that upon default any sum remaining in hands of municipality, upon completion of the contract, should be considered as assigned to surety. Farmers State Bank v. Burns, 212M455, 4NW(2d)330. Dissenting opinion 5NW (2d)589. See Dun. Dig. 9107c.

Generally, those who write surety bonds are regarded under our decisions as underwriters of contracts of insurance, and, being experts in business of appraising risks, they are not favored by the law. Id. See Dun. Dig. 9107a, 9107c.

Liability of a surety for one or more principals does not extend to acts performed by such principals jointly with others. Trovatten v. Minea, 213M544, 7NW(2d)390, 144ALR263. See Dun. Dig. 9078.

In action by surety on executor's bond against principal to recover value of attorneys' fees expended by surety in appearing in opposition to a petition by an heir of the estate to set aside final account of executor, latter refusing to defend for reason that proceeding was allegedly one merely to reopen estate, and, if granted, executor could then defend, and could appeal to the district court for a trial de novo if unsuccessful, and answer denying necessity of the surety, or good faith of the surety, in incurring claimed counsel fees and reasonableness of amount actually expended by it, there were issues which could not be decided as a matter of law on the pleading. U. S. Fidelity & Guaranty Co. v. Falk, 214M 138, 7NW(2d)398. See Dun. Dig. 9108.

General right of indemnity of a surety allows recovery of fees and expenses incurred only in defending a claim made by some third person against principal, and does not permit recovery of fees and expenses incurred in action by surety against principal to recover the expenses of defending an action against principal by third person, and right to expenses of suit against principal by surety must be based upon an express contract. Id.

Where surety on bond of executor brings action against principal to recover expenses of successful defense of a proceeding against the principal and the surety, surety is entitled to recover loss or damage, including attorneys' fees, on proof of its good faith and reasonableness of fees charged and paid. Id.

In the absence of any stipulation requiring such sale, it is entirely optional with surety with collateral to sell it, to hold it, or to abandon it altogether and look to other assets of his principal in payment of the debt secured. Faunce v. Schueller, 214M412, 8NW(2d)523. See Dun. Dig. 7747, 7749, 9089.

In the absence of stipulation requiring sale, a surety cannot be held liable for depreciation in the value of property held as collateral occurring after maturity of the debt. Id. See Dun. Dig. 7747, 7749, 9089.

A surety on a guardian's bond who holds a second mortgage as collateral security for the surety's liability on such bond owes his principal the duty of exercising ordinary care for the preservation of such security, provided it is in his possession and control, but this does not impose upon him the obligation of advancing substantial personal funds to prevent or to re-

deem from the foreclosure of first mortgage. Id. See Dun. Dig. 9089.

Guardian has burden of establishing that his loss was occasioned by the negligence or breach of duty of his surety. Id.

A surety is not compelled to advance expenses or payments on prior liens in order to preserve his security. Id. See Dun. Dig. 9089.

In many instances a contract of guaranty so nearly resembles a contract of suretyship that the authorities, in determining rights and liabilities of the parties, apply the same rules of law to both relations. Schmidt v. McKenzie, 9NW(2d)1. See Dun. Dig. 9077.

The distinction between the undertaking of a surety and that of a guarantor is that the surety's obligation is a primary one, while that of the guarantor is collateral and secondary. Id.

Where one contracting to wreck a large building was required to furnish a corporate surety bond to make certain of timely performance, surety is liable for "liquidated damages" provided for in wrecking contract for delay in completing the work. Schutt Realty Co. v. Mullowney, 215M340, 10NW(2d)273. See Dun. Dig. 9078.

Surety bond executed by seller in contract of sale, executed simultaneously or shortly after contract of sale, was not an amendment of the contract of sale, relinquishing right of seller to have goods rejected before installation in electrical system granted under the contract. De Witt v. Itasca-Mantrap Co-op. Elecrtical Ass'n, 215M551, 10NW(2d)715. See Dun. Dig. 8582a, 9079.

34. ——Discharge.

Fraud of principal in a bond inducing surety to execute it is not a defense in action by obligee against surety. Neefus v. N., 209M495, 296NW579. See Dun. Dig. 9098.

A surety for a partner is relieved from liability if a change is made in the membership of the partnership. Trovatten v. Minea, 213M544, 7NW(2d)390, 144ALR263. See Dun. Dig. 9081a, 9093.

A surety is not relieved from liability by the adding of greater security to the principal's obligation without the surety's knowledge or consent. Id. See Dun. Dig. 9107.

Fact that principal conducts his business through subordinates or agents does not relieve surety from liability in absence of an express provision to contrary. Id. See Dun. Dig. 9107.

35. ——Actions.

An owner who defended a previous action arising by reason of his contractor's default under a construction contract may recover on contractor's surety bond amount of attorney's fees incurred regardless of whether such fees have been paid. First Church of Christ Scientist v. Lawrence, 210M37, 297NW99. See Dun. Dig. 6093.

35½. Guaranty.

Contention that written guaranty executed to trust company prior to its consolidation with plaintiff bank was not relied upon by plaintiff in making loans to defendant subsequent to consolidation, held frivolous, where guaranty was a continuing one and was in possession of plaintiff at all times subsequent to consolidation. Chase Nat. Bank v. B., (DC-Minn), 32FSupp230.

Damage caused by negligence of railroad to a pile driver of a sub-contractor working on its right of way held within terms of bond of general contractor indemnifying railroad against damage to property "arising in any manner out of or in any manner connected with the said work". Northern Pac. Ry. Co. v. T., 206M193, 288 NW226. See Dun. Dig. 4337.

A contract to enter into a future contract of guaranty is binding like any other contract to enter into a particular contract in the future, and upon breach of a contract to guarantee a debt, party entitled to guaranty may recover amount of debt remaining past due and unpaid. Holbert v. Wermerskirchen, 210M119, 297NW327. See Dun. Dig. 1749.

A guaranty is absolute and one of payment unless it is by its terms made conditional. Id. See Dun. Dig. 4076.

A guaranty of collection is conditional and binds guarantor to pay upon condition that guarantee or creditor has prosecuted debtor without success. Id. See Dun. Dig. 4077.

A foreign corporation which maintains an office in Minnesota, engages in a substantial wholesale business here through an agent employed on a commission basis, and otherwise engages in business activities here, is doing a local business within the state, and cannot maintain an action upon a guaranty agreement executed in the state without having obtained a certificate of authority to do business in the state. Cohn-Hall-Marx Co. v. Feinberg, 214M584, 8NW(2d)825. See Dun. Dig. 4894.

The debtor is not a party to the guaranty, and the guarantor is not a party to the principal obligation, but the undertaking of the former is independent of the promise of the latter, and the responsibilities which are imposed by the contract of guaranty differ from those which are created by the contract to which the guaranty is collateral. Schmidt v. McKenzie, 215M1, 9NW(2d)1. See Dun. Dig. 4068.

A guaranty is a collateral contract to answer for the payment of a debt or the performance of a duty in case of default of another who is primarily liable to pay the debt or perform the duty. Id.

The distinction between the undertaking of a surety and that of a guarantor is that the surety's obligation is a primary one, while that of the guarantor is collateral and secondary. Id. See Dun. Dig. 4069.

In many instances a contract of guaranty so nearly resembles a contract of suretyship that the authorities, in determining rights and liabilities of the parties, apply the same rules of law to both relations. Id. See Dun. Dig. 4069.

Where plaintiff loaned money to a brewing company and obtained an exclusive agency for sale of beer, under agreement that note evidencing loan should be paid by deducting half of the purchase price from each shipment of beer, a guarantor of payment of note "according to terms of contract" was released from liability where plaintiff stipulated with brewing company that it could not furnish and supply beer on basis set out in the contract, in the absence of guarantor's consent to the change of the contract or of timely notice to him of brewing company's refusal to perform. Id. See Dun. Dig. 4085.

A guarantor has the right to insist that he never agreed to stand good for a new or changed contract, and suretyship cannot be imposed upon him without his express consent to be so bound. Id. See Dun. Dig. 4085.

A guarantor has the right to prescribe the exact terms upon which he will enter into the obligation and to insist on his discharge if those terms are not observed. Id. See Dun. Dig. 4085.

35¾. Indemnity.

Absent attempted escape from absolute duty to public or third person, a party may, without violation of public policy, contract for indemnity against damage resulting from his own negligence. Northern Pac. Ry. Co. v. T., 206M193, 288NW226. See Dun. Dig. 1872, 4334.

Indemnity contract should be construed fairly to accomplish its purpose, rather than being subjected to an arbitrary or strict interpretation. Id. See Dun. Dig. 4335.

An owner who defended a previous action arising by reason of his contractor's default under a construction contract may recover on contractor's surety bond amount of attorney's fees incurred regardless of whether such fees have been paid. First Church of Christ Scientist v. Lawrence, 210M37, 297NW99. See Dun. Dig. 9078.

An agreement by a vendee to assume an existing mortgage on property sold without express agreement that he also agrees to pay the same is one to pay the mortgage debt, and not one of indemnity. Kirk v. Welch, 212M300, 3NW(2d)426. See Dun. Dig. 6294.

Subrogation is not dependent upon contract, privity, or strict suretyship, and one suffering personal injuries and damage to his car in a collision subrogated a part of his cause to collision insurance company when he collected his collision insurance, whether or not he signed a subrogation receipt knowing what it was. Hayward v. State Farm Mut. Automobile Ins. Co., 212M500, 4NW(2d)316, 140ALR1236. See Dun. Dig. 4875o.

If surety on bond of an executor necessarily employed attorneys in good faith to appear in opposition to a petition by an heir of the estate to set aside final account and to account for proceeds of checks alleged to have been fraudulently converted, and later compromised claim of attorneys for services, surety was entitled to recover amount actually paid from principal, provided amount was such as an ordinarily prudent person, in the conduct of his own business, would have paid to settle such attorney's claim, and jury should not determine question of reasonable attorneys' fees as a wholly independent question. U. S. Fidelity & Guaranty Co. v. Falk, 214M138, 7NW(2d)398. See Dun. Dig. 4337.

Agreement in application for executor's bond providing for indemnification for counsel fees "by reason or in consequence of its having executed said bond" does not entitle surety to recovery of attorney's fees incurred in action against principal to recover expenses of a prior suit by third person against principal. Id.

Where surety on bond of executor brings action against principal to recover expenses of successful defense of a proceeding against the principals and the surety, surety is entitled to recover loss or damage, including attorneys' fees, on proof of its good faith and reasonableness of fees charged and paid. Id.

A third person, although he may have an interest in subject matter of indemnity agreement, and a right of action against the indemnitee, not being a party to the indemnity contract, is not entitled to sue thereon. Fiellman v. Weller, 213M457, 7NW(2d)621. See Dun. Dig. 4344.

A party injured by negligence would not have a right to join indemnitor of negligent persons as a party defendant in his action for damages. Id.

36. Estoppel.

United States could not be estopped from bringing an action to enforce Fair Labor Standards Act [29:201 et seq] because of the mistakes of its agents. Fleming v. Miller, (DC-Minn), 47FSupp1004. See Dun. Dig. 3211.

There can be no estoppel without a deceptive assurance upon faith of which one claiming estoppel has acted, to his detriment if estoppel is not allowed. First & American Nat. Bank of Duluth v. W., 207M537, 292NW 770. See Dun. Dig. 3187.

A promise relating to intended abandonment of an existing right which influences the promisee to act to his prejudice may be basis of an estoppel, where substantial injustice will result unless promise is enforced, although there is no consideration for the promise. Thom v. T., 208M461, 294NW461. See Dun. Dig. 3188.

Where estoppel is based on a party's silence, there must be not only silence, but a duty to speak under circumstances of the case, and ordinarily mere silence will not work an estoppel where a party's right appears

of record. Conner v. C., 208M502, 294NW650. See Dun. Dig. 3209(80).

A party cannot claim an estoppel unless truth was unknown to him at time he acted. Id. See Dun. Dig. 3185.

Estoppel is based on proposition that party estopped is at fault, and estoppel by conduct might more appropriately be called estoppel by misconduct. Id. See Dun. Dig. 3186.

To create an estoppel, conduct of the party need not consist of affirmative acts or words. It may consist of silence or a negative omission to act when it was his duty to speak or act. It is not necessary that fact must be actually known to a party estopped, but it is enough if circumstances are such that a knowledge of the truth is necessarily imputed to him. It is not necessary that conduct be done with a fraudulent intention to deceive, or with an actual intention that such conduct will be acted upon by the other party, it being enough that conduct was done under such circumstances that he should have known that it was both natural and probable that it would be so acted upon. Froslee v. Sonju, 209 M522, 297NW1. See Dun. Dig. 3187.

There can be no estoppel unless party sought to be estopped has full knowledge of the facts at time of representation, concealment or other conduct claimed to give rise to an estoppel, or was guilty of culpable negligence in not knowing them. Id. See Dun. Dig. 3193.

There can be no estoppel as to facts equally known to both parties or as to facts which party invoking estoppel ought, in exercise of reasonable prudence, to know, and he cannot claim ignorance when law charges him with knowledge. Id. See Dun. Dig. 3189.

Estoppel cannot be invoked by a party who knew the facts or was negligent in not knowing them. Id. See Dun. Dig. 3189.

No estoppel arises where conduct of the party sought to be estopped is due to ignorance founded upon an innocent mistake. Id. See Dun. Dig. 3190.

One invoking equitable estoppel or estoppel in pais must show a lack of knowledge on its part of truth of facts in question; reliance upon conduct of party against whom estoppel is invoked; and action based thereon of such character as to change position for worse of party invoking estoppel. Union Public Service Co. v. Village of Minneota, 212M92, 2NW(2d)555. See Dun. Dig. 3191.

It was conceded that a village or municipality is subject to equitable estoppel the same as an individual. Id. See Dun. Dig. 6719.

An equitable estoppel is the effect of voluntary conduct whereby a party is precluded from asserting rights of property, contract or remedy which he might otherwise have as against a person, who in good faith has relied on such conduct and has been led thereby to change his position for the worse with respect to his rights concerning the matter to which such conduct relates. Albachten v. Bradley, 212M359, 3NW(2d)783. See Dun. Dig. 3185.

An estoppel may be predicated on a promise of future action relating to the intended abandonment of existing rights, and need not be based on a misrepresentation of a past or present fact. Id. See Dun. Dig. 3187(23), 3202.

The basis of estoppel is fraud. Id. See Dun. Dig. 3186.

Because it protects the blameless and is a powerful means for accomplishment of justice, equitable estoppel is a favorite of the law. Id. See Dun. Dig. 3186.

An estoppel may be based on an oral promise of the purchaser at a mortgage foreclosure or judicial sale that he will not insist on the statutoryy period of redemption. Id. See Dun. Dig. 3209.

A milk company with exclusive right to use "cream top" bottles and notifying competitors thereof did not subject its bottles to general custom which had prevailed in city in regard to picking up straight-necked bottles, and it was entitled to possession of those bottles wherever it found them, and other milk companies picking up such bottles could be required to deliver them in replevin and without exchange of straight-necked bottles therefor. Albert Lea Co-Op. Ass'n v. Albert Lea Milk Co., 213M225, 6NW(2d)243. See Dun. Dig. 7422.

A village amending its franchise to a service corporation operating sewer and water facilities at the insistence of one about to make a loan to the service corporation for improvements and extension of systems, so as to show that any title which village might acquire to the property under the provisions of the franchise would be subject to the mortgage, was barred by laches and estoppel from questioning the legality of the mortgage. Country Club District Service Co. v. Village of Edina, 214M26, 8NW(2d)321. See Dun. Dig. 3207, 3211, 6710, 6719.

The element of reliance is necessary in estoppel. Bloomquist v. Thomas, 215M35, 9NW(2d)337. See Dun. Dig. 3191.

An estoppel against an estoppel sets the matter at large, one estoppel neutralizes tthe other. Hampshire Arms Hotel Co. v. St. Paul Mercury & Indem. Co., 215M 60, 9NW(2d)413. See Dun. Dig. 3184, 3213.

General rule is that the obligors in an appeal bond are estopped to contradict a recital therein of the existence of the judgment appealed from, but this is not true where appellee promptly moves for dismissal of the appeal on the ground that no judgment has been entered, the dismissal of the appeal being in effect an adjudication that the appeal, and consequently the bond, was void, and operates to estop appellee from asserting that the bond was valid or that the attempted appeal was a consideration for it. Id. See Dun. Dig. 3204b.

The mere device of recording a chattel mortgage cannot, under the statute as it is, be applied to abrogate all the rules of actual and apparent authority and ostensible ownership. Pioneer Nat. Bank v. Johnson, 215M331, 9NW(2d)760. See Dun. Dig. 3204.

A minor may be estopped by the acts and conduct of the ancestor through whom he claims title. Seitz v. Sitze, 215M452, 10NW(2d)426. See Dun. Dig. 3212, 4449, 8852a, 8885.

37. Patents.

Rights conferred by patent upon the owner are the exclusive right to manufacture sell and use the subject matter of the patent. Springer v. J. R. Clark Co., (DC-Minn), 46FSupp54. See Dun. Dig. 7417.

Manufacturer of a device under a license from the assignee of the original patent holder was not liable to an assignee of the original patent applicant for the royalty due on account of agreement between original inventor and party to whom the patent was issued. Id. See Dun. Dig. 7422.

Royalty agreement held to give licensee right to terminate upon ten day notice, notwithstanding supplemental agreement including additional patent omitted any mention of cancellation clause contained in original contract. Markwood v. O., 207M70, 289NW830. See Dun. Dig. 7422.

Provision that patent license contract shall remain in full force and effect during a stipulated period unless sooner terminated by mutual consent or nonperformance of "either party", which is qualified by other provisions showing that one of parties could terminate only with consent of or for breach by other, construed as intending to give right to each party to terminate only with consent of or for breach of other, absent a provision that one or both of parties had right of termination at will. Miller v. O. B. McClintock Co., 210M 152, 297NW724. See Dun. Dig. 7422.

A provision in a patent licensing agreement for a minimum royalty is to protect licensor by imposing a minimum liability on licensee for license granted, whether provision is that royalty shall equal at least a certain amount, or that it shall be paid on not less than a certain number of articles, regardless of whether or not licensee operated under license. Id.

Duration of liability to pay royalty for a patent license is determined by terms of contract. Id.

A licensee holding separate licenses from each of two co-owners of patent may not complain that one of them gave license under his share without written consent of other as required by contract between co-owners, since separate licenses granted by each operated as consent to license granted by other. Id.

A patent licensee who manfactured and sold patented article under exclusive license received the consideration for which he bargained and is not entitled to rescind or cancel contract for failure of consideration. Id.

Where term fixed by patent licensing contract is life of patents, royalty payments must be made during such term. Id.

A milk company with exclusive right to use "cream top" bottles and notifying competitors thereof did not subject its bottles to general custom which had prevailed in city in regard to picking up straight-necked bottles, and it was entitled to possession of those bottles wherever it found them, and other milk companies picking up such bottles could be required to deliver them in replevin and without exchange of straight-necked bottles therefor. Albert Lea Co-Op. Ass'n v. Albert Lea Milk Co., 213M225, 6NW(2d)243. See Dun. Dig. 7422.

Title to patented milk bottles did not pass to purchaser of milk, though no deposit was required and milk company relied on implied obligation to return bottles when empty. Albert Lea Co-Op. Ass'n v. Albert Lea Milk Co., 213M225, 6NW(2d)243. See Dun. Dig. 7417.

38. Subscriptions.

Enrollment agreement containing a promise to pay dues in a Property Tax Reduction Club, organized for the purpose of obtaining legislative support for lower property taxes and the substitution of more equitable methods of taxation, is not violative of public policy. Perkins v. Hegg, 212M377, 3NW(2d)671. See Dun. Dig. 1872.

39. Copyrights.

Right to royalties on literary work produced by state employee. Op. Atty. Gen. (90f), Dec. 10, 1942.

Patented part of machine may not be reproduced for use without consent of patentee, even by the state. Op. Atty. Gen. (980a-11), Aug. 8, 1940.