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
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9140. Want of final jurisdiction—Proceedings.
Justices of the peace have no jurisdiction over gross misdemeanor cases nor can jurisdiction be conferred by consent. Op. Atty. Gen. (208g-11), May 24, 1943.

9142. Judgment on conviction—Commitment—Execution.
After criminal trial has started justice may continue it from day to day or week to week, but after all evidence is in he loses jurisdiction by continuing the case without entering sentence for purpose of permitting defendant to enter the military service. Op. Atty. Gen. (266b-11), Sept. 9, 1942.

Where sentence imposes a fine of $100.00, payable in installments, or ninety days in jail, and defendant has paid only half of the fine, justice may commit defendant to jail for ninety days without credit for part of fine paid. Op. Atty. Gen. (266b-11), Sept. 9, 1942.

CHAPTER 76

Forcible Entry and Unlawful Detainer

Editorial note.—Remedies against soldiers and sailors, including draftees, are affected by the Selective Training and Service Act of 1940, §13, and the Soldiers' and Sailors' Civil Relief Act of 1940. See page I, this volume.

9149. Recovery of possession.
2. Nature and object of action.
An incompetent's guardian who, contrary to provisions of a will giving incompetent exclusive use of certain rooms in testator's dwelling, consents to use and occupancy of rooms by a member of his own household under a rental arrangement cannot maintain an action of trespass against occupant, latter's entry not having been forcible or unlawful. Martin v. Smith, 214M9, 7NW(2d) 481. See Dun. Dig. 5448.

9152. Summons—How served.
Order denying motion to vacate and set aside restitution judgment of municipal court in unlawful detainer for lack of jurisdiction upon grounds of want of service or defective service of summons is conclusive on that question. Ferch v. Hiller, 210M3, 297NW102. See Dun. Dig. 5194a.

9155. Judgment—Fine—Execution.
Judgment of restitution of municipal court in unlawful detainer action is conclusive not only of right of possession but fact upon which such right rested, and where plaintiff claimed title and right of possession as owner and defendant claimed right of possession under a contract for deed which owner claimed was duly cancelled, judgment for plaintiff was res judicata as to fact of cancellation of contract. Ferch v. Hiller, 210M3, 297NW102. See Dun. Dig. 3784.

9158. Appeal.
Where attempted appeal from a judgment in an unlawful detainer case was premature cause taken before entry of judgment, and appellee promptly obtained dismissal of appeal, defendant is liable independently of appeal bond for any damage caused plaintiff by the attempted appeal, though he and the surety are not liable as obligors under the appeal bond. Hampshire Arms Hotel Co. v. St. Paul Mercury & Indem. Co., 215M60, 9NW(2d)413. See Dun. Dig. 462a.

CHAPTER 77

Civil Actions

9164. One form of action—Parties, how styled.
In quo warranto instituted by attorney general to test corporate existence of a newly organized village, proceedings are governed by common law rules in the absence of any legislation or any controlling consideration to the contrary. State v. Village of North Pole, 213M297, 6NW(2d)458. See Dun. Dig. 1503.

As authorized by our constitution and statutes, quo warranto is not the old common law writ, but rather the information in the nature of quo warranto as left by the changes brought about by St. 9 Anne, c. 20, and came into this country by adoption in that form as a part of our common law. Id. See Dun. Dig. 8059.

Since quo warranto is an extraordinary legal remedy, procedure is not governed by requirements of service of notice of trial applicable in ordinary civil actions, for reasons that upon respondents in such a case rests burden of showing, before a court of competent jurisdiction at a stated time and place designated in the writ, by what warrant they exercised powers claimed by them. Id. See Dun. Dig. 8072.

Court attached no importance to exact common-law classification of plaintiff's purported cause of action, the common-law forms of action having been abolished in this state. Martin v. Smith, 214M9, 7NW(2d)481. See Dun. Dig. 94.

COMMON LAW DECISIONS RELATING TO ACTIONS IN GENERAL

½. In general.
Fact that plaintiff receiving personal injuries from negligence seeks only part of damages recoverable does not change nature of his cause of action. Eklund v. Evans, 211M164, 300NW617. See Dun. Dig. 14, 94.

Every cause of action consists of plaintiff's primary right and defendant's corresponding duty and an invasion of that right or a breach of that duty by defendant by some wrong or delict. Id. See Dun. Dig. 84a.

A cause of action is to be distinguished from the remedial rights arising therefrom and remedies by which such rights are enforced, cause of action being legal wrong done to plaintiff by defendant, and remedy being legal process by which remedial right is consummated or satisfied. Id. See Dun. Dig. 85.

A single wrongful act affecting only one person gives rise to but a single cause of action. Id. See Dun. Dig. 94.

Remedial right for personal injuries caused by negligence is recovery of compensatory damages, and right to damages is effect or consequence of cause of action. Id. See Dun. Dig. 6969.

1. Election of remedy.
A frustrated attempt to pursue a wrong remedy is not an election which will bar one otherwise right. Heibel v. U., 206M288, 288NW393. See Dun. Dig. 2914.

In action by Sunday School teacher against church for injuries suffered when a stack of folding chairs toppled due to activities of pupils, striking a concealing screen which in turn struck teacher, negligence of church was for jury. Logan v. Hennepin Avenue Methodist-Episcopal Church, 210M96, 297NW333. See Dun. Dig. 6996.

That purchaser of automobile unsuccessfully sought rescission after discovery of fraud did not bar subsequent action for damages for deceit, after subsequently completing contract. Kohanik v. Beckman, 212M11, 2NW(2d) 125. See Dun. Dig. 8612.

2. Conflict of laws.
Nat'l Sur. Corp. v. Wunderlich, (CCA8), 111F(2d)622, rev'g on other grounds 24FSupp640.

In diversity of citizenship cases, the federal courts must follow the conflict of laws rules prevailing in the states in which they sit. Klaxon v. Stentor Electric Mfg. Co., 313US487, 61SCR1020, 85LEd1477. See Dun. Dig. 3748.

Question whether court erred in denying motion for a directed verdict in action for personal injuries in federal district court of Minnesota must be determined by the law of Minnesota. Champlin Refining Co. v. W., (CCA8), 113F(2d)844.

In action by United States against a California county for specific performance of a contract respecting operation of bridges over a canal constructed by United States no question respecting federal government's control over navigable waters was involved, and hence state court decision holding contract to be void for lack of mutuality was binding on federal court. Alameda County v. U. S., (CCA9), 124F(2d)611. See Dun. Dig. 3748.

State law to be controlling in federal courts need not be declared by highest court in state, but must be accepted in federal courts when declared by intermediate courts of state unless there is "convincing evidence that the law of the state is otherwise." Id.

State law to be applied by federal court on review, is that existing at time of its decision, even though it may differ from that which existed when case was tried below. Id.

Act of Congress authorizing turning over bridge to county did not make federal law applicable where

terms of contract upon which bridge should be turned over to the county were not provided for in the Act. Id.

Under the rule in Erie R. Co. v. Tompkins, state law is applicable to all cases except in matters governed by the Federal Constitution, by acts of Congress or treaties, and there is no federal general common law. Id.

In diversity of citizenship cases the rules of conflict of laws which govern are the rules of the state in which the Federal Court sits. Maki v. George R. Cooke Co., (CCA6), 124F(2d)663. Cert. den. 316US686, 62SCR1274. See Dun. Dig. 3748.

In cases not involving construction of constitution or laws of United States decisions of Supreme Court of United States are not binding as authority on state courts. Addressograph-Multigraph Corp. v. American Expansion Bolt & Mfg. Co., (CCA7), 124F(2d)706. Cert. den. 316US682, 62SCR1270. See Dun. Dig. 3748.

An action in a federal court in New York upon a note must rest upon New York law, and where federal court is faced with two conflicting decisions of different appellate divisions of the Supreme Court of that state, the rule of Erie R. Co. v. Tompkins does not forbid the federal court from choosing the decision which is more in line with the New York Court of Appeals, especially when it construes a uniform act in accordance with its language and manifest purpose. U. S. v. Novsam Realty Corp., (CCA2), 125F(2d)456. See Dun. Dig. 3748.

The present trend of adjudication toward a complete denial of the injunctive process to restrain proceedings in state courts, if there is such a trend, does not extend to denaturing the removal statutes, and hence where action was properly removed to federal court such court would enjoin state court execution on judgment thereafter obtained in the state court on the removed cause of action. Ammond v. Pennsylvania R. Co., (CCA6), 125F (2d)747. Cert. den. 316US691, 62SCR1283. See Dun. Dig. 3748, 4477c, 4482, 4488, 8395a.

Separability of controversies is governed by state law, as affecting removal of causes to federal courts. Ammond v. Pennsylvania R. Co., (CCA6), 125F(2d)747. See Dun. Dig. 3748.

In action in federal court evidence is admissible where either the federal rule or the rule prevailing in the state where the case is tried favors the admission. National Battery Co. v. Levy, (CCA8), 126F(2d)33. Cert. den. 316US697, 62SCR1294. See Dun. Dig. 1548, 3748.

In action in federal court for death of one riding with defendant's employee in Minnesota question whether or not defendant's employee was acting within the scope of his employment was governed by Minnesota law. Id.

In action in Minnesota federal court for injuries sustained in an automobile collision in Missouri the law of Missouri was controlling upon questions of negligence and contributory negligence. Cram v. Eveloff, (CCA8), 127F(2d)486. See Dun. Dig. 3748.

In a death action in federal court local substantive law governs but federal court is not bound by the state rule that pleadings are to be construed most strongly against the pleader, the rule now being the reverse of what it was before the Erie Railroad Co. decision and before the Conformity Act was superseded by the Rules of Civil Procedure. Hannah v. Gulf Power Co., (CCA5), 128F(2d)930. See Dun. Dig. 3748b.

The substantive rights of parties to an action are governed by the lex loci, that is, the law of the place where the right was acquired or the liability was incurred which constitutes the claim or cause of action, while law of jurisdiction in which relief is sought controls as to all matter pertaining to remedial as distinguished from substantive rights. U. S. v. Rogers & Rogers, (DC-Minn), 36FSupp79. Appeal docketed and dism'd without costs to either party in circuit court pursuant to stipulation, (CCA8), 121F(2d)1019. See Dun. Dig. 1475, 1532, 1541, 1545, 1926, 1932, 1933, 9631, 10103, 10105.

Creation and extent of tort liability is governed by law of place where tort was committed. Id.

Right of United States to maintain action against commission merchants for conversion in Minnesota of cattle covered by chattel mortgage to Farm Security Administration, filed in Wisconsin, depended on Wisconsin law. Id.

There is a presumption that party intended to contract with reference to law of state that would uphold their contract rather than one that would nullify it. State v. Rivers, 206M85, 287NW790. See Dun. Dig. 1532.

Lex loci governs in all matters relating to right and lex fori in all matters relating to remedy. Daniel's Estate, 208M420, 294NW465. See Dun. Dig. 1528.

Where cause of action does not survive under law of place where wrongful injury was cause, no action may be maintained although under law of forum such actions do survive. Id. See Dun. Dig. 1541.

Limitation of time within which an action may be brought relates to the remedy and is governed by law of forum. Id. See Dun. Dig. 1546.

State law that increase in interest after default is usurious and unlawful must give way before federal statute requiring Federal Farm Loan mortgages to bear increased rate of interest after default. McGovern v. F., 209M403, 296NW473. See Dun. Dig. 1528.

Settled policy of Minnesota is that one spouse may not maintain a civil action against other for personal injury caused by other's tort, and that policy forbids a wife from maintaining action for personal injury sustained while a passenger in husband's car in state of Wisconsin where an action would be maintainable. Kyle v. Kyle, 210M204, 297NW744. See Dun. Dig. 1541.

Rule of comity does not prevail when opposed to a well-established law of the forum Id. See Dun. Dig. 1531.

Where a claimant against estate of a decedent is not a citizen of this state and personal services were largely rendered in another state, statute of limitations of such other state controls. Superior's Estate, 211M108, 300NW 393. See Dun. Dig. 1546.

In an action by a guest passenger for injuries received in another state, local court must take statute of such other state as construed by its highest court. Sohm v. Sohm, 212M316, 3NW(2d)496. See Dun. Dig. 1541, 6975a.

Federal courts follow the construction placed on a local statute by courts of enacting state. Babcock v. Bancamerica-Blair Corp., 212M428, 4NW(2d)89. See Dun. Dig. 3748.

Divorces and grounds therefor are prescribed by the state where the action is instituted and not at all by the law of the state where the marriage was entered or contracted. Rogers v. Cordingley, 212M546, 4NW(2d)627. See Dun. Dig. 2784b.

Tribal Indians residing on a reservation may go anywhere and get married, by anyone, including a justice of the peace, and return to the reservation and there become divorced according to usages and customs of the tribe, and without compliance with any state law. Rogers v. Cordingley, 212M546, 4NW(2d)627. See Dun. Dig. 4347a.

Each state may determine for itself what effect is to be given to divorce decree rendered against one of its own citizens by the court of a foreign state where personal service of process upon defendant is wholly lacking and there is no property belonging to defendant that can be reached within the jurisdiction of such foreign court. Minnesota has recognized foreign divorces insofar as they affect the marriage status but treats such judgments as in rem and not binding as to alimony and support money. Sheridan v. Sheridan, 213M24, 4NW(2d) 785. See Dun. Dig. 1530, 1557, 1698, 2784b, 2799, 5207.

The validity of a marriage celebrated in Iowa between residents of Minnesota is governed by the law of Iowa. Johnson v. Johnson, 214M462, 8NW(2d)620. See Dun. Dig. 1557.

A cause of action arising out of an automobile accident in Wisconsin is governed by the law of that state. Darian v. McGrath, 215M389, 10NW(2d)403. See Dun. Dig. 1541.

Owner's responsibility statute does not apply to Minnesota cars while operated in Wisconsin, which has no such statute. Id.

Where resident of Minnesota purchased automobile there under conditional sales contract and it was repossessed by finance company while he was visiting in Wisconsin, Minnesota law governed and it was not necessary that automobile be kept in Wisconsin for ten days. Magoon v. Motors Acceptance Corporation, 238Wis1, 298 NW191.

In an action in Wisconsin involving automobile accident in Minnesota, liability of host to guest is determined by laws of Minnesota. Hutzler v. McDonnell, 239Wis568, 2NW(2d)207. See Dun. Dig. 1541.

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

Constitutional aspects of the conflict of laws. 27 Minn LawRev 500.

3. Contract or tort.

One whose stock has been wrongfully transferred on the books of a corporation may treat the transfer as valid and sue either in equity to compel the corporation to restore him to his rights as a stockholder or at law for conversion of his shares by the corporation, but the duty of the corporation to protect the owner is one imposed by law, and not one arising out of contract. Boyum v. Massachusetts Investors Trust, 215M485, 10NW (2d)379. See Dun. Dig. 88.

6. Common counts.

The equitable doctrine of permitting recovery where there has been an unjust enrichment should have greater weight in determining rights of parties where postal money orders are issued than the doctrine of Price v. Neal, namely, that when the drawee of a bill of exchange, not knowing that the bill is forged, pays the same to an innocent holder, the drawee cannot recover the payments made. U. S. v. Northwestern Bank & Trust Co., (DC-Minn), 35FSupp484.

Equity recognizes the right to recover money paid through mistake, and negligence of the payor does not affect the right of such recovery. Id.

One who pays money to a village under such circumstances that exaction is unlawful may recover as for money had and received. Moore v. V., 207M75, 289NW 837. See Dun. Dig. 6129.

Where property has been sold on contract for deed, vendee may recover payments made prior to cancellation of contract as for money had and received when such fraud has been practiced upon him in procurement of contract as would have entitled him to rescind. Gable v. N., 209M445, 296NW525. See Dun. Dig. 6128.

Where defendant owned farm and induced plaintiffs to live there with her and operate farm, in consideration of which defendant was to furnish home, certain food and fuel, and plaintiffs entered upon performance of such unenforceable oral contract and were willing to continue in its performance, but were ousted by defendant, who

refused to abide by agreement and to leave property to plaintiffs at her death, plaintiffs could recover on theory of unjust enrichment for value of services rendered less benefits received thereunder until defendant's breach. Pfuhl v. Sabrowsky, 211M439, 1NW(2d)421. See Dun. Dig. 4300.

Where purchase price has been paid, in whole or in part, on an oral contract to sell land, and seller refuses or is unable to convey, an action lies for money had and received. Id. See Dun. Dig. 6129.

An action in indebitatus assumpsit for money had and received will not lie against one who has not been unjustly enriched. Soderlin v. Marquette Nat. Bank, 214 M408, 8NW(2d)331. See Dun. Dig. 6128.

Where husband and wife to enable them to purchase oil station equipment induced a third person to assist them by going to bank and borrowing money and third person went to bank and signed a note and took it to husband for signature and wife did not sign because she was out of the city and the property soon after was destroyed by fire and wife refused to go through with the original agreement, the third person having given a check to the husband who paid it for the equipment, the bank could recover from both husband and wife as for money had and received. Becker County Nat. Bank v. Miller, 215M336, 9NW(2d)923. See Dun. Dig. 6127.

An action for money had and received would not lie against a bank cashing a check upon which name of payee was forged and paying out entire proceeds of check by cash and credit and receiving from drawee bank only the amount it had disbursed, since it was not unjustly enriched. Id. See Dun. Dig. 6129. Of interest is Home Indemnity Co. v. State Bank of Fort Dodge, 8NW(2d) (Iowa)757; Sidles Co. v. Pioneer Valley Sav. Bank, 8NW (2d)(Iowa)794.

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. Id. See Dun. Dig. 6131.

7. Equitable remedies.

In action by one trading an old car for breach of contract to sell a new car, wherein it appeared that there was a unilateral mistake on the part of the defendant as to encumbrance on old car and knowledge thereof on part of plaintiff, defendant would be entitled to reformation, but plaintiff's right to be put in status quo should be protected, the old car having been resold by defendant. Rigby v. N., 208M88, 292NW751. See Dun. Dig. 8334a.

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. 8329.

Equity having assumed jurisdiction of an action to restrain competition in certain territory and granted an injunction will, as an incident, give full relief and compel an accounting of profits wrongfully obtained. Peterson v. Johnson Nut Co., 209M470, 297NW178. See Dun. Dig. 3138.

In an action for an accounting trial court is permitted to apply equitable principles and to mold its relief to meet the particular situation. Young v. Blandin, 215M111, 9NW(2d)313. See Dun. Dig. 3138.

8. ——Maxims.

Equity aids the vigilant and not the negligent. Sinell v. T., 206M437, 289NW44. See Dun. Dig. 3142.

Rule that equity looks upon things as done which ought to be done was applied as between respective grantees of adjoining land and in favor of a grantee in possession and against a grantee of adjoining land who was legally presumed to know of that possession and that there had been a mutual mistake in title deed. Flowers v. Germann, 211M412, 1NW(2d)424. See Dun. Dig. 3142(61).

The doctrine of equitable conversion is based on the maxim that equity regards that as done which ought to have been done. Hencke's Estate, 212M407, 4NW(2d)353. See Dun. Dig. 3132, 3142.

It was error to charge that it is more difficult for a street car to stop by reason of its weight than for a motor vehicle to stop. O'Neill v. Minneapolis St. Ry. Co., 213M514, 7NW(2d)665. See Dun. Dig. 9785.

9. ——Adequacy of legal remedy.

Each person paying unconstitutional processing taxes has a speedy and adequate remedy at law, and the complaint fails to state facts entitling plaintiffs to maintain an action in equity for any equitable relief either for themselves or others similarly situated. Thorn v. G., 206 M589, 289NW516. See Dun. Dig. 6126.

A remedy at law is not "plain and adequate" when it is not as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. State v. Sportsmen's Country Club, 214M151, 7NW(2d)495. See Dun. Dig. 3137.

10. ——Cancellation of instruments.

See ch. 49A, note 19.

A court of equity guards with jealous care all contracts or transactions with persons of unsound mind. Parrish v. Peoples, 214M589, 9NW(2d)225. See Dun. Dig. 4522.

Where confidential relation existed between parties and one of them by means of the relation secured from the other an inequitable advantage, equity will set aside the transaction. Hafner v. Schmitz, 215M245, 9NW(2d) 713. See Dun. Dig. 1188, 1191.

10½. ——Reformation of instruments.

Before a court of equity will reform a written instrument, it must appear that there was an antecedent agreement and that the writing failed to express true intentions due to a mutual mistake, or a mistake on one side and fraud or inequitable conduct on the other. Preferred Acc. Ins. Co. of New York v. Onali, (DC-Minn), 43FSupp 227. See Dun. Dig. 8328.

To warrant reformation of an instrument evidence must be clear, persuasive, and convincing. Langford Elec. Co. v. Employers Mut. Indem. Corporation, 210M289, 297NW 843. See Dun. Dig. 8347.

Evidence sustains finding of mutual mistake in writing fire policy with husband as insured instead of wife, the legal owner. Pellicano v. Hartford Fire Ins. Co., 211M314, 1NW(2d)354. See Dun. Dig. 8347.

11. ——Specific performance.

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

Oral contract to will property and its terms must be proved by clear, positive, and convincing evidence to warrant specific performance. Carlson v. Carlson, 211M 297, 300NW900. See Dun. Dig. 8789a, 8806, 10207.

Where corporate stock is not sold on market and as such has no established market value, and its actual value is conjectural or problematical, specific performance of an agreement to sell it may be enforced, as there is no definite basis for assessing damages. Haglin v. Ashley, 212M445, 4NW(2d)109. See Dun. Dig. 8789.

Where plaintiff's services were of such peculiar and personal nature that they are not measurable in money a remedy at law is not adequate. Downing v. Maag, 215 M506, 10NW(2d)778. See Dun. Dig. 8776.

12. ——Abatement of nuisances.

See notes under §9580.

Injunction as remedy against a club continuously violating liquor and gaming laws. State v. Sportmen's Country Club, 214M151, 7NW(2d)495. See Dun. Dig. 4483c.

12½. ——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.

13. Torts.

Before a tort can be committed there must be an invasion of a legal right. U. S. v. Rogers & Rogers, (DC-Minn), 36FSupp79. Appeal docketed and dismissed without costs to either party in circuit court, pursuant to stipulation, (CCA8), 121F(2d)1019. See Dun. Dig. 1475, 1532, 1541, 1545, 1921, 1932, 1933, 9631, 10103, 10105.

In tort actions for conspiracy, the conspiracy does not of itself furnish a cause of action since no damage results, but rather it is the overt acts committed in pursuance thereof that serve as footing for recovery. Cashman v. B., 206M301, 288NW732. See Dun. Dig. 1562.

Where plaintiff sued for breach of contract and recovered a judgment which was satisfied, and assigned his claim for breach of another contract and assignee recovered judgment, which, in turn, was assigned to plaintiff, and not satisfied, plaintiff could not then institute an action for conspiracy and include among allegations as "actionable wrongs" two paragraphs embodying the acts causing the breach of contract included as acts done by defendants in "furtherance of the conspiracy." Id. See Dun. Dig. 1567c.

Embalming of a body without authority of persons entitled to possession gives cause of action for damages. Sworski v. S., 208M201, 293NW309. See Dun. Dig. 2599.

Notwithstanding the fact that they have benevolent and charitable features, benevolent and beneficial associations, corporate and non-corporate, are liable in tort the same as other groups of individuals, including slander by their agents. High v. Supreme Lodge of the World, 214M164, 7NW(2d)675, 144ALR810. See Dun. Dig. 617, 2022.

The rights of privacy. 25MinnLawRev619.

Governmental responsibility for torts in Minnesota. 26 Minn. Law Rev. 613.

14. ——Negligence.

Injuries to hotel guests, see also §5907.

Law does not require one to choose best way of escape from an imminent peril suddenly created by negligence of another. Stolte v. L., (CCA8), 110F(2d)226.

Owner of gasoline filling station was not an insurer of safety of invitee on his premises but was liable only for injury resulting from a breach of his duty of exercising ordinary care. Champlin Refining Co. v. W., (CCA 8), 113F(2d)844.

In action for injuries to invitee at filling station questions of negligence and contributory negligence held for the jury. Id.

If negligence of defendant was not a proximate cause of injury, plaintiff cannot prevail. Krtinich v. D., 206M 106, 287NW870. See Dun. Dig. 6999.

In action by passenger on a street car which collided with a large truck coming out of an alley, negligence of motorman held for jury. Reiton v. S., 206M216, 288NW 155. See Dun. Dig. 1266.

There was negligence as a matter of law on part of a licensee who was injured by a fall down a dark basement stairs when she mistook door thereof to be entrance to lavatory. Plahn v. M., 206M232, 288NW575. See Dun. Dig. 7023.

The standard of conduct as applied to contributory negligence takes no account of personal equasion of the man concerned. Peterson v. M., 206M268, 288NW588. See Dun. Dig. 7012.

Negligence must be determined upon facts as they appeared at time, and not by a judgment from actual consequences which then were not to be apprehended by a prudent and competent man. Id. See Dun. Dig. 7021.

Evidence warranted submission to jury of actionable negligence of operator of a public roller skating rink, for failure to use ordinary care in supervising lobby of rink so as to restrain young and thoughtless skaters from there playing tag, endangering others lawfully in use thereof. Johnson v. A., 206M282, 288NW386. See Dun. Dig. 6988.

Instruction that "the care to be exercised by defendant is a care commensurate with the risks and dangers known or in the exercise of reasonable care to be anticipated" was not erroneous in action for injuries from thoughtless skaters on skating rink operated by defendant. Id.

Operator of a public amusement place is not an insurer of safety of patrons and is not responsible for unanticipated dangers created by some one of patrons to injury of another. Id.

It is only when a defendant has been placed in imminent peril by some other person's negligence that emergency instruction may be given; not when he confronts danger by reason of his own conduct. Anderson v. G., 206M367, 288NW704. See Dun. Dig. 7020.

Complaint showing knowledge of danger and intent to conceal it alleged a case of "wilful" negligence, though word "negligently" and "carelessly" were used as general characterization. Murphy v. B., 206M527, 289NW563. See Dun. Dig. 7058.

Ordinary negligence is not an intentional tort. Id. See Dun. Dig. 6969.

Jury was warranted in finding no liability where abutting land owner built retaining wall so low that a blind man fell over it. Kooreny v. D., 207M367, 291NW611. See Dun. Dig. 4190.

Holes placed by an abutting property owner in a retaining wall built and maintained by him, in the light of the evidence, did not as a matter of law present a link in the chain of negligent causation, such holes not being involved in blind man falling over wall. Id. See Dun. Dig. 6999.

Control within meaning res ipsa loquitur is not necessarily a control exercised at time of injury, but may be one exerecised at time of negligent act which subsequently resulted in an injury. Peterson v. M., 207M387, 291NW705. See Dun. Dig. 7044.

Res ipsa loquitur doctrine is essentially one of evidence rather than of tort law, and whether it should apply is largely a question of how justice in such cases is most practically and fairly administered. Id. See Dun. Dig. 7044.

Where housewife was temporarily blinded by an electric flash while operating an electric stove in usual manner, court properly applied res ipsa loquitur doctrine in action against power company which had installed stove a few days prior thereto. Id. See Dun. Dig. 7044.

An assurance of safety to a servant by his master is important only insofar as it induces servant to act in reasonable reliance on master's judgment as to safety of doing certain work rather than his own. Blume v. B., 207M393, 291NW906. See Dun. Dig. 5986.

A servant assumes risk of injuries from dangers incident to work which he knows and appreciates, and danger of unsupported objects, such as a chimney, falling are obvious, imminent and apparent to the ordinary mind. Id. See Dun. Dig. 5974, 5986.

A verdict must stand where a jury could properly find that plaintiff had made an error in judgment which a reasonable man might make. Norling v. S., 208M143, 293 NW250. See Dun. Dig. 7020.

Where employer promises by repair, to remove danger, he assumes risk of injury to servant for a reasonable time thereafter, but under a promise by a wife "to tell" her husband and have him remove defect (an obstacle on floor of basement laundry in defendant's home) promise not being brought home to him so as to be binding, husband is not liable for having, by promise, assumed risk. Liptak v. K., 208M168, 293NW612. See Dun. Dig. 5964.

Where a condition of danger is obvious, known to, and appreciated by, employee, and he continues work without protest, risk of danger is assumed by him. Id.

Where danger, if any, is obvious to sense of one of ordinary intelligence, discernable and open to employee, employer is under no duty to instruct or warn concerning it. Id.

Servant using carbon tetrachloride to clean floors did not assume risk of death from fumes unless he was chargeable with knowledge of the danger. Symons v. G., 208M240, 293NW303. See Dun. Dig. 5970.

Whether employee was guilty of contributory negligence in using carbon tetrachloride to clean floors, resulting in his death, held for jury. Symons v. G., 208M 240, 293NW303. See Dun. Dig. 2616.

Proximate cause of an injury is that which causes it directly and immediately, or through a natural sequence of events, without intervention of another independent and efficient cause, the predominant cause. Anderson v. J., 208M373, 294NW224. See Dun. Dig. 7000(84, 85).

A given act is proximate cause of a given result where that act is a material element or a substantial factor in happening of that result. Id.

Where an injury is caused by concurrent negligence of several persons, negligence of each is proximate cause of injury and each is liable for all resulting damages. Id.

Burden of proving contributory negligence rests upon defendant, and it is ordinarily a fact question for the jury. Id. See Dun. Dig. 7032.

In action for property damages to an automobile for negligence in connection with servicing and greasing car, whether seller of car was guilty of negligence in not discovering loose studbolts in wheel and tightening them, held for jury. McLeod v. H., 208M473, 294NW479. See Dun. Dig. 7033.

A retail dealer of automobiles who undertakes to repair and recondition them owes a duty to public and purchaser to use reasonable care in making of tests for purpose of detecting defects. Id. See Dun. Dig. 6974.

Gist of an action for recovery of damages for personal injuries received from a kick by a horse is neglect of owner or keeper of animal, known to be vicious and liable to attack, to restrain it. Lee v. S., 208M546, 294NW 842. See Dun. Dig. 275.

In action for injury to one kicked by a horse near sales ring, evidence held insufficient to show any connection between intoxication of owner of horse and injury to plaintiff. Id.

Negligence is presumed where an injury follows keeping of an animal known to be vicious. Id.

Evidence that horse, while being sold in sales ring, appeared nervous and, when subjected to a "hitch test," jumped, bucked, kicked up and was inclined to be balky, did not warrant finding that horse possessed vicious propensities towards human beings. Id.

Where evidence is such that reasonable minds might reach opposite conclusions as to defense of contributory negligence, it is error to direct a verdict against plaintiff. Fickling v. N., 208M538, 294NW848. See Dun. Dig. 7033.

One suddenly confronted by a peril through no fault of his own, who in attempt to escape does not choose best or safest way, should not be held negligent because of such choice, unless it was so hazardous that ordinarily prudent person would not have made it under similar circumstances. Dahlstrom v. H., 209M72, 295NW508. See Dun. Dig. 7020.

Evidence that hotelkeeper permitted presence of ice on foot mat in lobby entrance on which guest slipped, held sufficient to show negligence. Green v. E., 209M178, 295NW905. See Dun. Dig. 4513.

Negligence which is a material element or substantial factor in producing or happening of an injury is proximate cause although there is no physical contact or impact. Smith v. C., 209M268, 296NW132. See Dun. Dig. 7000.

An act done in normal response to stimulus of situation created by actor's negligence is a substantial factor in bringing about injury and not an independent intervening cause. Id. See Dun. Dig. 7005.

Contributory negligence in an emergency is to be determined by whether or not plaintiff exercised the caution and judgment which could reasonably be expected from an ordinarily prudent person under the circumstances. Id. See Dun. Dig. 7020, 7021.

In action against gas company which installed a heater in a brooder with propane gas for fuel without installing a pipe to carry off flue product, whether there was contributory negligence in failing to open ventilator on hunting trip, held for jury. Ruth v. H., 209M248, 296NW 136. See Dun. Dig. 7033.

If all members of a hunting party were engaged in a joint enterprise in obtaining and using a Radiantfire heater with propane gas for fuel a warning to one of the hunters to keep place well ventilated was a warning to all, as affecting contributory negligence. Id. See Dun. Dig. 7037.

As to third persons, each member of a joint enterprise is agent of others, and act of one within scope of enterprise are acts of all. Id. See Dun. Dig. 7037.

Whether a party of hunters were engaged in a joint enterprise in obtaining a brooder house and having installed therein a Radiantfire heater with propane gas for fuel without a pipe to carry off gases, held for jury. Id. See Dun. Dig. 7037.

Negligence consists of breach of duty to injury of another. Id. See Dun. Dig. 6969.

Where evidence supports an inference that harm on which accident is based was caused by negligence of party injured, question of contributory negligence is one of fact. Id. See Dun. Dig. 7033.

Parties are engaged in a joint enterprise where all parties have a community of interest in purposes and objects of undertaking and an equal right in its control and management. Id. See Dun. Dig. 7037.

In action by city street employee struck by a street car, negligence and contributory negligence held for jury. Schuman v. M., 209M334, 296NW174. See Dun. Dig. 9023.

When an event is followed in natural sequence by a result it is adapted to produce or aid in producing, that result is a consequence of the event, and the event is the cause of the result. Stenberg v. R., 209M366, 296NW 498. See Dun. Dig. 7003.

One faced with an emergency is bound to exercise only that caution and judgment which could be reasonably ex-

pected from **an ordinarily prudent person** under circumstances. Blom v. V., 209M419, 296NW502. See Dun. Dig. 7020.

Where plaintiff was invited to bring her child to a theatre to try out in a "talent contest," and girl in box office directed her to go to stage entrance down an alley and she stepped into a hole covered by a piece of composboard upon which was placed pipes and two-by-fours by workmen who had temporarily left for lunch, negligence and contributory negligence were for jury. Radle v. H., 209M415, 296NW510. See Dun. Dig. 9623b.

Doctrine of res ipsa loquitur asserts that whenever a thing which produced an injury is shown to have been under control and management of defendant, and occurrence is such as in ordinary course of events does not happen if due care has been exercised, fact of injury itself will be deemed to afford sufficient evidence to support a recovery in absence of any explanation by defendant tending to show that injury was not due to his want of care. Klingman v. L., 209M449, 296NW528. See Dun. Dig. 7044.

Res ipsa loquitur doctrine did not apply in action by automobile guest who sat in front seat with driver and had full knowledge as to dangerous curve and speed and every movement of car during progress of trip until accident occurred. **Id.**

Where plaintiff by proving particulars of accident revealed its cause by competent and sufficient proof of negligence, he cannot invoke res ipsa rule, since rule falls where necessity is absent. Id.

Res ipsa loquitur doctrine rests upon inference and not presumption. **Id.**

It is not the accident but the circumstances that justify application of doctrine of res ipsa loquitur, and where plaintiff makes a prima facie case by showing accident with its attendant circumstances he thereby destroys application **of it. Id.**

Question of causal relation is ordinarily one of fact and should be determined by jury in exercise of practical common sense rather than by application of abstract principles. Sankiewicz v. S., 209M528, 296NW909. See Dun. Dig. 7011.

Motorist driving off highway and breaking pole supporting highly charged electric wires was not relieved of liability for death of one electrocuted while rushing to his aid by reason of intervening negligence of power company in failing promptly to meet the emergency, and power company was not relieved of liability because it did not create the dangerous situation. Arnold v. Northern States Power Co., 209M551, 297NW182. See Dun. Dig. 2996, 7005.

Where motorist ran off of pavement and broke a pole carrying highly charged wires, causing wires to sag over edge of pavement several feet from ground, there existed a dangerous traffic situation and an emergency requiring prompt action by power company after notice, and power company was liable where its employees arriving upon scene failed to immediately render conditions safe before a person rushing to aid of injured motorist was electrocuted. Id. See Dun. Dig. 2996, 7025.

Inaction where duty requires action is just as potent a factor in chain of causation as action where law requires no action. Id. See Dun. Dig. 6969.

An intervening force is one which comes into active operation in producing the result, after the defendant's negligence, and "intervening" is used in a time sense and refers to later events, and the conditions existing and forces already in operation of time of defendant's conduct are not included within term. Id. See Dun. Dig. 7005.

A person who voluntarily attempts to rescue one whose life is imperiled by negligence of another, if injured in attempt, may recover from negligent person if act of attempted rescue be not one of extreme recklessness. Id. See Dun. Dig. 7025.

To relieve oneself from a charge of contributory negligence as a matter of law for attempting to save persons from harm, it is sufficient, if, to a reasonably prudent person, existing circumstances create apprehension of danger, even though danger to a definite person was not actually imminent at the moment. Id. See Dun. Dig. 7025.

Method of stacking or piling bags of sugar and method of removing bags so piled could be found by jury to be negligent as to a checker and trucker of a railroad injured while performing his duties in a wholesale grocery plant and a failure to provide a reasonably safe place in which to work. Ryan v. Twin City Wholesale Grocer Co., 210M21, 297NW705. See Dun. Dig. 5878.

Application of res ipsa loquitur rule to falling of an object from a pile, or toppling over of a pile of goods in a place of business. Id. See Dun. Dig. 6027, 7044.

Negligence as a foundation for legal liability has for its basis that every person in conduct of his affairs is under a legal duty to act with care and forethought, and if injury results to another from his failure so to do, he may be held accountable in action at law. Roadman v. C. E. Johnson Motor Sales, 210M59, 297NW166. See Dun. Dig. 6973.

Legal duty in any particular situation prescribed measure of care to be exercised by party charged with negligence, and, such duty determined, only thing remaining is whether that duty was breached by defendant thereby causing plaintiff harm. Id. See Dun. Dig. 6973.

Whenever one person is by circumstances placed in such a position with regard to another that anyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to person or property of other, a duty arises to use ordinary care and skill to avoid such danger. Id. See Dun. Dig. 6974.

An insurance salesman calling at a garage to sell liability insurance to an employee was entitled to care prescribed by his status as a "gratuitous licensee", and could recover for bodily harm caused by proprietor by failure of his employee to carry on his activities with reasonable care for safety of the insurance agent, which injury was not caused by any defect or dangerous condition within or upon the premises which were safe for their proper use. Id. See Dun. Dig. 6985.

General rule is that a mere licensee, like the trespasser, must take premises as he finds them, but this does not absolve a negligent defendant from liability where his active or affirmative acts of negligence are the cause of plaintiff's hurt. Id. See Dun. Dig. 6985.

As respects injuries to licensees on premises, the greater the chance of injury, the greater the precautions which must be taken to prevent it by active or affirmative act. Id. See Dun. Dig. 6985.

Where a truck driver took vehicle to garage for service and left it with the gears in neutral, and later employee of garage asked him to start motor while standing on the floor, whether negligence of employee in ordering motor started without ascertaining that it was in gear was proximate cause of injury to licensee standing in front of truck held for jury. Id. See Dun. Dig. 7005.

Defendant in a negligence case should not be allowed to defend an indefensible act by showing that party injured was engaged in doing something which, as to a third person, was unlawful. Id. See Dun. Dig. 7027.

Before negligence is present there must be not only a risk of harm to another's interest, but that risk must be an unreasonable one, and whether a risk of injury is present is determined by application to circumstances of perception, knowledge, and judgment of reasonable man in an effort to perceive existence of an appreciable risk of invading another's interest, and to unreasonableness of risk, actor's conduct partakes of this quality when risk of harm to another is of such magnitude as to outweigh what law regards as utility of act in question or particular manner in which it is done. Logan v. Hennepin Avenue Methodist-Episcopal Church, 210M96, 297 NW333. See Dun. Dig. 6970.

If defendant could not reasonably foresee any injury as result of his acts, or if his conduct was reasonable in light of what he could anticipate, there is no negligence and no liability. **Id. See Dun. Dig. 6969.**

In action by Sunday School teacher against church for injuries received when stack of folding chairs toppled and caused concealing screen to fall, contributory negligence was for jury. Id. See Dun. Dig. 7023.

Whether Sunday School teacher assumed risk of injury from toppling of stacked folding chairs concealed by a screen was for jury. Id. See Dun. Dig. 7041a.

Ordinarily, assumption of risk is for jury. Id. See Dun. Dig. 7041a.

It was not error to refuse a request on subject of assumption of risk where it was not before the jury or in the case. Hill v. Northern Pacific R. Co., 210M190, 297 NW627. See Dun. Dig. 6022*l*.

Fact that lighting of stairway to basement from a bar room of hotel was somewhat inadequate did not benefit one injured by falling who testified that you could see if you paid attention and that he paid no attention and fell because step was slippery. Pangolas v. Calvet, 210M 249, 297NW741. See Dun. Dig. 6999.

Mere fact of occurrence of injury in connection with surgical operations does not prove negligence of surgeon. Simon v. Larson, 210M317, 298NW33. See Dun. Dig. 7491.

It is enough to bar recovery if act of rescuer attempting to save others from injury appeared from fair preponderance of evidence to have been so rash or reckless as under the circumstances to indicate a lack of that prudent conduct that would have characterized a man of ordinary prudence under the same or similar circumstances. Duff v. Bemidji Motor Service Co., 210M456, 299NW196. See Dun. Dig. 7025.

Proximate cause of injury, to one who voluntarily interposes to save from injury other persons put in peril by the negligence of still another, is the negligence which causes the peril and not the intervention of the rescuer. Id.

Persons are ordinarily justified in assuming greater risks to protect human life and limb than law would sanction under other circumstances. Id.

Although duty of master to warn and instruct servant is nondelegable, it is universally held that master holds no duty to warn or instruct his servant of dangers obvious to a person of ordinary intelligence and judgment. Blomberg v. Trupukka, 210M523, 299NW11. See Dun. Dig. 5932.

An act which exposes another to risk of injury only by his failure to conform to those rules of conduct for his own safety with which he might reasonably be expected to comply does not violate standards of due care. Id. See Dun. Dig. 6970.

There is no necessity to warn against the obvious, such as operation of well-known natural laws, including law of gravity and fact that unbalanced pile of material will fall. Id. See Dun. Dig. 6970.

A party has a right to assume that others will observe as a minimum the operation of well-known natural laws. Id. See Dun. Dig. 6970.

A party is not guilty of negligence for failure to warn another against dangers which are open and obvious to any person of ordinary intelligence and judgment. Id. See Dun. Dig. 6970.

Operator of lumber yard was under duty to exercise due care to avoid causing injury to one upon premises to buy material and who was assisting manager in obtaining it from a pile, and there was no failure to exercise due care unless conduct exposed him to unreasonable risk of injury. Id. See Dun. Dig. 6987.

Manager of lumber yard selling metal siding to one who assisted him by holding up a pile on its side while he removed sheets behind those held up was guilty of no negligence in failing to warn purchaser of danger of permitting pile held by him to get out of equilibrium. Id. See Dun. Dig. 6987, 6996.

There is a duty to warn against extraordinary and hidden dangers such as fact that a top-heavy machine balanced by detachable part will topple over if part is removed. Id. See Dun. Dig. 6996.

Contributory negligence, like negligence, becomes a question of law only when reasonable minds functioning judicially could not arrive at different conclusions. Packar v. Brooks, 211M99, 300NW400. See Dun. Dig. 7012-7015.

Damages recoverable for personal injuries caused by negligence may consist of compensation for numerous items, such as physical pain and suffering, loss of earning capacity, value of time lost on account of injuries, expenses for medical treatment, hospitalization and nursing, and so on, but whatever their nature, damages recoverable arise out of single cause of action for negligence. Eklund v. Evans, 211M164, 300NW617. See Dun. Dig. 94, 2570, 2572, 2576.

Where one creates a dangerous situation on a public highway, his duty is to exercise a degree of care commensurate thereto in warning others. Olson v. Neubauer, 211M218, 300NW613. See Dun. Dig. 4168.

Conduct of one charged with negligence is to be judged by standard set by circumstances of the moment. Id. See Dun. Dig. 6969.

Once question of concurrent negligence of two defendants is affirmed, as it is by a verdict, there is no room for further argument on question of causation. Id. See Dun. Dig. 7006.

Application of doctrine of res ipsa loquitur permits trier of facts, in absence of evidence of specific acts of negligence, to reason from result back to cause—to infer fault on part of person having control of some instrumentality from failure of its operation to terminate in a safe or proper result when ordinarily a safe and proper result follows exercise of care. Johnson v. Colp, 211M 245, 300NW791. See Dun. Dig. 7044.

Emergency rule is but a special application of the general standard of reasonable care, requiring jury to consider part of sudden peril where was a real peril and party seeking to invoke it did not contribute thereto. Ignoring stop sign warranted submission of rule to jury. Zickrick v. Strathern, 211M329, 1NW(2d)134. See Dun. Dig. 4167b, 6972a1.

Liability is imposed where violation of statutory duty results as proximate cause in injury to another who is within class of persons for whose benefit legislation was designed. Judd v. Landon, 211M465, 1NW(2d)861. See Dun. Dig. 6976.

Owner of hotel building was bound to comply with requirements of two handrails on wide stairway and could not evade that duty by leasing building, and lessee was liable also and could not shift duty and liability to a sublessee. Id. See Dun. Dig. 6525.

Requirement of two handrails on stairways more than 42 inches wide applies to a hotel building constructed prior to passage of building code, even though no inspector has ordered the construction of a second handrail. Id. See Dun. Dig. 6525.

Duty of proprietor of tavern to exercise reasonable care for safety of patrons extended not only to care of premises but also to any instrumentalities under his control. Danielson v. Reeves, 211M491, 1NW(2d)597. See Dun. Dig. 6987.

Care required of a proprietor of a place of public amusement to prevent injuries to patrons must be commensurate with risk involved. Danielson v. Reeves. 211 M491, 1NW(2d)597. See Dun. Dig. 6988.

Negligence is failure to exercise the care required by law under circumstances. Id. See Dun. Dig. 6972.

Patron newly arrived in night club was not guilty of contributory negligence in partaking in a hobby-horse race on invitation of proprietor who did not warn him of peculiar antics of hobby-horse. Id. See Dun. Dig. 7019.

Patron in night club unacquainted with operation of hobby-horse did not assume risk of injury resulting from characteristic of hobby-horse which he rode in a race on invitation of proprietor. Id. See Dun. Dig. 7041a.

Duty rested upon proprietor of a night club operating hobby-horse races to warn his patrons of any dangers of which he had knowledge but as to which his patron had none, unless danger was such as to be readily observable, or observed, by him in exercise of reasonable care for his own safety, in partaking in a race. Id. See Dun. Dig. 6988.

Use in a store of a compound producing a highly polished and slippery floor surface is not negligent if properly applied, but where testimony introduced on behalf of store keeper showed that compound used by him when properly applied gives floor a gritty feeling and does not make it slippery, testimony that floor was actually slippery raised a question for jury whether compound was properly applied. O'Connor v. J. C. Penney Co., 211M602, 2NW(2d)419. See Dun. Dig. 6987.

Law imposes a duty upon proprietor of a store or shop to exercise due care for safety and protection of customers. Id.

One need not anticipate negligence of another until he becomes aware of such negligence. Mahowald v. Beckrich, 212M78, 2NW(2d)569. See Dun. Dig. 7022.

If act is one which party ought, in exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated particular injury which did happen, and consequences which follow in unbroken sequence, without an intervening efficient cause, from original negligent act, are natural and proximate. Thomsen v. Reibel, 212M83, 2NW(2d) 567. See Dun. Dig. 7003.

In action for injury to five-year old girl who fell out of a taxicab on way home from school, following some scuffling between children, evidence held not to raise question for jury on issue of contributory negligence. Id. See Dun. Dig. 7026a, 7029.

Question of contributory negligence on part of children of tender years is always a difficult one to solve as a matter of law, and usually question is one of fact. Id. See Dun. Dig. 7029.

One entering a dark basement with which he was unfamiliar to read a water meter, and which he could have lighted, but did not, and moved about using a flashlight to illuminate the walls, but not the floor, and falling into a furnace pit, was guilty of contributory negligence as a matter of law. Huyink v. Hart Publications, 212M87, 2NW(2d)552. See Dun. Dig. 7023, 7023a.

Where a person has a choice between equally available methods to do an act, one of which is known to him to be safe and the other to be dangerous, and he chooses the more dangerous method, he is guilty of contributory negligence as a matter of law, because such a choice involved unreasonable exposure to risk of injury. Id. See Dun. Dig. 7023.

If both choices appear to be safe and it turns out that one selected was unsafe, one is not guilty of contributory negligence. Id. See Dun. Dig. 7023.

Venturing in the dark does not constitute contributory negligence as a matter of law in all cases, question being whether plaintiff thereby unreasonably exposes himself to risk of injury. Id. See Dun. Dig. 7023.

Where plaintiff farmer was riding with trucker hauling his lambs to market and on journey trucker stopped to check on his cargo and suggested that plaintiff help him get lambs on their feet and opened rear gate and told plaintiff to close it but proceeded into lower deck before giving plaintiff a chance to get hold of the gate and a lamb fell from upper deck injuring farmer, negligence of trucker was for jury. Anderson v. Hegna 212M 147, 2NW(2d)820. See Dun. Dig. 6996.

Where trucker hauling plaintiff's lambs to market opened rear gate to get into lower deck and suddenly requested plaintiff, without time to estimate the hazard, to turn around and shut the rear gate, and he endeavored to comply and was injured by a lamb falling from upper deck, it was for jury to determine whether plaintiff assumed risk of injury. Id. See Dun. Dig. 7041a.

Whether farmer accompanying trucker hauling his lambs to market was guilty of contributory negligence in attempting to close rear gate when suddenly requested to do so by trucker who was entering lower deck to get lambs upon their feet, without time to estimate the hazard, held for jury. Id. See Dun. Dig. 7025.

To prove negligence plaintiff must show that defendant owed him a duty; that defendant violated that duty; that the breach caused the injury; and that actual damage to plaintiff resulted. Id. See Dun. Dig. 6973.

Whether negligence of trucker hauling lambs to market for plaintiff farmer in requesting farmer on the highway to close rear gate without giving him an opportunity to get hold of the gate was the proximate cause of injuries to the farmer when a sheep fell from upper deck upon him, held for jury. Id. See Dun. Dig. 7003.

Finding that cemetery failed to keep premises in reasonably safe condition for use of invitee was sustained by evidence that it allowed wire pedestal to remain on grave in area to be occupied by those attending a burial service, and plaintiff's failure to look as she stepped backward was not contributory negligence as matter of law, though some lot owner placed the wire pedestal on his lot contrary to regulations. Hutchison v. Hillside Cemetery Ass'n, 212M242, 4NW(2d)81. See Dun. Dig. 6984, 6994.

One attending a burial service was an invitee of cemetery, which was bound to keep premises in a reasonably safe condition for her use and give warning of latent or concealed defects, though it owed no duty to warn of known or obvious dangers. Id. See Dun. Dig. 6984.

Children are more readily excused from charge of negligence than are adults, but this does not mean that a modern boy of normal intelligence, physique, and experience, who has reached his fifteenth year, cannot be

chargeable with negligence as a matter of law. Wineman v. Carter, 212M298, 4NW(2d)83. See Dun. Dig. 7029.

Question of negligence is ordinarily one of fact. Id. See Dun. Dig. 7048.

The parent of an injured child takes his right of action for loss of services and expense of medical attention subject to any defense that could be urged against the child. Id. See Dun. Dig. 7301.

A normal boy of fifteen must be charged with contributory negligence as a matter of law when reasonable consideration of his conduct permits no other conclusion. Id. See Dun. Dig. 7029.

The emergency rule is but a special application of the general requirement of that degree of care which the circumstances would have dictated to ordinary prudence, and requires a jury to consider the fact of sudden peril as a circumstance in determining the reasonableness of a person's response thereto. Nicholas v. Minnesota Milk Co., 212M333, 4NW(2d)84. See Dun. Dig. 6972a, 7020.

Even where it applies, the emergency rule does not excuse conduct which under the circumstances is negligent. Id.

The emergency rule in the law of negligence has no application to a litigant placed in a position of peril through his own want of care. Id.

There is a clear line of distinction drawn between ordinary or business invitees and policemen and firemen who come upon an owner's property in discharge of official duty, and as to latter, owner or occupant is under no duty except to refrain from injuring them willfully or wantonly or to exercise ordinary care to avoid imperiling them by any active conduct. Mulcrone v. Wagner, 212M478, 4NW(2d)97, 141ALR580. See Dun. Dig. 6973(1), 6985, 6985(62).

Where member of city bureau of fire prevention entered upon premises in his official capacity and not in discharge of any private duty due from him to occupant of premises but only that which he owed the public, occupant was not liable for an injury sustained as result of an obviously defective condition in an inside stairway not used or maintained for the public. Id. See Dun. Dig. 6973(1), 6985(62).

Creamery was guilty of no negligence contributing to injury of truck driver when he fell off platform and cut hand on hook by maintaining a chain and simple hook to hold up pipe or hose used in filling cans with skimmed milk. Hasse v. Victoria Co-operative Creamery Ass'n, 212M337, 3NW(2d)593. See Dun. Dig. 6987.

Truck driver delivering milk at creamery for farmer was an invitee. Id. See Dun. Dig. 6984.

Contributory negligence is a want of ordinary or reasonable care on the part of a person injured by the negligence of another directly contributing to the injury, as a proximate cause thereof, without which injury would not have occurred. Malmgren v. Foldesi, 212M354, 3NW(2d)669. See Dun. Dig. 7012.

Judgment for defendant notwithstanding verdict for plaintiff was proper in an action for injuries by customer against department store when plaintiff stepped upon a nail imbedded in an opening between ends of where floor boards joined, claimed negligence being that there was a depression in the floor which was apt to collect articles such as nails so that when a person's foot came in contact with a nail or some other object the object would not move along the floor but would remain fixed, there being no evidence as to where the nail came from, how long it had been there, or what its position was on or in the floor, and the store employing persons whose sole duty it was to pass up and down aisles to pick up articles dropped by customers or others and aisle having been cleaned and inspected. Bragg v. Dayton Co., 212M491, 4 NW(2d)320. See Dun. Dig. 6987.

Negligence is not proved by an isolated occurrence but must be predicated on what should have been anticipated, and not merely on what happened. Id. See Dun. Dig. 6973.

If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then the act would not be negligent at all. Id. See Dun. Dig. 6974.

A shopkeeper or merchant is not an insurer of the safety of his premises, but he does owe to his customers the duty of ordinary care in respect to the safe condition of premises for their use. Id. See Dun. Dig. 6987.

Complaint in a negligence action which alleged that plaintiff, while seeking a toilet in defendant's building, entered a dark unfamiliar passageway and from it stepped into an open, totally dark basement doorway, thinking it to be the toilet entrance, and was injured, showed affirmatively that plaintiff was guilty of contributory negligence. Sartori v. Capitol City Lodge No. 48, 212M538, 4NW(2d)339. See Dun. Dig. 7023.

Contributory negligence is a matter of defense and plaintiff need not prove absence of it. Id. See Dun. Dig. 7032.

It is not necessary for plaintiff in his complaint to negative existence of a contributory negligence on his part. Id. See Dun. Dig. 7058.

A change of floor level at entrance of a basement beauty shop held to present jury questions as to negligence of lessor and lessee of premises and contributory negligence of a patron. Wood v. Prudential Ins. Co., 212 M551, 4NW(2d)617. See Dun. Dig. 5369, 6987.

In some cases a lessor is liable for bodily harm caused to persons upon leased premises by a dangerous condition which comes into existence after lessee has taken possession, where lessor has agreed to keep premises in repair or where he has negligently attempted to make repairs, but there was no liability for an alleged attractive nuisance in form of a disconnected bar created and existing by lessee while moving into other premises. Johnson v. Theo. Hamm Brewing Co., 213M12, 4NW(2d) 778, 11NCCA(NS)316. See Dun. Dig. 5369(40, 49), 6989 and 49ALR1418.

In action for injury to a child resulting from leaving bar or counter in a leased building at time when it was not securely attached to floor, evidence held not such as to warrant a finding that defective condition of back door was proximate cause of accident for which lessor would be liable, there being no testimony showing that any of the children involved entered building through back door. Johnson v. Theo. Hamm Brewing Co., 213M12, 4NW (2d)778. See Dun. Dig. 5369.

A motorist stopping at and then entering a "thru" street at an intersection and making a left turn is not guilty of contributory negligence as a matter of law in case of collision with a streetcar, where streetcar was not so close at the time he entered as to constitute an immediate hazard and he did not discover that there was danger of collision until it was too late to avoid it. Yien Tsiang v. Minneapolis St. Ry., 213M21, 4NW(2d)630. See Dun. Dig. 9026.

A person under the duty to exercise reasoanble care is bound to take notice of the ordinary operation of the laws and physical forces of nature. Anderson v. Winkle, 213 M77, 5NW(2d)355. See Dun. Dig. 6969a.

A possessor of premises used by business visitors, while not an insurer of their safety, is bound to exercise reasonable care to construct and to maintain his premises in a reasonably safe condition for their use, and this duty is continuing in nature, and does not end with an original safe construction or installation, but continues so long as premises are devoted to such use, and reasonable inspection during such use is a duty incident to the maintenance of the premises. Anderson v. Winkle, 213M77, 5NW (2d)355. See Dun. Dig. 6987.

Where a structure becomes in disrepair suddenly and without fault of the possessor, he is not guilty of negligence until he has had an opportunity by the exercise of reasonable care to make the premises safe, but this is not true as to a condition that was not created suddenly. Anderson v. Winkle, 213M77, 5NW(2d)355. See Dun. Dig. 6987.

A possessor of land is subject to liability for disrepair of a building which reasonable care would have discovered and made safe. Anderson v. Winkle, 213M77, 5 NW(2d)355. See Dun. Dig. 6987.

In the law of negligence, a person is bound to take notice that not only wood, but other substances also are subject to decay, deterioration, and breakage and are liable to become dangerous by long and continual use, and this applies to metal, rubber, and plastics. Anderson v. Winkle, 213M77, 5NW(2d)355. See Dun. Dig. 6991a.

Whether a blind person who was being helped by a person in full possession of her faculties to descend a stairway after attending to some business in an office on the upper floor was guilty of contributory negligence in tripping over an upturned brass strip installed to hold down floor covering was a fact question for jury. Anderson v. Winkle, 213M77, 5NW(2d)355. See Dun. Dig. 7030.

Within reasonable limits a blind person may intrust his safety to one younger and stronger mentally and physically without being guilty of negligence. Anderson v. Winkle, 213M77, 5NW(2d)355. See Dun. Dig. 7030.

The standard of conduct required by the law of negligence is objective rather than subjective, and it is immaterial that one charged with negligence thought he was acting carefully or exercised his best judgment, the standard of conduct not being the opinion of the individual, but the conduct of an ordinarily prudent person under the circumstances. Olson v. Duluth M. & I. R. Ry. Co., 213M106, 5NW(2d)492. See Dun. Dig. 6970(87, 88).

The emergency rule does not excuse negligence, since it is but a special application of the general requirement of that degree of care which the circumstances would have dictated to ordinary prudence. Olson v. Duluth M. & I. R. Ry. Co., 213M106, 5NW(2d)492. See Dun. Dig. 6972a, 7020.

The general rule is that a plaintiff's negligence is sufficient to bar recovery if it proximately contributed to the result. Olson v. Duluth M. & I. R. Ry. Co., 213M106, 5NW(2d)492. See Dun. Dig. 7012.

The two necessary elements required to constitute contributory negligence are want of ordinary care and the causal connection between plaintiff's conduct and the accident. Olson v. Duluth M. & I. R. Ry. Co., 213M106, 5NW (2d)492. See Dun. Dig. 7012.

The emergency rule is inapplicable unless it be first determined that there existed a real peril to which the party seeking its protection did not contribute by his own want of care. Olson v. Duluth M. & I. R. Ry. Co., 213M 106, 5NW(2d)492. See Dun. Dig. 7020.

Where one fails in his duty to protect others against operation of natural forces, he is not relieved from liability by fact that forces operated with unusual and sudden violence to cause the injuries complained of. Lunde v. Nat. Cit. Bank, 213M278, 6NW(2d)809. See Dun. Dig. 7002.

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. Fjellman v. Weller, 213M457, 7NW(2d)521. See Dun. Dig. 731d, 5369.

Even though service of repairs and maintenance upon personal property leased to another be termed a gratuity, that fact would not alone absolve one from liability for his own negligence in performing the service. Id. See Dun. Dig. 6973, 6983a.

Negligence of the highest degree is gross negligence. High v. Supreme Lodge of the World, 214M164, 7NW(2d) 675, 144ALR810. See Dun. Dig. 6871.

Since standards of prudent conduct, especially in negligence cases, are generally for jury determination, courts should exercise great caution in framing standards of behavior that amount to rules of law. Abraham v. Byman, 214M355, 8NW(2d)231. See Dun. Dig. 6969.

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.

"Wilful" or "wanton" negligence is a reckless disregard of the safety of the person or property of another by failing, after discovering the peril, to exercise ordinary care to prevent the impending injury. Turenne v. Smith, 215M64, 9NW(2d)409. See Dun. Dig. 7036.

A person is under a legal duty to exercise due care to avoid harm reasonably to be apprehended. Schroepfer v. City of Sleepy Eye, 215M525, 10NW(2d)398. See Dun. Dig. 6972.

Last clear chance doctrine and wilful and wanton negligence. 24MinnLawRev81.

Intervening crime and liability for negligence. 24Minn LawRev635.

Proximate cause and intervening criminal act. 24Minn LawRev666.

Collateral negligence. 25MinnLawRev399.

Business visitors and invitees. 26MinnLawRev573.

14.1. ——Proximate cause.

If bank renting out office rooms on second floor was negligent in failing to secure glass door so as to prevent it from slamming shut through action of the wind, such negligence was a proximate cause of injury to an employee of a lessee injured by glass breaking when door slammed due to a sudden gust of wind accompanying an approaching storm. Lunde v. Nat. Cit. Bank, 213M278, 6NW(2d)809. See Dun. Dig. 7003.

To render a tort-feasor liable for negligence it is not necessary that he should have been able reasonably to anticipate the resulting injury in the precise form in which it in fact occurred. Fjellman v. Weller, 213M 457, 7NW(2d)521. See Dun. Dig. 7000.

What a man may reasonably anticipate is important, and may be decisive, in determining whether an act is negligent, but is not at all decisive in determining whether that act is proximate cause of an injury which ensues, since a person guilty of a negligent act is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not. Id. See Dun. Dig. 7000c.

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. 7005-7007.

Any negligence of railroad in failing to discover and to guard against defective part on coal car proximately causing derailment of coal and tank cars, a wreck, and a fire, and failure to discover and guard against defective fusible valve on tank car proximately causing tank car to explode when subjected to external heat from fire, could not have been the proximate cause of injury to a spectator one block away who was injured in a stampede following the explosion. Wiseman v. N. P. Ry. Co. Co., 214M101, 7NW(2d)672, 13NCCA(NS)526. See Dun. Dig. 7003.

Negligence to be actionable must be a, but not the sole, cause of death or injury complained of. Harris v. Wood, 214M492, 8NW(2d)818. See Dun. Dig. 7007.

Evidence held to sustain finding that administration of a gas anesthetic to prepare patient for extraction of teeth was a cause of his death. Id. See Dun. Dig. 7491a.

14.2. ——Concurrent negligence.

Doctrine of an efficient intervening proximate cause does not apply where negligence is joint and concurrent. Fjellman v. Weller, 213M457, 7NW(2d)521. See Dun. Dig. 7005.

Instruction cautioning jury not to consider duties of a codefendant, as to whom action has been dismissed, but to limit its inquiry to duties of remaining defendant, held proper. Id. See Dun. Dig. 7006.

Even though negligence of tenant contributed to collapse of a building to the injury of a third person, landlord would not be relieved from liability if its negligence with respect to its knowledge of a defect in building and that it was a trap was a contributory factor and a proximate cause. Murphy v. Barlow Realty Co., 214M64, 7NW (2d)684. See Dun. Dig. 7006.

14.3. ——Contributory negligence.

Assumption of risk by putting oneself in a position to encounter known hazard which ordinarily prudent person would not do, in ordinary personal injury action, is but a phase of contributory negligence and is properly included within the scope of that term. Hubenette v. Ostby, 213M349, 6NW(2d)637. See Dun. Dig. 7023, 7041a.

Contributory negligence is a defense in action based on defendant's negligence, because, as a matter of policy, it is deemed unjust and unwise to permit a plaintiff to recover for injuries to which his own negligence has contributed. Mayes v. Byers, 214M54, 7NW(2d)403, 144 ALR821. See Dun. Dig. 7013.

Defense of contributory negligence, and policy underlying it, do not extend to all actions in tort, as is indicated by such actions as those based on assault and battery, trespass, and nuisance. Id.

If defendant's negligence consists in the violation of a statute enacted to protect a class of persons from their inability to exercise self-protective care, a member of such class is not barred by his contributory negligence from recovery for bodily harm caused by violation of such statute. Id. See Dun. Dig. 7031.

Purpose of a warning is to apprise a party of impending danger of which he is not aware, to enable him to protect himself against it, and where he is fully aware of existence of danger, a warning is unnecessary. O'Neill v. Minneapolis St. Ry. Co., 213M514, 7NW(2d)665. See Dun. Dig. 6973.

Contributory negligence, like negligence, is the failure to exercise due care to guard against harm reasonably foreseen or anticipated. Aide v. Taylor, 214M212, 7NW (2d)757, 145ALR530. See Dun. Dig. 7012.

Doctrine that plaintiff may be entitled to recover if the defendant might, by the exercise of care, have avoided the consequences of the plaintiff's negligence, is only applicable to cases in which the plaintiff's negligence preceded that of the defendant, and when the negligence of the two persons is contemporaneous, and the fault of each operates directly to cause the injury, neither can recover from the other. Turenne v. Smith, 215M64, 9NW (2d)409. See Dun. Dig. 7017.

When a person is discovered in a position of peril, notwithstanding his negligence in so placing himself, it is the duty of one having control of the situation to exercise ordinary care not to do anything that activates the impending danger or puts in motion the instrumentality from which the peril impends. Id.

Where a 14 year old boy helping on a garbage truck got upon step and told driver to go ahead along a snow-filled alley and defendant complied therewith, the "discovered peril" theory was properly submitted to jury. Id. See Dun. Dig. 7036.

Although neither malice, actual intent to injure another, nor negligence of grosser degree than lack of ordinary care is a necessary element in the tortious act which renders a defendant liable after discovering peril of plaintiff, this has frequently been miscalled "the wilful and wanton negligence rule." Id.

Where the defendant's acts are willful and intentional, the negligence of the plaintiff is no longer deemed in law a proximate cause of the injury and the willful and intentional acts of the defendant are deemed the sole proximate cause, and the negligence of the plaintiff only the remote cause, or, more properly speaking, the mere occasion, of the injury. Id.

Evidence held not to show contributory negligence of parents in sending a five year old boy on an errand across a street car track. Deach v. St. Paul City Ry. Co., 215 M171, 9NW(2d)735. See Dun. Dig. 2616, 7041, 9026.

Assumption of risk is but a phase of contributory negligence and is properly included within the scope of that term. Schroepfer v. City of Sleepy Eye, 215M525, 10NW (2d)398. See Dun. Dig. 7023, 7041a.

To charge a person with contributory negligence, warnings and knowledge of danger must extend to the particular danger causing the injury. Id. See Dun. Dig. 1019, 7023.

The doctrine of contributory negligence does not rest on a satisfactory basis. Generally, it is said to rest either on barring a plaintiff because he himself is at fault or on the rules of proximate cause. The former view is generally accepted. Christensen v. Hennepin Transp. Co., 215M394, 10NW(2d)406, 147ALR945. See Dun. Dig. 7013.

The administration of the rule of avoidable consequences as affected by the degree of blameworthiness of the defendant. 27 MinnLawRev 483.

14.4. ——Imputed negligence.

Where plaintiff and her husband were riding in defendant's car in Wisconsin, and the husband took the wheel when defendant was tired, either by prearrangement or by request made at the time, plaintiff taking no part in any such arrangement, the husband was not the agent of the wife and there was no bailment of the car to plaintiff or to her husband, and negligence of the husband was not imputed to plaintiff. Darian v. McGrath, 215M389, 10NW(2d)403, 147ALR945. See Dun. Dig. 7038.

Negligence of the husband is no longer imputed to the wife in Wisconsin. Id.

Imputation of a third party's negligence to plaintiff is based upon the plaintiff's right to control the conduct of the party claimed to be negligent. Christensen v. Hennepin Transp. Co., 215M394, 10NW(2d)406. See Dun. Dig. 7037.

14.5. ——Assumption of risk.

In the ordinary personal injury action, where plaintiff puts himself in a position to encounter known hazards which the ordinarily prudent person would not do, he assumes the risk of injury therefrom. Hubenette v. Ostby, 213M349, 6NW(2d)637. See Dun. Dig. 7041a.

Purpose of a warning is to apprise a party of existence of danger of which he is not aware, to enable him

to protect himself against it, and there is no duty to warn against risks which are open and obvious. Wiseman v. N. P. Ry. Co., 214M101, 7NW(2d)672. See Dun. Dig. 7023.

Evidence that a workman, who was electrocuted by taking hold of a metal brace and an uninsulated spot on a connection with high-voltage wires, while engaged in the performance of his work on the steeply sloping roof of a lean-to shed, was seen walking on the roof toward the crossarm brace and afterwards was seen holding onto the connection at the uninsulated spot and the metal brace, with his body doubled up, but did not show what the workman did when he got in close proximity to the brace, did not displace the presumption that decedent exercised due care for his own safety. Schroepfer v. City of Sleepy Eye, 215M525, 10NW(2d)398. See Dun. Dig. 7041b.

An instruction that "if a person recklessly exposes himself to known or imminent danger, unnecessarily, in a manner that a person of ordinary care would not do under the circumstances, he assumes the risk of such danger and is guilty of contributory negligence and cannot recover for any injuries sustained by him under such circumstances", is not open to the objection that it fails to submit the defense of assumption of risk as a separate and distinct defense. Id. See Dun. Dig. 7041a.

Assumption of risk is but a phase of contributory negligence and is properly included within the scope of that term. Id. See Dun. Dig. 7023, 7041a.

14.6. ——Acts in emergency.

Failure to include words "through no fault of his own" in submitting emergency doctrine to jury was harmless error, in view of language used by the court. Merritt v. Stuve, 215M44, 9NW(2d)329. See Dun. Dig. 424, 7020.

One suddenly confronted by a peril, through no fault of his own, who, in the attempt to escape, does not choose the best or safest way, should not be held negligent because of such choice, unless it was so hazardous that the ordinarily prudent person would not have made it under similar conditions. Id. See Dun. Dig. 7020.

In action for death of motorcycle driver who collided with truck emerging suddenly from a private driveway where view was obstructed by trees and parked cars, submission of the emergency rule to the jury was warranted. Id. See Dun. Dig. 7020.

Where driver of motor vehicle and pedestrian about to cross street each saw the other and pedestrian walked into street and stopped as though to wait for car to pass and then suddenly spurted forward, and driver stopped to avoid hitting pedestrian by sharply turning his car to the left but struck her with right fender, negligence and contributory negligence and question of sudden emergency were properly submitted to jury. Schendel v. Klein, 215M73, 9NW(2d)342. See Dun. Dig. 6972a.

Emergency is an important factor in determining negligence and contributory negligence. Christensen v. Hennepin Transp. Co., 215M394, 10NW(2d)406, 147ALR945. See Dun. Dig. 6972a.

14.7. ——Statutory duties.

Whether contributory negligence is a defense to an action based upon the violation of a statute or ordinance depends upon considerations of policy and legislative intent. Mayes v. Byers, 214M54, 7NW(2d)403. See Dun. Dig. 6993, 7031.

Contributory negligence is a defense in many instances where cause of action is based on violation of statute or ordinance made for benefit of individuals harmed, but it does not apply in all such instances, and while such violations have been characterized as negligence per se, courts have been careful to recognize that they are not true cases of negligence. Id. See Dun. Dig. 7031.

Ordinarily, a person may assume that another will obey the law and perform his duty. Aide v. Taylor, 214M212, 7NW(2d)757. See Dun. Dig. 7022.

14.9. ——Children.

In absence of proof that a boy knew of location of underground gasoline storage tank and presence of explosive vapors, mere lighting of a match by him, even in play, could under no circumstances be held contributory negligence. Fjellman v. Weller, 213M457, 7NW(2d) 521. See Dun. Dig. 7019.

Whether driver of a garbage truck exercised ordinary care by moving the truck along a snow-filled alley without insisting that 14 year old helper either get into the cab or off a steel step was a question of fact properly submitted to the jury. Turenne v. Smith, 215M64, 9NW(2d) 409. See Dun. Dig. 6980.

Whether a 14 year old boy helping on a garbage truck was guilty of contributory negligence in taking a position upon step of truck when it was about to be moved by driver held for jury. Id. See Dun. Dig. 7026a, 7029.

Where a 14 year old boy helping on a garbage truck got upon step and told driver to go ahead along a snow-filled alley and defendant complied therewith, the "discovered peril" theory was properly submitted to jury. Id. See Dun. Dig. 7029.

A child is bound to exercise such care, judgment, and discretion as might reasonably be expected from one of his age, experience, and mental capacity. Id. See Dun. Dig. 7029.

An injured minor, through a guardian ad litem, may bring an action directly against person whose negligence caused his injury, although as an unemancipated minor he might not have sued defendant's employer, who was his father, and in such an action it would be no defense that the defendant's employer was plaintiff's father. Id. See Dun. Dig. 7300, 7308. See 27 MinnLawRev 579.

The standard of care required of an infant is not that required of an adult, but rather the degree of care common to children of like age, intelligence, and experience. This rule leaves it for the jury. Deach v. St. Paul City Ry. Co., 215M171, 9NW(2d)735 See Dun. Dig. 7029.

14.9a. ——Attractive nuisance.

A possessor of land is liable to trespassing children where he knows or should know that place is one where children are likely to trespass, a condition maintained upon premises involves an unreasonable risk of harm to such children, particular child injured by such condition did not understand and appreciate the risk incident thereto, and utility to possessor of maintaining condition is slight as compared with risk of harm to children. Weber v. St. Anthony Falls Water Power Co., 214M1, 7NW(2d)339. See Dun. Dig. 6989.

14.10. ——Places of business.

Fact that employee of tenant in office building was familiar with condition of glass door which was not secure so as to prevent it from slamming shut did not relieve landlord of duty to keep premises in a reasonably safe condition, no issue of contributory negligence being raised in the case. Lunde v. Nat. Cit. Bank, 213M278, 6NW(2d)809. See Dun. Dig. 7004.

14.11. ——Owners and occupiers of property.

An owner of an underground gasoline storage tank who installs it and maintains it in a public alley is under a positive duty to inspect and properly maintain it so as to eliminate danger from explosion. Fjellman v. Weller, 213M457, 7NW(2d)521. See Dun. Dig. 6619.

Timbers piled so as to be apt to fall by action of boys climbing upon them involved an unreasonable risk of harm to trespassing boys, and evidence warranted finding that possessor of premises was guilty of negligence, rendering it liable for injuries to a boy who did not appreciate the danger. Weber v. St. Anthony Falls Water Power Co., 214M1, 7NW(2d)339. See Dun. Dig. 6989.

14.12. ——Employees.

An employee is liable to his employer for damages either to his master or to any one who had recourse to the master because of employee's negligence. Turenne v. Smith, 215M64, 9NW(2d)409. See Dun. Dig. 5844.

An injured minor, through a guardian ad litem, may bring an action directly against person whose negligence cause his injury, although as an unemancipated minor he might not have sued defendant's employer, who was his father, and in such an action it would be no defense that the defendant's employer was plaintiff's father. Id. See MinnLawRev 579.

A servant is primarily liable to the victim of his negligence, and it is no defense that his employer may also be responsible to the victim for the identical act which gives rise to the cause of action against the servant. Id.

14.15. ——Common carriers.

A gratuitous passenger, absent any condition or stipulation as to assumption of risk of personal injury, is entitled to the same degree of care as any other passenger. Radermacher v. St. Paul City Ry. Co., 214M427, 8 NW(2d)466, 145ALR1027. See Dun. Dig. 1206.

Employees of a carrier traveling to and from work as such fall within the category of passengers for hire, and as to them the so-called "free pass" furnished them is not a mere gratuity. Id.

14.16. ——Street railways.

A motor vehicle proceeding on left roadway of two-roadway highway, roadways of which are separated by a parkway, in middle of which there are street car tracks, is not entitled to right of way over a street car where motor vehicle and street car were proceeding in same direction and motor vehicle turned right at intersection and crossed in front of street car. O'Neill v. Minneapolis St. Ry. Co., 213M514, 7NW(2d)665. See Dun. Dig. 9016.

In collision between automobile passing behind a street car pulling out of a wye with street car backing into wye, contributory negligence of plaintiff was for jury. Solberg v. Minneapolis St. Ry. Co., 214M274, 7NW (2d)926 See Dun. Dig. 9023a.

An intending passenger on a streetcar becomes such when, in good faith, intending to take passage thereon, he places himself at a usual stopping place and, either by his position or in some other recognized manner, signals the car to stop, and signal is responded to by checking of the car. Radermacher v. St. Paul City Ry. Co., 214M427, 8NW(2d)466, 145ALR1027. See Dun. Dig. 1206.

Evidence held not to show contributory negligence of parents in sending a five year old boy on an errand across a street car track. Death v. St. Paul City Ry. Co., 215M 171, 9NW(2d)735. See Dun. Dig. 2616, 7041, 9026.

In action for death of a boy five years of age struck by streetcar when crossing street question of speed and control of streetcar was for jury in determining negligence. Id. See Dun. Dig. 9014.

In action for death of boy five years old struck by streetcar when crossing street, conflicting and contradictory statements of defendants' witnesses with reference to decedent's actions, and the indefinite character of such evidence, made question of his contributory negligence one for the jury. Id. See Dun. Dig. 9021.

Court properly instructed jury with reference to obligations relating to right of way as between a child

pedestrian and a streetcar in the middle of a block. Id.

14.19. ——Trespassers.

To render possessor of land liable to trespassing children, it is not necessary that a child trespass because particular condition was attractive to him; it is enough that the possessor knows or should know that children are likely to trespass and that they will be exposed to risk of harm by maintenance of condition. Weber v. St. Anthony Falls Water Power Co., 214M1, 7NW(2d) 339. See Dun. Dig. 6989.

14.21. ——Explosives and explosions.

An oil company engaged in distribution of gasoline was charged with knowledge that if intake pipe of an underground gasoline storage tank which had been abandoned by lessee was not properly closed vapors would escape and would explode if they came in contact with a flame, and that such flame might come from a match thrown by a boy in play. Fjellman v. Weller, 213M457, 7NW(2d)521. See Dun. Dig. 7002.

A railroad is not negligent for failure to warn a spectator, standing on a highway witnessing a fire caused by a wreck, of the danger that a tank car full of gasoline engulfed in the flames is likely to explode, risk being obvious. Wiseman v. N. P. Ry. Co., 214M101, 7NW(2d)672. See Dun. Dig. 8152.

14.29a. ——Parties and persons liable.

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. Fjellman v. Weller, 213M457, 7NW(2d) 521. See Dun. Dig. 6619.

One who assumes to act, even though gratuitously, thereby becomes subject to duty of acting carefully, if he acts at all. Id. See Dun. Dig. 6973.

A party injured by negligence of another must in any case seek his remedy against the person who caused the injury, and such person alone is liable. Id. See Dun. Dig. 7057a.

14.30. ——Pleading.

An ordinance prescribing standards of conduct, being an evidentiary fact in a negligence case, although not pleaded, may be proved, like any other fact tending to prove or disprove negligence as an ultimate fact. Christensen v. Hennepin Transp. Co., 215M394, 10NW(2d)406, 147ALR945. See Dun. Dig. 7056j.

14.31. ——Evidence.

Where a truck trailer was proceeding on left roadway of a two-roadway highway, separated by a parkway in the middle of which there were street car tracks, each of such roadways being designated as a one-way street, and truck driver turned right at intersection for purpose of getting on proper roadway, one-way statute was applicable and such fact that it was night time went not only to motorman's negligence, but to contributory negligence of plaintiff, and if the motorman was in any way misled or failed to see the tractor because of direction in which its headlights cast their light, that condition might be a factor which caused or helped to cause accident within rule of Guile v. Greenberg, 192M548, 257NW649. O'Neill v. Minneapolis St. Ry. Co., 213M514, 7NW(2d)665. See Dun. Dig. 9023a.

Failure of oil company during a period of three years to observe a broken lock on cover of abandoned underground gasoline storage tank and presence of vapors was sufficient to establish negligence on its part as to a boy who lit a match near the outlet. Fjellman v. Weller, 213M457, 7NW(2d)521. See Dun. Dig. 3699.

14.32. ——Res ipsa loquitur.

Rule of res ipsa loquitur permits but does not compel an inference that defendant was negligent. Marsh v. Henriksen, 213M500, 7NW(2d)387. See Dun. Dig. 7044.

14.32a. ——Instructions.

A general instruction on contributory negligence and degree of care required of a 14-year-old plaintiff having been given, there was no error in not further instructing as to defendant's theory that an explosion injuring plaintiff resulted from his own deliberate act, in absence of a request for such specific instruction. Fjellman v. Weller, 213M457, 7NW(2d)521. See Dun. Dig. 9771.

Where charge correctly submits issues of negligence and contributory negligence, trial court in its discretion may refuse to submit an additional instruction that plaintiff had a right to assume, until contrary appeared, that the defendant's conduct would be free from negligence. O'Neill v. Minneapolis St. Ry. Co., 213M514, 7NW(2d)665. See Dun. Dig. 9777.

Failure to include words "through no fault of his own" in submitting emergency doctrine to jury was harmless error, in view of language used by the court. Merritt v. Stuve, 215M44, 9NW(2d)329. See Dun. Dig. 424, 7020.

Where court repeatedly charged that jury could not find for plaintiff if they found that intestate was guilty of "contributory negligence" unless defendant discovered that the intestate was in a position of peril, it could not be contended that charge did not leave to the jury the question whether intestate was in a position of peril. Turenne v. Smith, 215M64, 9NW(2d)409. See Dun. Dig. 7017.

14.33. ——Questions for jury.

Contributory negligence vel non of a 14-year-old boy who dropped a lighted match near or in the fill pipe of an abandoned underground gasoline storage tank held for the jury. Fjellman v. Weller, 213M457, 7NW (2d)521. See Dun. Dig. 7023, 7029.

Rule that no warning is necessary where risks are open and obvious is to be applied cautiously, and where allegations permit the construction, or the evidence permits the inference, that the party lacked knowledge or was not aware of the danger, a fact issue is raised for the jury. Wiseman v. N. P. Ry. Co., 214M101, 7NW (2d)672. See Dun. Dig. 7019.

The issue of negligence is generally a fact question for the jury to determine. Merritt v. Stuve, 215M44, 9NW (2d)329. See Dun. Dig. 7048.

15. ——False imprisonment and malicious prosecution and abuse of process.

Where plaintiff sued for breach of contract and recovered a judgment which was satisfied, and assigned his claim for breach of another contract and assignee recovered judgment, which, in turn, was assigned to plaintiff, and not satisfied, plaintiff could not then institute an action for conspiracy and include among allegations as "actionable wrongs" two paragraphs embodying the acts causing the breach of contract included as acts done by defendants in "furtherance of the conspiracy." Cashman v. B., 206M301, 288NW732. See Dun. Dig. 5745.

Before action for malicious prosecution can be maintained complaint must allege a termination in plaintiff's favor of original proceeding, and no such action will arise where it appears that proceeding was for insanity and plaintiff was submitted to insane asylum, though plaintiff were restored to capacity later. Linder v. F., 209M43, 295NW299. See Dun. Dig. 5741(3).

Immunity of judicial officers to civil action for judicial acts cannot be avoided by pleading that acts complained of were results of a conspiracy previously entered into. Id. See Dun. Dig. 4959.

Where judgment was obtained without service of process and execution issued and levy made, actionable wrong was tortious taking of property notwithstanding that there were allegations of malice and other wrongful conduct, and rule that an action for malicious prosecution will not lie unless there has been a termination of action on merit favorable to plaintiff and dismissal solely upon jurisdictional grounds is not such termination, had no application. Beede v. N., 209M354, 296NW 413. See Dun. Dig. 7838.

A jailer or prison superintendent can be held liable for false imprisonment in action by prisoner detained beyond expiration of his sentence, but a jailer has a defense if he acted in reliance upon a commitment fair and valid on its face and issued by a court having general jurisdiction to sentence party therein named. Peterson v. Lutz, 212M307, 3NW(2d)489. See Dun. Dig. 3728.

Sheriff and members of county board of welfare where not guilty of any conspiracy in connection with removal of poor person from county under order of court, where the only combination between them was exercise of statutory duties as required by statute, and there was, consequently, no agreement to commit any unlawful act or to commit any lawful act in an unlawful manner, though order of court was erroneous because poor person was a freeholder. Robinette v. Price, 214M521, 8NW(2d)800. See Dun. Dig. 1562-1567c.

Fact that order for removal of poor person was subsequently reversed does not deprive sheriff of protection in executing it before the reversal was had. Id. See Dun. Dig. 7431, 7837.

All that is required to make process fair on its face is that it must proceed from a court having jurisdiction of the subject matter and that it contain nothing which ought reasonably to apprise the officer that it was issued without authority. Id. See Dun. Dig. 7837.

It is not necessary that the process under which a sheriff acts should show jurisdiction of the person to afford him protection and justification for his acts in executing it. Id. See Dun. Dig. 7837.

A sheriff is protected and justified for acts done in executing the process and orders of a court having jurisdiction of the subject matter when the process is regular on its face, and order of district court for removal of a pauper was regular on its face. Id. See Dun. Dig 8743.

Even though an arrest be lawful, a detention of the prisoner for an unreasonable length of time without taking him before a committing magistrate will constitute false imprisonment. Kleidon v. Glascock, 215M417, 10NW (2d)394. See Dun. Dig. 3728.

All those who by direct act or indirect procurement personally participate in or proximately cause a false imprisonment or unlawful detention are joint tort-feasors. Id. See Dun. Dig. 3730b.

Evidence justified finding that fire marshal was guilty of false imprisonment in detaining persons without a warrant and without taking them before a magistrate for several days. Id. See Dun. Dig. 3732a.

Any imprisonment which is not legally justifiable is false imprisonment. Id. See Dun. Dig. 3728.

17. ——Assault.

Defendant in action for assault and battery is not prejudiced by refusal of trial court to instruct jury concerning right of liquor establishment to eject unruly patrons where use of force by defendant was prompted by a motive other than that of removing party assaulted from premises. Symalla v. D., 206M280, 288NW385. See Dun. Dig. 9783.

License to use reasonable force to eject unruly customers from liquor establishments does not include privilege of brutally beating those reluctant to depart. Id. See Dun. Dig. 521.

Evidence that a party exhibited anger, used violent language and threatened to strike another while in his presence under circumstances indicating a present ability to carry out the threats is sufficient to show an assault. Dahlin v. F., 206M476, 288NW851. See Dun. Dig. 521.

Intent to commit an assault may be inferred where defendant was angry, threatened to strike plaintiff, came toward her with clenched fists and she fainted and keeled over within defendant's reach before she hit the floor. Id. See Dun. Dig. 521.

In action for assault and battery upon a boy looking for golf balls on a golf link owned by defendant, evidence held to sustain finding that blow was not struck in self defense but as part of use of unreasonable force, either in course of ejecting boy or as a product of anger. Ness v. F., 207M558, 292NW196. See Dun. Dig. 523.

18. ——Conversion.

Mason City P. C. Ass'n v. S., 205M537, 286NW713. Cert. den. 60SCR130. Reh. den. 60SCR178.

Right of mortgagee to maintain action in conversion against vendee of mortgaged property goes to substantive rights of the parties, and, hence, was governed by law of state where property was located and mortgage executed and filed, notwithstanding that property was sold elsewhere. U. S. v. Rogers & Rogers, (DC-Minn), 36FSupp79. Appeal docketed and dismissed without costs to either party in circuit court, pursuant to stipulation, (CCA8), 121F(2d)1019. See Dun. Dig. 1475, 1532, 1541, 1545, 1926, 1932, 1933, 9631, 10103, 10105.

The gist of an action in conversion is a wrongful assumption of dominion and control over property. Id.

Where chattel mortgagee forecloses and sells automobile in exclusion and defiance of lien rights of one furnishing storage or repairs, he may be held in conversion. Conner v. C., 208M502, 294NW650. See Dun. Dig. 1934.

To constitute a good conversion of goods, there must be some repudiation of owner's rights, or some exercise of dominion over them inconsistent with such rights, or some act done which has effect of destroying or changing quality of chattel. Borg & Powers Furniture Co. v. Reiling, 213M539, 7NW(2d)310. See Dun. Dig. 1926.

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. Id. See Dun. Dig. 1932.

In action by conditional vendor of furniture against landlord of tenant who abandoned property when moving out, an instruction that to find defendant guilty of conversion jury must find that he removed property, but that it need not necessarily be found that he personally took the furniture from the house, was proper and consistent with theory of trial. Id. See Dun. Dig. 1935.

A gratuitous bailee is liable for conversion if he intentionally removes or secretes property. Id. See Dun. Dig. 1935.

Evidence held sufficient to sustain finding that a mortgagor of crops was a tenant from year to year and in possession of a farm at the time of an alleged conversion of crops thereon by his mortgagee. State Bank of Loretto v. Dixon, 214M39, 7NW(2d)351. See Dun. Dig. 1951.

19. ——Respondeat superior.

Where servant is, notwithstanding deviation, engaged in the master's business, it is immaterial that he join with this some private business or purpose of his own, but if he departs from the employer's business for a purpose exclusively his own, the master is not liable for his acts. National Battery Co. v. Levy, (CCA8), 126F(2d)33. Cert. den. 316US697, 62SCR1294. See Dun. Dig. 5833.

An independent contractor, who through wilful negligence rebuilds portions of a damaged building so that it is intrinsically dangerous and an object of peril to those whom it is known will make use of it, is liable to such persons for injuries or death notwithstanding that building had been accepted by owners who knew of dangerous condition. Murphy v. B., 206M527, 289NW563. See Dun. Dig. 5835.

Where railroad checker and trucker performed all of his duties in a wholesale grocery plant under an agreement whereby grocery paid his wages and railroad social security railroad company under its duty to exercise ordinary care and caution not to put checker to work in a place of danger would be liable for consequences of any negligent piling of sugar sacks by employees of grocery company in same manner as if piling had been done by employees of railway company in ordinary course of its business. Ryan v. Twin City Wholesale Grocer Co., 210M21, 297NW705. See Dun. Dig. 5869.

Garage mechanic ordering truck driver standing near truck to start motor without ascertaining whether transmission was in gear could be found to have been negligent as to a mere licensee standing in front of truck. Roadman v. C. E. Johnson Motor Sales, 210M59, 297NW 166. See Dun. Dig. 6985.

Where presence of a licensee is known to an owner of property or operator of machinery, there is a duty to exercise ordinary care to avoid injury to him. Id.

An automobile is not within the special rule of strict liability applicable to "an inherently dangerous instrumentality". Wineman v. Carter, 212M298, 4NW(2d)83. See Dun. Dig. 5833, 5834c.

In action for wrongful death in automobile collision, there could be no recovery from driver of other car if death was due solely to negligence of servant of deceased driving his car, but such servant would be liable. Rogers v. Cordingley, 212M546, 4NW(2d)627. See Dun. Dig. 2605.

A doctor is liable for negligence of a nurse in his employ under the doctrine of respondeat superior. St Paul-Mercury Indemnity Co. v. St. Joseph's Hosp., 212M558, 4 NW(2d)637. See Dun. Dig. 5833.

When a general employer, such as a hospital, assigns his servant, such as a nurse, to a duty for another, such as an operating surgeon, and surrenders to the other direction and control in relation to the work to be done, the servant becomes the servant of the other insofar as his service relates to the work so controlled and directed, and his general employer is no longer liable for his torts committed in the controlled work. St. Paul-Mercury Indemnity Co. v. St. Joseph's Hosp., 212M558, 4NW(2d) 637. See Dun. Dig. 4250a, 5834.

Neither partners individually nor partnership are liable for injuries to wife of a partner caused by that partner's negligent driving of a partnership car. Karalis v. Karalis, 213M31, 4NW(2d)632. See Dun. Dig. 5834c.

Cases holding a corporation liable for negligence of its agent even though injured party is agent's wife are clearly distinguishable from cases holding that a partnership is not liable for negligence of a partner who injured his wife. Karalis v. Karalis, 213M31, 4NW(2d)632. See Dun. Dig. 5836.

A verdict for the death of a minor child is not subject to reduction or apportionment because the liability is based on the negligence of the father's employee, the father being one of the beneficiaries of the verdict. Turenne v. Smith, 215M64, 9NW(2d)409. See Dun. Dig. 2616, 5834c, 5844, 7041. See 27MinnLawRev579.

An employer is liable to third parties for the negligence of an employee in the course of his employment. Id. See Dun. Dig. 5833.

Employee is liable to master. Id. See Dun. Dig. 5844.

Ordinarily, the doctrine of respondeat superior has no application in criminal cases, and criminal liability, except 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.

One not the owner but holding himself out as the owner of a bakery may be held liable for damages for injuries caused from eating impure food products purchased at such bakery. Cermak v. Sevcik, 215M203, 9NW (2d)508. See Dun. Dig. 6995.

20. ——Damages.

Surviving parents of minor unmarried son had a legal right to possession of corpse for purposes of preservation and burial and a right of action for substantial damages for mental suffering for any interference with their right of possession. Sworski v. S., 208M201, 293NW 309. See Dun. Dig. 2599.

In connection with actual physical injuries sustained, it is not error to allow jury to consider plaintiff's testimony regarding subjective symptoms of other injuries claimed to have been sustained. Schuman v. M., 209M334, 296NW 174. See Dun. Dig. 2570a.

In an action at law for wrongful interference with a business measure of damages is loss shown to business, but in an action in equity to enjoin violation of a covenant not to compete in a given territory, there may be an accounting for profits gained by violator of covenant, and such illegal profits may properly measure the damages. Peterson v. Johnson Nut Co., 209M470, 297NW178. See Dun. Dig. 2561.

One suffering personal injuries is entitled to a fair estimate of suffering and physical injuries sustained as well as a recovery of special damages by way of medical services and property damage. Krueger v. Henschke, 210 M307, 298NW44. See Dun. Dig. 2570.

Value of use of a business unit such as a filling station depends upon its productivity in terms of profit, and quality of equipment, location, and established clientele should be reflected in value of its use, but actual profit or loss will ordinarily result largely from additional factors, such as personal ability of operator as manager and potency of competition, and should not be given controlling weight. Hatch v. Kulick, 211M309, 1NW(2d)359. See Dun. Dig. 1203, 2535, 5417.

Rules applicable to damages recoverable for trespass and for nuisance interfering with use of land occupied as a home. Sime v. Jensen, 213M476, 7NW(2d)325. See Dun. Dig. 2578.

Where there has been a trespass on realty, owner is entitled to recover such damages as he may have sus-

tained even though they are nominal in amount. Id. See Dun. Dig., 9694.

Insurance coverage of the plaintiff has no effect on the liability of a defendant for a tort. Donohue v. Acme Heating Sheet Metal & Roofing Co., 214M424, 8NW(2d) 618. See Dun. Dig. 2570b.

A verdict for the death of a minor child is not subject to reduction or apportionment because the liability is based on the negligence of the father's employee, the father being one of the beneficiaries of the verdict. Turenne v. Smith, 215M64, 9NW(2d)409. See Dun. Dig. 2616, 5834c, 5844, 7041. See 27MinnLawRev579.

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. 2617.

An allegation of general damage to business is sufficient to admit evidence of loss of trade. Marudas v. Odegard, 215M357, 10NW(2d)233. See Dun. Dig. 2580.

In case of tortious injury to personal property market value is the usual test in determining damages, but when it is not available or is not accurate the value of the property will be determined in some other way, the purpose of the law being to give compensation. Hohenstein v. Dodds, 215M348, 10NW(2d)236. See Dun. Dig. 2576a.

The administration of the rule of avoidable consequences as affected by the degree of blameworthiness of the defendant. 27 MinnLawRev 483.

20½. ——Contribution.

A judgment against operators or owners of two automobiles was not binding in a subsequent action by one of the defendants, against the other to enjoin enforcement of judgment against him for purposes of contribution on question of wilful and intentional violation of traffic law by defendant to second suit. Kemerer v. State Farm Mut. Auto Ins. Co., 211M249, 300NW793. See Dun. Dig. 1923.

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 the alleged tort-feasors. American Motorists Ins. Co. v. Vigen, 213M 120, 5NW(2d)397, 142ALR722. See Dun. Dig. 1922.

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, 213M120, 5NW(2d)397, 142ALR722. See Dun. Dig. 1924.

Contribution is available between joint tort-feasors, absent intentional wrong or conscious illegal act on part of one seeking such relief. American Motorists Ins. Co. v. Vigen, 213M120, 5NW(2d)397, 142ALR722. See Dun. Dig. 1924.

Where judgment in negligence case was an adjudication that negligence of all defendants was active and that all defendants were in pari delicto, insurer of one of the defendants was bound by the determination in a subsequent suit against another of the defendants for indemnity to recover amount paid by such insurer as its contribution to the judgment previously paid. Fidelity & Casualty Co. v. Minneapolis Brewing Co., 214M436, 8NW (2d)471. See Dun. Dig. 1923.

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 by 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.

21. ——Fraud.

Collusion is a secret agreement and cooperation for a fraudulent or deceitful purpose, and implies a secret understanding whereby one party plays into another's hands for fraudulent purposes, and in its legal significance it involves an agreement between two or more persons to defraud another of his rights by forms of law or to obtain an object forbidden by law. Turner v. E., 207M455, 292NW257. See Dun. Dig. 3816.

It is sufficient if representation, although not sole cause, constituted one of several inducements and had a material influence upon the plaintiff suing for damages for fraud. Rother v. H., 208M405, 294NW644. See Dun. Dig. 3821.

Statement that a farm is a "money maker" is not a statement of fact. Id. See Dun. Dig. 3824.

Civil actions require proof of fraud by a fair preponderance of evidence. Id. See Dun. Dig. 3839.

The question of fraud is for jury unless evidence is conclusive. Bulau v. B., 208M529, 294NW845. See Dun. Dig. 3840.

In action against commissioner of bank and bank officers for fraud in obtaining approval of general creditors and depositors to a plan of reorganization, a representation that assets sufficient to pay all public deposits would in no event be available to general depositors and general creditors whether they signed plan of reorganization or not was false since it included a proceeding in insolvency under general law, but such representation was not material where alleged fraud was based on claimed misrepresentation that depositors of the public funds were exempt from and entitled to preference under the reorganization. Rien v. Cooper, 211M517, 1NW(2d) 847. See Dun. Dig. 3820.

In action for damages for misrepresentation that car was in perfect condition and had never been in a wreck, evidence that car consumed inordinate quantities of oil was admissible as evidence of bad condition. Kohanik v. Beckman, 212M11, 2NW(2d)125. See Dun. Dig. 8626.

22. ——Libel and slander.

To be libelous per se, words must be of such a nature that the court can say, as a matter of law, that they will tend to disgrace and degrade the party defamed or hold him up to public hatred, contempt, or ridicule, or cause him to be shunned or avoided. Morey v. Barnes, 212M153, 2NW(2d)829. See Dun. Dig. 5509.

It is only where a publication clearly defames a person that court should instruct jury that it is libelous as a matter of law. Id. See Dun. Dig. 5560.

If an article is not obviously defamatory but is reasonably susceptible of an innocent meaning, question of libel or no libel is for jury to decide under proper instructions. Id. See Dun. Dig. 5560.

In deciding whether words will bear an innocent meaning, a writing must be construed as a whole without taking any word or phrase out of context, or placing undue emphasis upon any one part. Id. See Dun. Dig. 5510.

Where defendant published in his newspaper a letter referring to a cafe, which plaintiff claimed she owned and in which she did cooking, as a brothel, whether letter was defamatory of plaintiff held for jury. Id. See Dun. Dig. 5504.

Notwithstanding that fact that they have benevolent and charitable features, benevolent and beneficial associations, corporate and non-corporate, are liable in tort the same as other groups of individuals, including slander by their agents. High v. Supreme Lodge of the World, 214M164, 7NW(2d)675, 144ALR810. See Dun. Dig. 5503.

A statement referring to the handling by an attorney of settlement of affairs of a lodge as "a very slipshod, careless and unsatisfactory job" was equivalent of a charge of gross negligence and slanderous per se. Id. See Dun. Dig. 5520.

A defamatory charge imputing to a professional man such as an attorney or a physician lack of due qualification, misconduct or want of integrity is slanderous and actionable per se, but words must relate to one in his professional capacity and not merely as an individual without regard to his profession. Id. See Dun. Dif. 5520.

Criticism and comment concerning services rendered by an attorney at law imputing to him gross neglect and unskillfulness, if untrue, are slanderous and actionable per se, even though the words spoken relate to a single case. Id. See Dun. Dig. 5520.

A publication in an advertisement that advertiser could supply parts for certain automobiles "the service department of the Chevrolet Garage being closed" could not reasonably be construed to mean that Chevrolet dealer was in financial difficulties in June 1942 when impact of war economy had effected changes in the business world. Marudas v. Odegard, 215M357, 10NW(2d)233. See Dun. Dig. 5519.

Any imputation of insolvency to a merchant or business man is actionable without allegation of special damages, since the law guards most carefully the credit of business men, which is a necessary and invaluable asset in the business world, and will presume damage from any imputation on their solvency, or any suggestion they are in financial difficulties which would tend to impair it. Id.

When words charged as defamatory are not so upon their face, it is for the court to determine whether the construction of the language put forward by the innuendo is permissible. Id. See Dun. Dig. 5539.

Liability of radio broadcaster for defamatory utterances made by one not in its employ. 24MinnLawRev118.

Legal immunity for defamation. 24MinnLawRev607.

Defamation or disparagement? 24MinnLawRev625.

Publication of inadvertent defamatory material. 25 MinnLawRev495.

23. ——Hospitals.

When a general employer, such as a hospital, assigns his servant, such as a nurse, to a duty for another, such as an operating surgeon, and surrenders to the other direction and control in relation to the work to be done, the servant becomes the servant of the other insofar as his service relates to the work so controlled and directed, and his general employer is no longer liable for his torts committed in the controlled work. St. Paul-Mercury Indemnity Co. v. St. Joseph's Hosp., 212M558, 4NW(2d) 637. See Dun. Dig. 4250a, 5834.

An operating surgeon is liable for negligent acts of assisting nurses during an operation, though the nurses are general employees of the hospital, being under the direct control of the surgeon at the time. St. Paul-Mercury Indemnity Co. v. St. Joseph's Hosp., 212M558, 4NW(2d)637. See Dun. Dig. 4250a.

A hospital, private or charitable, is liable to a patient for torts of its employees under the doctrine of respondeat superior. St. Paul-Mercury Indemnity Co. v. St. Joseph's Hosp., 212M558, 4NW(2d)637. See Dun. Dig. 4250a.

24. ——Interference with contract rights or business.

In an action at law for wrongful interference with a business measure of damages is loss shown to business, but in an action in equity to enjoin violation of a covenant not to compete in a given territory, there may be an accounting for profits gained by violator of covenant, and such illegal profits may properly measure the damages. Peterson v. Johnson Nut Co., 209M470, 297NW178. See Dun. Dig. 2561.

Manager of hotel, whether there was a contract of the 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.

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. Id.

In action for conspiracy in inducing wrongful breach of a contract, where issue was whether defendants acted with justification and in good faith, standard to be applied was reasonable conduct under all circumstances in case. Id.

While a statement in an advertisement that service department of Chevrolet Garage was closed was not defamatory in war time as meaning that dealer was in financial difficulty, it was actionable for injury to business if false and malicious. Marudas v. Odegard, 215M357, 10 NW(2d)233. See Dun. Dig. 9637.

An action for malicious injury to plaintiff's business based on the false statement that plaintiff had closed the service department of its garage is in the nature of a common-law "action on the case". Id.

PARTIES

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

½. In general.

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

Where voters of school district voted to exclude children of orphan home from school, and school board acted thereon, board was proper party defendant in action in mandamus to compel admission of children to school. State v. School Board of Consol. School Dist. No. 3, 206M 63, 287NW625. See Dun. Dig. 5769.

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. La Mourea v. R., 209M53, 295NW304. See Dun. Dig. 1896.

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., 209M 99, 295NW910. See Dun. Dig. 7315.

That a certain corporation is interested in having a defendant excluded from territory wherein it operates does not make it in law or fact a real party in interest in an action by another corporation to enjoin defendant from competing with plaintiff in certain areas in violation of a covenant contained in sale of branch of business. Peterson v. Johnson Nut Co., 209M470, 297NW178. See Dun. Dig. 7315, 8436.

A party may assert his own rights, but not those of others. Esser v. Brophey, 212M194, 3NW(2d)3.

Owner of a shorthand system, as a taxpayer or otherwise, could not maintain suit to restrain schoolboard from reconsidering and rescinding a resolution making that shorthand system exclusive, not being a representive suit and there being no showing made of loss, damage, or increase of burdens to anyone. Caton v. Board of Education, 213M165, 6NW(2d)266. See Dun. Dig. 7315.

A private individual cannot maintain an action to enforce a right or redress a wrong of a public nature unless he has sustained some injury special and peculiar to himself, or unless there exists statutory authority so to do. Id.

An owner of a platted area who installed improvements such as water and sewer system at his own expense and, to induce purchase of lots in the area, represented to buyers that no assessments therefor would be imposed because the purchase price of the lots included payment of the improvements, cannot thereafter claim full ownership of the improvements, and, to the extent of the payments made by lot buyers, improvements became property of the community, and its rights may be asserted by the local unit of government. Country Club District Service Co. v. Village of Edina, 214M26, 8NW (2d)321. See Dun. Dig. 7315.

2. Held not real party in interest.

Where land and personal property were transferred to a son subject to an agreement that son should support parents with provision that if a breach occurred during the lifetime of the father and mother, or the survivor of either of them, son should forthwith lose possession, control, and management of the property, and the title and possession should automatically revert to its former status, and there was no breach of duty while father was still alive, no cause of action could pass to representative of his estate as result of a subsequent breach, and whatever cause surviving widow might have should be conducted by her in her own name and right, which might involve rights and remedies of a third-party beneficiary, or possibly an action as for breach of contract. Moline v. Kotch, 213M326, 6NW(2d) 462. See Dun. Dig. 1896, 7315.

4. Assignments.

Test of assignability of a claim is whether cause of action it represents survives to personal representative of claimant in event of latter's death. Leuthold v. R., 206M199, 288NW165. See Dun. Dig. 564.

An assignment is a transfer or making over to another of the whole of any property, in possession or in action. Cashman v. B., 206M301, 288NW732. See Dun. Dig. 553.

Assignee of judgment is "real party interest", within meaning of federal rules of civil procedure, for purpose of bringing suit upon judgment. Larson v. H., (DC-Minn), 1FRD109.

5. One or more suing for many.

A class suit cannot be maintained where relief sought is recovery of money or damages arising out of distinct and separate transactions of each of several plaintiffs with defendant. Thorn v. G., 206M589, 289NW516. See Dun. Dig. 7502.

Stockholder may bring representative suit against officers of corporation without requesting corporation to bring suit, where it appears that a demand would have been futile. Savory v. Berkey, 212M1, 2NW(2d)146. See Dun. Dig. 2069.

6. Action by taxpayer.

Where an auditorium is conveyed to a city, either under a charitable trust or as a gift on condition for public purposes, and instrument conveying property requires that all income be used only for auditorium purposes, a citizen and taxpayer of the city cannot maintain a representative suit to compel restoration of misapplied income to auditorium fund, attorney general being the only proper plaintiff. Longcor v. C., 206M627, 289NW570. See Dun. Dig. 7315.

9166. Action by assignee; etc.

1. General rule.

Mutual covenants not to compete in certain territory in connection with sale of a branch business followed assignment of contract by purchaser of branch to a corporation formed, and involuntary bankruptcy of assignee did not end or affect covenant, insolvency and adjudication was not anticipatory breach, and right to enforce covenant passed by sale of trustee in bankruptcy of assets and good will. Peterson v. Johnson Nut Co., 209M 470, 297NW178, construing 204M300, 283NW561. See Dun. Dig. 569.

Where one person takes on order for goods under circumstances creating a present contract to sell according to which payment and delivery are concurrent conditions, right to payment is assignable. Dworsky v. Unger Furniture Co., 212M244, 3NW(2d)393. See Dun. Dig. 569, 8509c.

Collection of assigned receivables. 25MinnLawRev201.

7. Notice.

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 dicharged indebtedness of a buyer even though he had notice of assignment. Dworsky v. Unger Furniture Co., 212M244, 3NW(2d)393. See Dun. Dig. 571.

In action by assignee of seller against buyer to recover purchase price, paid by buyer to seller direct, whether buyer had notice of assignment before making payment to assignor held for jury. Id. See Dun. Dig. 561, 8509c.

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

3. Guardian.

In action by guardian of an incompetent to cancel a deed executed by incompetent, in the title to the action plaintiff should be designated with name of ward first, followed by the name of the guardian, "her legal guard-

ian". Parrish v. Peoples, 214M589, 9NW(2d)225. See Dun. Dig. 4332, 4453.

9168. Married woman may sue or be sued.

Interest of wife in real estate of her husband is such as to render her a proper party defendant where the title to her husband's real estate is in issue. Cocker v. Cocker, 215M565, 10NW(2d)734. See Dun. Dig. 7319.

9169. Infants and insane persons—Guardians ad litem.

9. Guardian for insane person.

Implicit in trial court's denial of compensation and expenses to a guardian ad litem is a finding that there was no reasonable ground for the litigation, which finding must be affirmed if supported by record. Johnson v. Johnson, 214M462, 8NW(2d)620. See Dun. Dig. 4529.

Allowance to a guardian ad litem of compensation and expenses for litigation conducted on behalf of his ward is in sound discretion of trial court. Id.

The right of a guardian ad litem to compensation and expenses is not conditioned upon success of litigation. Id.

Where there is no reasonable ground for litigation undertaken by a guardian ad litem of an incompetent, the court may in its discretion deny him compensation and expenses. Id.

9172. Parent or guardian may sue for injury to child or ward—Bond—Settlement.—A father, or, in case of his death or desertion of his family, the mother, may maintain an action for the injury of a minor child, and a general guardian may maintain an action for the injury of his ward. Provided, that if no such action is brought by the father or mother, an action for such injury may be maintained by a guardian ad litem, either before or after the death of such parent. Before any such parent shall receive any money or other property in settlement or compromise of any action so brought, or in satisfaction of any judgment obtained therein, such parent shall file a bond as security therefor, in such form and with such sureties as the court shall prescribe and approve. Provided, however, that upon petition of such parent, the court may, in its discretion, order that in lieu of such bond, any money so received shall be invested in bonds or other securities issued by the United States of America, which shall be deposited for safe-keeping pursuant to an order of the Court, or shall be deposited as a savings account in a banking institution or trust company, together with a copy of the court's order and the evidence of deposit shall be filed with the Clerk of Court, subject to the order of the court, and no settlement or compromise of any such action shall be valid unless the same shall be approved by a judge of the court in which such action is pending. (As amended Act Apr. 13, 1943, c. 416, §1.)

Where property near which nuisance is maintained is owned jointly by husband and wife, husband and he alone may recover for injury to members of his family. King v. S., 207M573, 292NW198. See Dun. Dig. 7274.

An action for injury to a minor child should be brought in name of minor, as plaintiff, by his guardian. Johnson v. Colp, 211M245, 300NW791. See Dun. Dig. 7300.

The parent of an injured child takes his right of action for loss of services and expense of medical attention subject to any defense that could be urged against the child. Wineman v. Carter, 212M298, 4NW(2d) 83. See Dun. Dig. 7301.

An injured minor, through a guardian ad litem, may bring an action directly against person whose negligence caused his injury, although as an unemancipated minor he might not have sued defendant's employer, who was his father, and in such an action it would be no defense that the defendant's employer was plaintiff's father. Turenne v. Smith, 215M64, 9NW(2d)409. See Dun. Dig. 7300, 7308. See 27MinnLawRev579.

Investment of fiduciary funds in life insurance policies and annuities. 25MinnLawRev298.

9174. Joinder of parties to instrument.

In an action by third parties against a landlord to recover damages suffered when building collapsed from a hidden danger or trap that landlord failed to disclose to tenant, trial court did not err in refusing to bring in as parties defendants, the tenant, its workmen's compensation insurer, or its guarantor under the lease. Murphy v. Barlow Realty Co., 214M64, 7NW(2d)684. See Dun. Dig. 7317, 7328, 7329.

9175. Surety may bring action.

Where an auditorium is conveyed to a city either under a charitable trust or as a gift on condition for public purposes, and instrument conveying property requires that all income be used only for auditorium purposes, a citizen and taxpayer of the city cannot maintain a representative suit to compel restoration of misapplied income to auditorium fund, attorney general being the only proper plaintiff. Longcor v. C., 206M627, 289NW570. See Dun. Dig. 7315.

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

1. Effect of death on jurisdiction.

Where a stockholder bringing representative action against corporation and in its behalf against officer died pending action, personal representative of stockholder, substituted for him, was before court only as representative of corporation asserting its cause of action against the wrongdoer, but there was nothing to prevent him from appearing with consent of all concerned to assert claims against corporation due to estate. Briggs v. Kennedy Mayonnaise Products, 209M312, 297NW342. See Dun. Dig. 2069, 7331, 7675.

9180. Actions against partnership, etc.

Constitution and by-laws of association relating to expulsion and suspension of members are construed in light of principles of fundamental justice and constitutional right to due process so as to require specification of charges, notice, and hearing, and law implies or imposes requirements for due process where an association's rules are silent with respect to the matter. Mixed Local Etc. v. Hotel and R. Employees Etc., 212M587, 4NW(2d)771. See Dun. Dig. 618b.

Where a voluntary association such as a lodge or trade union proceeds without complying with its laws, its action is a nullity for want of jurisdiction, and redress may be had by direct resort to the courts without exhaustion of remedies within the organization. Id.

Where the method of procedure in controversy is not regulated by law of an association or trade union, procedure should be analogous to ordinary parliamentary proceedings. Id.

9181. Bringing in additional parties.

In action by assignee of vendors' interest in a conditional sales contract, trial court's statutory power to order parties brought in when necessary for a full determination of a pending action was not exceeded by an order bringing in vendors upon a showing by affidavit that assignment was made in order to avoid a counterclaim by defendant. Kavli v. L., 207M549, 292NW210. See Dun. Dig. 7328.

One who appears as an actor in a litigation or proceeding claiming or asserting an interest in subject matter is a party though he has filed no written pleading. State v. Rock Island Motor Transit Co., 209M105, 295NW 519. See Dun. Dig. 7329.

In action by sub-contractor against general contractor, and home owner whose liability was based upon promises made to plaintiff after he stated that he had decided to quit work, court did not abuse its discretion in adding title insurance company as an additional party upon motion of plaintiff based upon an affidavit of owner averring that title company had promised him to satisfy plaintiff's claim. Schau v. B., 209M99, 295NW910. See Dun. Dig. 7328.

Whether source of power for exercise of discretion in adding additional parties is statutory or inherent, problem of joinder should be resolved by a consideration of the public and judicial interest in administration of justice, through economy of litigation but without prejudice to parties, to end that determination of principal claims shall be full and complete. Id.

Where in replevin it appears that a third party is probably entitled to possession, he should be brought in as a party by intervention or impleader, and this may be ordered by court on its own motion. Braman v. Wall, 210M548, 299NW243. See Dun. Dig. 7328.

Application to intervene in title registration proceeding made more than a year after judgment was rendered was correctly denied. Application of Rees, 211M103, 300 NW396. See Dun. Dig. 4902.

Even if respective grantors under whom parties to an ejectment suit claim title are deemed "necessary parties", proper practice is to continue action or delay trial until they can be brought into case as parties, where case has been tried on its merits and court has passed upon all issues raised between parties directly involved. Flowers v. Germann, 211M412, 1NW(2d)424. See Dun. Dig. 7325(9, 10).

"Necessary parties", when term is accurately used, are those without whom no decree at all can be effectively made determining principal issues in cause. Id. See Dun. Dig. 7316.

While, generally speaking, court of equity will not proceed in a suit unless all parties necessary for full protection of each are before court, question of who shall be made parties in any equity suit is a question of convenience and discretion rather than of absolute right, and there is a distinction between necessary parties and proper parties. Id. See Dun. Dig. 7316(60, 65).

Rule as to "necessary parties" does not extend to those who are only consequentially interested in subject-matter. Id. See Dun. Dig. 7316(62).

"Proper parties" are those without whom a substantial decree may be made, but not a decree which shall completely settle all questions which may be involved in controversy, and conclude rights of all persons who have any interest in subject-matter of litigation. Id. See Dun. Dig. 7316.

Where under decree of probate court children of intestate were decreed two-thirds of a half interest in a newspaper business, and later agreed that widow should have the entire half interest in the newspaper during her lifetime, a subsequent action between children for accounting was not an action for a partnership accounting, and the partner of decedent was not a necessary party. Lewis v. Lewis, 211M587, 2NW(2d)134. See Dun. Dig. 7328.

Where an action is brought in proper county against a sole defendant and another defendant is later made a party on his own request and demands a change of venue to county of his residence, he is not entitled thereto as a matter of right although original defendant joins him in demand and consents thereto. Hanson v. Western Surety Co., 213M182, 6NW(2d)43. See Dun. Dig. 4901a.

In an action by third parties against a landlord to recover damages suffered when building collapsed from a hidden danger or trap that landlord failed to disclose to tenant, trial court did not err in refusing to bring in as parties defendants, the tenant, its workmen's compensation insurer, or its guarantor under the lease. Murphy v. Barlow Realty Co., 214M64, 7NW(2d)684. See Dun. Dig. 7317, 7328, 7329.

It is not the practice in this state to permit a defendant to maintain a cross action between defendant and proposed third parties on issues in which plaintiffs are not interested. Id. See Dun. Dig. 7328.

Surety, against whom judgment was rendered, held entitled to recover from principal obligor who was brought in as third party defendant. U. S. v. U., (DC-Minn), 1FRD112.

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.

LIMITATION OF ACTIONS

9185. General rule—Exceptions.

1. In general.

Pettibone v. Cook County, (DC-Minn), 31FSupp881. Aff'd (CCA8), 120F(2d)850. See Dun. Dig. 2300, 3744, 5602, 5609, 9520a, 9530, 9676, 9678a.

Departure of foreign corporation from Minnesota, subsequent absence therefrom and residence elsewhere, held to have tolled Minnesota Statute of Limitations with respect to action against such corporation. City Co. of New York v. S., (CCA8), 110F(2d)601, aff'g (DC-Minn), 25FSupp948; Chase Securities Corp. v. V., (CCA8), 110F (2d)607.

The provision of a bond of a contractor for a public improvement, and of the statute under which it was given, that suit on the bond must be brought within 60 days after accrual of cause of action, gave the surety on the bond a vested right in the limitation provided, and the repeal of the statute could not destroy such right and permit the claimant to bring the action within the time prescribed by the general limitation statute. Nat'l Sur. Corp. v. W., (CCA8), 111F(2d)622, rev'g 24FSupp640.

A general statute of limitations does not condition rights, but simply prescribes time within which rights may be enforced. Daniel's Estate, 208M420, 294NW465. See Dun. Dig. 5587.

Where facts pleaded in complaint show cause to be barred by statute of limitations and no facts are shown to forestall its operation, demurrer should be sustained. Parsons v. T., 209M129, 295NW907. See Dun. Dig. 5659.

Ordinarily, defense of statute of limitations is an affirmative one that should be specially pleaded. Id. See Dun. Dig. 5666.

Where facts pleaded in complaint and reply show that case is within statute of limitations and nothing is shown to forestall its operation, judgment on pleading for defendant may be granted. Parsons v. T., 209M132, 295 NW909. See Dun. Dig. 7689.

General statutes of limitation, although making no mention of foreign corporation, apply thereto notwithstanding. Pomeroy v. N., 209M155, 296NW513. See Dun. Dig. 5597.

Indebtedness of a distributee to decedent may be set off against his distributive share of personal property even though statute of limitations has run, and this is true in an action for an accounting among coheirs following close of administration proceedings. Lewis v. Lewis, 211M587, 2NW(2d)134. See Dun. Dig. 3661a, 5648.

There is no right to retain a note owing by guardian to his ward, which was outlawed prior to guardian's appointment, as against guardian's claim for expenses for care and support of ward and administration of guardianship. Guardianship of Overpeck, 211M576, 2NW(2d) 140, 138ALR1375. See Dun. Dig. 4122.

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. 5600.

2. When action accrues.

The fact that taxpayers remained in ignorance of the existence of their cause of action to recover taxes erroneously paid the State of Minnesota on islands located in Canada after it had actually accrued did not toll the statute of limitations. Pettibone v. Cook County, (CCA 8), 120F(2d)850, aff'g (DC-Minn), 31FSupp881. See Dun. Dig. 2300, 3744, 5602, 5609, 9520a, 9530, 9676, 9678a.

As soon as it was demonstrable that islands were in Canada and not Minnesota cause of action to recover taxes paid Cook County accrued. Id.

A cause of action accrues at time that action thereon can be commenced. Id.

Acceleration clause in a note, "shall forthwith be due", is for benefit of creditor, and gives him option of proceeding against debtor upon happening of contingencies comprehended in acceleration clause, and prior to due date set out in notes, if he so desires, but if creditor fails to take any action upon happening of such contingencies prior to due date of note, limitations does not commence to run until due date. Chase Nat. Bank v. B., (DC-Minn), 32FSupp230.

Where county condemning land entered into settlement agreement under which it paid cash and agreed to vacate another street abutting on property and give landowner 20 feet thereof, and landowner went into possession of strip of land, contention of land owner that he was rightfully in possession under claim of title and that no cause of action accrued against county in his favor for breach of its contract to vacate until his possession was disturbed by township authorities was without merit, since he did not acquire any title from county as it had no title to convey, and county could not even vacate street. Parsons v. T., 209M129, 295NW907. See Dun. Dig. 5602.

Under California Law two year statute of limitations did not begin to run against claim for personal services from inception of services where expectation was that compensation would be made by will. Superior's Estate, 211M108, 300NW393. See Dun. Dig. 3593*l*, 5605, 10207.

Establishment of title to relicted land by adverse possession carries with it right to all accretions and relictions attaching thereto, and statute of limitations relates back to time it began to run in favor of adverse possessor. Schmidt v. Marschel, 211M539, 2NW(2d)121. See Dun. Dig. 120.

Where intestate left half interest in newspaper business and one-third was decreed to widow and two-thirds to children and children agreed that widow should have whole interest in newspaper and income therefrom during her lifetime, limitations did not begin to run against some of the children who desired an accounting after death of widow until death of widow, litigation involving question whether children transferred their interest absolutely or only for life of widow. Lewis v. Lewis, 211M587, 2NW (2d)134.

Bonds issued by a city to a railroad, payable to it or to bearer, and refunding bonds payable to bearer on a certain date, were express contract obligations of city to pay a specified sum of money, and any action thereon was barred six years from their due date. Batchelder v. City of Faribault, 212M251, 3NW(2d)778. See Dun. Dig. 5601.

Limitations does not begin to run on town orders until funds are available or should have been available in treasury for payment thereof. Op. Atty. Gen. (442b-9), Aug. 13, 1942.

3. Waiver.

County may not pay a claim upon which limitations has run. Op. Atty. Gen. (107A-9), Aug. 12, 1941.

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

If property is held in possession with intention to exclude all others and is continued a sufficient length of time, it will ripen into title, regardless of good faith or bad faith of disseizor. Schmidt v. Marschel, 211M539, 2NW (2d)121. See Dun. Dig. 114.

3b. Lands which may be acquired.

Title to the shores or flats of tidewaters where privately held may be acquired by adverse possession. Schmidt v. Marschel, 211M539, 2NW(2d)121. See Dun. Dig. 107, 110, 6961.

If lands are subject of private ownership, adverse possession may be had of them even though they are covered by water. Id. See Dun. Dig. 107.

Title of a riparian owner to an island in a nonnavigable stream may be obtained by adverse possession. Id. See Dun. Dig. 107, 1067.

Title to relicted lands may be acquired by adverse possession. Id. See Dun. Dig. 107, 1067, 6954.

4. Laches.

Laches in equity is unreasonable delay in seeking relief or asserting one's right. It is a strictly equitable defense as distinguished from the absolute defense afforded by statute of limitations. Sinell v. T., 206M437, 289NW44. See Dun. Dig. 5350(67, 68).

Where facts pleaded fail to show any excuse for a delay of more than 62 years in bringing mandamus to open and grade a township road, laches appears as a matter of law, for equity aids the vigilant, and not the negligent. Id. See Dun. Dig. 5359.

Pith and substance of doctrine of laches is unreasonable delay in enforcing a known right, and practical question in each case is whether there has been such unreasonable delay resulting in prejudice to others as would make it inequitable to grant the relief sought. Cantieny v. B., 209M407, 296NW491. See Dun. Dig. 5350.

Basis of laches is public policy which requires for peace of society discouragement of stale demands. Id.

Where both parties are at fault in respect to delay neither can assert laches as against the other, and where each of the parties seeks affirmative relief against the other in reference to same transaction, neither may assert other was guilty of laches. Palm's Estate, 210M87, 297NW765(2nd case). See Dun. Dig. 5351.

The pith of the doctrine of laches is unreasonable delay in enforcing a known right. Young v. Blandin, 215M111, 9 NW(2d)313. See Dun. Dig. 5351.

Where the relationship between the parties is one of confidence and a breach of a fiduciary duty has occurred, the evidence should be very convincing before the injured party should be barred by laches from relief. Id. See Dun. Dig. 5353.

9186. Bar applies to state, etc.

Individual maintaining water supply system along highway could not claim authority or franchise on ground of municipal acquiescence since no prescriptive right may be gained in a public street or highway. Kuehn v. V., 207M518, 292NW187. See Dun. Dig. 8446.

Individual maintaining water supply system along highway could not claim authority or franchise on ground of municipal acquiescence since no prescriptive right may be gained in a public street or highway. Id. See Dun. Dig. 8448.

Long delay occurring between establishment of ditch and institution of proceedings to restore lake level does not limit right of state so to proceed since no prescriptive right can be obtained against sovereign, absent any statutory time limit within which to act. Lake Elysian High Water Level, 208M158, 293NW140. See Dun. Dig. 5601.

Use by abutting owners of part of platted streets for garden purposes was not of much legal significance as affecting duty of city not to permit an abandoned street to become a trap for motorists, since the public easement may not be acquired by adverse possession. Ollgaard v. C., 208M384, 294NW228. See Dun. Dig. 111.

Six-year statute of limitations applies to any loans made by Division of Vocational Rehabilitation. Op. Atty. Gen. (170h), Mar. 13, 1941.

Before passage of this section title to land within a public street might be acquired by adverse possession, but, in case of a street dedicated by plat, public authorities may choose their own time to open the street, and possession of street in meantime by abutting property owners is not regarded as hostile to rights of the public, and will not result in extinguishing the dedication. Op. Atty. Gen. (396g-16), Apr. 1, 1942. See Dun. Dig. 111, 4160, 8449.

9186-1. Cities of first class may not acquire property or easements by prescription.—No city of the first class or any board or department thereof shall hereafter obtain or acquire title to real property or any right or easement therein by prescription or adverse possession. (Act Apr. 23, 1943, c. 582, §1.) [465.013]

9186-2. Same—Application of act.—This Act shall not be construed to prevent the adjudication hereafter of title in such city in cases where lapse of time and adverse possession have already ripened into title but no adjudication thereof has yet been had. (Act Apr. 23, 1943, c. 582, §2.) [465.013]

9187. Recovery of real estate, fifteen years.

Instruments more than 50 years old. Laws 1943, c. 529.

Cities of first class cannot acquire title by prescription. Laws 1943, c. 582.

Actual possession in adverse possession of land. 25 IowaLawRev78.

3. Payment of taxes.

Where possession is had beyond proper boundary of area not separately assessed, payment of taxes on disputed area is not necessary. Mellenthin v. Brantman, 211 M336, 1NW(2d)141. See Dun. Dig. 112a.

Fact the person in possession of land lists house thereon as personal property for purposes of taxation is strong evidence that his possession is permissive and not adverse. State v. Riley, 213M448, 7NW(2d)770. See Dun. Dig. 114(c).

While nonpayment of taxes by school district is probably not evidence against adverse possession, payment of taxes by individual constitutes evidence of claim of title by such individual and permissive possession by school district. Op. Atty. Gen., (622i-16), Dec. 27, 1939.

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

Adverse possession requires not only actual, open, continuous, hostile, and exclusive possession for fifteen years, but a claim of assertion of title and intention to claim adversely to true owner. Sullivan v. Huber, 209M592, 297 NW33. See Dun. Dig. 114.

4. Public land.

Individual maintaining water supply system along highway could not claim authority or franchise on ground of municipal acquiescence since no prescriptive right may be gained in a public street or highway. Kuehn v. V., 207M518, 292NW187. See Dun. Dig. 8446.

5. Mistake as to boundary lines.

Practical location of a boundary line can be established only in one of three ways: acquiescence for sufficient length of time to bar right of entry under statute of limitations; express agreement between parties claiming land on both sides and acquiescence therein afterwards; or party whose rights are to be barred must, with knowledge of true line, have silently looked on while other party encroached upon it, and subjected himself to expense which he would not have done had line been in dispute. Dunkel v. Roth, 211M194, 300NW610. See Dun. Dig. 1083.

Possession under mistake as to boundary is adverse possession. Mellenthin v. Brantman, 211M336, 1NW(2d) 141. See Dun. Dig. 114(b).

If one enters into possession of property under an honest belief that it belongs to him and occupies it as his own with intention to exclude others, he holds adversely, even though he did not intend, under conveyance to him, to take any land that did not belong to him. Schmidt v. Marschel, 211M539, 2NW(2d)121. See Dun. Dig. 114.

6. Permissive possession.

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

To transform a permissive use into an adverse one there must be a distinct and positive assertion of a right hostile to rights of owner, and such assertion must be brought to his attention, and use continued for full prescriptive period under the assertion of right, and the rule is not affected by fact that privilege is claimed by successors in interest of party to whom permissive use was originally given. State v. Riley, 213M448, 7NW (2d)770. See Dun. Dig. 114(c).

A license to occupy and use land could have been created by parol that would be revocable at the will of the owner. Id. See Dun. Dig. 114(c).

The strictest proof of hostile inception of possessor is required. Id. See Dun. Dig. 127.

Possession of land by school district for school house site cannot ripen into title so long as possession is permissive. Op. Atty. Gen., (622i-16), Dec. 27, 1939.

8. Between mortgagor and mortgagee.

Prior to and after foreclosure, until the countrary appears the possession of a mortgagor is presumed to be amicable and in subordination to mortgage. Romanchuk v. Plotkin, 215M156, 9NW(2d)421. See Dun. Dig. 114(e).

18. Possession must be continuous.

Evidence was conclusive that possession of claimant's predecessors in interest was permissive and that it was not transformed into an adverse possession 15 years before commencement of proceedings. State v. Riley, 213M448, 7NW(2d)770. See Dun. Dig. 127.

21. Nature of title acquired by adverse possession.

Establishment of title to relicted land by adverse possession carries with it right to all accretions and relictions attaching thereto, and statute of limitations relates back to time it began to run in favor of adverse possessor. Schmidt v. Marschel, 211M539, 2NW(2d)121. See Dun. Dig. 120.

22. Easements.

Whether creamery has acquired a prescriptive right or implied grant to drain waste from creamery upon land is unimportant where amount of drainage and extent of injuries are substantially greater than they were when such right or grant was acquired. Herrmann v. Larson, 214M46, 7NW(2d)330. See Dun. Dig. 121, 2853.

A prescriptive right to maintain a nuisance cannot arise unless nuisance has continued in substantially same way and with equally injurious results for entire statutory period. Id. See Dun. Dig. 7256.

26. Degree of proof required.

The strictest proof of hostile inception of possessor is required. State v. Riley, 213M448, 7NW(2d)770. See Dun. Dig. 127.

27. Facts held sufficient to constitute adverse possession.

Adverse possession of relicted land in front of land of another was established by evidence of cutting trees and burning them, removing rocks, discing, and sowing clover, authorizing others to cut and take willows for their own use, selling trees growing on property, and renting a pasture which included disputed land to owner of upland. Schmidt v. Marschel, 2NW(2d)121. See Dun. Dig. 114.

30. Tax sales—Short statutes of limitation.

As affecting purchase by school district of tax title lands, a tax title is not a good marketable title until title has been quieted by action, since a tax title is subject to many errors and mistakes, which might be raised at any time within 15 years by original owner. Op. Atty. Gen. (425c-12), Sept. 12, 1940.

9187-1. Limitation of actions affecting title to real estate.—No action affecting the possession or title of any real estate which, for more than 30 years, has

been or shall have been platted by plat on record in the office of the Register of Deeds of the county in which such real estate is situate, shall be commenced by any person, corporation, state, or any political division thereof, after January 1, 1944, which is founded upon any unrecorded instrument executed more than 50 years prior to the commencement of such action, or upon any instrument recorded more than 50 years prior to the date of commencement of the action, or upon any transaction more than 50 years old, unless within 50 years after the execution of such unrecorded instrument or within 50 years after the date of recording of such recorded instrument, or within 50 years after the date of such transaction there is filed in the office of the register of deeds of the county in which the real estate is located, a notice setting forth the name of the claimant, a description of the real estate affected and of the instrument or transaction on which such claim is founded, with its date and the volume and page of its recording, if it be recorded, and a statement of the claims made. This notice shall be filed and may be discharged the same as a notice of pendency of action. Such notice filed after the expiration of 50 years shall be likewise effective, except as to the rights of a purchaser for value of the real estate or any interest therein which may have arisen prior to such filing. (Act Apr. 20, 1943, c. 529, §1.)
[541.023]

9187-2. Same—Actions to be commenced within one year.—All actions founded upon the written instrument or transaction referred to in the notice shall be commenced within one year from the filing of said notice, and unless such action is so commenced all rights under said notice shall terminate. (Act Apr. 20, 1943, c. 529, §2.)
[541.023]

9187-3. Same—Application of act.—This act does not extend the right to commence any action beyond the date at which such right would be extinguished by any other statute. (Act Apr. 20, 1943, c. 529, §3.)
[541.023]

9187-4. Same—Construction of act.—This act shall be construed to effect the legislative purpose of allowing bona fide purchasers of real estate, or of any interest therein, dealing with the person, if any, in possession, to rely on the record title covering a period of not more than 50 years prior to the date of purchase and to bar all claims to an interest in real property, remainders, reversions, mortgage liens, old tax deeds, rights as heirs or under wills, or any claim of any nature whatsoever, however denominated, and whether such claims are asserted by a person sui juris or under disability, whether such person is within or without the state, and whether such person is natural or corporate, or private or governmental, unless within such 50-year period there has been recorded some record evidence of the existence of such claim or unless a notice of renewal pursuant hereto has been filed. This section does not apply to any action commenced by any person who is in possession of the real estate involved as owner of the estate claimed in said action at the time the action is commenced. This section shall not affect any action or proceeding which is now or on January 1, 1944, shall be pending, for the determination of validity of the title to real estate. (Act Apr. 20, 1943, c. 529, §4.)
[541.023]

9188. Foreclosure of real estate mortgages.
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. 5648, 6311.

An action to recover a deficiency after foreclosure of a mortgage is one to enforce personal liability of mortgagor for debt, and where debt is barred, an action against mortgagor cannot be maintained. Id.

9189. When time begins to run.
See also §9602.

9189-1. Limitation of action for damages caused by dams.—No action or proceeding against the state of Minnesota, its officers or agents, shall be maintained on account of the construction, reconstruction, operation or maintenance of any dam or appurtenant structures designed to maintain water levels above natural ordinary high or on account of the maintenance of such levels, where such levels have been maintained for a period of 15 years or more, prior to January 1, 1941. (Act Apr. 24, 1941, c. 409, §1.)
[541.115]

Section 2, Act Apr. 24, 1941, c. 409 provides that the act takes effect on Sept. 1, 1941.

9190. Judgments, ten years.
In an action to renew a personal judgment, giving credit for amount paid thereon by execution and sale of corporate stock, defendant could not set up as a defense or counterclaim that sheriff did not have actual possession of certificate of stock at time of sale and bidders were therefor deterred from bidding, and stock was sold at a price less than its actual worth, since any objections that the defendant might have had should have been raised in a direct attack to set the sale aside. Brennan v. Friedell, 215M499, 10NW(2d)355. See Dun. Dig. 3502 (99), 5153.

Pleading of statute was insufficient. Hudson v. Hay, 13So(2d)(Fla)10. See Dun. Dig. 5150.

Judgments—limitations upon actions, executions and liens. 24MinnLawRev660.

9191. Various cases, six years.
½. In general.
Shepard v. C., (DC-Minn), 24FSupp682. App. dis., (CCA 8), 106F(2d)994.

Survey made in 1929, pursuant to Rott-Bryce Treaty, (35 Stat. 2003) established boundary between United States and Canada, and cause of action to recover taxes assessed by Cook County, Minnesota, on lands lying within Dominion of Canada, accrued as of that date, notwithstanding that official government plat was not filed in land office until August 15, 1934. Pettibone v. C., (DC-Minn), 31FSupp881. Aff'd (CCA8), 120F(2d)850. See Dun. Dig. 2300, 3744, 5602, 5609, 9520a, 9530, 9676, 9678a.

Plaintiff could not successfully maintain that they did not have available evidence to sustain proof that the lands were without the United States until filing of corrected plat, since availability of evidence is not determinative of time when an action accrues. Id.

Claims as to which Minnesota statute of limitations had not run at time of filing of petition in bankruptcy, remained valid and enforceable throughout entire bankruptcy proceedings. Berg, (DC-Minn), 33FSupp700.

Running of limitations is not tolled by departure of foreign corporation from state so long as there is a process agent in state. Pomeroy v. N., 209M155, 296NW 513. See Dun. Dig. 5610.

It is doubtful if this section would apply to any proceedings under the Workmen's Compensation Act. Op. Atty. Gen. (523a-20), Dec. 18, 1940.

1. Subdivision 1.
Pike Rapids Power Co. v. M., (CCA8), 99F(2d)902. Cert. den., 59SCR362, 488. Reh. den., 59SCR487. Judgment conforming to mandate aff'd, 106F(2d)891.

The fact that taxpayers remained in ignorance of the existence of their cause of action to recover taxes erroneously paid the State of Minnesota on islands located in Canada after it had actually accrued did not toll the Statute of limitations. Pettibone v. Cook County, (CCA 8), 120F(2d)850, aff'g (DC-Minn), 31FSupp881. See Dun. Dig. 2300, 3744, 5602, 5609, 9520a, 9530, 9676, 9678a.

Where trust instrument, settling corporate stock on beneficiary, gave the corporation an option to purchase the stock either upon sale or disposal of the stock during beneficiary's lifetime or upon its passing by descent or devise, rule against perpetuities was not violated, since any claim to be made upon the option would have to be made within the applicable statute of limitations. Warner & Swasey Co. v. Rusterholz, (DC-Minn), 41F Supp498. See Dun. Dig. 1520, 1749a, 2037, 2040a, 2112a, 3560, 5653, 7480, 9888a, 10258.

Option must be exercised within six years of death of beneficiary. Id.

Evidence held to sustain finding that no payment had been made upon note within six years of action. Campbell v. L., 206M387, 288NW833. See Dun. Dig. 5647.

Where grantees assume and agree to pay an encumbrance, their liability accrues when they fail to pay encumbrance as it falls due, and from that time statute of limitations runs. Johnson v. F., 207M61, 289NW835. See Dun. Dig. 5605.

Where county condemning land entered into settlement agreement under which it paid cash and agreed to vacate

another street abutting on property and give landowner 20 feet thereof, and landowner went into possession of strip of land, contention of land owner that he was rightfully in possesion under claim of title and that no cause of accrued against county in his favor for breach of its contract to vacate until his possession was disturbed by township authorities was without merit, since he did not acquire any title from county as it had no title to convey, and county could not even vacate street. Parsons v. T., 209M129, 295NW907. See Dun. Dig. 5648.

Period of limitations on breach by county of contract to vacate street is 6 years. Id. See Dun. Dig. 5605.

In absence of an agreement as to time of performance, law requires that a contract be performed within a reasonable time. Id. See Dun. Dig. 1785.

Complaint stated a cause of action for negligence making 6-year statute applicable where it alleged that defendants "wrongfully, unlawfully, willfully, and maliciously" set afire to a wooden structure and "wrongfully, unlawfully, carelessly and negligently" left a can of inflammable oil near burning building, though there was allegation of facts constituting arson as a setting for tort. Villaume v. W., 209M330, 296NW176. See Dun. Dig. 5654.

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. 5648.

Bonds issued by a city to a railroad, payable to it or to bearer, and refunding bonds payable to bearer on a certain date, were express contract obligations of city to pay a specified sum of money, and any action thereon was barred six years from their due date. Batchelder v. City of Faribault, 212M251, 3NW(2d)778. See Dun. Dig 5601.

One may be estopped to set up statute of limitations as a defense. Albachten v. Bradley, 212M359, 3NW(2d) 783. See Dun. Dig. 3187.

An action on a promissory note is barred unless commenced within six years from maturity, except where running of statute has been tolled by act of parties, such as a part payment. Bernloehr v. Fredrickson, 213 M505, 7NW(2d)328. See Dun. Dig. 5605.

Cause of action to compel performance of an oral contract to devise or convey realty by parents to son upon death of survivor of the parents, provided son maintained them throughout their lives, did not mature until death of survivor. Seitz v. Sitze, 215M452, 10NW(2d)426. See Dun. Dig. 8797.

Six-year statute of limitations applies to any loans made by Division of Vocational Rehabilitation. Op. Atty. Gen. (170h), Mar. 13, 1941.

Claim for refund on personal property taxes is in nature of a claim for money had and reecived and is barred after six years. Op. Atty. Gen. (424B-9), Aug. 1, 1941.

Limitations does not begin to run on town orders until *funds are available or should have been available in* treasury for payment thereof. Op. Atty. Gen. (442b-9), Aug. 13, 1942.

2. Subdivision 2.

An action in Michigan for injuries occurring in Minnesota resulting from defendant's violation of the Minnesota ventilation statute is controlled by the six-year Minnesota statute of limitation governing case of a liability created by statute rather than the three-year period of limitations prescribed by the Michigan statute, it being immaterial that the Minnesota limitation period is not prescribed in the ventilation statute, since the statutory limitation accompanies the new right created by the statute, and hence is substantive law which will be recognized by comity. Maki v. George R. Cooke Co., (CCA6), 124F(2d)663. Cert. den. 316US686, 62SCR1274. See Dun. Dig. 1546.

4. Subdivision 4.

Where embezzlement and alienation of property of a decedent was fraudulent, statute of limitations did not begin to run until discovery of cause of action. Owens v. O., 207M489, 292NW89. See Dun. Dig. 5608.

5. Subdivision 5.

Statute of limitations of Minnesota for actions founded on injuries to the person as the law of the forum governs as to time within which an action for damages for death may be brought in Minnesota for death occurring in Iowa. Daniel's Estate, 208M420, 294NW465. See Dun. Dig. 1546, 5654.

Complaint stated a cause of action for negligence making 6-year statute applicable where it alleged that defendants "wrongfully, unlawfully, willfully, and maliciously" set afire to a wooden structure and "wrongfully, unlawfully, carelessly and negligently" left a can of inflammable oil near burning building, though there was allegation of facts constituting arson as a setting for tort. Villaume v. W., 209M330, 296NW176. See Dun. Dig. 5654.

6. Subdivision 6.

Departure of foreign corporation from Minnesota, subsequent absence therefrom and residence elsewhere, held to have tolled Minnesota Statute of Limitations with respect to action against such corporation. City Co. of New York v. S., (CCA8), 110F(2d)601, aff'g (DC-Minn), 25FSupp948; City Co. of N. Y. v. Stern, (CCA8), 110F(2d) 601, aff'g 25FSupp948. Overruled by 209M155, 296NW513, and later rev'd and remanded 312US666, 61SCR823, 85LEd 1110; Chase Securities Corp. v. V., (CCA8), 110F(2d)607.

Failure of stockholders and creditors of bankrupt corporation to bring suit for the recovery of bonus payments made to officer of corporation until 15 or 20 years after such payments were made raised a presumption that the stockholders consented to the payment of such bonuses. Boyum v. Johnson, (Fergus Falls Woolen Mills Co.), (CCA8), 127F(2d)491, rev'g (DC-Minn), 41FSupp355. See Dun. Dig. 2084a, 2096, 5652, 5653.

If plaintiff's claim (as holder and payee of a check made and delivered as a gift) be considered an implied trust, the statute of limitations began to run from time when act was done by which decedent (maker of check) became chargeable as trustee. Burton's Estate, 206M516, 289NW66. See Dun. Dig. 5653(41).

In procedings brought by minority stockholder seeking relief against a judgment taken against corporation by fraudulent practices, corporation is the "aggrieved party." Lenhart v. Lenhart Wagon Co., 210M164, 298NW37. See Dun. Dig. 5652.

City suing clerk for shortage in accounts more than six years after embezzlement has burden of alleging and proving that it did not discover facts constituting trial until six years before commencement of action. Op. Atty. Gen. (605A-13), Aug. 11, 1941.

7. Subdivision 7.

Evidence sustains findings that claim on check did not accrue within six years next preceding date of death of decedent against whose estate claim was sought to be enforced. Burton's Estate, 206M516, 289NW66. See Dun. Dig. 5653.

Bonds issued by a city in 1899 to refund bonds issued in 1882 by a city to a railroad, or bearer, were express contract obligations of city to pay a specified sum of money on a certain date, and an action on such bonds accrued to holder on due date and not upon later date when demand for payment was made, notwithstanding that taxes were levied for their payment and turned over to city treasurer for purpose of paying such bonds, as against contention that tax money transmitted to treasurer became a trust fund. Batchelder v. City of Faribault, 212M251, 3NW(2d)778. See Dun. Dig. 5653.

8. Subdivision 8.

Limitations against action against village treasurer and surety begins to run at end of term during which money is lost through failure of a bank, notwithstanding that treasurer has held office continuously since and same sureties have appeared on all his official bonds. Op. Atty. Gen., (140B-9), Jan. 24, 1940.

9192. Against sheriffs and others.

2. Subdivision 2.

Section 8992-96, giving double damages for conversion of property of a deceased person, is not a penal statute since it gives same right as existed at common law and merely increases damages payable to party aggrieved. Owens v. O., 207M489, 292NW89. See Dun. Dig. 5657.

9193. Two years' limitations.

2. Subdivision 2.

Two-year statute of limitations against actions for penalties or forfeitures is not applicable to a tax penalty, and especially a tax penalty upon a privilege tax such as gross premium taxes. Op. Atty. Gen. (254d), Nov. 7, 1940.

9200. Effect of absence from state.

Foreign corporation which ceased to do business in Minnesota, cancelled its license, filed its resolution of withdrawal and removed its offices and representatives from the state, held to have departed from the state, being absent therefrom and residing in the state of its creation within this section though the Secretary of State and Commissioner of Securities continued to be its designated attorneys for service of profit. City of New York v. S., (CCA8), 110F(2d)601, aff'g (DC-Minn), 25F Supp948. Overruled 209M155, 296NW513. Rev'd and remanded 312US666, 61SCR823, 85LEd1110.

Departure of foreign corporation from Minnesota, subsequent absence therefrom and residence elsewhere, held to have tolled Minnesota Statute of Limitations with respect to action against such corporation. City Co. of New York v. S., (CCA8), 110F(2d)601, aff'g (DC-Minn), 25FSupp948; Overruled 209M155, 296NW513. Rev'd and remanded 312US666, 61SCR823, 85LEd1110. Chase Securities Corp. v. V., (CCA8), 110F(2d)607.

Running of limitations is not tolled by departure of foreign corporation from state so long as there is a process agent in state. Pomeroy v. N., 209M155, 296NW 513. See Dun. Dig. 5610.

9201. When cause of action accrues out of state.

If by the law of the state which has created a right of action, it made condition of the right that it shall expire after a certain period of limitation has elapsed, no action begun after the period has elapsed can be maintained in any state. Maki v. George R. Cooke Co., (C.C.A.6), 124 F(2d)663. Cert. den. 316US686, 62SCR1274. See Dun. Dig. 1546.

In common law actions the statute of limitation of the forum is a bar to remedy, even though the action is not barred in the state where it arose; and conversely, an action not barred by the limitation of the forum is

maintainable, though barred in the state of origin of the cause of action. Id.

Statute of limitations of Minnesota for actions founded on injuries to the person as the law of the forum governs as to time within which an action for damages for death may be brought in Minnesota for death occurring in Iowa. Daniel's Estate, 208M420, 294NW465. See Dun. Dig. 1546, 5654.

Where an action is brought by a legal representative who has sole right to sue, his citizenship as a party is determined by his citizenship as an individual and not by that of beneficiaries of the action. Id. See Dun. Dig. 5612.

Where a claimant against estate of a decedent is not a citizen of this state and personal services were largely rendered in another state, statute of limitations of such other state controls. Superior's Estate, 211M108, 300NW 393. See Dun. Dig. 5612.

9203. Period between death of party and granting of letters.

Limitation period provided by wrongful death statute is a condition precedent to right of action, to be strictly complied with, and is not extended by the tolling provisions of this section. Cashman v. Hedberg, 215M463, 10 NW(2d)388. See Dun. Dig. 2614, 3671.

Statute relates only to actions which survive the deceased. Id. See Dun. Dig. 3671.

9204. New promise must be in writing.

1. Acknowledgment or promise.

An unqualified and unconditional acknowledgment of a debt implies a promise to pay it, effect of which is to place debt on footing of one contracted at time of such acknowledgment, whether acknowledgment precedes or follows bar of statute of limitations. Reconstruction Finance Corp. v. O., 207M146, 290NW230. See Dun. Dig. 5623.

Giving of a chattel mortgage in usual form to secure a note after its due date was an acknowledgment and tolled statute so that it began to run from date of such acknowledgment. Id. See Dun. Dig. 5624.

Assurance by maker of note that holder thereof would not lose anything by waiting until a certain date, which was beyond period of limitations, was in effect an agreement that statute of limitations would not be asserted as a defense, though there was not express mention of statute of limitations. Albachten v. Bradley, 212M359, 3 NW(2d)783. See Dun. Dig. 5624.

A party may be estopped to set up statute of limitations as a defense by an oral agreement performed by other party to his prejudice notwithstanding requirement of this section that such an agreement be in writing. Id. See Dun. Dig. 5623, 5634.

Section is essentially a statute of frauds. Id. See Dun. Dig. 5623.

2. Part payment.

Claim of controlling stockholder of bankrupt corporation based upon a note was properly disallowed where payment of interest upon which claimant relied to toll statute of limitations was not shown by proof dehors the instruments establishing that the indorsement was actually made at a time when it was against claimant's interest to make it. Boyum v. Johnson, (Fergus Falls Woolen Mills Co.) (C.C.A. 8), 127 F. (2d) 491, aff'g (DC-Minn), 41 F. Supp. 355. See Dun. Dig. 5642.

Evidence held to sustain finding that no payment had been made upon note within six years of action. Campbell v. L., 206M387, 288NW833. See Dun. Dig. 5624.

Where one joint obligor made a payment on a coindebtedness with funds derived from sale of personalty mortgaged by his coobligor to secure the indebtedness, whether payment was voluntarily made as his own so as to toll statute or as a mere agent or conduit held for jury. Greve v. State Bank, 211M175, 300NW594. See Dun. Dig. 5643.

Payment by one joint debtor does not, standing alone, bind a co-obligor and prevent running of statute of limitations as to him. Id.

Payment ordinarily must be voluntary and cannot arise from an involuntary payment under compulsion of law. Id. See Dun. Dig. 5632.

Part payment before statute of limitations has run tolls the running of statute, upon theory that it amounts to a voluntary acknowledgment of existence of debt from which a promise to pay balance is implied. Bernloehr v. Fredrickson, 213M505, 7NW(2d)328. See Dun. Dig. 5633.

A part payment, to be basis for implied promise to pay balance must be made by debtor himself, or by his authority, or, if not made by him personally or by his authority, it must be ratified by him. Id. See Dun. Dig. 5643.

A part payment upon a promissory note by one of two joint makers before statute of limitations has run will not prevent running of statute as to other maker, except where part payment is made pursuant to latter's authority, or where, if he did not authorize such payment, he subsequently ratified it. Id. See Dun. Dig. 5643.

Evidence that defendant assured payee of note that he would receive his interest from a comaker, and shortly thereafter interest was paid as promised by such comaker, permitted an inference that payment was made at defendant's direction and by his procurement. Id. See Dun. Dig. 5643.

Authorities seem to hold that part payment by one comaker of a promissory note with the consent of another suspends running of the statute of limitations as to the latter. Id. See Dun. Dig. 5645.

VENUE

9206. General rule—Exception.

Statutes governing venue confer a personal privilege upon the defendant which may be waived. Duval v. B., (DC-Minn), 31FSupp510.

Venue in state court is not jurisdictional. Panzram v. O'Donnell, (DC-Minn), 48FSupp74. See Dun. Dig. 8393b, 10104.

Since district courts virtually constitute one court of general jurisdiction coextensive with boundaries of state, fact that a civil action is brought or tried in wrong county is not jurisdictional. Claseman v. Feeney, 211M 266, 300NW818. See Dun. Dig. 2758, 10104.

Question of venue is a matter for local regulation and state authority in an action in state court against a nonresident arising out of an automobile accident, and Congress may not legislate otherwise. Id. See Dun. Dig. 9956.

Venue, place of trial, is governed by statute. Id. See Dun. Dig. 10103.

9207. Actions relating to land.

General rule is that actions in a district court of the state are transitory unless excepted by statute as local, and statute relating to land is applicable only to such actions as are wholly local, as distinguished from those which are partly local and partly transitory. Yess v. Ferch, 213M593, 5NW(2d)641. See Dun. Dig. 10108.

Defendant in an action for a personal judgment and to cancel a deed to land is entitled to a change of venue to county of his residence from county where land is located, part of the demand for personal judgment having no alleged connection with the land. Id.

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

An action against members of state industrial commission to compel reinstatement of a dismissed employe is triable in Ramsey county where commission maintains its office. State v. District Court of St. Louis County, 206 M54, 287NW601. See Dun. Dig. 10113.

9213. Actions for wages.

Section includes actions for recovery of wages for labor regardless of whether labor performed was manual or was of a less toilsome nature. Sexton v. Baehr, 212M205, 3NW(2d)1. See Dun. Dig. 10113b.

"Wages" are compensation given to a hired person for his or her services, the reward of labor. Id.

9213-1. Venue in auto vehicle cases.

A resident defendant in an automobile accident case is not entitled to trial in county where accident occurred as a matter of right. Panzram v. O'Donnell, (DC-Minn), 48FSupp74. See Dun. Dig. 10113d.

Mason's St., §9213-1, M. S. 1941, §542.095 amends and supersedes the provisions of Mason's St., §9215, M. S., §542.10. Id.

In action against nonresident growing out of an automobile accident, there is open to defendant right to apply to court for change of venue because an impartial trial cannot be had in county wherein action is pending or because convenience of witnesses and ends of justice would be promoted thereby. Claseman v. Feeney, 211M 266, 300NW818. See Dun. Dig. 8957(98).

An action for wrongful death against a nonresident motorist is transitory and is triable in any county designated by plaintiff. Id. See Dun. Dig. 10109.

9214. Other cases—Residence of defendant—Residence of corporations.

Action of tort is transitory and may be brought wherever wrongdoer may be found and jurisdiction obtained, but law of place where right was acquired or liability incurred will control as to right of action. U. S. v. Rogers & Rogers, (DC-Minn), 36FSupp79. Appeal docketed and dismissed without costs to either party in circuit court, pursuant to stipulation, (CCA8), 121F(2d)1019. See Dun. Dig. 1475, 1532, 1541, 1545, 1926, 1932, 1933, 9631, 10103, 10105.

Under the new federal rules of civil procedure the questions as to whether or not the complaint states a cause of action and whether or not the action is lodged in the proper venue may be raised on the same motion without waiving the privilege of venue. Billings Utility Co. v. Federal Reserve Bank, (DC-Minn)46FSupp691. See Dun. Dig. 3748b.

This section did not violate equal protection clause of the federal constitution. Panzram v. O'Donnell, (DC-Minn), 48FSupp74. See Dun. Dig. 1701, 10106.

The difficulty of transportation of witnesses during war time is a factor to be considered in determining the reasonableness of an agreement between railroad and injured employee that the latter would not bring action for injury in district other than where accident occurred. Clark v. Lowden; (DC-Minn), 48FSupp261. See Dun. Dig. 10111.

As to residents, transitory actions are triable in county where defendant or one or more of several defendants reside when action is begun, but if action is brought elsewhere defendant must make seasonable demand for change of venue in compliance with statute. Claseman v. Feeney, 211M266, 300NW818. See Dun. Dig. 10106(97).

An action for wrongful death against a nonresident motorist is transitory and is triable in any county designated by plaintiff. Id. See Dun. Dig. 10109.

Whether a municipality may be sued elsewhere than in county in which it is situated is a question of venue rather than jurisdiction. Scaife Co. v. Dornack, 211M349, 1NW(2d)356. See Dun. Dig. 10104, 10111a.

Venue of a proceeding for involuntary dissolution of a corporation is in county of its principal place of business, and not in some other county where it has an agent or property. Radabaugh v. H. D. Hudson Mfg. Co., 212M 180, 2NW(2d)828. See Dun. Dig. 10110.

Defendant in an action for a personal judgment and to cancel a deed to land is entitled to a change of venue to county of his residence from county where land is located, part of the demand for personal judgment having no alleged connection with the land. Yess v. Ferch, 213M593, 5NW(2d)641. See Dun. Dig. 10105.

General rule is that actions in a district court of the state are transitory unless excepted by statute as local, and statute relating to land is applicable only to such actions as are wholly local, as distinguished from those which are partly local and partly transitory. Id. See Dun. Dig. 10106.

CHANGE OF VENUE

9215. As of right—Demand.

1. When applicable.

Mason's St. §9213-1, M. S., §542.095, amends and supersedes the provisions of Mason's St. §9215, M. S., §542.10. Panzram v. O'Donnell, (DC-Minn), 48FSupp74. See Dun. Dig. 10121.

An action against members of state industrial commission to compel reinstatement of a dismissed employe is triable in Ramsey county where commission maintains its office. State v. District Court of St. Louis County, 206M54, 287NW601. See Dun. Dig. 10113.

An action for recovery of wages may be brought in county in which labor was performed, and venue may not be changed without written consent of plaintiff, regardless of whether labor performed was manual or was of a less toilsome nature. Sexton v. Baehr, 212M205, 3NW (2d)1. See Dun. Dig. 10113b.

General rule is that actions in a district court of the state are transitory unless excepted by statute as local, and statute relating to land is applicable only to such actions as are wholly local, as distinguished from those which are partly local and partly transitory. Yess v. Ferch, 213M593, 5NW(2d)641. See Dun. Dig. 10121.

On application for a change of venue complaint alone must determine whether action is by right triable in another county. Id. See Dun. Dig. 10122.

3. Several defendants.

Venue of a transitory action against several defendants is not changed by a demand under this section unless joined in by a majority of defendants. Singer v. Mandt, 211M50, 299NW897. See Dun. Dig. 10125.

Where an action is brought in proper county against a sole defendant and another defendant is later made a party on his own request and demands a change of venue to county of his residence, he is not entitled thereto as a matter of right although original defendant joins him in demand and consents thereto. Hanson v. Western Surety Co., 213M182, 6NW(2d)43. See Dun. Dig. 10125.

4. When demand must be made.

As to residents, transitory actions are triable in county where defendant or one or more of several defendants reside when action is begun, but if action is brought elsewhere defendant must make seasonable demand for change of venue is compliance with statute. Claseman v. Feeney, 211M266, 300NW818. See Dun. Dig.10106(97).

A motion for change of venue on ground that a fair and impartial jury could not be secured in the community was not made in time. Roper v. Interstate Power Co., 213M597, 6NW(2d)625. See Dun. Dig. 10120, 10129.

7. Waiver.

Where city, having been brought into case as an additional defendant, appeared specially and objected to jurisdiction of court on ground that city could not be compelled to defend itself elsewhere than in county where it is located, an alternative writ of mandamus secured from supreme court must be discharged where no motion was made below for change of venue. Scaife Co. v. Dornack, 211M349, 1NW(2d)356. See Dun. Dig. 10118, 10120.

9. Removal of causes to federal court.

Petition for removal in action for injuries sustained in automobile collision alleging that two of the defendants had no connection whatever with petitioning defendant's truck or the driver thereof, which fact was known to plaintiff or his attorney at the time of the institution of the action or might have been readily ascertained sufficiently complied with requirements that petition showing joinder of defendants was a fraudulent device to prevent removal must state facts apart from pleader's conclusions. Polito v. Molasky, (CCA8), 123F(2d)258. Cert. den. 62SCR632. See Dun. Dig. 8389.

Amended petition attempting to make a resident of the state an additional party defendant not filed until after a sufficient petition for removal had been filed was ineffectual to prevent removal though an order for removal had not been secured, as jurisdiction of the state court absolutely ceased with the filing of the petition for removal. Polito v. Molasky, (CCA8), 123F(2d)258. Cert. den. 62SCR632. See Dun. Dig. 8391, 8393a.

Joinder of resident defendants who had no connection with accident out of which alleged cause of action arose held fraudulent as a matter of law where the joinder was made through a mistake of fact which might by the exercise of diligence have been discovered. Polito v. Molasky, (CCA8), 123F(2d)258. Cert. den. 62SCR632. See Dun. Dig. 8395.

A nonresident defendant does not waive its right to remove case to federal court by appointing an agent within the state for service of process. Polito v. Molasky, (CCA8), 123F(2d)258. Cert. den. 62SCR632. See Dun. Dig. 8399.

The present trend of adjudication toward a complete denial of the injunctive process to restrain proceedings in state courts, if there is such a trend, does not extend to denaturing the removal statutes, and hence where action was properly removed to federal court such court would enjoin state court execution on judgment thereafter obtained in the state court on the removed cause of action. Ammond v. Pennsylvania R. C., (CCA6), 125F (2d)747. Cert. den. 62SCR1283. See Dun. Dig. 3748, 8395a.

Separability of controversies is governed by state law. Id. See Dun. Dig. 8395a.

Suit for death of a seaman under Jones Act, Mason's U.S.C.A., 46:688, cannot be removed to federal court. Fiolat v. M., (DC-Minn), 31FSupp219.

Venue in state court is not jurisdictional. Panzram v. O'Donnell, (DC-Minn), 48FSupp74. See Dun. Dig. 8393b, 10104.

9216. By order of court—Grounds.

½. In general.

In action against nonresident growing out of an automobile accident, there is open to defendant right to apply to court for change of venue because an impartial trial cannot be had in county wherein action is pending or because convenience of witnesses and ends of justice would be promoted thereby. Claseman v. Feeney, 211M 266, 300NW818. See Dun. Dig. 8957(98).

2. Subdivision 2.

Defendants who have answered are entitled to written notice of motion for change of venue and cannot be ignored on ground that it appears from face of complaint that they were made parties only for purpose of preventing a change of venue. Singer v. Mandt, 211M50, 299NW 897. See Dun. Dig. 10128.

Where a motion is made for change of venue under this section notice thereof must be given defendants who have appeared, answered or demurred. Id. See Dun. Dig. 10122.

3. Subdivision 3.

A motion for change of venue on ground that a fair and impartial jury could not be secured in the community was not made in time. Roper v. Interstate Power Co., 213M597, 6NW(2d)625. See Dun. Dig. 10120, 10129.

4. Subdivision 4.

A resident defendant in an automobile accident case is not entitled to trial in county where accident occurred as a matter of right. Panzram v. O'Donnell, (DC-Minn), 48FSupp74. See Dun. Dig. 10127.

Where a change of venue will result in continuing a case over a regular term of the district court and there is no explanation of a delay of 2 months in making motion it is not an abuse of discretion to deny it. Sworski v. S., 208M580, 295NW62. See Dun. Dig. 10119.

It was not an abuse of discretion to deny motion for change of venue made 44 days after service of summons and complaint and where it appeared that plaintiff was 71 years of age and it would be unwise for her to travel. O'Brien v. Brogan, 211M192, 300NW794. See Dun. Dig. 10127.

Appellate court will not interfere in absence of abuse of discretion. Id.

Motion for change of venue could have been made, at least in the alternative, along with a motion to quash service. Id. See Dun. Dig. 6496, 10120.

Change of place of trial in St. Louis County. Merchants & Miners State Bank v. Manner, 215M575, 10NW (2d)770; note under §172.

9219. Actions in municipal court.

Section applies to municipal court of Mankato. Op. Atty. Gen. (306b-11), Dec. 30, 1942.

9220. On appeal from justice court.

Justice of the peace at a county seat has jurisdiction if defendant is a nonresident and is served within the county, and defendant has no right to a change of venue to the county of his residence, but if an appeal is taken from the justice's decision to a municipal or district court, then a change of venue may be taken to the county of defendant's residence upon compliance with statute. Op. Atty. Gen. (266b-11), Nov. 10, 1943.

9221. Affidavit of prejudice.

Correction:—"therefor" in the fourth line of this section as it appears in the 1940 Supplement should read "thereof or."

An affidavit of prejudice, which by its terms is limited to matters to be heard on motion before trial, does not disqualify a district judge from presiding at the trial of the action. Locksted v. L., 206M525, 289NW55. See Dun. Dig. 4962.

Section 9221, Mason's Minn. Stat. 1938 Supp., is not applicable to an action or proceeding pending in the municipal court of the city of Minneapolis. State v. Anderson, 207M78, 289NW883. See Dun. Dig. 4962.

This section requires filing of affidavit five days before a motion is to be heard at special terms in district having only one judge. State v. Moriarity, 208M469, 294 NW473. See Dun. Dig. 4962.

Amendment of 1937 made section applicable to all districts, even where there was but one judge. Id.

SUMMONS—APPEARANCE—NOTICES—ETC.

9224. Actions, how begun.

In proceeding against church for permission to disinter a body, defendant had a sufficient adverse interest so that it should have been served with a summons instead of a notice. Uram v. S., 207M569, 292NW200. See Dun. Dig. 89.

Parties may not be brought into court by mere amendment of pleadings. Guy v. D., 208M534, 294NW877. See Dun. Dig. 89.

A personal judgment entered without service of process was absolutely void, not merely irregular or erroneous, and a levy of execution under it constituted a tort in nature of tresspass rendering plaintiff liable for damages, irrespective of malice or other wrongful conduct on part of plaintiff. Beede v. N., 209M354, 296NW413. See Dun. Dig. 7837.

Where a court of general jurisdiction has exercised its powers it is presumed, unless contrary appears as matter of record, that it had jurisdiction both of subject matter and parties, and party asserting want of jurisdiction has burden of showing such want. Goodman v. Ancient Order of United Workmen, 211M181, 300NW624. See Dun. Dig. 2347.

It is fact of service of process and not proof thereof that gives court jurisdiction. Id. See Dun. Dig. 7807, 7820.

9227. Service of complaint—Appearance, etc.

Where defendant does not claim to have been mislead by the improper arrangement of papers served, fact that the summons did not appear as "the first paper seen upon opening and inspecting the face of the papers served" does not require opening of default judgment. Whipple v. Mahler, 215M578, 10NW(2d)771. See Dun. Dig. 7806.

9228. Service of summons—On natural persons.

3. Persons with whom summons may be left.

Running of limitations is not tolled by departure of foreign corporation from state so long as there is a process agent in state. Pomeroy v. N., 209M155, 296NW 513. See Dun. Dig. 5610.

5. On guardians.

Failure to serve guardian of insane person rendered judgment voidable and not void. Schultz v. Oldenburg, 202M237, 277NW918.

Evidence that summons and complaint was duly served upon guardian of incompetent, that incompetent took a copy "of said summons and complaint" to the office of his guardian, that guardian instructed incompetent to deliver papers to his attorney, and that thereafter attorney to whom incompetent was directed to go appeared generally in cause as his attorney and joined in making a stipulation consenting to appointment of a receiver, was sufficient to show service of process upon incompetent and that court had jurisdiction of his person. Goodman v. Ancient Order of United Workmen, 211M181, 300 NW624. See Dun. Dig. 7807.

9230. On the state.

Where land is purchased by the state for taxes, and state has lien on land for old age assistance, notice of expiration of redemption should be served upon the state through the attorney general. Op. Atty. Gen., (419f), May 4, 1940.

9231. On private corporations.

3. Subdivision 3.

When a foreign social and charitable corporation pursues within our limits purposes for which it is organized, it is doing business in Minnesota, and amenable to process here, and chief local officer, appointed by and responsible to the foreign corporation, is a proper person to serve as agent of the corporation. High v. S., 206M599, 289NW 519. See Dun. Dig. 7814.

4. Subdivision 4.

Service of process upon the agent which federal act requires to be appointed by an interstate motor carrier for purpose of receiving process, did not give the state or federal district courts of Minnesota jurisdiction of an action against Michigan corporation doing no business in Minnesota to compel the corporation to convey corporate stocks to the plaintiff. Madden v. Truckaway Corp., (DC-Minn), 46FSupp702, See Dun. Dig. 7814.

The requirements that an interstate motor carrier appoint an agent in each state in which it operates to receive service of process applies to the receiving of process in actions relating to the interstate business of the carrier only. Id.

Jurisdiction of a foreign corporation was not obtained by service of summons by sheriff leaving copies with chief clerk of corporation division of secretary of state, or by leaving copies of summons with deputy securities commissioner, it appearing that defendant entered state in May, 1929, and transacted business in securities until October, 1931, when it entirely withdrew therefrom and has never since transacted any business in the state, and never registered any securities in the state nor applied for nor received license to deal in securities therein, and never appointed any agent to receive process or notice for it nor complied with Mason's St., §§7493, 7494, on withdrawing, or with §3996-11, and securities sold to plaintiff were never registered with securities commissioner. Babcock v. Bancamerica-Blair Corp., 212M428, 4 NW(2d)89. See Dun. Dig. 7814.

In absence of a statute declaring that a foreign corporation by coming into the state to transact business thereby automatically appoints the statutory named process agent, jurisdiction may not be obtained of foreign corporation which neither is transacting business in the state at the time of the attempted service of summons nor has appointed a process agent. Id.

9236. When defendant may defend—Restitution.

1. Matter of right.

A defendant not personally served is given a right to defend within one year from judgment by §9236, but thereafter application for relief from judgment must be made to trial court in its discretion under §9283. Kane v. S., 209M138, 296NW1. See Dun. Dig. 5003.

Right to have default judgment set aside, though qualified in certain respects, is not discretionary with trial court. Id.

Federal Soldiers and Sailors Civil Relief Act of 1940 will apply to actions in state court which come within its terms. (Mason's USCA, Title 50, end.) Op. Atty. Gen. (310), Nov. 6, 1940.

3. A good defense sufficient cause.

Though a verified and specific general denial is perhaps "technically sufficient," good practice requires full and frank statement of facts relative to all asserted defenses. Kane v. S., 209M138, 296NW1. See Dun. Dig. 5005.

4. Diligence in making application.

A non-resident's application to set aside judgment taken by default and for leave to defend was properly denied for unexcused lack of diligence. Kane v. S., 209M 138, 296NW1. See Dun. Dig. 5006.

Though no written notice was ever given to defendant or counsel of entry of judgment, this omission does not absolve defendant from his obligation of diligence where he has actual knowledge of proceedings. Id.

9237. Proof of service.

3. Return of officer.

It is fact of service of process and not proof thereof that gives court jurisdiction. Goodman v. Ancient Order of United Workmen, 211M181, 300NW624. See Dun. Dig. 7807, 7820.

Return of deputy sheriff upon notice of expiration of time of redemption on lands sold for taxes is not conclusive, but may be overcome only by clear and satisfactory evidence. Holmes v. Conter, 212M394, 4NW(2d) 106. See Dun. Dig. 7818, 9436.

9238. Jurisdiction, when acquired—Appearance.

APPEARANCE

1. Definition.

In determining whether an appearance is general or special, court looks to purposes for which it was made rather than to what moving party labels it. Guy v. D., 208M534, 294NW877. See Dun. Dig. 479.

4. Appearance in foreign court.

In suit by local division of foreign corporation to enjoin cancellation of charter of local division, defendant by general appearance and prayer for general and affirmative relief gave court jurisdiction of the subject matter. Farmers Educational, Etc. v. F., 207M80, 289NW 884. See Dun. Dig. 477.

6. What constitutes general appearance.

If appearance is made for any purpose other than to question jurisdiction, it is a general, and not a special, appearance and subjects party to jurisdiction of court by consent. Guy v. D., 208M534, 294NW877. See Dun. Dig. 479.

11. Modes of appearing specially.

Allegations setting forth a special appearance may be made in same instrument that alleges matters going to merits of controversy so long as answer on merits is made conditionally on loss of jurisdictional point. Uram v. S., 207M569, 292NW200. See Dun. Dig. 482.

12. Waiver of special appearance.

A special appearance is not waived by answering and defending on merits after special appearance has been overruled. Uram v. S., 207M569, 292NW200. See Dun. Dig. 482.

Where action was brought against a corporation to recover for services rendered, and it appeared at the close of plaintiff's case that company was not a corporation at time services were rendered, and court permitted plaintiffs over objections to amend so as to make partners and partnership defendants, and counsel again objected to joining of partners as defendants as an improper method of service upon them as individuals, such partners did not waive their objections to jurisdiction of court by permitting themselves to be called and put in their testimony on the merits. Guy v. D., 208M 534, 294NW877. See Dun. Dig. 482.

9239. Appearance and its effect.

A party who interposes a demurrer is entitled to notice of all subsequent proceedings even though demurrer is overruled and no leave to plead over is obtained. Kemerer v. S., 206M325, 288NW719. See Dun. Dig. 476.

Failure to give defendant notice of application for an order for judgment following overruling of demurrer is an irregularity which rendered judgment vulnerable on direct attack. Id. See Dun. Dig. 476.

By a demurrer, defendant made a general appearance. Id. See Dun. Dig. 479.

Since judgment entered without notice following overruling of demurrer was unauthorized rather than merely erroneous, it may be vacated, and it is immaterial that six months time for appeal from judgment expired before any application for relief was made. Id. See Dun. Dig. 5114.

By demurring to complaint a defendant appears generally. Williams v. Jayne, 210M594, 299NW853. See Dun. Dig. 479.

Defendants who have filed answers may not be ignored with respect to notice of subsequent proceedings on ground that it appears upon face of complaint that they were made parties only for purpose of preventing defendant demanding change of venue from obtaining it. Singer v. Mandt, 211M50, 299NW897. See Dun. Dig. 10128.

Section requires a written notice of subsequent proceedings and not a telephone communication or a verbal notice. Id. See Dun. Dig. 7235a.

A defendant who answered and thereby appeared generally in the action could not thereafter move to dismiss garnishment solely on jurisdictional grounds, that is, on ground that court was without jurisdiction to hear garnishment disclosure because there was no action pending at time of service upon garnishee. Wejkert v. Blomster, 213M373, 6NW(2d)798. See Dun. Dig. 476.

9240. Service of notices; etc.

Where court granting divorce and granting property and alimony to wife reserved right to award additional alimony when property rights of husband should be ascertained in a probate proceedings, it had jurisdiction to order additional alimony based upon service of order to show cause by mail to defendant in another state if he actually received the order within time required for personal service. Daw v. Daw, 212M507, 4NW(2d)313. See Dun. Dig. 6497.

9243. Defects disregarded—Amendments, extensions, etc.

Defect as to names of parties in title of petition and alternative writ of mandamus should be disregarded where remedied by allegation in body of pleadings. Stenzel's Estate, 210M509, 299NW2. See Dun. Dig. 7509.

Mandamus issued to compel court to allow a case to be proposed where there had been a stay of proceedings and there was a misapprehension as to the effect of the stay on the part of court and counsel, a rejection of the transcript by counsel for appellee being followed promptly by a motion to the court for leave to propose a case for allowance. Schmit v. Village of Cold Spring, 215M 572, 10NW(2d)727. See Dun. Dig. 8732.

A stay of proceedings enlarges the time for preparing and proposing a case, and a misapprehension as to the effect of a stay on the part of court and counsel is sufficient excuse for allowing a case to be subsequently proposed. Id.

MOTIONS AND ORDERS

9246. Defined—Service of notice.

Motion for change of venue could have been made, at least in the alternative, along with a motion to quash service. O'Brien v. Brogan, 211M192, 300NW794. See Dun. Dig. 6496, 10120.

Where court already has jurisdiction of parties and subject matter, service of notice of motion which actually comes to hands of party to be served within time required for personal service is equivalent to such service. Daw v. Daw, 212M507, 4NW(2d)313. See Dun. Dig. 6497.

Parties having one hearing on a motion and a determination thereon are not entitled to a second hearing. Personal Loan Co. v. Personal Finance Co., 213M239, 6NW(2d)247. See Dun. Dig. 6502.

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

Well-pleaded facts are admitted by motion for judgment on the pleadings. Sullivan v. N., (CCA8), 104F(2d) 517, aff'g (DC-Minn), 24FSupp822.

In action to quiet title, defendant probably should have challenged the plaintiff's title by answer rather than by motion to dismiss complaint, but plaintiff is in no position to challenge procedure where he stipulated judgment roll in registration proceedings into the record, showing title in defendant, and did not challenge procedure until motion for new trial and rehearing. Dean v. R., 208M38, 292NW765. See Dun. Dig. 8049.

One hearing of a motion should be enough, and if merits were not fully presented, counsel have only themselves to blame. Lenhart v. Lenhart Wagon Co., 211M 572, 2NW(2d)421. See Dun. Dig. 5116a, 6502.

There is no such thing as demurrer to a motion. Id. See Dun. Dig. 6499.

An ultimate allegation of fact will be held good as against a motion for judgment on the pleadings, even though a motion to make it more definite would lie. Schmitt v. Emery, 215M288, 9NW(2d)777. See Dun. Dig. 7693.

Where the facts were undisputed, the issues clearly drawn by the pleadings, and the language and provisions of contract involved were unambiguous, trial court properly granted judgment on the pleadings. McReavy v. Zeimes, 215M239, 9NW(2d)924. See Dun. Dig. 7689.

PLEADINGS

9249. Pleadings, etc., how regulated.

Pleadings in conciliation and small claim courts need not follow the technical rules. Warner v. A. G. Anderson, Inc., 213M376, 7NW(2d)7. See Dun. Dig. 7511.

It is fundamental that a party should be entitled to formulate and present by appropriate pleading what he claims facts to be and to meet his opponent's assertions by his own proof before judgment is entered against him. U. S. Fidelity & Guaranty Co. v. Falk, 214M138, 7 NW(2d)398. See Dun. Dig. 7689.

9250. Contents of complaint.

½. In general.

A pleading may have all the attributes of a blunderbuss, which has been defined as a firearm intended to shoot objects at close quarters without exact aim. Moline v. Kotch, 213M326, 6NW(2d)462. See Dun. Dig. 7528a.

1. Subdivision 1.

Allegations in body of complaint control caption, although latter is to be considered. Stenzel's Estate, 210M 509, 299NW2. See Dun. Dig. 7509.

2. Subdivision 2.

Facts showing a right to recover on any theory suffice. Cashman v. B., 206M301, 288NW732. See Dun. Dig. 7528d.

If a complaint in an equitable case discloses delay in asserting a right which, remaining unexplained, amounts to laches it is necessary for plaintiff to allege facts excusing the delay. Sinell v. T., 206M437, 289NW44. See Dun. Dig. 5359.

General allegations in a complaint must be regarded as limited and controlled by particular allegations. Murphy v. B., 206M527, 289NW563. See Dun. Dig. 7722.

Where contract exhibits are very foundation of cause of action to which they relate, and are made part of complaint by its allegations, sufficiency of pleading as matter of law may be determined by terms of exhibits if they are plain and unambiguous, even though inconsistent with allegations in complaint. Markwood v. O., 207M70, 289NW830. See Dun. Dig. 7526.

When suit is brought against principal, it is not necessary to plead fact of agency or authority of agent. Rausch v. Aronson, 211M272, 1NW(2d)371. See Dun. Dig. 239.

A complaint alleging in the alternative that one or the other of two defendants is liable, but that plaintiff is unable to determine which one, states no cause of action, since a complaint must state, with ordinary directness, facts which constitute a cause of action against each of them. Pilney v. Funk, 212M398, 3NW(2d)792. See Dun. Dig. 7515.

On demurrer, as in other cases, general allegations are controlled by specific ones, and inferences or conclusions from specific allegations which follow as a matter of law prevail over a general allegation to the contrary. Wiseman v. N. P. Ry. Co., 214M101, 7NW(2d)672, 13NCCA(NS)526. See Dun. Dig. 7517.

Where specific facts alleged in a pleading show that party had knowledge, which he denies, general denial is of no avail. Id.

Every fact which a plaintiff must prove in order to maintain his action must be alleged. American Farmers Mut. Auto. Ins. Co. v. Riise, 214M6, 8NW(2d)18. See Dun. Dig. 7529.

An allegation that funeral expenses in a certain sum were "incurred" means that the personal representative by act of some person authorized in law to bind him because liable to pay decedent's funeral expenses out of his estate, as affecting sufficiency of complaint in action for wrongful death. Schmitt v. Emery, 215M288, 9 NW(2d)777. See Dun. Dig. 7516.

An ordinance prescribing standards of conduct, being an evidentiary fact in a negligence case, although not pleaded, may be proved, like any other fact tending to prove or disprove negligence as an ultimate fact. Christensen v. Hennepin Transp. Co., 215M394, 10NW(2d)406, 147ALR945. See Dun. Dig. 7516.

9251. Demurrer to complaint—Grounds.

½. In general.

Where facts pleaded in complaint show cause to be barred by statute of limitations and no facts are shown to forestall its operation, demurrer should be sustained. Parsons v. T., 209M129, 295NW907. See Dun. Dig. 5659.

Pleading of one intervening may be attacked by demurrer or by motion to dismiss if such person has no right to intervene. Personal Loan Co. v. Personal Finance Co., 212M600, 5NW(2d)61. See Dun. Dig. 4904.

If any ground upon which a demurrer to a complaint is sustained is valid, affirmance of the order necessarily follows. Jewell v. Jewell, 215M190, 9NW(2d)513. See Dun. Dig. 7538c.

3. For want of jurisdiction.

By demurring to complaint a defendant appears generally. Williams v. Jayne, 210M594, 299NW853. See Dun. Dig. 479.

6. For defect of parties.

Where there is a defect of parties, either plaintiff or defendant, and defect appears on face of complaint, objection must be taken by demurrer; if defect does not so appear, objection must be taken by answer; if neither objection is made, defect is deemed waived. Flowers v. Germann, 211M412, 1NW(2d)424. See Dun. Dig. 7323(5).

7. For misjoinder of causes of action.

A demurrer for misjoinder was properly sustained to a complaint by husband and wife, joint owners of a home, to recover for depreciation of value of use thereof by defendant's wrongful maintenance of a nuisance upon adjacent property, and by husband alone to recover damages sustained by his family from noxious odors members thereof were subjected to from the same nuisance. King v. S., 207M573, 292NW198. See Dun. Dig. 7554.

Complaint in action by stockholder in representative capacity and also upon a personal claim against corporation would be demurrable for misjoinder of causes of action. Briggs v. Kennedy Mayonnaise Products, 209M312, 297NW342. See Dun. Dig. 7554.

When a complaint contains causes of action which cannot properly be united and they are mingled and combined, the defendant is not required to move, in the first instance for the separation of the several causes of action in order that he may demur when such separation has been accomplished, but he may demur for misjoinder, though the pleading in form sets forth but one cause of action, if in reality it embraces two or more that cannot be joined in any form. Jewell v. Jewell, 215M190, 9 NW(2d)513. See Dun. Dig. 7554.

A complaint in action by widow, by guardian ad litem, against administrator, surety, general guardian, surety, and against administrator in his individual capacity, involving actions ex contractu and ex delicto, was the subject to demurrer for misjoinder of causes of action, though plaintiff attempted to weld them into a single claim for damages for conspiracy. Id.

8. For failure to state a cause of action.

A demurrer merely admits facts for purpose of testing validity of pleadings, and is not an admission of them for all purposes. Kemerer v. S., 206M325, 288NW719. See Dun. Dig. 7542.

Sufficiency of a complaint making plain and unambiguous contract exhibits a part of the complaint, may be determined upon demurrer, even though exhibits constituting foundation of cause of action are not consistent with allegations in complaint. Markwood v. O., 207M70, 289NW830. See Dun. Dig. 7549.

If complaint construed liberally states facts entitling plaintiff to any relief, whether legal or equitable, it states a cause of action, although plaintiff may have misconceived nature of his cause or demanded inappropriate relief. Lucas v. M., 207M380, 291NW892. See Dun. Dig. 7549(77).

A liberal rule prevails as to construction of pleadings, and one of primary objects of reformed procedure was to enable courts to give judgment according to facts stated and proved without reference to form used or to legal conclusions adopted by pleader, and a complaint is not demurrable because it proceeds on a wrong theory. Villaume v. W., 209M330, 296NW176. See Dun. Dig. 7549.

Though plaintiff need not negative existence of contributory negligence, if his complaint states facts which show affirmatively that he was guilty of negligence which contributed to the injury, it is demurrable. Sartori v. Capitol City Lodge No. 48, 212M538, 4NW(2d)339. See Dun. Dig. 7059.

Material facts of complaint well pleaded and inferences of fact which they fairly support must be assumed to be true on demurrer. Id. See Dun. Dig. 7542.

A complaint is considered as true for purposes of testing a demurrer. Karalis v. Karalis, 213M31, 4NW(2d)632. See Dun. Dig. 7542.

On demurrer, as in other cases, general allegations are controlled by specific ones, and inferences or conclusions from specific allegations which follow as a matter of law prevail over a general allegation to the contrary. Wiseman v. N. P. Ry. Co., 214M101, 7NW(2d) 672, 13NCCA(NS)526. See Dun. Dig. 7549.

On appeal from an order overruling a demurrer facts stated in complaint must be assumed to be true. Tankar Gas v. Lumbermen's Mut. Casualty Co., 215M265, 9NW (2d)754, 146ALR1223. See Dun. Dig. 7542.

Where a complaint in libel fails to state a cause of action for defamation, but contains an adequate statement of malicious injury to plaintiff's business, it is not vulnerable to a demurrer on ground that it does not state a cause of action. Marudas v. Odegard, 215M357, 10NW (2d)233. See Dun. Dig. 7549.

9252. Requisites—Waiver.

5. Waiver.

Under the new federal rules of civil procedure the questions as to whether or not the complaint states a cause of action and whether or not the action is lodged in the proper venue may be raised on the same motion without waiving the privilege of venue. Billings Utility Co. v. Federal Reserve Bank, (DC-Minn), 46FSupp 691. See Dun. Dig. 3748b.

Presence of a misjoined party is not objectionable in appellate court for the first time. State v. Rock Island Motor Transit Co., 209M105, 295NW519. See Dun. Dig. 384.

Overruling of a demurrer to complaint does not bar defendant from questioning sufficiency of complaint to state a cause of action by motion for judgment on pleadings after answer and reply are filed. Parsons v. T., 209 M132, 295NW909. See Dun. Dig. 7562.

Where there is a defect of parties, either plaintiff or defendant, and defect appears on face of complaint, objection must be taken by demurrer; if defect does not so appear, objection must be taken by answer; if neither objection is made, defect is deemed waived. Flowers v. Germann, 211M412, 1NW(2d)424. See Dun. Dig. 7323(5).

Misjoinder of causes must be demurred to or it is waived, and such questions cannot be raised for the first time on appeal from the judgment. Whipple v. Mahler, 215M578, 10NW(2d)771. See Dun. Dig. 7508.

Question whether there is a misjoinder of parties must be raised by answer or demurrer, and cannot be raised for the first time on appeal from the judgment. Id. See Dun. Dig. 7678.

9253. Contents of answer.

DENIALS

2. Effect of general denial.

Whatever tends to controvert directly allegations in a complaint may be shown defensively under a general denial. Lawrenz v. L., 206M315, 288NW727. See Dun. Dig. 7574.

Where owner is sued in tort for result of negligently constructing a concealed trap on premises, evidence that some wrong of lessee rather than that of owner is cause of plaintiff's injury is admissible under a general denial, and an allegation that lessee had in lease assumed liability to indemnify lessor for any damage either to person or property due to demised premises, regardless of cause was properly stricken. Murphy v. B., 206M537, 289 NW567. See Dun. Dig. 7574, 7578.

Defendant in replevin not having taken chattels from possession of plaintiff, may under general denial prove that a third party is entitled to possession as against plaintiff, even though plaintiff owns property subject to pledge in favor to third party. Braman v. Wall, 210M 548, 299NW243. See Dun. Dig. 8412.

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

NEW MATTER CONSTITUTING A DEFENSE

14. Must be pleaded specially.

In an action to recover federal capital stock tax erroneously paid if the Commissioner of Internal Revenue desires to question the sufficiency of the claim for refund, the defense of insufficiency should be specifically pleaded. Northwestern Nat. Bank & Trust Co. v. U. S., (DC-Minn), 46FSupp390. See Dun. Dig. 4888a, 7585.

Necessity for a defendant to specifically plead payment where complaint alleges nonpayment, discussed. Shapiro v. L., 206M440, 289NW48. See Dun. Dig. 7468.

When a writing is introduced in support of an allegation in a pleading which does not in any way indicate the existence thereof, it cannot be required that the opposite party shall anticipate its production and allege in his pleading fraud in its procurement in order to introduce evidence of such fraud. Turner v. E., 207M455, 292NW257. See Dun. Dig. 3826, 7585.

Ordinarily, defense of statute of limitations is an affirmative one that should be specially pleaded. Parsons v. T., 209M129, 295NW907. See Dun. Dig. 5666.

Fact that a foreign corporation, party to an action, has not been licensed to do business in state is, as against it, a defense to be affirmatively pleaded and may not be taken advantage of by motion to dismiss not made until the trial. Risvold v. G., 209M357, 296NW411. See Dun. Dig. 7585.

A defendant need not plead laches in his answer in order to avail himself of that defense. Cantieny v. B., 209M407, 296NW491. See Dun. Dig. 7585.

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, 4NW (2d)113, 141ALR657. See Dun. Dig. 2584.

A freeholder's right of irremovability as a pauper from his freehold is a personal right or privilege and does not go to court's jurisdiction to determine his removability,

being a matter for assertion by the poor person as a defense where he is a party to the proceeding and has been given notice. Robinette v. Price, 214M521, 8NW(2d) 800. See Dun. Dig. 7585.

16. Each defense must be complete in substance and form.

A counterclaim must be a complete and independent cause of action, either legal or equitable, and all material facts constituting a cause of action must be alleged, with a demand for relief as in a complaint. Fitzke v. Fitzke, 210M430, 298NW712. See Dun. Dig. 7601.

9254. Requisites of a counterclaim—Pleading does not admit.

9. Must exist in defendant at commencement of action.

A party cannot avail himself of a matter as a setoff unless it is a legally subsisting cause of action in his favor upon which he could maintain an independent action. State v. Tri-State Tel. & Tel. Co., 209M86, 295NW 511. See Dun. Dig. 7605.

20. Rules as to pleading counterclaim.

General rules governing statement of a cause of action in a complaint apply to statement of a counterclaim. Fitzke v. Fitzke, 210M430, 298NW712. See Dun. Dig. 7617.

9256. Judgment on defendant's default.

Editorial note.—The Soldiers and Sailors Civil Relief Act of 1940 is set out in full beginning on page I, this volume.

½. In general.

A cause of action based on a complaint showing on its face that alleged claim for reasonable value of services rendered is subject to dispute and that facts alleged are controverted is not one wherein a default judgment may be entered by clerk without an order of court. High v. S., 207M228, 290NW425. See Dun. Dig. 4995.

An answer shown to be false in fact may be stricken as sham and judgment ordered as for want of an answer. Kirk v. Welch, 212M300, 3NW(2d)426. See Dun. Dig. 7658, 7666.

On default the relief which may be awarded to plaintiff is limited in nature and degree to the relief demanded in the complaint, whether the proof justifies this or greater relief. Pilney v. Funk, 212M398, 3NW(2d)792. See Dun. Dig. 4996.

Since a complaint alleging in the alternative that one or the other of two defendants is liable, but that plaintiff is unable to determine which one, states no cause of action, trial court properly set aside default judgment as to one of defendants and granted him right to interpose answer or demurrer. Id. See Dun. Dig. 5013a.

Irregularity of procedure in the assessment of recovery in the entry of judgment upon default cannot be raised upon appeal to the Supreme Court unless the appellant has applied to the trial court for the relief against such irregularity. Whipple v. Mahler, 215M578, 10NW(2d)771, overruling Reynolds v. LaCrosse & Minn. Packet Co., 10 M178, 10Gil.144. See Dun. Dig. 296, 384, 4997.

Federal Soldiers and Sailors Civil Relief Act of 1940 will apply to actions in state court which come within its terms. (Mason's USCA, Title 50, end.) Op. Atty. Gen. (310), Nov. 6, 1940.

1. Notice.

Section 9312 has reference not to notice but to method of establishing plaintiff's claim under §9256. Kemerer v. S., 206M325, 288NW719. See Dun. Dig. 4991.

3. Necessity of proving cause of action.

Failure to apply for leave to plead over after overruling of a demurrer is not a concession of facts alleged, but plaintiff must show proof to satisfaction of court, with right of defendant to cross-examine plaintiff's witnesses. Kemerer v. S., 206M325, 288NW719. See Dun. Dig. 7561.

In action for reasonable value of services rendered, whether it was error for clerk to enter judgment by default without receiving proof of damages will not be decided where it was not presented for decision below. Kane v. S., 209M138, 296NW1. See Dun. Dig. 4995.

Whether an action for recovery of reasonable value of services rendered is within provision relating to contract for payment of money owing is not foreclosed by High v. Supreme Lodge, 207M228, 290NW425. Id.

Fact that complaint in action by attorney to recover amount allowed in divorce decree also alleged the reasonable value of the services cannot be taken advantage of for the first time on appeal from default judgment. Whipple v. Mahler, 215M578, 10NW(2d)771. See Dun. Dig. 384.

Clerk cannot refuse to enter default judgment because it appears upon face of complaint that claim is outlawed. Op. Atty. Gen. (144B-5), July 10, 1940.

6. Effect of failure to apply to court.

Suit by attorney against both parties to a divorce case to recover allowance of attorney's fees adjudged by decree of divorce was upon an adjudicated liability and clerk of court could properly enter judgment on default as upon a suit for a liquidated sum. Whipple v. Mahler, 215M578, 10NW(2d)771. See Dun. Dig. 4995, 5040.

In an action on a note providing for a reasonable attorney's fees, clerk should not enter judgment for attorney's fees without an order of court. Op. Atty. Gen. (144B-15), Feb. 9, 1942.

9257. Demurrer or reply to answer.

½. In general.

In action for personal injuries wherein answer alleged that plaintiff was an employee of defendant and that his injuries arose out of and in course of his employment, a general denial in the reply served to deny allegations of employment and the injuries in scope thereof contained in the answer. Hasse v. V., 208M457, 294NW 475. See Dun. Dig. 7626.

No reply is necessary in actions to foreclose mechanic's liens. Ylijarvi v. Brockphaler, 213M385, 7NW(2d)314. See Dun. Dig. 7632.

1. Demurrer to answer.

Where answer contains nothing upon which to build a defense or counterclaim, plaintiff's demurrer should have been sustained. Brennan v. Friedell, 215M499, 10 NW(2d)355. See Dun. Dig. 7556.

9258. Failure to reply—Judgment.

4. Judgment on the pleadings.

A motion for judgment on the pleadings should be decided by order without findings and conclusions. Robinette v. Price, 214M521, 8NW(2d)800. See Dun. Dig. 7692.

9259. Sham and frivolous pleadings.

SHAM PLEADINGS

½. In general.

Allegations of answer shown to be false in fact may be stricken a sham on motion. Ind. School Dist. v. C., 208M 29, 292NW777. See Dun. Dig. 7657.

A sham or frivolous answer may be stricken on motion and judgment rendered notwithstanding same as for want of an answer. Neefus v. N., 209M495, 296NW579. See Dun. Dig. 7658, 7668a.

An answer shown to be false in fact may be stricken as sham and judgment ordered as for want of an answer. Kirk v. Welch, 212M300, 3NW(2d)426. See Dun. Dig. 7658, 7666.

1. Defined.

A sham pleading is one that is false. Hasse v. V., 208M 457, 294NW475. See Dun. Dig. 7657.

A sham answer is one which is sufficient on its face but which is false in fact. Neefus v. N., 209M495, 296NW 579. See Dun. Dig. 7657.

A sham answer is one which is false in fact. Kirk v. Welch, 212M300, 3NW(2d)426. See Dun. Dig. 7657.

A sham pleading is one that presents no issue to try and therefore is false. U. S. Fidelity & Guaranty Co. v. Falk, 214M138, 7NW(2d)398. See Dun. Dig. 7657.

In action by surety on bond of an executor against principal to recover expenses of defense of proceeding against principal who refused to defend, wherein complaint asserted reasonableness of attorneys' fees paid by surety and necessity for incurring them in the prior suit and appearing therein, an answer denying the facts raised issue to be heard, and it was error to strike it as sham and frivolous. Id. See Dun. Dig. 7667.

A pleading is sham if it is false in fact, and such falsity may be established by affidavit. Minnesota Casket Co. v. Swanson, 215M150, 9NW(2d)324. See Dun. Dig. 7657.

2. Verified pleading may be stricken out.

Where allegations of fact in a pleading are shown to be false the pleading should be stricken as sham. Neefus v. N., 209M495, 296NW579. See Dun. Dig. 7658.

4. Counterclaims may be stricken out.

A sham counterclaim may be stricken out on motion. Minnesota Casket Co. v. Swanson, 215M150, 9NW(2d)324. See Dun. Dig. 7662.

6. Power to strike out to be exercised sparingly.

Every reasonable doubt should be resolved against striking out a pleading as sham. Hasse v. V., 208M457, 294NW475. See Dun. Dig. 7658.

8. Affidavits on motion.

Where fact of falsity of pleading is established by a clear and unequivocal showing, failure of opposing party to answer and contradict showing must be taken as admitting its truth. Ind. School Dist. v. C., 208M29, 292NW 777. See Dun. Dig. 7665.

Falsity of a pleading may be established by affidavit. Ind. School Dist. v. C., 208M29, 292NW777. See Dun. Dig. 7664.

Upon motion to strike out a pleading as sham, it is duty of court to determine whether there is an issue to try, not to try the issue. Hasse v. V., 208M457, 294NW 475. See Dun. Dig. 7664.

Falsity of a pleading may be shown by affidavit. Neefus v. N., 209M495, 296NW579. See Dun. Dig. 7664.

In determining whether or not allegations in an answer are false, court necessarily must find facts with respect to matter, but motion to strike was never intended as a substitute for a trial, and if there is an issue to try it must be determined by trial. Kirk v. Welch, 212M300, 3NW(2d)426. See Dun. Dig. 7658.

Falsity of a pleading may be shown by affidavit, but showing must be clear and unequivocal. Id. See Dun. Dig. 7664, 7665.

Where showing of plaintiff is that answer is false, failure to controvert showing must be taken as admitting its truth. Id. See Dun. Dig. 7665.

On motion to strike an answer as sham, the matter to be determined is whether there is a fact issue requiring a trial on the merits. Minnesota Casket Co. v. Swanson, 215M150, 9NW(2d)324. See Dun. Dig. 7664.

Where complaint alleged in detail the full performance of the terms of a contract for deed, portions of the answer constituting a general denial and making general allegations of default were properly stricken upon plaintiff's motion, supported by plaintiff's detailed sworn statement of payments made, uncontradicted and undisputed by defendants. McReavy v. Zeimes, 215M239, 9NW(2d)924. See Dun. Dig. 7664.

10. Motion to strike out granted.

Failure to answer and contradict a showing that allegations of an answer are false must be taken as admitting truth of showing. Neefus v. N., 209M495, 296NW579. See Dun. Dig. 7665.

In action on a note, an answer claiming credits over a number of years was properly stricken as sham where it appeared there was a written accord and satisfaction concerning amount due, reducing the amount of debt shown by the note and providing for new terms of payment, which was treated as binding for several years, and there was no claim of fraud or mistake. Minnesota Casket Co. v. Swanson, 215M150, 9NW(2d)324. See Dun. Dig. 7667.

FRIVOLOUS PLEADINGS

16. Frivolous answer or reply.

An answer is frivolous where it appears from bare inspection to be lacking in legal sufficiency and which in any view of facts pleaded does not present a defense. Ind. School Dist. v. C., 208M29, 292NW777. See Dun. Dig. 7668.

Allegations of answer that land of a school district was subject to special assessment for a local improvement may be stricken as frivolous, where such land is not subject to such assessment as a matter of law. Id.

A frivolous pleading is one which does not in any view of facts pleaded present a defense to action, and an essential fact issue being raised, the reply should not have been stricken as frivolous. Hasse v. V., 208M457, 294NW475. See Dun. Dig. 7668.

Where part of the pleading is frivolous but another part is good and puts in issue material allegations of complaint or answer, court cannot strike out whole and order judgment. Id. See Dun. Dig. 7668b.

An answer is frivolous which appears from a mere inspection to be lacking in legal sufficiency and which in any view of facts pleaded does not present a defense. Neefus v. N., 209M495, 296NW579. See Dun. Dig. 7668.

In action by surety on bond of an executor against principal to recover expenses of defense of proceeding against principal who refused to defend, wherein complaint asserted reasonableness of attorneys' fees paid by surety and necessity for incurring them in the prior suit and appearing therein, an answer denying the facts raised issue to be heard, and it was error to strike it as sham and frivolous. U. S. Fidelity & Guaranty Co. v. Falk, 214M138, 7NW(2d)398. See Dun. Dig. 7668.

A frivolous answer is one that does not in any view of the facts pleaded present a defense to the matters pleaded in the complaint. Id.

A frivolous answer is one that does not in any view of the facts pleaded present a defense to the action. Minnesota Casket Co. v. Swanson, 215M150, 9NW(2d)324. See Dun. Dig. 7668.

9261. Interpleader.

In action against issuing bank by named payee on cashier's check issued for a special purpose and subject to a contract between payee and purchaser by which check was used as an earnest money deposit, and was to be returned to purchaser in event payee could not perform his contract, trial court was justified in interpleading purchaser of check and discharging bank as defendant. Deones v. Zeches, 212M260, 3NW(2d)432. See Dun. Dig. 4892.

On review of action of trial court in granting motion of defendant to be permitted to pay money into court and have another person substituted as defendant and for discharge of original defendant as a party to action, where record shows that motion for interpleader was argued and resulting order was based upon plaintiff's unverified complaint and defendant's verified answer and there was no reply, in determining validity of order only these pleadings should be considered, and in case of conflict, verified answer must be taken as true. Id.

An action upon a cashier's check is an action upon "contract". Id.

Where refund from Public Employees Retirement Association if claimed to two parties, the association should not assume to decide which one of claimants is entitled to the money but should deposit the amount in court. Op. Atty. Gen. (331b-5), May 13, 1943.

9262. Deposit when no action is brought.

Where refund from Public Employees Retirement Association is claimed by two parties, the association should not assume to decide which one of claimants is entitled to the money but should deposit the amount in court. Op. Atty. Gen. (331b-5), May 13, 1943.

9263. Intervention.

½. In general.

Where in replevin it appears that a third party is probably entitled to possession, he should be brought in as a party by intervention or in impleader, and this may be ordered by court on its own motion. Braman v. Wall, 210M548, 299NW243. See Dun. Dig. 4899.

2. Interest entitling party to intervene.

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. Kniefel v. K., 207M109, 290NW218. See Dun. Dig. 4899.

Where garnishee summons is served on garnishee before summons in main action is issued and delivered to officer for service, and a subsequent garnishment is regularly and lawfully made by third party before defect in first garnishment has been waived, plaintiff in second garnishment is entitled to intervene in person and claim right of precedence in fund or property in hands of garnishee. Nash v. S. M. Braman Co., 210M196, 297NW755. See Dun. Dig. 4002.

A parent foreign corporation having no license to conduct a small loan business, but owning all stock of a defendant subsidiary corporation licensed under state law, has no right to intervene in action by another loan company to protect its trade-name and right to do business in a certain city. Personal Loan Co. v. Personal Finance Co., 212M600, 5NW(2d)61. See Dun. Dig. 4899.

2½. Time of application.

Application to intervene in title registration proceeding made more than a year after judgment was rendered was correctly denied. Application of Rees, 211M 103, 300NW396. See Dun. Dig. 4902.

4. Demurrer.

Pleading of one intervening may be attacked by demurrer or by motion to dismiss if such person has no right to intervene. Personal Loan Co. v. Personal Finance Co., 212M600, 5NW(2d)61. See Dun. Dig. 4904.

9264. Consolidation—Separate trials—Actions triable together.

Separate suits for damages for injuries arising out of the same collision involving common questions of law and facts may be consolidated by court in exercise of its discretion. Polito v. Molasky, (C.C.A.8), 123 F. (2d) 258. Cert. den. 62SCR632. See Dun. Dig. 91.

9265. Subscription and verification.

2. Verification.

On review of action of trial court in granting motion of defendant to be permitted to pay money into court and have another person substituted as defendant and for discharge of original defendant as a party to action, where record shows that motion for interpleader was argued and resulting order was based upon plaintiff's unverified complaint and defendant's verified answer and there was no reply, in determining validity of order only these pleadings should be considered, and in case of conflict, verified answer must be taken as true. Deones v. Zeches, 212M260, 3NW(2d)432. See Dun. Dig. 7641.

9266. Pleadings liberally construed.

In a death action in federal court local substantive law governs but federal court is not bound by the state rule that pleadings are to be construed most strongly against the pleader, the rule now being the reverse of what it was before the Erie Railroad Co. decision and before the Conformity Act was superseded by the Rules of Civil Procedure. Hannah v. Gulf Power Co., (CCA5), 128F(2d)930. See Dun. Dig. 3748b.

A liberal rule prevails as to construction of pleadings, and one of primary objects of reformed procedure was to enable courts to give judgment according to facts stated and proved without reference to form used or to legal conclusions adopted by pleader, and a complaint is not demurrable because it proceeds on a wrong theory. Villaume v. W., 209M330, 296NW176. See Dun. Dig. 7723b.

9267. Irrelevant, redundant and indefinite pleadings.

6. Remedy.

An ultimate allegation of fact will be held good as against a motion for judgment on the pleadings, even though a motion to make it more definite would lie. Schmitt v. Emery, 215M288, 9NW(2d)777. See Dun. Dig. 7693.

9270. Ordinances and local statutes.

In action to enjoin and to recover damages for a nuisance it was unnecessary to admit into evidence an ordinance of the city making it unlawful to permit the escape of certain noxious substances and odors, since court by virtue of manner in which it was pleaded knew of its existence by judicial notice. Jedneak v. Minneapolis General Electric Co., 212M226, 4NW(2d)326. See Dun. Dig. 3452.

9273. Conditions precedent.

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. 1910, 7533.

9277. Joinder of causes of action.

½. In general.

Separability of controversies is governed by state law, as affecting removal of causes of action to federal courts. Ammond v. Pennsylvania R. Co., (CCA6), 125F(2d)747. Cert. den. 316US691, 62SCR1283. See Dun. Dig. 3748, 8395a.

Joint and several suits against master and servant for tort of servant. 26 Minn. Law Rev. 730.

1. Subdivision 1.

Complaint in action by stockholder in representative capacity and also upon a personal claim against corporation would be demurrable for misjoinder of causes of action. Briggs v. Kennedy Mayonnaise Products, 209M312, 297NW342. See Dun. Dig. 2069, 7499c to 7508.

3. Subdivision 3.

Owner of a car in a collision with another car had but one indivisible cause of action against wrongdoer for injuries to his person and damage to his car. Hayward v. State Farm Mut. Automobile Ins. Co., 212M500, 4NW(2d)316, 140ALR1236. See Dun. Dig. 2531, 7500.

9. Must affect all the parties.

Processing taxes sought to be recovered is not a trust fund in which all similarly situated with plaintiffs share, so that an accounting in equity could be maintained; and, whether the recovery is sought upon the thory of unjust enrichment or for money had and received, each plaintiff's cause of action is one at law separate and not in common with the others, improperly joined. Thorn v. G., 206M589, 289NW516. See Dun. Dig. 7502.

A demurrer for misjoinder was properly sustained to a complaint by husband and wife, joint owners of a home, to recover for depreciation of value of use thereof by defendant's wrongful maintenance of a nuisance upon adjacent property, and by husband alone to recover damages sustained by his family from noxious odors members thereof were subjected to from the same nuisance. King v. S., 207M573, 292NW198. See Dun. Dig. 7502.

Stockholder bringing representative action on a cause of action belonging to corporation is not entitled to recover judgment in same action in his favor against corporation on a debt or other liability which he claims it owes to him. Briggs v. Kennedy Mayonnaise Products, 209M312, 297NW342. See Dun. Dig. 2069, 7499c to 7508.

A party cannot join causes of action in his personal and representative capacities. Id. See Dun. Dig. 7502a.

A complaint in action by widow, by guardian ad litem, against administrator, surety, general guardian, surety, and against administrator in his individual capacity, involving actions ex contractu and ex delicto, was the subject to demurrer for misjoinder of causes of action, though plaintiff attempted to weld them into a single claim for damages for conspiracy. Jewell v. Jewell, 215M190, 9NW(2d)513. See Dun. Dig. 7502.

In order that two or more causes of action may be united in the same pleading the result must be one that affects all parties to the action. Id.

A cause of action against one in his representative capacity cannot be joined in the same complaint with one against him in his individual capacity. Jewell v. Jewell, 215M190, 9NW(2d)513. See Dun. Dig. 7502a.

15. Splitting cause of action.

A single indivisible cause of action in tort or contract cannot be divided and made subject of several actions. Doyle v. C., 206M649, 289NW784, 785. See Dun. Dig. 5167. Aff'd 60SCR1102.

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. 2531, 5167, 7500.

Where owner of automobile suffers both personal injuries and property damage and recovers from wrongdoer for personal injuries and damage to his car before he seeks to collect on collision insurance, he cannot thereafter recover collision insurance, because he would thereby deprive insurer of its right of subrogation, Id. See Dun. Dig. 2531, 4875o, 5167.

9279. Amendments of course, and after demurrer.

2. Pleading over.

When a complaint is amended after answer, defendant is not bound to answer de novo, and if he does not choose to do so, his original answer stands as his answer to the amended complaint, but if he makes timely election to answer the pleading as amended, judgment may not be entered against him until he has had the opportunity to exercise that right. U. S. Fidelity & Guaranty Co. v. Falk, 214M138, 7NW(2d)398. See Dun. Dig. 7706.

9280. Amendment by order.

AMENDMENT OF PLEADINGS

2. Amendments on the trial held discretionary.

Whether or not an amendment to pleadings should be allowed during the course of the trial is a matter largely within the discretion of the trial court, whose exercise thereof may not be questioned on appeal except upon a showing of an abuse thereof. Bass v. Ring, 215M11, 9 NW(2d)234. See Dun. Dig. 7696, 7708.

4. Amendments after trial held discretionary.

It was within discretion of trial court to refuse to permit an amendment of answer to allege defense of contributory negligence after evidence was closed. Guin v. M., 206M382, 288NW716. See Dun. Dig. 7713a.

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

Where insured, whose dwelling was wholly destroyed by fire, alleged in her complaint, and answer admitted, that reasonable value was $8,000, but she erroneously alleged the insurance coverage to be $5,000, and at the trial it developed that amount of insurance agreed upon was in fact $6,000, court properly allowed amendment of complaint to conform to proof in that regard, since no new element was brought into the case and the question was one purely of discretion. Rommel v. New Brunswick Fire Ins. Co., 214M251, 8NW(2d)28. See Dun. Dig. 7710, 7713.

12. Scope of allowable amendment of complaint.

Denial of defendant's motion for amendment of answer made during the trial whereby they sought a reformation of the contract upon which the action was brought was not an abuse of discretion. Bass v. Ring, 215M11, 9NW(2d)234. See Dun. Dig. 7709.

15. Amendment of parties.

Where action was brought against a corporation to recover for services rendered, and it appeared at the close of plaintiff's case that company was not a corporation at time services were rendered, and court permitted plaintiffs over objections to amend so as to make partners and partnership defendants, and counsel again objected to joining of partners as defendants as an improper method of service upon them as individuals, such partners did not waive their objections to jurisdiction of court by permitting themselves to be called and put in their testimony on the merits. Guy v. D., 208M534, 294 NW877. See Dun. Dig. 7701.

18. Amendment after judgment.

Where proof establishes an attempt to prefer, pleading may be conformed to proof, even after judgment. De Luxe Oil Co., (DC-Minn), 36FSupp287. See Dun. Dig. 743, 3857, 3925.

In action to set aside a conveyance as fraudulent as to creditors, later amended to allege that grantee assumed indebtedness, court properly denied motion made at time of motion for a new trial to amend complaint so as to allege that conveyance was a mortgage. Blodgett v. Hollo, 210M298, 298NW249. See Dun. Dig. 7715.

OTHER AMENDMENTS

21. Amendment to an answer.

Statute of limitations was properly in case where plaintiff had been permitted to amend his complaint by striking from it allegation showing running of statute against his cause and defendant was thereupon given right to amend his answer by pleading statute. First State Bank of Correll, 206M250, 288NW709. See Dun. Dig. 5661, 7498a(38).

9281. Variance—Amendment—Exceptions.

1. Proof must follow pleadings.

Where plaintiff's complaint in suit for trespass alleged only fact of title generally and without disclosing means by which acquired, and defendant's answer pleaded generally that its alleged acts of trespass were consented to by plaintiff but without pleading anything more, plaintiff, under his reply denying all new matter, could assail a written grant of easement, introduced by defendant defensively against the charged trespass, upon ground that grant was result of a mutual mistake between parties thereto, defendant being in privity with grantee therein named. Lawrenz v. L., 206M315, 288NW727. See Dun. Dig. 7626.

Pleading may be waived where there is a voluntary trial of issue which pleading could have raised. State v. Rock Island Motor Transit Co., 209M105, 295NW519. See Dun. Dig. 7675.

Even though suit was brought, pleaded and tried on theory that reformation of public liability policy was absolutely necessary in order to recover, contention of insurer that insured should not be allowed on appeal to take position that policy is open to construction entitling it to recover loss sustained is too technical. Langford Elec. Co. v. Employers Mut. Indem. Corporation, 210M289, 297NW843. See Dun. Dig. 407.

Where court in instruction stated what he called plaintiff's "specific claim" of negligence by repeating in his own words all acts of defendant alleged by plaintiff in his complaint, and that portion of charge was not objected to, jury was entitled to consider each or all of the acts as a basis for finding defendant negligent, though complaint itself did not expressly state that some of the acts were negligent. Anderson v. Hegna, 212M147, 2NW(2d)820. See Dun. Dig. 9792.

Where plaintiff brought and tried his cause as one founded in tort and not upon contract but failed to establish it upon that theory, court properly directed a verdict against him. Tapper v. Pliam, 212M295, 3NW (2d)500. See Dun. Dig. 7674.

2. Immaterial variance.

Where defendant asked reformation of a contract sued on for "mutual mistake", and evidence established a unilateral mistake which was known at all times by other party, there was "mere variance" and the defendant was entitled to judgment, or at least a new trial, though theory of unilateral mistake was not raised until case

reached supreme court. Rigby v. N., 208M88, 292NW751. See Dun. Dig. 384.

Where case was tried and determined on theory of breach of contract appellant is not in position to claim that complaint sounded in conversion. Stanton v. M., 209M458, 296NW521. See Dun. Dig. 7675.

3. Material variance.

Where cause was predicated upon claim that defendant "fraudulently conspired to defraud" plaintiff of his broker's commission in a real estate transaction, a tort, and under the evidence there appeared to be no issue to decide other than whether or not plaintiff was procuring cause of sale, and also whether or not he was employed by one of the defendants as his agent, verdict was properly directed for defendant. Tapper v. Pliam, 212M295, 3NW(2d)500. See Dun. Dig. 7674.

9283. Extension of time—Mistakes, etc.

THE STATUTE GENERALLY

1. Application in general.

Since judgment entered without notice following overruling of demurrer was unauthorized rather than merely erroneous, it may be vacated, and it is immaterial that six months time for appeal from judgment expired before any application for relief was made. Kemerer v. S., 206M 325, 288NW719. See Dun. Dig. 5114.

Section applies to all judgments and not simply to default judgments or judgments that are erroneous. Holmes v. C., 209M144, 295NW649. See Dun. Dig. 5108a.

Statute is applicable to tax proceedings. Id.

Probate court is vested with power to correct, modify, or amend its records to conform to the facts, and to vacate its order procured through fraud, mistake, inadvertence, or excusable neglect, provided application therefor is seasonably made. Gooch's Estate, 212M272, 3 NW(2d)494. See Dun. Dig. 7784(2).

AMENDMENT OF JUDGMENTS AND JUDICIAL RECORDS

3½. In general.

Nunc pro tunc entries of judicial action are permitted to correct record and in furtherance of justice. Hampshire Arms Hotel Co. v. Wells, 210M286, 298NW452. See Dun. Dig. 5090a.

6. When may be made.

A nunc pro tunc entry of judgment will be allowed as of time when party would otherwise be entitled to it, if justice requires, where delay in entering it is caused by action of court, but a judgment entered precisely at time when court and counsel intended that it should be entered could not be amended as to date of entry because a premature appeal had been taken. Hampshire Arms Hotel Co. v. Wells, 210M286, 298NW452. See Dun. Dig. 5050.

11. Clerical mistakes of clerk.

Error of clerk of trial court in failing to file affidavit upon which temporary restraining order was based could be corrected by trial court nunc pro tunc, by endorsing upon affidavit a certificate that it was considered by court. McFadden Lumber Co. v. W., 209M242, 296NW18. See Dun. Dig. 5099.

Where because of a scrivener's mistake in drafting an original decree of distribution and not because of judicial error property was erroneously decreed to persons not entitled thereto under the will, probate court had power to open proceedings and amend its decree to conform with terms of will. Gooch's Estate, 212M272, 3NW(2d)494. See Dun. Dig. 7784(2).

18. Modification of judgments.

In ordinary action, after time for appeal expires, court cannot modify a judgment except for clerical error or misprision, or except as prescribed in statute, but there is a distinction in mortgages and mechanics' lien foreclosure actions. Smude v. Amidon, 214M266, 7NW(2d) 776. See Dun. Dig. 5095.

22. Amendment of names of parties.

Where defendant knew before judgment that he was person sued in action on a note and that person designated in judgment referred to him, though middle initial was wrong, judgment could be corrected and was not invalid as to him. Cacka v. Gaulke, 212M404, 3NW(2d)791. See Dun. Dig. 5104.

VACATION OF JUDGMENTS AND ORDERS

25½. In general.

After entrance of a consent decree in an action to enjoin violation of Fair Labor Standards Act (29:201 et seq) discovery by corporation that government agents were mistaken as to defendant's liability would not be grounds for vacation of the decree. Fleming v. Miller,(DC-Minn) 47FSupp1004. See Dun. Dig. 5123a.

After entrance of consent decree in action to enjoin violation of Fair Labor Standards Act, fact that plaintiff's attorneys may have been mistaken in thinking that defendant was subject to the act does not give grounds for vacating the decree. Id.

A mistake of law may furnish a ground for vacation of a judgment entered without notice following overruling of a demurrer. Kemerer v. S., 206M325, 288NW719. See Dun. Dig. 5123a.

An order adjusting and allowing final account of an executor is equivalent of a judgment or decree adjudging amount due estate from executor, and may not be vacated, after expiration of time for appeal therefrom, except under §§9283 or 9405. Woodworth's Estate, 207M 563, 292NW192. See Dun. Dig. 5108a.

Court has power to open its judgments and to correct or modify them upon presentation of newly discovered evidence when manifest wrong has been done upon substantially same principle on which rests its inherent power to grant a new trial. Holmes v. C., 209M144, 295NW 649. See Dun. Dig. 5121a.

32. Diligence.

In case of judicial error, motion to set aside must be made within time limited to appeal, but where it is sought to modify or vacate a judgment "for good cause shown," statutory limitation is one year after notice of its entry. Holmes v. C., 209M144, 295NW649. See Dun. Dig. 5114.

Within one year party seeking to vacate judgment "for good cause shown" must act with diligence. Id.

It was error to grant motion to vacate an order setting aside summons and complaint and dismissing action on application made 18 months after entry of such order. State v. Funck, 211M27, 299NW684. See Dun. Dig. 5114.

35. Jurisdictional defects.

On appeal from order vacating a previous order admitting one of two wills to probate court had before it de novo motion to vacate for surprise or excusable inadvertence or neglect, and had it there considered that motion on merits and reversed probate court there could have been no question as to propriety of result and supreme court would have been compelled to affirm. Showell's Estate, 209M539, 297NW111. See Dun. Dig. 7794.

On appeal from order of probate court vacating a previous appealable order admitting one of two wills to probate after time for appeal had expired upon ground that its failure to notify party of order constituted excusable neglect, district court should decide merits of application to vacate and it was error to vacate probate court's vacating order on ground that it acted without jurisdiction. Id.

37. Unauthorized action.

Probate court has power to vacate a previous order allowing a final account where it is made to appear that the order was procured without a hearing because of mistake and inadvertance on the part of the court, and such power does not terminate upon the expiration of the time to appeal from the order sought to be vacated. Henry's Estate, 207M609, 292NW249. See Dun. Dig. 7784.

40. Fraud.

Self or double dealing by a fiduciary renders transaction voidable by beneficiary, but where facts were fully disclosed to court, and action of guardian was on advice of independent counsel whose only duty was to, and whole whole interest was that of, the ward, and transaction was approved by court, it cannot thereafter be disaffirmed by ward. Fiske's Estate, 207M44, 291NW289. See Dun. Dig. 5122.

OPENING DEFAULTS

45½. In general.

A motion may not be heard and by appealable order denied, and then, after review on appeal, have whole process repeated, because opposition to motion was in form and terms of demurrer. Lenhart v. Lenhart Wagon Co., 211M572, 2NW(2d)421. See Dun. Dig. 6502.

Order refusing to open default judgment and permit defendant to answer was reversed, though this statute was not called to court's attention by counsel for either party. Bearman Fruit Co. v. Parker, 212M327, 3NW(2d) 501. See Dun. Dig. 5035.

Since a complaint alleging in the alternative that one or the other of two defendants is liable, but that plaintiff is unable to determine which one, states no cause of action, trial court properly set aside default judgment as to one of defendants and granted him right to interpose answer or demurrer. Pilney v. Funk, 212M398, 3NW (2d)792. See Dun. Dig. 5013a.

49. Relief granted liberally.

Courts should be liberal in relieving a defendant of default, if reasonable excuse is shown and he appeared to have a meritorious defense, to end that cases may be determined on their merits. Bearman Fruit Co. v. Parker, 212M327, 3NW(2d)501. See Dun. Dig. 5013.

In the interests of justice it is proper that this section should be liberally construed so that causes may be tried on the merits, and courts are naturally and properly inclined to relieve a party from default, provided he furnishes reasonable excuse for his neglect and makes a fair showing of a meritorious defense. Lentz v. Lutz, 215M 230, 9NW(2d)505. See Dun. Dig. 5013(41).

50. Discretionary.

Matter of opening a default lies almost wholly in discretion of trial court, and its action will not be reversed on appeal except for a clear abuse of discretion. Bonley, 213M214, 6NW(2d)245. See Dun. Dig. 5035(63).

A motion to vacate a judgment which asks that it be vacated on the ground of excusable neglect or inadvertence and sets up an affidavit of merits and a proposed answer is in reality a motion to open the judgment and is addressed to the discretion of the court. Whipple v. Mahler, 215M578, 10NW(2d)771. See Dun. Dig. 5012, 5108.

51. Excusable neglect.

Purpose of statute is to afford relief to those who are ignorant or inexperienced in business and legal affairs, and court did not abuse its discretion in setting aside a default judgment against an elderly lady who depended upon her banker son to obtain counsel and defend action

upon a note which she did not sign, though her motion was made about four years after judgment, but within one year of her learning of its entry. Pilney v. Funk, 212M398, 3NW(2d)792. See Dun. Dig. 5025.

Ignorance of the law, especially on the part of a lawyer, is not excuse requiring revocation of an order of default. Bonley, 213M214, 6NW(2d)245. See Dun. Dig. 5025.

Forgetfulness of defendants served with summons and complaint, mislaid because defendants were engaged in moving from a home to a farm, did not constitute excusable neglect or inadvertence which would render it an abuse of discretion to deny a motion to vacate a default judgment. Whipple v. Mahler, 215M578, 10NW(2d)771. See Dun. Dig. 5025.

56. Time of application—Diligence.

Trial court acted within its discretionary power when after seven months it vacated a judgment entered by clerk in favor of plaintiff and permitted defendant to answer upon showing facts constituting a defense. High v. S., 207M228, 290NW425. See Dun. Dig. 5009 to 5014.

Where parties, for about one year through no fault of theirs, had no knowledge of pendency of probate proceedings or of an order made therein and moved to vacate such order promptly upon discovery of the order, they are not guilty of laches barring right to have order vacated. Daniel's Estate, 208M420, 294NW465. See Dun. Dig. 7784(2).

A defendant not personally served is given a right to defend within one year from judgment by §9236, but thereafter application for relief from judgment must be made to trial court in its discretion under §9283. Kane v. S., 209M138, 296NW1. See Dun. Dig. 5012.

After time for appeal from an order has expired, only a restricted power is possessed by probate court to vacate or amend the previous order, but such court has same power as a district court to vacate an order, judgment or decree procured through surprise or excusable inadvertence or neglect. Showell's Estate, 209M539, 297 NW111. See Dun. Dig. 7784.

Trial court erred in vacating a default judgment when evidence failed to show that moving party initiated his action within one year after notice to him that judgment had been entered and also failed to show that it had been procured by fraud, though throughout entire proceedings middle initial in defendant's name was wrong. Cacka v. Gaulke, 212M404, 3NW(2d)791. See Dun. Dig. 5015.

It must affirmatively appear that application to set aside default was made with reasonable diligence, because a defaulting defendant cannot play fast and loose, acquiesce in judgment and then later expect to be relieved from it. Pilney v. Funk, 212M398, 3NW(2d)792. See Dun. Dig. 5015.

A defendant with verbal and written notices on many occasions both before and after entry of judgment that he could and should employ an attorney and defend an action for alienation of affection but acquiescing in judgment with thought that all of his property was exempt until 5 months after judgment when proceedings were brought to enforce payment of the judgment, was guilty of unexcusable delay and was not entitled to have default judgment set aside. Lentz v. Lutz, 215M230, 9NW(2d)505. See Dun. Dig. 5015.

It is the duty of a defendant to make his application for the relief afforded by the statute within a reasonable time after notice of the judgment and, at all events, within one year after such notice. Id. See Dun. Dig. 5015(56).

57. Meritorious defense necessary.

A discharge in bankruptcy is a meritorious defense. Davenport v. S., 206M69, 288NW167. See Dun. Dig. 5019.

A plea of discharge in bankruptcy presents a meritorious defense. Bearman Fruit Co. v. Parker, 212M327, 3NW(2d)501. See Dun. Dig. 5019.

59. Affidavit of merits.

Where motion to vacate default judgment is based on record as well as affidavits, both may be examined to determine whether there was an abuse of discretion. High v. S., 207M228, 290NW425. See Dun. Dig. 5018.

Affiant on motion to vacate default judgment may be an attorney who has personal knowledge of the facts. Id. See Dun. Dig. 5020.

64. Who may apply.

Affiant on motion to vacate default judgment may be an attorney who has personal knowledge of the facts. High v. S., 207M228, 290NW425. See Dun. Dig. 5018.

9285. Unimportant defects disregarded.

1. In general.

Correct judgment should be affirmed regardless of reasons given therefor by the trial court. McGivern v. Northern Pac. Ry. Co., (CCA8)132F(2d)213. See Dun. Dig. 421.

A correct ruling though placed upon untenable grounds will not be reversed. Beck v. N., 206M125, 288NW217. See Dun. Dig. 421.

Where hearing before board of medical examiners was adjourned without taking testimony of three witnesses for doctor and there was no showing that testimony would have been relevant to his methods of diagnosis, there was no prejudicial error in denying a continuance in order to take it. Minnesota State Board of Medical Examiners v. Schmidt, 207M526, 649, 292NW255. See Dun. Dig. 424. App. dism'd and cert. den. 61SCR135.

Where plaintiff as a matter of law was not entitled to recover, court need not consider any error in denying plaintiff a jury trial. Gilbertson v. I., 208M51, 293NW129. See Dun. Dig. 424.

In action for property damages to a car brought on theory of breach of warranty and also negligence in connection with tires and servicing, any error of court in requiring plaintiff to elect whether she would proceed in tort or for damages for breach of warranty was without prejudice where plaintiff elected to proceed in tort for negligence and the written warranty excluded specifically the tires. McLeod v. H., 208M473, 294NW479. See Dun. Dig. 424.

Court will not reverse for error where it is apparent that error did not materially prejudice appellant. Dahlstrom v. H., 209M72, 295NW508. See Dun. Dig. 416(50, 52).

An order directing a verdict for defendant on ground of contributory negligence must stand if court was right on any other ground. Pangolas v. Calvet, 210M249, 297 NW741. See Dun. Dig. 421.

Decision that a certain defendant had not appeared and that action as to her be dismissed, though erroneous, would not require reversal as to plaintiff who had not proved her case. Williams v. Jayne, 210M594, 299NW853. See Dun. Dig. 424.

A correct decision will be sustained although reasons given for it are wrong. Rien v. Cooper, 211M517, 1NW (2d)847. See Dun. Dig. 421.

Where evidence would not justify submitting case to jury as against either defendant, any error of court in entering a dismissal as to one of the defendants during the progress of the trial would be immaterial. Johnson v. Theo. Hamm Brewing Co., 213M12, 4NW(2d)778, 11 NCCA(NS)316. See Dun. Dig. 424.

While doctrine of harmless error is favored and will be applied whenever it seems reasonable or safe to do so, it is not a cure-all, and in their desire to sustain what appears to be a just verdict, courts should not strain doctrine beyond its legitimate function. Independent School Dist. No. 35 v. A. Hedenberg & Co., 214M82, 7NW (2d)511. See Dun. Dig. 416.

2. Rulings on pleadings.

Statutory rule of pleadings that formal defects should be disregarded is remedial and aimed at pitfalls of older rules of extreme technicality in pleading. Stenzel's Estate, 210M509, 299NW2. See Dun. Dig. 424, 7677.

Defect as to names of parties in title of petition and alternative writ of mandamus should be disregarded where remedied by allegation in body of pleadings. Id. See Dun. Dig. 7509.

In action for medical care, food, and shelter furnished to defendant's dog between certain dates, no prejudice resulted to plaintiff from court's refusal to permit him to file a supplemental complaint to cover accumulated charges to date, where it was found that plaintiff was not entitled to recover for charges after a certain specific date. Morgan v. Ibberson, 215M293, 10NW(2d)222. See Dun. Dig. 424.

4. Reception of evidence.

Ruling which is correct in excluding evidence will be upheld though reason given by trial court for exclusion is erroneous. Stolte v. L., (CCA8), 110F(2d)226.

In hearing on claim of son against estate of mother for improvements made on mother's farm, there was no prejudicial error in exclusion of evidence that plaintiff had not kept records of his expenditures because he had learned that stores where he purchased material kept records. Sickmann's Estate, 207M65, 289NW832. See Dun. Dig. 424.

In action by employer against employee for an accounting, refusal of court to permit defendant to testify as to his good faith and intentions in entering into certain transactions on his own behalf was not considered on appeal, where testimony received was in detail and covered entire affair to the extent that trial court could conclude fairly and justly matters involved. Raymond Farmers Elevator Co. v. A., 207M117, 290NW231. See Dun. Dig. 424.

Exclusion of evidence on a matter fully covered by other evidence is not prejudicial. Scott v. P., 207M131, 290 NW431. See Dun. Dig. 424.

Reception of medical testimony based on part of patient's statement as to "past transactions" is not ground for reversal where facts asserted in statement were already in evidence. Ferch v. G., 208M9, 292NW 424. See Dun. Dig. 424.

There was not reversible error in excluding expert opinion evidence where a specialist in field was permitted to give his expert favorable opinion on the subject. Rhoads v. R., 208M61, 292NW760. See Dun. Dig. 424.

In action for divorce on ground of cruel and inhuman treatment, court might well have permitted testimony as to disposition and temperament of defendant, but it was not reversible error to exclude where relationship of parties over a long period of time was dwelt upon at length. Locksted v. L., 208M551, 295NW402. See Dun. Dig. 424.

Any error which existed in overruling objection to reference by physician to a medical textbook was harmless in absence of motion to strike reference to textbook in previous answer. Wolfangel v. P., 209M439, 296NW576. See Dun. Dig. 424.

Refusal to strike testimony incompetent under Dead Man's Act was not prejudicial error where plaintiff had acknowledged error and court instructed jury wholly

to disregard it, especially where other witnesses testified to similar statements of deceased. Arnold v. Northern States Power Co., 209M551, 297NW182. See Dun. Dig. 423.

In condemnation proceeding exclusion of photograph of wheat in shock upon part of land taken was not reversible error where appellant without objection introduced uncontradicted evidence of every bushel of grain of all kinds raised on land during season in question and also of prior years. State v. Andrews, 209M578, 297NW 848. See Dun. Dig. 424.

Where statement written down by claim adjuster as given by party was only corroborative of similar statement made orally by defendant to a highway patrolman, its admission, if erroneous, would have been nonprejudicial. Johnson v. Farrell, 210M351, 298NW256. See Dun. Dig. 424.

Though admission of evidence of speed of a car traveling on road at about same time defendant made trip fatal to his guest should have been excluded because identification of car was not satisfactory, there was no prejudicial error where physical facts at place of accident showed conclusively that defendant's car had been traveling at terrific speed. Ressmeyer v. Jones, 210M423, 298NW709. See Dun. Dig. 424.

Where court excluded a question as part of cross-examination by plaintiff whether witness talked with a representative of an insurance company and matter was dropped, mere asking of question was not reversible error, such cross-examination taking place after it appeared that testimony of witness was different from his written statement. Schultz v. Swift & Co., 210M533, 299 NW7. See Dun. Dig. 424.

In action on official bond of county auditor by bank holding warrants unlawfully issued by auditor in payment of his own salary, reception in evidence of a number of similar warrants showing custom of bank and county treasurer in accepting warrants on issue of negligence of bank could not have prejudiced defendant where court instructed that custom or practice of evading or disregarding statutory provisions as to what warrants shall contain constitutes no legal justification for failing to make due inquiry. State Bank of Mora v. Billstrom, 210M497, 299NW199. See Dun. Dig. 424.

So long as liability insurance is not featured or made basis at trial for an appeal to increase or decrease damages, information that parties to automobile accident carry insurance would seem to be without prejudice, at least where question did not call for such information and defendants did not object and themselves asked questions concerning insurance. Odegard v. Connolly, 211 M342, 1NW(2d)137. See Dun. Dig. 419, 424.

In proceeding under Workmen's Compensation Act in which widow of another employee testified to a conversation between claimants, her deceased husband, and employer, employer was not prejudiced by exclusion, on cross-examination of widow, of her answer to question whether or not she intended to assert a claim against employer, she being cross-examined very fully in respect to her present feeling toward employer. James v. Peterson, 211M481, 1NW(2d)844. See Dun. Dig. 422.

Error in excluding evidence does not require a reversal where fact is otherwise satisfactorily proved. Schmitt v. Emery, 211M547, 2NW(2d)413, 139ALR1242. See Dun. Dig. 422.

Although it was error to permit plaintiff's counsel to ask defendant motorist on cross-examination whether he had a driver's license, it was not prejudicial where only close question in case was plaintiff's contributory negligence. Mahowald v. Beckrich, 212M78, 2NW(2d)569. See Dun. Dig. 422.

Supreme court is cautious about ordering a new trial for errors in admission of testimony and will not do so unless prejudice in fact appears. Id. See Dun. Dig. 424.

Error in excluding opinion testimony of a qualified expert based on his own observations is not cured by permitting him to testify as to his opinion based in part upon a hypothetical presentation of the testimony of others as to facts they observed. Independent School Dist. No. 35 v. A. Hedenberg & Co., 214M82, 7NW(2d)511. See Dun. Dig. 424.

Error in admission or rejection of expert opinion, or any other type of evidence, is ground for reversal if it is prejudicial. Id.

In action by employees of tenant injured when building collapsed against landlord as for a concealed trap, when it appeared that defendant had undertaken to repair building after it had been damaged by fire and did not replace certain old timbers, evidence that timbers used in original construction and not replaced are not approved by present day building code requirements was not prejudicial, defendant proving that repairs met approval of building inspector. Murphy v. Barlow Realty Co., 214M64, 7NW(2d)684. See Dun. Dig. 424.

If it was error to admit in evidence a letter written by an alleged agent to establish the fact of agency, it was rendered nonprejudicial by subsequent examination of the alleged agent wherein he testified that facts recited in the letter were true. Katzmarek v. Weber Brokerage Co., 214M580, 8NW(2d)822. See Dun. Dig. 424.

Where prejudice is not shown to have resulted to the appellant from an erroneous ruling requiring him to proceed with his evidence prior to the presentation of that of his adversary, the error is harmless and not ground for a new trial. Dittrich v. Brown County, 215M234, 9NW (2d)510. See Dun. Dig. 9715.

In action to recover liquidated damages for failure to wreck a large building within a stipulated time, exclusion of certain evidence for purpose of showing the probabilities with respect to forecasting the value of the use of the property was not prejudicial, there being no suggestion of fraud, overreaching, or mutual mistake, and the parties being competent to contract. Schutt Realty Co. v. Mullowney, 215M340, 10NW(2d)273. See Dun. Dig. 424.

5. Remarks and conduct of court and counsel.

In action for assault and battery, gratuitous statement of plaintiff counsel with respect to maintenance of slot machines by defendant in his place of business held not prejudicial where objection was sustained. Ness v. F., 207M558, 292NW196. See Dun. Dig. 424.

A judgment will not be reversed for misconduct on part of counsel in display of acrimony against opposing counsel and parties unless prejudice results. Anderson v. High, 211M227, 300NW597. See Dun. Dig. 416.

6. Instructions.

Defendant in action for assault and battery is not prejudiced by refusal of trial court to instruct jury concerning right of liquor establishment to eject unruly patrons where use of force by defendant was prompted by a motive other than that of removing party assaulted from premises. Symalla v. D., 206M280, 288NW385. See Dun. Dig. 424.

Vigorous instruction by court cured misconduct of counsel in argument as to what damages should be. Symons v. G., 208M240, 293NW303. See Dun. Dig. 423, 9800.

Error in instruction on presumption of due care by a deceased person did not require a new trial where there was no evidence upon which jury could base a finding of contributory negligence of deceased. Lang v. C., 208M 487, 295NW57. See Dun. Dig. 424.

Erroneous instruction in respect to emergency rule was harmless where plaintiff's theory at trial was that the emergency had been successfully met and avoided, and court submitted that issue as a question of fact to jury under appropriate instructions, and verdict was for defendant. Dahlstrom v. H., 209M72, 295NW508. See Dun. Dig. 416.

Where instruction submitted without definition term "active negligence," "trap," and "concealed dangers," to be applied only if jury found plaintiff to be a licensee, any error was without prejudice where jury by special verdict found plaintiff to be an invitee. Radle v. H., 209 M415, 296NW510. See Dun. Dig. 424.

Instruction informing jury of res ipsa loquitur rule involving toppling over of a pile of sugar sacks held not to warrant a new trial. Ryan v. Twin City Wholesale Grocer Co., 210M21, 297NW705. See Dun. Dig. 424.

Refusal of instruction on sudden peril was not prejudicial where under the circumstances defendant had no choice of action, and did not make any, it appearing that when defendant saw plaintiff's stalled car he immediately applied his brakes and thereafter had no control of car whatever. Corridan v. Agranoff, 210M237, 297NW759. See Dun. Dig. 424.

Instruction that one attempting to rescue a person imperiled by negligence of another should recover unless his act was "clearly" one of rashness or recklessness was erroneous, but was without prejudice where it appeared from instructions as a whole that contributory negligence need be shown only by a fair preponderance of the evidence. Duff v. Bemidji Motor Service Co., 210M 456, 299NW196. See Dun. Dig. 424.

Plaintiff was not prejudiced by instruction as to measure of damages where jury found that he was not entitled to recover. Wolfson v. Northern States Management Co., 210M504, 299NW676. See Dun. Dig. 424.

Even if an instruction that attorney had no right to keep any portion of funds in his hands which he had not earned up to time that it came into his hands was not strictly accurate, it was fully clarified by later statement that attorney was entitled to reasonable value of legal services over a much greater period. Anderson v. High, 211M227, 300NW597. See Dun. Dig. 9796.

Where its spirit and purpose cover the case, reading of a statute to jury is not prejudicial error, notwithstanding its exact wording may not be applicable. Olson v. Neubauer, 211M218, 300NW613. See Dun. Dig. 424.

Appellant cannot complain of an erroneous instruction which was more favorable to him than it should have been. Stark v. Magnuson, 212M167, 2NW(2d)814. See Dun. Dig. 418.

A charge relative to assumption of risk "That does not mean that plaintiff assumes negligence on the part of defendant, and if he was hurt through the negligence of defendant, then he didn't assume such risk. If he was hurt through the assumption of the risk incident to doing what he wanted to do independent of defendant's negligence, then it would be a risk which he assumed, and which he would have to take the consequences of.", was unfortunately worded, but was not erroneous where it followed a long discussion replete with examples of assumption of risk. Anderson v. Hegna, 212M147, 2NW (2d)820. See Dun. Dig. 424, 7041a.

In action by farmer against trucker hauling lambs to market, an instruction that relationship between farmer and trucker was that of a carrier and passenger was not prejudicial where court expressly defined defendant's duty in terms of "a person of ordinary prudence under the same or similar circumstances". Id. See Dun. Dig. 422.

Admission of testimony, on cross-examination, that witness for plaintiff in a three-car automobile accident case settled an action brought against him by the defendant for damages arising out of the same accident, could not be held harmless where its purpose was not simply to show bias arising from hostility, but also to show that witness, not defendant, was solely responsible for the accident. Esser v. Brophey, 212M194, 3NW(2d)3. See Dun. Dig. 424.

A verbal error or unintentional misstatement of law or fact which could have been corrected at the trial had attention been called to it by counsel is not such error as requires reversal, when raised for first time on motion for new trial, unless erroneous instructions complained of were on some controlling proposition of law. Greene v. Mathiowetz, 212M171, 3NW(2d)97. See Dun. Dig. 9798.

Action of trial judge in charging jury upon emergency rule after refusing defendant's request for such instruction, thus depriving defendant of benefit of argument thereon to jury, did not constitute reversible error under the circumstances. Latourelle v. Horan, 212M520, 4NW (2d)343. See Dun. Dig. 9774.

A new trial will not be ordered where error in instructions was obviously without prejudice. Hlubeck v. Beeler, 214M484, 9NW(2d)252. See Dun. Dig. 424.

Failure to include words "through no fault of his own" in submitting emergency doctrine to jury was harmless error, in view of language used by the court. Merritt v. Stuve, 215M44, 9NW(2d)329. See Dun. Dig. 424, 7020.

7. Findings of fact and verdicts.

Form of question and special verdict of jury in response thereto held not prejudicial error where court gave such explanation and instruction as was necessary to enable jury to make the finding embraced in the answer to the question. Concord Co. v. Willcuts, (CCA8), 125F(2d)584. See Dun. Dig. 423.

Where inadequate damages are awarded, plaintiff cannot prevail on appeal if record shows no right of recovery. Blume v. B., 207M393, 291NW906. See Dun. Dig. 418.

An order refusing a new trial cannot be sustained in absence of sufficient findings of fact, even though evidence as certified up would have fully warranted findings. Lewis v. Lewis, 211M587, 2NW(2d)134. See Dun. Dig. 434.

In mandamus against county auditor and others to compel defendants to permit plaintiff to redeem land and to enter a confession of judgment in respect to the land, plaintiff was not harmed because court ordered action dismissed with costs, instead of filing findings of fact and conclusions of law to the same effect, where upon the record plaintiff was not entitled to any relief. Adams v. Atkinson, 212M131, 2NW(2d)818. See Dun. Dig. 424.

An order denying a motion for a new trial will not be disturbed where there is a finding of fact decisive of the appeal, and no assignment of error that it is not sustained by the evidence. Barnard v. Kandiyohi County, 213 M100, 5NW(2d)317. See Dun. Dig. 424.

ISSUES AND TRIAL

9286. Terms defined.

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

An order granting a new trial wipes slate clean except insofar as testimony given on first trial may be introduced to confront a witness testifying differently on second trial, and testimony on first trial should not be taken into consideration, directly or indirectly, by trial court in disposing of matters raised on second trial. Salters v. U., 208M66, 292NW762. See Dun. Dig. 7082.

9287. Issues, how joined.

Since quo warranto is an extraordinary legal remedy, procedure is not governed by requirements of service of notice of trial applicable in ordinary civil actions, for reasons that upon respondents in such a case rests burden of showing, before a court of competent jurisdiction at a stated time and place designated in the writ, by what warrant they exercised powers claimed by them. State v. Village of North Pole, 213M297, 6NW (2d)458. See Dun. Dig. 9700.

1. Issue of law.

Overruling of a demurrer to complaint does not bar defendant from questioning sufficiency of complaint to state a cause of action by motion for judgment on pleadings after answer and reply are filed. Parsons v. T., 209 M132, 295NW909. See Dun. Dig. 7562.

Where facts pleaded in complaint and reply show that case is within statute of limitations and nothing is shown to forestall its operation, judgment on pleadings for defendant may be granted. Id. See Dun. Dig. 7689.

A motion for a directed verdict presents only a question of law to be determined by court, a right to be cautiously and sparingly exercised. Applequist v. O., 209M 230, 296NW13. See Dun. Dig. 9764.

2. Issues of fact.

Where respective claims of contending parties are at variance, with evidence to support claim of each, court should submit issues to jury as questions of fact. Abraham v. Byman, 214M355, 8NW(2d)231. See Dun. Dig. 9707.

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

RIGHT TO JURY TRIAL

½. In general.

Walsh v. U. S., (DC-Minn), 24FSupp877. App. dism'd, (CCA8), 106F(2d)1021.

A suit against a surety on contract of fidelity is an action for recovery based upon promise to pay and is triable by a jury ordinarily, but this may be qualified by nature of surety contract. Raymond Farmers Elevator Co. v. A., 207M117, 290NW231. See Dun. Dig. 5233.

1. Constitutional provision.

Where plaintiff as a matter of law was not entitled to recover, court need not consider any error in denying plaintiff a jury trial. Gilbertson v. I., 208M51, 293NW 129. See Dun. Dig. 5227.

5. Equitable actions.

In action by elevator company against manager for an accounting and a money judgment, in which surety on fidelity bond was named as a defendant, manager was not entitled to a jury trial, and surety could not complain that trial court withdrew case from jury and tried it as a court case, acts committed by manager during his employment coming within provisions of surety bond. Raymond Farmers Elevator Co. v. A., 207M117, 290NW231. See Dun. Dig. 5231.

On trial of a claim against estate based upon a trust relationship, neither party was entitled to a jury as a matter of right. Halweg's Estate, 207M263, 290NW577. See Dun. Dig. 9707.

5b. Municipal ordinances.

Defendant charged with violating city traffic ordinance is not entitled to a trial by jury. Op. Atty. Gen. (260a-13), May 12, 1942.

7½. Questions for jury.

Physical facts, where inconsistent with testimony necessary to plaintiff's case, are controlling, and jury cannot be allowed to return verdict flatly opposed thereto, but test for determining duty to direct verdict is not whether court is convinced of truth of defendant's theory but whether physical facts make plaintiff's theory impossible. Stolte v. L., (CCA8), 110F(2d)226.

On motion of defendant for directed verdict it must be assumed that all facts shown by plaintiff's evidence are established, together with all fair inferences. Walkup v. B., (CCA8), 111F(2d)789.

Ordinarily, an issue of negligence is a question for the jury unless under the evidence all reasonable minds must reach the same conclusion, when it becomes a question of law to be determined by the court. Champlin Refining Co. v. W., (CCA8), 113F(2d)844.

If evidence is such that reasonable men might reach different conclusions the case is for the jury. Id.

A motion for a directed verdict raises a question of law only, and admits credibility of evidence for adverse party and every inference which may clearly be drawn from such evidence, and that view of the evidence most favorable to the adversary must be accepted. Reiton v. S., 206M216, 288NW155. See Dun. Dig. 9764.

When facts relative to negligence are clear, and reasonable men could reach but one conclusion, a directed verdict is proper. Behr v. S., 206M378, 288NW722. See Dun. Dig. 9764.

Although the evidence on the part of plaintiff standing alone might justify submitting a case to the jury, yet the court should direct a verdict for defendants if, upon all the evidence, it would be its manifest duty to set aside a verdict against them. Brulla v. C., 206M398, 289 NW404. See Dun. Dig. 9764.

Court properly directed a verdict for defendant where evidence would not sustain a verdict to the contrary. Sickmann's Estate, 207M65, 289NW832. See Dun. Dig. 9764.

On review of a verdict directed for defendant at close of a plaintiff's testimony on ground of contributory negligence, unless most favorable evidence justifies conclusion that contributory negligence existed, there is no alternative but to reverse. Salters v. U., 208M66, 292NW 762. See Dun. Dig. 9707.

Where evidence of a fact is conflicting, issue is for jury. Symons v. G., 208M240, 293NW303. See Dun. Dig. 9707.

Question of what constitutes proximate cause is usually for jury unless evidence is conclusive, and should be determined by them in exercise of practical common sense, rather than by application of abstract principles. Anderson v. J., 208M373, 294NW224. See Dun. Dig. 9707.

Test to be applied upon motion for a directed verdict is not whether court might in exercise of its discretion grant a new trial, but whether from whole evidence it merely appears that it would be its manifest duty to set aside a contrary verdict. Applequist v. O., 209M230, 296 NW13. See Dun. Dig. 9764.

Contributory negligence, like negligence, becomes a question of law only when reasonable minds functioning judicially could not arrive at different conclusions. Packar v. Brooks, 211M99, 300NW400. See Dun. Dig. 7012-7015.

Where evidence is conflicting, it is duty of triers thereof to determine facts, and on appeal it is duty of court to view evidence in light most favorable to party whose claims triers of fact believe. Ristow v. Von Berg, 211M 150, 300NW444. See Dun. Dig. 9707.

Question of fact is for jury where testimony is such that varying inferences may be drawn. Wheeler v.

Equitable Life Assur. Soc., 211M474, 1NW(2d)593. See Dun. Dig. 9764.

While testimony of bank officers was that loan was made by president personally and not by bank, inference which jury might reasonably draw from checks, notes, and accounts justified a finding that transaction claimed to be usurious was in fact with bank. Dege v. Produce Exchange Bank, 212M44, 2NW(2d)423. See Dun. Dig. 9707, 10344a.

Jury must not be allowed to consider an issue where evidence admits of only one reasonable inference. Weber v. McCarthy, 214M76, 7NW(2d)681. See Dun. Dig. 9707.

Where there is a question of fact, it is reversible error to direct a verdict. Abraham v. Byman, 214M355, 8NW(2d)231. See Dun. Dig. 9764.

On a motion for directed verdict the evidence must be viewed in the light most favorable to the party opposing the motion. Merchants & Farmers Mut. Co. v. St. Paul-Mercury I. Co., 214M544, 8NW(2d)827. See Dun. Dig. 9764.

7¾. Waiver.

When both plaintiff and defendant move for directed verdicts there is not a waiver of right to a jury trial. Lee v. O., 206M487, 289NW63. See Dun. Dig. 5234.

Defendant having, by motion for directed verdict, insisted that there was no fact issue as to giving of train signals, point was not waived because, motion for directed verdict denied, defendant asked appropriate instructions in submitting case to jury. Engberg v. G., 207M194, 290NW579. See Dun. Dig. 384.

Plaintiff who makes no objection to oral order for reference at call of calendar nor to subsequent formal order of reference waives his right to jury trial, notwithstanding objection at commencement of proceedings before referee. Gondreau v. Beliveau, 210M35, 297NW352. See Dun. Dig. 5234.

ISSUES TO THE JURY IN EQUITABLE ACTIONS

17. Findings of jury how far conclusive on court.

A verdict in an equity case upon a special question is determinative and remains so unless vacated. Dose v. I., 206M114, 287NW866. See Dun. Dig. 9845.

9289. Notice of trial—Notice of issue.

1. Notice of trial.

Since quo warranto is an extraordinary legal remedy, procedure is not governed by requirements of service of notice of trial applicable in ordinary civil actions, for reasons that upon respondents in such a case rests burden of showing, before a court of competent jurisdiction at a stated time and place designated in the writ, by what warrant they exercised powers claimed by them. State v. Village of North Pole, 213M297, 6NW(2d)458. See Dun. Dig. 9700.

9292. Continuance.

Where hearing before board of medical examiners was adjourned without taking testimony of three witnesses for doctor and there was no showing that testimony would have been relevant to his methods of diagnosis, there was no prejudicial error in denying a continuance in order to take it. Minnesota State Board of Medical Examiners v. Schmidt, 207M526, 649, 292NW255. See Dun. Dig. 1713. App. dism'd and cert. den. 61SCR135.

The Soldiers and Sailors Civil Relief Act of 1940 furnishes no ground for continuance of a hearing involving a corporation whose managing officer is in the federal military service. Op. Atty. Gen., (832-K-3), July 3, 1941.

JURY TRIALS

9293. Jury—How impaneled—Ballots—Rules of court—Examination—Challenges.—When a jury issue is to be tried the clerk shall draw from the jury box ballots containing the names of jurors until the jury is completed or the ballots are exhausted. If exhausted, the court shall direct the sheriff to summon from the bystanders or the body of the county, qualified persons to complete the jury. The ballots containing the names of jurors sworn to try the case shall not be returned to the box until the jury is discharged. All others so drawn shall be returned as soon as the jury is completed. The judge or judges of any district court may provide by rule that in selecting a jury the clerk shall draw 12 names, together with sufficient additional names to cover the requirements of the provisions of Mason's Minnesota Statutes of 1927, Section 9294, and Laws 1941, Chapter 256. [§9458-1 herein] These jurors shall then be examined as to their qualifications to sit as jurors in the action and if any juror be excused for any reason, another shall be immediately called in his place. (As amended Mar. 30, 1943, c. 228, §1.)

Trial judge may call alternate jurors in district court cases. Laws 1941, c. 256.

9294. Challenges.—Either party may challenge the panel, or individual jurors thereon, for the same causes and in the same manner as in criminal trials, except that the number of peremptory challenges to be allowed on either side shall be as provided in this section. Before challenging a juror, either party may examine him in reference to his qualifications to sit as a juror in the cause. A sufficient number of jurors shall be called in the action so that 12 shall remain after the exercise of the peremptory challenges, as provided in this section and section 9293, and to provide alternate jurors when ordered by the court under the provisions of Laws 1941, Chapter 256. Each party shall be entitled to three peremptory challenges, which shall be made alternately beginning with the defendant. The parties to the action shall be deemed two, all plaintiffs being one party, and all defendants being the other party, except, in case two or more defendants have adverse interests, the court, if satisfied that the due protection of their interests so requires, may allow the defendant or defendants on each side of the adverse interests not to exceed three peremptory challenges. When the peremptory challenges have been exhausted or declined, the first twelve of the remaining jurors shall constitute the jury. (As amended Mar. 30, 1943, c. 228, §2.)

9295. Order of trial.

1¾. Reception of evidence.

Trial court has a large measure of discretion in respect to admission and exclusion of evidence. Klingman v. L., 209M449, 296NW528. See Dun. Dig. 9714.

It is duty of trial court to so guide trial that evidence may be confined to issues in controversy. Jones v. Al Johnson Const. Co., 211M123, 300NW447. See Dun. Dig. 9706.

Question of credibility of testimony of a witness as to substance of a conversation, objected to as an opinion of witness, is for jury, and question of admissibility is for court, which must decide whether testimony is a real effort to reproduce substance or mere conclusion of witness unsupported by any recollection of what substance was. Lewin v. Proehl, 211M256, 300NW814. See Dun. Dig. 9714.

In action to enjoin and to recover damages for a nuisance trial court properly limited number of witnesses allowed to testify as to conditions prevailing generally in consequence of operation of an electrical power plant. Jedneak v. Minneapolis General Electric Co., 212M226, 4NW(2d)326. See Dun. Dig. 9719.

Trial court properly sustained objections to questions designed to elicit testimony which was admitted or immaterial. Faunce v. Schueller, 214M412, 8NW(2d)523. See Dun. Dig. 9719.

In action by special administrator for death of his son, controversy over the time of admission of a statement signed by plaintiff is not of enough importance to require comment. Turenne v. Smith, 215M64, 9NW(2d)409. See Dun. Dig. 9715.

Ordinarily the party having the affirmative of the issue should be required to proceed with the evidence. Dittrich v. Brown County, 215M234, 9NW(2d)510. See Dun. Dig. 9715.

Assuming that there are cases where the court in its discretion may vary the order of proof, some reason should appear for requiring one not having the affirmative of an issue to proceed first with his evidence. Id.

1⅞. Disclosing protection by insurance.

Overruling of objection to question to witness on cross-examination with reference to statement given by witness to an insurance agent was not an abuse of discretion where such witness had also testified concerning a statement given to insurance agent, and insurance was mentioned several times during the trial by, perhaps unintentionally, elicitation by defendant's counsel. Jaenisch v. Vigen, 209M543, 297NW29. See Dun. Dig. 10317.

3. Order of proof.

Cross-examination of defendant's witness by counsel for plaintiff concerning a conversation with plaintiff's counsel and his associate containing statement inconsistent with testimony on direct examination, without requiring counsel to assure court that counsel or his associate would take witness stand for purpose of impeaching witness as requested by defendant's counsel, was not an abuse of discretion, and cross-examination was not improper where witness testified that conversation was substantially as claimed by plaintiff's counsel. Jaenisch v. Vigen, 209M543, 297NW29. See Dun. Dig. 10317.

3¼. Misconduct of counsel and argument.

Where plaintiff had gone to trouble of submitting to examination of three medical experts of defendant's election, and only one was called to give an opinion as to condition found, plaintiff's attorney had right to argue that two not called would have given testimony more favorable to him than defendant. Guin v. M., 206M382, 288NW716. See Dun. Dig. 9799.

In automobile collision case wherein defendant's counsel objected to argument of plaintiff's counsel in referring to an insurance company, and plaintiff's attorney stated that he did not think he used the words "insur-

ance company", but if he had it was an inadvertence, followed by some statements that defendant and not plaintiffs had brought matter of insurance company into the cases, and court upon request of defendant instructed jury to disregard all mention of an insurance company, there was no misconduct of plaintiff's counsel. Ost v. U., 207M500, 292NW207. See Dun. Dig. 9800.

Vigorous instruction by court cured misconduct of counsel in argument as to what damages should be. Symons v. G., 208M240, 293NW303. See Dun. Dig. 423, 9800.

Comments of counsel to jury relative to defendant's change of story were not so unfair as to be censurable as misconduct. Leifson v. Henning, 210M311, 298NW41. See Dun. Dig. 9799.

Great latitude should be enjoyed by counsel in argument and exaggeration is not necessarily improper, and evidence may justify strong and vituperative language. Rian v. Hegnauer, 210M607, 299NW673. See Dun. Dig. 9799.

Administration of justice finds no place for display of venom or venting on opposing parties or counsel of personal ill will, and it is duty of trial courts at first glimpse of vicious conduct to conduct trials so that such offenses may be prevented. Anderson v. High, 211M227, 300NW597. See Dun. Dig. 9799.

Argument of counsel based on irrelevant testimony was objectionable. Esser v. Brophey, 212M194, 3NW(2d) 3. See Dun. Dig. 9799.

In a wrongful death action statement of counsel in argument that deceased had just as much right to live as any man whether he earned nothing or $45 a week and nobody had a right to kill him on the highway and be burned alive even if he happened to earn only $45 a week was flagrantly prejudicial and called for action by the court on its own motion without exception. Weber v. McCarthy, 214M76, 7NW(2d)681. See Dun. Dig. 9800.

Misconduct of counsel in argument is a separate ground for new trial and is not subject to provisions in regard to assignment of errors in the motion for new trial. Id.

In determining whether improper argument of counsel is prejudicial, courts are not justified in assuming that the mind of the jury is of such plastic and unreliable material as to at any unjustified word of debate neglect the instructions, abandon the evidence and disregard their oaths. Murphy v. Barlow Realty Co., 214M64, 7NW (2d)684. See Dun. Dig. 9799.

Clients should not be unduly penalized for indiscretions of their lawyers in argument unless such indiscretions are of such a serious nature as to impede even administration of justice. Id. See Dun. Dig. 9800.

Trial courts have an important function to perform in the trial of a jury case and on their own motion should stop and, if necessary, chastise counsel when improper argument is being made. Id. See Dun. Dig. 9800.

3½. Instructions.

An instruction respecting duty of train crew on approaching a crossing held not to submit any issue of willful or wanton negligence, an issue neither pleaded nor proved. Lang v. C., 208M487, 295NW57. See Dun. Dig. 9783.

Ordinarily, there is no prejudicial emphasis of one feature of a charge unless it has been given such undue prominence as to obscure other issues. St. George v. L., 209M322, 296NW523. See Dun. Dig. 9783.

An instruction is to be construed from practical standpoint of jury, for the jury applies it. Hill v. Northern Pacific R. Co., 210M190, 297NW627. See Dun. Dig. 9781.

Instruction that one attempting to rescue a person imperiled by negligence of another should recover unless his act was "clearly" one of rashness or recklessness was erroneous, but was without prejudice where it appeared from instructions as a whole that contributory negligence need be shown only by a fair preponderance of the evidence. Duff v. Bemidji Motor Service Co., 210 M456, 299NW196. See Dun. Dig. 9781.

Rebuttable presumptions should not be given to jury in a civil case. Id. See Dun. Dig. 9788.

Presumption that deceased at moment of fatal injury was in exercise of due care should not be given to the jury in a civil case. Id. See Dun. Dig. 9788.

Instructions should not single out and give undue prominence and emphasis to particular items of evidence, or circumstances, favorable to one of parties only. Anderson v. High, 211M227, 300NW597. See Dun. Dig. 9784.

4. Re-opening case.

Trial court did not abuse its discretion in refusing to reopen divorce case for taking of additional testimony or ordering a new trial, where there was opportunity to garner all required witnesses during long pendency of matter, though defendant complained of attorneys employed by him at time of trial. Locksted v. L., 208M551, 295NW402. See Dun. Dig. 9716.

Reopening of divorce case for taking of additional testimony or to order a new trial is a matter primarily for trial court. Id.

9296. View of premises—Procedure.

Where upon stipulation of counsel in open court, jury is permitted to view stairway and premises, where plaintiff fell and sustained personal injuries, and to consider whatever they saw there as evidence, we cannot say that there was insufficient evidence to sustain their verdict against storekeeper. Smith v. O., 208M77, 292NW745. See Dun. Dig. 9721.

In proceeding by state to condemn land, wherein both parties appealed to district court from award, court did not abuse its discretion in permitting a view of the land by the jury as against objection that condition of land had been changed since award was filed. State v. Andrews, 209M578, 297NW848. See Dun. Dig. 3111, 9721.

Purpose of a view by jury is not to obtain evidence, but to enable them better to understand and apply evidence submitted in open court. Huyink v. Hart Publications, 212M87, 2NW(2d)552. See Dun. Dig. 9721.

In action against a power company maintaining a plant in an area zoned by city for heavy industrial use to enjoin and to recover damages for a nuisance, court did not err in permitting jury to view the premises. Jedneak v. Minneapolis General Electric Co., 212M226, 4 NW(2d)326. See Dun. Dig. 9721.

In action by employee of tenant in office building injured by glass when office door slammed, wherein jury had a view of the premises, and court permitted, over objections, testimony to effect that shortly after accident bank placed a door stop upon the door for purpose of informing jury of changed condition of premises, court should have clearly charged the jury to confine consideration of such testimony to the issue on which it was admitted and should have warned jury against drawing any conclusion of neglect of duty from the making of the repairs after the accident, but failure to so instruct was not reversible error in absence of a request or objection to its omission. Lunde v. Nat. Cit. Bank, 213M278, 6NW(2d)809. See Dun. Dig. 9721.

Evidence of subsequent repairs is inadmissible as an admission of previous neglect of duty, but where landlord had requested that jury view premises, and this was permitted by the court at the end of the trial and with consent of plaintiff, it was proper to receive evidence of changed condition and that change was made after the accident on which suit was based. Id.

9298. Requested instructions.

½. In general.

Generally, it is not advisable to read to jury statements of law found in decisions of courts or in textbooks, since such statements, frequently couched in legal verbiage which laymen are not likely to understand, may be confusing or misleading. Thomsen v. Reibel, 212M83, 2NW (2d)567. See Dun. Dig. 9781(49).

Where evidence was insufficient to raise issue for jury on contributory negligence, and it did not appear upon what jury based its verdict for defendant it was reversible error to submit such question to jury. Id. See Dun. Dig. 9783.

An instruction on the emergency rule was erroneous requiring a new trial where it was calculated to leave with jury the too broad impression that, the rule being applicable plaintiff was justified in employing "foolish" conduct "in order to extricate himself from the position of peril". Nicholas v. Minnesota Milk Co., 212M333, 4NW (2d)84. See Dun. Dig. 7020.

Action of trial judge in charging jury upon emergency rule after refusing defendant's request for such instruction, thus depriving defendant of benefit of argument thereon to jury, did not constitute reversible error under the circumstances. Latourelle v. Horan, 212M520, 4NW (2d)343. See Dun. Dig. 9771.

A trial judge must charge jury upon all applicable law. Id. See Dun. Dig. 9781.

Instruction cautioning jury not to consider duties of a codefendant, as to whom action has been dismissed, but to limit its inquiry to duties of remaining defendant, held proper. Fjellman v. Weller, 213M457, 7NW (2d)521. See Dun. Dig. 9789.

Where a statute is applicable, it is generally proper to read it. O'Neill v. Minneapolis St. Ry. Co., 213M514, 7NW(2d)665. See Dun. Dig. 9783.

Rule that failure to instruct jury that it cannot disregard testimony of an unimpeached witness unless there is reasonable ground for so doing is error had no application in an automobile collision case where there was testimony of physical facts to impeach testimony of witness concerned. Weber v. McCarthy, 214M76, 7NW(2d)681. See Dun. Dig. 9784, 10344a.

Since standards of prudent conduct, especially in negligence cases, are generally for jury determination, courts should exercise great caution in framing standards of behavior that amount to rules of law. Abraham v. Byman, 214M355, 8NW(2d)231. See Dun. Dig. 9783.

A rebuttable presumption should not be submitted to a jury as something to which they may attach probative force where there is credible and unimpeached evidence opposed to the claimed applicable presumption. Roberts v. Metropolitan Life Ins. Co., 215M300, 9NW(2d)730. See Dun. Dig. 9784.

Where defendant requested ambiguous and inconsistent instructions, one to the effect that plaintiff had not shown a right to a certain portion of his claim and the other that plaintiff must prove his entire claim to be entitled to any recovery, and court in substance gave the latter instruction, the most that can be asserted by defendant is that court's charge was incomplete and did not fully comply with his two requests. Ickler v. Hilger, 215M82, 10NW(2d)277. See Dun. Dig. 9771.

Where court submitted case on "all or nothing" theory of recovery, following requests for instructions which were ambiguous and inconsistent as to such matter, and defendant made no objection before jury retired, the charge became the law of the case by acquiescence. Id. See Dun. Dig. 9779, 9797.

Supreme court did not marshall the issues and assemble all the evidence bearing upon question whether there was a question for jury. Blanton v. Northern Pac. Ry. Co., 215M442, 10NW(2d)382. See Dun. Dig. 9784.

In determing correctness of an instruction, substance rather than name controls. Schroepfer v. City of Sleepy Eye, 215M525, 10NW(2d)398. See Dun. Dig. 9781.

1. Object of statute.

Purpose of provision requiring requested instruction to be submitted in writing in advance for a ruling is to permit litigant to have applicable principles of law discussed by counsel in final argument. Latourelle v. Horan, 212M520, 4NW(2d)343. See Dun. Dig. 9771.

3. When requests may be refused.

A trial court is justified in disregarding a request that it instruct jury under the res ipsa loquitur doctrine where such request is made orally after arguments to jury and where no request is formulated in language suitable for the charge. Pettit v. N., 206M265, 288NW223. See Dun. Dig. 9772, 9773.

Presumption against suicide is not evidence in action on accident policy, and so plaintiff was not entitled to an instruction that "there is in law a presumption against suicide". Ryan v. M., 206M562, 289NW557. See Dun. Dig. 9774.

In action by driver of automobile for loss of arm when vehicle was side-swiped by truck traveling in opposite direction, court did not err in refusing requested instruction concerning liability in case resting arm on window sill was negligent and proximate cause of injury sustained, though given instruction did not treat proximate cause of injury separate from proximate cause of collision. Jaenisch v. Vigen, 209M543, 297NW29. See Dun. Dig. 9777.

It was not error to refuse a request on subject of assumption of risk where it was not before the jury or in the case. Hill v. Northern Pac. R. Co., 210M190, 297 NW627. See Dun. Dig. 9774.

It could not be said that walking south on west shoulder of highway exposed one to obvious danger from cars moving towards him on east lane of highway, and requested instruction that one cannot expose himself to obvious dangers under assumption that other will exercise due care was properly refused. Corridan v. Agranoff, 210M237, 297NW759. See Dun. Dig. 9774.

In action for conspiracy in inducing wrongful breach of contract court did not err in refusing request to charge that contract involved was a partnership agreement, rather than an employment contract, where question at issue was whether, in terminating agreement, whatever its nature, defendant acted with justification and in good faith. Wolfson v. Northern States Management Co., 210M504, 299NW676. See Dun. Dig. 9774.

Where, after retiring, a jury returns into court for instruction upon an issue not presented by pleadings or evidence, there is no error in refusal to instruct concerning it. Grove v. Lyon, 211M68, 300NW373. See Dun. Dig. 9790.

A judge could not, out of solicitude for the privilege of argument, refuse to instruct upon an applicable provision of law notwithstanding that he had denied a prior request for such an instruction. Latourelle v. Horan, 212M520, 4NW(2d)343. See Dun. Dig. 9781.

There was no error in denying plaintiffs' request for a charge that plaintiff truck driver was not required to anticipate negligence on the part of a motorman of a street car, and that he had a right to assume, until the contrary appeared, that street car would be operated without negligence. O'Neill v. Minneapolis St. Ry. Co., 213M514, 7NW(2d)665. See Dun. Dig. 9774.

6. Request covered by the general charge.

Refusal of requested instructions substantially embraced in charge given was not error. Stolte v. L., (CCA 8), 110F(2d)226.

Trial court did not err in refusing to give instruction to effect that if jury found that plaintiff and defendant were traveling "on substantially the center of the highway" at the time of the accident, plaintiff could not recover, where court read applicable statutory provisions, explained them to jury, and defined negligence and told jury that if both parties were negligent neither could recover. Jaenisch v. Vigen, 209M543, 297NW29. See Dun. Dig. 9777.

It is proper to refuse a requested instruction adequately covered by given instructions. Ryan v. Twin City Wholesale Grocer Co., 210M21, 297NW705. See Dun. Dig. 9777.

Court by having clear instructions of its own emphasized that existence of testamentary capacity must be determined as of "the actual time of the making of the will," a requested instruction on effect of lucid intervals of testator was properly refused. Boese's Estate, 213M 440, 7NW(2d)355. See Dun. Dig. 9777.

Where whole law of case has been clearly, simply and fairly submitted to a jury by court's own instructions, it is proper to refuse special propositions submitted by counsel, which, though correct, present only a partial, disjointed, and misleading view of the law. Id. See Dun. Dig. 9778.

Where charge correctly submits issues of negligence and contributory negligence, trial court in its discretion may refuse to submit an additional instruction that plaintiff had a right to assume, until contrary appeared, that the defendant's conduct would be free from negligence. O'Neill v. Minneapolis St. Ry. Co., 213M514, 7NW (2d)665. See Dun. Dig. 9777.

Refusal to give requested instructions adequately covered in general charge was not ground for reversal. Blanton v. Northern Pac. Ry. Co., 215M442, 10NW(2d)382. See Dun. Dig. 9777.

6½. Necessity for request.

Failure to instruct jury on a particular point is not ground for a new trial in absence of a timely request. Ness v. F., 207M558, 292NW196. See Dun. Dig. 7179(46).

In action to set aside a deed as forgery, no reversible error was present where counsel failed to request an instruction that evidence must be clear and convincing and express satisfaction with a charge that burden of proving forgery may be satisfied by a fair preponderance of evidence. Amland v. G., 208M596, 296NW170. See Dun. Dig. 9780.

Even if requested instruction on sudden peril was not accurately framed so as to apply to both parties, each asserting a cause of action against the other from one accident, trial court's attention was called to fact that there was a claim of emergency to be considered by jury, and if failure to give a proper rule for jury's guidance was prejudicial there should be a new trial. Corridan v. Agranoff, 210M237, 297NW759. See Dun. Dig. 9774.

In eminent domain proceedings where there are no requests for instructions to jury and no exceptions to instructions given, failure of court to define meaning of "market value" is no ground for a new trial. State v. Andrews, 209M578, 297NW848. See Dun. Dig. 9771, 9797.

Where a statement made by a party was offered solely for impeachment, in absence of a request that jury's consideration of it be restricted to that use, defendants are deemed to have regarded such instruction unnecessary for their protection, and they cannot later claim improper use by jury. Johnson v. Farrell, 210M351, 298NW256. See Dun. Dig. 3237a.

Where testimony as to statement of one of several defendants was admitted by court with indication by court that it would be received only to impeach such defendant, by showing his inconsistent statements, and plaintiff insisted that testimony was admissible as an admission against such defendant, and court let matter rest with statement that it would rule on it later, but no formal ruling was made, it was duty of counsel for plaintiff to call attention of court to matter when court invited suggestions from counsel at time of making instructions. Schmitt v. Emery, 211M547, 2NW(2d)413, 139ALR1242. See Dun. Dig. 9737.

Where contributory negligence was pleaded as a defense, question whether testimony was such that defendant was entitled to an instruction on contributory negligence was presented, though it does not appear that a specific request for an instruction thereon was made, defendant's counsel having called to attention of trial court its failure to charge thereon and elicited from the court the suggestion that such failure was "deliberate." Hubenette v. Ostby, 213M349, 6NW(2d)637. See Dun. Dig. 9773.

In action by employee of tenant in office building injured by glass when office door slammed, wherein jury had a view of the premises, and court permitted, over objection, testimony to effect that shortly after accident bank placed a door stop upon the door for purpose of informing jury of changed condition of premises, court should have clearly charged the jury to confine consideration of such testimony to the issue on which it was admitted and should have warned jury against drawing any conclusion of neglect of duty from the making of the repairs after the accident, but failure to so instruct was not reversible error in absence of a request or objection to its omission. Lunde v. Nat. Cit. Bank, 213M278, 6NW(2d)809. See Dun. Dig. 9773, 9797.

A general instruction on contributory negligence and degree of care required of a 14-year-old plaintiff having been given, there was no error in not further instructing as to defendant's theory that an explosion injuring plaintiff resulted from his own deliberate act, in absence of a request for such specific instruction. Fjellman v. Weller, 213M457, 7NW(2d)521. See Dun. Dig. 9771.

Failure to include the words "through no fault of his own" in the charge in submitting emergency doctrine to jury, in view of language used by the court, was, at the most, incomplete, and defendant's failure to take an exception to the charge as given or to request an amplification of it precluded consideration thereof on review. Merritt v. Stuve, 215M44, 9NW(2d)329. See Dun. Dig. 9797, 9798.

7. General charge in language of court preferable.

A trial judge has a wide discretion in the matter of giving a requested charge as prepared by counsel, or by embodying the charge in language of its own choosing. O'Neill v. Minneapolis St. Ry. Co., 213M514, 7NW(2d)665. See Dun. Dig. 9778.

8. Expression of opinion as to facts.

Where there is no evidence to sustain a contrary view, an instruction that certain defendants did not discover plaintiff in a position of peril until they saw the Ford turn from behind Buick onto north lane of travel was correct. Schmitt v. Emery, 211M547, 2NW(2d)413, 139 ALR1242. See Dun. Dig. 9783.

In action by employee of tenant of an office building against landlord, it was not error for court to instruct jury that evidence that there was glass in a door which slammed and injured employee when glass broke was admissible upon the ground that it was common knowledge that anything with glass in it is a more dangerous instrumentality than if entire door, for instance, would have been made of wood, and that the only purpose of evidence in reference to the glass in the door was its use in considering fact that glass was in door in so far as this bore upon duty of landlord to exercise reasonable care to keep it from slamming, court having just previously instructed jury to ignore looseness of glass because there was no proximate or causal relations between that and the injury. Lunde v. Nat. Cit. Bank, 213M278, 6NW(2d)809. See Dun. Dig. 9784.

A general observation in charge by trial court that because of its weight it is more difficult to stop a street car than a motor vehicle, though without factual basis, does not mislead the jury where it is explicitly instructed to determine, upon evidence in case relating thereto, question of distance within which a motor vehicle and a street car can stop. O'Neill v. Minneapolis St. Ry. Co., 213M514, 7NW(2d)665. See Dun. Dig. 9785.

It was error to charge that it is more difficult for a street car to stop by reason of its weight than for a motor vehicle to stop. Id.

An instruction that jury could take into consideration the fact that street cars operate on rails and cannot turn out to pass another vehicle embodies a fact which everybody knows and which has in effect been approved. Id.

Instructions as to physical facts held not so unduly emphasized as to be reversible error in an automobile collision case. Weber v. McCarthy, 214M76, 7NW(2d)681. See Dun. Dig. 9784.

In an automobile collision case an instruction as to consideration of the physical facts was not subject to criticism that it in effect told jury that they could disregard oral testimony which was contrary to testimony as to physical facts, court informing jury that they must consider what were the physical facts, leaving to them the credibility of the various witnesses. Id. See Dun. Dig. 9785.

11. Undue emphasis upon items.

In action to recover money held by an attorney under claim of lien for services rendered, court in instruction did not give undue prominence and emphasis to particular matter by instructing as a matter of law that appellant did represent plaintiff on a certain occasion and repeated that fact when necessary in order to make it clear to jury that they were to decide value of that particular service. Anderson v. High, 211M227, 300NW 597. See Dun. Dig. 9783.

12. Reading statute to jury.

Where its spirit and purpose cover the case, reading of a statute to jury is not prejudicial error, notwithstanding its exact wording may not be applicable. Olson v. Neubauer, 211M218, 300NW613. See Dun. Dig. 9781.

13. Construction as a whole.

A charge relative to assumption of risk "That does not mean that plaintiff assumes negligence on the part of defendant, and if he was hurt through the negligence of defendant, then he didn't assume such risk. If he was hurt through the assumption of the risk incident to doing what he wanted to do independent of defendant's negligence, then it would be a risk which he assumed, and which he would have to take the consequences of.", was unfortunately worded, but was not erroneous where it followed a long discussion replete with examples of assumption of risk. Anderson v. Hegna, 212M147, 2NW (2d)820. See Dun. Dig. 424, 7041a.

The instructions should be considered as a whole. Hlubeck v. Beeler, 214M484, 9NW(2d)252. See Dun. Dig. 9781.

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

½. In general.

Where the jury disagrees, there is a mistrial, which in legal effect is the same as if there had been no trial. Bolstad v. Paul Bunyan Oil Co., 215M166, 9NW(2d)346. See Dun. Dig. 9813.

3. Correction of verdict.

Trial court has power to amend and correct verdicts as to matter of form so as to make them conform to intention of jury, but the verdict must be so definite that by reference to pleadings and record the thing found is clearly ascertainable, though better practice is to have verdict corrected before received. Jaenisch v. Vigen, 209 M543, 297NW29. See Dun. Dig. 9817.

A verdict in favor of defendant "by reason of the fact that both the defendant and plaintiff were negligent" contained surplusage which court should have directed to be eliminated. Christensen v. Hennepin Transp. Co., 215M394, 10NW(2d)406, 147ALR945. See Dun. Dig. 9828.

6. Construction of verdict.

A verdict finding damages against defendant in sum of $16,000, followed by three items of medical expense totalling $416, was properly construed by the court as meaning a total verdict of $16,416. Jaenisch v. Vigen, 209 M543, 297NW29. See Dun. Dig. 9817a.

In action by married woman for injuries received when riding with her husband in defendant's car, and at a time when car was being driven by husband, there was not implied in a verdict for defendant a finding of no negligence on part of husband, where jury was instructed to find such a verdict in the event it found that the husband was driving pursuant to a pre-arrangement between defendant and plaintiff and her husband, on the theory that such arrangement made the husband plaintiff's agent, the jury having so found in response to a special question. Darian v. McGrath, 215M389, 10NW(2d)403. See Dun. Dig. 9817a.

9303. Verdict, general and special.

If reference be to report facts, report has effect of a special verdict, which so presents findings of fact as established by evidence that nothing remains for court to do but to draw therefrom conclusions of law. Ferch v. H., 209M124, 295NW504. See Dun. Dig. 8318.

9304. Interrogatories—Special findings.

SPECIAL VERDICTS

2. Effect of failure to cover all the issues.

In a will contest it is proper to submit to a jury issue of forgery along with the issues of mental capacity and undue influence, notwithstanding the scrivener who prepared will is a witness on all issues, and in such case a division on issue of forgery is not a ground for setting aside a special verdict finding lack of mental capacity. Boese's Estate, 213M440, 7NW(2d) 355. See Dun. Dig. 9832.

INTERROGATORIES—SPECIAL FINDINGS

3½. Interrogatories in general.

In action to recover rent for use of machine, wherein there was counterclaim for damages for breach of warranty and issue as to time for which rent was due, trial court properly required special verdict. Jaeger Mach. Co. v. M., 206M468, 289NW51. See Dun. Dig. 9830.

Credibility of witnesses and inferences to be drawn from testimony were matters entirely for jury under special interrogatories. Amland v. G., 208M596, 296NW 170. See Dun. Dig. 9809.

Failure of a jury to agree on an answer to a special interrogatory submitted to it is equivalent to a finding against party having burden of proof. Boese's Estate, 213M440, 7NW(2d)355. See Dun. Dig. 9801-9812.

6. Character of interrogatories.

Trial court may submit to jury written questions susceptible of brief answer requiring only that the court shall give the jury such explanation and instruction concerning the matter submitted as may be necessary to enable the jury to make its finding. Concord Co. v. Willcuts, (C.C.A.8), 125 F. (2d) 584. See Dun. Dig. 9803.

TRIAL BY THE COURT

9311. Decision, how and when made.

FINDINGS AND CONCLUSIONS

1. Definitions and distinctions.

Where a special proceeding is required to be tried and determined as a civil action, rules applicable to latter apply. Hanson v. Emanuel, 210M51, 297NW176. See Dun. Dig. 9834.

In a case tried by the court, where there is a determination upon the merits, it is required to make findings of fact and conclusions of law, and determination is by judgment entered pursuant to findings and conclusions. Id. See Dun. Dig. 9846 to 9849.

Facts stated by trial court in a memorandum made part of decision, not inconsistent with facts specifically found, become part of findings. Sime v. Jensen, 213M 476, 7NW(2d)325. See Dun. Dig. 9846.

2. Object of statute.

Objects of section are to abolish doctrine of implied findings; to make definite and certain just what is decided, not only for purposes of particular action, but also for purpose of applying doctrine of estoppel to future actions; and, finally, to separate questions of law and fact so that they may be more conveniently, intelligently, and fairly considered and reviewed on a motion for a new trial or on appeal. Fredsall v. M., 207M18, 289NW 780. See Dun. Dig. 9847(7).

3. When findings necessary.

Statute, by reason of existence of several fact issues held applicable, to a contested claim against an insolvent corporation. Fredsall v. M., 207M18, 289NW780. See Dun. Dig. 9849.

Where order appealed from discloses that fact issues were tried and determined, court should have made its decision in writing, found the facts and conclusions of law, "separately stated", in conformity with this section. State v. Anderson, 207M357, 291NW605. See Dun. Dig. 9849.

Where appellant moved that cause be remanded to trial court so as to permit a hearing on his motion for amended findings or, if that be denied, for permission to move court to make its memorandum part of order for review, no complaint could be made of failure of trial court to make findings upon all determinative fact issues, separately stated, court having granted alternative asked for. State v. Anderson, 208M334, 294NW219. See Dun. Dig. 9849.

On motion for judgment upon pleadings, trial court properly ordered judgment without making findings.

Tanner v. Civil Service Commission, 211M450, 1NW(2d) 602. See Dun. Dig. 7692, 9849.

In an action for an accounting of profits from a business between distributees of an intestate estate and an agreement between the parties decree for plaintiff in a certain sum could not be sustained on appeal in absence of a finding that defendants received profits from business, record not permitting affirmance on theory that omission of finding was an oversight and that evidence was compelling as to what it should be, evidence as to who received profits during time in question not being conclusive. Lewis v. Lewis, 211M587, 2NW(2d)134. See Dun. Dig. 9857.

In mandamus against county auditor and others to compel defendants to permit plaintiff to redeem land and to enter a confession of judgment in respect to the land, plaintiff was not harmed because court ordered action dismissed with costs, instead of filing findings of fact and conclusions of law to the same effect, where upon the record plaintiff was not entitled to any relief. Adams v. Atkinson, 212M131, 2NW(2d)818. See Dun. Dig. 9849.

On appeal by plaintiff in action to reform a deed for mistake in omitting property, wherein court dismissed case without making findings or conclusions of law on ground that plaintiff had "absolutely failed to make out a cause of action," and record indicated that court either overlooked or misconstrued the effect of the evidence, order of trial court was reversed and remanded for a new trial rather than merely sending it back for compliance with statute with respect to findings and conclusions. Czanstkowski v. Matter, 213M257, 6NW(2d) 629. See Dun. Dig. 9849.

A trial court had no right to dismiss an action for reformation of a deed on ground that plaintiff had "absolutely failed to make out a cause of action," without findings of fact, conclusions of law, or order for judgment where there was evidence which would have justified trial court in finding that mistake was clearly established and that third party claiming omitted property had full knowledge of plaintiff's claim. Id.

A motion for judgment on the pleading should be decided by order without findings and conclusions. Robinette v. Price, 214M521, 8NW(2d)800. See Dun. Dig. 9849 (18).

4. Waiver of findings.

A motion for new trial assigning error upon dismissal of case and asking that dismissal be set aside on the ground "that there was sufficient evidence to justify a verdict in favor of plaintiffs to reform the deed" adequately informed court of plaintiff's contention that it erred in failing to make findings of fact, conclusions of law and an order for judgment. Czanstkowski v. Matter, 213M257, 6NW(2d)629. See Dun. Dig. 9850.

5. Nature of facts to be found.

Statute requires court to make findings upon all determinative fact issues. State v. Anderson, 208M334, 294 NW219. See Dun. Dig. 9851.

Decision required by section, after trial without a jury, establishing and classifying the controlling facts and law of the case, should be self-explanatory, self-sustaining, and complete. Martens v. Martens, 211M369, 1NW(2d) 356. See Dun. Dig. 9851, 9856, 9857.

Where it appears that all issues have been decided in a trial by the court without a jury, reviewing court is not required to reverse simply because decision below might have gone into more detail. Id. See Dun. Dig. 9851.

6. Sufficiency of particular findings.

Denial of a motion to make a finding of fact is equivalent to finding to the contrary. Blodgett v. Hollo, 210M 298, 298NW249. See Dun. Dig. 9866.

Where a motion for an amended finding is made requiring an affirmative upon issue thus made, a denial thereof is equivalent to a finding contrary to request, and it cannot be said that court did not pass upon facts. Martens v. Martens, 211M369, 1NW(2d)356. See Dun. Dig. 9873.

Denial of a motion for amended findings, including request for finding that services rendered by plaintiff to deceased were ascertainable and compensable in money, was equivalent to finding that services were not compensable in money, as affecting right to specific performance of contract to leave property by will. Herman v. Kelehan, 212M349, 3NW(2d)587. See Dun. Dig. 9866.

7. Findings and conclusions must be stated separately.

Whenever an issue of fact or of law and fact is tried and determined by the judge, statute requires separately stated findings of fact. Midland Loan Finance Co. v. T., 206M434, 288NW853. See Dun. Dig. 9853.

Where an issue of fact is tried by court sitting without a jury, there is required a decision separately stating facts found and conclusions of law following therefrom. State v. Riley, 208M6, 293NW95. See Dun. Dig. 9853.

11. Findings must be within the issues.

A finding must be based upon evidence received in the course of the trial, and it is not permissible for trier of fact to obtain or consider other evidence. Elsenpeter v. Potvin, 213M129, 5NW(2d)499. See Dun. Dig. 3224.

13. Judgment must be justified by the findings.

In absence of separately stated findings of fact and conclusions of law required by statute, case will be remanded to trial court. State v. Riley, 208M6, 293NW95. See Dun. Dig. 9853.

An order refusing a new trial cannot be sustained in absence of sufficient findings of fact even though evidence as certified up would have fully warranted findings. Lewis v. Lewis, 211M587, 2NW(2d)134. See Dun. Dig. 9857.

An implication of a finding is warranted on review in support of decision below if justified by record. Hockman v. Lindgren, 212M321, 3NW(2d)492. See Dun. Dig. 9857.

15½. Striking out and modifying.

An order denying a motion in the alternative for amended findings of fact and conclusions of law or a new trial is not appealable as far as it relates to refusal to amend the findings. Barnard v. Kandiyohi County, 213M 100, 5NW(2d)317. See Dun. Dig. 300, 395.

Where court refuses to make proposed amendments or changes in the findings, the order is equivalent to findings negativing the facts asked to be found. Droege v. Brockmeyer, 214M182, 7NW(2d)538. See Dun. Dig. 9852.

An order denying a motion for amended or additional findings is not appealable. Id. See Dun. Dig. 9873.

16. When findings become part of record.

Supreme Court has jurisdiction to remand a case to trial court to enable appellant to move that court that its memorandum be made a part of order pending on appeal. State v. Anderson, 207M357, 291NW605. See Dun. Dig. 438a.

19. Reopening case.

A court may vacate findings and reopen a case for further evidence. Holmes v. C., 209M144, 295NW649. See Dun. Dig. 9716.

9312. Proceedings on decision of issue of law.

A party who interposes a demurrer is entitled to notice of all subsequent proceedings even though demurrer is overruled and no leave to plead over is obtained. Kemerer v. S., 206M325, 288NW719. See Dun. Dig. 476.

Failure to give defendant notice of application for an order for judgment following overruling of demurrer is an irregularity which rendered judgment vulnerable on direct attack. Id. See Dun. Dig. 476.

Section 9312 has reference not to notice but to method of establishing plaintiff's claim under §9256. Id. See Dun. Dig. 4991.

TRIAL BY REFEREES

9316. Reference by consent, etc.

Plaintiff who makes no objection to oral order for reference at call of calendar nor to subsequent formal order of reference waives his right to jury trial, notwithstanding objection at commencement of proceedings before referee. Gondreau v. Beliveau, 210M35, 297NW352. See Dun. Dig. 5234.

No statutory authority is necessary for appointment of a referee to receive and file charges and to take testimony in proceedings to remove an appointive officer pending before an administrative board. State v. State Board of Education, 213M184, 6NW(2d)251, 143ALR503. See Dun. Dig. 8010, 8311.

9317. Compulsory reference, when.

Only limitation upon a court's power to appoint a referee is that it cannot be exercised in actions purely at law in which there was an absolute right of trial by jury as the law stood at time of adoption of constitution. State v. State Board of Education, 213M184, 6NW(2d) 251, 143ALR503. See Dun. Dig. 8315.

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

If reference be to report facts, report has effect of a special verdict, which so presents findings of fact as established by evidence that nothing remains for court to do but to draw therefrom conclusions of law. Ferch v. H., 209M124, 295NW504. See Dun. Dig. 8318.

In proceeding by state board to remove an appointee, wherein a referee was appointed, upon failure of board to produce certain department heads as witnesses, officer could have been subpoenaed and subjected to examination, and if testimony was adverse could establish that he was surprised thereby, and referee could permit impeachment of witness by proof of contradictory statements, a proper foundation being laid. State v. State Board of Education, 213M184, 6NW(2d)251, 143ALR503. See Dun. Dig. 10351.

Original specifications of charges against an official charged with misconduct in office may be supplemented or amended during progress of removal proceedings before a referee, proper opportunity to meet such additional or amended charges having been given. Id. See Dun. Dig. 8010.

GENERAL PROVISIONS

9322. Dismissal of action.

½. In general.

Generally, judgment of dismissal made at trial would be requisite before appeal could be taken, but where gist of dismissal is want of jurisdiction, an appeal from the order may be allowed. Bulau v. B., 208M529, 294NW 845. See Dun. Dig. 301.

An order denying a motion for judgment notwithstanding the disagreement of a jury is not reviewable on appeal from a judgment of dismissal entered motion by plaintiff. Bolstad v. Paul Bunyan Oil Co., 215M166, 9NW (2d)346. See Dun. Dig. 389, 396.

1. Dismissal by plaintiff before trial.
Right of plaintiff to dismiss after disagreement of the jury is subject to the right of the defendant to move for judgment non obstante. Bolstand v. Paul Bunyan Oil Co., 215M166, 9NW(2d)346. See Dun. Dig. 2741.
A dismissal after a mistrial is "before the trial begins", because a mistrial is in legal effect no trial at all. Id. See Dun. Dig. 2741, 2750.
Plaintiff has the right voluntarily to dismiss the action after denial of a motion by the defendant for judgment notwithstanding the disagreement of the jury. Id. See Dun. Dig. 2741.

5. Dismissal for failure to prove cause of action.
When plaintiff's case has disclosed a good defense a dismissal is justified at end of plaintiff's testimony. Beck v. N., 206M125, 288NW217. See Dun. Dig. 9758.

5. Dismissal for failure to prove cause of action.
Court is authorized to dismiss a case if plaintiff fails to substantiate or establish his cause of action or right to recover, but court must give plaintiff the benefit of every reasonable inference that might be drawn from evidence. Hirt's Estate, 213M209, 6NW(2d)98. See Dun. Dig. 9754.

8. Effect of dismissal.
If plaintiff's action is dismissed for want of jurisdiction, a counterclaim falls if there is no independent jurisdictional basis therefor, but where there is such independent basis a counterclaim seeking affirmative relief is sustainable regardless of what happens to the original complaint. Isenberg v. Biddle,(AppDC)125F (2d)741. See Dun. Dig. 2750.
A dismissal on the merits differs from dismissals authorized by statute, in that the latter conclude the action only; whereas, the former not only ends the action, but concludes also the cause of action, determining finally the whole controversy, and it is a final adjudication. Melady-Briggs Cattle Corp. v. Drovers State Bank, 213M304, 6NW(2d)454. See Dun. Dig. 2750.
A judgment of dismissal ends the action, subject to court's power to vacate for fraud or collusion. Id.
After a mistrial the case stands as if there had been no trial of any kind. Bolstad v. Paul Bunyan Oil Co., 215M166, 9NW(2d)346. See Dun. Dig. 2750, 9750.

11. Stipulation of parties.
Judgment entered pursuant to a written stipulation of settlement dismissing action on merits is binding on the parties and a bar to a subsequent action involving an issue before the court in the former action. Melady-Briggs Cattle Corp. v. Drovers State Bank, 213M304, 6NW (2d)454. See Dun. Dig. 2750.

NEW TRIALS

9325. Grounds—Presumption on appeal.

THE STATUTE GENERALLY

½. In general.
Where money was paid into court under an award in a highway condemnation proceeding and a contest ensued over ownership of the property and the fund, and on appeal it appeared that one contestant might not be entitled to any part of the fund, and the other contestant only a small part thereof, case was remanded for new trial of all the issues to prevent a gross miscarriage of justice, and for participation therein of the state, if attorney general elects to apply to intervene to obtain a possible recovery for the state. State v. Riley, 208M6, 293NW95. See Dun. Dig. 7069.

In action to set aside a deed as forgery, wherein issue was close on facts an order denying a new trial was reversed in interest of justice. Amland v. G., 208M596, 296 NW170. See Dun. Dig. 429.

That ends of justice require that a new trial be granted is not a statutory ground for a new trial, and court will not exercise its inherent powers to grant a new trial unless there is an exceptional case and newly discovered evidence is such a nature as to require a different verdict. Valencia v. Markham Co-op. Ass'n, 210M221, 297NW 736. See Dun. Dig. 7069.

1. New trial defined.
An order granting a new trial wipes slate clean except insofar as testimony given on first trial may be introduced to confront a witness testifying differently on second trial, and testimony of first trial should not be taken into consideration, directly or indirectly, by trial court in disposing of matters raised on second trial. Salters v. U., 208M66, 292NW762. See Dun. Dig. 7082.

8. Of less than all the issues.
Neither an appellant nor a trial court should put parties to trouble and expense of a re-trial of all the issues if it is possible to avoid it, and cases may be sent back for trial on part of the issues where either a well supported verdict or finding has settled other issues or where parts of issues are settled by evidence upon which reasonable minds could not differ and consequently have become questions of law, notwithstanding that verdict has been the other way. Lee v. Zaske, 213M244, 6 NW(2d)793. See Dun. Dig. 430, 7079.

9. Granted only for material error.
Section authorizes the supreme court to grant a new trial only for causes materially affecting rights of an appellant. Dahlstrom v. H., 209M72, 295NW508. See Dun. Dig. 7074.

Where contents of certain exhibits show purchases of merchandise are fully disclosed by the testimony and where there is no serious dispute as to the facts of such purchases, loss of the exhibits by the clerk of court is not ground for a new trial. Hlubeck v. Beeler, 214M484, 9NW(2d)252. See Dun. Dig. 7074.
A new trial will be granted only where it is apparent that the error materially prejudiced the appellant. Id.
Where prejudice is not shown to have resulted to the appellant from an erroneous ruling requiring him to proceed with his evidence prior to the presentation of that of his adversary, the error is harmless and not ground for a new trial. Dittrich v. Brown County, 215M234, 9NW (2d)510. See Dun. Dig. 7099.

FOR MISCONDUCT OF JURY

12½. In general.
A verdict of a jury for an amount that no combination of items could equal must have been a compromise between right of recovery and amount sought and was perverse and cannot be sustained. Dege v. Produce Exchange Bank, 212M44, 2NW(2d)423. See Dun. Dig. 7115b.
In action to recover unliquidated damages for breach of an implied warranty of fitness of an oil burner, arising out of explosions and smoke damage, contention that verdict was a compromise one was not shown by the record. Donohue v. Acme Heating Sheet Metal & Roofing Co., 214M424, 8NW(2d)618. See Dun. Dig. 7115b.
In action to recover for goods paid for but not received, it appearing that goods were delivered by alleged agent to a third person, a verdict against both principal and agent was not preverse under instructions not excepted to. Katzmarek v. Weber Brokerage Co., 214M580, 8NW (2d)822. See Dun. Dig. 7115b.

17. Affidavits on motion.
A juror's affidavit is not admissible to impeach verdict of jury. Dahlin v. F., 206M476, 288NW851. See Dun. Dig. 7109.

FOR MISCONDUCT OF COUNSEL

23. Improper remarks on the trial.
A new trial should be granted only where it appears that the misconduct interferes with administration of justice to substantial prejudice of a party. Rian v. Hegnauer, 210M607, 299NW673. See Dun. Dig. 7102.
Counsel for prevailing party is guilty of misconduct requiring a new trial where in his closing argument to jury he makes prejudicial remarks concerning opposing counsel. Id.
A judgment will not be reversed for misconduct on part of counsel in display of acrimony against opposing counsel and parties unless prejudice results. Anderson v. High, 211M227, 300NW597. See Dun. Dig. 416.

FOR ACCIDENT OR SURPRISE

24½. In general.
After answer set up running of statute of limitations plaintiff could not successfully claim surprise in not expecting that payment on note within six years of action would be denied. Campbell v. L., 206M387, 288NW833. See Dun. Dig. 7117.

25. Discretionary.
On motion for a new trial based on accident and surprise at testimony of a physician for defendant that plaintiff had "blind spots" in vision and that in certain positions of the eye she could not see an approaching automobile at a distance of 40 feet, it was for the trial court to determine effect of testimony and verdict and whether or not affidavit of other specialists that plaintiff could see an approaching car two blocks away would change result. Valencia v. Markham Co-op. Ass'n, 210M221, 297NW736. See Dun. Dig. 7117, 7118.
A motion for a new trial based on newly discovered evidence or on accident and surprise is addressed to sound discretion of trial court and an order denying same will not be disturbed on appeal unless there is a clear abuse of such discretion. Id. See Dun. Dig. 7119, 7125.

26. Necessity of objection on the trial.
A party, if surprised by testimony of a witness, should not proceed with trial and speculate on chances of a favorable verdict. Valencia v. Markham Co-op. Ass'n, 210M221, 297NW736. See Dun. Dig. 7119.
Objections to argument of counsel must be made at the conclusion thereof and before the jury retires, and it is too late to specify them in the notice of motion for judgment notwithstanding the verdict or a new trial. Ickler v. Hilger, 215M82, 10NW(2d)277. See Dun. Dig. 9800.

FOR NEWLY DISCOVERED EVIDENCE

30. To be granted with extreme caution.
Granting of new trial on ground of newly discovered evidence involves exercise of discretion. Amland v. G., 208M596, 296NW170. See Dun. Dig. 7123.
A motion for a new trial based on newly discovered evidence or on accident and surprise is addressed to sound discretion of trial court and an order denying same will not be disturbed on appeal unless there is a clear abuse of such discretion. Valencia v. Markham Co-op. Ass'n, 210M221, 297NW736. See Dun. Dig. 7119, 7125.

32. Showing on motion.
Trial court did not abuse its discretion in refusing to reopen divorce case for taking of additional testimony or ordering a new trial, where there was opportunity to

garner all required witnesses during long pendency of matter, though defendant complained of attorneys employed by him at time of trial. Locksted v. L., 208M551, 295NW402. See Dun. Dig. 7127.

Motion for new trial based on new evidence was properly denied where counsel might easily, by personal search of files open to them, have discovered document put forward as new evidence. Lewin v. Proehl, 211M256, 300NW814. See Dun. Dig. 7128.

A party may properly be held to be guilty of lack of diligence where the same diligence which led to the discovery of the new evidence after trial would have discovered it had such diligence been exercised prior thereto. Hlubeck v. Beeler, 214M484, 9NW(2d)252. See Dun. Dig. 7128.

35. Nature of new evidence.

Court was justified in denying motion for new trial on ground of newly discovered evidence consisting of bank records of deposit of check and collection thereof on account of lack of diligence, though there was a misapprehension as to whether banks kept records of checks transmitted for collection at the time of the trial. Campbell v. L., 206M387, 288NW833. See Dun. Dig. 7128.

Courts are cautious in granting new trials on ground of newly discovered evidence, and if new evidence is doubtful in character and not so material as to make a probable a different result on a new trial, relief will be denied. State v. Turner, 210M11, 297NW108. See Dun. Dig. 7131.

Plaintiff moving for a new trial held to have failed to show exercise of reasonable diligence in discovering evidence before trial. Valencia v. Markham Co-op. Ass'n, 210 M221, 297NW736. See Dun. Dig. 7128.

In eminent domain proceeding by state, wherein witness called by state to testify to value of land taken made a mistake and testified as to value of adjoining tract, it was within judicial discretion of trial court to determine whether or not a new trial should be granted. State v. Andrews, 209M578, 297NW848. See Dun. Dig. 7131.

Failure to exercise due diligence to discover the evidence before trial is sufficient reason for denying a new trial upon the ground of newly discovered evidence. Hlubeck v. Beeler, 214M484, 9NW(2d)252. See Dun. Dig. 7128.

FOR EXCESSIVE OR INADEQUATE DAMAGES

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

A verdict is not as a matter of law excessive where there is sufficient evidence to go to the jury that actual damages as distinguished from treble damages amounted to $1300, verdict being for actual damages of $400 and treble damages of $1200. Lawrenz v. L., 206M315, 288NW 727. See Dun. Dig. 2597.

Instruction in connection with permanent injury that jury should consider what the evidence shows is reasonably certain that plaintiff will sustain was not erroneous. Guin v. M., 206M382, 288NW716. See Dun. Dig. 2570.

Evidence held to justify submission of permanent injuries to plaintiff's neck to jury. Id. See Dun. Dig. 2570.

A verdict for $6,347.50 for injury to neck held not so excessive as to indicate passion or prejudice. Id. See Dun. Dig. 2597, 7134.

Verdict for $1,000 to a 17 year old boy who lost several teeth by assault and battery held not excessive. Ness v. F., 207M558, 292NW196. See Dun. Dig. 7134.

Verdict for $6575 for death of a 48 year old owner of a pool hall who supported his family of wife and 6 children well was not excessive. Ost v. U., 207M500, 292NW 207. See Dun. Dig. 7134.

A verdict for $3800.00, reduced to $3000.00, was not excessive for severe head and brain injuries. Kraus v. S., 208M220, 293NW253. See Dun. Dig. 2597.

Verdict for $7500 held not excessive for death of clerk 67 years of age. Symons v. G., 208M240, 293NW303. See Dun. Dig. 2617.

In connection with actual physical injuries sustained, it is not error to allow jury to consider plaintiff's testimony regarding subjective symptoms of other injuries claimed to have been sustained. Schuman v. M., 209M334, 296NW174. See Dun. Dig. 2570a.

A verdict for $3400, reduced to $2500 by court, held not excessive for severe bruises and scars on forehead, bridge of nose and left side of face with some deafness, dizzy spells and headaches. Id. See Dun. Dig. 7138.

Verdict for $16,000 for loss of an arm by owner and proprietor of a small feed mill did not indicate passion and prejudice. Jaenisch v. Vigen, 209M543, 297NW29. See Dun. Dig. 7134.

Verdict for $17,500 to a railroad man 48 years of age suffering an injury to his knee unfitting him for railroad work was not excessive. Ryan v. Twin City Wholesale Grocer Co., 210M21, 297NW705. See Dun. Dig. 2597.

Verdict for $7,621.50, reduced to $6,500, held not excessive for death of young person. Ressmeyer v. Jones, 210M423, 298NW709. See Dun. Dig. 2617.

Verdict for $8,078.80, reduced to $6,000, held not excessive for death of young person. Id.

Verdict of $10,000 for death of a woman annuitant, 67 years old at time of her death, who contributed approximately $66.66 a month to two sisters, held not excessive. Thoirs v. Pounsford, 210M462, 299NW16. See Dun. Dig. 2617.

Verdict for $9,000 was not excessive for death of a carpenter and farmer 49 years of age, leaving a wife of 35 in poor health and three children, ages 16, 14, and 11. Duff v. Bemidji Motor Service Co., 210M456, 299NW196. See Dun. Dig. 7133.

A verdict for $22,000, reduced to $15,000, for intermittent services to an ill person over a period of twelve years held not so excessive as to require interference. Superior's Estate, 211M108, 300NW393. See Dun. Dig. 10381.

Verdict of $7,500 reduced to $6,840 was not excessive, absent anything indicating passion or prejudice, for death of a man 52 years old with annual income of $2,000, leaving a daughter 19 years of age living at family home, and a daughter of 22 years of age, married and living on a nearby farm, to whom decedent had extended substantial and fatherly aid. Ristow v. Von Berg, 211M150, 300NW444. See Dun. Dig. 7136.

For temporary injury caused by unintentional trespass or private nuisance, cost of restoration rather than difference in market value before and after, is proper measure of damages. Jones v. Al Johnson Const. Co., 211 M123, 300NW447. See Dun. Dig. 9694.

Damages recoverable for personal injuries caused by negligence may consist of compensation for numerous items, such as physical pain and suffering, loss of earning capacity, value of time lost on account of injuries, expenses for medical treatment, hospitalization and nursing, and so on, but whatever their nature, damages recoverable arise out of single cause of action for negligence. Eklund v. Evans, 211M164, 300NW617. See Dun. Dig. 94, 2570, 2572, 2576.

Damages are the award made to a person because of a legal wrong done to him by another. Id. See Dun. Dig. 2528.

Verdict for $30,000 was not excessive to a married woman suffering pelvic, hip joint and skull injuries, and verdict of $5,000 to husband, were not excessive. Odegard v. Connolly, 211M342, 1NW(2d)137. See Dun. Dig. 2570, 2572, 2575, 2597.

Court knows that value of dollar is not what it formerly was. Id. See Dun. Dig. 2595, 3451.

Verdict of $12,366.06 was not excessive to 25 year old girl suffering pelvic and hip injuries. Id. See Dun. Dig. 2570, 2572, 2597.

Expenses of abortion by physician upon woman married after accident might be submitted to jury, and opinion of physician that hip injury might lead to arthritis in the future was proper for consideration of jury. Id. See Dun. Dig. 2530, 2572, 2578a.

On rescission of a lease after occupying premises for a time, measure of recovery is difference between reasonable value of use of premises and what lessee paid for such use during his occupancy. Hatch v. Kulick, 211M 309, 1NW(2d)359. See Dun. Dig. 1203, 3841.

Damage to an ordinary popularly known and priced car wrecked in a collision can be proved by showing the nature of the damage done to it without opinion evidence as to its value before and after the collision. Hayward v. State Farm Mut. Automobile Ins. Co., 212M500, 4NW (2d)316, 140ALR1236. See Dun. Dig. 3247.

Verdict for $5,000 was not excessive for death of 48-year-old, devoted mother, in good health, leaving two children 22 and 23 years of age respectively. Bergstrom v. Frank, 213M9, 4NW(2d)620. See Dun. Dig. 2617.

Verdict for $2,500 was not excessive for death of a 20-year-old sister. Id.

Verdict of $10,000 to 14-year-old boy severelly burned on face and hands by gasoline explosion held not excessive. Fjellman v. Weller, 213M457, 7NW(2d)521. See Dun. Dig. 2597.

As against contention that there was a lack of substantial evidence of pecuniary benefit to beneficiaries, testimony of widow that she was 37 years old and that her deceased husband was 40, that he left surviving him a 15-year-old daughter, that family lived together and were dependent upon him, and that at time of his death he was earning $45.46 per week and testimony of deceased's employer that he was an honest, industrious, and sober man, supported a verdict of $9,541. Weber v. McCarthy, 214M76, 7NW(2d)681. See Dun. Dig. 2617.

Verdict for $12,500 held not excessive for disability suffered by a woman injured in collapse of a building. Murphy v. Barlow Realty Co., 214M64, 7NW(2d)684. See Dun. Dig. 2570.

In action for personal injuries suffered in collapse of a building, evidence held to support a verdict for plaintiff though quite conflicting as to injuries previously suffered in an automobile collision. Id. See Dun. Dig. 2578a.

Verdict for $10,000 was not excessive for death of a man 32 years old who was married and had two small children. Id. See Dun. Dig. 2617.

Verdict for $1,000 for household goods destroyed in fire held not excessive. Rommel v. New Brunswick Fire Ins. Co., 214M251, 8NW(2d)28. See Dun. Dig. 2576a.

Careful consideration of extent of personal injuries by the trial court and the complete absence of anything indicating error in the trial or prejudice or passion influencing the jury in its award left the supreme court no sound basis for further reducing the verdict or ordering a new trial, trial court having reduced damages from $10,000 to $8,000. Olson v. Davis, 215M18, 9NW(2d)344. See Dun. Dig. 7136.

Action of trial court in denying a new trial for excessive damages will not be reversed except for a clear abuse of discretion. Id.

A verdict of $7,628 for the death of a boy of 14 years of age was not excessive. Turenne v. Smith, 215M64, 9 NW(2d)409. See Dun. Dig. 7134.

Verdict of $5,500 held not excessive for death of child five years and ten months old, where it appeared that special damages amounted to $1,609.65 and that decedent had already reached the age where he was helpful to both of his parents at the time of his death. Deach v. St. Paul City Ry. Co., 215M171, 9NW(2d)735. See Dun. Dig. 2617.

Verdict for $20,000 was not excessive for a sacroiliac strain injury. Blanton v. Northern Pac. Ry. Co., 215M442, 10NW(2d)382. See Dun. Dig. 2597.

37. General principles.

No damages for future or permanent impairment or suffering can be allowed unless evidence shows their occurrence to be reasonably certain. Odegard v. Connolly, 211M342, 1NW(2d)137. See Dun. Dig. 2530.

In comparing verdict for wrongful death with verdicts in former days, purchasing power of dollar now and then must be considered on question of excessiveness. Bergstrom v. Frank, 213M9, 4NW(2d)620. See Dun. Dig. 2617.

38. Necessity of passion or prejudice.

While a memorandum not expressly made a part of an order granting a new trial unless plaintiff consents to reduction in verdict may be referred to for purpose of throwing light upon or explaining the decision, it may not be referred to for purpose on impeaching, contradicting or overcoming express findings or conclusions necessarily following from decision, but may be referred to to ascertain that verdict was not result of passion or prejudice. Ross v. D., 207M157, 290NW566, 207M648, 291 NW610. See Dun. Dig. 2597. Cert. den. 61SCR9.

Verdict for $18,000 reduced to $15,000 was not excessive where plaintiff's loss of earnings alone exceeded amount allowed. Id. See Dun. Dig. 2597.

Court will not interfere with verdict unless damages awarded appear clearly to be excessive or inadequate and to have been given under influence of passion or prejudice. Litman v. Walso, 211M398, 1NW(2d)391. See Dun. Dig. 7134.

Unless it can be held that size of verdict for wrongful death, as a matter of law, establishes that passion or prejudice actuated jury, supreme court should not disturb verdict as excessive. Bergstrom v. Frank, 213M9, 4NW(2d)620. See Dun. Dig. 7136.

General damages of approximately $7,000 for injuries to a young woman 23 years of age, including a compression fracture of the sixth cervical vertebra, leaving it in a permanently weakened condition, and further including partial temporary paralysis of the left arm, are not excessive to an extent indicating passion and prejudice on the part of the jury. Olson v. Davis, 215M18, 9 NW(2d)344. See Dun. Dig. 2570, 7134.

42. For inadequate damages.

Given a case for nominal damages and no more, there should be no reversal for denial of any recovery. Hardware Mut. Casualty Co. v. F., 208M354, 294NW213. See Dun. Dig. 417a.

On motion for new trial on ground of inadequacy of verdict court could in its discretion grant a new trial upon all issues in the case. Krueger v. Henschke, 210M 307, 298NW44. See Dun. Dig. 7079, 7141.

Where defendant offered no evidence to dispute or question sums paid out or incurred for medical services and hospital charges amounting to $524.50 and there was damage to car which at lowest figure suggested in evidence, was $185, a verdict for $626.50 was inadequate and required new trial. Id. See Dun. Dig. 7141.

Finding in favor of plaintiff in automobile collision who received rather severe bumps, bruises, and contusions but awarding no damages required new trial. Id.

Where damages to two of three plaintiffs were clearly inadequate, a new trial on matter of damages was also awarded third plaintiff. Id.

Verdict for $300 for damage to car and personal injuries in collision at intersection held not so inadequate as to indicate passion or prejudice. Litman v. Walso, 211M398, 1NW(2d)391. See Dun. Dig. 7141.

Verdict for $1,250, increased by court to $1,650 for death of a single man 29 years old, leaving as next of kin a father 66 years of age and mother 58 years, was not so inadequate as to show passion or prejudice influenced jury. Gamble v. Smith, 211M457, 1NW(2d)411. See Dun. Dig. 7141.

Where there has been a trespass on realty, owner is entitled to recover such damages as he may have sustained even though they are nominal in amount. Sime v. Jensen, 213M476, 7NW(2d)325. See Dun. Dig. 2522.

FOR ERRORS OF LAW ON THE TRIAL

43. What are errors on the trial.

Ruling which is correct in excluding evidence will be upheld though reason given by trial court for exclusion is erroneous. Stolte v. L., (CCA8), 110F(2d)226.

The admission of expert testimony is largely a matter of discretion for the trial judge, and he may upon motion for a new trial decide that he abused that discretion and order a new trial on the ground of error of law occurring at the trial. Simon v. L., 207M605, 292NW270. See Dun. Dig. 7201.

Where a fireman was asked whether certain merchandise could have been destroyed by fire without burning off supports upon which it rested, and objection thereto did not challenge question as outside scope of opinion testimony, error, if any, in allowing an answer, was harmless. Supornick v. N., 209M500, 296NW904. See Dun. Dig. 7180.

Whether error in charge was prejudicial and likely to or did mislead or influence jury is a question which trial court is in a better position to determine than supreme court, and if trial court deems such error prejudicial and ground for a new trial, there must be a clear showing of error or abuse of discretion to warrant reversal. Larson v. Sventek, 211M385, 1NW(2d)608. See Dun. Dig. 399, 7166.

Where evidence was insufficient to raise issue for jury of contributory negligence, and it did not appear upon what jury based its verdict for defendant, it was reversible error to submit such question to jury. Thomsen v. Reibel, 212M83, 2NW(2d)567. See Dun. Dig. 7174.

In determining whether error in admission of testimony was prejudicial, practical rather than theoretical considerations must govern, and court may consider that amount of verdict is not challenged, and that there was no motion to strike and no request for an instruction that evidence be disregarded, and its effect upon issues in case. Mahowald v. Beckrich, 212M78, 2NW(2d)569. See Dun. Dig. 7180.

An instruction that "If that negligence contributed directly to the accident as a cause in a material degree he would then in law be guilty of contributory negligence" and not entitled to recover did not warrant a new trial. Malmgren v. Foldesi, 212M354, 3NW(2d)669. See Dun. Dig. 7015.

44. How far discretionary.

Granting of motion for new trial for error in instruction is largely a matter of sound judicial discretion. Larson v. Sventek, 211M385, 1NW(2d)608. See Dun. Dig. 7166.

45. Necessity of exceptions—Notice of trial.

Inaccuracy in expression, failure to instruct on every possible hypothesis, or inadequate treatment of some phase of the law applicable to the controversy, does not as a rule, entitle a party to take advantage thereof upon motion for a new trial where, had shortcoming in charge been called to attention of court by an exception or suggestion before the jury retired, it might readily be assumed that court would have promptly corrected the inadvertence. Greene v. Mathiowetz, 212M171, 3NW(2d) 97.

FOR INSUFFICIENCY OF EVIDENCE

46. General rules.

Order granting new trial for insufficiency of evidence must be affirmed where it is impossible to say upon the record that evidence is "manifestly and palpably in favor of verdict". Halweg's Estate, 207M263, 290NW577. See Dun. Dig. 7142.

A new trial may be granted in the interests of justice and where there is a likely probability of stronger evidence on another trial. Parrish v. Peoples, 214M589, 9NW (2d)225. See Dun. Dig. 7142, 7143.

46b. Mandamus.

A trial court's memorandum may not be used to impeach, contradict, or overcome express findings or an order granting or denying a motion for new trial where not made a part of the findings or order which form the basis for review on appeal. Kleidon v. Glascock, 215M 417, 10NW(2d)394. See Dun. Dig. 397a, 9860.

Trial judge did not abdicate his discretionary authority to pass upon a motion for new trial by denying the motion, though in a memorandum he stated that he emphatically disagreed with the finding of the jury, there being competent evidence adequate and sufficient to sustain the verdict. Id. See Dun. Dig. 7145.

9326. Basis of motion.

Unless objections to misconduct in argument are taken before jury retires, they cannot be reviewed on motion for new trial or appeal, although record contains argument in full. Symons v. G., 208M240, 293NW303. See Dun. Dig. 388a, 9800.

Trial court was not obliged to accept affidavit made in support of motion for new trial that certain statement of plaintiff was communicated to deceased who refused to comply with desire expressed therein. Dill v. Kucharsky, 212M276, 3NW(2d)585. See Dun. Dig. 7096.

Trial court did not abuse its discretion in denying motion for judgment or a new trial made almost 11 months after entry of verdict without valid excuse being shown for delay. Davitt v. Bloomberg, 214M277, 8NW (2d)16. See Dun. Dig. 7087.

Determination of question of reasonable diligence in moving for a new trial necessarily rests in sound discretion of trial court. Id.

Delay in making motion for new trial cannot be excused by asserting that opposing counsel delayed examination of transcript. Id.

It was no justification for delay in proceeding with motion for new trial that counsel was engaged in other professional duties. Id.

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

See also notes under §9493.

1. In general.

Reviewing court will not consider points in brief which were not presented to trial court on motion for new trial. Ness v. F., 207M558, 292NW196. See Dun. Dig. 385.

Only errors assigned below are reviewable on appeal from an order denying a motion for a new trial. Geo. Benz & Sons v. H., 208M118, 293NW133. See Dun. Dig. 384.

Scope of review on appeal is limited by assignments of error in motion for a new trial on appeal from order denying new trial. Amland v. G., 208M596, 296NW170. See Dun. Dig. 358a.

An assignment of error that court erred in denying a motion for a new trial, without more, raises no question of law, since it is duty of appellant to put finger on specific error. Slawik v. C., 209M428, 296NW496. See Dun. Dig. 360(94, 96).

Where case was tried and determined on theory of breach of contract appellant is not in position to claim that complaint sounded in conversion. Stanton v. M., 209M458, 296NW521. See Dun. Dig. 7675.

Where question of waiver by insurer of its defense of attempted fraud was not presented to lower court and did not appear in specifications of error in motion for new trial, that question will not be considered on appeal. Supornick v. N., 209M500, 296NW904. See Dun. Dig. 384.

Error in a ruling on trial may not be reviewed on an appeal from a judgment if appellant did not take an exception to the ruling on the trial or assign it as error in a motion for a new trial. Winning v. Timm, 210M270, 297NW739. See Dun. Dig. 388, 388a.

Point raised by an assignment of error should be one presented below by a proper specification of error in motion for new trial. Service & Security Inc. v. St. Paul Federal Sav. & Loan Ass'n, 211M199, 300NW811. See Dun. Dig. 388a.

An order denying a new trial is appealable, but when no ground for a new trial is stated in the motion no question is raised, and the order stands for affirmance. Julius v. Lenz, 212M201, 3NW(2d)10. See Dun. Dig. 7073.

Propriety of allowance of interest upon damages not questioned in court below may not be questioned upon appeal. Bang v. International Sisal Co., 212M135, 4NW(2d) 113, 141ALR657. See Dun. Dig. 384.

Where plaintiff recovered a verdict and defendant appealed from judgment after denial of his motion for judgment without asking for a new trial, judgment will not be reversed even though evidence is such that court in its discretion ought to have granted a new trial, since evidence must be so conclusive as to compel, as a matter of law, a result contrary to that reached by jury. Narjes v. Litzau, 214M21, 7NW(2d)312. See Dun. Dig. 385, 5085.

A party cannot be permitted to stand by without objection and speculate on the outcome of the verdict. Ickler v. Hilger, 215M82, 10NW(2d)277. See Dun. Dig. 9727.

2. Objections to pleadings.

No such objection having been made to trial court, it cannot be contended on appeal that there was a defect of parties. Flowers v. Germann, 211M412, 1NW(2d)424. See Dun. Dig. 384.

Fact that complaint in action by attorney to recover amount allowed in divorce decree also alleged the reasonable value of the services cannot be taken advantage of for the first time on appeal from default judgment. Whipple v. Mahler, 215M578, 10NW(2d)771. See Dun. Dig. 384.

Question whether there is a misjoinder of parties must be raised by answer or demurrer, and cannot be raised for the first time on appeal from the judgment. Id.

Misjoinder of causes must be demurred to or it is waived, and such questions cannot be raised for the first time on appeal from the judgment. Id. See Dun. Dig. 7508.

4. Reception of evidence.

Where there is no objection to question asked or answer given, there is no basis for a reversal. Ness v. F., 207M558, 292NW196. See Dun. Dig. 9728.

Counsel cannot on appeal complain that many essential matters were testified to through leading questions, where no objection was made below. Locksted v. L., 208M551, 295NW402. See Dun. Dig. 9724.

Objection to question that it was "without foundation, no length of time shown," did not challenge examination as going beyond field of opinion testimony. Supornick v. N., 209M500, 296NW904. See Dun. Dig. 9728.

Exclusion of evidence is not subject to review where no exception was taken and there was no specification of error on point in motion for new trial. Leifson v. Henning, 210M311, 298NW41. See Dun. Dig. 9724.

Exclusion of evidence to which there was no exception may not be considered on appeal from order denying motion for judgment or new trial. Smith v. Minneapolis Securities Corp., 211M534, 1NW(2d)841.

Where no objection was made to testimony of plaintiff's attorney at trial, error on its reception cannot be assigned or urged on appeal. Holmes v. Conter, 212M394, 4NW(2d)106. See Dun. Dig. 10313.

Where court sustained plaintiff's objection to offer of evidence by defendant, and defendant took no exception to the ruling, nor, in the motion for a new trial, were there any errors assigned in respect to the same, defendants are not in position to assail the ruling. Barnard v. Kandiyohi County, 213M100, 5NW(2d)317. See Dun. Dig. 358a, 388a, 9728.

In both civil and criminal cases where no exception was taken to ruling admitting testimony over objection at the trial or where the error is not clearly specified in the motion for a new trial it is not properly a matter for review on appeal. State v. Clow, 215M380, 10NW(2d)359. See Dun. Dig. 7091, 9724.

5. Misconduct of counsel.

There can be no reversal for gratuitous statements of fact by counsel where record discloses that no objection or motion was made to eliminate them. Ness v. F., 207M 558, 292NW196. See Dun. Dig. 9724.

Unless objections to misconduct in argument are taken before jury retires, they cannot be reviewed on motion for new trial or appeal, although record contains argument in full. Symons v. G., 208M240, 293NW303. See Dun. Dig. 388a, 9800.

Appearance by county attorney in automobile accident case for defendant whom he had prosecuted for criminal negligence in killing plaintiff's decedent is not looked upon with favor, but plaintiffs are in no position to challenge his conduct where he consulted and got the consent of counsel for plaintiff before making his appearance. Lee v. Zaske, 213M244, 6NW(2d)793. See Dun. Dig. 9727.

Misconduct of counsel in argument is a separate ground for new trial and is not subject to provisions in regard to assignment of errors in the motion for new trial. Weber v. McCarthy, 214M76, 7NW(2d)681. See Dun. Dig. 385, 7073, 7102.

In a wrongful death action statement of counsel in argument that deceased had just as much right to live as any man whether he earned nothing or $45 a week and nobody had a right to kill him on the highway and be burned alive even if he happened to earn only $45 a week was flagrantly prejudicial and called for action by the court on its own motion without exception. Id. See Dun. Dig. 9800.

Exceptions should be taken to misconduct of counsel in argument either when it occurs or at the close of argument. Id.

Objections to argument of counsel must be made at the conclusion thereof and before the jury retires, and it is too late to specify them in the notice of motion for judgment notwithstanding the verdict or a new trial. Ickler v. Hilger, 215M82, 10NW(2d)277. See Dun. Dig. 9800.

6. Instructions.

Defendant was not in position to assign error on submission of question of permanent injuries to jury where there was no request on the trial that such issue be not submitted, nor any exception taken to its submission. Guin v. M., 206M382. 288NW716. See Dun. Dig. 9797.

Where a statement by one of several defendants is an *admission as to him and an impeachment of him as to the* others and plaintiff fails to call court's attention at the time to error in charge in limiting effect of statement as impeachment without a qualification that it was an admission as against party making it, error cannot be relied on for reversal on appeal. Schmitt v. Emery, 211M 547, 2NW(2d)413, 139ALR1242. See Dun. Dig. 9797.

Where court in instruction stated what he called plaintiff's "specific claim" of negligence by repeating in his own words all acts of defendant alleged by plaintiff in his complaint, and that portion of charge was not objected to, jury was entitled to consider each or all of the acts as a basis for finding defendant negligent, though complaint itself did not expressly state that some of the acts were negligent. Anderson v. Hegna, 212M147, 2NW(2d)820. See Dun. Dig. 9792.

Inaccuracy in expression, failure to instruct on every possible hypothesis, or inadequate treatment of some phase of the law applicable to the controversy, does not, as a rule, entitle a party to take advantage thereof upon motion for a new trial where, had shortcoming in charge been called to attention of court by an exception or suggestion before the jury retired, it might readily be assumed that court would have promptly corrected the inadvertence. Greene v. Mathiowetz, 212M171, 3NW(2d)97. See Dun. Dig. 9797, 9798.

Statute was designed to prevent a miscarriage of justice, and to that end allows counsel an opportunity to urge on a motion for a new trial a fundamental error in the charge, although, when it was given, neither he nor the court perceived the mistake. Id. See Dun. Dig. 9797.

In collision at intersection where plaintiff's motor was disabled and he was pushing car by hand, if it was error to read to jury statutes relating to slow driving and driving of unsafe vehicles on highway, such statutes were not those of controlling propositions of law and attention should have been called thereto promptly and before motion for new trial in order to require reversal upon appeal. Id. See Dun. Dig. 9797, 9798.

A verbal error or unintentional misstatement of law or fact which could have been contracted at the trial had attention been called to it by counsel is not such error as requires reversal, when raised for first time on motion for new trial, unless erroneous instructions complained of were on some controlling proposition of law. Id. See Dun. Dig. 9798.

When the court reviews evidence defendant is entitled to a charge that jury are exclusive judges of all questions of fact, but a failure so to charge, no request being made therefor and no exceptions taken to the charge as given, will not result in a reversal. State v. Finley, 214M228, 8NW(2d)217. See Dun. Dig. 2479(b).

Instructions not excepted to became the law of the case, whether correct or erroneous. Katzmarek v. Weber Brokerage Co., 214M580, 8NW(2d)822. See Dun. Dig. 9792.

Failure to include the words "through no fault of his own" in the charge in submitting emergency doctrine to jury, in view of language used by the court, was, at the most, incomplete, and defendant's failure to take an exception to the charge as given or to request an amplification of it precluded consideration thereof on review. Merritt v. Stuve, 215M44, 9NW(2d)329. See Dun. Dig. 9797, 9798.

Where court submitted case on "all or nothing" theory of recovery, following request for instructions which were ambiguous and inconsistent as to such matter, and defendant made no objection before jury retired, the charge became the law of the case by acquiescence. Ickler v. Hilger, 215M82, 10NW(2d)277. See Dun. Dig. 9779, 9797.

Where there was no exception taken to the charge at the trial or on the motion for new trial, reviewing court may not overturn the result reached by the triers of fact who followed the instructions. Kleidon v. Glascock, 215 M417, 10NW(2d)394. See Dun. Dig. 9797.

7. Motion for directed verdict.

Defendant moving for a directed verdict at close of testimony and for judgment non obstante after verdict was in position to raise insufficiency of evidence on appeal from judgment for plaintiff. Hasse v. Victoria Co-operative Creamery Ass'n, 212M337, 3NW(2d)593. See Dun. Dig. 388.

On appeal from an order denying its motion for new trial, plaintiff cannot challenge a directed verdict for defendant or removal from jury of issue of value of services rendered where neither was designated as error for which plaintiff sought a new trial below. Universal Co. v. Reel Mop Corp., 212M473, 4NW(2d)86. See Dun. Dig. 395.

9. Findings of fact.

A failure of trial court to expressly find that transfer was made in good faith cannot be raised for first time on appeal from a judgment for defendant in action to set aside a fraudulent conveyance. Andrews v. W., 207 M404, 292NW251. See Dun. Dig. 384.

Assignment that court erred in not finding that amount stated to be due in public notice of foreclosure of mortgage was grossly excessive was not open to consideration in absence of a settled case or bill of exceptions. McGovern v. F., 209M403, 296NW473. See Dun. Dig. 344 (87).

Where there is no settled case fact that one finding of fact is inconsistent with others is not ground for relief. Moe v. O., 208M496, 296NW512. See Dun. Dig. 345.

A motion for new trial assigning error upon dismissal of case and asking that dismissal be set aside on the ground "that there was sufficient evidence to justify a verdict in favor of plaintiffs to reform the deed" adequately informed court of plaintiff's contention that it erred in failing to make findings of fact, conclusions of law and an order for judgment. Czanstkowski v. Matter, 213M257, 6NW(2d)629. See Dun. Dig. 7091, 9867.

10. Entry of judgment.

Reduction of verdict for personal injuries by trial court as a separate matter from general assignment of excessive damages, was out of case for failure to assign error on it below in motion for new trial, and in assignments of error on appeal. Kraus v. S., 208M220, 293 NW253. See Dun. Dig. 358.

In action for reasonable value of services rendered, whether it was error for clerk to enter judgment by default without receiving proof of damages will not be decided where it was not presented for decision below. Kane v. S., 209M138, 296NW1. See Dun. Dig. 384.

A party cannot for first time on appeal raise question that opponent specified grounds for judgment notwithstanding verdict which were not specified in motion for a directed verdict, where without objection trial court entertained all grounds specified in motion for judgment. Blomberg v. Trupukka, 210M523, 299NW11. See Dun. Dig. 384, 5085.

Irregularity of procedure in the assessment of recovery in the entry of judgment upon default cannot be raised upon appeal to the Supreme Court unless the appellant has applied to the trial court for the relief against such irregularity. Whipple v. Mahler, 10NW(2d)771, overruling Reynolds v. LaCrosse & Minn. Packet Co., 215M578, 10M178, 10 Gil 144. See Dun. Dig. 296, 384, 4997.

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

A transcript of the evidence which court below refused to allow as a settled case is no substitute for a settled case or bill of exceptions and does not furnish any basis for a review of evidence to determine its sufficiency. Doyle v. S., 288NW152. See Dun. Dig. 1369.

When a case comes up on appeal from an order sustaining a demurrer, no settled case is needed. Keller Corp. v. C., 207M336, 291NW515. See Dun. Dig. 1368.

9329. Bill of exceptions or case.

Sufficiency of evidence to sustain findings of fact cannot be reviewed on appeal without a settled case or bill of exceptions, in absence of which it is presumed that evidence sustained findings. Doyle v. S., 206M56, 288NW 152. See Dun. Dig. 344.

It is within discretion of trial court to settle a case where an appeal from a judgment has been perfected within six months from entry thereof, even though application to settle was not made until after expiration of said six months. McGovern v. F., 207M261, 290NW575. See Dun. Dig. 1372.

On appeal from a judgment where bill of exceptions or case is omitted, only question that may be considered is whether conclusions of law embodied in judgment are warranted by findings. State v. Anderson, 208M334, 294 NW219. See Dun. Dig. 344.

On appeal from a judgment, absent bill of exceptions or settled case, only question for review is whether findings support conclusions of law. Krueger v. Krueger, 210 M144, 297NW566. See Dun. Dig. 344.

Without a bill of exceptions or settled case containing the testimony, reviewing court will not consider evidence discussed in the briefs. State v. Finley, 214M 228, 8NW(2d)217. See Dun. Dig. 346.

Where manager of drug store and pharmacist were separately tried for selling intoxicating liquor without a license in violation of a city ordinance, court did not abuse its discretion in denying motion of manager to add to his own settled case the testimony he gave in the trial of his pharmacist, having had an opportunity to testify in his own behalf and having declined to do so, and not being in a position on appeal to claim disadvantage or prejudice by the denial of his motion. State v. McBride, 215M123, 9NW(2d)416. See Dun. Dig. 353, 1374, 1375, 1380.

Mandamus issued to compel court to allow a case to be proposed where there had been a stay of proceedings and there was a misapprehension as to the effect of the stay on the part of court and counsel, a rejection of the transcript by counsel for appellee being followed promptly by a motion to the court for leave to propose a case for allowance. Schmit v. Village of Cold Spring, 215M572, 10 NW(2d)727. See Dun. Dig. 1372(d).

A stay of proceedings enlarges the time for preparing and proposing a case, and a misapprehension as to the effect of a stay on the part of court and counsel is sufficient excuse for allowing a case to be subsequently proposed. Id. See Dun. Dig. 1371, 1372(d).

REPLEVIN

9331. Possession of personal property, how claimed.

A milk company with exclusive right to use "cream top" bottles and notifying competitors thereof did not subject its bottles to general custom which has 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.

9333. Bond and sureties.

Fraud of principal in redelivery bond in a replevin action in inducing surety to execute it is not a defense in action by obligee against surety. Neefus v. N., 209M495, 296NW579. See Dun. Dig. 8432.

9337. Delivery of property—Waiver of justification.

Where judgment creditors garnished bank to which judgment debtor had pledged insurance policies and other chattels and paid the bank amount of its debt, judgment creditors were subrogated to rights of bank and to possession of insurance policies as well as other chattels, and sheriff levying upon such other chattels under execution and obtaining possession of insurance policies had a right to retain possession in action in replevin by owners of policies, notwithstanding that insurance policies are exempt from execution, though pledgor might have right in case of forced sale to insist that non-exempt items be sold first. Braman v. Wall, 210 M548, 299NW243. See Dun. Dig. 8405.

9340. Claim of property by third person.

Defendant in replevin not having taken chattels from possession of plaintiff, may under general denial prove that a third party is entitled to possession as against plaintiff, even though plaintiff owns property subject to pledge in favor of third party. Braman v. Wall, 210M 548, 299NW243. See Dun. Dig. 8416.

Where in replevin it appears that a third party is probably entitled to possession, he should be brought in as a party by intervention or impleader, and this may be ordered by court on its own motion. Id. See Dun. Dig. 8407.

In replevin to recover property levied on by sheriff sheriff may set up defense that he did not take property from plaintiffs and that a third party was entitled to possession as against plaintiffs. Braman v. Wall, 214M 238, 7NW(2d)924. See Dun. Dig. 3528, 8416.

ATTACHMENT

9343. Contents of affidavit.

3. Transfer with intent to defraud.

Fraudulent conveyances of chattels—chattel mortgages —sales—conditional sales. 24 MinnLawRev 832.

9344. Conditions of required bond.

Court erred in vacating writ of attachment and levy without giving plaintiff opportunity to file another bond nunc pro tunc, irregularity being in use of stale bond due in part to court's act in approving it. Ingebretson v. M., 206M336, 288NW577. See Dun. Dig. 638.

Defect in attachment bond is a mere irregularity in procedure, and not jurisdictional. Id.

9346. Execution of writ.

2. Levy on personalty.

Shares of corporate stock are personal property in the form of a property interest in the corporation, and are subject of attachment, garnishment, and levy of execution. Wackerbarth v. W., 207M507, 292NW214. See Dun. Dig. 627.

Sheriff could levy execution upon corporate stock issued prior to effective date of the uniform stock transfer act without obtaining physical possession of the certificate, and could make a sale thereof. Brennan v. Friedell, 215 M499, 10NW(2d)355. See Dun. Dig. 641.

GARNISHMENT

9356. Affidavit—Garnishee summons—Title of action.—In an action in a court of record or justice court for the recovery of money, which exceeds $10.00 in the justice court or municipal court, and $25.00 in the district court, if the plaintiff, his agent or attorney, at the time of issuing the summons, or at any time during the pendency of the action, or after judgment therein against the defendant, files with the clerk of the court, or, if the action is in a justice court, with the justice, an affidavit stating that he believes that any person (naming him) has property or money in his hands or under his control belonging to the defendant, or that such person is indebted to the defendant, and that the value of such property or the amount of such money or indebtedness exceeds $25.00, if the action is in the district court, or $10.00 if in a justice court, or a municipal court, and if the plaintiff files with such affidavit a copy of the complaint when the complaint has not been theretofore either served on the defendant or filed in said action, and, provided further, that no fee be charged by the clerk of the court for filing said copy of complaint, a summons may be issued against such person, as hereinafter provided, in which summons and all subsequent proceedings in the action the plaintiff and defendant shall be so designated, and the person against whom such summons issues shall be designated as garnishee. (As amended Mar. 18, 1943, c. 151, §1.)

Wackerbarth v. W., 207M507, 292NW214; note under §9360, note 1.

No property or credit of a defendant in hands of a garnishee are laid hold of by service of a garnishee summons on garnishee unless there is a main action pending or unless summons therein is issued and in hands of proper officer for service. Nash v. S. M. Braman Co., 210M196, 297NW755. See Dun. Dig. 3969.

A defendant who answered and thereby appeared generally in the action could not thereafter move to dismiss garnishment solely on jurisdictional grounds, that is, on ground that court was without jurisdiction to hear garnishment disclosure because there was no action pending at time of service upon garnishee. Weikert v. Blomster, 213M373, 6NW(2d)798. See Dun. Dig. 3950.

9359. Effect of service on garnishee—Fees.

S. T. McKnight Co. v. T., 209M399, 296NW569, 134ALR 850; note under §9361(1).

A garnishee is regarded as an innocent person owing money to, or having in his possession property of, another, without fault or blame, and he is supposed to stand indifferent as to who shall have money or property. Midland Loan Finance Co. v. K., 206M134, 287NW 869. See Dun. Dig. 3953.

A garnishment proceeding is virtually an action brought by defendant in plaintiff's name against garnishee resulting in subrogating plaintiff to right of defendant against the garnishee, and plaintiff can have no greater rights or remedies than those possessed by his debtor. Id. See Dun. Dig. 3955.

Evidence sustains finding that at time of service of garnishment summons garnishee had no money or property in its hands or under its control belonging to defendant. Id. See Dun. Dig. 3988.

An attaching creditor in garnishment acquires by the garnishment the same, but no greater, right than the debtor has against the garnishee, and this applies to rights of holder of certified check delivered for a special purpose. Gilbert v. P., 206M213, 288NW153. See Dun. Dig. 3957.

Where garnishment summons was served before issuance of summons in main case, fact that defendant made a general appearance and demanded a change of venue and garnishee appeared and disclosed could not affect or cut off right which in meantime had lawfully impounded property and credit of defendant in hands of garnishee. Nash v. S. M. Braman Co., 210M196, 297NW 755. See Dun. Dig. 3956, 3969.

Where court erroneously set aside garnishment and released garnishee, its subsequent order vacating the previous order dismissing the garnishee and requiring defendant to restore and return to garnishee all of his moneys in possession of garnishee at time of disclosure was proper. Weikert v. Blomster, 213M373, 6NW(2d) 798. See Dun. Dig. 3976.

Garnishment and bankruptcy. 27MinnLawRev1.

9360. Property subject to garnishment.

S. T. McKnight Co. v. T., 209M399, 296NW569, 134ALR 850; note under §9361(1).

1. Held garnishable.

Northern Engineering Co. v. Neukom, 210M329, 298NW 47; note under §9361.

Shares of stock are personal property and subject to garnishment as property of defendant irrespective of whether or not stock certificates have been delivered to shareholder. Wackerbarth v. W., 207M507, 292NW214. See Dun. Dig. 3966.

Puget Sound National Bank v. Mather, 60M362, 62NW 396, applies only to stock certificates of a foreign corporation which is not subject to jurisdiction of courts of this state. Id. See Dun. Dig. 3966.

3. Held not garnishable.

If bank honored check and marked it paid, fact that there was an overdraft did not prevent bank from denying liability as a garnishee of depositor on theory that bank had no legal right or authority to cash the check. Midland Loan Finance Co. v. K., 206M134, 287NW869. See Dun. Dig. 3967.

Pay checks of employees of Moose Lake State Hospital are not subject to garnishment. Op. Atty. Gen., (843i), Apr. 21, 1941.

4. In general

Rights of creditors of legatee or distributee during administration of decedent's estate. 40 Mich. Law Rev. 267.

9361. In what cases garnishment not allowed.

In sale to city of right or license to install a patented process for purification of water, evidence held to sustain finding that when garnishee summons was served on city, all things to be done by licensor had been substantially performed or waived, and there was then a balance unpaid awaiting only acceptance by city and that it was not contingent. Northern Engineering Co. v. Neukom, 210M329, 298NW47. See Dun. Dig. 3965a.

Garnishment of funds upon which garnishee has a lien. 25MinnLawRev953.

(1).

Where defendant was liable as endorser upon promissory note made by bankrupt third party, payable to garnishee bank, which held as collateral accounts receivable of bankrupt and an "office check" payable to defendant by garnishee, funds represented by office check were payable only upon contingency that pledged receivable would be sufficient to retire principal to garnishee, there was a "contingency" which prevented garnishment. S. T. McKnight Co. v. T., 209M399, 296NW 569, 134ALR850. See Dun. Dig. 3965a.

9363. Garnishment of corporations.

Corporate garnishee whose stock is sought to be bound should have been compelled to disclose as to matters dealing with transfers of stock since it was relevant to proceeding and information as to possible claimants who might have rights superior to garnishing creditors. Wackerbarth v. W., 207M507, 292NW214. See Dun. Dig. 3997, 4000.

9364. Municipal corporations, etc.—Procedure.

Unearned compensation of state institutional employees cannot be assigned, and it is not possible to make deductions for insurance premiums from pay roll checks upon written request and authorization by employee. Op. Atty. Gen., (88a-19), Feb. 14, 1940.

City may not adopt and enforce a plan whereby it contracts for a group insurance policy covering all its employees and deduct from salary or wages sum required to pay premium, but this may be done for benefit of all employees consenting thereto. Op. Atty. Gen., (249B-9), Feb. 14, 1940.

Executive council has no authority to approve or put into operation a welfare group plan of accident, health, and surgical benefits sponsored by an insurance company, whereby deductions are to be made from salaries of state employees for payment of premiums. Op. Atty. Gen., (249B-9), Feb. 27, 1940.

City of Minneapolis may not enter into contract with members of police department for assignment of a part of their future wages to Minneapolis police officers group hospitalization service in payment for services in periods in excess of 60 days. Op. Atty. Gen. (249B-9[a]), June 14, 1940.

Board of Education may not contract for group insurance for its employees, but may consent to employees making such a contract and deduct premium from wages with their consent. Op. Atty. Gen. (249B-8), Aug. 27, 1940.

A city is without authority to compel its employees to enter into a group health and accident contract and deduct from their wages or salaries sum required to pay premiums, but may do so with consent of employees. Op. Atty. Gen., (249B-8), Jan. 31, 1941.

9366. Claimant of property to be joined.

5. Practice.

Where garnishee summons is served on garnishee before summons in main action is issued and delivered to officer for service, and a subsequent garnishment is regularly and lawfully made by third party before defect in first garnishment has been waived, plaintiff in second garnishment is entitled to intervene in person and claim right of precedence in fund or property in hands of garnishee. Nash v. S. M. Braman Co., 210M196, 297NW755. See Dun. Dig. 4002.

9368. Time for appearance in garnishee proceedings.

Federal Soldiers and Sailors Civil Relief Act of 1940 will apply to actions in state court which come within its terms. (Mason's USCA, Title 50, end.) Op. Atty. Gen. (310), Nov. 6, 1940.

9376. Proceedings when garnishee has lien.

S. T. McKnight Co. v. T., 209M399, 296NW569, 134ALR 850; note under §9361(1).

Where judgment creditors garnished bank to which judgment debtor had pledged insurance policies and other chattels and paid the bank amount of its debt, judgment creditors were subrogated to rights of bank and to possession of insurance policies as well as other chattels, and sheriff levying upon such other chattels under execution and obtaining possession of insurance policies had a right to retain possession in action in replevin by owners of policies, notwithstanding that insurance policies are exempt from execution, though pledgor might have right in case of forced sale to insist that nonexempt items be sold first. Braman v. Wall, 210 M548, 299NW243. See Dun. Dig. 3957.

In replevin to recover exempt life insurance policies and assignments thereof, which with non-exempt securities had been seized by sheriff under levy of execution against insured while such policies and securities were held by a bank as collateral to a loan to the insured, and in which sheriff paid off bank's lien with money furnished him by judgment creditor's attorney, who now claims that his actoin was without knowledge or consent of his clients, and no evidence was offered that either judgment creditors or any other person now claims an interest in the policies or assignments, insured is entitled to possession of policies and assignments from the sheriff, and it was error to make recovery dependent upon payment by insured of an amount used to lift bank's lien in excess of money recovered from nonexempt securities. Braman v. Wall, 214M238, 7NW(2d) 924. See Dun. Dig. 3955.

Garnishment of funds upon which garnishee has a lien. 25MinnLawRev953.

INJUNCTION

9385. How issued—Effect on running of time.

The present trend of adjudication toward a complete denial of the injunctive process to restrain proceedings in state courts, if there is such a trend, does not extend to denaturing the removal statutes, and hence where action was properly removed to federal court such court would enjoin state court execution on judgment thereafter obtained in the state court on the removed cause of action. Ammond v. Pennsylvania R. Co., (CCA6), 125F(2d)747. Cert. den. 316US691, 62SCR 1283. See Dun. Dig. 3748, 4477c, 4482, 4488, 8395a.

Injunction will lie to restrain illegal practice of law without a license. Cowern v. N., 207M642, 290NW795. See Dun. Dig. 4483b.

A fraternal organization employing and paying physician to care for members cannot interfere by injunction with any proceedings that may be brought by board of medical examiners to revoke license of physician for unprofessional conduct in being employed by a corporation. Fisch v. S., 208M102, 292NW758. See Dun. Dig. 7483.

Injunction will not lie against board of medical examiners to prevent threatened hearing that might lead to suspension or revocation of plaintiff's license to practice medicine and thereby interfere with contract relationship between plaintiff and a fraternal corporate organization, there being an adequate remedy in any proceeding that might be initiated before that board. Fisch v. S., 208M102, 292NW758. See Dun. Dig. 4472.

Equity having assumed jurisdiction of an action to restrain competition in certain territory and granted an injunction will, as an incident, give full relief and compel an accounting of profits wrongfully obtained. Peterson v. Johnson Nut Co., 209M470, 297NW178. See Dun. Dig. 3138.

Where neighboring landowners united in construction of a ditch to drain or improve their several lands and one of the landowners later filled the ditch and deprived another landowner of benefits from its construction, a court of equity may grant injunctive relief. Will v. Boler, 212M525, 4NW(2d)345. See Dun. Dig. 4479, 10157a.

A private individual cannot maintain an action to enforce a right or redress a wrong of a public nature unless he has sustained some injury special and peculiar to himself, or unless there exists statutory authority so to do. Caton v. Board of Education, 213M165, 6NW(2d) 266. See Dun. Dig. 4499a.

Owner of a shorthand system, as a taxpayer or otherwise, could not maintain suit to restrain schoolboard from reconsidering and rescinding a resolution making that shorthand system exclusive, not being a representive suit and there being no showing made of loss, damage, or increase of burdens to anyone. Id. See Dun. Dig. 4480.

Adjoining owner is entitled to a mandatory injunction to compel the removal of a retaining wall encroaching on his land. Sime v. Jensen, 213M476, 7NW(2d)325. See Dun. Dig. 4476.

Remedies at law, that of prosecution under the gambling and liquor laws, prosecution for violation of public nuisance statute, and legal remedy of abatement after judgment, are inadequate where there has been continuous and persistent violations of liquor and gambling statutes and repeated convictions have failed to abate them. State v. Sportsmen's Country Club, 214M151, 7NW (2d)495. See Dun. Dig. 4472.

Equity will not enjoin a crime, but where facts disclose a need for equitable relief equity will impose its authority notwithstanding conduct amounts to a crime. Id. See Dun. Dig. 4483a.

Fact that a law is not enforced is no ground for equity to restrain a commission of a crime. Id. See Dun. Dig. 4483a, 4483c.

Where there has been continuous and persistent violations of liquor and gambling statutes and repeated convictions have failed to abate them an injunction is properly granted to abate a "public nuisance." Id. See Dun. Dig. 4483a.

Where statute affords a taxpayer an adequate remedy at law to contest assessment proceedings or the collection of an assessment, taxpayer is not entitled to maintain a suit in equity to enjoin collection of the assessment. Rosso v. Village of Brooklyn Center, 214M364, 8 NW(2d)219. See Dun. Dig. 4472.

Refusal of trial court to grant injunction restraining violation of, or interference with, contract did not in effect determine or deny the legality or obligation of the contract so as to render issues relative thereto res adjudicata upon dismissal of appeal from judgment denying such injunctive relief, trial court not having construed or determined the validity of the contract. McDonald v. B. and B. D. and H. and W. L. Union No. 792, 215M274, 9NW(2d)770. See Dun. Dig. 4479, 5168.

The granting of, or refusal to grant, an injunction to restrain the breach of a contract rests largely in the discretion of the trial court. Id. See Dun. Dig. 4479.

An action may be maintained for the abatement by injunction of a beer tavern guilty of continuous and persistent violation by selling intoxicating liquor without a license. Op. Atty. Gen. (218f), May 24, 1943.

9386. Temporary injunction when authorized.

1. In general.

Temporary restraining order pending final judgment rests largely upon judicial discretion and should not be reversed in absence of abuse. McFadden Lambert Co. v. W., 209M242, 296NW18. See Dun. Dig. 4490(89).

Granting or vacating of a temporary injunction or restraining order is within judicial discretion of trial court. East Lake Drug Co. v. Pharmacists and Drug Clerks' Union, Local No. 1353, 210M433, 298NW722. See Dun. Dig. 4490.

An appeal under a parent union's laws by a local union from a decision of the parent union's general president to its general executive board will not be held futile and illusory in advance of the event, where provision is made for a full hearing on such appeal, but where the general executive board by its conduct renders such an appeal nugatory, the parent union will be held to have waived compliance with the provision of its laws requiring that redress of grievances must be sought by exhaustion of intra-union remedies before there can be recourse to the courts. Mixed Local Etc. v. Hotel and R. Employees Etc., 212M587, 4NW(2d)771. See Dun. Dig. 9674.

In action by Personal Loan Company against Personal Finance Company to protect a trade name, it was an abuse of discretion to deny plaintiff's motion for a temporary injunction pending suit, where it was shown clearly that because of defendant's name, window and neon signs, and advertising of its business, mail and telephone messages intended for plaintiff went to defendant and messages intended for defendant came to plaintiff. Personal Loan Co. v. Personal Finance Co., 212M600, 5NW (2d)61. See Dun. Dig. 4490, 9670.

2. Breach of contract.

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

5. Restraining suit.

Federal court having jurisdiction of action in rem or quasi in rem, in which possession or control of the property is required may, in order to protect its jurisdiction, restrain prosecution of a state court suit brought for the same purpose, but not where the federal action is strictly in personam, thus Illinois federal court having jurisdiction of a suit in personam for the construction of a will could not enjoin prosecution of state court suits in Wisconsin and Minnesota to construe the same will with respect to property located in those states. Mandeville v. Canterbury, 63SCR472, rev'g (CCA7)130F (2d)208. See Dun. Dig. 3746.

In as much as a sale of property claimed to have been fraudulently conveyed will not be restrained by injunc-

tion, it is clear that assertion of such a claim after the sale and after a determination of the transfer as being fraudulent in fact cannot be permitted to stand in the way. Brennan v. Friedell, 215M499, 10NW(2d)355. See Dun. Dig. 3906(84), 4477a.

10. Protection of easement.

Threat to stop gravel trucks which would use right of way over land of defendant, rendering it impossible for plaintiff to sell her gravel, would justify a court of equity in entertaining a suit for an injunction. Giles v. Luker, 215M256, 9NW(2d)716. See Dun. Dig. 4471, 4476a.

Injunction against interference with use of easement of way to haul gravel was conditioned on keeping way in repair, using at reasonable times and oiling to keep down dust. Id. See Dun. Dig. 4476a.

9388. Bond required—Damages.

While damages from a wrongful issuance of injunction may be determined in the injunction suit, they are recoverable (unless the writ was procured by malice) only by action on the bond. Midland Loan Finance Co. v. T., 206M434, 288NW853. See Dun. Dig. 4499.

RECEIVERS

9390. Court may order deposit, etc.

District court had jurisdiction to enter judgment against vilage and also to determine and enter judgment in favor of attorney for judgment creditor for a certain sum as a lien upon the first judgment, and to permit village to deposit the amount of the judgment with the clerk of court when a judgment creditor of the first judgment creditor attempted to levy execution on the judgment against the village, based upon its judgment, and an assignment of the attorney's judgment, and a receiver of the first judgment creditor was not entitled to prohibition to prevent the court from considering proceedings on order to show cause why money deposited with clerk should not be paid to second judgment creditor. State v. District Court, 206M645, 287NW491. See Dun. Dig. 8247.

JUDGMENT

9392. Measure of relief granted.

½. In general.

It is fundamental that a party should be entitled to formulate and present by appropriate pleading what he claims facts to be and to meet his opponent's assertions by his own proof before judgment is entered against him. U. S. Fidelity & Guaranty Co. v. Falk, 214M138, 7 NW(2d)398. See Dun. Dig. 7689.

1. On default.

A judgment by default for recovery of money for a debt for work done and material furnished in construction, repair, or improvement of debtor's homestead may be established by a provision in judgment incorporating a finding made under an amendment of allegations in complaint that work was done and material was furnished in deepening a well on premises constituting her "home" to effect that work was done and material was furnished in deepening a well on premises constituting her "homestead", describing it by its full legal description, or by extrinsic evidence showing that judgment was for such a debt, or by both. Keys v. Schultz, 212M109, 2NW(2d) 549. See Dun. Dig. 4996.

In a judgment by default plaintiffs' relief is strictly limited in nature and degree to that specifically demanded in complaint, and it makes no difference that other and greater relief might be justified by allegations and proofs. Id.

Where defendant knew before judgment that he was person sued in action on a note and that person designated in judgment referred to him, though middle initial was wrong, judgment could be corrected and was not invalid as to him. Cacka v. Gaulke, 212M404, 3NW(2d) 791. See Dun. Dig. 5001a.

Since a complaint alleging in the alternative that one or the other of two defendants is liable, but that plaintiff is unable to determine which one, states no cause of action, trial court properly set aside default judgment as to one of defendants and granted him right to interpose answer or demurrer. Pilney v. Funk, 212M398, 3NW(2d)792. See Dun. Dig. 5013a.

On default the relief which may be awarded to plaintiff is limited in nature and degree to the relief demanded in the complaint, whether the proof justifies this or greater relief. Id. See Dun. Dig. 4996.

Federal Soldiers and Sailors Civil Relief Act of 1940 will apply to actions in state court which come within its terms. (Mason's USCA, Title 50, end.) Op. Atty. Gen. (310), Nov. 6, 1940.

Judgment of restitution of municipal court in unlawful detainer action is conclusive not only of right of possession but fact upon which such right rested, and where plaintiff claimed title and right of possession as owner and defendant claimed right of possession under a contract for deed which owner claimed was duly cancelled, judgment for plaintiff was res judicata as to fact of cancellation of contract. Ferch v. Hiller, 210M3, 297NW102. See Dun. Dig. 3784, 5194a.

A prayer for general relief does not authorize granting of relief for which there is no basis in pleadings. Briggs v. Kennedy Mayonnaise Products, 209M312, 297 NW342. See Dun. Dig. 7537.

Where defendant filed memorandum that plaintiff was entitled to a certain credit which could not be recovered under issues pleaded, plaintiff by causing judgment to be entered in accordance with findings of fact and conclusions of law based on memorandum consented to decision on the issue. Id. See Dun. Dig. 7675.

A consent to try an issue not raised by pleadings can not be inferred from fact that evidence was received without objection which would have been pertinent to such an issue if it had been raised, where evidence was pertinent to issues actually made by pleadings. Id.

An issue may be litigated by consent of parties without pleadings the same as if it had been raised by them. Id.

Where an implied consent to litigate an unpleaded issue is claimed, it is to be gathered from course of trial. Id.

There is a presumption that evidence is offered and received with reference to issues made by pleadings. Id.

Though pleadings in action by lessee against lessor gave action appearance of one to recover damages for deceit, where facts made it one in rescission of lease, it was reversible error to try case as one for deceit and to submit to jury measure of recovery for deceit and not for rescission. Hatch v. Kulick, 211M309, 1NW(2d)359. See Dun. Dig. 7528a.

Where "principal issue" is whether plaintiffs or defendants are owners of disputed property, as to them a substantial decree may be made even though it may not completely settle all questions which may be involved so as to conclude rights of all persons who have an interest in subject-matter of litigation, such as grantors of respective parties. Flowers v. Germann, 211M412, 1NW(2d) 424. See Dun. Dig. 7316(66).

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. 7671.

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 executors, 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 pleadings. U. S. Fidelity & Guaranty Co. v. Falk, 214M138, 7NW(2d)398. See Dun. Dig. 7689.

When a complaint is amended after answer, defendant is not bound to answer de novo, and if he does not choose to do so, his original answer stands as his answer to the amended complaint, but if he makes timely election to answer the pleading as amended, judgment may not be entered against him until he has had the opportunity to exercise that right. Id.

3. Conclusiveness and collateral attack.

In suit by mortgage trust deed trustees at request of owner of about 90% of mortgage bonds to foreclose such trust deed wherein such owner of bonds was joined as party plaintiff and as defendant to petition of intervention, which suit resulted in decree for defendants, such owner of bonds was concluded by the decree. Phoenix Finance Corp. v. I., (CCA8), 115F(2d)1, 139ALR1490. Rev'd on other grounds 314US118, 62SCR139. Mandate ordered recalled and amended so as to give petitioner $94.00 for additional costs, 316US641, 62SCR940. See 313 US538, 61SCR833; 314US582, 62SCR294. See Dun. Dig. 5173, 6438.

Judgments are not evidence against strangers to the actions producing them, that is, persons who are not parties or their privies, and are therefore not admissible to establish the facts on which they are based. S. T. McKnight Co. v. Central Hanover Bank & Trust Co., (CCA8), 120F(2d)310.

Holding judgment recovered by a claimant against indemnitee in action, pendency of which he gave due notice to indemnitor and which he requested him to defend, conclusive against indemnitor in action by indemnitee to recover indemnity is not a denial of due process of law. State Bank v. A., 206M137, 288NW7. See Dun. Dig. 1646.

A judgment recovered against an indemnitee upon obligation covered by a contract of indemnity is conclusive against indemnitor in an action by indemnitee to recover indemnity, if indemnitee gave indemnitor notice of pendency of action in which judgment was recovered and requested him to assume defense. Id. See Dun. Dig. 4341.

Where plaintiff sued for breach of contract and recovered a judgment which was satisfied, and assigned his claim for breach of another contract and assignee recovered judgment, which, in turn, was assigned to plaintiff, and not satisfied, plaintiff could not then institute an action for conspiracy and include among allegations as "actionable wrongs" two paragraphs embodying the acts causing the breach of contract included as acts done

by defendants in "furtherance of the conspiracy." Cashman v. B., 206M301, 288NW732. See Dun. Dig. 5163.

Probate court being one of record and of superior jurisdiction, its records import verity and can be impeached only in a direct proceeding. Shapiro v. L., 206M440, 289 NW48. See Dun. Dig. 7769(33, 34, 35).

Presumption of jurisdiction on collateral attack is conclusive unless want of jurisdiction affirmatively appears from record itself. Id. See Dun. Dig. 5146.

If one sues on a contract, he must litigate all claims he then has thereunder. Such claims constitute but one cause of action. Doyle v. C., 206M649, 289NW784, 785. See Dun. Dig. 5167. Aff'd 60SCR1102.

Testimony of attorneys not in conflict with court record is competent as explanation of subject matter and as showing their own action with respect thereto. Fiske's Estate, 207M44, 291NW289. See Dun. Dig. 5138.

An order adjusting and allowing final account of an executor is equivalent of a judgment or decree adjudging amount due estate from executor, and may not be vacated, after expiration of time for appeal therefrom, except under §§9283 or 9405. Woodworth's Estate, 207M 563, 292NW192. See Dun. Dig. 5114.

Where in neither registration proceedings themselves nor by the record, existence of an unclaimed claimant is shown, want of jurisdiction does not appear from judgment roll itself, judgment of registration is not subject to collateral attack in a suit to quiet title. Dean v. R., 208M38, 292NW765. See Dun. Dig. 8361.

Decree of a federal court in a reorganization proceeding is not res judicata of certain issues expressly stated to be without prejudice to decision of such issues in state courts. First & American Nat. Bank of Duluth v. W., 207M537, 292NW770. See Dun. Dig. 5164.

A default judgment of a domestic court of superior jurisdiction being immune to collateral attack by a party for fraud, judgment debtor cannot show fraud and that he did not owe debt on which judgment was rendered. Geo. Benz & Sons v. H., 208M118, 293NW133. See Dun. Dig. 5143.

A third party defrauded by an agreement and judgment pursuant thereto, may attack the judgment collaterally for fraud, but parties to fraud cannot. Id.

A judgment by default is just as conclusive an adjudication between parties as any other. Geo. Benz & Sons v. H., 208M118, 293NW133. See Dun. Dig. 5181.

A prior judgment or order is not res judicata as to matters not litigated or adjudicated. First & American Nat. Bank of Duluth v. H., 208M295, 293NW585. See Dun. Dig. 5159.

An order affecting a substantial right, and appealable, made in determining a motion after a full hearing has been had on a controverted question of fact and deciding a point actually litigated, is an adjudication binding upon parties in a subsequent action and conclusive upon point decided, but estoppel applies only to facts actually litigated and not to such as might have been litigated. Bulau v. B., 208M529, 294NW845. See Dun. Dig. 6510.

Unless one is a party to cause and as such possessed of right to have a voice in proceeding, to examine and cross-examine witnesses, and to appeal from a final order or judgment, he is not bound by result of litigation, being a mere stranger thereto. Midland Loan Finance Co. v. L., 209M278, 296NW911. See Dun. Dig. 5171.

An order denying a motion by a defendant to vacate and set aside service of process upon him is res judicata on the question of jurisdiction and is not subject to collateral attack. Ferch v. Hiller, 210M3, 297NW102. See Dun. Dig. 5141.

Doctrine of res judicata applies to judgments of appellate as well as those of trial courts. Id. See Dun. Dig. 5163.

Judgments bind privies as well as parties. Id. See Dun. Dig. 5172.

Personal representative is in privity with his decedent in respect to property coming to him in his representative capacity under rule as to binding effect of judgment concerning title. Id. See Dun. Dig. 5173.

A grantee is in privity with his grantor within rule that one who succeeds to an estate or interest is entitled to benefits of judgment determining ownership. Id.

One who succeeds to an estate or interest in property stands in privity with predecessor in interest and is entitled to benefits of and is bound by a final adjudication in favor of or against the latter concerning such estate or interest which was rendered while he owned the same. Id.

Report of examiner of titles in registration proceedings showing an interest in vendee in contract for deed was not res judicata in favor of that vendee where proceeding was dismissed upon application of applicant for registration. Id. See Dun. Dig. 5179.

Public liability insurer by refusing to defend insured in a suit is concluded by implications contained in verdict and judgment therein. Langford Elec. Co. v. Employers Mut. Indem. Corporation, 210M289, 297NW843. See Dun. Dig. 4875pp, 5176.

A judgment affirmed by Supreme Court held conclusive in respect to ownership and title of land. Application of Rees, 211M103, 300NW396. See Dun. Dig. 5163.

Doctrine that previous adjudication of an issue of fact is conclusive between parties as to existence of that fact when it arises in a subsequent action premised upon a different claim or demand is known as "estoppel by former verdict" as distinguished from "estoppel by former judgment" which applies where a new action is brought on same cause of action as was involved in previous adjudication. Holtz v. Beighley, 211M153, 300NW 445. See Dun. Dig. 5161, 5162.

Previous adjudication of location of a boundary line, made in an action to recover property unlawfully possessed, operated as an estoppel against re-litigation of that issue in a later action brought to determine location of same boundary line. Id. See Dun. Dig. 1084, 5163.

Fact that judgment establishing boundary line results in a jog in true platted line does not, without more, divest true owner of his title to that portion of his land not lost to him by adverse possession. Dunkel v. Roth, 211M194, 300NW610. See Dun. Dig. 1084.

A judgment against operators or owners of two automobiles was not binding in a subsequent action by one of the defendants against the other to enjoin enforcement of judgment against him for purposes of contribution on question of wilful and intentional violation of traffic law by defendant to second suit. Kemerer v. State Farm Mut. Auto Ins. Co., 211M249, 300NW793. See Dun. Dig. 5164.

What was law for one of several co-makers of a note on appeal is law for others on a subsequent appeal. Pattridge v. Palmer, 211M368, 1NW(2d)377. See Dun. Dig. 398.

A judgment in favor of hotel guest against owner of the building and the lessee jointly is not res judicata of a question of liability between defendants or right to contribution growing out of the violation of the building code respecting construction and maintenance of two handrails on stairs. Judd v. Landin, 211M465, 1NW(2d) 861. See Dun. Dig. 5174.

An order of probate court allowing and settling guardian's intermediate account, and determining that guardian was not liable on a note issued by him to ward and outlawed prior to guardianship was res judicata regardless of any liability arising from acceptance of appointment as guardian. Guardianship of Overpeck, 211M576, 2NW(2d)140, 138ALR1375. See Dun. Dig. 4117a.

In action by receiver of bank for benefit of only creditor against only stockholder to recover assets alleged to have been fraudulently transferred to the stockholder, issue whether creditor's claim was satisfied was conclusively decided in proceeding brought by creditor for an order assessing stockholder's liability. Bolsta v. Bremer, 212M269, 3NW(2d)430. See Dun. Dig. 5172, 5204.

A judgment remains res judicata until reversed, and where affirmed by supreme court it is conclusive as to all issues determined, even though not considered by supreme court which affirmed on one of several grounds. Id. See Dun. Dig. 5163, 5201.

Where owner of automobile suffers personal injuries and property damage in a collision and recovery is had on either element of the cause, the other element is barred by the judgment. Hayward v. State Farm Mut. Automobile Ins. Co., 212M500, 4NW(2d)316, 140ALR1236. See Dun. Dig. 2531, 5167.

A judgment is never void for error, if the court has jurisdiction over the person of the defendant and the subject matter of the action. Sheridan v. Sheridan, 213M 24, 4NW(2d)785. See Dun. Dig. 5117.

Judgment in action for personal injuries against two defendants, adjudging one defendant liable and the other not liable, was conclusive that there was no liability of successful defendant to original plaintiff and hence no common liability as to him upon which a suit for contribution could be based. American Motorists Ins. Co. v. Vigen, 213M120, 5NW(2d)397, 142ALR722. See Dun. Dig. 5174.

Ordinarily, parties to a judgment are not bound by it in a subsequent controversy unless they were adversary parties in the original action, but where some issue was determined in original suit which is an essential element in a cause of action subsequently arising between such coparties, original adjudication of such issue is conclusive between them. Id.

In determining whether issues sought to be litigated have been determined in a prior action, it is proper to examine the record in that action to ascertain whether such issues were or could have been litigated therein. Melady-Briggs Cattle Corp. v. Drovers State Bank, 213 M304, 6NW(2d)454. See Dun. Dig. 5163.

A judgment on merits constitutes an absolute bar to a second suit for same cause of action and is conclusive between parties and privies, not only as to every matter which was actually litigated but as to every matter which might have been litigated therein. Id.

A judgment in a former action is final and conclusive between the same parties as to all questions or issues presented by the pleadings therein. Id.

In determining whether a given question was an issue in prior trial, it is proper to look behind judgment to ascertain whether the evidence necessary to sustain a judgment for a party in the second action would have authorized a judgment for him in the first action. Id. See Dun. Dig. 5169.

A common test in determining whether a former judgment is a bar in a subsequent action is to inquire whether the same evidence will sustain both actions. Id. See Dun. Dig. 5169.

A dismissal on the merits differs from dismissals authorized by statute, in that the latter conclude the action only; whereas, the former not only ends the action, but concludes also the cause of action, determining

finally the whole controversy, and it is a final adjudication. Id. See Dun. Dig. 5180.

Judgment entered pursuant to a written stipulation of settlement dismissing action on merits is binding on the parties and a bar to a subsequent action involving an issue before the court in the former action. Id. See Dun. Dig. 5203.

A decision of tax commission allowing certain deductions from income constituted a settlement of income taxes for the year involved, but had no binding effect as to subsequent year. Abbott's Estate, 213M289, 6NW(2d)466. See Dun. Dig. 5160a.

Whether or not the fact basis for an administrative order can be attacked collaterally in a court proceeding is an interesting question. Tepel v. Sima, 213M526, 7NW(2d)532. See Dun. Dig. 6885.

Fact that prospective guest in automobile recovered for personal injuries in action against owner and host and driver is not conclusive against another guest who negligently closed automobile door on her foot, such negligent guest not being a party to former action and not being bound by decision therein. American Farmers Mut. Auto. Ins. Co. v. Rilse, 214M6, 8NW(2d)18. See Dun. Dig. 5171.

Employer was not a party to a proceeding by employees to secure benefits under Unemployment Compensation Act, especially where he had no notice of such application and no opportunity to be heard, and decisions awarding benefits were not binding upon him merely because he did not appeal therefrom, as affecting fixing of his rate of contribution to unemployment fund. Juster Bros. v. Christgau, 214M108, 7NW(2d)501. See Dun. Dig. 5160a.

Where personal liability for debt in a lien foreclosure action is foundd 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, 214M 266, 7NW(2d)776. See Dun. Dig. 1920.

Where a party moved only for judgment notwithstanding the verdict, and thus challenged only the sufficiency of the evidence to sustain verdict, the charge of the court is the law of the case determining the effect of the judgment as to the issues adjudicated. Fidelity & Casualty Co. v. Minneapolis Brewing Co., 214M436, 8NW(2d)471. See Dun. Dig. 5163-5184.

Where judgment in negligence case was an adjudication that negligence of all defendants was active and that all defendants were in pari delicto, insurer of one of the defendants was bound by the determination in a subsequent suit against another of the defendants for indemnity to recover amount paid by such insurer as its contribution to the judgment previously paid. Id. See Dun. Dig. 5167.

An adjudication of incompentency by the probate court is evidence, but not conclusive, in any litigation to prove the mental condition of the alleged incompetent at time the judgment was rendered or at any past time during which the judgment finds the person to be incompetent. Johnson v. Johnson, 214M462, 8NW(2d)620. See Dun. Dig. 4519.

By making the poor person a party to proceedings to determine settlement as between municipalities, not only are his rights protected, but the adjudication is res judicata as to him also. Robinette v. Price, 214M521, 8NW (2d)800. See Dun. Dig. 5159-5206.

Refusal of trial court to grant injunction restraining violation of, or interference with, contract did not in effect determine or deny the legality or obligation of the contract so as to render issues relative thereto res adjudicata upon dismissal of appeal from judgment denying such injunctive relief, trial court not having construed or determined the validity of the contract. McDonald v. B. and B. D. and H. and W. L. Union No. 792, 215 M274, 9NW(2d)770. See Dun. Dig. 4479, 5168.

A judgment in a former action by plaintiff in her individual capacity to recover for personal injuries based upon the same facts and issues as those in the later action brought by her as administratrix of her deceased husband against the defendant for wrongful death is not res judicata as to those facts and issues in the later action, where the recovery would be for not only the benefit of the plaintiff, but also for the payment of decedent's funeral expenses. Schmitt v. Emery, 215M288, 9 NW(2d)777. See Dun. Dig. 5173-5178.

The general rule is that a judgment does not operate as a bar or estoppel against a person unless he appears in the two actions in the same capacity. Whether a special administratrix who is the sole beneficiary of the recovery in a subsequent action for wrongful death of her husband is barred by a judgment in a prior action brought by her in an individual capacity is not determined. Id. See Dun. Dig. 5178.

A judgment on the merits constitutes an absolute bar to a second suit for the same cause of action and is conclusive between the parties and their privies. O'Neil v. Rueb, 215M296, 10NW(2d)363. See Dun. Dig. 5163.

In determining whether the former judgment was rendered on the merits, the record of the earlier action will be examined. Id. See Dun. Dig. 5179.

Where the only issue submitted to jury in an action on an account was whether an oral arrangement had been entered into between parties under which the defendant could pay the account in installments of $10 per month, a verdict and judgment for defendant was not res adjudicata so as to bar a second action by plaintiff after the time limitation involved in the oral agreement was no longer an obstacle. Id. See Dun. Dig. 5179.

A former judgment is not a bar to the bringing of another action when the matter involved in the prior litigation was distinctly withdrawn, abandoned, ruled out, or withheld from the consideration of the jury so that it constituted no part of the verdict or judgment rendered thereon. Id. See Dun. Dig. 5163.

A determination in a prior action that plaintiffs, as holders of third mortgage, were entitled to have rents due under the renewal of a lease executed during the period of redemption from the foreclosure of the second mortgage applied to reduce amount due under the first mortgage, is res judicata in a subsequent action between the same parties. Gandrud v. Hanson, 215M474, 10NW (2d)372. See Dun. Dig. 5205.

While it is the primary obligation of the husband under a decree of divorce to pay attorney fees adjudicated, nevertheless the reasonableness of the value of the services rendered must be determined by the court, and if there is a promise by the wife to pay for them, express or implied from the request to perform them, the reasonable value is determined by the decree and, in the absence of agreement to the contrary, she is estoppd to challenge it. Whipple v. Mahler, 215M578, 10NW(2d)771. See Dun. Dig. 5174, 5189.

A decree of divorce which adjudged allowance of attorney's fees directly to the divorced wife's attorney is an adjudication of the reasonableness of such fees and estops both parties to the divorce action as between them and the attorney from challenging the reasonable value of the services as so determined. Id. See Dun. Dig. 5189.

Judgments of a municipal court attempted to be established by unconstitutional law are valid. Op. Atty. Gen., (306a-4), Feb. 21, 1941.

Failure to plead mistake in action at law as a bar to a subsequent suit in equity. 24MinnLawRev576.

Judgment—res judicata as between co-defendants. 27 MinnLawRev 519.

4. Foreign judgments—full faith and credit.

Haddock v. Haddock,201US562, 22SupCtRep525, 50 L.Ed. 867, 5 Ann. Cas. 1 overruled insofar as the theory of that case is that the court of the state where wife resided need not give full force and effect to divorce obtained by the husband in another state wherein husband had established a separate domicile because husband had wrongfully left his wife in the matrimonial domicile and obtained service upon her only by publication. Williams v. North Carolina, 317US287, 63SCR207, 143ALR 1273, rev'g 220NC445, 17SE(2d)769. See Dun. Dig. 1530, 1557, 1698, 2784, 5207.

Bigamy prosecution was not sustainable in North Carolina on theory that defendant was still married to spouse from whom divorce was obtained in Nevada on ground that defendant had not obtained a bona fide residence in Nevada before obtaining the divorce there, since the Nevada court's decree including the jurisdictional finding of bona fide residence in Nevada was entitled to full faith and credit in North Carolina. Williams v. North Carolina, 317US287, 63SCR207, 143ALR 1273, rev'g 220NC445, 17SE(2d)769, and overruling Haddock v. Haddock, 201US562, 26SCR525, 50LEd867, 5Ann Cas1. See Dun. Dig. 5207.

Decree of state court in action for annulment of marriage ordering that life insurance policy issued to husband remain in possession of wife and that husband keep policy in effect and refrain from changing beneficiary was entitled to full faith and credit in federal court and other state courts. Mueller v. Mueller,(CCA8) 124F(2d)544. Cert. dism'd 316US649, 62SCR1288. See 62 SCR1273. See Dun. Dig. 5207.

The act of Congress providing that judicial proceedings authenticated as required thereby shall have such faith and credit given to them "in every court within the United States as they have by law or usage in the courts of the state from which they are taken" (28 Mason's U. S. Code Ann. 687) extends to rule of the constitution to all courts, federal as well as state. Id.

Where action was brought in federal district court of Minnesota against the Federal Reserve Bank on account of bank's refusal to make a loan, a decision of the federal district court of Montana in a previous action on the same cause, dismissing that action because it failed to state a cause of action and because of improper venue was res judicata as to both matters. Billings Utility Co. v. Federal Reserve Bank, (DC-Minn) 46FSupp691. See Dun. Dig. 5180.

Presumptively Jefferson county court of common claims, Alabama, being a court of record with a seal, had jurisdiction to render judgment as shown by certificate, in absence of evidence demonstrating otherwise in action on such judgment in Minnesota. Patterson v. C., 209M50, 295NW401. See Dun. Dig. 5208.

Judgment entered only on docket of court of another state would be sufficient to support action in this state if such entry constituted a sufficient judgment under laws of the foreign state. Id. See Dun. Dig. 5209.

In action on a judgment of a foreign state, if defendant had same name as defendant against whom judgment was taken, it was burdened with disproving identity of party. Id. See Dun. Dig. 5209.

In action on judgment of another state there may be no allowance in addition to judgment for costs in action in foreign court. Id. See Dun. Dig. 5210.

Jurisdiction of a foreign corporation may not be acquired by service of summons on a statutory process agent when corporation is not transacting any business in the state and cause of action is upon a contract entered and to be performed in state of corporation's domicile. Babcock v. Bancamerica-Blair Corp., 212M428, 4NW(2d)89. See Dun. Dig. 1698.

Where husband obtained a divorce in another state on constructive service while wife was a resident of this state, a court of this state had jurisdiction of an action to determine alimony where it had the jurisdiction of both parties by personal service, foreign decree having made no provision for alimony. Sheridan v. Sheridan, 213M24, 4NW(2d)785. See Dun. Dig. 1698, 5207.

Where a personal judgment has been rendered in court of a state against a nonresident merely upon constructive service and without acquiring jurisdiction over the person of the defendant, such judgment may not be enforced in another state in virtue of full faith and credit clause. Id.

Each state may determine for itself what effect is to be given to divorce decree rendered against one of its own citizens by the court of a foreign state where personal service of process upon defendant is wholly lacking and there is no property belonging to defendant that can be reached within the jurisdiction of such foreign court. Minnesota has recognized foreign divorces insofar as they affect the marriage status, but treats such judgments as in rem and not binding as to alimony and support money. Sheridan v. Sheridan, 213M24, 4NW(2d) 785. See Dun. Dig. 1698, 2784b, 2799, 5207.

5. Precedents.

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

In diversity of citizenship cases, the federal courts must follow the conflict of laws rules prevailing in the states in which they sit. Klaxon v. Stentor Electric Mfg. Co., 313 U. S. 487, 61 Sup. Ct. Rep. 1020, 85 L. Ed. 1477. See Dun. Dig. 3748.

Doctrine of stare decisis would not be adhered to where it was clear to the court that the decision sought to be followed under the doctrine was erroneous. U. S. v. State of Minnesota, (CCA8), 113F(2d)770.

Decisions of the United States Supreme Court are final as to what constitutes interstate commerce. City of Waseca v. B., 206M154, 288NW229. See Dun. Dig. 3747.

The law is a practical science, having to do with the affairs of life, and any rule is unwise if, in its general application, it will not, as a usual result, serve the purposes of justice. First State Bank of Correll, 206M250, 288NW709. See Dun. Dig. 7498a(38).

Doctrine of stare decisis is declaration of policy rather than rule, and no rule of practice and no rights of property being involved, it can have no restraining effect where erroneous policy of decision law is opposed to a later rule declared by statute. Park Const. Co. v. I., 209 M182, 296NW475. See Dun. Dig. 8819a.

Absent adequate rule-making power in the court, change in law should come from legislative rather than judicial action. Olson v. Neubauer, 211M218, 300NW613. See Dun. Dig. 1595, 8819.

A decision of an administrative body is not binding by way of stare decisis or otherwise upon the court in a later action involving the same or similar points of law. Abbott's Estate, 213M289, 6NW(2d)466. See Dun. Dig. 8819.

Decisions of Supreme Court of the United States will be followed in interpretation of the meaning of due process under federal constitution. State v. Northwest Airlines, 213M395, 7NW(2d)691. See Dun. Dig. 3747, 8819.

If a court is convinced of the justice of a cause, it cannot refuse to recognize and give effect to it merely because an applicable precedent or legal principle cannot be found, as, in the absence of authority, it must of its own develop and assert those legal principles which in its judgment will best serve the ends of justice in the case before it and in other like cases. Country Club District Service Co. v. Village of Edina, 214M26, 8NW(2d)321. See Dun. Dig. 5500a, 8819.

Decisions of the Supreme Court of the United States, as the final arbiter of the meaning and application of the federal constitution, are binding on state courts even though inconsistent with prior decisions. Glover v. Minneapolis Building Trades Council, 215M533, 10NW(2d) 481, 147ALR1071. See Dun. Dig. 3747, 8819.

6. Summary judgment.

Discrepancy between amount sued for and amount for which plaintiff filed its claim in bankruptcy required explanation in the way of evidence, and precluded summary judgment. Chase Nat. Bank of City of New York v. B., (DC-Minn), 32FSupp230.

In suit on written guaranty of notes, plaintiff was not entitled to summary judgment where an alleged payment, denied by defendant to have been made, would possibly have an important bearing on an acceleration clause in the notes, and in determining as to whether or not statute of limitations had run. Id.

9393. Judgment between parties and against several defendants.

1. Between several parties.

Where judgment in negligence case was an adjudication that negligence of all defendants was active and that all defendants were in pari delicto, insurer of one of the defendants was bound by the determination in a subsequent suit against another of the defendants for indemnity to recover amount paid by such insurer as its contribution to the judgment previously paid. Fidelity & Casualty Co. v. Minneapolis Brewing Co., 214M436, 8NW (2d)471. See Dun. Dig. 1923.

9394. Same, how signed and entered—Contents.

½. In general.

A stockholder does not have constructive notice of default judgment against corporation so as to be a "discovery" within statute authorizing setting aside of fraudulent judgment. Lenhart v. Lenhart Wagon Co., 210 M164, 298NW37, 135ALR833. See Dun. Dig. 2120.

Order for judgment on pleadings was in favor of all defendants, though memorandum attached to it confined discussion of reasons for decision to case against one defendant. Robinette v. Price, 214M521, 8NW(2d)800. See Dun. Dig. 5049.

1. Entry by clerk.

Suit by attorney against both parties to a divorce case to recover allowance of attorney's fees adjudged by decree of divorce was upon an adjudicated liability and clerk of court could properly enter judgment on default as upon a suit for a liquidated sum. Whipple v. Mahler, 215M578, 10NW(2d)771. See Dun. Dig. 4995, 5040.

3. What constitutes judgment book.

Probate court's denial of petition to reopen estate does not constitute res judicata on issue of fraud in inducing a party not to file a claim against estate of a deceased person because probate court did not have jurisdiction to determine such issue. Bulau v. B., 208M529, 294NW845. See Dun. Dig. 5194a.

9396. Treble damages for trespass.

Evidence held to sustain verdict that trespass by electric company was not casual, the result of inadvertence, mistake, or unintentional. Lawrenz v. L., 206M315, 288 NW727. See Dun. Dig. 9696.

9400. Lien of judgment.

DOCKETING JUDGMENT

5. As evidence of judgment.

Where transcript of judgment of municipal court of St. Paul for recovery of money is filed with clerk of district court, judgment remains subject to jurisdiction of municipal court to vacate and set it aside in a proper case. Keys v. Schultz, 212M109, 2NW(2d)549. See Dun. Dig. 6904, 6907.

A judgment of municipal court of St. Paul for recovery of money becomes a lien upon judgment debtor's real estate by filing a transcript thereof with clerk of district court. Id.

JUDGMENT LIEN

8. Nature of lien.

Lien of a judgment upon a homestead may be enforced by execution unaffected by debtor's discharge in bankruptcy. Keys v. Schultz, 212M109, 2NW(2d)549. See Dun. Dig. 749, 4209, 4210, 5068.

The docketing of a judgment, and the lien thereby acquired, performs office, and takes place of an actual levy on land, and a levy under execution does not change lien of judgment, but is only a means to enforce it. Id. See Dun. Dig. 5066.

Rights of bona fide purchasers at execution sale. 24 MinnLawRev 805.

9. Duration of lien.

Municipal court judgment docketed by transcript in district court ceases to be a lien 10 years after its entry, rather than 10 years after docketing in district court. Op. Atty. Gen., (520d), Jan. 25, 1940.

Lien of judgment creditor is extinguished by forfeiture to state for delinquent taxes. Op. Atty. Gen., (412a-10), Feb. 13, 1940

Judgments—limitations upon actions, executions and liens. 24MinnLawRev660.

10. Upon what estates and interests.

Where judgment debtor and another acquired title to property in joint tenancy, and thereafter judgment debtor transferred her interest to other joint tenants, there was accomplished a complete severance of joint tenancy and judgment and execution sale could only reach interest of judgment debtor as a tenant in common, even though other joint tenant died following conveyance to her. Greiger v. Pye, 210M71, 297NW173. See Dun. Dig. 5068, 5069.

Doubt as to whether a homestead exemption exists has been held to make a title unmarketable when there is a judgment on record against vendor, and a vendee is entitled to recover amount of such outstanding judgment following execution of contract. Service & Security v. St. Paul Federal Sav. & Loan Ass'n, 211M199, 300NW 811. See Dun. Dig. 10024.

A judgment by default for recovery of money for a debt for work done and material furnished in construction, repair, or improvement of debtor's homestead may be established by a provision in judgment incorporating a finding made under an amendment of allegations in complaint that work was done and material was furnished in deepening a well on premises constituting her "home" to effect that work was done and material was

furnished in deepening a well on premises constituting her "homestead", describing it by its full legal description, or by extrinsic evidence showing that judgment was for such a debt, or by both. Keys v. Schultz, 212M109, 2 NW(2d)549. See Dun. Dig. 4209, 4210, 5068.

A duly docketed judgment for a debt for work done or materials furnished in construction, repair, or improvement thereof is a lien upon a homestead. Id.

Where owner repurchases tax-forfeited property and assigns his interest to a third person and deed is issued directly to assignee, judgment docketed against assignor attached to interest of assignee. Op. Atty. Gen. (412a-23), Sept. 13, 1940.

Where contract of deed was executed and purchaser failed to make payment required and gave vendor a quitclaim deed and was released from further obligation to pay, and meantime state obtained judgment against vendee, there is probably no property right subject to lien of state judgment, but there is no state officer with authority to give a release. Op. Atty. Gen. (520d), Apr. 30, 1943.

9404. Assignment of judgment—Mode and effect.

Rights of bona fide purchasers at execution sale. 24 MinnLawRev 805.

9405. Judgments, procured by fraud, set aside.

1. Nature of action.

An order adjusting and allowing final account of an executor is equivalent of a judgment or decree adjudging amount due estate from executor, and may not be vacated, after expiration of time for appeal therefrom, except under §§9283 or 9405. Woodworth's Estate, 207M 563, 292NW192. See Dun. Dig. 5108a.

Statute does not speak in terms of jurisdiction, but imposes a duty and speaks in terms only of duty, and violation would be error and so reversible if prejudicial, which is very different from a transgression of jurisdiction. Lenhart v. Lenhart Wagon Co., 211M572, 2NW(2d) 421. See Dun. Dig. 5126.

An action brought under this section is equitable in its nature and is governed by equitable principles. Bloomquist v. Thomas, 9NW(2d)337. See Dun. Dig. 5126.

Lower court has no power to alter, amend, or modify a mandate of the supreme court, but a lower court possessing general original jurisdiction in law and equity, has the power to set aside a judgment entered pursuant to mandate of the supreme court on the ground that there was fraud in the proceeding before the supreme court preventing a party from having his defenses properly presented his full day in court, to which he is entitled. Tankar Gas v. Lumbermen's Mut. Casualty Co., 215M265, 9NW(2d)754, 146ALR1223. See Dun. Dig. 5126.

Statute contemplates the exercise of the equitable powers of the court: Id.

Fraudulent judgments procured in lower tribunals may be set aside. Id.

A fraudulent judgment obtained in a workmen's compensation proceeding may be set aside for ffaud under this section. Id. See Dun. Dig. 5136.

3. Concurrent with remedy by motion.

Section makes remedy by action concurrent with that by motion, and has no application where attack is made by motion rather than action. Lenhart v. Lenhart Wagon Co., 211M572, 2NW(2d)421. See Dun. Dig. 5126.

5. Stranger to action cannot maintain.

In proceeding by minority stockholder for relief against a judgment taken against corporation by fraudulent practices, corporation is "aggrieved party." Lenhart v. Lenhart Wagon Co., 210M164, 298NW37, 135ALR833. See Dun. Dig. 5132.

6. Complaint.

Averment by minority stockholder that a groundless default judgment had been taken against corporation by those engaged in a conspiracy to defraud it obtained after service of process upon a co-conspirator stated grounds for relief from a judgment taken by fraudulent act or practice of prevailing party. Lenhart v. Lenhart Wagon Co., 210M164, 298NW37, 135ALR833. See Dun. Dig. 5135.

Complaint in action to set aside a judgment for fraud held not to show as a matter of law that plaintiff was guilty of such contributory negligence as to preclude it from the relief it seeks. Tankar Gas v. Lumbermen's Mut. Casualty Co., 215M265, 9NW(2d)754, 146ALR1223. See Dun. Dig. 5135.

7. For perjury.

Intrinsic fraud as a result of perjury committed by prevailing party is not a ground for setting aside a judgment under this section, where the pleadings clearly inform the opposing litigant of the issues and what will be attempted to be proved. Bloomquist v. Thomas, 215M 35, 9NW(2d)337. See Dun. Dig. 5128.

8. For fraudulent practices on adverse party.

Perjury or fraud must be something that occurs outside the trial and prevents other party from participating in trial or induces him to not appear and present his defense or objections. Woodworth's Estate, 207M563, 292NW192. See Dun. Dig. 5122.

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

Judgment of a marriage annulment was properly set aside on the ground of intrinsic fraud under this section where husband fraudulently induced wife to believe that an action for the annulment of his marriage to her had been abandoned and, by his conduct, she was prevented from appearing and presenting her defense. Id. See Dun. Dig. 5129.

To entitle a party to setting aside of judgment, it is necessary that fraud be of an extrinsic nature and collateral to the issue tried in the action, and must be of such a nature as to prevent the unsuccessful party from having his day in court and presenting his case fully, and intrinsic fraud is unavailaing. Tankar Gas v. Lumbermen's Mut. Casualty Co., 215M265, 9NW(2d)754, 146 ALR1223. See Dun. Dig. 5129.

Where supreme court affirmed judgment against employer but dismissed proceeding as to compensation insurer because policy of insurance indicated there was no coverage of the place of business where the accident occurred, employer would be entitled to relief under this section if there actually was coverage and insurer while representing employer was guilty of fraud in failing to so disclose leading employer to believe it was properly represented. Id.

The adversary character of interests between the parties necessary to establish the status of "aggrieved" and "prevailing" party is not limited solely to those litigants who in the first class find themselves obliged to pay a judgment and those in the second class who are entitled to receive the fruits of the litigation, and the relationship extends also to other parties to the action, such as an insurer joined in a workmen's compensation proceeding and representing employer against whom judgment was rendered but took steps to relieve itself of liability and was successful in supreme court, employer thus being an aggrieved party and the insurer a prevailing party for all practical purposes. Id. See Dun. Dig. 5132.

9. For fraud on court.

Self or double dealing by a fiduciary renders transaction voidable by beneficiary, but where facts were fully disclosed to court, and action of guardian was on advice of independent counsel whose only duty was to, and whole whole interest was that of, the ward, and transaction was approved by court, it cannot thereafter be disaffirmed by ward. Fiske's Estate, 207M44, 291NW289. See Dun. Dig. 5126.

10. In action for divorce.

A woman whose marriage was annulled by a judgment fraudulently obtained was not estopped from bringing action to set aside the judgment by the fact that her husband without her knowledge married another who was ignorant of the first marriage, the first wife having no knowledge of either the annulment or the second marriage until death of former husband 20 days after the second marriage, there being no children and only property rights being involved. Bloomquist v. Thomas, 215 M35, 9NW(2d)337. See Dun. Dig. 5131.

In action to vacate and set aside a decree annuling a marriage contract for intrinsic fraud, upon a remarriage, the death of the husband intervening and property rights only being involved, the rights of the parties under this section are governed by equitable principles. Id. See Dun. Dig. 5131, 5136.

The state has been considered an interested party in cases brought under this section where the marital relation was involved, but where death intervened and there were no children but only property rights involved state had no concern. Id. See Dun. Dig. 5131.

Principles involved in setting aside a judgment of annulment of marriage are the same as those in actions to set aside divorce decrees. Id. See Dun. Dig. 5131.

11. Laches.

In considering whether minority stockholders have been diligent in discovering fraud perpetrated upon corporation, there is no presumption that directors are dishonest which burdens stockholders with duty of investigating books, since fiduciary capacity of directors absolving stockholders of anticipating the worst, and knowledge of public records containing evidence of the fraud will not be constructively imputed to stockholder. Lenhart v. Lenhart Wagon Co., 210M164, 298NW37, 135 ALR833. See Dun. Dig. 2096, 5132.

There has been no "discovery" of the fraud by a corporation through any doctrine of imputed notice where corporation is in adverse control and management of conspiring stockholders permitting default judgment to be entered against corporation, discovery occurring only when nonparticipating stockholders as a class have been informed. Id.

Woman was not guilty of laches in bringing action to set aside a judgment annulling her marriage where the parties to first action made up immediately after service of papers and went on living together as usual, and the judgment was obtained without her knowledge and while she believed that the action for annulment had been abandoned and her former husband remarried almost immediately without her knowledge, where she acted promptly after discovering the second marriage and the fraud that had been perpetrated on her. Bloomquist v. Thomas, 215M35, 9NW(2d)337. See Dun. Dig. 5134.

Belief may be barred by laches of a party seeking relief. Id.

Estoppel may arise precluding the granting of relief from a judgment fraudulently obtained. Id.

12. Relief which may be awarded.

In action to vacate and set aside a decree annuling a marriage contract for intrinsic fraud, upon a remarriage, the death of the husband intervening and property rights

only being involved, the rights of the parties under this section are governed by equitable principles. Bloomquist v. Thomas, 215M35, 9NW(2d)337. See Dun. Dig. 5131, 5136.

The court has the power and it is its duty to award such relief as the facts in each particular case and the ends of justice may require. Id. See Dun. Dig. 5136.

Where judgment of marriage annulment was obtained fraudulently and without knowledge of wife and husband almost immediately remarried another woman without knowledge of the former marriage or the judgment of annulment and husband died in an accident 20 days later and there were no children, the second wife was an innocent third party within meaning of this section, equities being evenly divided. Id. See Dun. Dig. 5136.

Where insurer represented employer in workmen's compensation proceeding, against whom judgment was affirmed in the supreme court but insurer was relieved of liability without prior notice or knowledge of employer that insurer was denying liability under its policy, and employer brought action to set aside judgment for fraud, fact that injured employee had vested third party rights was no ground for denying relief, since court may make adequate provisions fully and completely to protect the rights of employee and determine the rights as between the employer and the insurer. Tankar Gas v. Lumbermen's Mut. Casualty Co., 215M265, 9NW(2d)754, 146ALR 1223. See Dun. Dig. 5136.

13. Limitations.

Probate court has power to vacate a previous order allowing a final account where it is made to appear that the order was procured without a hearing because of mistake and inadvertance on the part of the court, and such power does not terminate upon the expiration of the time to appeal from the order sought to be vacated. Henry's Estate, 207M609, 292NW249. See Dun. Dig. 7784.

9406. How discharged of record.

Judgments will not be set off upon motion if it will defeat attorney's right to a lien, and this applies as to a judgment for defendant for costs, especially where defendant is without funds and attorney has advanced cost of printing brief. Exsted v. O., 206M644, 287NW602. See Dun. Dig. 5088.

9407. Satisfaction and assignment by state.

Manner of extinguishing liens of judgment in favor of state following tax forfeiture and sale. Op. Atty. Gen. (425d), Jan. 9, 1943.

9409. Discharge of judgments against bankrupts.

Trial court did not abuse its discretion in vacating a judgment proved up as upon default after defendant's counsel answered in court and advised plaintiff's attorney, the court and the clerk that defendant had been adjudicated a bankrupt, and left court room in belief that no proceedings would be had, defendant later obtaining a discharge in bankruptcy. Davenport v. S., 206M69, 288 NW167. See Dun. Dig. 5121.

9410. Joint debtors—Contribution and subrogation.

Kemerer v. S., 206M325, 288NW719.

In action to restrain enforcement of judgment for purpose of contribution purposes, evidence held to sustain finding that when defendant entered intersection and was about to turn left he saw plaintiff's car approaching and swung in front of it in intentional violation of traffic law and in reckless disregard of obvious danger and that neither defendant nor his insurer was entitled to contribution. Kemerer v. State Farm Mut. Auto Ins. Co., 211M249, 300NW793. See Dun. Dig. 1924.

A judgment against operators or owners of two automobiles was not binding in a subsequent action by one of the defendants against the other to enjoin enforcement of judgment against him for purposes of contribution on question of wilful and intentional violation of traffic law by defendant to second suit. Id. See Dun. Dig. 5164.

Judgment in action for personal injuries against two defendants, adjudging one defendant liable and the other not liable, was conclusive that there was no liability of successful defendant to original plaintiff and hence no common liability as to him upon which a suit for contribution could be based. American Motorists Ins. Co. v. Vigen, 213M120, 5NW(2d)397, 142ALR722. See Dun. Dig. 1923.

Contribution is available between joint tort-feasors, absent intentional wrong or conscious illegal act on part of one seeking such relief. 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 the action for contribution. Id.

Section has made no change in substantive law of contribution, but has merely supplied a summary method of procedure. Id.

9411. Several judgments against joint debtors.

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, 2782, 7328, 7329.

All persons participating in a tort are liable as tort feasors. Lawrenz v. L., 206M315, 288NW727. See Dun. Dig. 9643(92, 97).

Where owners and independent contractor agreed upon a repair on rebuilding that they knew would be dangerous to other persons who would use the building, they were joint tort feasors and equally guilty of reprehensible conduct. Murphy v. B., 206M527, 289NW563. See Dun. Dig. 5835, 9643.

Where an injury is caused by concurrent negligence of several persons, negligence of each is proximate cause of injury and each is liable for all resulting damages. Anderson v. J., 208M373, 294NW224. See Dun. Dig. 7000(84, 85).

Where both owners of hotel and their lessee contributed directly to injury of person using stairway by violating building code requiring two handrails, they were jointly and severally liable, though there was no conspiracy or joint concert of action. Judd v. Landin, 211M465, 1NW(2d)861. See Dun. Dig. 6976, 6991b.

EXECUTIONS

9416. When enforced.

A personal judgment entered without service of process was absolutely void, not merely irregular or erroneous, and a levy of execution under it constituted a tort in nature of trespass rendering plaintiff liable for damages, irrespective of malice or other wrongful conduct on part of plaintiff. Beede v. N., 209M354, 296NW 413. See Dun. Dig. 7837.

Judgments—limitations upon actions, executions and liens. 24MinnLawRev660.

9423. Execution against property, how executed.

Status and interest of a member of a federal savings and loan association is not subject to provisions of uniform stock transfer act relating to a levy of execution, and share certificate need not be seized to make a levy on account effective, and sheriff does not sell the share account, but merely collects from association the "things in action," the amount in the debtor's account to which debtor is entitled. Benton's Apparel v. Hegna, 213M 271, 7NW(2d)3, 143ALR1148. See Dun. Dig. 3516.

9425. What may be levied on, etc.

½. In general.

Where judgment debtor and another acquired title to property in joint tenancy, and thereafter judgment debtor transferred her interest to other joint tenants, there was accomplished a complete severance of joint tenancy and judgment and execution sale could only reach interest of judgment debtor as a tenant in common, even though other joint tenant died following conveyance to her. Greiger v. Pye, 210M71, 297NW173. See Dun. Dig. 3510.

Rights of bona fide purchasers at execution sale. 24 MinnLawRev 805.

1. Held subject to levy.

Shares of corporate stock are personal property in the form of a property interest in the corporation, and are subject of attachment, garnishment, and levy of execution. Wackerbarth v. W., 207M507, 292NW214. See Dun. Dig. 3510.

9429. On other personal property.

Shares of corporate stock are personal property in the form of a property interest in the corporation, and are subject of attachment, garnishment, and levy of execution. Wackerbarth v. W., 207M507, 292NW214. See Dun. Dig. 3510.

Status and interest of a member of a federal savings and loan association is not subject to provisions of uniform stock transfer act relating to a levy of execution, and share certificate need not be seized to make a levy on account effective, and sheriff does not sell the share account, but merely collects from association the "things in action," the amount in the debtor's account to which debtor is entitled. Benton's Apparel v. Hegna, 213M271, 7NW(2d)3, 143ALR1148. See Dun. Dig. 3516.

Sheriff could levy execution upon corporate stock issued prior to effective date of the uniform stock transfer act without obtaining physical possession of the certificate, and could make a sale thereof. Brennan v. Friedell, 215M499, 10NW(2d)355. See Dun. Dig. 3516.

A judgment creditor who claims his debtor has made a transfer of corporate stock in fraud of creditors may disregard the transfer and levy upon the property by execution and leave the issue of fraudulent transfer to be later determined. Id. See Dun. Dig. 3906.

9430. Certificate to be furnished officer.

Shares of corporate stock are personal property in the form of a property interest in the corporation, and are subject of attachment, garnishment, and levy of execution. Wackerbarth v. W., 207M507, 292NW214. See Dun. Dig. 3510.

9431. On pledged or mortgaged chattels.
In replevin to recover property levied on by sheriff sheriff may set up defense that he did not take property from plaintiffs and that a third party was entitled to possession as against plaintiffs. Braman v. Wall, 214M 238, 7NW(2d)924. See Dun. Dig. 3509.

9432. On growing crops, etc.
Crops may not be sold under original execution after expiration of thirty days from maturity of crops, at least not by new sheriff while former sheriff who made levy still lives. Op. Atty. Gen. (390a-19), Apr. 10, 1943.

9435. Sale, when and how.
A purchaser of property sold on execution under judgment acquires a good title as against claim of fraud and non-indebtedness. Geo. Benz & Sons v. H., 208M118, 293NW133. See Dun. Dig. 3536.

9436. Sale of corporate stock, etc.
In an action to renew a personal judgment, giving credit for amount paid thereon by execution and sale of corporate stock, defendant could not set up as a defense or counterclaim that sheriff did not have actual possession of certificate of stock at time of sale and bidders were therefor deterred from bidding, and stock was sold at a price less than its actual worth, since any objections that the defendant might have had should have been raised in a direct attack to set the sale aside. Brennan v. Friedell, 215M499, 10NW(2d)355. See Dun. Dig. 3502 (99).
Fact that the price received from sale of corporate stock at execution sale was less than the actual value thereof does not, standing alone, invalidate it. Id. See Dun. Dig. 3539a.

9437. Certificate of sale of realty.
2. Rights of purchaser.
Where interest in real estate was sold under execution to holder of an assignment of judgment executed in blank, and thereafter land was condemned by the state and damages deposited with clerk of court, and thereafter sheriff's deed was executed under the execution sale, grantee was entitled to the money deposited. State v. Anderson, 208M334, 294NW219. See Dun. Dig. 3536.

9447. Property extempt.—No property hereinafter mentioned shall be liable to attachment, or sale on any final process, issued from any court:

1. The family Bible.

2. Family pictures, school books or library, and musical instruments for the use of the family.

3. A seat or pew in any house or place of public worship.

4. A lot in any burial ground.

5. All wearing apparel of the debtor and his family; all beds, bedsteads, and bedding kept and used by the debtor and his family; all stoves and appendages put up or kept for the use of the debtor and his family; all cooking utensils; and all other household furniture not herein enumerated, not exceeding $500.00 in value.

6. Three cows, ten swine, a span of horses or mules or in lieu of such span of horses or mules, one farm tractor, 100 chickens, 50 turkeys, 20 sheep, and the wool from the same, either in raw material or manufactured into yarn or cloth; food for all the stock above mentioned necessary for one year's support, either provided or growing, or both, as the debtor may choose; one wagon, cart, or dray, one sleigh, two plows, one drag; and other farming utensils, including tackle for teams, not exceeding $300.00 in value.

7. Provisions for the debtor and his family necessary for one year's support, either provided or growing, or both, and fuel necessary for one year.

8. The tools and instruments of a mechanic, miner, or other person, used and kept for the purpose of carrying on his trade; and, in addition thereto, stock in trade, including goods manufactured in whole or in part by him, not exceeding $400.00 in value; and the library and implements of a professional man.

9. The presses, stones, type, cases, and other tools and implements used by any person or co-partnership in printing or publishing a newspaper, or by any person hired by him to use them, not exceeding $2,000 in value, together with stock in trade not exceeding $400.00 in value.

10. One watch, one sewing machine, one typewriting machine, and one bicycle.

11. Necessary seed for the actual personal use of the debtor for one season, not to exceed in any case the following amounts: 100 bushels of wheat, 100 bushels of rye, 100 bushels of barley, 100 bushels of potatoes, 100 bushels of oats, 100 bushels of flax, 100 bushels of corn, and binding material sufficient for use in harvesting the crop raised from such seed.

12. The library and philosophical and chemical or other apparatus belonging to, and used for the instruction of youth in, any university, college, seminary of learning, or school which is indiscriminately open to the public.

13. All money arising from fire or other insurance upon any property exempt from sale on execution.

14. All money received by, or payable to, a surviving wife or child from insurance upon the life of a deceased husband or father, not exceeding $10,000.

15. All money, relief, or other benefits payable or to be rendered by any police department association, fire department association, beneficiary association, or fraternal benefit association to any person entitled to assistance therefrom, or to any certificate holder thereof or beneficiary under any such certificate.

16. The wages of any person not exceeding $35.00, plus $5.00 additional for each actual dependent of such person, due for any services rendered by him or her for another during 30 days preceding any attachment, garnishment or the levy of any execution against him or her, provided, that all wages paid to such person, and earned within said 30 day period, shall be deemed and considered a part of, or all, as the case may be, of said exemption of $35.00, plus $5.00 additional for each dependent. Said exemption above referred to shall be allowed out of the wages of any such person as a right whether claimed or not, unless said employee, his agent or attorney, shall file with the court in which said action is pending his written waiver of all or part of such exemption; in the absence of proof of dependents he shall be entitled to an exemption of $35.00, in any event; and if proof is made by affidavit or testimony of additional dependents he shall be entitled to such additional exemption as provided by this act; provided, that the party instituting garnishment proceedings shall pay the cost of any garnishment where the amount in the hands of the garnishee is wholly exempt. The exemption shall be allowed out of the wages of any such person and paid when due by the employer, as if no garnishment summons had been served. The spouse of such person, all minor children under the age of 18 years and all other persons wholly dependent upon him or her for support are to be classed as dependents within the meaning of this act, provided, however, that the maximum exemption in any case shall not exceed $50.00. The salary or wages of any debtor who is or has been a recipient of relief based on need shall, upon his return to private employment after having been a recipient of public relief, be exempt from attachment, garnishment or levy of execution for a period of six months after his return to employment, provided, however, that he may take advantage of such exemption provisions only once in every three years, provided, however, that agencies distributing relief shall at the request of creditors, or their agents or attorneys, inform them whether or not any debtor has been a recipient of relief based on need within such period of six months.

17. The earnings of the minor child of any debtor or the proceeds thereof, by reason of any liability of such debtor not contracted for the special benefit of such minor child.

18. The chaim for damages recoverable by any person by reason of a levy upon or sale under execution of his exempt personal property, or by reason of the wrongful taking or detention of such property by any person, and any judgment recovered for such damages.

All articles exempted by this section shall be selected by the debtor, his agent, or legal representative. The exemptions provided for in subdivisions 6-18 hereof, shall extend only to debtors having an actual residence in the state. No property exempted hereby shall be exempt from attachment or execution in an action for the recovery of the purchase money of the same property. (As amended Act Apr. 21, 1941, c. 351, §1.)

(4).

Exemption laws relate to debts and obligation voluntarily incurred, and not to taxes. Christgau v. W., 208M263, 293NW619. See Dun. Dig. 3680.

(6).

An automobile is not exempt from levy and sale as a "wagon". Poznanovic v. M., 209M379, 296NW415. See Dun. Dig. 3686.

History of statute, which formerly used the word "vehicle" indicated to the court that legislature changed it to read "wagon, cart or dray" with an intent to restrict the tenor of the statute to the vehicles so strictly specified, so as not to include a motor vehicle. Giles v. Luker, 215M256, 9NW(2d)716. See Dun. Dig. 3686.

(8.)

A nonresident is not entitled to claim tools of his trade exempt. Ingebretson v. M., 206M336, 288NW577. See Dun. Dig. 3688.

A farmer is not entitled to an exemption as a "mechanic, miner, or other person". Poznanovic v. M., 209M379, 296NW415. See Dun. Dig. 3688.

A feed grinding outfit, consisting of a machine mounted upon a truck, owner going from farm to farm and grinding feed for farmers as a means of support, is exempt. Op. Atty. Gen. (390a-19), Mar. 18, 1943.

(16).

Workers leaving WPA work for private employment are exempt from attachment and garnishment for six months, but only where employment by WPA was granted for purpose of relieving actual need to a person who would otherwise be compelled to seek direct relief. Op. Atty. Gen., (843k), Oct. 3, 1939.

During the 6-months period following receipt of relief debtor may invoke exemption against as many creditors as he may choose. Op. Atty. Gen. (843k), Oct. 2, 1940.

This sub-section as amended is constitutional. Id.

Words "return to private employment" would mean returning to such employment that it is no longer necessary to extend relief based on need to debtor. Op. Atty. Gen. (843k), Nov. 5, 1941.

UNIFORM DECLARATORY JUDGMENTS ACT

9455-1. Courts to construe rights.

See Dun. Dig. 4988a.

Adopted by Maine and West Virginia, 1941.

In suit for declaratory judgment court could not determine question rendered moot by stipulation that judgment should not be res judicata, as act did not authorize court to give opinion upon hypothetical question not connoting a controversy of a justiciable nature. Imperial Irr. Dist. v. N., (CCA9), 111F(2d)319.

Liability of insurer to defend state court action against insured held a controversy within meaning of act. Maryland Casualty Co. v. U., (CCA1)111F(2d)443, rev'g (DC-Mass)29FSupp986.

The phrase "rights and other legal relations" is broad enough to authorize a declaration of nonliability. Id.

Upon motion to dismiss action for declaratory relief facts alleged in complaint must be taken as true. Consolidation Coal Co. v. M., (CCA6), 113F(2d)813.

Federal Declaratory Judgment Act is operative only as to controversies which are such in a constitutional sense, that is appropriate for judicial determination, the word controversy being less comprehensive than case. Smith v. B., (CCA4), 115F(2d)186, aff'g (DC-SC), 34FSupp 989.

In determining whether there was requisite diversity of citizenship in declaratory judgment suit to give federal court jurisdiction it was duty of court to arrange parties with respect to actual controversy, looking beyond formal arrangement made by the bill, and such realignment should be based upon identity of interests. State Farm Mut. Automobile Ins. Co. v. H., (CCA4), 115F(2d)298, aff'g (DC-SC), 32FSupp665.

A bona fide controversy between citizens of different states is necessary to support federal jurisdiction in declaratory judgment suit depending upon diversity of citizenship. Id.

Relief under federal declaratory judgment statute must be sought within limits of jurisdiction of federal court. Id.

State attorney general is not under a duty to enforce a law which violates federal constitution, and hence suit against him to have the law declared unconstitutional is not a suit against the state; but before he may be proceeded against as an individual there must be some basis for treating him as a threatened wrongdoer, and suit cannot be maintained against him in face of his express declaration that he would not attempt to enforce the law until he formed an opinion that it was constitutional. Southern Pac. Co. v. C., (CCA9), 115F(2d)746.

Existence of a justiciable controversy is essential to jurisdiction to render declaratory judgment, and such controversy is present when enforcement of statute is sought against one asserting its unconstitutionality, who would sustain irreparable injury by the enforcement. Id.

Where gas company and city disagreed as to former's liability to carry out contract to furnish such city gas from certain field at rate fixed in the contract, the latter claiming that gas was available from field in question and former claiming that it had to be procured from foreign field rendering the rates provided in the contract inapplicable, a justiciable controversy was presented within jurisdiction of federal court, and such jurisdiction was not defeated by Johnson Act prohibiting exercise of federal jurisdiction to restrain the enforcement of orders affecting public utility rates. Mississippi Power & Light Co. v. C., (CCA5), 116F(2d)924.

A complaint which asks for no more than immediate relief which must be adjudicated before it is given was not a true declaratory judgment action. Corcoran v. Royal Development Co., (CCA2), 121F(2d)957, aff'g (DC-NY), 35FSupp400. Cert. den. 62SCR360.

A complaint which asks for no more than immediate relief which must be adjudicated before it is given is not a true declaratory action. Corcoran v. Royal Development Co., (CCA2), 121F(2d)957, aff'g (DC-NY), 35F Supp400. Cert. den. 62SCR360.

The right of one who is in danger of being sued for patent infringement to bring a declaratory judgment action to determine validity of the patent is intended to avoid a multiplicity of infringement suits by the patent owner. Crosley Corp. v. Hazeltine Corp., (C.C.A.3), 122F(2d)925, rev'g and remanding 38FSupp38. Cert. den. 315US813, 62SCR798. Reh. den. 62SCR913. See Dun. Dig. 4988a.

Suit by bishops of Methodist Church, on behalf of themselves and all other members of the church, for a declaratory judgment that the union of three Methodist bodies was legal, involved a real controversy between a vast number of citizens, and the court would take jurisdiction notwithstanding the pendency of other class suits in state courts. Purcell v. Summers, (CCA4), 126F (2d)390, rev'g (DC-SC), 34FSupp421. Cert. den. 317US 640, 63SCR32. See Dun. Dig. 4988a.

The general rule that where two actions are begun in different districts involving the same subject matter the court first acquiring jurisdiction would decide the case was applicable where action for a declaratory judgment as to patent validity was filed in one district on the day before a patent infringement suit was commenced in another. Crosley Corp. v. Westinghouse Electric & Manufacturing Co., (CCA3), 130F(2d)474, rev'g (DC-Pa), 43F Supp690. Cert. den. 317US681, 63SCR202.

Availability of another adequate remedy is no ground for refusing relief under federal act, although some support is found for this position in cases arising under state law. Dunleer Co. v. M., (DC-WVa), 33FSupp242.

The Declaratory Judgment Act furnishes an additional remedy, which is not to be denied because of the pendency of another suit. Lehigh Coal & Navigation Co. v. C., (DC-Pa), 33FSupp362.

Suit by dairy proprietor and farmer milk producers for declaratory judgment determining that milk received by such dairy proprietor from his co-plaintiffs and used by him in the manufacture of dairy products should be included in pooling arrangement under milk order promulgated under Agricultural Marketing Agreement Act, held to present an actual controversy. Roloff v. P., (DC-Ia), 33FSupp513.

Act does not add to jurisdiction of court, but is a procedural statute which provides an additional remedy for use in cases where federal courts already have jurisdiction. Mutual Life Ins. Co. of N. Y. v. M., (DC-SC), 34FSupp127. Aff'd (CCA4)116F(2d)434.

A controversy must be definite and concrete. Id.

A declaratory judgment suit is not a suit in equity and the rule that absence of an adequate remedy at law is requisite to a suit in equity is not applicable. Bakelite Corp. v. L., (DC-Del), 34FSupp142.

This act merely affords an additional remedy to one who is not certain of his rights and desires an early adjudication without waiting until his adversary should decide to bring suit. Sunshine Mining Co. v. C., (DC-Idaho), 34FSupp274.

Employer was entitled to declaratory judgment concerning Fair Labor Standards Act and to enjoin prosecutions thereunder threatened to be instituted by employees and their bargaining agents on theory that lunch period may not be deducted in computing working hours. Id.

Availability of another remedy is no bar. Id.

Suit by bishops of Methodist Church, on behalf of themselves and all other members of the church, for a declaratory judgment that the union of three Methodist bodies was legal, involved a real controversy between a vast number of citizens, and the court would have taken jurisdiction but for the pendency of other class suits in state courts. Purcell v. S., (DC-SC), 34FSupp421.

Jurisdiction of court is limited to matters which are in their nature "cases or controversies." Lambert v. D., (DC-Tenn), 34FSupp610.

Purpose of statute is to adjudicate rights of parties who have not otherwise been given opportunity to have those rights determined. Travelers Ins. Co. v. W., (DC-Fla), 34FSupp721.

Court would not accept jurisdiction of matter passed on by railroad commission, of which it had exclusive jurisdiction. Delno v. Market St. Ry. Co., (DC-Cal), 38 FSupp341. Aff'd (CCA9), 124F(2d)965. See Dun. Dig. 4988a.

Granting of declaratory relief rests in discretion of court. Id.

Where assignee of beneficiary on insurance policy had brought an action in state court, insurer could not maintain a declaratory judgment action in federal court. Prudential Ins. Co. of America v. Bohlken, (DC-Mo), 40F Supp494.

Purpose of Act is to settle and accord relief for uncertainties with respect to rights. Sunshine Mining Co. v. Carver, (DC-Idaho), 41FSupp60.

General interest of public in having Tennessee Valley Authority maintain its principal offices in Muscle Shoals vicinity did not give individual taxpayers rights to maintain declaratory judgment action. Frahn v. Tennessee Valley Authority, (DC-Ala), 41FSupp83.

Where real controversy involved in petition by indemnity insurance company is whether insured's car was being operated with his consent at time of accident, and insured was a resident of same state as claimant under the policy, federal court had no jurisdiction. Hartford Accident & Indemnity Co. v. Smith, (DC-Ia), 41FSupp692.

Corporation threatened by patent holder with infringement suit against itself and its customers is entitled to declaratory judgment determining rights under patent even though it has filed certificate of dissolution since date of its incorporation. Display Stage Lighting Co. v. Century Lighting, Inc., (DC-NY), 41FSupp937. See Dun. Dig. 4988a.

In action for infringement of a patent, defendant had a right to plead a counterclaim asking that the patent be adjudged invalid and not infringed where threatened voluntary dismissal of the suit would result in damage to the defendant. Benz v. J., (DC-Wis), 43FSupp799. See Dun. Dig. 4988a.

Fact that patentee had granted an exclusive license to another, and had infringmement suit pending in other jurisdictions, would not prevent defendant in one infringement action from pleading a counterclaim asking for declaratory judgment that other patents as to which it had received notice of infringement were invalid and not infringed. Id.

Action by one who had recovered a personal injury judgment, against insurer of judgment debtor for a declaratory judgment to determine insurer's liability under a policy, presented a justiciable controversy, even though an appeal from the judgment by the insurer to the State Supreme Court was pending. Caldwell v. Traveller's Ins. Co., (DC-Ark), 45FSupp573. See Dun. Dig. 4988a.

In action by insurer against a pawnbroker and one of his pledgors, as representative of all, to determine liability of insurer on Fire Insurance policy, fact that named pledgor had an action pending against the insurer in a municipal court would not prevent federal court from granting a declaratory judgment. Pacific Fire Ins. Co. v. Reiner, (DC-La), 45FSupp703. See Dun. Dig. 4988a.

Allegations in a complaint that patent owner was threatening plaintiff and his distributor with infringement suit, coupled with plaintiff's denial of infringement held to show a real controversy which could be determined by a declaratory judgment. Ice Plant Equipment Co. v. Martocello, (DC-Pa), 43FSupp281. See Dun. Dig. 4988a.

An action against a patent holder for declaratory judgment that patent was invalid and not infringed by plaintiff stated a substantial controversy. Petersime Incubator Co. v. Bundy Incubator Co., (DC-Ohio), 43FSupp 446. See Dun. Dig. 4988a.

In action for declaratory judgment as to the validity of a patent, and to restrain patentee from unfair trade practice consisting of threatening infringement suit, court has jurisdiction of all questions presented. Id.

In determining whether to entertain a suit for a declaratory judgment the court has a limited judicial discretion. Western Electric Co. v. Hammond, (DC-Mass), 44FSupp717. See Dun. Dig. 4988a.

A complaint by motion picture distributing company praying for a declaratory judgment that labor union's threat to call a strike among all plaintiff's motion picture operators, if distributor did not enter contract to boycott independent operators who did not employ members of the union, was illegal, and restraining the union from calling such a strike stated a valid cause of action under this act. Loew's Incorporated v. Basson, (DC-NY), 46FSupp66. See Dun. Dig. 4988a.

An action in state court, involving liability on insurance policies, by two insurers who were residents of the same state as the insured would not prevent the federal district court from taking jurisdiction of an action for a declaratory judgment by another group of insurance companies over which the state court had no jurisdiction. Firemen's Fund Ins. Co. v. Crandall Horse Co., (DC-NY), 47FSupp78. See Dun. Dig. 4988a.

In declaratory judgment action by a group of insurers who had issued policies covering the same property the federal district court would not grant an injunction restraining an action brought in state court by the insured against two of the insurers to recover on their policies. Firemen's Fund Ins. Co. v. Crandall Horse Co., (DC-NY), 47FSupp82. See Dun. Dig. 4988a.

Where insurance company brought action for declaratory judgment to determine its liability under a policy against the insured and the plaintiffs in an action in state court against the insured who were suing for $25,000, the amount involved was sufficient to give the federal court jurisdiction. Trinity Universal Ins. Co. v. Woody, (DC-NJ), 47FSupp327. See Dun. Dig. 4988a.

An issue which the party who attempts to raise it is estopped to contest does not present a justiciable controversy under this act. Timken-Detroit Axle Co. v. Alma Motor Co., (DC-Del), 47FSupp582. See Dun. Dig. 4988a.

Court would have no right to refuse a declaratory judgment as to liability for patent infringement merely because at the time the action was brought there was another action pending in another court between the patent owner and another party in which the patent owner was seeking to adjudicate its right under such patent. Atlas Mineral Products Co. v. Johnston, (DC-Mich), 47FSupp948. See Dun. Dig. 4988a.

If there is a question as to whether there is a justiciable controversy, burden of proving its existence is on the plaintiff in the action. State Farm Mut. Automobile Ins. Co. v. Smith, (DC-Mo), 48FSupp570. See Dun. Dig. 4988a.

The Federal Declaratory Judgment Act expressly excepts controversies relating to federal taxes, but it may be invoked where the suit is not by a taxpayer but by a third person. Excelsior Life Ins. Co. v. Thomas, (DC-Texas), 49FSupp90. See Dun. Dig. 4988a.

Fact that patentee subsequently brought action in United States District Court of Maryland for identical relief would be no grounds for dismissing or staying a declaratory judgment action brought in New York by one threatened with infringement suit, where there was no burden upon the court or inconvenience to the parties to try the case therein. U. S. Industrial Chemicals v. Carbide & Carbon Chemicals Corp., (DC-NY), 49FSupp 345. See Dun. Dig. 4988a.

The provision of the Selective Service Act that the decision of the Selective Service Board as to classification shall be final except for appeal in the prescribed manner prevented the existence of any justiciable controversy which would give the court the power to render a declaratory judgment as to a registrant's proper classification. Meredith v. Carter, (DC-Ind), 49FSupp899. See Dun. Dig. 4988a.

In action to quiet title to patent for injunctive relief, defendant's allegations that plaintiffs knew of license held by defendant, and that plaintiffs were marketing invention so as to violate Title 35, §§15 and 22, Mason's U. S. Code Annotated, was a valid counterclaim. American Car & Foundry Inv. Corp. v. Chandler-Groves Co., (DC-Mich), 2FRD85.

Where a contract has been entered into because of mistake, fraud or of duress or in violation of some law, annulment therefor may be sought under Declaratory Judgments Act. Macdanz v. N., 206M510, 289NW58. See Dun. Dig. 4988a.

Judicial power does not extend to giving advisory opinions to other departments of the government. Selz v. C., 207M277, 290NW802. See Dun. Dig. 4988a.

A proceeding for a declaratory judgment must be based on a justiciable controversy for lack of which appellate court will reverse for want of jurisdiction of subject matter, although point has nowhere been raised. Id. See Dun. Dig. 4988a.

Though plaintiff really seeks equivalent of a declaratory judgment, supreme court on appeal from order of dismissal based upon pleadings asking only for injunctive relief, cannot determine the question, dismissal being based on adequacy of remedy. Fisch v. S., 208M102, 292NW758. See Dun. Dig. 4988a.

Question of respective rights of a lienor who has obtained a judgment for foreclosure of a motor vehicle lien for storage or repairs and a subsequent bona fide chattel mortgagee purchasing it at foreclosure sale under his mortgage, does not by a sale to a third party become moot so as to abate declaratory judgment act. Conner v. C., 208M502, 294NW650. See Dun. Dig. 4988a.

A civil service rule allowing an employee to absent himself at any time necessary to prevent loss of any unused portion of his annual leave was not an adequate remedy which would prevent an employee from obtaining a declaratory judgment where controversy is the length of the time employee may stay away and receive pay. Nollet v. Hoffmann, 210M88, 297NW164, 134ALR192. See Dun. Dig. 4988a.

Existence of another adequate remedy does not preclude a judgment for declaratory relief. Barron v. City of Minneapolis, 212M566, 4NW(2d)622. See Dun. Dig. 4988a.

"Justiciable controversy." Klein v. J., 195So(Ala)593.

Proceeding in declaratory relief is one in equity. Zimmer v. G., 109Pac(2d)(CalApp)34.

Court should not have granted a declaratory judgment that certain sales were exempt from sales tax upon the ground that they were wholesale sales, until evidence was produced on which to base conclusions as to the declaration to be made and the relief to be granted. Armstrong v. Carman Distributing Co., 108Colo223, 115 Pac(2d)386.

Authority given to court of Connecticut to render declaratory judgments was not intended to broaden their function so as to include issues which would not be such

as could be determined by courts in ordinary actions. Board of Education v. B., 16Atl(2d)(Conn)601.

It must clearly appear from pleadings that there is an actual controversy between parties, and just what controversy is. City of Cherryvale v. Wilson, 153Kan505, 112 Pac(2d)111.

One of the conditions for rendering declaratory judgment is that person seeking it must have an interest, legal or equitable, by reason of danger of loss or of uncertainty as to his rights or other jural relations. Id.

Demurrer to complaint in action for declaratory judgment is not "defense" within meaning of Kentucky statute which provides that if no defense be made in action, plaintiff cannot have judgment for any relief not specifically demanded, and plaintiff cannot recover interest where it was not included in prayer for relief. Union Light, Heat & Power Co. v. C., 144SW(2d)(KyApp)1046.

A declaratory action cannot be had to determine matters involved in a case which is already pending. Gibbs v. Tyree, 154SW(2d)(Ky)732.

Contention that mortgagors transfer of mortgaged property impaired security of mortgage, held not to present justiciable controversy in absence of showing that mortgagor's personal estate was not sufficient to cover any deficiency judgment. Carolina St. P. Bldg. Ass'n v. S., 13Atl(2d)(Md)616.

The purpose of the act is to afford an immediate remedy where the traditional remedies are not adequate. Where an immediate adequate remedy exists and is available this act is not appropriate. Id.

Where one of common remedies of law or equity was adequate and available, a proceeding for a declaratory judgment was not appropriate. Morgan v. D., 16Atl(2d)(Md)916.

There was no intention to widen traditional remedies of, or distinction between, law and equity. Id.

Complaint in action by taxpayer seeking to have tax status determined, tax statute declared unconstitutional, and injunction against state tax officers, held demurrable where legislature had pointed out definitely certain tribunals and conferred upon them authority to decide tax matters. Williams v. T., 17Atl(2d)(MdApp)137.

Granting of declaratory relief is discretionary, and where no consequential relief is sought, it will be exercised with great care, extreme caution, and only where there are special circumstances demanding it, and ordinarily a declaration will be refused where it would require a judicial investigation of disputed facts, especially where disputed questions of fact will be subject of judicial investigation in a regular action. Rott v. Standard Accident Ins. Co., 299Mich384, 300NW134.

A declaratory judgment is not a substitute for regular actions, and one test of right to declaratory relief is necessity of present adjudication as a guide for plaintiff's future conduct in order to preserve his legal rights. Id.

Court should not have dismissed a petition for a declaratory judgment to interpret a will, even though it disagreed with all of petitioner's contentions. Kinston v. St. Louis Union Trust Co., 348Mo448, 154SW(2d)39.

An equity court has the power to determine the parentage of a child. Carlson v. Bartels, 10NW(2d)(Neb)671. See Dun. Dig. 4988a.

Petition for declaratory judgment cannot be maintained where there is available another adequate remedy. Gitsis v. T., 16Atl(2d)(NH)369.

Where liability insurer denies coverage and refuses to defend, insured is not entitled to sue for a declaratory judgment, having adequate remedy by defending action and suing for damages. Dover Boiler Works v. N., 15Atl(2d)(NJ)231.

The Declaratory Judgments Act was not intended to supersede the jurisdiction of the Supreme Court to declare legal rights through the agency of its writ of certiorari. Provident Mut. Life Ins. Co. v. Unemployment Compensation Commission, 126NJLaw348, 19Atl(2d)630.

A declaratory judgment suit will not lie to determine an issue which is pending in a proceeding before another court which presumably has jurisdiction. Freechas Realty Co. v. H., 20NYS(2d)588.

In action against village board for declaratory judgment determining that plaintiff holds office of village justice, board was not required to establish its good faith in abolishing plaintiff's office. O'Connor v. G., 21NYS(2d)631.

Dealer of fish occupying upper floor of building abutting street on which he had a roadway stand was entitled to judgment declaring that market rules restricting issue of permits to tenants of street level stores arbitrarily discriminated against tenants of upper floor in contravention of due process and equal protection clauses of Fourteenth Amendment. Russo v. M., 21NYS(2d)637.

A declaration of rights will not be made where matter has become moot pending the action. Gross, 22NYS(2d)623, 174Misc1086.

A declaratory action is appropriate to determine status of child as to legitimacy, parentage, and the like. Melis v. D., 24NYS(2d)51, 260AppDiv772, aff'g 18NYS(2d)432.

Action in which plaintiff sought declaratory judgment that he was entitled to office of president of common council of city of Mount Vernon was not case for declaratory judgment. Brush v. C., 24NYS(2d)355, 260AppDiv1048, aff'g 20NYS(2d)455.

Declaratory judgment decreeing that plaintiff and appellant are husband and wife despite divorce procured by wife in Nevada was proper where Nevada court never acquired jurisdiction over husband, and wife, resident of New York, went to Nevada for sole purpose of procuring a divorce. Langsam v. L., 24NYS(2d)510, 260App Div1034.

Where court found that a decree of divorce obtained by defendant in Nevada was without service of process on present plaintiff, latter was entitled to judgment declaring Nevada divorce decree void. Hollister v. Hollister, 26NYS(2d)1020, 261AppDiv693.

There can be no declaratory judgment regarding issues not involved in suit. Dry v. B., 11SE(2d)(NC)143.

Act is intended to provide a method whereby parties to a justiciable controversy may have the same determined by a court in advance of any invasion of rights or breach of obligation, but no action lies to obtain a decision which is merely advisory, or which determines only abstract questions, and action must involve an actual controversy of a justiciable character between parties having adverse interests. Asbury Hospital v. Cass County, 7NW(2d)(ND)438. See Dun. Dig. 4988a.

The nature of an action for a declaratory judgment, whether at law or in chancery, is determined by the relief to which the plaintiff would be entitled. Liberal S. & L. Co. v. F., 28NE(2d)(OhioApp)367.

Cross petition in suit for declaratory judgment which did not constitute a counterclaim or set-off could not be withdrawn and redocketed under statute allowing withdrawal of counterclaim or set-off and permitting it to become subject of another action. Schriber Sheet Metal & Roofers v. S., 28NE(2d)(Ohio)699.

Action will not be defeated merely because plaintiff could have maintained an action at law. Id.

Declaratory judgment held proper remedy to determine priorities between mortgages though determination could have been had by foreclosure, as latter remedy would have been slow, expensive and complicated. Grambo v. S., 14Atl(2d)(Pa)925.

Where there is a real controversy which will be terminated by the declaration sought court will take jurisdiction even though plaintiff has another remedy. Day v. Ostergard, 146PaSuper27, 21Atl(2d)586.

An action for a declaratory judgment must involve a controversy of a justiciable character between parties having adverse interests and the party seeking such relief must have a legally protectible interest. State of North Dakota v. Perkins County, 9NW(2d)(SD)500. See Dun. Dig. 4988a.

Statutes do not require courts to render advisory opinions or to determine moot or theoretical questions. Id.

Judgment dismissing action for declaratory judgment was not res judicata where there was no determination with respect to status or rights of plaintiff, dismissal presumably resting on ground of lack of jurisdiction. Gibson v. U., 105Pac(2d)(Utah)353.

Since enactment of Virginia Declaratory Judgment Statute it is as much incumbent upon a wrongdoer to assert his rights in a court of law as it is incumbent upon one whose rights are being violated to assert them in a court of equity. Mullins v. M., 10SE(2d)(Va)593.

An innocent purchaser of real estate subject to a mortgage who claims conveyance to him was fraudulent as to creditors of an ancestor in title and having paid only part of purchase price before learning of fraudulent character of transfer, has a good cause of action for declaratory relief. Angers v. S., 235Wis422, 293 NW173.

An action for declaratory judgment cannot be joined with an action to review an order of public service commission denying application of railroad for a permit to abandon agency service at a certain city. Thomson v. P., 236Wis157, 294NW517. See Dun. Dig. 4988a.

Purpose of declaratory judgments law was to expedite justice and to avoid long and complicated litigation—not to interrupt the orderly process of liquidation or other legal proceedings presently in operation, as for instance to determine legality of an assessment by liquidator of a mutual casualty company. Cheese Makers Mut. Casualty Co. v. D., 243Wis206, 10NW(2d)125. See Dun. Dig. 4988a.

Discretion to refuse jurisdiction of actions for declaratory judgments. 26 Minn. Law Rev. 677.

9455-2. May have instruments construed.

Complaint for declaratory judgment by insurance company alleging existence of controversy between such company and its insured respecting coverage of policy and as to obligation of company to defend and indemnify insured in actions to recover for injuries caused third party and also disclosing controversy between insurance company and another insurance company as to coverage afforded by latter's policy, held to disclose controversy appropriate for judicial determination. Maryland Casualty Co. v. T., (CCA8), 114F(2d)952.

Suit under Federal Declaratory Judgment Act, held maintainable by insurer for declaration of rights under automobile policy. Maryland Casualty Co. v. T., (DC-Cal), 29FSupp69. Aff'd, (CCA9), 115F(2d)297.

Federal court did not have jurisdiction of declaratory judgment suit by insurer against insured as claimant for damages for injuries by insured where there was no controversy between insurer and insured and insured and claimant were residents of same state. State Farm Mut. Automobile Ins. Co. v. H., (CCA4), 115F(2d)298, aff'g (DC-SC), 32FSupp665.

Neither manufacturer of patented machine for production of paper milk bottles nor manufacturer of such bot-

tles has such a direct interest in question of validity and construction of city ordinance as to support suit for declaratory judgment that such ordinance does not sustain administrative interpretation that it prohibits the use of paper milk containers, of if it does that it is invalid, since the damage accruing to each of such parties is only remotely consequential and incidental. Ex-Cell-O Corp. v. C., (CCA7), 115F(2d)627.

There was no justiciable controversy in action against state attorney general for judgment declaring unconstitutional state statute, enforcement of which would cause irreparable injury, where defendant disclaimed any attempt to enforce the law until he had formed an opinion that it was constitutional. Southern Pac. Co. v. C., (CCA9), 115F(2d)746.

Action by citizens of Florida against Florida corporation for death of plaintiffs' child who was killed by defendant's truck was triable in state court and defendant's insurer, though have an interest in outcome of controversy which involved validity of a release, could not carry it into federal court because of diverse citizenship there being no justiciable controversy between insurer and plaintiffs. Liberty Mutual Ins. Co. v. L., (CCA5), 117F(2d)735. Cert. dism'd 313US601, 61SCR1087.

Controversy as to whether state court action is predicated upon an occupational disease so as to be outside of coverage of insurance policy or upon an accident within state workmens' compensation law covered by policy held to present an issue of fact and not a controversy proper for judicial determination under Declaratory Judgment Act. Maryland Casualty Co. v. T., (CCA8), 117F(2d)905, aff'g (DC-Mo), 30FSupp949.

While federal courts can render no judgment at law directing cancellation of an insurance policy for fraud since court of equity alone can give such remedy in case of irreparable injury, federal courts may and will by declaratory judgment adjudge such policy void where it was procured by representations fraudulently concealing real facts, though an adequate legal remedy exists in defending a suit upon policy. Great Northern Life Ins. Co. v. Vince, (CCA6), 118F(2d)232. Cert. den. 62SCR71.

Where patentee gives notice to buyers of a certain product that its patent covers the manufacture of such product, petition by competitor for a declaratory judgment determining whether his product infringes the patent presents a justiciable controversy. Treemond Co. v. Schering Corp., (CCA3), 122F(2d)702, rev'g (DC-NJ), 35FSupp475.

Allegations that plaintiff and defendant entered into contracts for construction and sale of thirty-four houses on their joint account, that five of the houses had been sold with losses chargeable to defendant, and that defendant denied liability and repudiated the entire contract, entitled plaintiff to declaratory judgment with respect to validity of contracts and rights thereunder. Dunleer Co. v. M., (DC-WVa)33FSupp242.

An action will lie to determine scope of matters to be submitted to arbitration pursuant to agreement in contract. Lehigh Coal & Navigation Co. v. C., (DC-Pa) 33FSupp362.

A submission to arbitration is a contract subject to laws governing contracts in general and must have all elements necessary to a contract, and interpretation and construction of written submissions is a question for the court. Id.

Where insured's son met with accident while using insured's automobile, and actions for injuries were instituted in state court by the son's guests at time of accident, insurer could maintain proceeding under federal declaratory judgment act for determination of liability under policy. Liberty Mut. Ins. Co. v. S., (DC-Minn)34F Supp885.

Action, by insurer against insured and other claimants, to have policy declared ineffective at time of accident presented justiciable controversy. New Century Casualty Co. v. Chase, (DC-WVa), 39FSupp768.

Defendant held entitled to declaratory judgment that patent was invalid after plaintiffs dismissed action for infringement. Larson v. General Motors Corp., (DC-NY), 40FSupp570.

Question of whether insurance company's failure to disclaim liability waived the defense that conditions of the policy had been broken presented a justiciable controversy. Commercial Standard Insurance Co. v. Blankenship, (DC-Tenn), 40FSupp618.

One who might be prosecuted under the Fair Labor Standards Act could bring declaratory action to determine his rights. Sunshine Mining Co. v. Carver, (DC-Idaho), 41FSupp60.

Action by taxpayers of Muscle Shoals vicinity based on requirement of Tennessee Valley Authority Act that principal offices be maintained in that vicinity did not present justiciable controversy. Frahn v. Tennessee Valley Authority, (DC-Ala), 41FSupp83.

Jewelry manufacturer was entitled to declaratory judgment determining whether defandant's patent was valid and infringed by its own products, where defendant had pursuant to §49, Title 35, given notice of infringment, and thereafter brought infringement suit against plaintiff. Ostby & Barton Co. v. Jungersen, (DC-NJ), 41FSupp 552.

Where indemnity insurance company sought to test its liability to insured and others claiming under its policies, petition must show the existence of an actual controversy. Hartford Accident & Indemnity Co. v. Smith, (DC-Ia), 41FSupp692.

Action by insurance company to determine whether certain truck owned by insured and involved in an accident was covered by insurance contract held to be proper case for declaratory judgment. Commercial Standard Ins Co. v. Central Produce Co., (DC-Tenn), 42FSupp31. See Dun. Dig. 4988a.

In action by insurance company for a declaratory judgment that it was not liable on a policy, court had power to permit defendant to amend his answer so as to ask a reformation of the insurance contract. Preferred Acc. Ins. Co. of New York v. O., (DC-Minn), 43F Supp227. See Dun. Dig. 4988a.

Whether or not insurance companies waived the right to examination of one claiming a fire loss by making an agreement as to the sound value and loss and damage to the property, or by appointing an appraiser was a justiciable controversy. American Macaroni Mfg. Co. v. Niagara Fire Ins. Co., (DC-Ala), 43FSupp933. See Dun. Dig. 4988a.

Where shipper was insured on a shipment of lambs from the West Coast to Chicago, and operators of feeding stock on the route were insured by another company, federal district court had jurisdiction of an action for a declaratory judgment brought by the shipper to determine liability of the various insurers for loss incurred when lambs were destroyed by fire at feeding yard. McPherrin v. Hartford Fire Ins. Co., (DC-Cal), 44FSupp674. See Dun. Dig. 4988a.

An action against a patentee for a declaratory judgment that if the devices sold by the plaintiff to the federal government were within the patent, the plaintiff was licensed to sell them, presented a justiciable controversy which advanced the purposes of title 35, section 68. [Mason's USCA]. U. S. Code Western Electric Co. v. Hammond, (DC-Mass), 44FSupp717. See Dun. Dig. 4988a.

Insurance company was entitled to a declaratory judgment determining whether it was liable to defend insured party in action for personal injury, where pending action by third parties against the insured would not determine such issue. Associated Indemnity Corp. v. Davis, (DC-Pa), 45FSupp118. See Dun. Dig. 4988a.

Federal District Court has jurisdiction of an action for a declaratory judgment that a contract to manufacture and sell plaintiff's goods was terminated, where sums accrued under the contract exceeded $3000, even though plaintiff no longer has any property rights in the subject matter of the contract. American Type Founders v. Lanston Monotype Mach. Co., (DC-Pa), 45FSupp531. See Dun. Dig. 4988a.

Pledgor whose interest was far under required jurisdictional amount could not be sued in federal district court as a representative of all pledgors in a declaratory judgment action by insurer against pawnbroker and his pledgor to determine insurance company's liability for loss covered by fire insurance policy. Pacific Fire Ins. Co. v. Reiner, (DC-La), 45FSupp703. See Dun. Dig. 4988a.

Federal district court had no jurisdiction of an action for a declaratory judgment that a state tax law violated the federal constitution, and to restrain the enforcement of such law, where there was a speedy and adequate remedy provided by the state law. West Pub. Co. v. McColgan, (DC-Cal), 46FSupp163. See Dun. Dig. 4988a.

The mere fact that an action is pending in state court between same parties involving a licensing agreement is not sufficient ground for refusing to entertain an action for a declaratory judgment as to the validity of a patent, but where the licensing agreement itself provides that licensee will not question validity of patent, federal district court was without jurisdiction to determine that or any of the other questions raised in the complaint. Foster Wheeler Corp. v. Furnace Engineering Co., (DC-NY), 46FSupp867. See Dun. Dig. 4988a.

Fact that insurance companies seeking to avoid liability on fire insurance policies on the grounds of the fraud of the insured had other adequate remedies at law would not prevent a group of them bringing an action for a declaratory judgment declaring such policies void. Firemen's Fund Ins. Co. v. Crandall Horse Co., (DC-NY), 47FSupp78. See Dun. Dig. 4988a.

Federal district court would have no jurisdiction of an action for a declaratory judgment to declare that a city ordinance licensing peddlers was in valid as applied to members of a religious sect engaged in distributing and selling religious books and pamphlets where there was no allegation that the matter in controversy exceeded the sum or value of $3,000. Bradford v. City of Somerset, (DC-Ky), 47FSupp171. See Dun. Dig. 4988a.

Pendency of an action in state court for personal injuries by persons claiming to have been injured in auto accident with insured party did not prevent insurance company which issued the policy involved from bringing an action for a declaratory judgment to determine its liability under the policy. Trinity Universal Ins. Co. v. Woody, (DC-NJ), 47FSupp327. See Dun. Dig. 4988a.

In an action for declaratory judgment that defendants' patents were invalid, in the absence of written or spoken words or affirmative conduct on part of defendant which could be interpreted as a claim that its patents were being infringed by plaintiff and where the defendant had never threatened suit, there is no actual controversy between the parties. Dewey & Almy Chemical Co. v. American Anode, (DC-Del), 47FSupp921. See Dun. Dig. 4988a.

The question of whether a stockyard company's employees were within the provisions of the Fair Labor

Standards Act [29 Mason's USCA 201 et seq] or under the Railway Labor Act [45 Mason's USCA 151 et seq] did not present a justiciable controversy in an action by the company against the employees union for a declaratory judgment, where parties were operating under the later act, and no effort had been made to enforce the former. Denver Union Stockyards Company v. Brotherhood of R. & S. Clerks, etc., (DC-Colo), 48FSupp308. See Dun. Dig. 4988a.

The decisions of state courts as to whether a justiciable controversy exists in a declaratory judgment action are not binding on Federal court in an action involving the construction of Acts of Congress. Id.

Where patent owner gave notice that it considered the making of ethylene oxide by a certain method to infringe its patent and threatened legal action, and the party notified continued to use the process and brought action for a declaratory judgment to determine validity of the patent, a justiciable controversy existed. U. S. Industrial Chemicals v. Carbide & Carbon Chemicals Corp., (DC-NY), 49FSupp345. See Dun. Dig. 4988a.

A declaratory judgment regarding the validity of a patent could not be rendered where the plaintiff was not actually manufacturing the product involved in the patent. Crowell v. Baker Oil Tools, (DC-Cal), 49FSupp 552. See Dun. Dig. 4988a.

A patentee's action for infringement commenced more than 6 years previously, and subsequently dismissed, would not serve as the notice of infringement required to enamble the defendant in that action to maintain an action for declaratory judgment to determine the validity of the patent, where no claim of infringement had been made during the intervening 6 years. Id.

A state court decree enjoining the use of a patent number belonging to the plaintiff in that action on products manufactured by the defendant was not a threat of prosecution for patent infringement which would entitle defendant to maintain an action for declaratory judgment as to validity of the patent. Zachs v. Aronson, (DC-Conn), 49FSupp696. See Dun. Dig. 4988a.

A plaintiff who had no standing to seek a declaratory judgment as to patent validity could not obtain incidental injunctive relief in its declaratory judgment action. Id.

Automobile liability insurer having doubt as to its obligation to defend a claim made against assured may bring action under the declaratory judgment act against assured, and injured third party. State Farm Mut. Auto Ins. Co. v. S., 208M44, 294NW413. See Dun. Dig. 4988a.

Statute is very broad and seems to give to any party to a written instrument right to have it construed. Myhre v. Severson, 211M189, 300NW605. See Dun. Dig. 4988a.

One engaged in business of selling by means of coin vending machines and in leasing, selling and distributing such machines, and operating under a license issued pursuant to a city ordinance could seek a declaratory judgment as to validity of a new ordinance without waiting for summary prosecution under the ordinance. Barron v. City of Minneapolis, 212M566, 4NW(2d)622. See Dun. Dig. 4988a.

Action for declaratory judgment to determine whether city could issue additional bonds for sewage disposal system in view of constitutional inhibition held proper remedy. Fuller v. C., 199So(Ala)2.

Question of validity of ordinance levying retail license is not within justiciable controversy where action was brought for declaratory decree concerning license tax for privilege of delivery of motor fuels. City of Enterprise v. F., 199So(Ala)691.

Question of whether a municipal ordinance violated state statute on same subject was a justiciable controversy. Chapman v. City of Troy, 241Ala637, 4So(2d)1.

Action could be brought for declaratory judgment determining whether plaintiff was liable for penalty, under state tax law. Peterson v. C., 107Pac(2d)(Ariz)205.

Demurrer to complaint was properly sustained where no facts were alleged from which court might assume existence of an actual controversy between parties regarding legal rights under contract involved. City of Alturus v. G., 104Pac(2d)(Cal)810.

Under California Declaratory Judgment Act action may be brought to determine rights under oral contract. Zimmer v. G., 109Pac(2d)(CalApp)34.

In taking steps under zoning regulations property owner did not waive his right to bring action for declaratory judgment to determine whether his property was within zoned area. Kimberly v. T., 17Atl(2d)(Conn)504.

Where two questions before the court in a declaratory judgment action were the meaning of a contract and also the damages due one party, court should determine both matters in the one judgment. Sweeney v. American Nat. Bank, 115Pac(2d)(Idaho)109.

Action for declaratory judgment was not the proper remedy for one who sought a review of certain unemployment compensation awards to determine constitutionality of Unemployment Compensation Law. Stearns Coal & L. Co. v. U., 147SW(2d)(Ky)382.

State supreme court on appeal had jurisdiction of an action by taxpayers to determine constitutionality of a statute. Roberts v. B., 142SW(2d)(Mo)1058.

Where bailee of automobile was sued in separate actions in different counties for damages for negligence for operation of automobile, bailor could not maintain suit for declaratory judgment against plaintiffs where it did not appear that plaintiffs had an adverse claim against him. Gitsis v. T., 16Atl(2d)(NH)369.

Reformation of liability insurance policy because of mutual mistake. Parrette v. C., 15Atl(2d)(NJ)802.

Question of constitutionality of New Mexico Barbers Price Fixing Act held to present a justiciable controversy. Arnold v. B., 109Pac(2d)(NM)779.

Where defendant changed savings account to joint account with plaintiff without surrendering bankbook, no jural relation existed warranting declaratory judgment. Hurley v. M., 21NYS(2d)974.

In an action for declaratory judgment to determine constitutionality of statute regarding licensing of nurses, complaint should point out specifically wherein statute exceeds legislative power, or provisions of federal or state constitution claimed to have been violated. Neyerlin v. M., 24NYS(2d)19.

A suit where plaintiff sought to have a loan contract declared void on account of illegal interest, and defendant denied accusation and sought to collect unpaid portion of loan was a justiciable controversy. Hennessey v. Personal Finance Co., 26NYS(2d)1012, 176Misc201.

Declaratory action could be brought to determine constitutionality of a law involving the duties of certain public officers. Board of Health v. Board of Com'rs, 220 NC140, 16SE(2d)677.

Declaratory judgment suit to determine validity of ordinance is not maintainable by one who fails to show that his own legal relations will be affected by such ordinance. League for Preservation of Civil Rights v. C., 28NE(2d)(Ohio)660.

Where contractor withheld amount of money from sub-contractor on ground owner had withheld same amount of money from him petition alleging such facts and asking for declaratory judgment determining that deductions were proper held not to state cause of action against owner of building on which work was being done. Schriber Sheet Metal & Roofers v. S., 28NE(2d)(Ohio)699.

One who merely owns property which might be used for gambling purposes had no justiciable controversy by which he could obtain a declaratory judgment as to the constitutionality of a law providing for confiscation of gambling equipment. Driskill v. City of Cincinnati, 66 OhioApp372, 34NE(2d)241.

Proceedings under statute are not excepted from rule that equity will not enjoin criminal proceedings or stay hands of peace officers in enforcing criminal law except where law attempted to be enforced is unconstitutional and its enforcement will result in irreparable injury to vested property rights. American Federation of Labor v. B., 106Pac(2d)(Ore)544.

Where validity of ordinance is conceded and it is also conceded that ordinance is not ambiguous, allegation that plaintiff is uncertain as to his rights and duties thereunder does not present a justiciable controversy. Hickey v. C., 109Pac(2d)(Ore)594.

A proceeding for a declaratory judgment construing the provision of a will should not be permitted, after the executor's account has been filed, and the jurisdiction of the orphans' court has attached for purposes of distribution. Lochrie's Estate, 16Atl(2d)(Pa)133.

The obligation under the statutes of South Dakota providing for public relief is local in character and state of North Daktota has no cognizable interest thereunder, and state court is without jurisdiction to make a declaration, in an action brought by state of North Dakota against a county in South Dakota. State of North Dakota v. Perkins County, 9NW(2d)(SD)500. See Dun. Dig. 4988a.

Where there was a real controversy as to the meaning of a deed dated thirty years previous, it was subject to construction under this act. Clarke v. Walker, 150SW (2d)(Tenn)1082.

Court correctly refused to adjudge, under allegations in complaint, that proposed gasoline filling and service station in residential area would be a nuisance per se, under city ordinance. Chamberlin v. H., 15Atl(2d)(Vt) 586.

It was proper to bring action to determine constitutionality of city ordinance regarding pensions for city employees. Ayers v. C., 108Pac(2d)(Wash)348.

It was proper to bring action to determine constitutionality of a statute regulating manufacture and sale of confections, where petitioner was threatened with prosecution for violation of statute. Bauer v. S., 110 Pac(2d)(Wash)154.

One may not challenge constitutionality of a statute by action for a declaratory judgment unless it appears that he will be directly damaged in person or in property by its enforcement. De Cano v. S., 110Pac(2d) (Wash)627.

A corporation whose members were all Filipinos could not challenge an anti-alien land statute where corporation did not own any real estate and had not contracted for purchase of any. Id.

In Wisconsin where liability insurer is made directly liable to party injured in an automobile accident, insurer is not entitled to bring action for a declaratory judgment to determine coverage, since it might result in separate trials on coverage and negligence. New Amsterdam Casualty Co. v. Simpson, 238Wis550, 300NW367.

Action for a declaratory judgment is a proper remedy against a town to have a road adjudged to be a town road and public highway. Zblewski v. Town of New Hope, 242Wis451, 8NW(2d)365. See Dun. Dig. 4988a.

Where insurance commissioner is insisting that statute requiring a minimum surplus applies to a mutual casualty company, such company is entitled to declaratory relief in the way of a construction of the statute. Cheese Makers Mut. Cas. Co. v. Duel, 243Wis206, 10NW(2d)125. See Dun. Dig. 4988a.

Federal declaratory judgments on automobile insurance. 1939WisLawRev496.

9455-3. Contract may be construed—When.

Where holder of automobile liability policy settled suit against third party for damages arising out of collision and paid guests who were riding with him at time of collision to execute releases to such third party, after which they brought suits against insured, insurer was entitled to declaration of whether insured's collusive conduct effected a cancellation of the policy. American Automobile Ins. Co. v. M., (DC-Ky), 34FSupp224.

Federal court would not declare liability of insurer with respect to disability payments under life policy, where rights of parties had been declared in three suits in state courts, and the same rights were involved in two pending suits filed prior to application for declaratory judgment, and where any judgment of federal court would only determine unadjudicated rights up to date of filing of complaint. Travelers Ins. Co. v. W., (DC-Fla), 34FSupp717, 721.

Action for declaratory judgment by insurance company against employee of one insured by it and third parties claiming to have been injured in accident with the employee, presented a justiciable controversy even though third parties had not brought action against the employee, where they had asserted claims against the insurance company. Ohio Casualty Ins. Co. v. Maloney, (DC-Pa), 44FSupp312. See Dun. Dig. 4988a.

Lessor had right to determine question of termination of lease of oil lands. Tide Water Associated Oil Co. v. C., 107Pac(2d)(CalApp)945.

Question of whether option to purchase realty had *terminated, did not constitute an actual controversy.* Kahn v. W., 17Atl(2d)(Pa)340.

9455-4. Who may ask for construction.

An administrator with will annexed may bring an action for a declaratory judgment construing a will under Indiana statutes. Weppler v. H., 29NE(2d)(Ind)204.

District court had no jurisdiction of an action for a declaratory judgment construing wills and determining the beneficiaries, where the wills were before the probate court where probate had administration. Pennington v. G., 107Pac(2d)(Kans)766.

Act was not designed to enable district courts to supersede functions of probate court in probate of wills and the ordinary administration upon estates. Id.

Where estate of testator was before probate court, question of whether or not heir was estopped from claiming that an order made by the testator was a part of codicil to the will could not be determined in action for a declaratory judgment. Morgan v. D., 16Atl(2d)(Md)916.

A daughter, who as trustee, brought an action for a declaratory judgment to determine rights to property left by her father, could bring action in county in which administratrix of father's estate resided, even though estate was being probated in another county. State v. Waltner, 145SW(2d)(Mo)152.

Where estate amounted to less than $500 executor was not justified in bringing action for declaratory judgment to determine whether amount taken by surviving spouse was subject to costs and expenses of administration where same end could have been accomplished by executor filing partial account and asking that allowance be made for attorney's fees and costs to be paid prior to specific exemptions. Schmehl v. S., 31NE(2d)(OhioApp)259.

9455-5. Not restricted.

Where insurer has brought an action for declaratory judgment to determine whether it is liable on its policy on account of an accident, the party who has recovered a judgment against the insured on account of such accident may file a counterclaim for the amount of the judgment. State Farm Mut. Automobile Ins. Co. v. Brooks, (DC-Mo), 43FSupp870. See Dun. Dig. 4988a.

9455-6. Court may refuse to enter decree.

It was an abuse of discretion for district court which had jurisdiction of declaratory judgment action brought to determine the validity of certain patents to refuse to enjoin the prosecution of an infringement action involving same patent in another district. Crosley Corp. v. Hazeltine Corp., (CCA3), 122F(2d)925, rev'g (DC-Del), 30FSupp38. Cert. den. 315US813, 62SCR798. Reh. den. 62SCR913. See Dun. Dig. 4988a.

Controversy must be real and substantial, admitting of specific relief through decree of conclusive character, as distinguished from opinion based on hypothetical facts. Larson v. General Motors Corp., (DC-NY), 40FSupp570.

The underlying principle of the declaratory judgment is equity, and a granting of it to some extent should rest in the sound discretion of the court. Crosley Corporation v. Westinghouse Electric & Mfg. Co., (DC-Pa), 43FSupp690. See Dun. Dig. 4988a.

In the exercise of its judicial discretion, district court would refuse to grant declaratory judgment determining whether one selling patented devices to the federal government was licensed to do so, where patentee had two actions pending in court of claims for infringement, in which actions the government was allowing the seller to cooperate in the defense. Western Electric Co. v. Hammond, (DC-Mass), 44FSupp717. See Dun. Dig. 4988a.

Declaratory judgment to determine validity of transaction between a county and a corporation concerning construction and renting of a bridge would not be determined where sufficient facts were not placed before the court to ascertain ability of county to meet rental without exceeding constitutional limit of indebtedness. Wells v. P., 142SW(2d)(Ky)178.

Owner of a building was properly denied declaratory relief where several liens were filed against his property and he was named garnishee defendant in several actions by unpaid materialmen and there is a tax proceeding which does not affect the owner and surety on bond of contractor is made a party in order to recover damages for breach of contract. Rott v. Standard Accident Ins. Co., 299Mich384, 300NW134.

Granting of declaratory relief is a matter within the discretion of the court, to be exercised or not according to the circumstances of the case under consideration. Carlson v. Bartels, 10NW(2d)(Neb)671. See Dun. Dig. 4988a.

Where right of plaintiff husband to rescind a trust agreement made with his wife is established, a declaratory judgment respecting rights under the agreement becomes unnecessary. Mindheim v. M., 21NYS(2d)372.

9455-7. Orders, judgments and decrees may be reviewed.

On appeal from judgment dismissing action by insurer for declaratory judgment respecting coverage of policy, it would be assumed that court below, after issues had been joined and trial had been had, will determine only such questions as properly may be adjudicated. Maryland Casualty Co. v. T., (CCA8), 114F(2d)952.

Granting or refusing declaratory relief is within sound discretion of court, but such discretion is judicial discretion and reviewable on appeal. Creamery Package Mfg. Co. v. C., (CCA3), 115F(2d)980, rev'g (DC-Del), 33FSupp625. Cert. den. 312US709, 61SCR828.

In reviewing judgment dismissing declaratory judgment suit because of lack of jurisdiction court is concerned only with question whether or not court had jurisdiction, and not either with court's right in its discretion to refuse jurisdiction, or the merits of the case. Mississippi Power & Light Co. v. C., (CCA5), 116F(2d)924.

In action to have a written agreement for furnishing electricity to plaintiff's dwelling at prices not exceeding a specified maximum rate, during life of defendant's franchise, adjudged void for want of consideration, judgment of dismissal cannot be reversed where proof fails to show want of consideration. Macdanz v. N., 206M510, 289NW58. See Dun. Dig. 4988a.

The Kentucky declaratory judgment act provides that appeal must be taken within 60 days after final judgment, and at the expiration of the 60-day period courts are without jurisdiction to set aside, modify, or alter declaratory judgment which has become final. Lexington Ry. System v. L., 146SW(2d)(KyApp)26.

Where suit was brought under declaratory judgment act and throughout proceedings litigants and court treated suit as one for declaration of rights, and court made orders declaring rights, appeal was subject to time limitation provided by statute for declaratory judgments. Id.

Appeal from declaratory judgment was premature where issues raised were still pending. Essex Foundry v. B., 17Atl(2d)(NJApp)568.

Section of declaratory judgment act providing for review must be read in connection with Pennsylvania statute limiting right to appeal to party aggrieved. Musser's Estate, 17Atl(2d)(Pa)411.

Executors of estate were not "aggrieved parties" and could not appeal from declaration of rights under will. Id.

Parties who have agreed to seek declaratory relief are bound by the statutory procedure. Day v. Ostergard, 146PaSuper27, 21Atl(2d)586.

9455-8. Application to court for relief.

Occurrences happening pending appeal from judgment dismissing suit for declaratory judgment because of want of justiciable controversy held not to entitle plaintiff to file a supplemental complaint based upon defendant's undisclosed state of mind and setting forth facts which would authorize no further or different relief from that sought in the complaint. Southern Pac. Co. v. C., (CCA9), 115F(2d)746.

Where it was determined that patent was not infringed, the patent owner could be enjoined from bringing infringement suit against any members of the class for whose benefit the action was brought. National Hairdressers' & Cosmetologists' Ass'n v. Philad Co., (DC-Del), 41FSupp701. Aff'd (CCA3), 129F(2d)1020.

Where party bringing an action for a declaratory judgment that certain tax assessments were void sought to amend the complaint so as to collect damages for fraudulent and discriminatory acts upon the part of additional defendants, the amendments would be allowed if all parties submitted the issue of fraud to a jury whose decision would bind the court or if all agreed that all is-

sues should be tried by the court. Cromwell v. Hillsborough Tp., (DC-NJ), 49FSupp908. See Dun. Dig. 4988a.

Kentucky statute authorizing supplementary relief does not authorize allowance of interest where it was not prayed for in complaint in action for declaratory judgment for refunds to consumers by public utility company. Union Light, Heat & Power Co. v. C., 144SW(2d)(Ky)1046.

9455-9. Issues of fact may be tried.—When a proceeding under this Act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending; provided, that any issue of fact for which a jury trial is not required may be brought on for trial at any special term of the court in like manner as an issue of law unless there is a general term of the court at which such issue of fact may be tried as soon as at such special term. (As amended Act Feb. 10, 1943, c. 25, §1.)

Burden of proof rests on the party who must submit to an adverse judgment if no evidence is introduced, in other words, on the party who asserts the affirmative of the issue. If, however, the other party, though seeking no affirmative relief in his pleading, introduces evidence showing a right to recover on the contract set forth in the other party's pleading, the burden of proof shifts accordingly. Reliance Life Ins. Co. v. B., (CCA8) 112F(2d)234. Cert. den. 61SCR137. Reh. den. 61SCR391.

Phrase "triable by a jury" relates to a case triable as of right under Seventh Amendment to federal constitution, and it was not intent of Congress that remedy by declaraory relief should affect right to a trial by jury as it formerly existed. Great Northern Life Ins. Co. v. Vince, (CCA6), 118F(2d)232. Cert. den. 62SCR71.

Declaratory relief will not be denied under federal act because of a complex factual situation. Dunleer Co. v. M., (DC-WVa)33FSupp242.

Federal court has discretionary power to grant jury trial in declaratory judgment action brought by automobile liability insurance company to determine its liability under a policy, even though no demand was made within time prescribed by Federal Civil Procedure Rule 38(b). Allstate Ins. Co. v. Cross, (DC-Penn), 2 FRD120. See Dun. Dig. 4988a.

Action for declaratory judgment by group of insurers seeking to avoid liability on fire insurance policies on ground of fraud of the insured would not deny a jury trial to the insured on the issues of fraud. Firemen's Fund Ins. Co. v. Crandall Horse Co., (DC-NY), 47FSupp 78. See Dun. Dig. 4988a.

Right of jury trial remains inviolate under declaratory judgment statute. State Farm Auto Ins. Co. v. S., 208M44, 294NW413. See Dun. Dig. 4988a.

Act did not repeal the statutory provisions relating to discovery of assets in probate court. State v. Waltner, 145SW(2d)(Mo)152.

Where parties were not in agreement as to items of account, court did not err in ordering reference, though counterclaim in action was purely a legal one. Andrew County v. M., 146SW(2d)(Mo)621.

In action for declaratory judgment defendant was entitled to examine plaintiff before trial as to act of misfeasance and nonfeasance alleged in defendant's counterclaim. Forman v. F., 22NYS(2d)922.

Where there is no substantial dispute of facts raised by pleadings court may rule on motion and cross-motion for judgment on pleadings without regard for moving affidavits. Muldoon v. M., 25NYS(2d)36, 175Misc700.

Plaintiff may not move for summary judgment in an action in New York for a declaratory judgment. Id.

9455-10. Costs.

In declaratory judgment action by insured against insurer plaintiff's right to attorney's fees held controlled by state law. Continental Cas. Co. v. G., (CCA5), 116F (2d)431. Cert. den. 313US567, 61SCR941.

In declaratory judgment action to determine validity and infringement of a patent, where court found patent valid but not infringed by plaintiff, it had discretionary power to relieve defendant of the taxing of costs for plaintiff's expenses incurred in unsuccessfully attempting to prove invalidity. Leeds & Northrup Co. v. Doble Engineering Co., (DC-Mass), 41 F. Supp. 951. See Dun. Dig. 4988a.

Where suit is instituted by insurance company upon its liability under accident policy, insurance company is not liable for attorney's fees and expenses incurred in absence of contract, and in absence of fraud, bad faith, and stubborn litigiousness. Maryland Casualty Co. v. S., 11SE(2d)(GaApp)89.

9455-11. Parties.

Dismissal of suit on ground of failure to join necessary or indispensable parties was erroneous where there was no justiciable controversy between any of such parties and plaintiffs and where the legal interests of such absent parties would not be affected by an adjudication. Samuel Goldwyn, Inc. v. U., (CCA3), 113F(2d)703.

Provisions of Civ. Pro. R. 19 of federal district courts relating to indispensable and necessary parties apply to actions under declaratory judgment act. Id.

If necessary parties were before court to enable it to dispose of declaratory judgment suit of which it had jurisdiction, it was immaterial that other persons were made nominal parties since they could be ignored or eliminated at any stage of the proceedings. Maryland Casualty Co. v. T., (CCA8), 114F(2d)952.

Owner and operator of crashed airplane was not entitled to declaratory judgment that it was entitled to recover of its co-defendant, which manufactured plane's engine, which was allegedly defective, such amounts as it might be required to pay as damages for death of passengers and crew, in absence, as parties of representatives of persons other than plaintiff who were killed in the crash. Lewis v. U., (DC-Conn), 34FSupp124.

An exclusive licensee is not an indispensable party defendant in a declaratory judgment proceeding against patent owner. Bakelite Corp. v. L., (DC-Del), 34FSupp 142.

Beauty parlor was entitled to declaratory judgment respecting validity and infringement of patent, on behalf of itself and all members of the National Association of Beauty Parlors, as against a defendant who had sent threatening notices to trade and commenced numerous infringement suits against members of the association. National Hairdressers' & Cosmetologists' Ass'n v. P., (DC-Del), 34FSupp264.

In action by Brotherhood of Locomotive Engineers asking for construction of mediation agreement entered into by plaintiff and defendant railway, Brotherhood of Firemen and Enginemen was permitted to intervene where, because of the interconnection between the two brotherhoods, any change in the engineers' rules, or the interpretation thereof, which would increase the number of miles or days that each engineer might work during the month, would effect a corresponding reduction of the opportunity of firemen to work as engineers. Brotherhood of L. Engineers v. C., (DC-Wis), 34FSupp594.

In action by Federal Deposit Insurance Corporation with respect to liability on claims asserted against it by alleged depositors in closed bank, joinder of the several claimants as defendants was authorized. Federal Deposit Ins. Corp. v. R., (DC-Mo), 34FSupp600.

District attorney was proper party to action for declaratory judgment in relation to plaintiff's rights and liabilities under Fair Labor Standards Act. Sunshine Mining Co. v. Carver, (DC-Idaho), 41FSupp60.

Labor union which asserted that employer was violating Fair Labor Standards Act was proper party to declaratory judgment action brought by employer. Id.

In action where a member of an association was a plaintiff, validity of defendant's patent would be determined for benefit of all association members, even though association as such could not be a party. National Hairdressers' & Cosmetologists' Ass'n v. Philad Co., (DC-Del), 41FSupp701. Aff'd (CCA3), 129F(2d)1020.

Brotherhood of Locomotive Firemen and Enginemen had right to intervene in action brought by Brotherhood of Locomotive Engineers to determine their rights under a contract with railroad. Brotherhood of Locomotive Engineers v. Chicago, M. St. P. & P. R. R. Co., (DC-Wis), 41FSupp751.

In action by insurance company for declaratory judgment to determine its liability to those injured in an accident with an employee of the insured which occurred when the employee was using insured's vehicle for pleasure driving, it was not necessary to make the insured a party to the action. Ohio Casualty Ins. Co. v. Maloney, (DC-Pa), 44FSupp312. See Dun. Dig. 4988a.

Fact that one seeking to determine the scope of a patent held by another, by a declaratory judgment, could have intervened in pending infringement suit between his customer and the patent owner did not bar his right to a declaratory judgment. Assad Abood v. Beldoch-Popper, (DC-NY), 45FSupp679. See Dun. Dig. 4988a.

Where action for a declaratory judgment as to the rights of parties under a certain patent is filed in one district prior to the time an infringement suit is filed in another district plaintiff in the first suit is entitled to have his case carried to adjudication and an intervener in such suit is regarded as an original party in connection with the time his suit was filed. Godfrey L. Cabot Inc. v. Binney & Smith Co., (DC-NJ), 46FSupp346. See Dun. Dig. 4988a.

Where several insurance companies issued policies covering the same property, each policy containing a pro rata clause, the total amount of liability and not the separate liability of each company would determine whether the federal district court had jurisdiction of an action by a group of the insurers for a declaratory judgment to determine their liability on the policies. Firemen's Fund Ins. Co. v. Crandall Horse Co., (DC-NY), 47F Supp78. See Dun. Dig. 4988a.

In action by group of insurers who issued policies on the same property for a declaratory judgment, to determine their liabilities on the policy, two insurance companies not original parties to the action, and who were residents of the same state as the insured would not be allowed to intervene, notwithstanding fact that insured had filed a counterclaim to recover the entire amount of the policies rather than the amount stated in its proof of claims. Firemen's Fund Ins. Co. v. Crandall Horse Co., (DC-NY), 47FSupp82. See Dun. Dig. 4988a.

Mere membership in the general public does not entitle one to maintain a suit for a declaratory judgment as to the validity of a patent. Zachs v. Aronson, (DC-Conn), 49FSupp696. See Dun. Dig. 4988a.

The rule regarding necessary parties is not relaxed in action brought to obtain declaratory relief. Lloyd v. L., 107Pac(2d)(Cal)622.

Statute allows joinder only of those persons legally affected and does not enlarge procedure as to joining parties defendant. Schriber Sheet Metal & Roofers v. S., 28NE(2d)(Ohio)699.

Where a daughter as trustee, brought an action for a declaratory judgment to determine the rights to property given to her as trustee for benefit of certain beneficiaries, administrator of father's estate, executor of mother's estate, and sister named as sole beneficiary were properly joined as defendants. State v. Waltner, 145SW(2d)(Mo)152.

A daughter who as trustee held certain property given to her by her father for distribution among designated beneficiaries after his decease, was a proper party to petition for declaratory judgment in determining rights and shares of beneficiaries in property. Id.

In a declaratory action to determine legitimacy of child all persons interested or likely to be affected by determination should be joined or impleaded as parties, and infant, whose rights are paramount, should be made a party in the manner provided by law, and guardian ad litem appointed to protect its interests. Melis v. D., 24NYS(2d)51, 260AppDiv772, aff'g 18NYS(2d)432.

Court will not pass on constitutionality of a statute in a declaratory action, unless attorney general has been served with a copy of the proceedings. Day v. Ostergard, 146PaSuper27, 21Atl(2d)586.

Under Utah Declaratory Judgment Act attorney general has right to be and should be served where statute for state franchise or permit is alleged to be invalid. Hemenway & Moser Co. v. F., 106Pac(2d)(Utah)779.

Prayer for declaratory judgment cannot be considered where all parties in interest have not been made parties in action, and executors and trustees are interested parties in the matter of probate and construction of will. State v. Farr, 236Wis323, 295NW21.

9455-12. Act to be remedial.

Nature of action for declaratory relief is neither legal nor equitable but sui generis. Great Northern Life Ins. Co. v. Vince, (CCA6), 118F(2d)232. Cert. den. 62SCR71.

This is a remedial statute and should be liberally construed. Continental Casualty Co. v. N., (DC-Wis)32F Supp849.

The Federal Declaratory Judgment Act is merely a procedural statute which provides an additional remedy available in respect to justiciable controversies of which the federal courts otherwise have jurisdiction, but it does not draw into the federal courts all controversies of a justiciable nature. Bradford v. City of Somerset, (DC-Ky), 47FSupp171. See Dun. Dig. 4988a.

Purpose of act is to settle and afford relief from uncertainty with respect to rights status, and other legal relations; and it should be liberally construed. Peterson v. C., 107Pac(2d)(Ariz)205.

The only new right created by the declaratory judgment act is to make disputes as to rights or titles justiciable without proof of a wrong. Gitsis v. T., 16Atl(2d)(NH)369.

CHAPTER 78

Juries

9458-1. Alternate jurors.—When in the opinion of the trial judge in any case pending in the district court, the trial is likely to be a protracted one, the court may cause an entry to that effect to be made on the minutes of the court, and immediately after the jury is impaneled and sworn, may direct the calling of not more than two additional jurors, to be known as alternate jurors.

Such jurors must be drawn and have the same qualifications as the jurors already sworn, and be subject to the same examinations and challenges; except, the prosecution or plaintiff shall be entitled to one peremptory challenge and the defendant to two.

Alternate jurors shall be seated near, with equal facilities for seeing and hearing the proceedings, and shall take the same oath as the jurors already selected. They must attend at all times upon the trial of the cause in company, and be admonished and kept in custody with the other jurors.

Alternate jurors shall be discharged upon the final submission of the case to the jury, unless, before the final submission of the case, a juror dies, or becomes ill so as to be unable to perform his duty, the court may order such a juror to be discharged and draw the name of an alternate, who shall then take his place in the jury box and become a member of the jury as though he had been selected as one of the original jurors. (Act Apr. 16, 1941, c. 256, §1.) [546.095]

9468. Selection of jurors.

Names of persons drawn for jury service should be stricken from jury list even though it was discovered there were no jury cases and jurors were told not to report for service. Op. Atty. Gen. (260a-8), Sept. 18, 1943.

CHAPTER 79

Costs and Disbursements

9470. Agreement as to fees of attorney—Etc.

½. In general.

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 attorneys' fees incurred in action against principal to recover expenses of a prior suit by third person against principal. U. S. Fidelity & Guaranty Co. v. Falk, 214M138, 7NW(2d)398. See Dun. Dig. 2219.

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. Id. See Dun. Dig. 2219, 2523.

10. Contract with attorney.

Evidence held to sustain finding that attorney, who as dictator of a lodge, with approval of and in response to solicitation of national organization, undertook and over a three-year period successfully completed job of liquidating financial distress of local organization, was entitled to proceed against national organization upon an implied contract to recover reasonable value of services. High v. Supreme Lodge of World, Loyal Order of Moose, 210M471, 298NW723. See Dun. Dig. 698a.

Legality of contingent fee contracts to procure "favor" as distinguished from "debt" legislation. 24MinnLaw Rev412.

9471. Costs in district court.

6. See in general.

In a suit in district court for recovery of money where amount sued for and recovered is less than $100 but more than $50, plaintiff, upon entry of a default judgment by the clerk, is entitled to have taxed and included his costs and his disbursements, but plaintiff cannot have his costs and disbursements in an uncontested suit to recover less than $50 where, if case had been contested, he could not have taxed the same. Op. Atty. Gen. (144B-5), Mar. 12, 1942.

9473. Disbursements—Taxation and allowance.—In every action in a district court, the prevailing party shall be allowed his disbursements necessarily paid or incurred. Provided that in actions for the recovery of money only, of which a municipal court has jurisdiction, the plaintiff, if he recover no more than fifty dollars, shall not recover any disbursements. (As amended Act Apr. 20, 1943, c. 508, §1.)

4. When justice has jurisdiction.

In a suit in district court for recovery of money where amount sued for and recovered is less than $100 but more than $50, plaintiff, upon entry of a default judgment by