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.

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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.

9477. Interest on verdict, etc.

Personal property and money and credits taxes, upon which penalties have already been imposed, do not bear interest prior to judgment. Op. Atty. Gen., (421-2-8), Jan. 16, 1941.

9481. To defendant after tender.

A tender is unnecessary where it would be an idle ceremony, as where owner of a dog demanded at a pet hospital and delivery was refused solely because demand was made outside of office hours, there being no dispute as to the amount owing at the time. Morgan v. Ibberson, 215M293, 10NW(2d)222. See Dun. Dig. 9612.

A tender is waived when the tenderee assumes any position which would render it, so long as such position is maintained, a vain and idle ceremony. Id. See Dun. Dig. 9620.

9482. Chargeable on estate or fund.

An administrator is not personaly liable for costs and disbursements for bringing an action in his representative capacity, except where judgment awarding such costs and disbursements expressly provide that he shall be personally liable or that it shall be enforced against him personally. Minneapolis St. Ry. Co. v. R., 208M187, 293NW256. See Dun. Dig. 3673.

Rule seems to be that a favorable issue in first instance is decisive that proceeding was not groundless. Id.

Sureties on bond of a special administrator are not liable for costs and disbursements, awarded against him in an action brought by him in his representative capacity, where there were no assets in estate. Minneapolis St. Ry. Co. v. R., 208M187, 293NW256. See Dun. Dig. 3580s.

9483. Relator entitled to, and liable for.

Board, having acted in behalf of school district in discharge of governmental functions, is not liable for costs or disbursements of mandamus action. State v. School Board of Consol. School Dist. No. 3, 206M63, 287NW625. See Dun. Dig. 2207.

9485. In criminal proceedings.

Jury fee is a part of disbursements of a prosecution which municipal court of Faribault may add to and include in penalty in criminal prosecution. Op. Atty. Gen. (199a-3), Sept. 28, 1942.

9486. Supreme court—Costs and disbursements.

½. In general.

On hearing of an order to show cause questioning authority of attorneys for appellants to take an appeal in which proper authority was found to exist, motion by appellants' attorneys for costs and disbursements was denied. Larson v. Dahlstrom, 213M595, 6NW(2d)636. See Dun. Dig. 2226.

No statutory costs were allowed plaintiff appellants in an automobile accident case because of their failure to comply with admonition of supreme court in printed calendar in the matter of including in the record a plat or diagram of the scene of the accident. Lee v. Zaske, 213M244, 6NW(2d)793. See Dun. Dig. 2238.

Where vendor of real estate petitioned for declaratory judgment that option to defendant who purchased land had been withdrawn and cancelled, defendant could file petition in same action asking for supplementary relief by decree holding the withdrawal unjustified and ordering sale. Lowe v. Harmon, 167Ore128, 115Pac(2d) 297.

1. Statutory.

Appellant was denied statutory costs on appeal where he provided an abridged record which omitted portions of settled case but appeared as though it reflected all testimony received. Palm's Estate, 210M87, 297NW765 (2nd case). See Dun. Dig. 2238.

2. No costs to defeated party.

Plaintiff on appeal from a judgment denying a divorce was allowed attorney's fees and disbursements, though she was unsuccessful, where appeal appeared to be made in good faith and upon reasonable grounds. Rhoads v. R., 208M61, 292NW760. See Dun. Dig. 2804.

8. Discretionary—when not allowed.

Where woman obtaining divorce was awarded $650.00 as expense money to procure transcript and pay for necessary printing in presentation of her case on appeal, and there was much needless printing in record that easily could have been avoided in view of narrow issues properly brought up, no statutory costs or disbursements were allowed on appeal. Burke v. B., 208M1, 292NW426. See Dun. Dig. 2238.

Appellant was denied statutory costs on appeal where reversal was had upon a theory not raised in the court below. Rigby v. N., 208M88, 292NW751. See Dun. Dig. 2238.

Successful appellant was denied statutory costs where it appeared he failed to bring in party or parties needed for a final determination of issues in case. Braman v. Wall, 210M548, 299NW243. See Dun. Dig. 2238.

Statutory costs were denied for excessive length of brief, due to lengthy and repetitious quotations from, rather than brief summary of, testimony and authority, and temptation to further deny otherwise taxable expense of printing respondent's brief was resisted because fault may have been invited by similar dereliction on part of counsel for appellant. Bergquist's Estate, 211M 380, 1NW(2d)418. See Dun. Dig. 2238, 2239.

Where counsel for the parties have stated that all that parties want is a construction of the law rather than any personal vindication as to a few dollars involved, no statutory costs should be taxed. Perszyk v. School Dist. No. 32, 212M513, 4NW(2d)321. See Dun. Dig. 2226.

CHAPTER 80

Appeals in Civil Actions

9490. Appeal from district court.

Appellate jurisdiction may not be enlarged by consent of the litigant. Simon v. L., 207M605, 292NW270. See Dun. Dig. 286.

Appellate jurisdiction cannot be conferred by consent. Bulau v. B., 208M529, 294NW845. See Dun. Dig. 286.

Right to appeal is statutory. State v. Rock Island Motor Transit Co., 209M105, 295NW519. See Dun. Dig. 283.

A judgment of the municipal court of Duluth may not be reviewed by certiorari. Warner v. A. G. Anderson, Inc., 212M610, 3NW(2d)673. See Dun. Dig. 1404.

Certiorari is a proper method to review judgment of municipal court of Duluth rendered on removal from the conciliation court. Warner v. A. G. Anderson, Inc., 213 M376, 7NW(2d)7, overruling 212M610, 3NW(2d)673. See Dun. Dig. 1400.

9491. Title of action on appeal.

A party entitled to join in an appeal may do so by enering a voluntary appearance in appellate court after appeal has been perfected. Owens v. O., 207M489, 292 NW89. See Dun. Dig. 311.

Where a city was brought into case as an additional defendant and appeared specially and objected to jurisdiction of court elsewhere than in county where city was located, attention of counsel for city securing an alternative writ of mandamus from supreme court was called to Supreme Court Rule II, providing that all cases under review shall be entitled as in court below. Scaife Co. v. Dornack, 211M349, 1NW(2d)356. See Dun. Dig. 310.

9492. Requisites of appeal.

3. On whom served.

Failure of appellants to serve notice of appeal on a party affected by judgment from which appeal was taken is remedied when such party files in supreme court his consent to be bound by disposition of case. Kavli v. L., 207M549, 292NW210. See Dun. Dig. 320.

Codefendants in ordinary negligence case are not adversary parties under statute requiring service of notice of appeal. Olson v. Neubauer, 211M218, 300NW613. See Dun. Dig. 320.

3½. Bond.

A new appeal bond without an attorney as surety filed after motion to dismiss was made obviated objection that attorney was surety in bond. Hanson v. Emanuel, 210M51, 297NW176. See Dun. Dig. 328, 329.

Court may permit substitution of a good for a defective or void supersedeas bond. Mixed Local, etc. v. Hotel & Restaurant Employees International Alliance, 211M 616, 1NW(2d)133. See Dun. Dig. 328.

6. Amendment.

Substitution of bond. Mixed Local, etc. v. Hotel & Restaurant Employees International Alliance, 211M616, 1NW (2d)133; note 3½.

9493. Return to Supreme Court.

1. In general.

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. Cert. den. 61SCR9. See Dun. Dig. 394.

Where there has been a general appearance by defendant below, it is improper to include summons in

printed record on appeal. Rigby v. N., 208M88, 292NW751. See Dun. Dig. 353.

Printed record and brief served and filed on appeal from order denying a new trial were allowed as record and brief on subsequent appeal from judgment. Geddes v. B., 209M603, 295NW518. See Dun. Dig. 355.

Burden is upon appellant to cause clerk of court below to transmit files to supreme court prior to date set for hearing of an appeal, and court is entitled to all files deemed needful pending appeal, and is not restricted to that part which appellant has requested clerk below to transmit. McFadden Lambert Co. v. W., 209M242, 296NW 18. See Dun. Dig. 341.

Out of consideration for other business, attorneys must not heedlessly impose upon liberality of court in allowing extensions of time to complete and file records and briefs. Schnedler v. Warren, 209M605, 297NW35. See Dun. Dig. 355.

A close adherence to rules of court is essential to orderly and proper disposition of appeals. Id.

An application for a second extension of time to serve and file record and brief was denied and appeal dismissed. Anderson v. High, 210M613, 297NW321. See Dun. Dig. 355.

Decision of reviewing court must be made upon record of court proceedings rather than upon what counsel later say concerning them. Gondreau v. Beliveau, 210M35, 297 NW352. See Dun. Dig. 386.

On appeal by plaintiff from an order overruling its demurrer to intervener's complaint, and from an order denying its motion for a temporary injunction against defendant pending suit, where records showed that defendant appeared by attorney and opposed the motion, but interposed no answer to plaintiff's amended complaint, a previously signed stipulation giving defendant right to answer within ten days after Supreme Court had rendered its decision in the appeal, filed with the clerk of lower court and transmitted to clerk of Supreme Court after it had made its decision, concerned future procedure in the courts below and was not a part of the record on appeal. Personal Loan Co. v. Personal Finance Co., 212 M600, 5NW(2d)61. See Dun. Dig. 356.

When an appeal comes to the supreme court in a mandamus case, it should have before it all the essential facts upon which the trial court acted, thereby enabling it to render a final determination upon the merits. State v. Pennebaker, 215M75, 9NW(2d)257. See Dun. Dig. 5781.

2. Authentication.

Where defendant's attorneys appealing from an order continuing in effect a temporary restraining order did not cause affidavit of plaintiff to be transmitted to supreme court because of belief that it was not filed, supreme court will consider the affidavit where trial judge endorsed thereupon a certificate that it was considered by him on hearing but that clerk had failed to file it. McFadden Lambert Co. v. W., 209M242, 296NW18. See Dun. Dig. 339.

3. Record and briefs.

Where appellant's brief made subdivisions of arguments, but did not precede each subdivision with a separate statement of proposition urged in what followed, statutory costs were denied, though judgment was reversed. Liptak v. K., 208M168, 293NW612. See Dun. Dig. 5964.

Motion for additional time within which to comply with rule requiring timeliness in filing record and brief was denied where there was inexcusable delay amounting to conscious contempt for orderly procedure. Schnedler v. Warren, 211M618, 1NW(2d)418. See Dun. Dig. 355.

4. Settled case or bill of exceptions.

See also notes under §9327.

Judgment for plaintiff in personal injury suit will not be reversed because of alleged misconduct of counsel in argument where bill of exceptions does not contain all arguments in full, and does not show that adequate objections and exceptions were taken during the argument complained of or at the close thereof. Thomson v. Boles, (CCA8), 123F(2d)487. Cert. den. 62SCR632. See Dun. Dig. 344.

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.

A finding of fact in nature of a conclusion from other facts specifically found may be reviewed on appeal without a settled case or bill of exceptions to determine whether facts specifically found support conclusion. Holden's Trust, 207M211, 291NW104. See Dun. Dig. 344.

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. 349.

Court will not review decision of a lower court upon any question of fact unless record contains all of the evidence introduced on trial pertaining to such question. State v. Anderson, 208M334, 294NW219. See Dun. Dig. 343.

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. Id. See Dun. Dig. 344.

Memorandum of trial court may be resorted to in order to sustain findings, but may not be used to overturn them. McGovern v. F., 209M403, 296NW473. See Dun. Dig. 343.

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. Id. See Dun. Dig. 344(87).

Where there is not a settled case or bill of exceptions on appeal from judgment, only question presented is whether findings of fact support judgment. Moe v. O., 208M496, 296NW512. 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, 210M 144, 297NW566. See Dun. Dig. 344.

Ordinarily, in determining question of abuse of discretion by trial court in denying an application for a new trial supreme court would be confined to affidavits presented on motion where there is no settled case, but where no objection was raised at hearing on motion and defendants appeared generally and presented counter-affidavits, and the matter was heard on all records, files, and proceedings in the case, including a complete transcript of testimony taken at the trial, and trial court must have the considered point waived, it will be considered in same light on appeal. Valencia v. Markham Co-op. Ass'n, 210M 221, 297NW736. See Dun. Dig. 344a.

Abridgment of printed record is desirable wherever possible, but where it omits portions of settled case fact of such omission should be indicated by brief explanation indicating omission and reason therefor. Palm's Estate, 210M87, 297NW765 (2nd case). See Dun. Dig. 353.

Where questions of fact are to be reviewed, record on appeal should affirmatively and unequivocally show, either in body of case or certificate of judge, that case contains all evidence introduced upon issue of fact raised. Gubbins v. Irwin, 210M428, 298NW715. See Dun. Dig. 352(58).

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.

Alleged errors by trial court in rejecting certain testimony cannot be reviewed without a settled case or bill of exceptions. Bonley v. R., 213M214, 6NW(2d)245. See Dun. Dig. 346(13).

Where manager of drugstore 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.

6. Assignments of error.

Though notice of appeal indicated entire order was to be attacked, this may be accomplished only by assigning error. Kemerer v. S., 206M325, 288NW719. See Dun. Dig. 358.

Assignments of error that trial court erred in denying motion for direction of verdict, and that it also erred in denying motion for judgment notwithstanding verdict, raises only question of whether verdict is supported by the evidence. Fontaine v. J., 206M506, 289NW68. See Dun. Dig. 361.

An omnibus assignment of error against findings of fact consisting of several separately numbered paragraphs is not good. Holzgraver v. S., 207M88, 289NW881. See Dun. Dig. 361.

Where findings of fact consist of distinct numbered paragraphs appellant, if desiring to challenge any finding as not supported by the evidence, should designate the paragraph or parts of paragraph so challenged by an assignment of error. Id. See Dun. Dig. 361.

Errors assigned but not discussed or mentioned in brief or oral argument are deemed abandoned. Oilgaard v. C., 208M384, 294NW228. See Dun. Dig. 366.

Assignments of error made without any argument or discussion whatever ought to be deemed abandoned. Lang v. C., 208M487, 295NW57. See Dun. Dig. 386.

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).

An assignment that "the trial court erred, to plaintiff's prejudice, in denying plaintiff's motion for a new trial," presented no question for decision. Gondreau v. Beliveau, 210M35, 297NW352. See Dun. Dig. 366.

One assignment of error challenging three and one-half pages of court's instructions to jury is too general to raise a question for consideration on appeal. First Church of Christ Scientist v. Lawrence, 210M37, 297NW 99. See Dun. Dig. 364.

An assignment of error not urged in brief is deemed waived. Lemon v. Dworsky, 210M112, 297NW329. See Dun. Dig. 366.

To assign as error "that the decision is not justified by the evidence and is contrary to law" is to assign nothing. McIntyre v. Peterson, 210M419, 298NW713. See Dun. Dig. 361.

Omission of assignments of error was waived where only point raised by defendant on appeal was that trial court erred in granting plaintiff's motion for judgment

on pleadings. Fitzke v. Fitzke, 210M430, 298NW712. See Dun. Dig. 358.

Though sufficiency of evidence to support findings of fact may be challenged upon appeal from judgment appellant must comply with rule requiring specification of each finding of fact charged to be lacking in evidentiary support. High v. Supreme Lodge of World, Loyal Order of Moose, 210M471, 298NW723. See Dun. Dig. 388.

Assignment that court erred in its Findings of Fact numbered IV to XV, inclusive, did not challenge any one of the ten findings as not supported by the evidence, but was sufficient on question whether findings of fact warranted conclusions of law. Peterson v. New England Furniture & Carpet Co., 210M449, 299NW208. See Dun. Dig. 357, 358.

Where assignments of error are faulty court considers only question whether evidence sustains recovery. Pioneer Garage v. Hallquist, 211M106, 300NW403. See Dun. Dig. 358.

Practice of assigning error upon several pages of a charge containing separate and disconnected paragraphs is disapproved. Jones v. Al Johnson Const. Co., 211M123, 300NW447. See Dun. Dig. 360.

Assignments of error not argued or simply reiterated without discussion are considered waived. Service & Security v. St. Paul Federal Sav. & Loan Ass'n, 211M199, 300NW811. See Dun. Dig. 366.

Where there is no proper assignment of error the judgment appealed from is ordinarily affirmed. Delinquent Real Estate Taxes, 212M562, 4NW(2d)783. See Dun. Dig. 358(71).

An assignment of error "the judgment appealed from is not sustained by the evidence and that it is contrary to law" presents nothing for review. Delinquent Real Estate Taxes, 212M562, 4NW(2d)783. See Dun. Dig. 361(5).

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, 213M100, 5NW(2d)317. See Dun. Dig. 358.

An assignment "that the trial court erred in denying defendant's motion for a new trial" is of no avail. Barnard v. Kandiyohi County, 213M100, 5NW(2d)317. See Dun. Dig. 361(1).

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. 361.

Assignment that court erred in denying motion for a new trial, setting forth no specific grounds, could not be considered by court. Larson v. Dahlstrom, 214M304, 8NW (2d)48, 146ALR245. See Dun. Dig. 360.

Though appellants failed separately to state and number their assignments of error, supreme court reviewed case where there was only one question involved and respondent was not misled. State v. Pohl, 214M221, 8NW (2d)227. See Dun. Dig. 357.

An assignment of error not discussed in the written argument, nor mentioned in oral argument, will not be considered, on assumption that it has been abandoned by appellant. Olson v. Davis, 215M18, 9NW(2d)344. See Dun. Dig. 366.

An assignment that "the findings are not supported by the evidence", with no particular assignment of error, presented nothing for review. Estrada v. Hanson, 215M 353, 10NW(2d)223. See Dun. Dig. 361.

An assignment that the court erred in entering and docketing a default judgment in favor of respondent and against appellants is too general to raise the question whether parties or actions were misjoined, whether the complaint stated a cause of action, or whether the judgment was improperly entered without order of the court. Whipple v. Mahler, 215M578, 10NW(2d)771. See Dun. Dig. 357.

Each assignment of error must be single, concise, certain and complete in itself, and an omnibus assignment is unavailing, as counsel must put his finger on the specific error. Id. See Dun. Dig. 360.

9494. Powers of appellate court.

1. In general.

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.

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. 384.

State supreme court will not write its decision interpreting its own constitution on such a basis that Supreme Court of United States will have unquestionable jurisdiction to review it. National Tea Co. v. State, 208M607, 294 NW230. See Dun. Dig. 425.

The purpose of an appeal is to rectify mistakes of judgment. Mixed Local Etc. v. Hotel and R. Employees Etc., 212M587, 4NW(2d)771. See Dun. Dig. 281.

1½. Persons entitled to allege error.

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., 207M149, 290NW579. See Dun. Dig. 384.

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. Seiz v. C., 207M277, 290NW802. See Dun. Dig. 384.

Respondents, who have not taken a cross-appeal, may not make cross-assignments of error. Holden's Trust, 207M211, 291NW104. See Dun. Dig. 360.

Supreme court will not decide whether a litigant can rely upon res ipsa loquitur when specific acts of negligence are alleged, where point was not raised. Peterson v. M., 207M387, 291NW705. See Dun. Dig. 384.

There was no issue before supreme court as to amount of plaintiff's attorney's fees, there being no appeal by any defendant from court's finding in favor of plaintiff. Risvold v. G., 207M359, 292NW103. See Dun. Dig. 314.

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.

Appellant was denied statutory costs on appeal where reversal was had upon a theory not raised in the court below. Rigby v. N., 208M88, 292NW751. See Dun. Dig. 2238.

Parties of record in proceeding before Railroad and Warehouse Commission, in which they fully participated by consent and without objection, who upon appeal to district court were notified to appear and did appear and enter formal appearance and by consent litigated the issues raised by appeal to supreme court, will be heard with other parties. State v. Rock Island Motor Transit Co., 209M105, 295NW519. See Dun. Dig. 310.

Parties to partition action insisting upon sale rather than partition in kind until judgment cannot on appeal shift their position and claim sale should not have been ordered. Burke v. Burke, 209M386, 297NW340. See Dun. Dig. 401-409.

A party will not be permitted to shift his position on appeal. Briggs v. Kennedy Mayonnaise Products, 209M 312, 297NW342. See Dun. Dig. 401.

Party inviting particular judgment rendered cannot complain on appeal that it was erroneous. Id. See Dun. Dig. 419.

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 remaindermen did not appeal there was an affirmance of an order settling trustees account by debiting them with all income and crediting them with all disbursements to trust donor within limit of income. Watland, 211M84, 300NW195. See Dun. Dig. 426, 9945.

In action against vendor for damages for misrepresentation as to condition of well on farm where case was tried on theory and jury instructed that measure of damages was difference between value of farm had well been represented and value thereof in condition well was when sale was made, and there was no request for any other instruction, it cannot be contended for first time on appeal that measure of damages was reasonable amount for repair of well or construction of a new well, there being no evidence adduced with reference to repairing well. Forsberg v. Baker, 211M59, 300NW371. See Dun. Dig. 404.

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. See Dun. Dig. 9728.

Order refusing to open default judgment and permit defendant to answer was reversed notwithstanding failure of either counsel to call statute relieving a party from any judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, nor cases interpreting and applying same, to attention of trial court. Bearman Fruit Co. v. Parker, 212M327, 3NW (2d)501. See Dun. Dig. 384.

Respondents were not entitled to any decision on appeal to supreme court as to propriety of a particular part of probate court's order or the effect of district court's order affirming that of the probate court without mentioning such provision of the order, where appellant assigned no error with respect to that particular matter. Hencke's Estate, 212M407, 4NW(2d)353.

A respondent who has not appealed cannot assign error. Id.

Proponent of will having claimed no prejudice from amendment in district court making a forgery an issue,

and having stated that she did not desire a continuance, she is in no position on appeal to supreme court to claim surprise or prejudice. Boese's Estate, 213M440, 7NW(2d) 355. See Dun. Dig. 384.

In a proceeding by the state to determine right to money paid into court under an award in a highway condemnation proceeding, a party who is not entitled to claim any part of the award is in no position to contend that the state, not having appealed, cannot be awarded any part of the fund on appeal. State v. Riley, 213M 448, 7NW(2d)770. See Dun. Dig. 398.

Where appellants in their motion for new trial assigned specifically their charges of misconduct of counsel, it cannot be assumed on appeal that a charge of misconduct omitted in the motion for new trial but assigned on appeal was presented to trial court, and it cannot be considered. Weber v. McCarthy, 214M76, 7NW(2d)681. See Dun. Dig. 368, 385, 7073, 7102.

On appeal by plaintiff, defendants not appealing may not urge error or attack decision below, but this does not deny to them right to stress as a ground for affirmance any sound reason presented by record in support of decision, even though it is not the one assigned by trial judge. Droege v. Brockmeyer, 214M182, 7NW(2d)538. See Dun. Dig. 426.

Where plaintiffs alleged existence of a judgment and defendant in effect admitted its existence but denied that it was res judicata, and the judgment in the prior action has not been returned as part of the record, court cannot consider a suggestion of the defendant that no judgment was entered in the prior action. Gandrud v. Hansen, 215M474, 10NW(2d)372. See Dun. Dig. 408.

A party will not be permitted to shift his position on appeal. Id. See Dun. Dig. 401.

1¾. Scope and extent of review.

Where trial court in denying motion to vacate judgment did not exercise any discretion in, or actually pass upon, merits of application for leave to answer, an assignment of error with respect to portion of order denying leave to answer would present nothing for review. Kemerer v. S., 206M325, 288NW719. See Dun. Dig. 397.

Affidavits presented on motion for new trial on ground of newly discovered evidence are not before the supreme court on consideration of merits of issue of fact determined below. Campbell v. L., 206M387, 288NW833. See Dun. Dig. 388.

Questions not presented by pleadings nor litigated at trial cannot be considered on appeal. Slawik v. L., 207M 137, 290NW228. See Dun. Dig. 384.

Construction of will, being dependent on legal implications of its language can be determined on appeal without a retrial. Holden's Trust, 207M211, 291NW104. See Dun. Dig. 425.

It is neither the practice nor duty of supreme court to increase printed matter for which lawyers must pay, and to that end will refrain from discussion of evidence merely to demonstrate correctness of decision below. Dahn's Estate, 208M86, 292NW776. See Dun. Dig. 414.

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.

Review is confined to record before the court, and it may not consider evidence appearing in a companion case. Sworski v. C., 208M43, 293NW297. See Dun. Dig. 346.

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.

Question whether an order dismissing an action in district court is properly appealable cannot be overlooked though not raised on appeal. Bulau v. B., 208M529, 294NW 845. See Dun. Dig. 358.

Causes will be disposed of on appeal within limits of consideration fixed upon theory on which they were tried. Dahlstrom v. H., 209M72, 295NW508. See Dun. Dig. 401 (48).

Order refusing to settle a case made long after entry of judgment cannot be reviewed on appeal from judgment. McGovern v. F., 209M403, 296NW473. See Dun. Dig. 389(32).

An appeal from an order denying an alternative motion for amended findings of fact and conclusions of law or a new trial brings up for review only that part of order relating to denial of a new trial. Ferch v. Hiller, 210M3, 297NW102. See Dun. Dig. 396.

Consideration on appeal of "demeanor" of a witness, assigned in support of a decision on the facts, will be limited to extent by which such demeanor appears from record. Williams v. Jayne, 210M594, 299NW853. See Dun. Dig. 386.

Point raised by 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.

When record shows there is no cause of action or no defense, appellate court will so determine no matter on what theory pleadings were framed or issues were tried in court below. Union Public Service Co. v. Village of Minneota, 212M92, 2NW(2d)555. See Dun. Dig. 401.

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. 4892.

Supreme court did not decide whether it was necessary to follow new procedure for questioning correctness of an assessment of land for tax purpose where question was not raised. Delinquent Real Estate Taxes, 212M562, 4NW(2d)783. See Dun. Dig. 386.

Trial on appeal may be restricted to review of mere questions of law, as where the appeal is from an administrative body or where the appellate court's jurisdiction is limited to review of the case made in court from which appeal is taken, but where appeal is from one tribunal to another with trial jurisdiction, the general rule is that appeal brings up case for trial de novo. Mixed Local Etc. v. Hotel and R. Employees Etc., 212M 587, 4NW(2d)771. See Dun. Dig. 388.

Where assignments of error were without merit or related to matters which could not be reviewed in view of the record, only question which appeal presented was whether conclusions of law were justified by findings of fact. Barnard v. Kandiyohi County, 213M100, 5NW(2d) 317. See Dun. Dig. 386.

In action by creamery upon bond of dealer in butter wherein verdict was against dealer and surety, and court rendered judgment for surety, court on appeal did not consider contention of surety that creamery knew that dealer was insolvent at time bond was procured and yet undertook to pay a portion of premium on bond and that this relieved bonding company of its liability, evidence of this knowledge being such that it became a question for jury, and such question was not submitted to jury and record shows no request that it be submitted. Trovatten v. Minea, 213M544, 7NW(2d)390, 144ALR263. See Dun. Dig. 384.

On appeal supreme court will determine merits whereever it can be done with due regard to limitations arising from nature of appellate jurisdiction. Droege v. Brockmeyer, 214M182, 7NW(2d)538. See Dun. Dig. 425.

Scope of review in certiorari proceedings is limited to and determined by record made by officers whose action is sought to be reviewed, and on appeal to supreme court from an order discharging the writ and affirming order below, supreme court cannot make findings of fact or determine questions of fact, but appealing relator has a right to have considered and determined all questions properly presented by the record. State v. Elston, 214M 205, 7NW(2d)750. See Dun. Dig. 1402.

On appeal from a judgment after trial by the court, no motion for a new trial having been made and no errors on rulings or proceedings at the trial being involved, the questions for review are limited to a consideration of whether the evidence sustains the findings of fact and whether such findings sustain the conclusions of law and judgment. Calich's Estate, 214M292, 8NW(2d)337. See Dun. Dig. 388a.

In reviewing an order or determination of an administrative board, supreme court will go no further than to determine whether the evidence was such that board might reasonably make order or determination which it made. Chellson v. State Div. of Emp. and Sec., 214M332, 8NW(2d)42. See Dun. Dig. 397b.

The review which the supreme court can make of a finding of an administrative body is limited, and it cannot disturb the determination because it does not agree with it, but can only interfere when it appears that the administrative body has not kept within its jurisdiction, or has proceeded upon an erroneous theory of the law, or unless its action is arbitrary and oppressive and unreasonable so that it represents its will and not its judgment, or is without evidence to support it. Bowman v. Troy Launderers & Cleaners, 215M226, 9NW(2d)506. See Dun. Dig. 397b.

Decisions of the supreme court on appeal must be limited to real controversies and questions involving existing rights asserted thereunder. McDonald v. B. and B. D. and H. and W. L. Union No. 792, 215M274, 9NW(2d) 770. See Dun. Dig. 425a.

Decisions in Supreme Court should be limited to real controversies involving existing facts and rights asserted thereunder. Dehning v. Marshall Produce Co., 215M339, 10NW(2d)229. See Dun. Dig. 463.

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, 215M417, 10NW(2d)394. See Dun. Dig. 397a.

Where a new trial is ordered, the appellate court will consider questions not technically before it which will arise on a new trial, especially where they may be decisive. Christensen v. Hennepin Transp. Co., 215M394, 10 NW(2d)406, 147ALR945. See Dun. Dig. 386.

Ordinarily reviewing court will refuse to pass on a contention that a ruling was erroneous where appellant acquiesced in the rulings below, but court will pass on the contention where it will undoubtedly arise on a retrial which is rendered necessary by other errors. Id. See Dun. Dig. 388a.

2. Dismissal of appeal.
A motion to dismiss an appeal as frivolous will be granted only where it is perfectly apparent, without argument, that it is of that character. Chisholm Water Supply Co. v. C., 205M617, 287NW493. See Dun. Dig. 462.
Without a prior determination of question of authority vel non of attorneys who represent appellant, Supreme Court cannot entertain a motion to dismiss appeal on ground of want of authority. Larson v. Dahlstrom, 213M 596, 6NW(2d)37. See Dun. Dig. 462a.
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.
3. Affirmance.
Although court directed a verdict for defendant solely on ground of plaintiff's contributory negligence, there should be no reversal, if on entire evidence a verdict in plaintiff's favor could not stand. Fickling v. N., 208M 538, 294NW848. See Dun. Dig. 421.
Chief Justice deeming himself disqualified and other justices being equally divided, judgment of lower court was affirmed. Armstrong v. City of Rochester, 211M613, 299NW683. See Dun. Dig. 290.
Where members of court participating are equally divided as to what decision should be, order below is affirmed. Feder v. Modern Woodmen of America, 212M609, 3NW(2d)673. See Dun. Dig. 290.
Where members of an appellate court participating in decision are equally divided in opinion, the judgment or order will be affirmed by operation of law. Barlau v. Minneapolis-Moline Power Implement Co., 214M564, 9NW (2d)6. See Dun. Dig. 290.
4. Reversal.
Where court granted defendant's motion for judgment non obstante and denied motion for new trial and former alternative was erroneously granted, cause was reversed with leave to defendant to renew its motion for a new trial. Applequist v. O., 209M230, 296NW13. See Dun. Dig. 5085.
On appeal by plaintiff in an action to cancel a deed, supreme court granted a new trial on the issue of competency of the grantor in the interests of justice where there was doubt in the minds of the court as to the competency of the grantor. Parrish v. Peoples, 214M589, 9NW (2d)225. See Dun. Dig. 429.
Where there is no conflict in the evidence or the inferences to be drawn therefrom on the decisive question in the case, supreme court will direct final disposition of the controversy. Kiley v. Sward-Kemp Drug Co., 214M548, 9NW(2d)237. See Dun. Dig. 425.
4¼. Discretionary rulings.
The allowance of attorneys' fees and other expenses in divorce proceedings is largely a matter of discretion with trial court, and it is established policy of supreme court to be conservative in matter of such allowances and they are to be allowed cautiously and only when necessary. Burke v. B., 208M1, 292NW426. See Dun. Dig. 2804.
Disposition of custody of children in a divorce case made by trial court will not be reversed upon appeal except for abuse of broad discretion with which court is invested. Locksted v. L., 208M551, 295NW402. See Dun. Dig. 2800.
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).
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.
An order granting or vacating a temporary injunction or restraining order will not be reversed except when record compels a finding of abuse of discretion. East Lake Drug Co. v. Pharmacists and Drug Clerks' Union, Local No. 1353, 210M433, 298NW722. See Dun. Dig. 4490.
That supreme court would have been inclined to affirm had trial court denied motion for new trial on ground that use of word "and" instead of "or" in an instruction was an obvious inadvertence, it does not follow that granting of new trial would be disturbed. Larson v. Sventek, 211M385, 1NW(2d)608. See Dun. Dig. 7166.
Order of trial court modifying divorce decree as to custody of a child will not be disturbed on appeal unless it appears there was an abuse of discretion. Menke v. Menke, 213M311, 6NW(2d)470. See Dun. Dig. 399.
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, 9NW (2d)234. See Dun. Dig. 7696, 7708.
Action of trial court in denying a new trial for excessive damages will not be reversed except for a clear abuse of discretion. Olson v. Davis, 215M18, 9NW(2d)344. See Dun. Dig. 7136.

5. Proceedings below on reversal.
Appeal from decree entered on reviewing court's mandate brings up for reexamination only the proceedings subsequent to the mandate, and court cannot consider new issues nor modify previous opinion or mandate. Pike Rapids Power Co. v. M., (CCA8), 106F(2d)891. See 99F(2d)902, in which cert. was denied 59SCR362, 488, and rehearing denied, 59SCR487.
Rule of opinion that interlocutory judgment in partition is reviewable on appeal from final judgment having stood for 50 years without legislative change, court left change, if needed, to legislative action. Burke v. Burke, 209M386, 297NW340. See Dun. Dig. 389, 7345.
In action to rescind a lease for fraud of lessor, on reversal of a judgment for plaintiff because of erroneous instruction as to measure of recovery and failure to submit question whether there was unreasonable delay in rescinding after discovery of fraud, that defendant was guilty of fraud was considered as settled, leaving only issues remaining for decision whether rescission was made with reasonable promptness and amount of recovery. Hatch v. Kulick, 211M309, 1NW(2d)359. See Dun. Dig. 430.
Where case involving title to land was tried on its merits and court has passed upon all issues raised between parties directly involved so that a decree of reformation of title deeds may be made as case stands, and since upon trial court initially rested burden of determining whether additional parties should be joined, reversal on appeal will be without prejudice to entertainment of a motion to bring in respective grantors of parties as necessary additional parties. Flowers v. Germann, 211M412, 1NW(2d)424. See Dun. Dig. 457.
Where case was sent back because of insufficient findings, it was determined that it would be advisable that trial court reopen case to take additional evidence on certain points of accounting. Lewis v. Lewis, 211M587, 2NW(2d)134. See Dun. Dig. 435.
An order refusing to vacate a judgment against corporation in favor of one of its officers, on motion of a minority stockholder, being reversed, mandate calling for an order explicitly vacating judgment under attack, and "directions to try the controversy upon the merits of the proposed answer", right or wrong, required district court to proceed with trial of merits upon issue joined by the "proposed answer", filed by parties moving to annul judgment. Lenhart v. Lenhart Wagon Co., 211M 572, 2NW(2d)421. See Dun. Dig. 455.
Where supreme court reversed an order denying a temporary injunction to protect a trade name and ordered lower court to issue such injunction, fact that parent of defendant corporation attempted to intervene and defend action and that defendant, pursuant to a stipulation between the parties, did not answer, but retained right to answer within ten days after court rendered its decision on appeal, and that defendant after decision on appeal interposed an answer, had no effect upon operation of rule requiring compliance of lower court with mandate of supreme court. Personal Loan Co. v. Personal Finance Co., 213M239, 6NW(2d)247. See Dun. Dig. 455.
Where supreme court reverses an order or judgment and remands case with specific directions as to order or judgment to be entered, upon remittitur it is the duty of trial court to execute mandate precisely according to its terms, without alteration, modification, or change in any respect, and new defenses existing and known at date of an order or judgment so reversed cannot be heard or entertained in opposition to mandate. Id.
Mandamus may issue out of supreme court to compel judge of district court to comply with a mandate. Id. See Dun. Dig. 460, 5765.
A matter litigated and decided on appeal may not be relitigated under a different form and thus avoid effect of mandate on decision disposing of a case. Id. See Dun. Dig. 454.
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 has "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. 438a.
Neither an appellant nor a trial court should put parties to trouble and expense of a retrial 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, 6NW (2d)793. See Dun. Dig. 430.
On appeal by plaintiffs in an automobile accident case from a judgment for defendant following verdict for defendant, Supreme Court reversed and remanded for new trial only on issue of damages where evidence was conclusive that there was no contributory negligence and that defendant was guilty of negligence, though neither party moved for a directed verdict during the trial and

appellant asked for a new trial on all issues but challenged verdict as contrary to the evidence. Id. See Dun. Dig. 430, 5079, 5080, 7079.

Notwithstanding that there has been a verdict for defendant in a negligence case, no constitutional right to a jury trial or any other fundamental right is infringed by a reversal of the case and its remand for new trial on amount of damages only, when the evidence is conclusive that there was no contributory negligence and that defendant was guilty of negligence as a matter of law, there no longer being a jury question. Id. See Dun. Dig. 430, 5227.

Where an issue is settled as a matter of law by the record, supreme court will determine question and thereby avoid delay and expense of a retrial of the issues. Droege v. Brockmeyer, 214M182, 7NW(2d)538. See Dun. Dig. 425.

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 and 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. 455.

6. Law of case.

Illinois Cent. R. Co. v. Minnesota, 309US157, 60SCR419, aff'g 205Minn621, 286NW359. Reh. den., 60SCR585.

Following reversal with directions, proceedings in lower court should conform to mandate, opinion of reviewing court being law of case. Pike Rapids Power Co. v. M., (CCA8), 106F(2d)891. See 99F(2d)902, in which cert. was denied 59SCR362, 488, and rehearing denied, 59 SCR487.

Where appellant moved that cause be remanded to trial court so as to permit a hearing on his motion for amended finding 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.

Holding on appeal determining all legal propositions of case became law thereof to be followed and applied upon retrial of action. Peterson v. Johnson Nut Co., 209 M470, 297NW178. See Dun. Dig. 398, 404, 454.

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.

There having been no appeal from an order directing a verdict in favor of one defendant, question was not before the court on appeal by another defendant from an adverse judgment. Murphy v. Barlow Realty Co., 214M64, 7NW(2d)684. See Dun. Dig. 389, 398.

Determination by supreme court on appeal that recovery by owner of land taken by the state could not exceed a certain sum, was taken as law of the case on a subsequent appeal where in there was no finding as to value of the land. State v. Riley, 213M448, 7NW(2d)770. See Dun. Dig. 398, 454.

7. Moot questions.

Where husband and wife perished in same calamity and administrator collected a life insurance policy in which wife was beneficiary, and beneficiaries of both estates are identical, administrator upon appeal has no grounds upon which to argue that it was error to make a charge for insurance moneys in estate of wife, question being moot. Palm's Estate, 210M77, 297NW765 (first case). See Dun. Dig. 463.

On motion to dismiss appeal for lack of authority of attorneys for appellant to take the appeal and for want of a proper appeal bond, it is unnecessary for court to enter into question of proper parties on appeal bond until proper authority of attorneys is decided by proper motion. Larson v. Dahlstrom, 213M596, 6NW(2d)37. See Dun. Dig. 463.

Upon appeal from court's refusal to grant injunction restraining alleged breach of, or interference with, contract, questions presented became moot when contract terminated prior to decision on appeal. McDonald v. B. and B. D. and H. and W. L. Union No. 792, 215M274, 9NW (2d)770. See Dun. Dig. 463.

Where wholesale produce dealer's license expired before order of commissioner revoking license could be reviewed by certiorari, case was moot and writ was discharged. Dehning v. Marshall Produce Co., 215M339, 10 NW(2d)229. See Dun. Dig. 463.

7½. Presumptions.

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.

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, 292NW 745. See Dun. Dig. 371.

Appellate court cannot assume that jury failed to heed a direction in instructions limiting consideration of impeaching testimony. Klingman v. L., 209M449, 296NW528. See Dun. Dig. 380.

To secure a reversal burden is upon appellant to show prejudicial error. Gubbins v. Irwin, 210M428, 298NW715. See Dun. Dig. 368.

On appeal from an order vacating a restraining order and denying application for a temporary injunction, it must be assumed that there is a state of facts as favorable to it as record will justify. East Lake Drug Co. v. Pharmacists and Drug Clerks' Union, Local No. 1353, 210 M433, 298NW722. See Dun. Dig. 368a.

Presumption that a complaint states a cause of action until otherwise decided cannot operate upon an appeal from an order sustaining a demurrer, without memorandum, and appellant must sustain burden of demonstrating existence of error, and may not merely assign error and require respondent to first give reasons why demurrer should have been sustained. Bacich v. Homeland Ins. Co., 211M619, 2NW(2d)125. See Dun. Dig. 379, 7726.

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. 372.

In death action where only that part of settled case which relates to loss sustained by beneficiaries is printed, court must assume that there is nothing in part not printed which tended to arouse passion or prejudice in the jury which would affect amount of verdict. Bergstrom v. Frank, 213M9, 4NW(2d)620. See Dun. Dig. 373.

Where record is entirely barren on appeal as to how an administrative body reached its decision, culminating in an order, it must be presumed that order was a valid one, made after proper hearing, complying with requirements of "due process". Tepel v. Sima, 213M526, 7NW(2d)532. See Dun. Dig. 368.

Where appellants in their motion for new trial assigned specifically their charges of misconduct of counsel, it cannot be assumed on appeal that a charge of misconduct omitted in the motion for new trial but assigned on appeal was presented to trial court, and it cannot be considered. Weber v. McCarthy, 214M76, 7NW(2d)681. See Dun. Dig. 368, 385, 7073, 7102.

Absent a record showing the contrary, it will be presumed that evidence warranted assumptions of fact in court's charge. State v. Finley, 214M228, 8NW(2d)217. See Dun. Dig. 375.

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. 379.

8. Findings of fact.

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.

Review of denial of motion for directed verdict for defendant on ground of insufficiency of proof of negligence of defendant and conclusive proof of contributory negligence of plaintiff requires that testimony be viewed in light most favorable to plaintiff. Stolte v. L., (CCA8), 110F(2d)226.

In reviewing ruling of lower court on motion for a directed verdict question presented is whether or not there was substantial evidence to sustain a verdict, and in determining that question, evidence favorable to party against whom a directed verdict has been sought must be accepted as true and he is entitled to benefit of all favorable inferences therefrom. Champlin Refining Co. v. W., (CCA8), 113F(2d)844.

An appellate court does not weigh the evidence nor substitute its judgment as to inferences that may be drawn therefrom by the jury, and all facts which the evidence of prevailing party reasonably tends to prove must be accepted as established together with all favorable inferences fairly deducible therefrom. Cram v. Eveloff, (C.C.A.8) 127 F. (2d) 486. See Dun. Dig. 415.

On appeal from a judgment upon a verdict for plaintiff court must consider the evidence most favorable to plaintiff. Lowden v. Burke, (C.C.A.8) 129 F. (2d) 767. See Dun. Dig. 415.

In reviewing denial of motion for a directed verdict for defendant, the jury thereafter finding all issues for plaintiff, all conflicts in the evidence must be resolved against defendant and plaintiff is entitled to the benefits of such favorable inferences as the jury might reasonably have drawn from the evidence. Chicago, St. P. M. and O. Ry. Co. v. Muldowney, (CCA8), 130F(2d)971. Cert. Den. 63 SCR526. See Dun. Dig. 415b, 7159, 9764.

A verdict supported by substantial evidence will not be disturbed on appeal. Meyer v. A., 206M72, 287NW680. See Dun. Dig. 415.

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. 415.

On review of an order denying motion for amended findings or a new trial each material finding sustained by sufficient evidence must stand. Bearl v. E., 206M479, 288NW844. See Dun. Dig. 411.

A finding of fact in nature of a conclusion from other facts specifically found may be reviewed on appeal without a settled case or bill of exceptions to determine whether facts specifically found support conclusion. Holden's Trust, 207M211, 291NW104. See Dun. Dig. 388.

Findings of fact which are controlled or influenced by error of law are not final on appeal and will be set aside. Id. See Dun. Dig. 388.

A verdict, whether general or special, supported by substantial evidence, is final on appeal. Blume v. B., 291M393, 291NW906. See Dun. Dig. 415.

Findings of trial court will stand on appeal where those that are decisive are well supported, though other findings perhaps go beyond the evidence. Rhoads v. R., 208M61, 292NW760. See Dun. Dig. 388.

In action to procure a divorce trial court determines credibility of the witnesses and weight to be given their testimony and can conclude that testimony is product of imagination and exaggeration rather than a recital of what actually took place. Id.

It would be highly improper for supreme court to disturb finding of trial court in will contest of lack of testamentary capacity. Dahn's Estate, 208M86, 292NW 776. See Dun. Dig. 411.

Where two juries have found verdict for plaintiff, second verdict, approved by trial court, will not be interfered with unless evidence is demonstrably false or not entitled to credence. Becker v. T., 208M332, 294NW 214. See Dun. Dig. 388.

Whether certain witnesses are worthy of belief is primarily for jury and trial court. Id.

If a decisive finding is supported by sufficient evidence and is adequate to sustain conclusions of law, it is immaterial on appeal whether or not some other findings are not so supported. Locksted v. L., 208M551, 295NW402. See Dun. Dig. 411.

Disposition by trial judge of an issue of fact arising from conflicting evidence on motion to vacate a judgment is final. Connors v. U., 209M300, 296NW21. See Dun. Dig. 5124.

On appeal in an action for an accounting court has no authority to make or amend findings of fact where evidence is in conflict, but may only determine whether findings of fact as made below are manifestly and palpably contrary to evidence. Range Ice & Fuel Co. v. B., 209M260, 296NW407. See Dun. Dig. 411, 434.

Court will not review decision of trial court upon mere questions of fact unless record contains all evidence introduced on trial pertaining to such questions. Gubbins v. Irwin, 210M428, 298NW715. See Dun. Dig. 343(76), 344.

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. 388.

Where testimony reasonably tends to support findings of trial court they must be upheld. Service & Security v. St. Paul Federal Sav. & Loan Ass'n, 211M199, 300NW 811. See Dun. Dig. 411.

Supreme court will not set aside a verdict if there is evidence reasonably tending to support it. Anderson v. High, 211M227, 300NW597. See Dun. Dig. 415.

Verdict must be permitted to stand on appeal if evidence was open to inference sustaining it. Olson v. Thake, 211M231, 300NW602. See Dun. Dig. 415.

Reviewing court may not overturn decision below, after trial without a jury, where evidence permits a finding either way. Martens v. Martens, 211M369, 1NW(2d)356. See Dun. Dig. 411.

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. 411.

Even though evidence is not in conflict, yet if it is open to conflicting inference, decision of triers of fact is final. Brennan v. Friedell, 212M115, 2NW(2d)547. See Dun. Dig. 411.

In cases involving only questions of fact, supreme court is powerless to interfere if a finding can be made either way. Id.

Evidence that employee was properly discharged for disobedience was not so manifestly and palpably contrary to finding that employee was improperly discharged as to allow interference on appeal. Bang v. International Sisal Co., 212M135, 4NW(2d)113, 141ALR657. See Dun. Dig. 411.

On review of judgment for plaintiff on verdict view most favorable to plaintiff must be taken as to all matters in dispute in passing on sufficiency of evidence to sustain charge that defendant's negligence caused or contributed proximately to plaintiff's injury. Hasse v. Victoria Co-operative Creamery Ass'n, 212M337, 3NW (2d)593. See Dun. Dig. 388.

It is not the province of an appellate court to demonstrate the correctness of a fact issue found by the trial court. Holmes v. Conter, 212M394, 4NW(2d)106. See Dun. Dig. 415a.

It is not necessary for an appellate court to demonstrate the correctness of a fact issue determined by the trial court. Haglin v. Ashley, 212M445, 4NW(2d)109. See Dun. Dig. 415a.

If findings of district court as to value of land in tax proceedings are reasonably supported by evidence, they must be sustained on appeal. Delinquent Real Estate Taxes, 212M562, 4NW(2d)783. See Dun. Dig. 411.

On review of verdict directed for defendant evidence will be considered in light most favorable to plaintiff. Johnson v. Theo. Hamm Brewing Co., 213M12, 4NW(2d) 778, 11NCCA(NS)316. See Dun. Dig. 388, 415.

Findings of trial court will not be set aside unless clearly or manifestly against the weight of evidence or have no reasonable support in evidence. Warner v. A. G. Anderson, Inc., 213M376, 7NW(2d)7. See Dun. Dig. 411.

Findings of fact supported by evidence, although evidence is in conflict, are entitled to same weight as a verdict of a jury and are conclusive on appeal. Ylijarvi v. Brockphaler, 213M385, 7NW(2d)314. See Dun. Dig. 411.

Facts stated in a memorandum made part of decision, not inconsistent with facts specificially found, beome a part of the findings which must be accepted on appeal. Sime v. Jensen, 213M476, 7NW(2d)325. See Dun. Dig. 411.

A finding not sustained by the record and which is in substance a mere conclusion of law may be stricken as irrelevant to the issues. S.R.A., Inc., 213M487, 7NW(2d) 484. See Dun. Dig. 411.

In determining correctness of an order directing a verdict for defendant, it must be assumed that all facts shown by plaintiff's evidence and all fair inferences therefrom are established. Tepel v. Sima, 213M526, 7NW (2d)532. See Dun. Dig. 9764.

Since jury and trial court had benefit of seeing and hearing witnesses, reviewing court must regard evidence in light most favorable to party who prevalled below. Borg & Powers Furniture Co. v. Reiling, 213M539, 7NW (2d)310. See Dun. Dig. 415b.

When findings of fact are couched in general terms that anticipate the result and disclose that they are colored by an erroneous conception of the law applicable, supreme court will not give them the weight to which they are ordinarily entitled. Country Club District Service Co. v. Village of Edina, 214M26, 8NW(2d)321. See Dun. Dig. 411.

Findings of trial court will not be set aside if reasonably sustained by a consideration of all the evidence, and this applies to inferences from undisputed facts as well as to findings on conflicting testimony. Calich's Estate, 214M292, 8NW(2d)337. See Dun. Dig. 411.

On appeal testimony must be considered in light most favorable to respondents. Id.

On appeal from a verdict and judgment for plaintiff, question of plaintiff's contributory negligence should be considered on the basis of jury's finding that plaintiff's version of accident was true. Aide v. Taylor, 214M212, 7NW(2d)757, 145ALR530. See Dun. Dig. 415b.

A directed verdict expresses only the opinion of the court as a question of law, not of fact. Abraham v. Byman, 214M355, 8NW(2d)231. See Dun. Dig. 415.

Rule that reviewing court will view evidence in aspects most favorable to verdict does not apply in cases where court has directed the verdict. Id. See Dun. Dig. 415b.

While supreme court does not try cases involving allowances to administrators and their attorneys de novo, if there is no controversy as to the facts or if court considers facts in light most favorable to claimant, general rule as to review of a court's findings does not apply in full force to such allowances. Simmons' Estate, 214M 388, 8NW(2d)222. See Dun. Dig. 413.

Reviewing court is bound by findings of fact supported by ample evidence. Donohue v. Acme Heating Sheet Metal & Roofing Co., 214M424, 8NW(2d)618. See Dun. Dig. 415.

Unless trial court's finding of value of land on appeal in tax proceeding is manifestly against the weight of the evidence, supreme court must affirm. Kalscheuer v. State, 214M441, 8NW(2d)624. See Dun. Dig. 411.

In reviewing a judgment for plaintiff entered after denial of defendant's motion for judgment notwithstanding a verdict for plaintiff, evidence is considered in a view most favorable to the verdict. Harris v. Wood, 214M492, 8NW(2d)818. See Dun. Dig. 415b.

On appeal by plaintiff in an action to cancel a deed, although evidence on value was a fact question on issue of sufficiency of consideration, which, having been determined adversely to plaintiff, cannot be disturbed on review, it is proper to be considered insofar as it bears upon question of competency of grantor to execute the deed complained of. Parrish v. Peoples, 214M589, 9NW (2d)225. See Dun. Dig. 411.

In action to cancel a deed, although there was great disparity in testimony on value and strong support in evidence that land conveyed was worth considerably more than price for which it was sold, reviewing court cannot disturb finding that there was sufficient consideration unless such finding was palpably contrary to the evidence. Id.

On appeal in an action to cancel a deed testimony must be considered in light most favorable to the prevailing party. Id.

While it is true that a new trial should not be granted if the findings are reasonably supported by the evidence, it is also true that findings contrary to uncontradicted and not inherently improbable testimony cannot be sustained. Id. See Dun. Dig. 413.

Where, upon the evidence, reasonable minds might differ as to whether certain expenses were incurred in connection with litigation arising out of certain construction work and whether plaintiff consented to the pay-

ment thereof, the findings of the trial court, based upon jury's answers to specific questions, allowing certain items and disallowing in whole, or in part, other items may not be disturbed on appeal. Bass v. Ring, 215M11, 9NW(2d)234. See Dun. Dig. 411, 415.

On review of a verdict for damages for personal injuries, reduced in amount by the court, reviewing court must look upon the testimony in the light most favorable to plaintiff. Olson v. Davis, 215M18, 9NW(2d)344. See Dun. Dig. 415b.

On appeal from an adverse decision of a trier of fact testimony must be considered in the light most favorable to the prevailing party. Bloomquist v. Thomas, 215M35, 9NW(2d)337. See Dun. Dig. 411.

On review of an order denying a defendant's motion for judgment notwithstanding verdict for plaintiff, court is bound to accept the testimony most favorable to plaintiff. Merritt v. Stuve, 215M44, 9NW(2d)329. See Dun. Dig. 415b, 5085.

Where there is sufficient evidence reasonably tending to sustain the verdict it will not be disturbed on review. Ickler v. Hilger, 215M82, 10NW(2d)277. See Dun. Dig. 415.

On review of a judgment upon a verdict for plaintiff evidence must be considered in light most favorable to plaintiff. Id. See Dun. Dig. 415b.

Supreme court must affirm on questions of fact where there is evidence sufficient to sustain findings of trial court. McHardy v. State, 215M132, 9NW(2d)427. See Dun. Dig. 411.

The trier of fact is the sole judge of the credibility of witnesses testifying in relation to an issuable fact, not only where there is a conflict in the testimony of witnesses called by different parties, but also where it exists between the witnesses of a party or even in the versions given by a single witness. Dittrich v. Brown County, 215M234, 9NW(2d)510. See Dun. Dig. 411.

The rule that trier of a fact is sole judge of credibility of witnesses applies where the facts are established by expert testimony. Id.

Counsel who persists in appealing cases where only fact issues are involved suffers from a mental ailment described as the spirit of controversy as an ever present obsession. Becker County Nat. Bank v. Miller, 215M336, 9NW(2d)923. See Dun. Dig. 411, 415.

Supreme court is bound by the jury's findings on fact issues where the evidence permits a finding either way. Id. See Dun. Dig. 415.

Where there is evidence to sustain trial court's finding in a suit for a specific performance, reviewing court is compelled to affirm. Seitz v. Sitze, 215M452, 10NW(2d) 426. See Dun. Dig. 411.

Determination of taxing officials, if reasonably supported by competent evidence and permissible inferences therefrom, will be sustained under the rule that findings of administrative officers, when made upon such proofs, are final on review. Cargill v. Spaeth, 215M540, 10NW(2d) 728. See Dun. Dig. 397b, 9577c.

9. Rehearing.

A reargument should be granted where an important fact controlling decision has been entirely overlooked. Briggs v. Kennedy Mayonnaise Products, 209M312, 297 NW342. See Dun. Dig. 471.

Where a judgment in a criminal case is reversed upon ground that verdict and judgment are not sustained by evidence and case is remanded without directions as to disposition thereof in the trial court as required by statute, although necessary legal effect of such action is to remand case for a new trial, supreme court cannot amend its judgment accordingly. State v. Peterson, 214 M204, 7NW(2d)408. See Dun. Dig. 459.

After remittitur supreme court is without jurisdiction to amend its judgment. Id.

9495. Judgment notwithstanding verdict.

½. In general.

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, 9792.

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. Bolstad v. Paul Bunyan Oil Co., 215M166, 9NW(2d)346. See Dun. Dig. 5083.

1. When judgment should be ordered.

On review of an order denying a defendant's motion for judgment notwithstanding verdict for plaintiff, court is bound to accept the testimony most favorable to plaintiff. Merritt v. Stuve, 215M44, 9NW(2d)329. See Dun. Dig. 415b, 5085.

Trial court properly granted judgment for defendant notwithstanding a verdict for plaintiff where plaintiff was not entitled to recover under positive testimony of an unimpeached witness. Roberts v. Metropolitan Life Ins. Co., 215M300, 9NW(2d)730. See Dun. Dig. 5082.

2. Motion on trial for directed verdict necessary.

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. 5079, 5085.

On appeal by plaintiffs in an automobile accident case from a judgment for defendant following verdict for defendant, supreme court reversed and remanded for new trial only on issue of damages where evidence was conclusive that there was no contributory negligence and that defendant was guilty of negligence, though neither party moved for a directed verdict during the trial and appellant asked for a new trial on all issues but challenged verdict as contrary to the evidence. Lee v. Zaske, 213M244, 6NW(2d)793. See Dun. Dig. 430, 5079, 5080, 7079.

3. Motion for judgment.

Motion for judgment notwithstanding verdict should not be granted unless the party against whom it is made has failed to make a case and a verdict in his favor should have been set aside, the question being whether there is any evidence to support the verdict, such evidence to be accepted as true and given the benefit of all reasonably favorable inferences. McGivern v. Northern Pac. Ry. Co., (CCA8), 132F(2d)213. See Dun. Dig. 5082.

On motion for judgment notwithstanding verdict, single question is whether there is any competent evidence reasonably tending to sustain verdict. Peterson v. M., 206 M268, 288NW588. See Dun. Dig. 5080.

Where evidence is so overwhelmingly on defendant's side as to leave no room to doubt what facts are, court should grant judgment notwithstanding the verdict. Brulla v. C., 206M398, 289NW404. See Dun. Dig. 5082.

Testimony of a passenger in a crowded Ford that he did not hear crossing whistle sounded or locomotive bell rung, it not appearing that such passenger was listening for sounds, or that windows of Ford were open, or that he heard rumbling of freight train running at 25 miles an hour at any moment prior to Ford's collision with 19th car from front, is of no probative value as against positive testimony of several witnesses in a position to know that whistle was sounded and bell rung. Krause v. C., 207M175, 290NW294. See Dun. Dig. 5082.

It was error to deny motion for judgment notwithstanding verdict where there was only slight negative evidence supporting it, notwithstanding appellant asked appropriate instructions in submitting case to jury following denial of its motion for a directed verdict. Engberg v. G., 207M194, 290NW579. See Dun. Dig. 5080.

Order for judgment notwithstanding verdict will be sustained only where there is no evidence reasonably supporting it. Goldfine v. J., 208M449, 294NW459. See Dun. Dig. 5082.

Judgment for defendant notwithstanding verdict for plaintiff was proper where verdict rested on no better foundation than mere speculation and conjecture. Bragg v. Dayton Co., 212M491, 4NW(2d)320. See Dun. Dig. 5082.

In action upon bond of dealer in butter wherein verdict was for plaintiff, it was error to render judgment for the surety notwithstanding the verdict where all questions were for the jury under the evidence, though surety contended on appeal that plaintiff knew that dealer was insolvent at time bond was procured and yet undertook to pay a portion of the premium and that this relieved bonding company of its liability, a question not submitted to the jury and record showing no request that it be submitted. Trovatten v. Minea, 213M544, 7NW (2d)390, 144ALR263. See Dun. Dig. 5078.

It was error to grant judgment for defendant notwithstanding verdict for plaintiff where evidence made defendant's liability a fact question for jury. Weber v. St. Anthony Falls Water Power Co., 214M1, 7NW(2d)339. See Dun. Dig. 5078.

A motion by a defendant for judgment notwithstanding verdict should not be granted in a negligence case, whether the ground of the motion be the want of negligence of the defendant or contributory negligence of the plaintiff, unless evidence of negligence of defendant is wanting or evidence of plaintiff's negligence is clear. Solberg v. Minneapolis St. Ry. Co., 214M274, 7NW(2d) 926. See Dun. Dig. 5082.

All reasonable doubts must be resolved in favor of the verdict. Id.

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

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. 5080.

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. Appealability of order on motion.

Requirement in this statute that appeal be taken from whole order does not apply to an appeal under Laws 1933, c. 259, §3. Holden's Trust, 207M211, 291NW104. See Dun. Dig. 393.

When a motion is made in alternative for judgment notwithstanding or a new trial and a new trial is granted, moving party may not appeal from order denying judgment. Simon v. L., 207M605, 292NW270. See Dun. Dig. 300.

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. 5084.

7. Disposition of case on appeal.

Where court granted defendant's motion for judgment non obstante and denied motion for new trial and former alternative was erroneously granted, cause was reversed with leave to defendant to renew its motion for a new trial. Applequist v. O., 209M230, 296NW13. See Dun. Dig. 5086.

Though court below entered judgment for defendant notwithstanding verdict for plaintiff on ground of assumption of risk, reviewing court may affirm the order if it was right in any event upon ground that there was no negligence. Blomberg v. Trupukka, 210M523, 299NW 11. See Dun. Dig. 421, 5086.

On appeal from an order denying a blended motion for judgment notwithstanding verdict or new trial in action to recover part of purchase price of an article plaintiff should not have judgment notwithstanding verdict for defendant on counterclaim based on rescission, which remedy defendant had lost by delay, where upon another trial evidence might be forthcoming showing defective installation of work so as to justify an award of damages to defendant. Reliance Engineers Co. v. Flaherty, 211M233, 300NW603. See Dun. Dig. 5086.

8. Scope of review on appeal from judgment.

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. 5085, 5087.

9497. Appeal, when taken.

2. Appeal from judgment.

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. 316.

In election contest involving legislative offices time to appeal is five days after filing of decision, while in cases involving other offices time is that allowed by law for appealing from an order denying a motion for a new trial or judgment as case might be. Hanson v. Emanuel, 210M51, 297NW176. See Dun. Dig. 316.

An entry nunc pro tunc amending date of judgment cannot validate a premature appeal, no judgment having been entered prior to appeal and judgment being entered precisely at time when court and counsel intended that it should be entered. Hampshire Arms Hotel Co. v. Wells, 210M286, 298NW452. See Dun. Dig. 316, 5050.

An appeal from a judgment before it has been entered is premature and should be dismissed. Id. See Dun. Dig. 316.

3. Appeal from order.

Where order denying new trial was filed March 8, 1940, and on March 12, 1940, a copy of order was duly served by mail upon defendants' attorney, and upon stipulation court on April 6, 1940, ordered all proceedings stayed in case until May 17, 1940, notice of appeal on May 11, 1940, was too late. Geddes v. B., 208M609, 294NW845. See Dun. Dig. 317.

Certiorari in district court to review order of a civil service commission demoting superintendent of fire prevention bureau of Minneapolis Fire Department was not "an action" within meaning of §9498(1), and decision of court affirming action of the commission was "a final order, affecting a substantial right, made in a special proceeding" within §9498(7), and appeal therefrom must be taken within 30 days after service of written notice under §9497, and it is not contemplated that any judgment be entered in the certiorari proceeding. Johnson v. C., 209M67, 295NW406. See Dun. Dig. 317.

6. Election contests.

In election contest involving legislative offices time to appeal is five days after filing of decision, while in cases involving other offices time is that allowed by law for appealing from an order denying a motion for a new trial or judgment as case might be. Hanson v. Emanuel, 210M51, 297NW176. See Dun. Dig. 316.

9498. Appeals to supreme court.

STATUTE GENERALLY

½. In general.

Appealability of an order is not determined by merits of case but rather and only by nature of order from which a review is sought. Rodgers v. S., 206M637, 289NW 580. See Dun. Dig. 296a.

Right of appeal is governed by statute. Bulau v. B., 208M529, 294NW845. See Dun. Dig. 283.

An appeal from both a judgment, which is appealable, and an order, which is not appealable, will be treated as a valid appeal from judgment only and will be disregarded so far as it relates to the order. State v. Rock Island Motor Transit Co., 209M105, 295NW519. See Dun. Dig. 294.

An order appealable in part and non-appealable in part will present for review only that part which is appealable, and the non-appealable order or part of the order which is non-appealable will be disregarded. Julius v. Lenz, 212M201, 3NW(2d)10. See Dun. Dig. 296a.

A non-appealable order is not rendered appealable because it is coupled with an appealable order. Id.

Appeals to the supreme court are governed by statute. Id. See Dun. Dig. 283.

An order requiring defendant to do a certain act and if he fail to do it to show cause why he should not be adjudged in contempt is not a final order and is not appealable. Paulson v. Johnson, 214M202, 7NW(2d)338. See Dun. Dig. 296a.

An order adjudging a defendant in contempt and fining him $50 or, in case he does not pay the fine, imprisoning him for 30 days, is an adjudication of criminal contempt and is reviewable only on certiorari and not on appeal. Id.

If a contempt is a criminal contempt, one simply to impose a punishment, it can be reviewed only by certiorari; but if it is one to aid enforcement of a civil remedy, as by compelling one adjudged in contempt to deliver property in his possession, it is a civil contempt reviewable by appeal. Id.

¾. Party aggrieved.

An appellee or respondent, by making appellant a party to litigation or proceedings, is estopped to deny that appellant has a sufficient interest to entitle him to prosecute an appeal. State v. Rock Island Motor Transit Co., 209M105, 295NW519. See Dun. Dig. 310(87).

A party defendant whose rights and liabilities under a contract will be adversely affected if order from which appeal is taken by all defendants jointly is affirmed may maintain in his own name and right such appeal though his co-appellants, with plaintiff's consent, dismiss their appeal. Rice v. C., 208M509, 295NW529. See Dun. Dig. 311.

Where an appellant has accepted benefit awarded him by a judgment, he may yet appeal therefrom, challenging it so far as it is unfavorable to him, if reversal or modification cannot possibly affect his right to benefit he has taken. Bass v. Ring, 210M598, 299NW679. See Dun. Dig. 287.

SUBDIVISION 1

4. From judgment on appeal to district court.

Certiorari in district court to review order of a civil service commission demoting superintendent of fire prevention bureau of Minneapolis Fire Department was not "an action" within meaning of §9498(1), and decision of court affirming action of the commission was "a final order, affecting a substantial right, made in a special proceeding" within §9498(7), and appeal therefrom must be taken within 30 days after service of written notice under §9497, and it is not contemplated that any judgment be entered in the certiorari proceeding. Johnson v. C., 209M67, 295NW406. See Dun. Dig. 294.

An order of the district court dismissing an appeal from the probate court is appealable. Hencke's Estate, 212M407, 4NW(2d)353.

5. From judgment in action commenced in district court.

An interlocutory judgment directing sale is open to review on appeal from final judgment in partition. Burke v. Burke, 209M386, 297NW340. See Dun. Dig. 389, 7345.

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.

SUBDIVISION 3

10. Orders held appealable.

An appeal lies from a part of a judgment or order which involves a distinct and separable question. Holden's Trust, 207M211, 291NW104. See Dun. Dig. 296a.

An appeal lies from that part of an order, in proceedings by a trustee for accounting and distribution under L. 1933, c. 259, §3, allowing trustee's accounts and ordering distribution of estate, which determines who are entitled to take as distributees, since such part presents a distinct and separable question. Id. See Dun. Dig. 298.

Order concerning disposition of condemnation damages deposited with clerk of court was appealable. State v. Anderson, 208M334, 294NW219. See Dun. Dig. 302.

An order granting a motion to amend proof of service to show substitute of service rather than personal service and vacating a former order setting aside summons and complaint and dismissing action was appealable. State v. Funck, 211M27, 299NW684. See Dun. Dig. 301.

An order setting aside summons and complaint and dismissing action is appealable. Id.

11. Orders held not appealable.

An order denying a motion for judgment based upon a stipulation of liability is not an appealable order. Rodgers v. S., 206M637, 289NW580. See Dun. Dig. 298.

Where action was brought against a county and a town and a demurrer was sustained as to county and overruled as to town, an order refusing to require plaintiff to file an amended complaint omitting allegations applying to county on motion of town was an intermediate order and not appealable. Parsons v. T., 209M 132, 295NW909. See Dun. Dig. 298.

Where a motion for amended or additional findings is coupled with an alternative motion for a new trial, only that part of order denying a new trial is appealable. Droege v. Brockmeyer, 214M182, 7NW(2d)538. See Dun. Dig. 298, 300.

An order denying a motion for amended or additional findings is not appealable. Id. See Dun. Dig. 298(c).

An order denying a motion for amended findings or conclusions amounts to findings to the contrary and is not appealable. State v. Riley, 213M448, 7NW(2d)770. See Dun. Dig. 298(c).

Where there is a disagreement of the jury and a motion for judgment notwithstanding is denied no judgment can be entered, and the order denying the motion is not appealable. Bolstad v. Paul Bunyan Oil Co., 215M 166, 9NW(2d)346. See Dun. Dig. 298(c).

Order denying motion to dismiss an action is not appealable. State v. McBride, 215M123, 9NW(2d)416. See Dun. Dig. 309.

SUBDIVISION 4

12. Orders held appealable.

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.

Order of court on motion for amendment of findings and conclusions or for a new trial, amending findings of fact in part, conclusions of law not affected, and denying motion for a new trial, was appealable only as it denied a new trial. State v. Erickson, 212M218, 3NW(2d) 231. See Dun. Dig. 296a, 300.

Where a motion for amended or additional findings is coupled with an alternative motion for a new trial, only that part of order denying a new trial is appealable. Droege v. Brockmeyer, 214M182, 7NW(2d)538. See Dun. Dig. 298, 300.

When a motion for amended findings or conclusions is blended with a motion for a new trial and is denied as a whole, order denying new trial is appealable, being another way of questioning sufficiency of evidence in support of findings complained of. State v. Riley, 213M448, 7NW(2d)770. See Dun. Dig. 300.

On appeal from order denying a new trial, court may give consideration to assignments of error complaining of order of court refusing to add additional testimony and an order refusing to dismiss the action. State v. McBride, 215M123, 9NW(2d)416. See Dun. Dig. 396.

13. Orders held not appealable.

When a motion is made in alternative for judgment notwithstanding or a new trial and a new trial is granted, moving party may not appeal from order denying judgment. Simon v. L., 207M605, 292NW270. See Dun. Dig. 300.

An order denying an alternative motion for amended finding or a new trial is not appealable as a final order. State v. Rock Island Motor Transit Co., 209M105, 295NW 519. See Dun. Dig. 301.

SUBDIVISION 5

15. Orders held appealable.

An order dismissing a cause for want of jurisdiction is appealable. Bulau v. B., 208M529, 294NW845. See Dun. Dig. 301.

Rule that order in form of ordinary findings and order for judgment in civil cases is not appealable does not apply to a determination in certiorari which finally disposes of administrative proceedings. State v. Board of Education of Duluth, 213M550, 7NW(2d)544. See Dun. Dig. 295(72).

16. Orders held not appealable.

General rule is that no appeal lies from an action by court which requires a subsequent order or judgment to give it effect. Rodgers v. S., 206M637, 289NW580. See Dun. Dig. 298(17).

An order denying a motion for judgment based upon a stipulation of liability is not an appealable order. Id. See Dun. Dig. 298.

Part of order denying motion for amended findings is not appealable, though it may be ground for an assignment of error. Driessen v. M., 208M356, 294NW206; State v. Anderson, 208M334, 294NW219. See Dun. Dig. 301.

Generally, an order of dismissal is but an order upon which judgment may be entered, and appeal should be from the judgment. Bulau v. B., 208M529, 294NW845. See Dun. Dig. 301.

SUBDIVISION 7

18. Definitions.

Where a final order is determinative of the questions involved in a special proceeding, no further order or judgment is necessary, and appeal lies from a final order although it contains a direction for entry of judgment. Hanson v. Emanuel, 210M51, 297NW176. See Dun. Dig. 302.

Where a special proceeding is to be tried and determined as a civil action, appeal lies from either an order denying a motion for a new trial or the judgment. Id.

19. Orders held appealable.

While a judgment which is authorized but erroneous can only be reviewed by an appeal from the judgment, yet if judgment is unauthorized, it may be vacated on motion, and appeal from order denying application may be taken. Kemerer v. S., 206M325, 288NW719. See Dun. Dig. 308.

An order which on its face appears to be a final one in a special proceeding and affecting a substantial right is appealable. State v. Anderson, 207M357, 291NW605. See Dun. Dig. 302.

Order concerning disposition of condemnation damages deposited with clerk of court was appealable. State v. Anderson, 208M334, 294NW219. See Dun. Dig. 302.

Certiorari in district court to review order of a civil service commission demoting superintendent of fire prevention bureau of Minneapolis Fire Department was not "an action" within meaning of §9498(1), and decision of court affirming action of the commission was "a final order, affecting a substantial right, made in a special proceeding" within §9498(7), and appeal therefrom must be taken within 30 days after service of written notice under §9497, and it is not contemplated that any judgment be entered in the certiorari proceeding. Johnson v. C., 209M67, 295NW406. See Dun. Dig. 302.

An order of district court in certiorari proceedings which finally disposes of administrative proceedings by ordering that administrative decision be set aside and vacated is appealable, though in form of ordinary finding and order for judgment. State v. Board of Education of Duluth, 213M550, 7NW(2d)544. See Dun. Dig. 294.

20. Orders held not appealable.

A litigant whose alternative motion for judgment notwithstanding or a new trial is denied as to judgment but granted as to new trial cannot appeal. Halweg's Estate, 207M263, 290NW577. See Dun. Dig. 300.

Notwithstanding that election contest is a special proceeding, an appeal may not be taken from an order denying a motion for amended findings of fact and conclusions of law, but an appeal may be taken from judgment or an order denying a new trial. Aura v. Brandt, 211M614, 299 NW910. See Dun. Dig. 302.

An order appointing commissioners in eminent domain proceedings by the state is not a final one and is not appealable. State v. Simons, 212M452, 4NW(2d)361. See Dun. Dig. 3129.

APPEALABILITY OF ORDERS GENERALLY

22. Orders held not appealable.

An order granting respondent's motion for judgment on pleadings and denying relator's motion for judgment on pleadings and dismissing alternative writ of mandamus, is not appealable. State v. Delaney, 212M519, 4NW (2d)348. See Dun. Dig. 309.

Order of trial court denying application to add to a settled case testimony offered in trial of another action is not appealable. State v. McBride, 215M123, 9NW(2d) 416. See Dun. Dig. 309.

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

An order refusing to vacate an order granting judgment on the pleadings is not appealable. State v. Delaney, 212M519, 4NW(2d)348. See Dun. Dig. 304.

Ordinarily, an order denying a motion to vacate a non-appealable order does not acquire an appealable status. Id.

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

State v. Erickson, 212M218, 3NW(2d)231; note 12.

An order refusing to amend findings is not appealable. Aura v. Brandt, 211M614, 299NW910. See Dun. Dig. 309.

An order denying a motion for amended findings is not appealable, whether it be accompanied by a motion for a new trial or not. Julius v. Lenz, 212M201, 3NW(2d) 10. See Dun. Dig. 309.

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, 213M100, 5NW(2d)317. See Dun. Dig. 300, 395.

On appeal from an order denying a blended motion for amended findings or new trial, only that part of order denying a new trial will be reviewed. S. R. A., Inc., 213M487, 7NW(2d)484. See Dun. Dig. 300, 301.

34. Contempt proceedings.

An order adjudging a husband guilty of civil contempt is reviewable on appeal, but not by certiorari. Dahl v. Dahl, 210M361, 298NW361. See Dun. Dig. 302, 1400, 1708a.

9499. Bond or deposit for costs.

Appeal from judgment was not dismissed because bond was inadequate, there were no sureties and it was not in form required by statute, but appellant was given 10 days in which to file a proper bond. Geddes v. B., 209M 603, 295NW518. See Dun. Dig. 328.

A new appeal bond without an attorney as surety filed after motion to dismiss was made obviated objection that attorney was a surety in bond. Hanson v. Emanuel, 210M51, 297NW176. See Dun. Dig. 328, 329.

On motion to dismiss appeal for lack of authority of attorneys for appellant to take the appeal and for want of a proper appeal bond, it is unnecessary for court to enter into question of proper parties on appeal bond until proper authority of attorneys is decided by proper motion. Larson v. Dahlstrom, 213M596, 6NW(2d)37. See Dun. Dig. 324.

Where an appeal is unauthorized, a bond given for the sole purpose of taking such an appeal is void as a statutory obligation. Hampshire Arms Hotel Co. v. St. Paul

Mercury & Indemnity Co., 215M60, 9NW(2d)413. See Dun. Dig. 324.

An appeal bond insufficient or unenforceable as a statutory obligation may be valid as a voluntary, or so-called common-law, obligation. Id. See Dun. Dig. 327, 331.

An appeal bond, invalid for noncompliance with statute, is unenforceable as a voluntary obligation, if it lacks consideration. Id. See Dun. Dig. 331.

9500. Appeal from order—Supersedeas.

A supersedeas bond given under a void appeal does not operate to stay proceedings. Hampshire Arms Hotel Co. v. St. Paul Mercury & Indem. Co., 215M60, 9NW(2d) 413. See Dun. Dig. 326.

Where the consideration claimed for an appeal bond is that there was an appeal from a judgment, which had no existence, there is no consideration for the bond, because there could be no appeal. Id. See Dun. Dig. 327.

General rule is that the obligors in an appeal bond are estopped to contradict a recital therein of the existence of the judgment appealed from, but this is not true where appellee promptly moves for dismissal of the appeal on the ground that no judgment has been entered, the dismissal of the appeal being in effect an adjudication that the appeal, and consequently the bond, was void, and operates to estop appellee from asserting that the bond was valid or that the attempted appeal was a consideration for it. Id. See Dun. Dig. 331.

Where appellate court takes jurisdiction and hears an unauthorized appeal, the obligors on the appeal bond receive a benefit, which is consideration for the bond, and in such a case the grounds of the appellate court's decision, whether it be on the merits or otherwise, makes no difference, but there is not consideration where appellee procures a prompt dismissal of the appeal on the ground that it is a nullity. Id. See Dun. Dig. 331.

Where appellee procured dismissal of an attempted appeal from a judgment in an unlawful detainer case as premature, because taken before entry of judgment, obligors on a supersedeas bond given under this section are not liable for rents accruing between the dates of appeal and the dismissal, because of the invalidity of the appeal and lack of consideration for the bond. Id. See Dun. Dig. 331.

Where attempted appeal from a judgment in an unlawful detainer case was premature because 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. Id. See Dun. Dig. 331.

9501. Money judgment—Supersedeas.

Where appeal bond does not recite any consideration, and is given for purposes of an appeal from a judgment which does not exist, it is insufficient to create liability either as a statutory obligation or common-law obligation. Hampshire Arms Hotel Co. v. St. Paul Mercury & Indem. Co., 215M60, 9NW(2d)413. See Dun. Dig. 331.

CHAPTER 81

Arbitration and Award

9513. What may be submitted—Submission irrevocable.

Where contracting parties first agree to a statutory arbitration and later make complete submission to an arbitration which does not comply with statute but which is good at common law, it will be given effect as a common-law arbitration, overruling Holdridge v. Stowell, 39M360, 40NW259. Park Const. Co. v. I., 209M182, 296NW475, 135ALR59. See Dun. Dig. 499, 500.

Doctrine is discarded that general agreements to arbitrate oust jurisdiction of courts, and are therefore illegal as against public policy. Id. See Dun. Dig. 499.

A contract provision for arbitration of disputes "at the choice of either party" is not self-executing, and may be modified, rescinded, or waived by agreement or acts and conduct of parties and this notwithstanding a further provision that a "decision" of arbitrators "shall be a condition precedent to any right of legal action." Independent School Dist. No. 35 v. A. Hedenberg & Co., 214M82, 7NW(2d)511. See Dun. Dig. 487a.

Building contractor's conduct in failing to demand arbitration of dispute for over a year and in proceeding to trial of action for damages without making such demand or asking for a stay to permit arbitration constituted a waiver of its right to arbitration. Id. See Dun. Dig. 487a.

Word "irrevocable," even as used in an arbitration statute, means that contract to arbitrate cannot be revoked at the will of one party over the objection of the other, but that it can only be set aside for facts existing at or before time of its making, which would permit revocation of any other contract. Id. See Dun. Dig. 498.

Arbitration in insurance.

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

9516. Procedure after filing.

If arbitration is under statute award is summarily reviewable, but if proceeding was under common law, an action lies on the award. Park Const. Co. v. I., 209M182, 296NW475, 135ALR59. See Dun. Dig. 507.

9517. Grounds of vacating award.

Where arbitrators are permitted by submission to fix their own fees, such allowance to themselves is a severable matter, subject to review and correction as such without effect on award otherwise. Park Const. Co. v. I., 209M182, 296NW475, 135ALR59. See Dun. Dig. 509.

CHAPTER 82

Actions Relating to Real Property

GENERAL PROVISIONS

9521. Notice of lis pendens.

Lis pendens filed by attorney suing for money judgment in sum equal to a third interest in land acquired by former client was of no effect as against subsequent purchaser of land without actual notice. Melin v. Mott, 212M517, 4NW(2d)600. See Dun. Dig. 5669.

Notice of lis pendens need not be filed or published in an action by the state to quiet title under Laws 1939, c. 341. Op. Atty. Gen. (374g), Dec. 4, 1940.

ACTIONS FOR PARTITION

9527. Judgment for partition—Referees.

Appeals from orders or interlocutory judgments in partition proceedings to the supreme court. Laws 1941, c. 448.

An interlocutory judgment directing sale is open to review on appeal from final judgment in partition. Burke v. Burke, 209M386, 297NW340. See Dun. Dig. 389, 7345.

9530. Confirmation of report—Final judgment.

Appeals from orders or interlocutory judgments in partition proceedings to the supreme court. Laws 1941, c. 448.

9537. Sale ordered, when.

Appeals from orders or interlocutory judgments in partition proceedings to the supreme court. Laws 1941, c. 448.

9540. Sale of real property under action for partition—Notice.

Where separate owners each had a home building on one tract of land and that tract and another some distance away were sold enmasse, sale was valid as against alleged homestead rights where there was a relatively large single mortgage covering both tracts and court retained jurisdiction to pass upon any homestead claims and enforce them against proceeds of sale. Burke v. Burke, 209M386, 297NW340. See Dun. Dig. 7343.

Provision that distinct farms or lots shall be sold separately is directory and not mandatory, and contravention thereof does not render a sale void, but voidable upon a showing of fraud or prejudice or for other good cause. Id.

9544. Final judgment on confirming report.

Appeals from orders or interlocutory judgments in partition proceedings to the supreme court. Laws 1941, c. 448.