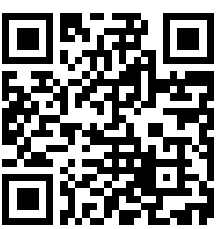

MINNESOTA DIGEST

SUPPLEMENT
1921

BY

MARK B. DUNNELL

OWATONNA, MINN.
MINNESOTA LAW BOOK COMPANY
1921

PREFACE

The original edition of Dunnell's Minnesota Digest, covering Minnesota Reports, 1–109, was published in 1910. A Supplement to the original Digest, covering Minnesota Reports, 110–130, and a part of 131, was published in 1916. This Supplement includes all the subsequent Minnesota cases published in Minnesota Reports, 131–147, and in Northwestern Reporter, 155–184, down to September 16, 1921. It includes cases that will hereafter appear in Minnesota Reports, 148–150. The classification of the subject-matter and the section and note numbers of this Supplement follow exactly those of the original Digest. To avoid needless duplication, cases which follow without modification well established rules that are stated at length in the original Digest are merely cited in this volume under the appropriate section and note number. This Supplement is designed to be used only in connection with and after the original Digest and for that reason it was deemed unnecessary to repeat cross-references. Tables of citations are omitted because of the well-nigh universal practice of attorneys to rely on periodical publications devoted exclusively to citations. M. B. D.

EXPLANATIONS

The section numbers in black-face type correspond with the section numbers of the original Digest. The numbers in parentheses, preceding citations, refer to the superior note numbers under the corresponding section of the original Digest. Minnesota cases which are merely cited in this volume after a number in parentheses, without any statement of law or facts, follow without modification the rule stated at length in the original Digest under the corresponding section and superior number. The original Digest should be consulted first.

ABANDONMENT

1. Definition and nature—An abandonment involves an intent to give up the right or estate abandoned. Mineral Land Investment Co. v. Bishop Iron Co., 134 Minn. 412, 159 N. W. 966.

2. What may be lost by abandonment—The equitable interest of a vendee in a contract for the sale of land may be lost by abandonment. Mathwig v. Ostrand, 132 Minn. 346, 157 N. W. 589; Enkema v. McIntyre, 136 Minn. 293, 161 N. W. 587; Porten v. Peterson, 139 Minn. 152, 166 N. W. 183.

An unperfected equitable title may be lost by abandonment. An easement may be so lost even though originating in grant. A legal title cannot be so lost. Agreements, options or leases, expressly or impliedly requiring work or exploration may be abandoned. Mineral Land Investment Co. v. Bishop Iron Co., 134 Minn. 412, 159 N. W. 966.

ABATEMENT AND REVIVAL

ANOTHER ACTION PENDING

5. When plea allowable—(6, 7) Colby v. Street, 146 Minn. 290, 178 N. W. 599. See L. R. A. 1918A, 5 (identity of issues necessary).

7. Action in another state—(18) Davis v. Minneapolis etc. Ry. Co., 134 Minn. 455, 159 N. W. 1084.
(19) L. R. A. 1917F, 1016.

8. Action in federal court—(20) See McCormick v. Robinson, 139 Minn. 483, 167 N. W. 271 (priority).

11. Pleading—A demurrer to a complaint on the ground that another action is pending accomplishes the same purpose as a plea in abatement. To be good it must appear that a judgment in the former action would be a bar to a judgment in the second action. It is not good where the nature of the two actions is essentially different though they relate to the same subject-matter. Colby v. Street, 146 Minn. 290, 178 N. W. 599.

A defendant held not to have abandoned an action to cancel a certificate in a mutual benefit society or its right to enjoin an action at law on the certificate, because it failed to plead in its answer the pendency of the former action. Kanevsky v. National Council, 132 Minn. 422, 157 N. W. 646.

DEATH OF PARTY

14. What causes of action survive—(30) Kanevsky v. National Council, 132 Minn. 422, 157 N. W. 646 (cause of action for cancelation of benefit certificate); Warsaw v. Bakken, 133 Minn. 128, 156 N. W. 7 (cause of action for obstruction of roadway and to abate the nuisance

caused by its obstruction); National Council v. Scheiber, 137 Minn. 423, 163 N. W. 781 (cause of action for cancelation of a policy of insurance); Guggisberg v. Boettger, 139 Minn. 226, 166 N. W. 177 (cause of action for damages for fraud or deceit).

15. Action does not abate—A suit in equity, brought during the lifetime of the insured, to cancel a certificate in a mutual benefit society, does not abate by reason of the death of the insured, nor by reason of the fact that the plaintiff now has an adequate remedy at law by way of defence to an action on the certificate, nor by reason of the fact that the action at law is begun before the beneficiaries are substituted as defendants in the equity suit. Kanevsky v. National Council, 132 Minn. 422, 157 N. W. 646.

The death of one partner pending an action of a survivable character against the partnership does not abate the action as against the survivors, and they are not entitled to a continuance so that the personal representative may be substituted nor should he be substituted. Reliable Engine Co. v. Ferch Bros., 145 Minn. 420, 177 N. W. 657.

(32) Warsaw v. Bakken, 133 Minn. 128, 156 N. W. 7 (action to restrain defendant from obstructing a roadway through his land and to abate the nuisance caused by its obstruction); National Council v. Scheiber, 137 Minn. 423, 163 N. W. 781; Supornick v. National Council, 147 Minn. 469, 180 N. W. 773. See § 2621.

16. Effect on jurisdiction—If a party was dead at the commencement of an action a judgment for or against him is void. Poupore v. Stone-Ordean-Wells Co., 132 Minn. 409, 157 N. W. 648.

An action having been brought against the insured to cancel a beneficiary certificate issued to her under which different amounts were payable to each of two beneficiaries, and the insured having subsequently died, and one of the beneficiaries being beyond the jurisdiction of the court, the action was properly continued against the beneficiary within the jurisdiction. National Council v. Scheiber, 141 Minn. 41, 169 N. W. 272.

(35) Poupore v. Stone-Ordean-Wells Co., 132 Minn. 409, 157 N. W. 648.

ABORTION

23. What constitutes—G. S. 1913, § 8610, makes the procurement of a miscarriage resulting in death, manslaughter, "unless the same is necessary to preserve * * * life." In order to bring a case within the exception it is not necessary that the danger of death be immediate. An instruction that to bring a case within the exception the danger of death must be immediate is not, however, erroneous, where the defence is predicated on the existence of immediate danger to life. State v. Hatch, 138 Minn. 317, 164 N. W. 1017.

27. Evidence—Admissibility—(51) State v. Newell, 134 Minn. 384, 159 N. W. 829 (declarations of the woman while under treatment and before the abortion as to the treatment given by defendant held admissible—declarations of another woman that shortly before the date of the abortion charged defendant offered to perform an abortion upon her held admissible to prove defendant's criminal intent).

28. Evidence—Sufficiency—Evidence held sufficient to justify a conviction. State v. Newell, 134 Minn. 384, 159 N. W. 829.

ACCORD AND SATISFACTION

34. Definition and nature—The distinction between an accord and satisfaction and a compromise and settlement is not always observed in the cases. C. W. La Moure Co. v. Cuyuna-Mille Lacs Iron Co., 147 Minn. 433, 180 N. W. 540.

There may be an accord and satisfaction by a new promise though it has not yet been performed. Ward v. Allen, 138 Minn. 1, 163 N. W. 749.

35. Accord executory—(65) See Westfall v. Ellis, 141 Minn. 377, 383, 170 N. W. 339; 10 A. L. R. 222; 1 Minn. L. Rev. 503.

36. Necessity of agreement—The fact that defendant in making division of a crop added to plaintiff's share, without his knowledge, an additional quantity to satisfy a liability to him, did not constitute an accord and satisfaction of such liability. Brekken v. Wensel, 144 Minn. 218, 174 N. W. 831.

(67) Held v. Keller, 135 Minn. 192, 160 N. W. 487.

37. Consideration—The evidence in this case sustains a finding of the trial court that a certain compromise agreement was without consideration, in that plaintiff thereby agreed to accept in satisfaction of a claim against defendant a sum less than the amount of such claim; there being no bona fide dispute between the parties as to defendant's liability for the full amount thereof. Gilia v. Robbins, 134 Minn. 45, 158 N. W 807.

Evidence held not to show any consideration for a relinquishment of a claim for insurance. Edwards v. Svea Fire & Life Ins. Co., 141 Minn. 285, 170 N. W. 206.

(71) See Hage v. Drake Marble & Tile Co., 145 Minn. 113, 176 N. W. 192.

38. Effect—The parties are concluded only as to matters actually included in the agreement. Held v. Keller, 135 Minn. 192, 160 N. W. 487.

If the promise or agreement itself, and not the performance thereof, is accepted in satisfaction of the demand, and the agreement to accept is based on a sufficient consideration, the demand is extinguished and cannot be the foundation of an action. Ward v. Allen, 138 Minn. 1, 163 N. W. 749.

(73) Dieudonne v. Arco Co., 139 Minn. 441, 166 N. W. 1067.

39. Part payment of a liquidated claim—The rule that an agreement to pay and accept a smaller sum in full of a debt not yet due is not void, as being without consideration, does not apply when the creditor is to receive nothing in return for his discharge of the debt. Gilia v. Robbins, 134 Minn. 45, 158 N. W. 807.

The general rule has been held inapplicable to an agreement reducing the future rent stipulated in a lease and acted upon by both parties. After an agreement has been fully executed on both sides the question of consideration becomes immaterial. C. S. Brackett Co. v. Lofgren, 140 Minn. 52, 167 N. W. 274.

(75) Gilia v. Robbins, 134 Minn. 45, 158 N. W. 807; C. S. Brackett Co. v. Lofgren, 140 Minn. 52, 167 N. W. 274; C. W. La Moure Co. v. Cuyuna-Mille Lacs Iron Co., 147 Minn. 433, 180 N. W. 540. See Edwards v. Svea Fire & Life Ins. Co., 141 Minn. 285, 170 N. W. 206. See L. R. A. 1917A, 719.

(76) C. S. Brackett Co. v. Lofgren, 140 Minn. 52 ,167 N. W. 274.

(80) Gilia v. Robbins, 134 Minn. 45, 158 N. W. 807.

40. Compromise of unliquidated, disputed, or contingent claims—(89) C. W. La Moure Co. v. Cuyuna-Mille Lacs Iron Co., 147 Minn. 433, 180 N. W. 540. See Gilia v. Robbins, 134 Minn. 45, 158 N. W. 807 (evidence held to show that there was not a bona fide dispute between the parties as to defendant's liability for the full amount of the claim).

(92) C. W. La Moure Co. v. Cuyuna-Mille Lacs Iron Co., 147 Minn. 433, 180 N. W. 540. See Edwards v. Svea Fire & Life Ins. Co., 141 Minn. 285, 170 N. W. 206.

41. Retention of money—(96) Isaacs v. Wishnick, 136 Minn. 317, 162 N. W. 297; C. W. La Moure Co. v. Cuyuna-Mille Lacs Iron Co., 147 Minn. 433, 180 N. W. 540.

42. Acceptance of check—Receiving and cashing a check, which shows on its face that it is to be accepted as full payment of a disputed claim or returned, operates as an accord and satisfaction of the claim. The effect of cashing the check is not changed by erasing the words "in full," without the knowledge or consent of the other party, as it must be accepted as tendered or rejected. Beck Electric Const. Co. v. National Contracting Co., 143 Minn. 190, 173 N. W. 413. See 34 Harv. L. Rev. 204.

When a check is sent upon the condition that it be accepted in full

payment of a disputed claim, there is, as a general rule, but one of two courses open to the creditor, either to decline the offer and return the check or to accept it with the condition attached. The moment the creditor indorses and collects the check, knowing it was offered only upon condition, he thereby agrees to the condition and is estopped from denying such agreement. It is then that the minds of the parties meet and the contract of accord and satisfaction becomes complete. Beck Electric Const. Co. v. National Contracting Co., 143 Minn. 190, 173 N. W. 413.

(98) Isaacs v. Wishnick, 136 Minn. 317, 162 N. W. 297; Matloch v. Jerabek, 138 Minn. 128, 164 N. W. 587.

44. Receipts in full—A receipt in full of "all claims and demands of every kind and nature" given as evidence of an accord and satisfaction, does not operate as a discharge of a claim which affirmatively appears not to have been included in the settlement. Held v. Keller, 135 Minn. 192, 160 N. W. 487.

(1) Held v. Keller, 135 Minn. 192, 160 N. W. 487.

47. Pleading—An accord and satisfaction is not admissible under a general denial. Lankester v. Fine, 134 Minn. 330, 159 N. W. 622.

An accord and satisfaction is new matter which must be specially pleaded. Edwards v. Svea Fire & Life Ins. Co., 141 Minn. 285, 170 N. W. 206.

49. Evidence—Sufficiency—(9) Ward v. Allen, 138 Minn. 1, 163 N. W. 749; Matloch v. Jerabek, 138 Minn. 128, 164 N. W. 587; Edwards v. Svea Fire & Life Ins. Co., 141 Minn. 285, 170 N. W. 206; C. W. La Moure Co. v. Cuyuna-Mille Lacs Iron Co., 147 Minn. 433, 180 N. W. 540.

ACCOUNTING—See Cancelation of Instruments, § 1203.

ACCOUNTS

ACCOUNT STATED

50. What constitutes—An account stated is an agreement that a statement of account between the parties is correct. The agreement may be implied, and it may be inferred where a statement is rendered by one party and acquiesced in by the other. But where the debtor renders a statement and the creditor protests that it is incorrect, his subsequent use of a check stated by the debtor to be in full payment of the account is not conclusive evidence of the creditor's agreement to an account stated. Isaacs v. Wishnick, 136 Minn. 317, 162 N. W. 297.

The giving of a check for an account operates as an account stated. Parties may agree upon the correctness of certain items of an account between them, though they do not agree as to all, and this agreement is conclusive in the absence of fraud or mistake. A reservation of an amount pending a complete settlement must, under such circumstances,

be regarded as a reservation to cover discrepancies in the portions of the account as to which the parties do not agree. Behrens v. Kruse, 132 Minn. 69, 155 N. W. 1065, 156 N. W. 1.

Where a debtor receives a statement of account and not only retains it for some months without questioning its correctness but also promises to pay it, he gives it the standing of an account stated which is assailable only for fraud or mistake. Kenyon Co. v. Johnson, 144 Minn. 48, 174 N. W. 436.

(12) L. R. A. 1917C, 447.

(13) Standard Grain Co. v. Middlewest Grain Co., 143 Minn. 11, 172 N. W. 775.

(14) International Harvester Co. v. Swenson, 135 Minn. 141, 160 N. W. 255; Isaacs v. Wishnick, 136 Minn. 317, 162 N. W. 297.

52. Parties—The assent to an account stated may be made through an agent. Moody v. Thwing, 46 Minn. 511, 49 N. W. 229. See 2 A. L. R. 6.

53. Effect—Conclusiveness—An account stated can be assailed or set aside only for fraud or mistake, which must be pleaded and proved. Behrens v. Kruse, 132 Minn. 69, 155 N. W. 1065, 156 N. W. 1; Kenyon Co. v. Johnson, 144 Minn. 48, 174 N. W. 436. See 11 A. L. R. 586.

An account stated having been established and defendants having failed to present any competent evidence to prove their alleged offset, the court properly directed a verdict for plaintiff. Kenyon Co. v. Johnson, 144 Minn. 48, 174 N. W. 436.

55. Limitation of actions—(25) '34 Harv. L. Rev. 560.

56. Pleading—To allege that an account was stated in a certain sum means that the debtor and creditor agreed that at the end of their previous dealings the sum named was the correct amount due and owing from the former to the latter. Kelly-How-Thompson Co. v. Merritt Development Co., 147 Minn. 153, 179 N. W. 897.

(28) Behrens v Kruse, 132 Minn. 69, 155 N. W. 1065, 156 N. W. 1.

(30) Kelly-How-Thompson Co. v. Merritt Development Co., 147 Minn. 153, 179 N. W. 897 (complaint sustained as against objection to evidence thereunder).

57a. Evidence—Sufficiency—Action on account stated. Defendant alleged a purchase of goods and set up a counterclaim. Evidence held to justify findings for defendant. Forman, Ford & Co. v. Madigan, 141 Minn. 492, 169 N. W. 546.

Evidence held to justify a finding of an account stated and for judgment as ordered. Standard Grain Co. v. Middlewest Grain Co., 143 Minn. 11, 172 N. W. 775.

VARIOUS KINDS OF ACCOUNTS

59. Outstanding and open account—(34) 1 A. L. R. 1060.

60. Running account—(35) Lebens v. Nelson, 148 Minn. —, 181 N. W. 350.

ACKNOWLEDGMENT

65. Nature and sufficiency—Acknowledgment over telephone. 12 A. L. R. 538.

73. Who may take—(70) See 34 Harv. L. Rev. 330.

78. Conclusiveness—(80) Summit Mercantile Co. v. Daigle, 146 Minn. 218, 178 N. W. 588. See Fuller v. Johnson, 139 Minn. 110, 165 N. W. 874.

83. Liability of officer for negligence—(85) See 10 A. L. R. 871.

ACTION

IN GENERAL

85. Remedy—Definition—The distinction between rights and remedies is fundamental. A right is a well-founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. Soderstrom v. Curry & Whyte, Inc., 143 Minn. 154, 173 N. W. 649.

(87) Soderstrom v. Curry & Whyte, Inc., 143 Minn. 154, 173 N. W. 649.

86. Remedies for new statutory rights—(90) See Friederick v. Redwood County, 148 Minn. —, 181 N. W. 324.

87. Statutory actions and remedies—When exclusive—When a statutory proceeding prescribes no remedy one who has suffered a wrong in connection therewith may proceed with any proper remedy afforded by the common law. Merz v. Wright County, 114 Minn. 448, 131 N. W. 635; Friederick v. Redwood County, 148 Minn. —, 181 N. W. 324.

(91) State v. Board of Education, 133 Minn. 386, 158 N. W. 635; State v. Schulz, 142 Minn. 112, 171 N. W. 263; Hyett v. Northwestern Hospital, 147 Minn. 413, 180 N. W. 552; United States v. Babcock, 250 U. S. 328.

88. Ex contractu or ex delicto—An action for damages for malicious delay in settling and paying fire insurance held on contract, though the complaint abounded in allegations of malice and intentional wrong doing. Independent Grocery Co. v. Sun Ins. Co., 146 Minn. 214, 178 N. W. 582.

(94) Keiper v. Anderson, 138 Minn. 392, 165 N. W. 237.

89. How and when commenced—An action is deemed as begun for all purposes when the summons is delivered to the proper officer for service if such service be completed within the time prescribed by law. McCormick v. Robinson, 139 Minn. 483, 167 N. W. 271.

Where an action is brought against a person in one capacity, an amendment by which it is continued against him in a different capacity does not bring in a new party nor begin a new action, but merely changes the capacity in which he is sought to be held, and the beginning of the action will date from the time it was originally begun regardless of the

time when the amendment was made. McCormick v. Robinson, 139 Minn. 483, 167 N. W. 271.

In the present case the state action was begun before the commencement of the federal action, and is entitled to priority. McCormick v. Robinson, 139 Minn. 483, 167 N. W. 271.

The action, wherein the judgment now sought to be attacked was rendered, was already begun, under the purview of section 7707, G. S. 1913, when the attachment therein was levied. Neither the attachment nor the action was, as a matter of law, abandoned by the delay in the service of the summons. Wagner v. Farmers' Co-operative Exchange Co., 147 Minn. 376, 180 N. W. 231.

Under our statutes an action in which the summons is not served promptly and within a reasonable time after the commencement thereof is not deemed pending within the meaning of the law. Spotts v. Beebe, — Minn. —, 182 N. W. 167.

91. Consolidation—A record on appeal held not to show a consolidation of actions. Chance v. Hawkinson, — Minn. —, 182 N. W. 911.

93. Duty to prosecute with diligence—(1) McCormick v. Robinson, 139 Minn. 483, 167 N. W. 271; Spotts v. Beebe, — Minn. —, 182 N. W. 167. See Murray v. Mulligan, 135 Minn. 471, 160 N. W. 1032; Union Investment Co. v. Abell, 148 Minn. —, 181 N. W. 353.

ADEMPTION OF LEGACIES—See Wills, § 10297a.

ADJOINING LANDOWNERS

95a. Contracts—Injunction—A permanent injunction held properly granted to restrain the closing of an opening into an alley whereby an owner of adjoining property was cut off from access to his property from the rear of adjoining property, contrary to a contract between the adjoining owners. Sharkey v. Batcher, 139 Minn. 337, 166 N. W. 350.

A right given by the owner of a building to the owner of an adjoining building to use a stairway and passageway in the first building for access to the second floor of the adjoining building, does not grant an easement in the land, and is lost when the building, including the stairway and passageway, is destroyed by fire without the fault of the owner, and not restored by the construction of a new building and stairway in place of the old. Brechet v. Johnson Hardware Co., 139 Minn. 436, 166 N. W. 1070.

LATERAL SUPPORT

96. Nature of right—(18) 30 Harv. L. Rev. 331.

ADMINISTRATIVE LAW—See Constitutional Law, § 1600.

ADMIRALTY

98. Jurisdiction of federal courts—How far exclusive—The federal constitution and statutes conferred upon the federal courts the admiralty and maritime jurisdiction exactly as it existed at common law. When the admiralty jurisdiction was exclusive it remained so. If a suit is in rem against the vessel itself it is essentially one in admiralty and exclusively within the admiralty jurisdiction of the federal courts. Of such an action the states cannot confer jurisdiction on their courts. But where the action is in personam against an individual defendant there is concurrent jurisdiction in the federal courts of admiralty and the state courts. Lindstrom v. Mutual Steamship Co., 132 Minn. 328, 156 N. W. 669.

When a person has a cause of action under admiralty or maritime law he has a choice of remedies. He may proceed in rem in admiralty if a maritime lien arises; or he may bring suit in personam in an admiralty court; or he may resort to his remedy at law in the state court; or he may resort to a federal court at law, if there are proper parties to give such jurisdiction. When the action is brought in a state court it is governed by the laws of the state and not the laws of admiralty. It is competent for the state to modify by statute its common-law rules of liability in their application to such cases, provided the modification does not conflict with the federal constitution or some paramount federal law. Lindstrom v. Mutual Steamship Co., 132 Minn. 328, 156 N. W. 669.

An action for an injury received while unloading a vessel at a dock in the harbor of Duluth, the vessel being operated on the Great Lakes, is within the jurisdiction of the proper federal court of admiralty, and also within the jurisdiction of the courts of this state exercising common-law jurisdiction. Lindstrom v. Mutual Steamship Co., 132 Minn. 328, 156 N. W. 669.

A common-law court may enforce a statutory attachment against a vessel, as auxiliary to the remedy in personam. Rounds v. Cloverport F. & M. Co., 237 U. S. 303, Lindstrom v. Mutual Steamship Co., 132 Minn. 328, 334, 156 N. W. 669.

State workmen's compensation laws are inapplicable in admiralty. Southern Pacific Co. v. Jensen, 244 U. S. 205; Peters v. Veasey, 251 U. S. 121; Soderstrom v. Curry & Whyte, Inc., 143 Minn. 154, 173 N. W. 649. Lindstrom v. Mutual Steamship Co., 132 Minn. 328, 156 N. W. 669, is overruled. See 31 Harv. L. Rev. 488; 34 Id. 82; 2 Minn. L. Rev. 145.

The act of Congress of October 6, 1917, providing for the application of state workmen's compensation acts to admiralty, was unconstitutional. Knickerbocker Ice Co. v. Stewart, 253 U. S. 149. See Soderstrom v. Curry & Whyte, Inc., 143 Minn. 154, 173 N. W. 649 (holding the act not retroactive).

98a. Common law and admiralty law different—It is well understood that in the two courts, that is, courts of admiralty and courts of law, not

only is the course of proceeding in many respects different, but also "the rules of decision are different." A striking instance of this difference is the rule for estimating damages in suits for personal injury. In the common-law courts the defendant must pay all the damages or none. If there has been contributory negligence on the part of the plaintiff, he can recover nothing. In the admiralty court, where there has been contributory negligence, the entire damages must be equally divided between the parties. It is held that when the action is at law the rule of liability prevailing at law, and not the admiralty rule, must be applied. It is also held that the principles which determine the existence of mutual fault in admiralty are not precisely the same as those which establish contributory negligence at law, but that "each court has its own set of rules for determining these questions, which may be in some respects the same, but in others vary materially," and it is held that if a person injured, though he might proceed in admiralty, elects to sue at law, the common-law rule as to contributory negligence must be applied, and he cannot recover "though defendant were negligent, if it appeared that his own negligence directly contributed to the result complained of." If this is the true principle to be applied as to contributory negligence, it must be the true principle to be applied as to all of the rules of law upon which liability depends. Lindstrom v. Mutual Steamship Co., 132 Minn. 328, 156 N. W. 669.

98b. Maritime torts—Injuries to employees—One employed by a shipper of pulpwood to load it on a vessel while moored on navigable waters at a dock in a port in this state, to be transported to a port in another state, is engaged in work of a maritime nature, and, if injured while so employed, does not come within the scope of the Workmen's Compensation Law of this state. One thus employed, if injured by reason of the actionable negligence of his employer, is not limited to the relief to which seamen are entitled under the rules of admiralty, but may recover the full damages to which he would be entitled at common law. Soderstrom v. Curry & Whyte, Inc., 143 Minn. 154, 173 N. W. 649.

ADOPTION

98c. Consent of parents—The consent of the mother is essential to the adoption of an illegitimate child. State v. Juvenile Court, 147 Minn. 222, 179 N. W. 1006; State v. Beardsley, — Minn. —, 183 N. W. 956.

Her consent, though given in writing and accompanied by a transfer of the custody of the child, may be revoked at any time before the child is legally adopted. State v. Beardsley, — Minn. —, 183 N. W. 956.

99. Nature of statutory proceedings—Conclusiveness of decree—Collateral attack—Estoppel of parties—Notice—The purpose of an adoption proceeding is to change the status of the child in its relation to its adoptive parents, and the child, its natural parents or guardian, and the adoptive parents are the parties to the proceeding. A substantial compli-

ance with the requirements of the statute will sustain the validity of the proceeding. The decree cannot be attacked collaterally. The presumptive heirs of the adoptive parents cannot complain because they may be deprived of rights of inheritance by the adoption of a child. When the adoptive parents obtain the decree they asked for and take the child into the family and treat it as their own, they and their heirs and personal representatives are estopped from asserting that the child was not legally adopted. Kenning v. Reichel, — Minn. —, 182 N. W. 517.

After the death of her adoptive parents, appellant made an ex parte application for the entry nunc pro tunc of a decree of adoption. The application, which was not based solely on the court records, but also on affidavits stating facts extraneous to the records, was granted. Thereafter, on the motion of a son and heir at law of the adoptive parents, the judgment so entered was vacated, and he was given an opportunity to oppose appellant's application. Held, that the son was entitled to notice before the judgment was entered, and that the court properly vacated it for want of such notice. Kenning v. Reichel, — Minn. —, 182 N. W. 517.

Under G. S. 1913, § 7155, as amended by Laws 1917, c. 222, requiring publication of notice of an adoption proceeding and such further notice to the known kindred as shall appear just and practicable, where grandparents of an orphan had no notice of the proceeding, and after obtaining knowledge promptly applied for a vacation of the decree, the court should have exercised its discretion to open the decree. In re Fay, 147 Minn. 472, 180 N. W. 533.

In support of the validity of a judgment of adoption of an orphan entered without notice to the maternal grandparents, it may be assumed that the court determined that no further notice than the one published as required by statute was just and practicable. In re Fay, 147 Minn. 472, 180 N. W. 533.

ADULTERY

103. Indictment—Complaint of spouse—A prosecution for the crime of adultery may be commenced by an indictment without a formal complaint being first made by the innocent spouse before a committing magistrate. In such a prosecution the grand jury may not receive the evidence of the innocent spouse, without the consent of the defendant, and base a true bill in part upon such testimony. An indictment so found will not be set aside on motion on the ground merely that incompetent evidence was received by the grand jury. State v. Marshall, 140 Minn. 363, 168 N. W. 174. See 5 Minn. L. Rev. 389.

ADVANCEMENTS—See Descent and Distribution, § 2724b; Executors and Administrators, § 3656.

ADVERSE POSSESSION

107. The statute—General scope—It is actual possession of one party for the requisite period that bars recovery and not the non-occupancy of the other party. Mineral Land Investment Co. v. Bishop Iron Co., 134 Minn. 412, 159 N. W. 966.

(43) Mineral Land Investment Co. v. Bishop Iron Co., 134 Minn. 412, 159 N. W. 966.

109. Object and policy of statute—The statute is a statute of repose. Rupley v. Fraser, 132 Minn. 311, 156 N. W. 350.

The statute was not designed in favor of the disseizor, but it prefers an interloper who will utilize the land and assume the burdens of ownership, to the true owner who abandons the land and its burdens. Rupley v. Fraser, 132 Minn. 311, 156 N. W. 350.

(47) 32 Harv. L. Rev. 135 (policy and operation of statute).

(48) Rupley v. Fraser, 132 Minn. 311, 156 N. W. 350.

110. Public lands excepted—The title to public land does not pass from the government until the issuance of a patent, and while the title is in the United States no adverse possession of it can, under a state statute of limitations, confer a title which will prevail against the legal title under a patent from the government. Baker v. Berg, 138 Minn. 109, 164 N. W. 588.

111. Public streets, parks, etc., excepted—One may be in adverse possession of land though it is traversed by public streets, and, while he cannot acquire by adverse user the rights of the public in the streets, he may by occupation of the whole tract acquire title to the portions not dedicated to public use and he may also acquire title to the fee in the streets. Rupley v. Fraser, 132 Minn. 311, 156 N. W. 350.

In order to prove title by adverse possession it is necessary to prove, not only possession, but hostile possession. When a street is dedicated by plat, the city may choose its own time to occupy, open and use the street, and until it does so, possession of the street by the abutting owner who owns the fee of the street, is not regarded as hostile and the statute of limitations will not commence to run. Pierro v. Minneapolis, 139 Minn. 394, 166 N. W. 766.

(55) Hrdlicka v. Haberman, 140 Minn. 124, 167 N. W. 363.

112a. Necessity of paying taxes—The statute, making payment of taxes for at least five consecutive years upon land separately assessed a prerequisite to the acquisition of title by adverse possession, applies in all cases where the possession had not ripened into title before the statute took effect. Post v. Sumner, 137 Minn. 201, 163 N. W. 161.

Where the owner of lot 9 claims the title by adverse possession to an adjoining strip of lot 10 not separately assessed, it is not necessary, under G. S. 1913, § 7696, that he should have paid taxes on the disputed strip. Kelley v. Green, 142 Minn. 82, 170 N. W. 922.

113. Essentials of adverse possession—In general—(58) Rupley v. Fraser, 132 Minn. 311, 156 N. W. 350; Stevens v. Velde, 138 Minn. 59, 163 N. W. 796; Kelley v. Green, 142 Minn. 82, 170 N. W. 922.

114. The possession must be hostile and under claim of right—By "hostile" is meant that the possession must be with intent to claim and hold the land against the true owner and the whole world, but it is not necessary that the claimant enter under a claim of ownership in fee. Rupley v. Fraser, 132 Minn. 311, 156 N. W. 350; Cain v. Highland Co., 134 Minn. 430, 159 N. W. 830.

It is not necessary that the disseizor should believe or assert that he has a right to enter. Good faith is not an essential element of adverse possession. Rupley v. Fraser, 132 Minn. 311, 156 N. W. 350; Cain v. Highland Co., 134 Minn. 430, 159 N. W. 830.

The claimant need not be in possession under color of title or claim of actual right. The possession may originate in trespass and the purpose may be to usurp. Cain v. Highland Co., 134 Minn. 430, 159 N. W. 830.

Title may be acquired by adverse possession though the occupancy is under a mistake as to boundry, but the usual elements of adverse possession must exist, including adverse intent. Stevens v. Velde. 138 Minn. 59, 163 N. W. 796.

Adverse possession must be openly hostile. Divestiture of title by adverse possession rests upon proof or presumption of notice to the true owner of the hostile character of the possession. The possession of one owner in common is presumed not to be hostile. Possession originating in a tenancy is presumably not hostile. Acts of occupation sufficient to show hostility as to strangers may not be sufficient as between near relatives. In all cases where the original occupation was permissive, the statute will not run until an adverse holding is declared and notice of such change is brought to the knowledge of the owner. Proof of inception of hostility must in all such cases be clear and unequivocal. But it is not necessary that the assertion of title be expressly or affirmatively declared. This may be shown by circumstances. Beitz v. Buendiger, 144 Minn. 52, 174 N. W. 440.

(59) Rupey v. Fraser, 132 Minn. 311, 156 N. W. 350; Stevens v. Velde, 138 Minn. 59, 163 N. W. 796; Pierro v. Minneapolis, 139 Minn. 394, 166 N. W. 766; Rux v. Adam, 143 Minn. 35, 172 N. W. 912.

(62) Rupley v. Fraser, 132 Minn. 311, 156 N. W. 350.

(68) Stevens v. Velde, 138 Minn. 59, 163 N. W. 796; Kelley v. Green, 142 Minn. 82, 170 N. W. 922.

(70) Leuthold v. John A. Stees Co., 141 Minn. 213, 169 N. W. 709; Beitz v. Buendiger, 144 Minn. 52, 174 N. W. 440.

(73) Holland v. Ousbye, 132 Minn. 106, 155 N. W. 1071 (evidence held to show an ouster and assertion of adverse claim for the statutory period); Beitz v. Buendiger, 144 Minn. 52, 174 N. W. 440.

(74) Holland v. Ousbye, 132 Minn. 106, 155 N. W. 1071.

(78) 2 Minn. L. Rev. 137.

(80) Rux v. Adam, 143 Minn. 35, 172 N. W. 912.

(82) See Holland v. Ousbye, 132 Minn. 106, 155 N. W. 1071.
(83) 1 A. L. R. 1329.
(87) Beitz v. Buendiger, 144 Minn. 52, 174 N. W. 440.

117. The possession must be continuous—One in adverse possession may acquire a tax certificate on sale of the land for taxes, and may assign the same without breaking the continuity of his possession. An instrument of assignment, given in this case by one in adverse possession, and in form a sale and transfer of all his interest in the land, is held not to break the continuity of adverse posssession: First, because it was not delivered until after title by adverse possession matured; and, second, because intended only as an assignment of the tax lien. Although the instrument was in writing, still, in litigation between one party to the instrument and strangers, the real nature of the transaction may be shown by parol evidence. There is no real forfeiture to the state for taxes in this state, and what is sometimes called forfeiture to the state upon the expiration of three years from date of sale to the state does not interrupt adverse possession. Rupley v. Fraser, 132 Minn. 311, 156 N. W. 350.

An occupant's temporary absence from premises used as a home does not break the continuity of his possession. Kelley v. Green, 142 Minn. 82, 170 N. W. 922.

The possession of several successive holders may be tacked together if there is privity between them. Such privity exists between two successive holders when the latter takes under the earlier by voluntary transfer of possession. It is not necessary that the deed from the one to the other should describe the tract adversely occupied. Kelly v. Green, 142 Minn. 82, 170 N. W. 922.

The fact that a predecessor in title, who farmed and raised crops on the land, did not reside on it nor keep cattle on it for two years and hence did not use the lane in dispute as a passageway for cattle during that period, did not break the continuity of possession. The finding that such possession was adverse is sustained by the evidence. Bahneman v. Fritche, 147 Minn. 329, 180 N. W. 215.

(4) Kelley v. Green, 142 Minn. 82, 170 N. W. 922.
(9, 10) Kelley v. Green, 142 Minn. 82, 170 N. W. 922. See 32 Harv. L. Rev. 135.

118. The possession must be exclusive—(13) John A. Stees Co. v. Reinhardt, 142 Minn. 340, 172 N. W. 219; Rux v. Adam, 143 Minn. 35, 172 N. W. 912.

119. Color of title—(15) Rupley v. Fraser, 132 Minn. 311, 156 N. W. 350; Stevens v. Velde, 138 Minn. 59, 163 N. W. 796.

(16, 17) Rupley v. Fraser, 132 Minn. 311, 156 N. W. 350; Cain v. Highland Co., 134 Minn. 430, 159 N. W. 830.

(18) 2 A. L. R. 1457 (necessity of writing to give color of title).
(20) Rupley v. Fraser, 132 Minn. 311, 156 N. W. 350.

121. Easements—Certain wall and sewer easements held not acquired by adverse possession. Leuthold v. John A. Stees Co., 141 Minn. 213, 169 N. W. 709.

Evidence held not to show a public easement by prescription in a strip of land inside the line of a sidewalk left open by the owner for the display of goods by occupants of business buildings, erected five feet back from the line for that purpose. The use of the public was not exclusive. John A. Stees Co. v. Reinhardt, 142 Minn. 340, 172 N. W. 219.

125. Pleading—The sufficiency of a complaint to admit proof of adverse possession questioned but not determined. Roy v. Dannehr, 137 Minn. 464, 162 N. W. 1050.

(35) Beitz v. Buendiger, 144 Minn. 52, 174 N. W. 440. See § 112a.

127. Evidence must be clear and convincing—(40) Cain v. Highland Co., 134 Minn. 430, 159 N. W. 830; Stevens v. Velde, 138 Minn. 59, 163 N. W. 796; Beitz v. Buendiger, 144 Minn. 52, 174 N. W. 440.

128. Law and fact—(41) Stevens v. Velde, 138 Minn. 59, 163 N. W. 796.

129. Burden of proof—Though the court finds adverse possession for more than the statutory period it is enough if the proof establishes it for the statutory period. Kelley v. Green, 142 Minn. 82, 170 N. W. 922.

130. Facts held sufficient to constitute adverse possession—Evidence held to show adverse possession for the statutory period by one whose possession began as that of a tenant in common. Holland v. Ousbye, 132 Minn. 106, 155 N. W. 1071.

Where an abutting owner maintained for the statutory period a fence on a section line which was the center of a road laid out by town supervisors, it was conceded that this was sufficient to establish title by adverse possession. Hrdlicka v. Haberman, 140 Minn. 124, 167 N. W. 363.

The evidence sustains the finding of the court that defendant and his predecessors were in adverse possession of a strip adjoining a city lot owned by them for more than fifteen years. Although the court found adverse possession for a period of twenty-six years, it is not necessary that the proof establish it for more than fifteen years. Kelley v. Green, 142 Minn. 82, 170 N. W. 922.

Property in controversy consisted of a house and lot inherited by three sisters. It was exclusively occupied by one as a home for nearly twenty-five years. After her death her children occupied or rented it out for five years. These occupants paid the taxes for this whole period and made substantial improvements from time to time. The other sisters lived near by. They never asserted any right in the property, though not always on friendly terms. Held, the evidence sustains a finding of title by adverse possession. Beitz v. Buendiger, 144 Minn. 52, 174 N. W. 440.

131. Facts held insufficient to constitute adverse possession—Evidence held not to justify a finding that an abutting owner had acquired

title by adverse possession to a portion of a public road established by town supervisors. Hrdlicka v. Haberman, 140 Minn. 124, 167 N. W. 363.

AFFIDAVITS

132. Definition—(58) See State v. Sheriff of Hennepin County, 148 Minn. —, 181 N. W. 640 (sufficiency of an affidavit questioned); 12 A. L. R. 538 (sufficiency of oath over telephone).

133. Jurat—(59) See State v. Sheriff of Hennepin County, 148 Minn. —, 181 N. W. 640.

(60) See 1 A. L. R. 1568.

137. Signature of affiant—Where, in executing a lien statement, an authorized agent of the claimant signs his name immediately below the verification and above the jurat, the signing constitutes a sufficient subscription thereto. L. J. Mueller Furnace Co. v. Bahneman, 144 Minn. 119, 174 N. W. 614.

AGENCY

IN GENERAL

142. General agents—Defendant, a New York corporation, maintained a branch office in Minneapolis. Its branch manager had the handling of all affairs relating to defendant's business in certain counties in several states. Such manager held to be a general agent, with authority to bind the defendant for services of plaintiff, rendered under a verbal arrangement with the manager. Malone v. Pathe Exchange, Inc., 141 Minn. 339, 170 N. W. 215.

(73) Malone v. Pathe Exchange, Inc., 141 Minn. 339, 170 N. W. 215.

144. Exclusive agents—Plaintiff, an Illinois corporation, appointed defendant exclusive representative for the sale of its products in the states of Minnesota and Iowa, agreeing to pay a stated commission on accepted orders. Defendant had attempted, without success, to obtain an order from a certain Minneapolis dealer; thereafter, while in Chicago, a representative of said dealer gave an order for plaintiff's products to an agent of plaintiff whom he met there, which order was filled by plaintiff and shipped to the dealer at Minneapolis. It is held that defendant was not entitled to a commission on this order. The record fails to show that defendant was entitled to commissions in excess of the amount allowed by the trial court. Aluminum Products Co. v. Anderson, 138 Minn. 142, 164 N. W. 663.

145. Existence of agency—Miscellaneous cases—(78) Nichols v. Kissel Motor Car Co., 144 Minn. 137, 174 N. W. 733 (agency for sale of automobile).

(79) Smith v. O'Dean, 132 Minn. 361, 157 N. W. 503 (third party held not agent of one of the principals in an exchange of realty); Bur-

nett v. Sulflow, 134 Minn. 407, 159 N. W. 951 (evidence held to justify finding that defendant was not the agent of plaintiff in the purchase of certain land but purchased for himself and sold to plaintiff); Matson v. Bauman, 139 Minn. 296, 166 N. W. 343 (sale of corporate stock); Vasey v. Saari, 141 Minn. 103, 169 N. W. 478 (evidence held not to show that one was agent for others in the hiring of horses).

PROOF OF AGENCY

149. In general—The fact of agency may be proved by the direct testimony of either the agent or principal whether they are parties to the action or not. Such testimony is not hearsay. Ruppert v. Muelling, 132 Minn. 33, 155 N. W. 1039.

A settlement having been made by an insurance adjuster and it being necessary to show his authority to represent the defendant, it was permissible to prove such authority by showing that he was acting under the provisions of an indemnity policy issued to the defendant by his company. Althoff v. Torrison, 140 Minn. 8, 167 N. W. 119.

(85) Ruppert v. Muelling, 132 Minn. 33, 155 N. W. 1039.

(88) Althoff v. Torrison, 140 Minn. 8, 167 N. W. 119; Stanger v. Pandolfo, 144 Minn. 294, 175 N. W. 912. See Prigge v. Selz, Schwab & Co., 134 Minn. 245, 158 N. W. 975.

(91) Stanger v. Pandolfo, 144 Minn. 294, 175 N. W. 912.

POWERS OF AGENT

152. In general—The powers of an agent may be enlarged by his principal from time to time. Greenfield v. Hill City Land, L. & L. Co., 141 Minn. 393, 170 N. W. 343.

(98) Dispatch Printing Co. v. National Bank of Commerce, 115 Minn. 157, 132 N. W. 2; Bloomingdale v. Cushman, 134 Minn. 445, 159 N. W. 1078.

153. Implied authority—The distinction between implied authority and apparent or ostensible authority is not always observed with nicety. Frequently there is confusion as the evidence which tends to show implied authority may show apparent authority. Schauble v. Hedding, 138 Minn. 187, 164 N. W. 808.

Implied authority is actual authority and one dealing with an agent may take advantage of it though he did not know of it or rely upon it in such dealing. In this respect implied authority differs from apparent. Bloomingdale v. Cushman, 134 Minn. 445, 159 N. W. 1078.

Implied authority includes only such acts as are incident and necessary to the exercise of the authority expressly granted. First Nat. Bank v. Schirmer, 134 Minn. 387, 159 N. W. 800.

An agent clothed with authority to accept promissory notes with the indorsement of the payee as security to a loan by his principal has no implied authority to contract with the indorser to pay the mortgage

registry tax and to record an unassigned mortgage securing the payment of the same. First Nat. Bank v. Schirmer, 134 Minn. 387, 159 N. W. 800.

Apparent authority is not actual authority. Implied authority is actual authority circumstantially proved, and is the authority the principal intended his agent to possess and includes all things directly connected with and essential to the business in hand. Koivisto v. Bankers & Merchants Ins. Co,. 148 Minn. —, 181 N. W. 580.

(99) Johnson v. Evans, 134 Minn. 43, 158 N. W. 823; Bloomingdale v. Cushman, 134 Minn. 445, 159 N. W. 1078; Doeren v. Krammer, 141 Minn. 466, 170 N. W. 609; Minneapolis Brewing Co. v. Yahnke, 148 Minn. —, 181 N. W. 331; Koivisto v. Bankers & Merchants Ins. Co., 148 Minn. —, 181 N. W. 580.

(1) Johnson v. Evans, 134 Minn. 43, 158 N. W. 823.

(2) First Nat. Bank v. Schirmer, 134 Minn. 387, 159 N. W. 800.

154. Inferable from course of dealing between principal and agent—(4) Bloomingdale v. Cushman, 134 Minn. 445, 159 N. W. 1078.

156. Apparent or ostensible authority—The doctrine of apparent or ostensible authority has been applied so as to estop the grantor in a deed to question the authority of his agent to fill in the name of the grantee in a blank in the deed. Schauble v. Hedding, 138 Minn. 187, 164 N. W. 808.

The evidence that tends to show implied authority may show apparent authority. Koivisto v. Bankers & Merchants Ins. Co., 148 Minn. —, 181 N. W. 580.

A principal who sends his agent to negotiate for the adjustment of his alleged liability on a contract of sale is estopped from questioning the agent's authority to make an agreement under which the principal gets possession of the property sold in order that he may fulfil his contract. Wellberg v. Duluth Auto Supply Co., 146 Minn. 29, 177 N. W. 924.

(6) Johnson v. Evans, 134 Minn. 43, 158 N. W. 823; Bloomingdale v. Cushman, 134 Minn. 445, 159 N. W. 1078; Schauble v. Hedding, 138 Minn. 187, 164 N. W. 808; Minneapolis Brewing Co. v. Yahnke, 148 Minn. —, 181 N. W. 331.

(7) Wellberg v. Duluth Auto Supply Co., 146 Minn. 29, 177 N. W. 924; Koivisto v. Bankers & Merchants Ins. Co., 148 Minn. —, 181 N. W. 580.

(9) Schauble v. Hedding, 138 Minn. 187, 164 N. W. 808; Segal v. Bart, 140 Minn. 167, 167 N. W. 481.

(10) See Schauble v. Hedding, 138 Minn. 187, 164 N. W. 808.

(12) Dispatch Printing Co. v. National Bank of Commerce, 115 Minn. 157, 132 N. W. 2; Bloomingdale v. Cushman, 134 Minn. 445, 159 N. W. 1078.

159. Authority to sell not inferable from possession—(20) See Dalton Adding Machine Co. v. Bailey, 137 Minn. 61, 162 N. W. 1059 (authority of sales agent to sell machine held for demonstration).

160. Power to sell, convey or mortgage realty—Power to bind principal by covenants in sale. L. R. A. 1917F, 954.

Power to bind principal by representations. L. R. A. 1917F, 962.

(28) Westfall v. Ellis, 141 Minn. 377, 170 N. W. 339. See § 1142.

161. Authority to receive payment or collect debts—Where there are two agents and a contract provides against payment to one without the consent of the other, a payment to one without the consent of the other does not discharge the debt. Trustees v. Merchants Nat. Bank, 139 Minn. 80, 165 N. W. 491.

An agent employed to sell goods and collect the price is not, by virtue of the employment, invested with power to indorse checks received upon such collections and made payable to the order of his principal, and a jury may not infer either express or implied authority to indorse from the fact of the employment. Defendants failed to prove either express or implied authority. There was proof that express authority was withheld, and the employment as carried on did not require as a necessary incident thereto that the agent should indorse plaintiff's name upon checks. Doeren v. Krammer, 141 Minn. 466, 170 N. W. 609.

Plaintiff executed a power of attorney, authorizing his agent to receive and receipt for dividends upon claims in bankruptcy. The agent received and indorsed the checks and drew the money thereon from the bank. In an action against the bank for the conversion of the checks defendant had a right to show the rules and practice in bankruptcy with reference to the method of handling and paying out funds by the trustee, as bearing upon the intention of the parties as to the authority of the agent to indorse such checks. Talbot v. First & Security Nat. Bank, 145 Minn. 12, 176 N. W. 184.

The rule of law is well settled in this state that an agent has no implied authority to indorse checks received by him, payable to his principal, for collections which he was authorized to make. Talbot v. First & Security Nat. Bank, 145 Minn. 12, 176 N. W. 184.

The secretary of a corporation received a check for rent due the corporation, indorsed it as secretary, cashed it, and converted the proceeds to his own use. Held, that the rent was paid. Gjertsen Realty Co. v. Holland Invest. Co., 148 Minn. —, 180 N. W. 774.

(33) See 8 A. L. R. 203.

(37) Doeren v. Krammer, 141 Minn. 466, 170 N. W. 609; Talbot v. First & Security Nat. Bank, 145 Minn. 12, 176 N. W. 184.

162. Authority of agent to solicit orders—The authority delegated to a traveling salesman, or drummer, for a wholesale mercantile house, is, as a rule, limited to soliciting and transmitting orders to his principal for acceptance. Plaintiff's evidence conclusively negatives authority in the defendant's traveling salesman, who solicited and transmitted an order for merchandise, to consummate a sale thereof; it appearing that the order was promptly rejected by defendant. Such evidence is also held to establish that a general custom in the mercantile business restricts the authority of traveling salesmen to soliciting orders merely and not

to make sales, of which custom plaintiff must be charged with knowledge; and further that such writings from defendant as might have come to plaintiff's notice could not have induced a belief in plaintiff that the salesman was invested with authority to make an absolute sale of the goods described in the order. Japan Tea Co. v. Franklin MacVeagh & Co., 142 Minn. 152, 171 N. W. 305.

A principal may clothe a traveling salesman with apparent or ostensible authority to enter into absolute contracts of sale, but the burden of proof rests upon him who asserts that the principal has done so. Hill v. James, 148 Minn. —, 181 N. W. 577.

A traveling salesman held not authorized to enter into an unusual contract of sale. Hill v. James, 148 Minn. —, 181 N. W. 577.

163. Authority to employ—Compensation of persons employed by agent. L. R. A. 1918F, 8, 720.

164a. Delegation—The powers conferred upon an agent are based on the confidence which the principal has in the agent's ability and integrity, and an agent cannot delegate or transfer to another powers calling for the exercise of discretion, skill or judgment. One employed as a sales agent by a manufacturer cannot transfer the powers and rights which the contract with his principal conferred upon him personally, to a corporation organized by him, unless his principal consents thereto. W. H. Barber Agency Co. v. Co-operative Barrel Co., 133 Minn. 207, 158. N. W. 38.

165. Authority to do particular things—Miscellaneous cases—To draw checks. Johnson v. Evans, 134 Minn. 43, 158 N. W. 823.

To contract with the indorser of a note to pay the mortgage registry tax and record an unassigned mortgage securing the note. First Nat. Bank v. Schirmer, 134 Minn. 387, 159 N. W. 800.

To agree to a modification of an order for goods subject to the approval of the principal, the modification being agreed to before such approval. International Harvester Co. v. Swenson, 135 Minn. 141, 160 N. W. 255.

To sell machine held by sales agent for purposes of demonstration. Dalton Adding Machine Co. v. Bailey, 137 Minn. 61, 162 N. W. 1059.

To fill in the name of the grantee in a blank of a deed executed by the principal. Schauble v. Hedding, 138 Minn. 187, 164 N. W. 808.

To waive a stipulation in a building contract requiring that any future provision for extras should be in writing. Walberg v. Jacobson, 143 Minn. 210, 173 N. W. 409.

To agree to a condition in a stock subscription that the corporation will move its head office to another city. Gasser v. Great Northern Ins. Co., 145 Minn. 205, 176 N. W. 484.

To agree to apply payments on a note so as to protect a surety. Minneapolis Brewing Co. v. Yahnke, 148 Minn. —, 181 N. W. 331

To assent to an account stated. Moody v. Thwing, 46 Minn. 511, 49 N. W. 229. See 2 A. L. R. 6.

(43) See L. R. A. 1916C. 112.

(45) Malone v. Pathe Exchange, Inc., 141 Minn. 339, 170 N. W. 215. See State v. District Court, 138 Minn. 416, 165 N. W. 268.

(46) La Plant v. Loveland, 142 Minn. 89, 170 N. W. 920. See §1142.

(47) Walberg v. Jacobson, 143 Minn. 210, 173 N. W. 409.

(50) Doeren v. Krammer, 141 Minn. 466, 170 N. W. 609.

(50, 56, 57) 12 A. L. R. 111.

166. Managing agent—(67) Malone v. Pathe Exchange, Inc. 141 Minn. 339, 170 N. W. 215; Minneapolis Brewing Co. v. Yahnke, 148 Minn. —, 181 N. W. 331. See § 2114.

169. Third parties charged with notice of powers—Contracts in writing sometimes expressly limit the authority of agents in relation thereto. Roseberry v. Hart-Parr Co., 145 Minn. 142, 176 N. W. 175. See § 4706.

A third person dealing with a known agent is charged with notice of his powers, and cannot rely on his assumption of actual authority to bind his principal, but must investigate and ascertain the nature and extent of his powers. One dealing with a known agent must exercise reasonable prudence, and, if the agent tenders a contract so unusual as to arouse the inquiry of a man of average business prudence, he is put upon notice, and must ascertain if actual authority to enter into the contract has been conferred. Hill v. James, 148 Minn. —, 181 N. W. 577.

(70) Hill v. James, 148 Minn. —, 181 N. W. 577.

170. Powers of attorney—Construction in general—A general power of attorney to sell lands containing no restrictions as to price or terms may nevertheless be limited and restricted by oral instructions; and such instructions are binding upon the agent and any person who, with knowledge of the same, becomes a purchaser through the agent. A formal revocation of such a power of attorney by the donors thereof would not nullify or affect a contract previously entered into under the power. The complaint is held to state a cause of action for the cancelation of an executory contract to sell real estate, entered into by the vendee with knowledge that the one who executed the same, under a power of attorney from the vendors, was violating his instruction as to price and terms. The vendee, accepting such a contract knowing that the agent, who executed it under a power of attorney, violated the instructions of the vendors as to price or terms, to the latter's loss and the vendee's gain, is equally guilty with the agent of legal fraud. Ziebarth v. Donaldson, 141 Minn. 70, 169 N. W. 253. See § 160.

172. Particular Powers of attorney construed—(78) Talbot v. First & Security Nat. Bank, 145 Minn. 12, 176 N. W. 184 (power to receive and receipt for dividends upon claims in bankruptcy).

EXECUTION OF POWERS

173. Joint agents—Execution by less than all—(79) Trustees v. Merchants Nat. Bank, 139 Minn. 80, 165 N. W. 491.

174. Mode of signing instruments—(84) National City Bank v. Zimmer Vacuum Renovator Co., 132 Minn. 211, 156 N. W. 265.

RATIFICATION OF UNAUTHORIZED ACTS OF AGENT

176. **Definition**—To ratify the act of an agent is to confirm, approve, or sanction a previous act done in behalf of the principal without authority. There can be no ratification of a contract which could not have been made binding on the ratifier at the time it was made. Farmers Co-operative Exchange Co. v. Fidelity & Deposit Co., — Minn. —, 182 N. W. 1008.

(87) Farmers Co-operative Exchange Co. v. Fidelity & Deposit Co., — Minn. —, 182 N. W. 1008.

181. **Necessity of full knowledge**—Ratification of unauthorized acts of an agent cannot be based upon something said or done by the principal when ignorant of what the agent had attempted to do. Doeren v. Krammer, 141 Minn. 466, 170 N. W. 609.

(95) Jones v. Blair, 137 Minn. 306, 163 N. W. 523.

182. **Must be of whole act**—Where an agent makes an unauthorized contract, the principal must accept or reject it as a whole; he cannot enforce the provisions beneficial to himself and repudiate those beneficial to the other party. Independent Harvester Co. v. Malzohn, 147 Minn. 145, 179 N. W. 727.

(97) Jones v. Blair, 137 Minn. 306, 163 N. W. 523; Gasser v. Great Northern Ins. Co., 145 Minn. 205, 176 N. W. 484; Independent Harvester Co. v. Malzohn, 147 Minn. 145, 179 N. W. 727.

(98) Independent Harvester Co. v. Malzohn, 147 Minn. 145, 179 N. W. 727.

184. **Accepting and retaining benefits of act**—When a principal retains the benefits of a contract obtained for him by his agent, he cannot repudiate the acts of the agent which induced the other party to the contract to enter into it on the ground that such acts were unauthorized. By accepting the contract he takes it with whatever taint attached to its origin, and by retaining the fruits of the unauthorized acts he assumes the same responsibility therefor as though they had been done with his authority. Roseberry v. Hart-Parr Co., 145 Minn. 142, 176 N. W. 175.

An instruction to the effect that to constitute a ratification of a transaction requires an acceptance, on the part of the plaintiff, of the fruits and benefits of the transaction, was, under the evidence, prejudicial to the rights of the defendant. Farmers Co-operative Exchange Co. v. Fidelity & Deposit Co., — Minn. —, 182 N. W. 1008.

Recovery may sometimes be had in quasi contract for benefits received under a contract with an unauthorized agent, though they were not knowingly received so that there was no ratification. 30 Harv. L. Rev. 402.

(8) Dickinson v. Citizens Ice & Fuel Co., 139 Minn. 201, 165 N. W. 1056; Doeren v. Krammer, 141 Minn. 466, 170 N. W. 609; Hoidale v. Cooley, 143 Minn. 430, 174 N. W. 413; Roseberry v. Hart-Parr Co., 145

Minn. 142, 176 N. W. 175; Gasser v. Great Northern Ins. Co., 145 Minn. 205, 176 N. W. 484.

184a. Suing on unauthorized contract—Where a principal brings an action for specific performance of an unauthorized contract entered into by an agent in his behalf, he thereby adopts the contract and ratifies the act of the agent and must bear the loss arising from a misappropriation by the agent of money paid to him by the other party in pursuance of the contract. Jones v. Blair, 137 Minn. 306, 163 N. W. 523.

185. Effort to avoid loss—(11) See Bergstrom v. Pickett, 148 Minn. —, 181 N. W. 343.

187. Void acts—(13) See Farmers Co-operative Exchange Co. v. Fidelity & Deposit Co., — Minn. —, 182 N. W. 1008.

189. Torts—Evidence held to justify a finding that a principal so adopted or ratified the acts of officers in causing a false imprisonment as to be liable therefor. Ehrhardt v. Wells, Fargo & Co., 134 Minn. 58, 158 N. W. 721.

190. Evidence—Sufficiency—(16) Block v. Duluth Log Co., 134 Minn. 313, 159 N. W. 760; Vasey v. Saari, 141 Minn. 103, 169 N. W. 478.

191. Effect—When a principal ratifies an unauthorized contract entered into by his agent he must bear the loss arising from a misappropriation of money by the agent paid to him by the other party to the contract and in pursuance thereof. Jones v. Blair, 137 Minn. 306, 163 N. W. 523. See § 237.

RIGHTS AND LIABILITIES INTER SE

194. Agent cannot make profit—(23) Nichols v. Kissel Motor Car Co., 144 Minn. 137, 174 N. W. 733.

197. Duty of agent to exercise care and skill—An agent is bound to exercise due care though his services are gratuitous. See 31 Harv. L. Rev. 891.

(29) Erickson v. Reine, 139 Minn. 282, 166 N. W. 333 (evidence held to justify finding that agent was negligent in remitting funds in his hands for the payment and discharge of a real estate mortgage to a party other than the owner of the mortgage).

198. Acting for both parties—A principal is liable for the misrepresentations of his agent though the latter is also acting as agent for the other party. Heidegger v. Burg, 137 Minn. 53, 162 N. W. 889. See § 1146.

200. Sales between principal and agent—(36) See James E. Carlson, Inc. v. Babler, 144 Minn. 125, 174 N. W. 824.

203. Compensation of agent—Fraud or bad faith on the part of an agent will generally defeat his right to compensation. Venie v. Harriet State Bank, 146 Minn. 142, 178 N. W. 170.

Compensation of sub-agent. L. R. A. 1918F, 720.

Compensation of persons employed by agent. L. R. A. 1918F, 8.

207. Duty of principal to reimburse agent—Plaintiff, at defendant's request, sold for him certain wheat and oats for actual future delivery out of the crop then being raised by defendant on his farm. Under the terms of his agreement with the defendant plaintiff made certain advances to protect the trade, which was finally closed at a loss. Plaintiff brought this action to recover the amounts paid by him for the defendant for commissions and margins. Plaintiff had a verdict. Held, that the evidence is sufficient to sustain the verdict. Monroe v. Rehfeld, 132 Minn. 81, 155 N. W. 1042.

208. Duty of principal to indemnify agent—(47) 34 Harv. L. Rev. 219.

LIABILITY OF PRINCIPAL TO THIRD PARTIES

211. Unauthorized contracts—A principal may generally either adopt or repudiate the unauthorized contracts of his agent. Hoidale v. Cooley, 143 Minn. 430, 174 N. W. 413. See § 4716a.

(50) Anderson v. Butterick Pub. Co., 132 Minn. 30, 155 N. W. 1045 (extension of contract).

212. Torts of agent—One does not become personally bound as a principal for the fraud of another unless such other, at the time of the commission of the fraud, was in fact the agent or the ostensible agent of the one sought to be charged. Smith v. O'Dean, 132 Minn. 361, 157 N. W. 503.

By legal intendment, the act of an agent within the scope of his agency is the act of his principal. There is a legal identification of the principal and agent, and the former is liable for the tortious act of the latter, because, in the eyes of the law, the act was really done by him, though in fact he may not have participated in it at all. The agent is himself liable for his own active wrong, while the principal is liable because the law attributes to him the act of his agent, with the result that both are liable jointly and severally to the person injured by the wrongful act. Melady v. South St. Paul Live Stock Exchange, 142 Minn. 194, 171 N. W. 806.

The principal and agent are jointly and severally liable to the person injured. Melady v. South St. Paul Live Stock Exchange, 142 Minn. 194, 171 N. W. 806.

A principal who authorizes his agent to make misrepresentations, and knows that he is making them, and remains silent, is liable therefor. Perkins v. Orfield, 145 Minn. 68, 176 N. W. 157.

The rule of respondeat superior is bottomed on the principle that he who expects to derive advantage from an act which is done by another for him, must answer for an injury which a third person may sustain from it. New York Central R. Co. v. White, 243 U. S. 188.

The liability of the principal for the acts of his agent does not rest on fault in the former. See Arizona Copper Co. v. Hammer, 250 U. S. 400, 432.

(51) Roemer v. Jacob Schmidt Brewing Co., 132 Minn. 399, 157 N. W. 640 (slander); Ehrhardt v. Wells, Fargo & Co., 134 Minn. 58, 158 N. W. 721 (false imprisonment); Prigge v. Selz, Schwab & Co., 134 Minn. 245, 158 N. W. 975 (representations as to the value of a retail stock of shoes); Heidegger v. Burg, 137 Minn. 53, 162 N. W. 889 (misrepresentations in the exchange of property); Roseberry v. Hart-Parr Co., 145 Minn. 142, 176 N. W. 175 (fraud).

(53) Hade v. Simmons, 132 Minn. 344, 157 N. W. 506.

215. Notice to agent notice to principal—(58) Hagstrom v. American Fidelity Co., 137 Minn. 391, 163 N. W. 670; Hanson v. Beaulieu, 145 Minn. 119, 176 N. W. 178.

(61) State Bank v. Adams, 142 Minn. 63, 170 N. W. 925. See L. R. A. 1918B, 929.

See §§ 777, 2119, 4709.

216. Undisclosed principal—(66) Ristvedt v. Walters, 146 Minn. 146, 178 N. W. 166.

(67) Jones v. Blair, 137 Minn. 306, 163 N. W. 523.

LIABILITY OF AGENT TO THIRD PARTIES

217. Acting with authority for known principal—(71) See Matson v. Bauman, 139 Minn. 296, 166 N. W. 343.

219. Failure to disclose agency—Liability of broker for breach of contract by undisclosed principal. 6 A. L. R. 641.

(76) See Matson v. Bauman, 139 Minn. 296, 166 N. W. 343; 33 Harv. L. Rev. 591.

224. Torts—(85) Tarara v. Novelty Electric Mfg. Co., 136 Minn. 216, 161 N. W. 409.

TERMINATION OF AGENCY

225. Principal may revoke agency at will—(87) Fletcher v. Southern Colonization Co., 148 Minn. —, 181 N. W. 205.

(88) Johnson v. Evans, 134 Minn. 43, 158 N. W. 823.

234a. Dissolution of partnership—Where a principal has authorized a partnership to act as his agent, the subsequent dissolution of the partnership terminates the agency, and a partner who takes over the business of the firm cannot continue to act as such agent unless the principal authorizes him to do so. W. H. Barber Agency Co. v. Co-operative Barrel Co., 133 Minn. 207, 158 N. W. 38.

235. Miscellaneous cases—In an action to recover upon bank checks issued in the name of the defendant by one formerly his agent, it is held that the evidence conclusively shows that the agent was discharged prior to the issuance of the checks; that whatever implied authority to issue checks he had prior to his discharge did not survive it; and that, there being no right of recovery except upon the ground of implied authority,

the court properly directed a verdict for the defendant. Johnson v. Evans, 134 Minn. 43, 158 N. W. 823.

(98) Moore v. Bentson, 147 Minn. 72, 179 N. W. 560 (correspondence held not to create an agency for an indefinite term).

ACTIONS

237. Undisclosed principal—The right to enforce a contract as an undisclosed principal is not dependent on the fact that the principal was in fact unknown to the other party. An undisclosed principal is one not disclosed by the contract. Unruh v. Roemer, 135 Minn. 127, 160 N. W. 251.

(3) Unruh v. Roemer, 135 Minn. 127, 160 N. W. 251; Jones v. Blair, 137 Minn. 306, 163 N. W. 523.

(5) Jones v. Blair, 137 Minn. 306, 163 N. W. 523.

239. Pleading—Evidence of a claim of defendant held properly stricken out as not within the issues made by the pleadings. Aluminum Products Co. v. Anderson, 138 Minn. 142, 164 N. W. 663.

An allegation that a publication of a libel made by the manager of a corporation, was made as its agent, is sufficient to charge the corporation with liability for the act. Northwestern Detective Agency v. Winona Hotel Co., 147 Minn. 203, 179 N. W. 1001.

241. Evidence—Admissibility—In an action between an agent and his principal, evidence of the correspondence and contracts between the agent and third parties in relation to matters of business which the agent was authorized to transact, held admissible. J. Walter Thompson Co. v. Minneapolis Cereal Co., 133 Minn. 316, 158 N. W. 424.

Certain checks held admissible to prove that an agent received a secret commission. International R. & S. Corp. v. Miller, 135 Minn. 292, 166 N. W. 793.

243. Law and fact—Evidence of implied authority held insufficient to go to the jury. Doeren v. Krammer, 141 Minn. 466, 170 N. W. 609.

Evidence held sufficient to make the question of agency one for the jury. Nichols v. Kissel Motor Car Co., 144 Minn. 137, 174 N. W. 733.

An instruction held not erroneous as assuming an agency. Whitnack v. Twin Valley Produce Co., — Minn. —, 182 N. W. 444.

(23, 24) Gaylord v. Rosander & Co., 148 Minn. —, 181 N. W. 583.

ALIENS

IN GENERAL

251. Right to acquire land—Right of alien enemy to take land by descent. 5 Minn. L. Rev. 373.

252. Actions by and against—Status of alien enemies in courts of justice. 31 Harv. L. Rev. 470.

NATURALIZATION

257. Judgment—Collateral attack on judgment. 6 A. L. R. 407.

ALTERATION OF INSTRUMENTS

259. Effect—Where a deed is executed and delivered, and is subsequently altered by the grantee, he cannot enforce any executory obligations therein; but his title remains unaffected, and he may prove such title by presenting the deed and proving its contents at the time of its execution. Robbins v. Hobart, 133 Minn. 49, 157 N. W. 908.

An alteration of an instrument, in order that it shall prevent recovery thereon, must be a material one and made with intent to defraud. Under this rule where by mistake in drawing a promissory note for "five hundred dollars" the word "hundred" is omitted, though the figures expressing the amount are correctly written, it is not an alteration which prevents recovery for the holder of the note to write in the omitted word. Spiering v. Spiering, 138 Minn. 119, 164 N. W. 583.

See § 2691a.

261. Held material—The addition of the word "or" between the names of two payees of a certificate of deposit. Trustees v. Merchants Nat. Bank 139 Minn. 80, 165 N. W. 491.

Adding additional party to negotiable instrument. 1918F, 698.

262. Held not material—The addition of the word "hundred" to a note for five hundred dollars, the figures expressing the correct amount being given. Spiering v. Spiering, 138 Minn. 119, 164 N. W. 583.

268. By stranger—Agent—(3) See L. R. A. 1916F, 293.

270. Evidence—Admissibility—Parol evidence is admissible to prove the alteration of a deed after its delivery. Grimes v. Minneapolis, etc., Traction Co., 133 Minn. 442, 158 N. W. 719.

A hotel inspector has been allowed to explain an erasure made in the copy kept as his record of a notice served by him upon a hotel keeper. State v. Minor, 137 Minn. 254, 163 N. W. 514.

271. Evidence—Sufficiency—(7) Spiering v. Spiering, 138 Minn. 119, 164 N. W. 583.

ANIMALS

274. Dogs personal property—(12) L. R. A. 1917F, 434.

275. Injuries by vicious dogs and other animals—Evidence held to justify a finding that a dog owned by defendant was vicious and that defendant was chargeable with notice of that fact so as to render him liable. Maynard v. Keough, 145 Minn. 26, 175 N. W. 891.

Liability of owner for injury due to dog interfering with travel on highway. 11 A. L. R. 270.

(14) Maynard v. Keough, 145 Minn. 26, 175 N. W. 891. See 34 Harv. L. Rev. 770 (liability for attack by mad dog known to be vicious).

276. Running at large—Chickens—Chickens running at large. Liability of owner for trespass. 34 Harv. L. Rev. 551.

(26) 32 Harv. L. Rev. 420 (injuries by trespassing animals).

See Laws 1921, c. 319.

APPEAL AND ERROR

IN GENERAL

283. Appeal a statutory remedy—Legislative control—The right of appeal is purely statutory, and may be given or withheld by the legislature, at its discretion. If given, it may be upon such conditions as the legislature deems proper. State v. Tri-State T. & T. Co., 146 Minn. 247, 178 N. W. 603.

(47) State v. Tri-State T. & T. Co., 146 Minn. 247, 178 N. W. 603.

285. Construction of statutes regulating appeals—Amendments—Where a party who has given notice of appeal, but by mistake has omitted to perfect his appeal within the statutory time, seeks permission from the court, under the authority conferred upon it by G. S. 1913, § 7995, as amended, to cure the omission, he must make his application with reasonable promptness after discovering the omission. Wheeler v. Crane, 141 Minn. 78, 169 N. W. 476, 597.

(54) State v. Tri-State T. & T. Co., 146 Minn. 247, 178 N. W. 603.

(56) Wheeler v. Crane, 141 Minn. 78, 169 N. W. 476, 597.

286. Jurisdiction not given by consent—(57) See State v. Schulz, 142 Minn. 112, 171 N. W. 263.

287. Waiver of right of appeal—Estoppel—An appellant may be estopped from questioning an order of continuance by acquiescing and taking advantage thereof. Thwing v. McDonald, 134 Minn. 148, 158 N. W. 820.

An appellant, by taking the benefit of the provisions of a judgment apportioning or distributing certain funds in controversy, has been held

estopped from questioning the apportionment and distribution on appeal. Thwing v. McDonald, 134 Minn. 148, 158 N. W. 820.

An estoppel going only to a portion of a judgment will not justify the dismissal of an appeal from the whole thereof. Thwing v. McDonald, 134 Minn. 148, 156 N. W. 780.

A wife does not waive her right to appeal from a judgment divorcing her from her husband and ordering her from his house, by the forced acceptance of monthly allowances, made in the judgment, which are not appreciably larger than the allowances previously made pendente lie. Spratt v. Spratt, 140 Minn. 510, 166 N. W. 769, 167 N. W. 735.

(64) Pulver v. Commercial Security Co., 135 Minn. 286, 160 N. W. 781.

(67) Thwing v. McDonald, 134 Minn. 148, 158 N. W. 820.

288. Jurisdiction of lower court after appeal—After an appeal under G. S. 1913, §4200, relating to the Railroad and Warehouse Commission, held, that the district court had jurisdiction to vacate its prior order staying the operation of its judgment. State v. District Court, 136 Minn. 455, 161 N. W. 164.

289. Judicial notice of records—Where an order striking out an answer as sham on the ground that an estoppel by judgment barred defendant from asserting the defence set forth therein is appealed to this court, if this court subsequently reverses the judgment relied upon as an estoppel, it may take judicial notice of such reversal and in consequence thereof reverse the order striking out the answer. Brokl v. Brokl, 133 Minn. 334, 158 N. W. 436.

293a. Delay in prosecution of appeal—Continuance—Delay in prosecution of an appeal and neglect to comply with the rules of the court held such that a continuance should be denied and an affirmance granted. Crescent Creamery Co. v. Massachusetts Bonding & Ins. Co., 135 Minn. 464, 160 N. W. 663.

293b. Improper argument of counsel—The argument of the state in the brief and at bar, referring to matters unfavorable to the defendant, said to have occurred in connection with the case after verdict, and not proper for consideration on the matters presented by the appeal, is disapproved. State v. Schmoker, — Minn. —, 182 N. W. 957.

293c. Oral argument after submission on briefs—An application for an oral argument, after a submission of the case on briefs, based on the failure of the clerk to notify counsel of the date set for the submission of the cause, denied. Stock v. St. Paul City Ry. Co., 142 Minn. 315, 172 N. W. 959.

WHAT JUDGMENTS AND ORDERS APPEALABLE

294. Appeal from a judgment in the district court on an appeal to that court—An order, signed by a judge of the district court, which "adjudged" that a judgment of the probate court for a specific sum of money

was "affirmed," and did not direct the entry of any further judgment, held appealable as a judgment, though it was not signed by the clerk. Alger v. Minnesota Loan & Trust Co., 135 Minn. 235, 159 N. W. 565, 160 N. W. 765.

A final order or judgment of the district court in special administrative or other non-judicial proceedings coming to that court by statutory appeal or other appropriate method of review may be removed to the supreme court by appeal as in ordinary civil actions. Neumann v. Edwards, 146 Minn. 179, 178 N. W. 589.

(92) Neumann v. Edwards, 146 Minn. 179, 178 N. W. 589.

295. Appeal from a judgment in an action commenced in the district court—An appeal from a judgment for defendant, entered upon an ex-parte order for judgment after a remand for further proceedings upon an appeal, will be dismissed, when no application to set aside the order or judgment was made to the lower court. Pope v. Ramsey County State Bank, 140 Minn. 502, 167 N. W. 280.

(95) Alger v. Minnesota Loan & Trust Co., 135 Minn. 235, 159 N. W. 565, 160 N. W. 765.

(5) Joss v. Melin, 138 Minn. 488, 165 N. W. 1074; Wildung v. Security Mortgage Co., 143 Minn. 478, 172 N. W. 692; Wilson v. Tauer, 147 Minn. 466, 180 N. W. 93.

(6) State v. District Court, 139 Minn. 205, 166 N. W. 185; Arnoldy v. Northwestern State Bank, 142 Minn. 449, 172 N. W. 699 (order for judgment on the pleadings); Wildung v. Security Mortgage Co., 143 Minn. 478, 172 N. W. 692; State v. Penney, 144 Minn. 463, 174 N. W. 611; Layton v. Lee, 146 Minn. 478, 178 N. W. 735; Wilson v. Tauer, 147 Minn. 466, 180 N. W. 93.

296. Default judgments—(12, 13) Chicago etc. Ry. Co. v. Sprague, 140 Minn. 1, 167 N. W. 124.

297. Appeal from orders relating to provisional and ancillary remedies—An order denying an injunction enjoining the prosecution of an action at law pending the determination of an action in equity held appealable. Kanevsky v. National Council, 132 Minn. 422, 157 N. W. 646.

An order dissolving a temporary injunction is appealable; but when its vacation is incidental to the order for judgment on the pleadings, no judgment is entered from which an appeal can be taken, no record is returned of the proceedings upon which the injunction was granted, and none as to the proceedings when it was vacated except the order of vacation, there is nothing presented for review. Arnoldy v. Northwestern State Bank, 142 Minn. 449, 172 N. W. 699.

298. Appeal from orders involving the merits—After the expiration of the time to appeal from a judgment probably no appeal will lie from an interlocutory order which might have been reviewed on an appeal from the judgment. Harcum v. Benson, 135 Minn. 23, 160 N. W. 80.

300. Appeal from orders granting or denying new trials—Under G. S. 1913, § 8001, an order granting a new trial is not appealable unless based

exclusively upon errors occurring at the trial, and it is so expressly stated in the order or memorandum of the trial court. Pust v. Holtz, 134 Minn. 266, 159 N. W. 564; Barwald v. Thuet, — Minn. —, 182 N. W. 719.

An order granting a new trial on the sole ground of the insufficiency of the evidence is not appealable. Schommer v. Eischens, — Minn. —, 182 N.W. 166; Williamson v. Albinson Construction Co., — Minn. —, 182 N. W. 166.

An order granting a new trial for insufficiency of the evidence or because of excessive damages is not appealable. McAlpine v. Fidelity & Casualty Co., 134 Minn. 192, 158 N. W. 967; Gutmann v. Anderson, 142 Minn. 141, 171 N. W. 303.

Plaintiff had a verdict. Defendant moved for judgment notwithstanding the verdict or for a new trial. The court granted a new trial and denied the motion for judgment. The new trial was not granted exclusively for errors occurring on the trial. Defendant appealed from the whole order. Held, that chapter 31, Laws 1915, does not repeal that part of chapter 474, Laws 1913 (G. S. 1913, § 8001), which permits an appeal to be taken from an order granting a new trial in a certain specified case only, and that the order herein is not appealable. Greenberg v. National Council, 132 Minn. 84, 155 N. W. 1053.

After the expiration of the time to appeal from a judgment no appeal lies from an order made before judgment denying a motion for a new trial. Harcum v. Benson, 135 Minn. 23, 160 N. W. 80.

Where an alternative motion for amended findings or for a new trial is made, an order denying both motions is appealable. Berg v. Veit, 136 Minn. 443, 162 N. W. 522.

Where a motion for a new trial was based on the ground that the verdict was not justified by the evidence and upon an error in law, an order granting a new trial, but silent as to the grounds thereof, was not appealable; G. S. 1913, § 7828, having no effect in determining the appealable character of the order. Faribault Packing & Produce Co. v. Storlie, 143 Minn. 486, 173 N. W. 400.

An appeal will not be dismissed because it was taken from an order denying an alternative motion for the amendment of conclusions of law or for a new trial. Mascall v. Reitmeier, 145 Minn. 214, 176 N. W. 486.

An order granting a new trial for insufficiency of the evidence to sustain the verdict is appealable where a previous verdict in favor of the appellant has been set aside on the same ground. It is immaterial whether the two orders were made by the same judge or by different judges. Guest v. Northern Motor Car Co., — Minn. —, 183 N. W. 147.

301. Appeal from order determining action and preventing a judgment —An order denying a motion for such judgment as the moving party may be entitled to upon the files, records and pleadings in the action, including the decision of the supreme court on appeal, is not appealable under this provision. National Council v. Garber, 132 Minn. 413, 157 N. W. 591.

Though an order changing the venue of an action is a final order disposing of the action in the court making the order, it is not appealable. Winegar v. Martin, — Minn. —, 182 N. W. 513.

302. Appeal from final orders in special proceedings—An order requiring village officers to call the requisite meetings, give the requisite notices, assess a stated percentage of the cost of paving on benefited property, cause the assessments to be collected, and transmit to the county auditor a statement of unpaid assessments, held appealable. State v. District Court, 136 Minn. 461, 161 N. W. 1055.

No appeal lies from an order granting judgment on the pleadings in mandamus proceedings. State v. Penney, 144 Minn. 463, 174 N. W. 611.

A final order of the district court in special administrative or other non-judicial proceedings coming to that court by statutory appeal or other appropriate method of review is appealable. Neumann v. Edwards, 146 Minn. 179, 178 N. W. 589.

An order requiring a county to show cause why a bill against it should not be paid, being a final order effecting a substantial right made in the special proceeding, in view of G. S. § 8001, subd. 7, is appealable. Gove v. Murray County, 147 Minn. 24, 179 N. W. 569.

(16) Gove v. Murray County, 147 Minn. 24, 179 N. W. 569.

(26) State v. Searles, 141 Minn. 267, 170 N. W. 198.

308. General list of appealable orders—An order denying an application for an injunction enjoining the prosecution of an action at law pending the determination of an action in equity. Kanevsky v. National Council, 132 Minn. 422, 157 N. W. 646.

An order denying an alternative motion for amended findings or a new trial. Berg v. Veit, 136 Minn. 443, 162 N. W. 522.

An order requiring village officers to take certain steps in assessing and collecting special assessments for paving streets. State v. District Court, 136 Minn. 461, 161 N. W. 1055.

An order of imprisonment in contempt proceedings until compliance with a writ of mandamus. State v. Searles, 141 Minn. 267, 170 N. W. 198.

An order requiring a pleading to be made more definite and certain, and directing that it be stricken out, unless the order is complied with. Hart v. Lincoln Nat. Life Ins. Co., 144 Minn. 155, 174 N. W. 740.

An order denying an alternative motion for the amendment of conclusions of law or for a new trial. Mascall v. Reitmeier, 145 Minn. 214, 176 N. W. 486.

An order granting a new trial on a single issue, not determinative of the action. Lawler v. Rice County, 147 Minn. 234, 178 N. W. 317.

A final order in special administrative or non-judicial proceedings. Neumann v. Edwards, 146 Minn. 179, 178 N. W. 589

An order requiring a county to show cause why a bill against it should not be paid. Gove v. Murray County, 147 Minn. 24, 179 N. W. 569.

(81) State v. Searles, 141 Minn. 267, 170 N. W. 198.

(22) Rishmiller v. Denver & Rio Grande R. Co., 134 Minn. 261, 159 N. W. 272.

309. General list of non-appealable orders—An order granting a new trial, unless based exclusively upon errors occurring at the trial and it is so expressly stated in the order or memorandum of the trial court. See § 300.

An order denying a motion for such judgment as the moving party is entitled to upon the files, records and pleadings in the action, including the decision of the supreme court on appeal. National Council v. Garber, 132 Minn. 413, 157 N. W. 591.

An order denying a motion to vacate and set aside an action, such motion being in effect a motion to dismiss the action. Fitzgibbins v. Yennie, 132 Minn. 478, 157 N. W. 114.

An order permitting plaintiff to prosecute an action to final determination, and any of the defendants to serve an answer, permitting plaintiff to reply, and placing the cause on the calendar. Francis v. Heberle, 136 Minn. 463, 161 N. W. 783.

An order vacating a final order establishing a ditch in drainage proceedings and granting a rehearing of the issues involved. Brecht v. Troska, 137 Minn. 466, 163 N. W. 126.

An order amending conclusions of law or directing a new judgment after a reversal on appeal of the original judgment. National Elevator Co. v. Great Northern Ry. Co., 140 Minn. 382, 168 N. W. 134.

A ruling on evidence is not appealable, though it be a ruling excluding all evidence because of the insufficiency of the facts stated in the complaint, and though the ruling be embodied in a formal written order. The error claimed may be preserved by bill of exceptions or settled case and reviewed on appeal from the judgment or from the order on a motion for a new trial. Arnoldy v. Northwestern State Bank, 142 Minn. 449, 172 N. W. 699.

An order for judgment on the pleadings in mandamus proceedings. State v. Penney, 144 Minn. 463, 174 N. W. 611.

An order denying an application for leave to file an amended answer in the nature of a cross-complaint and for a new trial after the reversal of a judgment in favor of the defendant. Chicago G. W. R. Co. v. Zahner, — Minn. —, 182 N. W. 904.

(28) Renville County v. Minneapolis, 112 Minn. 487, 128 N. W. 669; State v. District Court, 139 Minn. 205, 166 N. W. 185; Supornick v. National Council, 141 Minn. 306, 170 N. W. 507; Arnoldy v. Northwestern State Bank, 142 Minn. 449, 172 N. W. 699; State v. Penney, 144 Minn. 463, 174 N. W. 611.

(31) See Chicago G. W. R. Co. v. Zahner, — Minn. —, 182 N. W. 904.

(32) Arnoldy v. Northwestern State Bank, 142 Minn. 449, 172 N. W. 699.

(37) Kay v. Elsholtz, 138 Minn. 153, 164 N. W. 665; Winegar v. Martin, — Minn. —, 182 N. W. 513.

(38) Rees v. Nash, 142 Minn. 260, 171 N. W. 781.

(42) See § 1383.

(52) National Council v. Garber, 132 Minn. 413, 157 N. W. 591.

(84) See Kanevsky v. National Council, 132 Minn. 422, 157 N. W. 646.

PARTIES

310. Who may appeal—A receiver in proceedings to enforce the liability of stockholders of an insolvent corporation has no interest in the question of the disallowance of claims against the insolvent, nor in an order granting a rehearing in the allowance of such claims, and cannot appeal from such an order. The creditor upon whose complaint the proceedings are founded has no interest in an order of that kind, as it affects other creditors, and cannot appeal therefrom. Finch, Van Slyck & McConville v. Le Sueur County Co-operative Co., 134 Minn. 376, 159 N. W. 826.

312. Who are parties—Who must be made respondents—A judgment affecting a party to an action who is not a party to the appeal cannot be reversed or modified as to such party. Breen v. Cameron, 132 Minn. 357, 157 N. W. 500.

Though a party is not served with notice of appeal he will be deemed a party and bound by the result if he files a brief and designates himself as respondent. Shraiberg v. Hanson, 138 Minn. 80, 163 N. W. 1032.

(12) Breen v. Cameron, 132 Minn. 357, 157 N. W. 500.

(13, 14) See Shraiberg v. Hanson, 138 Minn. 80, 163 N. W. 1032.

313. Death of parties—Substitution—Upon the death of a party pending an appeal the statutes provide for a substitution. There is no statutory provision where a party is dead at the commencement of the action. The supreme court will not proceed with an appeal when it is made to appear that a party to it is dead. If a party was dead at the commencement of the action, the adverse party may move for a dismissal of the appeal, but he is not entitled to a remand of the case in order that proof may be made in the district court of the death of the party. Poupore v. Stone-Ordean-Wells Co., 132 Minn. 409, 157 N. W. 648.

315a. Parties filing briefs voluntarily—Though a party is not served with notice he will be deemed a party and bound by the result if he files a brief and designates himself as a party. Shraiberg v. Hanson, 138 Minn. 80, 163 N. W. 1032.

TIME WITHIN WHICH TO APPEAL

316. Appeal from judgment—The statute contemplates that a judgment not appealed from shall not be disturbed after the time to appeal therefrom has expired. Smith v. Minneapolis Street Ry. Co., 134 Minn. 292, 157 N. W. 499, 159 N. W. 623; Harcum v. Benson, 135 Minn. 23, 160 N. W. 80; Churchill v. Overend, 142 Minn. 102, 170 N. W. 919.

The right of appeal from a judgment expires six months from the date of entry of the judgment. The time is not extended by application to vacate the judgment. Lipman v. Slimmer, 146 Minn. 429, 178 N. W. 954.

317. Appeal from order—After the expiration of the time to appeal from a judgment no appeal lies from an order made before judgment

denying a motion for a new trial. Harcum v. Benson, 135 Minn. 23, 160 N. W. 80.

An appeal taken from an order denying a motion for a new trial, the grounds for the motion being alleged errors during the trial or insufficiency of the evidence, will not be considered on the merits when it appears that before the motion was heard and the appeal taken more than six months had expired after judgment had been entered. The judgment was then free from attack by a motion for a new trial on the grounds stated. Churchill v. Overend, 142 Minn. 102, 170 N. W. 919.

(31) Strand v. Chicago G. W. R. Co., 147 Minn. 1, 179 N. W. 369.

(01) Harcum v. Benson, 135 Minn. 23, 160 N. W. 80.

318. Extension of time—Admission of due service of a notice of appeal does not give validity to an appeal taken after the statutory time. Harcum v. Benson, 135 Minn. 23, 160 N. W. 80.

(37) Harcum v. Benson, 135 Minn. 23, 160 N. W. 80.

318a. Restriction of time by stipulation—The time within which to appeal may be restricted by stipulation of the parties. Such a limitation cannot be extended by an ex parte order of the trial court. Krieg v. Bofferding, 140 Minn. 512, 167 N. W. 1047.

NOTICE OF APPEAL

319. Contents—One notice of appeal from a judgment held sufficient, there being no necessity for two appeals. Millett v. Minnesota Crushed Stone Co., — Minn. —, 179 N. W. 682.

(42) See Millett v. Minnesota Crushed Stone Co., — Minn. —, 179 N. W. 682.

320. Upon whom served—A judgment affecting a party to an action who is not a party to the appeal cannot be reversed or modified as to such party. Breen v. Cameron, 132 Minn. 357, 157 N. W. 500.

Though a party is not served with notice he will be deemed a party and bound by the result if he files a brief and designates himself as a party. Shraiberg v. Hanson, 138 Minn. 80, 163 N. W. 1032.

The notice of appeal in this case was served upon plaintiff and the receiver of the defendant corporation, but not upon minority stockholders thereof who were parties defendant. The interests of these defendants in relation to the subject of the appeal are in direct conflict with a reversal or modification of the judgment appealed from. The judgment appealed from is indivisible, and must be affirmed, reversed, or modified as to all the parties to the action. The appeal must therefore be dismissed. Thwing v. McDonald, 139 Minn. 157, 165 N. W. 1065.

(43, 44) Thwing v. McDonald, 139 Minn. 157, 165 N. W. 1065.

(46) Riley v. Minneapolis & St. Louis R. Co., 132 Minn. 195, 156 N. W. 272; W. J. Burns International Detective Agency v. Holt, 138 Minn. 165, 164 N. W. 590. See Shraiberg v. Hanson, 138 Minn. 80, 163 N. W. 1032.

(47) Riley v. Minneapolis & St. Louis R. Co., 132 Minn. 195, 156 N. W. 272; Shraiberg v. Hanson, 138 Minn. 80, 163 N. W. 1032.

323a. Filing—Appeal fee—To render an appeal effective for any purpose the notice of appeal and the bond must be filed and the appeal fee must be deposited within the statutory time for taking the appeal. This time having expired before the deposit of the appeal fee and no mistake being shown, the appeal never became effective and is dismissed. Wheeler v. Crane, 141 Minn. 78, 169 N. W. 476, 597.

BONDS

324. Bond or deposit for costs—No order of court is necessary to authorize the deposit of money in place of a bond under G. S. 1913, §8002. Such a deposit does not operate as a stay. Thwing v. McDonald, 134 Minn. 148, 156 N. W. 780.

325. Appeal from money judgment—Supersedeas—When there is an appeal from a money judgment, the statute directs that the appeal shall not stay execution unless a bond is executed conditioned that, if the judgment is affirmed the appellant will pay the amount directed to be paid by the judgment and all damages awarded against appellant on the appeal. Carlson v. American Fidelity Co.,—Minn.—,182 N. W. 985.

The supreme court has the power to protect a respondent during the pendency of an appeal against inadequate or improvident stay bonds approved and filed in the lower court. In the first instance, the fixing and approval of a stay bond is not for the supreme court. After a case is there upon a cost bond alone, the court retains jurisdiction to proceed until a supersedeas is furnished. In this case it was held fixing the stay bond at $20,000 was not an abuse of discretion. Axford v. Western Syndicate Invest. Co., 141 Minn. 412, 168 N. W. 97, 170 N. W. 587.

(56) Carlson v. American Fidelity Co., — Minn. —, 182 N. W. 985.

325a. Exemptions—State—Municipalities—Executors and administrators—It is provided by statute that no undertaking or bond need be given upon any appeal or other proceeding instituted in favor of the state, or any county, city, town, or school district therein, or of any executor or administrator as such. G. S. 1913, § 8237; Roerig v. Houghton, 144 Minn. 231, 175 N. W. 542.

325b. Filing—The appeal bond must be filed within the statutory time for taking the appeal. Wheeler v. Crane, 141 Minn. 78, 169 N. W. 476, 597.

327. Sufficiency—Approval—A bond must be approved as provided by statute or it will not operate as a stay. Sweeney v. Ellsworth, 135 Minn. 474, 159 N. W. 1067.

328. Amendment—New bond—(63) Axford v. Western Syndicate Invest. Co., 141 Minn. 412, 168 N. W. 97, 170 N. W. 587.

331. Liability on bonds—In proceedings under the Workmen's Compensation Act an injured workman recovered a judgment against the insurer of his employer. A writ of certiorari was issued to review the judgment, and to obtain the writ defendant executed an undertaking conditioned as a supersedeas bond under section 8004, G. S. 1913. Held, that the undertaking obligated the surety for defendant to pay the judgment, and not merely the costs and damages.

The fact that by the execution of an undertaking so conditioned the plaintiff gained an advantage to which he may not have been entitled does not relieve the surety from the liability expressed in the undertaking. The undertaking may be enforced as a common-law obligation, although its conditions are more onerous than would have been required if a statutory bond had been given to effect the same purpose. The judgment was payable in weekly instalments, and such instalments were paid until and after the judgment was affirmed and the case remanded to the district court. Held, that the surety on the undertaking nevertheless remained liable for the payment of the remainder of the judgment. Carlson v. American Fidelity Co., — Minn. —, 182 N. W. 985.

In an action on a bond a general denial held properly struck out as sham. Prinz v. Melin, 144 Minn. 461, 174 N. W. 412.

(69) Carlson v. American Fidelity Co., — Minn. —, 182 N. W. 985.

331a. Supersedeas bond on writ of error to federal supreme court—Liability—A bond filed by defendant in proceedings by writ of error in review by the supreme court of the United States of a judgment of this court affirming a judgment of the district court held to obligate defendant and his surety to pay the judgment so affirmed by this court, upon an affirmance of its judgment by the federal supreme court. Stiles v. American Surety Co., 143 Minn. 21, 172 N. W. 776.

STAY OF PROCEEDINGS

333. Extent and effect of stay—When a case is in the supreme court with only a cost bond, the court below has jurisdiction to proceed until a supersedeas bond is furnished. Axford v. Western Syndicate Invest. Co., 141 Minn. 412, 168 N. W. 97, 170 N. W. 587.

An appeal with a supersedeas bond does not vacate or annul the judgment appealed from, and the matters determined by it remain res judicata until it is reversed. State v. Spratt, — Minn. —, 184 N. W. 31.

THE RETURN

337. What included—Statute—The pleadings are a part of the record and either party has full benefit of any statement or admission in a pleading of the adverse party without putting such pleading in evidence. Antel v. St. Paul City Ry. Co., 133 Minn. 156, 157 N. W. 1073.

338. Memorandum of trial court—The court's memorandum following an order, but not made part of it, does not establish the existence of

a fact referred to in the memorandum, but not necessarily inferred from the order itself. Fletcher v. Southern Colonization Co., 148 Minn. —, 181 N. W. 205.

The facts stated in a memorandum made a part of the decision become a part of the findings, and specific facts so found control as against general findings which are mere conclusions drawn therefrom. Thomas Peebles & Co. v. Sherman, 148 Minn. —, 181 N. W. 715.

(12) Jacobson v. Brasie Motor Car Co., 132 Minn. 417, 157 N. W. 645; Baker v. Polydisky, 144 Minn. 72, 174 N. W. 526.

(13) Fletcher v. Southern Colonization Co., 148 Minn. —, 181 N. W. 205.

SUFFICIENCY OF RECORD

342. General rule as to completeness of return—(30) State v. Atanosoff, 138 Minn. 321, 164 N. W. 1011; State v. Nelson, 145 Minn. 31, 176 N. W. 181.

343. To review any question of fact—(32) Aaberg v. Minnesota Commercial Men's Assn., 143 Minn. 354, 173 N. W. 708 (issue of fraud in action on insurance policy); Mascall v. Reitmeier, 145 Minn. 214, 176 N. W. 486 (inconsistency of findings of fact).

344. Necessity of a bill of exceptions or case on appeal from a judgment—In the absence of a settled case the action of the trial court in directing a verdict cannot be reviewed. Chance v. Hawkinson, — Minn. —, 182 N. W. 911.

(34) Anderson v. Montevideo, 137 Minn. 179, 162 N. W. 1073.

345. In what cases record must contain all the evidence—Where there is no settled case, and only the pleadings and findings are before this court, a specific finding of fact cannot be overturned because it appears to be inconsistent with another finding. Mascall v. Reitmeier, 145 Minn. 214, 176 N. W. 486.

(43) McCoy v. Grant, 144 Minn. 92, 174 N. W. 728; Mascall v. Reitmeier, 145 Minn. 214, 176 N. W. 486.

346. To review rulings on evidence—Error in excluding evidence at a former trial cannot be reviewed unless the record shows the materiality of the evidence in the subsequent action. Haack v. Coughlan, 134 Minn. 78, 158 N. W. 908.

Where the record does not show that an excluded conversation was material to the issues involved its exclusion cannot be held error. Bergh v. Calmenson, 136 Minn. 322, 162 N. W. 353.

A new trial will not be ordered by the supreme court for the purpose of admitting a letter in evidence where there is nothing in the record to show the contents of the letter and its materiality. Ryan v. Simms, 147 Minn. 98, 179 N. W. 683.

(54) Haack v. Coughlan, 134 Minn. 78, 158 N. W. 908.

(57) See § 9717.

349. To review orders—The record does not show upon what grounds appellant opposed a confirmation of receiver's sale, neither does it indicate any deviation from the mode in which the court had ordered it to be made nor inadequacy of price, hence the order confirming the sale cannot be attacked on appeal. Northwestern National Bank v. Mickelson-Shapiro Co., 134 Minn. 422, 159 N. W. 948.

350. Miscellaneous cases—No settled case or bill of exceptions is necessary to review an order disposing of a motion for a new trial on the ground of mistake of the jury in reducing their verdict to writing, the affidavits on which the motion was made being returned. Paul v. Pye, 135 Minn. 13, 159 N. W. 1070.

In the absence of a certification under the statute, or a case or bill of exceptions, a ruling on a challenge to the grand jury cannot be reviewed. State v. Atanosoff, 138 Minn. 321, 164 N. W. 1011.

The supreme court cannot take into consideration a stipulation of the parties made on the trial unless it is incorporated in the record. Doty v. Struble, 140 Minn. 478, 168 N. W. 551.

In the absence of a settled case, held not error to impress property recovered by a trustee in bankruptcy with a lien for taxes paid by him to protect the property from loss. Bergin v. Blackwood, 145 Minn. 363, 177 N. W. 493.

In the absence of a settled case the action of the trial court in directing a verdict cannot be review. Chance v. Hawkinson, —Minn.—, 182 N. W. 911.

(70) See Paul v. Pye, 135 Minn. 13, 159 N. W. 1070.

352. Certificate of judge as to completeness of record—(86) McCoy v. Grant, 144 Minn. 92, 174 N. W. 728; State v. Nelson, 145 Minn. 31, 176 N. W. 181.

PAPER BOOKS AND BRIEFS

353. Contents of paper books—The rules require an appellant to print only so much of the record as will fully and clearly present the questions raised by him. If respondent deems other parts of the record necessary to properly present all the questions involved, he may print a supplemental record, or refer to the folios or pages of the settled case on file. Wunsewich v. Olson, 137 Minn. 98, 162 N. W. 1054.

354a. References to pages and folios—Appellant's brief should refer to the page or folio in the printed record where the challenged ruling or error may be found. Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541.

ASSIGNMENT OF ERRORS

358. Necessity—Effect of failure to make—An assignment of error in a motion for a new trial does not obviate the necessity of an assignment on appeal. If not renewed on appeal it is waived, unless it goes to the jurisdiction over the subject-matter. Martinson v. State Bank, 137 Minn. 476, 163 N. W. 503.

When no objection is made or exception taken to the admission of improper evidence, and its admission is not assigned as error, the supreme court will consider it as properly in the case. Lovell v. Beedle, 138 Minn. 12, 163 N. W. 778. See § 7091.

There must be an assignment of error on the ground that damages awarded were excessive, appearing to have been given under the influence of passion or prejudice. Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541.

(95) Huttig Mfg. Co. v. National Contracting Co., 139 Minn. 108, 165 N. W. 879; Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541.

(96) Roseberry v. Hart-Parr Co., 145 Minn. 142, 176 N. W. 175 (indulgence shown foreign attorney unacquainted with our practice); McCusky v. Kuhlman, 147 Minn. 460, 179 N. W. 1000.

358a. Limited by motion for new trial—Where there is a motion for a new trial the scope of permissible assignments of error on appeal from the order thereon is limited by the specification of errors in the notice of motion, in the absence of exceptions on the trial. And where a motion for a new trial is made and determined in the district court on special grounds stated in the notice of motion, the moving party will not be heard in the supreme court on new or additional grounds. See Digest, § 7091.

Where the assignments of error in a motion for a new trial are upon the grounds that the "decision on said claim is not justified by the evidence and is contrary to law," assignments in appellant's brief upon appeal, of errors of law occurring at the trial, cannot be considered. Stravs v. Steckbauer, 136 Minn. 69, 161 N. W. 259.

When the trial is by a court without a jury and the moving party on a motion for a new trial specifies error in certain findings of fact, he is not concluded thereby but on appeal may assign error in other findings. Hrdlicka v. Haberman, 140 Minn. 124, 167 N. W. 363.

360. General rules—Cross-assignments—Mode of stating—Cross-assignments are not authorized. State v. Jelly, 134 Minn. 276, 159 N. W. 566.

Each assignment of error should refer to the page or folio in the printed record where the challenged ruling or error may be found. Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541.

A general assignment "because of errors of law at the trial" is insufficient. McCusky v. Kuhlman, 147 Minn. 460, 179 N. W. 1000.

An appellant cannot complain of errors that only affected other parties. Miles v. National Surety Co., —Minn. —, 182 N. W. 996.

(99) State v. Jelley, 134 Minn. 276, 159 N. W. 566.

(4) McCusky v. Kuhlman, 147 Minn. 460, 179 N. W. 1000.

361. As to findings and conclusions—Where there are several findings, an assignment "that the findings of the court are not sustained by the evidence and are contrary to law," is insufficient to challenge any one of the findings. Holford v. Crowe, 136 Minn. 20, 161 N. W. 213.

(15) Holford v. Crowe, 136 Minn. 20, 161 N. W. 213; Calmenson v. Moudry, 137 Minn. 123, 162 N. W. 1076.

(19) Holford v. Crowe, 136 Minn. 20, 161 N. W. 213.

362. As to rulings on evidence—A general assignment that the court erred in overruling objections to evidence cannot be considered unless the evidence excepted to is pointed out. Fargo Foundry Co. v. Calloway, 148 Minn. —, 181 N, W. 584.

(28) Koch v. Speiser, 145 Minn. 227, 176 N. W. 754.

363. As to orders granting or denying new trials—(34) Holford v. Crowe, 136 Minn. 20, 161 N. W. 213.

(35) See Stock v. St. Paul City Ry. Co., 142 Minn. 315, 172 N. W. 122.

365. As to miscellaneous matters—Certain assignments of error held sufficient to raise the point that the verdict was inadequate. Leonard v. Rosendahl, 133 Minn. 320, 158 N. W. 419.

366. Waiver—(46) Steinkemper v. Beckman, 138 Minn. 477, 164 N. W. 802.

PRESUMPTIONS AND BURDEN OF PROOF

368. In general—Want of jurisdiction of an appeal to the district court must be made to appear affirmatively by the record on an appeal to the supreme court. Plaster v. Aitkin County, 135 Minn. 198, 160 N. W. 493.

(53) Licensed Retail Liquor Dealers Assn. v. Denton, 144 Minn. 81, 174 N. W. 526.

(54) Hobart v. Minneapolis, 139 Minn. 368, 166 N. W. 411.

368a. As to facts proved—The supreme court cannot assume facts to be proved unless they are conclusively proved. Jacobson v. Brasie Motor Car Co., 132 Minn. 417, 157 N. W. 645. See § 436.

368b. As to jurisdiction of district court—Want of jurisdiction in the district court of an appeal thereto must be made to appear affirmatively by the record. Otherwise such jurisdiction will be presumed. Hempsted v. Cargill, 46 Minn. 141, 48 N. W. 686; Plaster v. Aitkin County, 135 Minn. 198, 160 N. W. 493.

372. As to findings—Where the settled case fails to show that it contains all the evidence bearing on the matters presented for review, this court must take it for granted that the evidence justified the findings of fact and did not conclusively establish other facts not found. McCoy v. Grant, 144 Minn. 92, 174 N. W. 728.

It will be presumed that the trial court made its findings of fact solely from a consideration of the evidence, uninfluenced by the legal conclusions which may be drawn from the findings. State v. Minnesota & Ontario Paper Co., 147 Minn. 369, 180 N. W. 548.

(67) McCoy v. Grant, 144 Minn. 92, 174 N. W. 728.

374. As to orders—On an appeal from an order based on conflicting affidavits, disputes as to the facts must be taken as having been resolved

in favor of the respondents. Barrette v. Melin Bros., 146 Minn. 92, 177 N. W. 933.

375. As to instructions—It will be presumed that the evidence warranted the assumptions of fact in the charge unless the record shows the contrary. Morrison v. Johnson, 148 Minn. —, 181 N. W. 945.

378. As to rulings on evidence—(86) State v. Henrionnet, 142 Minn. 1, 170 N. W. 699 (relevancy and materiality of excluded evidence—rule applies to criminal prosecutions).

As to the necessity of an offer to show error, see § 9717.

380. As to jury following instructions—(98) Kelley v. Chicago, B. & Q. R. Co., 142 Minn. 44, 170 N. W. 886.

383. Miscellaneous presumptions—That the district court had jurisdiction of an appeal thereto. Plaster v. Aitkin County, 135 Minn. 198, 160 N. W. 493.

That municipal officers were acting in accordance with law in accepting the resignation of an employee of the municipality. Byrne v. St. Paul, 137 Minn. 235, 163 N. W. 162.

(19) See Plaster v. Aitkin County, 135 Minn. 198, 160 N. W. 493.

NECESSITY OF DETERMINATION BY TRIAL COURT

384. In general—The objection that a complaint fails to state a cause of action may be raised for the first time on appeal. See § 7732.

Objection to the jurisdiction of the court over the subject-matter may be raised for the first time on appeal. Chicago etc. Ry. Co. v. Sprague, 140 Minn. 1, 167 N. W. 124. See Digest, §§ 286, 296, 476, 2348, 5139, 7731.

It cannot be urged for the first time on appeal that parties were entitled to subrogation. Morrison County Lumber Co. v. Duclos, 138 Minn. 20, 163 N. W. 734.

This court will not generally consider questions not first presented for decision to the trial court, and parties are generally bound in this court by the theory, however erroneous, upon which they tried the case below. But where the record shows conclusively as a matter of law that on the merits there is no cause of action or a defence, and where the question raised here for the first time is plainly decisive of the entire controversy on the merits, and nothing is to be gained by having first a ruling of the trial court, this court will consider and decide such question, though it is first raised in this court on appeal. Chicago etc. Ry. Co. v. Sprague, 140 Minn. 1, 167 N. W. 124; Bauman v. Metzger, 145 Minn. 133, 176 N. W. 497.

An appeal from a judgment for defendant, entered upon an ex parte order for judgment, will be dismissed, where no application to set aside the judgment and the order directing it was made to the trial court. Pope v. Ramsey County State Bank, 140 Minn. 502, 167 N. W. 280.

It cannot be objected for the first time on appeal that an order appointing a receiver of the assets of a foreign corporation does not

limit the powers of the receiver to assets in this state. Tasler v. Peerless Tire Co., 144 Minn. 150, 174 N. W. 731.

In an action against two tort-feasors it cannot be objected for the first time on appeal that a joint verdict for damages was awarded against them. Daigle v. Summit Mercantile Co., 144 Minn. 178, 174 N. W. 830.

Where no question of fact is involved, and no appeal is made to discretion, and the question is purely one of law, this court may, with consent of all parties, determine a question not passed on by the trial court. In re Peavey's Estate, 144 Minn. 208, 175 N. W. 105.

The failure to file a lis pendens in an action to foreclose a mechanic's lien, as required by G. S. 1913, § 7030, cannot be taken advantage of for the first time on appeal. Carr-Cullen Co. v. Cooper, 144 Minn. 380, 175 N. W. 696.

The amount of interest included in a verdict cannot be questioned for the first time on appeal. Itasca County v. Ralph, 144 Minn. 446, 175 N. W. 899.

The objection that a verdict in an action on an insurance policy is too large and should be reduced cannot be raised for the first time on appeal. Ivanesovich v. North American L. & C. Co., 145 Minn. 175, 176 N. W. 502.

The general rule is applied only where it clearly appears that a claim or theory presented to the supreme court was not presented to or determined by the trial court, and even in such cases the rule is seldom, if ever, applied where it conclusively appears that the point urged could not have been cured or avoided by amendment or other evidence. Bauman v. Metzger, 145 Minn. 133, 176 N. W. 497.

Questions not presented by the pleadings, nor litigated at the trial, cannot be considered on appeal. Klinkert v. Streissguth, 145 Minn. 336, 177 N. W. 363.

Objection that a hypothetical question assumes facts not in evidence must be raised on the trial, and cannot be raised for the first time on appeal. Geiger v. Sanitary Farm Dairies, 146 Minn. 235, 178 N. W. 501.

In an action on an insurance policy it cannot be urged for the first time on appeal that the insured made false answers to questions in the application. Quinn-Shepherdson Co. v. United States F. & G. Co., — Minn. —, 183 N. W. 347.

In an action for cancelation of a deed defendant's right to specific performance was not raised on the trial. Held, that the supreme court would not grant the remedy. Bergstrom v. Pickett, 148 Minn. —, 181 N. W. 343.

(22) Braunstein v. Fraternal Union, 133 Minn. 8, 14, 157 N. W. 721; Delasca v. Grimes, 144 Minn. 67, 174 N. W. 523.

(22–24) Chicago etc. Ry. Co. v. Sprague, 140 Minn. 1, 167 N. W. 124.

(30) Segerstrom v. Holland Piano Mfg. Co., 142 Minn. 104, 170 N. W. 930; Kief v. Mills, 147 Minn. 138, 179 N. W. 724.

(37) Baudette v. Miller, 146 Minn. 477, 178 N. W. 315.

(44) See § 7630

SCOPE OF REVIEW ON APPEAL FROM JUDGMENTS

387. When review limited to the judgment roll—(69) Cherveny v. Hemza, 134 Minn. 39, 158 N. W. 810; Francis v. Heberle, 136 Minn. 463, 161 N. W. 783.

388. Review of verdict or findings—Sufficiency of the evidence—On appeal from a judgment an appellant cannot complain of nominal damages found against him which are not included in the judgment. Stoering v. Swanson, 139 Minn. 115, 165 N. W. 875.

(72) Smith v. Minneapolis St. Ry. Co., 132 Minn. 51, 155 N. W. 1046. See § 393

389. Review of intermediate orders—An appeal from a judgment brings before this court for review only the proceedings which resulted in the judgment. No appeal having been taken from the order denying plaintiff's application to vacate the judgment and for leave to amend his complaint, that matter is not before this court for review. Van Slyke v. Andrews, 146 Minn. 316, 178 N. W. 959.

(73) Harcum v. Benson, 135 Minn. 23, 160 N. W. 80.

(75) Van Slyke v. Andrews, 146 Minn. 316, 178 N. W. 959.

(79) Anker v. Chicago G. W. R. Co., 140 Minn. 63, 167 N. W. 278.

(80) Anker v. Chicago G. W. R. Co., 140 Minn. 63, 167 N. W. 278; Arnoldy v. Northwestern State Bank, 142 Minn. 449, 172 N. W. 699.

(88) Winegar v. Martin, —Minn.—, 182 N. W. 513; Delasca v. Grimes, 144 Minn. 67, 174 N. W. 523.

389a. Errors in entry of judgment—On an appeal from a judgment the appellant cannot contend that the judgment does not contain provisions in his favor though they are authorized by the verdict or findings. The remedy for errors in the entry of a judgment is a motion to the trial court for an amendment of the judgment and not an appeal from the judgment. Cherveny v. Hemza, 134 Minn. 39, 158 N. W. 810. See Digest, §§ 5050, 5100, 5102, 5103.

391. Review limited to particular judgment—The record does not show a consolidation of two actions as claimed by plaintiff; and the appeal brings for review the judgment in one. Chance v. Hawkinson, —Minn.—, 182 N. W. 911.

393. Judgment notwithstanding the verdict—Where there is a motion for judgment notwithstanding the verdict, but no motion for a new trial, the only objections that can be raised on appeal are (1) whether the court had jurisdiction; (2) whether the court erred in denying the motion for a directed verdict; and (3) whether the evidence is sufficient to justify the verdict. Objections cannot be raised to the pleadings, to rulings on the trial, to the charge, or to the amount of the verdict. Smith v. Minneapolis St. Ry. Co., 132 Minn. 51, 155 N. W. 1046; Sheey v. Minneapolis & St. Louis R. Co., 132 Minn. 307, 156 N. W. 346; Prigge v. Selz, Schwab & Co., 134 Minn. 245, 158 N. W. 975; Martin v. Minneapolis

& St. Louis R. Co., 138 Minn. 40, 163 N. W. 983; Hoggarth v. Minneapolis & St. Louis R. Co., 138 Minn, 472, 164 N. W. 658; Mahoney v. St. Paul City Ry. Co., 140 Minn. 516, 168 N. W. 49; Dunn v. Great Northern Ry. Co., 141 Minn. 191, 169 N. W. 602; Oletzky v. Great Northern Ry. Co., 141 Minn. 218, 169 N. W. 715; White v. Great Northern Ry. Co., 142 Minn. 50, 170 N. W. 849; Nichols v. Kissel Motor Car Co., 144 Minn. 137, 174 N. W. 733; National Cash Register Co. v. Merrigan, 148 Minn.— 181 N. W. 585. Wyman, Partridge & Co. v. Bible,—Minn.—, 184 N. W. 45.

Where the defendant moves for judgment notwithstanding the verdict but makes no motion for a new trial, the only questions for consideration by the supreme court are whether the trial court had jurisdiction and whether there is any competent evidence tending to sustain the verdict. Prigge v. Selz, Schwab & Co., 134 Minn. 245, 158 N. W. 975.

Where a defendant asks for judgment notwithstanding the verdict without asking for a new trial, the only question presented is whether the record shows that the plaintiff is not entitled to recover. Martin v. Minneapolis & St. Louis R. Co., 138 Minn. 40, 163 N. W. 983.

Where a party asks for judgment notwithstanding the verdict, but not for a new trial, the only question he may raise on appeal is whether the evidence is conclusive against the verdict. Objections to the pleadings or to the charge of the court will not be considered. National Cash Register Co. v. Merrigan, 148 Minn. —, 181 N. W. 585.

393a. Proceedings of former trial not reviewable—Granting a new trial leaves the case as if no trial had ever been had; and upon an appeal from a judgment rendered as the result of the second trial, none of the proceedings at the first trial are reviewable. Holm v. Great Northern Ry. Co., 139 Minn. 258, 166 N. W. 224.

SCOPE OF REVIEW ON APPEAL FROM ORDERS

394. Order granting a new trial—Upon the appeal of the defendant from an order granting the plaintiff's motion for a new trial, after verdict for the defendant, where the motion was granted because of errors of law occurring at the trial, and the order so stated, the plaintiff may support the order by showing other errors, if properly raised, than the specific ones because of which the new trial was granted; but upon such appeal the plaintiff cannot question the sufficiency of the evidence to sustain the verdict. McAlpine v. Fidelity & Casualty Co., 134 Minn. 192, 158 N. W. 967.

When a motion for a new trial is granted upon the ground of error of law it cannot be sustained upon the ground of insufficiency of evidence or excessive damages, as such orders are not appealable. Gutmann v. Anderson, 142 Minn. 141, 171 N. W. 303.

When a new trial is granted on the ground of error of law it may be sustained by showing other errors, properly raised, aside from the one on which it was granted. Gutmann v. Anderson, 142 Minn. 141, 171 N. W. 303.

(9) McAlpine v. Fidelity & Casualty Co., 134 Minn. 192, 158 N. W. 967.

(12) McAlpine v. Fidelity & Casualty Co., 134 Minn. 192, 158 N. W. 967; Gutmann v. Anderson, 142 Minn. 141, 171 N. W. 303.

395. Order denying a new trial—The question of whether the court erred in striking out portions of a pleading will not be considered on appeal from an order denying a new trial; the pleading having been amended; and no appeal having been taken from the former order. Melady v. South St. Paul Live Stock Exchange, 142 Minn. 194, 171 N. W. 806.

On appeal from an order denying a new trial, a defendant will be held to have waived his right to assign as error an order overruling his demurrer to the complaint, where neither by answer nor at the trial by objection or motion did he challenge the sufficiency of the complaint on any of the grounds specified in his demurrer. Delasca v. Grimes, 144 Minn. 67, 174 N. W. 523.

The practice of obtaining a review of an order relating to the venue of an action by appealing from an order denying a new trial is not to be commended. Delasca v. Grimes, 144 Minn. 67, 174 N. W. 523.

Objection that the findings of fact do not sustain the conclusions of law may be raised on motion for new trial. But if not there raised, and the motion is made on other specific grounds, the objection cannot be raised on appeal from an order denying the motion. Holmstrom v. Barstad, 147 Minn. 172, 179 N. W. 737.

(17) Kelly v. McKeown, 139 Minn. 285, 166 N. W. 329. See Digest, § 7091.

(20) Delasca v. Grimes, 144 Minn. 67, 174 N. W. 523; Winegar v. Martin, —Minn.—, 182 N. W. 513.

(25) State v. Atanosoff, 138 Minn. 321, 164 N. W. 1011.

(26) Holmstrom v. Barstad, 147 Minn. 172, 179 N. W. 737.

397a. Effect of recitals as to basis of order—In an order denying a motion to vacate a default judgment, it was recited that the order was based on the failure of the proposed answer to state a defence. On an appeal from the order, the only question which should be considered is whether the answer did in fact state a defence. Mannheimer Bros. v. Kansas Casualty & Surety Co., 147 Minn. 350, 180 N. W. 229.

SCOPE OF REVIEW ON APPEAL FROM ADMINISTRATIVE ORDERS

397b. In general—In reviewing an order or determination of an administrative board or commission the supreme court will go no further than to determine, (1) whether the board or commission kept within its jurisdiction, (2) whether its action proceeded on a correct theory of the law, (3) whether its action was arbitrary, fraudulent, oppressive, or unreasonable, so as to represent its will and not its judgment, and (4) whether the evidence was such that it might reasonably make the order or determination that it made. State v. Medical Examining Board, 32

Minn. 324, 20 N. W. 238; Steenerson v. Great Northern Ry. Co., 69 Minn. 353, 72 N. W. 713; Diamond v. Mankato, 89 Minn. 48, 93 N. W. 911; Schweigert v. Abbott, 122 Minn. 383, 142 N. W. 723; Hunstiger v. Kilian, 130 Minn. 474, 153 N. W. 869; Sorknes v. Lac Qui Parle County, 131 Minn. 79, 154 N. W. 669; School District v. School District, 134 Minn. 82, 158 N. W. 729; Farrell v. Sibley County, 135 Minn. 439, 161 N. W. 152; Hunstiger v. Kilian, 136 Minn. 64, 161 N. W. 263; State v. Minnesota Tax Commission, 137 Minn. 20, 162 N. W. 675; Hughes v. Farnsworth, 137 Minn. 295, 163 N. W. 525; Sullwold v. St. Paul, 138 Minn. 271, 164 N. W. 983; Brazil v. Sibley County, 139 Minn. 458, 166 N. W. 1077; Erickschen v. Sibley County, 142 Minn. 37, 170 N. W. 883; State v. State Securities Commission, 145 Minn. 221, 176 N. W. 759; G. O. Miller Tel. Co. v. Minimum Wage Commission, 145 Minn. 262, 177 N. W. 341; Paulson v. Yellow Medicine County, 147 Minn. 7, 179 N. W. 217; Brazil v. Sibley County, 148 Minn. —, 181 N. W. 329; State v. State Securities Commission, —Minn. —, 182 N. W. 910; Sartell v. Benton County, — Minn. —, 183 N. W. 148. See § 8078a.

LAW OF CASE

398. Res judicata—Law of case—When the evidence on a second trial of an action is not materially different from the evidence on the first trial, the decision of the supreme court on an appeal reviewing the former trial is, whether right or wrong, the law of the case and conclusive on a second appeal. Bjorgo v. First Nat. Bank, 132 Minn. 273, 156 N. W. 277.

When a case is reversed on appeal, not upon the ground that there can be no recovery upon the evidence produced, but upon the ground that the evidence upon a specific issue is so unsatisfactory that a new trial should be had, the determination on the first appeal that the evidence is insufficient to sustain the verdict is not the law of the case upon the second trial. Mullen v. Otter Tail Power Co., 134 Minn. 65, 158 N. W. 732.

When the supreme court sets aside a verdict as not justified by the evidence, the doctrine of the law of the case does not require it to set aside a second verdict on the same evidenc. Thill v. Freiermuth, 139 Minn. 78, 165 N. W. 490. See Digest, § 7151.

The doctrine of the law of the case is one of practice and not a limitation of power. Standard Lithographing Co. v. Twin City Motor Speedway Co., 145 Minn. 5, 176 N. W. 347.

The doctrine of the law of the case applies to questions decided, but not to questions which are raised and not determined. Questions not decided may be considered on a subsequent appeal. Standard Lithographing Co. v. Twin City Motor Speedway Co., 145 Minn. 5, 176 N. W. 347.

On the former appeal there was a reversal. The trial court found that there was an overissue of certain stock; but it held that the claimants were estopped to assert it. The claimants appealed. The point of the reversal was the holding on the question of estoppel. The opinion stated

that it did not conclusively appear that there was not an overissue and it directed a new trial upon all the issues. The present appellants were respondents upon the former appeal. It is held that the doctrine of the law of the case does not preclude them from attacking the sufficiency of the evidence to sustain the finding of an overissue. Standard Lithographing Co. v. Twin City Motor Speedway Co., 145 Minn. 5, 176 N. W. 347.

(30) Bjorgo v. First Nat. Bank, 132 Minn. 273, 156 N. W. 277; State v. Great Northern Ry. Co., 132 Minn. 474, 157 N. W. 1069; Jones v. St. Paul, 133 Minn. 464, 158 N. W. 251; Beck v. Chicago etc. Ry. Co. 134 Minn. 363, 159 N. W. 831; Inkenberry v. New York Life Ins. Co., 134 Minn. 432, 159 N. W. 955; Meyer v. Keating, 135 Minn. 25, 159 N. W. 1091; Lenning v. Retail Merchants Mutual Fire Ins. Co., 138 Minn. 233, 164 N. W. 908; Jensen v. Fischer, 138 Minn. 483, 165 N. W. 1055; Bradshaw v. Sibert, 139 Minn. 490, 165 N. W. 1074; Stevens v. Fritzen, 139 Minn. 491, 164 N. W. 365, 165 N. W. 1073; Knapp v. Foley, 140 Minn. 423, 168 N. W. 183; Davis v. Godart, 141 Minn. 203, 169 N. W. 711; Great Northern Ry. Co. v. Mineapolis, 142 Minn. 308, 172 N. W. 135; Clearwater County State Bank v. Ricke, 142 Minn. 493, 171 N. W. 922; Standard Lithographing Co. v. Twin City Speedway Co., 145 Minn. 5, 176 N. W. 347; Brede v. Minnesota Crushed Stone Co., 146 Minn. 406, 178 N. W. 820; O. C. Hanson & Sons v. Beaulieu, 148 Minn. —, 181 N. W. 321.

(31) Thill v. Freiermuth, 139 Minn. 78, 165 N. W. 490.

REVIEW OF DISCRETIONARY ORDERS

399. In general—(38) Standard L. & T. Co. v. Twin City M. S. Co., 138 Minn. 294, 164 N. W. 986; Flannery v. Kusha, 147 Minn. 156, 179 N. W. 902.

(39) In re Fay, 147 Minn. 472, 180 N. W. 533.

THEORY OF CASE—SHIFTING POSITION ON APPEAL

401. In general—Though the pleadings were made on the theory of an equitable action the action will be treated on appeal as one at law for damages, if the conduct of the trial was on that theory. Ada v. Melberg, 135 Minn. 130, 160 N. W. 257.

The general rule is subject to the qualification that a party is not prevented from raising the objection that the record shows conclusively as a matter of law that the adverse party has no cause of action or defence on the merits or that the court is without jurisdiction of the subject-matter. Chicago etc. Ry. Co. v. Sprague, 140 Minn. 1, 167 N. W. 124.

The rule forbidding a party from shifting his position and adopting a new theory of the case on appeal is not affected by the fact that new counsel conduct the case on appeal. Minneapolis Holding Co. v. Landers-Morrison-Christenson Co., 141 Minn. 127, 169 N. W. 534.

A party cannot adopt in the trial court a theory of his cause of action,

and of the relative rights of the other parties to the litigation, and obtain findings and judgment in accordance therewith, nor invite error, and afterwards, on appeal, claim that the theory of the case was wrong and that the judgment was erroneous and that there was error in the proceedings. Northland Pine Co. v. Melin Bros., 142 Minn. 233, 171 N. W. 808.

Defendant's theory at the trial having been rejected, they do not infringe the rule against shifting position by insisting that they are entitled to recover on the theory of the case adopted by the court. North Coast Lumber Co. v. Great Northern Lumber Co., 144 Minn. 304, 175 N. W. 547.

At the trial the parties to an action on an insurance policy stipulated that the only question was whether the insured was in good health at the time of his reinstatement; and the case was tried and determined upon the theory that the only question was the one stated. A party making such a stipulation is bound by it; and when he adopts a theory upon which his case is tried and determined he must abide by it on appeal; and upon the facts stated the only issue was upon the fact of good health. Pampusch v. National Council, 145 Minn. 71, 176 N. W. 158.

(43) Anderson v. Butterick Pub. Co., 132 Minn. 30, 155 N. W. 1045; Leonard v. Schall, 132 Minn. 446, 157 N. W. 723, (action for services—whether on quantum meruit or on express contract); Schaefer v. Marshall Milling Co., 133 Minn. 73, 157 N. W. 993; Victor Produce Co. v. Chicago etc. Ry. Co., 135 Minn. 49, 160 N. W. 201; Olson v. Moulster, 137 Minn. 96, 162 N. W. 1068; Minneapolis Holding Co. v. Landers-Morrison-Christenson Co., 141 Minn. 127, 169 N. W. 534; Pampusch v. National Council, 145 Minn. 71, 176 N. W. 158; Klinkert v. Streissguth, 145 Minn. 336, 177 N. W. 363; Podratz v. Nemitz, 145 Minn. 422, 177 N. W. 769; Bahneman v. Fritche, 147 Minn. 329, 180 N. W. 215.

404. As to the law of the case—Where the common law of Wisconsin as to wanton negligence was not pleaded, but the parties tried the case on the theory that the question of contributory negligence was determinable by the Wisconsin law, it was so considered on appeal. Pickering v. Northern Pacific Ry. Co., 132 Minn. 205, 156 N. W. 3.

When a case is tried on the theory that foreman under whose orders the plaintiff acted when injured was a vice-principal and not a fellow servant, and the court's charge to that effect is acquiesced in, it is too late on appeal to contend for the first time that the fellow-servant doctrine is applicable. Schaefer v. Marshall Milling Co., 133 Minn. 73, 157 N. W. 993.

(48) Chicago etc. Ry. Co. v. Sprague, 140 Minn. 1, 167 N. W. 124; Northland Pine Co. v. Melin Bros., 142 Minn. 233, 171 N. W. 808.

(49) Chicago etc. Ry. Co. v. Sprague, 140 Minn. 1, 167 N. W. 124.

406. As to the pleadings—In construing a pleading facts will be assumed by the supreme court which were assumed by the parties and court below. St. Paul Southern Electric Ry. Co. v. Flanagan, 138 Minn. 123, 164 N. W. 584.

When an action is tried at plaintiff's instance on the theory that it is an action of replevin he cannot claim judgment as for conversion. Grice v. Berkner, 148 Minn.—, 180 N. W. 923.

(55) Pickering v. Northern Pacific Ry. Co., 132 Minn. 205, 156 N. W. 3.

407. As to the issues—A case was tried upon an issue as to whether there was a three-year extension of a contract. Held, that the appellant could not claim on appeal that the original contract was automatically extended for a year by a provision in it. Anderson v. Butterick Pub. Co., 132 Minn. 30, 155 N. W. 1045.

On appeal the issues will be deemed those made by the pleadings unless the record shows that there were issues litigated by consent. German v. McKay, 136 Minn. 433, 162 N. W. 527.

The issues to be tried may be fixed by stipulation. Pampusch v. National Council, 145 Minn. 71, 176 N. W. 158. See § 409.

(56) Kief v. Mills, 147 Minn. 138, 179 N. W. 724.

407a. As to burden of proof—An erroneous instruction that the burden of proof is on the plaintiff cannot aid the defendant in upsetting a verdict for plaintiff. Nardinger v. Ladies of the Maccabees, 138 Minn. 16, 163 N. W. 785.

408. As to the facts—A stipulation made at the trial which recognized that the location of the boundary lines still remained in dispute and was treated throughout the trial as merely establishing a survey made by a surveyor who was not present as a witness, cannot be given effect in this court as conclusively establishing that the lines located by such surveyor were the true boundary lines Bahneman v. Fritche, 147 Minn. 329, 180 N. W. 215.

409. How theory of case disclosed—The theory may be shown by stipulations of the parties. Olson v. Moulster, 137 Minn. 96, 162 N. W. 1068; Pampusch v. National Council, 145 Minn. 71, 176 N. W. 158; Bahneman v. Fritche, 147 Minn. 329, 180 N. W. 215.

WEIGHT GIVEN FINDINGS OF FACT BY TRIAL COURT

410. Findings on motions, etc.—When an application for a temporary injunction is denied on conflicting pleadings and affidavits, the supreme court will assume a state of facts as favorable to the defendants as the showing made by them will reasonably justify. Steffes v. Motion Picture M. O. Union, 136 Minn. 200, 161 N. W. 524.

The general rule applies to the determination of the competency of a person for whom a guardian is sought. The trial court is in a far better position than the appellate court to judge of the capacity of the alleged incompetent. Sterling v. Miller, 138 Minn. 192, 164 N. W. 812.

(67) Steffes v. Motion Picture M. O. Union, 136 Minn. 200, 161 N. W. 524; Charest v. Bishop, 137 Minn. 102, 162 N. W. 1065; Hurni v. John-

son, 146 Minn. 99, 177 N. W. 942; State v. District Court, 146 Minn. 476, 178 N. W. 1002; Flannery v. Kusha, 147 Minn. 156, 179 N. W. 902.

411. Findings on trial by court without a jury—The general rule applies to findings in the proceedings for the collection of delinquent taxes. State v. Union Tank Line Co., 94 Minn. 320, 102 N. W. 921; State v. Minnesota & Ontario Paper Co., 147 Minn. 369, 180 N. W. 548. See § 7156.

The general rule applies to the findings of the court in making an award of compensation under the Workmen's Compensation Act. State v. District Court, 137 Minn. 435, 163 N. W. 755. See § 5854z.

The general rule applies to the findings in tax proceedings wherein is involved the issue whether certain land was assessed at more than its real or actual value. State v. South St. Paul Syndicate, 140 Minn. 359, 168 N. W. 95.

It is for the trial court to determine the weight and credit to be given to the testimony of the witnesses when such testimony is in conflict. The function of the supreme court is to determine whether there is any substantial evidence to sustain the conclusion of the trial court. Exrieder v. O'Keefe, 143 Minn. 278, 173 N. W. 434.

A conclusion drawn by a trial court from evidential facts is one of fact and not of law and falls within the scope of the rule governing this court in weighing findings of fact. It will not be disturbed unless manifestly contrary to the conclusion a reasonable mind might properly draw therefrom. Great Northern Ry. Co. v. Minneapolis, 142 Minn. 308, 172 N. W. 135.

The general rule applies where the facts must be proved, not by a mere preponderance of the evidence, but by clear and convincing evidence. Rechtzigel v. National Casualty Co., 143 Minn. 302, 173 N. W. 670.

The general rule applies to the review of findings of fact in special assessment proceedings. In re Concord Street Assessment, 148 Minn.—, 181 N. W. 859.

(70) Johnson v. Huhn, 137 Minn. 3, 162 N. W. 679; Merchants Trust & Savings Bank v. Schudel, 141 Minn. 250, 169 N. W. 795.

(73) In re Concord Street Assessment, 148 Minn.—, 181 N. W. 859.

414. Discussion of evidence unnecessary—(84) Minneapolis Holding Co. v. Landers-Morrison-Christenson Co., 141 Minn. 127, 169 N. W. 534.

WEIGHT GIVEN VERDICT

415. In general—(85) Dawson v. Thuet Bros., 147 Minn. 429, 180 N. W. 534; C. W. La Moure Co. v. Cuyuna-Mille Lacs Iron Co., 147 Minn. 433, 180 N. W. 540.

HARMLESS ERROR

416. In general—When the trial is by the court without a jury and the result is right and no other result could be reached, any errors com-

mitted by the court in arriving at the result are harmless. Nostdal v. Morehart, 132 Minn. 351, 356, 157 N. W. 584.

The supreme court will not reverse a judgment of the trial court though it is technically wrong if no substantial benefit is to be accomplished by a reversal. State v. Truax, 139 Minn. 313, 166 N. W. 339.

(87) State v. Truax, 139 Minn. 313, 166 N. W. 339; Staley v. Theo. Hamm Brewing Co., 142 Minn. 399, 172 N. W. 491.

417. De minimis non curat lex—(89) Davis v. Haugen, 133 Minn. 423, 158 N. W. 705; Erickson v. Minnesota & Ontario Power Co., 134 Minn. 209, 158 N. W. 979; National Elevator Co. v. Great Northern Ry. Co., 140 Minn. 382, 168 N. W. 134; Howe v. Gray, 144 Minn. 122, 174 N. W. 612.

(90) Davis v. Haugen, 133 Minn. 423, 158 N. W. 705.

418. Error favorable to appellant—As a general rule a party cannot complain that a verdict is in amount more favorable to him than it might have been; but where the damages are not unliquidated, but are certain, and the plaintiff is entitled to a specific sum if anything, and the jury disregard the issues and the evidence and compromise between the right of recovery and the amount of it, giving a sum much less than the plaintiff should have recovered if anything, the defendant may assail the verdict. Alden v. Sacramento Suburban Fruit Co., 137 Minn. 161, 163 N. W. 133.

The court in charging the jury understated plaintiff's claim as to the terms of the contract. Defendant cannot complain of this. James E. Carlson, Inc., v. Babler, 144 Minn. 125, 174 N. W. 824.

(91) Westlund-Westerberg Lumber Co. v. Lindsay, 140 Minn. 518, 168 N. W. 96. See Cherveny v. Hemza, 134 Minn. 39, 158 N. W. 810.

(93) Nardinger v. Ladies of the Maccabees, 138 Minn. 16, 163 N. W. 785; Staley v. Theo. Hamm Brewing Co., 142 Minn. 399, 172 N. W. 491; Gibbons v. Yunker, 145 Minn. 401, 177 N. W. 632.

(94) Staley v. Theo. Hamm Brewing Co., 142 Minn. 399, 172 N. W. 491.

419. Error caused by appellant—A party cannot complain of an erroneous instruction in harmony with his own requests. Curran v. Chicago G. W. R. Co., 134 Minn. 392, 159 N. W. 955.

Where a party states to the court that certain evidence is inadmissible if the adverse party objects, he probably cannot thereafter complain of error in excluding such evidence. State v. Henrionnet, 142 Minn. 1, 170 N. W. 699.

A party cannot invite error and thereafter complain thereof. Northland Pine Co. v. Melin Bros., 142 Minn. 233, 171 N. W. 808.

(98) State v. Henrionnet, 142 Minn. 1, 170 N. W. 699; Crane v. Veley, —Minn.—, 182 N. W. 915.

(99) McAlpine v. Fidelity & Casualty Co., 134 Minn. 192, 158 N. W. 967.

419a. Error as to other parties—There was a verdict against the defendant railway company and in favor of the individual defendants joined

with it who were charged with an act of negligence different from that charged against the defendant. The railway company cannot avail itself of an error in the charge upon the liability of its codefendants upon the ground that is was too favorable to them. McGillivray v. Great Northern Ry. Co., 145 Minn. 51, 176 N. W. 200.

421. Wrong reasons for right decision—Where the evidence of negligence was weak the supreme court refused to sustain a directed verdict on that ground, when it was not sustainable on the ground assigned by the trial court. Davis v. Chicago etc. Ry. Co., 134 Minn. 49, 158 N. W. 911.

(5) Reliance Elevator Co. v. Chicago etc. Ry. Co., 139 Minn. 69, 165 N. W. 867; Scheurer v. Great Northern Ry. Co., 141 Minn. 503, 170 N. W. 505. See Wunsewich v. Olson, 137 Minn. 98, 162 N. W. 1054.

422. Miscellaneous cases—On appeal from a judgment an appellant cannot complain of nominal damages found against him which are not included in the judgment. Stoering v. Swanson, 139 Minn. 115, 165 N. W. 875.

(11) Stoering v. Swanson, 139 Minn. 115, 165 N. W. 875.

424. Unimportant defects disregarded—Statute—(18) Dr. Ward's Medical Co. v. Wolleat,—Minn.—, 182 N. W. 523 (statute cited but not applied).

DISPOSITION OF CASE—POWERS OF SUPREME COURT

426. As to different parties—A judgment cannot be reversed or modified as to a party to an action who is not a party to the appeal. Breen v. Cameron, 132 Minn. 357, 157 N. W. 500.

(22) Johnstown Land Co. v. Brainerd Brewing Co., 142 Minn. 291, 172 N. W. 211. See Miles v. National Surety Co., — Minn. —, 182 N. W. 996.

427. Modification of judgment—A judgment cannot be modified as to a party to an action who is not a party to the appeal. Breen v. Cameron, 132 Minn. 357, 157 N. W. 500.

A case may be remanded with directions to the trial court to amend its conclusions of law and to enter judgment accordingly. Minnesota Loan & Trust Co. v. Peteler Car Co., 132 Minn. 277, 290, 156 N. W. 255; Breen v. Cameron, 132 Minn. 357, 157 N. W. 500.

A modification of the judgment will be ordered rather than a new trial where the interests of the parties require that the litigation should end and a new trial is not necessary to secure justice between the parties. Walberg v. Jacobson, 143 Minn. 210, 173 N. W. 409; Otterstetter v. Stenerson Bros. Lumber Co., 143 Minn. 442, 174 N. W. 305.

Where the findings of fact were somewhat inconsistent and at variance with the conclusions of law, the court thought it better to direct a new trial rather than a modification of the findings and judgment. Stronge Warner Co. v. H. Choate & Co., — Minn. —, 182 Minn. 712.

(23) Twin City Brief Printing Co. v. Review Pub. Co., 139 Minn. 358, 166 N. W. 413; State v. District Court, 134 Minn. 16, 158 N. W. 713; State v. District Court, 134 Minn. 324, 159 N. W. 755; Johnson v. Bruzek, 142 Minn. 454, 172 N. W. 700.

(24) Joyce v. Janesville, 132 Minn. 121, 155 N. W. 1067 (modification of conclusions of law not directed because the findings of fact were somewhat conflicting).

428. Directing judgment—Where the amount recovered in an action on contract is a little less than the plaintiff is entitled to, an order denying a new trial may be reversed with directions to enter judgment for the plaintiff for a specified amount, such amount being as large as, in the opinion of the supreme court, the evidence will warrant. Berglund v. American Multigraph Sales Co., 135 Minn. 67, 160 N. W. 191.

Where the amount of recovery is excessive the supreme court will not order judgment for a specified amount, if it is doubtful what amount should be recovered. Orr v. Bennett, 135 Minn. 443, 161 N. W. 165.

Where the trial court erred in denying a motion for a directed verdict for a party the supreme court may direct the entry of judgment in his favor. Bell Lumber Co. v. Seaman, 136 Minn. 106, 161 N. W. 383.

(28) Petersdorf v. Malz, 136 Minn. 374, 162 N. W. 474; Helvetia Copper Co. v. Hart-Parr Co., 142 Minn. 74, 171 N. W. 272, 767.

As to directing judgment notwithstanding the verdict, see §§ 393, 5076-5087.

429. Granting a new trial—In general—A new trial will not be granted when it is not necessary. It will not be granted simply because the findings of the court are not justified by the evidence, if proper findings may be directed by the supreme court without injustice to the parties. Hunt v. Meeker County Abstract & Loan Co., 135 Minn. 134, 160 N. W. 496. See §§ 427, 430, 432, 7068–7224.

430. Granting a new trial of part of the issues—A reversal of an order denying a new trial operates to grant a new trial of all the issues unless otherwise directed. O'Rourke v. O'Rourke, 134 Minn. 5, 158 N. W. 704.

(31) Gross Iron Ore Co. v. Paulle, 132 Minn. 160, 156 N. W. 268; O'Rourke v. O'Rourke, 134 Minn. 5, 158 N. W. 704; Glaze v. Stryker, 135 Minn. 186, 160 N. W. 490; Orr v. Bennett, 135 Minn. 443, 161 N. W. 165; Wheeler v. McKeon, 137 Minn. 92, 162 N. W. 1070; Hughes v. Globe Indemnity Co., 139 Minn. 417, 166 N. W. 1075; Helvetia Copper Co. v. Hart-Parr Co., 142 Minn. 74, 171 N. W. 272, 767; Periodical Press Co. v. Sherman-Elliott Co., 143 Minn. 489, 174 N. W. 516; Delasca v. Grimes, 144 Minn. 67, 174 N. W. 523; Bauman v. Metzger, 145 Minn. 133, 176 N. W. 497. See § 7079.

431. On appeal from an order on demurrer—(32) Moore v. Thorpe, 133 Minn. 244, 251, 158 N. W. 235; Haroldson v. Knutson, 142 Minn. 109, 171 N. W. 201; Northern Timber Products Co. v. Stone-Ordean-Wells Co., 143 Minn. 200, 173 N. W. 439.

432. Remitting parties to trial court for relief—A case will not be remanded in order that proof may be made of the death of a party at the commencement of the action. The remedy of dismissal on appeal is sufficient. Poupore v. Stone-Ordean-Wells Co., 132 Minn. 409, 157 N. W. 648.

A case may be remanded without prejudice to the right of a party to apply to the trial court for a modification of the judgment. State v. Foster, 141 Minn. 140, 169 N. W. 529.

A judgment of divorce granted the custody of the children to the wife. It should have granted the husband leave to visit his children at reasonable times. Held, that a new trial was not necessary to enable him to obtain this privilege, but that he might obtain it by application to the district court after a remand. Dorsey v. Dorsey, 142 Minn. 279, 171 N. W. 933.

If a judgment was improperly entered against some of the parties the supreme court may remand the case with leave to them to apply to the trial court for relief. Miles v. National Surety Co., — Minn. —, 182 N. W. 996.

434. Cannot make or amend findings—As a general rule the supreme court cannot make or amend findings. Breen v. Cameron, 132 Minn. 357, 157 N. W. 500; Jacobson v. Brasie Motor Car Co., 132 Minn. 417, 157 N. W. 645; A. J. Whitman & Co. v. Mielke, 139 Minn. 231, 166 N. W. 178.

While the supreme court cannot make findings it will sometimes supply a finding by intendment. See §§ 436, 9860.

(35) Breen v. Cameron, 132 Minn. 357, 157 N. W. 500; State v. Jelley, 134 Minn. 276, 159 N. W. 566.

(36) A. J. Whitman & Co. v. Mielke, 139 Minn. 231, 166 N. W. 178.

435. Remanding with directions to amend or make particular findings—Where the evidence is conclusive and only one finding of fact is justified, the supreme court may remand the case with directions to strike out a contrary finding or to make a finding as directed and change the conclusions of law accordingly. Hunt v. Meeker County Abstract & Loan Co., 135 Minn. 134, 160 N. W. 496.

Where the evidence is conflicting and findings might reasonably be made in more than one way the supreme court cannot direct the trial court to make specified findings. Breen v. Cameron, 132 Minn. 357, 157 N. W. 500; Jacobson v. Brasie Motor Car Co., 132 Minn. 417, 157 N. W. 645; A. J. Whitman & Co. v. Mielke, 139 Minn. 231, 166 N. W. 178.

(37) Breen v. Cameron, 132 Minn. 357, 157 N. W. 500; Cohen v. Minneapolis etc. Ry. Co., 133 Minn. 298, 158 N. W. 334; Glaze v. Stryker, 135 Minn. 186, 160 N. W. 490.

436. Findings of fact assumed—The supreme court cannot assume facts to be proved when there are no findings unless it appears that they were conclusively proved. Luthey v. Joyce, 132 Minn. 451, 157 N. W. 708; Mikolas v. Val Blatz Brewing Co., 147 Minn. 230, 180 N. W. 109.

(38) Breen v. Cameron, 132 Minn. 357, 157 N. W. 500; Rockey v.

Joslyn, 134 Minn. 468, 158 N. W. 787. See Gross Iron Ore Co. v. Paulle, 132 Minn. 160, 156 N. W. 268; Jacobson v. Brasie Motor Car Co., 132 Minn. 417, 157 N. W. 645; Small v. Anderson, 139 Minn. 292, 166 N. W. 340.

437a. Remanding with directions to reduce verdict—Where the liability of the defendant under the Workmen's Compensation Act was established, and the extent thereof was less than the verdict, the case was remanded with directions to reduce the verdict to the amount authorized by the act and to enter judgment accordingly. Mahowald v. Thompson-Starrett Co., 134 Minn. 113, 158 N. W. 913.

438. Remanding to permit motion for new trial—(40) Jensen v. Fischer, 132 Minn. 475, 157 N. W. 498 (if motion granted by trial court remand is absolute—if motion denied the proceedings will be certified to the supreme court as a part of the return—proceedings in trial court should be conducted without unnecessary delay). See Poupore v. Stone-Ordean-Wells Co., 132 Minn. 409, 156 N. W. 648.

See § 5086.

438a. Remanding for new trial or amendment of findings and judgment—A case may be remanded for a new trial or for such amendments of the findings and order for judgment as the trial court may deem advisable. Morrison County Lumber Co. v. Duclos, 138 Minn. 20, 163 N. W. 734.

438b. Remanding with leave to apply for additional findings—Where the findings do not warrant the judgment a case may be remanded without prejudice to the right of either party to apply to the trial court for additional findings upon the evidence already taken and such further evidence as may be presented with leave of court. Halvorson v. Halvorson, 133 Minn. 78, 157 N. W. 1001.

440a. Affirmance conditional on slight increase in verdict—Where there is an evident mistake in the amount of the verdict, and the proper amount is readily ascertainable, the error will be corrected by conditional affirmance, though the record is not such that a new trial would be granted of all the issues. Altona v. Electric Mfg. Co., 142 Minn. 358, 172 N. W. 212.

EFFECT OF REVERSAL

441. Reversal of judgment without directions—Where a judgment is reversed on appeal solely because the facts found call for different conclusions of law, the effect is not necessarily a new trial. National Elevator Co. v. Great Northern Ry. Co., 140 Minn. 382, 168 N. W. 134.

Where a case is remanded "for further proceedings" in accordance with the opinion, the effect necessarily depends on the particular case. See Klampe v. Klampe, 145 Minn. 404, 177 N. W. 629.

(43) National Elevator Co. v. Great Northern Ry. Co., 140 Minn. 382,

168 N. W. 134; O'Rourke v. O'Rourke, 134 Minn. 5, 158 N. W. 704; Chicago G. W. R. Co. v. Zahner, — Minn. —, 182 N. W. 904.

(45) See National Elevator Co. v. Great Northern Ry. Co., 140 Minn. 382, 168 N. W. 134.

(47) O'Rourke v. O'Rourke, 134 Minn. 5, 158 N. W. 704.

443. Reversal of order for judgment—As to effect of reversal of order for judgment notwithstanding the verdict, see § 5086.

443a. Reversal of order granting new trial—When a motion for a new trial is made upon the grounds of errors of law, insufficiency of evidence, and excessive damages, and granted solely on the first, without a consideration of the others, and the order is reversed, the second and third are for consideration by the trial court upon the going down of the remittitur. Gutmann v. Anderson, 142 Minn. 141, 171 N. W. 303.

444. Reversal of order denying new trial—Vacation of judgment—Where a new trial is granted unless the respondent consents to a reduction of the verdict, the effect of a new trial is to vacate the judgment. Mahr v. Maryland Casualty Co., 132 Minn. 336, 156 N. W. 668.

Where the supreme court, in its decision on an appeal from an order denying a new trial, reverses the order appealed from, without expressly saying that a new trial is granted, and without limiting the issues to be retried, the necessary effect of such reversal is to grant a new trial of all the issues, and the opinion cannot be resorted to in order to establish the claim that it was intended to grant a new trial only as to certain issues. O'Rourke v. O'Rourke, 134 Minn. 5, 158 N. W. 704; State v. Brill, 134 Minn. 471, 158 N. W. 908.

The reversal of an order denying a new trial leaves the case where it stood before it was brought to trial. The second trial is not controlled by the evidence or proceedings at the first. Quinn-Shepherdson Co. v. United States F. & G. Co., — Minn. —, 183 N. W. 347.

444a. Reversal of order granting new trial—The reversal of an order granting a new trial reinstates the verdict of the jury, and it is often expressly so ordered. Darrington v. Chicago & N. W. Ry. Co., 134 Minn. 30, 158 N. W. 727.

446. Effect of granting a new trial without restrictions—Upon a reversal and order for a new trial the cause stands for trial de novo, and a dismissal may be had under the statute, the same as though no trial had been had. Wilson v. Anderson, 145 Minn. 274, 177 N. W. 130.

(54) O'Rourke v. O'Rourke, 134 Minn. 5, 158 N. W. 704.

REMITTITUR

449. Necessity of remittitur—Waiver—(60, 61) See Nason v. Barrett, 141 Minn. 220, 169 N. W. 804.

451a. Filing in lower court—When judgment becomes final—Under the terms of a certain judgment it became final, in case of an appeal there-

from, when the remittitur was filed with the clerk of the trial court. The fact that the remittitur was mailed to plaintiff's attorneys and not filed by them for several days did not constitute a waiver of the filing. Nason v. Barrett, 141 Minn. 220, 169 N. W. 804.

452. Stay for writ of error from federal supreme court—(66) See State v. Langum, 135 Minn. 320, 160 N. W. 858 (habeas corpus proceedings).

453. Recalling—A remittitur may be recalled any time before it is filed in the lower court. Nason v. Barrett, 141 Minn. 220, 169 N. W. 804.

PROCEEDINGS IN LOWER COURT AFTER REMAND

456. Granting a new trial—After the going down of a remittitur upon a reversal of a judgment for defendant he applied to the trial court for leave to file an answer in the form of a cross-complaint and for a new trial. Held, that there was no abuse of discretion in denying this application. Chicago G. W. R. Co. v. Zahner, — Minn. —, 182 N. W. 904.

457. Matters undetermined by appeal—(74) Gutmann v. Anderson, 142 Minn. 141, 171 N. W. 303.

458. Amendment of pleadings—Where a right of rescission on the ground of fraud is denied on appeal, the district court, after the cause is remanded, may allow an amendment and permit the action to proceed as an action at law for damages. Gunderson v. Halvorson, 140 Minn. 292, 168 N. W. 8.

458a. Receiving further evidence—In summary proceedings against an attorney, held, that the district court had authority to receive further evidence as to the value of the attorney's services after a remand. Klampe v. Klampe, 145 Minn. 404, 177 N. W. 629.

458b. Stay of proceedings—The trial court may sometimes stay proceedings though the case is remanded for a new trial. See § 2231.

JURISDICTION OF SUPREME COURT AFTER REMAND

459. In general—(79) See Nason v. Barrett, 141 Minn. 220, 169 N. W. 804.

DISMISSAL OF APPEAL

460a. When taken too late—An appeal taken too late will be dismissed. Churchill v. Overend, 142 Minn. 102, 170 N. W. 919.

461. For defective return—(81) Apelt v. Melin, 135 Minn. 480, 160 N. W. 486.

462. For want of merit—Frivolous appeals—Where a question relating to the service of process on foreign corporations doing business in this state had been squarely raised and decided in four recent cases, an appeal raising the same question was dismissed as frivolous. Callahan v. Union Pacific Ry. Co., — Minn. —, 182 N. W. 1004.

(82) Lincoln County v. Curtis, 134 Minn. 473, 159 N. W. 129; Shaughnessey v. Shaughnessey, 140 Minn. 513, 167 N. W. 1046; Mahoney v. St. Paul City Ry. Co., 140 Minn. 516, 168 N. W. 49.

462a. Improper certiorari proceedings—Certiorari proceedings will be dismissed when the appropriate remedy was an appeal. Neumann v. Edwards, 146 Minn. 179, 178 N. W. 589.

462b. Party dead at commencement of action—An appeal will be dismissed when it is made to appear that a party was dead at the commencement of the action. Poupore v. Stone-Ordean-Wells Co., 132 Minn. 409, 157 N. W. 648.

463. For want of real controversy—Moot and academic questions—Where, after an order striking out a reply as sham and frivolous, the action was dismissed by the court for want of prosecution, it was held that an appeal from the order striking out should be dismissed, as it presented a moot question. Sweeney v. Ellsworth, 135 Minn. 474, 159 N. W. 1067.

463c. On the ground of estoppel or waiver—Where the appellant accepted certain benefits of a judgment dissolving a corporation and distributing the funds thereof, it was held his appeal could not be dismissed, though he might be estopped as to a part of the judgment. Thwing v. McDonald, 134 Minn. 148, 156 N. W. 780.

464. Appellant cannot dismiss as of right—(85) Greenhut Cloak Co. v. Oreck, 134 Minn. 464, 157 N. W. 327. See L. R. A. 1917A, 113.

465. Appeal from non-appealable order or judgment—(86) Francis v. Heberle, 136 Minn. 463, 161 N. W. 783.

466. Reinstatement of appeal—(87) Wheeler v. Crane, 141 Minn. 78, 169 N. W. 476, 597.

REHEARINGS

472a. Record unaffected—The record cannot be corrected on an ex parte application for a rehearing. Martinson v. Hensler, 132 Minn. 437, 442, 157 N. W. 714.

APPEARANCE

476. Effect of general appearance—(25) Carr-Cullen Co. v. Cooper, 144 Minn. 380, 175 N. W. 696.

(26) State v. Schulz, 142 Minn. 112, 171 N. W. 263; Carr-Cullen Co. v. Cooper, 144 Minn. 380, 175 N. W. 696; Morehart v. Furley, — Minn. —, 182 N. W. 723.

(28, 29) See Wagner v. Farmers Co-operative Exchange Co., 147 Minn. 376, 180 N. W. 231.

478. Validating a void judgment by an appearance—(33) See Morehart v. Furley, — Minn. —, 182 N. W. 723; 33 Harv. L. Rev. 960.

479. General appearance—What constitutes—Asking for a dismissal of an appeal from a justice court under G. S. 1913, § 7611, does not constitute a general appearance. Spicer v. Kennedy, 144 Minn. 158, 174 N. W. 821.

Asserting a counterclaim and asking for affirmative judgment thereon is a general appearance and gives the court jurisdiction. Morehart v. Furley, — Minn. —, 182 N. W. 723.

Giving a bond to secure the release of attached property held not a general appearance by a non-resident defendant so as to give the court jurisdiction to enter a personal judgment against him. Wagner v. Farmers Co-operative Exchange Co., 147 Minn. 376, 180 N. W. 231.

(34, 35) Carr-Cullen Co. v. Cooper, 144 Minn. 380, 175 N. W. 696; Morehart v. Furley, — Minn. —, 182 N. W. 723.

482. Proceeding to trial after special appearance—Waiver—A defendant may challenge the jurisdiction of the court, and, if his objection is overruled, may answer and defend on the merits without waiving his objection to the jurisdiction. But if he presents a counterclaim and asks for an affirmative judgment thereon he invokes the power of the court in his own behalf, and thereby submits himself to its jurisdiction. Morehart v. Furley, — Minn. —, 182 N. W. 723.

(58) Morehart v. Furley, — Minn. —, 182 N. W. 723.

ARBITRATION AND AWARD

IN GENERAL

487. Favored in the law—(70) Larson v. Nygaard, — Minn. —, 180 N. W. 1002.

488. Conclusiveness—Fraud—Mistake—An action or proceeding to set aside an award is of an equitable nature, except perhaps for defects appearing on the face of the award, and the rules and principles of equity control the procedure and relief to be awarded. McQuaid Market House Co. v. Home Ins. Co., 147 Minn. 254, 180 N. W. 97.

A party cannot avoid the award of arbitrators on the ground that they received evidence in the absence of the parties where they were expressly authorized to do so. Arbitration is favored in law and the courts will not interfere with the conclusions drawn by the arbitrators from conflicting evidence, nor set aside an award made in good faith and in the exercise of an honest judgment, even if the court would have reached a different result. To impeach an award on the ground that the arbitrators reached a wrong conclusion, it must be shown that this conclusion was so at variance with any conclusion which could legitimately be drawn from the evidence before them as to imply bad faith or a failure to exercise an honest judgment. Larson v. Nygaard, — Minn. —, 180 N. W. 1002.

(71) Larson v. Nygaard, — Minn. —, 180 N. W. 1002. See State v. Equitable Surety Co., 140 Minn. 48, 167 N. W. 292.

(72) Larson v. Nygaard, — Minn. —, 180 N. W. 1002.

(75) McQuaid Market House Co. v. Home Ins. Co., 147 Minn. 254, 180 N. W. 97.

489. Award—What constitutes—It is well settled, in the absence of statute otherwise providing, that in the common-law arbitration the arbitrators need not specify in detail the facts made the basis of their decision, but may report the result of their deliberations in the form of general conclusions, which determine the points involved, together with a statement of the gross allowance made. McQuaid Market House Co. v. Home Ins. Co., 147 Minn. 254, 180 N. W. 97.

491. Arbitrators must be impartial—(80) McQuaid Market House Co. v. Home Ins. Co., 147 Minn. 254, 180 N. W. 97.

498a. Arbitrators not civilly liable—Arbitrators are not civilly liable for damages from their acts, whatever their motives may have been. See Melady v. South St. Paul Live Stock Exchange, 142 Minn. 194, 171 N. W. 806.

AT COMMON LAW

499. In general—Witnesses need not be sworn unless the agreement requires it. State v. Truax, 139 Minn. 313, 166 N. W. 339.

The parties may waive the objection that witnesses are not sworn. See State v. Schulz, 142 Minn. 112, 171 N. W. 263.

UNDER STATUTE

508. Judgment—Evidence held sufficient to justify a judgment on an award as to the value of certain bank stock. Larson v. Slette, 132 Minn. 469, 156 N. W. 1086.

509. Vacating award on motion—(25) See note, 8 A. L. R. 1082 (attempting to influence decision).

ARCHITECTS—See Contracts, §§ 1842, 1853, 1853a.

ARMY AND NAVY

510a. Discouraging enlistment—Statute—Discouraging enlistment in the army or navy was made a criminal offence by Laws 1917, c. 463. State v. Holm, 139 Minn. 267, 166 N. W. 181 (act held constitutional—act not superseded or abrogated by Federal Espionage Law—what constitutes violation of act—circulating seditious pamphlets); State v. Spartz, 140 Minn. 203, 167 N. W. 547 (indictment under act held insufficient on demurrer); State v. Freerks, 140 Minn. 349, 168 N. W. 23 (indictment under act held sufficient); State v. Townley, 140 Minn. 413, 168 N. W. 591 (indictment under act held not to show a violation thereof—subject-matter of section 3, of act is within title of act); State v. Kaercher, 141 Minn. 186, 169 N. W. 699 (act construed with reference to its title and held valid—indictment under act held sufficient); State v. Gilbert, 141 Minn. 263, 169 N. W. 790 (intent not an essential element of offence—statements alleged to have been made by defendant held a violation of act—evidence held to make defendent's guilt a question for jury and sufficient to justify a verdict of guilty—act held constitutional); State v. Luker, 141 Minn. 494, 169 N. W. 700 (indictment under act held sufficient); State v. Townley, 142 Minn. 326, 171 N. W. 930 (indictment for a conspiracy to discourage enlistment in violation of the act held sufficient); State v. Martin, 142 Minn. 484, 169 N. W. 792, 173 N. W. 648 (violation of statute by approving speech of another—what words constitute violation of statute—evidence of what was said and done at a public meeting held admissable); State v. Gilbert, 142 Minn. 495, 171 N. W. 798, affirmed, 254 U. S. 325 (indictment under act held sufficient—act construed with reference to section 3 and held valid); State v. Deike, 143 Minn. 23, 172 N. W. 777 (evidence held insufficient to justify a conviction under the act); State v. Randall, 143 Minn. 203, 173 N. W. 425 (language of defendant held to constitute a violation of act—defendant not entitled to repeat all of his speech—act not a violation of the right of free speech—intent not essential element of offence—former cases under act followed—limitation of defendant's witnesses prejudicial and new trial granted); State v. Townley, — Minn. —, 182 N. W. 773 (conspiracy to discourage enlistment—conviction sustained). See §§ 1564a, 1654.

510b. Soldiers and Sailors Relief Act—Moratorium—The act of Congress known as the Soldiers' and Sailors' Civil Relief Act, approved March 8, 1918, was designed and intended to authorize and require in particular instances the restraint and stay of judicial proceedings commenced in any state or federal court for the enforcement of pecuniary obligations against those in the military service of the United States; but it has no application to the non-judicial proceeding for the foreclosure of a real estate mortgage by advertisement, as authorized by our statutes, which was fully completed by a sale of the mortgaged property prior to the commencement of the military service of soldier affected, though the period of redemption had not then expired. Taylor v. McGregor State Bank, 144 Minn. 249, 174 N. W. 893.

The act of Congress known as the Soldiers' and Sailors' Civil Relief Act by its express language becomes inoperative and without effect upon the death or discharge of a soldier within its protection, and an order of a court, requiring a refundment or return of money paid prior to his entry into the service upon an executory contract for the sale of land as a condition to a cancelation thereof, is not authorized by the act in an action or proceeding commenced subsequent to such death or discharge. Nelson Real Estate Agency v. Seeman, 147 Minn. 354, 180 N. W. 227.

There was no error under the facts stated in the opinion in excluding evidence that a third person was in the naval service. The Soldiers' and Sailors' Civil Relief Act was without application. Chance v. Hawkinson, — Minn. —, 182 N. W. 911.

ARREST

512. Without warrant—Under the statutes of this state, a peace officer may arrest without a warrant; when the person arrested has in his presence committed or attempted to commit any public offence, either a felony or a misdemeanor; when he has committed a felony, though not in the officer's presence; when a felony has been committed and the officer has reasonable cause to believe that the person arrested committed it; upon a charge made upon reasonable cause of the commission of a felony by the person arrested; and at night when the officer has reasonable cause to believe that the person arrested has committed a felony, though no felony has in fact been committed. There is no authority for arrest without a warrant because of mere belief that a person has committed a misdemeanor. Hilla v. Jensen, — Minn. —, 182 N. W. 902. See 5 A. L. R. 263.

Peace officers raided a building of thirty apartments, some of which, they had cause to believe, the proprietress used or permitted to be used for purposes of prostitution. There is no evidence that they were in fact so used. Plaintiff and his wife lived in one of the apartments and were arrested without a warrant. There is no claim that the officers believed that they were in any sense connected with the management

of the building. There was no thought that they were committing any offence except the misdemeanor of being inmates of a disorderly house. They were not committing and had not committed that offence. Held, their arrest was unlawful. Hilla v. Jensen, — Minn. —, 182 N. W. 902.

(34) Ehrhardt v. Wells, Fargo & Co., 134 Minn. 58, 158 N. W. 721.

(38) Hilla v. Jensen, — Minn. —, 182 N. W. 902.

514. Use of force—(43) See 3 A. L. R. 1170 (degree of force which may be used in arresting one charged with a misdemeanor).

ARSON

517b. What constitutes—Burning as element of offence. 1 A. L. R. 1163.

520. Evidence—Admissibility—(53) State v. Ettenburg, 145 Minn. 39, 176N. W. 171 (attempt of defendant to bribe witness for state admissible —evidence of former fire in store of defendant admissible—evidence that defendant suffered a loss from former fire inadmissible—evidence that employee of defendant who was a witness for state and another had conspired to rob store properly excluded).

520a. Evidence—Sufficiency—Evidence held insufficient to justify a conviction. State v. McCauley, 132 Minn. 225, 156 N. W. 280.

Evidence held to justify a conviction of arson in the third degree. State v. Ettenburg, 145 Minn. 39, 176 N. W. 171.

ASSAULT AND BATTERY

CIVIL LIABILITY

521. Definitions—(56) See Duluth St. Ry. Co. v. Fidelity & Deposit Co., 136 Minn. 299, 161 N. W. 595.

522. Who liable—In an action against four defendants for an assult the evidence is held insufficient to justify submitting to the jury the claim of a conspiracy. The charge in submitting such claim was prejudicially erroneous as to two of the defendants, who were not conclusively shown to have participated directly in the alleged assault or as aiders or abettors; but as to the other two defendants, who actively participated, and who confessedly were either justifiably defending themselves or were the aggressors, and who were by the general verdict of the jury found to be the aggressors, it was not prejudicial for it did not affect the question of their liability nor the amount of damages to be awarded. Leibel v. Golden, 138 Minn. 90, 163 N. W. 991.

The fact that persons other than defendants participated in the assault upon plaintiff, and that some of his injuries were received at their hands,

does not absolve the defendants from liability for all the injuries inflicted upon him in the course of an affray in which they and such other persons jointly participated. Wrabek v. Suchomel, 145 Minn. 468, 177 N. W. 764.

(64) Leibel v. Golden, 138 Minn. 90, 163 N. W. 991; Wrabek v. Suchomel, 145 Minn. 468, 177 N. W. 764.

523. Self-defence—The evidence was insufficient to justify the jury in finding that three of the defendants who admitted that they assaulted plaintiff were acting in self-defence in so doing. Wrabek v. Suchomel, 145 Minn. 468, 177 N. W. 764.

524. Forms of assault considered—Assault on female. 6 A. L. R. 985.

(67) York v. York, 146 Minn. 442, 179 N. W. 212.

525. Indecent assault on females—(76) Nickolay v. Orr, 142 Minn. 346, 176 N. W. 222 (plaintiff may not, before offering proof of the attack on her, inquire of defendant, when called for cross-examination under the statute, as to his conduct toward others; and the offer then made to show defendant's bad character was properly rejected—while defendant may give proof of his good character, his character is not in issue and not subject to direct attack unless he introduces proof of good character—charge as to defendant's omission to offer evidence of good character held proper—charge as to complaints made by plaintiff of the alleged mistreatment held proper—verdict for defendant held justified by evidence). See 6 A. L. R. 985 (general note on action); 6 A. L. R. 1048 (character evidence); 6 A. L. R. 1062 (measure of damages); 6 A. L. R. 1074 (excessive or inadequate damages).

527. Pleading—A general denial in an answer held to put plaintiff's reputation in issue. Wrabek v. Suchomel, 145 Minn. 468, 177 N. W. 764.

528a. Evidence—Admissibility—Evidence as to defendant's loyalty during the war held properly excluded. York v. York, 146 Minn. 442, 179 N. W. 212.

529. Evidence—Sufficiency—Evidence held to justify a verdict for defendant. Leonard v. Schmidt, 135 Minn. 470, 160 N. W. 1034.

The evidence of an alleged conspiracy among the defendants to commit an assault upon plaintiff was not sufficient to require the court to submit that issue to the jury. Wrabek v. Suchomel, 145 Minn. 468, 177 N. W. 764.

(83) Dahlsie v. Hallenberg, 143 Minn. 234, 173 N. W. 433; Daigle v. Summit Mercantile Co., 144 Minn. 178, 174 N. W. 830; York v. York, 146 Minn. 442, 179 N. W. 212.

531. Damages—In general—Humiliation reasonably certain to be endured in the future on account of disfigurement is a proper element of damages. Patterson v. Blatti, 131 Minn. 23, 157 N. W. 717.

If a person has a latent disease which is developed into activity by an assault he may recover damages for such development. Young v. St. Paul City Ry. Co., 142 Minn. 10, 170 N. W. 845.

(91) 6 A. L. R. 1062 (measure of damages for assault on female); 6 A L. R. 1074 (excessive or inadequate damages for assault on female).

(93) Wrabek v. Suchomel, 145 Minn. 468, 177 N. W. 764.

(94) York v. York, 146 Minn. 442, 179 N. W. 212 (blow in eye causing traumatic cataract with loss of sight—blow not sole cause of blindness—verdict, $3,250—reduced to $1,400).

(95) Patterson v. Blatti, 133 Minn. 23, 157 N. W. 717 (permanent shortening and stiffening of thumb—expenses and loss of time amounting to $350—humiliation from disfigurement—verdict, $1,250); Young v. St. Paul City Ry. Co., 142 Minn. 10, 170 N. W. 845 (assault on passenger by motorman—latent pulmonary tuberculosis developed into activity by assault—verdict, $2,500); Daigle v. Summit Mercantile Co., 144 Minn. 178, 174 N. W. 830 (assault by deputy sheriff while serving summons—attack unprovoked on premises of plaintiff who was roughly handled in wanton disregard of his rights— verdict, $1,250).

532. Exemplary damages—The fact that the probate court had appointed a guardian of the person and estate of defendant is not conclusive evidence of his inability to entertain malicious intent and the court properly submitted the question of punitive damages to the jury. Dalsie v. Hallenberg, 143 Minn. 234, 173 N. W. 433.

(97) Daigle v. Summit Mercantile Co., 144 Minn. 178, 174 N. W. 830. See Nicolay v. Orr, 142 Minn. 346, 172 N. W. 222 (indecent assault —verdict for defendant—harmless error not to permit jury to consider exemplary damages).

533. Mitigation of damages—The complaint alleged that, in addition to inflicting injuries upon his person by an assault, defendants intended to injure, and by the publicity of the assault did injure, plaintiff's standing and reputation as a citizen in the community where he lived. The general denial in the answers put plaintiff's reputation as a citizen in issue, and entitled defendants to show, in mitigation of damages, that it was bad. Wrabek v. Suchomel, 145 Minn. 468, 177 N. W. 764.

(1) Patterson v. Blatti, 133 Minn. 23, 157 N. W. 717 (indecent, insultinn and provocative language).

CRIMINAL LIABILITY

535. What constitutes assault armed with dangerous weapon—Evidence that during an affray one of the defendants started to draw a revolver from his pocket, but did not point it toward any one or make any movement to use it against any one, is not sufficient to sustain a conviction of an assault with a weapon likely to produce grievous bodily harm. State v. Rempel, 143 Minn. 88, 172 N. W. 920.

544. Conviction for lesser offence—The evidence was such that it was for the jury to determine whether the offence committed by defendant was of a lesser degree than the one named in the indictment and verdict; but no error can be predicated upon the failure to submit that question to

the jury, for the record does not show a request to submit the same, or any objection, made before the jury retired, to the charge on that score. State v. Gaularpp, 144 Minn. 86, 174 N. W. 445.

Under an indictment for assault in the second degree the evidence was such as to justify a finding of assault in the third degree. A refusal to instruct upon the third degree was error. State v. Brinkman, 145 Minn. 18, 175 N. W. 1006.

547. Evidence—Sufficiency—Evidence held insufficient to justify a conviction for assault in the second degree in resisting a peace officer. State v. Gesell, 137 Minn. 41, 162 N. W. 683.

Evidence held sufficient to justify a conviction for assault in the third degree, but not in the second degree. State v. Rempel, 143 Minn. 88, 172 N. W. 920.

(27) State v. Gaularpp, 144 Minn. 86, 174 N. W. 445.

INDECENT ASSAULT

552a. Evidence—Sufficiency—Evidence held to justify a conviction for an indecent assault on a female child. State v. Barnes, 140 Minn. 517, 168 N. W. 98.

Evidence held sufficient to sustain a conviction for taking indecent liberties with a female child under fourteen years of age. State v. Taylor, 144 Minn. 377, 175 N. W. 615.

ASSIGNMENTS

IN GENERAL

553. Definition—(37) King v. Hartford Fire Ins. Co., 133 Minn. 322, 158 N. W. 435.

554. What constitutes—Where A and B entered into an agreement whereby A promised to perform certain services for B, an agreement between A and C whereby C agreed to perform such services for and on behalf of A, it was held that the contract between A and C was not an assignment of the contract between A and B. Reed v. R. M. Chapman-Basting Co., 137 Minn. 442, 163 N. W. 794.

A subcontract is not an assignment and creates no legal relations between the original obligor and the subcontractor. Reed v. R. M. Chapman-Basting Co., 137 Minn. 442, 163 N. W. 794.

(40) Jackson Nat. Bank v. Christensen, 146 Minn. 303, 178 N. W. 494. See Slimmer v. State Bank, 134 Minn. 349, 159 N. W. 795.

(41) Jackson Nat. Bank v. Christensen, 146 Minn. 303, 178 N. W. 494.

555. Equitable assignment—Plaintiff had in his possession collateral security for a debt due from a third party, who also owed the defendant Held, that an agreement by the parties in interest that any sum received

upon such collateral security in addition to the indebtedness first secured thereby should be applied on the debt due to defendant operated as an equitable assignment to defendant of such surplus, if any. Second Nat. Bank v. Sproat, 55 Minn. 14, 56 N. W. 254.

A mortgagor sold to a third person certain mortgaged property, and received in payment therefor a check upon a bank for the purchase price, payable, by an indorsement on the face thereof, to the mortgagee as his interest might appear. A controversy arose between the mortgagor and mortgagee as to the application of the money; the mortgagee claimed that it should be applied in payment of a debt of the mortgagor not secured by the mortgage, while the mortgagor and also the purchaser of the mortgaged property claimed that it should be applied in discharge of the mortgage debt. The officers of the bank were informed of the check, and an amount sufficient for that purpose was reserved for its payment; it was finally agreed between the parties, with the knowledge of the bank, that the fund should be paid to the mortgagee, to be applied upon the mortgage debt. It is held that the agreement amounted to an equitable assignment of the fund to the mortgagee, and that a right thereto passed to a subsequent transferee of the promissory notes so secured. Slimmer v. State Bank, 134 Minn. 349, 159 N. W. 795.

It has been held in some cases, that where a contractor for work subcontracts with another to do the same work at the same price he is to receive and agrees to pay the second contractor in the same instalments as are stipulated in the original contract, the agreement constitutes an assignment to the person who performs the work of the money to accrue under the original contract, and the transaction is an equitable assignment of a chose in action. Reed v. R. M. Chapman-Basting Co., 137 Minn. 442, 163 N. W. 794.

An agreement to pay out of a particular fund, however clear, in its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect. The phraseology employed is not material, provided the intent to transfer is manifested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund, any power to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee. The transfer must be of such a character that the fund holder can safely pay, and is compellable to do so, though forbidden by the assignor. Jackson Nat. Bank v. Christensen, 146 Minn. 303, 178 N. W. 494.

(43) See Logan v. Modern Woodmen, 137 Minn. 221, 163 N. W. 292.

557. Consideration—A recital of "value received" is prima facie evidence of a valuable consideration between the parties, but not as against third parties. National Surety Co. v. Winslow, 143 Minn. 66, 173 N. W. 181.

558. Mode of assigning things in action—(47) Jackson Nat. Bank v. Christensen, 146 Minn. 303, 178 N. W. 494.

(48) National Surety Co. v. Winslow, 143 Minn. 66, 173 N. W. 181, See § 3857.

(50) Slimmer v. State Bank, 134 Minn. 349, 159 N. W. 795; Jackson Nat. Bank v. Christensen, 146 Minn. 303, 178 N. W. 494.

558a. Filing—Failure to file the assignment of a debt as required by G. S. 1913, § 7017, does not render it void, but casts upon the assignee the burden of proving that it was made in good faith and for a valuable consideration. Such an assignment is presumptively fraudulent. First State Bank v. Woehler, 140 Minn. 32, 167 N. W. 276. See § 3857.

561. Notice—In the case of an assignment of wages provision is made by statute for a notice to the obligor. G. S. 1913, § 3858; Fay v. Bankers Surety Co., 125 Minn. 211, 146 N. W. 359; Sheldon v. Padgett, 144 Minn. 141, 174 N. W. 827.

562. Who may attack—Facts held to justify defendants in attacking an assignment of a claim to plaintiff. Greer v. Equity Co-operative Exchange, 137 Minn. 300, 163 N. W. 527.

562a. Evidence—Sufficiency—Evidence held to show a valid assignment of a debt. First State Bank v. Woehler, 140 Minn. 32, 167 N. W. 276.

WHAT ASSIGNABLE

563. Common-law rule—(65) 33 Harv. L. Rev. 1016.

564. Test of assignability—(68) Guggisberg v. Boettger, 139 Minn. 226, 166 N. W. 177.

564a. Consent of parties—Practical construction—Estoppel—Even though a contract is not assignable, the parties may consent to its assignment or become estopped by their conduct from asserting that it is not assignable. Koehler & Hinrichs Mer. Co. v. Illinois Glass Co., 143 Minn. 344, 173 N. W. 703.

565. Rights of action ex delicto—A cause of action for damages for fraud or deceit is assignable. Guggisberg v. Boettger, 139 Minn. 226, 166 N. W. 177.

569. Held assignable—A cause of action for damages for fraud or deceit. Guggisberg v. Boettger, 139 Minn. 226, 166 N. W. 177.

A state warrant. Cooper, Myers & Co. v. Smith, 139 Minn. 382, 166 N. W. 504.

A share of corporate stock. Segerstrom v. Holland Piano Mfg. Co., 142 Minn. 104, 170 N. W. 930.

A contract of sale. Koehler & Hinrichs Mer. Co. v. Illinois Glass Co., 143 Minn. 344, 173 N. W. 703.

An order and acceptance for the sale of goods. Guaranty Securities Co. v. Exchange State Bank, 148 Minn. —, 180 N. W. 919.

570. Held not assignable—A contract for a lease. Halford v. Crowe, 136 Minn. 20, 161 N. W. 213.

Possibly a contract to perform delivery work for a mercantile house is not assignable. Reed v. R. M. Chapman-Basting Co., 137 Minn. 442, 163 N. W. 794.

EFFECT

571. In general—As a general rule a claim good in the hands of an assignor is equally good and free from defences in the hands of his assignee. Facts held to take an assignment of a claim by a railroad company out of the general rule. Greer v. Equity Co-operative Exchange, 137 Minn. 300, 163 N. W. 527.

(5) Northland Pine Co. v. Melin Bros., 142 Minn. 233, 171 N. W. 808. See 30 Harv. L. Rev. 97, 449; 31 Id. 822 (whether right of an assignee should be deemed legal or equitable).

572. Assignee takes subject to equities—(7) Farmers State Bank v. McGrath, 141 Minn. 281, 170 N. W. 209; Guaranty Securities Co. v. Exchange State Bank, 148 Minn. —, 180 N. W. 919.

(8, 9) 30 Harv. L. Rev. 102.

576. Estoppel—A party who executes and delivers a contract for the payment of money containing a representation to the effect that it is free from all equities not disclosed therein is estopped from asserting undisclosed equities against a good faith purchaser. Guaranty Securities Co. v. Exchange State Bank, 148 Minn. —, 180 N. W. 919.

ASSIGNMENTS FOR BENEFIT OF CREDITORS

IN GENERAL

580. What constitutes—A trust agreement entered into by partners and a third party for the benefit of creditors held in substance a common-law assignment for the benefit of creditors. Johnson v. Brusek, 142 Minn. 454, 172 N. W. 700.

581. Nature of statute and proceedings—An assignment for the benefit of creditors is an absolute appropriation by the debtor of the property so assigned to the purpose of paying his debts, and he retains no interest or control over it, and has no right to have it applied for his own benefit in any manner whatever until the debts have been fully paid. The sole purpose of the assignment must be to immediately appropriate the debtor's property to the payment of his debts. The reservation of any benefit or advantage to the debtor, before his debts shall be fully paid, will avoid the assignment. Boyum v. Jordan, 146 Minn. 66, 178 N. W. 158. See §§ 3876–3883.

DEED OF ASSIGNMENT

590. Formal requisites—(45) See Johnson v. Bruzek, 142 Minn. 454 172 N. W. 700.

591. Contents of deed—As to fraudulent provisions, see §§ 3876–3883.

596a. Gives creditors a vested interest—The assignment creates a trust for the benefit of the creditors. The creditors are the beneficiaries, the cestuis que trust. The deed which creates the trust confers, defines and limits the powers and duties of the assignee, and gives the creditors as beneficiaries a vested interest in the property and its proceeds which cannot be changed or impaired by the act of either assignor or assignee or by the joint act of both. Boyum v. Jordan, 146 Minn. 66, 178 N. W. 158.

ASSIGNEES

598. In general—An assignee or trustee is not permitted to derive a personal profit from his management of the trust property or his dealings with it. Where a debtor assigns his property to three trustees for the benefit of creditors, and after a so-called bankrupt sale the residue of the merchandise is offered for sale in a lump, and the highest offer therefor is made by a party who has arranged with one of the trustees to furnish the money to make the purchase for a share of the profits, and this trustee informs the debtor that if the sale is made he will be interested in it and may derive a profit from it and for that reason desires the debtor to determine for himself whether the sale shall be made without being influenced in any manner by the trustee, and the debtor directs that the sale be made, and the price received is the full value of the goods, the debtor is not in position to invoke the rule that a trustee cannot be interested in the purchase of trust property. Boyum v. Jordan, 146 Minn. 66, 178 N. W. 158.

The assignee must execute the trust according to its terms. He must convert the property into money and pay the lawful claims of the creditors to the full extent that the amount realized from the property will permit. His first duty is to the creditors and he is not allowed to do anything for the benefit of the assignor which will be detrimental to the interests of the creditors. They are entitled to payment in full if the property be sufficient to pay in full; and any agreement having a tendency to create a temptation for the assignee to make unfavorable representations to the creditors concerning the state of the assets for the purpose of influencing them to compromise or discount their claims is contrary to public policy and unenforceable. Boyum v. Jordan, 146 Minn. 66, 178 N. W. 158.

It is the duty of the assignee to pay the debts to the full extent that the property will permit, and he must not be a party to any arrangement which will create a temptation to misrepresent the state of the assets to the creditors. Where the assignor procured a third party to furnish the funds and buy up claims under an agreement to divide the discounts obtained, knowing that the third party must obtain his funds from others, and this agreement was carried out, and the third party procured the funds from a trustee under an agreement by which he paid the trustee a part of his share of the discount, whatever right of action may exist against the trustee rests in the creditors and not in the assignor. Where

a trustee receives a profit other than interest on his money by furnishing his own funds to a third party to buy up the claims of creditors, he violates his duty to such creditors and they, and not the assignor, have the right to call him to account. Boyum v. Jordan, 146 Minn. 66, 178 N. W. 158.

(66-69) Boyum v. Jordan, 146 Minn. 66, 178 N. W. 158.

ADMINISTRATION

614. Releases—(41) See Boyum v. Jordan, 146 Minn. 66, 178 N. W. 158.

614a. Sales of assets—Fraud—A partner of a firm making an assignment for the benefit of creditors may purchase assets from the assignee. If there is no fraud or collusion another partner cannot attack the sale. Johnson v. Bruzek, 142 Minn. 454, 172 N. W. 700.

ASSOCIATIONS

616. Liability on contracts—(46) See note, 7 A. L. R. 222.

ASSUMPSIT

620. History—(51) Heywood v. Northern Assur. Co., 133 Minn. 360, 158 N. W. 632.

621. Pleading—The fictitious promise which the courts implied in order to bring the case within assumpsit at common law need not be alleged in a similar action under the code. See § 1905.

(52) Boydstun v. Hackney Land Credit Co., 145 Minn. 392, 177 N. W. 779.

ATTACHMENT

IN GENERAL

622. Nature—The only object of an attachment is to obtain a lien which will continue until final judgment is obtained which may be enforced by a seizure on execution. Beigler v. Chamberlin, 145 Minn. 104, 176 N. W. 49.

An attachment is made for the purpose of holding the property until an execution can be levied thereon. Wagner v. Farmers Co-operative Exchange Co., 147 Minn. 376, 180 N. W. 231.

625. Jurisdiction—How acquired—(62) Wagner v. Farmers Co-operative Exchange Co., 147 Minn. 376, 180 N. W. 231.

(63) Wagner v. Farmers Co-operative Exchange Co., 147 Minn. 376, 180 N. W. 231. See Wipperman Mercantile Co. v. Jacobson, 133 Minn. 326, 158 N. W. 606.

626. In what actions allowed—The writ may issue in an action for alienation of affections. Stockhause v. Lind, — Minn. —, 183 N. W. 844.

627. What may be attached—The only object of an attachment of property is to obtain a lien which will continue until final judgment is obtained, which may be enforced by seizure on execution, and realty which cannot be seized on execution cannot be attached so as to give a lien thereon. Beigler v. Chamberlin, 145 Minn. 104, 176 N. W. 49.

The membership of a non-resident in the Chamber of Commerce of Minneapolis is property that may be attached, so as to give the court jurisdiction, when followed by the service of summons as prescribed by statute, to enter a judgment against such non-resident, valid in so far as it may be satisfied out of the membership attached. Wagner v. Farmers Co-operative Exchange Co., 147 Minn. 376, 180 N. W. 231.

GROUNDS

628. Debt fraudulently contracted—Evidence held to justify a finding that a debt was not fraudulently contracted. Aldrich v. Sentinel Publishing Co., 138 Minn. 475, 164 N. W. 992.

629. Fraudulent disposition of property—(71) Sweeney v. McMahon, 145 Minn. 334, 177 N. W. 361. See 4 A. L. R. 832 (attachment for property embezzled, stolen or converted).

PROCEDURE

634. At what time issued—Diligence in service of summons—If the attachment is levied before the service of summons the plaintiff must proceed with reasonable diligence in the service of summons or the lien of the attachment will lapse. Wagner v. Farmers Co-operative Exchange Co., 147 Minn. 376, 180 N. W. 231; Union Investment Co. v. Abell, 148 Minn. —, 181 N. W. 353.

636. Affidavit—An affidavit for attachment stated as grounds that the debtor "has departed from this state, as affiant verily believes, with intent to defraud or delay his creditors, or to avoid the service of summons, or keeps himself concealed therein with like intent." Held, that the affidavit was not bad as stating two or more separate grounds in the alternative. Blevins v. Rice, 137 Minn. 430, 163 N. W. 770.

638. Bond—No liability arises under an attachment bond given pursuant to G. S. 1913, § 7847, from a judgment of dismissal, where the record shows that it was entered pursuant to a stipulation of the parties settling and adjusting all matters in dispute between them. First, such a stipulation releases the principal on the attachment bond, and by so doing releases the surety. Second, the statute is part of the contract between the parties. The judgment contemplated by the statute and the bond is a judgment determining that plaintiff had no cause of action at the time the attachment was made. The rule against collateral attack of judg-

ments is not here involved. Downs v. American Surety Co., 132 Minn. 201, 156 N. W. 5.

643. Discharge on bond—A non-resident defendant, by giving a bond to procure the release of certain articles attached, does not thereby appear generally, so as to give the court jurisdiction to enter a personal judgment against him, except to the extent that satisfaction thereof may be had from the bond standing as a substitute for the articles released. Wagner v. Farmers Co-operative Exchange Co., 147 Minn. 376, 180 N. W. 231.

(11) Wagner v. Farmers Co-operative Exchange Co., 147 Minn. 376, 180 N. W. 231 (bond substitute for attached property—giving of bond not a general appearance).

LIEN

650. On realty—(21) Wagner v. Farmers Co-operative Exchange Co., 147 Minn. 376, 180 N. W. 231.

652. Abandonment—Where a creditor files a complaint and causes an attachment to be issued and levied on the real estate of a non-resident but fails to serve the summons or take any further steps in the action, and a year and nine months later commences a new action against the same non-resident, on the same cause of action, and levies a new attachment on the same real estate, and prosecutes this action to judgment, he is deemed to have abandoned his first action and to have waived any lien under his first attachment. Union Investment Co. v. Abell, 148 Minn. —, 181 N. W. 353. See § 634.

VACATION

653. Grounds—It is not a ground for vacating an attachment that the property attached is exempt as a homestead. Beigler v. Chamberlin, 145 Minn. 104, 176 N. W. 49.

A writ of attachment was procured on the ground that defendant was about to dispose of his property with intent to defraud his creditors. The evidence produced at the hearing of a motion to vacate the writ was sufficient to justify the court in finding that defendant was not about to dispose of his property, and that he was mentally incapable of entertaining an intent to defraud his creditors, and the motion might properly be granted on either or both of these grounds. Sweeney v. McMahon, 145 Minn. 334, 177 N. W. 361.

(24) Aldrich v. Sentinel Publishing Co., 138 Minn. 475, 164 N. W. 992.

(25) Beigler v. Chamberlin, 145 Minn. 104, 176 N. W. 49.

654. Who may move—(31) See Furst v. W. B. & W. G. Jordan, 142 Minn. 230, 171 N. W. 772.

657. Practice on hearing—The burden of proving the allegations of his original affidavit is on plaintiff. Sweeney v. McMahon, 145 Minn. 334, 177 N. W. 361.

(40) Tereau v. Madison, 135 Minn. 469, 169 N. W. 1024; Furst v. W. B. & W. G. Jordan, 142 Minn. 230, 171 N. W. 772.

662. Question on appeal—(47) Tereau v. Madison, 135 Minn. 469, 160 N. W. 1024; Sweeney v. McMahon, 145 Minn. 334, 177 N. W. 361; Hurni v. Johnson, 146 Minn. 99, 177 N. W. 942; Reed v. Union Central Lumber Co., 147 Minn. 210, 179 N. W. 895; Stockhaus v. Lind, — Minn. —, 183 N. W. 844.

WRONGFUL ATTACHMENT

663. Liability of plaintiff and sheriff—In an action to recover the value of certain timber alleged to have been wrongfully levied on and sold on execution at the suit of defendant, it is held that the evidence supports the verdict to the effect that the execution debtor owned the property, that the claim of title asserted by plaintiff was fraudulent and void, and that the record presents no reversible error. Northern Timber Products Co. v. Stone-Ordean-Wells Co., 148 Minn. —, 180 N. W. 920.

ATTORNEY AND CLIENT

IN GENERAL

664. Officer of court—Control of court—(52) Charest v. Bishop, 137 Minn. 102, 162 N. W. 1063.

666. Summary jurisdiction over attorneys—Statute—In summary proceedings against an attorney the findings of fact by the trial court will not be reversed on appeal unless they are manifestly and palpably contrary to the evidence. Charest v. Bishop, 137 Minn. 102, 162 N. W. 1063.

The district courts of this state under section 4956, G. S. 1913, as well as at common law, have disciplinary authority over attorneys practicing therein, and on the petition of a client may in a summary proceeding require them to return money or property received from the client in the course of their employment and for which they have failed to account. Whether in a particular case a summary proceedings shall be entertained or the client put to his remedy by action at law rests in the sound discretion of the trial court. A claim of ownership of the money or property by the attorney does not prevent an exercise of the summary jurisdiction of the court; such claim merely presents a question or issue of fact to be determined with all other issues presented. On the facts stated in the opinion it is held that the client was in this case the real party in interest, with the right to initiate the proceeding, though the money in dispute was in fact the property of another. Charest v. Bishop, 137 Minn. 102, 162 N. W. 1063.

This proceeding, involving the determination of the amount which an attorney was entitled to retain as his fees out of money collected by him on a judgment, was remanded to the district court to determine the reasonable value of the services rendered by the attorney. Held: (1)

That it was within the discretion of the district court to submit that question to a jury; (2) that the circumstances of the case justified the court in directing the jury to determine whether the client had had the benefit, in the action in which the money was collected, of services rendered prior to the commencement of the action, and if they so found to allow therefor. Klampe v. Klampe, 145 Minn. 404, 177 N. W. 629.

Objection is raised because appellant did not have a regular trial. The record contains no exceptions. Both parties submitted their controversy on affidavits. Appellant is not in position to question the propriety of this summary proceeding. And even if he were it would not avail. It is further claimed that only a federal court could deal with the matter, since respondent was in custody for a violation of an act of Congress of which no state court has jurisdiction. The claim is without merit. Appellant acknowledges that he became respondent's attorney. The district courts of this state have undoubted jurisdiction to inquire as to the conduct of attorneys toward their clients, not only in respect to actions therein pending, but also in respect to other legal business, no matter what such business may have been, provided the attorney resides in the county of the district court whose authority is appealed to. G. S. 1913, § 4956, is too plain for argument on the proposition. Misenish v. Nelson, 148 Minn. —, 181 N. W. 319.

(56) See Klampe v. Klampe, 137 Minn. 227, 163 N. W. 295; L. R. A. 1918D, 830.

667. When relation exists—(58) See 31 Harv. L. Rev. 886 (what constitutes practice of law).

667a. Representing several parties in litigation—Where there is no substantial controversy between two of the parties to an action there is no impropriety in the same attorney representing them so long as the parties represented are content. Hoildale v. Cooley, 143 Minn. 430, 174 N. W. 413.

668. Contract of employment—The general principles of the law of contracts apply to contracts between attorney and client. Southworth v. Rosendahl, 133 Minn. 447, 158 N. W. 717.

A contract of employment between attorney and client is not invalid for the reason that the amount of compensation was increased by agreement subsequent to the bringing of the action. Anker v. Chicago G. W. R. Co., 144 Minn. 216, 174 N. W. 841.

See §1416 (champerty and maintenance).

669a. Discharge of attorney by client—A client may discharge his attorney at any time, with or without cause. Lawler v. Dunn, 145 Minn. 281, 176 N. W. 989.

670. Notice to attorney notice to client—(62) Riley v. Pearson, 120 Minn. 210, 139 N. W. 361. See note, 4 A. L. R. 1592.

671. Good faith—Fiduciary relation—(63) Miller v. Ginsberg, 134 Minn. 397, 159 N. W. 950; Svendsgaard v. Grimes, 136 Minn. 469, 162 N.

W. 298. See Selover v. Hedwall, — Minn. —, 184 N. W. 180 (duty of attorney to communicate to his client information affecting his interests).

672. Contracts and deeds—Good faith—Burden of proof—Transactions between an attorney and a client whereby the attorney acquires property of his client are closely scrutinized and the burden of proving entire fairness, the adequacy of the consideration and absolute good faith, is upon the attorney. The finding of the court that the contract between the plaintiff and the defendants was entirely fair and upon adequate consideration and in absolute good faith is sustained. Mercer v. McHie, 141 Minn. 144, 169 N. W. 531.

The finding of the court that the transaction stated in the opinion constituted a purchase by the plaintiff of property in which the defendants had an equitable interest with an option given to them to purchase it within five years and not a loan from the plaintiff to them is sustained. Mercer v. McHie, 141 Minn. 144, 169 N. W. 531.

An attorney, obtaining a deed from his client, has the burden of establishing the perfect fairness and good faith of the transaction and the adequacy of the consideration. The evidence sustains a finding and conclusion that a deed so obtained, running to the attorney's wife, should be set aside. Upon setting aside a deed so obtained, there should be an accounting between the parties, in which the plaintiff should be credited with the rents and profits of the land, and charged with taxes, interest, and other proper expenditures made by defendants. Delasca v. Grimes, 144 Minn. 67, 174 N. W. 523.

(67) Delasca v. Grimes, 144 Minn. 67, 174 N. W. 523.

674. Liability of attorney to client—Evidence held to justify a verdict for a client against his attorney for the recovery of money given to the attorney to secure bail for the client but not needed for that purpose. Miller v. Ginsberg, 134 Minn. 397, 159 N. W. 950.

Upon an objection to a complaint upon the ground that the facts alleged do not state a cause of action first made after the impaneling of the jury and when the taking of evidence is commencing, every reasonable intendment is indulged in favor of its sufficiency. Applying this rule it is held that a complaint which alleged that the plaintiff had a cause of action against another for fraud, that the defendant, employed as his counsel to prosecute it, understood that such other had threatened to obtain a discharge in bankruptcy, and would do so and avoid liability unless the action were so conducted that it would result in a judgment based on fraud and therefore not dischargeable, that suit was brought and a verdict rendered for the plaintiff, and that the proceeding was so negligently conducted that the verdict was lost to the plaintiff, is sufficient, although it was not directly alleged that the verdict was based on contract instead of on fraud, nor that the defendant in the action received a discharge in bankruptcy. Ziegler v. Cray, 143 Minn. 45, 172 N. W. 884.

In an action against an attorney at law for damages resulting from his alleged negligence in the conduct of certain litigation for plaintiff, the evidence is held not to make a case for recovery. Ziegler v. Cray, — Minn. —, 182 N. W. 616.

(71) Ziegler v. Cray, — Minn. —, 182 N. W. 616. See 5 A. L. R. 1389 (liability for passing defective title).

675a. Compromise of claim by client—A client may at any time compromise and settle a claim without regard to his attorney. He may do so even though he has entered into an express contract with the attorney not to do so without his consent or approval. The lien of the attorney, however, is protected by the present statute. Huber v. Johnson, 68 Minn. 74, 70 N. W. 806; Anderson v. Itasca Lumber Co., 86 Minn. 480, 91 N. W. 12; Nielsen v. Albert Lea, 91 Minn. 388, 98 N. W. 195; Boogren v. St. Paul City Ry. Co., 97 Minn. 51, 106 N. W. 104; Burho v. Carmichiel, 117 Minn. 211, 135 N. W. 386; Desaman v. Butler Bros., 118 Minn. 198, 136 N. W. 747; Davis v. Great Northern Ry. Co., 128 Minn. 354, 151 N. W. 128; Southworth v. Rosendahl, 133 Minn. 447, 158 N. W. 717; Nelson v. Berkner, 140 Minn. 504, 167 N. W. 423; Kubu v. Kabes, 142 Minn. 433, 172 N. W. 496; Wildung v. Security Mtg. Co., 143 Minn. 251, 173 N. W. 429; Scharmann v. Union Pacific Ry. Co., 144 Minn. 251, 173 N. W. 429; Middlestadt v. Minneapolis, 147 Minn. 186, 179 N. W. 890. See §§ 706, 710, 712.

REMOVAL AND SUSPENSION OF ATTORNEYS

678. Grounds—An attorney may be suspended for exacting an unconscionable retainer from a poor prisoner and advising him to forfeit his bail and leave the state. In re Ginsberg, 141 Minn. 271, 169 N. W. 787.

Misconduct indicative of moral unfitness for the profession, whether it be professional or non-professional, justifies dismissal, as well as exclusion from the bar. The evidence sustains the charges that the accused attorney at law wilfully made false and fraudulent representations to a legislative committee with reference to his pecuniary interest in certain bills then being considered by the committee, and also that he obtained from the beneficiaries named in said bills agreements to pay such exorbitant compensation for the services he was to render in securing their passage as to show him guilty of dishonesty and bad faith towards his clients. In re Cary, 146 Minn. 80, 177 N. W. 801.

(75) State Board v. O'Neil, 137 Minn. 477, 163 N. W. 504.

(76) In re Hertz, 139 Minn. 504, 166 N. W. 397 (collecting money and not accounting—bringing suit without authority—acting for both parties in a suit—conspiring with officer of benefit society in relation to fees—procuring another attorney to sign paper as attorney for a party).

680. Evidence—Sufficiency—(79, 80) In re Hertz, 139 Minn 504, 166 N. W. 397; In re Mohn, —Minn. —, 184 N. W. 14 (evidence insufficient to sustain a charge).

AUTHORITY OF ATTORNEYS

685. Authority to appear—(95) Park, Grant & Morris v. Shannon & Mott Co., 140 Minn. 60, 167 N. W. 285.

690. Compromise of claims—Except in an emergency, there is no authority in an attorney to enter a stipulation to settle and compromise a cause of action without the knowledge or consent of his client. Matteson v. Blaisdell, —Minn.—, 182 N. W. 442.

693. Ratification—(7) Northern Pacific Ry. Co. v. Pioneer Fuel Co., 148 Minn. —, 181 N. W. 341.

697. Held to have authority—(15) National Council v. Scheiber, 141 Minn. 41, 169 N. W. 272.

698. Held not to have authority—An order appointing counsel to appear for and represent the shareholders in a Manitoba corporation, made by a Manitoba court pursuant to a provision of the Manitoba winding-up act, could not authorize such counsel to make a personal appearance in that court for a shareholder over whom the court had no jurisdiction. Traders Trust Co. v. Davidson, 146 Minn. 224, 178 N.W. 735.

COMPENSATION

698a. Contingent fee—Effect of compromise of claim—The relation of attorney and client does not preclude the latter from settling and compromising the matters in litigation in his own way, and without the knowledge or consent of the attorney, and by so doing he does not subject himself to the payment to the attorney of a contingent fee agreed upon in case of the successful outcome of the case. Where the client exercises his legal right to settle with his adversary, in good faith and without purpose to defraud the attorney out of his compensation, the latter may recover only the reasonable value of the services rendered by him down to the time of the settlement. Southworth v. Rosendahl, 133 Minn. 447, 158 N. W. 717. See 3 A. L. R. 472.

699a. After discharge—Only reasonable value of services recoverable—A contract of employment between attorney and client may be canceled by the client at any time with or without cause. The discharge of an attorney without cause does not constitute a breach of contract because it is an implied term of such contract that he may do so, and in such case the attorney may recover only the reasonable value of the services which he has rendered. It was error to submit to the jury under the circumstances of this case, the question of damages for breach of contract, for which a new trial must be granted. Lawler v. Dunn, 145 Minn. 281, 176 N. W. 989 (overruling Moyer v. Cantieny, 41 Minn. 242, 42 N. W. 1060). See 30 Harv. L. Rev. 183.

700. Fraud and bad faith—(34) See Svensgaard v. Grimes, 136 Minn. 467, 162 N. W. 298 (no evidence of bad faith); Selover v. Hedwall, — Minn. —, 184 N. W. 180.

701. Value of services—Evidence—(35) 9 A. L. R. 237 (what are reasonable fees).

(36) Leonard v. Rosendahl, 133 Minn. 320, 158 N. W. 419.

(37) Morris v. Wulke, 141 Minn. 27, 169 N. W. 22. See § 3334.

702. Action to recover—(43) Leonard v. Schall, 132 Minn. 446, 157 N. W. 723 (judgment in former action as a bar—modification of contract—burden of proof); Leonard v. Rosendahl, 133 Minn. 320, 158 N. W. 419 (verdict inadequate—new trial granted on appeal); Darelius v. C. W. Lunquist Co., 136 Minn. 477, 162 N. W. 464 (services in foreclosing a mechanic's lien—verdict for plaintiff sustained); Morris v. Wulke, 141 Minn. 27, 169 N. W. 22 (verdict not so inadequate as to require granting of new trial by supreme court); Daggett v. St. Paul Tropical Development Co., 141 Minn. 51, 169 N. W. 252 (services rendered corporation—compromise and settlement of claim—proof otherwise than by corporate records—evidence held sufficient).

LIEN OF ATTORNEYS

705. On papers and money in hand—When an attorney in a divorce action serves notice of claim of lien for his fees upon the adverse party, and receives money thereunder to apply on the judgment, he cannot withhold the same from his client under a contract for fees in another matter. Under a claim of lien for attorney's fees, the attorney may retain from his client, in the absence of an agreement for the amount of his fees, only sufficient to cover the reasonable value of his services. Klampe v. Klampe, 137 Minn. 227, 163 N. W. 295.

706. On cause of action—Statute—An attorney has a lien upon a cause of action arising under the federal Employers' Liability Act when an action thereon is instituted in the courts of this state, and in such action the lien may be enforced. Halloway v. Dickinson, 137 Minn. 410, 163 N. W. 791, affirmed, 246 U. S. 631; Heuser v. Chicago, B. &. Q. R. Co, 138 Minn. 286, 164 N. W. 984; Scharmann v. Union Pacific Ry. Co., 144 Minn. 290, 175 N. W. 554; Miner v. Chicago, B. & Q. R. Co., 147 Minn. 21, 179 N. W. 483.

The deposit of money equal to the amount of such lien in the courts of another state in no manner affects the res upon which such lien is held. Scharmann v. Union Pacific Ry. Co., 144 Minn. 290, 175 N. W. 554.

Subdivision 3 of section 4955, G. S. 1913, providing that an attorney shall have a lien for his compensation upon the cause of action from the time of the service of the summons therein, applies to an action in tort as well as to an action upon contract. The lien is created by statute, and neither the validity nor the enforcement thereof depends upon the solvency or insolvency of the client. Kubu v. Kabes, 142 Minn. 433, 172 N. W. 496.

Parties to an action have a right to settle it in any manner they see fit without the knowledge or consent of their attorneys. In making a settlement, they are required to take notice of the lien rights which are given by the statute to attorneys and, for their own protection, are bound to guard against a possible second liability under the lien, precisely as they would be if the transaction involved mortgaged property. Subdivision 3 of section 1, c. 98, Gen. Laws 1917 (Gen. St. Supp. 1917, § 4955), relating to notice, has no application to an action for damages for the alleged conversion of plaintiff's property.

An attorney's lien attaches only to the amount which is ultimately due his client after adjusting all the cross-demands and equities between the parties to the action. It extends to the clear balance found to be due the client either at the termination of the litigation or in the settlement, if one is made. The right of set-off between the parties to an action is superior to the claims of attorneys under the lien statute. Where there was an express contract between an attorney and his client, fixing the compensation which the former was to receive, the amount of his lien for services is properly determined by referring to the contract. Wildung v. Security Mtg. Co., 143 Minn. 251, 173 N. W. 429. See § 675a.

In enforcing his lien in the original action, when his client and the defendant have settled without his consent, an attorney proceeds as one subrogated to the original cause of action so far as necessary to protect his rights. Miner v. Chicago, B. & Q. R. Co., 147 Minn. 21, 179 N. W. 483.

(51) Kubu v. Kabes, 142 Minn. 433, 172 N. W. 496.

710. **Settlement and dismissal**—Under the present statute the lien of an attorney on the cause of action cannot be defeated by a settlement between the parties without his consent. Wildung v. Security Mortgage Co., 143 Minn. 251, 173 N. W. 429; Scharmann v. Union Pacific Ry. Co., 144 Minn. 290, 175 N. W. 554. See § 675a.

The defendant in the action is charged with notice of the lien, and a settlement of the action without the knowledge or consent of the attorney, and the payment of the amount agreed upon between the parties, will not, where there is no waiver by the attorney, relieve him from further liability on the lien. Kubu v. Kabes, 142 Minn. 433, 172 N. W. 496.

711. **Setting off judgments**—(71) See Wildung v. Security Mtg. Co., 143 Minn. 251, 173 N. W. 429.

712. **Enforcement**—In an action by an intervener to enforce a lien, held, that neither the allegations of the complaint in intervention nor the judgment entered thereon were justified by the evidence. Castigliano v. Great Northern Ry. Co., 137 Minn. 385, 163 N. W. 741.

An offer to prove that a case came to an attorney at law through the solicitation of a layman, held not admissible under the pleadings. A transcript of proceedings in the district court in the state of Nebraska, where, defendant claims, the contract forming the basis of the cause of

action in the present case was adjudicated, was properly rejected upon the ground that the Nebraska court did not pass upon the same contract. Held, under the evidence, that the trial court was warranted in directing a verdict in favor of intervener. Heuser v. Chicago, B. & Q. R. Co., 138 Minn. 286, 164 N. W. 984.

Plaintiff sued defendant for the recovery of money. Before the trial they settled for $500 without the consent of plaintiff's attorney. The plaintiff had a contract with his attorney for one-half of the recovery. In a proceeding to enforce the attorney's lien, held proper to award him judgment for $250. Nelson v. Berkner, 140 Minn. 504, 167 N. W. 423.

Where an attorney has a lien for his services upon a cause of action under section 4955, G. S. 1913, and the action is settled by the parties before trial, the attorney may elect to enforce his lien rights by an independent action against the defendant, or by intervention in the original action. Where the latter procedure is pursued and a full hearing had, it is final, and the attorney cannot thereafter resort to an independent action. Middlestadt v. Minneapolis, 147 Minn. 186, 179 N. W. 890.

See § 706.

713. Waiver—To justify a court in declaring a waiver of an existing legal right, in the absence of facts creating an estoppel, an intention to waive should clearly be made to appear. On the facts stated in the opinion, it is held that there was no waiver by the attorney of his rights under the lien here in question. Kubu v. Kabes, 142 Minn. 433, 172 N. W. 496.

AUCTIONS AND AUCTIONEERS

715. Offer of property—Bids—(76) See 11 A. L. R. 543 (modes of making and accepting bids).

AUTOBUS—See Negligence, § 7038 (imputed negligence).

AUTOMOBILES—See Bailment, § 733 (conversion by vendor); Carriers, § 1291a; Conversion, § 1932; Criminal Law, § 2457 (theft); Damages, § 2577b (damages for injury to); Death by Wrongful Act, § 2616 (contributory negligence of driver); § 2620 (proximate cause of death); Evidence, § 3322a (evidence as to speed); Highways, §§ 4162a–4167n (regulation—license—headlights—law of road—use of highways—collisions—negligence and contributory negligence); Homicide, § 2421 (manslaughter in driving); Insurance, §§ 4875e, 4875f, 4875h; Larceny, § 5487; Liens, § 5579a; Livery Stable and Garage Keepers, § 5673a (theft from public garage); Master and Servant, §§ 5833, 5834, 5834b, 5840–5843; Municipal Corporations, § 6838; Negligence, § 7038 (imputed negligence); § 7044 (res ipsa loquitur); Railroads, §§ 8188, 8188a, 8190, 8193; Street Railways, §§ 9023a, 9026, 9029; Taxation, §§ 9157, 9210.

AUTOPSY—See Dead Bodies, § 2599.

BAIL

724a. Release of surety—Irregularities in the continuance of a criminal cause pending trial do not release a surety on the bail bond. The oral agreement, by the county attorney and the attorney of the accused, that the accused need not appear in court for trial until after his discharge from the army, entered into without the knowledge or consent either of the surety or of the court, does not discharge the surety from the obligation to produce the accused for trial, when notified so to do. State v. Cooper, 147 Minn. 272, 180 N. W. 99.

BAILMENT

728. Definition—What constitutes—(5) Outcault Advertising Co. v. Citizens State Bank, 147 Minn. 449, 180 N. W. 705 (contract for furnishing certain advertising material held one of hiring rather than one of sale). See 1 A. L. R. 394 (what amounts to delivery of, or assumption of control over, property essential to a bailment).

729. Fiduciary relation—(6) See Blackorby v. Friend, Crosby & Co., 134 Minn. 1, 158 N. W. 708.

731. Hiring—Plaintiff sued to recover compensation for certain teams hired by defendants. He alleged a contract of hiring at $30 per month for each team, and that defendants wrongfully worked and misused the animals; that by reason of defendants' wrongful conduct plaintiff demanded a return; that defendants consented, and returned them; that the teams worked one month, but the compensation had not been paid, nor the return transportation charges. He also claimed damages on the ground that the animals and parts of the harnesses were returned injured through defendants' negligence and misuse. It is held: No issue of a hiring at will was presented either by the pleadings or the evidence, and the court rightly omitted the same from the charge. The evidence does not justify a submission of the issue of voluntary return of the teams so as to allow a recovery for the time they were used by defendants. The hiring being at a fixed price per month and the teams not being kept for a month, there could not be a recovery, since it does not appear that the hiring was at will and since the jury found that defendants had not violated the contract of hire in any respect. Magnuson v. Stevens Bros., 146 Minn. 38, 177 N. W. 929.

A contract for furnishing certain advertising material held one of hiring rather than one of sale. Outcault Advertising Co. v. Citizens State Bank, 147 Minn. 449, 180 N. W. 705.

See § 5834a.

731a. Storage—Implied contract—Where the owner of personal property installs it in a rented building and departs for some place

unknown leaving it in the building at the expiration of his lease, his conduct may be taken as an implied request for the owner of the building to store and care for the property. Grice v. Berkner, 148 Minn. —, 180 N. W. 923.

731b. Liability of bailor for negligence—Liability of bailor for personal injuries due to defects in subject of bailment. 12 A. L. R. 774.

731c. Liability of bailor to third parties—One who loans property to another is not liable to third parties for the negligence of the borrower in the use of the property. Mogle v. A. W. Scott Co., 144 Minn. 173, 174 N. W. 832.

Imputing negligence of bailee to bailor. 6 A. L. R. 316.

732. Liability of bailee for negligence—Burden of proof—In this action to recover damages for injury to a stallion while in the care and custody of defendant as bailee, the burden of proof is upon plaintiff, the bailor, to establish that the injury resulted from defendant's negligence or breach of duty to exercise the due care required under the contract of bailment. This is so whether the bailment be gratuitous or for the mutual benefit of the parties. When plaintiff proved that defendant received the animal in a good condition and returned the same with an injury which ordinarily does not happen without negligence of the keeper, a prima facie case was made out, and it was an error to then dismiss the action. Lebens v. Wolf, 138 Minn. 435, 165 N. W. 276.

Proof of injury or loss makes out a prima facie case for plaintiff. The burden of proving that the injury or loss did not occur through his negligence is on the bailee. This burden is not merely a burden of going on with the evidence, but a burden of establishing by a preponderance of the evidence freedom from negligence. Hoel v. Flour City Fuel & Transfer Co., 144 Minn. 280, 175 N. W. 300; Steenson v. Flour City Fuel & Transfer Co., 144 Minn. 375, 175 N. W. 681.

(9) Wellberg v. Duluth Auto Supply Co., 146 Minn. 29, 177 N. W. 924.

(10) 34 Harv. L. Rev. 82 (suggesting a different standard). See Parker v. Dixon, 132 Minn. 367, 157 N. W. 583; 4 A. L. R. 1196.

(11) Hoel v. Flour City Fuel & Transfer Co., 144 Minn. 280, 175 N. W. 300.

(12) Hoel v. Flour City Fuel & Transfer Co., 144 Minn. 280, 175 N. W. 300; Wellberg v. Duluth Auto Supply Co., 146 Minn. 29, 177 N. W. 924. See 9 A. L. R. 559 (loss by fire).

(13) Wellberg v. Duluth Auto Supply Co., 146 Minn. 29, 177 N. W. 924.

733. Liability of bailee for conversion—An action of assumpsit for a breach of a contract of bailment, or one on the case for a neglect of duty whereby the subject of the bailment is lost, is not the only remedy of the bailor, if the property is converted by the bailee or his agent. Wellberg v. Duluth Auto Supply Co., 146 Minn. 29, 177 N. W. 924.

If the vendor of an automobile, sold with a warranty, obtains it from the vendee, and, to fulfil the warranty, intrusts it to another to replace

defective parts, and it is wrongfully destroyed or its identity changed, the vendor may be held for conversion. Wellberg v. Duluth Auto Supply Co., 146 Minn. 29, 177 N. W. 924.

By showing that a bailee had control of and refused, or unreasonably neglected, to return the property when its return was demanded by the bailor, a prima facie case of conversion is made out. Wellberg v. Duluth Auto Supply Co., 146 Minn. 29, 177 N. W. 924.

(15) Wellberg v. Duluth Auto Supply Co., 146 Minn. 29, 177 N. W. 924; Stine v. Hines, 148 Minn. —, 181 N. W. 321. See Lebens v. Wolf, 138 Minn. 435, 165 N. W. 276.

See Digest, §§ 1935, 10140.

733a. Estoppel of bailee—A bailee must return the property or its proceeds to the bailor before he can assert a claim thereto adverse to the bailor. There are some exceptions to this rule, as where the bailee has yielded to a paramount title asserted by a third party without connivance, or where fraud is being perpetrated on the bailee. Blackorby v. Friend, Crosby & Co., 134 Minn. 1, N. W. 708.

733b. Estoppel of bailor—The mere fact that an owner of property has intrusted the possession of it to another will not estop him from asserting his ownership against one who purchases from the bailee in the belief that such bailee was the owner. Baker v. Taylor, 54 Minn. 71, 55 N. W. 823. See Digest, § 3204.

734. Excuses for non-delivery—(16) Blackorby v. Friend, Crosby & Co., 134 Minn. 1, 158 N. W. 708. See Taylor v. Duluth etc Ry. Co., 139 Minn. 216, 166 N. W. 128; Banik v. Chicago etc. Ry. Co., 147 Minn. 175, 179 N. W. 899.

(17) Banik v. Chicago etc. Ry. Co., 147 Minn. 175, 179 N. W. 899. See Taylor v. Duluth etc. Ry. Co., 139 Minn. 216, 166 N. W. 128.

736b. Lien for storage—A person who stores goods for another, but who is neither a warehouseman nor in the business of storing goods, has no lien thereon for his storage charges at common law. Whoever keeps or stores personal property at the request of the owner or legal possessor is given a lien thereon by statute for the value of the storage. Where the lienholder refused to surrender the property until his claim against it was paid but was not asked and did not state the amount of the claim, he did not lose his lien by claiming an excessive amount in the suit brought against him for the property. Grice v. Berkner, 148 Minn. —, 180 N. W. 923.

BANKRUPTCY

ACT OF 1898

739. Insolvent defined—(27) See Booth v. Union Fibre Co., 142 Minn. 127, 171 N. W. 307.

740. Adjudication—Effect—Collateral attack—An adjudication by the federal court in involuntary bankruptcy proceedings, initiated on the petition of a creditor, that the debtor proceeded against is not insolvent, such adjudication being founded on a verdict of a jury impaneled under section 19a of the Bankruptcy Act (U. S. Comp. St. § 9603), is not res judicata of the question of the validity of the claim of the creditor so initiating the proceeding. Granite City Bank v. Tvedt, 146 Minn. 12, 177 N. W. 767.

An adjudication of bankruptcy is conclusive, even against strangers to the proceedings, as to the status of the debtor as a bankrupt, but it is not conclusive as against strangers as to the facts on which it is based, or as to subsidiary questions of law on which it is based. Gratiot County State Bank v. Johnson, 249 U. S. 246.

741. Dissolution of attachments, etc.—Whether an adjudication of bankruptcy ipso facto vacates an attachment made less than four months prior thereto is an open question. Furst v. W. B. & W. G. Jordan, 142 Minn. 230, 171 N. W. 772.

743. Preferences—See 34 Harv. L. Rev. 309, 547.

744. Schedules—Schedules made under the direction of a party to an action and verified by his oath held admissible against him as an admission on the value of the bankrupt estate which he purchased from the estate. Sodergren v. Nelson, 131 Minn. 466, 155 N. W. 760.

Schedules in proceedings against a corporation held admissible in proceedings to enforce the constitutional liability of its stockholders. Finch Van Slyck & McConville v. Vanasek, 132 Minn. 9, 155 N. W. 754.

The court found that the defendant, the maker of the promissory note involved in the action, did not properly schedule the same in the proceedings wherein he was adjudicated a bankrupt and discharged. Plaintiff, an accommodation indorser before delivery, was compelled to take up the note when due, which was after the discharge in bankruptcy, and sues for the amount he was required to pay. Held, that because of failure of defendant to properly schedule the note it survived the bankruptcy discharge in the hands of the holder, and when plaintiff paid and received it he became subrogated to the rights of the holder. It devolved on defendant to prove that the payee or holder had actual knowledge of the bankruptcy proceeding, it having been established that the debt was not duly scheduled. Calmenson v. Moudry, 137 Minn. 123, 162 N. W. 1076.

746. What passes to trustee—Right of action for tort causing personal and property damage. 33 Harv. L. Rev. 860.

747. Powers of trustees—Actions to recover assets—When a bankrupt is estopped against certain creditors from claiming title to realty which he has allowed to appear of record in the name of another, the trustee may maintain an action to appropriate the property to the extent of the claims of such creditors. The trustee may appropriate the property to no greater extent than the creditors might have appropriated it had bankruptcy not intervened. When his action is brought in a state court the measure of his relief is in the first instance determined there. The state court is not concerned with the distribution of the proceeds. This is for the bankruptcy court. A judgment setting aside a conveyance made by the bankrupt to the defendant, and adjudging that the trustee is the owner and that the defendant has no interest, grants too extensive relief in a case such as stated. Bergin v. Blackwood, 141 Minn. 325, 170 N. W. 508.

A trustee cannot enforce the liability of stockholders to creditors on bonus or watered stock as such liability is not a corporate asset. State Bank v. Kenney Band Instrument Co., 143 Minn. 236, 173 N. W. 560.

A trustee may collect an unpaid stock subscription. State Bank v. Kenney Band Instrument Co., 143 Minn. 236, 173 N. W. 560.

A trustee cannot enforce the constitutional liability of stockholders to creditors. State Bank v. Kenney Band Instrument Co., 143 Minn. 236, 173 N. W. 560.

The findings of fact sustain the judgment subjecting certain real property of the defendant to the payment of the amount of the claim of a creditor, who extended credit to the bankrupt, of whom the plaintiff is trustee, in whose name the title stood. There was no error in impressing the property with a lien for taxes paid by the plaintiff to protect it from loss. There was no settled case, and it does not appear that the question of taxes was not presented by amendment at the trial, or that it was not litigated by consent. Bergin v. Blackwood, 145 Minn. 363, 177 N. W. 493.

(44) Mackall v. Pocock, 136 Minn. 8, 161 N. W. 228; Goldberg v. Brule Timber Co., 140 Minn. 335, 168 N. W. 22; Bergin v. Blackwood, 141 Minn. 325, 170 N. W. 508; Bergin v. Blackwood, 145 Minn. 363, 177 N. W. 493. See §§ 1446, 2084a.

747a. Liability of trustee—A trustee held not liable on a claim against the bankrupt though the trustee promised to pay the claim. Park, Grant & Morris v. Shannon & Mott Co., 140 Minn. 60, 167 N. W. 285.

749. Discharge of bankrupt—The discharge of a corporation does not discharge the constitutional liability of its stockholders if it is not resorted to in the bankrupcy proceedings. Finch, Van Slyck & McConville v. Vanasek, 132 Minn. 9, 155 N. W. 754.

Debts provable in bankruptcy are released by the discharge. Mahr v. Maryland Casualty Co., 132 Minn. 336, 156 N. W. 668.

In cases involving the effect of a discharge under insolvent and bankruptcy laws which provide for the discharge of only such debts as exist at the time the proceedings were initiated, it is generally held that where

a cause of action existed at the time of the filing of the petition, and was of such a nature that the discharge would have affected it, a judgment thereon taken after the filing of the petition will be discharged. Within the meaning of such laws the judgment is not regarded as a new debt arising subsequently to the filing of the petition. Gould v. Svendsgaard, 141 Minn. 437, 170 N. W. 595.

750. Exceptions from discharge—Fraud—The record is held to sustain the conclusion of the trial court that the judgment in question, which defendant seeks to have discharged of record under the provisions of section 7914, G. S. 1913, as having been released by his discharge in bankruptcy, represents a debt or obligation which arose from the fraud of defendant while acting in a fiduciary capacity, and is therefore excluded from the discharge by subdivision 4, § 17, of the Bankruptcy Act. Arnold v. Smith, 137 Minn. 364, 163 N. W. 672.

The defendant sold a secondhand automobile to the plaintiff. The plaintiff claimed that the defendant agreed to take it back and repay the purchase price if certain representations or warranties made as a part of the contract of sale were untrue, and that they were untrue. The defendant refused to repay the purchase price. Suit was brought and the plaintiff had judgment. Upon an examination of the pleadings and charge of the court it is held that the action was on contract, and that the judgment was not excepted from the operation of the defendant's discharge in bankruptcy as representing a liability "for obtaining property by false pretences or false representations." The burden of proof is upon the creditor who claims that his duly scheduled debt is excepted from the operation of the discharge in bankruptcy because of fraud; and when under the pleadings and charge the creditor's judgment might be based upon contract, or upon fraud, or upon both, and there is nothing but the pleadings and charge from which to determine the fact, the creditor does not sustain the burden. Guindon v. Brusky, 142 Minn. 86, 170 N. W. 918. See 33 Harv. L. Rev. 470.

Actual fraud, or fraud in fact, as distinguished from fraud in law or constructive fraud, is necessary. Ziegler v. Cray, — Minn. —, 182 Minn. 616.

Wilful and malicious injury to property. McIntyre v. Kavanaugh, 242 U. S. 138 (conversion of stock held by brokers as collateral). See 30 Harv. L. Rev. 643.

751a. Rules in bankruptcy—The rules in bankruptcy adopted by the federal supreme court held admissible to show the method of handling and paying out funds by the trustee, as bearing on the authority of an agent under a power of attorney to receive and receipt for dividends upon claims in bankruptcy. Talbot v. First & Security Nat. Bank, 145 Minn. 12, 176 N. W. 184.

BANKS AND BANKING

IN GENERAL

763a. Regulation—The banking business is such as to justify special regulation by the state. Banking institutions are a class by themselves and justify special legislation. State v. Elliott, 135 Minn. 89, 160 N. W. 204; State v. State Securities Commission, 145 Minn. 221, 176 N. W. 759. See § 796a.

763b. Organization—Authorization by state securities commission—Chapter 86, Laws 1919, approved March 21, 1919, imposing upon the state securities commission the duty of determining whether a certificate of authority to do business as a bank should be issued, applies to proceedings pending before the superintendent of banks at the time of its enactment. So construed the statute is not unconstitutional as in contravention of the fourteenth amendment, nor of sections 2, 7, or 11, art. 1, of the state constitution. Carlson v. Pearson, 145 Minn. 125, 176 N. W. 346.

Laws 1919, c. 86, providing for the granting by the state securities commission of a certificate of authority to do business as a bank, is enacted in the exercise of the police power and is constitutional though it limits in the interests of the public the right to engage in banking; and the policy of the restriction, it being within constitutional limits, is for the legislature and not for the courts. The commission is an administrative body. The statute does not confer upon it judicial nor legislative powers, and is not unconstitutional upon that ground; and in conferring upon it administrative powers with authority to determine facts and exercise its judgment in carrying out the purposes of the statute it is not constitutionally objectionable. The statute provides for the granting of a certificate if there exists, among other things, a reasonable public demand for the bank. By a reasonable public demand the statute intends such a desire upon the part of the community for the bank as will make its coming welcome and insure an amount of business sufficient to promise it success. It may come from the natural desire of the community and upon its own initiative, or it may be the result of propaganda. In reviewing on certiorari the determination of the commission the court can go no farther than to inquire whether it kept within its jurisdiction, whether it proceeded upon the proper theory of the law, whether its action was arbitrary or oppressive or unreasonable and so the exercise of its will and not of its judgment, and whether there was evidence upon which it might make the determination which it made. The responsibility for a correct determination, subject to the conditions stated, rests upon the commission and not upon the court. Viewing the record in accordance with the rule stated, it is held that the determination of the commission that there was no reasonable public demand for the proposed bank is sustained. State v. State Securities Commission, 145 Minn. 221,

176 N. W. 759; State v. State Securities Commission, — Minn. —, 182 N. W. 910.

765a. Impairment of capital—Liquidation—Assessment—Where the capital of a state bank becomes impaired, the power to elect whether the bank shall go into liquidation or make up the deficiency by levying an assessment on its capital stock rests with the stockholders, and such an assessment, levied by the board of directors, is void for lack of power to make it. Devney v. Harriett State Bank, 145 Minn. 339, 177 N. W. 460.

765b. Sale of bank stock—Reliance on books or reports—A person buying bank stock has no greater right to rely on the accuracy of the books and reports of the bank than he would have to rely on those of any other corporation whose stock he was buying. The books of a bank showed that its paid-in capital was intact and that it had a surplus and undivided profits. In fact, its capital had become seriously impaired, and it had no surplus or undivided profits. A stockholder sold part of his stock for a price equal to its book value. Both he and the purchaser believed that the books showed the true state of facts. There was no fraud or deception. Both parties were equally innocent in their mistaken belief. Held, that the purchaser of the stock did not have the right to rescind the contract of sale on the ground that there had been a mutual mistake of fact. Costello v. Sykes, 143 Minn. 109, 172 N. W. 907.

POWERS AND LIABILITIES

771. Loaning on or holding its own stock—The time within which a bank is required to sell shares of its capital stock which have been taken as security under the authority conferred by section 6257, G. S. 1913, commences to run from the date the stock is so acquired, and not from the due date of the secured obligation. The failure of the bank to sell and dispose of the stock within the time fixed by the statute renders the security invalid as to creditors or purchasers subsequently acquiring rights thereto from or through the owner of the stock. The state has no interest in the subject-matter, the taking of such security is not an ultra vires act, and subsequent creditors may urge that the failure of the bank to dispose of the stock as required by law renders its claim invalid. Sigel v. Security State Bank, 134 Minn. 272, 159 N. W. 567.

773. Loan—Fraud—Rescission—(92) See Harriman Nat. Bank v. Seldomridge, 249 U. S. 1.

773a. Limit of loans to one person—By G. S. 1913, § 6358, providing that the total liabilities of any person, corporation, or copartnership to a state bank shall never exceed 15 per cent of its capital and surplus, it was not intended to limit the amount of bonds of the United States that a state bank might purchase or hold. Trumer v. South Side State Bank, 139 Minn. 222, 166 N. W. 127.

OFFICERS

776a. Presumption of performance of duty—It will be presumed that officers of a bank performed their duty with reference to funds deposited. Stein v. Kemp, 132 Minn. 44, 155 N. W. 1052.

777. Notice to officers notice to bank—A bank is chargeable with knowledge of facts known to an officer transacting its business, even though the officer is himself interested if he is the sole representative of the bank in the transaction. A bank is chargeable with knowledge acquired by its active officer, even though acquired in another transaction, if it appears that the knowledge is actually present in his mind while he is acting for the bank. State Bank v. Adams, 142 Minn. 63, 170 N. W. 925.

(97) Farmers State Bank v. McGrath, 141 Minn. 281, 170 N. W. 209; Kipp v. Welsh, 141 Minn. 291, 170 N. W. 222; First Nat. Bank v. Anderson, 144 Minn. 288, 175 N. W. 544; Farmers State Bank v. Cooke, — Minn. —, 183 N. W. 137.

777a. Chargeable with notice.—Whatever notice an officer of a bank has or ought to have in his official capacity is generally chargeable to him in his private capacity, but this rule is not always applicable when he is claiming as a bona fide purchaser or incumbrancer. Minnesota Loan & Trust Co. v. Peteler Car Co., 132 Minn. 277, 288, 156 N. W. 255.

777b. Authority of president—See 1 A. L. R. 693; 9 A. L. R. 1146.

778. Authority of cashier—Cashier held to have no authority to contract with the indorser of a note to pay the mortgage registry tax and record an unassigned mortgage securing the note, that being no necessary part of the business which the bank was doing in discounting the notes for the accommodation of the parties concerned. First Nat. Bank v. Schirmer, 134 Minn. 387, 159 N. W. 800.

Conversations of a depositor with one in a bank designated as cashier or acting as such may be shown without proofs of his appointment and actual authority, in an action by the depositor against the bank to recover a deposit. Larson v. Citizens State Bank, 142 Minn. 334, 172 N. W. 125.

778a. Authority of secretary—Whether the secretary of a trust company and savings bank had authority over a bond department so as to justify his discharge of the manager thereof for disobeying his orders, held a question for the jury. Bacon v. Bankers Trust & Sav. Bank, 143 Minn. 318, 173 N. W. 719.

779b. Drawing checks—A personal check of an officer of a bank drawn upon such bank and accepted in payment of the note of such officer does not charge the holder of the note with notice that there is an attempt to misappropriate the funds of the bank. Pope v. Ramsey County State Bank, 137 Minn. 46, 162 N. W. 1051.

779c. Ratification of unauthorized acts—The contract of employment involved in this action though entered into by certain officers of defendant corporation without authority, was made valid and binding by the subsequent acquiescence of the board of directors, the contracting authority of the corporation, with knowledge of the facts. Bacon v. Bankers Trust & Sav. Bank, 143 Minn. 318, 173 N. W. 719. See Digest, § 2116.

DEPOSITS

780. Relation of bank and depositor—Debtor and creditor—The relation between bank and depositor is contractual and cannot be created without the consent of the parties. A bank is not bound to accept deposits. 33 Harv. L. Rev. 977.

(6) Stein v. Kemp, 132 Minn. 44, 155 N. W. 1052.

781. Passbook—Printed statement of rules in passbook as affecting rights of bank and depositor. 5 A. L. R. 1203.

782. Title to checks and drafts deposited—(9) Stein v. Kemp, 132 Minn. 44, 155 N. W. 1052. See 11 A. L. R. 1043.

783. Deposit subject to trust—Duty of bank as to deposits by a trustee "as trustee." 34 Harv. L. Rev. 454.

Creation of trusts by deposits. See § 9886a.

(11) See Stein v. Kemp, 132 Minn. 44, 155 N. W. 1052.

785. Deposit of note—Discount or purchase by bank—Bona fide purchaser—The note mentioned was taken as collateral, in part, to other notes then transferred and indorsed by the same payee to plaintiff. At least $4,100 of the amount realized for the notes transferred was placed to the credit of the payee upon plaintiff's books. There is no evidence that this sum or any part thereof was paid out before plaintiff was informed of the fraud practiced on the maker of the note in suit. Unless paid out before so informed, plaintiff could not be a holder in due course for value. First Nat. Bank v. Denfeld, 143 Minn. 281, 173 N. W. 661.

(13) 6 A. L. R. 252.

(14) First Nat. Bank v. Denfeld, 143 Minn. 281, 173 N. W. 661. See note, 6 A. L. R. 252.

786. Deposit under assumed name—(16) See Walso v. Latterner, 140 Minn. 455, 168 N. W. 353.

786a. Joint deposits—Payment to survivor—Whether G. S. 1913, § 6390, providing for the payment of joint deposits to the survivor of the depositors, affects their rights between themselves or is only for the protection of the bank, is not determined. McLeod v. Hennepin County Sav. Bank, 145 Minn. 299, 176 N. W. 987.

787. Application of deposit by bank—Right of bank to apply trust deposit to payment of individual debt of depositor to bank. 5 Minn. L. Rev. 470.

787a. Special deposit—Payment—Notice to bank—H. contracted to sell land to S. for $12,800, $4,800 of which was paid at the time the con-

tract was executed. The balance, $8,000, was to be paid on delivery of deed, $5,000 in cash, and $3,000 in notes secured by mortgage on the land. The cash, notes, and mortgage were to be deposited in the bank until title was perfected and furnished to S. The note and mortgage and the $5,000 were deposited according to the terms of the contract. Some months later the bank became insolvent and went into the hands of a receiver. H never owned the land, or made any payment to the real owner of the land, who subsequently sold and conveyed it to a third person. H. was unable to carry out the contract, and S. seeks to recover the $5,000 cash deposit. Held, that this was a special, not a general, deposit. Appellant contends that, although the money was traced into the hands of the bank, the court erred in ordering the receiver to pay it over, because it is not shown that there was more than $5,000 passing from the bank to the receiver. There is no evidence as to the amount coming into the hands of the receiver from the insolvent bank. The plaintiff placed the $5,000 in the bank as a special deposit, and the money is presumed to be there still. If it was returned to the depositor or paid to any one under her authority, that would be a matter of evidence in defence. Stein v. Kemp, 132 Minn. 44, 155 N. W. 1052.

The fact that a bank draft issued by a small village bank was made payable to the order of the defendant bank, held sufficient to put the defendant bank on inquiry as to the ownership of the proceeds before paying the same to the firm presenting the same. Bjorgo v. First Nat. Bank, 132 Minn. 273, 156 N. W. 277.

What constitutes a special deposit. L. R. A. 1918A, 65.

Power of national banks to receive special deposits. L. R. A. 1918A, 73.

Right of bank to apply special deposit to debt of depositor. L. R. A. 1918A, 80.

787b. Payment of forged check by bank—Notice by depositor—G. S. 1913, § 6378, requiring notice by a depositor to a bank which has paid a forged check, within six months after return of the check to him, as a condition to liability of the bank to the depositor for the amount paid, has no application to a case where a bank advances money to cash a voucher issued by the state, the indorsement of the payee of which is forged. State v. Merchants Nat. Bank, 145 Minn. 322, 177 N. W. 135.

788a. Proof of deposit—In an action by a depositor against a bank to recover a deposit, he can show by parol that he made a deposit and need not require the production of the bank's books, and conversations with one in the bank designated cashier and acting as such may be shown without proofs of his appointment and actual authority. Larson v. Citizens State Bank, 142 Minn. 334, 172 N. W. 125.

COLLECTIONS

790a. Forwarding out of town checks for collection—Diligence—Defendant is an outlying bank in Minneapolis. Plaintiff deposited a Chicago check for collection. Defendant had no Chicago correspondent.

Plaintiff knew it. Defendant forwarded the check to Chicago through a Mankato bank. When presented for payment the payee bank had closed its doors. Had it been presented a day earlier, it would have been paid. It was customary for outlying Minneapolis banks without Chicago correspondents to forward Chicago checks for collection through central Minneapolis banks. Had this been done in the customary way, no time would have been gained. A check is intended for payment, not for circulation. A collecting bank must forward out of town checks for collection within a reasonable time and by a reasonably direct route. The usual commercial route is sufficient. The customary speed of banks similarly situated is all the check holder may expect. No liability arises from forwarding a check from Minneapolis to Chicago through a bank in Mankato where no time is lost thereby. Plaintiff's president was an officer in defendant bank. A conversation between him and another officer of defendant, both acting as such, as to a proposed manner of handling Chicago checks, gives rise to neither contract, representation, nor estoppel, so far as plaintiff is concerned. Richardson Grain Separator Co. v. East Hennepin State Bank, 143 Minn. 420, 174 N. W. 415.

791. Liability for default of subagent—(22) See Pope v. Ramsey County State Bank, 137 Minn. 46, 162 N. W. 1051; 34 Harv. L. Rev. 83.

792. Negligence in selecting subagent—(23) See Pope v. Ramsey County State Bank, 137 Minn. 46, 162 N. W. 1051.

793. Duty to charge prior parties on dishonor—(24) McWethy v. Norby, 143 Minn. 386, 173 N. W. 803.

794. Accounting for collections—Duty to see that bill or note is returned if not paid. 6 A. L. R. 618.

794a. Negligence in acting as agent—A bank in Iowa negotiated for a purchase from a resident of Minnesota, of his interest in a contract of sale of Minnesota land. Being ignorant of a certain second mortgage upon the land, the Iowa bank computed the amount to be paid at too large a sum. It remitted the amount computed to a bank in Minnesota, with directions to pay it over, only upon execution by the vendor of a certain assignment of his interest in the contract, which proposed assignment contained a representation that the land was subject only to the first mortgage. The Minnesota Bank paid the money over without procuring the execution of this assignment. The Minnesota Bank knew of the existence of the second mortgage. The assignor is now insolvent. The evidence sustains a finding that the Minnesota Bank was negligent and that its negligence caused the loss of the amount paid over in excess of the amount due. Troutman v. Gates, 145 Minn. 1, 176 N. W. 187.

STOCKHOLDERS' LIABILITY

796a. Constitutional amendment increasing liability—At the time the plaintiff, a state bank of Oregon, was organized and defendant became owner of shares of stock therein, the constitution of said state con-

tained no provision, reserving in the state the right to amend or alter the charter of the bank so as to increase the obligations of its stockholders, but, on the contrary, a provision of the constitution at that time did guarantee that a stockholder should not be liable beyond the unpaid par value of the shares of stock owned. A subsequent amendment of said provision, imposing a double liability upon stockholders in banks, cannot be held to embrace those who became such previous to the adoption of the amendment. The right to regulate and control banking business under the police power of the state cannot go to the extent of imposing a personal liability upon the stockholders in a bank contrary to the express constitutional provision in force at the time of the organization of the bank and the purchase of the stock by the stockholder. Yoncalla State Bank v. Gemmill, 134 Minn. 334, 159 N. W. 798.

803. Liability of transferrer of stock—Held, following the rule stated and applied in Whitney v. Butler, 118 U. S. 655, 7 Sup. Ct. 47, 30 L. Ed. 266, that defendants neglected no duty resting upon them to cause and effect a transfer of stock in the national bank in question, which they had sold in good faith, and that they are not liable for a stock assessment made in insolvency proceedings three years after such sale. Keyes v. Myhre, 143 Minn. 193, 173 N. W. 422.

NATIONAL BANKS

814. Power to hold and convey realty—(70) See 33 Harv. L. Rev. 718.

819. Usury—Taking interest in advance, at the maximum rate of interest allowed by the state law, upon the discount of a note in the usual course of business, is not usury for a national bank, though it might be for a state bank. Evans v. National Bank, 251 U. S. 108.

820a. Directors—Contracts—A contract made by the directors of a national bank to elect a designated person as an officer of the bank and maintain him in such office for a specified time at a specified salary is void and no right of action can be founded thereon. Van Slyke v. Andrews, 146 Minn. 316, 178 N. W. 959.

821. Stockholders—Liability for corporate debts—A stockholder's superadded liability does not accrue, so as to set the statute of limitations running, until an assessment is made by the comptroller or the court. Shearer v. Christy, 136 Minn. 111, 161 N. W. 498.

PROCEEDINGS UNDER G. S. 1913, §§ 6368-6370

824a. Payment of claims—State preferred creditor—In proceedings under G. S. 1913, §§ 6368-6370, to wind up an insolvent bank in which state funds are deposited, the state is a preferred creditor. Payment of claims must be made according to G. S. 1913, § 6634. American Surety Co. v. Pearson, 146 Minn. 342, 178 N. W. 817.

BANNERING—See Conspiracy, § 1566.

BASTARDY

IN GENERAL

824b. Status—An illegitimate child takes the status of the mother Opsahl v. Johnson, 138 Minn. 42, 163 N. W. 988.

825. Custody and support—(87) State v. Juvenile Court, 147 Minn. 222, 179 N. W. 1006.

825a. Custody of state board of control—Statute—A child having a parent able to provide for its proper support, and who does not consent to separation from it, is not a dependent within the meaning of Laws 1917, c. 397. In proceedings to commit an illegitimate child to the care of the state board of control, the consent of the mother is essential, in the absence of a showing that the commitment is needful in order to prevent serious detriment to the child. Testimony considered, and held not sufficient to warrant the commitment of an illegitimate child to the care of the state board of control. State v. Juvenile Court, 147 Minn. 222, 179 N. W. 1006.

826. Legitimation—A letter alleged to have been written and signed by deceased, attested by a witness and sent to respondent, is held to be sufficient in form to constitute an acknowledgment of paternity under G. S. 1913, § 7240. The evidence is sufficient to sustain a finding that the letter was written and sent to respondent and received by her. Anderson v. Oleson, 143 Minn. 328, 173 N. W. 665.

An illegitimate child is legitimated by the marriage of its parents. Hendrickson v. Queen, — Minn. —, 182 N. W. 952.

(88) See L. R. A. 1916E, 659.

PROCEEDINGS TO CHARGE FATHER

827. General nature of proceedings—The proceeding is purely statutory being unknown to the common law. While in form a criminal prosecution it is in substance a civil action. State v. District Court, 138 Minn. 77, 163 N. W. 797.

(91) State v. Longwell, 135 Minn. 65, 160 N. W. 189; State v. Solie, 137 Minn. 279, 163 N. W. 505.

833a. Venue—A prosecution under the statute is triable in the county in which the mother of the child resides, and the defendant is not entitled to have the place of trial changed therefrom to the county in which he resides. State v. District Court, 138 Minn. 77, 163 N. W. 797.

834. Complaint—The court may allow an amendment of the complaint. State v. Solie, 137 Minn. 279, 163 N. W. 505.

838. Corroboration not necessary—(9) State v. Deike, 144 Minn. 453, 175 N. W. 1000.

840. Evidence—Sufficiency—(18) State v. Solie, 137 Minn. 279, 163 N. W. 505; State v. Foster, 141 Minn. 140, 169 N. W. 529; State v. Deike, 144 Minn. 453, 175 N. W. 1000.

842. Trial—The five-sixth jury law applies. State v. Longwell, 135 Minn. 65, 160 N. W. 189.

843. Release as a defence—(24) See L. R. A. 1918D, 291.

844. Marriage as a defence—An illegitimate child is legitimated by the marriage of its parents. Hendrickson v. Queen, — Minn. —, 182 N. W. 952.

Presumption of legitimacy of child born in wedlock. 33 Harv. L. Rev. 306.

845. Period of gestation—Instructions—It is proper for the court to instruct the jury as to the average period of gestation. State v. Solie, 137 Minn. 279, 163 N. W. 505.

850. Judgment—Laws 1917, c. 210, authorizes imprisonment on default in the payment required by the judgment. State v. Foster, 141 Minn. 140, 169 N. W. 529.

BILLS AND NOTES

NATURE AND REQUISITES

859. A form of money—Bank drafts and cashier's checks pass current as money in everyday business transactions. Johnson v. First State Bank, 144 Minn. 363, 175 N. W. 612.

861a. Signing by maker—The evidence was such as to require a finding that two promissory notes executed in the name of the defendant though not signed by him personally were executed under his direction and were his act and a verdict was properly directed for the plaintiff. Citizens State Bank v. Mellquist, 136 Minn. 19, 161 N. W. 210.

862. Must be unconditional—Prior to the Negotiable Instrument Act of 1913, a note for merchandise providing that title should remain in the vendor; that it should vest in the vendee upon payment; that in case of default, or an attempt to sell or remove the property, all payments shall be forfeited; and that possession should be given the vendor was not negotiable, the promise to pay not being an unconditional promise such as is essential to negotiability. The provision of section 3 of the Negotiable Instrument Act (G. S. 1913, §5815), that a promise shall not be conditional because coupled with "a statement of the transaction which gives rise to the instrument," does not make such a note negotiable. Polk County State Bank v. Walters, 145 Minn. 149, 176 N. W. 496.

(59) Polk County State Bank v. Walters, 145 Minn. 149, 176 N. W. 496.

(60) See 32 Harv. L. Rev. 560 (effect of references to shipping documents or goods).

865. Certainty as to amount—(68-69) Rule changed by G. S. 1913, § 5814. Farmers State Bank v. Walch, 133 Minn. 230, 158 N. W. 253.
(71) See 2 A. L. R. 139.

869. Consideration—Presumption—Where one signs his name in blank on the back of a note, made by another, before delivery, the debt for which the note was given is a consideration to support his promise. But if he signs after the note is delivered, a new consideration is necessary. American Multigraph Sales Co. v. Grant, 135 Minn. 208, 160 N. W. 676.

It is not necessary that a negotiable instrument should specify the consideration for which it was given. Baxter v. Brandenburg, 137 Minn. 259, 163 N. W. 516.

A note without consideration does not represent or evidence a debt. Gundlach v. Park, 140 Minn. 78, 165 N. W. 969, 167 N. W. 302.

In an action to recover upon a promissory note, where the answer alleges want of consideration as a defence, evidence considered, and held sufficient to warrant the submission of that issue to the jury. Long v. Conn, 147 Minn. 77, 179 N W. 644.

(79) Baxter v. Brandenburg, 137 Minn. 259, 163 N. W. 516; Spiering v. Spiering, 138 Minn. 119, 164 N. W. 583; Galbraith v. Clark, 138 Minn. 255, 164 N. W. 902; Skluzacek v. Fossum, 139 Minn. 498, 166 N. W. 124; Long v. Conn, 142 Minn. 502, 172 N. W. 958; Hage v. Drake Marble & Tile Co., 145 Minn. 113, 176 N. W. 192.

(80) Baxter v. Brandenburg, 137 Minn. 259, 163 N. W. 516; Long v. Conn, 147 Minn. 77, 179 N. W. 644.

871. Effect of mortgage—A note secured by mortgage may be enforced without regard to the mortgage. Hewitt v. Dredge, 133 Minn. 171, 157 N. W. 1080.

872. Conditional privilege of cancelation—(90) See Snelling State Bank v. Clasen, 132 Minn. 404, 157 N. W. 643.

873. Various stipulations in notes construed—The words "as per contract" written on the back of a note at the time of its execution, under which the payee indorses at the time of the negotiation, do not affect the negotiability of the note. Snelling Sate Bank v. Clasen, 132 Minn. 404, 157 N. W. 643.

875. Blanks left to be filled—Implied or apparent authority to fill in blank left for name of payee. L. R. A. 1918D, 1064.
(96) See State Bank v. Missia, 144 Minn. 410, 175 N. W. 614.

878. Delivery—Where a note passes from the maker to the payee that is prima facie a delivery. American Multigraph Sales Co. v. Grant, 135 Minn. 208, 160 N. W. 676.

The statute provides that "where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved." Wade v. Nat. Bank of Commerce, 144 Minn. 187, 174 N. W. 889.

879. Conditional delivery—(8) Wade v. Nat. Bank of Commerce, 144 Minn. 187, 174 N. W. 889; American Multigraph Sales Co. v. Grant, 135 Minn. 208, 160 N. W. 676; Galbraith v. Clark, 138 Minn. 255, 164 N. W. 902. See Bryan v. Capital Trust & Sav. Bank, 144 Minn. 434, 175 N. W. 897; L. R. A. 1917C, 306; § 3377.

882. Construction—Uniformity to be sought—Under the Negotiable Instruments Act uniformity of construction is especially desirable. Lumpkin v. Lutgens, 143 Minn. 139, 172 N. W. 893. See 29 Harv. L. Rev. 541.

(115) Palm Vacuum Cleaner Co. v. Bjornstad, 136 Minn. 38, 161 N. W. 215.

886a. Conflict of laws—Defendants executed in this state their promissory notes payable in this state to the order of plaintiff. To secure payment of these notes defendants executed a mortgage on land in Manitoba, Canada. It is held that a so-called moratorium act of the legislative assembly of Manitoba, which provided that no proceedings to foreclose a mortgage, or to enforce payment of any covenant therein to pay money, should be brought until after one year from a default, does not affect the right of plaintiff to bring suit on the notes in this state. Hewitt v. Dredge, 133 Minn. 171, 157 N. W. 1080.

See 1 Minn. L. Rev. 10, 117, 239, 320, 401.

ACCEPTANCE OF BILL OF EXCHANGE

888a. By telegram—Construction—Defendants telegraphed plaintiff bank: "We will honor draft of G. Roedel bill of lading attached for stock purchased by him shipped Thuet Bros." In the light of the surrounding circumstances, the relations of the parties, and their conduct, this telegram is held to be an acceptance by defendants of all drafts drawn on them by the person named, with bill of lading attached to pay for stock shipped to defendants by him during the current season, and not merely an acceptance of only the first draft drawn. James River Nat. Bank v. Thuet, 135 Minn. 30, 159 N. W. 1093.

Acceptance by telegram is sufficient. 34 Harv. L. Rev. 552.

PRESENTMENT FOR PAYMENT

897. Necessity—When a note is payable on demand after date no demand is necessary before action thereon. First State Bank v. Utman, 136 Minn. 103, 161 N. W. 398.

(37) First State Bank v. Utman, 136 Minn. 103, 161 N. W. 398.

897a. Instrument must be exhibited—See 11 A. L. R. 969.

PAYMENT

901. Before maturity—If a holder receives a note charged with notice that it has been paid the fact that it was paid before maturity is

immaterial and does not entitle him to recover at maturity. Farmers State Bank v. McGrath, 141 Minn. 281, 170 N. W. 209.

908. Forged bill—Doctrine of Price v. Neal—(65) United States v. Chase National Bank, 252 U. S. 485. See 12 A. L. R. 1089.

(66) See Trustees v. Merchants Nat. Bank, 139 Minn. 80, 165 N. W. 491.

911a. Evidence of payment against holder with notice—Any competent evidence which would establish the defence of payment as against the payee is admissible against the holder with notice. The findings and decision of the court in an action between the maker and payee, by which the payment of the note as between those parties was conclusively established as against the payee, held admissible against plaintiff. Farmers State Bank v. McGrath, 141 Minn. 281, 170 N. W. 209.

PROTEST

916. Waiver of demand and notice—An indorser may by express terms of his indorsement waive presentment for payment, protest and notice of protest of non-payment. First State Bank v. Utman, 136 Minn. 103, 161 N. W. 398.

NOTICE OF DISHONOR

918. Necessity—The failure to give the notice discharges the indorser, and a subsequent presentation and demand for payment, attended with the same formalities six months later, followed by proper notice to the indorser, will not revive his liability. Torgerson v. Ohnstad, — Minn. —, 182 N. W. 724.

Where the presentation and demand conforms in all respects to the statutory requirements, and the refusal of the maker to pay is thus brought home to the holder, his failure to notify the indorser cannot be excused on the theory or claim that a formal presentation and demand, though in fact made, was not intended. Torgerson v. Ohnstad, — Minn. —, 182 N. W. 724.

(98-99) Torgerson v. Ohnstad, — Minn. —, 182 N. W. 724.

919a. Time—Where the holder of a negotiable instrument presents it to the maker for payment, the presentation and demand being in all respects in full compliance with the law, and payment is refused and the instrument thus dishonored, to fix and continue the liability of an indorser, notice of the dishonor must be given within the time fixed by the Negotiable Instruments Act, in default of which the indorser will be discharged. Torgerson v. Ohnstad, — Minn. —, 182 N. W. 724.

TRANSFERS WITHOUT INDORSEMENT

931. Liability of transferrer—(28) See State v. Merchants Nat. Bank, 145 Minn. 322, 177 N. W. 135.

INDORSEMENT

937. **Without recourse**—The words "without recourse" cannot be added to an indorsement by parol evidence. Lake Harriet State Bank v. Miller, 138 Minn. 481, 164 N. W. 989.

(39) State v. Merchants Nat. Bank, 145 Minn. 322, 177 N. W. 135. See 2 A. L. R. 216.

941. **Nature of contract and liability assumed**—When a bank, which has cashed a negotiable voucher, transmits it with its own indorsement to another, it guarantees that all previous indorsements are genuine and that it has good title to the paper, and if the prior indorsement of the payee was forged, the bank must respond to one who later purchases or pays the instrument. Where a bank, through which a forged state warrant is cleared, pays the amount of the same and presents it to the state treasurer for redemption, it guarantees that all previous indorsements are genuine. State v. Merchants Nat. Bank, 145 Minn. 322, 177 N. W. 135.

944. **Rights of indorser**—(52) Torgerson v. Ohnstad, — Minn. —, 182 N. W. 724.

945. **Irregular indorsement before payee**—(56) See G. S. 1913, § 5876; American Multigraph Sales Co. v. Grant, 135 Minn. 208, 160 N. W. 676.

BONA FIDE PURCHASERS

952. **What constitutes "value"**—When a negotiable note upon its delivery to the transferee is in such form that the transfer makes him a party to the instrument, and imposes on him the duty to fix the liability of prior parties according to the commercial law by presentation for payment and due notice in case of non-payment, the obligation thus imposed is a sufficient consideration to make the transferee a holder for value. See Bank of Montreal v. Beecher, 133 Minn. 81, 157 N. W. 1070.

One who takes an indorsement of a promissory note as collateral security for an antecedent debt owing to him by the indorser is a "purchaser for value." On the other hand, where one takes, as collateral to a debt due from his debtor, the naked promise of a third person who is indebted to neither, such promise is without consideration. An agreement to forbear the enforcement of a legal right is a sufficient consideration to sustain a promise. Where a negotiable note held by a wife is indorsed and delivered to a judgment creditor of her husband as collateral security for the payment of the judgment, the continuance for a period of three months of proceedings supplementary to execution upon such judgment is a valuable consideration for the transfer. Whatever may be the nature of the consideration in such a case if it is a valuable consideration the indorsee may hold the collateral, not merely for the amount of the new consideration, but for the full amount of the debt for which it is pledged. Bank of Montreal v. Beecher, 133 Minn. 81, 157 N. W. 1070.

(76) Snelling State Bank v. Clasen, 132 Minn. 404, 157 N. W. 643; Bank of Montreal v. Beecher, 133 Minn. 81, 157 N. W. 1070.

952a. Renewal note—A note given in renewal of a valid note is good in the hands of an assignee of the payee, without proof of his good faith, though when the payee took the renewal he promised the maker that he would place it as collateral to a loan then contemplated and would not otherwise negotiate it, and, failing to procure such loan, negotiated it in violation of his promise. Farmers State Bank v. Skellet, — Minn. —, 183 N. W. 831.

953. Notice—Good faith—Negligence—The statute provides that "to constitute notice of an infirmity in the instrument * * * the person to whom it is negotiated must have had actual knowledge of the infirmity * * * or knowledge of such facts that his action in taking the instrument amounted to bad faith." G. S. 1913, § 5868; State Bank v. Adams, 142 Minn. 63, 170 N. W. 925.

Notice to an indorsee of the infirmity of a note must be actual and not constructive. To constitute notice of an infirmity in the instrument, the indorsee must have had actual knowledge of the infirmity or knowledge of such facts that his action in taking the instrument amounted to bad faith. Wilful ignorance or gross negligence are evidence of bad faith. The question of what is bad faith is usually a question for the jury. State Bank v. Adams, 142 Minn. 63, 170 N. W. 925.

To establish good faith there must not only be an absence of knowledge of any invalidity, but an absence of circumstances which would put an ordinary prudent man upon inquiry. If there are such circumstances, and he makes no attempt to ascertain the truth, he cannot claim good faith in accepting the instrument. State Bank v. Missia, 144 Minn. 410, 175 N. W. 614.

What will put purchaser upon inquiry. L. R. A. 1918L, 1148.

(80) Bank of Montreal v. Beecher, 133 Minn. 81, 157 N. W. 1070; State Bank v. Adams, 142 Minn. 63, 170 N. W. 925; McWethy v. Norby, 143 Minn. 386, 173 N. W. 803; Wade v. Nat Bank of Commerce, 144 Minn. 187, 174 N. W. 889; First Nat. Bank v. Anderson, 144 Minn. 288, 175 N. W. 544; State Bank v. Missia, 144 Minn. 410, 175 N. W. 614.

(81) See McWethy v. Norby, 143 Minn. 386, 173 N. W. 803.

954. Facts appearing on face of paper—The words "as per contract," written on the back of a note at the time of its execution, under which the payee indorses at the time of the negotiation, do not affect the negotiability of the note. Such words cannot be overlooked by the purchaser; but when a contract accompanies the note and passes to the purchaser, the contract not giving the maker a defence, he is not charged by such words with knowledge of another agreement giving a defence. Snelling State Bank v. Clasen, 132 Minn. 404, 157 N. W. 643.

A check had written on its face: "To be applied on paper held by B. B. Larson if found correct." Held, that an assignee of the check took with notice of Larson's rights as a mortgagee. Slimmer v. State Bank, 134 Minn. 349, 159 N. W. 795.

(86) See First Nat. Bank v. Forsyth, 67 Minn. 257, 69 N. W. 909; 11 A. L. R. 1277.

956. Evidence of good or bad faith—The conduct of the purchaser after a note becomes due is relevant and material. McWethy v. Norby, 143 Minn. 386, 173 N. W. 803.

Plaintiff claimed that the note was given for the purchase price of stock sold defendant. It appeared that, at a time after the note had been negotiated, a certificate of stock had been transmitted by mail to defendant. It was proper to admit an accompanying letter in evidence in explanation of the sending of the stock. McWethy v. Norby, 143 Minn. 386, 173 N. W. 803.

In the absence of suspicious circumstances a purchaser is not bound to inquire of the maker as to the validity of a note, but upon his examination he may be asked whether he made such inquiry. McWethy v. Norby, 143 Minn. 386, 173 N. W. 803.

959. Notice to agent—Notice to the president of a bank held notice to the bank. Farmers State Bank v. McGrath, 141 Minn. 281, 170 N. W. 209; State Bank v. Adams, 142 Minn. 63, 170 N. W. 925. See § 777.

961a. Holder with notice takes subject to defences and equities—One who is not a bona fide holder takes it subject to all equities and defences which might have been interposed against the payee. Farmers State Bank v. McGrath, 141 Minn. 281, 170 N. W. 209. See Digest, §§ 572, 967.

962. Law and fact—A bank through its cashier purchased of the payee two notes which were given under such circumstances that the makers had a defence against the payee and that a purchaser had the burden of proving good faith and want of notice. The payee was brought to the cashier and recommended by the vice president, who was a member of the discount committee, but not active in bank affairs. The vice president was not a witness nor was there an explanation of his absence; nor was the payee a witness nor was there a showing why he was not. It is held that the question of the good faith of the purchasing bank was for the jury. First Nat. Bank v. Anderson, 144 Minn. 288, 175 N. W. 544.

(98) State Bank v. Adams, 142 Minn. 63, 170 N. W. 925; McWethy v. Norby, 143 Minn. 386, 173 N. W. 803; First Nat. Bank v. Anderson, 144 Minn. 288, 175 N. W. 544; Farmers State Bank v. Cooke, — Minn. —, 183 N. W. 137.

963. Held bona fide purchasers—(1) Rantala v. Haish, 132 Minn. 323, 156 N. W. 666; Snelling State Bank v. Clasen, 132 Minn. 404, 157 N. W. 643; Bank of Montreal v. Beecher, 133 Minn. 81, 157 N. W. 1070; Public Bank v. Burchard, 135 Minn. 171, 160 N. W. 667; Pope v. Ramsey County State Bank, 137 Minn. 46, 162 N. W. 1051; Thorpe v. Cooley, 138 Minn. 431, 165 N. W. 265; National Farmers Bank v. Nygren, 141 Minn. 49, 169 N. W. 228; Kipp v. Welsh, 141 Minn. 291, 170 N. W. 222; Farmers State Bank v. Skellet, — Minn. —, 183 N. W. 831.

964. Held not bona fide purchasers—(2) Nicholson v. National Mfg. & Supply Co., 132 Minn. 102, 155 N. W. 1070; Bauman v. Krieg, 133 Minn.

196, 158 N. W. 40; Slimmer v. State Bank, 134 Minn. 349, 159 N. W. 795; Stevens v. Pearson, 138 Minn. 72, 163 N. W. 769; State Bank v. Adams, 142 Minn. 63, 170 N. W. 925; Farmers State Bank v. McGrath, 141 Minn. 281, 170 N. W. 209; Lumpkin v. Lutgens, 143 Minn. 139, 172 N. W. 893; First Nat. Bank v. Denfeld, 143 Minn. 281, 173 N. W. 661; McWethy v. Norby, 143 Minn. 386, 173 N. W. 803; Wade v. Nat. Bank of Commerce, 144 Minn. 187, 174 N. W. 889; First Nat. Bank v. Anderson, 144 Minn. 288, 175 N. W. 544; State Bank v. Missia, 144 Minn. 410, 175 N. W. 614; Farmers State Bank v. Cooke, — Minn. —, 183 N. W. 137.

OVERDUE PAPER

965. When paper is overdue—In an action on a promissory note by a purchaser before maturity the fact that interest due annually was to his knowledge unpaid for a number of years was a circumstance against his claim of good faith in purchasing; and that with other circumstances mentioned in the opinion sustains the verdict of the jury for the defendant. Lumpkin v. Lutgens, 143 Minn. 139, 172 N. W. 893.

(5) See Lumpkin v. Lutgens, 143 Minn. 139, 172 N. W. 893; 11 A. L. R. 1277.

966. Not commercial paper—(6) See 31 Harv. L. Rev. 1104 (rights in overdue paper).

967. Subject to what defences and set-offs—Where the payee of a promissory note transfers it overdue, the maker may offset against the transferee a claim against the payee, existing at the time of the transfer, and later reduced to judgment. A judgment merges the cause of action so that the judgment creditor may not maintain another action on it against the judgment debtor but it does not annihilate the debt. Inquiry into the nature of the cause of action is allowed where the ends of justice require it. Gould v. Svendsgaard, 141 Minn. 437, 170 N. W 595.

(7) See Farmers State Bank v. McGrath, 141 Minn. 281, 170 N. W. 209; 31 Harv. L. Rev. 1104 (rights in overdue paper).

ACCOMMODATION PAPER

969. What constitutes—In an action on a promissory note made by the defendant makers at the request of the plaintiff bank to the defendant payee without consideration passing from him to them, and indorsed by the defendant payee to the plaintiff at its request and without consideration, the evidence is held to show as a matter of law that the indorsement was for the accommodation of the plaintiff and it cannot recover thereon. State Bank v. Pangerl, 139 Minn. 19, 165 N. W. 479.

970. Corporation paper—(12) Nicholson v. National Mfg. & Supply Co., 132 Minn. 102, 155 N. W. 1070; Bloomingdale v. Cushman, 134 Minn. 445, 159 N. W. 1078. See § 2010.

974. Not binding between parties—(16) State Bank v. Pangerl, 139 Minn. 19, 165 N. W. 479.

977. Parol Evidence—(20) State Bank v. Pangerl, 139 Minn. 19, 165 N. W. 479. See Pope v. Hoefs, 140 Minn. 443, 168 N. W. 584.

979. Rights of bona fide holders—Evidence held not to show that plaintiff was a bona fide purchaser. Nicholson v. National Mfg. & Supply Co., 132 Minn. 102, 155 N. W. 1070.

In order to charge an indorsee with constructive notice that a note is accommodation paper the facts must be such as to show fraud or actual bad faith. Bank of Montreal v. Beecher, 133 Minn. 81, 157 N. W. 1070. See § 953.

(22) Bank of Montreal v. Beecher, 133 Minn. 81, 157 N. W. 1070.

CHECKS

981. Nature—A check is intended for payment and not for general circulation. Richardson Grain Separator Co. v. East Hennepin State Bank, 143 Minn. 420, 174 N. W. 415.

Bank cashier's checks pass current as money in everyday business transactions. Johnson v. First State Bank, 144 Minn. 363, 175 N. W. 612.

(29) Baster v. Brandenburg, 137 Minn. 259, 163 N. W. 516.

(31) See Johnson v. First State Bank, 144 Minn. 363, 175 N. W. 612.

982. Effect as assignment of fund—(32) See Johnson v. First State Bank, 144 Minn. 363, 175 N. W. 612; L. R. A. 1916C, 164.

982a. Liability of drawer—No funds—Where a check is given for a valuable consideration the drawer is the principal debtor, and in the event of no funds in the bank to pay the check, he becomes absolutely liable to a suit thereon. This obligation survives the death of the drawer. Baxter v. Brandenburg, 137 Minn. 259, 163 N. W. 516.

985. Presentment—Acceptance—Acceptance of check by telegraph or telephone. 2 A. L. R. 1146.

986. Necessity of presentment and notice of dishonor—(39) See Baxter v. Brandenburg, 137 Minn. 259, 163 N. W. 516.

987. Time to be presented—(40) See 11 A. L. R. 1028 (discharge of indorser by delay in presenting).

990. Delivery—Delivery of a check to the payee may be complete, though the payee after delivery hands it back to the drawer, if the circumstances are such as to give rise to an implication that the drawer is to hold or dispose of it as trustee for the payee. Such an implication arises when the sole purpose of the redelivery of the check is to forward it to one to whom it has been indorsed. The intent of the parties governs, and, if they intend a delivery, that intent will be carried into effect. It is even held that there may be a delivery, though manual possession is not passed at all, if the circumstances are such as to give

rise to an implication that the check is held by the maker as the agent or trustee of the payee. Behrens v. Kruse, 132 Minn. 69, 155 N. W. 1065, 156 N. W. 1.

992. Consideration—An outlawed debt is a good consideration for a check. The check need not recite that such is the consideration. Where a husband buys property and takes title in the name of another with a trust in favor of himself, his wife has marital rights in such property, and her rights will form sufficient consideration for a check given by the husband to the wife in recognition of such rights. A check imports consideration, and where all the testimony of several witnesses is to the effect that such matters formed the consideration for a check, the court will not be justified in submitting the question of consideration to a jury simply because the holder of the check at one time filed a proof of claim based on the check, which inferentially stated a consideration which was in fact invalid. Baxter v. Brandenburg, 137 Minn. 259, 163 N. W. 516.

994. Bona fide holders—A personal check of an officer of a bank drawn upon such bank and accepted in payment of the note of such officer does not charge the holder of the note with notice that there is an attempt to misappropriate the funds of the bank. There was no proof in this case that the one who presented the personal checks of the bank officer and received payment thereon knew, or had reason to suspect, that the account of such officer was largely overdrawn. The checks were presented and paid in the usual course of business, and the record indicates as well the good faith of defendant in receiving the checks as of those who participated in their collection. The fact that shortly after these checks were paid the drawer's deposit account was replenished so as to more than wipe out all prior overdrafts would seem to cancel any cause of action which might have existed for recovery against defendant. Pope v. Ramsey County State Bank, 137 Minn. 46, 162 N. W. 1051.

(48) Slimmer v. State Bank, 134 Minn. 349, 159 N. W. 795.

995a. Revocation—The drawer of a check may revoke the authority of the drawee to pay, accept, or certify it at any time before it is paid, accepted or certified. Johnson v. First State Bank, 144 Minn. 363, 175 N. W. 612.

996a. Payment by bank draft or cashier's check—Where a check is presented for payment to the drawee having funds of the drawer to meet it, and the payee, for his own convenience, receives part in cash and part in drafts or cashier's checks of the drawee, the transaction constitutes in law a payment of the check so far as the drawer and drawee are concerned, so that the drawee cannot set up as defence, when sued on the drafts, that the drawer of the check for good cause stopped payment thereon after the drafts were issued and delivered to the payee of the check, nor can the drawer of the check intervene and assert any right in the drafts or claim any relief against the drawee. Johnson v. First State Bank, 144 Minn. 363, 175 N. W. 612.

997. Negligence of bank in paying—Payment to unauthorized agent—Payment to an agent not authorized to receive payment will not ordinarily relieve the bank. Trustees v. Merchants Nat. Bank, 139 Minn. 80, 165 N. W. 491. See § 1008a.

998a. Certified checks—Effect of overcertification. 2 A. L. R. 86.

999. Forged checks—Doctrine of Price v. Neal—In the absence of negligence on the part of the payee, a bank paying a check on a forged indorsement is liable even though it was not negligent. Trustees v. Merchants Nat. Bank, 139 Minn. 80, 165 N. W. 491.

(56) See United States v. Chase National Bank, 252 U. S. 485; 32 Harv. L. Rev. 287 (forged checks—negligence of depositor); 12 A. L. R. 1089; L. R. A. 1916E, 539.

1000a. Action by bank against drawer—In an action by a bank against the drawer of a check on the bank, the drawer not having sufficient funds in the bank to pay it, and having promised to deposit sufficient funds for that purpose and failed, held that the defendant was not entitled to a dismissal when plaintiff rested. State Bank v. Ronan, 144 Minn. 236, 174 N. W. 892.

CERTIFICATES OF DEPOSIT

1001. Nature—(63) L. R. A. 1918C, 691.

1008a. To whom payable—Alteration—Wrongful payment—Interest—Action to recover the amount of certificates of deposit issued by defendant to German Lutheran Cemetery payable to its treasurer and its president, and paid by defendant to the treasurer alone, the certificates having been altered by him so that as presented they were payable to the treasurer or the president. It is held: Conceding that defendant could have rightfully paid the certificates without an indorsement, it was bound to pay to the person or persons authorized by the terms of the certificates to receive payment. Payment to the treasurer was not justified unless he was by the terms of the certificates so entitled to receive payment, and it is not material that he was in fact the treasurer of the cemetery and as such in charge of its funds, or that defendant so believed. It was not error to receive in evidence a certain resolution, or the testimony of the president as to instructions given defendant's teller as to whom the certificates should be made payable. The certificates belonged to plaintiffs, under the name of German Lutheran Cemetery. The treasurer and president were their agents to receive payment, and plaintiffs, for their own protection, had provided against payment to either without the consent of the other. Under these circumstances a payment to either agent alone, without the other's consent, does not discharge the bank's liability to the principal. The evidence justified a finding that the treasurer never paid over to plaintiffs or accounted for the moneys received on the certificates. Defendant cannot complain that the trial court instructed the jury that plaintiffs could not recover unless defendant was negligent, though if the certifi-

cates were altered after they were issued so as to make them payable to either the treasurer or the president, the defendant is liable, even though it was not negligent. There was no prejudice to defendant in receiving evidence on this issue, or in instructing the jury thereon. There was no error in instructions to the jury as to certain of the certificates which as presented for payment did not have the word "or" between the names of treasurer and president. The court did not err in allowing plaintiffs interest at 6 per cent from the date of the demand upon defendant. Trustees v. Merchants Nat. Bank, 139 Minn. 80, 165 N. W. 491.

PAROL EVIDENCE

1012. To vary indorsement—To the general rule that a contemporaneous oral agreement is inadmissible to vary the effect of an indorsement an exception is recognized where an equity arises between the immediate parties from an antecedent transaction which includes an agreement that the note is taken on the responsibility of the maker and is indorsed only for the purpose of transferring title pursuant thereto, so that the enforcement of the obligation of the indorsement would work a fraud. Facts held not to bring a case within this exception. Giltner v. Quirk, 131 Minn. 472, 155 N. W. 760.

A contemporaneous parol agreement that the purchaser of a note and mortgage shall look to the maker of the note and the security of the mortgage for payment and not to enforce the obligation of the indorsement is inadmissible. Giltner v. Quirk, 131 Minn. 472, 155 N. W. 760.

An oral agreement to stamp over an indorsement the words "without recourse" cannot be proved. Lake Harriet State Bank v. Miller, 138 Minn. 481, 164 N. W. 989.

The rule that an indorsement is a complete contract and cannot be varied by parol evidence does not forbid the introduction of such evidence to show want of consideration or that the paper is accommodation. State Bank v. Pangerl, 139 Minn. 19, 165 N. W. 479.

(84) Giltner v. Quirk, 131 Minn. 472, 155 N. W. 760; Lake Harriet State Bank v. Miller, 138 Minn. 481, 164 N. W. 989; State Bank v. Pangerl, 139 Minn. 19, 165 N. W. 479. See 4 A. L. R. 764.

(87, 92) Giltner v. Quirk, 131 Minn. 472, 155 N. W. 760.

1013. Held admissible—Where a person signs a joint note, at the request of the principal debtor, he may, in the absence of any understanding with a prior surety to the contrary, stipulate with the principal and make it a condition of his signing that he signs only as surety to those signing prior to his signing; and such fact may be shown by parol evidence without being subject to objection as hearsay. Pope v. Hoefs, 140 Minn. 443, 168 N. W. 584.

(95) State Bank v. Pangerl, 139 Minn. 19, 165 N. W. 479.

(99) See Giltner v. Quirk, 131 Minn. 472, 155 N. W. 760.

DEFENCES

1014. Alteration—G. C. Knox and S. J. Burchard executed a note payable to the order of "ourselves" by signing their individual names upon the face of the note and indorsing their individual names upon the back thereof. Subsequently it was altered so that it purported to be executed by the Knox-Burchard Mercantile Company, and to be indorsed by that company and by Knox, Burchard, and others individually; and thereafter was negotiated to plaintiff, a holder in due course. The Negotiable Instruments Act provides, "when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor." By virtue of this statute Burchard is liable upon the note according to its original tenor, notwithstanding the alteration. Public Bank v. Burchard, 135 Minn. 171, 160 N. W. 667.

(4) See § 1008a.

1014a. Forgery—When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority. G. S. 1913, § 5835; Public Bank v. Burchard, 135 Minn 171, 160 N. W. 667. See §§ 908, 999.

1016. Failure of consideration—(7) Galbraith v. Clark, 138 Minn. 255, 164 N. W. 902.

1017. Partial want or failure of consideration—(11) Davies v. Price Merchants' Syndicate, 147 Minn. 6, 179 N. W. 215.

1018. Fraud—Defendant gave to the Donald-Richard Company an order in writing for certain goods and at the same time signed a promissory note at the bottom of the order, detachable from the order by an indistinct perforation. It is virtually conceded that the note was procured by fraud. Plaintiff is an indorsee of the note. There is evidence sufficient to sustain a finding that plaintiff was chargeable with notice of the fraud and that defendant was not negligent in signing the note. Stevens v. Pearson, 138 Minn. 72, 163 N. W. 769.

The promissory note sued on was obtained from defendant by fraudulently misrepresenting the financial standing of a corporation whose bonds were to be issued in exchange for the note. This is held to make the title of the payee who thus procured the instrument defective under the Negotiable Instruments Law (section 5867, G. S. 1913). First Nat. Bank v. Denfeld, 143 Minn. 281, 173 N. W. 661.

Evidence held to justify a finding that a note was obtained by fraud. First Nat. Bank v. Denfeld, 143 Minn. 281, 173 N. W. 661.

A note, given to be used, with the notes of others, only as collateral to a note of the payee, and which is sold and indorsed by the payee be-

fore maturity as an original obligation, is negotiated "in breach of faith" and "under such circumstances as amount to a fraud," within the meaning of the Negotiable Instruments Act. McWethy v. Norby, 143 Minn. 386, 173 N. W. 803; Farmers State Bank v. Skellet, — Minn. —, 183 N. W. 831.

Where a note is procured through fraud the giving of a renewal note after discovery of the fraud is a waiver of the fraud. Thorpe v. Cooley, 138 Minn. 431, 165 N. W. 265.

(13) Stevens v. Pearson, 138 Minn. 72, 163 N. W. 769. See First Nat. Bank v. Schirmer, 134 Minn. 387, 159 N. W. 800 (evidence held not to show fraud); First State Bank v. Utman, 136 Minn. 103, 161 N. W. 398; Hage v. Drake Marble & Tile Co., 145 Minn. 113, 176 N. W. 192 (evidence held not to show fraud).

(14) Farmers State Bank v. Skellet, — Minn. —, 183 N. W. 831.

1019. Fraud in procuring signature—Statute—Fraud, in procurement of a signature to a promissory note, may consist of a trick or artifice by which a person is induced to sign the note without knowledge of the fact that it is a note, as where the paper is folded in such manner as to conceal its true nature. A note procured by fraud of this character is not a contract at all, for there is no real assent on the part of the signer and it is wholly void and acquires no vitality, even in the hands of an innocent purchaser for value, unless the signer is guilty of some negligence, and in such event the liability to the innocent purchaser is predicated on negligence or estoppel and not on original assent. This is common law doctrine. G. S. 1913, § 6015, embodies this doctrine and perhaps enlarges it. Stevens v. Pearson, 138 Minn. 72, 163 N. W. 769.

The statute creates a new defence. It does not affect the common-law rules as to the effect of fraud in procuring a signature. National Cash Register Co. v. Merrigan, 148 Minn. —, 181 N. W. 585.

(16) National Farmers Bank v. Nygren, 141 Minn. 49, 169 N. W. 228; Stevens v. Pearson, 138 Minn. 72, 163 N. W. 769.

(17) First Nat. Bank v. Schirmer, 134 Minn. 387, 159 N. W. 800; Stevens v. Pearson, 138 Minn. 72, 163 N. W. 769.

(18-20) First Nat. Bank v. Schirmer, 134 Minn. 387, 159 N. W. 800.

(19) National Farmers Bank v. Nygren, 141 Minn. 49, 169 N. W. 228.

1020. Illegality—Negotiable paper, executed as part of a transaction with a foreign corporation doing business in this state in violation of the laws relating to foreign corporations, may be enforced by a bona fide purchaser thereof. Finseth v. Scherer, 138 Minn. 355, 165 N. W. 124.

When a bank loans money and takes a note therefor, it may recover on the note though it knew that the money was to be used to pay a gambling debt, if it did not participate in the gambling transaction. Kipp v. Welsh, 141 Minn. 291, 170 N. W. 222.

As between the immediate parties and those with notice it is a good defence that the note was given for money loaned for an illegal purpose in the furtherance of which the lender actively participated. Johnstown Land Co. v. Brainerd Brewing Co., 142 Minn. 291, 172 N. W. 211

1022. Estoppel—(33) Finseth v. Scherer, 138 Minn. 355, 165 N. W. 124.

(34) Wade v. Nat. Bank of Commerce, 144 Minn. 187, 174 N. W. 889; First Nat. Bank v. Denfeld, 143 Minn. 281, 173 N. W. 661.

1028. Breach of warranty—In an action on a note given for a gasolene engine sold with a warranty, held, that there was evidence of a breach of such warranty. Fairmont Gas Engine etc. Co. v. Crouch, 133 Minn. 167, 157 N. W. 1090. See Digest, §§ 8618-8627.

ACTIONS

1037. Answer—An answer in an action on a note of a corporation alleging that the note was executed for the personal benefit of certain officers of the corporation and that the plaintiff had knowledge of the facts held sufficient to admit proof of the defence. National City Bank v. Zimmer Vacuum Renovator Co., 132 Minn. 211, 156 N. W. 265.

An answer of a defendant indorsing a note for the accommodation of the maker held insufficient to show that plaintiff payee participated in misrepresentations claimed to have been made by the maker to induce him to indorse or that the payee had knowledge of them. First State Bank v. Utman, 136 Minn. 103, 161 N. W. 398.

Where payment of the check was refused and thereafter the seller asserted ownership of the property and offered it for sale to a third party in whose possession it then was, but subsequently brought suit on the check, an answer alleging no consideration for the check should not be stricken out as sham, as the buyer's claim that the seller had rescinded the sale is not clearly shown to be unfounded. J. I. Case Threshing Machine Co. v. Barbagos, 143 Minn. 8, 172 N. W. 882.

1038. Issues—Evidence admissible under pleadings—A claim for attorney's fees for the prosecution and collection of a note is not a part of the cause of action on the note; and a denial in the answer of the value thereof alleged in the complaint does not raise an issue which prevents the plaintiff testing by demurrer the sufficiency of the answer as a defence to the note. First State Bank v. Utman, 136 Minn. 103, 161 N. W. 398.

A general denial puts in issue an allegation in the complaint of a demand before suit. First State Bank v. Utman, 136 Minn. 103, 161 N. W. 398.

1039. Evidence admissible under general denial—Where the complaint alleges non-payment a general denial does not raise an issue upon the question of payment and payment is inadmissible thereunder. First State Bank v. Utman, 136 Minn. 103, 161 N. W. 398.

1040. Burden of proof—When there is fraud in the inception of a note or in its negotiation, the burden is upon the indorsee of proving that he purchased before maturity, in due course, for value, and that he was without notice of equities in the maker; but the negotiation of a note,

given in part payment of the purchase of lands, with an agreement that if the maker is dissatisfied upon inspection the payee will return it, does not constitute such fraud. Snelling State Bank v. Clasen, 132 Minn. 404, 157 N. W. 643. See 6 A. L. R. 1667.

Where defendant admits the execution of the note but denies plaintiff's title, and alleges that the note is and always has been the property of a third party against whom he asserts a defence, the plaintiff has the affirmative. Kipp v. Welsh, 141 Minn. 291, 170 N. W. 222.

Where plaintiff in his case in chief presented evidence which, if uncontradicted, established the bona fides of the original payee of the note, the court properly required defendant to produce evidence tending to show bad faith on the part of such payee before attempting to prove that he, defendant, had been gambling in grain options, and gave the note to enable him to settle the losses incurred. The rule that defendant may prove illegality in the inception of a note, and thereby shift the burden of proof to plaintiff, applies only where the state of the record is such that proof of such illegality will entitle defendant to a verdict if plaintiff fails to produce further evidence of bona fides. Kipp v. Welsh, 141 Minn. 291, 170 N. W. 222.

The burden was upon defendants, who, as an accommodation to plaintiff's agent and not in any business transaction with plaintiff, had taken from the agent checks payable to plaintiff's order, to prove authority in the agent to indorse thereon plaintiff's name. Doeren v. Krammer, 141 Minn. 466, 170 N. W. 609.

When it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. G. S. 1913, § 5871; First Nat. Bank v. Anderson, 144 Minn. 288, 175 N. W. 544.

The title of the one who negotiated the promissory notes in suit was defective, within the meaning of section 5867 G. S. 1913, and cast the burden of proof upon plaintiff that it was an innocent holder in due course. State Bank v. Missia, 144 Minn. 410, 175 N. W. 614.

A check payable to the order of defendant was delivered without indorsement to plaintiff under an agreement that it should belong to plaintiff if the statements of defendant in a report made by him respecting a mine were not substantially corroborated by H. and M. In an action to recover the amount of the check, the burden of proving that the report had not been substantially corroborated by H. and M. rested upon the plaintiff, and he failed to sustain it. Bryan v. Capital Trust & Sav. Bank, 144 Minn. 434, 175 N. W. 897.

The presumption is that a promissory note is a valid obligation, based upon a good and legal consideration, and the burden of showing that there was a want of consideration rests upon the defendant. Long v. Conn, 147 Minn. 77, 179 N. W. 644.

(19) 11 A. L. R. 952.

(20) Snelling State Bank v. Clasen, 132 Minn. 404, 157 N. W. 643; Stevens v. Pearson, 138 Minn. 72, 163 N. W. 769; State Bank v. Missia,

144 Minn. 410, 175 N. W. 614; First Nat. Bank v. Denfeld, 143 Minn. 281, 173 N. W. 661; McWethy v. Norby, 143 Minn. 386, 173 N. W. 830; Farmers State Bank v. Cooke, — Minn. —, 183 N. W. 137. See Kipp v. Welsh, 141 Minn. 291, 170 N. W. 222.

(23) See Kipp v. Welsh, 141 Minn. 291, 170 N. W. 222.

1042. Amount of recovery—According to a note as altered a party appeared to be only an indorser and the verdict against him was on the theory that his liability was that of an indorser. As he was held to no greater or different liability than he in fact assumed it was held that he could not complain. Public Bank v. Burchard, 135 Minn. 171, 160 N. W. 667.

A verdict must be so definite that by reference to the record the finding of the jury is clearly ascertainable. A verdict in this case finding for the defendants and assessing their damages in a sum less than the note, and indicating that such damages should be deducted from the note and interest, the amount of which was undisputed, meant that the plaintiff should recover the amount of his note and interest, less the damages awarded for the breach of warranty; and while bad in form it is not so indefinite that it cannot be given effect. Anderson v. Van Doren, 142 Minn. 237, 172 N. W. 117.

1042a. Evidence—Sufficiency—The evidence was not such as to sustain a finding that the consideration of the note was corporate stock purchased by the defendant of the plaintiff; and the court did not err in refusing to submit such question to the jury. Merchants Nat. Bank v. Coyle, 143 Minn. 440, 174 N. W. 309.

Defendant interposed in defence an agreement between the parties, by which defendant agreed to transfer to plaintiffs his saloon business, with stock and fixtures, in full discharge of the note; that plaintiffs agreed to accept the same. It appears that the agreement was made, but the trial court found as a fact that it was never carried out or performed by the parties, and by mutual consent was subsequently rescinded. Our examination of the record discloses sufficient evidence to support the findings. Goldale Liquor Co. v. Bailys, 144 Minn. 464, 174 N. W. 821.

BLACKLISTING—See Conspiracy, § 1565; Master and Servant, § 5832a.

BLOODHOUNDS—See Evidence, § 3251 (trailing persons by).

BLUE SKY LAW—See Brokers, § 1125a.

BONDS

1056. Statutory bond—Defective—The obligations of a surety under a statutory bond must be construed as being coincident with the obligations imposed by the statute, unless such construction does violence to the language of the bond. Downs v. American Surety Co., 132 Minn. 201, 156 N. W. 5.

(58) Drake v. Drake, — Minn. —, 182 N. W. 717.

(59) See L. R. A. 1917B, 990.

(64) Downs v. American Surety Co., 132 Minn. 201, 156 N. W. 5. See Carlson v. American Fidelity Co., — Minn. —, 182 N. W. 985.

(66) Carlson v. American Fidelity Co., — Minn. —, 182 N. W. 985.

1057. Actions—Leave of court to sue—Necessity of leave of court to sue. 2 A. L. R. 563.

BOUNDARIES

1059. Reference to plats—The purchaser of abutting property takes subject to the conditions and limitations of the plat. Drake v. Chicago etc. Ry. Co., 136 Minn. 366, 162 N. W. 453.

1060. Courses and distances—A description by metes and bounds held to prevail over a meander line about a lake. Stavanau v. Gray, 143 Minn. 1, 172 N. W. 885.

(83) See 34 Harv. L. Rev. 326.

1061. Monuments and natural boundaries—(87) Lawler v. Rice County, 147 Minn. 234, 180 N. W. 37; Silver King Coalition Mines Co. v. Conkling Mining Co., 255 U. S.—. See 34 Harv. L. Rev. 326.

1065. Highways—The presumption is that the owner of land abutting on a street or road is the owner of the fee in the street or road. Every intendment is in favor of such ownership. A reservation of the fee in a plat or other grant must be express or arise by necessary implication. Drake v. Chicago etc. Ry. Co., 136 Minn. 366, 162 N. W. 453.

(97) 2 A. L. R. 6.

1067. Rivers and lakes—It may be considered a canon in American jurisprudence that, where the calls in a conveyance of land are for two corners at, in, or on a stream or its bank, and there is an intermediate line extending from one such corner to the other, the stream is the boundary. See Stavanau v. Gray, 143 Minn. 1, 172 N. W. 885.

1068. Meander lines about lakes—A meandered lake does not cease to be such because it dries up temporarily. Troska v. Brecht, 140 Minn. 233, 167 N. W. 1042.

Where, in a survey of the public domain, a body of water or lake is found to exist and is meandered, the result of such meander is to exclude the area from the survey and to cause it, as thus separated, to become subject to the riparian rights of the respective owners abutting on the

meander line in accordance with the laws of the several states. Wilson & Co. v. United States, 245 U. S. 24.

(10) See Stavanau v. Gray, 143 Minn. 1, 172 N. W. 885.

1070. Non-navigable and dried-up lakes—The giving of the beds of dried-up lakes to the riparian owners was originally a matter of favor or grace. State v. District Court, 146 Minn. 150, 178 N. W. 595.

(13) State v. District Court, 146 Minn. 150, 178 N. W. 595.

1075. Parol evidence—(29, 30) Stavanau v. Gray, 143 Minn. 1, 172 N. W. 885.

1077. Official plats and field notes—If government plats and field notes are inconsistent with monuments established by the government the latter control. Lawler v. Rice County, 147 Minn. 234, 180 N. W. 37.

1079. Government corners, surveys, etc.—The corners and boundary lines established by the government survey of the public lands are where they were actually marked on the ground by the government surveyors, and the point where a section post or quarter section post was placed on the ground, if satisfactorily established, is controlling and conclusive as to the location of the corners marked by it, although such location may not accord with the courses and distances shown on the plat and field notes. Lawler v. Rice County, 147 Minn. 234, 180 N. W. 37.

The evidence sustains the finding of the trial court that the quarter section post in controversy was placed by the government surveyors at the point claimed by plaintiff. Lawler v. Rice County, 147 Minn. 234, 180 N. W. 37.

(39) Lawler v. Rice County, 147 Minn. 234, 180 N. W. 37.

1081. Lost corners—(46) See Lawler v. Rice County, 147 Minn. 234, 180 N. W. 37.

1083. Practical location—The evidence of a "practical location" of the boundary lines in dispute at the place where the court established them was sufficient to justify the court in adopting such lines as the true boundary lines. Bahneman v. Fritche, 147 Minn. 329, 180 N. W. 215.

The fact that a predecessor in title, who farmed and raised crops on the land, did not reside on it nor keep cattle on it for two years and hence did not use the lane in dispute as a passageway for cattle during that period, did not break the continuity of possession. The finding that such possession was adverse is sustained by the evidence. Bahneman v. Fritche, 147 Minn. 329, 180 N. W. 215.

(51) Bahneman v. Fritche, 147 Minn. 329, 180 N. W. 215.

1084. Statutory action to determine boundaries—The statute, section 8097, G. S. 1913, provides that after the entry of judgment the court may direct a competent surveyor to establish permanent iron or stone landmarks to mark the location of the boundary lines as established by the judgment, and the court, in its order, provided that either party might apply for a further survey and the placing of such landmarks if he so

desired. If either party wishes to have the lines marked on the ground in a more substantial manner the way is open for him to have it done. The description of the location of the lines established as the boundary lines does not appear to be so indefinite that they cannot be located on the ground. Bahneman v. Fritche, 147 Minn. 329, 180 N. W. 215.

Evidence held not to prove that there had been a common-law arbitration of a boundary dispute. A finding that the allegation of the complaint that the boundary line had never been determined was true, held a finding against a contention that the boundary line had been located by arbitration. Lejonquist v. Bukowski, — Minn. —, 182 N. W. 513.

(58) Knutson v. Wellendorf, 132 Minn. 464, 155 N. W. 905.

BOUNTIES

1086. To soldiers—Under section 7 of article 9 of the constitution there is no limitation of the amount of debt which may be contracted by the state "in time of war, to repel invasion or suppress insurrection." The act of September 22, 1919 (Laws 1919 [Ex. Sess.] c. 49), appropriating $20,000,000 for the payment of additional compensation to those serving with the associated forces in the war with Germany, is authorized by said section and is constitutional; and the debt created by the act is a direct obligation of the state. The debt created by the act is for a "public purpose." The act does not include among its beneficiaries residents of Minnesota enlisted in the associated forces, but not enlisted in the forces of the United States. Gustafson v. Rhinow, 144 Minn. 415, 175 N. W. 903.

1086a. For wolves—Under G. S. 1913, § 5197, a county cannot be compelled to pay the wolf bounty offered by the state and payable out of state funds in the absence of a state fund out of which the county can be reimbursed, though the statute contemplates that in ordinary course and as a matter of convenience the county shall first pay. The additional wolf bounty offered by a county under G. S. 1913, § 5198, which is a primary charge upon the county, is payable irrespective of the payment of the state bounty or the condition of the state bounty fund. A resolution of a county board held not to repeal a previously passed resolution giving a county wolf bounty. State v. Bertilrud, 139 Minn. 356, 166 N. W. 405.

BREACH OF THE PEACE

1101. What constitutes—See § 2751.

BRIBERY

1103. What constitutes—Giving money to a witness to affect his testimony in a case is bribery. State v. Liss, 145 Minn. 45, 176 N. W. 51.

1106a. Defences—The court correctly instructed the jury that the offence consisted in giving a bribe to the witness with intent to influence the witness not to give the facts as the witness knew them, and that defendant's belief in the truth of the statement which by the payment of money he was influencing the witness to make was not a defence. State v. Liss, 145 Minn. 45, 176 N. W. 51.

1107. Evidence—Admissibility—(95) State v. Liss, 145 Minn. 45, 176 N. W. 51 (prosecution for bribing a witness to affect his testimony at the trial of E, charged with arson—indictment against E held admissible—minutes of court on trial against E held admissible—witness sought to be bribed properly permitted to state facts relating to the case against E—testimony of defendant at trial of E held admissible).

1108. Evidence—Sufficiency—(96) State v. Liss, 145 Minn. 45, 176 N. W. 51.

BRIDGES

1110. Part of highway—(99) St. Paul v. Great Northern Ry. Co., 138 Minn. 25, 163 N. W. 788.

1112a. Strength—G. S. 1913, § 2600, relating to the strength of public bridges, does not prevent a bridge builder from recovering the contract price of a bridge which has not been submitted to the test referred to in the statute, but which has supported a weight four times as great as that required by the specifications and three times as great as that required by the statute. McClure v. Browns Valley, 143 Minn. 339, 173 N. W. 672.

1113. Contracts for construction—(3) McClure v. Browns Valley, 143 Minn. 339, 173 N. W. 672 (strength required—question of substantial performance held for jury).

1115. Powers and duties of town board—A town board of supervisors under the authority conferred by section 1280, G. S. 1913, may appropriate money from the town road fund to aid in the construction of a bidge by a village situated within the town, without previous authorization by the town electors. The authority to make such appropriation springs solely from the statute, and when made by the town board cannot be nullified by the electors at a subsequent town meeting. Though the person who enters into a contract for the construction of such a bridge would be required to take notice of the authority of the village officers, the law will not require him to go further and determine whether the place designated for the construction of the bridge is a public high-

way. In the absence of an affirmative showing to the contrary, it will be presumed that an authorized appropriation of public money is within the limits of the fund thus drawn upon. Great Northern Bridge Co. v. Finlayson, 133 Minn. 270, 158 N. W. 392.

A contract between two towns for keeping in repair a bridge forming part of a highway between them held valid. Mount Pleasant v. Florence, 138 Minn. 359, 165 N. W. 126.

1120. Liability of municipalities for defective bridges—Liability when bridge is on county or municipal line. 8 A. L. R. 1274.

BROKERS

IN GENERAL

1124a. Compensation—Several competing brokers—Where two brokers are competing to secure the same customer for the same principal, the one through whose efforts the business is secured is entitled to the commission, though he was not the first to solicit the customer, and though the one who first did so has not abandoned the quest. Esterly-Hoppin Co. v. Burns, 135 Minn. 1, 159 N. W. 1069.

1124b. Acting for buyer and seller—In this suit by a broker for compensation for services in selling two carloads of honey for defendant, the latter was not entitled to judgment notwithstanding the verdict, on the ground that plaintiff also represented the buyer. The evidence was conclusive that plaintiff was employed by defendant to sell the honey, and that he did sell it at a price acceptable to defendant, and the court rightly instructed the jury that the only question for their determination was the reasonable value of the services so rendered. The answer did not allege as a defence that in the transaction plaintiff, without defendant's knowledge, acted as the buyer's agent, nor was there evidence to go to the jury as to such a defence. Holbert-Haagensen Co. v. Kicher, 148 Minn. —, 180 N. W. 917. See § 1146.

1125. Brokers for miscellaneous purposes—Action to recover a commission for the sale of a one-third interest in a stock of hardware and farm implements. Evidence considered, and held sufficient to make a question for the jury as to whether the plaintiffs' efforts were the procuring cause of the sale. Vold v. Hagen, 147 Minn. 358, 180 N. W. 112.

1125a. License—Blue Sky Law—Securities Commission—A corporation issuing and selling certificates which provide that, in consideration of a sum paid by the purchaser and his assistance in promoting the sale of goods manufactured by the corporation, he shall share in the profits of the business, is engaged in the business of selling securities within the meaning of chapter 429, Gen. Laws 1917, as amended, commonly known as the "Blue Sky Law." The law is intended to put a stop to the sale of securities that will not pass inspection by the state securities commission, and is a proper exercise of the police power to protect the

public against imposition. There is no hard and fast rule for determining whether a security is or is not within the purview of the statute. The placing of capital or laying out of money in a way intended to secure income or profit from its employment is an investment, and the certificates issued by defendant were investment contracts. An indictment charging defendant with having sold its certificates to six persons who are named and to others not named, without having a license to do so, is not bad for duplicity. The rule against duplicity does not apply where the indictment charges an offence consisting of several distinct acts which are in fact to be construed as one continuous act or transaction. The offence of selling securities without a license is not committed where there is only a single or isolated sale; hence the indictment must set forth the making of several sales in the nature of continuous acts or transactions. State v. Gopher Tire & Rubber Co., 146 Minn. 52, 177 N. W. 937. See 3 Minn. L. Rev. 149.

The Investors' Syndicate issues a ten-year instalment savings certificate which promises the purchaser at the end of ten years a sum which is equivalent to the amount of the annual instalments paid with six per cent. interest compounded semiannually. Its ability to perform its contract is not questioned. After the second year a certificate has a surrender value which until the sixth year is less than the principal amounts paid. Many purchasers fail to make their payments and suffer lapses and consequent losses. Held, that such certificates do not "work a fraud upon the purchaser" within the meaning of Laws 1917, c. 429, and that the State Securities Commission is not justified in suspending the license of the syndicate to sell them. In re Investors' Syndicate, 147 Minn. 217, 179 N. W. 1001.

Constitutionality of Blue Sky Law. Hall **v.** Geiger-Jones Co., 242 U. S. 539; L. R. A. 1917F, 524.

STOCK BROKERS

1126. Dealing in futures—Evidence held to justify a finding that the purchase by defendant for plaintiff's account of certain quantities of pork for future delivery was authorized by plaintiff and that an unauthorized purchase was ratified by defendant. Watkins **v.** W. E. Neiler Co., 135 Minn. 343, 160 N. W. 864.

LOAN BROKERS

1131. Principal securing loan—(31) See Aluminum Products Co. **v.** Anderson, 138 Minn. 142, 164 N. W. 663.

REAL ESTATE BROKERS

1136. Necessity of employment—(36) Tanner v. Joslyn, 132 Minn. 1, 155 N. W. 762; Morrow v. Tourtellotte, 135 Minn. 248, 160 N. W. 665;

Alden v. Sacramento Suburban Fruit Lands Co., 137 Minn. 161, 163 N. W. 133; Hatfield v. Holquist, 139 Minn. 513, 166 N. W. 1068.

1137. Contract of employment—What the terms of an oral contract of employment were is a question for the jury unless the evidence is conclusive. Ruppert v. Muelling, 132 Minn. 33, 155 N. W. 1039.

Evidence held to justify a finding that there was a contract between plaintiff and defendants for a specified commission. Clabots v. Ballweber, 133 Minn. 400, 158 N. W. 621.

A contract by defendant to pay plaintiff a fixed commission on sale of land at a fixed price with a sufficient cash payment to "secure him on the sale," the balance at 5 per cent for "five years and maybe longer," is a valid brokerage contract. Edmundson v. Phenix, 146 Minn. 331, 178 N. W. 893.

The relinquishment of plaintiff's claim under the prior contract and his acts under the present contract constitute a valid consideration, and the contract is not void for want of mutuality. Neither is it void for indefiniteness and uncertainty. McRae v. Feigh, 143 Minn. 241, 173 N. W. 655.

(38) See McRae v. Feigh, 143 Minn. 241, 173 N. W. 655.

(39) Alden v. Sacramento Suburban Fruit Lands Co., 137 Minn. 161, 163 N. W. 133; Thompson v. Davidson, 136 Minn. 368, 162 N. W. 458; Appleby v. Dysinger, 137 Minn. 382, 163 N. W. 739; Boydstun v. Hackney Land Credit Co., 145 Minn. 392, 177 N. W. 779; Edmundson v. Phenix, 146 Minn. 331, 178 N. W. 893; Moore v. Bentson, 147 Minn. 72, 179 N. W. 560. See § 1147 (terms of contract as to compensation).

1137a. Modification of contract—The evidence in an action to recover for services in the sale of lands sustained the finding of the jury that an entire contract for the sale of a large tract was modified, so that the plaintiffs were to have compensation at an agreed price per acre upon a sale of any tract, though the whole tract which was the subject-matter of the contract was not sold. Conceding that the modification was only to the effect, as claimed by the defendant, that individual sales were to be closed when made, but that the plaintiffs were to have no compensation unless they finally sold the entire tract, the evidence required a finding that the defendant terminated the contract without right; and the plaintiffs were then entitled to recover the reasonable value of the services which they rendered. Boydstun v. Hackney Land Credit Co., 145 Minn. 392, 177 N. W. 779.

1139. Application of general principles of agency—(42) James E. Carlson, Inc. v. Babler, 144 Minn. 125, 174 N. W. 824.

(44) Jones v. Blair, 137 Minn. 306, 163 N. W. 523.

1141. Exclusive agency—(47) See L. R. A. 1917E, 1040 (mutuality and validity of contract); § 1152.

1142. Powers—The authority of a real estate broker or agent to bind his principal by a contract of sale should be clearly and unequivocally

appear before the latter can be held either to an action for damages or specific performance. LaPlant v. Loveland, 142 Minn. 89, 170 N. W. 920.

The general rule is that an agent or broker, authorized to find a purchaser or negotiate a sale at a named price, lacks the power to make a contract binding the principal. The wording of the authority to the agent, considered in the light of the surrounding circumstances, did not grant the power to make the contract of sale for defendant. LaPlant v. Loveland, 142 Minn. 89, 170 N. W. 920.

(49) LaPlant v. Loveland, 142 Minn. 89, 170 N. W. 920. See Jones v. Blair, 137 Minn. 306, 163 N. W. 523.

(53) See Jones v. Blair, 137 Minn. 306, 163 N. W. 523.

1144. Cannot act for himself except by consent—An agent may recover compensation on a sale to himself if the parties, with full knowledge of the facts, so agree. Edmundson v. Phenix, 146 Minn. 331, 178 N. W. 893.

1145. Fraud of broker—(58) Jones v. Blair, 137 Minn. 306, 163 N. W. 523 (broker converted purchase money); Snyder v. Samuelson, 140 Minn. 57, 167 N. W. 287 (fraud of broker in procuring contract from purchasers for a commission on a resale of the property—duress—want of consideration).

1146. Acting for both parties—If the extent of the broker's agency is to bring the contracting parties together, and if after doing so he stands indifferent between them and permits them to make their own bargain, he is termed a middleman. James E. Carlson, Inc. v. Babler, 144 Minn. 125, 174 N. W. 824.

While the negotiations for exchange were pending, plaintiff entered into negotiations with the other party to the exchange, to take over the property which he was to acquire. Plaintiff's evidence is not explicit as to whether defendant was advised of this. No defence predicated on bad faith of plaintiff was pleaded. Plaintiff was not a mere middleman. He negotiated for both sides. A broker negotiating for both sides owes to each the same good faith that he would have owed to either had he acted for him alone. Private negotiations with one party will defeat the broker's right to compensation from the other if the facts are concealed. But where no such defence is pleaded or litigated, the court will not set aside a verdict for the broker on this ground, unless it is clear as a matter of law that the broker was guilty of bad faith. On the evidence in this case, the court cannot so hold. James E. Carlson, Inc. v. Babler, 144 Minn. 125, 174 N. W. 824.

The contract between the seller and the broker may provide that the purchaser shall pay the commission of the broker. Segal v. Greenberg, 148 Minn. —, 180 N. W. 1000.

(59) See Holbert-Haagensen Co. v. Kicher, 148 Minn. —, 180 N. W. 917; 33 Harv. L. Rev. 976 (secret agreement to pool commissions).

(61) James E. Carlson, Inc. v. Babler, 144 Minn. 125, 174 N. W. 824.

1147. Commission—When earned—In general—A broker presented a second broker to the owner to whom the owner sold a part of the land and through whose efforts the owner sold the remainder to another person. Held, that the first broker was entitled to a commission on the sale to the second broker but not on the sale of the remainder of the land sold through the efforts of the second broker. Anderson v. Upper Cuyuna Land Co., 132 Minn. 382, 157 N. W. 581.

A contract by which the compensation of a real estate broker for effecting a sale of land is limited to the excess of the purchase price over and above a net price to the owner imposes no personal liability upon the owner, where the purchaser presented by the broker is unable to perform the contract of purchase. Where the broker's commission is so limited, the fact that the owner upon presentation of a purchaser enters into a contract of sale with him, does not estop the owner from showing when sued for the commission that the purchaser was irresponsible, unable to perform, and for that reason that the contract of sale was canceled by mutual consent. Martinson v. Hensler, 132 Minn. 437, 157 N. W. 714. See 20 L. R. A. (N. S.) 168.

The contract may provide that the broker is not entitled to a commission until the purchaser has made his first payment. Thompson v. Davidson, 136 Minn. 368, 162 N. W. 458.

The evidence sustains the finding of the jury that the plaintiff's services in securing an exchange of lands were performed under a contract with the defendant contemplating compensation in the event of a successful result and not as a mere voluntary or friendly service nor under an agreement for a specific sum based on the exchange value of the defendant's property. Grose v. Koller, 139 Minn. 92, 165 N. W. 483.

(62) Edmundson v. Phenix, 146 Minn. 331, 178 N. W. 893.

(63) Snider v. Lyons, 133 Minn. 68, 157 N. W. 1002; Thompson v. Davidson, 136 Minn. 368, 162 N. W. 458; Alden v. Sacramento Suburban Fruit Lands Co., 137 Minn., 161, 163 N. W. 133; Appleby v. Dysinger, 137 Minn. 382, 163 N. W. 739; Matloch v. Jerabek, 138 Minn. 128, 164 N. W. 587; Thaden v. Bagan, 139 Minn. 46, 165 N. W. 864; Grose v. Koller, 139 Minn. 92, 165 N. W. 483; Hatfield v. Holquist, 139 Minn. 513, 166 N. W. 1068; Snyder v. Samuelson, 140 Minn. 57, 167 N. W. 287; Allen v. Torbert, 140 Minn. 195, 167 N. W. 1033; Mooney v. Burgess, 142 Minn. 406, 172 N. W. 308; McRae v. Feigh, 143 Minn. 241, 173 N. W. 655; Boydstun v. Hackney Land Credit Co., 145 Minn. 392, 177 N. W. 779; Segal v. Greenberg, 148 Minn. —, 180 N. W. 1000; Barr v. Olson, 147 Minn. —, 179 N. W. 563; Confer Bros. v. Colbrath, — Minn. —, 183 N. W. 524; Wetmore v. Hudson, — Minn. —, 183 N. W. 672; Homan v. Barber, — Minn. —, 184 N. W. 19.

(64) Kamper v. Hunter Land Co., 146 Minn. 337, 178 N. W. 747; Edmundson v. Phenix, 146 Minn. 331, 178 N. W. 893.

(68) Nokleby v. Docken, 134 Minn. 318, 159 N. W. 757; Meyer v. Keating, 135 Minn. 25, 159 N. W. 1091; Horan v. Stevens, 135 Minn. 43, 159 N. W. 1085; Matloch v. Jerabek, 138 Minn. 128, 164 N. W. 587.

See Martinson v. Hensler, 132 Minn. 437, 157 N. W. 714 (purchaser unable to perform); Thompson v. Davidson, 136 Minn. 368, 162 N. W. 458.

(69) Appleby v. Dysinger, 137 Minn. 382, 163 N. W. 739; Grose v. Koller, 139 Minn. 92, 165 N. W. 483; White v. Erickson, 141 Minn. 141, 169 N. W. 535. See Thompson v. Davidson, 136 Minn. 368, 162 N. W. 458.

1149. Broker must be procuring cause of sale—When the broker's contract is to procure a purchaser and not to negotiate a sale, it is not necessary to prove that the purchaser procured by him was induced to buy because of his efforts or representations. Matloch v. Jerabek, 138 Minn. 128, 162 N. W. 587.

(74) Ruppert v. Muelling, 132 Minn. 33, 155, 155 N. W. 1039; Barr v. Olson, 147 Minn. 49, 179 N. W. 563.

1151. Variation of terms—A stipulation in the proposed contract of sale that the purchasers may make deferred payments "on or before" a given date was not inconsistent with the agency contract. A stipulation that defendant should furnish an abstract of title is not sufficiently important to affect the validity of the transaction. Edmundson v. Phenix, 146 Minn. 331, 178 N. W. 893.

Where a broker agreed to secure a lessee to operate a mine and a lessee was procured by him and a lease executed by the owner, it was held that the owner could not refuse to pay the agreed commission on the ground that the lease contained certain terms not expressly specified in his agreement with the broker at the time it was first made. McRae v. Feigh, 143 Minn. 241, 173 N. W. 655.

(76) Edmundson v. Phenix, 146 Minn. 331, 178 N. W. 893.

(78) McRae v. Feigh, 143 Minn. 241, 173 N. W. 655.

1152. Sale by owner—In consideration of plaintiff's efforts to sell certain real estate, defendant gave plaintiff the exclusive right to sell it for a period of thirty days and agreed to pay plaintiff a specified commission upon any sale made while the contract remained in force whether made by plaintiff or defendant. Plaintiff accepted the employment by advertising the property and taking prospective purchasers to examine it. Defendant sold the property himself within the thirty days. Held, that plaintiff was entitled to recover the stipulated commission. Confer Bros. v. Colbrath, — Minn. —, 183 N. W. 524.

Where a real estate broker has no exclusive right of sale, the owner of the land is not precluded from the right of sale to any person who may present himself, and, in case the sale is made before the broker presents a purchaser, is not liable to the broker for a commission on a sale subsequently made by him. The evidence sustains the verdict of the jury to the effect that the sale made by the broker was reported to the landowner prior to the sale by him and rejected without cause. Peters v. Reubenhagen, — Minn. —, 184 N. W. 16.

(81) Aluminum Products Co. v. Anderson, 138 Minn. 142, 164 N. W.

663; Peters v. Ruebenhagen, — Minn. —, 184 N. W. 16. See 10 A. L. R. 814.

(82) Confer Bros. v. Colbrath, — Minn. —, 183 N. W. 524.

1153. Sale defeated by owner—Defective title—The plaintiff has the burden of alleging and proving that non-performance was due to the fault of defendant. Appleby v. Dysinger, 137 Minn. 382, 163 N. W. 739.

(87) Wessel v. Cook, 132 Minn. 442, 157 N. W. 705.

(88) Nokleby v. Docken, 134 Minn. 318, 159 N. W. 757. See Allen v. Torbert, 140 Minn. 195, 167 N. W. 1033.

1155. Amount of compensation—The customary rate may be recovered in the absence of a specific agreement. Matlock v. Jerabek, 138 Minn. 128, 164 N. W. 587.

An agency contract for the sale of land provided that the agent should receive half of the proceeds over $100 an acre, "cash or trade." The land was traded. Held, the value of the land received forms the basis for figuring the agent's commission. The court erred in excluding evidence of the value of the land received. There is testimony that the principal's land was "valued at" $125 an acre, but no evidence that the parties balanced accounts on the basis of a cash value of either piece of land. It was error to instruct the jury that, if the principal's land was figured in or valued at $125 an acre, that price determined the amount of the commission. Doty v. Struble, 140 Minn. 478, 168 N. W. 551.

If the principal wrongfully terminates the contract of employment the broker may recover the reasonable value of services rendered. Boydstun v. Hackney Land Credit Co., 145 Minn. 392, 177 N. W. 779.

A contract between a real estate broker and a purchaser of certain property by which the matter of the broker's compensation "was left entirely" with the purchaser held to entitle the broker to the reasonable value of his services, and not to vest in the purchaser the right to refuse payment of any compensation at all. F. R. Stocker Realty Co. v. Porter, — Minn. —, 182 N. W. 993.

(92) See Doty v. Struble, 140 Minn. 478, 168 N. W. 551.

(93) F. R. Stocker Realty Co. v. Porter, — Minn. —, 182 N. W. 993.

1158. Employment of several brokers—Where two brokers are employed independently and each performs his contract, each is entitled to compensation, and the burden of the defence against a possible double liability rests on the owner of the land. Alton v. Peters & Merritt, 145 Minn. 426, 177 N. W. 770.

Under the findings of the court, which are sustained by the evidence, there was no consideration for the defendant's promise to divide a real estate commission with the plaintiff. Confer Bros., Inc. v. Gleason, — Minn. —, 181 N. W. 917.

(97) Wetmore v. Hudson, — Minn. —, 183 N. W. 672. See Anderson v. Upper Cuyuna Land Co., 132 Minn. 382, 157 N. W. 581.

(98) Wetmore v. Hudson, — Minn. —, 183 N. W. 672. See Esterly-Hoppin Co. v. Burns, 135 Minn. 1, 159 N. W. 1069; Segel v. Greenberg, — Minn. —, 180 N. W. 1000.

1160. Revocation and termination of authority—Certain correspondence between the owner of the land and a land agent construed, and held, not to create an agency for an indefinite term. The price quoted in January in contemplation of a present sale was not an authority to the agent to sell at the same price near the last of May. Moore v. Bentson, 147 Minn. 72, 179 N. W. 560.

Whether appellant's authority was revoked by a sale made through another broker before appellant produced a purchaser was properly submitted to the jury. Wetmore v. Hudson, — Minn. —, 183 N. W. 672.

(1) Wetmore v. Hudson, — Minn. —, 183 N. W. 672.

1161. Action for commission—Pleading—Evidence—Admissibility and sufficiency—Plaintiff and defendants agreed that the former should receive a cash commission in case he procured a purchaser for certain lands owned by defendants at a price and upon terms satisfactory to them. Claiming that he procured such a purchaser, that thereafter he agreed to take and did take as his commission stock in a corporation instead of cash, that defendants were guilty of fraud that entitled him to rescind this transaction, and that he did so rescind, plaintiff brought this action to recover the cash commission under the original agreement. It is held: Plaintiff must prevail, if at all, on the theory of his complaint. No issues other than those there presented were litigated by consent. To recover on the original agreement it was necessary for plaintiff to establish his right to rescind the transaction in which he agreed to and did take stock instead of a cash commission, and that he had earned the cash commission originally agreed upon. The evidence sustains a finding to the effect that the original agreement was abrogated and the agreement to take stock substituted therefor before plaintiff procured a purchaser, and that he never earned the cash commission agreed upon. If he has any remedy it is not that sought in this action, and cannot be had herein, under the pleadings and evidence. Snider v. Lyons, 133 Minn. 68, 157 N. W. 1002.

(5) Snider v. Lyons, 133 Minn. 68, 157 N. W. 1002 (complaint drafted on the theory that plaintiff had rescinded a substituted contract for fraud and was entitled to recover the commission stipulated in the original contract—held, that plaintiff must recover on that theory, if at all, no issues having been tried by consent); McRae v. Feigh, 143 Minn. 241, 173 N. W. 655 (variance between contract alleged and contract proved held not fatal); James E. Carlson, Inc. v. Babler, 144 Minn. 125, 174 N. W. 824 (complaint on quantum meruit—amendment setting up express contract—complaint did not contain an admission of the claim sued on—fraud of plaintiff not alleged not provable); Boydstun v. Hackney Land Credit Co., 145 Minn. 392, 177 N. W. 779 (common count in indebitatus assumpsit sufficient—recovery may be had thereunder for agreed price under a completed contract, or for the reasonable value of services in the performance of an entire contract the completion of which is prevented by defendant); Holbert-Haagensen Co. v. Kicher, 148 Minn. —, 180 N. W. 917 (answer a general denial—defence that broker acted for both

parties not admissible); Homan v. Barber, — Minn. —, 184 N. W. 19 (error to order judgment for plaintiff on the pleadings).

(6) Wessel v. Cook, 132 Minn. 442, 157 N. W. 705 (parol evidence to supply omissions in written contract); Clabots v. Ballweber, 133 Minn. 400, 158 N. W. 621 (book accounts of defendants held inadmissible against plaintiff to prove that transaction involved was with another person instead of with plaintiff); Nockleby v. Docken, 134 Minn. 318, 159 N. W. 757 (exclusion of record in action by purchaser against defendant for breach of contract for sale of the land held proper); Meyer v. Keating, 135 Minn. 25, 159 N. W. 1091 (no error in admitting oral evidence of modification of contract which was partially carried out as it was restricted by the charge to its possible bearing on the purchaser's ability to perform); Doty v. Struble, 140 Minn. 478, 168 N. W. 551 (value of land admissible—stipulation between vendor and vendee as to value of land received by broker's client admissible); Mooney v. Burgess, 142 Minn. 406, 172 N. W. 308 (letter written by plaintiff to defendant held admissible—admission of letter having little or no bearing on the issues held not prejudicial); Edmundson v. Phenix, 146 Minn. 331, 178 N. W. 893 (letter written to defendant by a stranger on behalf of plaintiff, communicating the fact and terms of sale, admissible—fact that defendant later sold the land receiving a smaller payment down admissible).

(7) Tanner v. Joslyn, 132 Minn. 1, 155 N. W 762; Ruppert v. Muelling, 132 Minn. 33, 155 N. W. 1039; Anderson v. Upper Cuyuna Land Co., 132 Minn. 382, 157 N. W. 581; Wessel v. Cook, 132 Minn. 442, 157 N. W. 705; Snider v. Lyons, 133 Minn. 68, 157 N. W. 1002; Clabots v. Ballweber, 133 Minn. 400, 158 N. W. 621; Nokleby v. Docken, 134 Minn. 318, 159 N. W. 757 (evidence that plaintiff had earned commission conclusive—verdict for plaintiff properly directed); Meyer v. Keating, 135 Minn. 25, 159 N. W. 1091; Horan v. Stevens, 135 Minn. 43, 159 N. W. 1085; Morrow v. Tourtellotte, 135 Minn. 248, 160 N. W. 665; Alden v. Sacramento Suburban Fruit Lands Co., 137 Minn. 161, 163 N. W. 133; Matloch v. Jerabek, 138 Minn. 128, 164 N. W. 587; Thaden v. Bagin, 139 Minn. 46, 165 N. W. 864; Grose v. Koller, 139 Minn. 92, 165 N. W. 483; Hatfield v. Holquist, 139 Minn. 513, 166 N. W. 1068; Allen v. Torbert, 140 Minn. 195, 167 N. W. 1033; Mooney v. Burgess, 142 Minn. 406, 172 N. W. 308; McRae v. Feigh, 143 Minn. 241, 173 N. W. 655; Boydstun v. Hackney Land Credit Co., 145 Minn. 392, 177 N. W. 779; Barr v. Olson, 147 Minn. 49, 179 N. W. 563; Edmundson v. Phenix, 146 Minn. 331, 178 N. W. 893; Segal v. Greenberg, 148 Minn. —, 180 N. W. 1000 (directed verdict for defendant sustained); Wetmore v. Hudson, — Minn. —, 183 N. W. 672.

BUDGET SYSTEM—See State, § 8848a.

BUILDING AND LOAN ASSOCIATIONS

1169. Exemption from usury laws—Assuming that a foreign building and loan association, in order to obtain a valid mortgage on lands in this state, must first comply with the Somerville law, certain curative acts, validating contracts made before compliance with the law, effectively legalized a loan by such an association to which they applied. Jenkins v. Union Savings Assn., 132 Minn. 19, 155 N. W. 765.

BUILDING RESTRICTIONS—See Covenants, § 2393; Deeds, § 2676; Municipal Corporations, § 6525.

CANCELATION OF INSTRUMENTS

1181. Discretion of court—(54) Haataja v. Saarenpaa, 118 Minn. 255, 136 N. W. 871; Walsh v. Walsh, 144 Minn. 182, 174 N. W. 835.

1182. Adequate remedy at law—There may be an adequate remedy by simply reducing the amount of compensation in case of a fraud in a sale. Straabe v. Jackson, 134 Minn. 179, 158 N. W. 915.

An executory contract for the sale of realty may be canceled though the facts justifying it might be set up as a defence to an action for the specific performance of the contract. Ziebarth v. Donaldson, 141 Minn. 70, 169 N. W. 253.

(55) See Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736.

1184. As a whole—Upon the cancelation of a deed a contract for the execution of the deed remains in force, if not otherwise provided. Staring Co. v. Rossman, 132 Minn. 209, 156 N. W. 120.

(58) See Gross Iron Ore Co. v. Paulle, 143 Minn. 48, 172 N. W. 907.

1185a. For incompetency of parties—A contract may be set aside for incompetency of a party, but to justify such relief the evidence must be clear and convincing. Carlson v. Elwell, 128 Minn. 440, 151 N. W. 188; Wheeler v. McKeon, 137 Minn. 92, 162 N. W. 1070.

Intoxication as a ground for relief. 6 A. L. R. 331.

1186. For breach of contract—Where one gives a deed in part performance of a larger oral executory contract which the grantee fails to perform in a substantial manner, the grantor is entitled to a rescission and to a cancelation of the deed. Staring Co. v. Rossman, 132 Minn. 209, 156 N. W. 120.

As a general rule a court of equity will not entertain an action to cancel a contract for breach of a condition subsequent, but will leave the parties to their remedy at law. National Council v. Scheiber, 141 Minn. 41, 169 N. W. 272.

(60) Model Clothing House v. Dickinson, 146 Minn. 367, 178 N. W. 957.

See §§ 1808, 2677, 10087, 10096.

1187. Want or failure of consideration—Equity will not set aside an executed contract or transfer on the mere ground of want of consideration. Copley v. Hyland, 46 Minn. 205, 48 N. W. 777; Peavey v. Wells, 136 Minn. 180, 161 N. W. 508.

(63) See §§ 1809. 2677.

See L. R. A. 1916D, 382 (cancelation of deed for inadequacy of consideration).

1188. For fraud—All contracts and deeds are subject to rescission or cancelation for fraud. See Digest, §§ 1810, 1815, 2677, 3834, 10088, 10092, 10097.

Cancelation will not be granted where there has been a ratification after knowledge of the fraud. See §§ 1810, 1815, 10097.

An action will lie without proof of damage. Straabe v. Jackson, 134 Minn. 179, 158 N. W. 915. See § 3828.

In an action for rescission or cancelation the question is not whether the representations would deceive the average man. It is a question whether they were of such a character and were made under such circumstances that they were reasonably calculated to deceive the plaintiff, and the diligence and prudence that is required of the plaintiff is not necessarily such as an ordinarily prudent person would exercise, but such as may reasonably be expected of a person of the intelligence and character of the person seeking relief. Kempf v. Ranger, 132 Minn. 64, 155 N. W. 1059.

An executory contract for the sale of realty may be canceled on the ground that the vendee fraudulently entered into it with knowledge that the agent of the vendor, who executed it under a power of attorney, violated his instructions. Ziebarth v. Donaldson, 141 Minn. 70, 169 N. W. 253.

An instrument fraudulently executed by an officer of a corporation may be canceled at the instance of the corporation. Gross Iron Ore Co. v. Paulle, 143 Minn. 48, 172 N. W. 907.

A defrauded party by offering to rescind does not thereby forego his equitable remedy of rescission. He still has his election to sue in equity for rescission or at law for damages. And if he sues for rescission, the court is not divested of jurisdiction to proceed if it develops that restitution in kind cannot be had because, prior to the offer to rescind, the other party to the transaction had disposed of the property obtained to good-faith purchasers without notice of fraud. Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736.

A deed wrongfully delivered contrary to the terms of an escrow may be canceled. Bergstrom v. Pickett, 148 Minn. —, 181 N. W. 343. See § 3153.

Equity will sometimes cancel an instrument for abuse of confidence or constructive fraud. See § 3833.

(64) Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736; McLean v. Meyer, 148 Minn. —, 181 N. W. 917 (quitclaim deeds from ignorant heirs canceled). See Klinkert v. Streissguth, 145 Minn. 336, 177 N. W. 363.

(66) Jacobson v. Chicago etc. Ry. Co., 136 Minn. 181, 156 N. W. 251. See § 8374.

(67) Peavey v. Wells, 139 Minn. 174, 165 N. W. 1063; Axford v. Western Syndicate Invest. Co., 141 Minn. 412, 168 N. W. 97, 170 N. W. 587.

(68) See Malchow v. Malchow, 143 Minn. 53, 173 N. W. 915.

1189. For innocent misrepresentations—Rescission or cancelation may be granted for an innocent misrepresentation of a material fact. Pennington v. Roberge, 122 Minn. 295, 142 N. W. 710; Kempf v. Ranger, 132 Minn. 64, 68, 155 N. W. 1059; Fawkes v. Knapp, 138 Minn. 384, 165 N. W. 236. See § 3826.

1191. For undue influence—(73) Thill v. Friermuth, 132 Minn. 242, 156 N. W. 260; Malley v. Quinn, 132 Minn. 254, 156 N. W. 263; Thill v. Friermuth, 139 Minn. 78, 165 N. W. 490; Merchants Trust & Savings Bank v. Schudel, 141 Minn. 250, 169 N. W. 795; Manchester v. Manchester, 131 Minn. 487, 154 N. W. 1102 (evidence held insufficient to justify finding of undue influence). See §§ 7311, 9949.

1192. For mistake—Where the parties have entered upon the performance of a contract and it would be difficult to put them in statu quo, cancelation will rarely be granted for a unilateral mistake. St. Nicholas Church v. Kropp, 135 Minn. 115, 160 N. W. 500

It was found that through an honest mistake, without being negligent, the intervener made a bid for the erection of a church for $2,350 less than intended; that plaintiff accepted the bid without knowledge of the mistake; that the next day, and before plaintiff had altered its position in any respect, it was notified of the mistake and informed that intervener would not enter the contemplated written contract to erect the church; and that thereupon plaintiff accepted a belated bid of less amount than intervener intended to make his, and much less than the two bids opened at the time intervener's was accepted under which the church was erected. Held, that the mistake, though unilateral, was so great that it must be considered fundamental, and the minds of the parties did not meet; that the one who accepted the bid did not change its position in the slighest because of its acceptance prior to notice of the mistake, and could not be prejudiced by a cancelation of the bid; hence equity should cancel the same and restore to the bidder the certified check accompanying the bid. St. Nicholas Church v. Kropp, 135 Minn. 115, 160 N. W. 500. See 30 Harv. L. Rev. 637.

(76) St. Nicholas Church v. Kropp, 135 Minn. 115, 160 N. W. 500. See 30 Harv. L. Rev. 637.

(77) Costello v. Sykes, 143 Minn. 109, 172 N. W. 907. See Becthold v. King, 134 Minn. 105, 158 N. W. 910.

(80) St. Nicholas Church v. Kropp, 135 Minn. 115, 160 N. W. 500. See § 6124.

1193. Instrument liable to improper use—(81) See Bolfing v. Schoener, 144 Minn. 425, 175 N. W. 901.

1194. Void instruments—A mortgage may be canceled on the ground that it was given to secure a debt incurred in gambling. Bolfing v. Schoener, 144 Minn. 425, 175 N. W. 901.

(83) See Axford v. Western Syndicate Invest. Co., 141 Minn. 412, 168 N. W. 97, 170 N. W. 587.

1195. Intervening rights of third parties—(85) Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736.

1196. Laches—Limitation of actions—In an action to rescind a contract for the sale of stock in a corporation, where it appears that plaintiff continued her efforts to surrender the stock and recover the money paid therefor for a period of three years, though not in form amounting to a legal demand, held, that the testimony does not support a finding that plaintiff was guilty of laches. Ricker v. J. L. Owens Co., — Minn. —, 182 N. W. 960.

(86) Straabe v. Jackson, 134 Minn. 179, 158 N. W. 915; Ricker v. J. L. Owens Co., — Minn. —, 182 N. W. 960.

1199. Rescission and tender before suit—The fact that plaintiff has offered to rescind does not defeat a subsequent action for rescission. Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736.

(90) Bergstrom v. Pickett, 148 Minn. —, 181 N. W. 343.

1199a. Parties—Action to cancel a certified check given by plaintiff to a school district for bonds to be issued by it, to enjoin the district from cashing the check and the certifying bank from paying it. Held, that the bank was a proper but not necessary party. State v. District Court, — Minn. —, 182 N. W. 165.

1200. Pleading—A complaint held to state a cause of action for rescission and restitution based on fraud in the exchange of farms. Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736.

1202. Evidence—Sufficiency—A mere preponderance of the evidence is sufficient to justify the rescission of a contract for fraud. Martin v. Hill, 41 Minn. 337, 43 N. W. 337.

Evidence held not to justify a finding that a grantor in a deed did not know the contents of a deed when he signed it or that he was incompetent. Klinkert v. Streissguth, 145 Minn. 336, 177 N. W. 363.

(95) Malley v. Quinn, 132 Minn. 254, 156 N. W. 263 (evidence held not to show undue influence); Klinkert v. Streissguth, 145 Minn. 336, 177 N. W. 363; McClean v. Meyer, 148 Minn. —, 181 N. W. 917 (evidence held to justify findings of fraud in procuring quitclaim deeds from ignorant heirs). See Summit Mercantile Co. v. Daigle, 146 Minn. 218, 178 N. W. 588; §§ 1191, 9951a.

1202a. Offset for use and occupation—Evidence—The refusal of the trial court to find that defendant was the owner in fee of certain real property, and the further refusal to find that he was entitled to rent for the use and occupation thereof by plaintiff, held sustained by the evidence. Harney v. Harney, 139 Minn. 140, 165 N. W. 967.

1203. Judgment—Relief allowable—The judgment should be so moulded as to work out full justice to all the parties. See Thill v. Freiermuth, 132 Minn. 242, 156 N. W. 260.

In an action by an equitable owner to set aside a legal title the holder of the legal title may be required to convey it to the equitable owner on payment of the amount paid therefor, when such a requirement would be just under the circumstances. Krelwitz v. McDonald, 135 Minn. 408, 161 N. W. 156.

In an action by a corporation to cancel a note and mortgage executed by an officer of the corporation for his personal benefit, held, that defendant could not complain that the court imposed as a condition to the cancelation of the note and mortgage the payment to defendant of the amount of certain taxes paid by the officer for plaintiff. Gross Iron Ore Co. v. Paulle, 143 Minn. 48, 172 N. W. 907.

In setting aside a deed it is sometimes necessary to order an accounting between the parties. See Delasca v. Grimes, 144 Minn. 67, 174 N. W. 523.

When a court has once acquired jurisdiction of an action for rescission it is its duty to determine all the rights and obligations pertaining to the subject-matter and to grant full measure of relief, either legal or equitable, as the facts proved require. Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736.

In an action for rescission of an exchange of lands the court is not divested of jurisdiction to proceed if it develop that restitution in kind cannot be had because, prior to an offer to rescind, the other party to the transaction had disposed of the property obtained to bona fide purchasers. Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736.

Plaintiff was induced to trade farms with defendant through the latter's misrepresentations, and he sues for rescission. On the trial it appeared that before plaintiff discovered the fraud practiced upon him and before his offer to rescind, defendant had conveyed to innocent third parties the farm deeded to it pursuant to the agreement to trade. It is held that the measure of restitution is the value of the farm which plaintiff parted with at the time the trade was made, and not what defendant afterwards received on a sale thereof. Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736.

The court may mould the relief so as to work out justice between the parties in a practical manner. See Bergstrom v. Pickett, 148 Minn. —, 181 N. W. 343.

The claim that a defendant is entitled to specific performance cannot be made for the first time on appeal. Bergstrom v. Pickett, 148 Minn.—, 181 N. W. 343.

(96) Gross Iron Ore Co. v. Paulle, 143 Minn. 48, 172 N. W. 907. See § 10087.

(99) See Gunderson v. Halvorson, 140 Minn. 292, 168 N. W. 8; Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736; 30 Harv. L. Rev. 188.

CARRIERS

IN GENERAL

1204. Who are common carriers—A transfer company, carrying passengers and baggage to and from railroad trains is a common carrier. McQuat v. Cook's Taxicab & Transfer Co., 145 Minn. 210, 176 N. W. 763.

A taxicab company carrying passengers for hire as a business is a common carrier. McKellar v. Yellow Cab Co., 148 Minn. —, 181 N. W. 348.

(4) State v. District Court, 142 Minn. 410, 172 N. W. 310.

1205c. State rates—Distance tariff—Cashman act—The rates prescribed by chapter 232, Laws of 1907, were the lawful rates for transporting intrastate shipments from the time that act declared such rates to be in effect, notwithstanding the fact that the enforcement thereof had been enjoined for a time. Solum v. Northern Pacific Ry. Co., 133 Minn. 93, 157 N. W. 996; L. Christian & Co. v. Chicago etc. Ry. Co., 135 Minn. 45, 159 N. W. 1082.

A railroad corporation owned a majority of the stock of another railroad. Its stockholders owned nearly all of the remainder. So far as concerned the ultimate power of direction and control the officers of the two companies were substantially the same. The two roads connected and were operated as a continuous line. Their location was such that they were not competing lines. Each maintained a separate organization and its legal individuality. As respects shipments made over the two there was a single control and operation ultimately exercised by their common officers. It is held that for the purpose of establishing freight rates the two constituted one road or line and that the intrastate, continuous mileage rates fixed by the Railroad and Warehouse Commission pursuant to the distance tariff law, Laws 1913, c. 90 (Gen. St. 1913, §§ 4348–4357), applied, and that the commission was without authority to fix a joint rate under Laws 1913, c. 344 (G. S. 1913, §§ 4229, 4230). State v. Chicago & N. W. Ry. Co., 135 Minn. 413, 158 N. W. 627. See Minneapolis C. & C. Assn. v. Chicago etc. Ry. Co., 134 Minn. 169, 158 N. W. 817.

The distance tariff law was amended by Laws 1915, c. 367, so as to authorize the establishment of common rate points. St. Paul Association of Commerce v. Chicago etc. Ry. Co., 134 Minn. 217, 158 N. W. 982.

The Cashman Act does not apply to switching operations nor to movements from place to place within a city or district which constitutes a single shipping point. Traffic between Duluth station and the suburb of Fond du Lac in Duluth is held to be between places within a single shipping point, and to this traffic the act does not apply. Commercial Club v. Northern Pacific Ry. Co., 138 Minn. 449, 165 N. W. 270.

The distance tariff act of 1913 and an order made thereunder by the Railroad and Warehouse Commission, held applicable to traffic under a through traffic agreement between two independent connecting railroads, the effect of the agreement being to create a new and independent continuous line. State v. Chicago etc. Ry. Co., 139 Minn. 55, 165 N. W. 869.

A judgment declaring the distance tariff act of 1913 applicable to traffic under a through traffic agreement between two railroads, or requiring compliance with an order of the Railroad and Warehouse Commission applying such act, held not an interference with interstate commerce. State v. Chicago etc. Ry. Co., 139 Minn. 55, 165 N. W. 869.

A change in the tariffs of a railroad company, voluntarily made, reducing rates to all shippers on all commodities, at all stations in this state, becomes effective without obtaining the consent of the Railroad and Warehouse Commission in the manner provided by chapter 176, G. L. 1905 (G. S. 1913, §§ 4290–4297). After such a change has been made, the original rate cannot be restored without the consent of the commission after a hearing upon notice, a finding that the reinstatement of such rate will be a fair and reasonable change in rates, and an order or other action on the part of the commission sanctioning the change. National Elevator Co. v. Chicago etc. Ry. Co., 143 Minn. 162, 173 N. W. 418.

1205d. Discrimination in rates—Overcharges—Recovery—As between the seller and the purchaser of commodities transported to destination by a common carrier, overcharges for such transportation refunded by the carrier belong to the one who had borne the expense of such transportation. In the instant case plaintiff had borne such expense and is entitled to the amount refunded by the railway company. Jennison Bros. & Co. v. Dixon, 133 Minn. 268, 158 N. W. 398.

If more than legal rates have been exacted the right of recovery does not necessarily depend on statute. Bell Lumber Co. v. Great Northern Ry. Co., 135 Minn. 271, 160 N. W. 688.

If the validity of published interstate rates is not questioned the state courts have jurisdiction of an action to recover the amount of an alleged overcharge. Plaintiff, without questioning the validity of the published rate, sought to recover an alleged overcharge, but as the stipulated facts show that it paid the legal rate and no more, the action was properly dismissed, although the court erroneously based the dismissal upon the ground that it had no jurisdiction. Reliance Elevator Co. v. Chicago etc. Ry. Co., 139 Minn. 69, 165 N. W. 867.

As between the seller and the purchaser of goods transported by a common carrier, the one who bears the expense of transportation is entitled to the refund for overcharges. Houck v. Hubbard Milling Co., 140 Minn. 186, 167 N. W. 1038.

Where a carrier refunded to a consignee overcharges for freight, it was held that in view of the contract of sale between the consignor and the consignee that the former could not recover the refund from the latter as for money had and received. Houck v. Hubbard Milling Co., 140 Minn. 186, 167 N. W. 1038.

Chapter 195, Laws 1909 (G. S. 1913, §§ 4307–4309), authorizing the Attorney General to sue for recovery of excessive freight charged by railway corporations, has no application to a suit by a shipper. Big Diamond Milling Co. v. Chicago etc. Ry. Co., 142 Minn. 181, 171 N. W. 799.

See § 5624 (limitation of actions).

1205f. Interstate commerce—Rates—Schedules—Interstate Commerce Commission—The rates for interstate shipments named in a tariff published and filed as provided by the interstate commerce law are valid and binding until changed in the manner provided in that law. Original jurisdiction to determine whether such rates are unreasonable, or discriminatory, or infringe the law in some other respect, has been withdrawn from the courts and vested in the Interstate Commerce Commission. If the validity of the published rate is not questioned, the state court has jurisdiction of an action to recover the amount of an alleged overcharge. Reliance Elevator Co. v. Chicago etc. Ry. Co., 139 Minn. 69, 165 N. W. 867.

Defendant has a line of railway which extends from Linton, N. D., through Strasburg, N. D., to Minneapolis, Minn. Its published tariff filed with the Interstate Commerce Commission names 17 cents per 100 pounds as the rate for carrying wheat from Strasburg to Minneapolis, and 16 cents per 100 pounds as the rate for carrying wheat from Linton, the next more distant station, to Minneapolis. The tariff also provides: "Between stations on the C. M. & St. P. Ry. rates to and from intermediate stations will be the same as shown to or from the next more distant station to or from which rates are named." Held, that this provision applies only to shipping points to or from which a specific rate is not named and which are intermediate between stations to or from which a specific rate is named, and does not apply to Strasburg, and that the legal rate for shipments from Strasburg is the specific rate named therefor. Reliance Elevator Co. v. Chicago etc. Ry. Co., 139 Minn. 69, 165 N. W. 867.

Under the interstate commerce rule a carrier is required to file with the Commission its schedule of rates and tariffs, and to promulgate and distribute the same so that shippers may have access thereto and ascertain its terms. To establish and render operative a $5 rental for a refrigerator car in which potatoes are shipped from points in Minnesota to points in Oklahoma, over connecting lines, the tariff schedule must be filed and published at the point of origin. Schaff v. J. C. Famechon Co., 145 Minn. 108, 176 N. W. 197.

In cases arising under the Hepburn Act and its amendments the federal decisions are to the effect that, so far as concerns the matter of rates, or regulations or provisions which are in effect part of the rate, neither the intentional or accidental misstatement by a station agent as to the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. There is no such thing as actionable misrepresentation as to rates for every person is bound to know the lawful rate, and since the amount of

liability for loss of goods transported depends upon the rate, the liability incident to a particular rate attaches automatically to the contract. Duholm v. Chicago etc. Ry. Co., 146 Minn. 1, 177 N. W. 772.

The state courts have jurisdiction to construe a tariff filed with the Interstate Commerce Commission, even though it has not been officially construed by the commission. Merchants' Elevator Co. v. Great Northern Ry. Co., 147 Minn. 251, 180 N. W. 105.

The provisions of a railway tariff established under the Interstate Commerce Law must be complied with until changed or abrogated in the manner provided by that law, and no act of either shipper or carrier will release the other from a liability imposed by such tariff. Minneapolis etc. Ry. Co. v. Reeves Coal Co., 148 Minn. —, 181 N. W. 335.

1205h. Classification of commodities—When chapter 232, Laws 1907 (G. S. 1913, §§ 4298-4304), went into effect defendant's tariff on fence posts in carload lots was 75 per cent of its lumber rates. Said law fixed the lumber rate at less than defendant's schedule. It never obtained the consent of the Railroad and Warehouse Commission to a new schedule established by it, or to a change of the rules and regulations governing the rates on fence posts as they were when the law went into effect. Held, the legal rate for fence posts remained at 75 per cent of the legal maximum rate for lumber as fixed by said chapter. Bell Lumber Co. v. Great Northern Ry. Co., 135 Minn. 271, 160 N. W. 688.

Classification of commodities and rules based thereon are recognized and necessary factors in the establishment of proper rate schedules. In rate classifications the classes are few. Under rules and provisions related commodities may be placed in a class and take a percentage of the rate established for that class. Bell Lumber Co. v. Great Northern Ry. Co., 135 Minn. 271, 160 N. W. 688.

1205i. Error of agent in quoting rates—Liability of carrier—A railroad company, having transported a car of goods from a point without to a point within the state to which it was consigned, is not liable to a purchaser of the goods from the consignee for the error of its agent in quoting a tariff rate upon a connecting line for transporting the car to another point within the state, or for the erroneous statement that the car would go forward on a through tariff rate. The railroad company was under no legal duty or obligation correctly to quote such rate. W. G. Goodnow Coal Co. v. Northern Pacific Ry. Co., 136 Minn. 420, 162 N. W. 519.

1205j. Notice of rates—The tariff rates for the transportation of goods and property by common carriers are fixed and prescribed by law, of which all concerned are charged with notice. W. C. Goodnow Coal Co. v. Northern Pacific Ry. Co., 136 Minn. 420, 162 N. W. 519. See § 1205f.

A consignee is conclusively presumed to have knowledge of the published legal rates. Chicago etc. Ry. Co. v. Greenberg, 139 Minn. 428, 166 N. W. 1073. See Ann. Cas. 1918E, 458.

1205k. Reconsignment charges—Under the applicable tariffs, defendants were not entitled to exact a reconsignment charge, on shipments of grain held in cars on track at billed destination for inspection and disposition orders incident to such inspection, and after inspection reconsigned to another station. Merchants' Elevator Co. v. Great Northern Ry. Co., 147 Minn. 251, 180 N. W. 105.

1205l. Terminal switching charges—Discrimination—Both the Railroad and Warehouse Commission and the trial court found as a fact that the Minneapolis Eastern Railway is one of the terminal facilities of the "Milwaukee" and "Omaha" railway systems at Minneapolis. Held, that the fact that these companies furnished all the funds for constructing the Eastern and own all its capital stock and bonds, taken in connection with the restrictions imposed upon it by the contract under which it was constructed and the rights and powers secured to these companies by such contract and with the facts disclosed as to the manner in which it is managed, controlled and operated, is sufficient to sustain such finding. Imposing charges for switching shipments of grain to industries located upon the tracks of the Eastern, no charge being made for switching like shipments to industries located upon other industrial tracks of the "Milwaukee" and "Omaha," is an unjust discrimination against the industries served by the tracks of the Eastern. The charges for the line haul made by the "Milwaukee" and "Omaha" include the charge for switching to and from industries located upon their industrial tracks, and they cannot remove the discrimination against industries located upon the tracks of the Eastern by imposing an additional charge for switching over their other industrial tracks. Minneapolis C. & C. Assn. v. Chicago etc. Ry. Co., 134 Minn. 169, 158 N. W. 817, affirmed 247 U. S. 490.

The same principles have been applied to the Great Northern Railway Company and the Minneapolis Western Railway Company. Minneapolis C. & C. Assn. v. Great Northern Ry. Co., 137 Minn. 10, 162 N. W. 689, 163 N. W. 294.

A schedule of rates published and filed by a railroad company, providing for the absorption by the company of the switching charges of connecting carriers at the destination of shipments, where, under its schedules of rates theretofore published and filed, the shipper was required to pay such charges, is a change in an existing tariff, and not a "first instance tariff," within the meaning of chapter 176, G. L. 1905 (G. S. 1913, §§ 4290–4297). National Elevator Co. v. Chicago, etc. Ry. Co., 143 Minn. 162, 173 N. W. 418.

CARRIERS OF PASSENGERS

IN GENERAL

1206. Who are passengers—One who boards a railroad train at an unauthorized place and against the orders of the conductor is not a passenger and may be ejected. Carpenter v. Minneapolis etc. Traction Co., 133 Minn. 46, 157 N. W. 902.

A shipper riding with his goods in a box car with the consent or acquiescence of the carrier is a passenger and entitled to all the rights of a passenger on a freight train. A provision that a shipper shall ride in the caboose may be waived. Germ v. Chicago etc. Ry. Co., 133 Minn. 395, 158 N. W. 630.

Plaintiff had taken passage on one of defendant's passenger trains, paying his fare between certain points on the line. At an intermediate station during a short stop plaintiff left the train and proceeded to a restaurant a block and a half away for refreshments. When he retuned to the station he found that his train had departed. Held, that the relation of passenger and carrier ceased upon plaintiff's failure to return to the station in time to resume his journey upon the train, and that he had no right as a matter of law to continue the journey upon some other train without further payment of fare. He took passage upon a freight train without payment of fare, with the consent of the engineer, riding upon a flat car loaded with rock, from which he was thrown by a violent jerk of the train and injured. Held, that he was not a passenger while so riding upon the freight train. The engineer was without authority to accept him as a passenger, and he was in fact and law a trespasser thereon. The evidence did not require the submission of the case to the jury, upon the question of passenger and carrier, or of injury by wilful negligence. Tuder v. Oregon Short Line R. Co., 135 Minn. 294, 160 N. W. 785.

Status as street car passenger of one transferring from one car to another. 6 A. L. R. 1301.

(11) See Gruhl v. Northern Pacific Ry. Co., 140 Minn. 353, 168 N. W. 127 (caretaker's return ticket).

(14) See Tuder v. Oregon Short Line R. Co., 135 Minn. 294, 160 N. W. 785.

(18) Tuder v. Oregon Short Line R. Co., 135 Minn. 294, 160 N. W. 785. See 31 Harv. L. Rev. 306 (leaving train to obtain meal at station).

(20) Gruhl v. Northern Pacific Ry. Co., 140 Minn. 353, 168 N. W. 127 (caretaker returning home after accompanying shipment of livestock—using ticket issued to another caretaker—no intention to violate shipping contract—exchange of tickets made with knowledge and consent of the ticket agent issuing them); Marinos v. Chicago & N. W. Ry. Co., 142 Minn. 469, 172 N. W. 706 (possible employee of railroad company being carried on a gasolene car by a roadmaster to the place where he might be employed on construction work).

1207. **When relation of passenger terminates**—Where a passenger left a train to obtain a lunch and did not return in time to catch the train it was held that he ceased to be a passenger. Tuder v. Oregon Short Line R. Co., 135 Minn. 294, 160 N. W. 785. See 31 Harv. L. Rev. 306.

(23) Gillis v. Duluth Casualty Assn., 133 Minn. 238, 158 N. W. 252.

VARIOUS DUTIES

1212. **Duty to announce stations**—(30) Gruhl v. Northern Pacific Ry. Co., 140 Minn. 353, 168 N. W. 127.

1213. **Duty to furnish information**—(31) 8 A. L. R. 1183 (liability for misinformation as to running of trains).

1214. **Duty to furnish safe ingress and egress**—A carrier is bound to stop its train a reasonable time for passengers to board it, but is not bound to keep the train standing until they have a reasonable time to get seated, unless in the case of sick or infirm passengers. Blume v. Chicago etc. Ry. Co., 133 Minn. 348, 158 N. W. 418. See 42 L. R. A. 293; L. R. A. 1915, 797.

A recovery has been sustained where a carrier did not announce a station at which a passenger was to alight or take up his ticket. The passenger did not learn that the train had reached the station until the train was pulling out. He then hurried to the platform with his luggage. The brakeman then noticed him and stopped the train but would not back up to the station. The passenger got off and was injured in walking back by falling over some wires. Gruhl v. Northern Pacific Ry. Co., 140 Minn. 353, 168 N. W. 127.

1215. **Duty to furnish seats**—(38) See Oletzky v. Great Northern Ry. Co., 141 Minn. 218, 169 N. W. 715.

1215a. **Duty to keep aisles free of baggage**—Where defendant permitted baggage to remain in the aisle of a car, which was so crowded that many passengers were standing in the aisle, and a passenger making her way through the crowd fell over the baggage and was injured, and it does not appear that defendant was unable to place the baggage where it would not endanger passengers, the court cannot say that it conclusively appears that defendant was free from negligence, although the amount of travel on this day was so unprecedented that it could not have been foreseen or properly provided for. Oletzky v. Great Northern Ry. Co., 141 Minn. 218, 169 N. W. 715.

That a passenger in a street car falls over a sample case which another passenger has placed on the floor beside him does not, as a matter of law, establish the street car company's negligence; and the court's instruction that if the sample case was so placed and plaintiff fell over it she was entitled to damages, unless she was guilty of contributory negligence, was erroneous. Rittle v. St. Paul City Ry. Co., — Minn. —, 183 N. W. 146.

1218. Duty toward sick or infirm persons—Duty toward passengers taken sick en route. 34 Harv. L. Rev. 211.

(41) See Blume v. Chicago etc. Ry. Co., 133 Minn. 348, 158 N. W. 418.

TICKETS AND FARES

1223a. Limitations—Limitation of time on use. L. R. A. 1918A, 779.

1226. Authority of ticket agents—Evidence held not to show that a ticket agent had authority to direct a passenger who had been left by a train which he had left for a lunch to take a certain freight train. Tuder v. Oregon Short Line R. Co., 135 Minn. 294, 160 N. W. 785.

A ticket agent issued return tickets to two caretakers returning home after accompanying a shipment of livestock. The caretakers exchanged tickets in the presence and with the knowledge and consent of the agent. Held, that one of them riding on one of the exchanged tickets was not a trespasser but entitled to all the rights of a passenger, their being no intention to defraud the company or violate the special contract under which the tickets were issued. Gruhl v. Northern Pacific Ry. Co., 140 Minn. 353, 168 N. W. 127.

1227. Authority of conductors—Evidence held not to show any authority in a conductor of a freight train to accept a person as a passenger who had taken a position on a flat car loaded with crushed stone. Tuder v. Oregon Short Line R. Co., 135 Minn. 294, 160 N. W. 785.

(57) See Gruhl v. Northern Pacific Ry. Co., 140 Minn. 353, 168 N. W. 127.

1233. Stop-over privileges—(63) Tuder v. Oregon Short Line R. Co., 135 Minn. 294, 160 N. W. 785.

1233a. Caretaker's tickets—A caretaker's return ticket is not a gratuitous pass. The consideration therefor is found in the freight charges and other mutual benefits flowing from the shipping contract. Gruhl v. Northern Pacific Ry. Co., 140 Minn. 353, 168 N. W. 127. See § 1226.

1237. Transfer of tickets—(69) See Gruhl v. Northern Pacific Ry. Co., 140 Minn. 353, 168 N. W. 127 (transfer of caretaker's return ticket held not to render holder a trespasser on train).

BAGGAGE

1240. Definition—"Baggage" means such articles of necessity and convenience as are usually carried by passengers for their personal use. It does not include merchandise held for sale, but if the carrier knowingly accepts such merchandise as baggage its liability is the same as in case of other baggage. In this case the evidence sustains the finding of the jury that certain articles of merchandise kept for sale were accepted as baggage with notice of their character and use. Ferris v. Minneapolis & St. L. R. Co., 143 Minn. 90, 173 N. W. 178.

(74) See 34 Harv. L. Rev. 327.

1241. Checking—Check room in station—Carrier's liability for baggage checked in parcel room. 7 A. L. R. 1234.

A baggage check is not ordinarily a contract of carriage but a mere receipt. Ferris v. Minneapolis & St. L. R. Co., 143 Minn. 90, 173 N. W. 178.

1244. Passenger not on same train—The common-law liability probably applies where the baggage is carried on a train subsequent to the passenger's train. See 34 Harv. L. Rev. 326.

(79) See 34 Harv. L. Rev. 326.

1245. Drummer's samples—(80) See Ferris v. Minneapolis & St. L. R. Co., 143 Minn. 90, 173 N. W. 178.

1246. Liability for loss or damage—In interstate commerce the extent of liability is regulated by the federal statutes and the schedules filed with the Interstate Commerce Commission. The passenger is charged with notice of the schedules filed. See Dettis v. Western Union Tel. Co., 141 Minn. 361, 170 N. W. 334.

Acceptance and use of a ticket purporting to limit the liability of the carrier for baggage suffices to establish prima facie a valid agreement in accordance therewith. The mere failure of the passenger to read the ticket does not overcome the presumption of assent. New York Central etc. Ry. Co. v. Beaham, 242 U. S. 148.

A limitation on the baggage check does not limit the carrier's liability unless assented to by the passenger and there is a contract fairly and honestly entered into establishing the limitation. The limitation of the amount of the carrier's liability for loss is a matter of contract. A limitation in a schedule of rates published and filed as required by statute is not effective for the purpose if not assented to by the shipper. The burden of proof is upon the carrier to prove that such a contract was fairly and honestly made. Ferris v. Minneapolis & St. L. R. Co., 143 Minn. 90, 173 N. W. 178.

Limitation of liability under Carmack Amendment. Galveston etc. Ry. Co. v. Woodbury, 254 U. S. 357.

(81, 82) McQuat v. Cook's Taxicab & Transfer Co., 145 Minn. 210, 176 N. W. 763. See § 1323.

EJECTION OF PASSENGERS

1247. Duty of passenger to leave when ordered—Use of force—Evidence held to justify a finding that no greater force than was reasonably necessary was used. Carpenter v. Minneapolis etc. Traction Co., 133 Minn. 46, 157 N. W. 902.

1249. For non-payment of fare—(86) See 29 Harv. L. Rev. 801; 30 Id. 409.

1252. For violation of regulations—A carrier by railroad is not required to receive passengers at a place not a station nor a junction or transfer point where it stops at a crossing with another railroad. One

who gets on at such a place contrary to the orders of the trainmen may be ejected. Carpenter v. Minneapolis etc. Traction Co., 133 Minn. 46, 157 N. W. 902.

LIABILITY FOR INJURY TO PASSENGERS

1261. Care required of carriers—In general—A carrier of passengers on a freight train is not bound to warn them of the movement of the train in switching operations. Block v. Chicago etc. Ry. Co., 132 Minn. 118, 155 N. W. 1072.

Whether the exceptional liability applies to stations is an open question. Richey v. Minneapolis St. Ry. Co., 135 Minn. 54, 160 N. W. 188; Lentz v. Minneapolis etc. R. Co., 135 Minn. 310, 160 N. W. 794.

The high degree of care required of a carrier for the protection of passengers extends to an unusual place where passengers are invited to enter cars. Richey v. Minneapolis St. Ry. Co., 135 Minn. 54, 160 N. W. 188.

The exceptional liability extends to furnishing passengers a safe place in which to alight. Lentz v. Minneapolis etc. R. Co., 135 Minn. 310, 160 N. W. 794.

It is the duty of a common carrier by taxicab to exercise the highest degree of care for the safety of its passengers consistent with the proper conduct of its business; to have skilful and careful drivers, alert and watchful at all times to discover and avoid danger. McKellar v. Yellow Cab Co., 148 Minn. —, 181 N. W. 348. See 4 A. L. R. 1499.

(7, 9) McKellar v. Yellow Cab Co., 148 Minn. —, 181 N. W. 348.

(15) Rittle v. St. Paul City Ry. Co., — Minn. —, 183 N. W. 146.

(22) See § 1289.

1262. Limiting liability by contract—A stipulation that no claim for personal injury to a passenger shall be valid unless presented within four months is void. Gerin v. Chicago etc. Ry. Co., 133 Minn. 395, 158 N. W. 630.

Plaintiff rode in a car in which his household goods and horses were being shipped over defendant's road. The shipping contract provided that the liability of defendant for injuries to the person of the shipper should be limited to $500. It is held that this attempt of defendant to limit its liability for its negligence was void. Gerin v. Chicago etc. Ry. Co., 133 Minn. 395, 158 N. W. 630.

(23) New York Central R. Co. v. Mohney, 252 U. S. 152 (limitation of liability in a free pass inapplicable to wilful or wanton injury); Norfolk Southern R. Co. v. Chatman, 244 U. S. 276 (caretaker of live stock riding on a pass). See note, 7 A. L. R. 852.

1268. Injuries from unsafe premises—A recovery sustained where a passenger, upon alighting from a train, entered a wrong door of the station and was killed by falling to the basement. The accident occurred early in the morning before light. The door was usually guarded by a chain. The words "keep out" were printed on the door. The evidence

was meager and conflicting. The questions of negligence and contributory negligence were held for the jury. Falk v. Chicago & N. W. Ry. Co., 133 Minn. 41, 157 N. W. 904.

Whether the standard of care required in this connection is ordinary or reasonable care, or the exceptional care required for the protection of passengers, is an open question in this state. It is settled, however, that the exceptional care required for the protection of passengers applies to the place furnished for their alighting. Richey v. Minneapolis St. Ry. Co., 135 Minn. 54, 160 N. W. 188; Lentz v Minneapoils etc. R. Co., 135 Minn. 310, 160 N. W. 794.

Liability for casual or temporary condition of station or its approaches. 10 A. L. R. 259.

(32) See 10 A. L. R. 259.

(36) See Falk v. Chicago & N. W. Ry. Co., 133 Minn. 41, 157 N. W. 904.

1269. Injuries from defective cars—A hole in the step of a street car large enough to take in the heel of a shoe is a defect which may sustain a charge of negligence O'Leary v. St. Paul City Ry. Co., 135 Minn. 163, 164 N. W. 659.

1270. Overcrowding cars—See Oletzky v. Great Northern Ry. Co., 141 Minn. 218, 169 N. W. 715; 5 A. L. R. 1257.

1271. Passenger in improper place—In general—Objection that a passenger is riding in a box car instead of the caboose contrary to the terms of the contract of carriage may be waived. Gerin v. Chicago etc. Ry. Co., 133 Minn. 395, 158 N. W. 630.

A contract of carriage provided that the shipper should ride in the caboose when the train was in motion. The accident occurred when the train was not in motion. Held, that the stipulation was inapplicable though the shipper was riding in a box car with the goods. Gerin v. Chicago etc. Ry. Co., 133 Minn. 395, 158 N. W. 630.

1273. Injuries to passengers riding on platform or step of train—A verdict for the defendant sustained, where the plaintiff, a young woman, was injured, while on the front platform of a caboose, by catching her toe in the coupling as the train started backward in switching operations. Block v. Chicago etc. Ry. Co., 132 Minn. 118, 155 N. W. 1072.

Evidence held to justify a recovery where a passenger, while on a platform in the act of passing from one coach to another, slipped and fell down the steps, and, in trying to save himself, was thrown under a coach. Evans v. Chicago etc. Ry. Co., 133 Minn. 293, 158 N. W. 335.

1275. Injuries to passengers boarding trains—(49) Smith v. Chicago etc. Ry. Co., 134 Minn. 404, 159 N. W. 963 (passenger got off to get a lunch—train started before he expected—while boarding car in motion porter closed vestibule in his face and he was forced off the step and fell under the wheels).

1276. Injuries to passengers boarding street cars—Evidence held not to justify a recovery where plaintiff claimed to have been thrown to the floor of a car by a collision with another car before she had become seated. Eliason v. Minneapolis St. Ry. Co., 133 Minn. 392, 158 N. W. 622. See § 1282.

1277. Injuries to passengers alighting from trains—Plaintiff was a passenger on one of defendant's trains. When nearing his destination he went out on the platform, and, while waiting for the train to arrive at the depot, was told by one of defendant's brakemen that, "We won't stop at the depot," and, "you better get off here." The increasing darkness made it impossible for plaintiff accurately to determine the speed of the train. He relied chiefly on the statement of the trainman in deciding that it was safe to get off. Holding his suitcase in his hand, he alighted while the train was in motion, and was injured. Held, that the question of plaintiff's contributory negligence was one of fact and was properly submitted to the jury. Joseph v. Chicago etc. Ry. Co., 135 Minn. 239, 160 N. W. 689.

(57, 58) Joseph v. Chicago etc. Ry. Co., 135 Minn. 239, 160 N. W. 689.

1278. Injuries to passengers alighting from street cars—Where a car suddenly lurched back while a passenger was alighting it was held that the negligence of the carrier was a question for the jury. Benoe v. Duluth St. Ry. Co., 138 Minn. 155, 164 N. W. 662.

Plaintiff claimed that she was thrown when in the act of alighting from a street car by having the heel of her shoe caught in a hole in the step of the car. Held, that there was not sufficient evidence of a hole in the step large enough to take in the heel of a shoe and that a verdict for plaintiff could not be sustained. O'Leary v. St. Paul City Ry. Co., 138 Minn. 163, 164 N. W. 659.

(67) Larson v. Wisconsin R. L. & P. Co., 138 Minn. 158, 164 N. W. 666.

(68) Stevens v. St. Paul City Ry. Co, 140 Minn. 306, 167 N. W. 1045. See § 1282.

1280. Injuries to passengers putting head out of window or door—(76) See Gerin v. Chicago etc. Ry. Co., 133 Minn. 395, 158 N. W 630 (plaintiff opened door of box car and put his head out to see what was the trouble—car was bumped by another car and door shut catching his head—contributory negligence held for jury).

1282. Street car stopping at unsafe place—Where a street car company in the operation of one of its cars passes the regular stopping place for the acceptance and discharge of passengers, and brings it to a stop upon the private right of way of the company so that the gates at which persons enter the same open upon cattle guards, installed by the company to keep trespassers from its right of way, and which are covered with snow to such an extent as to render the place dangerous to one not familiar with the situation, the company owes to those it invites to enter the car at such place the high degree of care required by law of carriers for the protection of passengers. An instruction of the court that the com-

pany in such a situation was bound only by the rule of ordinary care was error, for which a new trial was properly granted. Richey v. Minneapolis St. Ry. Co., 135 Minn. 54, 160 N. W. 188.

In furnishing a safe place in which to alight the carrier owes the high degree of care imposed upon it for the safety of passengers. The defendant stopped its street car on a curve so that one alighting would step upon the guard rail. In alighting in the night time the plaintiff stepped upon the guard rail, the heel of her shoe caught in the groove, and she was thrown and injured. It is held a jury question whether the defendant was negligent in stopping at an unsafe place. Lentz v. Minneapolis etc. R. Co., 135 Minn. 310, 160 N. W. 794.

1283. Assault on passengers by employees—(79) Young v. St. Paul City Ry. Co., 142 Minn. 10, 170 N. W. 845 (unprovoked assault on passenger of street car by motorman—verdict for $2,500 held not excessive—latent pulmonary tuberculosis developed into activity by assault).

1284. Assault or other injury by fellow passenger—(80) L. R. A. 1918F, 555.

1289. Freight and mixed trains—The care required of a railroad company carrying passengers on a freight train is the highest degree of care consistent with the practical operation of such a train. Plaintiff, a passenger on a freight train, was injured while on the front platform of a caboose by catching her toe in the coupling as the train started backward as an incident to switching at a station. The train started with no unusual suddenness and at no unusual time. The evidence shows no negligence on the part of defendant. There was no obligation to give notice to passengers of movements of the train during switching operations at a station. The evidence is insufficient to establish a custom to give such warning. Plaintiff, in sitting or standing with her toe upon or about the bumpers or coupling between cars, was herself negligent as a matter of law. Block v. Chicago etc. Ry. Co., 132 Minn. 118, 155 N. W. 1072.

Evidence held to justify a recovery where the plaintiff was injured while riding in a box car with his household goods and livestock. While standing at a station the car was bumped by another car. Plaintiff opened the door and put his head out to see if the bumping could not be stopped. The car was again bumped and the door was thrown against his head. Gerin v. Chicago etc. Ry. Co., 133 Minn. 395, 158 N. W. 630.

(85) Block v. Chicago etc. Ry. Co., 132 Minn. 118, 155 N. W. 1072. See Gerin v. Chicago etc. Ry. Co., 133 Minn. 395, 158 N. W. 630.

1291a. Injuries to passengers of automobiles, taxicabs, etc.—Recovery against a carrier by taxicab sustained. Defendant's negligence, which resulted in the collision, consisted in driving its taxicab at an excessive rate of speed in the business part of the city, and in failing to yield the right of way at a street intersection to an approaching car which was coming from the right on the intersecting street. There was also a claim that the taxicab was on the wrong side of the street at the time of the collision. McKellar v. Yellow Cab Co., 148 Minn. —, 181 N. W. 348.

1292. Care required of passengers—A passenger is bound to exercise reasonable care for his own safety though he is justified in believing that the train will not be moved without warning him. Block v. Chicago etc. Ry. Co., 132 Minn. 118, 155 N. W. 1072.

A passenger of a taxicab has a right to assume that the carrier is familiar with the dangers to be apprehended and will use proper care, skill and diligence to avoid them, and owes him no duty to make suggestions or give warnings; and the failure of the passenger to protest against the manner in which he operates the taxicab or to give warning of the likelihood of a collision with another vehicle will not relieve him from liability for injury to the passenger resulting from his negligence. McKellar v. Yellow Cab Co., 148 Minn. —, 181 N. W. 348.

(88) Block v. Chicago etc. Ry. Co., 132 Minn. 118, 155 N. W. 1072 (passenger on freight train standing on platform of caboose—toe caught in coupling); Gerin v. Chicago etc. Ry. Co., 133 Minn. 395, 158 N. W. 630 (plaintiff riding in a box car with stock—opened doorway and put his head out to see what was the trouble—car was bumped by another car and door was thrown shut catching his head—contributory negligence held for jury).

1295. Proximate cause of injury—(93) Stevens v. St. Paul City Ry. Co., 140 Minn. 306, 167 N. W. 1045.

1296. Presumption of negligence and burden of proof—Presumption of negligence from throwing passenger from seat. Res ipsa loquitur. 5 A. L. R. 1034.

CARRIERS OF GOODS

IN GENERAL

1298. Discrimination in facilities—(1) See Minneapolis C. & C. Assn. v. Chicago etc. Ry. Co., 134 Minn. 169, 158 N. W. 817, affirmed, 247 U. S. 490; Gibbon Farmers Elevator Co. v Minneapolis & St. L. R. Co., 142 Minn. 57, 170 N. W. 706.

1300. Duty to furnish cars—It is the duty of a railway company as a common carrier to furnish suitable cars for the transportation of the particular class of goods intended to be shipped, and it is not relieved from such duty by reason of the fact that the consignor inspected the car before loading. De Vita v. Payne, — Minn. —, 184 N. W. 184.

(4) 10 A. L. R. 342 (car shortage as excuse).

1300a. Repair of cars by shipper—Recovery—Where a railroad company fails to provide the lumber for cooperage of cars, furnished by it for intrastate shipments of grain, which under a duly published tariff rule it has agreed to provide, and the shipper, with the approval of the company's local agent, procures the necessary lumber, he may recover the reasonable value thereof from the company. Our statute does not

require the submission of such a claim in the first instance to the Railroad and Warehouse Commission for adjustment. And the claim being for the very amount which the railroad company would have had to disburse had it or its agent observed the tariff rule mentioned, the recovery will not effect a discrimination or tend to destroy uniformity of rates. Gibbon Farmers Elevator Co. v. Minneapolis & St. L. R. Co., 142 Minn. 57, 170 N. W. 706.

1300b. Routing—Deviation—Damages—Where a railway company operates two lines of railroad between the same points and the freight rate over one line is less than over the other, if other conditions are reasonably equal, it is the duty of the company to transport shipments between those points over the line which will give the shipper the benefit of the cheaper rate. To justify carrying such shipments over the other line and thereby compel the shipper to pay the higher rate, the company must show that he selected such line, or that a proper regard for his interests required the shipment to be made over it. Defendant having both an intrastate line and an interstate line over either of which it could have transported plaintiff's shipments, and the lawful rate over the intrastate line being less than that over the interstate line, defendant was not relieved from the duty of transporting such shipments over the intrastate line, and thereby giving plaintiff an opportunity to secure the benefit of the intrastate rate, by the fact that the validity of such rate was in litigation and its enforcement enjoined at the time of the shipment and until the judgment of the United States Supreme Court established its validity and annulled such injunction. Where it was entirey feasible and practicable to transport such shipments over the intrastate line, the fact that owing to easier grades it was more economical to transport them over the interstate line did not justify defendant in disregarding plaintiff's right to have them transported over the intrastate line. Plaintiff's cause of action is based on the common law and is not affected by the federal statute regulating interstate commerce. Solum v. Northern Pacific Ry. Co., 133 Minn. 93, 157 N. W. 966, reversed, 247 U. S 477.

In the absence of shipping instructions it is ordinarily the duty of the carrier to ship by the cheaper route, but this duty is not absolute. The obligation of the carrier is to deal justly with the shipper, not to consider only his interests and to disregard wholly its own and those of the general public. If, all things considered, it would be unreasonable to ship by the cheaper route, the carrier is not compelled to do so. The duty is upon the carrier to select the cheaper route only if other conditions are reasonably equal. Resort to the more expensive route may be justified and the justification may rest either upon the peculiar circumstances of the particular case or upon a general practice. Northern Pacific Ry. Co. v. Solum, 247 U. S. 477, reversing Solum v. Northern Pacific Ry. Co., 133 Minn. 93, 157 N. W. 996.

An action will not lie against an interstate carrier for a refund pending proceedings before the Interstate Commerce Commission to determine

the propriety of the routing. Northern Pacific Ry. Co. v. Solum, 247 U. S. 477, reversing Solum v. Northern Pacific Ry. Co., 133 Minn. 93, 157 N. W. 996.

The rule that where a carrier has two routes, one intrastate and the other interstate, it is bound to select the cheaper one for the shipper, does not apply where the carrier does not have two direct routes between the place of shipment and destination. Comstock Farmers Elevator Co. v. Great Northern Ry. Co., 137 Minn. 470, 163 N. W. 280.

The fact that the carrier deviated from the route designated in the bill of lading did not relieve the shipper from demurrage charges imposed by the tariff for failure to unload within the prescribed time after arrival at destination. Although the carrier becomes an insurer of safe delivery if he deviates from the designated route without the consent of the shipper, he does not become liable for losses resulting from the inability of the shipper to accomplish some special purpose of which he had no knowledge. Where the deviation from the designated route prevented the shipper from diverting the shipment to a more favorable market, as he had intended to do, but the carrier had no knowledge of such intention, the loss of the more favorable market cannot be deemed to have been within the contemplation of the parties, as a consequence which might result from misrouting, and the carrier is not liable therefor. Minneapolis etc. Ry. Co., v. Reeves Coal Co., 148 Minn. —, 181 N. W. 335.

1301. Schedules of rates—Interstate commerce—(5) See § 1205f.

1303. Authority of agents—A freight agent and a claim agent held to have no authority to make admissions of negligence on the part of the carrier. H. L. Elliott Jobbing Co. v. Chicago etc. Ry. Co., 136 Minn. 138, 161 N. W. 390.

A local station agent held to have implied authority to agree with a shipper that the latter should furnish lumber at the expense of the company for coopering grain cars. Gibbon Farmers Elevator Co. v. Minneapolis & St. L. R. Co., 142 Minn. 57, 170 N. W. 706.

An agent of an interstate carrier cannot bind the carrier by a misstatement as to rates. Duholm v. Chicago etc. Ry. Co., 146 Minn. 1, 177 N. W. 772.

BILLS OF LADING

1304. Definition—(9) Duholm v. Chicago etc. Ry. Co., 146 Minn. 1, 177 N. W. 772.

1304a. Forms—Order and straight—The federal statutes prescribe two forms, an order bill of lading and a straight bill of lading. Whichever form is used the rate is the same. Duholm v. Chicago etc. Ry. Co., 146 Minn. 1, 177 N. W. 772.

1304b. Federal act—In 1916 Congress enacted a general Bills of Lading Act and this governs interstate shipments. The federal act is sub-

stantially the same as our statutes. Banik v. Chicago etc. Ry. Co., 147 Minn. 175, 179 N. W. 899. See § 1344a.

By virtue of the federal statutes the rights and obligations of the shipper and of the several carriers under a through bill of lading are to be measured and determined by the provisions of the bill of lading in so far as they are consistent with such statutes and with the established tariff regulations. Minneapolis etc. Ry. Co. v. Reeves Coal Co., 148 Minn. —, 181 N. W. 335.

1305. Nature—Symbol of property—Transfer—The rule that the form in which a bill of lading is taken is indicative of the title to the goods is not conclusive. Banik v. Chicago etc. Ry. Co., 147 Minn. 175, 179 N. W. 899.

1310. Fraud—Issued for goods not received—Chapter 414, Laws 1909 (G. S. 1913, §§ 4322–4329), making a bill of lading, acquired in good faith and for value, conclusive that the carrier issuing the same received the goods therein specified for transportation, has no application and no effect where the liability of the common carrier arises out of the issuance of an interstate bill of lading. Lowitz v. Chicago etc. Ry. Co., 136 Minn. 227, 161 N. W. 411.

It is a criminal offence for a carrier to issue a bill of lading for goods not actually received by it and at the time under its actual control. G. S. 1913, § 4325; National Elevator Co. v. Great Northern Ry. Co., 137 Minn. 217, 163 N. W. 164.

Plaintiff desired to ship goods interstate so that he might collect the price before delivery to the consignee. In effect, he agreed with defendant's agent on an order bill of lading, and the agent, in effect, represented that he had issued him such a bill of lading. In fact he issued a straight bill of lading and the goods were delivered to the consignee without payment. No question of rates being involved, rate statutes and rate decisions do not control. The case is one of fraud. A shipper may be relieved of the terms of his bill of lading for fraud. That the fraud was not wilful is not important. Defendant is liable for its agent's unqualified word of deception. The fact that plaintiff may have been negligent in not reading the contract is not a defence between the original parties. Duholm v. Chicago etc. Ry. Co., 146 Minn. 1, 177 N. W. 772.

1311. Parol evidence—Fraud or mistake may be shown by parol. Duholm v. Chicago etc. Ry. Co., 146 Minn. 1, 177 N. W. 772.

(19) Duholm v. Chicago, etc. Ry. Co. 146 Minn. 1, 177 N. W. 772.

1311a. Receipts showing weight of grain—Statute—It is provided by statute that every common carrier transporting grain shall give the shipper, on request, a receipt for the number of pounds of grain received from him, and shall deliver such quantity to the consignee or proper connecting carrier. G. S. 1913, § 4491; National Elevator Co. v. Great Northern Ry. Co., 137 Minn. 217, 163 N. W. 164.

Section 4491, G. S. 1913, providing that "every common carrier transporting grain shall give the shipper, on request, a receipt for the number of pounds of grain received from him, and shall deliver such quantity to the consignee * * * less loss from transportation, not to exceed sixty pounds to each car," construed as it must be with section 4492, which provides for a penalty for failure to deliver the proper quantity of grain, is held to be a penal provision only, and it does not in any manner affect the civil liability of the carrier. This civil liability remains as at common law, save as this may be modified by other provision of statute. National Elevator Co. v. Great Northern Ry. Co., 138 Minn. 100, 164 N. W. 79. See National Elevator Co. v. Great Northern Ry. Co., 140 Minn. 382, 168 N. W. 134.

LIMITATION OF LIABILITY

1312. Right to limit liability—The liability of a carrier is often affected by instructions given by the shipper as to the care of the goods in transit. Special agreements are often made as to heating or refrigerating cars. See Victor Produce Co. v. Chicago etc. Ry. Co., 135 Minn. 49, 160 N. W. 201.

Limitation of liability is not effected by the mere filing of schedules and regulations by a carrier in pursuance of our state statute. It can only be effected by a special contract. Ferris, v. Minneapolis & St. L. R. Co., 143 Minn. 90, 173 N. W. 178.

Contracts limiting the liability of carriers are in derogation of common law and are not favored. The burden of proof is on the carrier to prove that such a contract was fairly and honestly made. Ferris v. Minneapolis & St. L. R. Co., 143 Minn. 90, 173 N. W. 178.

(23) Treadway v. Western Union Tel. Co., 133 Minn. 252, 158 N. W. 247; Ferris v. Minneapolis & St. L. R. Co., 143 Minn. 90, 173 N. W. 178. See § 1246.

1313. Presumption of common-law liability—(25) Gerin v. Chicago etc. Ry. Co., 133 Minn. 395, 158 N. W. 630 (the limitation of liability must be pleaded and proved by the carrier as the common-law liability presumptively applies).

1315. Liability for negligence—A stipulation limiting the liability of a carrier for personal injury to a shipper to a certain amount is void. It is immaterial that the shipper pays no fare beyond the freight charges and is carried merely to care for the stock shipped. Gerin v. Chicago, etc. Ry. Co., 133 Minn. 395, 158 N. W. 630.

(27) See Quirk Milling Co. v. Minneapolis etc. Ry. Co., 98 Minn. 22, 107 N. W. 742; Millers Nat. Ins. Co. v. Minneapolis etc. Ry. Co., 132 Minn. 151, 156 N. W. 117.

1316. Sufficiency of contract—Where a transfer company received a traveler's trunk, to be transferred from one railroad station to another,

and delivered to the traveler a claim check therefor, upon which was printed a notice that in case of loss of the baggage its liability was limited to $100, such limitation is not binding upon the traveler, unless notice thereof is brought to her attention under circumstances from which her assent thereto is to be implied. Whether, under all the circumstances as disclosed by the evidence, the plaintiff, in accepting the appellant's claim check, had actual or constructive knowledge of the limitation of liability printed thereon, was a question for the jury. Stine v. Hines, 148 Minn. —, 181 N. W. 321.

(29) Stine v. Hines, 148 Minn. —, 181 N. W. 321. See Ferris v. Minneapolis & St. L. R. Co., 143 Minn. 90, 173 N. W. 178.

(31) See New York Central etc. Ry. Co. v. Beahan, 242 U. S. 148.

1317. Notice of claim—Waiver—A stipulation that no claim for personal injury to a shipper shall be valid unless presented within four month is void. Gerin v. Chicago etc. Ry. Co., 133 Minn. 395, 158 N. W. 630.

Where a carrier has filed a form of bill of lading for interstate shipments with the Interstate Commerce Commission and such form has been approved by the commission, a provision therein to the effect that no claim for loss or damage can be enforced unless notice of such claim was given in writing within the time prescribed therein cannot be waived by the carrier. An oral notice that the shipment has been lost followed by a "tracer" sent out by the carrier in an attempt to locate it is not a compliance with such provision. Carbic Manufacturing Co. v. Western Express Co., — Minn. —, 184 N. W. 35.

(32) Chesapeake & Ohio Ry. Co. v. McLaughlin, 242 U. S. 142; Erie Railroad Co. v. Stone, 244 U. S. 332; Southern Pacific Co. v. Stewart, 248 U. S. 446; Baltimore & Ohio R. Co. v. Leach, 249 U. S. 217. See 33 Harv. L. Rev. 311.

(36) 1 A. L. R. 900.

(37) See § 1356b.

1318. Agreed valuation—Cummins Amendment—Under the Cummins Amendment of August 9, 1916, to the Interstate Commerce Act (U. S. Comp. St. § 8604a), a common carrier of interstate commerce is required to obtain by order of the Interstate Commerce Commission, the right to adopt alternative rates based on declared values of the shipment, and, the carrier not having done so, the shipper is not restricted, in an action to recover for loss of the shipment, to such declared value. Western Assur. Co. v. Wells, Fargo & Co., 143 Minn. 60, 173 N. W. 402,

(38) Tredway v. Western Union Telegraph Co., 133 Minn. 252, 158 N. W. 247.

(40) Pennsylvania Railroad Co. v. Olivit Bros., 243 U. S. 574. See note, 5 A. L. R. 152.

CHARGES AND LIEN

1319a. Whose duty to pay freight—In the absence of a special contract, both consignor and consignee, who has accepted the goods, are

liable to the carrier for the freight. Chicago etc. Ry. Co. v. Greenberg, 139 Minn. 428, 166 N. W. 1073.

The consignor or shipper is primarily liable to the carrier for the freight. But if the consignee, the presumed owner, accepts an interstate shipment and pays part of the freight, the law implies an agreement on his part to pay the balance to the carrier, where, as here, the carrier, at the time of the delivery of the shipment, has no knowledge of the arrangement between the consignor and consignee as to the payment of the freight, and the consignor then is and ever since has been insolvent. In an action by a railroad company to recover a balance of the legal freight upon an interstate shipment from the consignee who had accepted the shipment, paid the amount of the freight erroneously understated in the bill of lading, and settled with the consignor upon that basis, the defence of estoppel is not available, for the consignee is conclusively presumed to have had knowledge of the published legal rate. Chicago etc. Ry. Co. v. Greenberg, 139 Minn. 428, 166 N. W. 1073. See Ann. Cas. 1918E, 458.

LIABILITY FOR LOSS OR INJURY

1323. Carrier an insurer at common law—The general rule is limited in the case of perishable goods. A carrier of such goods is not an insurer that they will be delivered in an undamaged condition. George B. Higgins & Co. v. Chicago, B. & Q. R. Co., 135 Minn. 402, 161 N. W. 145.

A common carrier transfer company, carrying under an independent contract a trunk coming on a train as a passenger's baggage, is responsible to the passenger for the loss of the contents of the trunk, though not all baggage as between the railway carrier and the passenger; and it cannot assert for itself the limitation of liability which runs in favor of a passenger carrier which, as an incident to the carriage of its passenger, carries his baggage. McQuat v. Cook's Taxicab & Transfer Co., 145 Minn. 210, 176 N. W. 763.

(50) Chicago & Eastern Illinois R. Co. v. Collins Produce Co., 249 U. S. 186.

1326. Defective cars—The liability of a carrier for defective cars is not absolute. The measure of the carrier's duty is due care, skill and diligence. George B. Higgins & Co. v. Chicago, B. & Q. R. Co., 135 Minn. 402, 161 N. W. 145. See L. R. A. 1917C, 510.

(55). See Alink v. Chicago etc. Ry. Co., 141 Minn. 55, 169 N. W. 250 (injury to goods from dampness of car).

1330. Seizure of goods under process—(60) Burkee v. Great Northern Ry. Co., 133 Minn. 200, 158 N. W. 41.

1331. Act of God—An unprecedented flood is an act of God. Northwestern Consolidated Milling Co. v. Chicago, B. & Q. R. Co., 135 Minn. 363, 160 N. W. 1028.

Under the rule applied in the federal courts, unless the carrier is chargeable with some negligence other than delay in making the ship-

ment, the destruction of the property by an act of God, not foreseen in time to guard against it, absolves the carrier from liability. Where the carrier shows that the property was destroyed by an act of God, if the shipper claims that negligence of the carrier contributed to the loss, the burden is upon the shipper to prove such negligence. In the present case the evidence fails to establish any negligence other than delay, and the carrier is not liable. Northwestern Consolidated Milling Co. v. Chicago, B. & Q. R. Co., 135 Minn. 363, 160 N. W. 1028.

(61) Northwestern Consolidated Milling Co. v. Chicago, B. & Q. R. Co., 135 Minn. 363, 160 N. W. 1028.

1333. Perishable goods—Perishable goods, such as eggs, are often shipped under instructions for the shipper to carry them without heat. Sometimes instructions call for refrigeration and for "strawing" a car Such special instructions affect the liability of the carrier. See Victor Produce Co. v. Chicago etc. Ry. Co.. 135 Minn. 49, 160 N .W. 201.

A common carrier of perishable freight is not an insurer of its delivery at destination in an undamaged condition. The rule in this state is that when the shipper has shown that the damage occurred while the goods were in the carrier's possession, a prima facie case of liability is made out, and the burden of proof is on the carrier to show that the damage was not caused by its negligence. Such a showing is a good defence, and it is not necessary to prove that the loss was caused by the natural tendency to decay. George B. Higgins & Co. v. Chicago, B. & Q. R. Co., 135 Minn. 402, 161 N. W. 145.

(64) Victor Produce Co. v. Chicago etc Ry. Co., 135 Minn 49, 160 N. W. 201 (shipment of eggs to Duluth in February—duty to round-house car to avoid freezing).

LIABILITY FOR DELAY

1337. Duty in general—In the absence of a special contract a common carrier is not an insurer of the time of delivery as he is of safe delivery. He must use diligence and must deliver within a reasonable time and is liable for negligence. National Elevator Co. v. Great Northern Ry. Co., 141 Minn. 407, 170 N. W. 515.

A carrier, although not an insurer of the time of delivery, must deliver within a reasonable time, and in case of a great and unusual delay must show that it was not caused by his negligence. Shippers must take notice of the railway time schedules in force at the time of the shipment, and a carrier who transports and delivers in accordance with such schedules cannot be charged with negligence on account of delays shown thereon, in the absence of a special contract to make an earlier delivery. The inference of negligence arising from the length of time consumed in transporting the shipment in question was overcome by showing delivery according to the time schedules then in force. Janesville Live Stock & Shipping Co. v. Hines, 146 Minn. 260, 178 N. W. 739.

(69) National Elevator Co. v. Great Northern Ry. Co., 141 Minn. 407, 170 N. W. 515.

1337a. Delay due to operating difficulties—While the development of a hot box may be such an incident to railway operation that the carrier may excuse a particular delay resulting from it, the evidence offered by the defendant was insufficient as an excuse, and it was not error to strike it out. National Elevator Co. v. Great Northern Ry. Co., 141 Minn. 407, 170 N. W. 515.

1338. Delay concurring with act of God—The rule stated in the text is overruled so far as interstate commerce is concerned. Northwestern Consolidated Milling Co. v. Chicago, B. & Q. R. Co., 135 Minn. 363, 160 N. W. 1028. See § 1331; 1 Minn. L. Rev. 276.

1339. Delay to investigate claim—(71) See Taylor v. Duluth etc. Ry. Co., 139 Minn. 216, 166 N. W. 128.

1339a. Demurrage charges—The fact that the carrier deviated from the route designated in the bill of lading did not relieve the shipper from demurrage charges imposed by the tariff for failure to unload within the prescribed time after arrival at destination. Minneapolis etc. Ry. Co. v. Reeves Coal Co., 148 Minn. —, 181 N. W. 335.

Reimbursement of buyer of goods by seller for demurrage charges paid by former on account of fault of latter. See § 8522a.

1339b. Damages—The carrier is liable for all damages which naturally and proximately result from the delay. See McArdle v. Chicago etc. Ry. Co., 138 Minn. 379, 165 N. W. 232.

DELIVERY OF GOODS

1340. Production of bill of lading—(74) See Quinn-Sheperdson Co. v. Great Northern Ry. Co., 141 Minn. 100, 169 N. W. 422; Thompson, Felde & Co. v. Great Northern Ry. Co., 142 Minn. 60, 170 N. W. 708; Pere Marquette Ry. Co. v. J. F. French & Co., 254 U. S. 538.

1341. Consignee presumptively owner—(77) Chicago etc. Ry. Co. v. Greenberg, 139 Minn. 428, 166 N. W. 1073.

1344. Inspection before delivery—Change of destination—A contract for the shipment of a car of wheat over the line of defendant's road contained the provision that the wheat should not be delivered to a named prospective purchaser without a surrender of the bill of lading, and that such prospective purchaser should not be permitted to inspect the wheat before such delivery. It is held: 1. That the act of defendant on the arrival of the car at destination in switching the same at the instance of the prospective purchaser onto an unloading side track did not constitute a delivery to such purchaser; and 2. That the carrier in such a case is not responsible for an inspection by the prospective purchaser, when made through secret and stealthy means, without the knowledge or consent of the carrier. Quinn-Sheperdson Co. v. Great Northern Ry. Co., 141 Minn. 100, 169 N. W. 422.

1344a. To true owner regardless of bill of lading—Where a carrier delivers the goods to the true owner but fails to take up an order bill

of lading issued to and retained by the shipper, it is not liable in an action of conversion brought by the shipper. By the federal Bills of Lading Act, Congress has recognized the right of a carrier transporting goods in interstate commerce to deliver them to the true owner and to make such delivery a complete defence to an action by the holder of an order bill of lading to recover damages for a failure to deliver the goods to him. Banik v. Chicago etc. Ry. Co., 147 Minn. 175, 179 N. W. 899.

1344b. Time for investigating adverse claims—Where upon arrival at destination, property is demanded from a carrier by the consignee and also by an adverse claimant, the carrier is entitled to a reasonable time for investigation, upon its request therefor, before an action will lie against it. Taylor v. Duluth etc Ry. Co., 139 Minn. 216, 166 N. W. 128.

1345. Unauthorized delivery—Mistake—Conversion—A carrier cannot excuse a wrong delivery and loss by showing an innocent mistake. J. L. Owens Co. v. Chicago etc. Ry. Co., 142 Minn. 487, 171 N. W. 768.

The owner shipped two carloads of potatoes from Barnesville, Minn. to Streator, Ill., consigned to the order of himself with an indorsement on the bill of lading: "Notify Baker, Wignall & Co." At the request of this firm, but without the knowledge or consent of the owner and without production of the bill of lading, the carrier stopped the shipment at La Salle, Illinois, where this firm inspected the potatoes and refused to accept them. The potatoes were never transported to Streator and never delivered to the owner. Held: (1) That the carrier is liable for the value of the potatoes; (2) That a demand was not necessary to entitle the owner to bring an action in conversion, as the carrier was never in position to make delivery at the place of delivery. Thompson, Felde & Co v. Great Northern Ry. Co., 142 Minn. 60, 170 N. W. 708.

The plaintiff J. L. Owens Company forwarded to the J. L. Owens Manufacturing Company, which was a selling company of its products, at Springfield, Illinois, over the defendant road and a connecting line, a carload of machinery by a straight bill of lading. After the car had reached Springfield, the defendant, at the request of the plaintiff, substituted an order bill of lading, in which the plaintiff was the consignor and consignee, and which provided for the surrender of the bill of lading duly indorsed before delivery of the shipment. The plaintiff, suing in conversion, claimed that the defendant made delivery to the J. L. Owens Manufacturing Company. The defendant claimed that it delivered to the plaintiff company; and that in any event the machinery was held in storage, ready for delivery on surrender of the bill of lading, when the suit in conversion was brought. The jury found specially that the merchandise was held ready for delivery on surrender of the bill of lading at the time of the commencement of the action; and it returned a general verdict for the defendant. Conceding that the J. L. Owens Manufacturing Company received the machinery, the evidence is clear that there was no actual conversion or loss of the machinery; that no demand was ever made for it nor was there a surrender of the order bill of lading; that the plaintiff

could have had it at any time if it had wanted it; and that it was held ready for delivery when this suit for conversion was brought. Under these circumstances a verdict other than for the defendant could not be sustained. J. L. Owens Co. v. Chicago etc. Ry. Co., 142 Minn. 487, 171 N. W. 768.

(83) See Cohen v. Minneapolis etc. Ry. Co., 133 Minn. 298, 158 N. W. 334 (mistake made in name of consignor in freight bill—consignee paid wrong consignor for goods but the money was refunded by the latter—plaintiff consignee suffered no loss from mistake of carrier—held no conversion by carrier); Banik v. Chicago etc. Ry. Co., 147 Minn. 175, 179 N. W. 899.

LIABILITY AS WAREHOUSEMEN

1348. In general—Where the adverse claimant claimed no rights under the contract of shipment, and made no claim to the property until after it had arrived at its destination, the carrier owed to him only the duties of a bailee or warehouseman, and may relieve itself from liability by showing that without fault or negligence on its part it is unable to produce or deliver the property. Taylor v. Duluth etc. Ry. Co., 139 Minn. 216, 166 N. W. 128.

CONNECTING CARRIERS

1352. Through traffic agreements—The legal effect of a through traffic agreement between two or more railroad companies owning and operating connecting lines of road is the creation of a new and independent continuous line. The contract set out in the opinion brings this case within the rule, and with respect to the traffic there agreed upon creates a continuous through line under the control of appellant, between the points therein stated. State v. Chicago etc Ry. Co., 139 Minn. 55, 165 N. W. 869.

1353. Designation of connecting carriers—(97) See Minneapolis etc. Ry. Co. v. Reeves Coal Co., 148 Minn. —, 181 N. W. 335 (deviation from route designated—damages).

1354. Through cars—Liability—It was admitted that the damage was caused from the freight, potatoes in sacks, being loaded in cars in which the wood of the bottoms was permeated with salt. These cars were furnished by a prior carrier, and the potatoes transported in them over the line of such carrier and delivered to defendant, a connecting carrier, which continued the shipment to its destination on its line. The unsuitable character of the cars was not discoverable by defendant on any reasonable inspection. Held, that the duty of defendant when it received the cars from the connecting carrier was to use due care, skill, and diligence in inspecting them, that it would be liable for a breach of such duty, but not for a defect which was unknown to it and not discoverable

by the exercise of due car, skill, and diligence. George B. Higgins & Co. v. Chicago, B. & Q. R. Co., 135 Minn. 402, 161 N. W. 145.

(99) See George B. Higgins & Co. v. Chicago, B. & Q. R. Co., 135 Minn. 402, 161 N. W. 145.

1355. Liability for loss or injury—Carmack Amendment—An initial carrier issued a regular bill of lading and also made out a waybill on which it noted, "no heat by order of shipper," and this was delivered to the connecting carrier. Held, that this notation did not relieve the latter from liability for goods frozen while in its hands. Victor Produce Co. v. Chicago etc. Ry. Co., 135 Minn. 49, 160 N. W. 201.

Plaintiff shipped a carload of freight from Mankato to Duluth over the Omaha Railway which delivered it to plaintiff at the latter place. Plaintiff then delivered it to defendant for transportation from Duluth to Hartford, Conn., and defendant issued a through bill of lading therefor. It was damaged after defendant had delivered it to a connecting carrier. The Omaha Company did not undertake to cause the shipment to be carried beyond Duluth and did not know that it was to be carried beyond that point. Held, that defendant was the initial carrier within the purview of the Carmack Amendment. As the court adopted the correct rule for measuring the damages, whether the consignee at Hartford rejected the shipment without sufficient ground therefor is immaterial. Victor Produce Co. v. Western Transit Co., 135 Minn. 121, 160 N. W. 248. See 31 L. R. A. (N. S.) 1; 44 L. R. A. (N. S.) 257; 50 L. R. A. (N. S.) 819.

The Carmack Amendment does not make a connecting carrier liable for damages caused by a prior carrier. George B. Higgins & Co. v. Chicago, B. & Q. R. C., 135 Minn. 402, 161 N. W. 145.

The Carmack Amendment to the Hepburn Act, as enacted June 29, 1906 (U. S. Comp. St. § 8604a), provides, in effect, that any common carrier, railroad, or transportation company, receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability thereby imposed; provided that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. De Vita v. Payne, — Minn. —, 184 N. W. 184.

1356. Presumption as to condition of goods—Burden of proof—(9) Victor Produce Co. v. Chicago etc. Ry. Co., 135 Minn. 49, 160 N. W. 201; George B. Higgins & Co. v. Chicago, B. & Q. R. Co., 135 Minn 402, 161 N. W. 145.

(11) George B. Higgins & Co. v. Chicago, B. & Q. R. Co., 135 Minn. 402, 161 N. W. 145.

ACTIONS

1356b. Limitation—Waiver—A carrier, issuing a bill of lading containing a four months limitation provision for making claim for loss for failure to deliver, may waive such provision. E. L. Welch Co. v. Chicago etc. Ry. Co., 144 Minn. 471, 175 N. W. 100.

1358. Demand before suit—No demand is necessary where there is other evidence of conversion by the carrier and where it is clear that a demand would have been fruitless. Thompson, Felde & Co. v. Great Northern Ry. Co., 142 Minn. 60, 170 N. W. 708.

1360. Burden of proof—Where a carrier receives perishable property in good condition and delivers it at destination in a frozen condition, this establishes a prima facie case of negligence, and the burden is on the carrier to overcome the presumption. Victor Produce Co. v. Chicago etc. Ry. Co., 135 Minn. 49, 160 N. W. 201.

In the case of perishable goods, when the shipper has shown that the damage occurred while the goods were in the carrier's possession a prima facie case of liability is made out and the burden of proof is on the carrier to show that the damage was not caused by its negligence. Such a showing is a good defence, and it is not necessary to prove that the loss was caused by the natural tendency to decay. George B. Higgins & Co. v. Chicago, B. & Q. R. Co., 135 Minn. 402, 161 N. W. 145.

When a shipper, in an action to recover the value of grain lost in transit introduces in evidence a bill of lading calling for a delivery of a certain specified amount of grain at the point of destination, and then proves that a less amount was delivered, the presumption arises that the loss was caused by the negligence of the carrier, and it then becomes necessary for the carrier to prove the contrary by a fair preponderance of evidence. In such action it was error to refuse to charge the jury that defendant must prove by a preponderance of the evidence that either the weight of grain involved as shown by the bill of lading, or by the state certificate of weight, is incorrect. National Elevator Co. v. Great Northern Ry. Co., 137 Minn. 217, 163 N. W. 164.

Proof of the delivery of a shipment by consignor to the carrier in good condition and of its delivery to the consignee at the end of the route in damaged condition is sufficient to sustain a recovery for damages against the initial carrier. A common carrier is an insurer of the safe transportation of goods committed to it for that purpose, and responsible for all damages to the same while in transit, unless such damage is occasioned by certain excepted causes. To relieve itself from such liability the carrier must show that the damage arose solely from one or more of the excepted causes, and it avails it nothing to show that the shipper was negligent if the damage would not have resulted except for the concurring fault of the carrier. De Vita v. Payne, — Minn. —, 184 N. W. 184.

The expression "burden of proof" is generally used in this connection in the sense of the burden of going forward with the evidence. Of course,

the burden of proof in the sense of establishing the negligence of the carrier is on the shipper throughout the trial, but upon a prima facie showing he is aided by presumptions. Zimmerman v. Northern Pacific Ry. Co., 140 Minn. 212, 167 N. W. 546. See Digest, §§ 3468-3470.

The general rule has its foundation in the fact that the subject-matter of the transportation contract is committed to the exclusive possession of the carrier, and he alone is in position to know and to disclose the cause of injury thereto while in transit. The shipper is wholly without such knowledge, and must submit to his loss unless the carrier be required by the law to explain the occasion thereof and to exonerate himself from blame. Zimmerman v. Northern Pacific Ry. Co., 140 Minn. 212, 167 N. W. 546.

The presumption of negligence on the part of a common carrier arising from a showing of the sound condition of the property at the time of shipment and the injured and damaged condition thereof at destination does not apply to a case where under the transportation contract the shipper by himself or agent accompanies the shipment for the purpose of taking care of the property in transit; the cause of the injury not being shown to be a matter outside the duties and obligations of the caretaker, or in respect to a matter of which his presence did not relieve the carrier from the obligations imposed upon him by law. Zimmerman v. Northern Pacific Ry. Co., 140 Minn. 212, 167 N. W. 546.

A delay in shipment may be so great and unusual and unless explained so unreasonable as to put upon the carrier the burden of proving absence of negligence. National Elevator Co. v. Great Northern Ry. Co., 141 Minn. 407, 170 N. W. 515; Janesville Live Stock & Shipping Co. v. Hines, 146 Minn. 260, 178 N. W. 739.

In an action against a transfer company, in conversion, for the value of a trunk and its contents, where the answer admits receiving the trunk and alleges that appellant transferred and delivered the same to the railway company as directed by plaintiff, and it failed to prove such delivery or to deliver the same upon demand, the plaintiff may recover therefor in such form of action. Stine v. Hines, 148 Minn. —, 181 N. W. 321.

(25) Lewer v. Minneapolis & St. Louis R. Co., 132 Minn. 173, 156 N. W. 6; Victor Produce Co. v. Chicago etc. Ry. Co., 135 Minn. 49, 160 N. W. 201; George B. Higgins & Co. v. Chicago, B. & Q. R. Co., 135 Minn. 402, 161 N. W. 145; Zimmerman v. Northern Pacific Ry. Co., 140 Minn. 212, 167 N. W. 546.

(31) See National Elevator Co. v. Great Northern Ry. Co., 141 Minn. 407, 170 N. W. 515.

1361. Evidence—Admissibility—The loss of grain in transit may be proved by evidence of its weight when shipped and its weight when unloaded at destination. State Elevator Co. v. Great Northern Ry. Co., 133 Minn. 295, 158 N. W. 399.

Where the plaintiff had proved the loss of grain in shipment by evidence of its weight at the point of shipment and its weight when

unloaded at its destination, it was held proper to exclude evidence offered by the defendant as to inaccuracy in weights of other shipments made by plaintiff, about the same time, in order to show the inaccuracy of plaintiff's scales. The admissibility of such evidence was held to rest largely within the discretion of the trial court. State Elevator Co. v. Great Northern Ry. Co., 133 Minn. 295, 158 N. W. 399.

Evidence of the time taken in a number of other shipments between the same points as the one involved in suit held competent proof as to the usual and reasonable time. National Elevator Co. v. Great Northern Ry. Co., 141 Minn. 407, 170 N. W. 515.

Evidence of the quantity of goods received is admissible to prove the quantity shipped, in the absence of evidence tending to show a loss in transit. Carnegie Dock & Fuel Co. v. Midland Lumber & Coal Co., — Minn. —, 182 N. W. 515.

1361a. Evidence—Sufficiency—Evidence held not to show conclusively that goods were delivered to a carrier in good condition and delivered by the carrier in bad condition. Lewer v. Minneapolis & St. Louis R. Co., 132 Minn. 173, 156 N. W. 6.

Evidence held to justify a verdict for the defendant. Lewer v. Minneapolis & St. Louis R. Co., 132 Minn. 173, 156 N. W. 6.

Evidence held to justify a recovery for loss of wheat in transit. State Elevator Co. v. Great Northern Ry. Co., 133 Minn. 295, 158 N. W. 399.

Evidence held sufficient to justify a recovery by a shipper. Victor Produce Co. v. Chicago etc. Ry. Co., 135 Minn. 49, 160 N. W. 201.

Evidence held sufficient to justify a recovery by a shipper of perishable goods. George B. Higgins & Co. v. Chicago, B. & Q. R. Co., 135 Minn. 402, 161 N. W. 145.

1361b. Damages—The defendant, a common carrier, safely carried and made delivery of a shipment of berries to the consignee, but in the freight or expense bill erroneously inserted the name of W. L. Monstad as consignor instead of plaintiff, the owner of the shipment. The consignee paid the consignor so named for the berries. Before this action for the recovery of the value of the shipment was begun, Monstad returned to the consignee the money so received. It is held that when the money was so returned the error was rectified and no damage resulted to plaintiff from defendant's carelessness. Cohen v. Minneapolis etc. Ry. Co., 133 Minn. 298, 158 N. W. 334.

CARRIERS OF LIVE STOCK

1365. Burden of proof—The general rule as to the burden of proof is modified where a caretaker goes with the stock under a special agreement. Zimmerman v. Northern Pacific Ry. Co., 140 Minn. 212, 167 N. W. 546. See § 1360.

(44) Prelvitz v. Minnesota Transfer Co., 133 Minn. 131, 157 N. W. 1079; Janesville Live Stock & Shipping Co. v. Hines, 146 Minn. 260, 178 N. W. 739.

1366. Miscellaneous cases—(45) Prelvitz v. Minnesota Transfer Co., 133 Minn. 131, 157 N. W. 1079 (shipment of carload of horses—ground of action limited to rough handling—evidence that one horse was injured —no evidence of injury to other horses—no substantial evidence that any injury was due to negligence of defendant—verdict in excess of value of one injured horse—evidence held not to justify verdict); McArdle v. Chicago etc. Ry. Co., 138 Minn. 379, 165 N. W. 232 (claim that verdict was inadequate—finding that carrier was not delayed in shipment by blizzard—measure of damages); Janesville Live Stock & Shipping Co. v. Hines, 146 Minn. 260, 178 N. W. 739 (delay in delivery—burden of proof —time schedules).

CARTWAYS—See Roads, §§ 8466a, 8467.

CASES AND BILLS OF EXCEPTIONS

1368. Necessity—(49) State v. Atanosoff, 138 Minn. 321, 164 N. W. 1011.

1369. No substitute—The record made at the trial cannot be supplemented or enlarged by an affidavit on a motion for a new trial. State v. Henrionnet, 142 Minn. 1, 170 N. W. 699.

Misconduct of defendant's attorney in his argument to the jury cannot be shown by affidavit outside the record. Mathwig v. Minneapolis etc. Ry. Co., 145 Minn. 429, 177 N. W. 643. See Digest, § 9800.

(52) State v. Atanosoff, 138 Minn. 321, 164 N. W. 1011; State v. Henrionnet, 142 Minn. 1, 170 N. W. 699.

(54) Mathwig v. Minneapolis etc. Ry. Co., 145 Minn. 429, 177 N. W. 643.

1369a. Right of prevailing party to propose—Conceding that in a particular case the prevailing party may be entitled to propose and have settled and allowed a record containing the evidence and proceedings on the trial, the showing on this application for an order requiring the trial court to allow and sign the case proposed by relator is not such as to justify the order prayed for, and the proceeding is dismissed. State v. Jelly, 134 Minn. 276, 159 N. W. 566.

1372. Time allowed for settlement—Extension—Under G. S. 1913, § 7832, the court has power to extend the time limited for proposing and settling a case and to grant leave to propose a case after the time limited has expired. That attorneys attempted to serve the proposed case after the time limited had expired and before they obtained leave to do so is not controlling. Motion to strike the settled case from the record denied. Stevens v. Fritzen, 139 Minn. 491, 164 N. W. 365, 165 N. W. 1073.

(79) State v. Fish, 132 Minn. 146, 155 N. W. 905; State v. Johnson, 136 Minn. 465, 161 N. W. 782.

(80) State v. Johnson, 136 Minn. 465, 161 N. W. 782.

(82) Stevens v. Fritzen, 139 Minn. 491, 164 N. W. 365, 165 N. W. 1073.

1380. Amendment by trial court—After a case had been settled, allowed and certified by the trial court, a motion was made on affidavits, to add to it certain testimony which did not appear in the minutes of the official stenographer. The motion was denied and this was held not an abuse of discretion on appeal. Skar v. McKenney, 135 Minn. 477, 160 N. W. 247.

1383. Appeal—An order denying a motion to settle a case is not appealable, nor is it reviewable on appeal from the order denying a new trial. Mandamus is the remedy. State v. Atanosoff, 138 Minn. 321, 164 N. W. 1011.

(11) State v. Atanosoff, 138 Minn. 321, 164 N. W. 1011.

1384. Construction and conclusiveness on appeal—The record on appeal cannot be corrected on an ex parte application for a rehearing. Martinson v. Hensler, 132 Minn. 437, 442, 157 N. W. 714.

The record made at the trial cannot be supplemented or enlarged by an affidavit on a motion for a new trial. State v. Henrionnet, 142 Minn. 1, 170 N. W. 699, See § 1369.

(15) See Skar v. McKenney, 135 Minn. 477, 160 N. W. 247.

(18) Berkner v. Olson, 143 Minn. 214, 173 N. W. 568.

(19) Martinson v. Hensler, 132 Minn. 437, 442, 157 N. W. 714.

CASHMAN ACT—See Carriers, § 1205c.

CEMETERIES

1386. Nature of incorporated associations—Calvary cemetery, owned and operated by the Diocese of St. Paul, held not a public cemetery association. Diocese of St. Paul v. St. Paul, 138 Minn. 67, 163 N. W. 978.

1387. Lands dedicated to public use—Cannot be sold or mortgaged—Lands actually devoted to burial purposes cannot be sold. Diocese of St. Paul v. St. Paul, 138 Minn. 67, 163 N. W. 978.

Character of estate or property of owner in burial lot. L. R. A. 1918A, 147.

CERTIORARI

IN GENERAL

1391. General nature of writ—(38–40) State v. District Court, 134 Minn. 435, 159 N. W. 965.

(39, 40) State v. Hense, 135 Minn. 99, 160 N. W. 198.

1393. Allowance discretionary—Other adequate remedy—The writ will not lie if there is another adequate remedy. State v. Board of Public Works, 134 Minn. 204, 158 N. W. 977.

1395. Does not lie where there is right of appeal—(49) State v. District Court, 136 Minn. 461, 161 N. W. 1055 (order requiring village officers to take steps in assessing and collecting special assessments for street paving); State v. Searles, 141 Minn. 267, 170 N. W. 108 (order of imprisonment in contempt proceedings until compliance with a writ of mandamus); State v. Probate Court, 142 Minn. 283, 171 N. W. 928 (order of probate court on claim of state under Laws 1917, c. 409, for support of insane decedent in state hospital); State v. Probate Court, 142 Minn. 499, 172 N. W. 210 (order of probate court granting creditor further time to present claim); State v. Kane, 144 Minn. 225, 174 N. W. 884 (order of justice court denying an application for relief from a default in garnishment proceedings); Neumann v. Edwards, 146 Minn. 179, 178 N. W. 589 (judgment confirming the revocation of an insurance agent's license).

1396. Does not lie to an intermediate order—(52) State v. District Court, 132 Minn. 100, 155 N. W. 1057; State v. District Court, 134 Minn. 435, 159 N. W. 965; State v. Probate Court, 142 Minn. 499, 172 N. W. 210; State v. Tri-State T. & T. Co., 146 Minn. 247, 178 N. W. 603.

(53) State v. District Court, 134 Minn. 435, 159 N. W. 965.

1397. To review action of municipalities, boards, officers, etc.—Certiorari will lie to review the quasi-judicial proceedings of municipal boards only where there is no right of appeal and no other adequate remedy. State v. Board of Public Works, 134 Minn. 204, 158 N. W. 977.

(58) State v Burnquist, 146 Minn. 460, 179 N. W. 371.

1398. Proceedings held judicial—(62) State v. Montevideo, 135 Minn. 436, 161 N. W. 154.

1399. Proceedings held not judicial—The action of the Minneapolis council in removing a street commissioner. State v. Minneapolis, 138 Minn. 182, 164 N. W. 806.

Proceedings before the Governor, resulting in a proclamation submitting a proposition for the division of a county to the voters. State v. Burnquist, 146 Minn. 460, 179 N. W. 371.

1400. Held to lie—To review judgment under Workmen's Compensation Act. State v. District Court, 132 Minn. 249, 156 N. W. 120; State v. District Court, 134 Minn. 189, 158 N. W. 825. See § 5854z.

To review a resolution of a city council laying out an alley and directing the taking of private property therefor, the resolution not being reviewable on an appeal from the assessment and damages provided by the city charter. State v. Montevideo, 135 Minn. 436, 161 N. W. 154.

To review action of Governor in removing a public officer under the statue. In re Mason, 148 Minn. —, 181 N. W. 570.

(82) State v. Searles, 141 Minn. 267, 170 N. W. 198 (order imposing a fine in criminal or quasi-criminal contempt proceedings for disobedience of a writ of mandamus).

1401. Held not to lie—To review an intermediate order in proceedings under the Workmen's Compensation Act. State v. District Court, 132 Minn. 100, 155 N. W. 1057.

To review the action of a board of public works in relation to special assessments for street improvements. State v. Board of Public Works, 134 Minn. 204, 158 N. W. 977.

To review an order directing a survey and appointing an engineer in judicial ditch proceedings under G. S. 1913, c. 44. State v. District Court, 134 Minn. 435, 159 N. W. 965.

To review the action of the state tax commission in refusing to reduce an alleged excessive valuation of real estate for taxation purposes. State v. Minnesota Tax Commission, 135 Minn. 282, 160 N. W. 665.

To reveiw an order requiring village officers to take steps in assessing and collecting special assessments for street paving. State v. District Court, 136 Minn. 461, 161 N. W. 1055.

To review act of Minneapolis council in removing a street commissioner. State v. Minneapolis, 138 Minn. 182, 164 N. W. 806.

To review an order of imprisonment in contempt proceedings until compliance with a writ of mandamus. State v. Searles, 141 Minn. 267, 170 N. W. 198.

To review order of probate court on claim of state under Laws 1917, c. 409, for support of insane decedent in state hospital. State v. Probate Court, 142 Minn. 283, 171 N. W. 928.

To review proceedings before the Governor, resulting in a proclamation submitting a proposition for the division of a county to the voters. State v. Burnquist, 146 Minn. 460, 179 N. W. 371.

1402. Scope of review—In reviewing the determination of administrative boards or commissioners the supreme court goes no further than to inquire whether the board kept within its jurisdiction, whether it proceeded upon a proper theory of the law, whether its action was arbitrary or oppressive or unreasonable, and whether the evidence affords a reasonable and substantial basis for the determination. State v. State Securities Commission, 145 Minn. 221, 176 N. W. 759. See § 397b.

The province of the supreme court in reviewing procedings brought before it by writ of certiorari is well defined. It may examine the evidence, but only for the purpose of ascertaining whether it furnished any reasonable or substantial basis for the decision. It cannot reweigh the evidence for the purpose of determining where the preponderance lies, nor substitute its judgment as to the credibleness of the testimony of a witness for that of the tribunal charged with the duty of determining the facts. In re Mason, 148 Minn. —, 181 N. W. 570.

The sufficiency of the evidence cannot be considered in the absence of a settled case or a certificate of the trial judge as to the accuracy and fulness of the record returned. State v. Nelson, 145 Minn. 31, 176 N. W. 181.

(4) State v. Minnesota Tax Commission, 137 Minn. 20, 162 N. W. 675; State v. District Court, 137 Minn. 435, 163 N. W. 755; State v. District

Court, 142 Minn. 335, 172 N. W. 133; In re Mason, 148 Minn. —, 181 N. W. 570.

(6) State v. Nelson, 145 Minn. 31, 176 N. W. 181.

(7) State v. Hense, 135 Minn. 99, 160 N. W. 198.

See § 5854z (scope of review under Workmen's Compensation Act).

OUT OF SUPREME COURT

1404. Statutory provision—The supreme court will entertain original jurisdiction in certiorari only in cases where general public interest requires immediate determination. State v. Schulz, 142 Minn. 112, 171 N. W. 263.

In the absence of some special emergency the supreme court will not issue a writ of certiorari to review an order of a probate court denying an application for an extension of time for the presentation of claims, but will leave the applicant to his remedy in the district court, which has jurisdiction to issue the writ in such cases. State v. Probate Court, 142 Minn. 499, 172 N. W. 210.

Except in special instances and when public interests are involved the supreme court will not issue a writ of certiorari to a justice court, in review of a judgment or order there rendered, but will refer the parties to the court having direct appellate jurisdiction of such court. State v. Kane, 144 Minn. 225, 174 N. W. 884.

Certiorari will lie to the probate court. Martin v. Dodge County, 146 Minn. 129, 178 N. W. 167.

OUT OF DISTRICT COURT

1406. To probate courts—(14) State v. Probate Court, 142 Minn. 499, 172 N. W. 210.

1407. To justice courts—(18, 19) State v. Kane, 144 Minn. 225, 174 N. W. 884.

PROCEDURE

1409. Parties—A resident and taxpayer of a municipality cannot maintain certiorari to review a judgment against the municipality unless he is interested in some more direct way. State v. Nelson, 136 Minn. 272, 159 N. W. 758, 161 N. W. 576.

The state tax commission, after hearing on the application of the owners of mines situated in the city of Ely, materially reduced the valuation for taxation purposes of the unmined ore contained in the mines and the ore in stock piles. The city brought certiorari to review this action of the commission. Quaere, whether the city has such an interest in the matter as entitled it to have the action of the commission reviewed on certiorari? State v. Minnesota Tax Commission, 137 Minn. 20, 162 N. W. 675.

(22) State v. Nelson, 136 Minn. 272, 159 N. W. 758, 161 N. W. 576.

1411. Form of writ—To whom directed—As to title of writ see Rule 1, subdivision 6. 143 Minn. XX.

In a writ to review drainage proceedings it is not necessary to name all the petitioners for the ditch as respondents. Service on their attorneys is sufficient notice for them. State v. Nelson, 137 Minn. 265, 161 N. W. 714.

(28) State v. Nelson, 137 Minn. 265, 161 N. W. 714.

(30) G. S. 1913, § 8315; State v. Nelson, 137 Minn. 265, 161 N. W. 714; Carlson v. American Fidelity Co., — Minn. —, 182 N. W. 985.

1411a. Service—It is not necessary to serve a writ to review drainage proceedings on all petitioners for the ditch. Service on their attorneys is sufficient to them. State v. Nelson, 137 Minn. 265, 161 N. W. 714.

1412. Return—Where the return does not contain a full record of the proceedings below, the supreme court will act on the certificate of the trial court as to the facts therein stated and which are not otherwise shown by the record. State v. Nelson, 137 Minn. 265, 161 N. W. 714, 163 N. W. 510.

(34) State v. Nelson, 137 Minn. 265, 161 N. W. 714, 163 N. W. 510; State v. Nelson, 145 Minn. 31, 176 N. W. 181.

1414. Effect as a supersedeas—(37) See Carlson v. American Fidelity Co., — Minn. —, 182 N. W. 985.

1414a. Surety for costs—The statute provides that a writ in a civil case shall be indorsed by some responsible person as surety for costs. An order for a writ required the petitioner to file a bond for costs, to be approved by a justice of the supreme court and this was done. Held, a sufficient compliance with the statute. State v. Nelson, 137 Minn. 265, 161 N. W. 714.

CHAMPERTY AND MAINTENANCE

1416. What constitutes—A contract held not champertous as a matter of law. Holloway v. Dickinson, 137 Minn. 410, 163 N. W. 791.

Evidence considered and held not to sustain a finding that a layman, acting as agent of intervener, a lawyer, did not solicit plaintiff to employ intervener as his attorney in a personal injury action. If said case was so solicited under the facts here intervener is not entitled to an attorney's lien for his compensation; plaintiff in the case having settled with defendant for his injuries. Anker v. Chicago G. W. R. Co., 140 Minn. 63, 167 N. W. 278.

Evidence examined, and held sufficient to sustain the finding of the jury that the action was not procured by plaintiff's attorney by solicitation of a layman for hire. Anker v. Chicago G. W. R. Co., 144 Minn. 216, 174 N. W. 841.

Evidence held to justify a finding that a contract was not champertous and void. Scharmann v. Union Pacific Ry. Co., 144 Minn. 290, 175 N. W. 554.

Purchase of cause of action by attorney. 4 A. L. R. 173.

(39) Southworth v. Rosendahl, 133 Minn. 447, 158 N. W. 717.

(41) See Koochiching County v. Elder, 145 Minn. 77, 176 N. W. 195.

(42) Anker v. Chicago G. W. R. Co., 140 Minn. 63, 167 N. W. 278; Anker v. Chicago G. W. R. Co., 144 Minn. 216, 174 N. W. 841; Scharmann v. Union Pacific Ry. Co., 144 Minn. 290, 175 N. W. 554 See Holloway v. Dickinson, 137 Minn. 410, 163 N. W. 791.

1417a. Pleading—An offer to prove that a case came to an attorney at law through the solicitation of a layman held inadmissible under the pleadings. Heuser v. Chicago, B. & Q. R. Co., 138 Minn. 286, 164 N. W. 984.

CHARITIES

1419. Charitable trusts—Want of trustee as invalidating trust. 5 A. L. R. 315.

(45, 46) See 1 Minn. L. Rev. 201.

1423. Gifts in trust—Absolute gifts—(51) See Bogart v. Taylor, 144 Minn. 454, 175 N. W. 913.

1423a. Liability of charitable corporations for negligence—Charitable corporations are liable for negligence the same as other corporations or individuals. Mulliner v. Evangelischer etc. Synod, 144 Minn. 392, 175 N. W. 699. See 31 Harv. L. Rev. 479.

CHATTEL MORTGAGES

IN GENERAL

1427. What may be mortgaged—(70) L. R. A. 1917C, 8.

1427a. Incompetency of mortgagor—Fraud—The evidence sustains the findings that respondent was of unsound mind and incompetent to transact business when he executed the chattel mortgage under which plaintiff claimed the property replevied in this action, and that respondent was induced to enter the deal wherein such mortgage was given through the mortgagee's fraud and misrepresentations. Plaintiff as assignee of the mortgage can claim no greater right to the property than could the mortgagee, and under the findings mentioned neither could claim the right of posssession thereto. No reversible error is found in the record. Bauman v. Krieg, 133 Minn. 196, 158 N. W. 40.

1427b. Consideration—Validity—A chattel mortgage executed and acknowledged in due form of law and duly filed in the proper office is presumed to express the terms and purpose of the instrument in its

true light. The burden to overcome the presumption and to establish the claim that the mortgage was not intended as a reality, but as a sham and pretence to deceive creditors, rests with the mortgagor or those claiming under him. The evidence to establish such claim must be strong, clear, and convincing, amounting to more than a preponderance; for written contracts thus formally executed will not under the law be lightly set aside or held as sham and fictitious. The trial court in this case was not bound to accept the unsupported testimony of the mortgagor that the mortgage was a sham, intended to deceive creditors, and the order directing judgment for plaintiff notwithstanding the verdict was proper, and is sustained. Summit Mercantile Co. v. Daigle, 146 Minn. 218, 178 N. W. 588.

FORM AND EXECUTION

1431. Form—Execution—Delivery—Evidence held not to require the submission to the jury of the question of delivery of a mortgage. Ward v. Allen, 138 Minn. 1, 163 N. W. 749

FILING AND PRIORITIES

1441. What constitutes filing—Indexing—(51) See 2 Minn. L. Rev. 386.

1445. Effect of filing—Effect of filing mortgage on future crops. 3 Minn. L. Rev. 194.

1446. Effect of not filing—Conflict of laws—The validity of a chattel mortgage upon property in Michigan and the rights of the parties under it, are governed by the laws of Michigan. Under the Michigan statute (How. St. Ann. 1912, § 11407), as construed by the Michigan courts, where possession of the mortgaged property is not transferred, failure to properly file the chattel mortgage renders it absolutely and conclusively void as to creditors of the mortgagor who become such after the mortgage is given and before the statute is complied with, and such creditors may attack the mortgage although they did not acquire a lien during the period of non-compliance with the statute. A trustee in bankruptcy, has the right to assail such a mortgage on behalf of general creditors who became such after the mortgage was given. Possession, taken by the mortgagee in legal proceedings after the rights of the creditors have become fixed, can detract nothing from the rights of such creditors. Goldberg v. Brule Timber Co., 140 Minn. 335, 168 N. W. 22. See § 1537.

1447. Who may object to want of filing—A trustee in bankruptcy may assail an unfiled mortgage on behalf of general creditors who become such after the mortgage is given. Goldberg v. Brule Timber Co., 140 Minn. 335, 168 N. W. 22.

(86) Goldberg v. Brule Timber Co., 140 Minn. 335, 168 N. W. 22.

1451. Burden of proving good faith—(8) See James v. Pettis, 134 Minn. 438, 159 N. W. 953.

RIGHTS OF PARTIES IN GENERAL

1454. Rights of mortgagor—A mortgagor in possession is an "owner" of the property within the statute giving a lien on motor vehicles for labor and materials. Reed v. Horton, 135 Minn. 17, 159 N. W. 1080.

There is no presumption that a sale by a mortgagor was with the consent of the mortgagee. James v. Pettis, 134 Minn. 438, 159 N. W. 953.

(24) See James v. Pettis, 134 Minn. 438, 159 N. W. 953.

(29) King v. Hartford Fire Ins. Co., 133 Minn. 322, 158 N. W. 435.

1455. Rights of mortgagee—A second mortgagee cannot maintain replevin or other action against one in rightful possession of the property under the first mortgage unless he has a substantial equity in the property after its application to the satisfaction of the first mortgage. Berkner v. Lewis, 133 Minn. 375, 158 N. W. 612.

(30) King v. Hartford Fire Ins. Co., 133 Minn. 322, 158 N. W. 435.

PERFORMANCE

1456. Payment—Discharge—Release—A chattel mortgage stands as security for the mortgage debt until the debt is paid, even though the evidence of the debt is changed in form. The parties may, however, agree that the payment of part of the debt and the giving of a new note for the balance shall operate as a satisfaction of the debt. If the mortgage debt is satisfied, the mortgage loses all vitality though no formal release is given. The evidence in this case sustains a finding that the payment of part of notes secured by a mortgage upon a team of horses and the giving of a new note were agreed to be in payment of the mortgage debt. An agreement to take the mony and "clear the horses" and take a "plain note" for the balance operates as an acceptance of the money and the new note in payment of the mortgage debt. Anderson v. Willson, 132 Minn. 364, 157 N. W. 582.

Evidence held not to justify a finding that a chattel mortgage had not been paid. Holland v. Nichols, 136 Minn. 354, 162 N. W. 468.

Where the giving of the mortgage is admitted, a statement by the mortgagor that the mortgagee had no mortgage or no claim on the mortgaged property is not sufficient to prove the non-existence of the mortgage or its discharge. Bogstad v. Anderson, 143 Minn. 336, 173 N. W. 674.

(42, 43) Anderson v. Willson, 132 Minn. 364, 157 N. W. 582.

1456a. Application of payments—Evidence held to show that it was the intention of the parties that a certain payment by check was to be applied to the payment of the mortgage debt rather than to another debt owing by the mortgagor to the mortgagee but not secured by the mortgage. Slimmer v. State Bank, 134 Minn. 349, 159 N. W. 795.

FORECLOSURE

1460. Foreclosure by statutory sale—Evidence held to justify a finding that an auction sale by the mortgagor at the instance of a first mortgagee was in good faith. Berkner v. Lewis, 133 Minn. 375, 158 N. W. 612.

The statutory procedure must be strictly followed. Jankowitz v. Kaplan, 138 Minn. 452, 165 N. W. 275.

The failure to serve a copy of the notice of sale, in proceedings to foreclose a chattel mortgage, upon the person in the actual possession of the mortgaged property, as required by G. S. 1913, § 6974, renders the proceedings invalid. The objection to the failure to make such service is open to the mortgagor, though he may have sold the property prior to the date of the foreclosure proceedings. Jankowitz v. Kaplan, 138 Minn. 452, 165 N. W. 275.

There is no warranty of title on a foreclosure sale, but there is a warranty or representation by the mortgagee that he has a subsisting mortgage on the property sold. Bogstad v. Anderson, 143 Minn. 336, 173 N. W. 674.

1462. Effect of valid foreclosure—(99) Citizens State Bank v. Moebeck, 143 Minn. 291, 173 N. W. 853 (effect of foreclosure as payment).

1463. Effect of void foreclosure—The mortgagee purchased the property at the foreclosure and thereafter sold a part thereof to a third person, receiving therefor an amount in excess of the mortgage debt. Held, that such sale was a conversion of the property, since the foreclosure was void, and in an action to recover a balance due on the mortgage debt the mortgagor may interpose the amount so received as a set-off. It is not necessary in such case to prove the value of the property. Jankowitz v. Kaplan, 138 Minn. 452, 165 N. W. 275.

ASSIGNMENT

1464. Assignment of note—(10) Slimmer v. State Bank, 134 Minn. 349, 159 N. W. 795.

1465. Assignment of mortgage—(11) Bauman v. Krieg, 133 Minn. 196, 158 N. W. 40.

REMEDIES

1474. Action by mortgagor against mortgagee for conversion—In an action by a chattel mortgagor against his mortgagee for the conversion of property acquired by him after the mortgage and placed with that mortgaged, and taken possession of by the mortgagee with that mortgaged, the evidence did not show that the mortgaged and unmortgaged property were so mingled and confused that it was error to refuse a peremptory instruction for the defendant under the doctrine that a mortgagor who mingles his other property with that mortgaged so that a

confusion of goods results cannot claim that not mortgaged unless he separates it from the other and that the mortgagee is not a wrongdoer in taking all of it. Nor did it require a peremptory instruction for the defendant because no demand was made nor was the evidence insufficient to sustain a finding of conversion. A cause of action for damages for the loss of accounts alleged to have been caused by the defendant taking possession of the plaintiff's books of account is held unsustained. A cause of action for loss upon certain unfinished contracts alleged to have been caused by the defendant taking possession of the plaintiff's property is held unsustained. Aylmer v. Northwestern Mutual Invest. Co., 138 Minn. 148, 164 N. W. 659.

The plaintiff, a mortgagor, sued Andrew Schoch and the Schoch Grocery Company for the conversion of the property mortgaged. No cause of action was proved against Schoch. The evidence sustains a finding of conversion by the company. In a suit by the owner the usual measure of damages for conversion is the value at the time of taking, with interest; but when the conversion is by the mortgagee of the property the measure is the difference between the value at the time of the taking and the mortgage lien, with interest. When the case was submitted to the jury the parties adopted the view that the grocery company was in fact the mortgagee of the property alleged to have been converted. This made applicable the measure of damages last stated. In view of the facts stated in the opinion the court did not err in charging that the measure was the value at the time of the taking, with interest, and applying on the value found the amount found due on the mortgage lien after the foreclosure mentioned in the opinion; and leave is given the company to ask for a like application of an undisputed amount due on the mortgage lien at the time of the foreclosure but before sale. Carlson v. Schoch, 141 Minn. 236, 170 N. W. 195.

When a mortgagee wrongfully retakes possession the mortgagor may recover for conversion. Reinkey v. Findley Electric Co., 147 Minn. 161, 180 N. W. 236.

(34) Carlson v. Schoch, 141 Minn. 236, 170 N. W. 195. See Anderson v. Willson, 132 Minn. 364, 157 N. W. 582.

(43) See Anderson v. Willson, 132 Minn. 364, 157 N. W. 582.

1477. Action by mortgagor against stranger for conversion—(51) See Anderson v. Willson, 132 Minn. 364, 157 N. W. 582.

1478. Action by mortgagee against stranger for conversion—Evidence held to justify a finding that the property converted was covered by the mortgage. James v. Pettis, 134 Minn. 438, 159 N. W. 953.

In an action against a purchaser from the mortgagor it is not necessary for the mortgagee to prove that he did not consent to the sale. James v. Pettis, 134 Minn. 438, 159 N. W. 953.

1479. Replevin by mortgagee against mortgagor—In an action of replevin by a mortgagee against a mortgagor, held, the evidence did not justify the submission to the jury of the question of the delivery of the

mortgage, and the plaintiff was not entitled to a directed verdict, for the evidence would justify the jury in finding that a valid contract was entered into whereby the mortgage was to be extinguished, that such contract had been partly performed by defendant, and that he was ready, willing and able to completely perform his part thereof. Ward v. Allen, 138 Minn. 1, 163 N. W. 749.

(62) See Summit Mercantile Co. v. Daigle, 146 Minn. 218, 178 N. W. 588.

1482. Replevin by mortgagee against stranger—The jury returned a verdict for defendant under an instruction directing them to do so if they found that none of the property in controversy belonged to the mortgagor when the mortgage was given, or that the mortgage debt had been paid. As the evidence is not sufficient to sustain the verdict on either of these grounds, it cannot stand. Schwartz v. Kleiber, 141 Minn. 332, 170 N. W. 210.

1483. Replevin by one mortgagee against another—In an action of replevin by a second mortgagee against one holding under a first mortgage, the claim being that the first mortgage was fraudulent as to creditors, held, that an auction sale of the property made by the mortgagor at the instance of the first mortgagee, was in good faith, that the mortgage was not fraudulent as a matter of law; and that there was no equity in the property left after the same, or its full value, was applied to the first mortgage, upon which to predicate the replevin action. Berkner v. Lewis, 133 Minn. 375, 158 N. W. 612. See § 3885.

A second mortgagee cannot maintain replevin for the property against one in rightful possession unless he has a substantial equity therein after its application to the satisfaction of the first mortgage. Berkner v. Lewis, 133 Minn. 375, 158 N. W. 612.

1485a. Action by purchaser at foreclosure sale against mortgagee—Where a purchaser at a chattel mortgage foreclosure sale sues to recover the consideration paid on the theory that the mortgage was discharged before foreclosure, the burden is upon him to prove such discharge. A judgment, rendered after the sale, in an action between the defendant and the mortgagor, is not evidence in favor of the plaintiff in this action, nor is a judgment in an action between this plaintiff and another claimant of the property. Bogstad v. Anderson, 143 Minn. 336, 173 N. W. 674.

CITIZENSHIP

1487. Who are citizens—A mixed blood Indian is a citizen if his father was. Opsahl v. Johnson, 138 Minn. 42, 163 N. W. 988.

A person is presumed to be a citizen of the country in which he resides until the contrary is shown. As the decedent had been a resident and property owner of this state for many years, and there is no evidence that he was foreign born, the trial court correctly held that he was a citizen of the United States. Wallerstedt v. Trank, 146 Minn. 230, 178 N. W. 738.

CLERK OF THE DISTRICT COURT

1491. Term—(89) State v. Berg, 132 Minn. 426, 157 N. W. 652 (term cannot be extended or abridged by legislature—Laws 1915, c. 168, held unconstitutional)

COMMON LAW

1501. Definition—There is no common law of the United States. Southern Pacific Co. v. Jensen, 244 U. S. 205, 221.

1502. Nature—The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified. Southern Pacific Co. v. Jensen, 244 U. S. 205, 221.

1503. How far in force in this state—(26) State v. Storey, — Minn. —, 182 N. W. 613.

(27) State v. Townley, — Minn. —, 182 N. W. 773.

COMPOSITION WITH CREDITORS

1506. Definition—(33) Boyum v. Jordan, 146 Minn. 66, 178 N. W. 158.

1507. Mutuality—Consideration—(34) Boyum v. Jordan. 146 Minn. 66, 178 N. W. 158.

COMPROMISE AND SETTLEMENT

1515. Definition—The distinction between an accord and satisfaction and a compromise and settlement is not always observed in the cases. C. W. LaMoure Co. v. Cuyuna-Mille Lacs Iron Co., 147 Minn. 433, 180 N. W. 540.

1516. A contract—(46) Daggett v. St. Paul Tropical Development Co., 141 Minn. 51, 169 N. W. 252.

1516a. Matters included—In order to constitute a valid compromise and settlement the minds of the parties must meet and they are concluded thereby only as to matters actually included therein. Held v. Keller, 135 Minn. 192, 160 N. W. 487.

1516b. Effect of receipt in full—A receipt in full of "all claims and demands of every kind and nature," given as evidence of a settlement, does not operate as a discharge of a claim which affirmatively appears not to have been included within the settlement as evidence of which the receipt was given. Held v. Keller, 135 Minn. 192, 160 N. W. 487.

1517. Offer of compromise—The admission in evidence of a telegram was not a violation of the rule forbidding offers of compromise to be re-

ceived, for, according to the claim of plaintiff, there was then no dispute as to the validity of the claim, and, furthermore, the party objecting subsequently offered the same telegram and a response thereto in evidence. Flick v. Ellis-Hall Co., 138 Minn. 364, 165 N. W. 135.

(47) See Ann. Cas. 1918E, 439 (statement of independent fact).

1518. Necessity of dispute or doubt—(48) Gilia v. Robbins, 134 Minn. 45, 158 N. W. 807; Isaacs v. Wishnick, 136 Minn. 317, 612 N. W. 297; C. W. LaMoure Co. v. Cuyuna-Mille Lacs Iron Co., 147 Minn. 433, 180 N. W. 540.

1519. Favored—Claims arising out of crime—The law condemns the suppression of crime, and, except as to civil rights and remedies, prohibits the settlement thereof by the parties concerned therein. State v. Wagener, 145 Minn. 377, 177 N. W. 346.

(49) Southworth v. Rosendahl, 133 Minn. 447, 158 N. W. 717.

1520. Consideration—A wife's interest in her husband's property may afford a sufficient consideration. Baxter v. Brandenburg, 137 Minn. 259, 163 N. W. 516.

A compromise of a disputed cause of action, asserted in good faith and upon reasonable ground, is supported by a consideration. This doctrine is applied in a suit on a note where the maker claimed a cause of action against the payee for fraud in the transaction out of which the note arose, and there was an agreement of settlement releasing the cause of action for fraud and surrendering the note. Kies v. Searles, 146 Minn. 359, 178 N. W. 811.

(50) Helvetia Copper Co. v. Hart-Parr Co., 137 Minn. 321, 163 N. W. 665; Kies v. Searles, 146 Minn. 359, 178 N. W. 811. See Griffith v. Dowd, 133 Minn. 305, 158 N. W. 420; Hage v. Drake Marble & Tile Co., 145 Minn. 113, 176 N. W. 192.

1522. Enforceability of claim—(54) Kies v. Searles, 146 Minn. 359, 178 N. W. 811.

1522a. Retention of money—The mere retention of money which one of the parties is entitled to receive unconditionally does not amount to a compromise and settlement, even though the money is paid or tendered in full satisfaction of the claim. C. W. LaMoure Co. v. Cuyuna-Mille Lacs Iron Co., 147 Minn. 433, 180 N. W. 540. See § 41.

1524. Fraud—Avoidance—Whether certain settlement agreements growing out of an excavating contract were procured by fraud or were without consideration held a question for the jury. Griffith v. Dowd, 133 Minn. 305, 158 N. W. 420.

Material misrepresentations will avoid a compromise and settlement though they were made in good faith and not with a design to deceive or defraud. Helvetia Copper Co. v. Hart-Parr Co., 137 Minn. 321, 163 N. W. 665.

The same promptness is not required in disaffirming a release of damages as is required in rescinding a sale for fraud. Helvetia Copper Co. v. Hart-Parr Co., 142 Minn. 74, 171 N. W. 272, 767.

Helvetia Copper Co. v. Hart-Parr Co., 137 Minn. 321, 163 N. W. 665, followed, to the effect that the question whether plaintiff had a right to avoid a settlement for fraud was a question of fact for the jury. Plaintiff was not, as a matter of law, barred by estoppel, by its acts, or by acquiescence, from avoiding the settlement. In repudiating a settlement for fraud it is not necessary as a condition precedent to return the amount of a payment made on a liquidated claim justly due and owing simply because the payment was made as part of the transaction of settlement. Helvetia Copper Co. v. Hart-Parr Co., 142 Minn. 74, 171 N. W. 272, 767

(56) See Helvetia Copper Co. v. Hart-Parr Co., 137 Minn. 321, 163 N. W. 665.

See § 8374.

1524a. Particular contracts construed—A compromise and settlement agreement with reference to the times and conditions for the repayment of a loan construed. Wall v. Fitger Brewing Co., 134 Minn. 11, 158 N. W. 789.

1525a. Law and fact—Whether a compromise was made held a question for the jury. Kies v. Searles, 146 Minn. 359, 178 N. W. 811.

1527. Evidence—Sufficiency—(60) Dieudonne v. Arco Co., 139 Minn. 441, 166 N. W. 1067 (facts held to show a compromise and settlement of a claim for breach of warranty); Daggett v. St. Paul Tropical Development Co., 141 Minn. 51, 169 N. W. 252; C. W. LaMoure Co. v. Cuyuna-Mille Lacs Iron Co., 147 Minn. 433, 180 N. W. 540; Whitnack v. Twin Valley Produce Co., — Minn. —, 182 N. W. 444.

COMPROMISE VERDICTS—See New Trial, § 7115b.

CONFLICT OF LAWS

IN GENERAL

1529. The several states foreign to one another—Business has scant respect for state lines. State v. District Court, 139 Minn. 205, 166 N. W. 185.

COMITY AND PUBLIC POLICY

1530. Comity—(71) State v. District Court, 140 Minn. 494, 168 N. W. 589.

1531. Public policy—A contract of a married woman made in another state will not be enforced in the state of her domicil, if it is contrary to the public policy of the latter state to allow married women to make such contracts. Union Trust Co. v. Grosman, 245 U. S. 412.

CONTRACTS

1532. In general—A note executed in this state and payable here is governed by our law though it is secured by a mortgage on land in another state or country. Hewitt v. Dredge, 133 Minn. 171, 157 N. W. 1080.

As a general rule, a contract entered into with all the formalities required to make it valid in the state where made and to be performed will be enforced in another state unless contrary to the policy of the laws of the forum. Halloran v. Jacob Schmidt Brewing Co., 137 Minn. 141, 162 N. W. 1082.

Where a note is made and is payable in North Dakota its validity is governed by the laws of that state notwithstanding the fact that it is secured by mortgage on Minnesota land. Patterson v. Wyman, 142 Minn. 70, 170 N. W. 928.

Where an agent is authorized to enter into contracts in a state other than that of the residence of his principal, the place where he exercises that authority is the place of contract. Officers and agents of defendant, in charge of a department maintained by it in the state of Florida for the sale of lands therein, had authority to enter into and conclude land contracts in that state; in the exercise thereof they entered into a contract with plaintiff by which they offered on behalf of defendant to pay him a reasonable commission for the sale of certain timber in said state at a stated price per thousand feet; plaintiff accepted the offer and subsequently presented to the Florida office a purchaser ready, able, and willing to buy the timber at the price named, all of which took place in the state of Florida. Held, that the contract was a Florida and not a Minnesota transaction, though defendant was a Minnesota corporation, with its principal headquarters in this state. Kamper v. Hunter Land Co., 146 Minn. 337, 178 N. W. 747.

A married woman domiciled in Texas made a contract while temporarily in Illinois guaranteeing her husband's note. Such a contract was valid in Illinois but not in Texas. In an action on the contract in a federal court of Texas, held, that the law of Texas governed and that there could be no recovery. Union Trust Co. v. Grosman, 245 U. S. 412. See 31 Harv. L. Rev. 799; 2 Minn. L. Rev. 464.

What law governs as to the capacity to contract. 31 Harv. L. Rev. 799.

Conflict of laws as to land contracts. L. R. A. 1916A, 1011.

(78) Farmers State Bank v. Walch, 133 Minn. 230, 158 N. W. 253; Halloran v. Jacob Schmidt Brewing Co., 137 Minn. 141, 162 N. W. 1082; Granite City Bank v. Tvedt, 146 Minn. 12, 177 N. W. 767.

1537. Chattel mortgages—The validity of a mortgage and the rights of the parties thereunder are governed by the law of the state where the property is situated. Goldberg v. Brule Timber Co., 140 Minn. 335, 168 N. W. 22.

A chattel mortgage duly recorded and valid in the state where the property is situated is valid, even against bona fide purchasers, in other

states to which the property is taken, except possibly when the mortgagee consents to the removal. 34 Harv. L. Rev. 553.

1540. Interest—Usury—Express agreement—One state will not enforce the penalties of the usury laws of another state. A provision of the North Dakota statute (Rev. Codes 1905, § 5513) for recovery of double interest paid on a usurious contract is a penalty and will not be enforced in Minnesota. Patterson v. Wyman, 142 Minn. 70, 170 N. W. 928.

(7) Jenkins v. Union Savings Assn., 132 Minn. 19, 155 N. W. 765.

See L. R. A. 1916D, 750 (conflict of laws as to usury).

TORTS

1541. In general—In an action for negligence the burden of proving the negligence is probably governed by the lex loci delicti. Manning v. Chicago G. W. R. Co., 135 Minn. 229, 160 N. W. 787. See § 1548.

(9) Beard v. Chicago etc. Ry. Co., 134 Minn. 162, 158 N. W. 815.

1543. Death by wrongful act—(12) Pickering v. Northern Pacific Ry. Co., 132 Minn. 205, 156 N. W. 3. See § 2603.

REMEDIES

1545. General rule—(16) Manning v. Chicago G. W. R. Co., 135 Minn. 229, 160 N. W. 787.

1545a. Subrogation—Whether upon a given state of facts there is a right of subrogation probably depends on the lex fori. Northern Trust Co. v. Consolidated Elevator Co., 142 Minn. 132, 171 N. W. 265.

1546. Limitation of actions—(17) See Hewitt v. Dredge, 133 Minn. 171, 157 N. W. 1080 (Canadian moratorium).

1548. Evidence—(22) See Halloran v. Jacob Schmidt Brewing Co., 137 Minn. 141, 162 N. W. 1082 (statute of frauds).

(23) See Manning v. Chicago G. W. R. Co., 135 Minn. 229, 160 N. W. 787; New Orleans & N. E. R. Co. v. Harris, 247 U. S. 367.

1550. Damages—Interest—In an action on a foreign judgment interest should be computed according to the law of the state where the judgment was rendered. 34 Harv. L. Rev. 553.

(25) Bowers v. Chicago etc. Ry. Co., 141 Minn. 385, 170 N. W. 226.

PENAL AND CRIMINAL LAW

1552. In general—One state will not enforce the penalties of the usury laws of another state. Patterson v. Wyman, 142 Minn. 70, 170 N. W. 928.

MISCELLANEOUS

1553. Situs of personalty—(30) State v. Giller, 138 Minn. 369, 165 N. W. 132. See § 9155; 28 Yale L. Journal 525.

(31) 28 Yale L. Journal 525.

1555. Descent and testamentary disposition—(34) Mechling v. McAllister, 135 Minn. 357, 160 N. W. 1016. See Seccomb v. Bovey, 135 Minn. 353, 160 N. W. 1018.

(35) Baker v. Baker, Eccles & Co., 242 U. S. 394.

1557a. Legitimacy—The status of a person as legitimate or illegitimate depends on the law of his domicil of origin. Once fixed this status follows the person wherever he may go. See 31 Harv. L. Rev. 892.

CONFUSION OF GOODS

1561. In general—Where the commingling is done by the defendant intentionally, wilfully or fraudulently and the separate property cannot be identified, the injured owner may recover the entire mass. Evidence held not to show such a commingling. International Lumber Co. v. Bradley T. & R. Supply Co., 132 Minn. 155, 156 N. W. 274.

It is the prevailing rule that where the confusion results from accident, mistake or negligence, but without fraudulent intent, the property does not pass to the several owners, but they become tenants in common in proportion to their several interests. International Lumber Co. v Bradley T. & R. Supply Co., 132 Minn. 155, 156 N. W. 274.

Evidence held not to bring a case within the rule that a mortgagor, who mingles his other property with that mortgaged so that a confusion of goods results, cannot claim that not mortgaged unless he separates it from the other and that the mortgagee is not a wrongdoer in taking all of it. Aylmer v. Northwestern Mutual Invest. Co., 138 Minn. 148, 164 N. W. 659.

(52) International Lumber Co. v. Bradley T. & R. Supply Co., 132 Minn. 155, 156 N. W. 274.

(55) See International Lumber Co. v. Bradley T. & R. Supply Co., 132 Minn. 155, 156 N. W. 274.

CONSPIRACY

1562. Concert of action—The combination of two or more minds in an unlawful purpose is the foundation of the offence, but an overt act in furtherance of the common purpose is necessary to complete it. State v. Townley, — Minn. —, 182 N. W. 773. See Duplex Printing Press Co. v. Deering, 254 U. S. 443.

1563. At common law—(59) State v. Townley, — Minn. —, 182 N. W. 773 (common-law rule changed by statute).

1563a. To commit a crime—The statute provides that, whenever two or more persons shall conspire to commit a crime, every such person shall be guilty of a misdemeanor, but no agreement, except to commit a felony upon the person of another, or to commit arson or burglary, shall amount to a conspiracy, unless some act besides such agreement be done

to effect the object thereof by one or more of the parties to such agreement. G. S. 1913, §§ 8595, 8596. State v. Townley, 142 Minn. 326, 171 N. W. 930.

A conspiracy to commit a crime is one offence and the commission of that crime is another and different offence. State v. Townley, 142 Minn. 326, 171 N. W. 930.

See § 2416.

1564. Statutory offence—What constitutes—An agreement among union employees in the building trades who have a bona fide dispute with a contractor, to withhold their services from him or his subcontractors until the dispute is settled, does not violate G. S. 1913, §§ 8595, 8996. George J. Grant Const. Co. v. St. Paul Building Trades Council, 136 Minn. 167, 161 N. W. 520, 1055.

What one may lawfully do singly, two or more may agree to do jointly. Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119; Hartle v. Neighbauer, 142 Minn. 438, 172 N. W. 498.

1565. Preventing employment—Statute—The mere entry in an employer's record of the grounds for the discharge of an employee is not a "blacklisting" in violation of G. S. 1913, § 8890. Cleary v. Great Northern Ry. Co., 147 Minn. 403, 180 N. W. 545.

1566. Boycott—Bannering—It is not unlawful for the members of labor unions to agree among themselves that they will not work for a building contractor with whom they have a controversy nor for any subcontractor on any contract he may have on hand. George J. Grant Const. Co. v. St. Paul Building Trades Council, 136 Minn. 167, 161 N. W. 520, 1055. See 4 Minn. L. Rev. 544.

The term "unfair" as used by organized labor means that the person so designated is unfriendly to organized labor or refuses to recognize its rules and regulations. A notification to customers or prospective customers that an employer of labor is unfair may portend a threat or intimidation. In such case it constitutes a boycott and is unlawful, but a mere notification that an employer is unfair, without more, is not unlawful. Display of an "unfair" placard on the public street near plaintiff's place of business is not unlawful if there be no obstruction to traffic or of access to plaintiff's place of business and no threat, intimidation or other unlawful interference. Steffes v. Motion Picture M. O. Union, 136 Minn. 200, 161 N. W. 524.

Bannering plaintiff's place of business as unfair to organized labor and thereby deterring the public from patronizing him, if done for the purpose of compelling him not to work for himself in his own business, is unlawful and may be enjoined. Roraback v. Motion Picture M. O. Union, 140 Minn. 481, 168 N. W. 766.

(63) Roraback v. Motion Picture M. O. Union, 140 Minn. 481, 168 N. W. 766. See George J. Grant Const. Co. v. St. Paul Building Trades Council, 136 Minn. 167, 161 N. W. 520, 1055; Duplex Printing Press Co. v. Deering, 254 U. S. 443 (sympathetic strike in aid of a secondary boy-

cott illegal); 6 A. L. R. 909 (exhaustive note on use of boycott); 31 Harv. L. Rev. 482 (boycott on materials); 34 Id. 880 (boycott); 1 Minn. L. Rev. 437; 4 Id. 544; Ann. Cas. 1918E, 54 (picketing).

1566a. Evidence—Admissibility—Great latitude should be allowed in the cross-examination of a defendant. Backe v. Curtis, 139 Minn. 64, 165 N. W. 488.

Evidence of certain transactions after a settlement held properly excluded. Rosenberg v. Nelson, 145 Minn. 455, 177 N. W. 659.

The combination need not be established by direct evidence. It may be inferred from circumstances. No formal agreement to do the acts charged need be shown. Concurrence of sentiment and co-operative conduct, and not formality of speech, are the essential ingredients of conspiracy. State v. Townley, — Minn. —, 182 N. W. 773.

In a prosecution for a conspiracy to discourage enlistment, held that there was no error in admitting or excluding evidence. State v. Townley, — Minn. —, 182 N. W. 773.

(02) State v. Townley, — Minn. —, 182 N. W. 773.

1566b. Evidence—Sufficiency—Evidence held insufficient to require submitting to a jury a claim of conspiracy to commit an assault. Leibel v. Golden, 138 Minn. 90, 163 N. W. 991.

Evidence held not to justify a finding of a conspiracy to injure plaintiff in his business. Loucks v. Priest, 140 Minn. 41, 167 N. W. 280.

Evidence held insufficient to justify a recovery. Rosenberg v. Nelson, 145 Minn. 455, 177 N. W. 659.

Evidence held not sufficient to require the court to submit to the jury an issue of an alleged conspiracy to commit an assault on plaintiff. Wrabek v. Suchomel, 145 Minn. 468, 177 N. W. 764.

Evidence held sufficient to justify a conviction for a conspiracy to discourage enlistment. State v. Townley, — Minn. —, 182 N. W. 773.

1566c. Indictment—An indictment which charges defendants with conspiring to teach and advocate that men should not enlist in the military or naval forces of the United States, and that the citizens of this state should not aid or assist the United States in prosecuting a war in which it is engaged with a public enemy, does not, by reason of the fact that it contains an averment that one of the defendants consummated the offence, which they conspired to commit, charge the offence of so teaching and advocating, but is an indictment for conspiracy. State v. Townley, 142 Minn. 326, 171 N. W. 930.

In an indictment charging a conspiracy to teach and advocate that men should not enlist in the military or naval forces of the United States, and that the citizens of this state should not aid or assist the United States in prosecuting a war in which it is engaged with its public enemy, charging as an overt act that one of the conspirators, after the formation of the conspiracy and during its continuance, to effect the object thereof, did so teach and advocate, is an averment to complete the charge of conspiracy, and does not charge the commission of the

offence which was the object of the conspiracy. State v. Townley, 142 Minn. 326, 171 N. W. 930.

1567a. Law and fact—Whether appellant knew that the checks, which he permitted the defendant Gesell to issue to him as payee and which he indorsed and delivered to Gesell, were used by the latter in a check-kiting scheme to defraud the bank upon which they were drawn, was a question for the jury under the evidence. The issue was also rightly left to the jury whether, when honoring these checks, the officers of the bank knew, or in the exercise of ordinary prudence should have known, the manner in which Gesell was doing his banking business. Backe v. Curtis, 139 Minn. 64, 165 N. W. 488.

CONSTITUTIONAL LAW

IN GENERAL

1570. Constitutional conventions—(72) See 29 Harv. L. Rev. 528 (powers of constitutional conventions).

(73) See 5 Minn. L. Rev. 407.

CONSTRUCTION OF CONSTITUTION

1576. In general—The present tendency is to give great weight to practical considerations in the construction of constitutions and to leave the powers of government flexible and adaptive. Williams v. Evans, 139 Minn. 32, 45, 165 N. W. 495.

Some provisions of the constitution are now construed far more liberally than formerly. They must necessarily be construed with reference to changed social, economic and political conditions. Seamer v. Great Northern Ry. Co., 142 Minn. 376, 172 N. W. 765.

The constitution is as it was when adopted; but when it employs terms which change in definition as conditions change, it refers to them in the sense in which they are meant when the protection of the constitution is sought. State v. Houghton, 144 Minn. 1, 174 N. W. 885, 176 N. W. 159.

(97) Seamer v. Great Northern Ry. Co., 142 Minn. 376, 172 N. W. 765; State v. Houghton, 144 Minn. 1, 174 N. W. 885, 176 N. W. 159; Merrick v. N. W. Halsey & Co., 242 U. S. 568.

1583. Amendments—An amendment "so as to read as follows" is to be construed as to any matter after the amendment as if it had been originally enacted in the amended form. Yoncalla State Bank v. Gemmill, 134 Minn. 334, 159 N. W. 798. See § 8928.

THREE DEPARTMENTS OF GOVERNMENT

1587. In general—Recent decisions have more and more recognized the difficulty of exact separation of the powers of government and the neces-

sity of giving weight to practical considerations. Williams v. Evans, 139 Minn. 32, 165 N. W. 495.

(15) State v. District Court, 141 Minn. 1, 168 N. W. 634.

(18) State v. Flaherty, 140 Minn. 19, 167 N. W. 122; Williams v. Evans, 139 Minn. 32, 45, 165 N. W. 495.

1589. What constitutes a judicial question—The formation and expansion of municipal corporations are legislative and not judicial problems. State v. Kinney, 146 Minn. 311, 178 N. W. 815.

(26) State v. State Securities Commission, 145 Minn. 221, 176 N. W. 759.

(27) State v. Flaherty, 140 Minn. 19, 167 N. W. 122.

1590. Held not a delegation of judicial power—A law providing for the supervision of telephone companies by the Railroad and Warehouse Commission. State v. Four Lakes Telephone Co., 141 Minn. 124, 169 N. W. 480.

A law authorizing the state securities commission to issue certificates for the organization of banks. State v. State Securities Commission, 145 Minn. 221, 176 N. W. 759.

A law providing for minimum wages. G. O. Miller Telephone Co. v. Minimum Wage Commission, 145 Minn. 262, 177 N. W. 341.

1592. Imposing non-judicial duties on judiciary—Duties of a mixed legislative and judicial or quasi judicial character may be conferred or imposed upon the courts by appropriate legislation without infringement of the constitution. The provisions of section 2108, Gen. St. 1913, granting to the property owner the defence of overvaluation in real estate tax assessments, are not unconstitutional as a delegation of exclusive legislative or administrative duties to the courts, nor because the same defence is not extended to personal property assessments. State v. Koochiching Realty Co., 146 Minn. 87, 177 N. W. 940.

The power to establish, alter or vacate roads cannot be imposed on courts. Brazil v. Sibley County, 148 Minn. —, 181 N. W. 329.

Laws 1917, c. 442, authorizing courts to organize drainage and flood districts in river basins near boundary waters and to appoint a board of directors to carry the purpose of the act into effect, is not unconstitutional as an unwarranted delegation of legislative functions and powers to the judiciary. State v. Flaherty, 140 Minn. 19, 167 N. W. 122.

The legislature could not impose upon the courts the duty of determining the existence of a reasonable public demand for the organization of a bank. State v. State Securities Commission, 145 Minn. 221, 176 N. W. 759.

(40) State v. State Securities Commission, 145 Minn. 221, 176 N. W. 759.

(41) State v. Flaherty, 140 Minn. 19, 167 N. W. 122.

(42) State v. Flaherty, 140 Minn. 19, 167 N. W. 122; Petition of Siblerud, — Minn. —, 182 N. W. 168.

(50) See State v. Kinney, 146 Minn. 311, 178 N. W. 815.

(51) See State v. Flaherty, 140 Minn. 19, 167 N. W. 122.

1593. Control of executive officers by judiciary—While the courts cannot interfere with the exercise of the powers which the constitution vests in the Governor, his action in removing an officer from office may be reviewed by writ of certiorari as that power rests only on an act of the legislature. State v. Ebehart, 116 Minn. 313, 133 N. W. 857; In re Mason, 148 Minn. —, 181 N. W. 570.

The courts cannot prevent an executive officer from enforcing an unconstitutional statute before its unconstitutionality has been finally determined by the supreme court and they cannot punish him as for contempt of court for such enforcement. State v. District Court, 141 Minn. 1, 168 N. W. 634.

In an action to enjoin the several members of the Minnesota Public Safety Commission (created by chapter 261, Laws 1917), the village president and sheriff from enforcing the orders of the commission in closing a licensed saloon, the court, upon ex parte application, granted a temporary restraining order. The relator Burnquist, as Governor of the state, ordered the adjutant general, the relator Rhinow, to close the saloon with the military force of the state. The order was carried out; and relators were cited to show cause why they should not be punished for contempt. It is held: (1) That the trial court is without jurisdiction to proceed against the relator Burnquist, since it appears that in closing the saloon he was in good faith discharging a constitutional duty, placed upon him as Governor, to take care that a duly enacted law was faithfully executed. (2) That the same is true with reference to the relator Rhinow, since, as adjutant general, he was a proper agency in the hands of the Governor to aid in discharging his said duty. State v. District Court, 141 Minn. 1, 168 N. W. 634.

(52) State v. District Court, 141 Minn. 1, 168 N. W. 634; In re Mason, 148 Minn. —, 181 N. W. 570. See 33 Harv. L. Rev. 462; L. R. A. 1917F, 774 (mandamus).

1594. Control of legislature by judiciary—The courts cannot control the legislature in the enactment of laws. State v. District Court, 141 Minn. 1, 168 N. W. 634.

1596. Assumption of judicial power by legislature—How far legislature may regulate judicial procedure. 34 Harv. L. Rev. 424.

(58) Petition of Siblerud, — Minn. —, 182 N. W. 168.

1597. Delegation of legislative power—It is not an unauthorized delegation of legislative power to leave it to the court to determine what constitutes a "dangerous" employment for minors. Westerlund v. Kettle River Co., 137 Minn. 24, 162 N. W. 680.

A statute, to be valid, must be complete as a law when it leaves the legislature. Williams v. Evans, 139 Minn. 32, 165 N. W. 495.

The formation and expansion of municipal corporations are legislative and not judicial problems. State v. Kinney, 146 Minn. 311, 178 N. W. 815.

(64) Williams v. Evans, 139 Minn. 32, 165 N. W. 495; State v. Brothers, 144 Minn. 337, 176 N. W. 685.

(65) Williams v. Evans, 139 Minn. 32, 165 N. W. 495.

1598. Held an unauthorized delegation of legislative power—(70) See State v. Kinney, 146 Minn. 311, 178 N. W. 815.

(72) St Paul Association of Commerce v. Chicago etc. Ry. Co., 134 Minn. 217, 158 N. W. 982.

1599. Held not a delegation of legislative power—A law authorizing the Railroad and Warehouse Commission to establish a common rate point for railroad rates. St. Paul Association of Commerce v. Chicago etc. Ry. Co., 134 Minn. 217, 158 N. W. 982.

A law establishing a Minimum Wage Commission and providing for minimum wages for women and minors. Williams v. Evans, 139 Minn. 32, 165 N. W. 495.

A law whose operation was made contingent on the existence of an act of Congress of a certain import. State v. Brothers, 144 Minn. 337, 175 N. W. 685.

A law authorizing the State Securities Commission to issue certificates for the organization of state banks. State v. State Securities Commission, 145 Minn. 221, 176 N. W. 759.

A law providing for minimum wages. G. O. Miller Telephone Co. v. Minimum Wage Commission, 145 Minn. 262, 177 N. W. 341.

See §§ 1587–1592.

1600. Administrative boards and commissions—The legislature may delegate to a commission the power to do some things which it might properly but not advantageously do itself. It may vest in a commission authority or discretion to be exercised in the execution of the law. It may delegate power to determine some fact or state of things upon which the law makes its own action or operation to depend. It may declare that a law shall be operative or applicable only upon the subsequent establishment of some fact by a commission. Williams v. Evans, 139 Minn. 32, 165 N. W. 495.

A statute to be valid must be complete as a law when it leaves the legislature. If, by the terms of the act, it is to be effective only in case a commission deems the act expedient, then there is a delegation of legislative power and the act is void, for a determination of legislative expediency can be made by the legislature alone. Williams v. Evans, 139 Minn. 32, 165 N. W. 495.

The legislature may delegate to a board or commission authority or discretion to be exercised in carrying out the purposes of a statute. State v. State Securities Commission, 145 Minn. 221, 176 N. W. 759.

An administrative board cannot pass on the constitutionality of a statute which it is directed to enforce. 30 Harv. L. Rev. 386.

Administrative boards are not bound by the doctrines of stare decisis and res judicata. 31 Harv. L. Rev. 487.

(88) St. Paul Association of Commerce v. Chicago etc. R. Co., 134

Minn. 217, 158 N. W. 982 (railroad and warehouse commission—fixing railroad rates); State v. Minnesota Tax Commission, 137 Minn. 20, 162 N. W. 675 (state tax commission); Williams v. Evans, 139 Minn. 32, 165 N. W. 495 (statute authorizing commission to establish minimum wages for women and minors sustained); State v. Four Lakes Tel. Co., 141 Minn. 124, 169 N. W. 480 (railroad and warehouse commission—regulating telephone companies—installing service); State v. State Securities Commission, 145 Minn. 221, 176 N. W. 759 (statute authorizing state securities commission to issue certificates for the organization of banks); G. O. Miller Telephone Co. v. Minimum Wage Commission, 145 Minn. 262, 177 N. W. 341 (powers of minimum wage commission defined). See 30 Harv. L. Rev. 430; 31 Id. 644, 1165.

See § 397b (scope of review on appeal); § 1642 (right to notice and opportunity to be heard).

EXTENT OF LEGISLATIVE POWER

1602. In general—(90) State v. International Falls, 132 Minn. 298. 156 N. W. 249; Williams v. Evans, 139 Minn. 32, 165 N. W. 495.

POLICE POWER

1603. Nature—The police powers of the state are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. Williams v. Evans, 139 Minn. 32, 165 N. W. 495.

The police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Noble State Bank v. Haskell, 219 U. S. 104, 111; State v. Houghton, 134 Minn. 226, 240, 158 N. W. 1017; Williams v. Evans, 139 Minn. 32, 165 N. W. 495.

The police power is one of the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government. District of Columbia v. Brooke, 214 U. S. 138, 149; State v. Houghton, 134 Minn. 226, 240, 158 N. W. 1017.

The prevention of fraud and imposition upon the purchasing public in the sale of a commodity, the quality of which is not readily ascertainable, is a proper object of police regulation. State v. Bartles Oil Co., 132 Minn. 138, 155 N. W. 1035; State v. Pure Oil Co., 134 Minn. 101, 158 N. W. 723, affirmed, 248 U. S. 158.

(93) State v. Houghton, 134 Minn. 226, 158 N. W. 1017.

(95) Williams v. Evans, 139 Minn. 32, 165 N. W. 495.

(96) State v. Houghton, 134 Minn. 226, 158 N. W. 1017; Williams v. Evans, 139 Minn. 32, 165 N. W. 495.

(98) State v. Chicago etc. Ry. Co., 135 Minn. 277, 160 N. W. 773; State v. Holm, 138 Minn. 281, 164 N. W. 989. See State v. Houghton, 144 Minn. 1, 174 N. W. 885, 176 N. W. 158.

(99) State v. Holm, 138 Minn. 281, 164 N. W. 989; Block v. Hirsh, 254 U. S. 640; Marcus Brown Holding Co. v. Feldman, 255 U. S. —.

(1) See State v. Houghton, 144 Minn. 1, 174 N. W. 885, 176 N. W. 159.

1604. Limitations—It is very generally held that restrictions on the use of property based on purely aesthetic considerations cannot be upheld as a legitimate exercise of the police power. Thus, it is generally held, that statutes or ordinances forbidding the erection of billboards or other structures for advertising purposes, are invalid. State v. Houghton, 134 Minn. 226, 158 N. W. 1017. See L. R. A. 1917A, 1220.

In the exercise of the police power the state may impose liability without fault. New York Central R. Co. v. White, 243 U. S. 188; Arizona Copper Co. v. Hammer, 250 U. S. 400. See § 9631.

A law designed to meet an emergency and operating for a limited time may be justified though it would not be justified if it were to operate indefinitely. Block v. Hirsh, 254 U. S. 640; Marcus Brown Holding Co. v. Feldman, 255 U. S. —.

(2–5) State v. Houghton, 134 Minn. 226, 158 N. W. 1017.

(3) Williams v. Evans, 139 Minn. 32, 165 N. W. 495. See State v. Houghton, 144 Minn. 1, 174 N. W. 885, 176 N. W. 159.

(5) State Fire Marshal v. Fitzpatrick, — Minn. —, 183 Minn. 141.

(6) See State v. Houghton, 141 Minn. 1, 174 Minn. 885, 176 N. W. 159.

(9) Adams v. Tanner, 244 U. S. 590 (employment agencies).

1605. Discretion of legislature—Power of courts—(11) State v. Bartles Oil Co., 132 Minn. 138, 155 N. W. 1035; State v. Pure Oil Co., 134 Minn. 101, 158 N. W. 723, affirmed, 248 U. S. 158; Williams v. Evans, 139 Minn. 32, 165 N. W. 495; State v. State Securities Commission, 145 Minn. 221, 176 N. W. 759; State v. Rogers & Rogers, — Minn. —, 182 N. W. 1005; Block v. Hirsh, 254 U. S. 640.

1606. Cannot be surrendered—The police power cannot be surrendered, divested, abridged or bargained away. One legislative body cannot deprive its successor of it. State v. Great Northern Ry. Co., 134 Minn. 249, 158 N. W. 972; State v. Chicago etc. Ry. Co., 135 Minn. 277, 160 N. W. 773.

(14) State v. Great Northern Ry. Co., 134 Minn. 249, 158 N. W. 972; St. Paul v. Chicago etc. Ry. Co., 139 Minn. 322, 166 N. W. 335; Chicago etc. Ry. Co. v. Sprague, 140 Minn. 1, 167 N. W. 124. See §§ 6698, 8121.

1607. Delegation—(15) State v. Chicago etc. Ry. Co., 135 Minn. 277, 160 N. W. 773.

1607a. Regulation of rates or charges—If a business is affected with a public interest the legislature may regulate the rates or charges for services therein. The business need not be monopolistic in effect or clothed with special privileges by the law, and the public need not have the right to demand the services. State v. Rogers & Rogers, — Minn. —, 182 N. W. 1005 (charges of commission men engaged in buying and selling stock at public stockyards).

See § 8077.

1608. Fees and licenses—Inspection fees must be reasonable in amount and designed to cover the expenses of the inspection and not to raise revenue. A law will not be declared unconstitutional on account of the amount of an inspection fee unless the amount is so large as to show bad faith in the law. Courts will not interfere immediately upon it being made to appear that the amount collected is beyond what is needed for inspection expenses, because of the presumption that the legislature will reduce the fee to a proper amount. State v. Bartles Oil Co., 132 Minn. 138, 155 N. W. 1035; State v. Pure Oil Co., 134 Minn. 101, 158 N. W. 723, affirmed, 248 U. S. 158.

(17) State v. Bartles Oil Co., 132 Minn. 138, 155 N. W. 1035; State v. Pure Oil Co., 134 Minn. 101, 158 N. W. 723, affirmed, 248 U. S. 158.

1609. Seizure and destruction of property—Old buildings liable to take fire and which are therefore dangerous to life and property may be demolished by public authority under the police power without compensation. York v. Hargadine, 142 Minn. 219, 171 N. W. 773; State Fire Marshal v. Fitzpatrick, — Minn. —, 183 N. W. 141.

1610. Held within police power—A law providing for the testing of gasolene for gravity, requiring it to be branded "unsafe for illuminating purposes," and requiring the word "gasolene" to be branded and the gravity stenciled on every barrel or package. State v. Bartles Oil Co., 132 Minn. 138, 155 N. W. 1035; State v. Pure Oil Co., 134 Minn. 101, 158 N. W. 723, affirmed, 248 U. S. 158.

A law requiring railroad companies to keep their ditches and culverts clean between April 1 and November 1. Peterson v. Northern Pacific Ry. Co., 132 Minn. 265, 156 N. W. 121.

A law providing for local option. State v. International Falls, 132 Minn. 298, 156 N. W. 249.

A law prohibiting the service of process on legal holidays. Farmers Implement Co. v. Sandberg, 132 Minn. 389, 157 N. W. 642.

A law providing for a five-sixth verdict. McNaney v. Chicago etc. Ry. Co., 132 Minn. 391, 396, 157 N. W. 650.

An order of the Railroad and Warehouse Commission requiring a railroad company to construct a spur track to an industrial plant and to bear a part of the expense. Range Sand-Lime Brick Co. v. Great Northern Ry. Co., 137 Minn. 314, 163 N. W. 656.

A law requiring railroads to construct sidetracks to industrial plants and to pay a share of the expense thereof. Ochs v. Chicago & N. W. Ry. Co., 135 Minn. 323, 160 N. W. 866.

A law establishing a minimum wage commission and providing for minimum wages for women and children. Williams v. Evans, 139 Minn. 32, 165 N. W. 495.

A law making it a criminal offence to advocate that men should not enlist in the military forces of the United States or aid the government in the prosecution of war. State v. Holm, 139 Minn. 267, 166 N. W. 181.

A law authorizing the state fire marshal to abate old, dilapidated buildings liable to take fire and dangerous to life and property in the vicinity. York v. Hargadine, 142 Minn. 219, 171 N. W. 773.

A law requiring a certificate from the State Securities Commission for the organization of a state bank. State v. State Securities Commission, 145 Minn. 221, 176 N. W. 759.

A law regulating the sale of securities. State v. Gopher Tire & Rubber Co., 146 Minn. 52, 177 N. W. 937.

A law authorizing the Railroad and Warehouse Commission to fix reasonable commission charges of commission men engaged in buying and selling stock at public stockyards. State v. Rogers & Rogers, — Minn. —, 182 N. W. 1005.

1611. Held not within police power—An ordinance prohibiting the owner of land from building a store or flat building thereon in a residential district. State v. Houghton, 134 Minn. 226, 158 N. W. 1017; State v. Minneapolis, 136 Minn. 479, 162 N. W. 477.

A law imposing a personal liability upon the stockholders of a bank contrary to the express constitutional provision in force at the time of the organization of the bank and the purchase of the stock by the stockholders. Yoncalla State Bank v. Gemmill, 134 Minn. 334, 159 N. W. 798.

VESTED RIGHTS

1613. Impairment unconstitutional—Where the rights of parties to a contract are settled by a judgment the legislature cannot, by subsequent enactment, change such rights. Seastrand v. D. A. Foley & Co., 144 Minn. 239, 175 N. W. 117.

(87) Seastrand v. D. A. Foley & Co., 144 Minn. 239, 175 N. W. 117.

1616. Rules of evidence—(92) Finch, Van Slyck & McConville v. Vanasek, 132 Minn. 9, 155 N. W. 754. See Boynton v. Modern Woodmen, 148 Minn. —, 181 N. W. 327.

1617. Remedies—(93) Finch, Van Slyck & McConville v .Vanasek, 132 Minn. 9, 155 N. W. 754.

1619. Rights held not vested—A person has no vested right to the defence of usury, nor in the non-compliance of a corporation with a statutory prerequisite to doing business. Jenkins v. Union Savings Assn., 132 Minn. 19, 155 N. W. 765.

Rights of a municipality growing out of a franchise granted by it to a telephone company. State v. Holm, 138 Minn. 281, 164 N. W. 989.

A right to have a certificate for the organization of a state bank. Carlson v. Pearson, 145 Minn. 125, 176 N. W. 346.

CURATIVE ACTS

1620. In general—(16, 19) Jenkins v. Union Savings Assn., 132 Minn. 19, 155 N. W. 765.

1621. Curative acts held valid—An act validating contracts of foreign corporations made before complying with the Somerville law. Jenkins v. Union Savings Assn., 132 Minn. 19, 156 N. W. 765.

IMPAIRMENT OF CONTRACTS

1624. To what applicable—The constitutional guaranty is applicable to the charter of a corporation. Yoncalla State Bank v. Gemmill, 134 Minn. 334, 159 N. W. 798.

It does not forbid the legislature from annuling obligations due the public. State v. Holm, 138 Minn. 281, 164 N. W. 989.

It forbids impairment of contracts by municipalities. See 31 Harv. L. Rev. 879.

1628. Change of remedies—(47) See Standard Salt & Cement Co. v. National Surety Co., 134 Minn. 121, 158 N. W. 802.

1631. Police power—(50) St. Paul v. Great Northern Ry. Co., 145 Minn. 355, 177 N. W. 492; Block v. Hirsh, 254 U. S. 640; Marcus Brown Holding Co. v. Feldman, 255 U. S. —. See Yoncalla State Bank v. Gemmill, 134 Minn. 334, 159 N. W. 798; 3 Minn. L. Rev. 43.

1635. Held to impair obligation—A law imposing a personal liability upon the stockholders of a bank contrary to the express constitutional provision in force at the time of the organization of the bank and the purchase of the stock by the stockholders. Yoncalla State Bank v. Gemmill, 134 Minn. 334, 159 N. W. 798.

1636. Held not to impair obligation—The adoption of a new charter affecting the remedy on a bond of a public contractor given under a former charter. Standard Salt & Cement Co. v. National Surety Co., 134 Minn. 121, 158 N. W. 802.

A law providing for an application to the State Securities Commission for a certificate for the organization of a state bank. Carlson v. Pearson, 145 Minn. 125, 176 N. W. 346.

A construction placed on a state mining lease by the supreme court. State v. Hobart Iron Co., 143 Minn. 457, 176 N. W. 758.

A law shortening the time within which a tax certificate may be recorded. Northern Counties Land Co. v. Excelsior Land etc. Co., 146 Minn. 207, 178 N. W. 497.

DUE PROCESS OF LAW

1637. Nature—The result of a proceeding does not constitute the test whether the proceeding itself is due process of law. St. Paul Association of Commerce v. Chicago etc. R. Co., 134 Minn. 217, 158 N. W. 982.

In determining what is due process of law regard must be had to substance, not to form. Great Northern Ry. Co. v. Minneapolis, 136 Minn. 1, 161 N. W. 231.

Due process of law, as applied to judicial proceedings instituted for the taking of private property for public use, means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted

to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation. Great Northern Ry. Co. v. Minneapolis, 136 Minn. 1, 161 N. W. 231.

1639. To what applicable—(14) St. Paul v. Great Northern Ry. Co., 145 Minn. 355, 177 N. W. 492. See § 1701.

1641. Notice and opportunity to be heard—In drainage proceedings imposing on counties financial obligations therefor they are entitled to notice and an opportunity to be heard. There is no distinction between a municipality and an individual as respects the right to notice. State v. District Court, 138 Minn. 204, 164 N. W. 815.

A party is entitled to notice and an opportunity to be heard before he can be deprived of membership in a mutual benefit society carrying with it a vested right. The notice required is one that will give the party a reasonable opportunity to prepare and present his defence. Burmaster v. Alwin, 138 Minn. 383, 165 N. W. 135. See § 4822b.

When a person is entitled to personal notice, a notice by registered mail is insufficient. Rost v. O'Connor, 145 Minn. 81, 176 N. W. 166.

An abutting owner cannot be deprived by municipal authorities of his right to trees growing in a highway without some form of notice and opportunity to be heard. Rost v. O'Connor, 145 Minn. 81, 176 N. W. 166.

The statute being unconstitutional, no vitality can be given to it, and no effect given to proceedings under it, by the issuance of an order to show cause. The constitutionality of a statute does not depend upon the acts of parties nor upon an order of a court. If the statute offends against the federal constitutional requirement of due process of law, it is a nullity and it cannot be mended by parties or courts. The law itself must save the rights of the parties. The notice that is required to satisfy the requirement of due process of law must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace. Gove v. Murray County, 147 Minn. 24, 179 N. W. 569.

(18) State v. Security Nat. Bank, 143 Minn. 408, 173 N. W. 885; Baker v. Baker, Eccles & Co., 242 U. S. 394.

(20) Great Northern Ry. Co. v. Minneapolis, 136 Minn. 1, 161 N. W. 231.

(21) State v. Security Nat. Bank, 143 Minn. 408, 173 N. W. 885.

See § 7835 (substituted service of process); § 6879 (special assessments); § 9145 (tax proceedings).

1642. Administrative proceedings—If administrative orders are quasi judicial in character notice and an opportunity to be heard are essential. See Missouri Pacific Ry. Co. v. Nebraska, 217 U. S. 196; State v. Chicago etc. Ry. Co., 115 Minn. 51, 131 N. W. 859; Ochs v. Chicago & N. W. Ry. Co., 135 Minn. 323, 160 N. W. 866; Range Sand-Lime Brick Co. v. Great Northern Ry. Co., 137 Minn. 314, 163 N. W. 656.

A drainage law requiring a county auditor to draw county warrants upon the preliminary or progress certificates of the engineer in charge has

been held constitutional against the objection that it provided no notice to the county. State v. Hansen, 140 Minn. 28, 167 N. W. 114.

Municipal officers and boards often command and enforce restraints upon the use of private property which do not amount to a taking of property without due process, though there is no hearing, and from the doing of which they cannot be enjoined. But the owner whose property has been interfered with or taken has at some time and in some form the right to have it judicially determined whether the interference or taking was rightful. Pelkey v. National Surety Co., 143 Minn. 176, 173 N. W. 435.

(25) See Rost v. O'Connor, 145 Minn. 81, 176 N. W. 166.

1643. New modes of procedure—(26) Finch, Van Slyck & McConville v. Vanasek, 132 Minn. 9, 155 N. W. 754.

1645. Taking private property for a private use—The use which the owner may make of his property is subject to any reasonable restrictions and regulations, imposed by the legislative power, which tend to promote the public welfare or to secure to others the rightful use and enjoyment of their own property; but only such use of property as may produce injurious consequences, or infringe the lawful rights of others, can be prohibited without violating the constitutional provisions that the owner shall not be deprived of his property without due process of law, nor without compensation first paid or secured. State v. Houghton, 134 Minn. 226, 158 N. W. 1017. See State v. Minneapolis, 136 Minn. 479, 162 N. W. 477; Meyers v. Houghton, 137 Minn. 481, 163 N. W. 754.

1645a. Liability without fault—Imposing a liability on a person who is without fault is not a denial of due process of law. New York Central R. Co. v. White, 243 U. S. 188. See §§ 1604, 9631.

1646. Held due process of law—A law authorizing the use of affidavits in proceedings for the assessment of the constitutional liability of stockholders in insolvent corporations. Finch, Van Slyck & McConville v. Vanasek, 132 Minn. 9, 155 N. W. 754.

An order of the Railroad and Warehouse Commission fixing a common rate point for railroad rates. St. Paul Association of Commerce v. Chicago etc. R. Co., 134 Minn. 217, 158 N. W. 982.

A law requiring railroads to construct sidetracks to industrial plants and to pay a share of the expense thereof. Ochs v. Chicago & N. W. Ry. Co., 135 Minn. 323, 160 N. W. 866.

A law providing for the condemnation of land for streets and parks in certain cities. Great Northern Ry. Co. v. Minneapolis, 136 Minn. 1, 161 N. W. 231.

An order of the Railroad and Warehouse Commission requiring a railroad company to construct a spur track to an industrial plant and to bear a part of the expense. Range Sand-Lime Brick Co. v. Great Northern Ry. Co., 137 Minn. 314, 163 N. W. 656.

A drainage law requiring a county auditor to issue county warrants upon the preliminary or progress certificates of the engineer in charge,

without any notice to the county. State v. Hansen, 140 Minn. 28, 167 N. W. 114.

A law providing for a rescale of timber sold by the state without notice to the purchaser and making the rescale conclusive as to the amount of timber cut. State v. Equitable Surety Co., 140 Minn. 48, 167 N. W. 292.

A law making syndicalism a criminal offence. State v. Moilen, 140 Minn. 112, 167 N. W. 345.

Allowance of claim of engineers against county in drainage proceedings. Baugh v. Norman County, 140 Minn. 465, 168 N. W. 348.

A dismissal of an action in this state unless a party should procure the dismissal of a foreign injunction tending to hamper improperly the exercise of jurisdiction by the court. Lipman v. Bechhoefer, 141 Minn. 131, 169 N. W. 536.

The procedure provided for condemnation proceedings by the charter of the city of Montevideo. State v. Montevideo, 142 Minn. 157, 171 N. W. 314.

An order of the Railroad and Warehouse Commission requiring a railroad company to construct a new depot. Commercial Club v. Chicago etc. Ry. Co., 142 Minn. 169, 171 N. W. 312.

Condemnation proceedings under the charter of the city of Minneapolis. Great Northern Ry. Co. v. Minneapolis, 142 Minn. 308, 172 N. W. 135.

A law providing for an application to the State Securities Commission for a certificate for the organization of a state bank. Carlson v. Pearson, 145 Minn. 125, 176 N. W. 346.

A construction placed on a state mining lease by the supreme court. State v. Hobart Iron Co., 143 Minn. 457, 176 N. W. 758.

An ordinance prohibiting undertaking establishments and funeral homes or parlors in resident districts. St. Paul v. Kessler, 146 Minn. 124, 178 N. W. 171.

Charter provisions for dividing a city into sewer districts and paying for sewers by a special district tax. In re Delinquent Taxes, —Minn. —, 180 N. W. 240.

1647. Held not due process of law—An ordinance prohibiting the owner of land from building a store or flat building thereon in a residential district. State v. Houghton, 134 Minn. 226, 158 N. W. 1017; State v. Minneapolis, 136 Minn. 479, 162 N. W. 477; Meyers v. Houghton, 137 Minn. 481, 163 N. W. 754. See § 6525.

A law imposing financial obligations on counties for the expenses of judicial ditches without notice and an opportunity to be heard. State v. District Court, 138 Minn. 204, 164 N. W. 815.

A personal judgment in tax proceedings rendered without personal notice. State v. Security Nat. Bank, 143 Minn. 408, 173 N. W. 885.

Section 2560, G. S. 1913, in so far as it authorizes local highway officials, without notice to the abutting landowner or opportunity by him to be heard, as a penalty for his failure to pay the expense of cutting down

trees thereby authorized to be removed from the highway, to make an ex parte sale of the trees and appropriate the proceeds to the use of the municipality, even though the amount may greatly exceed such expense, is unconstitutional and void as an attempt to deprive the owner of his property without due process of law. Rost v. O'Connor, 145 Minn. 81, 176 N. W. 166.

A criminal statute prescribing no ascertainable standard of guilt. United States v. Cohen Grocery Co., 255 U. S. —.

LIBERTY

1652. Liberty of contract—Liberty of contract is guaranteed by the Fourteenth Amendment. This liberty is not absolute, but is subject to reasonable regulations under the police power. Williams v. Evans, 139 Minn. 32, 165 N. W. 495.

Laws 1913, c. 547, establishing a minimum wage commission and providing for minimum wages for women and minors, is not unconstitutional as an infringement of the liberty of contract. Williams v. Evans, 139 Minn. 32, 165 N. W. 495.

Liberty of contract is not infringed by reasonable regulations as to the hours of labor of women or minors, or of men engaged in employments hazardous to health or on public works, or as to working conditions of labor, or as to the time, manner or medium of payment of wages. See Williams v. Evans, 139 Minn. 32, 165 N. W. 495.

(18) 3 Minn. L. Rev. 43.

1654. Liberty of press and of free speech—Laws 1917, c. 463, making it a criminal offence to advocate that men should not enlist in the military forces of the United States or aid the government in the prosecution of the war, is not a violation of the constitutional provisions for freedom of speech or of the press. State v. Holm, 139 Minn. 267, 166 N. W. 181; Gilbert v. Minnesota, 254 U. S. 325. See § 510a.

Freedom of speech and of the press is not absolute, but is subject to reasonable restrictions in the interest of public welfare. State v. Holm, 139 Minn. 267, 166 N. W. 181.

Liberty of speech does not entitle a person to force his thoughts upon the attention of the public in public places in such manner that riot and disorder will inevitably follow. State v. Broms, 139 Minn. 402, 166 N. W. 771.

The constitutional freedom of the press protects criticism and agitation for a modification or repeal of laws, but it does not protect one who counsels the violation of the law as it exists. United States v. Burleson, 255 U. S. —.

(20) See 2 Minn. L. Rev. 239.

1655. Liberty to adopt and pursue calling—The right of every person to work in his own business is a fundamental right guaranteed to him by the bill of rights in the state constitution and by the fourteenth amendment of the federal constitution, and any attempt to deprive him

of that right is necessarily unlawful. Roraback v. Motion Picture Machine Operators Union, 140 Minn. 481, 168 N. W. 766.

An ordinance regulating plumbers held not unconstitutional as infringing the right to labor. State v. Foss, 147 Minn. 281, 180 N. W. 104.

CRUEL AND UNUSUAL PUNISHMENTS

1661. What constitutes—The nature, character, and extent of punishments for crime is a matter almost wholly legislative. The legislature may prescribe definite terms of imprisonment, a specified amount as a fine, or fix the maximum and minimum limits of either, which the courts are bound to respect and follow. In fact the court has jurisdiction to interfere with legislation upon this subject only when there has been a clear departure from the fundamental law and the spirit and purpose thereof and a punishment imposed which is manifestly in excess of constitutional limitations. The term "cruel and unusual punishments," as used in the constitution has no special reference to the duration of the term of imprisonment for a particular crime, though it would operate to nullify the imposition by legislation of a term flagrantly in excess of what justice and common humanity would approve. The purpose of incorporating that particular provision in the constitution was to prevent those punishments which in former times were deemed appropriate without regard to the character or circumstances of the crime, but which later standards in such matters condemned as unjust and inhuman; such punishments as burning at the stake, the pillory, stocks, dismemberment, and other extremely harsh and merciless methods of compelling the victim to atone for and expiate his crime. The intention was to guard against a return to such inhuman methods. State v. Moilen, 140 Minn. 112, 167 N. W. 345.

(47) State v. Moilen, 140 Minn. 112, 167 N. W. 345.

IMPRISONMENT FOR DEBT

1667. Held not unconstitutional—A law providing that the misuse by a contractor, with intent to defraud, of moneys paid to him by the landowner for whom he is making improvements on the land, shall be larceny. State v. Harris, 134 Minn. 35, 158 N. W. 824.

CLASS LEGISLATION

1669. General principles—Legislation making certain acts criminal is not class legislation merely because it affects a class of people who are prone to commit the forbidden acts. State v. Harris, 134 Minn. 35, 158 N. W. 829.

(71) Seamer v. Great Northern Ry. Co., 142 Minn. 376, 172 N. W. 765.

1673. Constitutional prohibition—(78) State v. Elliott, 135 Minn. 89, 160 N. W. 204; Seamer v. Great Northern Ry. Co., 142 Minn. 376, 172 N. W. 765.

1674. Held class legislation—(80) 6 A. L. R. 1140.

1675. Held not class, unequal or partial legislation—A law providing that the misuse by a contractor, with intent to defraud, of moneys paid to him by the landowner for whom he is making improvements on the land, shall be larceny. State v. Harris, 134 Minn. 35; 158 N. W. 829.

A law providing for minimum wages in an occupation only when the wages paid to one-sixth or more of the women or minors employed therein are less than living wages. Williams v. Evans, 139 Minn. 32, 165 N. W. 495.

A law making it a crime to make or use false statements to obtain credit from banks, savings banks, and trust companies. State v. Elliott, 135 Minn. 89, 160 N. W. 204.

A law making syndicalism a criminal offence. State v. Moilen, 140 Minn. 112, 167 N. W. 345.

An act defining the liability of railroad companies to their employees for personal injury or death. Seamer v. Great Northern Ry. Co., 142 Minn. 376, 172 N. W. 765.

A law relating to the commitment of dependent illegitimate children to the control of the state board of control. State v. Juvenile Court, 147 Minn 222, 179 N. W. 1006.

SPECIAL LEGISLATION

1677. Definition of general law—A law is general if the class to which it applies requires or justifies legislation peculiar to itself in the matters covered by the law. It is special if the classification is purely arbitrary. State v. Independent School Dist., 143 Minn. 433, 174 N. W. 414.

The fact that there is only one city now in the class is not decisive. If the statute is so framed as to apply automatically to other cities as they may acquire the characteristics of the class then the statute is general. State v. Independent School Dist., 143 Minn. 433, 174 N. W. 414.

(9) State v. Dakota County, 142 Minn. 223, 171 N. W. 801.

(10) State v. Dakota County, 142 Minn. 223, 171 N. W. 801; State v. Independent School Dist., 143 Minn. 433, 174 N. W. 414.

(11) State v. Independent School Dist., 143 Minn. 433, 174 N. W. 414.

1678. Discretion of legislature—Construction—There has been a marked change in recent years in the attitude of the courts upon the question of proper classification for purposes of legislation. The present tendency is to leave the matter largely to the discretion of the legislature. This change is due to the greatly increased complexity of social and economic facts of modern times, calling for more complex and specific legislation. Seamer v. Great Northern Ry. Co., 142 Minn. 376, 172 N. W. 765.

(12) State v. Harris, 134 Minn. 35, 158 N. W. 829; Seamer v. Great Northern Ry. Co., 142 Minn. 376, 172 N. W. 765; State v. Independent

School Dist., 143 Minn. 433, 174 N. W. 414. See Park v. Duluth, 134 Minn. 296, 159 N. W. 627.

1679. General principles of classification—If a classification is made on a reasonable basis, and is applicable without discrimination to all similarly situated, it is valid. Park v. Duluth, 134 Minn. 296, 159 N. W. 627.

A statute aimed at an evil and hitting it presumably where experience shows it to be most felt is not invalid because there might be other instances to which it might be equally well applied. State v. Elliott, 135 Minn. 89, 160 N. W. 204.

Any classification is permissible which has a reasonable relation to some permitted end of governmental action. Watson v. State Comptroller, 254 U. S. 122.

A classification may be based on a particular kind of business peculiarly susceptible to the evil aimed at, as, for example, the banking business. State v. Elliott, 135 Minn. 89, 160 N. W. 204.

A classification may exclude cases of minor or negligible importance. Practical considerations are controlling. Williams v. Evans, 139 Minn. 32, 165 N. W. 495.

A classification based on the inequality of women with men in the economic strife is permissible. Williams v. Evans, 139 Minn. 32, 165 N. W. 495.

The relation of master and servant may properly be made the basis of legislation involving rights and duties arising therefrom. State v. Moilen, 140 Minn. 112, 167 N. W. 345.

Common carriers by steam railroad are a proper basis for classification. Seamer v. Great Northern Ry. Co., 142 Minn. 376, 172 N. W. 765.

(15) State v. Elliott, 135 Minn. 89, 160 N. W. 204; Seamer v. Great Northern Ry. Co., 142 Minn. 376, 172 N. W. 765.

1682. Classification of cities under section 36—Section 36 affects sections 33 and 34 only to the extent of permitting the legislature to classify cities on the basis of population as therein provided, and where population is only one of several elements on which the classification is based those sections still apply as to the additional elements. Lodoen v. Warren, 146 Minn. 181, 178 N. W. 741.

The legislature may except from the operation of a general law applying to cities of the fourth class, the cities of that class having a home rule charter, as the classification thus created is warranted by the differences existing between the two classes. Lodoen v. Warren, 146 Minn. 181, 178 N. W. 741.

(30) Lodoen v. Warren, 146 Minn. 181, 178 N. W. 741.

(31) Marwin v. Board of Auditorium Commissioners, 140 Minn. 346, 168 N. W. 17.

1683. Uniformity of operation—When the people amended the constitution by inserting a provision that the legislature should pass no local or special law regulating the affairs of any city or village (section

33, article 4), and that all general laws regulating such affairs should be uniform in their operation throughout the state (section 34, article 4), and that laws relating to cities should apply equally to all cities of the designated class (section 36, article 4), we think they did not intend that these provisions should be evaded, and in effect nullified, by the simple expedient of enacting a law general in form but which should become operative only in those municipalities that elected to adopt it If this form of legislation were permissible, laws in fact local or special could be enacted to substantially the same extent as before. Any municipality desiring special legislation could procure it by securing the passage of an act general in form but operative only in those municipalities which elected to adopt it. Other municipalities would not be concerned for they need not adopt it, and could obtain in the same manner any different legislation which they might desire. A law general in form but special in operation violates the constitutional inhibition as much as if it were special in form. Lodoen v. Warren, 146 Minn. 181, 178 N. W. 741.

(32) Marwin v. Board of Auditorium Commissioners, 140 Minn. 346, 168 N. W. 17; State v. Erickson, 140 Minn. 509, 167 N. W. 734; State v. Independent School Dist., 143 Minn. 433, 174 N. W. 414; Lodoen v. Warren, 146 Minn. 181, 178 N. W. 741.

1685. Existing special legislation—The word "modify" as used in the constitution in this connection means to enlarge or extend, and a statute which removes or takes from a special statute a distinct and severable part is not a modification thereof. State v. Lincoln, 133 Minn. 178, 158 N. W. 50.

(37, 39) Minneapolis Real Estate Board v. Minneapolis, 145 Minn. 379, 177 N. W. 494.

(40) State v. Lincoln, 133 Minn. 178, 158 N. W. 50.

1688. Repeals—(43) See State v. Lincoln, 133 Minn. 178, 158 N. W. 50.

1690. Laws held invalid under section 36—The provision of chapter 65, Laws of 1919, which permits each city of the fourth class having a home rule charter to determine for itself whether that law shall become operative therein, violates sections 33, 34 and 36 of article 4 of the constitution and is void. The powers conferred by that act are charter powers and the power to adopt them cannot be delegated by the legislature except in the manner provided by section 36, article 4, of the constitution. Lodoen v. Warren, 146 Minn. 181, 178 N. W. 741.

1691. Laws sustained since amendment of 1892—A law making it a crime to make or use false statements to obtain credit from banks, savings banks, and trust companies. State v. Elliott, 135 Minn. 89, 169 N. W. 204.

A law making syndicalism a criminal offence. State v. Moilen, 140 Minn. 112, 167 N. W. 345.

A law giving cities of the fourth class situated in two or more counties exclusive power to expend all moneys arising from taxation for roads,

bridges and streets, upon the real and personal property within their respective limits. State v. Dakota County, 142 Minn. 223, 171 N. W. 801.

A law relating to the consolidation of schools in any incorporated village or city of the fourth class which contains two or more school districts, situated wholly or in part within its limits, when only one of such districts maintains a high school. State v. Independent School Dist., 143 Minn. 433, 174 N. W. 414.

A law authorizing the enlargement of school districts having a borough, village or city of not more than seven thousand inhabitants partly or wholly within its boundaries. Kramer v. Renville County, 144 Minn. 195, 175 N. W. 101.

1692. Laws held invalid since amendment of 1892—A law creating an auditorium commission in cities of the first class not operating under a home rule charter, the members of which were required to qualify within ninety days after the approval of the act. Marwin v. Board of Auditorium Commissioners, 140 Minn. 346, 168 N. W. 17.

A law providing for school boards in cities of the first class not under home rule charters. State v. Erickson, 140 Minn. 509, 167 N. W. 734.

The provision of chapter 65, Laws 1919, which permits each city of the fourth class having a home rule charter to determine for itself whether that law shall become operative therein. Lodoen v. Warren, 146 Minn. 181, 178 N. W. 741.

MISCELLANEOUS

1695. Privileges and immunities of citizens—Federal constitution—The courts of this state cannot decline jurisdiction of an action properly brought here by a citizen of another state and he cannot be enjoined from prosecuting such an action. Davis v. Minneapolis etc. Ry. Co. 134 Minn. 455, 159 N. W. 1084.

A citizen of another state may maintain a transitory action in this state though he is restrained from prosecuting it here by a court of the state of his residence. State v. District Court, 140 Minn. 494, 168 N. W. 589.

The courts of another state may on equitable grounds enjoin its citizens from proceeding in Minnesota courts to enforce a cause of action given by the statute of the foreign state, without violating the privileges and immunities clause. State v. District Court, 140 Minn. 494, 168 N. W. 589.

(12) Davis v. Minneapolis etc. Ry. Co., 134 Minn. 455, 159 N. W. 1084; State v. District Court, 140 Minn. 494, 168 N. W. 589.

1698. Full faith and credit clause—The courts of another state may on equitable grounds enjoin its citizens from proceeding in Minnesota courts to enforce a cause of action given by the statute of the foreign state, without violating the full faith and credit clause. The legislature cannot create a transitory cause of action and by statute confine its enforcement to its own courts, upon a claim that the full faith and credit clause re-

quires the courts of another state to decline jurisdiction. State v. District Court, 140 Minn. 494, 168 N. W. 589.

See § 5207.

1699. Rights and privileges of citizens—State constitution—A resident citizen of this state cannot be denied the right to seek redress for his wrongs in its courts in all cases within their jurisdiction. He cannot be forced to resort to a foreign tribunal for relief within the power of our courts to grant. Davis v. Minneapolis etc. Ry. Co., 134 Minn. 455, 159 N. W. 1084.

This provision of the constitution does not apply to school districts. Kramer v. Renville County, 144 Minn. 195, 175 N. W. 101.

A law providing for an application to the state securities commission held not obnoxious to this provision of the constitution. Carlson v. Pearson, 145 Minn. 125, 176 N. W. 346.

1701. Fourteenth amendment—Section 243 of the charter of St. Paul is not in conflict with the fourteenth amendment. That amendment does not prevent the states from classifying the subjects of legislation and making different regulations as to the property of different individuals differently situated. The amendment is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed. Sullwood v. St. Paul, 138 Minn. 271, 164 N. W. 983.

The amendment is not a pedagogical requirement of the impracticable. Seamer v. Great Northern Ry. Co., 142 Minn. 376, 172 N. W. 765.

Section 1 of the amendment does not apply to school districts of the state. Kramer v. Renville County, 144 Minn. 195, 175 N. W. 101.

(34) State v. Elliott, 135 Minn. 89, 160 N. W. 204.

(35) State v. Elliott, 135 Minn. 89, 160 N. W. 204; Williams v. Evans, 139 Minn. 32, 165 N. W. 495.

(36) Sullwood v. St. Paul, 138 Minn. 271, 164 N. W. 983; Carlson v. Pearson, 145 Minn. 125, 176 N. W. 346.

(37) St. Paul v. Great Northern Ry. Co., 145 Minn. 355, 177 N. W. 492.

1701a. Duties on imports—The provision of the federal constitution prohibiting a state from laying duties on imports except such as are necessary in the execution of its inspection laws, refers to imports from foreign countries and not to shipments from state to state. State v. Bartles Oil Co., 132 Minn. 138, 155 N. W. 1035; State v. Pure Oil Co., 134 Minn. 101, 158 N. W. 723, affirmed, 248 U. S. 158.

CONTEMPT

1702. In general—The courts cannot control the Governor in the exercise of his constitutional duty of enforcing the laws by means of contempt proceedings against him. State v. District Court, 141 Minn. 1, 168 N. W. 634. See § 1593.

What courts or officers may punish for contempt. 8 A. L. R. 1543.

Power of legislative body to punish for contempt. L. R. A. 1917F, 288.

1703. What constitutes—A party may be punished for contempt in refusing to obey a writ of mandamus. State v. Searles, 141 Minn. 267, 170 N. W. 198.

Perjury or false swearing as contempt. 11 A. L. R. 342.

(46) See 5 Minn. L. Rev. 459.

1705. Constructive contempt—Procedure—The form in which a certain order to show cause was drawn held not prejudicial to the party cited. Nason v. Barrett, 141 Minn. 220, 169 N. W. 804.

A proceeding instituted to punish the defendant in a criminal case for contempt of court, committed by him in attempting to induce the complaining witness against him to leave the state and not appear before the grand jury, is one involving a constructive criminal contempt. The rules of evidence applied in criminal cases should be observed at the hearing in a proceeding in which a person is accused of a criminal contempt, and he cannot be called as a witness for cross-examination under either section 8362 or 8377, G. S. 1913, and compelled to testify against himself. The immunity conferred upon defendants in criminal cases by section 7, art. 1, of the state constitution, and by the fifth amendment to the constitution of the United States, extends to prosecutions for criminal contempts. State v. District Court, 144 Minn. 326, 175 N. W. 908.

(59) State v. District Court, 144 Minn. 326, 175 N. W. 908.

1708. Punishment—An order in contempt proceedings imposing a fine for the disobedience of a writ of mandamus commanding the furnishing of telephone service and imprisonment until compliance with it is of a dual character. In respect of the fine it is in vindication of the authority of the court and imposes punishment for a contempt criminal or quasi criminal in character and is reviewable on certiorari. In respect of the imprisonment it is a remedy of a party to coerce obedience and is reviewable on appeal. Such an order does not impose a fine nor an imprisonment such as is prohibited by G. S. 1913, § 8355. It is not incumbent upon the party prosecuting a contempt proceeding for the disobedience of the writ to go forward with his proofs of the financial ability of the one commanded by the writ to comply with it. State v. Searles, 141 Minn. 267, 170 N. W. 198.

(65) State v. Searles, 141 Minn. 267, 170 N. W. 198.

CONTINUANCE

1710. A matter of discretion—There is no hard and fast rule for determining whether an application for a continuance should be granted or denied. Courts are properly inclined to be liberal in granting it, where it is requested because of defendant's inability to procure the testimony of an employee whose wrongful acts gave rise to plaintiff's cause of action. Young v. St. Paul City Ry. Co., 142 Minn. 10, 170 N. W. 845.

(70) Sawyer v. Frankson, 134 Minn. 258, 159 N. W. 1; State v. Monroe, 142 Minn. 394, 172 N. W. 313; Sundin v. County Fire Ins. Co., 144 Minn. 100, 174 N. W. 729; Guhl v. Warroad Stock Grain & Produce Co., 147 Minn. 44, 179 N. W. 564; McLean v. Meyer, 148 Minn. —, 181 N. W. 917.

1712. Time of motion—A motion not made until the case was called for trial held properly denied. Sundin v. County Fire Ins. Co., 144 Minn. 100, 174 N. W. 729.

A motion made during the course of the trial held properly denied. Roseberry v. Hart-Parr Co., 145 Minn. 142, 176 N. W. 175.

1713. Moving affidavits—(75) See Sundin v. County Fire Ins. Co., 144 Minn. 100, 174 N. W. 729.

1715. To secure evidence—(79) Young v. St. Paul City Ry. Co., 142 Minn. 10, 170 N. W. 845; Sundin v. County Fire Ins. Co., 144 Minn. 100, 174 N. W. 729. See L. R. A. 1918E, 527 (continuance to secure witness out of state).

1719. Waiver and estoppel—By taking advantage of a continuance granted at his request a party is estopped on appeal from asserting that the court had no authority to grant it. Thwing v. McDonald, 134 Minn. 148, 158 N. W. 820.

1721. Denied—There was no abuse of discretion in refusing to grant a continuance because of defendant's lack of diligence in securing the testimony of an employee, where it appeared that issue was joined four months before the case came on for trial, and that no attempt to secure the attendance or procure the testimony of such employee was made until the day before the trial began, when defendant first discovered that he had left its employ and gone to a distant state several weeks theretofore. Young v. St. Paul City Ry. Co., 142 Minn. 10, 170 N. W. 845.

A motion for a continuance based on the ground of an absent witness held properly denied. State v. Monroe, 142 Minn. 394, 172 N. W. 313.

Where counsel claimed to be suprised by an amendment of the complaint which could only be met by the testimony of a witness who was in France in the service of the Red Cross. Sundin v. County Fire Ins. Co., 144 Minn. 100, 174 N. W. 729.

Where a complaint was amended on the trial by increasing the demand for damages from $75 to $7,500. Guhl v. Warroad Stock, Grain & Produce Co., 147 Minn. 44, 179 N. W. 564.

(95) Roseberry v. Hart-Parr Co., 145 Minn. 142, 176 N. W. 175.

CONTRACTORS' BONDS—See Drains, § 2834; Mechanics' Liens, § 6093; Municipal Corporations, § 6720; Suretyship, § 9104a.

CONTRACTS

IN GENERAL

1723a. Preliminary negotiations—Agreement for writing—When the parties make the reduction of the agreement to writing and its signature by them a condition precedent to its completion, it will not be a contract until that is done, and this is true although all the terms of the contract have been agreed upon. But where the parties have assented to all the terms of the contract, the mere reference to a future contract in writing will not negative the existence of a present contract. Lamoreaux v. Weisman, 136 Minn. 207, 161 N. W. 504.

1724. Express contracts—Contracts implied in fact—One may accept delivery and make use of a newspaper delivered to him under such circumstances as to make a contract implied in fact between him and the publisher. Legal News Publishing Co. v. George C. Knispel Cigar Co., 142 Minn. 413, 172 N. W. 317.

Mutual assent in contracts implied in fact. 33 Harv. L. Rev. 376.

1725. Bilateral and unilateral contracts distinguished—(15) See Minn. L. Rev. 94 (acceptance of offer for unilateral contract by partial performance of service requested).

1726. Definiteness and certainty—A contract by plaintiff to manufacture and deliver certain specially made premium catalogues for defendant's use, and providing that certain articles of merchandise shall be listed in such catalogue, held not to be uncertain and unenforceable because it did not contain a description of such articles. John Newton Porter Co. v. Kiewel Brewing Co., 137 Minn. 81, 162 N. W. 887.

Indefiniteness as to the time of some feature of the contract does not invalidate it. Welsh v. Welsh's Estate, 148 Minn. —, 181 N. W. 356.

(16) Warren v. Hodges, 137 Minn. 389, 163 N. W. 739; McRea v. Feigh, 143 Minn. 241, 173 N. W. 655 (contract between an owner of land on which there was a mine and a broker to secure a lessee for the mine held not void for indefiniteness and uncertainty). See § 8781.

1727. Entire and several contracts—A contract for the preparation of a specially prepared premium catalogue held entire. John Newton Porter Co. v. Kiewel Brewing Co., 137 Minn. 81, 162 N. W. 887.

A contract by plaintiff, a mechanical engineer, to prepare plans for the building of a grain elevator, to furnish copies at certain centers for the use of builders, to attend to advertisements for bids and to be present when bids were opened for the letting of the contract, held to be an entire contract. Failure to advertise for bids as agreed, the furnishing of defective specifications, and failure to be present when bids were opened, were omissions of such importance as to defeat plaintiff's claim of substantial performance of the contract. Brahtz v. Triumph Farmers' Elevator Co., 147 Minn. 74, 179 N. W. 561.

(17) Mascall v. Reitmeier, 145 Minn. 214, 176 N. W. 486; Boydstun v. Hackney Land Credit Co., 145 Minn. 392, 177 N. W. 779; Welsh v. Welsh's Estate, 148 Minn. —, 181 N. W. 356. See 2 A. L. R. 643 (sale of goods).

(19) Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736. See Welsh v. Welsh's Estate, 148 Minn. —, 181 N. W. 356.

1730b. Law and fact—The evidence of an oral agreement and its meaning may be so conclusive that the court may declare it as a matter of law. Thompson v. Davidson, 136 Minn. 368, 162 N. W. 458.

What the agreement of the parties was, it being oral, is for the jury, where the evidence is not conclusive. Farmers Store & Warehouse Assn. v. Barlow, — Minn. —, 182 N. W. 447.

PARTIES

1731. Contractual capacity—Intoxication—Evidence held to justify a finding that one was of unsound mind and incompetent to transact business when he executed a chattel mortgage. Bauman v. Krieg, 133 Minn. 196, 158 N. W. 40.

Evidence held to justify a finding that vendor was incompetent at the time of entering into a contract for the sale of land. Wheeler v. McKeon, 137 Minn. 92, 162 N. W. 1070.

The business acts of a party whose competency is in question, and declarations and conversations about the time, when they tend to show his comprehension of affairs, are admissible. Great liberality should be allowed in the admission of evidence on an issue of competency. Wheeler v. McKeon, 137 Minn. 92, 162 N. W. 1070.

To justify the setting aside of a written contract for want of mental capacity the evidence must be clear and convincing. See Johnson v. Brastad, 143 Minn. 332, 173 N. W. 668.

Whether a party had contractual capacity when entering into a contract is a question for the jury, unless the evidence is conclusive. Johnson v. Brastad, 143 Minn. 332, 173 N. W. 668.

The making of an improvident contract is not sufficient in itself to show want of contractual capacity. Rogers v. Central Land & Invest. Co., — Minn. —, 183 N. W. 961.

Intoxication as affecting contractual capacity. 6 A. L. R. 331; Ann. Cas. 1918E, 330.

(29) Shaughnessy v. Shaughnessy, 135 Minn. 262, 160 N. W. 769; Rogers v. Central Land & Invest. Co., — Minn. —, 183 N. W. 961. See § 2661b.

1731a. Right to choose—Mistake—Substitution—A landlord has a right to choose his tenant. A contract for a lease is not assignable. Holford v. Crowe, 136 Minn. 20, 161 N. W. 213.

A person has the right to determine for himself with whom he will enter into contractual relations, and, as a general rule, cannot be held to a contract with a party with whom he never intended to deal. Where a person who intended to contract with a certain party contracts with another in the belief that such other is the party with whom he intended to deal, he may repudiate the contract on the ground that he never knowingly dealt with such other Where a person contracts with another with no reason to believe that he is dealing with a different party, he cannot invoke the doctrine of mistaken identity to avoid the contract, although he may have believed that the other owned property which in fact belonged to a third party. If deceived to his injury his remedy is on the ground of fraud. Everson v. J. L. Owens Mfg. Co., 145 Minn. 199, 176 N. W. 505. See L. R. A. 1916D, 801.

EXECUTION AND DURATION

1734. Signing—See §§ 1019, 3832 (fraud in procuring signature); § 8769 (signatures).

1739. Duration—A contract which by its very nature is of a continuous character cannot be terminated by either party at will. Mount Pleasant v. Florence, 138 Minn. 359, 165 N. W. 126.

(44) See 33 Harv. L. Rev. 608.

OFFER AND ACCEPTANCE

1740. In general—A contract to prepare and furnish certain specially made premium catalogues, with option in defendant to select a cover, held not incomplete. John Newton Porter Co. v. Kiewell Brewing Co., 137 Minn. 81, 162 N. W. 887.

The trial court correctly instructed the jury that under the accepted proposal described in the opinion, and certain correspondence which followed, a contract was made between plaintiff and defendant, that it was admitted that the contract was broken by plaintiff, and that the only question for the jury was the extent of the damages sustained by defendant from the breach. Huttig Mfg. Co. v. National Contracting Co., 139 Minn. 108, 165 N. W. 879.

Acceptance of offer for unilateral contract by partial performance of service requested. 5 Minn. L. Rev. 94.

A written instrument held not a mere offer but a complete contract. Krohn v. Dustin, 142 Minn. 304, 172 N. W. 213.

Silence as acceptance of offer. 33 Harv. L. Rev. 595.

(46) Northern Nat. Bank v. Douglas, 135 Minn. 81, 160 N. W. 193; Nelson v. Rohweder, 147 Minn. 325, 180 N. W. 223. See Digest, § 4089.

(47) Kull v. Wilson, 137 Minn. 127, 162 N. W. 1072 (contract for sale of realty by correspondence); Nelson v. Rohweder, 147 Minn. 325, 180 N. W. 223 (proposal and counter proposal for sale of tractors—failure to agree on material terms); Beaumont v. Prieto, 249 U. S. 554.

(53) See Huttig Mfg. Co. v. National Contracting Co., 139 Minn. 108, 165 N. W. 879.

1741. Withdrawal—Revocation of offer—(54) Kull v. Wilson, 137 Minn. 127, 162 N. W. 1072.

1742. Mutual assent—Meeting of minds—(57) Northern National Bank v. Douglas, 135 Minn. 81, 160 N. W. 193; Kull v. Wilson, 137 Minn. 127, 162 N. W. 1072; Krohn v. Dustin, 142 Minn. 304, 172 N. W. 213; Gasser v. Great Northern Ins. Co., 145 Minn. 205, 176 N. W. 484; 14 Ill. L. Rev. 85; 33 Harv. L. Rev. 376. See Digest, §§ 8499, 10000.

1743. Mistake—A mistake of one of the parties may be of so fundamental a nature as to prevent a meeting of minds sufficient to constitute a contract. St. Nicholas Church v. Kropp, 135 Minn. 115, 160 N. W. 500. See §§ 1192, 4652a.

1744. Definiteness of offer—(63) See Huttig Mfg. Co. v. National Contracting Co., 139 Minn. 108, 165 N. W. 879.

1748. By mail or telegraph—An offer and acceptance may be made by telegrams. The telegrams are to be construed in the light of the attendant circumstances. Costello v. Siems-Carey Co., 140 Minn. 208, 167 N. W. 551.

1749. Contract for a future contract—(69) See Lamoreaux v. Weisman, 136 Minn. 207, 161 N. W. 504; Huttig Mfg. Co., v. National Contracting Co., 139 Minn. 108, 165 N. W. 879.

CONSIDERATION

1750. Definition—A possible advantage to one as a stockholder of a corporation has been held an insufficient consideration for a contract of guaranty. Northern Nat. Bank v. Douglas, 135 Minn. 81, 160 N. W. 193.

(73) See 1 Minn. L. Rev. 383.

(74) See Lindell v. Lindell, 135 Minn. 368, 160 N. W. 1031.

(78) Galbraith v. Clark, 138 Minn. 255, 164 N. W. 902.

1750a. Effect of lack of consideration—A contract without consideration may be invoked to show a confirmation or ratification of a prior release induced by fraud. Oestreich v. Chicago etc. Ry. Co., 140 Minn. 280, 167 N. W. 1032.

1751. Reason for requiring—(79) See Alger v. Minnesota Loan & Trust Co., 135 Minn. 235, 159 N. W. 565, 160 N. W. 765.

1752. Executed contracts—A court of equity will not set aside a contract which has been executed on one side merely because it was without consideration. Peavey v. Wells, 136 Minn. 180, 161 N. W. 508.

(80) Peavey v. Wells, 136 Minn. 180, 161 N. W. 508; C. S. Brackett Co. v. Lofgren, 140 Minn. 52, 167 N. W. 274; Colby v. Street, 146 Minn. 290, 178 N. W. 599.

1753. Options—Unilateral contracts—The payment of one dollar will sustain a short-time option to purchase on fair terms. Morrison v. Johnson, 148 Minn. —, 181 N. W. 945.

(81) See Peavey v. Wells, 136 Minn. 180, 161 N. W. 508.

(82) Koehler & Hinrichs Mer. Co. v. Illinois Glass Co., 143 Minn. 344, 173 N. W. 703.

1755. From whom must move—Presumption—Presumptively the consideration is paid by the person to be benefited by the contract. Stone-Ordean-Wells Co. v. Helmer, 142 Minn. 263, 171 N. W. 924.

1756. Adequacy—(85) Stone-Ordean-Wells Co. v. Helmer, 142 Minn. 263, 171 N. W. 924 (recital of consideration of one dollar); Morrison v. Johnson, 148 Minn. —, 181 N. W. 945 (one dollar sufficient to sustain a short-time option).

1757. Moral consideration—Contracts entered into or promises made on the basis of relations of friendship and good will, unsupported by pecuniary or material benefit, create at most bare moral obligations, binding only on the conscience, and a breach thereof presents no cause for redress by the courts. A promise founded on that relation by a business associate, to the effect that he would look after and protect the business interests of the promisee's wife after his death, held not enforceable in law or equity. Rask v. Norman, 141 Minn. 198, 169 N. W. 704.

1758. Mutual promises—Mutuality—A contract between an owner of land, on which there was a mine, and a broker to secure a lessee for the mine, held not void for want of mutuality. McRae v. Feigh, 143 Minn. 241, 173 N. W. 655.

The parties to an executory contract may recognize its binding effect by their conduct, so that it is no longer open to question on the ground that it lacks mutuality. Koehler & Hinrichs Mer. Co. v. Illinois Glass Co., 143 Minn. 344, 173 N. W. 703.

(90) Koehler & Hinrichs Mer. Co. v. Illinois Glass Co., 143 Minn. 344, 173 N. W. 703. See Peavey v. Wells, 136 Minn. 180, 161 N. W. 508.

(91) See Bundy v. Meyer, 148 Minn. —, 181 N. W. 345; Welsh v. Welsh's Estate, 148 Minn. —, 181 N. W. 356.

1760. Forbearance—An agreement to forbear the enforcement of a legal right is a sufficient consideration to sustain a promise. Where a negotiable note held by a wife is indorsed and delivered to a judgment creditor of her husband as collateral security for the payment of the judgment, the continuance for a period of three months of proceedings

supplementary to execution upon such judgment is a valuable consideration for the transfer. Bank of Montreal v. Beecher, 133 Minn. 81, 157 N. W. 1070.

The relinquishment of a claim under a prior contract held a sufficient consideration for a new contract. McRae v. Feigh, 143 Minn. 241, 173 N. W. 655.

(1) Bank of Montreal v. Beecher, 133 Minn. 81, 157 N. W. 1070; Wampa v. Lyshik, 144 Minn. 274, 175 N. W. 301; Hage v. Drake Marble & Tile Co., 145 Minn. 113, 176 N. W. 192.

(3) Luing v. Peterson, 143 Minn. 6, 172 N. W. 692.

1763. Satisfaction of debt of another—The promise to pay the antecedent debt of another must be supported by some new consideration. Luing v. Peterson, 143 Minn. 6, 172 N. W. 692.

1765. Pre-existing obligations—(13) Baxter v. Brandenburg, 137 Minn. 259, 163 N. W. 516. See § 5624.

1766. Promises of extra compensation—(17,18) Griffith v. Dowd, 133 Minn. 305, 158 N. W. 420; W. K. Morrison Co. v. Slonzynski, 145 Minn. 485, 175 N. W. 992.

(19) W. K. Morrison Co. v. Slonzynski, 145 Minn. 485, 175 N. W. 992.

1769. Recitals of "for value received," etc.—A recital of "value received" is not evidence against third persons of a valuable consideration or of good faith in the transaction. National Surety Co. v. Winslow, 143 Minn. 66, 173 N. W. 181.

(25) Stone-Ordean-Wells Co. v. Helmer, 142 Minn. 263, 171 N. W. 924; Morrison v. Johnson, 148 Minn. —, 181 N. W. 945. See Kuhne v. Gau, 138 Minn. 34, 163 N. W. 982.

1770. Effect of seal—(26, 28) Kuhne v. Gau, 138 Minn. 34, 163 N. W. 982.

1771. In equity—(29) Rask v. Norman, 141 Minn. 198, 169 N. W. 704. See Copley v. Hyland, 46 Minn. 205, 48 N. W. 777; Peavey v. Wells, 136 Minn. 180, 161 N. W. 508.

1771a. Law and fact—Held not error to refuse to submit to a jury the question whether a check given by a husband to his wife was based on a consideration. Baxter v. Brandenburg, 137 Minn. 259, 163 N. W. 516.

1772. Held to have a sufficient consideration—A contract guaranteeing the payment of the purchase price of corporate stock attached to and delivered with the certificate of the stock. Alger v. Minnesota Loan & Trust Co., 135 Minn. 235, 159 N. W. 565, 160 N. W. 765.

A promise to give land by deed or will to another. Lindell v. Lindell, 135 Minn. 368, 160 N. W. 1031.

A deed of land, the grantee assuming a mortgage on the land. Enkema v. McIntyre, 136 Minn. 293, 161 N. W. 587.

A check given by a husband to his wife. Baxter v. Brandenburg, 137 Minn. 259, 163 N. W. 516.

A note given by a farmer to a farmers' elevator company to enable it to pay off its indebtedness or continue its business. Galbraith v. Clark, 138 Minn. 255, 164 N. W. 902.

A contract terminating a prior contract for the conduct of a "quitting business" sale and continuing the employment. Flick v. Ellis-Hall Co., 138 Minn. 364, 165 N. W. 135.

A note given for a share of corporate stock. Skluzacek v. Fossum, 139 Minn. 498, 166 N. W. 124.

A letter of credit. Stone-Ordean-Wells Co. v. Helmer, 142 Minn. 263, 171 N. W. 924.

A promise to perform a contract after the time limited upon a waiver of the breach. McDonald v. Union Hay Co., 143 Minn. 40, 172 N. W. 891.

A contract of sale giving to the buyer the privilege of increasing the quantity of goods specified in the contract as much as he may desire during the period covered by the contract. Koehler & Hinrichs Mer. Co. v. Illinois Glass Co., 143 Minn. 344, 173 N. W. 703.

A contract whereby a third party agreed to bid in land at a foreclosure sale, and if he acquired title by the sale, to pay the holder of the equity of redemption a certain sum of money. Wampa v. Lyshik, 144 Minn. 274, 175 N. W. 301.

A note given by a father in settlement of claims against his son. Hage v. Drake Marble & Tile Co., 145 Minn. 113, 176 N. W. 192.

A promise to complete a job of painting for an increased compensation after a delay caused by work on the building being stopped for a time. W. K. Morrison Co. v. Slonzynski, 145 Minn. 485, 175 N. W. 992.

A promise to devise property. Colby v. Street, 146 Minn. 290, 178 N. W. 599.

A promise of a husband to pay his wife certain sums of money, they living apart by mutual agreement. Vanderburgh v. Vanderburgh, 148 Minn. —, 180 N. W. 999.

(46) See C. S. Brackett Co. v. Lofgren, 140 Minn. 52, 167 N. W. 274.

1773. Held not to have a sufficient consideration—An indorsement of a note as collateral security for the payment of a judgment against the husband of the indorser. Bank of Montreal v. Beecher, 133 Minn. 81, 157 N. W. 1070.

A contract of guaranty. Northern Nat. Bank v. Douglas, 135 Minn. 81, 160 N. W. 193.

An indorsement in blank on a note made by a third party after its delivery to the payee. American Multigraph Sales Co. v. Grant, 135 Minn. 208, 160 N. W. 676.

A promise by a donee of an executed advancement to repay it. Kuhne v. Gau, 138 Minn. 34, 163 N. W. 982.

A contract for a commission to a broker on a resale of property. Snyder v. Samuelson, 140 Minn. 57, 167 N. W. 287.

A confirmation of a prior release of a claim for personal injuries. Oestreich v. Chicago etc. Ry. Co., 140 Minn. 280, 167 N. W. 1032.

A relinquishment of a claim for insurance. Edwards v. Svea Fire & Life Ins. Co., 141 Minn. 285, 170 N. W. 206.

A promise of a mother to pay certain debts of her son held by a collector making a loan to the mother partly in consideration of such promise made to him by her at the time of the loan. Luing v. Peterson, 143 Minn. 6, 172 N. W. 692.

A promise to divide a real estate broker's commission. Confer Bros. v. Gleason, 148 Minn. —, 181 N. W. 917.

(31, 33) See Luing v. Peterson, 143 Minn. 6, 172 N. W. 692.

(41) See C. S. Brackett Co. v. Lofgren, 140 Minn. 52, 167 N. W. 274.

MODIFICATION AND SUBSTITUTION

1774. Written contract—Modification by parol—(52) See § 8855.

1776. Consideration—(54) Westfall v. Ellis, 141 Minn. 377, 170 N. W. 339; W. K. Morrison Co. v. Slonzynski, 145 Minn. 485, 175 N. W. 992.

1777. Burden of proof—Whether, after making the original contract, the parties made a subsequent contract by which certain services were not to be paid for under the original contract was a question for the jury; and the burden of establishing such modification of the original contract was on the defendant. Leonard v. Schall, 132 Minn. 446, 157 N. W. 723.

(55) Gilbert Gulbrandson Estate, Inc. v. Hart-Parr Co., 142 Minn. 465, 172 N. W. 704.

PERFORMANCE

1781. What constitutes—Substantial—(60) Grimes v. Arthurs, 132 Minn. 476, 157 N. W. 590; Brahtz v. Triumph Farmers' El. Co., 147 Minn. 74, 179 N. W. 561 (evidence held not to show substantial performance).

1782. Sufficiency—(65) R. S. Newbold & Son Co. v. Northern Dredge & Dock Co., 145 Minn. 88, 176 N. W. 193 (contract to execute a note when a dredge should show a certain capacity).

1782a. Executory contracts—Merger—Fraud — Mistake — Generally, where there is an executory contract, and the parties perform it, doing and accepting certain acts, or executing and accepting certain deeds or contracts, in full satisfaction and discharge thereof, the executory contract becomes functus officio, and the rights of the parties must rest on the acts done, or contracts made, in performance of their original contract. And if such acts or contracts vary in some respects from those stipulated for in the executory contract, the presumption is that the parties altered their original intentions, and that the acts done or contracts executed in performance give expression to the final purposes of the parties. But this conclusive effect is given to what is done in performance only in the absence of fraud or mistake. If one of the parties has been led by fraud, or mutual mistake of fact, clearly shown, to do or

accept what the executory contract did not call for, the courts will give relief as in other cases of fraud or mistake. Thwing v. Davidson, 33 Minn. 186, 22 N. W. 293. See Digest, § 10019.

1783b. Implied warranty of quality—Where a farmer, desiring water for farm use, hires a well-driller to drill a well in a particular place, there is no implied warranty by the well-driller of the quality of the water which may be obtained. Skalsky v. Johnson, 138 Minn. 275, 164 N. W. 978.

1785. Time—General rules—The use of the word "about" does not render time immaterial. Its force is like that of the expression "more or less." It gives some leeway and allows for contingencies, but it does not make the contract terminable at will. Costello v. Siems-Carey Co., 140 Minn. 208, 167 N. W. 551.

As a rule, the question of what is a reasonable time within which a party to a contract must act to secure performance by the other party, no time for performance being specified, is a question of fact for a jury. Krause v. Union Match Co., 142 Minn. 24, 170 N. W. 848.

Reasonable time may be defined generally to be so much time as is necessary for a reasonably prudent and diligent man to do, conveniently, what the contract or duty requires should be done, having regard for the rights and possibility of loss, if any, to the other party affected. Davis v. Godart, 147 Minn. 362, 180 N. W. 239.

Indefiniteness as to the time of some feature of a contract does not render it invalid. Welsh v. Welsh's Estate, 148 Minn. —, 181 N. W. 356.

(69) Henry v. Hutchins, 146 Minn. 381, 178 N. W. 807. See McDonald v. Union Hay Co., 143 Minn. 40, 172 N. W. 891.

(70 Henry v. Hutchins, 146 Minn. 381, 178 N. W. 807. See § 9630.

1786. Time of the essence—Time has been held not of the essence of a contract for the repurchase by the seller of corporate stock. Matson v. Bauman, 139 Minn. 296, 166 N. W. 343.

See Digest, § 10033.

1787. Delay excused—Waiver—Estoppel—There is authority to the effect that where a time limit is fixed for the performance of a contract, a request made upon the party in default to perform, after the expiration of the time, waives the breach, and the contract thereafter becomes a subsisting contract with the time limit eliminated, giving the one in default a reasonable time after the request within which to perform. Possibly this rule does not apply where the one in default makes no effort whatever, after the request is made to perform or promise to perform. McDonald v. Union Hay Co., 143 Minn. 40, 172 N. W. 891.

Where by the course of conduct of one party to a contract, entitled to the performance of certain terms or conditions thereof, the other party has been led to believe, as a man of average intelligence, that such performance will not be required, until it has become too late to perform, or until to insist upon performance would work material injustice, the person who has so conducted himself is barred from asserting the right he had. Malmquist v. Peterson, — Minn. —, 183 N. W. 138.

1787a. Suspension during incapacity of party—A contract between a parent and child for the support of the former by the latter has been suspended during the detention of the former in a state insane hospital. Penas v. Cherveny, 135 Minn. 427, 161 N. W. 150.

1789. Impossibility—Change in law—Change in economic conditions—A contract which appears possible of performance when made does not become invalid or unenforceable because conditions afterwards arise which render performance impossible. To make a contract invalid or unenforceable the thing agreed to be done must be impossible on its face, not merely improbable or impossible to the promisor. The inability to control the actions of a third party, whose co-operation is needed for a performance of the undertaking, is not considered a legal impossibility avoiding the obligation. Hokanson v. Western Empire Land Co., 132 Minn. 74, 155 N. W. 1043.

A cropper's contract provided that the occupant of a farm should work out the road taxes assessed against the land during the term of the contract. Under the statute in effect when the contract was made, it was optional with a taxpayer to discharge his road taxes in labor or in money; the allowance for a day's labor being fixed by the statute at $1.50. Thereafter the statute was amended, and all road taxes were required to be paid in money. The occupant of the land was denied permission to work out the road taxes on account of this change in the law and the owner was compelled to pay them. Held: (1) That the change in the law did not relieve the occupant from the obligation of the contract with reference to the taxes. (2) That the essential purpose of the contract might still be accomplished by the occupant's payment of the taxes, though literal and precise performance had been rendered impossible by the change in the law. (3) That, though it might be more burdensome to discharge the taxes in money instead of in labor, that of itself would not be enough to relieve the occupant from the obligation of his contract. (4) That, where no provision as to the event of impossibility is found in a contract containing an absolute promise, the promisor remains responsible for damages, notwithstanding the supervening impossibility of performance. The appropriate remedy available to the owner for the occupant's failure to discharge the taxes was an action on the contract for damages for the breach thereof; the measure of damages being compensation for the loss sustained by the owner by reason of the occupant's failure to discharge the taxes. Mascall v. Reitmeier, 145 Minn. 214, 176 N. W. 486.

(83) Hokanson v. Western Empire Land Co., 132 Minn. 74, 155 N. W. 1043 (promise of vendor of land to resell it by certain dates at certain prices—inability to find purchaser at stipulated price no excuse); Muscall v. Reitmeier, 145 Minn. 214, 176 N. W. 486 (contract to work out road tax—change in law making tax payable in money); Day v. United States, 245 U. S. 24. See Middlestadt v. Kostendick, 144 Minn. 319, 175 N. W. 553 (building contract—excavation—sink hole and soft spot in ground requiring deeper excavation for foundation of building—facts

held not to bring the case within the general rule and to justify extra compensation); Columbus R. P. & L. C. v. Columbus, 249 U. S. 399 (increased cost of operating street railway as a result of war); 34 Harv. L. Rev. 312 (impossibility from change in foreign law); L. R. A. 1916F, 10 (intervening impossibility).

(85) Texas Company v. Hogarth Shipping Corp., 255 U. S.—(ship requisitioned by government for war purposes); 12 A. L. R. 1273.

1790. Prevented by other party—(86) Grimes v. Arthurs, 132 Minn. 476, 157 N. W. 590 (failure of heating plant due to improper management).

1790a. Excused by statute declaring act unlawful—See Mascall v. Reitmeier, 145 Minn. 214, 176 N. W. 486; 34 Harv. L. Rev. 312 (impossibility of performance by change in foreign law).

1791. Excused by breach—(87) Hjorth v. Albert Lea Machinery Co., 142 Minn. 387, 172 N. W. 488.

1792. Part performance—Acceptance—Waiver—(90) Magnuson v. Stevens Bros., 146 Minn. 38, 177 N. W. 929; Brahtz v. Triumph Farmers' El. Co., 147 Minn. 74, 179 N. W. 561. See § 5811.

1793. Part performance—Recovery—(92) See Mascall v. Reitmeier, 145 Minn. 214, 176 N. W. 486.

1794a. Alternative performance—Disabling one's self—Where there is a provision in the alternative to do one or the other of certain things, and the promisor, by his own act, disables himself from performing one of the alternatives, the other becomes a fixed obligation. Westfall v. Ellis, 141 Minn. 377, 170 N. W. 339.

1795. Option to discharge in money or land—(96) Westfall v. Ellis, 141 Minn. 377, 170 N. W. 339.

1797. Penalties for non-performance—(99) See 19 Harv. L. Rev. 117.

BREACH

1799. Repudiation—Anticipatory breach—Disabling one's self—In an action by real estate brokers to recover commissions on the exchange of real estate, it being conceded that there was no right of recovery if one of the parties to the contract of exchange breached the contract and refused to perform its terms, the question whether there was such a breach is held to have been a question of fact for the jury; and the court erred in directing a verdict for the defendant upon the ground that as a matter of law there was such breach. White v. Erickson, 141 Minn. 141, 169 N. W. 535.

Where there is a provision in the alternative to do one or the other of certain things, and the promisor by his own act, disables himself from performing one of the alternatives, the other becomes a fixed obligation. Westfall v. Ellis, 141 Minn. 377, 170 N. W. 339.

(2) See Periodical Press Co. v. Sherman-Elliott Co., 143 Minn. 489, 174 N. W. 516; 1 Minn. L. Rev. 163.

(4) Wold v. Wold, 138 Minn. 409, 165 N. W. 229; White v. Erickson, 141 Minn. 141, 169 N. W. 535. See Matteson v. Blaisdell, — Minn. —, 182 N. W. 442 (repudiation of contract does not set the statute of limitations running).

(7) Southworth v. Rosendahl, 133 Minn. 447, 158 N. W. 717.

(9) 29 Harv. L. Rev. 551.

1800. Default in instalments—(10) Hjorth v. Albert Lea Machinery Co., 142 Minn. 387, 172 N. W. 488.

(11) See 29 Harv. L. Rev. 551.

1802. Alternative contracts—Where there is a provision in the alternative to do one or the other of certain things, and the promisor, by his own act, disables himself from performing one of the alternatives, the other becomes a fixed obligation. Westfall v. Ellis, 141 Minn. 377, 170 N. W. 339.

If the promise be to pay money at a certain time, or deliver certain chattels, it is a promise in the alternative; and the alternative belongs to the promisor. He may do either the one or the other at his election, nor need he make his election until the time when the promise is to be performed; but, after that day has passed without election on his part, the promisee has an absolute right to the money, and may bring his action for it. If one branch of an alternative becomes impossible, so that the promisor had no longer an election, it does not destroy his obligation, unless the contract expressly so provides, but he is now bound to perform the other alternative. Welsh v. Welsh's Estate, 148 Minn. —, 181 N. W. 356.

1803. Effect—Excusing performance by other party—(17) Hjorth v. Albert Lea Machinery Co., 142 Minn. 387, 172 N. W. 488.

Forfeiture for breach. 5 Minn. L. Rev. 329.

1804. Waiver—A party does not waive a breach by going on with the contract on his part. Where one party to a contract breaks it the other party may stop and refuse further performance. But instead of doing so he may perform so far as he is permitted and then claim the damages he has suffered from the breach. Hjorth v. Albert Lea Machinery Co., 142 Minn. 387, 172 N. W. 488.

To justify a court in depriving a party of the benefits of express contract stipulations on the ground of waiver an intention to waive them should be made to appear clearly or arise by necessary implication from the facts disclosed. Henry v. Hutchins, 146 Minn. 381, 178 N. W. 807.

See §§ 1813, 8607, 10039.

1804a. Evidence—Sufficiency—Evidence held to justify a finding that defendant rescinded a contract without just cause. John Newton Porter Co. v. Kiewel Brewing Co., 137 Minn. 81, 162 N. W. 887.

1805. Law and fact—(20) White v. Erickson, 141 Minn. 141, 169 N. W. 535 (direction of verdict held erroneous).

RESCISSION BY ACT OF PARTY

1808. For breach—Where one party to a contract refuses to perform the substantial part of the contract, the other party may rescind it. Independent Harvester Co. v. Malzohn, 147 Minn. 145, 179 N. W. 727.

(23) Staring Co. v. Rossman, 132 Minn. 209, 156 N. W. 120; Stronge-Warner Co. v. H. Choate & Co., — Minn. —, 182 N. W. 712. See § 1186.

1809. For failure of consideration—(25) See Staring Co. v. Rossman, 132 Minn. 209, 156 N. W. 120; § 1187.

1810. For fraud—Restoring property—The rescission need not be in technically accurate language. It is sufficient if the intent to rescind clearly appears. Kremer v. Lewis, 137 Minn. 368, 163 N. W. 732.

A party may rescind for an innocent misrepresentation. It is not necessary for him to prove a fraudulent intent on the part of defendant. Fawkes, v. Knapp, 138 Minn. 384, 165 N. W. 236. See § 3826.

A party to a written contract is not precluded from rescinding it for fraud because of a recital therein that no representations have been made except as stated in the contract. Nelson v. Berkner, 139 Minn. 301, 166 N. W. 347.

A transaction may involve two contracts that are severable, so that a party may rescind one for fraud and affirm or ratify the other. Przyblyski v. Pellowski, 141 Minn. 193, 169 N. W. 707.

A right to rescind for fraud may be lost, after discovery of the fraud, by acts of affirmance, by acts or delay which evidence an abandonment of the right, or by acts of such a character, or delay so long, that to now assert the right would put the defendant to disadvantage. The question whether plaintiff lost his right of rescission in this case was one of fact for the jury. Zeglin v. Tetzlaff, 146 Minn. 397, 178 N. W. 954.

(26) Johnson v. Olsen, 134 Minn. 53, 158 N. W. 805; Kremer v. Lewis, 137 Minn. 368, 163 N. W. 732; Fawkes v. Knapp, 138 Minn. 384, 165 N. W. 236; Nelson v. Berkner, 139 Minn. 301, 166 N. W. 347; Remington v. Savage, — Minn. —, 182 N. W. 524.

(27) Johnson v. Olsen, 134 Minn. 53, 158 N. W. 805; Straabe v. Jackson, 134 Minn. 179, 158 N. W. 915; Fawkes v. Knapp, 138 Minn. 384, 165 N. W. 236; Everson v. J. L. Owens Mfg. Co., 145 Minn. 199, 176 N. W. 505.

(28) Straabe v. Jackson, 134 Minn. 179, 158 N. W. 915; Fawkes, v. Knapp, 138 Minn. 384, 165 N. W. 236; Arcade Investment Co. v. Hawley, 139 Minn. 27, 165 N. W. 477; Gunderson v. Halvorson, 140 Minn. 292, 168 N. W. 8; Everson v. J. L. Owens Mfg. Co., 145 Minn. 199, 176 N. W. 505; Zeglin v. Tetzlaff, 146 Minn. 397, 178 N. W. 954; O'Neil v. Davidson, 147 Minn. 240, 180 N. W. 102. See Ricker v. J. L. Owens Co., — Minn. —, 182 N. W. 960.

(30) Arcade Investment Co. v. Hawley, 139 Minn. 27, 165 N. W. 477; The Encyclopedia Press, Inc. Co. v. Harris, 140 Minn. 145, 167 N. W. 363; Zeglin v. Tetzlaff, 146 Minn. 397, 178 N. W. 954; O'Neil v. David-

son, 147 Minn. 240, 180 N. W. 102. See Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736; Bergstrom v. Pickett, 148 Minn. —, 181 N. W. 343.

See Digest, §§ 1188, 1814, 1815, 3834, 8604, 8611, 10097.

1811. Partial—A transaction may involve two contracts that are severable, so that a party may rescind one for fraud and affirm or ratify the other. Przyblyski v. Pellowski, 141 Minn. 193, 169 N. W. 707.

Fraud may affect a part of a divisible contract so that one part may be rescinded and the other part carried out. Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736.

FRAUD

1814. Effect—In general—Recitals negativing fraud—A party to a written contract is not precluded from showing fraud by the fact that the contract contains a recital that no representations have been made except as stated in the contract. Nelson v. Berkner, 139 Minn. 301, 166 N. W. 347. See note, 10 A. L. R. 1472.

Fraud may affect a part only of a divisible contract so that one part may be rescinded and the other parts carried out. Bauer v. OBrien Land Co., 144 Minn. 130, 174 N. W. 736.

A defrauded party is not precluded from showing the fraud vitiating a written contract, even though the contract contains language expressly negativing the use of fraud. Nygard v. Minneapolis St. Ry. Co., 147 Minn. 109, 179 N. W. 640. See note, 10 A. L. R. 1472.

1815. Election of remedies—By bringing an action for rescission of a contract for fraud one does not necessarily bar himself from subsequently affirming the contract and recovering damages for the fraud. Freeman v. Fehr, 132 Minn. 384, 157 N. W. 587.

Rescission may sometimes be denied where there is an adequate remedy by merely reducing the amount of compensation. Straabe v. Jackson, 134 Minn. 179, 158 N. W. 915.

The mere bringing of an action for rescission which fails because plaintiff was not entitled to that relief does not bar a subsequent action for damages. Kremer v. Lewis, 137 Minn. 368, 163 N. W. 732.

The commencement of an action for damages upon a complaint that did not state a cause of action and which action was later dismissed by plaintiff does not destroy plaintiff's right of action, based on the rescission, to recover the money paid by plaintiff on the purchase price. Kremer v. Lewis, 137 Minn. 368, 163 N. W. 732.

The commencement of an action for damages which is dismissed, or not prosecuted to a conclusion, probably does not bar a subsequent action for rescission. Kremer v. Lewis, 137 Minn. 368, 163 N. W. 732.

One who is induced by false representations to enter into a contract, and who, after discovering the falsity of the representations, ratifies the contract while it still remains wholly executory, waives the fraud and cannot recover damages therefor. If he has partly performed the con-

tract before discovering the fraud, he may affirm it and bring his action for deceit; but an agreement modifying the prior contract, made after discovery of the fraud, operates as a waiver of his right to bring such action. Plaintiff partly performed the original contract and subsequently made two contracts modifying it. Whether these modifications were made before he had knowledge of the deceit was, under the evidence, a question for the jury. Humphrey v. Sievers, 137 Minn. 373, 163 N. W. 737.

A party does not waive his right of action for fraud by selling the property acquired under the contract after affirming the contract with knowledge of the fraud. Humphrey v. Sievers, 137 Minn. 373, 163 N. W. 737.

To entitle a party to a contract to rescind it for fraud and recover back what he paid thereunder, it is not necessary for him to plead or prove that he was damaged in any particular amount by the fraud or suffered any real injury therefrom. Fawkes v. Knapp, 138 Minn. 384, 165 N. W. 236.

If, while a contract is executory, one party discovers that he has been defrauded, or learns facts that put him on inquiry, and then executes the contract, he cannot thereafter sue for damages. The Encyclopedia Press, Inc. v. Harris, 140 Minn. 145, 167 N. W. 363.

One cannot both rescind a contract and recover damages for fraud in inducing it. The Encyclopedia Press, Inc. v. Harris, 140 Minn. 145, 167 N. W. 363.

An action for rescission on the ground of fraud is not a bar to a subsequent action for damages for the same fraud. Gunderson v. Halvorson, 140 Minn. 292, 168 N. W. 8.

A transaction may involve two contracts that are severable, so that a party may rescind one for fraud and affirm or ratify the other. Przyblyski v. Pellowski, 141 Minn. 193, 169 N. W. 707.

The general rule is that upon rescission the consideration should be returned. It has in some cases been held that if the rights of the parties can be easily and equitably adjusted in the action brought upon the original demand, a strict application of the rule requiring an offer to return the money received will not be enforced. Helvetia Copper Co. v. Hart-Parr Co., 142 Minn. 74, 171 N. W. 272, 767.

A defrauded party by offering to rescind does not thereby forego his equitable remedy of rescission. He still has his election to sue in equity for rescission or at law for damages. Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736.

Acts tending to show a recognition of a contract as still in force, after discovery of the fraud tainting its inception, do not necessarily amount to an affirmance. It depends upon all the facts. Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736.

A person who has been induced to enter into an executory contract by fraud, upon a discovery of the fraud, the contract then being only partly performed, may disaffirm and rescind as to future performance, retaining the right to be restored to his former position by way of dam-

ages or other appropriate relief. He cannot elect to affirm the contract, go forward with the performance thereof, and claim demages to accrue therefrom in the future. Defiel v. Rosenberg, 144 Minn. 166, 174 N. W. 838; O'Neil v. Davidson, 147 Minn. 240, 180 N. W. 102.

Where the contract has been partly performed before the discovery of the fraud and the defrauded party goes on with the contract without promptly rescinding it he cannot have it rescinded in equity. O'Neil v. Davidson, 147 Minn. 240, 180 N. W. 102.

Selling from a stock of merchandise and replenishing it in the usual course of business held not a ratification of fraud so as to bar cancelation. Bergstrom v. Pickett, 148 Minn. —, 181 N. W. 343.

A mere effort to avoid loss will not amount to a ratification so as to bar cancelation. Triggs v. Jones, 46 Minn. 277, 48 N. W. 1113; Bergstrom v. Pickett, 148 Minn. —, 181 N. W. 343.

(40) Freeman v. Fehr, 132 Minn. 384, 157 N. W. 587; Johnson v. Olsen, 134 Minn. 53, 158 N. W. 805; Tarara v. Novelty Electric Mfg. Co., 136 Minn. 216, 161 N. W. 409 (not necessary that defendant be placed in statu quo absolutely—sale of corporate stock—bills incurred while plaintiff was running corporation before discovering fraud); Lyons v. Snider, 136 Minn. 252, 161 N. W. 532; Kremer v. Lewis, 137 Minn. 368, 163 N. W. 732; Fawkes v. Knapp, 138 Minn. 384, 165 N. W. 236; Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736; Townsend v. Jahr, 147 Minn. 30, 179 N. W. 486; Bergstrom v. Pickett, 148 Minn. —, 181 N. W. 343.

(41) Humphrey v. Sievers, 137 Minn. 373, 163 N. W. 737; The Encyclopedia Press, Inc. v. Harris, 140 Minn. 145, 167 N. W. 363; Defiel v. Rosenberg, 144 Minn. 166, 174 N. W. 838; Townsend v. Jahr, 147 Minn. 30, 179 N. W. 486; Dawson v. Thuet Bros., 147 Minn. 429, 180 N. W. 534. See Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736.

(42) Humphrey v. Sievers, 137 Minn. 373, 163 N. W. 737; Defiel v. Rosenberg, 144 Minn. 166, 174 N. W. 838; Dawson v. Thuet Bros., 147 Minn. 429, 180 N. W. 534; Schmitt v. Ornes Esswein & Co., — Minn. —, 183 N. W. 840.

(46) Remington v. Savage, — Minn. —, 182 N. W. 524.

See § 8374.

CONSTRUCTION

1816. Object—Intention of parties—Courts cannot make contract for parties, or fix terms in respect to matters which the parties have expressly reserved for their own agreement and determination. If they fail to agree upon an essential term of a contemplated contract no binding contract is made. Sanford v. Tuckelt, 133 Minn. 233, 158 N. W. 245

The effect of a contract cannot be restricted because rights or property embraced in its language were not in the minds of the parties when the contract was executed. International Lumber Co. v. Staude, 144 Minn. 356, 175 N. W. 909.

(48) Sell v. Lenz, — Minn.—, 183 N. W. 135.

1817. When language plain—(52) Bell Lumber Co. v. Seaman, 136 Minn. 106, 161 N. W. 383; Northern Welding Co. v. Jordan, — Minn. —, 184 N. W. 39. See § 3407.

1817a. Surrounding circumstances—Negotiations—The surrounding circumstances and negotiations leading up to the contract may be considered in aid of construction. Seastrand v. D. A. Foley & Co., 135 Minn. 5, 159 N. W. 1072; Sell v. Lenz, — Minn. —, 183 N. W. 135.

See §§ 3397–3407.

1818. With reference to applicable law—The provisions of statutes applicable to a contract are to be read into and considered a part of the contract. State v. Equitable Surety Co., 140 Minn. 48, 167 N. W. 292.

(53) Seastrand v. D. A. Foley & Co., 135 Minn. 5, 159 N. W. 1072; State v. District Court, 141 Minn. 348, 170 N. W. 218.

1820. Practical construction—The rights of the public probably cannot be frittered away by any practical construction which public officers may place on a franchise. Duluth v. Duluth St. Ry. Co., 137 Minn. 286, 163 N. W. 659.

(56) James River Nat. Bank v. Thuet, 135 Minn. 30, 159 N. W. 1093; Leuthold v. John A. Stees Co., 141 Minn. 213, 169 N. W. 709; Burns v. Willems, 142 Minn. 473, 172 N. W. 772; Sell v. Lenz, — Minn. —, 183 N. W. 135.

(57) Westfall v. Ellis, 141 Minn. 377, 170 N. W. 339.

1822. To be sustained if reasonably possible—If a contract is reasonably susceptible of two constructions, one of which renders it valid and the other invalid, the former should be adopted. Hagen v. Hagen, 136 Minn. 121, 161 N. W. 380; Ditkof v. Lifshitz, 141 Minn. 88, 169 N. W. 483.

1824a. Trade terms—The term "invoice value," as applied to a stock of merchandise, has a well defined meaning in the commercial world and denotes the cost price or the amount at which the goods were invoiced by the seller to the purchaser. Knopfler v. Flynn, 135 Minn. 333, 160 N. W. 860. See Sell v. Lenz, — Minn. —, 183 N. W. 135.

Technical trade terms will not be given their technical meaning if it is clear from the surrounding circumstances, the negotiations leading up to the contract, or the practical construction of the parties, that they used the terms in a different sense. Sell v. Lenz, — Minn. —, 183 N. W. 135.

1825. Ordinary sense of words—(68) Paust v. Georgian, 147 Minn. 149, 179 N. W. 735.

1831. Related instruments—Instruments executed at the same time, for the same purpose, and in the course of the same transaction, are, in the eye of the law, one instrument, and will be read and construed together. American Poster Co. v. Cammack, 139 Minn. 372, 166 N. W. 501.

Two writings relating to the same subject-matter and executed at the same time as parts of the same transaction are to be read together as

constituting the contract. Guaranty Securities Co. v. Exchange State Bank, 148 Minn. —, 180 N. W. 919.

(78) American Poster Co. v. Cammack, 139 Minn. 372, 166 N. W. 501; Guaranty Securities Co. v. Exchange State Bank, 148 Minn. —, 180 N. W. 919.

1834. Punctuation—(83) 3 A. L. R. 1062.

1837. Ejusdem generis—(87) Paust v. Georgian, 147 Minn. 149, 179 N. W. 735. See Barney v May, 135 Minn. 299, 160 N. W. 790; Northern Welding Co. v. Jordan, — Minn. —, 184 N. W. 39.

1838. Expressio unius est exclusio alterius—(89) J. L. Owens Co. v. O'Keefe, 141 Minn. 275, 170 N. W. 204.

1839. Particular words and phrases—Wet excavation. Griffith v. Dowd, 133 Minn. 305, 158 N. W. 420.

Invoice value. Knopfler v. Flynn, 135 Minn. 333, 160 N. W. 860.

More or less. Costello v. Siems-Carey Co., 140 Minn. 208, 167 N. W. 551.

For "about" a specified time. Costello v. Siems-Carey Co., 140 Minn. 208, 167 N. W. 551.

Immoral conduct. Paust v. Georgian, 147 Minn. 149, 179 N. W. 735.

Invoice price. Sell v. Lenz, — Minn. —, 183 N. W. 135.

1840. Particular contracts construed—(99) Griffith v. Dowd, 133 Minn. 305, 158 N. W. 420 (excavating contract—meaning of "wet excavation"); Paine & Nixon Co. v. United States F. & G. Co., 135 Minn. 9, 159 N. W. 1075 (contract for purchase of building tile—meaning of "brick measure"). American Poster Co. v. Cammack, 139 Minn. 372, 166 N. W. 501 (contract for advertising in theater programs); Jung Brewing Co. v. Rund, 141 Minn. 205, 169 N. W. 706 (contract for exclusive sale of plaintiff's beer and for improvement of a saloon wherein the sales were to be made by defendant—stipulation for reimbursement for improvement in case defendant did not carry out agreement).

See § 1848 (building and construction contracts); § 8510 (sale of goods); § 10008 (sale of land).

1841. Law and fact—The construction of an oral contract is ordinarily for the jury, but when it is reasonably susceptible of only one construction the court may declare it as a matter of law. Gransbury v. Saterbak, 116 Minn. 339, 133 N. W. 851; Thompson v. Davidson, 136 Minn. 368, 162 N. W. 458. See § 1730b.

(2) Bell Lumber Co. v. Seaman, 136 Minn. 106, 161 N. W. 383.

(3) Paine & Nixon Co. v. United States F. & G. Co., 135 Minn. 9, 159 N. W. 1075.

BUILDING AND CONSTRUCTION CONTRACTS

1842. Plans and specifications—Ownership—It is probably true that one who employs an architect to devise and prepare plans and specifications for a building and pays him therefor becomes the owner of such

plans and specifications unless the contract provides that they are not to become his property. McCoy v. Grant, 144 Minn. 92, 174 N. W. 728.

(15) See United States v. Spearin, 248 U. S. 132.

1843. Bids—Certified checks—Where a certified check is deposited with a bid it is usually the understanding that the amount will be forfeited if the bidder refuses to enter into a contract upon the acceptance of his bid. See St. Nicholas Church v. Kropp, 135 Minn. 115, 160 N. W. 500; Barber Asphalt Paving Co. v. St. Paul, 136 Minn. 396, 162 N. W. 470. See §§ 1192, 6707.

Where a bid is made and accepted there is at least a preliminary contract, or step toward a contract. It is usually contemplated that a formal conract will be executed. Tunny v. Hastings, 121 Minn. 212, 141 N. W. 168; St. Nicholas Church v. Kropp, 135 Minn. 115, 160 N. W. 500.

1843a. Estimates—An estimate, as the word implies, is a mere approximation. A builder's estimate when allowed by an architect does not fix the actual but only the approximate value of the labor and materials covered by the estimate. P. M. Hennessey Const. Co. v. Hart, 141 Minn. 449, 170 N. W. 597.

1847. Measurements, quantities, etc.—Evidence held admissible to prove the amount of earth moved under a grading contract and the amount of overhaul on the earth moved by plaintiff over and above the estimate of the engineer. Dawson v. Northwestern Construction Co., 137 Minn. 352, 163 N. W. 772.

1848. Particular stipulations construed—A stipulation for a certain compensation for "wet excavation." Griffith v. Dowd, 133 Minn. 305, 158 N. W. 420.

A stipulation as to the price of building tile "not to exceed $9.20 per thousand, brick measure." Paine & Nixon Co. v. United States F. & G. Co., 135 Minn. 9, 159 N. W. 1075.

A contract for remodeling a building, by which the contractor agreed to "fix the foundation where necessary," held to impose upon him the obligation to repair the foundation and adjust it to conditions resulting from raising the building from the existing foundation; the raising of the building being one of the contemplated changes the parties had in mind in entering into the contract. Walberg v. Jacobson, 143 Minn. 210, 173 N. W. 409.

Controversy as to whether plaintiff was required by the terms of a contract to do a certain part of the tile work on a building. Verdict for defendant held justified by the evidence. Northwestern Marble & Tile Co. v. Swenson, 144 Minn. 466, 175 N. W. 99.

(28) Dawson v. Northwestern Construction Co., 137 Minn. 352, 163 N. W. 772.

1850. Substantial performance sufficient—Evidence held to justify a finding that a contract to instal a heating plant was substantially performed and that the failure to heat the building was due to improper

management of the plant. Grimes v. Arthurs, 132 Minn. 476, 157 N. W. 590.

The evidence in an action by the owners against the contractor for the breach of a contract to build a house was such as to sustain though not to require a finding that the defendant substantially performed and that such defects as there were could be readily remedied by a reasonable expenditure so that the plaintiffs would then have the house for which they contracted. In such a case the measure of damages is the reasonable cost of remedying such defects and not the difference in value between the house as it was and as it should have been; and it was error to exclude from the jury the cost of remedying defects. Snider v. Peters Home Building Co., 139 Minn. 413, 167 N. W. 108.

Evidence held to justify a finding of substantial performance. McClure v. Browns Valley, 143 Minn. 339, 173 N. W. 672.

Whether there has been a substantial performance is a question for the jury, unless the evidence is conclusive. McClure v. Browns Valley, 143 Minn. 339, 173 N. W. 672.

Evidence held to justify a finding of substantial performance of a contract for the repair or reconstruction of a building. Sampson v. Brince, 146 Minn. 101, 177 N. W. 933.

(31) Snider v. Peters Home Building Co., 139 Minn. 413, 167 N. W. 108; McClure v. Browns Valley, 143 Minn. 339, 173 N. W. 672; Middlestadt v. Kostendick, 144 Minn. 319, 175 N. W. 553; Sampson v. Brince, 146 Minn. 101, 177 N. W. 933; 5 Minn. L. Rev. 330.

(34) Snider v. Peters Home Building Co., 139 Minn. 413, 167 N. W. 108. See 6 A. L. R. 137.

1853. Umpire—Architect or engineer—Where a building contract provides that all payments shall be made upon written certificates of the architect that they have become due, that only the certificate for the final payment shall be evidence of the completion of the contract, and that a written guaranty must be furnished guaranteeing the roof for a period of ten years before payment will be made for the roof, the issuance of such final certificate and the furnishing of such guaranty are conditions precedent to the right to collect the final payment. A pleading which sets forth the contract, but does not allege the issuance of the certificate or the furnishing of the guaranty, nor any excuse for failing to procure them, does not state sufficient facts to entitle the contractors to recover the final payment. St. Paul Sash, Door & Lumber Co. v. Berkner, 137 Minn. 402, 163 N. W. 668.

No notice of the time or place of examining the work or making the decision by the architect or engineer is necessary, unless expressly provided in the contract. State v. Equitable Surety Co., 140 Minn. 48, 167 N. W. 292.

A builder's preliminary estimate when allowed by an architect does not fix the actual but only the approximate value of the labor and materials covered by the estimate. P. M. Hennessey Const. Co. v. Hart, 141 Minn. 449, 170 N. W. 597.

(37) Dawson v. Northwestern Construction Co., 137 Minn. 352, 163 N. W. 772 (road contract—evidence held to justify a finding that there was a gross mistake in the final estimate of the engineer as to the earth moved and the overhaul sufficient to relieve plaintiff from a provision in his contract that the final estimate of the engineer should be binding); State v. Equitable Surety Co., 140 Minn. 48, 167 N. W. 292 (as to amount of timber cut from state lands).

See § 9104a.

1853a. Architects—Compensation—In an action by an architect for services in preparing preliminary sketches of plans for a dwelling house which were not accepted or used, and for the value of the use of plans and specifications under which the house was constructed, the latter plans having been prepared and used for a former house and paid for by defendant, held, that the findings sustained the conclusions of law and there were no errors. McCoy v. Grant, 144 Minn. 92, 174 N. W. 728.

Plaintiff's claim is that at the instance and request of defendants he prepared certain plans and specifications for a residence which they contemplated constructing in the city of Minneapolis, for which they agreed to pay him an amount equal to four per cent. of the cost of construction. The defence in substance was that the plans and specifications were prepared by plaintiff on the express understanding that defendants were to pay nothing therefor unless they were acceptable and were used; that they were not acceptable and were not used. The court found that the defence thus alleged was not sustained by the evidence. Our conclusion is that the finding is not clearly against the evidence. Kennison v. Lucker, 144 Minn. 469, 175 N. W. 1007.

1859. Extra work and materials—Recovery—A provision of the contract that, in the event extras became necessary to complete the work, they should be provided for by written agreement, was not of the essence of the contract, but a detail in the performance, and the requirement of a writing on the subject could be waived. Walberg v. Jacobson, 143 Minn. 210, 173 N. W. 409.

Facts held to justify a claim for extra compensation for constructing a wall for a building deeper than originally contemplated. Middlestadt v. Kostendick, 144 Minn. 319, 175 N. W. 553.

Evidence held to sustain a verdict in favor of a building contractor for extra labor and material under an alleged subsequent agreement. Bukachek v. Blazek, 145 Minn. 498, 177 N. W. 124.

1860. Modification—(60) Griffith v. Dowd, 133 Minn. 305, 158 N. W. 420.

1864. Pleading—(64) St. Paul Sash, Door & Lumber Co. v. Berkner, 137 Minn. 402, 163 N. W. 668 (necessity of pleading architect's certificate and the furnishing of a written guaranty as condition precedent).

1866. Subcontractors—A subcontractor constructed a tile roof on a concrete base constructed by the general contractor. The subcontractor

proceeded with his work under peremtory directions from the general contractor after objecting that the base was defective. Held, that the general contractor could not urge that the subcontractor was negligent. Evidence held to justify a finding that the subcontractor was not negligent. Breen v. Cameron, 132 Minn. 357, 157 N. W. 500.

A subcontract is not an assignment and creates no legal relations between the original obligor and the subcontractor. Reed v. R. M. Chapman-Basting Co., 137 Minn. 442, 163 N. W. 794.

1866a. Assignment—Construction—Plaintiffs assigned to defendants a building contract which it had partially performed, together with the right to receive all moneys due and to grow due thereon. Defendants agreed to complete the building, indemnify plaintiff against liability on the contract, and assume the same relation towards the owner for whom the building was to be constructed as though they, instead of plaintiff, had made the contract. When the building was completed each party was to account to the other for all work done and moneys received and plaintiff was to be credited with the labor and materials it had furnished up to the date of the execution of its contract with defendants, and charged with all moneys or estimates received from the owner and was to receive 25 per cent. of the profits which might be realized. Held: (a) That as between the plaintiff and the defendants, the latter became substituted for the former as to the future performance of the building contract. (b) That plaintiff was not to bear any portion of the losses which might arise from the construction of the building. (c) That it was not entitled to receive the full amount of preliminary estimates allowed by the architect in charge of the work, but only the actual value of the labor and materials furnished. P. M. Hennessey Const. Co. v. Hart, 141 Minn. 449, 170 N. W. 597.

ILLEGAL CONTRACTS

1869. Illegality—In general—(73) See Johnstown Land Co. v. Brainerd Brewing Co., 142 Minn. 291, 172 N. W. 211.

1870. Public policy—In general—(78) Stronge-Warner Co. v. H. Choate & Co., — Minn. —, 182 N. W. 712.

(79) Seitz v. Michel, — Minn. —, 181 N. W. 102.

(81) Stronge-Warner Co. v. H. Choate & Co., — Minn. —, 182 N W. 712.

1871. Contracts held contrary to public policy—Possibly a contract of a railroad company leasing an elevator on its right of way and exempting the company from liability to the lessee for fire or other cause in the operation of the railroad is invalid. Millers Nat. Ins. Co. v. Minneapolis etc. Ry. Co., 132 Minn. 151, 156 N. W. 117.

A contract between an attorney and a husband for a contingent fee for the recovery of property in his wife's name for the purpose of facilitating a divorce in a proceeding about to be instituted. Klampe v. Klampe, 137 Minn. 227, 163 N. W. 295.

A contract made by the directors of a national bank to elect a certain person as an officer of the bank and maintain him in such office for a specified time at a specified salary. Van Slyke v. Andrews, 146 Minn. 316, 178 N. W. 959.

A contract whereby defendant "guaranteed" that as long as plaintiff lived he should share in the management of certain corporations in which both were stockholders and directors, and that he would furnish him with employment by such corporations. Seitz v. Michel, 148 Minn. —, 181 N. W. 102; Seitz v. Michel, 148 Minn. —, 181 N. W. 106.

(91) Klampe v. Klampe, 137 Minn. 227, 163 N. W. 295.

(92) Southworth v. Rosendahl, 133 Minn. 47, 158 N. W. 717. See § 675a.

1872. Contracts held not contrary to public policy—A stipulation in a lease by a railroad company of an elevator on its right of way that the railroad company should not be liable to the lessee for loss of grain caused by fire communicated from the elevator to such grain while in the possession of the company within one hundred feet of the elevator, even though a shipping receipt for the grain had been issued to the lessee. Millers Nat. Ins. Co. v. Minneapolis etc. Ry Co., 132 Minn. 151, 156 N. W. 117.

A contract of a railroad company to locate a station at a particular point, the public interests not being prejudiced thereby. Grimes v. Minneapolis etc. Traction Co., 133 Minn. 442, 158 N. W. 719.

A fifty-year option for a thirty-year mining lease. Mineral Land Investment Co. v. Bishop Iron Co., 134 Minn. 412, 159 N. W. 966. See § 6123a.

A contract not to furnish premium catalogues and articles of merchandise to other dealers in the same locality. John Newton Porter Co. v. Kiewel Brewing Co., 137 Minn. 81, 162 N. W. 887.

A sale of goods to a corporation under an agreement that the seller will look only to the proceeds of the sale of stock of the corporation for payment. A. J. Whitman & Co. v. Mielke, 139 Minn. 231, 166 N. W. 178.

A contract exonerating one from his acts of negligence is not invalid unless prohibited by statute or in contravention of public policy. Commercial Union Assur. Co. v. Foley Bros., 141 Minn. 258, 169 N. W. 793.

A contract exempting a lessor from liability to a lessee for loss or injury from fire. Commercial Union Assur. Co. v. Foley Bros., 141 Minn. 258, 169 N. W. 793.

A contract of a corporation to move its head office from one city to another in this state. Gasser v. Great Northern Ins. Co., 145 Minn. 205, 176 N. W. 484.

A promise by a husband to pay his wife certain sums of money for her support, they living apart by mutual agreement. Vanderburgh v. Vanderburgh, 148 Minn. —, 180 N. W. 999.

A contract for the separate operation of a department store in a general department store of another . Stronge-Warner Co. v. H. Choate & Co., — Minn. —, 182 N. W. 712.

(3) See Commercial Union Assur. Co. v. Foley Bros., 141 Minn. 258, 169 N. W. 793.

1873. **Contracts contrary to statutes or ordinances**—A guaranty by a brewing company of the payment of rent under a lease of premises to be used as a saloon held not illegal under the statutes of Iowa. Halloran v. Jacob Schmidt Brewing Co., 137 Minn. 141, 162 N. W. 1082.

A provision in a lease, authorizing the lessee to operate a theatre under a license issued to and held by the lessor, held illegal as contrary to an ordinance and to vitiate the entire lease. Ditkof v. Lifshitz, 141 Minn. 88, 169 N. W. 483.

(5) Johnstown Land Co. v. Brainerd Brewing Co., 142 Minn. 291, 172 N. W. 211 (contract for introduction of liquor into territory made dry by treaty with Indians.)

1876. **Leases for illegal purposes**—A lease of premises to be used as a saloon held not illegal under the laws of Iowa. Halloran v. Jacob Schmidt Brewing Co., 137 Minn. 141, 162 N. W. 1082.

A provision in a lease, authorizing the lessee to operate a theater under a license issued to and held by the lessor, held illegal as contrary to an ordinance. Ditkof v. Lifshitz, 141 Minn. 88, 169 N. W. 483.

1877. **Sales for unlawful use**—It is well-settled law, applicable to cases of sales, that mere knowledge by a vendor of an intent on the part of the vendee to use the goods for an unlawful purpose will not bar a recovery by the vendor on the contract of sale, but if the vendor in any way aids the vendee in his unlawful design to violate the law, such participation will render void the contract of sale and will bar recovery by the vendor. The participation must be to some extent active. The vendor must do something in furtherance of the vendee's unlawful design. Johnstown Land Co. v. Brainerd Brewing Co., 142 Minn. 291, 172 N. W. 211.

1877a. **Loans for unlawful use—Recovery**—Where money is borrowed with intent on the part of the borrower to use it for an unlawful purpose, mere knowledge of the lender of such purpose will not bar his recovery of his loan, but if the lender actively aids the borrower in carrying out the unlawful purpose the transaction is illegal and the lender cannot recover. Johnstown Land Co., v. Brainerd Brewing Co., 142 Minn. 291, 172 N. W. 211.

One undertaking to act for plaintiff loaned money to defendant to be used in the purchase of a saloon in territory covered by the Chippewa Indian treaty of February 22, 1855, and made the continued operation of the saloon and the sale of certain kinds of beer there, a condition to the loan. The purchase was made and the specified kinds of beer sold. The prohibitory clause of the Chippewa Indian treaty of February 22, 1855, is valid. The treaty forbids the introduction of intoxicating liquor into this territory. Any contract in furtherance of a purpose to violate it is void. An agent of a brewing company, who sometimes acted also as plaintiff's agent and who assumed to do so in this transaction, was an active participant in the plan to introduce beer into this prohibited terri-

tory. Plaintiff accepted the contract that he made and it took it with all its infirmities. The whole transaction was void. Johnstown Land Co. v. Brainerd Brewing Co., 142 Minn. 291, 172 N. W. 211.

1879. Illegality collateral to contract—(16) Kipp v. Welsh, 141 Minn. 291, 170 N. W. 222. See Johnstown Land Co. v. Brainerd Brewing Co., 142 Minn. 291, 172 N. W. 211.

1880. Entire contracts—(17) Ditkof v. Lifshitz, 141 Minn. 88, 169 N. W. 483.

1881. Severable contracts—Partial illegality—If any part of the agreement is valid, it will avail pro tanto, though another part of it may be prohibited by statute; provided the statute does not, either expressly or by necessary implication, render the whole void; and provided, furthermore that the sound part can be separated from the unsound, and be enforced without injustice to the defendant. Welsh v. Welsh's Estate, 148 Minn. —, 181 N. W. 356.

(18) Millers Nat. Ins. Co. v. Minneapolis etc. Ry. Co., 132 Minn. 151, 156 N. W. 117; Welsh v. Welsh's Estate, 148 Minn. —, 181 N. W. 356.

1885. No right of action upon illegal contracts—Money paid under an illegal contract may sometimes be recovered in an action for money had and received. Ditkof v. Lifshitz, 141 Minn. 88, 169 N. W. 483.

A mortgage may be canceled on the ground that it was given to secure a debt incurred in gambling. Bolfing v. Schoener, 144 Minn. 425, 175 N. W. 901.

A court will not directly enforce a contract or recognize it by awarding damages for its breach if it is contrary to public policy, but will leave the parties where it finds them, not out of consideration for the rights of either, but because the contract is injurious to or contravenes some interest of society or of the state. Seitz v. Michel, 148 Minn. — 181 N. W. 102.

Recovery of money loaned for illegal purpose. L. R. A. 1918C, 247.

Restitution may sometimes be enforced in quasi contract. 31 Harv. L. Rev. 310.

(24) Iverson v. Iverson, 140 Minn. 157, 167 N. W. 483; Johnstown Land Co. v. Brainerd Brewing Co., 142 Minn. 291, 172 N. W. 211; Van Slyck v. Andrews, 146 Minn. 316, 178 N. W. 959; Seitz v. Michel, 148 Minn. —, 181 N. W. 106. See Ditkof v. Lifshitz, 141 Minn. 88, 169 N. W. 483; 31 Harv. L. Rev. 310.

1886. Third parties—Where a bank loans money and takes a note therefor, it may recover on the note though it knew that the money was to be used to pay a gambling debt, if it did not participate in the gambling transaction. Kipp v. Welsh, 141 Minn. 291, 170 N. W. 222.

1887. Estoppel—Neither party to a contract contrary to public policy is estopped from questioning it because the other party has parted with property or rendered services in reliance thereon. Seitz v. Michel, 148 Minn. — 181 N. W. 102.

(30) Finseth v. Sherer, 138 Minn. 355, 165 N. W. 124.

1888. Waiver—Validation—A contract which is contrary to public policy cannot be validated by acts of the parties in recognition of its validity. Seitz v. Michel, 148 Minn. —, 181 N. W. 102.

(31) Seitz v. Michel, 148 Minn. —, 181 N. W. 102.

1889a. Parties—Joining illegal scheme after inception—It is immaterial at what time a party joins an illegal scheme. If he becomes a party to it at any stage of its execution, he will, in contemplation of law, be deemed to have been a party to it from its inception. Gammons v. Gulbranson, 78 Minn. 21, 80 N. W. 779; Koochiching County v. Elder, 145 Minn. 77, 176 N. W. 195.

1891. Pleading—The objection that a contract set up in a complaint is contrary to public policy may be raised by a general demurrer. Seitz v. Michel, 148 Minn. —, 181 N. W. 106.

(38) Stronge-Warner Co. v. H. Choate Co., — Minn. —, 182 N. W. 712.

PARTIES TO ACTIONS

1893. All parties must join—Where, under a policy of insurance, different specific amounts are payable to the different beneficiaries, the interest of the beneficiaries is deemed several rather than joint. National Council v. Scheiber, 141 Minn. 41, 169 N. W. 272.

1894. Parties plaintiff—General rule—Where A and B enter into an agreement whereby A promises to perform certain services for B, and C agrees with A to perform such services as a subcontractor of A, C cannot sue B for loss of profits caused by B refusing to allow C to perform the services. Reed v. R. M. Chapman-Basting Co., 137 Minn. 442, 163 N. W. 794.

(45) Reed v. R. M. Chapman-Basting Co., 137 Minn. 442, 163 N. W. 794.

1896. Contracts for benefit of third parties—In an action to recover for merchandise the defendant claimed a credit or offset which the plaintiff, upon purchasing property from a third party, agreed with his vendor to give. The defendant was a stranger to the contract of purchase, was not in privity with the vendor, the vendor was under no duty or obligation to the defendant, and the defendant gave no consideration. Held, that the defendant can not avail himself of the agreement for a credit. General Electric Co. v. Jordan, 137 Minn. 107, 162 N. W. 1061.

In an action on a promise of a vendee, embodied in a written bill of sale, to pay a debt owing by the vendor to plaintiff, the written promise cannot be varied by parol. There is no pleading that the promise made by the vendee in this case was procured by fraud or under mistake of fact nor is the evidence sufficient to make out such a defence. The measure of recovery is not the consideration stated in the bill of sale but the amount of the debt of plaintiff. Germain v. Great Northern Lumber Co., 143 Minn. 311, 173 N. W. 667.

A contract made by a mother in behalf of herself and her minor

children may be ratified by the children, and, after ratification, they may enforce it. Jentzen v. Pruter, 148 Minn. —,180 N. W. 1004.

(48) General Electric Co. v. Jordan, 137 Minn. 107, 162 N. W. 1061. See Red Wing v. Wisconsin-Minnesota L. & P. Co., 139 Minn. 240, 166 N. W. 175; 2 Minn. L. Rev. 463.

(51, 55) Germain v. Great Northern Lumber Co., 143 Minn. 311, 173 N. W. 667.

1899. Parties to joint obligations—Even at common law, where a joint party was beyond the jurisdiction of the court, the action might proceed against those who were within the jurisdiction. National Council v. Scheiber, 141 Minn. 41, 169 N. W. 272.

(58) National Council v. Scheiber, 141 Minn. 41, 169 N. W. 272. See Posch v. Lion Bonding & Surety Co., 137 Minn. 169, 163 N. W. 131.

1900. Persons severally liable on same instrument—(61) State v. Aetna Casualty & Surety Co., 140 Minn. 70, 167 N. W. 294.

(62) Posch v. Lion Bonding & Surety Co., 137 Minn. 169, 163 N. W. 131.

PLEADING

1903. Common count in indebitatus assumpsit—Under a complaint in the form of a common count in indebitatus assumpsit for services performed, a recovery may be had for the agreed price of services rendered under a completed contract, or the reasonable value of services in the performance of an entire contract the completion of which is prevented by defendant. Boydstun v. Hackney Land Credit Co., 145 Minn. 392, 177 N. W. 779.

(71) Boydstun v. Hackney Land Credit Co., 145 Minn. 392, 177 N. W. 779.

1904. As express or implied—Where a complaint contains appropriate allegations of both an express and implied contract, a recovery may generally be had upon proof of either, but the instructions and conduct of the trial may prevent this. Leonard v. Schall, 132 Minn. 446, 157 N. W. 723.

Under a complaint in the form of quantum meruit the plaintiff may recover upon proof either of the reasonable value of the services, or upon proof of an express contract which has been fully performed on his part. If the evidence shows an express contract the amount of recovery is determined by the contract. Northwestern M. & T. Co. v. Swenson, 139 Minn. 365, 166 N. W. 406; James E. Carlson, Inc. v. Babler, 144 Minn. 125, 174 N. W. 824. See § 10377.

1905. Implied or quasi contracts—(75) See Heywood v. Northern Assur. Co., 133 Minn. 360, 158 N. W. 632.

1908. Want of consideration—(83) L. R. A. 1917F, 581.

1914. Modified contract—A modification of a contract sued upon may be alleged as a defence. State v. Schurz, 143 Minn. 218, 173 N. W. 408.

The evidence showed that, after the agreement was made, it was modified. The complaint did not plead a modification, but the court ordered that it be amended to conform to the evidence. The order did away with the variance between the pleading and the proof. Kociemba v. Kociemba, 146 Minn. 62, 177 N. W. 927.

(56) Kociemba v. Kociemba, 146 Minn. 62, 177 N. W. 927.

1918. Denial of execution—When a plaintiff in his complaint alleges a contract with defendant and performance by himself, proof that the contract was different from that alleged by plaintiff, and that the contract entered into was not performed by plaintiff, is admissible under a general denial. Glencoe Ditching Co. v. Martin, 148 Minn. —, 181 N. W. 108.

(98) Glencoe Ditching Co., v. Martin, 148 Minn. —, 181 N. W. 108.

CONTRIBUTION

1921. Basis of doctrine—Enforced at law—Though of equitable origin the doctrine of contribution is now enforced in actions at law. Bolles v. Boyer, 141 Minn. 404, 170 N. W. 229.

(3, 4) See Bolles v. Boyer, 141 Minn. 404, 170 N. W. 229 (implied promise).

1922. When right accrues—A cause of action for contribution accrues the moment one of the co-obligors pays or performs, under compulsion, the common obligation. Bolles v. Boyer, 141 Minn. 404, 170 N. W. 229.

Where one of two or more makers of a note not due dies, and the holder files it as a claim against the estate of the deceased maker, and it is allowed and paid by the executor or administrator, a cause of action for contribution against the co-makers accrues at once. Bolles v. Boyer, 141 Minn. 404, 170 N. W. 229.

1924. Between wrongdoers—Generally, one of two joint tortfeasors cannot have contribution from the other. An exception arises where the parties are not in pari delicto, as where the injury results from a violation of a duty which one owes to the other, so that as between themselves, the act or omission of one is the primary cause of the injury. Fidelity & Casualty Co. v. Northwestern Tel. Exchange Co., 140 Minn. 229, 167 N. W. 800.

(8) 5 Minn. L. Rev. 370.

1925. Between co-debtors—The evidence sustains the verdict based upon the conclusion that defendant and plaintiff's assignor were the joint owners of an enterprise to finance which they gave their promissory notes; that plaintiff's assignor was compelled to take up such notes; that a third joint maker on the notes was merely an accommodation maker; and that defendant and plaintiff's assignors were as between themselves liable for one-half of the amount of the notes. George E. Lennon, Inc. v. McDermott, 136 Minn. 30, 161 N. W. 211.

Where two persons are called upon to pay the debt of a third, and

each pays the amount for which he is ultimately liable and no more, the equities between them cease and each becomes an independent creditor of the principal for the amount paid for him. In such case, if one afterwards receives payment or indemnity from the pincipal, the other is entitled to no part thereof. Northern Trust Co. v. Consolidated Elevator Co., 142 Minn. 132, 171 N. W. 265.

(9) Sodergren v. Nelson, 131 Minn. 466, 155 N. W. 760 (action between indorsees of note of corporation in which they were interested—verdict for defendants—evidence held to justify finding that defendants indorsed the note as sureties of the plaintiff); Pope v. Hoefs, 140 Minn. 443, 168 N. W. 584 (plaintiff and defendant joint makers of note—controversy as to whether they were co-sureties—parol evidence to show relation); Bolles v. Boyer, 141 Minn. 404, 170 N. W. 229 (co-makers of note).

1925b. Recovery of expenses—In an action for contribution by one wrongdoer against another, held, that plaintiff was not entitled to recover attorney's fees and disbursements incurred and paid in defending an action brought by the injured party, no notice having been given defendant of the pendency of such action and no demand having been made on him to defend it. Fidelity & Casualty Co. v Northwestern Tel. Exchange Co., 140 Minn. 229, 167 N. W. 800.

CONVERSION

WHAT CONSTITUTES

1926. Definition—(12) Wellberg v. Duluth Auto Supply Co., 146 Minn. 29, 177 N. W. 924.

1928. Intent—Knowledge—Motive—(28) See Greer v. Equity Co-operative Exchange Co., 137 Minn. 300, 163 N. W. 527.

1929. Realty—Chattels attached to realty—(29) See Larson v. Larson, 133 Minn. 452, 158 N. W. 707.

(30) See Digest, § 1934.

1931. Knowledge and consent of owner—(32) Carlson v. Schoch, 141 Minn. 236, 170 N. W. 195. See James v. Pettis, 134 Minn. 438, 159 N. W. 953.

1932. Acts held to constitute conversion—Drawer of checks failing to mail them to indorsees according to agreement with payee. the indorsees being creditors of the drawer, from whom purchases had been made by the payee on behalf of the drawer. Behrens v. Kruse, 132 Minn. 69, 155 N. W. 1065, 156 N. W. 1.

Using horses of another and refusing or failing to deliver them to the owner on demand. Colbroth v. National Surety Co., 133 Minn. 465, 158 N. W. 1057.

Diverting a carload of wheat from its destination. Greer v. Equity Co-operative Exchange Co., 137 Minn. 300, 163 N. W. 527.

If the vendor of an automobile, sold with a warranty, obtains it from the vendee, and, to fulfil the warranty, intrusts it to another to replace defective parts, and it is wrongfully destroyed or its identity changed, the vendor, is liable for conversion. Wellberg v. Duluth Auto Supply Co., 146 Minn. 29, 177 N. W. 924.

Wrongfully retaking of property by a vendor on a conditional sale. Reinkey v. Findley Electric Co., 147 Minn. 161, 180 N. W. 236.

(40) James v. Pettis, 134 Minn. 438, 159 N. W. 953.

(60) Greer v. Equity Co-operative Exchange, 137 Minn. 300, 163 N. W. 527.

1933. Acts held not to constitute conversion—A mistake made by a carrier in the name of the consignor held not a conversion of the goods shipped, the goods being received by the proper consignee, who, because of the mistake paid the wrong consignor for the goods, but the latter refunded the money and the consignee suffered no damage. Cohen v. Minneapolis etc. Ry. Co., 133 Minn. 298, 158 N. W. 334. See § 1345.

1934. Conversion of various forms of property—Bank checks. Behrens v. Kruse, 132 Minn. 69, 155 N. W. 1065, 156 N. W. 1.

Hogs. James v. Pettis, 134 Minn. 438, 159 N. W. 953.

A dismantled freight hoisting elevator. Bergh v. Calmenson, 136 Minn. 322, 162 N. W. 353.

A show case. Bergh v. Calmenson, 136 Minn. 322, 162 N. W. 353.

Furniture and fixtures. Peltier v. Nadeau, 138 Minn. 126, 164 N. W. 578.

Certificates of deposit. Darelius v. Peoples State Bank, 145 Minn. 21, 175 N. W. 993.

Baggage delivered to a transfer company for transfer from one railroad station to another. Stine v. Hines, 148 Minn. —, 181 N. W. 321.

(4) Thompson, Felde & Co. v. Great Northern Ry. Co., 142 Minn. 60, 170 N. W. 708.

(6) Northern Timber Products Co. v. Stone-Ordean-Wells Co., 148 Minn. —, 180 N. W. 920.

(8) Wellberg v. Duluth Auto Supply Co., 146 Minn. 29, 177 N. W. 924.

(10) Henry v. Hutchins, 146 Minn. 381, 178 N. W. 807.

(14) Anderson v. Willson, 132 Minn. 364, 157 N. W. 582; Colbroth v. National Surety Co., 133 Minn. 465, 158 N. W. 1057; Carlson v. Schoch, 141 Minn. 236, 170 N. W. 195.

(76) Millers Nat. Ins. Co. v. Minneapolis, etc. Ry. Co., 132 Minn. 151, 156 N. W. 117; Greer v. Equity Co-operative Exchange, 137 Minn. 300, 163 N. W. 527.

(77) Billmeyer v. International Lumber Co., 132 Minn. 466, 156 N. W. 1086; George v. Bowser, 141 Minn. 305, 170 N. W. 506.

(82) See Bergh v. Calmenson, 136 Minn. 322, 162 N. W. 353.

1935. Conversion by various classes of persons—Vendor in a conditional sale. Reinkey v. Findley Electric Co., 147 Minn. 161, 180 N. W. 236.

Drawer of check. Behrens v. Kruse, 132 Minn. 69, 155 N. W. 1065, 156 N. W. 1.

Purchaser from commission merchant. Greer v. Equity Co-operative Exchange, 137 Minn. 300, 163 N. W. 527.

(26) See Greer v. Equity-Co-operative Exchange, 137 Minn. 300, 163 N. W. 527.

(29) Wellberg v. Duluth Auto Supply Co., 146 Minn. 29, 177 N. W. 924.

(30) Millers Nat. Ins. Co. v. Minneapolis etc. Ry. Co., 132 Minn. 151, 156 N. W. 117; Greer v. Equity Co-operative Exchange, 137 Minn. 300, 163 N. W. 527; Thompson, Felde & Co. v. Great Northern Ry. Co., 142 Minn. 60, 170 N. W. 708; J. L. Owens Co. v. Chicago etc. Ry. Co., 142 Minn. 487, 171 N. W. 768; Banik v. Chicago etc. Ry Co., 147 Minn. 175, 179 N. W. 899; Stine v. Hines, 148 Minn. —, 181 N. W. 321. See Cohen v. Minneapolis etc. Ry. Co, 133 Minn. 298, 158 N. W. 334.

(37) Anderson v. Willson, 132 Minn. 364, 157 N. W. 582; Aylmer v. Northwestern Mutual Invest. Co., 138 Minn. 148, 164 N. W. 659; Jankowitz v. Kaplan, 138 Minn. 452, 165 N. W. 275; Carlson v. Schoch, 141 Minn. 236, 170 N. W. 195.

(44) Greer v. Equity Co-operative Exchange, 137 Minn. 300, 163 N. W. 527.

ACTIONS

1936. Election of remedies—Where a bailee or his agent converts the property the bailor may maintain an action for conversion. He is not limited to an action of assumpsit for a breach of the contract of bailment or to one on the case for a neglect of duty. Wellberg v. Duluth Auto Supply Co., 146 Minn. 29, 177 N. W. 924.

1940. Who may maintain action—(63) See Darelius v. Peoples State Bank, 145 Minn. 21, 175 N. W. 993.

1942. Demand before suit—(79) Thompson, Felde & Co. v. Great Northern Ry. Co., 142 Minn. 60, 170 N. W. 708.

(80) Aylmer v. Northwestern Mutual Investment Co., 138 Minn. 148, 164 N. W. 659.

(85) Thompson, Felde & Co. v. Great Northern Ry. Co., 142 Minn. 60, 170 N. W. 708.

(86) See J. L. Owens Co. v. Chicago etc. Ry. Co., 142 Minn. 487, 171 N. W. 768.

1945. General denial—Evidence admissible—(15) Anderson v. Willson, 132 Minn. 364, 157 N. W. 582 (existence and amount of lien on property).

1946. Defences—It is not a defence that the plaintiff has not paid debts which he intended to pay by realizing on the property converted. Behrens v. Kruse, 132 Minn. 69, 155 N. W. 1065, 156 N. W. 1.

A defence of payment held not made out by the evidence. Behrens v. Kruse, 132 Minn. 69, 155 N. W. 1065, 156 N. W. 1.

Where the conversion is by an attempted foreclosure and sale by a former mortgagee the amount of a new note taken in satisfaction of the mortgage cannot be deducted from the damages awarded without pleading and proof of the note. Anderson v. Willson, 132 Minn. 364, 157 N. W. 582.

Action in trover for the conversion of a carload of wheat shipped over the Great Northern Railway. Unintentionally and innocently the railway company and defendants converted the wheat. Thereafter the railway company paid the owners for the wheat and took from them an assignment to plaintiff of the wheat and the cause of action, and instituted this suit. Plaintiff has no personal interest in the matter. It is held: Defendants could set up the defence that, as between them and the railway company, the latter could not purchase and assert the claim of the shippers, since it committed the first act in the conversion of the wheat, out of which grew the connection of defendants with the transaction. Therefore it was proper to receive evidence showing that plaintiff had no interest in the assignment or cause of action, and that the railway company paid the shippers and took the assignment for its own benefit, and instituted the action. Greer v. Equity Co-operative Exchange, 137 Minn. 300, 163 N. W. 527.

Plaintiff turned over certain personal property to defendant in part payment of a debt, and defendant accepted it as such part payment. Subsequently defendant brought suit for the debt and recovered a judgment, which he collected. Thereafter plaintiff, claiming that no credit for the part payment had been given in the former suit, brought this suit for conversion of the property. Held, that an action for conversion will not lie, as the ownership of the property had passed from plaintiff to defendant, and that plaintiff should have asserted his claim of part payment in the former suit. Peltier v. Nadeau, 138 Minn. 126, 164 N. W. 578.

(21) See J. L. Owens Co. v. Chicago etc. Ry. Co., 142 Minn. 487, 171 N. W. 768.

(22) Wellberg v. Duluth Auto Supply Co, 146 Minn. 29, 177 N. W. 924.

1949. Burden of proof—(36) Peltier v. Nadeau, 138 Minn. 126, 164 N. W. 578.

(39) Wellberg v. Duluth Auto Supply Co., 146 Minn. 29, 177 N. W. 924; Stine v. Hines, 148 Minn. —, 181 N. W. 321. See § 733.

(42) James v. Pettis, 134 Minn. 438, 159 N. W. 953.

(44) See Doeren v. Krammer, 141 Minn. 466, 170 N. W. 609.

1951. Evidence—Sufficiency—(53) Billmeyer v. International Lumber Co., 132 Minn. 466, 156 N. W. 1086; Wellberg v. Duluth Auto Supply Co., 146 Minn. 29, 177 N. W. 924.

(54) Henry v. Hutchins, 146 Minn. 381, 178 N. W. 807; Northern Timber Products Co. v. Stone-Ordean-Wells Co., 148 Minn. —, 180 N. W. 920.

(56) George v. Bowser, 141 Minn. 305, 170 N. W. 50 (action held properly dismissed for failure to prove a taking); Darelius v. Peoples State Bank, 145 Minn. 21, 175 N. W. 993.

1951a. Law and fact—Whether there was a conversion is a question for the jury, unless the evidence is conclusive. Colbroth v. National Surety Co., 133 Minn. 465, 155 N. W. 1057.

1952. Relief allowable—(59) See Grice v. Berkner, 148 Minn. —, 180 N. W. 923 (plaintiff cannot have a judgment as for conversion if he tries his case on the theory that the action is replevin).

DAMAGES

1955. General rule—In an action of conversion, where the property, while in the possession of the defendant's agent, was in part carried away or lost either by the wilful act or negligence of the agent, the measure of damages is the value of the property as it was when defendant received it, and not its value at the time defendant offered to return it. Wellberg v. Duluth Auto Supply Co., 146 Minn. 29, 177 N. W. 924.

(64) Carlson v. Schoch, 141 Minn. 236, 170 N. W. 195 (general rule stated). See § 1474.

1956. Where plaintiff has special interest only—In an action against one having a valid lien on the property the right of the plaintiff to recover the full value of the property is subject to deduction to the extent of the amount of the lien. The existence and amount of the lien may generally be proved under a general denial. Anderson v. Willson, 132 Minn. 364, 157 N. W. 582.

(67) James v. Pettis, 134 Minn. 438, 159 N. W. 953 (mortgagee—mortgage covering one-half interest in certain hogs—defendant purchased hogs from mortgagor and paid him all the price—mortgagee held entitled to recover full amount).

(68) Anderson v. Willson, 132 Minn. 364, 157 N. W. 582. See § 1474.

1958. Things in action—(70) Doeren v. Krammer, 141 Minn. 466, 170 N. W. 609 (check—burden of proof on defendant to prove facts in reduction of damages below face value of check); 33 Harv. L. Rev. 474 (corporate stock).

1961. Special damages—(76) See Aylmer v. Northwestern Mutual Invest. Co., 138 Minn. 148, 164 N. W. 659.

CONVICTS

1965a. No forfeiture of property rights—Civil death—A conviction for life does not work a forfeiture of estate or property rights, either under the constitution or by virtue of G. S. 1913, § 8493. Hall v. Crook, 144 Minn. 82, 174 N. W. 519. See § 2677.

CORPORATIONS

IN GENERAL

1969. Definition and nature—A corporation may sometimes be regarded as a mere aggregation of stockholders. Whatever will estop all the stockholders will estop the corporation itself. Olson v. Warroad Mercantile Co., 136 Minn. 310, 161 N. W. 713.

A corporation cannot divide itself into several parts so that each segment shall constitute a separate entity in dealing with the public. Lebens v. Nelson, 148 Minn. —, 181 N. W. 350.

(93) See Trumer v. South Side State Bank, 139 Minn. 222, 166 N. W. 127 (United States as a corporation).

(94) State v. Probate Court, 142 Minn. 415, 172 N. W. 318. See 29 Harv. L. Rev. 404; 31 Id. 894; 1 A. L. R. 610 (disregarding corporate entity).

(99) State v. Reiter, 140 Minn. 491, 168 N. W. 714 (surety company held not a "person" within G. S. 1913, §§ 3116, 3117).

1969a. Partnership as corporation—Public policy will not permit a partnership to do business in the guise of a corporation, nor allow the partners to be a corporation as to the rest of the world while as between themselves the enterprise conducted in the corporate form is in fact a joint venture. The consent of all the stockholders to a contract between the two principal ones, intended to permit them to obtain the benefits of using the corporate form in carrying on their business enterprises, while remaining copartners as between themselves, does not remove the objection that the contract is against public policy. Seitz v. Michel, 148 Minn. —, 181 N. W. 102.

1970. Domestic and foreign corporations defined—(3) State v. Probate Court, 142 Minn. 415, 172 N. W. 318.

1970a. Conflict of laws—A corporation organized under the laws of this state is subject thereto. The issuance and transfer of its stock and the rights of the holders thereof are governed by the laws of this state. State v. Probate Court, 142 Minn. 415, 172 N. W. 318.

1973. Office in state—It is not contrary to public policy for a corporation to agree to move its head office from one city to another in this state. Gasser v. Great Northern Ins. Co., 145 Minn. 205, 176 N. W. 484.

(12) See 3 Minn. L. Rev. 279.

1974. By-laws—The statute requires corporations to prescribe the powers of its officers either in its articles of incorporation or in its by-laws. Persons dealing with them are charged with notice of such powers so prescribed. Bloomingdale v. Cushman, 134 Minn. 445, 159 N. W. 1078.

By-laws may be amended in any way not contrary to law. Mooney v. Farmers Mercantile & Elevator Co., 138 Minn. 199, 164 N. W. 804.

It cannot be presumed that a transferee of stock in a corporation has knowledge of its by-laws. Baer v. Waseca Milling Co., 143 Minn. 483, 173 N. W. 401.

(14) See Mooney v. Farmers Mercantile & Elevator Co., 138 Minn. 199, 164 N. W. 804 (by-law of co-operative association as to distribution of profits).

1975. Records—Stock books—Admissibility—Records of corporation held admissible in action by corporation against an officer thereof to recover secret commissions received by him. International R. & S. Corp. v. Miller, 135 Minn. 292, 160 N. W. 793.

The books of a bank are not the exclusive evidence of the state of a checking account. Finseth v. Scherer, 138 Minn. 355, 165 N. W. 124.

A party dealing with a corporation is not bound by the record of the transaction subseqently entered in the corporate books, but may show what actually took place by any available evidence. The same rule applies where the corporation deals with a member of the corporation as an adverse party. Daggett v. St. Paul Tropical Development Co., 141 Minn. 51, 169 N. W. 252.

Sham and fictitious entries in the books of a corporation are not evidence of the existence of the facts stated in such entries. Axford v. Western Syndicate Invest. Co., 141 Minn. 412, 168 N. W. 97, 170 N. W. 587.

The records of a private corporation are competent evidence of the ownership of corporate stock where an alleged stockholder denies such ownership. A list of stockholders prepared under the direction of the officers of a corporation by copying the name appearing on the original subscriptions for stock is admissible in evidence to show that the persons whose names are entered on the list were stockholders. Lebens v. Nelson, 148 Minn. —, 181 N. W. 350.

(20) Minneapolis Holding Co. v. Landers-Morrison-Christenson Co., 141 Minn. 127, 169 N. W. 534. See State v. Barnes, 136 Minn. 438, 162 N. W. 513, 1050.

(21) Minneapolis Holding Co. v. Landers-Morrison-Christenson Co., 141 Minn. 127, 169 N. W. 534.

(22) Lebens v. Nelson, 148 Minn. —, 181 N. W. 350; Ohman v. Lee, — Minn. —, 184 N. W. 41. See Cookson v. Hill, 146 Minn. 165, 178 N. W. 591 (stock books held best evidence of stockholders by trial court).

(25) See Havlicek v. Western Bohemian Fraternal Assn., 138 Minn. 62, 163 N. W. 985.

(26) Daggett v. St. Paul Tropical Development Co., 141 Minn. 51, 169 N. W. 252. See State v. Barnes, 136 Minn. 438, 162 N. W. 513, 1050.

1976. Proof of corporate acts by oral evidence—The adoption of an amendment to the constitution of a mutual benefit society may be shown by parol where the minutes of the meeting contain no record, and there is no requirement, charter or statutory, that such matters shall be recorded. Such proof may be made, if material between the litigants, though the society is not a party to the action. State v. Barnes, 136 Minn. 438, 162 N. W. 513, 1050.

It is the general rule, in the absence of a statute to the contrary, that the acts of corporations or associations may be proved in the same manner as acts of individuals. Unless the act to be proved is an integral part of some transaction required by law to be in writing, the act may be proved by parol, at least in the absence of a written record. State v. Barnes, 136 Minn. 438, 162 N. W. 513, 1050.

(27) State v. Barnes, 136 Minn. 438, 162 N. W. 513, 1050; Finseth v. Scherer, 138 Minn. 355, 165 N. W. 124; Daggett v. St. Paul Tropical Development Co., 141 Minn. 51, 169 N. W. 252.

PROMOTERS

1977. Contracts of promoters—Adoption—The findings to the effect that plaintiff's bank building had been erected and the site therefor purchased by defendant F. J. Venie, pursuant to agreements between himself and the other promoters that he should make such purchase and erect such building and be repaid the actual cost thereof, and that such agreements had been ratified after the incorporation of plaintiff, are sustained by the evidence. Venie, having been repaid all the advancements and expenditures made by him, is not entitled to retain any part of the lot purchased for the bank, nor the proceeds of that part of the lot which by agreement among the promoters was sold after such purchase, to reduce the amount which the bank would be called upon to pay. In settling his account for expenditures, Venie could not represent both himself and the bank; and the bank is entitled to recover the excess above the amount expended which, as president of the bank, he had caused to be credited to himself on account of such expenditures, and subsequently withdrew from the funds of the bank. He conveyed the legal title to a part of the lot to defendant, Harriet Loan & Realty Company, but as that company stands in his shoes, plaintiff is entitled to a conveyance thereof. A note having been executed to Venie by the Realty Company without consideration, and he, while president of the bank and without other authority, having placed this note, unindorsed, among the assets of the bank and withdrawn the amount thereof from the funds of the bank, the bank had the right to repudiate the transaction and recover from him the amount so withdrawn. Directors of a corporation are liable for losses resulting from abuse of their authority, or gross neglect of their duties; and the individual defendants having violated their

duty as directors by authorizing Venie to appropriate to himself funds of the bank to which they knew or ought to have known that he was not entitled, and such funds having become lost to the bank, they are liable therefor. Lake Harriet State Bank v. Venie, 138 Minn. 339, 165 N. W. 225.

Whether a corporation assumed liability for a breach of a contract entered into by a company whose business it took over, held a question for the jury. Lewiston Iron Works v. Vulcan Process Co., 139 Minn. 180, 165 N. W. 1071.

The rules and principles of law upon the subject of principal and agent apply, for such in effect and substance is the relation between the promoters and the prospective company and its stockholders. Venie v. Harriet State Bank, 146 Minn. 142, 178 N. W. 170.

A promoter of a corporation stands in a fiduciary relation to those associated with him and to the proposed company, and is bound to act in perfect good faith in all his relations to the enterprise. A betrayal of the trust thus reposed in him, and a fraudulent diversion of the funds received for the organization and equipment of the proposed corporation, will forfeit the right to compensation for services rendered in the promotion proceedings. Venie v. Harriet State Bank, 146 Minn. 142, 178 N. W. 170.

(28) Lewiston Iron Co. v. Vulcan Process Co., 139 Minn. 180, 165 N. W. 1071; Langley v. Mohr, 146 Minn. 394, 178 N. W. 943. See 31 Harv. L. Rev. 894; 33 Id. 110.

(29) 33 Harv. L. Rev. 110.

(30) Lake Harriet State Bank v. Venie, 138 Minn. 339, 165 N. W. 225.

1977a. Torts of promoters—Liability of corporation—A corporation is not liable in an action for deceit, on the ground of respondeat superior, for the fraud of a promoter committed before its incorporation. And this is so though it adopts the contract in connection with which the fraud was committed. In the latter case it may have to submit to a rescission of the contract. Langley v. Mohr, 146 Minn. 394, 178 N. W. 943.

1980. Liability of promoters—(36) See Lake Harriet State Bank v. Venie, 138 Minn. 339, 165 N. W. 225; 30 Harv. L. Rev. 39.

1980a. Contracts between promoters—Evidence held to justify a finding of a valid agreement by defendant to transfer and deliver to plaintiff certain fully paid shares of stock of a corporation which they promoted and a breach of the agreement by defendant. Fairchild v. Hovland, 139 Minn. 187, 165 N. W. 1053. See L. R. A. 1918E, 833.

CORPORATE EXISTENCE

1981. De facto corporations—(37) Evens v. Anderson, 132 Minn. 59, 155 N. W. 1040. See Moe v. Harris, 142 Minn. 442, 172 N. W. 494.

1983. Estoppel to deny corporate existence—(41) 5 A. L. R. 1580 (what names import corporation).

INCORPORATION AND ORGANIZATION

1987. Filing proof of publication of articles—(64) See Moe v. Harris, 142 Minn. 442, 172 N. W. 494.

1987a. When organization complete—When articles of incorporation have been executed, filed; and published as required by law, and proof of their publication has been filed in the office of the secretary of state, the corporate organization is complete. G. S. 1913, § 6149. When the organization of a corporation has been completed as required by statute, a corporation de jure is brought into existence, notwithstanding the fact that no capital stock was subscribed or paid for, no books were kept, no by-laws adopted, and no meetings held or officers elected. Moe v. Harris, 142 Minn. 442, 172 N. W. 494.

1989. Co-operative associations—(66) See Mooney v. Farmers Mercantile & Elevator Co., 138 Minn. 199, 164 N. W. 804.

POWERS AND FRANCHISES

1999. Power to sue—(93) Lee v. Scriver, 143 Minn. 17, 172 N. W. 802.

2004. Power to mortgage—One who loans money to a corporation and takes a mortgage of the corporate property as security and pays the money to the proper officer is not bound to see that the money is properly applied to corporate uses. If the money is borrowed for the private use of the officer to whom it is paid, and the lender has notice of that fact, the mortgage may be set aside at the suit of the corporation. Gross Iron Ore Co. v. Paulle, 132 Minn. 160, 156 N. W. 268. See 34 Harv. L. Rev. 454.

..(6) Gross Iron Ore Co. v. Paulle, 132 Minn. 160, 156 N. W. 268.

2007. Power to guarantee debt of another—A corporation has been held to have authority to guarantee the payment of a bill for furniture for an employee, in order to retain the employee in its service. M. Burg & Sons, Inc. v. Twin City Four Wheel Drive Co., 140 Minn. 101, 167 N. W. 300.

2008. Power to purchase and hold its own stock—(10) Gasser v. Great Northern Ins. Co., 145 Minn. 205, 176 N. W. 484. See Booth v. Union Fibre Co., 142 Minn. 127, 171 N. W. 307.

(12) See 2 Minn. L. Rev. 456; 4 Id. 367.

2010. Negotiable paper—Accommodation paper—A corporation cannot be held as an accommodation maker or indorser of commercial paper, except by a bona fide purchaser under certain conditions. Nicholson v. National Mfg. & Supply Co., 132 Minn. 102, 155 N. W. 1070.

A note of a corporation given for the personal benefit of an officer of the corporation cannot be enforced against the corporation by one charged with notice of the facts. National City Bank v. Zimmer Vacuum Renovator Co., 132 Minn. 211, 156 N. W. 265.

A purchaser of accommodation paper of a corporation has the burden

of proving that the officer executing it had authority to do so, either express, implied or apparent, if such authority is denied. He is chargeable with notice of the authority of the officer as disclosed by the charter or articles of incorporation or by-laws of the corporation. He cannot rely on the apparent authority of the officer unless he relied thereon. Bloomingdale v. Cushman, 134 Minn. 445, 159 N. W. 1078.

One who receives an obligation of a corporation from the officer or agent who issued it in payment of the latter's personal debt is charged with notice of want of authority in the officer or agent to execute the obligation. The presumption is against the right or authority of an officer or agent of a corporation to execute its obligation for his own use. Pope v. Ramsey County State Bank, 137 Minn. 46, 162 N. W. 1051. See 34 Harv. L. Rev. 461.

See § 2114.

2012. Power to enter partnerships—Individual partners cannot escape liability as partners on the ground that their partner is a corporation and is unauthorized to enter into a partnership. Moore v. Thorpe, 133 Minn. 244, 158 N. W. 235.

(18, 19) Moore v. Thorpe, 133 Minn. 244, 158 N. W. 235.

2013. Power to hold stock in other corporations—The ownership by one corporation of a majority of the stock of another does not give the former ownership of or a legal interest in the property of the latter, nor merge the two, nor destroy the legal identity or individuality of either. State v. Chicago & N. W. Ry. Co., 133 Minn. 413, 158 N. W. 627; Minneapolis C. & C. Assn. v. Chicago etc. Ry. Co., 134 Minn. 169, 158 N. W. 817; Erickson v. Minnesota & Ontario Power Co., 134 Minn. 209, 158 N. W. 979.

The fact that one corporation owns all the stock of another corporation does not make them the same, nor does it pass to one the property of the other, or render one liable for the acts of the other. Erickson v. Minnesota & Ontario Power Co., 134 Minn. 209, 158 N. W. 979.

(20) Olson v. Warroad Mercantile Co., 136 Minn. 310, 161 N. W. 713.

2013a. Power to act as agent of another corporation—One corporation may act as the agent of another corporation. Erickson v. Minnesota & Ontario Power Co., 134 Minn. 209, 158 N. W. 979.

2014. Power to transfer business to another company—(23) 30 Harv. L. Rev. 335.

2016. Contracts—Authority of officers or agents must appear—Implied contracts—It is sufficient if the name of the corporation is attached to the contract without adding the name of the officer signing it. National City Bank v. Zimmer Vacuum Renovator Co., 132 Minn. 211, 156 N. W. 265.

A corporation may purchase goods under an agreement that the seller will look only to the proceeds of sales of stock of the corporation for payment. A. J. Whitman & Co. v. Mielke, 139 Minn. 231, 166 N. W. 178.

Corporations, like individuals, may be held upon an implied promise. Cochrane v. Interstate Packing Co., 139 Minn. 452, 167 N. W. 111.

The fact that a preliminary contract was not signed by the president of the corporation held immaterial after the contract had been fully carried out. Geiger v. Sanitary Farm Dairies, 146 Minn. 235, 178 N. W. 501.

A written agreement, made on purchasing the property of a corporation, to assume all liabilities, and all debts, claims and demands whatsoever, of the corporation, assumes an obligation to pay an existing liability arising out of personal tort. In a suit on such a tort claim it is not competent for defendant to prove by parol that the agreement was to pay only specific claims, not including the claim sued on. The plaintiff in such a case is not a stranger to the instrument. Geiger v. Sanitary Farm Dairies, 146 Minn. 235, 178 N. W. 501.

2019. Franchises and privileges—Nature—The grant of a franchise to a corporation is an exercise of the sovereign power of the state and creates a contract between the state and the corporation and its members. Seitz v. Michel, 148 Minn. —, 181 N. W. 102.

LIABILITIES

2022. Liability for torts—Corporations are not liable for the negligence of an officer or agent committed in the pursuance of his private affairs. Hade v. Simmons, 132 Minn. 344, 157 N. W. 506.

A corporation is liable for a slander uttered by its agent in the course of his employment and while engaged in furthering the business of the corporation. There is no distinction between slander and libel as respects the liability of a corporation. Roemer v. Jacob Schmidt Brewing Co., 132 Minn. 399, 157 N. W. 640; Manion v. Jewel Tea Co., 135 Minn. 250, 160 N. W. 767. See 21 L. R. A. (N. S.) 873.

A corporation is liable for the torts of another corporation acting as its agent. Erickson v. Minnesota & Ontario Power Co., 134 Minn. 209, 158 N. W. 979.

When it is sought to hold a corporation for a tort the doctrine of respondeat superior applies. Melady v. South St. Paul Live Stock Exchange, 142 Minn. 194, 171 N. W. 806.

A contract whereby a corporation assumed all obligations of another corporation held to include a liability arising in tort. Geiger v. Sanitary Farm Dairies, 146 Minn. 235, 178 N. W. 501.

Where another employee acts under authority of a manager who has authority in the premises, the company is liable for the acts of both. Eastman v. Leiser Co., 148 Minn. —, 181 N. W. 109.

(39) Northwestern Detective Agency v. Winona Hotel Co., 147 Minn. 203, 179 N. W. 1001.

See § 5726 (malicious prosecution).

ULTRA VIRES TRANSACTIONS

2026. When enforceable—Estoppel—Whatever will estop all the stockholders will estop the corporation itself. Olson v. Warroad Mercantile Co., 136 Minn. 310, 161 N. W. 713.

Where one corporation took stock in another and all the stockholders and the corporation acquiesced in the transaction for a long time, it was held that the defence of ultra vires could not be maintained to defeat the liability of the corporation to the creditors of the corporation in which it held stock. Olson v. Warroad Mercantile Co., 136 Minn. 310, 161 N. W. 713.

The doctrine of ultra vires is calculated to protect first, the interest of the public that the corporation shall not transcend the powers granted to it, and second, the interest of the stockholders that the capital shall not be subjected to the risk of enterprises not contemplated by the articles of incorportion, and therefore not authorized by the stockholders in subscribing for the stock. The interest of the public is to be conserved by the state and not by the individual stockholder. The right of the stockholder himself to object for the protection of his own interest may be lost by his own consent or acquiescence, for it does not lie in the mouth of a stockholder to object to what the company has done, if the action which he complains of was taken with his knowledge and consent. He cannot be heard to complain that he has been injured by the doing of something which he knew of at the time, and expressly consented to, or, by long silence, acquiesced in. Olson v. Warroad Mercantile Co., 136 Minn. 310, 161 N. W. 713.

It is the settled rule in this state that where a private corporation has received the consideration coming its way under an ultra vires contract it is estopped from asserting that the contract was ultra vires when the obligation it assumed under the contract is asserted against it. This is in accordance with the general principle that where a contract, not contrary to law or public policy has been fully executed on either side and the party so executing on his part is suing to recover the agreed consideration therefor, the other party will not be allowed to set up the defence that the corporation had no power to enter into the contract. Olson v. Warroad Mercantile Co., 136 Minn. 310, 161 N. W. 713. See L. R. A. 1917A, 749.

While an ultra vires act of an officer of a corporation may be enforceable against the corporation, the officer may be personally liable to the corporation for any damages resulting therefrom to it. Fergus Falls Woolen Mills Co. v. Boyum, 136 Minn. 411, 162 N. W. 516.

Estoppel from raising defence in actions by corporations. L. R. A. 1917A, 821.

Remedies other than action on contract. L. R. A. 1917A, 1026.

(50) See § 4721.

(59) See Sigel v. Security State Bank, 134 Minn. 272, 159 N. W. 567; Olson v. Warroad Mercantile Co., 136 Minn. 310, 161 N. W. 713.

See §§ 6703, 6717 (liability of municipal corporations for ultra vires transactions).

STOCK

2029. Nature of certificates of stock—A stock certificate is merely evidence of title to stock or interest in the corporation. It does not run to bearer or to the order of the person to whom it is issued and is not negotiable. Axford v. Western Syndicate Invest Co., 141 Minn. 412, 168 N. W. 97, 170 N. W. 587.

Capital stock represents the interest of its owner in the corporation and does not represent any direct interest in the property of the corporation. Such property is owned by the corporation as a legal entity, not by the stockholders as individuals. State v. Probate Court, 142 Minn. 415, 172 N. W. 318.

A stock certificate is prima facie evidence of ownership by the person to whom it is issued. Lebens v. Nelson, 148 Minn. —, 181 N. W. 350.

(66) Axford v. Western Syndicate Invest. Co., 141 Minn. 412, 168 N. W. 97, 170 N. W. 587.

(67) Skluzacek v. Fossum, 139 Minn. 498, 166 N. W. 124 (certificate not necessary to membership in corporation—dividends paid without issue of certificate).

(70) See State v. Security Nat. Bank, 139 Minn. 162, 165 N. W. 1067 In re Thorne's Estate, 145 Minn. 412, 177 N. W. 638.

2029a. Preferred stock—The statute permits a corporation to issue preferred stock when its articles so authorize. G. S. 1913, § 6193. It does not define preferred stock. By general definition preferred stock is stock entitled to a preference over other kinds of stock in the payment of dividends. The dividends come out of earnings and not out of capital. Unless there are net earnings there is no right to dividends. The stockholder is still a stockholder and not a creditor. He makes a contribution to capital and not a loan. The corporation is not his debtor. There may be a provision, though it is not a usual one, for a preference upon the liquidation of the corporation and the distribution of corporate property among the stockholders. These are the general characteristics of preferred stock. Booth v. Union Fibre Co., 137 Minn. 7, 162 N. W. 677.

The use of the word stock or the words preferred stock is not controlling. It is the thing and not what it is called that is important. If the transaction resulted in the creation of a debt it should be so declared though the plaintiff and the defendant defined it in terms of stock. If instruments denominated bonds are issued, having the properties of preferred stock and no debt is created, they will be treated in law as preferred stock. Booth v. Union Fibre Co., 137 Minn. 7, 162 N. W. 677.

The articles of the defendant corporation provided for the issuance of preferred stock which should receive such dividends and should be subject to such conditions as the by-laws might prescribe. The by-laws provided that the preferred stock should receive cumulative dividends of a specified percentage, and that it should be redeemed at its full face value, not less than par, with accumulated dividends, at a stated date. This provision was inserted in the stock certificate issued to the plaintiff

upon the incorporation of the defendant. It is held, without determining whether the transaction was a loan resulting in a debt, that there was an obligation on the part of the defendant to redeem, and, the rights of creditors not being involved, the plaintiff could recover. Booth v. Union Fibre Co., 137 Minn. 7, 162 N. W. 677.

See § 2041.

2031a. Issued without authority—Overissue—Estoppel—An overissue of stock is a nullity. Evidence held to justify a finding that certain stock issued and delivered in satisfaction of a claim against a corporation was an overissue and that there were no facts estopping the claimants from attacking the invalidity of the stock. Standard Lithographing & Printing Co. v. Twin City Motor Speedway Co., 140 Minn. 240, 167 N. W. 796.

The holders of the Speedway Company stock, all of the stock having been issued, surrendered their stock and it was canceled. It was contemplated that the stock would be reissued to the parties in interest as their interests should be determined to be; and it was further contemplated that it might be necessary to use some of the stock in caring for the corporate indebtedness. Certain stock was issued to the claimants in payment of their claim against the corporation and they gave a release. They claim that the stock was an overissue and not a payment and the trial court so found. Held, upon the facts stated in the opinion, that the stock was not an overissue; that it was valid stock; that the doctrine that a surrender such as was made was invalid as to creditors has no bearing upon the controversy as to an overissue; and that the acceptance of the stock by the claimants was a payment of their claim. Standard Lithographing Co. v. Twin City Motor Speedway Co., 145 Minn. 5, 176 N. W. 347.

2032. Watered or bonus stock—Under the constitution of South Dakota stock issued without consideration is void. Axford v. Western Syndicate Invest. Co., 141 Minn. 412, 168 N. W. 7, 170 N. W. 587.

The evidence in support of plaintiff's contention that part of the capital stock in controversy was issued by the company without consideration and that the other part was issued prematurely is not sufficiently clear and certain to justify so holding as a matter of law. Berman v. Minneapolis Photo Engraving Co., 144 Minn. 146, 174 N. W. 735.

2033. Capital—How far a trust fund for creditors—Corporate capital cannot be withdrawn or distributed among stockholders without provision being first made for the full payment of corporate debts. Lebens v. Nelson, 148 Minn. —, 181 N. W. 350.

2038. Lien of corporation—(87) Ann. Cas. 1918D, 368.

2040a. Restrictions on sale of stock by stockholder—Exclusive right of corporation to purchase—A mutual agreement between all the stockholders of a trading corporation, that whenever a stockholder wishes to sell any of his stock the corporation shall have the exclusive right to purchase it for a period of sixty days after notice of the wish to sell, is

valid and not an unlawful restriction on the power of alienation. Where stock is sold in violation of such contract to a business rival having notice of it, an action will lie to cancel such sale and enforce specific performance of the contract. The evidence justifies the findings that the sale in controversy was made in violation of such a contract to a business rival having notice of it. Model Clothing House v. Dickinson, 146 Minn. 367, 178 N. W. 597. See 5 Minn. L. Rev. 312.

2041. Conditional sales by corporation—Agreement to redeem preferred stock—Effect of insolvency—The defendant, a manufacturing corporation under the laws of Minnesota, issued to the plaintiff certain stock designated preferred stock upon which it agreed to pay specified cumulative dividends before anything was paid on the common stock. All dividends paid, after the dividends on the preferred, were paid on all stock without preference. In the event of liquidation, the preferred stock was first paid. It then participated in the assets, if any, after the payment of the common. The preferred stock carried all the rights, powers and privileges of the common stock including voting privileges. The defendant had the option to redeem on a fixed basis after five and within ten years, and agreed to redeem at the end of ten; and the by-laws provided for the creation out of the profits of a sinking fund to meet the redemption. Held, that the transaction was not a "loan" but was the issuance of "preferred stock." Such an agreement to redeem, no sinking fund having been created and there having been no profits out of which to create one, will not be enforced at a time when the corporation is insolvent, and its capital stock depleted, and the necessary effect of a redemption will be to imperil creditors, though the corporation is not in liquidation, and though no creditor is a party. Booth v. Union Fibre Co., 142 Minn. 127, 171 N. W. 307. See 34 Harv. L. Rev. 295.

An issuance of stock by a corporation, with a stipulation that, in the event of failure of the corporation to move its general offices, the transaction shall be null and the money refunded, is a sale of the stock with an option to return upon failure of the condition. The subscriber's remedy on such failure is to return the stock and demand a return of his money. A stock salesman has no implied authority to assent to such a condition, but where he undertakes to do so, and the corporation, with knowledge of the facts, claims the benefit of the subscription, it ratifies his act. It is not ultra vires or against public policy for a corporation to move its principal place of business, or to stipulate that a subscription shall be void in event of its failure to do so. A corporation may, on a sale of its stock, no rights of creditors being involved, stipulate for a right of rescission on certain conditions. Under the evidence, the question whether plaintiff waived such a condition, was one of fact for the jury. Gasser v. Great Northern Ins. Co., 145 Minn. 205, 176 N. W. 484. See 34 Harv. L. Rev. 293.

(92) Lyons v. Snider, 136 Minn. 252, 161 N. W. 532; Booth v. Union Fibre Co., 137 Minn. 7, 162 N. W. 677; Gasser v. Great Northern Ins.

Co., 145 Minn. 205, 176 N. W. 484. See Booth v. Union Fibre Co., 142 Minn. 127, 171 N. W. 307; § 8649a

2043. Transfer—Effect—Novation—The plaintiff's testate delivered to the defendants an instrument purporting to transfer corporate stock to them. They agreed by another instrument to pay for it its par value, with interest, out of dividends declared, and to apply all dividends to payment, and reserved the option, but did not assume the obligation of paying from other sources. The stock was deposited with a custodian for the protection of the parties. It is held that the legal title passed to the defendants and that the stock in the possession of the custodian was pledged to the performance of their agreement. Peavey v. Wells, 136 Minn. 180, 161 N. W. 508.

An assignment or transfer of stock is subject to all rights and liabilities attaching thereto at the time of the assignment. In other words, the transfer works a complete substitution, carrying with it, in the absence of a statute to the contrary, all rights and liabilities of the assignor. Axford v. Western Syndicate, 141 Minn. 412, 168 N. W. 97, 179 N. W. 587.

Certificates of stock are assignable. Segerstom v. Holland Piano Mfg. Co., 142 Minn. 104, 170 N. W. 930.

It cannot be presumed that a transferee of stock of a corporation has knowledge of its by-laws. Baer v. Waseca Milling Co., 143 Minn. 483, 173 N. W. 401.

See § 2072a.

2044. Transfer on stock books—Statute—Stock standing in the name of a non-resident decedent, or in trust for a non-resident decedent, cannot be transferred on the stock books of a domestic corporation without the consent of the attorney general. State v. Probate Court, 142 Minn. 415, 172 N. W. 318.

Where the holder of capital stock sells, assigns and delivers it to another, and in the assignment, authorizes the corporation to transfer the stock to the purchaser on its records, the corporation, on learning of such assignment, may make such transfer on its records without a surrender of the stock or a request from the purchaser. By purchasing the stock the purchaser gave authority to transfer it to him of record. The provisions of the statutes and of the by-laws regulating the transfer of stock are for the benefit of the corporation and may be waived by the corporation. Where the corporation recorded the transfer of stock on the stubs from which the certificates were detached and kept no other record thereof, such stubs constituted the transfer book of the corporation and were evidence of the transfers noted thereon. Transfers appearing on the records are presumed to have been properly made, and as there is nothing to impeach the record of the transfer of the stock in controversy to defendant, he was a registered stockholder and liable to creditors as such. Ohman v. Lee, — Minn. —, 184 N. W. 41.

(98, 99, 1) Ohman v. Lee, —Minn. —, 184 N. W. 41.

2044a. Conflict of laws—The issuance and transfer of the stock of a domestic corporation are governed by the laws of this state. State v. Probate Court, 142 Minn. 415, 172 N. W. 318.

SUBSCRIPTIONS TO STOCK

2048. Consideration—Evidence held to show that certain stock was paid for, the subscriber having delivered to an agent of the corporation stock in another corporation to be sold by the agent and the proceeds to be applied by him in payment of the subscription. Bissell v. M. W. Savage Factories, Inc., 137 Minn. 131, 162 N. W. 1066.

2055. Conditions subsequent—(25) Gasser v. Great Northern Ins. Co., 145 Minn. 205, 176 N. W. 484 (condition as to moving office of corporation). See § 2041.

2060. Tender of certificate before suit—(31) See Davies v. Price Merchant's Syndicate, 147 Minn. 6, 179 N. W. 215.

STOCKHOLDERS

2063. Who are stockholders—The usual evidence of who are stockholders in a corporation is the stock record of the corporation. This is prima facie evidence, and one whose name appears on the corporate records as a stockholder is prima facie subject to the liabilities of a stockholder. The corporation record is not conclusive evidence. This would not do, for if it were held to be conclusive, a person might be held bound as a stockholder through the error or connivance of others and without his knowledge. Bartlett v. Stephens, 137 Minn. 213, 163 N. W. 288.

Creditors are presumed to extend credit on the faith of the showing made by the corporate books. Bartlett v. Stephens, 137 Minn. 213, 163 N. W. 288.

Where the purchaser of capital stock thereafter exercises the rights of a stockholder and is recognized as such by the corporation, he thereby acquires the rights and becomes subject to the liabilities of a stockholder, although his stock may not have been transferred to him on the records. Ohman v. Lee, — Minn. —, 184 N. W. 41.

When a person voluntarily assumes the relation of stockholder in a mercantile corporation and voluntarily procures or permits his name to be recorded as such on the corporate records, he fixes his own status, and the constitution fixes his liability for corporate debts. One who has been induced by the fraud of the corporation to become a stockholder may, under some circumstances, be relieved from his liability by taking seasonable action to that end. But he may lose this right by estoppel or laches. After a delay of six months before discovering the fraud and a further delay of four months until bankruptcy of the corporation, without taking any effective steps to secure a cancelation of the stock, during all of which time the corporation was doing business and incurring debts, the stockholder must be held to have lost his right to secure relief from liability to corporate creditors. Bartlett v. Stephens, 137 Minn. 213, 163 N. W. 288.

A stockholder makes a contribution of capital to the corporation and not a loan. Booth v. Union Fibre Co., 137 Minn. 7, 162 N. W. 677.

(44) See Bartlett v. Ryan, 141 Minn. 76, 169 N. W. 421.

(48) Bartlett v. Stephens, 137 Minn. 213, 163 N. W. 288; Lebens v. Nelson, 148 Minn. —, 181 N. W. 350.

(50) Olson v. Warroad Mercantile Co., 136 Minn. 310, 161 N. W. 713; Bartlett v. Stephens, 137 Minn. 213, 163 N. W. 288.

(51) See Bartlett v. Stephens, 137 Minn. 213, 163 N. W. 288.

(53) Bartlett v. Ryan, 141 Minn. 76, 169 N. W. 421 (finding that defendant was not a stockholder held justified by the evidence); Lebens v. Nelson, 148 Minn. —, 181 N. W. 350 (evidence held to show conclusively that defendants were stockholders of the corporation of which plaintiff was receiver).

2064a. Conflict of laws—The rights of stockholders in respect to the issue, ownership, and transfer of stock in a corporation are governed by the laws of the state under which the corporation was formed, in so far as such laws deal with and affect such rights. Axford v. Western Syndicate Invest. Co., 141 Minn. 412, 168 N. W. 97, 170 N. W. 587; State v. Probate Court, 142 Minn. 415, 172 N. W. 318.

Under the provisions of article 17, § 8, constitution of the state of South Dakota, stock issued by a corporation without consideration is fictitious and void. Axford v. Western Syndicate Invest. Co., 141 Minn. 412, 168 N. W. 97, 170 N. W. 587.

2069. Right to sue and defend—In a suit by a stockholder against other stockholders and directors for conspiracy to exclude plaintiff from participation in the management of the corporation and to render his stock valueless contrary to a certain contract between himself and the principal stockholder, that it appeared on the face of the complaint that the contract was contrary to public policy might be taken advantage of by demurrer as well as by motion for judgment on the pleadings after answering. Seitz v. Michel, 148 Minn. —, 181 N. W. 106.

Where a stockholder had no individual right of action against an officer for misappropriating the money of the corporation, he had none against third persons who persuaded the officer to misappropriate it, without regard to the motives which actuated such third persons. Seitz v. Michel, 148 Minn. —, 181 N. W. 106.

A stockholder cannot maintain an individual action against an officer of the corporation for consequential damages for the improper diversion of corporate funds. The right of action is in the corporation. If the corporation is controlled by the guilty officer, a stockholder may sue, but must bring his action in a representative capacity to have the funds restored to the corporation for the benefit of all the stockholders. Seitz v. Michel, 148 Minn. —, 181 N. W. 102; Seitz v. Michel, 148 Minn. —, 181 N. W. 106.

Right of a transferee from a wrongful stockholder to sue. 33 Harv. L. Rev. 979.

(62) United Copper Securities Co. v. Amalgamated Copper Co., 244 U. S. 261.

(66) State Bank v. Kenney Band Instrument Co., 143 Minn. 236, 173 N. W. 560.

See § 2074 (right of minority stockholders to sue).

2070. Right to inspect corporate books—(67) State v. Displayograph Co., 135 Minn. 479, 160 N. W. 486 (fact that stockholder had been indicted held not to defeat right).

2071. Rights in corporate property—Stock ownership does not give title to the corporate property. State v. Northern Pacific Ry. Co., 139 Minn. 473, 167 N. W. 294.

(68) Gross Iron Ore Co. v. Paulle, 132 Minn. 160, 156 N. W. 268.

2072. Right to profits—Dividends—A co-operative association organized under section 6485, G. S. 1913, is authorized by the statute to provide by by-laws for the distribution of profits and earnings in such proportion as the stockholders may deem just. A by-law which discriminates within reasonable limits between stockholders who deal with the company, thereby increasing its earning power, and those who do not deal with it, held not violative of the rights of the stockholders thus discriminated against. For several years the company made an equal pro rata distribution of its profits without discrimination. It is held, that the custom in this respect, though extending over several years, did not preclude the company from departing therefrom, or of the right to enact a by-law providing for a different distribution. No right of the non-assenting stockholders was thereby violated. Mooney v. Farmers Mercantile & Elevator Co., 138 Minn. 199, 164 N. W. 804.

Profits are the surplus earnings available for the payment of dividends. Net profits go to make up the surplus of the corporation. It denotes what remains after defraying every expense, including loans falling due as well as interest on such loans. The net profits or surplus of a corporation belong to its stockholders. Cochrane v. Interstate Packing Co., 139 Minn. 452, 167 N. W. 111.

When dividends are declared by the directors of the corporation, the corporation becomes a debtor to each of the owners and holders of the outstanding shares of stock. Segerstrom v. Holland Piano Mfg. Co., 142 Minn. 104, 170 N. W. 930.

Under a written contract 50 shares of defendant's capital stock were placed in escrow, to be delivered to plaintiff's assignor when payment of a specific sum had been made therefor out of future declared dividends. When this suit was brought to recover dividends upon these shares, payment of said sum had not been made, but there were declared dividends on hand out of which to then make the first partial payment. It is held: Evidence of conversations pending the negotiations for the written contract was inadmissible to vary or contradict its terms. Whether such conversations would tend to establish the right of the escrow shares to participate in the declared dividends was not made to appear by any

offer of proof; hence the rulings excluding the conversations cannot be considered reversible error. Upon this record the court below was justified in holding the escrow shares not entitled to participate in any dividends declared at the time this action was begun. Segerstrom v. Holland Piano Mfg. Co., 142 Minn. 104, 170 N. W. 930.

Rights of holders of preferred stock as to dividends. 6 A. L. R. 802.

(69) See In re Thorne's Estate, 145 Minn. 412, 177 N. W. 638.

2072a. Right to refund of assessments—The stockholders of defendant, a corporation, at its request, by five written agreements, voluntarily assessed the shares of stock held by them, and paid such assessments into its treasury to restore defendant's impaired capital and credit. The three first agreements provided for a refund out of the corporation's first net profits. The fourth contained no refund provision, but that agreement was made necessary only because through an error the one made a month before was unintentionally too small. By the fifth, or last, agreement the assessments paid thereunder were to be refunded before any dividends were declared and before any refund on account of prior assessments, but it was not stated that the refund should come out of the first net profits. Plaintiff signed the last agreement only, and paid the assessment therein called for; the previous assessments upon the shares of stock now held by him were paid by the then owners. It is held: Plaintiff was entitled to demand and receive a refund whenever the accumulation of the net profits, or surplus, equaled or exceeded the total amounts of all the assessments paid by all the shareowners. This right of refund passed with the transfer of the shares from the holders thereof who had paid the first four assessments to plaintiff's assignor, and with the transfer from him to plaintiff. Cochrane v. Interstate Packing Co., 139 Minn. 452, 167 N. W. 111.

2073. Contracting with corporation—(71) See Minnesota Loan & Trust Co v. Peteler Car Co., 132 Minn. 277, 156 N. W. 255.

2073a. Combination of majority to control—Whether the owners of a majority of the stock of a corporation may combine, either through the agency of a voting trust or by private agreement, to secure and retain control and secure permanency in the management of corporate affairs is an open question in this state. See Seitz v. Michel, 148 Minn. —, 181 N. W. 102; Seitz v. Michel, 148 Minn. —, 181 N. W. 106.

2074. Rights of minority stockholders—Where minority stockholders are being deprived of their property rights by the unlawful acts of the majority stockholders, a court of equity will intervene and afford them such relief as may be necessary to protect adequately such rights. Thwing v. McDonald, 134 Minn. 148, 156 N. W. 780, 158 N. W. 820. See Green v. National Advertising & Amusement Co., 137 Minn. 65, 162 N. W. 1056.

An officer of a corporation may be removed by a court at the instance of minority stockholders for misconduct in his office materially prejudicial to their interests. Thwing v. McDonald, 134 Minn. 148, 158 N. W. 820.

Where those in charge of the management of a corporation misapply the corporate assets and divert them to their own private use, a minority stockholder may maintain an action to compel restoration, and to restrain such misconduct in the future, and as incident to such relief, may, in a proper case, procure the appointment of a receiver. Tasler v. Peerless Tire Co., 144 Minn. 150, 174 N. W. 731.

In the absence of special authority, it is the general rule that the owners of a majority of the stock of a corporation have no power to authorize the directors to sell all of the property of the company, and thereby abandon the enterprise for which it was organized. But there is an exception to this general rule. Where, from any cause, the business of a corporation, not charged with duties to the public, has proved so unprofitable that there is no reasonable prospect of conducting the business in the future without loss, or where the corporation has not, and cannot obtain, the money necessary to pay its debts and to continue the business for which it was organized, even though it may not be insolvent in the commercial sense, the owners of a majority of the capital stock, in their judgment and discretion, exercised in good faith, may authorize the sale of all the property of the company, for an adequate consideration, and distribute among the stockholders what remains of the proceeds after the payment of its debts, even over the objection of the owners of the minority of such stock. Geddes v. Anaconda Copper Mining Co., 254 U. S. 590.

Power of majority to dissolve corporation. 2 Minn. L. Rev. 526.

(73) See Olson v. Warroad Mercantile Co., 136 Minn. 310, 161 N. W. 713; Fergus Falls Woolen Mills Co. v. Boyum, 136 Minn. 411, 162 N. W. 516.

(74) Thwing v. McDonald, 134 Minn. 148, 156 N. W. 780, 158 N. W. 820; Axford v. Western Syndicate Invest. Co., 141 Minn. 412, 168 N. W. 97, 170 N. W. 587.

(75) Thwing v. McDonald, 134 Minn. 148, 156 N. W. 780, 158 N. W. 820; Axford v. Western Syndicate Invest. Co., 141 Minn. 412, 168 N. W. 97, 170 N. W. 587; Tasler v. Peerless Tire Co., 144 Minn. 150, 174 N. W. 731. See Green v. National Advertising & Amusement Co., 137 Minn. 65, 162 N. W. 1056; Southern Pacific Co. v. Bogert, 250 U. S. 483 (majority in control occupy fiduciary relation toward minority—right of minority to share in property acquired by majority from corporation).

(77) Gross Iron Ore Co. v. Paulle, 132 Minn. 160, 156 N. W. 268; Tasler v. Peerless Tire Co., 144 Minn. 150, 174 N. W. 731. See Seitz v. Michel, 148 Minn. —, 181 N. W. 102; Seitz v. Michel, 148 Minn. —, 181 N. W. 106.

(78) See Geddes v. Anaconda Copper Mining Co., 254 U. S. 590.

(82) See Thwing v. McDonald, 134 Minn. 148, 156 N. W. 780, 158 N. W. 820; Green v. National Advertising & Amusement Co., 137 Minn. 65, 162 N. W. 1056.

See § 2069.

2075. Estoppel of minority stockholders—(83) Olson v. Warroad Mercantile Co., 136 Minn. 310, 161 N. W. 713. See Fergus Falls Woolen Mills Co. v. Boyum, 136 Minn. 411, 162 N. W. 516; Southern Pacific Co. v. Bogert, 250 U. S. 483; 10 A. L. R. 370 (laches).

2079. Meetings—Notice—Where a stockholder is present at an annual meeting he is not entitled to notice of the date to which the meeting is adjourned. Mooney v. Farmers Mercantile & Elevator Co., 138 Minn. 199, 164 N. W. 804.

LIABILITY OF STOCKHOLDERS

2080. Constitutional liability—The discharge of a corporation under the federal bankruptcy act does not affect the constitutional liability of its stockholders, if it is not resorted to therein. Way v. Barney, 116 Minn. 285, 133 N. W. 801; Finch, Van Slyck & McConville v. Vanasek, 132 Minn. 9, 155 N. W. 754.

If any surplus remains after the payment of debts and expenses it is returned to the stockholders. Finch, Van Slyck & McConville v. Vanasek, 132 Minn. 9, 155 N. W. 754.

A corporation organized to conduct a general manufacturing business, and to generate and distribute electric light, heat and power, and to furnish and supply electrical appliances and devices of all kinds, and in carrying out such purposes to conduct the business of electrical contractors and electrical and mechanical engineers, as well as other business specifically authorized, is not a manufacturing corporation within art. 10, § 3 of the constitution; and the stockholders of such a corporation are liable to corporate creditors to the amount of their stock. Goddard v. Jost, 136 Minn. 28, 161 N. W. 223.

Where one corporation is a stockholder in another it is subject to the constitutional liability the same as an individual. Olson v. Warroad Mercantile Co., 136 Minn. 310, 161 N. W. 713.

The liability is not a corporate asset, nor a liability on contract, nor a liability to the corporation, with which a trustee in bankruptcy has to do, but a right created for the creditors and personal to them. State Bank v. Kenney Band Instrument Co., 143 Minn. 236, 173 N. W. 560.

The enforcement of the constitutional liability by creditors in a state court is not affected by the pendency of bankruptcy proceedings. Selig v. Hamilton, 234 U. S. 652; State Bank v. Kenney Band Instrument Co., 143 Minn. 236, 173 N. W. 560.

A "manufacturer" is one who by labor, art, or skill transforms raw material into some kind of a finished product or article of trade. A corporation, organized to operate a stone quarry, and to use the excavated or blasted material, either in some allied manufacturing industry conducted by it, or in any other manner, which would include a sale thereof on the market in its raw form, is not an exclusively manufacturing corporation within the meaning of section 3 of article 10 of the state constitution, and the stockholders thereof are not exempt from the liability there created. It is not a mechanical corporation because not connected

or associated in the use of the material with any form of manufacturing industry. Graff v. Minnesota Flint Rock Co., 147 Minn. 58, 179 N. W. 562.

(6) Not contractual. State Bank v. Kenney Band Instrument Co., 143 Minn. 236, 173 N. W. 560.

(16) Shearer v. Christy, 136 Minn. 111, 161 N. W. 498.

(17) State Bank v. Kenney Band Instrument Co., 143 Minn. 236, 173 N. W. 560.

(19) See § 2172.

(21) Goddard v. Jost, 136 Minn. 28, 161 N. W. 223; Marin v. Aygedahl, 247 U. S. 142.

(22) Graff v. Minnesota Flint Rock Co., 147 Minn. 58, 179 N. W. 562. See § 796a.

2081. Enforcement in other states—(25) State Bank v. Kenney Band Instrument Co., 143 Minn. 236, 173 N. W. 560.

2082. Conflict of laws—(27) See Yoncalla State Bank v. Gemmill, 134 Minn. 334, 159 N. W. 798; Axford v. Western Syndicate Invest. Co., 141 Minn. 412, 168 N. W. 97, 170 N. W. 587; State Bank v. Kenney Band Instrument Co., 143 Minn. 236, 173 N. W. 560.

2082a. Liability on capital stock withdrawn and refunded—It is provided by statute that if the capital stock of a manufacturing corporation is withdrawn and refunded to the stockholders before the payment of corporate debts for which it would have been liable, the stockholders shall be liable to any creditor, to the amount so refunded to each of them respectively. G. S. 1913, § 6450; Minnesota Thresher Mfg. Co. v. Langdon, 44 Minn. 37, 46 N. W. 310; Mackall v. Pocock, 136 Minn. 8, 161 N. W. 228.

2083. Liability in equity on bonus or watered stock—Stockholders receiving stock partly bonus, because issued to them fully paid in return for greatly overvalued property, will be compelled to pay the difference between the value of what they gave and the par of the stock received, if such difference is required to pay the claims of subsequent creditors who have actually or presumably relied upon the stock as fully paid. This liability of the stockholders is founded upon fraud. Subsequent creditors can enforce this liability, when otherwise entitled to do so, though the corporation is in bankruptcy and a trustee is appointed; for the liability of the stockholder is not a corporate asset which the trustee takes from the bankrupt, nor is it a liability which he may assert as a representative of creditors. State Bank v. Kenney Band Instrument Co., 143 Minn. 236, 173 N. W. 560.

(28) State Bank v. Kenney Band Instrument Co., 143 Minn. 236, 173 N. W. 560.

(28–32) Mackall v. Pocock, 136 Minn. 8, 161 N. W. 228.

(30) 7 A. L. R. 972.

(32) Bartlett v. Stephens, 137 Minn. 213, 163 N. W. 288; State Bank v. Kenney Band Instrument Co., 143 Minn. 236, 173 N. W. 560.

2084. Same—Basis of Liability—In determining the liability of stockholders in a Minnesota corporation the federal courts follow the theory of the liability adopted by our courts. State Bank v. Kenney Band Instrument Co., 143 Minn. 236, 173 N. W. 560.

(33) Mackall v. Pocock, 136 Minn. 8, 161 N. W. 223.

(34) Mackall v. Pocock, 136 Minn. 8, 161 N. W. 223; State Bank v. Kenney Band Instrument Co., 143 Minn. 236, 173 N. W. 560.

(34–36) 29 Harv. L. Rev. 854; 34 Id. 888.

2084a. Dividends paid out of capital—Dividends paid to stockholders out of the capital of a corporation at a time when it had made no profits, owed debts, but was not then insolvent, may, the corporation thereafter becoming bankrupt, be recovered back by the trustee in bankruptcy for the benefit of creditors who became such, after the payment of such dividends; it not appearing that such creditors did not deal with the corporation in reliance on its capital being unimpaired as represented. Mackall v. Pocock, 136 Minn. 8, 161 N. W. 228. See L. R. A. 1917C, 397.

The right to follow the distributed assets of a corporation in the hands of the stockholders applies not only to those who are creditors in the commercial sense, but to all who hold unsatisfied claims. Pierce v. United States, 255 U. S. —.

2086. Stock paid for in overvalued property—(41) State Bank v. Kenney Band Instrument Co., 143 Minn. 236, 173 N. W. 560. See 30 Harv. L. Rev. 503; 12 A. L. R. 449 (liability of transferees).

2087. Statutory liability for unpaid instalment on stock—A trustee in bankruptcy may collect an unpaid stock subscription. State Bank v. Kenney Band Instrument Co., 143 Minn. 236, 173 N. W. 560.

(43) See 7 A. L. R. 972 (creditor's knowledge that stock was unpaid).

2092. Liability as partners—(64–66) See L. R. A. 1916C, 196.

2093. Avoiding liability by contract—(67) Bartlett v. Stephens, 137 Minn. 213, 163 N. W. 288; Lebens v. Nelson, 148 Minn. —, 181 N. W. 350.

2093a. Effect of surrender of stock in exchange for money or property of corporation—The individual liability of stockholders for the debts of the corporation continues after a surrender of the stock in exchange for money or property of the corporation. Corporate capital may not be withdrawn or distributed among stockholders without provision being first made for the full payment of corporate debts. A creditor whose claim is founded on a running account, part of it arising before and part after the stock was surrendered, has all the rights of an existing creditor, even though the entire account has been reduced to judgment. Lebens v. Nelson, 148 Minn. —, 181 N. W. 350.

2094. Effect of transfer of stock—The sale and transfer of his stock does not release a stockholder from the liability imposed upon him by the Constitution for debts of the corporation existing while he was a stockholder. In such case his liability is secondary to that of the trans-

feree, and the liability of both is secondary to that of the corporation, and he is in a sense a surety for such debts. A valid extension of time granted by a creditor to the corporation without the consent of a stockholder who has previously transferred his stock releases such stockholder from his liability for the debt. But the burden is upon the stockholder to show that such extension was made without his consent, and in the present case there is no evidence that such was the fact. Way v. Mooers, 135 Minn. 339, 160 N. W. 1014.

If liability is enforced against a stockholder who has transferred his stock, he has recourse against his transferee and is entitled to be subrogated to the rights of creditors to the extent necessary to enable him to enforce contribution from any stockholder who has failed to pay. Way v. Mooers, 135 Minn. 339, 160 N. W. 1014.

(69) Way v. Mooers, 135 Minn. 339, 160 N. W. 1014. See Lebens v. Nelson, 148 Minn. —, 181 N. W. 350 (creditor on running account held an existing creditor).

See § 803.

DIRECTORS

2095a. Qualifications—The law requires the director of a mercantile corporation to be a stockholder. Caldwell Milling & Elevator Co. v. L. L. May Co., 141 Minn. 255, 169 N. W. 797.

2096. Relation to corporation—Trustees—The directors of a corporation occupy a fiduciary relation to it which imposes upon them the duty to use the authority given them solely for the benefit of the corporation and its stockholders, and to exercise ordinary business care and diligence to see that its property is not wasted nor taken from it upon unfounded claims. The law does not permit them to appropriate such property to themselves nor give it to others; and if they waste it, or apply it in payment of claims which they have no authority to pay, or by negligent inattention to their duties suffer others to appropriate it without right, they are liable to the corporation for any losses resulting from such misuse of authority or neglect of duty. Lake Harriet State Bank v. Venie, 138 Minn. 339, 165 N. W. 225.

The relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation; and where the fairness of such transactions is challenged, the burden is upon those who would maintain them to show their entire fairness; and where a sale is involved, the full adequacy of the consideration. Especially is this true where a common director is dominating in influence or in character. Geddes v. Anaconda Copper Mining Co., 254 U. S. 590.

Directors cannot enter into contracts that will bargain away the independent judgment which they are bound to exercise in the interest of the corporation and all the stockholders. Seitz v. Michel, 148 Minn. —, 181 N. W. 102.

Liability to corporation for profits. 4 Minn. L. Rev. 513.

(75) Minnesota Loan & Trust Co. v. Peteler Car Co., 132 Minn. 277, 156 N. W. 255; Axford v. Western Syndicate Invest. Co., 141 Minn. 412, 168 N. W. 97, 170 N. W. 587; Van Slyke v. Andrews, 146 Minn. 316, 178 N. W. 959; Seitz v. Michel, 148 Minn. —, 181 N. W. 102.

2098. Powers—In general—While the board of directors is usually the managing body of the corporation it is not necessarily so. Where the duties of directors are not expressly prescribed by statute or by the articles of incorporation, they derive their power from the stockholders, who may, if they see fit, select other agencies for the transaction of the corporate business. Gross Iron Ore Co. v. Paulle, 132 Minn. 160, 156 N. W. 268; Olson v. Warroad Mercantile Co., 136 Minn. 310, 161 N. W. 713.

A board may accept a contract, or approve a security by vote, or by a tacit or implied assent. Dickinson v. Citizens Ice & Fuel Co., 139 Minn. 201, 165 N. W. 1056.

(81) See Lake Harriet State Bank v. Venie, 138 Minn. 339, 165 N. W. 225.

(83) Bacon v. Bankers Trust & Sav. Bank, 143 Minn. 318, 173 N. W. 719 (authority to employ or discharge heads of departments of bank); Van Slyke v. Andrews, 146 Minn. 316, 178 N. W. 959 (authority to contract to elect a certain person an officer and maintain him in such office for a specified time at a specified salary); Seitz v. Michel, 148 Minn. —, 181 N. W. 102 (contract restricting free exercise by director of his judgment in the interest of the corporation and all the stockholders). See 12 A. L. R. 1070.

2101. Contracting with corporation—The directors of a corporation may loan the corporation money or pledge their credit therefor, and take a mortgage from the corporation as security, if they act fairly and in good faith, and without wronging others. Minnesota Loan & Trust Co. v. Peteler Car Co., 132 Minn. 277, 156 N. W. 255.

The law imposes upon the directors of a corporation the duty of exercising the measure of good faith towards their corporation which trustees should exercise; and a mortgage made by the corporation to the directors to secure them against liability on their guaranty to a bank made to enable the corporation to obtain money, the transaction being in good faith and entirely fair, and without wrong to others, is valid. Such mortgage, when the mortgagees are a majority of the directors, and the presence of a majority of them is necessary to a quorum, and when they participate in the meeting of the board authorizing it, is subject to close scrutiny; but it will be held valid upon an affirmative showing that the directors acted fairly and in good faith, without a breach of their fiduciary duty, and with no harm resulting to the corporation, nor undue advantage accruing to themselves. Minnesota Loan & Trust Co. v. Peteler Car Co., 132 Minn. 277, 156 N. W. 255.

A director owes to the corporation and its stockholders the utmost good faith, and he may not enter into an agreement whereby he derives

a secret profit at the expense of the corporation. The cancelation of certain shares of stock in a corporation, issued to defendants upon a transfer of void stock, held to be justified by the findings of the trial court. Axford v. Western Syndicate Invest. Co., 141 Minn. 412, 168 N. W. 97, 170 N. W. 587.

(87) Minnesota Loan & Trust Co. v. Peteler Car Co., 132 Minn. 277, 156 N. W. 255.

2103. Liability to corporation for neglect of duty—(95) See Fergus Falls Woolen Mills Co. v. Boyum, 136 Minn. 411, 162 N. W. 516.

2104. Ratification of unauthorized acts—(96) See Fergus Falls Woolen Mills Co. v. Boyum, 136 Minn. 411, 162 N. W. 516; Seitz v. Michel, 148 Minn. —, 181 N. W. 102 (contract against public policy cannot be ratified); 10 A. L. R. 370 (laches).

2109. Meetings—Notice—Though a meeting is without proper notice the subsequent conduct of all the directors may amount to a ratification of what was done at the meeting. Dickinson v. Citizens Ice & Fuel Co., 139 Minn. 201, 165 N. W. 1056.

The stockholders, having knowingly for a period of more than two years, recognized the validity of meetings of the board of directors, held without notice to an absent director, who in fact never acted as a director, are precluded from now asserting that such meetings were illegal for failure to give such notice. Plaintiffs, having obtained their stock by subsequent purchase from two of the directors who attended the directors' meeting which authorized the issuance of the stock in controversy and who voted for the resolution authorizing such issuance, are not in position to assert that such meeting was illegal. Berman v. Minneapolis Photo Engraving Co., 144 Minn. 146, 174 N. W. 735.

OFFICERS AND AGENTS

2109a. Qualifications—The president of a mercantile corporation must be a director and stockholder. Caldwell Milling & Elevator Co. v. L. L. May Co., 141 Minn. 255, 169 N. W. 797.

2112. Officers are agents—(10) Fergus Falls Woolen Mills Co. v. Boyum, 136 Minn. 411, 162 N. W. 516.

2112a. Acts of officers and agents acts of corporation—Though a lessee was notified of a resolution of the directors of lessor corporation that all rentals should be paid to its treasurer, no recovery can be had for rent thereafter paid by check mailed to lessor and received by its secretary, who indorsed it as such, cashed it, and appropriated the money to his own use. Gjertsen Realty Co. v. Holland Invest. Co., 148 Minn. —, 180 N. W. 774.

Where another employee acts under authority of a manager who has authority in the premises the corporation is liable for the acts of both. Eastman v. Leiser Co., 148 Minn. —, 181 N. W. 109.

2113. Fiduciary relation to corporation and its creditors—The officers of a corporation are charged in the performance of their duties with certain obligations of trust and confidence to all the stockholders thereof without discrimination, to be performed with fidelity, and any intentional deviation or departure therefrom to the substantial injury of any of the stockholders constitutes wilful mismanagement as a matter of law, for which a court of equity has jurisdiction to call them to account. Green v. National Advertising & Amusement Co., 137 Minn. 65, 162 N. W. 1056.

The officers of a corporation occupy a fiduciary relation not only to wards the corporation but also towards its creditors. Aiken v. Timm, 147 Minn. 317, 180 N. W. 234.

(11) International Realty & Securities Corp. v. Miller, 135 Minn. 292, 160 N. W. 793 (action to recover secret commissions taken by managing director—verdict for corporation held justified by the evidence); Lake Harriet State Bank v. Venie, 138 Minn. 339, 165 N. W. 225.

See § 2096.

2113a. Fraud on creditors—Conveyances—A conveyance of land by an insolvent corporation, acting through its general manger, to the wife of such manager and in payment of a debt due to her from the corporation, and also an indebtedness due to the manager so executing the same is presumptively fraudulent as to other existing creditors, and may be avoided in statutory sequestration proceedings brought in their behalf. The transfer in such case is not a nullity in an action of that kind, and may be avoided only to the extent it may obstruct the enforcement of the claims of creditors. Aiken v. Timm, 147 Minn. 317, 180 N. W. 234.

2114. Powers—Estoppel—Ordinarily the president, secretary and treasurer of a corporation, singly or collectively, have no authority to execute a mortgage on the property of the corporation. Gross Iron Ore Co. v. Paulle, 132 Minn. 160, 156 N. W. 268.

The stockholders may confer upon a single officer the entire power of the corporation and the existence of such power may arise from implication. Where the stockholders of a corporation by direct act or acquiescence invest an officer with the functions of the board of directors, a mortgage of the corporation properly executed in its behalf by him is valid, though not authorized by vote of the directors or stockholders. Gross Iron Ore Co. v. Paulle, 132 Minn. 160, 156 N. W. 268.

Persons dealing with officers of corporations are chargeable with notice of the statute under which they are organized. As the statute requires a corporation to prescribe the duties of its officers either in its certificate of incorporation or in its by-laws, persons dealing with such officers are chargeable with notice of the powers of such officers as so prescribed. Where a corporation prescribes in its by-laws that all notes issued by it shall be signed by both its president and secretary persons taking such notes are charged with notice of this requirement. Bloomingdale v. Cushman, 134 Minn. 445, 159 N. W. 1078.

The president of a corporation has no inherent power by virtue of his

office to execute commercial paper for it. Bloomingdale v. Cushman, 134 Minn. 445, 159 N. W. 1078.

Where a corporation provides by its by-laws that all notes issued by it shall be signed by both its president and secretary, no actual authority either express or implied, as distinguished from apparent authority, exists in the president to execute such notes alone. The doctrine of implied authority can be invoked only by those who had knowledge that the officer had been permitted to exercise such authority and when they acted in reliance thereon. Bloomingdale v. Cushman, 134 Minn. 445, 159 N. W. 1078.

A single officer may conduct all the affairs of the corporation with the acquiescence of the board of directors and stockholders so that his acts become the acts of the corporation as to third parties, but as to the corporation he is bound by its charter and by-laws. Fergus Falls Woolen Mills Co. v. Boyum, 136 Minn. 411, 162 N. W. 516.

Where the stockholders of a corporation, either by direct act or acquiescence, invest the executive officers thereof with the general corporate powers, the acts of such officers, done within the scope of such powers, are the acts of the corporation. Olson v. Warroad Mercantile Co., 136 Minn. 310, 161 N. W. 713; C. S. Brackett Co. v. Lofgren, 140 Minn. 52, 167 N. W. 274.

In the absence of evidence to the contrary it will be presumed that the president of a business corporation has authority to represent the corporation in the execution of ordinary contracts and to take charge of its litigation and to employ counsel. Dickinson v. Citizens Ice & Fuel Co., 139 Minn. 201, 165 N. W. 1056.

A corporation may be estopped from questioning the authority of its officers. Dickinson v. Citizens Ice & Fuel Co., 139 Minn. 201, 165 N. W. 1056.

A general manager has been held to have implied authority to execute a guaranty of the payment of a debt of an employee, in order to retain the employee in the service of the corporation. M. Burg & Sons, Inc. v. Twin City Four Wheel Drive Co., 140 Minn. 101, 167 N. W. 300.

Plaintiff's president procured a loan from defendant and gave the note of the corporation and a mortgage on land of the corporation as security. The loan was in fact procured for the personal use of the president and was received by him and so used. The evidence sustains a finding that defendant had notice of the purpose for which the loan was procured. Gross Iron Ore Co. v. Paulle, 143 Minn. 48, 172 N. W. 907.

An officer or agent of a corporation has no authority to agree to move the head office of the corporation from one city to another. Gasser v. Great Northern Ins. Co., 145 Minn. 205, 176 N. W. 484.

(12) Bloomingdale v. Cushman, 134 Minn. 445, 159 N. W. 1078. See Gross Iron Ore Co. v. Paulle, 143 Minn. 48, 172 N. W. 907; § 2010.

(13) Fergus Falls Woolen Mills Co. v. Boyum, 136 Minn. 411, 162 N. W. 516; Moorhead v. Minneapolis Seed Co., 139 Minn. 11, 165 N. W. 484 (vice-president and general manager held to have authority to war-

rant the quality of seed grain though such warranty was contrary to the custom of the trade); M. Burg & Sons, Inc. v. Twin City Four Wheel Drive Co., 140 Minn. 101, 167 N. W. 300; Eastman v. Leiser Co., 148 Minn. —, 181 N. W. 109. See Bacon v. Bankers Trust & Sav. Bank, 143 Minn. 318, 173 N. W. 719.

(15) Bloomingdale v. Cushman, 134 Minn. 445, 159 N. W. 1078.

(16) Gross Iron Ore Co. v. Paulle, 132 Minn. 160, 156 N. W. 268; Dickinson v. Citizens Ice & Fuel Co., 139 Minn. 201, 165 N. W. 1056. See Bloomingdale v. Cushman, 134 Minn. 445, 159 N. W. 1078; Rosenberger v. H. E. Wilcox Motor Co., 145 Minn. 408, 177 N. W. 625; 5 A. L. R. 1485 (power to employ, control or discharge agents or subordinates).

(18) Dickinson v. Citizens Ice & Fuel Co., 139 Minn. 201, 165 N. W. 1056.

(19) Gross Iron Ore Co. v. Paulle, 132 Minn. 160, 156 N. W. 268 (president held authorized under the facts of the particular case to execute a mortgage on the property of the corporation); Bissell v. M. W. Savage Factories, Inc., 137 Minn. 131, 162 N. W. 1066 (authority of agent selling stock to accept stock in another corporation to be sold and the proceeds to be applied in payment of the subscription); Dickinson v. Citizens Ice & Fuel Co., 139 Minn. 201, 165 N. W. 1056 (authority of president to enter into stipulation for settlement of action); Bacon v. Bankers Trust & Sav. Bank, 143 Minn. 318, 173 N. W. 719 (trust company and savings bank—authority of secretary to discharge manager of bond department); Gasser v. Great Northern Ins. Co., 145 Minn. 205, 176 N. W. 484 (authority of stock salesman to insert a condition in a stock subscription that the corporation will move its head office); Rosenberger v. H. E. Wilcox Motor Co., 145 Minn. 408, 177 N. W. 625 (authority of president to negotiate the settlement of a claim against the corporation); Eastman v. Leiser Co., 148 Minn. —, 181 N. W. 109 (foreign corporation—authority of local manager of store to prosecute purchaser at store for passing forged check); Gjertsen Realty Co. v. Holland Invest. Co., 148 Minn. —, 180 N. W. 774 (authority of secretary to receive payment of money due corporation).

2114a. Liability to corporation for ultra vires acts—The manager of a corporation intrusted with the transaction of its business affairs is bound by the restrictions imposed upon the corporation by its charter and by-laws, and, if he transgresses such restrictions, is liable for the damages resulting to the corporation therefrom. Defendant as manager of plaintiff corporation, having contracted debts in excess of the limit prescribed by the charter in consequenec whereof it became necessary to dispose of plaintiff's merchandise at an assignee's sale and at a loss, is liable in damages. As the restriction violated was imposed upon the corporation itself by its charter, the ultra vires acts of defendant could not be ratified by the directors, but only by the unanimous action of the stockholders after full knowledge of the facts. The claims of the creditors appearing to be valid and enforceable, the recognition by the stockholders of liability

to the creditors did not waive the right to hold defendant responsible for the damages resulting from his ultra vires acts in contracting such claims. Fergus Falls Woolen Mills Co. v. Boyum, 136 Minn. 411, 162 N. W. 516.

2115. Liability on contract—Signatures—It is sufficient if the name of a corporation is attached to a contract without adding the name of the officer signing it. National City Bank v. Zimmer Vacuum Renovator Co., 132 Minn. 211, 156 N. W. 265.

2116. Ratification of unauthorized acts—Nothing less than the unanimous action of the whole body of stockholders can authorize the use of the corporate credit for the benefit of an individual, and nothing less than such action can ratify such use. Ratification must be with full knowledge of the facts. Ratification of a mortgage given by an officer for his private benefit, and of which fact the mortgagee has notice, can only be accomplished by action of all the stockholders, each acting with full knowledge of the facts. Gross Iron Ore Co. v. Paulle, 132 Minn. 160, 156 N. W. 268.

Where an officer violates restrictions imposed upon the corporation itself by its charter, his ultra vires acts cannot be ratified by the board of directors, but only by the unanimous action of the stockholders after full knowledge of the facts. Fergus Falls Woolen Mills Co. v. Boyum, 136 Minn. 411, 162 N. W. 516.

There is a ratification as a matter of law when it appears that the board of directors of the corporation, or other managing offcers having the power and authority to enter into like contracts, either affirmatively approve of the unauthorized contract, or with knowledge of the facts silently acquiesces therein or fails promptly to repudiate it. Bacon v. Bankers Trust & Sav. Bank, 143 Minn. 318, 173 N. W. 719.

(21) Dickinson v. Citizens Ice & Fuel Co., 139 Minn. 201, 165 N. W. 1056; Gasser v. Great Northern Ins. Co., 145 Minn. 205, 176 N. W. 484. See 7 A. L. R. 1446 (acceptance and retention of benefits).

2118. Contracting with corporation—(25) Minnesota Loan & Trust Co. v. Peteler Car Co., 132 Minn. 277, 156 N. W. 255; Great Northern Exploration Co. v. Mizen, — Minn. —, 184 N. W. 20.

2119. Notice to officers notice to corporation—A corporation is chargeable with knowledge of facts known to an officer transacting its business, even though the officer is interested, if he is the sole representative of the corporation in the transaction. It is chargeable with knowledge acquired by its active officer, even though acquired in another transaction, if it appears that the knowledge is actually present in his mind while he is acting for it. State Bank v. Adams, 142 Minn. 63, 170 N. W. 925.

(28) Dickinson v. Citizens Ice & Fuel Co., 139 Minn. 201, 165 N. W. 1056; Farmers State Bank v. McGrath, 141 Minn. 281, 170 N. W. 209; State Bank v. Adams, 142 Minn. 63, 170 N. W. 925; 34 Harv. L. Rev. 656.

(29) Kipp v. Welsh, 141 Minn. 291, 170 N. W. 222; State Bank v. Adams, 142 Minn. 63, 170 N. W. 925. See Ortonville Elevator & Milling

Co. v. Luff, 136 Minn. 450, 162 N. W. 885; Farmers State Bank v. McGrath, 141 Minn. 281, 170 N. W. 209.

See Digest, §§ 215, 777, 4709, 5866.

2120. When chargeable with notice—The directors who pay a debt which they guaranteed, the mortgage being given as security for their guaranty, are not charged with notice of the after-acquired provision in a former mortgage because a director who signed with them, and who is one of the mortgagees, but who is unable to pay, was a director and officer when such former mortgage was made. Directors who take a mortgage in actual good faith are not conclusively charged by law, because of their relation to the corporation, with knowledge of the after-acquired property provision in a mortgage, executed by their mortgagor more than eight years before, and long prior to their becoming stockholders, and from five to eight years before they became directors. Minnesota Loan & Trust Co. v. Peteler Car. Co., 132 Minn. 277, 156 N. W. 255.

The mere fact that one is a stockholder in a corporation does not charge him with notice. First Nat. Bank v. Loyhed, 28 Minn. 396, 399, 10 N. W. 421; State Bank v. Adams, 142 Minn. 63, 170 N. W. 925.

2121. Compensation—Right of officer, director or stockholder to compensation for services in the absence of contract. L. R. A. 1917F, 310.

2121a. Removal by court—An officer of a corporation may be removed by a court for misconduct in his office. Thwing v. McDonald, 134 Minn. 148, 156 N. W. 780, 158 N. W. 820.

DISSOLUTION AND FORFEITURE OF FRANCHISE

2122. Voluntary dissolution—Statute—(33) Seitz v. Michel, 148 Minn. —, 181 N. W. 102. See Thwing v. McDonald, 134 Minn. 148, 156 N. W. 780, 158 N. W. 820.

(34) 30 Harv. L. Rev. 335; 2 Minn. L. Rev. 526.

2124. Dissolution by court of equity independent of statute—Receiver—It is the general rule that a corporation cannot be dissolved by a court at the instance of minority stockholders unless under statutory authority. There are exceptions to this general rule. For example, when it has become impossible to accomplish the purpose for which the corporation was chartered or organized, or when failure or ruin is inevitable, a court of equity may intervene and wind up its business and apportion and distribute its assets to those entitled thereto. And when a majority of the stockholders take upon themselves the exclusive management and control of the corporation and abuse their powers by arbitrarily or fraudulently conducting the corporate affairs so as to appropriate to themselves the profits or property of the corporation, to the despoilment of the minority stockholders, a court of equity may dissolve the corporation when there is no other adequate remedy. In no case, however, will the drastic remedy of dissolution be granted to minority stockholders if their inter-

ests can be otherwise adequately protected. Thwing v. McDonald, 134 Minn. 148, 156 N. W. 780, 158 N. W. 820; Green v. National Advertising & Amusement Co., 137 Minn. 65, 162 N. W. 1056. See § 2185; Ann. Cas. 1918E, 420.

A court of equity may appoint a receiver of a corporation at the instance of creditors or stockholders to preserve, administer and distribute its assets to those entitled thereto. This power of a court of equity is independent of G. S. 1913, § 6634. Northwestern Nat. Bank v. Mickelson-Shapiro Co., 134 Minn. 422, 159 N. W. 948.

By admitting all the allegations of the complaint in its answer and expressly consenting to the appointment of a receiver, the defendant corporation waived the prerequisites to a receivership specified in said section 6634, G. S. 1913, viz., that no judgment had been rendered against it upon which an execution had been returned unsatisfied. And appellant, after having acquiesced in the action of the corporation and its receiver for almost two years, should not now be heard to question the jurisdiction of the court in making the appointment. The record shows that a sale of all the assets of the corporation was imperative, hence the order directing such sale was not improvidently granted. Northwestern Nat. Bank v. Mickelson-Shapiro Co., 134 Minn. 422, 159 N. W. 948.

While it is clear that the court may, as a necessary step in the proceedings, appoint a receiver to take charge of the corporate business and affairs, to convert the property and effects into money, the question whether there should be a final dissolution of the corporation should not be left to the receiver to determine, but should be definitely declared by the court, and a time set for the sale and disposal of the property and a distribution of the proceeds among the stockholders. There should be reasonably prompt action in a case of this kind, to the avoidance of a long-continued operation of the business of the company under the guidance and supervision of the court. Green v. National Advertising & Amusement Co., 137 Minn. 65, 162 N. W. 1056.

Where officers of a corporation, chosen by stockholders representing and owning one-half the corporate stock, in collusion with such stockholders intentionally manage and conduct the affairs of the company in the exclusive interests of those so electing them, allow themselves exorbitant salaries, wrongfully exclude the stockholders owning the other one-half of the stock from participation in the profits or property of the company, and there is such enmity and hostility between the contending stockholding factions as to render harmonious management of the company impossible, a court of equity may, without statutory authority, at the suit of the excluded stockholders, though the corporation be not insolvent, entertain proceedings to wind up the affairs of the corporation, convert its property into money for distribution to those entitled thereto, and appoint a receiver to conduct the affairs of the concern pending the proceedings. Green v. National Advertising & Amusement Co., 137 Minn. 65, 162 N. W. 1056. See § 2185.

2127. Grounds for forfeiture—An exercise of corporate powers in excess of those granted by law constitutes, where no other penalty is prescribed by law, a basis or ground for the forfeiture of its charter at the suit of the state. Where the penalty for an excessive exercise of authority is not prescribed by statute, a forfeiture is the only redress; the court cannot otherwise punish the offending corporation. State v. W. L. Harris Realty Co., 148 Minn. —, 180 N. W. 776.

SEQUESTRATION PROCEEDINGS UNDER G. S. 1913, § 6634

2144. Construction—Proceedings under G. S. 1913, § 6634, are not exclusive of an action in equity for a receiver of a corporation to preserve, administer and distribute its assets to those entitled thereto. Northwestern Nat. Bank v. Mickelson-Shapiro Co., 134 Minn. 422, 159 N. W. 948. See § 2124.

2144a. Applicable to foreign corporations—The statute authorizes the sequestration of the property of a foreign corporation in this state and the appointment of a receiver thereof. Rittle v. J. L. Owens Mfg. Co., 136 Minn. 93, 161 N. W. 401.

2145. General nature of proceedings—From the time that other creditors assert their claims in such an action, it is under the control of the court for the benefit of all creditors who are, or become, parties to it. Parten v. Southern Colonization Co., 146 Minn. 287, 178 N. W. 744.

(83) Parten v. Southern Colonization Co., 146 Minn. 287, 178 N. W. 744.

2147. Return of sheriff—Conclusiveness—(87) Greenfield v. Hill City Land, L. & L. Co., 141 Minn. 393, 170 N. W. 343.

2148. Judgment on which action based—The corporation cannot defeat the appointment of a receiver by paying the judgment of plaintiff after other creditors have joined the proceedings. Parten v. Southern Colonization Co., 146 Minn. 287, 178 N. W. 744.

(88) Finch, Van Slyck & McConville v. Le Sueur County Co-operative Co., 134 Minn. 376, 159 N. W. 826; Greenfield v. Minnesota M. & D. Co., 138 Minn. 446, 165 N. W. 274; Greenfield v. Hill City Land, L. & L. Co., 141 Minn. 393, 170 N. W. 343.

See § 2124

2150. Limitation of actions—The cause of action against a stockholder in a domestic corporation arising out of the so-called "double liability" imposed by the state constitution accrues, so as to set the statute of limitations running, when the corporation is declared insolvent and a receiver appointed to wind up its affairs. Under the rule stated the demurrer to the complaint should have been sustained; for it clearly appears from its allegations that more than six years elapsed between the time the receiver was appointed and the time this action was commenced. Shearer v. Christy, 136 Minn. 111, 161 N. W. 498.

(96) Contra, Shearer v. Christy, 136 Minn. 111, 161 N. W. 498.

2151. Who may maintain action—(1) See Northwestern Nat. Bank v. Mickelson-Shapiro Co., 134 Minn. 422, 159 N. W. 948; Zebens v. Nelson, 148 Minn. —, 181 N. W. 350 (as to who are existing creditors).

2154. Pleading—Set-off—A complaint held sufficient to authorize the appointment of a receiver for a foreign corporation with its principal office and place of business in this state. Rittle v. J. L. Owens Mfg. Co., 136 Minn. 93, 161 N. W. 401.

(16) 34 Harv. L. Rev. 178 (set-off of immature claims).

2155. Procedure—Miscellaneous cases—Certain orders of the trial court relating to the time for hearing claims, authorizing the receivers to join with the minority stockholders in making and delivering or tendering to a certain defendant an assignment of all their claims, authorizing and directing the receivers to execute and deliver a certain license affecting land, and authorizing the receivers to pay to plaintiff's attorney certain disbursements of a former appeal, held proper. Thwing v. McDonald, 139 Minn. 157, 165 N. W. 1065.

(24) Standard Lithographing & Printing Co. v. Twin City M. S. Co., 139 Minn. 120, 165 N. W. 967.

2157. Appointment of receiver—The statute authorizes the sequestration of the property of a foreign corporation in this state and the appointment of a receiver thereof. Rittle v. J. L. Owens Mfg. Co., 136 Minn. 93, 161 N. W. 401.

An order appointing a receiver pendente lite in an action brought to sequestrate the property of an insolvent corporation is not void because it does not appear that a summons had been issued or served upon the corporation before the order was made. In such an action the stockholders of the corporation, when made parties defendant, are represented in their corporate capacity by the corporation. The order appointing a receiver in such an action cannot be attacked collaterally. When the receiver files a petition for the assessment of the stockholders, as provided by G. S. 1913, § 6645, they cannot resist the making of such assessment on the ground that his appointment was invalid, unless such invalidity appears upon the face of the record. If they desire to question the validity of the appointment, they must do so by a direct proceeding to vacate the order. Greenfield v. Hill City Land, L. & L. Co., 141 Minn. 393, 170 N. W. 343.

Where the action is against a foreign corporation having resident stockholders alleged to be liable for unpaid stock subscriptions, a receiver may be appointed without first establishing the existence of assets within the state. Parten v. Southern Colonization Co., 146 Minn. 287, 178 N. W. 744.

Where a judgment creditor of a corporation, after the return of an execution unsatisfied, brings an action under section 6634, G. S. 1913, in behalf of himself and all other creditors to sequestrate the assets of the corporation and have a receiver appointed for it, and other creditors have asserted their claims in the action, the corporation cannot defeat the ap-

pointment of a receiver by paying the judgment of the plaintiff. Parten v. Southern Colonization Co., 146 Minn. 287, 178 N. W. 744.

(34) Greenfield v. Hill City Land, L. & L. Co., 141 Minn. 393, 170 N. W. 343.

2158. Powers and duties of receivers—A receiver has no interest in the disallowance of claims against the insolvent, or in an order granting a rehearing in the allowance of such claims and cannot appeal from such an order. Finch, Van Slyck & McConville v. Le Sueur County Co-operative Co., 134 Minn. 376, 159 N. W. 826. See Pulver v. Commercial Security Co., 135 Minn. 286, 160 N. W. 781.

The receiver represents the court in the administration of the trust imposed upon him, and stands indifferent as between the creditors asserting claims against the insolvent. He may in some respects represent the collective body of creditors in the protection of rights common to all, but in no case can he become an advocate in support of the allowance of claims presented by them. He may oppose fictitious or fraudulent claims, but he cannot champion the claims of creditors, either singly or collectively. Finch, Van Slyke & McConville v. Le Sueur County Co-operative Co., 134 Minn. 376, 159 N. W. 826.

The powers of a receiver may be enlarged from time to time by additional orders of the court appointing him. Greenfield v. Hill City Land, L. & L. Co., 141 Minn. 393, 170 N. W. 343.

A receiver has authority to apply to the court for an assessment of its stockholders, even though he was only appointed pendente lite and not originally authorized by the order appointing him to begin such a proceeding. Greenfield v. Hill City Land, L. & L. Co., 141 Minn. 393, 170 N. W. 343.

The evidence justified the court in refusing to set aside the sale made by the receiver, or to interfere with the possession of the property. Barrette v. Melin Bros., 146 Minn. 92, 177 N. W. 933.

He may avoid a conveyance by officers of the corporation in fraud of its creditors. Aiken v. Timm, 147 Minn. 317, 180 N. W. 234.

(35) See Darelius v. Peoples State Bank, 145 Minn. 21, 175 N. W. 993 (action by receiver for the conversion of certain certificates of deposit held properly dismissed because the corporation was not the owner thereof).

(42) Greenfield v. Hill City Land, L. & L. Co., 141 Minn. 393, 170 N. W. 343; State Bank v. Kenney Band Instrument Co., 143 Minn. 236, 173 N. W. 560.

(47) See Aiken v. Timm, 147 Minn. 317, 180 N. W. 234.

2159. Claims—Filing, proof and allowance—In an application by a receiver of an insolvent corporation to present for allowance a claim against another insolvent corporation, also in the hands of a receiver. made after the expiration of the time limited for the presentation of claims against it, the court properly considered the merits of the claim sought to be presented especially since the same could be determined from an inspection of written contracts not in dispute, so that there

was no occasion to pass upon conflicting affidavits. While, perhaps, the court was not justified in finding that the receiver who made the application had not personally used due diligence in the matter, the showing suggests a situation where the creditors and the stockholders of his insolvent, because of lack of diligence or want of right, are not in position to assert the claim sought to be presented. The order denying the application is a discretionary order, and no abuse of judicial discretion is made to appear. Standard Lithographing & Printing Co. v. Twin City M. S. Co., 138 Minn. 294, 164 N. W. 986.

The question, in proceedings against an insolvent corporation under G. S. 1913, § 6634, whether certain creditors are entitled to share in the distribution of funds derived from the statutory liability of stockholders, cannot properly be raised by an objection to the allowance of their claims, unless it affirmatively appears that the fund so to be raised is the only fund for distribution among the creditors, and for some valid reason the particular creditors are excluded from participating therein. When it does not so affirmatively appear the question may be raised on the receiver's application for an order of distribution. Standard Lithographing & Printing Co. v. Twin City M. S. Co., 139 Minn. 120, 165 N. W. 967.

Claimants sold their stock of merchandise to a co-operative company, agreeing to look only to the proceeds of sales of stock for their pay. Part of the stock was already subscribed and was later paid for, and claimants received the proceeds. Held, the contract created no claim against the corporation unless it was broken by the corporation. A. J. Whitman & Co. v. Mielke, 139 Minn. 231, 166 N. W. 178.

(51) Standard L. & P. Co. v. Twin City M. S. Co., 138 Minn. 294, 164 N. W. 986.

(62) American Surety Co. v. Pearson, 146 Minn. 342, 178 N. W. 817.

(64) A. J. Whitman & Co. v. Mielke, 139 Minn. 231, 166 N. W. 178 (burden of proof on claimant to show breach of contract—findings); O'Hara v. Western Mortgage Loan Co., 147 Minn. 417, 180 N. W. 701 (order disallowing a claim properly vacated as improvidently made); Grant v. State Bank of Commerce, 147 Minn. 471, 180 N. W. 703 (Id.); 34 Harv. L. Rev. 178 (set-off of immature claims).

ENFORCEMENT OF STOCKHOLDERS' LIABILITY UNDER G. S. 1913, §§ 6645-6651

2163. Statute constitutional—(82) Finch, Van Slyck & McConville v. Vanasek, 132 Minn. 9, 155 N. W. 754; Marin v. Augedahl, 247 U. S. 142.

2164. Nature of proceedings—The proceedings are informal and summary and not controlled by all the forms usually incident to judicial procedure. No formal pleadings are contemplated and there is no right to a jury trial. The proceeding is but preliminary to an action to enforce the assessment. In the main the court deals only with probabilities. Finch, Van Slyck & McConville v. Vanasek, 132 Minn. 9, 155 N. W. 754.

If any surplus remains after the payment of debts and expenses it is

returned to the stockholders. Finch, Van Slyck & McConville v. Vanasek, 132 Minn. 9, 155 N. W. 754.

(84) Shearer v. Christy, 136 Minn. 111, 161 N. W. 498.

2165. How far exclusive—Application of statute—The constitutional liability of stockholders may be enforced under the statute. Finch, Van Slyck & McConville v. Vanasek, 132 Minn. 9, 155 N. W. 754.

(87) Shearer v. Christy, 136 Minn. 111, 161 N. W. 498.

2166. Limitation of actions—Laches—The doctrine of laches is inapplicable. Greenfield v. Hill City Land, L. & L. Co., 141 Minn. 393, 170 N. W. 343.

(90) Contra, Shearer v. Christie, 136 Minn. 111, 161 N. W. 498. See § 2150; 30 Harv. L. Rev. 767.

2168. Pleading—No formal pleadings are contemplated by the statute. Finch, Van Slyck & McConville v. Vanasek, 132 Minn. 9, 155 N. W. 754.

An answer of a stockholder held not to allege sufficiently fraud and collusion in the judgment on which the proceedings were based. Greenfield v. Minnesota M. & D. Co., 138 Minn. 446, 165 N. W. 274.

2169. Defences in action against stockholder—The defendant may by answer assail for fraud or collusion the judgment for the plaintiff against the corporation. He cannot assail it for error or irregularity. Greenfield v. Minnesota M. & D. Co., 138 Minn. 446, 165 N. W. 274. See § 2148.

(93) Finch, Van Slyck & McConville v. Vanasek, 132 Minn. 9, 155 N. W. 754; Greenfield v. Hill City Land, L. & L. Co., 141 Minn. 393, 170 N. W. 343; Graff v. Minnesota Flint Rock Co., 147 Minn. 58, 179 N. W. 562; Harrison v. Carman, — Minn. —, 183 N. W. 826; Marin v. Augedahl, 247 U. S. 142.

2170. Petition—Hearing—Assessment—Findings—The court may receive such evidence, by affidavit or otherwise, as may aid it in the determination of the questions involved. Certain schedules in bankruptcy proceedings against the corporation and certain affidavits held properly admitted though the latter contains some matter of hearsay. Finch, Van Slyck & McConville v. Vanasek, 132 Minn. 9, 155 N. W. 754.

A hearing on a petition may be had in another county if all the parties consent. Finch, Van Slyck & McConville v. Vanasek, 132 Minn. 9, 155 N. W. 754.

(95) Finch, Van Slyck & McConville v. Vanasek, 132 Minn. 9, 155 N. W. 754.

2170a. Necessity for assessment—Proof—The return, unsatisfied, of an execution against a corporation, is prima facie evidence that it is necessary to enforce the liability of stockholders to its creditors. Greenfield v. Hill City Land, L. & L. Co., 141 Minn. 393, 170 N. W. 343.

2171. Order of assessment—Conclusiveness—The assessment is conclusive only as to the insolvency of the corporation and the amount of the assessment. It does not estop a stockholder in an action thereon from

asserting other matters by way of defence. Finch, Van Slyck & McConville v. Vanasek, 132 Minn. 9, 155 N. W. 754.

The assessment levied by the court against a stockholder in a corporation does not preclude the defence that he was not a stockholder at all, or was not the holder of so large an amount of stock as was alleged in the complaint in an action brought to enforce his constitutional liability. The evidence did not justify the court in directing a verdict against defendant for the full amount of his assessments. Harrison v. Carman, — Minn. —, 183 N. W. 826.

(97) Marin v. Augedahl, 247 U. S. 142. See Greenfield v. Hill City Land, L. & L. Co., 141 Minn. 393, 170 N. W. 343.

(98) Marin v. Augedahl, 247 U. S. 142.

2173. Enforcement in another state—The order of assessment is entitled to full faith and credit in other states and is not open to collateral attack for error. Marin v. Augedahl, 247 U. S. 142.

(2) See State Bank v. Kenney Band Instrument Co., 143 Minn. 236, 173 N. W. 560.

PLEADING

2174. Unnecessary to allege incorporation—If incorporation is unnecessarily alleged it need not be proved but may be treated as surplusage. It is not a necessary allegation in an action for goods sold and delivered and if alleged need not be proved. Moorman Mfg. Co. v. Haack, 135 Minn. 126, 160 N. W. 258.

(3) Trustees v. United States F. & G. Co., 133 Minn. 429, 158 N. W. 709; Lee v. Scriver, 143 Minn. 17, 172 N. W. 802; Licensed Retail Liquor Dealers Assn. v. Denton, 144 Minn. 81, 174 N. W. 526.

2178. Compliance by foreign corporation with state laws—In an action against a foreign corporation it is not necessary to allege that it has obtained a license to do business here as required by statute. If it has not, that is a matter of defence. State v. Reiter, 140 Minn. 491, 168 N. W. 714.

2179. Denial of corporate existence—An order denying an application by defendant on the trial to amend his answer by specifically denying that plaintiff was a corporation, held not an abuse of discretion. Licensed Retail Liquor Dealers Assn. v. Denton, 144 Minn. 81, 174 N. W. 526.

(9) Trustees v. United States F. & G. Co., 133 Minn. 429, 158 N. W. 709 (general denial insufficient). See Moorman Mfg. Co. v. Haack, 135 Minn. 126, 160 N. W. 258.

PUBLIC SERVICE CORPORATIONS

2181. Nature—A partnership engaged in furnishing a public utility is governed by the same rules as a public service corporation. State v. Four Lakes Tel. Co., 141 Minn. 124, 169 N. W. 480.

Right of public service corporation to cease operation and dismantle its plant. 32 Harv. L. Rev. 716.

Protection of public service corporations from competition. 33 Harv. L. Rev. 576.

2182. Rates must be reasonable and uniform—The legislature is supreme in the matter of prescribing or altering rates. A municipality has no vested right in the maintenance of rates as against an exercise of the police power of the state. State v. Holm, 138 Minn. 281, 164 N. W. 989.

Right of public service corporation to alter rates fixed by contract. 32 Harv. L. Rev. 74; 33 Id. 97.

Valuation of public service property. L. R. A. 1916F, 599, 761.

(14) See Belle Plaine v. Northern Power Co., 142 Minn. 361, 172 N. W. 217.

2182a. Impartial service—A telephone company must serve alike all persons similarly situated. State v. Four Lakes Tel. Co., 141 Minn. 124, 169 N. W. 480.

FOREIGN CORPORATIONS

2185. Jurisdiction—Visitorial powers—The courts of this state have no "visitorial powers" over foreign corporations. They have no jurisdiction to interfere with their "internal management," that is they could not enforce forfeiture of charter, nor removal of officers, nor could they exercise authority over corporate functions, nor direct the manner of the transaction of the corporate business. These powers belong only to the state which created the corporation. Tasler v. Peerless Tire Co., 144 Minn. 150, 174 N. W. 731.

Where those in charge of the management of a corporation misapply the corporate assets and divert them to their own private use, a minority stockholder may maintain action to compel restoration, and to restrain such misconduct in the future, and as incident to such relief may, in a proper case, procure the appointment of a receiver. Such an action may be maintained in this state against officers transacting the corporate business in this state, though the corporation is a foreign corporation. Failure of the court to limit, by order, the authority of the receiver to possession and control of assets within this state does not oust the court of jurisdiction. Where the place of business of the corporation is in this state and there is no showing of assets elsewhere, and the point is raised for the first time on appeal, this court will not reverse the case because of the failure of the trial court to so limit its order. Tasler v. Peerless Tire Co., 144 Minn. 150, 174 N. W. 731.

Changing rates of assessments and benefits in a fraternal beneficiary association pertains to the management of its internal affairs. Courts refuse to entertain actions which interfere with or attempt to regulate the management of the internal affairs of a foreign corporation. Hence, the complaint herein, which shows that the action is brought by plaintiff in his own behalf and in behalf of the other members of the defendant corporation, a fraternal beneficiary association incorporated under the laws of Nebraska, to enjoin said defendant and its officers from enforcing changes made in the assessment rates and benefits of the association, was demurrable. Olsen v. Danish Brotherhood, — Minn. —, 184 N. W. 178.

(18) Baer v. Waseca Milling Co., 143 Minn. 483, 173 N. W. 401; Tasler v. Peerless Tire Co., 144 Minn. 150, 174 N. W. 731.

2187. Prerequisites to doing business in this state—Statute—Contracts made by foreign corporation before complying with G. S. 1913, §§ 6206-6208, have been validated by various curative acts. Jenkins v. Union Savings Assn., 132 Minn. 19, 155 N. W. 765.

G. S. 1913, § 6207, providing that a foreign corporation shall, upon coming into the state to do business, pay a fee represented by its property and business in this state, and upon an increase of its capital stock it shall pay a fee of $5 for every $10,000 "of such increase of said proportion of capital stock," means that, upon an increase of the capital stock the foreign corporation shall pay a fee based upon the proportion of the increased capital used in this state. State v. Schmahl, 133 Minn. 175, 157 N. W. 1082.

A contract by a foreign corporation which has not complied with the laws of this state so as to entitle it to transact its business therein for the sale and shipment to a resident of this state of a certain machine, coupled with an agreement to install the same in a building of the purchaser in this state, is not protected as an interstate commerce transaction; for the agreement for the installation of the machine, not being a necessary or an essential part of the contract of sale, requires the doing of business in this state, and renders the whole contract unenforceable in the courts of this state. Palm Vacuum Cleaner Co. v. Bjornstad, 136 Minn. 38, 161 N. W. 215. See 11 A. L. R. 614.

Negotiable paper, executed as part of a transaction with a foreign corporation doing business in this state in violation of the laws relating to foreign corporations, may be enforced by a bona fide purchaser thereof. Finseth v. Scherer, 138 Minn. 355, 165 N. W. 124.

In an action brought in the courts of this state by a foreign corporation to recover upon several promissory notes, it is held, that the question whether the notes arose out of transactions had by the corporation in this state in violation of our statute imposing certain conditions upon the right of such corporations to do business in this state, or whether they arose out of interstate transactions, was made an issue of fact by the pleadings, and there was no error in denying defendant's motion to dismiss the action before trial on the ground that plaintiff had no right to transact business in this state because of its failure to comply with our foreign corporation statutes. A violation of the statute will not be presumed. Campbell Electric Co. v. Christian, 141 Minn. 296, 170 N. W. 199.

A foreign corporation not licensed to do business in this state may maintain an action in the courts of this state to enforce payment for goods sold in interstate commerce to residents of this state. A sale of tile to be shipped from Illinois and Iowa, and delivered on board cars in Minnesota, was a transaction in interstate commerce. Plaintiff manufactured tile in Iowa and shipped it to purchasers in Minnesota. The finding of the trial court that plaintiff's transactions were transactions in

interstate commerce and that none of them constituted the doing of business in Minnesota in violation of the statutes of Minnesota is not overcome by the fact that plaintiff made bids and contracts in Minnesota for furnishing tile for county and judicial ditches and had representatives in Minnesota soliciting such contracts, nor by the fact that plaintiff as a matter of accommodation furnished a contractor with a certified check to file with his bid for constructing a ditch, nor by the fact that plaintiff procured an assignment of money due or to become due under a ditching contract as security for the unpaid purchase price of tile sold the contractor. American Brick & Tile Co. v. Turnell, 143 Minn. 96, 173 N. W. 175.

The burden of proof is upon one who asserts it, to prove that a foreign corporation has not complied with chapter 69, Laws 1899. That act did not affect the title to land owned by a foreign corporation at the time the act was passed. Northern Counties Land Co. v. Excelsior Land etc. Co., 146 Minn. 207, 178 N. W. 497.

Plaintiff, an Illinois corporation, furnishing and shipping from its place of business in that state certain advertising type, cuts, and other display matter to the defendant at its place of business in Minnesota for use in advertising its business, under a written lease executed at the latter place, is engaged in "interstate commerce," and was not doing business within this state, in violation of the foreign corporation statute, sections 6206 and 6207, G. S. 1913. Outcault Advertising Co. v. Citizens State Bank, 147 Minn. 449, 180 N. W. 705.

(29) Palm Vacuum Cleaner Co. v. Bjornstad, 136 Minn. 38, 161 N. W. 215.

(31) See Palm Vacuum Cleaner Co. v. Bjornstad, 136 Minn. 38, 161 N. W. 215.

(33) Palm Vacuum Cleaner Co. v. Bjornstad, 136 Minn. 38, 161 N. W. 215; Campbell Electric Co. v. Christian Co., 141 Minn. 296, 170 N. W. 199; American Brick & Tile Co. v. Turnell, 143 Minn. 96, 173 N. W. 175; Outcault Advertising Co. v. Citizens State Bank, 147 Minn. 449, 180 N. W. 705.

(37) Campbell Electric Co. v. Christian Co., 141 Minn. 296, 170 N. W. 199; Northern Counties Land Co. v. Excelsior Land etc. Co., 146 Minn. 207, 178 N. W. 497. See State v. Reiter, 140 Minn. 491, 168 N. W. 714.

(39) Northern Counties Land Co. v. Excelsior Land etc. Co., 146 Minn. 207, 178 N. W. 497.

2191. Application of domestic statutes—G. S. 1913, § 6634, providing for sequestration proceedings, is applicable to the property of foreign corporations in this state. Rittle v. J. L. Owens Mfg. Co., 136 Minn. 93, 161 N. W. 401.

2193. Liability of stockholders—Enforcement in this state—(49) Cookson v. Hill, 146 Minn. 165, 178 N. W. 591 (evidence held to justify findings that some of the defendants were not stockholders and that the others had paid for their stock).

COSTS

IN GENERAL

2194. Definition—Attorney's fees—Attorney's fees are not allowed in ordinary civil actions, and can be allowed only when authorized by statute. Johanson v. Lundin Bros., 144 Minn. 470, 175 N. W. 302.

2207. Liability of state and municipalities—In proceedings for the collection of inheritance taxes, the state is not liable for costs and disbursements. State v. Chadwick, 133 Minn. 117, 124, 157 N. W. 1076, 158 N. W. 637.

In proceedings under G. S. 1913, § 5724, for the removal of a public officer for misconduct in office, where the order of removal is set aside by the supreme court on certiorari, the officer proceeded against is not entitled to costs and disbursements either against the Governor or against the persons who petitioned the Governor for his removal. Such proceedings are solely in the public interest and those who join do not become parties to the record or liable for costs. State v. Burnquist, 141 Minn. 308, 170 N. W. 201, 609.

A county held not liable for costs on appeal from an order of the county board creating a new school district. Independent School District No. 47 v. Meeker County, 143 Minn. 475, 175 N. W. 992.

(74) See State v. Burnquist, 141 Minn. 308, 170 N. W. 201, 609.

2208. Security for costs—Statute—Waiver of statutory requirment. 8 A. L. R. 1510.

2210. In criminal actions—In passing sentence upon a man convicted of the crime of attempting to have carnal knowledge of a female under the age of eighteen years, the district court may require the payment of such items of the state's disbursements as would be properly taxable against the defeated party in a civil action, in addition to the penalty imposed as punishment for the crime. Such disbursements must be properly ascertained and taxed before their payment can be adjudged as part of the sentence pronounced by the court. State v. Morehart, — Minn. —, 183 N. W. 960.

DISBURSEMENTS

2218. Witness fees—Where a case was set for trial on Tuesday, and on the preceding Saturday defendant subpoenaed witnesses who lived from seventy-five to one hundred miles away, and on Monday was informed by plaintiff that the action would be dismissed, it was held that he was entitled to tax fees for such witnesses. Loyd v. Northwestern Drainage Co., 132 Minn. 478, 157 N. W. 592.

The fees of a witness may be taxed though the party calling him gave him free transportation to the place of trial. The fees of a non-resident witness may be taxed though he did not select the shortest route, if there

were several usually traveled routes and he selected one of them. Jakutis v. Illinois Central R. Co., 133 Minn. 33, 157 N. W. 896.

Fees are to be computed according to the usual traveled route and not necessarily by the shortest route. A witness may take a usual traveled route by railroad though there is a shorter route by highway. In any event the fees must be computed by the route actually taken. Marshall County v. Rokke, 134 Minn. 346, 159 N. W. 791.

(2) Loyd v. Northwestern Drainage Co., 132 Minn. 478, 157 N. W. 592.

2219. Miscellaneous disbursements—The expense of procuring documentary evidence, such as certified copies of papers or records in a public office, is taxable as a general rule, but this rule is not to be extended. Frederickson v. American Surety Co., 135 Minn. 346, 160 N. W. 859.

Plaintiff, in preparing for the trial of an action involving the location of the correct line between his land and that of defendant, paid civil engineers for a survey of his land, and a timber cruiser for an estimate of the timber cut and taken from his land by defendant. It is held that the sums so paid are not taxable as "disbursements" against defendant. Shterk v. Veitch, 135 Minn. 349, 160 N. W. 863.

The expenses of making a plat of the locus in quo and of taking X-ray photographs are not taxable. Martin v. Minneapolis & St. L. R. Co., 138 Minn. 40, 163 N. W. 983.

The cost of a transcript of the evidence, used on plaintiff's motion for amended findings, was not taxable. Brede v. Minnesota Crushed Stone Co., 146 Minn. 406, 178 N. W. 820.

(10) Shterk v. Veitch, 135 Minn. 349, 160 N. W. 863.

(17) Thwing v. McDonald, 134 Minn. 148, 158 N. W. 820.

TAXATION

2224. Appeal to district court—The exclusive remedy for an improper taxation of costs by the clerk is an appeal to the district court. Objection cannot be raised for the first time in the supreme court. See § 384(37).

IN SUPREME COURT

2228. Who is the prevailing party—Where defendants took a joint appeal, and the order was affirmed as to one and reversed as to the other, the taxation of the successful defendant's costs against plaintiff, including the entire expense of printing the record and defendant's brief was proper where plaintiff did not point out any part of the record or brief not necessary to the proper presentation of such defendant's case. Morken v. St. Pierre, 147 Minn. 106, 180 Minn. 215.

(42) Mahowald v. Thompson-Starrett Co., 134 Minn. 113, 158 N. W. 913.

2229. Where there are several prevailing parties—Where appeals in three actions between the same parties and involving identical questions of law were by stipulation presented together, with one record, one brief,

one oral argument, and one attorney on each side, it was held that only one allowance of statutory costs should be made. Behrens v. Kruse, 132 Minn. 69, 155 N. W. 1065, 156 N. W. 1.

2231. Payment of costs a condition of remittitur—The case of Peery v. Illinois Central Railroad Co., 123 Minn. 264, 143 N. W. 724, was tried in the district court, and a judgment for plaintiff rendered. This judgment was affirmed by this court, but on a writ of error to the United States Supreme Court, the judgment of this court was reversed, and a judgment for costs rendered against plaintiff. Pursuant to this reversal, this court reversed its former judgment and the judgment of the trial court, and remanded the case for a new trial. It is held that the trial court had the power to stay proceedings until the judgment for costs in the United States Supreme Court was paid. State v. District Court, 139 Minn. 464, 166 N. W. 1080.

(48) State v. District Court, 139 Minn. 464, 166 N. W. 1080; Nason v. Barrett, 141 Minn. 220, 169 N. W. 804.

2232. Appeal for delay—(49) Greenhut Cloak Co. v. Oreck, 134 Minn. 464, 159 N. W. 327.

2238. Cases in which costs were not allowed—Where the appeal involved the construction of the Workmen's Compensation Act. State v. District Court, 134 Minn. 16, 158 N. W. 713.

Where it was partly the fault of counsel for respondent that a judgment did not contain provisions authorized by the findings favorable to the appellant, the judgment being affirmed. Cherveny v. Hemza, 134 Minn. 39, 158 N. W. 810.

Where the appeal was from an order opening a judgment for further evidence under the Workmen's Compensation Act. State v. District Court, 134 Minn. 189, 158 N. W. 825.

Where the appeal was in drainage proceedings and involved merely the sufficiency of the demand for a jury trial. Sands v. Dysthe, 134 Minn. 290, 159 N. W. 629; Wermerskirchen v. Dysthe, 134 Minn. 291, 159 N. W. 629.

Where the amount involved was small and no important questions were involved. Scannell v. Metterhausen, 134 Minn. 479, 159 N. W. 1095.

Where the action was a friendly one to settle a mooted question as to the right of a county attorney to compensation under the drainage laws. Dosland v. Clay County, 136 Minn. 140, 161 N. W. 382.

Where an order denying a motion for judgment notwithstanding a verdict or for a new trial was reversed and a new trial granted. Galbraith v. Clark, 138 Minn. 255, 164 N. W. 902.

Where an appellant violated settled practice. State v. District Court, 139 Minn. 205, 166 N. W. 185.

Where a case involved the construction of a doubtful statute providing state aid to schools. Mushel v. Schulz, 139 Minn. 234, 166 N. W. 179.

Where a case involved the construction of a doubtful statute as to the liability of a county for a wolf bounty. State v. Bertilrud, 139 Minn. 356, 166 N. W. 405.

Where a new trial was granted because the verdict was split. Blume v. Ronan, 141 Minn. 234, 169 N. W. 701.

Where a case was affirmed on condition of consent to a slight increase in a verdict. Altona v. Electric Mfg. Co., 142 Minn. 358, 172 N. W. 212.

In habeas corpus proceedings involving the custody of a child. State v. Pelowski, 145 Minn. 383, 177 N. W. 627.

On habeas corpus to review a judgment of a justice of the peace. State v. Rice, 145 Minn. 359, 177 N. W. 348.

Where the point on which a judgment was reversed was raised for the first time on appeal. Northern Counties Land Co. v. Excelsior Land etc. Co., 146 Minn. 207, 178 N. W. 497.

Where a discretionary order refusing to open a judgment of adoption was reversed. In re Fay, 147 Minn. 472, 180 N. W. 533.

2239. Disbursements—A claim that parts of the record were unnecessarily printed held not substantiated. Mahowald v. Thompson-Starrett Co., 134 Minn. 113, 158 N. W. 913.

Certain items for serving notice on appeal, record and brief on parties who were not adverse held not allowable. Thwing v. McDonald, 134 Minn. 148, 158 N. W. 820.

Certain items for serving record and brief on parties where service had been made on their attorney held not allowable. Thwing v. McDonald, 134 Minn. 148, 158 N. W. 820.

The expense of procuring certified copies of records is not allowable unless it appears that they were procured for use in the supreme court. Thwing v. McDonald, 134 Minn. 148, 158 N. W. 820.

A disbursement for the service of a notice of appeal by one not an officer is not allowable. Thwing v. McDonald, 134 Minn. 148, 158 N. W. 820.

(80) Steele v. Duluth, 136 Minn. 288, 161 N. W. 593; Millett v. Minnesota Crushed Stone Co., — Minn. —, 179 N. W. 682.

COUNTIES

IN GENERAL

2241. Nature—A county is a governmental agency of the state, with no rights in the discharge of governmental functions superior to the state. Roseau County v. Hereim, — Minn. —, 183 N. W. 518.

(90) Hammer v. Narverud, 142 Minn. 199, 171 N. W. 770; Newman v. St. Louis County, 145 Minn. 129, 176 N. W. 191; Roseau County v. Hereim, — Minn. —, 183 N. W. 518.

(92) State v. Minnesota Tax Commission, 137 Minn. 37, 162 N. W. 686; Hammer v. Narverud, 142 Minn. 199, 171 N. W. 770.

2242a. County buildings—Used by county officers—Where the county constructed a building for a jail and sheriff's residence and fitted up and used one cellroom as a jail, but, having no other county building, appro-

priated the remainder of the building for use as county offices and installed the several county officers therein, the sheriff cannot oust the other county officers therefrom for the purpose of appropriating the building to his personal use as a residence. Curtis v. Lincoln County, 136 Minn. 25, 161 N. W. 210.

OFFICERS

2263. Election—Term—Laws 1913, c. 458, fixing the terms of certain county officers at four years, and operating prospectively, is constitutional, and no election of such officers in 1916 was authorized. State v. Berg, 133 Minn. 65, 157 N. W. 907.

(47) See State v. Berg, 133 Minn. 65, 157 N. W. 907.

2263a. Interest in county contracts—Criminal liability—Indictment—An indictment charged defendants, one as county auditor, the other as a county commissioner, with becoming unlawfully interested in a certain county contract. Each defendant demurred to the indictment. It is held: The indictment does not violate the requirements of G. S. 1913, §§ 9134, 9136, that it shall contain a statement of the acts constituting the offence, and that it shall be direct and certain as regards the offence charged and the particular circumstances thereof, when they are necessary to constitute a complete offence. More than one offence is not charged in the indictment. The facts stated in the indictment constitute a public offence. That the two defendants are accused jointly of the crime is not a ground of demurrer, nor does it appear from the indictment that defendants could not be jointly guilty of the offence charged. The statute against county officials being interested in a county contract applies to all county officials, not alone to those who have official duties to perform in relation to the contract. State v. Byhre, 137 Minn. 195, 163 N. W. 282.

COUNTY BOARD

2267a. Compensation—Mileage—Section 685, G. S. 1913, does not modify the express provisions of section 684, G. S. 1913, in so far as the latter section fixes the compensation of county commissioners in counties having an assessed valuation of more than twenty million dollars, but not exceeding one hundred million dollars, limiting such compensation to $800 yearly salary and the actual and necessary traveling expenses not exceeding, during the year, the sume of $1,200 for all the members of the board. Nelson v. Itasca County, 131 Minn. 478, 155 N. W. 752.

A county commissioner in attending meetings of the board is entitled to compute mileage for the distance necessarily traeveled by the usual traveled route from his place of residence to the county seat. He may take a usual traveled route by railroad though there is a shorter route by highway, but the distance "necessarily traveled" cannot exceed the distance actually traveled. Marshall County v. Rokke, 134 Minn. 346, 159 N. W. 791.

2268. Powers—In general—The county acts through the board and the management and control of its property and the transaction of its business affairs is vested in the board, except as otherwise provided by law. Curtis v. Lincoln County, 136 Minn. 25, 161 N. W. 210.

The board is required to provide a courthouse and jail and to provide offices for certain county officers. Curtis v. Lincoln County, 136 Minn. 25, 161 N. W. 210.

It is competent for a county board, in entering into a contract, to insert stipulations not required by statute, in order to secure the object for which the contract is made, if such stipulations are not contrary to public policy and are made without fraud and impose no impediment to competitive bidding. Kief v. Mills, 147 Minn. 138, 179 N. W. 724.

(55) Curtis v. Lincoln County, 136 Minn. 25, 161 N. W. 210.

(56) Curtis v. Lincoln County, 136 Minn. 25, 161 N. W. 210; Lindstrom v. Ramsey County, 136 Minn. 46, 161 N. W. 222.

2274. Ratification of unauthorized contracts—An unauthorized employment of counsel by a county attorney may be ratified by the county board. Peterson v. Koochiching County, 133 Minn. 343, 158 N. W. 605.

2278a. Sessions—Adjournment—The question has been raised but not determined, whether the informal action of the commissioners in session not evidenced by any motion or resolution, and of which no record is made, constitutes any binding action of the board. Peterson v. Koochiching County, 133 Minn. 343, 158 N. W. 605.

POWERS AND LIABILITIES

2284. Issuance of bonds—Sale below par—Clearwater county now owns a courthouse, and therefore cannot issue bonds for the erection of a new one without the approval at an election of a majority of the voters of the county. G. S. 1913, §§ 1854, 1855. G. S. 1913, § 1934, does not apply. Rydeen v. Clearwater County, 139 Minn. 329, 166 N. W. 334.

Under section 5542, Gen. St. 1913, a contract made by a county for sale of its bonds at less than par is, as between the original parties, void. Payment of a commission to the buyer is but a discount. If the bonds are sold for less than par the county may affirm the transaction and recover the amount of the discount from the buyer. When a bid for less than par has been accepted by one without ability to complete the purchase, one who with full knowledge of the facts, and with an agreement to divide the discount becomes a participant in the transaction, receives the bonds from the county, and pays the county for them, is liable to respond to the county for the amount of the discount. Koochiching County v. Elder, 145 Minn. 77, 176 N. W. 195.

2286. Liability for torts—In the matter of the improvement of highways the acts of the county board, within the general scope of its powers and duties, are the acts of the county; so that, if such acts result in damages to adjacent lands, for which a private owner would be liable if

caused by acts done by him on his own land, such county would be liable. Lindstrom v. Ramsey County, 136 Minn. 46, 161 N. W. 222.

Counties are governmental agencies, and, unless the right is given by constitution or statute, no private action lies for their neglect of public duty. It is not liable for consequential injuries to adjacent property resulting necessarily from the improvement of a highway. It is liable for positive trespass committed in making such improvements. Liability is not limited to cases of positive trespass. As respects adjacent property, the county in possession of a highway stands in the position of owner, with the same liability as a private owner for damages to adjacent lands caused by acts done in the management and control of the highway. A complaint alleging that a county, while clearing and opening a county road, negligently set fire to inflammable brush and refuse within the road, and negligently tended the fire, so that it spread and damaged adjacent property, states a cause of action. Newman v. St. Louis County, 145 Minn. 129, 176 N. W. 191.

See §§ 2821a, 10172.

2287. Liability for acts of officers—Ratification—(1) Peterson v. Koochiching County, 133 Minn. 343, 158 N. W. 605.

See § 2821a.

2288. Ultra vires contracts—Unauthorized contracts may sometimes be ratified so as to give them validity. See § 6710; Tracy Cement Tile Co. v. Tracy, 143 Minn. 415, 176 N. W. 189.

Held that a county could not be held liable for certain drainage construction under an implied contract, or on the theory that it had individually or in a proprietary sense received the benefit of the work. Alden v. Todd County, 140 Minn. 175, 167 N. W. 548. See § 2821a.

See §§ 6703, 6717.

PRESENTATION AND ALLOWANCE OF CLAIMS

2297. Appeal to district court from allowance of claim—An order of the board of county commissioners, granting a demand under Laws 1917, c. 418, for the refundment of taxes, is not the allowance of a claim against the county within G. S. 1913, § 674, providing for an appeal to the district court from the allowance or disallowance of a claim by the county commissioners. The pretended appeal was properly dismissed. Penney v. Hennepin County, 139 Minn. 148, 165 N. W. 965.

2298. Practice on appeal to district court—The provisions of G. S. 1913, § 675, for pleadings, has no application to appeals under G. S. 1913, § 2676. Farrell v. Sibley County, 135 Minn. 439, 161 N. W. 152.

An appeal from the allowance of a claim by a county board vacates the order of allowance, and the issue is for trial de novo on the merits, with the burden of proof on the claimant. Kief v. Mills, 147 Minn. 138, 179 N. W. 724.

2299. Appeal to supreme court—On appeal to the supreme court from a judgment in favor of the claimant, if there is no settled case, judgment will not be ordered against the claimant for want of a reply. Kief v. Mills, 147 Minn. 138, 179 N. W. 724.

COUNTY ATTORNEY

2306. Compensation—A county attorney who performs services for the county in proceedings under the drainage laws to establish a county ditch is not entitled under G. S. 1913, §§ 5571 and 5614, to compensation therefor, unless his services are required or requested by the board of county commissioners or the services were rendered in protction of some special interest of the county, which it was his general duty as county attorney to protect. The county has no special interest in the question of damages and benefits to be paid by and to the owners of affected property, and no such interest to protect on an appeal to the district court from an award thereof. Dosland v. Clay County, 136 Minn. 140, 161 N. W. 382.

2307. Duties—Control of court—In the discharge of his duties as prosecuting officer he is largely under the control of the court. State v. Cooper, 147 Minn. 272, 180 N. W. 99.

The county attorney is charged with the duty of conducting proceedings for the collection of general taxes against real and personal property. Thwing v. International Falls, 148 Minn. —, 180 N. W. 1017.

A prosecuting attorney is a public officer whose duties and obligations in the trial of a case are not simply those of an attorney in a civil action. State v. Bernstein, 148 Minn. —, 181 N. W. 947. See §§ 2478, 9799.

2308. Special counsel—G. S. 1913, § 970, authorizes the county board to employ an attorney to assist the county attorney in the prosecution of a criminal case, and to pay such attorney out of the funds of the county. If the county attorney, after informal conference with the board in session, undertakes to employ an attorney to assist him in pursuance of authority supposedly, though irregularly, given, the county board may thereafter by ratification adopt his action and make it binding on the county, and the allowance of the bill for services of the attorney so chosen constitutes ratification. Peterson v. Koochiching County, 133 Minn. 343, 158 N. W. 605.

Section 970, G. S. 1913, does not authorize the board of county commissioners to supersede the regular county attorney by the employment of another attorney to make such investigation and institute such actions on behalf of the county as he may deem fit. Such employment may only be authorized in specific matters, where it appears to the board that the regular county attorney cannot, for some good reason, represent the county. The burden was upon plaintiffs to prove that no occasion existed for employing another attorney in the specific actions which the findings show that this attorney was employed to bring, or else, if work had been under an invalid, roving employment, to so identify that work

that the injunctive relief could be applied thereto. This burden plaintiffs failed to sustain. The evidence is insufficient to sustain the claim that funds were lacking for the payment of the services still unpaid. Keiver v. Koochiching County, 141 Minn. 64, 169 N. W. 254.

A city is not authorized to employ special counsel to assist a county attorney in proceedings for the collection of general taxes. Thwing v. International Falls, 148 Minn. —, 180 N. W. 1017.

COUNTY AUDITOR

2308a. Eligibility—In so far as section 811, G. S. 1913, declares a county commissioner ineligible to the office of county auditor it violates the constitution and cannot be given effect. Hoffman v. Downs, 145 Minn. 465, 177 N. W. 669.

2309. Official bond—Liability—Receiving from villages 10 per cent of the fees paid to them for liquor licenses, from auctioneers and peddlers the fees paid for their respective licenses, and the money paid for the use or sale of county property, was wholly outside the scope of the official authority of the county auditor, and his sureties are not liable for his misappropriation of such funds. The county treasurer was the only officer authorized to receive such payments. Mower County v. American Bonding Co., 133 Minn. 274, 158 N. W. 394.

(65) See Cooper, Myers & Co. v. Smith, 139 Minn. 382, 166 N. W. 504; Duluth v. Ross, 140 Minn. 161, 167 N. W. 485.

COUNTY TREASURER

2322. Compensation—A county treasurer is not entitled to compensation in addition to his salary for making collection of instalments of principal and interest on assessments for the construction of county ditches. Trovaton v. Pennington County, 135 Minn. 274, 160 N. W. 766.

(81) Trovaton v. Pennington County, 135 Minn. 274, 160 N. W. 766.

2327. Official bond—Liability—(93) See Cooper, Myers & Co. v. Smith, 139 Minn. 382, 166 N. W. 504.

COURTS

JURISDICTION

2345. Definition and nature—Jurisdiction is the power to hear and determine, but it involves also the power to give the judgment that is entered. State v. Reed, 132 Minn. 295, 156 N. W. 127. See §§ 5140, 5142.

The foundation of jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout proceedings properly begun, and although submission to the jurisdiction by ap-

pearance may take the place of service upon the person. McDonald v. Mabee, 243 U. S. 90.

(42) State v. Reed, 132 Minn. 295, 156 N. W. 127.

2346. Of the subject-matter and of the person—A court does not act without jurisdiction over the subject-matter, if by law it might exercise jurisdiction if the case is brought before it in a different manner. State v. Schultz, 142 Minn. 112, 171 N. W. 263.

A court must acquire jurisdiction over the person of a defendant before it can render a judgment in personam against him. Traders Trust Co. v. Davidson, 146 Minn. 224, 178 N. W. 735.

(47) State v. Reed, 132 Minn. 295, 156 N. W. 127. See §§ 5140, 5142.

2347. Presumption of jurisdiction—As to presumption of jurisdiction of courts of foreign countries see § 5207.

(49) See Marin v. Augedahl, 247 U. S. 142.

2348. Consent to jurisdiction—Estoppel—Mere irregularity in the method of procedure may be waived by consent, and a party may be estopped to deny the existence of facts, on which jurisdiction depends. State v. Schulz, 142 Minn. 112, 171 N. W. 263.

(53, 54) State v. Schulz, 142 Minn. 112, 171 N. W. 263.

2350. Interference by another court—The district court of one county may not interfere with process issued to enforce a judgment in an action in the district court of another county in the state, unless on the face of the record the judgment is void. Irregularities that make a judgment voidable merely can be taken advantage of only in the court where the judgment was rendered. Wagner v. Farmers Co-operative Exchange Co., 147 Minn. 376, 180 N. W. 231.

2351a. Maintenance by coercive measures on litigants—A court has inherent power to render its jurisdiction effective; and when a litigant disobeys a proper order, or commits a fraud on the court or the opposing party, so as to render jurisdiction ineffective, he may be subject to coercive measures. Lipman v. Bechhoefer, 141 Minn. 131, 169 N. W. 536.

COVENANTS

IN GENERAL

2354. Outstanding title in grantee—(62) 10 A. L. R. 441.

COVENANTS OF SEIZIN

2361. Damages—The damages which a remote covenantee is entitled to recover for the breach of the grantor's covenant of seizin, where there is a partial failure of title, is the value of the property to which the title failed, not exceeding the consideration paid for the whole. Knapp v. Foley, 140 Minn. 423, 168 N. W. 183.

2362. Action by assignee—(77) See Knapp v. Foley, 140 Minn. 423, 168 N. W. 183.

OF WARRANTY AND QUIET ENJOYMENT

2366. Force and effect—An unfounded outstanding claim is not a breach of the covenant. 5 A. L. R. 1084.

COVENANT AGAINST INCUMBRANCES

2382. Breach—(21) See Delisha v. Minneapolis etc. R. Co., 110 Minn. 518, 126 N. W. 276; Chicago G. W. R. Co. v. Zahner, 145 Minn. 312, 177 N. W. 350.

COVENANTS RUNNING WITH THE LAND

2393. In equity—(43) Godley v. Weisman, 133 Minn. 1, 157 N. W. 711, 158 N. W. 333. See § 2676; 33 Harv. L. Rev. 813; 5 Minn. L. Rev. 486.

CREDITORS' SUIT

2399. When lies—(57) See Pierce v. United States, 255 U. S. — (held to lie by United States to obtain satisfaction of a judgment imposing a fine on a corporation for accepting rebates out of the assets of the corporation distributed among the stockholders).

2400. Prior exhaustion of legal remedies—(61) See Pierce v. United States, 255 U. S. —.

CRIMINAL LAW

IN GENERAL

2407. Legislative descretion—It is the exclusive province of the legislature to declare what acts, deemed inimical to the public welfare shall constitute a crime, to prohibit the same, and impose appropriate punishment for a violation thereof. Judicial consideration of such enactments is limited to the inquiry whether the constitutional rights of the citizens are thereby violated or impaired. State v. Moilen, 140 Minn. 112, 167 N. W. 345.

(80) State v. Harris, 134 Minn. 35, 158 N. W. 829; State v. Moilen, 140 Minn. 112, 167 N. W. 345; State v. Dombroski, 145 Minn. 278, 176 N. W. 985. See State v. Elliott, 135 Minn. 89, 160 N. W. 204.

2409. Intent—At common law knowledge of the criminal of an act and evil intent in committing it were essential elements of all crimes, and without a showing thereof directly or by facts creating a necessary inference of their existence no conviction could be had. But the rule of the common law on the subject is not in force in this state, for, as in

other jurisdictions, we recognize the power and authority of the legislature in declaring what act or acts shall constitute a crime, to make those elements essential to a particular crime, or dispense therewith, as may be deemed expedient and best suited to the prevention of crime and disorder. And a statute by which such elements are so dispensed with must be given force and effect by the courts. State v. Dombroski, 145 Minn. 278, 176 N. W. 985.

(86) 30 Harv. L. Rev. 535.

(87) State v. Damuth, 135 Minn. 76, 160 N. W. 196; State v. Bruno, 141 Minn. 56, 169 N. W. 249.

(88) State v. Bruno, 141 Minn. 56, 169 N. W. 249; State v. Gilbert, 141 Minn. 263, 169 N W. 790; State v. Dombroski, 145 Minn. 278, 176 N. W. 985. See State v. Washed .Sand & Gravel Co., 136 Minn. 361, 162 N. W. 451.

2410. Wilful—Wilfully—The word "wilfully" generally means designedly or intentionally. State v. Lehman, 131 Minn. 427, 155 N. W. 399; State v. Damuth, 135 Minn. 76, 160 N. W. 196.

2413. Acts punishable by both state and federal authority—Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. State v. Holm, 139 Minn. 267, 166 N. W. 181.

(97) State v. Holm, 139 Minn. 267, 166 N. W. 181; In re Mason, 148 Minn. —, 181 N. W. 570.

2414. Attempt to commit crime—(98) State v. Christofferson, — Minn. —, 182 N. W. 961.

2415. Principal and accessory—Strictly speaking, there is no such a thing now as an accessory before the fact, for an accessory before the fact is made a principal by G. S. 1913, § 8478. State v. Lyons, 144 Minn. 348, 175 N. W. 689.

One connected with a crime as an accessory after the fact is not an accomplice. State v. Lyons, 144 Minn. 348, 177 N. W. 689.

Evidence held to show that one indicted for murder as a principal could only be indicted and tried as provided by G. S. 1913, § 8479. State v. Pennington, — Minn. —, 182 N. W. 962.

(1) State v Lyons, 144 Minn. 348, 175 N. W. 689. See State v. Pennington, — Minn. —, 182 N. W. 962.

(3) State v. Lyons, 144 Minn. 348, 175 N. W. 689. See State v. Gesell, 137 Minn. 43, 162 N. W. 683.

2416. All conspirators guilty—All who are parties to the combination incur guilt when any of them does an act to further the purpose of the unlawful confederation. State v. Townley, — Minn. —, 182 N. W. 773.

2417. Construction of penal statutes—All reasonable doubts as to a criminal statute will be resolved in favor of the accused, but if the

language is plain it will be construed as it reads. State v. Whipple, 143 Minn. 403, 173 N. W. 801.

G. S. 1913, § 2635, regulating the speed of motor vehicles, is not void for indefiniteness. State v. Goldstone, 144 Minn. 405, 175 N. W. 892.

The rule that penal statutes are to be construed strictly is not violated by allowing their words to have full meaning, or even the more extended of two meanings, where such construction best harmonizes with the context, and most fully promotes the policy and object of the legislation. Ash Sheep Co. v. United States, 252 U. S. 159.

(12) Edberg v. Johnson, — Minn. —, 184 N. W. 12.

2419a. Compromise and settlement—The law condemns the suppression of crime, and, except as to civil rights and remedies, prohibits the settlement thereof by the parties concerned therein. State v. Wagener, 145 Minn. 377, 177 N. W. 346.

2419b. Control of court over prosecuting attorney—It may be stated generally that under our practice the county attorney's conduct of criminal prosecutions is under the control of the court. Continuances, nolle prosequis, and dismissals of causes must be sanctioned by the court. G. S. 1913, §§ 8510, 8511, 9220. State v. Cooper, 147 Minn. 272, 180 N. W. 99.

JURISDICTION

2420. In general—Jurisdiction of the court to impose sentence is limited to the sentence prescribed by statute for the offence charged in the indictment. An excessive sentence is valid except as to the excess, but as to the excess it is void and after the convict has served for the maximum authorized term he may be discharged. State v. Reed, 132 Minn. 295, 156 N. W. 127.

2421. Waiver of objection to jurisdiction of person—(19) See State v. Volk, 144 Minn. 223, 174 N. W. 883.

VENUE

2423. Place of trial—Where the evidence was conflicting as to whether the offence was committed in the county as charged or in an adjoining county, it was held not error for the court to read to the jury the statute fixing the boundary line between the two counties. State v. Bragdon, 136 Minn. 348, 162 N. W. 465.

A thief may be prosecuted in any county into which he carries the stolen property. State v. Giller, 138 Minn. 369, 165 N. W. 132.

A person who receives into his possession at his place of residence or business contraband game in violation of the laws of the state, and at that place ships the same to a purchaser at a distant point in the state, commits a crime in so doing, subjecting himself to prosecution in the county wherein such shipment was so made. He is not subject to prosecution in a county through which the shipment may pass en route to

destination on the theory that he was in constructive possession of the contraband articles in such county, where he does not accompany the shipment. G. S. 1913, § 4765, defining the word "possession" as used in the regulatory game statutes, was not intended as fixing the venue in prosecutions for a violation of the statute, nor to change the place of trial as fixed by section 9196, G. S. 1913. State v. Giller, 138 Minn. 369, 165 N. W. 132.

(28) See State v. Bragdon, 136 Minn. 348, 162 N. W. 465.

FORMER JEOPARDY—FORMER CONVICTION OR ACQUITTAL

2425. In general—The constitutional provision is declaratory of a common-law right which has existed from time immemorial. State v. Healy, 136 Minn. 264, 161 N. W. 590.

A judgment of acquittal in a federal court for the violation of a federal law will not bar a prosecution in a state court for the violation of a state law though based on the same acts. In re Mason, 148 Minn. —, 181 N. W. 570.

A judgment dismissing an indictment on the ground that the offence charged is barred by the statute of limitations is a bar to a second prosecution under a new indictment for the same offence, irrespective of any question of former jeopardy. United States v. Oppenheimer, 242 U. S. 85.

Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, the adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence. In this respect the criminal law is in unison with that which prevails in civil proceedings. United States v. Oppenheimer, 242 U. S. 85.

(37) See Lovato v. New Mexico, 242 U. S. 199.

(42) L. R. A. 1918A, 1181.

2426. What constitutes same offence—Where the state is permitted to prove all similar offences which have taken place within a designated period without electing upon which it will rely, and can convict if the jury find that defendant has committed any one of such offences, an acquittal is a bar to a second prosecution for any specific offence committed within the designated period. Where the state, although permitted to prove several similar offences, is required to point out the specific offence for which it seeks a conviction, and the jury is required to acquit unless they find that the defendant had committed that particular offence, an acquittal is not a bar to another prosecution for another like offence. Defendant was tried for the crime of carnal knowledge of a female under the age of consent, committed on January 16, 1914, and acquitted He was subsequently tried and convicted for a like offence committed with the same female on July 16, 1914. Held, that the acquittal of the offence of January 16th was not a bar to the prosecution

for the offence of July 16th, and that the court properly disallowed the plea of former acquittal without submitting it to the jury. State v. Healy, 136 Minn. 264, 161 N. W. 590.

A violation of the criminal laws and a violation of duties of office are different offences though predicated on the same act. In re Mason, 148 Minn. —, 181 N. W. 570

(50) In re Mason, 148 Minn. —, 181 N. W. 570.

2427. Sufficiency of plea—(59) State v. Healy, 136 Minn. 264, 161 N. W. 590.

2427a. Burden of proof—The accused has the burden of establishing his plea of former acquittal. State v. Healy, 136 Minn. 264, 161 N. W. 590.

2427b. Law and fact—Where the evidence is uncontradicted and is insufficient as a matter of law to establish the plea of former acquittal, the court may disallow the plea without submitting the question to the jury. State v. Healy, 136 Minn. 264, 161 N. W. 590.

PRELIMINARY EXAMINATION

2428. Who are committing magistrates—Jurisdiction—Justices of the peace have no authority to hold a preliminary examination where an offence is committed within a city or village wherein a municipal court is organized or existing. State v. Kelley, 139 Minn. 462, 167 N. W. 110.

A judge of a municipal court has no jurisdiction to hold a preliminary examination where an offence has been committed in another city having a municipal court. State v. Kelley, 139 Minn. 462, 167 N. W. 110.

2433. Warrant of arrest—(70) State v. Volk, 144 Minn. 223, 174 N. W. 883.

2434. Examination—Admissibility and sufficiency of evidence—Evidence held sufficient to justify a finding that a crime had been committed and that there was probable cause for holding defendant to the grand jury. State v. Julius, 138 Minn. 468, 163 N. W. 985.

On a prosecution for rape it was proper for the state to introduce portions of the testimony of the prosecutrix on the preliminary examination to explain and supplement portions thereof as to which she was cross-examined by the defendant. It was not proper to introduce all her testimony or to allow the jury to take a transcript of all the testimony to the jury room. State v. Schmoker, — Minn. —, 182 N. W. 957.

It is not improper to allow witnesses in a criminal prosecution to read their testimony at the preliminary examination of the accused to refresh their memories before their examination on the trial. State v. Pugliese, — Minn. —, 182 N. W. 958.

ARRAIGNMENT

2440a. Necessity of warrant and arrest—When a person is in custody for trial on a criminal charge, and a new charge is preferred against him

in legal form, of which the court has jurisdiction, the court may require him to plead to such new charge without the formality of the issuance and service of a warrant of arrest. State v. Volk, 144 Minn. 223, 174 N. W. 883.

PLEAS

2442. Former conviction, acquittal or jeopardy—See L. R. A. 1917A, 1233 (manner and time of raising defence of former jeopardy).

2442a. Plea of guilty of lesser degree—A defendant indicted for larceny in the first degree may be allowed to plead guilty to larceny in the second degree, and, if after such plea, and before sentence, he, and those indicted with him testify on the trial of the latter that no one of them was connected with the larceny, the court nevertheless may properly pronounce sentence upon the plea entered. State v. Levine, 146 Minn. 187, 178 N. W. 491.

2444. Withdrawal of plea—The court did not abuse judicial discretion in refusing defendant's motion, made after sentence was pronounced, for vacation thereof and for leave to withdraw the plea and stand trial. State v. Levine, 146 Minn. 187, 178 N. W. 491.

VARIOUS DEFENCES

2446. Insanity—(94) 29 Harv. L. Rev. 538; 30 Id. 535, 724.
(97) L. R. A. 1917F, 650.

2447. Intoxication—(1) See 34 Harv. L. Rev. 78.
(6) 12 A. L. R. 861.

2448. Alibi—(12) See State v. Pugliese, — Minn. —, 182 N. W. 958.

2448a. Misinterpretation of statute—If a statute makes a certain act a crime beyond reasonable doubt, a misinterpretation of the statute by the accused is no defence. State v. Whipple, 143 Minn. 403, 173 N. W. 801.

BURDEN AND DEGREE OF PROOF

2449. In general—The state need not prove every allegation in an indictment. It is enough if it proves a crime alleged. State v. Goldstone, 144 Minn. 405, 175 N. W. 892.

2453. Corpus delicti—Under the present statute it is not necessary that the corpus delicti should be proved beyond a reasonable doubt by evidence other than the confession of the accused. It is sufficient if the other evidence reasonably tends to prove the commission of the offence charged. State v. Nordstrom, 146 Minn. 136, 178 N. W. 164.
(29) State v. McCauley, 132 Minn. 225, 156 N. W. 280 (arson).

2454. Burden of proving criminal intent—(30) State v. Edmons, 132 Minn. 465, 156 N. W. 1086.

2455. Definition of reasonable doubt—Instructions—An instruction as to reasonable doubt held sufficient. State v. Couplin, 146 Minn. 189, 178 N. W. 486.

(32) State v. Meyers, 132 Minn. 4, 155 N. W. 766.

(33) State v. Hines, — Minn. —, 182 N. W. 450.

(34) See State v. Keehn, 135 Minn, 211, 160 N. W. 666 (definition of reasonable doubt as a doubt based upon some reason, "not some purely imaginary, fantastic or chimerical doubt, but a doubt based on reason" held not erroneous).

EVIDENCE

2457. Necessity of corroborating an accomplice—It seems that the question whether a witness is an accomplice is for the jury no matter how conclusive the evidence may be. State v. Price, 135 Minn. 159, 160 N. W. 677.

The instruction of the trial court in defining an "accomplice" was not prejudicial. To make a witness an "accomplice" it must appear that a crime has been committed, that the person on trial committed the crime, either as principal or as accessory, and that the witness co-operated with, aided, or assisted the person on trial in the commission of that crime either as principal or accessory. State v. Price, 135 Minn. 159, 160 N. W. 677.

A purchaser of liquors is not an accomplice of the seller unless the statute so provides. State v. Provencher, 135 Minn. 214, 160 N. W. 673.

One who purchases intoxicating liquor, sold contrary to law, for the purpose of prosecuting the seller for an unlawful sale, does not thereby become an accomplice. State v. Gesell, 137 Minn. 43, 162 N. W. 683.

An employee of defendant who aided in the operations under a system of stealing automobiles, whose term of service ended two months prior to the theft of the automobile involved in this prosecution, and who was not shown to have participated therein, was not an accomplice in that transaction, and the trial court properly refused to instruct the jury that it was necessary that his testimony be corroborated. State v. Monroe, 142 Minn. 394, 172 N. W. 313.

The test as to whether a witness is an accomplice is, could he have been indicted and punished for the offence of which defendant is charged? State v. Lyons, 144 Minn. 348, 175 N. W. 689.

Whether the corroborating evidence is sufficient is a question for the jury, unless it is conclusive. State v. Lyons, 144 Minn. 348, 175 N. W. 689.

The reasons for requiring the testimony of an accomplice to be bolstered up by corroborating testimony is that it is the testimony of one admittedly corrupt, and that it is likely to have been given in the hope, that, by turning state's evidence, the witness may receive clemency. State v. Lyons, 144 Minn. 348, 175 N. W. 689.

One connected with a crime as an accessory after the fact is not an accomplice. State v. Lyons, 144 Minn. 348, 175 N. W. 689.

An attempt of defendant to bribe a witness for the state is sufficient corroboration. State v. Ettenburg, 145 Minn. 39, 176 N. W. 171.

The credit to be given to corroborating evidence is for the jury. State v. Dallas, 145 Minn. 92, 176 N. W. 491.

One accused of crime cannot be convicted upon the uncorroborated testimony of an accomplice nor upon his own confession; but the testimony of the accomplice is corroborated by the confession of the accused and upon such testimony and his confession he may be convicted. State v. Huebsch, 146 Minn. 34, 177 N. W. 779.

Evidence held not to require an instruction that one indicted with defendants, but a witness for the state, was an accomplice in the commission of a murder. State v. Pennington, — Minn. —, 182 N. W. 962.

Objection to the want of instructions as to the necessity of corroborative evidence cannot be raised for the first time on appeal. State v. Pennington, — Minn. —, 182 N. W. 962.

(38) See In re Mason, 148 Minn. —, 181 N. W. 570 (rule inapplicable to proceedings before Governor for removal of public officer).

(39) State v. Dunn, 140 Minn. 308, 168 N. W. 2; State v. Lyons, 144 Minn. 348, 175 N. W. 689; State v. Ettenburg, 145 Minn. 39, 176 N. W. 171; State v. Dallas, 145 Minn. 92, 176 N. W. 491; State v. Morris,— Minn. —, 182 N. W. 721.

(41) State v. Price, 135 Minn. 159, 160 N. W. 677; State v. Dunn, 140 Minn. 308, 168 N. W. 2; State v. Lyons, 144 Minn. 348, 175 N. W. 689.

(42) State v. Price, 135 Minn. 159, 160 N. W. 677; State v. Lyons, 144 Minn. 348, 175 N. W. 689.

2458. Character of defendant—There is no presumption of good character to be considered as evidence in favor of the accused. Greer v. United States, 245 U. S. 559.

When the defendant's character is put in issue, the state cannot rebut it by showing specific instances of wrongdoing. It must rebut by showing bad character. The reasons which induce the rejection of evidence of specific acts is based in part on the same general policy which excludes evidence of bad character unless the accused puts his character in issue. State v. Nelson, 148 Minn. —, 181 N. W. 850.

The policy of the Anglo-American law is perhaps more or less due to the inborn spirit and instinct of Anglo-Normandum—the instinct of giving the game fair play—an instinct which asserts itself in other departments of our trial law to much less advantage. But, as a pure question of policy, the doctrine is and can be supported as one better calculated than the opposite to lead to just verdicts. The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot help operating with any jury, in or out of court. * * * Our rule, then, firmly and universally established in policy and tradition, is that the prosecution may not initially attack the defendant's character. State v. Nelson, 148 Minn. —, 181 N. W. 850.

If a witness has known the defendant long enough and under such circumstances that he would be likely to have heard remarks derogatory to his character if they had been made, he may give evidence negative in form as to defendant's reputation. Defendant was not prejudiced by the exclusion of such evidence after he was allowed to introduce a large amount of character evidence. State v. Morris, — Minn. —, 182 N. W. 721.

The accused does not put his character in issue by becoming a witness in his own behalf, except his truthfulness. State v. Nelson, 148 Minn. —, 181 N. W. 850.

When the defendant's character in respect of a trait involved in the crime charged is in issue the state cannot attack it by showing particular acts of wrongdoing. State v. Nelson, 148 Minn. —, 181 N. W. 850.

The defendant did not put his character in issue when under cross-examination he give an irresponsive answer to the effect that he was not a fighting man and would bring witnesses to show it; nor did such testimony subject his character to attack on cross-examination or in rebuttal by a showing of particular acts of misconduct. State v. Nelson, 148 Minn. —, 181 N. W. 850.

(52) State v. Meyers, 132 Minn. 4, 155 N. W. 766 (charge held not to restrict unduly the force of evidence of good character).

(53) State v. Nelson, 148 Minn. —, 181 N. W. 850.

(54) State v. Maddaus, 137 Minn. 249, 163 N. W. 507; State v. Nelson, 148 Minn. —, 181 N. W. 850.

(55) State v. Dunn, 140 Minn. 308, 168 N. W. 2; State v. Morris, — Minn. —, 182 N. W. 721. See 10 A. L. R. 8 (propriety of instructions on such evidence in its bearing on reasonable doubt).

(56) State v. Dunn, 140 Minn. 308, 168 N. W. 2; State v. Morris, — Minn. —, 182 N. W. 721. See State v. Maddaus, 137 Minn. 249, 163 N. W. 507 (a charge held not equivalent to telling the jury to disregard the character evidence offered by defendant).

(60) State v. Morris, — Minn. —, 182 N. W. 721.

2459. Evidence of other crimes—Where evidence of other crimes is admissible merely to show defendant's criminal intent the court should limit its scope in the charge. State v. Newell, 134 Minn. 384, 159 N. W. 829.

Where evidence of other crimes is admitted for a specific purpose it is proper for the court to give instructions limiting its effect accordingly. State v. Van Vleet, 139 Minn. 144, 165 N. W. 962.

Evidence of other crimes is not admissible to show an "inclination" on the part of defendant to commit crime. State v. Monroe, 142 Minn. 394, 172 N. W. 313.

Evidence disclosing a general system practiced by defendant of stealing or receiving stolen automobiles, and so disfiguring them as to render identification by the owner difficult or impossible, and then disposing of them on the market, is admissible in corroboration of the inference of guilt arising from the possession and control by him of a recently stolen

automobile which while so in his possession had been subjected to the systematic treatment given other stolen cars. State v. Monroe, 142 Minn. 394, 172 N. W. 313.

It was proper in this case to receive evidence of other sales of narcotics to the same addict and of other sales to other addicts. Such evidence was within the rule which permits evidence of this character when it is part of one scheme to violate the law or when it tends to show an inclination or predisposition to violate the law. State v. Whipple, 143 Minn. 403, 173 N. W. 801.

In a prosecution for arson for the deliberate burning of a clothing store, evidence that defendant suffered a similar fire three months earlier, the plans and details of which, indicating deliberation, were the same as those of the fire in question, held admissible in corroboration of that tending to show the guilt of the charge on trial. State v. Ettenburg, 145 Minn. 39, 176 N. W. 171.

Applying the rule that proof may be made of a system of cheats or swindles of the same general nature as that with which defendant is charged, it is held that the evidence sufficiently connected the defendant with the perpetration of a swindle of the same general nature as the one for which he was being tried, and that the state was properly allowed to make proof thereof. State v. Friedman, 146 Minn. 373, 178 N. W. 895.

The trial court did not receive evidence that the defendant had committed another unrelated crime. State v. Storey, — Minn. —, 182 N. W. 613.

(61) State v. Rutledge, 142 Minn. 117, 171 N. W. 275. See State v. Liss, 145 Minn. 45, 176 N. W. 51 (certain testimony held not to offend against rule).

(62) State v. Shtemme, 133 Minn. 184, 158 N. W. 48; State v. Gesell, 137 Minn. 43, 162 N. W. 683; State v. Van Vleet, 139 Minn. 144, 165 N. W. 962; State v. Hartung, 141 Minn. 207, 169 N. W. 712; State v. Monroe, 142 Minn. 394, 172 N. W. 313; State v. Ettenburg, 145 Minn. 39, 176 N. W. 171; State v. Nelson, 148 Minn. —, 181 N. W. 850; State v. Morris, — Minn. —, 182 N. W. 721.

(64) See State v. Shtemme, 133 Minn. 184, 158 N. W. 48; State v. Newell, 134 Minn. 384, 159 N. W. 829.

(66) 3 A. L. R. 1540.

(67) See State v. Shtemme, 133 Minn. 184, 158 N. W. 48; State v. Monroe, 142 Minn. 394, 172 N. W. 313; State v. Whipple, 143 Minn. 403, 173 N. W. 801; State v. Ettenburg, 145 Minn. 39, 176 N. W. 171; In re Mason, — Minn. —, 181 N. W. 570; State v. Pugliese, — Minn. —, 182 N. W. 958.

(68) State v. Shtemme, 133 Minn. 184, 158 N. W. 48.

2460. Acts and declarations of fellow conspirators—Whenever a conspiracy is shown (which is usually inductively from circumstances), the declarations of one co-conspirator in furtherance of the common design, as long as the conspiracy continues, are admissible against his associates, though made in the absence of the latter. The least degree of concert or

collusion between the parties to an illegal transaction makes the act of one the act of all. State v. Dunn, 140 Minn. 308, 168 N. W. 2.

(71) State v. Dunn, 140 Minn. 308, 168 N. W. 2; State v. Lyons, 144 Minn. 348, 175 N. W. 689; State v. Townley, — Minn. —, 182 N. W. 773; Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229.

(73) State v. Dunn, 140 Minn. 308, 168 N. W. 2 (evidence held to show prima facie a conspiracy so as to render admissible acts and declarations of fellow conspirators).

2462. Confessions—One cannot be convicted of a crime upon his own confession alone. State v. Huebsch, 146 Minn. 34, 177 N. W. 779.

Under the present statute it is not necessary that the corpus delicti should be proved beyond a reasonable doubt by evidence other than the confession. It is sufficient if the other evidence reasonably tends to prove the commission of the offence charged. State v. Nordstrom, 146 Minn. 136, 178 N. W. 164.

Evidence held not to show that a confession was made under the influence of fear, duress, or expected favor, though the accused was very much "scared" when he made it. State v. Nordstrom, 146 Minn. 136, 178 N. W. 164.

Admission of entire conversation containing alleged confession. 2 A. L. R. 1017.

(81) 7 A. L. R. 419 (whose promises are within rule).

(83) Contra under present statute. State v. Nordstrom, 146 Minn. 136, 178 N. W. 164.

2463. Admissions not amounting to confessions—Shortly after an alleged illegal sale of liquor defendant was arrested charged with the sale and also with keeping an unlicensed drinking place. He appeared before a justice of the peace, pleaded guilty to the latter offence and offered to plead guilty to the illegal sale, but the justice refused to accept the plea for want of jurisdiction. Held, that the proceedings before the justice were admissible in a prosecution for the illegal sale as an admission of guilt. State v. Mamer, 139 Minn. 265, 166 N. W. 345.

Testimony of defendant in another case held admissible as an admission. State v. Liss, 145 Minn. 45, 176 N. W. 51.

(88) See State v. Solem, 135 Minn. 200, 160 N. W. 491.

2464. Flight—(89) State v. Maddaus, 137 Minn. 249, 163 N. W. 507; State v. Ettenburg, 145 Minn. 39, 176 N. W. 171. See State v. Ryan, 137 Minn. 78, 162 N. W. 893.

2465. Suppression or concealment of evidence—Bribing witness—An attempt by a person under an indictment for crime to bribe an adverse witness who is likely to be called at the trial to testify against him is evidence of guilt and may be so considered by the jury. State v. Ettenburg, 145 Minn. 39, 176 N. W. 171.

2467. Motive—(92) State v. Dunn, 140 Minn. 308, 168 N. W. 2.

(93) State v. McCauley, 132 Minn. 225, 156 N. W. 280; State v. Kasper, 140 Minn. 259, 167 N. W. 1035.

2468. Threats—The man killed was working at the time on a farm occupied by one Jacobson, and owned by the father-in-law of the defendant. He was helping move. Between Jacobson and defendant there was ill feeling and defendant had made threats. The trouble between them arose in connection with the farm. It was proper to show ill feeling and threats. Such evidence was competent as throwing light upon the occurrences immediately attending the killing. It was not proper to go into the details of the troubles to such an extent as to divert the attention of the jury from the real issue or to substitute a false one, nor so as unjustly to prejudice the defendant by a showing of matters collateral to the real issue. The evidence should have been restricted. State v. Nelson, 148 Minn. —, 181 N. W. 850.

2468a. Footprints—Weight of evidence of footprints considered. State v. McCauley, 132 Minn. 225, 156 N. W. 280.

2468b. Self-serving declarations—Self-serving declarations of a defendant accused of killing his wife as to his intentions or treatment of her held properly excluded. State v. Dunn, 140 Minn. 308, 168 N. W. 2.

2468f. Documentary evidence in possession of defendant—Secondary evidence—The defendant cannot be required to produce a document in his possession for use on the trial. Showing that the document is in his possession is a sufficient foundation for the introduction of secondary evidence of its contents. State v. Minor, 137 Minn. 254, 163 N. W. 514; State v. Dunn, 140 Minn. 308, 168 N. W. 2.

TIME OF TRIAL AND CONTINUANCE

2469. Right to a speedy trial—Section 8510, G. S. 1913, requires that an indictment be dismissed when defendant is not tried at the next term of court in which he is triable, "unless good cause to the contrary is shown." The trial was not had at the October, 1917, term of court because of the absence of a material witness, and was continued on the motion of the state. The trial was not had at the March or October, 1918, term because defendant was in military service and was not available. Held, that there was no error in denying the motion of defendant to dismiss the indictment at either of those terms, nor in denying the motion at the March, 1919, term of court, when the trial was had. State v. Kloempken, 145 Minn. 496, 176 N. W. 642.

2470. Continuance—Irregularities in the continuance of a cause pending trial do not release a surety on a bail bond. State v. Cooper, — Minn. —, 180 N. W. 99.

TRIAL

2471. Presence of accused—After the trial was under way, the trial judge, during a recess of the court and in the presence of counsel for both the defendant and the state, called two of the jurors into his chambers, one at a time, and inquired of them concerning their having been tampered with. Error is now claimed from the fact that the defendant was

not present at this inquiry. The incident was no part of the trial; and, no challenge having been taken to either juror and no objection having been made on account of the absence of the defendant, it is held that the defendant is in no position to complain, nor were his rights, in any manner, prejudiced. State v. Bragdon, 136 Minn. 348, 162 N. W. 465.

A jury deliberated for ten hours. When the judge entered the court room, where the jury then were, the foreman asked him whether he told them that, if defendant furnished a certain person less than five gallons of liquor at a certain town, as claimed in the indictment, defendant was guilty. The judge answered, yes, left the room and did not return until informed the jury had agreed. At the time defendant was out on bail and neither he nor his attorneys were in the court room. The answer was correct. Held, that no substantial right of accused was violated and he was not entitled to a new trial. State v. Kruse, 137 Minn. 468, 163 N. W. 125.

The jury may be given a view of the premises in the absence of the accused. State v. Rogers, 145 Minn. 303, 177 N. W. 358.

2472. Right to a public trial—(11) See 5 Minn. L. Rev. 554.

2473. Right to fair trial—The accused cannot complain of a vigorous prosecution, but he is entitled to a fair trial. Whether he is good or bad, popular or unpopular, he is entitled to have the charge of his guilt, and if he is found guilty the degree of his guilt, determined by minds reflecting calmly upon competent evidence unaffected by prejudicial evidence erroneously received, or by suggestions and insinuations of the existence of harmful facts not proved. State v. Nelson, 148 Minn. —, 181 N. W. 850.

(13) State v. Bragdon, 136 Minn. 348, 162 N. W. 465; State v. Nelson, 148 Minn. —, 181 N. W. 850; State v. Bernstein, 148 Minn. —, 181 N. W. 947; State v. Townley, — Minn. —, 182 N. W. 773. See State v. Dallas, 145 Minn. 92, 176 N. W. 491; 33 Harv. L. Rev. 956.

See § 2490.

2474. Separate trial of defendants jointly indicted—(17) State v. Townley, — Minn. —, 182 N. W. 773.

2475. Granting a view—It is not essential that the accused be allowed to accompany the jury on a view. State v. Rogers, 145 Minn. 303, 177 N. W. 358.

2477. Province of court and jury—Law and fact—Where the evidence of a fact is conclusive, so that the jury would not be justified in finding otherwise, the court may instruct the jury to that effect, or that the fact exists. State v. Damuth, 135 Minn. 76, 160 N. W. 196.

Where the evidence is uncontradicted and is insufficient as a matter of law to establish the plea of former acquittal, the court may disallow the plea without submitting the question to the jury. State v. Healy, 136 Minn. 264, 161 N. W. 590.

(22) State v. Damuth, 135 Minn. 76, 160 N. W. 196.

(23, 27) State v. Price, 135 Minn. 159, 160 N. W. 677.

2477a. Unsworn statement by accused not permissible—Since the accused may now testify in his own behalf if he desires, the courts should no longer follow or recognize the practice obtaining at common law of permitting him to make an unsworn statement to the jury at the close of the case. State v. Townley, — Minn. —, 182 N. W. 773. See 5 Minn. L. Rev. 390, 553.

2477b. Closing argument by accused personally—There is no constitutional provision conferring upon the accused the right to make the closing argument to the jury in his own behalf. He is guaranteed the right of having the assistance of counsel for his defence, and counsel cannot be imposed upon him against his will, but if he elects to be represented by counsel who conduct the defence until the time comes to make the argument to the jury, he cannot ostensibly discharge them and then insist on making the closing argument himself, especially where he did not take the stand as a witness. It is within the discretion of the trial court to permit him to do so, and, under the facts disclosed by the record, it did not abuse its discretion in refusing such permission. State v. Townley, — Minn. —, 182 N. W. 773. See 5 Minn. L. Rev. 554.

2478. Argument of counsel—The prosecuting attorney represents the state and should conduct the trial with a due regard for the rights accorded to the accused by the law, and should be promptly checked by the trial court whenever he so far forgets himself as to trench upon such rights. State v. Kampert, 139 Minn. 132, 165 N. W. 972.

The prosecuting attorney may express his belief in the truth of the testimony of a witness, if in so doing he is arguing or drawing deductions from the testimony given in court. He may argue that in his opinion the defendant is guilty when he states, or it is apparent, that such opinion is based on the evidence. State v. Wassing, 141 Minn. 106, 169 N. W. 485.

Certain remarks of the county attorney in his opening address to the jury held objectionable but not a ground for reversal. State v. Bohls, 144 Minn. 437, 175 N. W. 915.

Counsel may comment on the interest of an insurance company in a prosecution for arson. State v. Ettenburg, 145 Minn. 39, 176 N. W. 171.

See §§ 7102, 9799.

2479. Charging the jury—The court is forbidden to comment on the failure of the accused to testify in his own behalf. See § 10307.

The accused is not entitled to an instruction that he is presumed to be of good character and that this presumption should be considered as evidence in his favor. There is no such presumption. Greer v. United States, 245 U. S. 559.

Where evidence of other crimes is admitted merely to prove defendant's criminal intent the court should limit its scope accordingly. State v. Newell, 134 Minn. 384, 159 N. W. 829. See § 2459.

It has been held under the facts of the particular case that it was

not prejudicial error for the court to charge that certain facts were "admitted," where they were uncontroverted or conclusively proved, though not expressly admitted. State v. Damuth, 135 Minn. 76, 160 N. W. 196.

The charge of the court discussed the evidence and indulged in inferences to a greater extent than is commendable, but it emphasized to the jury that all questions of fact were for their determination, and impressed so strongly that, if certain contentions of defendant were true, they must acquit, that this court cannot say there was error prejudicial to the defendant. State v. Kearns, 139 Minn. 89, 165 N. W. 480.

Giving a brief correct instruction in respect to circumstantial evidence was proper, although the principal evidence for the prosecution was the testimony of an eyewitness. State v. Kampert, 139 Minn. 132, 165 N. W. 972.

Where a conviction is sought on weak circumstantal evidence, it is proper for the court to call attention to the fact that the evidence does not disclose any motive for the crime. State v. Kasper, 140 Minn. 259, 167 N. W. 1035.

It was not reversible error to instruct the jury that when a law is a new one and subject to misinterpretation that is not a defence. State v. Whipple, 143 Minn. 403, 173 N. W. 801.

In a criminal prosecution founded on circumstantial evidence, except that the state claims an admission of guilt by an offer of the defendant, after indictment, to return the property alleged to have been stolen, if the trouble were dropped, all of which is in dispute, the defendant is entitled to a charge on circumstantial evidence. State v. Rickmier, 144 Minn. 32, 174 N. W. 529.

The rule that a failure of the court to instruct the jury on a particular point is not error, in the absence of a timely request or objection, applies to criminal cases. State v. Gaularpp, 144 Minn. 86, 174 N. W. 445. See § 7179.

In a prosecution for arson in burning a store, it is proper for the court to state to the jury that an insurance company having a policy on the property burned was not to be censured for aiding by lawful means the discovery of truth as to the origin of the fire. State v. Ettenburg, 145 Minn. 39, 176 N. W. 171.

(44) State v. Macbeth, 133 Minn. 425, 158 N. W. 793; State v. Gaularpp, 144 Minn. 86, 174 N. W. 445; State v. Townley, — Minn. —, 182 N. W. 773.

(55) State v. Kearns, 139 Minn. 89, 165 N. W. 480; State v. Johnson, 140 Minn. 73, 167 N. W. 283; State v. Dallas, 145 Minn. 92, 176 N. W. 491.

See §§ 2486, 7098, 7165-7179, 9771-9798.

2479a. Objections and exceptions—In criminal cases there is the same necessity of objecting to inaccurate, incomplete or indefinite instructions as in civil cases. State v. Shtemme, 133 Minn. 184, 158 N. W. 48. See §§ 7179, 9797, 9798.

In criminal cases there is the same necessity of objecting to inadmissible evidence as in civil cases. The rule is general that the defendant must protect his record. State v. Rutledge, 142 Minn. 117, 171 N. W. 275.

A court may grant a new trial for error in the admission of evidence though there was no objection to its admission, but this is purely a matter of discretion and rarely done. State v. Rutledge, 142 Minn. 117, 171 N. W. 275.

No exception is necessary to an erroneous instruction in order to take advantage of it on a motion for a new trial, but this does not apply to a failure to instruct on a particular point. State v. Gaularpp, 144 Minn. 86, 174 N. W. 445. See § 7179.

2483. Verdict—Sufficiency—If a verdict acquits a defendant on a specific charge and finds him guilty of a charge which is substantially the same, it is inconsistent with itself and a new trial will be granted. State v. Macbeth, 133 Minn. 425, 158 N. W. 793.

A verdict is not fatally uncertain if its meaning can be determined by reference to the indictment. A verdict is not to be construed with the same strictness as an indictment, but is to be liberally construed and sustained if reasonably possible. Under an indictment for carnally knowing and abusing a child, the jury returned: "We, the jury, find the defendant guilty of the crime of an attempt to commit the crime of carnal knowledge and abuse of a female child." Held sufficient on habeas corpus. State v. Brown, — Minn. —, 183 N. W. 669.

(61, 64) State v. Brown, — Minn. —, 183 N. W. 669.

2486. Verdict for lesser offences or lesser degrees of offences than charged—Instructions—Under an indictment for maiming, the evidence may be such as to justify the court in charging the jury that they should find the defendant guilty of the crime charged, or of assault in the second degree, or acquit him, the evidence not justifying a conviction for assault in the third degree. State v. Damuth, 135 Minn. 76, 160 N. W. 196.

Under an indictment charging mayhem there may be a conviction for assault in the second degree, or possibly in the third degree, for an assault and battery is necessarily included in the commission of the crime of maiming. State v. Damuth, 135 Minn. 76, 160 N. W. 196.

A failure of the court to instruct the jury as to their right to find the accused guilty of a lesser offence is not error in the absence of timely request or objection. State v. Gaularpp, 144 Minn. 86, 174 N. W. 445.

Upon a charge of assault in the second degree, held that the evidence justified a charge that there might be a conviction for assault in the third degree. State v. Gaularpp, 144 Minn. 86, 174 N. W. 445.

Under an indictment for one degree of a crime a defendant may be convicted of a lesser degree if the facts warrant; and, the facts so warranting, he is entitled to a charge to that effect. The defendants were indicted for assault in the second degree. The evidence was such as to justify a finding that the assault, if committed, was in the third degree.

A refusal to instruct upon the third degree was error. State v. Brinkman, 145 Minn. 18, 175 N. W. 1006.

One accused of larceny in the first degree may be permitted to plead guilty of larceny in the second degree. State v. Levine, 146 Minn. 187, 178 N. W. 491.

Upon a charge of grand larceny a conviction may be had for petit larceny. State v. Morris, — Minn. —, 182 N. W. 721.

A defendant indicted for grand larceny in the second degree cannot complain because the court permitted the jury to find him guilty of petit larceny, although the evidence strongly tended to show that, if guilty at all, he was guilty of the crime charged. State v. Morris, — Minn. —, 182 N. W. 721.

If the evidence permits of no doubt as to the degree of the crime, the court may properly instruct the jury either to convict of the crime charged or to acquit, but the defendant should request such an instruction if he desires to waive the benefit of sections 8476 and 9213, G. S. 1913. State v. Morris, — Minn. —, 182 N. W. 721.

Under an indictment charging an attempt to commit rape by forcibly overcoming the resistance of the female the accused may be convicted of an assault in the third degree. State v. Christofferson,—Minn.—, 182 N. W. 961.

(67) State v. Abdo, — Minn. —, 183 N. W. 143.

(68) State v. Macbeth, 133 Minn. 425, 158 N. W. 793; State v. Brinkman, 145 Minn. 18, 175 N. W. 1006; State v. Morris,—Minn.—, 182 N. W. 721; State v. Abdo, — Minn. —, 183 N. W. 143.

(70) State v. Damuth, 135 Minn. 76, 160 N. W. 196; State v. Keehn, 135 Minn. 211, 160 N. W. 666; State v. Henrionnet, 142 Minn. 1, 170 N. W. 699.

(71) State v. Damuth, 135 Minn. 76, 160 N. W. 196; State v. Morris, — Minn. —, 182 N. W. 721.

(76) See State v. Macbeth, 133 Minn. 425, 158 N. W. 793.

(78) State v. Brown, — Minn. —, 183 N. W. 669.

(80) State v. Abdo, — Minn. —, 183 N. W. 143.

2487. Sentence or judgment—Stay—Where the law requires a sentence to be for a definite term, a sentence from which the length of the term cannot be ascertained is void. A sentence for murder in the third degree to "imprisonment at hard labor in the state prison at Stillwater, Minn., according to law," when the statute required for such a crime a definite term of "not less than seven years nor more than thirty years," is void. State v. Reed, 138 Minn. 465, 163 N. W. 984.

It was the duty of the court upon receipt of the verdict either to pass judgment thereon or to set it aside and order a new trial, but not to discharge the defendant. If the court erred in this regard it was an error arising in the progress of the trial and did not go to the jurisdiction so as to be taken advantage of upon habeas corpus. State v. Brown, — Minn. —, 183 N. W. 669.

A defendant cannot complain on appeal that the punishment of a fine was not imposed in addition to imprisonment, though the statute pro-

vides for both fine and imprisonment. State v. Mamer, 139 Minn. 265, 166 N. W. 345; State v. Radke, 139 Minn. 276, 166 N. W. 346.

Power to suspend sentence. L. R. A. 1918C, 551; 2 Minn. L. Rev. 381.

Staying execution of sentence. See Ex parte United States, 242 U. S. 27.

(87) State v. Nordstrom, 146 Minn. 136, 178 N. W. 164.

(90) State v. Rice, 145 Minn. 359, 177 N. W. 348. See § 3761.

NEW TRIALS

2490. Granted only for substantial error—A new trial may be granted for insufficiency of the evidence to prove criminal intent. State v. Edmons, 132 Minn. 465, 156 N. W. 1086.

Whether error in admitting evidence is prejudicial depends largely on whether the other evidence proves the guilt of the accused clearly or not. State v. Marx, 139 Minn. 448, 166 N. W. 1082.

Where the record leaves it doubtful whether the full measure of proof required in criminal convictions has been made, errors during the trial are more likely to prejudicially affect defendant's right to a fair trial than where the proof of guilt is strong and clear. State v. Kasper, 140 Minn. 259, 167 N. W. 1035. See § 2473.

Error in excluding evidence held not sufficiently important to justify a new trial. State v. Kloempken, 145 Minn. 496, 176 N. W. 642.

Where the evidence of the guilt of the accused is clear a new trial may be denied though material and competent evidence is excluded. State v. Huebsch, 146 Minn. 34, 177 N. W. 779.

If error is committed on the trial, the natural tendency of which is to prejudice accused, it is ground for a new trial, unless it appears that he could not have been prejudiced thereby. State v. Sandquist, 146 Minn. 322, 178 N. W. 883.

If guilt is clearly established, a criminal conviction will not be reversed for technical errors, where the substantial rights of the accused have not been so violated as to make it reasonably clear that a fair trial was not had. State v. Townley, — Minn. —, 182 N. W. 773.

The admission of evidence of doubtful relevancy is not alone sufficient ground for a new trial where there was ample competent evidence to warrant the jury's conclusion respecting defendant's guilt. State v. Townley, — Minn. —, 182 N. W. 773.

(7) State v. Sandquist, 146 Minn. 322, 178 N. W. 883.

(8) State v. Townley, — Minn. —, 182 N. W. 773.

(9) State v. Price, 135 Minn. 159, 160 N. W. 677; State v. Bragdon, 136 Minn. 348, 162 N. W. 465; State v. Kruse, 137 Minn. 468, 163 N. W. 125; State v. Townley, — Minn. —, 182 N. W. 773.

(10) State v. Shtemme, 133 Minn. 184, 158 N. W. 48; State v. Price, 135 Minn. 159, 160 N. W. 677.

(11) State v. Marx, 139 Minn. 448, 166 N. W. 1082; State v. Dallas, 145 Minn. 92, 176 N. W. 491; State v. Bernstein, 148 Minn. —, 181 N. W. 947.

APPEAL

2491. When lies—(18) State v. Johnson, 146 Minn. 468, 177 N. W. 657.

2493. Certifying questions to supreme court—The question whether an indictment states a public offence cannot be certified to the supreme court after the trial court has sustained a demurrer thereto. State v. Johnson, 139 Minn. 500, 166 N. W. 123.

Motion to quash an indictment for the discharge of defendant, on the ground that proof of the facts stated by the county attorney in his opening address to the jury would not warrant a conviction for a violation of the statute on which the indictment was founded. The trial court discharged the jury and certified the cause to the supreme court. Held, that the facts do not bring the case within the statute authorizing a certification to the supreme court. State v. Wellman, 143 Minn. 488, 173 N. W. 574.

The statute does not authorize a review by the supreme court of an order granting a new trial. State v. Johnson, 146 Minn. 468, 177 N. W. 657.

(25) State v. Atanosoff, 138 Minn. 321, 164 N. W. 1011.

(27) State v. Wellman, 143 Minn. 488, 173 N. W. 574.

2498. Assignment of errors—Errors cannot well be assigned upon the items of a statement of the trial judge as to what the evidence established. The ultimate finding to be made was whether defendant was guilty or not guilty of the offence charged. State v. Broms, 139 Minn. 402, 166 N. W. 771.

2500. Scope of review—Sufficiency of record—In the absence of a certification under the statute, or a case or bill of exceptions, a ruling on a challenge to the grand jury cannot be reviewed; nor without a case or bill of exceptions can rulings at a trial nor the sufficiency of the evidence be considered. State v. Atanosoff, 138 Minn. 321, 164 N. W. 1011.

On appeal from an order of the district court affirming an order of a municipal court denying a motion for a new trial, held, that alleged errors in the reception of evidence could not be reviewed, it not appearing that the rulings were presented on the motion for a new trial. Duluth v. Gervais, 146 Minn. 469, 177 N. W. 763.

(50–52) State v. Atanosoff, 138 Minn. 321, 164 N. W. 1011.

(54) Duluth v. Gervais, 146 Minn. 469, 177 N. W. 763.

See § 2479a (objections and exceptions).

2501. Powers of supreme court—Disposition of case on appeal—Where a conviction is right but the sentence void the case will be remanded for a lawful sentence. State v. Reed, 138 Minn. 465, 163 N. W. 984; State v. Mamer, 139 Minn. 265, 166 N. W. 345.

Where the supreme court affirmed a judgment with directions that it be modified by reducing the term of imprisonment for non-payment of a fine, and the trial court discharged the defendant on habeas corpus and then sentenced him to pay a less fine, and in default of payment to be

imprisoned for a less and proper term, it was held that the procedure was irregular but not void. State v. Superintendent of Workhouse, 146 Minn. 140, 178 N. W. 610.

It is the duty of the supreme court to examine the record and render judgment upon it. State v. Morehart, — Minn. —, 183 N. W. 960.

PUNISHMENT AND EXECUTION

2502. Punishment in absence of express provision—See §§ 3758–3763.

2503. Fine or imprisonment—See §§ 3758-3763.

2503c. Second conviction—Increased punishment—In order to give the court jurisdiction to impose increased punishment under G. S. 1913, § 8491, the former conviction must be charged in the indictment, but if it is imposed without such charge in the indictment the sentence is not wholly void. It is void only as to the excess. After serving the maximum term warranted by law in such a case the prisoner may be released on habeas corpus. State v. Reed, 132 Minn. 295, 156 N. W. 127.

CROPS

2509. Title of trespasser—Rights and remedies of owner of land as to crops grown thereon by one not in privity with him. L. R. A. 1918A, 550.

CUSTOMS AND USAGES

2511. Requisites of valid custom—A custom or usage cannot be allowed to subvert a well settled rule of law. Stein v. Shapiro, 145 Minn. 60, 176 N. W. 54.

(83, 85) Stein v. Shapiro, 145 Minn. 60, 176 N. W. 54.

2514. Upon whom binding—A local merchant is charged with knowledge of a general custom in the mercantile business to restrict the authority of traveling salesmen to soliciting orders merely and not to make sales. Japan Tea Co. v. Franklin MacVeagh & Co., 142 Minn. 152, 171 N. W. 305.

(95) Matloch v. Jerabek, 138 Minn. 128, 164 N. W. 587.

2515. Effect upon contracts—A custom may be proved to fix the amount of compensation for services in the absence of specific agreement. Matloch v. Jerabek, 138 Minn. 128, 164 N. W. 587.

Where a general custom or usage prevails in the conduct of a trade or business it enters into and becomes a part of a contract made in that business, unless there is repugnancy between the custom and the terms of the contract in which case the latter control. McDonald v. Union Hay Co., 143 Minn. 40, 172 N. W. 891.

By written memorandum defendant, a dealer in feed at Minneapolis,

sold and agreed to ship 300 tons of bran at $28 per ton to plaintiffs, delivery at Boston or Boston rate points. The bran was not shipped as requested or within a reasonable time. Plaintiffs alleged an oral modification of the contract whereby the shipment should be made during the last twelve days of April, 1917. Sixty tons were shipped when the modification was made. No further shipments were made, although plaintiffs demanded performance several times during the month of May. A custom in the feed trade requires twenty-four hours' written notice before either seller of buyer may be held to have breached the contract. Such notice was not given. In this action for damages it is held: It was competent to prove the alleged oral modification, though the contract was written and within the statute of frauds. The custom of the trade entered into the terms of the contract, and under a denial of a breach of contract, evidence of this custom under which breach was disproved was admissible. There was nothing irreconcilable between the terms of the oral modification alleged and the operation of the custom proven. And, further plaintiffs' insistence upon performance of the contract after the time specified in the modification waived the time, and clearly put in operation the custom referred to. McDonald v. Union Hay Co., 143 Minn. 40, 172 N. W. 891.

A custom or usage cannot change the rights and obligations which arise by implication of law from a contract. Stein v. Shapiro, 145 Minn. 60, 176 N. W. 54.

A usage or custom cannot inject into a sales contract an obligation on the part of the seller to deliver the goods sold, upon being tendered a draft drawn by the buyer's agent upon the buyer. Stein v. Shapiro, 145 Minn. 60, 176 N. W. 54. See 8 A. L. R. 1264.

(1-3) McDonald v. Union Hay Co., 143 Minn. 40, 172 N. W. 891.

(1) See Stein v. Shapiro, 145 Minn. 60, 176 N. W. 54.

2518. Pleading—(11) McDonald v. Union Hay Co., 143 Minn. 40, 172 N. W. 891.

DAMAGES

IN GENERAL

2522. Nominal damages—(17) Greenfield v. Unique Theatre Co., 146 Minn. 17, 177 N. W. 666 (a few cents or a dollar).

2523. Expenses of action—Counsel fees—When attorney's fees are recoverable they are not a part of the cause of action. First State Bank v. Utman, 136 Minn. 103, 161 N. W. 398.

2524. Interest—In an action for damages for deceit, where the measure of damages is the difference between the value of that with which the plaintiff parted and the value of that which he received in exchange, interest is recoverable from the date of the transaction. Brody v. Foster, 134 Minn. 91, 158 N. W. 824.

Where a party rescinds a contract for fraud and sues to recover money paid thereunder he is entitled to interest on the money from the time of payment. Fawkes v. Knapp, 138 Minn. 384, 165 N. W. 236.

The amount of interest included in a verdict cannot be questioned for the first time on appeal. Itasca County v. Ralph, 144 Minn. 446, 175 N. W. 899.

(32) Trustees v. Merchants Nat. Bank, 139 Minn. 80, 165 N. W. 491.

(35) See Trustees v. Merchants Nat. Bank, 139 Minn. 80, 165 N. W. 491.

2526. Mental suffering—Wounded feelings—Humiliation or mortification to arise in the future on account of disfigurement of the person is a proper element of damage in an action for personal inujry. Patterson v. Blatti, 133 Minn. 23, 157 N. W. 717; Erie Railroad Co. v. Collins, 253 U. S. 77. See 15 L. R. A. (N. S.) 775; L. R. A. 1916E, 898; Ann. Cas. 1918D, 65.

It is the general rule that damages for mental suffering are not recoverable in an action for breach of contract. There are possible exceptions to this rule where a personal injury is inflicted in the enforcement of a contract right, or the breach of the contract is of a character amounting to an independent wilful tort. Reinkey v. Findley Electric Co., 147 Minn. 161, 180 N. W. 236.

2527. Law and fact—It is for the jury to determine what are the proximate consequences of an injury, unless the evidence is conclusive. Hansman v. Western Union Tel. Co., 144 Minn. 56, 174 N. W. 434.

NATURAL AND PROXIMATE CONSEQUENCES

2528. In general—Evidence held to justify a finding that tuberculosis was a proximate result of the failure of defendant properly to heat a room in which plaintiff worked. Hansman v. Western Union Tel. Co., 144 Minn. 56, 174 N. W. 434.

(46) Swaney v. Crawley, 133 Minn. 57, 157 N. W. 910; John Newton Porter Co. v. Kiewel Brewing Co., 137 Minn. 81, 162 N. W. 887; Benoe v. Duluth St. Ry. Co., 138 Minn. 155, 164 N. W. 662; Northern Timber Products Co. v. Stone-Ordean-Wells Co., 143 Minn. 200, 173 N. W. 439 (replevin—damages to plaintiff's business and credit too remote); Loe v. Bjorkman Bros., 146 Minn. 471, 178 N. W. 316; Independent Grocery Co. v. Sun Ins. Co., 146 Minn. 214, 178 N. W. 582.

PROSPECTIVE DAMAGES AND SUCCESSIVE ACTIONS

2529. Actions ex contractu—(47) Stronge-Warner Co. v. Choate & Co., — Minn. —, 182 N. W. 712.

2530. Actions ex delicto—Future suffering—In actions for personal injury prospective damages cannot be allowed unless there is evidence upon which an intelligent judgment respecting such damages can be based.

Often expert medical testimony is essential. Haugen v. Northern Pacific Ry. Co., 132 Minn. 54, 155 N. W. 1058.

In an action for personal injury mental suffering reasonably certain to be endured in the future is a proper element of damages. Johnson v. Northern Pacific Ry. Co., 47 Minn. 430, 50 N. W. 473; Cooper v. St. Paul City Ry. Co., 54 Minn. 379, 56 N. W. 42; Patterson v. Blatti, 133 Minn. 23, 157 N. W. 717.

In an action for personal injury humiliation or mortification on account of disfigurement of the person, reasonably certain to be endured in the future, is a proper element of damage. Patterson v. Blatti, 133 Minn. 23, 157 N. W. 717. See § 2526.

Damages cannot be awarded as for a permanent injury unless there is reasonable certainty that it will be permanent. A charge to the effect that the plaintiff is entitled to damages compensating her for pain and suffering up to the time of the trial "and for any pain and suffering which under the evidence you believe she will sustain in the future as the result of the accident" correctly states the rule. Carson v. Turrish, 140 Minn 445, 168 N. W. 349.

Where the objective symptons indicate that a full recovery has been made, a large verdict cannot be sustained on the ground that subjective symptons described by the plaintiff indicate a continuance of ailments resulting from the injuries, unless the evidence furnishes a basis for determining, with reasonable certainty, the future consequences to be apprehended from such ailments and for saying that they will continue for a considerable time. Lowe v. Armour Packing Co., — Minn. —, 182 N. W. 610.

(50) Burch v. Hoy & Elzy Co., 131 Minn. 475, 155 N. W. 767; Carson v. Turrish, 140 Minn. 445, 168 N. W. 349; Lowe v. Armour Packing Co., — Minn. —, 182 N. W. 610.

MITIGATION

2532. Duty of injured party to mitigate damages—An error of judgment in applying a remedy to a physical injury will not defeat a recovery of full compensation. Whether reasonable care is exercised in applying a remedy is a question for the jury unless the evidence is conclusive. Beck v. Chicago etc. Ry. Co., 134 Minn. 363, 159 N. W. 831.

One is not bound to submit to a serious surgical operation in order to mitigate damages. Peterson v. Branton, 137 Minn. 74, 162 N. W. 895; Gibbs v. Almstrom, 145 Minn. 35, 176 N. W. 173. See note, 11 A. L. R. 227.

What must be done to mitigate damages depends upon the facts of the particular case. Wavra v. Karr, 142 Minn. 248, 172 N. W. 118.

Where a cropper received obviously unfit seed grain from his landlord, it was held that he could not plant the seed with full knowledge of its unfitness and recover from his landlord the value of a crop that would probably have been raised from good seed. Wavra v. Karr, 142 Minn. 248, 172 N. W. 118.

Failure of a party to a contract to minimize the damages from its breach does not defeat his right to recover, but goes only to the amount of recovery. Casper v. Frederick, 146 Minn. 112, 177 N. W. 936.

Breach of contract to furnish advertising space in street car. Plaintiff was not obliged, with a view to reducing his damage, to accept advertising at a less cost than he was charging for his other unsold space. Barron G. Collier, Inc. v. Kindy, 146 Minn. 279, 178 N. W. 584.

(53) Patterson v. Blatti, 133 Minn. 23, 157 N. W. 717; Mullen v. Otter Tail Power Co., 134 Minn. 65, 158 N. W. 732 (evidence held to justify a finding that plaintiff made due effort to save goods from a fire); Beck v. Chicago etc. Ry. Co., 134 Minn. 363, 159 N. W. 831 (applying solution of carbolic acid to injured foot—wound became affected with gangrene); Wavra v. Karr, 142 Minn. 248, 172 N. W. 118; O'Neil v. Davidson, 147 Minn. 240, 180 N. W. 102 (lease—fraud); 33 Harv. L. Rev. 854 (duty of aggrieved contracting party to accept new offer of defaulter to obviate avoidable damage). See Digest, § 8615.

2533. Evidence in mitigation—Insurance—The fact that the plaintiff or injured party had insurance covering the injury or loss is not admissible to defeat or diminish recovery. Evans v. Chicago etc. Ry. Co., 133 Minn. 293, 158 N. W. 335.

UNCERTAIN, CONTINGENT AND SPECULATIVE DAMAGES

2534. General rule—To recover damages for injury to real property, resulting from negligence, the owner must wait until the injury or damage has actually happened. Damages, based upon apprehension of future injury to real property, by an act yet to happen, is too remote and speculative. Johnson v. Rouchleau-Ray Iron Land Co., 140 Minn. 289, 168 N. W. 1.

(57) Grimes v. Minneapolis etc. Traction Co., 133 Minn. 442, 158 N. W. 719; Aylmer v. Northwestern Mutual Invest. Co., 138 Minn. 148, 164 N. W. 659; Kalland v. Brainerd, 141 Minn. 119, 169 N. W. 475; Northern Timber Products Co. v. Stone-Ordean-Wells Co., 143 Minn. 200, 173 N. W. 439 (replevin—damages to plaintiff's business and credit too speculative); Independent Grocery Co. v. Sun Ins. Co., 146 Minn. 214, 178 N. W. 582.

2535. Profits—In an action for breach of contract, profits which would have been realized had the contract been performed, and which had been prevented by its breach, may be recovered where such profits are not open to the objection of uncertainty or of remoteness, or where, from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into Lewiston Iron Works v. Vulcan Process Co., 139 Minn. 180, 165 N. W. 1071.

In an action for breach of contract, where the vendor sold to the vendee

a certain welding apparatus for use in its machine repairing business, in a certain county, and, as a part of the contract of sale, agreed to protect the vendee for that county on all such machines sold to it, and not to place any others of the same make in the county, proof of the amount of welding work and the profits derived therefrom done by machines of the same make placed in the county by the vendor, or others liable upon such contract, may be shown and taken into consideration by the jury, in estimating the vendee's damages for the breach. Lewiston Iron Works v. Vulcan Process Co., 139 Minn. 180, 165 N. W. 1071.

To recover prospective profits as damages for a breach of contract, it must appear that the loss of the profits was not a remote, but a direct, consequence of the breach; that the anticipated profits did not depend on contingencies, but were reasonably certain to accrue if the contract had not been breached; and that the amount of such profits was not conjectural or speculative, but was proved with reasonable, though not necessarily absolute, certainty. Force Bros. v. Gottwald, — Minn. —, 183 N. W. 356.

(61) Lewiston Iron Works v. Vulcan Process Co., 139 Minn. 180, 165 N. W. 1071; Dreyer Commission Co. v. Fruen Cereal Co., — Minn —, 182 N. W. 520. See § 8615.

(62) Force Bros. v. Gottwald, — Minn. —, 183 N. W. 356.

(64) Dreyer Commission Co. v. Fruen Cereal Co., — Minn. —, 182 N. W. 520 (sale of goods—profits on resale—contract for resale known to seller); Stronge Warner Co. v. H. Choate & Co., — Minn —, 182 N. W. 712 (breach of contract for separate operation of a department store in a general department store of another); Force Bros. v. Gottwald, — Minn. —, 183 N. W. 356 (breach of contract of landlord to make improvements—interruptions of business). See § 8615.

(65) Minneapolis etc. Ry. Co. v. Reeves Coal Co., 148 Minn. —, 181 N. W. 335.

LIQUIDATED DAMAGES

2537. When enforceable—A certified check filed with a bid to secure the execution of a contract held not liquidated damages. Barber Asphalt Paving Co. v. St. Paul, 136 Minn. 396, 162 N. W. 470. See § 6707.

(67) Nostdal v. Morehart, 132 Minn. 351, 157 N. W. 584 (land contract—stipulation that if title could not be made good the contract should be inoperative and only the consideration paid recovered); J. E. Hathaway & Co. v. United States, 249 U. S. 460; Wise v. United States, 249 U. S. 361. See § 10101.

(73) Johnson v. Dittes, 137 Minn. 175, 162 N. W. 1078.

EXEMPLARY DAMAGES

2540. When allowable—(77) Manion v. Jewel Tea Co., 135 Minn. 250, 160 N. W. 767; Burmaster v. Alwin, 138 Minn. 383, 165 N. W. 135;

Johnson v. Wolf, 142 Minn. 352, 172 N. W. 216; Daigle v. Summit Mercantile Co., 144 Minn. 178, 174 N. W. 830.

(79) Johnson v. Wolf, 142 Minn. 352, 165 N. W. 135.

2543. Wanton injury—(86) Daigle v. Summit Mercantile Co., 144 Minn. 178, 174 N. W. 830.

2545. Criminal acts—The fact that the act committed is a crime as well as a tort is not conclusive of the right to exemplary damages. But the relation of malice to crime is so close that criminality is proper to be considered in determining whether the elements necessary to exemplary damages are present. Muenkel v. Muenkel, 143 Minn. 29, 173 N. W. 184.

2547. Necessity of actual damages—(93) See Burmaster v. Alwin, 138 Minn. 383, 165 N. W. 135.

2548. Discretionary with jury—If there is any evidence warranting exemplary damages its force and weight rest exclusively with the jury. Johnson v. Wolf, 142 Minn. 352, 172 N. W. 216.

(94) Johnson v. Wolf, 142 Minn. 352, 172 N. W. 216.

2553. Who liable—A private corporation is liable for exemplary damages whenever a private individual would be liable for the same acts or omissions. Manion v. Jewel Tea Co., 135 Minn. 250, 160 N. W. 767 (slander).

A person under guardianship is liable if capable of entertaining a malicious intent. Dahlsie v. Hallenberg, 143 Minn. 234, 173 N. W. 433.

A principal is liable for exemplary damages for acts of his agent, in cases where he would be liable if he had committed the acts himself. Daigle v. Summit Mercantile Co., 144 Minn. 178, 174 N. W. 830.

2556. Evidence—Admissibility—The fact that the defendant was under guardianship when he committed the act is relevant but not conclusive. Dahlsie v. Hallenberg, 143 Minn. 234, 173 N. W. 433.

2557. Instructions—Where the verdict is for defendant error in refusing to permit the jury to consider exemplary damages is harmless. Nickolay v. Orr, 142 Minn. 346, 172 N. W. 222.

It has been held proper for the court to charge that the acts constituting a trespass were criminal offences. Muenkel v. Muenkel, 143 Minn. 29, 173 N. W. 184.

There was no error in instructing the jury that, in their discretion, they might award punitive damages as against both defendants. Daigle v. Summit Mercantile Co., 144 Minn. 178, 174 N. W. 830.

2558. Cases classified—An action for wrongful and malicious interference with the contract relations of others. Swaney v. Crawley, 133 Minn. 57, 157 N. W. 910.

Action against corporation for slander by employee. Manion v. Jewel Tea Co., 135 Minn. 250, 160 N. W. 767.

Malicious expulsion from a mutual benefit society. Burmaster v. Alwin, 138 Minn. 383, 165 N. W. 135.

(7) Johnson v. Wolf, 142 Minn. 352, 172 N. W. 216; Muenkel v. Muenkel, 143 Minn. 29, 173 N. W. 184.

(10) Dahlsie v. Hallenberg, 143 Minn. 234, 173 N. W. 433; Daigle v. Summit Mercantile Co., 144 Minn. 178, 174 N. W. 830.

(13) Nickolay v. Orr, 142 Minn. 346, 172 N. W. 222.

MEASURE OF DAMAGES FOR BREACH OF CONTRACT

2559. General rules—Rule of Hadley v. Baxendale—The measure of damages for a total breach of an entire contract by a rescission on the part of defendant is the loss of profits. John Newton Porter Co. v. Kiewel Brewing Co., 137 Minn. 81, 162 N. W. 887.

Expenses of procuring a contract are not ordinarily recoverable for a breach thereof. John Newton Porter Co. v. Kiewel Brewing Co., 137 Minn. 81, 162 N. W. 887.

The general rule applies though the motives prompting the breach were malicious or wrongful. Independent Grocery Co. v. Sun Ins. Co., 146 Minn. 214, 178 N. W. 582.

(21) Mascall v. Reitmeier, 145 Minn. 214, 176 N. W. 486.

(22) See McArdle v. Chicago etc. Ry. Co., 138 Minn. 379, 165 N. W. 232 (charge that party was entitled to recover damages which were the natural and "necessary" result of the breach of the contract held inaccurate but not prejudicial).

(23) Lewiston Iron Works v. Vulcan Process Co., 139 Minn. 180, 165 N. W. 1071; Dettis v. Western Union Tel. Co., 141 Minn. 361, 170 N. W. 334; Independent Grocery Co. v. Sun Ins. Co., 146 Minn. 214, 178 N. W. 582; Minneapolis etc. Ry. Co. v. Reeves Coal Co., 148 Minn. —, 181 N. W. 335 (general rule applicable to contracts of carriage); Dreyer Commission Co. v. Fruen Cereal Co., — Minn. —, 182 N. W. 520.

2561. Compensation the aim—(26) Mascall v. Reitmeier, 145 Minn. 214, 176 N. W. 486.

2562. Damages for tort and for breach of contract distinguished—(29) Independent Grocery Co. v. Sun Ins. Co., 146 Minn. 214, 178 N. W. 582.

2564. Difference between cost of performance and contract price—(32) See John Newton Porter Co., 137 Minn. 81, 162 N. W. 887.

2567b. Contracts for advertising—Plaintiff's assignor contracted to furnish defendant advertising space in street cars for a fixed period. Such a contract is governed by principles similar to those governing contracts of employment. Prima facie the measure of damages for breach of the contract by defendant is the price to be paid less the cost of furnishing the service. If other compensation for the space is obtained, or if it might with reasonable diligence have been obtained, the amount must be deducted. The burden is on defendant to make proof of facts entitling him to such deduction. Where the contract calls for merely a certain amount of space, as long as other like space remains undisposed of, the defendant has no right to deduction. Plaintiff was

not obliged, with a view to reducing his damage, to accept advertising at a less cost than it was charging for its other unsold space. Nor was plaintiff under obligation to defendant to maintain its rates as they were at the time the contract was made. Barron G. Collier, Inc. v. Kindy, 146 Minn. 279, 178 N. W. 584.

2568a. Repudiation of contract after part performance—Where a contract is repudiated after one of the parties has been to an expense in part performance, or in preparing for performance, such expense can be recovered, and also the net profits, if any are proved. But care must be used to make clear to the jury that, in determining the profits for which a recovery is to be allowed, the expenditures made must be added to the further expenditures that would have been necessary in order to have fully completed the whole contract, and that, unless the sum total be less than the contract price, damages for profits are eliminated. Periodical Press Co. v. Sherman-Elliott Co., 143 Minn. 489, 174 N. W. 516.

2569. Particular contracts—A contract of a railroad company to locate a station at a particular point. Grimes v. Minneapolis etc. Traction Co., 133 Minn. 442, 158 N. W. 719.

A contract to prepare and furnish special premium catalogues. John Newton Porter Co. v. Kiewel Brewing Co., 137 Minn. 81, 162 N. W. 887.

A contract by a landlord to make certain repairs. Warren v. Hodges, 137 Minn. 389, 163 N. W. 739.

A contract for the sale of a welding machine and not to sell any other machines of the same kind in the county of the buyer. Lewiston Iron Works v. Vulcan Process Co., 139 Minn. 180, 165 N. W. 1071.

A contract for the sawing of logs. Johnson v. Sinclair, 140 Minn. 436, 168 N. W. 181.

A promise to sell a second mortgage for a third party. Petrich v. Berkner, 142 Minn. 451, 172 N. W. 770.

A contract to print and furnish certain souvenir booklets. Periodical Press Co. v. Sherman-Elliott Co., 143 Minn. 489, 174 N. W. 516.

A contract to work out a road tax. Mascall v. Reitmeier, 145 Minn. 214, 176 N W. 486.

A contract to furnish advertising space in street cars. Barron G. Collier, Inc. v. Kindy, 146 Minn. 279, 178 N. W. 584.

A contract of a farm tenant to plow the land in the fall. Meisch v. Safranski, 147 Minn. 122, 179 N. W. 685.

A contract for transportation of coal. Minneapolis etc. Ry. Co. v. Reeves Coal Co., 148 Minn. —, 181 N. W. 335.

A contract for the separate operation of a department store in a general department store of another. Stronge Warner Co. v. H. Choate & Co., — Minn. —, 182 N. W. 712.

A contract for farming on shares. Glaubitz v. Meyer, — Minn. —, 182 N. W. 1002.

Contract of lessor to make improvements in leased premises. Force Bros. v. Gottwald, — Minn. —, 183 N. W. 356.

(39) Germain v. Great Northern Lumber Co., 143 Minn. 311, 173 N. W. 667.

MEASURE OF DAMAGES FOR TORT

2570. In general—Courts must exercise much circumspection in sustaining large verdicts for personal injuries where no injury can be seen and the testimony of the person injured is the only evidence of its extent. Haugen v. Northern Pacific Ry. Co., 132 Minn. 54, 155 N. W. 1058.

The supreme court has not and cannot set a standard as to the limit of damages to be awarded for loss of an arm or leg. Kelley v. Chicago, B. & Q. R. Co., 142 Minn. 44, 170 N. W. 886.

Aggravation of injury by accident. 9 A. L. R. 255.

(64) Swaney v. Crawley, 133 Minn. 57, 157 N. W. 910. See § 2528.

(66) Kelley v. Chicago, B. & Q. R. Co., 142 Minn. 44, 170 N. W. 886; Stapp v. Jerabek, 144 Minn. 439, 175 N. W. 1003.

2570a. Existence of insurance—The existence of insurance covering death, injury or loss, does not affect the measure of damages for a tort, and evidence thereof is inadmissible to defeat or diminish a recovery. Evans v. Chicago etc. Ry. Co., 133 Minn. 293, 158 N. W. 335; State v. District Court, 134 Minn. 28, 158 N. W. 791; Wentworth v. Butler, 134 Minn. 382, 159 N. W. 828.

2571. Persons in diseased or weakened condition—If a person has a latent disease which is developed into activity by an assault he may recover damages for such development. Young v. St. Paul City Ry. Co., 142 Minn. 10, 170 N. W. 845.

(67) See Watson v. Rinderknecht, 82 Minn. 235, 84 N. W. 798.

2572. Expense of medical treatment—The expenses of medical attention is a proper element of damage. Patterson v. Blatti, 133 Minn. 23, 157 N. W. 717.

2573. Negligent medical treatment—(69) See 8 A. L. R. 506.

2573a. Expenses of trip for health—In an action for personal injuries it has been held that the expenses of a trip to California to restore the health of the plaintiff could not be recovered. Benoe v. Duluth St. Ry. Co., 138 Minn. 155, 164 N. W. 662.

2574a. Tuberculosis—The evidence sustains a finding that the tuberculosis from which the plaintiff is suffering was the proximate result of the negligent failure of the telephone company properly to heat the premises in which she worked for the telegraph company. Hansman v. Western Union Tel. Co., 144 Minn. 56, 174 N. W. 434.

2575. Injury to nervous system—(71) Haugen v. Northern Pacific Ry. Co., 132 Minn. 54, 155 N. W. 1058.

2576. Loss of employment—The value of the services of the plaintiff, her inability to perform her usual work at all for a time, and the incapacity resulting from her injury, may be taken into consideration as bearing on damages, though she was working for her father in his business

and lived at home and received no wages. Stenshoel v. Great Northern Ry. Co., 142 Minn. 14, 170 N. W. 695.

(72) Burch v. Hoy & Elzy Co., 131 Minn. 475, 155 N. W. 767; Patterson v. Blatti, 133 Minn. 23, 157 N. W. 717; Stenshoel v. Great Northern Ry. Co., 142 Minn. 14, 170 N. W. 695; 9 A. L. R. 510.

(73) See Stenshoel v. Great Northern Ry. Co., 142 Minn. 14, 170 N. W. 695.

2577. Injury to or destruction of crops or trees—In an action for damages to farm lands from water, held proper to prove the depreciation of rental value by showing the value of certain hay stumpage, wholly lost because of the water, and also the value of the pasturage lost. Peterson v. Northern Pacific Ry. Co., 132 Minn. 265, 156 N. W. 121.

Damage to crops may be estimated by taking the difference between the value of the land with the crop and without it. Koch v. Speiser, 145 Minn. 227, 176 N. W. 754.

(75) Peterson v. Northern Pacific Ry. Co., 132 Minn. 265, 156 N. W. 121.

2577b. Injury to vehicles—Automobiles—Damages for temporary loss of use of a damaged pleasure vehicle. 34 Harv. L. Rev. 330.

Injury or destruction of commercial vehicle. 4 A. L. R. 1350.

2577c. Injury to buildings—Cost of repairs or rebuilding—See 7 A. L. R. 277.

2578. Particular torts—For wrongful interference with the contract relations of others. Swaney v. Crawley, 133 Minn. 57, 157 N. W. 910.

Loss or conversion of, or injury to, household goods or wearing apparel. L. R. A. 1917D, 495.

Destruction of or injury to buildings. L. R. A. 1917A, 367.

(80) Plaude v. Mississippi & Rum River Boom Co., 141 Minn. 170, 169 N. W. 600.

PLEADING

2579. Necessity of pleading—In general—When attorney's fees are recoverable they are not a distinct cause of action or a part of the cause of action alleged, and should not be submitted with the issues upon which the liability of defendant depends. They do not accrue until the services are performed. Then, upon application to the court, their value may be determined and they may be allowed. First State Bank v. Utman, 136 Minn. 103, 161 N. W. 398.

2580. General damages—In actions for personal injury evidence of particular injuries is admissible under a general allegation of injury. Seith v. Minneapolis etc. Traction Co., 133 Minn. 367, 158 N. W. 611; Huettner v. Minneapolis etc. Traction Co., 133 Minn. 368, 158 N. W. 611. See Dunnell, Minn. Pl. (2 ed.) §§ 623, 627, 1250.

2581. Special damages—(86) Swaney v. Crawley, 133 Minn. 57, 157 N. W. 910 (action for interference with contract relations of others);

Howe v. Gray, 144 Minn. 122, 174 N. W. 612 (breach of contract to purchase land—claim for interest on the purchase price and for taxes paid by the vendor must be specially pleaded); Griebe v. Hagen, — Minn. —, 184 N. W. 19 (breach of contract by landlord to make repairs or improvements).

(87) Glaubitz v. Meyer, — Minn. —, 182 N. W. 1002 (complaint for damages for breach of a farm contract held to plead special damages sufficiently as against an objection first raised on the trial).

2584. Matter in mitigation—(91) See Anderson v. Willson, 132 Minn. 364, 157 N. W. 582.

See §§ 533, 5551.

2585. Matter in aggravation—Matter in aggravation of damages may be pleaded. Mullen v. Devenney, 136 Minn. 343, 162 N. W. 448.

2586. Exemplary damages—(94) Northern Timber Products Co. v. Stone-Ordean-Wells Co., 143 Minn. 200, 173 N. W. 439.

ASSESSMENT

2590. Assessment by jury—Statute—Compensatory and exemplary damages are assessable in a lump sum. Muenkel v. Muenkel, 143 Minn. 29, 173 N. W. 184.

2591. Proof—Expert testimony—In some cases medical or expert testimony is not necessary to enable a jury to determine the nature of an injury or its cause. In other cases such testimony is necessary to any intelligent understanding of the injured person's condition and prospects. Haugen v. Northern Pacific Ry. Co., 132 Minn. 54, 155 N. W. 1058.

Though evidence that the plaintiff carried accident insurance, offered in connection with proof that he was feigning his injuries, and for the purpose of showing a motive for feigning and his interest in doing so, is competent, a measure of discretion in receiving or rejecting it rests with the trial court, and its rejection in this case is held not reversible error. Wentworth v. Butler, 134 Minn. 382, 159 N. W. 828.

In an action for personal injury the plaintiff must prove the causal connection between the disability at the time of the trial and the injury received in the accident. Ehrler v. Chicago, B. & Q. R. Co., 137 Minn. 245, 163 N. W. 506.

The plaintiff was an apprenticed bricklayer. His apprenticeship would expire six months after his injury. It was not error to permit proof of the wages of a journeyman bricklayer in the community as bearing on damages. Kalland v. Brainerd, 141 Minn. 119, 169 N. W. 475.

In a suit for personal injuries the burden is on the plaintiff to show with reasonable certainty the nature, extent and probable duration of his injuries. Lowe v. Armour Packing Co., — Minn. —, 182 N. W. 610.

To justify the recovery of special damages for the breach of a contract there must be proof that the defendant had knowledge of facts

rendering him liable therefor. Glaubitz v. Meyer, — Minn. —, 182 N. W. 1002.

2592. Against several tortfeasors—The fact that the court gave the jury no opportunity to assess exemplary damages against several defendants separately, held not a ground for a reversal in the absence of a request therefor. Muenkel v. Muenkel, 143 Minn. 29, 173 N. W. 184.

Where no request for separate verdicts is made, either as to compensatory or punitive damages, a defendant who did not actively participate in the assault cannot complain because he was jointly held with his co-defendant for the entire amount of damages awarded. Daigle v. Summit Mercantile Co., 144 Minn. 178, 174 N. W. 830.

(10) Wrabek v. Suchomel, 145 Minn. 468, 177 N. W. 764. See Muenkel v. Muenkel, 143 Minn. 29, 173 N. W. 184.

2593. In gross—Compensatory and exemplary damages are assessable in a lump sum. Muenkel v. Muenkel, 143 Minn. 29, 173 N. W. 184. See § 2592.

2594. Difficulty of assessment—(12) See Mascall v. Reitmeier, 145 Minn. 214, 176 N. W. 486.

EXCESSIVE AND INADEQUATE DAMAGES

2595. Precedents—Increased cost of living—In determining whether a verdict is excessive or not regard may be had to the decreased purchasing power of money at the present time. Drimel v. Union Power Co., 139 Minn. 122, 165 N. W. 1058; Rasten v. Calderwood, 145 Minn. 493, 175 N. W. 1007; Hillstrom v. Mannheimer Bros., 146 Minn. 202, 178 N. W. 881. See 3 A. L. R. 610.

2596. Held excessive—(14) Haugen v. Northern Pacific Ry. Co., 132 Minn. 54, 155 N. W. 1058 (woman—no bones broken—mutilation—evidence of injury slight—right arm stiff—back lame—memory claimed to be affected—no competent evidence of future consequences—verdict, $3,000); Grant v. Minneapolis etc. Traction Co., 136 Minn. 155, 161 N. W. 400 (brakeman—injuries serious, painful and permanent—clavicle or collar bone dislocated at left shoulder—protrudes upward—condition cannot be remedied—lifting and heavy manual labor with left arm permanently impossible—verdict, $17,500—reduced by trial court to $10,000—reduced on appeal to $7,500); Ehrler v. Chicago, B. & Q. R. Co., 137 Minn. 245, 163 N. W. 506 (fireman on locomotive—sprained and dislocated wrist—bad healing—inflammation—pus—operation necessary—second operation—blood poisoning in arm—ankylosis of wrist bones—wrist and hand practically useless—condition permanent—verdict $15,500—reduced by trial court to $12,000—reduced on appeal to $10,000); Powers v. Wilson, 138 Minn. 407, 165 N. W. 231 (woman twenty-nine years old—earning $30 a month—injuries serious—spiral fracture of upper end of right femur near hip—one leg permanently shortened—much pain—not incapacitated from earning a living at her work—verdict

$12,500—reduced on appeal to $10,000); Holland v. Yellow Cab Co., 144 Minn. 475, 175 N. W. 536 (young woman—injury to sacro-iliac joint—verdict, $2,775—reduced by trial court to $2,000—so reduced held not excessive on appeal); York v. York, 146 Minn. 442, 179 N. W. 212 (farm laborer fifty-seven years old—blow on eye causing traumatic cataract and blindness—blow not sole cause of blindness—verdict, $3,250—reduced on appeal to $1,400); Lowe v. Armour Packing Co., — Minn. —, 182 N. W. 610 (woman—contusion on forehead—two teeth loosened—bruise on right knee—nervousness—inability to do housework six months after accident—no structural, functional or permanent injuries—verdict $2,500—reduced to $1,500 on appeal); Burchfield v. West, — Minn. —, 182 N. W. 954 (woman seventy years old—two ribs broken—pleural cavity of lung punctured—verdict, $2,500—reduced on appeal to $1,700); Appleby v. Payne, — Minn. —, 182 N. W. 901 (freight conductor—paralysis of left arm and leg—in hospitals eight months—in wheel chair at trial—permanency of paralysis of arm fairly proved—permanency of paralysis of leg a matter of speculation and conjecture—verdict, $30,000—new trial granted on appeal on the issue of damages).

2597. Held not excessive—(15) Burch v. Hoy & Elzy Co., 131 Minn. 475, 155 N. W. 767 (bricklayer—unable to work for a year after accident—able to work only half-time second year—stiff finger on right hand—verdict, $4,000); Smith v. Great Northern Ry. Co., 132 Minn. 147, 153 N. W. 513, 155 N. W. 1040 (brakeman—left leg badly squeezed—wound not entirely healed twenty months after accident—verdict, $2,100); Jacobson v. Chicago etc. Ry. Co., 132 Minn. 181, 156 N. W. 251 (farmer—impacted fracture of the neck of the femur of left leg—injury to sacro-iliac joint—curvature of spine—shortening of leg—verdict, $10,000); Riley v. Minneapolis & St. Louis R. Co., 132 Minn. 195, 156 N. W. 272 (switchman—injury to neck and spine—wryneck—injuries permanent—verdict, $7,116); Seith v. Minneapolis etc. Traction Co., 133 Minn. 367, 158 N. W. 611 (woman—wrench or sprain of sacro-iliac joint—contusion of spine—traumatic sciatica—nervous shock—injury to stomach—permanent disability—verdict, $3,000); Huettner v. Minneapolis etc. Traction Co., 133 Minn. 368, 158 N. W. 611 (woman—large gash in head—eyesight permanently injured—three ribs fractured—backbone and spine injured—displacement of womb—permanent disability—verdict, $5,500); Jones v. St. Paul, 133 Minn. 464, 158 N. W. 251 (laborer on streets—foot burned by tar—verdict, $1,800); Anderson v. St. Cloud, 133 Minn. 467, 158 N. W. 417 (woman fell on icy sidewalk—verdict, $1,500); Cramer v. Chicago etc. Ry. Co., 134 Minn. 61, 158 N. W. 796 (switchman—twenty-seven years old—injury to spinal column and nerves thereof—hemorrhage into canal of spine—cauda equina—complications affecting other parts of body—injury permanent—verdict, $10,000); Beck v. Chicago etc. Ry. Co., 134 Minn. 363, 159 N. W. 831 (farmer stepped on nail—gangrene supervened and leg was amputated below knee—verdict, $5,800); Wentworth v. Butler, 134 Minn. 382, 159 N. W. 828 (plaintiff thirty-nine years old—receiving good wages—injury

not permanent—prevented from working about five months—verdict, $750); Holt v. Ten Broeck, 134 Minn. 458, 159 N. W. 1073 (woman burned on hip by application of X-rays—in hospital six months—considerable pain—unable to work at time of trial—sore still open—verdict, $2,500); Wien v. Flemming, 134 Minn. 477, 159 N. W. 1095 (woman thrown to pavement by automobile—possible internal injuries—verdict, $1,500); Manning v. Chicago G. W. R. Co., 135 Minn. 229, 160 N. W. 787 (locomotive fireman forty years old—earning $110 a month—tibia of right leg broken about three inches below knee and split up into the knee joint—T fracture—imperfect union—bone twisted—foot, turned inward—leg shortened—deformity permanent—permanently incapacitated to work at trade—future pain probable—falling of arch of right foot—verdict, $15,000); Eckert v. Chicago etc. Ry. Co., 135 Minn. 372, 160 N. W. 1020 (man twenty-eight years old earning $28 a week—right arm paralyzed and atrophied—compound fracture of left leg between knee and hip joint—leg shortened six inches—shortening of thigh—union fibrous—great deformity—ankylosis of hip joint and knee—movement at knee and hip slight—no present use of leg—injuries permanent—fracture of skull above right eye and some injury to top of head—hearing in one ear defective—sight of right eye affected—much suffering—in hospital nine months—verdict, $35,000); Killean v. St. Cloud, 136 Minn. 66, 161 N. W. 260 (man earning $125 per month—fracture of two ribs—partial dislocation of left shoulder—injury to ligaments that connect left arm to shoulder—use and movement of left arm permanently impaired—laid up three months—has not earned full salary since injury—verdict, $1,600); Riser v. Smith, 136 Minn. 417, 162 N. W. 520 (young man—foot crushed—operation necessary and some bone removed—injury permanent—total loss of earning for a year—hospital charges and medical attendance about $300—earning capacity lessened for some time—verdict, $2,000); Archer v. Skahen, 137 Minn. 432, 163 N. W. 784 (plaintiff severely injured by being struck by an automobile—verdict, $7,500); Smith v. Great Northern Ry. Co., 137 Minn. 473, 163 N. W. 1070 (freight conductor—traumatic neurosis—verdict, $20,000, reduced by trial court to $12,000—so reduced not excessive); Thoorsell v. Virginia, 138 Minn. 55, 163 N. W. 976 (young man—fracture of thigh bone—permanent shortening of leg—much pain—verdict, $2,500); Larson v. Wisconsin R. L. & P. Co., 138 Minn. 158, 164 N. W. 666 (woman twenty-nine years old—hair dresser—dislocation of right ankle—ligaments torn loose—great pain—in bed four weeks—care of physician thirteen weeks—injury permanent—verdict, $2,060); Schmidt v. Minneapolis, 138 Minn. 193, 164 N. W. 801 (woman—articular surface of ankle bone fractured and thrown or shoved back—considerable pain—slight injury to head not permanent—verdict, $2,500); Otto v. Duluth St. Ry. Co., 138 Minn. 312, 164 N. W. 1020 (employee of electric company—earning $100 a month—permanent and serious injury rendering him unfit to pursue his trade—verdict, $4,500); Theisen v. Durst, 138 Minn. 353, 165 N. W. 128 (woman—teacher of oratory and dramatic

art—fracture at base of skull and permanent injury to brain—other severe injuries from which she had recovered—ability to pursue calling permanently impaired—verdict, $12,750); Notaro v. Mandel, 138 Minn. 422, 165 N. W. 267 (young man—injury severe necessitating painful surgical treatment—full recovery not yet attained—medical and hospital expenses over $200—verdict, $1,500); Chapko v. Chicago, B. & Q. R. Co., 138 Minn. 470, 164 N. W. 366 (injuries disclosed by X-rays—testimony of medical experts contradictory—verdict, $11,500); Moscrip v. Great Northern Ry. Co., 139 Minn. 494, 165 N. W. 1074 (boy—skin and muscle covering on right hip torn off—hole in leg—little finger on right hand broken and muscles of hand torn—skin back of right ear torn—necessary to use catheter for several days—necessary to graft skin—verdict, $6,000); Althoff v. Torrison, 140 Minn. 8, 167 N. W. 119 (woman—serious and permanent injury to right knee and ankle—serious injury to spine and sacro-iliac joint affecting nervous system—verdict, $7,500); McLain v. Chicago G. W. R. Co., 140 Minn. 35, 167 N. W. 349 (locomotive engineer fifty-five years old—injury to shoulder—verdict, $10,000); Carr v. Minneapolis etc. Ry. Co., 140 Minn. 91, 167 N. W. 299 (matron in railroad station—hand scratched—gangrene set in—open, running sore—painful, discolored and offensive—several minor operations—medical care required for a long time—no substantial improvement at time of trial a year and a half after accident—verdict, $5,000); Carson v. Turrish, 140 Minn. 445, 168 N. W. 349 (husband and wife injured in automobile accident—wife severely bruised—superficial scalp wounds—one thumb broken—nose flattened—right eye injured—neurasthenic condition—unconscious for a day—in hospital two weeks—permanent facial disfigurement—double vision in eye probably permanent—verdict, $8,125—husband not seriously injured—pain in hips probably due to slight injury to pelvic bones—verdict, $2,000); Hefferon v. Reeves, 140 Minn. 505, 167 N. W. 423 (blind man struck by automobile—injuries not serious—some interruption of occupation—verdict, $800); Robinson v. Minneapolis etc. Ry. Co., 141 Minn. 28, 169 N. W. 146 (brakeman twenty-five years old—injuries very serious and permanent—unable to maintain erect position without pain unless supported—permanently unable to work on his feet—verdict, $15,000); Fry v. Minneapolis etc. Ry. Co., 141 Minn. 32, 169 N. W. 147 (head brakeman on freight train—thirty-nine years old—left arm crushed and bones broken—never united—some bones in shoulder broken—in hospital seven weeks—several operations—blood poison—running sores on arm—drainage tubes used for long time—intense pain up to trial—arm permanently useless—more or less pain always likely—verdict, $15,000); Axelson v. Great Northern Ry. Co., 141 Minn. 179, 169 N. W. 600 (passenger on train thrown by collision against the wall striking his temple—knocked unconscious—for time had spells of unconsciousness—left arm and leg paralyzed—in hospital nearly a year—hallucinations and occasional epileptic fits due to irritation of brain cortex—injury severe and probably permanent—expenses and loss of time to trial $3,500—verdict, $20,000); Kelley v. Chicago, B. & Q. R. Co., 142 Minn.

44, 170 N. W. 886 (freight conductor thirty-two years old earning $1,500 or $1,600 a year—lost left arm a few inches from shoulder—head, side and legs badly bruised but no permanent disability—permanently disabled from railroading—verdict, $13,000); Draves v. Minneapolis etc. R. Co., 142 Minn. 321, 172 N. W. 128 (woman—entire side of face, including muscles and skin and small pieces of broken bone, torn out—cheek bone crushed—left elbow disjointed and radius broken—intense and prolonged suffering—serious injury to brain tissue—medical and hospital expenses exceeding $900—verdict, $10,870); Klick v. Great Northern Ry. Co., 142 Minn. 498, 172 N. W. 958 (employee of railroad—nature and character of injuries in dispute—verdict, $6,500); Hansman v. Western Union Tel. Co., 144 Minn. 56, 174 N. W. 434 (woman twenty-seven years old—telegraph operator—earning $40 a month—exposure to cold causing tuberculosis—verdict, $18,500); Podgorski v. Kerwin, 144 Minn. 313, 175 N. W. 694 (workman employed in delivering coal—injury serious—verdict, $7,000); Allen v. Johnson, 144 Minn. 333, 175 N. W. 545 (clergyman fifty-seven years old—comminuted fracture of right leg—considerable suffering—good recovery—verdict, $6,000); Strapp v. Jerabek, 144 Minn. 439, 175 N. W. 1003 (young man thrown from motor cycle—evidence as to nature and extent of injuries conflicting—verdict, $3,485); Offerman v. Yellow Cab Co., 144 Minn. 478, 175 N. W. 537 (injury not serious—verdict, $1,200); Maynard v. Keough, 145 Minn. 26, 175 N. W. 891 (child bitten by vicious dog—injury painful—permanent scar on cheek—verdict, $800); Gibbs v. Almstrom, 145 Minn. 35, 176 N. W. 173 (city salesman twenty-seven years old—expenses $300—disabled six weeks but lost no salary—painful lacerations and bruises—bridge of nose broken—disfigurement and defect of speech—verdict, $2,600); McGillivray v. Great Northern Ry. Co., 145 Minn. 51, 176 N. W. 200 (fireman on passenger train—derailment—some of the injuries definite and undisputed—others subjective and involved in uncertainty—verdict, $6,500); Erickson v. W. J. Gleason & Co., 145 Minn. 64, 176 N. W. 199 (boy—thumb and index finger of right hand necessarily amputated—left eye injured and permanently impaired—verdict, $1,500); Rasten v. Calderwood, 145 Minn. 493, 175 N. W. 1007 (boy thirteen years old—run over by automobile and seriously injured—verdict, $11,500); Geiger v. Sanitary Farm Dairies, 146 Minn. 235, 178 N. W. 501 (man sixty-three years old earning $2.30 a day—head cut—collar bone broken—vicious union, bones uniting at angle—unable to raise right arm—shoulder joint about 40 per cent function—permanent paralysis of facial nerves—headache and dizziness—verdict, $3,500); Hillstrom v. Mannheimer Bros., 146 Minn. 202, 178 N. W. 881 (traveling salesman forty-two years old earning $7,600 a year—fracture of skull—in hospital a month—at time of trial six months after accident was weak—weak heart action and low blood pressure—below normal weight—unable to work but injuries probably not permanent—verdict, $12,000); Unmacht v. Whitney, 146 Minn. 327, 178 N. W. 886 (married woman twenty-six years of age knocked down and bruised by automobile—separation of sacro-iliac joint—nervous shock—at time of trial eight

months after accident she was hysterical and anaemic—verdict, $5,500); Gibson v. Gray Motor Co., 147 Minn. 134, 179 N. W. 729 (actions by husband and wife tried together—wife suffered a fractured skull resulting in very serious permanent injuries—husband incurred large expense for her care and treatment—verdict, for husband, $3,000; verdict, for wife, $10,000); Elvidge v. Stronge & Warner Co., 148 Minn. — 181 N. W. 346 (young man—before accident in perfect health—struck over heart—angina pectoris—incurable—verdict, $8,032.75); McKellar v. Yellow Cab Co., — Minn. —, 181 N. W. 348 (woman—cut through eyelid—facial disfigurement—eyesight permanently impaired—shock to nervous system—verdict, $4,000); Clark v. Goche, — Minn. —, 182 N. W. 436 (boy fourteen years old—loss of arm below elbow—verdict. $4,500).

DEAD BODIES

2599. Autopsy without consent—It is no defence to an action to recover damages caused by an autopsy performed on the body of the daughter of plaintiff, without the consent of the next of kin, that defendant, as the attending physician was unable to ascertain the cause of death and performed the autopsy for that purpose so as to be able to give a certificate as required by law stating the cause of death. Woods v. Graham, 140 Minn. 16, 167 N. W. 113.

(20) 12 A. L. R. 342; 2 Minn. L. Rev. 227; Ann. Cas. 1918D, 733.

DEATH BY WRONGFUL ACT

2600. Right of action statutory—The right of action given by the statute is a new and distinct right of action, not a survival of the right of action which the injured person had before his death to recover damages. Keiper v. Anderson, 138 Minn. 392, 165 N. W. 237.

(21) See 2 Minn. L. Rev. 292.

See § 6022b (under the federal Safety Appliance Act).

2603. Jurisdiction—Conflict of laws—The statute is applicable to maritime torts and may be enforced in the federal admiralty courts. Lindstrom v. Mutual Steamship Co., 132 Minn. 328, 335, 156 N. W. 669.

Where the action is under a foreign statute the measure of damages is governed by such statute. Bowers v. Chicago etc. Ry. Co., 141 Minn. 385, 170 N. W. 226. See Digest, § 1550.

There is a right of action under the federal Safety Appliance Act though the train movement in which the decedent was engaged was intrastate. Kraemer v. Chicago & N. W. Ry. Co., 148 Minn. —, 181 N. W. 847. See § 6022d.

(28) State v. District Court, 140 Minn. 494, 168 N. W. 589; State v. Probate Court, — Minn. —, 184 N. W. 43. See 32 Harv. L. Rev. 172.

2606. For what action lies—An action will lie under the statute where the wrongful act causing the death constitutes a breach of contract, as,

for example, a contract to heat leased premises. It is not essential that the wrongful act be a tort in the sense of a wrong wholly independent of contract. Keiper v. Anderson, 138 Minn. 392, 165 N. W. 237. See 31 Harv. L. Rev. 800.

2607. Who may maintain action—A foreign executor or administrator may maintain an action in this state. State v. District Court, 140 Minn. 494, 168 N. W. 589.

An administrator may be appointed in this state to prosecute an action here on a claim arising under a foreign statute, though the claim is the only asset of the estate in this state. The fact that an administrator has been appointed in another state and an action on the death claim commenced there does not go to the jurisdiction of the probate court of this state. State v. Probate Court, — Minn. —, 184 N. W. 43.

(36) See L. R. A. 1916E, 118.

2608. Who are beneficiaries—(38) See L. R. A. 1916E, 118.

2611. Compromise and settlement—Releases—(49) See Kokesh v. Price, 136 Minn. 304, 161 N. W. 715.

2615. Pleading—The complaint alleged negligence in the performance by a landlord of his contract with a tenant to keep the leased premises heated, causing the death of the tenant. Though the action is based on the contract and is therefore an action on contract, it is held that the complaint states a cause of action to recover damages for the tenant's death as caused by the wrongful acts and omissions of defendants. Keiper v. Anderson, 138 Minn. 392, 165 N. W. 237.

An amendment of a complaint so as to change the action from one under the federal Employer's Liability Act to one under the statutes of Iowa, held not to introduce a new cause of action. Nash v. Minneapolis & St. Louis R. Co., 141 Minn. 148, 169 N. W. 540.

(56) Haack v. Coughlin, 134 Minn. 78, 158 N. W. 908; McCrossin v. Noyes Bros & Cutler, 143 Minn. 181, 173 N. W. 566.

2616. Defences—Contributory negligence—Though contributory negligence on the part of deceased is a defence there is a strong presumption that he was in the exercise of due care at the time of the accident. The question of contributory negligence in such cases is always for the jury, unless the evidence shows such negligence conclusively. Sheey v. Minneapolis & St. Louis R. Co., 132 Minn. 307, 156 N. W. 346; Falk v. Chicago & N. W. Ry. Co., 133 Minn. 41, 157 N. W. 904; Gahagen v. Geo. A. Hormel & Co., 133 Minn. 356, 158 N. W. 618; Bowers v. Chicago etc Ry. Co, 141 Minn. 385, 170 N. W. 226; Praught v. Great Northern Ry. Co., 144 Minn. 309, 175 N. W. 998; Guhl v. Warroad Stock, Grain & Produce Co., 147 Minn. 44, 179 N. W. 564.

Evidence held to show contributory negligence as a matter of law. Darrington v. Chicago & N. W. Ry. Co., 134 Minn. 30, 158 N. W. 727 (walking on narrow railroad bridge where trains were frequent); Knapp v. Northern Pacific Ry. Co., 139 Minn. 338, 166 N. W. 409 (decedent drove his automobile over a railroad track without looking for trains);

Wesler v. Chicago etc. Ry. Co., 143 Minn. 159, 173 N. W. 565 (decedent spurted his automobile across a railroad track attempting to cross in front of a train in plain sight). See § 8189.

The courts are divided on the question whether in an action brought by an administrator the contributory negligence of a beneficiary is a bar to recovery to the extent that he will share in the amount recovered. Where, however, only one of several beneficiaries is negligent, his negligence is not a bar to all recovery, and where no apportionment or reduction to the extent of his interest is asked for, full recovery will be allowed. Kokesh v. Price, 136 Minn. 304, 161 N. W. 715.

Contributory negligence of the sole beneficiaries probably bars a recovery. Drimel v. Union Power Co., 139 Minn. 122, 165 N. W. 1058.

Parents of a girl between five and six years old held not guilty of contributory negligence in allowing her to play about the house on a farm. Drimel v. Union Power Co., 139 Minn. 122, 165 N. W. 1058.

The eyewitness of the accident observed the conduct of the person killed by the alleged negligence of the defendant for so few moments before the accident that an instruction was not warranted that no inference of due care for his own safety could be considered by the jury. Bowers v. Chicago etc. Ry. Co., 141 Minn. 385, 170 N. W. 226.

In an action under G. S. 1913, § 3848, prohibiting the employment of children under sixteen in certain work, the child's contributory negligence or assumption of risk is not a defence. Neither is a misrepresentation of the child's age by the child or his parents. Dusha v. Virginia & Rainy Lake Co., 145 Minn. 171, 176 N. W. 482.

If the deceased was intoxicated, that fact should be considered by the jury in connection with all the other facts and circumstances in determining whether he was guilty of contributory negligence, but did not in itself establish such negligence. Defendants' requests might have led the jury to give undue effect to the fact of intoxication, if they found that the deceased was intoxicated, and the court did not err in refusing to give them. Guhl v. Warroad Stock, Grain Produce Co., 147 Minn. 44, 179 N. W. 564.

(61) Kokesh v. Price, 136 Minn. 304, 161 N. W. 715; Kaiser v. Minneapolis St. Ry. Co., 147 Minn. 278, 181 N. W. 569. Contra in an action under G. S. 1913, § 3848. Dusha v. Virginia & Rainy Lake Co., 145 Minn. 171, 176 N. W. 482.

(65) Contra in an action under G. S. 1913, § 3848. Dusha v. Virginia & Rainy Lake Co., 145 Minn. 171, 176 N. W. 482.

2617. Damages under state act—When the beneficiary is the widow of the decedent the recovery is not as a matter of law limited to nominal damages though the decedent had failed to furnish her support for several years. Falk v. Chicago & N. W. Ry. Co., 133 Minn. 41, 157 N. W. 904.

The amount of damages recoverable is not affected by the fact that the decedent had insurance from which his surviving spouse or next of kin receives benefit. State v. District Court, 134 Minn. 28, 158 N. W. 791.

Children not presently dependent may be taken into account in assess-

ing damages. Zenner v. Great Northern Ry. Co., 135 Minn. 37, 159 N. W. 1087.

In considering cases as precedents the present decreased pruchasing power of the dollar should be given weight. Drimel v. Union Power Co., 139 Minn. 122, 165 N. W. 1058. See § 2595.

The charge properly limited the damages to the pecuniary loss sustained by the next of kin, and cannot be construed as authorizing damages to next of kin who had sustained no pecuniary loss. Guhl v. Warroad Stock, Grain & Produce Co., 147 Minn. 44, 179 N. W. 564.

(66) Falk v. Chicago & N. W. Ry. Co., 133 Minn. 41, 157 N. W. 904 (beneficiary widow of decedent—decedent fifty-three years old, a tailor by trade—drunkard—had furnished wife no support for years—verdict for $700 sustained); Price v. Great Northern Ry. Co., 134 Minn. 89, 158 N. W. 825 (decedent a track repairer in railroad yards—verdict, $5,750); Hillstrom v. St. Paul, 134 Minn. 451, 159 N. W. 1076 (decedent a boy fourteen years old—verdict for $5,000, reduced to $3,500, sustained); Zenner v. Great Northern Ry. Co., 135 Minn. 37, 159 N. W. 1087 (decedent a farmer sixty-one years old—beneficiaries, a daughter thirteen years old, a son twenty years old and four married sons and daughters—verdict for $4,585 sustained); Posch v. Lion Bonding & Surety Co., 137 Minn. 169, 163 N. W. 131 (decedent a married man—farm laborer—big, strong man with a life expectancy of twenty-six or twenty-seven years—habitual drunkard—verdict, $2,000 held not excessive); Drimel v. Union Power Co., 139 Minn. 122, 165 N. W. 1058 (decedent a girl between five and six years old—verdict, $4,000—reduced by trial court to $3,400—so reduced held not excessive on appeal); Johnson v. Norman, 147 Minn. 61, 179 N. W. 560 (decedent a girl eight years old—verdict for $1,600 sustained); Rothenberger v. Powers Fuel etc. Co., 147 Minn. —, 181 N. W. 641 (decedent a boy eight years old—verdict for $2,500 held not excessive); L. R. A. 1916C, 820.

See L. R. A. 1916D, 187 (loss of consortium as element of damage).

2617a. Damages under federal act—Damages cannot be recovered for pain and suffering of the decedent substantially contemporaneous with his death or incident thereto. Great Northern Ry. Co. v. Capital Trust Co., 242 U. S. 144, reversing Capital Trust Co. v. Great Northern Ry. Co., 127 Minn. 144, 149 N. W. 14, 128 Minn. 537, 150 N. W. 1102.

Where the decedent was a minor there need be no affirmative proof of the pecuniary loss resulting to his father to justify submitting the case to the jury. Minneapolis & St. L. R. Co. v. Gotschall, 244 U. S. 66, affirming Gotschall v. Minneapolis & St. L. R. Co., 125 Minn. 525, 147 N W. 430, 130 Minn. 33, 153 N. W. 120.

Decedent was a switchman, leaving as next of kin, a widow and three young children. A verdict for $20,000 was held excessive on appeal and reduced to $16,000. Castle v. Union Pacific Ry. Co., 139 Minn. 396, 166 N. W. 767.

2618. Necessity of proving damages—(68) Falk v. Chicago & N. W. Ry. Co., 133 Minn. 41, 157 N. W. 904.

2619. Evidence as to damages—Held not error to exclude a letter written by a daughter of the deceased, containing an admission as to the support given by the deceased, in view of the charge of the court that no damages could be awarded upon the theory that the daughter would receive a benefit from the continuance of the life of her father. Falk v. Chicago & N. W. Ry. Co., 133 Minn. 41, 157 N. W. 904.

Presumptions and proof of pecuniary loss. L. R. A. 1918C, 1056, 1071, 1080, 1087, 1096, 1111, 1122.

2620. Proximate cause—Law and fact—The deceased was struck by an automobile. Nearly a year thereafter he died of interstitial nephritis. Whether his death was proximately caused by the accident held a question for the jury. Turner v. Minneapolis St. Ry. Co., 140 Minn. 248, 167 N. W. 1041.

Evidence held to justify a finding that decedent was killed by being run over by an automobile of defendant and not by jumping from a carriage. Bursaw v. Plenge, 144 Minn. 459, 175 N. W. 1004.

A surgical operation may be the proximate cause of death by aggravating a diseased condition. Clark v. George, 148 Minn. —, 180 N. W. 1011.

(72) Kraemer v. Chicago & N. W. Ry. Co., 148 Minn. —, 181 N. W. 847.

(73) Hurley v. Illinois Central R. Co., 133 Minn. 101, 157 N. W. 1005; Thompson v. Minneapolis & St. Louis R. Co., 133 Minn. 203, 158 N. W. 42. See § 7047.

2621. Substitution of personal representative—In an action for injury by wrongful act, commenced by the injured person, where a verdict was returned in favor of the defendant, and a motion for a new trial made, but not finally disposed of, during his life, his personal representative may be substituted as plaintiff as a matter of course, under section 8175, G. S. 1913. Wilson v. Anderson, 145 Minn. 274, 177 N. W. 130.

DEDICATION

IN GENERAL

2624. To whom and for what purposes—Dedication of footway by permissive use. 7 A. L. R. 125.

BY PLATTING UNDER STATUTE

2629. Fee does not pass—(90) See Drake v. Chicago etc. Ry. Co., 136 Minn. 366, 162 N. W. 453.

2633. Approval by public authorities—The charter of the city of Minneapolis gives to the city council power to reject plats of land within the city limits. This power must be exercised in recognition of other limitations of the charter. The city council has no power to require, as

a condition of its approval of a plat, that all streets and alleys indicated on the plat shall be graded, since this, in effect, imposes the burden of street grading in a manner contrary to the provisions of the charter. Nelson v. McElroy, 140 Minn. 429, 168 N. W. 179, 587.

2641. Construction of plats—(10) Drake v. Chicago etc. Ry. Co., 136 Minn. 366, 162 N. W. 453; John A. Stees Co. v. Reinhardt, 142 Minn. 340, 172 N. W. 219.

2642. Vacation and correction of plats—(11) Maletta v. Oliver Iron Mining Co., 135 Minn. 175, 160 N. W. 771 (right of abutting owners to damages).

AT COMMON LAW

2644. Requisites—(13, 15) John A. Stees Co. v. Reinhardt, 142 Minn. 340, 172 N. W. 219.

2645. Intention to dedicate—The owner of a platted city block, surrounded by streets duly platted and dedicated to public use, set the business buildings erected thereon back 5 feet from the lot line, in order to afford a space for the display of goods. The streets were curbed 8 feet from the lot line, and the public authorities ordered 8-foot sidewalks laid. The owner laid these walks and extended them 5 feet further to the front walls of the business buildings. The city claims an easement for public travel in the five feet inside the lot lines. It is held: The evidence sustains the findings to the effect that there was no intent to dedicate an easement beyond the lot line, and that the acts and conduct of the owner were not such as to require the inference of an intent to dedicate. John A. Stees Co. v. Reinhardt, 142 Minn. 340, 172 N. W. 219.

The acts and declarations of the landowner, indicating the intent to dedicate, must be unmistakable in their purpose and decisive in their character. John A. Stees Co. v. Reinhardt, 142 Minn. 340, 172 N. W. 219.

2646. Evidence of intention to dedicate—(25) See John A. Stees Co. v. Reinhardt, 142 Minn. 340, 172 N. W. 219.

2647. Acceptance—Evidence—(31,34, 35) John A. Stees Co. v. Reinhardt, 142 Minn. 340, 172 N. W. 219.

2653. Fee does not pass—Reserved rights of dedicator—A village plat dedicated a street to the public for street purposes only, and expressly declared that upon the vacation of a street the title should be in the platter, and further provided that the fee of the street should not be included in or a part of any lot. The street has not been vacated and is used as a public street. It is held that the fee of the street remained in the platter, did not pass to the subsequent purchasers of abutting property, but passed by a conveyance by the platter. Drake v. Chicago etc. Ry. Co., 136 Minn. 366, 162 N. W. 453.

2654. Use by public on business with owner—(47) See John A. Stees Co. v. Reinhardt, 142 Minn. 340, 172 N. W. 219.

2655. Evidence—Sufficiency—(48, 50) John A Stees Co. v. Reinhardt, 142 Minn. 340, 172 N. W. 219.

DEEDS

IN GENERAL

2657. Parties—Blanks—An assignment of a sale certificate of state lands with a blank space for the name of the grantee is a nullity until the name of the grantee is inserted. Werntz v. Bolen, 135 Minn. 449, 161 N. W. 155.

A grantee may be authorized to insert his name in a blank as grantee. Schauble v. Hedding, 138 Minn. 187, 164 N. W. 808.

Where a blank is left for the name of the grantee the title remains in the grantor until the name of the grantee is inserted. Union Investment Co. v. Abell, 148 Minn. —, 181 N. W. 353.

2657a. Seal not necessary—A seal is not essential to a deed in this state. Schauble v. Hedding, 138 Minn. 187, 164 N. W. 808.

2659. Consideration—Recitals—Assumption of a mortgage on the land by the grantee is a valuable consideration. Enkema v. McIntyre, 136 Minn. 293, 161 N. W. 587.

A deed from a parent to a child, with a provision for payment by the grantee of certain sums to the other children of the grantor, held not founded on a valuable consideration so far as the latter children were concerned. Emkee v. Ahston, 139 Minn. 443, 166 N. W. 1079.

A recital of consideration in a deed is no evidence of the payment thereof as against strangers to the deed. Rux v. Adam, 143 Minn. 35, 172 N. W. 912. See § 7455.

2661b. Competency of grantor—A person afflicted with the infirmities of age is not precluded from transacting business or conveying property because the intellect is not as keen as it once was. That in an old person there may be occasional lapses of memory as to recent events, or an easy wandering from subject to subject in ordinary, everyday conversation with friends and acquaintances, does not signify that, when a matter of business of importance is undertaken, the faculties will not readily respond so that it is done rationally according to the free choice of such person. Shaughnessy v. Shaughnessy, 135 Minn. 262, 160 N. W. 769.

Action in ejectment. Plaintiff relied on a certain deed. Defendant contended and the court found that the grantor in the deed was incapable of understanding the nature of the transaction; that the deed was without consideration, and was obtained by fraud. The evidence sustains these findings. Crane v. Veley, — Minn. —, 182 N. W. 915.

Evidence held to justiy a finding that the grantor had mental capacity to contract. Hjelm v. St. Cloud, 134 Minn. 343, 159 N. W. 833; Klinkert v. Streissguth, 145 Minn. 336, 177 N. W. 363

Evidence held insufficient to justify a finding of incompetency in a grantor. Shaughnessy v. Shaughnessy, 135 Minn. 262, 160 N. W. 769.

2661d. Fraud—Priority—The evidence supports the findings that a deed by which the defendant procured title to certain property was duly

executed, delivered, and recorded prior to a deed of the same property executed by the same grantor to plaintiffs, and that the first mentioned deed was executed and delivered by the grantor with the full knowledge of its contents and with intent to convey his interest in said property to defendant, that the transaction was not tainted with fraud or misconduct of any kind, and that defendant thereby became owner of the premises conveyed by the deed. German v. McKay, 136 Minn. 433, 162 N. W. 527.

DELIVERY AND ACCEPTANCE

2662. Necessity of delivery—Where a deed was never recorded and never passed into the actual possession of the grantee, the fact that, for years after the execution of the deed, both grantor and grantee treated the property as the property of the grantee, is sufficient to show that the deed was intended to and did take effect as a conveyance. Berryhill v. Clark, 137 Minn. 135, 163 N. W. 137.

2664. What constitutes delivery—Law and fact—Continued possession and management of the property by the grantor is a circumstance negativing delivery, but it is not conclusive. Ingersoll v. Odendahl, 136 Minn. 428, 162 N. W. 525.

Evidence held to justify a finding that a delivery of a deed to an officer of a corporation, the grantee, did not pass the title. Edwards v. Svea Fire & Life Ins. Co., 141 Minn. 285, 170 N. W. 206.

Whether there has been a delivery with an intention to pass the title is a quetion for the jury, unless the evidence is conclusive. Edwards v. Svea Fire & Life Ins. Co., 141 Minn. 285, 170 N. W. 206.

The grantor's intention to pass title by the execution and disposition of his deed is of controlling importance on the question of the delivery without an actual passing of the instrument from the grantor to the grantee. Kessler v. Von Bank, 144 Minn. 220, 174 N. W. 839.

(77) Ingersoll v. Odendahl, 136 Minn. 428, 162 N. W. 525; State v. Probate Court, 140 Minn. 342, 168 N. W. 14; Kessler v. Von Bank, 144 Minn. 220, 174 N. W. 839.

(78) Ingersoll v. Odendahl, 136 Minn. 428, 162 N. W. 525; Kessler v. Von Bank, 144 Minn. 220, 174 N. W. 839.

(80) Edwards v. Svea Fire & Life Ins. Co., 141 Minn. 285, 170 N. W. 206.

(82) Berryhill v. Clark. 137 Minn. 135, 163 N. W. 137.

2666. Delivery to third party—Delivery of a deed to a third party is a good delivery to the grantee only when the grantor evinces an intention to presently and unconditionally part with all control over it and that it shall take effect according to its terms. Evidence held to justify a finding that a grantor did not evince such an intention. Pettis v. McLarne, 135 Minn. 269, 160 N. W. 691.

Delivery to the grantor's agent is no delivery, but delivery to one as agent of the grantee is a delivery to the grantee, and it will be presumed that a third person to whom a delivery is made takes as an agent or

trustee of the grantee. Delivery of a deed to a third person, with instructions to record it, presumptively constitutes him the grantee's agent, as it is the duty of the grantee to record the deed. Ingersoll v. Odendahl, 136 Minn. 428, 162 N. W. 525.

A deed, executed by a man advanced in years to his only child and heir was delivered by him to the attorney who drew the deed, with instructions to have it recorded. The attorney took it to the proper office for record but taxes were unpaid and it could not be recorded until they were paid. He kept the deed with the knowledge of both parties, the grantor promising to pay the taxes but he died before doing so. The court properly found that the deed had been delivered. Ingersoll v. Odendahl, 136 Minn. 428, 162 N. W. 525.

Delivery of a deed to an agent, or to a stranger, or for record, even when done without the knowledge of the grantee, if followed by his assent, is a good delivery. Kessler v. Von Bank, 144 Minn. 220, 174 N. W. 839.

(84) Pettis v. McLarne, 135 Minn. 269, 160 N. W. 691; Ingersoll v. Odendahl, 136 Minn. 428, 162 N. W. 525; Kessler v. Von Bank, 144 Minn. 220, 174 N. W. 839.

2667. Delivery after death—Conditions—Distribution of estate while living—Reservation of life estate—The fact that the grantor has the right to have the contract canceled and the deed returnd if the grantee fails to perform the conditions of the contract, is not such a reservation by the grantor of the right to recall or control the deed as to affect the validity of the agreement or the title of the grantee. Malley v. Quinn, 132 Minn. 254, 156 N. W. 263.

A modificaion of the contract may be shown by parol evidence. Evidence held to justify a finding that there was an agreement to accept a modified or substituted performance of the conditions of the contract in place of a literal performance thereof; that the grantee fully performed the contract as modified; and that such performance was accepted by the grantor as full performance of the contract. Malley v. Quinn, 132 Minn. 254, 156 N. W. 263.

One may distribute his estate while living, whether it be real or personal property, though reserving to himself a life estate therein. Ekblaw v. Nelson, 124 Minn. 335, 144 N. W 1094; Shaughnessy v. Shaughnessy, 135 Minn. 262, 160 N. W. 769.

The statement in the charge that the grantor in the deeds here involved was attempting to distribute her estate among those who were to have it after her death was not improper, since the court evidently referred to a completed transaction and not to one wherein the grantor retained the control over the delivery of the deeds. Shaughnessy v. Shaughnessy, 135 Minn. 262, 169 N. W. 769.

(87) Malley v. Quinn, 132 Minn. 254, 156 N. W. 263; Shaughnessy v. Shaughnessy, 135 Minn. 262, 160 N. W. 769; Pettis v. McLarne, 135 Minn. 269, 160 N. W. 691; Hagen v. Hagen, 136 Minn. 121, 161 N. W. 380. See 11 A. L. R. 23 (provisions limiting rights of grantee until after death of grantor).

2668. Recording—Placing a deed on record usually operates as a delivery thereof, and, though done without the knowledge of the grantee, raises a presumption of delivery. Delivery of a deed to a third person, with instructions to record it, presumptively constitutes him the agent of the grantee for that purpose, as it is the duty of the grantee to record the deed. Ingersoll v Odendahl, 136 Minn. 428, 162 N. W. 525.

2670. Necessity of acceptance—Presumption—Where the grant imposes no burden on the grantee his acceptance will be presumed. Ingersoll v. Odendahl, 136 Minn. 428, 162 N. W. 525.

When a deed is not burdened with conditions, a compliance with which is necessary to the vesting of the granted right, acceptance by the grantee will be presumed. Emkel v. Ashton, 139 Minn. 443, 166 N .W. 1079.

(93) Ingersoll v. Odendahl, 136 Minn. 428, 162 N. W. 525.

EXCEPTIONS AND RESERVATIONS

2671. Definitions and distinctions—(95) Aldrich v. Soucheray, 133 Minn. 382, 158 N. W. 637.

2673. Reservations—It is the general rule that a bare reservation cannot be made to a stranger to the title or as appurtenant to lands not those of the grantor. Aldrich v. Soucheray, 133 Minn. 382, 158 N. W. 637.

Certain deeds construed to reserve an easement for a foot and bicycle path in the land conveyed appurtenant to the other land in the plat. Aldrich v. Soucheray, 133 Minn. 382, 158 N. W. 637.

A reservation of timber on the land conveyed. International Lumber Co. v. Staude, 144 Minn. 356, 175 N. W. 909.

2674. Construction—A reservation in favor of the grantor is to be construed more strictly than a grant. International Lumber Co. v. Staude, 144 Minn. 356, 175 N. W. 909.

The language of a reservation in a deed may properly be referred to the land described therein, or to the interest or estate in the land, or to both, according to the intention of the parties. International Lumber Co. v. Staude, 144 Minn. 356, 175 N. W. 909.

CONDITIONS

2675. Conditions subsequent—(14, 17, 22) Furst v. Lacher, — Minn. —, 182 N. W. 720 (condition against conveyance or incumbrance during life of grantor).

2675a. Conditions against alienation—A condition against alienation or incumbrance during the life of the grantor held enforceable. Furst v. Lacher, — Minn. —, 182 N. W. 720.

2676. Restriction on use of property—Building restrictions—The owner of real property has a right to restrict its use by covenant or

agreement provided the restriction is reasonable and not contrary to public policy. When enforceable such restrictions are to be fairly and reasonably construed to carry out the clear intention of the parties. The surrounding circumstances may be considered in aid of construction as in other cases. As the law leans in favor of the unrestricted use of property a strained construction will not be adopted in favor of such restrictions. A restriction against the building of a "duplex" in a resident district may be enforced by injunction. Godley v. Weisman, 133 Minn. 1, 157 N. W. 711, 158 N. W. 333.

A deed to "lot 11" and other lots contained a covenant that the deed was subject to building restrictions contained in a prior deed which conveyed only lot 11. This adopted the building restrictions in the former deed and applied them to all lots conveyed by the later deed so far as the restrictions could be made applicable thereto. Where the owner of a lot subject to no building restrictions conveys it and in the deed inserts restrictive covenants, these covenants cannot, in the absence of some general building plan, be regarded as inuring to the benefit of lots previously conveyed by him, and prior grantees cannot enforce such restrictions. Where, however, a number of lots in the same locality, and some contiguous to others, were conveyed by a single deed containing building restrictions applicable to all, and the grantee conveyed one tract to plaintiff and later a contiguous tract to defendant, and in each deed incorporated the building restrictions under which he held his title, these transactions evince a purpose to adopt a general building plan. An owner need not have a multitude of lots in order to have a building plan. He may have such plan for two lots as well as for more. Where there is a general building plan with restrictions, the restrictions are for the benefit of all the land subject thereto, and each grantee of any part of the land may enforce the restrictions against his neighbor. Plaintiff has not forfeited her right to enforce a restriction against the building of duplex houses by the fact that a one-story sun room or porch of her house extends beyond the building line, the main portion of her house being within the line. Godley v. Weisman, 133 Minn. 1, 157 N. W. 711, 158 N. W. 333.

A fifty-year option for a thirty-year mining lease held not an unreasonable restriction on the use and enjoyment and alienation of property. Mineral Land Investment Co. v. Bishop Iron Co., 134 Minn. 412, 159 N. W. 966.

Construction of language limiting use. L. R. A. 1918B, 695.

(24) 31 Harv. L. Rev. 876 (effect of changed conditions).

See Digest, §§ 2390–2397; 5391.

See L. R. A. 1917A, 328 (who may enforce restrictive covenants).

2677. Conditions for support of grantor for life—Owing to the peculiar character of such transactions and the fact that usually they are between the aged and their near relatives and result from the confidence which one reposes in the other, conveyances of property in consideration of an agreement for future support are placed in a class

by themselves; and the courts, when called upon to enforce rights growing out of such contracts, endeavor to give effect to the intention of the parties so far as possible, and to protect both by affording each such relief as in equity and good conscience he is entitled to under the facts of the particular case. The courts consider each case on its own facts and in the exercise of their broad equitable powers will grant whatever relief will most nearly work out substantial justice. The conveyance may be canceled on condition that the grantee be reimbursed for expenditures of which the grantor has received or will receive the benefit if this will produce an equitable result and the rights of the grantor cannot be properly safeguarded otherwise, or, in proper cases, the grantee may be permitted to retain the property on condition that he comply with the requirements of the contract and make compensation for past delinquencies. But the conveyance will not be canceled where it would be inequitable to do so. Walsh v. Walsh, 144 Minn. 182, 174 N. W. 835.

Where a person deeds realty to a city in consideration of a promise of the city to support him for the remainder of his life, and the city duly performs its promise, the deed cannot be set aside by his heirs after his death, though the city was not authorized to make the promise. Hjelm v. St. Cloud, 134 Minn. 343, 159 N. W. 833.

Where a parent conveys real estate to her son, and contemporaneous therewith enters into a contract with the son whereby he agrees to pay to his parent and to each of his brothers and sisters a certain specified sum of money, to furnish the parent each year during her life certain provisions, and to furnish her certain rooms in the dwelling in which to live during the remainder of her life, construed and held to be a contract for support and maintenance, and therefore personal to the parent. The parent having been adjudged insane and committed to the hospital for the insane, held, that during her detention in the hospital the provisions of the contract for the payment and delivery to her of money or property for her support are suspended, and that during such time such obligation cannot be enforced by her guardian. Penas v. Cherveny, 135 Minn. 427, 161 N. W. 150.

In a transaction by which the parents conveyed a certain real property to their son, in consideration of an agreement on his part to make provision for their support during the remainder of their lives, and also to pay certain specified sums of money to other children of the grantors, all of mature years, but not parties to the contract, within six months after the death of the parents, which payments were declared by the contract liens upon the property until paid, it is held, that the provision for the payments to the other children was not founded upon a valuable consideration, was a mere incident to the main contract, created no irrevocable rights in such other children, and that the obligation to make the payments was discharged and the liens abrogated upon the rescission and abandonment of the contract by the parties thereto and a reconveyance of the property to the parents. Emkee v. Ashton, 139 Minn. 443, 166 N. W. 1079.

The plaintiff in March, 1910, conveyed to the defendant, his niece, certain premises, in consideration of her giving him care, support and a home during life and burial after death. The obligation to give care, support and a home was made an express lien on the premises but not so the obligation to give burial. After the partial execution of the agreement, and about October 1, 1910, the plaintiff wrongfully killed the defendant's husband. In December, 1910, he was convicted of murder in the second degree and sentenced to life imprisonment. He was pardoned in July, 1916. This action was brought after the pardon to cancel the deed. It is held: That under the constitution providing that there shall be no forfeiture of estate for conviction of crime and the statute providing that one sentenced to life imprisonment shall be deemed civilly dead, the plaintiff did not by his sentence forfeit his property rights. The deed contemplated that the plaintiff should have a home with the defendant upon the premises conveyed and that he should there receive from her care and support. By his wrongful act in killing her husband he rendered it impossible for her to perform in the spirit contemplated her agreement to give him a home and care and support; and thereby he forfeited his right to claim performance after pardon. The plaintiff's wrongful act did not affect the obligation of the defendant to give proper burial; but such obligation rests upon a personal covenant and is not a charge upon the land. Hall v. Crook, 144 Minn. 82, 174 N. W. 519.

A mother conveyed a tract of land to her son in consideration of his verbal promise to support her. The son faithfully performed his promise until his death twenty-three years later. His widow had no knowledge of the agreement and provided no support for the mother after his death and was never asked to do so. Five years later the mother brought suit to cancel the conveyance for failure to furnish support, but died before it came to trial, and her executor was substituted as plaintiff. Held, that in view of the circumstances disclosed by the record a cancellation of the conveyance would be inequitable and will not be decreed; held further that neither the pleadings nor the evidence furnish a basis for any other relief, and that the court correctly dismissed the action. Walsh v. Walsh, 144 Minn. 182, 174 N. W. 835.

Excuses for failure of grantee to perform. L. R. A. 1917E, 658.

(25) Hall v. Crook, 144 Minn. 82, 174 N. W. 519. See 29 Harv. L. Rev. 878.

CONSTRUCTION AND EFFECT

2679a. Nature—Transfer of title—A deed is merely the medium for the transfer of the title from the grantor to the grantee, and when its purpose is once fully accomplished its subsequent disposition cannot affect the title it has conveyed. It may be altered, mutilated, lost or destroyed, its executory provisions may be rendered inoperative by fraudulent changes or otherwise, but the title which has passed by it will remain undisturbed. Robbins v. Hobart, 133 Minn. 49, 157 N. W. 908.

2680a. What passes—Unaccrued rents pass with a sale of the land. State v. Royal Mineral Assn., 132 Minn. 232, 156 N. W. 128.

2681a. Grant to two—Presumption of equality—Where two persons are named grantees in a deed the presumption is that their interests in the land conveyed are equal. This presumption, however, is not conclusive and the true interest of each may be shown. Dorsey v. Dorsey, 142 Minn. 279, 171 N. W. 933.

2683. Quantity of land conveyed—Force of expression "more or less". See Costello v. Siems-Carey Co., 140 Minn. 208. 167 N. W. 551.

2684. Contract of parties—Notice of terms—Evidence held to show that the grantor knew the contents of a deed when he signed it, that he was competent, and that there was no fraud. Klinkert v. Streissguth, 145 Minn. 336, 177 N. W. 363.

2686. Construction—In general—If the intent is clear, particular words of reservation or conveyance usual in deeds will not be construed in their technical common-law sense to defeat it. Aldrich v. Soucheray, 133 Minn. 382, 158 N. W. 637.

The effect of a deed cannot be restricted because rights of property properly embraced in its language were not in the minds of the parties when the sale was agreed upon. International Lumber Co. v. Staude,, 144 Minn. 356, 175 N. W. 909.

(36) International Lumber Co. v. Staude, 144 Minn. 356, 175 N. W. 909. See §§ 1075, 1816-1841, 2674, 2857, 3397-3407.

2689. When takes effect—Relation—A deed given in pursuance of an executory contract therefor relates back and takes effect as of the date of the contract, when necessary to protect the interest of the parties. Greenfield v. Olson, 143 Minn. 275, 173 N. W. 416.

2690a. Revocation—It may be conceded that an executed transfer of property, or an executed grant of a property right, whether in the form of a gift or founded on a valuable consideration, is beyond recall by the grantor, except for fraud and mistake, and cannot be revoked or canceled after acceptance by the grantee, and when not burdened with conditions, a compliance with which is necessary to the vesting of the granted right, acceptance will be presumed. Yet to be irrevocable and beyond recall the transaction must be fully completed and in no essential respect left depended upon the performance of future conditions. Emkee v. Ashton, 139 Minn. 443, 166 N. W. 1079.

2691. Collateral personal agreements—A deed may be given in part performance of a larger oral executory agreement. Staring Co. v. Rossman, 132 Minn. 209, 156 N. W. 120.

2691a. Subsequent alterations by grantee—Where a deed is executed and delivered, and is subsequently altered by the grantee, he cannot enforce any executory obligations contained therein; but his title remains unaffected, and he may prove such title by presenting the deed

and proving its contents at the time of its execution.. Robbins v. Hobart, 133 Minn. 49, 157 N. W. 908; Grimes v. Minneapolis etc. Traction Co., 133 Minn. 442, 158 N. W. 719.

If the grantee in a deed offers it in evidence for the purpose of asserting an executory provision therein against the grantor, it is competent for the grantor to testify that such provision was not in the deed when delivered to the grantee. Grimes v. Minneapolis etc. Traction Co., 133 Minn. 442, 158 N. W. 719.

QUITCLAIM DEEDS

2694. Nature—(55) 3 A. L. R. 945 (test of conveyance as quitclaim or otherwise).

2695. Force and effect—A quitclaim deed passes the equitable rights of a holder of a sale certificate of state lands. Krelwitz v. McDonald, 135 Minn. 408, 161 N. W. 156.

DEPOSITARIES

2702a. Private depositaries—Contracts—It was not error to receive in evidence a written assignment of a claim against defendant for money deposited with the defendant by the assignor, although, for the convenience of the assignor, the receipt for the money was taken in a relative's name; the transaction being between the assignor and the defendant, and the money belongng to the assignor. The case of plaintiff was predicated upon the existence of an oral contract between him and defendant, separate and distinct from the written contract between plainiff and a third party relating to the purchase of certain lots, under which oral contract the purchase price of the lots was to be held by defendant, as trustee of plaintiff, until plaintiff determined whether he would consumate the purchase. If such independent oral contract existed, plaintiff was not concluded by the provision of written demand contained in the written contract not executed by defendant. Miszewski v. Baxter, 141 Minn. 224, 169 N. W. 800.

DEPOSITIONS

2707. Necessity of use at time of trial—Where the deposition of a witness is taken outside of the state, and in it the witness testifies that he is a non-resident of this state, no further proof of cause for using the deposition is required. Lieb Packing Co. v. Trocke, 136 Minn. 345, 162 N. W. 449.

DEPOSITS IN COURT

2719. Statutory—(66) State v. Probate Court, 137 Minn. 238, 163 N. W. 285.

DESCENT AND DISTRIBUTION

IN GENERAL

2720a. **Who are heirs**—A widow is the statutory heir of her deceased husband. Anderson v. Brower, 148 Minn. —, 180 N. W. 1019.

2722. **When title passes**—(69) Glencoe Ditching Co. v. Martin, 148 Minn. —, 181 N. W. 108.

2723. **Contracts—Relinquishment**—Evidence held to justify a finding that a written instrument, purporting to be a relinquishment of a daughter's prospective right to inherit from her father's estate, was procured by the undue influence of the father, since deceased, and that another instrument of the same nature was not signed by the son of the deceased. Bruski v. Bruski, — Minn. —, 182 N. W. 620.

(72) See Digest, § 3559; 6 A. L. R. 555.

2724. **Murderer cannot inherit from victim**—It is now provided by statute that a murderer cannot inherit from his victim. Laws 1917, c. 353. See 5 Minn. L. Rev. 76.

Constitutionality of statute. 6 A. L. R. 1408; 33 Harv. L. Rev. 475.

(73) 30 Harv. L. Rev. 622

2724a. **Adopted children**—Under the statute adopted children inherit from their adopting parents the same as though they were the legitimate children of such parents. Kenning v. Reichel, — Minn. —, 182 N. W. 517. See 2 Minn. L. Rev. 301.

2724b. **Advancements**—Every advancement is a gift. Even in case of intestacy it remains a gift. An advancement is never to be returned. In case of intestacy, the gift reduces by so much the share of the heir receiving it, while in case of testacy the gift becomes absolute. An advancement is not a loan. Kuhne v. Gau, 138 Minn. 34, 163 N. W. 982.

Where a father makes an advancement to his daughter and then dies testate, the advancement becomes a mere gift. A promise to repay it to other heirs and a mortgage given to secure the performance of such promise are without consideration. An allegation in pleading that an advancement was made cannot be construed as an allegation that a loan was made, even though the donee after the death of the donor makes an agreement to repay. Kuhne v. Gau, 138 Minn. 34, 163 N. W. 982.

Certain gifts to a child held ordinary gifts inter vivos and not advancements. Bruski. v. Bruski, — Minn. —, 182 N. W. 620.

2725a. **Determination of heirship under Laws 1917, c. 72**—Evidence held sufficient to justify a finding of heirship. Clifford v. Colbert, 141 Minn. 151, 169 N. W. 529.

DESCENT OF REALTY OTHER THAN HOMESTEAD

2726. To surviving spouse—The statutory third is subject to the inheritance tax. State v. Probate Court, 137 Minn. 238, 163 N. W. 285.

(81, 83) State v. Probate Court, 137 Minn. 238, 163 N. W. 285.

(89) See § 2724.

2729. To next of kin—Per stirpes and per capita—Under G. S. 1913, § 7238(5), before its amendment by Laws 1917, c. 272, it was held that where a decedent leaves neither issue, spouse, father, mother, brother or sister, but leaves issue of deceased brothers or sisters, the latter take per stirpes and not per capita. Swenson v. Lewison, 135 Minn. 145, 160 N. W. 253.

DISTRIBUTION OF PERSONALTY

2731. Wearing apparel—Furniture, etc.—Pecuniary allowance to spouse—The property selected under this provision is not assets of the estate and is no part of the residue for distribution. It is not subject to the inheritance tax. State v. Probate Court, 137 Minn. 238, 163 N. W. 285.

The widow of an intestate made no formal selection of household goods and none were formally assigned to her. The household goods, $400 in value, were accounted for in the final account and assigned as other property in the final decree. The widow sold her interest to the other heirs and received one-third of the appraised value in cash and the use of the household goods for life. Held, the widow had no longer any right in the household goods. She was entitled to select the goods and no order of the probate court was necessary to protect her right. But she might waive her right and did so by knowingly permitting the probate court to dispose of this property in the administration of the estate. The decree is conclusive against collateral attack. Rickert v. Wardell, 142 Minn. 96, 170 N. W. 915.

The right to the allowance may be barred by an antenuptial contract. Malchow v. Malchow, 143 Minn. 53, 172 N. W. 915.

A widow cannot sue a representative in the district court, pending administration, to recover possession of this allowance. Her remedy is in the probate court. Fischer v. Hintz, 145 Minn. 161, 176 N. W. 177.

(99) Poupore v. Stone-Ordean-Wells, 132 Minn. 409, 157 N. W. 648 (on death of widow prior to allowance the right of selection survives to her personal representative.) See Fischer v. Hintz, 145 Minn. 161, 176 N. W. 177.

2732. Allowance to widow and children pending administration—A contract between the widow and other devisees under a will, disposing of the estate of the deceased in a manner different from the terms of the will, and which has by decree been determined to be a valid contract, may, with the decree, be received in evidence on the hearing of an application of the widow for an allowance. The widow's right to an allowance for

maintenance under the statute may be waived by contract. The contract in evidence in this case operated as a waiver of appellant's right to such an allowance. Benz v. Rogers, 141 Minn. 93, 169 N. W. 477.

The right to an allowance may be barred by an antenuptial contract. Malchow v. Malchow, 143 Minn. 53, 172 N. W. 915.

(4) Benz v. Rogers, 141 Minn. 93, 169 N. W. 477.

RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES

2734. Action against distributees on debts of decedent—Statutes—An action by a creditor of a decedent pursuant to G. S. 1913, §§ 8182-8192, to recover of the defendants, heirs of the deceased, to the extent of the value of real property inherited by them, may be maintained though his claim was not presented to the probate court, the sole property of the deceased and that inherited being a homestead, the debt of the creditor being for labor performed by a servant and excepted by Art. 1, § 12 of the constitution from the operation of the homestead exemption statute, no order limiting the time for filing claims having been entered by the probate court, the statute (Gen. St. 1913, § 7320) providing that when the only property of the deceased is a homestead no such order need be made. Ramstadt v. Thunem, 136 Minn. 222, 161 N. W. 413.

(10) Ramstadt v. Thunem, 136 Minn. 222, 161 N. W. 413.

2734c. Heirs not bona fide purchasers—An heir is not a bona fide purchaser but takes subject to any trust attaching to the property in the hands of the decedent. Colby v. Street, 146 Minn. 290, 178 N. W. 599.

DETECTIVES—See Trial, § 9786; Witnesses, § 10346.

DISCOVERY

2736. Bills of discovery—A court of equity will not, by a bill of discovery, compel a defendant to make disclosure of facts which would subject him to a criminal prosecution or to a penalty or forfeiture. Hawley v. Wallace, 137 Minn. 183, 163 N. W. 127.

DISMISSAL AND NONSUIT

2738. Form of judgment—A judgment of dismissal in replevin should restore the parties to the situation they were in before the action was commenced. Bradshaw v. Langum, 141 Minn. 39, 169 N. W. 148.

(43) See Bradshaw v. Langum, 141 Minn. 39, 169 N. W. 148.

2740. Other modes of terminating action abolished—(45) Wilson v. Anderson, 145 Minn. 274, 177 N. W. 130.

2742. Dismissal by the court before trial—While the district court may at any time before trial, upon application by the plaintiff and sufficient cause shown, dismiss an action, yet such cause must relate to and affect the legal rights of the parties litigant. Wallenschlager v. Minneapolis etc. Ry. Co., — Minn. —, 183 N. W. 145.

2744. Voluntary nonsuit—(75) Barrett v. Virginian Ry. Co., 250 U. S. 473.

(76) See Bradshaw v. Langum, 141 Minn. 39, 169 N. W. 148.

2746a. Dismissal after verdict—Section 7825, G. S. 1913, provides how an action may be dismissed without a final determination of its merits, and abolishes all modes of dismissal, except as therein provided. The statute is silent as to a dismissal after verdict, and by the great weight of authority a dismissal, in the absence of a statute, may not be made after verdict, either as a matter of right or by permission of court. But upon the verdict being set aside, or upon a reversal and order for a new trial, the cause stands for trial de novo, and a dismissal may be had under the statute, the same as though no trial had been had. Wilson v. Anderson, 145 Minn. 274, 177 N. W. 130.

2747. Dismissal for failure to obey order of court—(85) Lipman v. Bechhoefer, 141 Minn. 131, 169 N. W. 536.

2748. Miscellaneous grounds for dismissal—Where jurisdiction over a party is acquired only by an admission of the service of a complaint by an attorney, the case is properly dismissed where it appears that the attorney had no authority to appear for the party. Park, Grant & Morris v. Shannon & Mott Co., 140 Minn. 60, 167 N. W. 285.

A court may dismiss an action for fraud practiced on the court by a party. Lipman v. Bechhoefer, 141 Minn. 131, 169 N. W. 536.

2749. Who may move for or object to dismissal—One defendant cannot object to a dismissal as to another defendant where the liability of the former does not depend upon any act or omission of the latter. Hefferon v. Reeves, 140 Minn. 505, 167 N. W. 423.

Right of plaintiff to dismiss action brought in behalf of himself and others. 8 A. L. R. 950.

2750. Effect—A judgment of dismissal in an action of replevin annuls all the proceedings and leaves the parties as though no action had been commenced. Bradshaw v. Langum, 141 Minn. 39, 169 N. W. 148.

2750a. Vacation and reinstatement—Upon proper notice an order dismissing an action may be vacated on motion and the action reinstated. Rishmiller v. Denver & Rio Grande R. Co., 134 Minn. 261, 159 N. W. 272.

DISORDERLY CONDUCT

2751. Complaint—A complaint under an ordinance charging disorderly conduct held sufficient. State v. Olson, 115 Minn. 153, 131 N. W. 1084; State v. Broms, 139 Minn. 402, 166 N. W. 771.

DISORDERLY HOUSE

2752. **Definition**—(7) 12 A. L. R. 529 (character of house as affected by number of women who resort to it or reside therein for immoral purposes).

2752b. **Houses of prostitution—Abatement—Statute**—Lessees of a building who sublet it for purposes of prostitution are subject to the penalties of the statute. State v. Goldstein & Smiloweitz, 135 Minn. 465, 160 N. W. 783.

An abatement proceeding does not eliminate the title of a defendant to the property seized therein until the entry of a decree to that effect, and it is not unlawful for a defendant to contract with reference to such property prior to the decree. Abernethy v. Halk, 139 Minn. 252, 166 N. W. 218.

2753. **What constitutes keeping a disorderly house**—To constitute the offence of keeping a disorderly house it must appear that disorderly acts are habitually permitted on the premises or that the house is kept as a place to which people may and do resort for the purpose of indulging in immoral or unlawful practices. State v. Nanick, 144 Minn. 413, 175 N. W. 693.

(9) State v. Rogers, 145 Minn. 303, 117 N. W. 358.

2755. **Evidence—Admissibility**—(13) State v. Rogers, 145 Minn. 303, 177 N. W. 358 (character of those who visited house and what they said and did while there admissible—fact that prostitutes visited house admissible—character of house shortly before and after time charged admissible—court did not abuse its discretion in refusing to strike out the testimony of a witness as to the reputation of the place who stated on cross-examination that his information was received from people who had a place of business in the neghborhood and were there daily but resided elsewhere).

2756. **Evidence—Sufficiency**—The evidence warranted the jury in finding that immoral acts were committed so frequently and openly that the proprietor must have known that his house was resorted to for the purpose of indulging in such practices. The claim that the testimony of certain witnesses to the effect that prostitutes frequented the place related to a time before defendant became the proprietor of the house is not borne out by the record. State v. Rogers, 145 Minn. 303, 177 N. W. 358.

(14) State v. Nanick, 144 Minn. 413, 175 N. W. 693; State v. Rogers, 145 Minn. 303, 177 N. W. 358.

DISTRICT COURT

2759. Jurisdiction—Original—The district court has jurisdiction to apportion between several executors a lump sum awarded to them by the probate court for their services. Slingerland v. Slingerland, 136 Minn. 204, 161 N. W. 497.

An action will not lie in the district court against an executor or administrator pending administration proceedings in the probate court. Fischer v. Hintz, 145 Minn. 161, 176 N. W. 177.

The district court and not the probate court has jurisdiction of an action for the enforcement of the specific performance of a contract by which a deceased owner of land had agreed to devise it to plaintiff, where plaintiff seeks to impress property acquired with the proceeds of the sale of the land with a trust in her favor. Colby v. Street, 146 Minn. 290, 178 N. W. 599.

The district court has jurisdiction of an action brought by a ward against his guardian and those to whom the guardian sold the ward's property under license of the probate court, the complaint alleging that the sale was fraudulently made, and that the guardian, along with other defendants fraudulently acting with him, had an interest in the purchase. That the ward might have relief in the pending guardianship proceeding upon the accounting of his guardian does not deprive the district court of jurisdiction. Wilson v. Erickson, 147 Min. 260, 180 N. W. 93.

The district court has jurisdiction of an action to set aside a final decree of distribution of a probate court obtained by fraud or by reason of a mistake of fact. Bruski v. Bruski, — Minn. —, 182 N. W. 620. See § 3663a.

(33) Fischer v. Hintz, 145 Minn. 161, 176 N. W. 177.

2761. Power to pass title by judgment—A judgment cannot operate as a conveyance of a homestead unless both husband and wife are made parties. Brokl v. Brokl, 133 Minn. 218, 158 N. W. 250.

(35) State v. District Court, 138 Minn. 336, 164 N. W. 1014.

2766. Place of holding court—(49) See Thwing v. McDonald, 134 Minn. 148, 156 N. W. 780, 158 N. W. 820.

DIVORCE

GROUNDS

2776. Desertion—Evidence held to justify a finding of desertion. Wandersee v. Wandersee, 132 Minn. 321, 156 N. W. 348; Wulke v. Wulke, — Minn.,—, 183 N. W. 349.

Evidence held not to justify a finding of desertion. Dayton v. Dayton, 146 Minn. 48, 177 N. W. 931.

(71) Wulke v. Wulke, — Minn. —, 183 N. W. 349.

2777. Habitual drunkenness—(76) Larson v.Larson, 147 Minn. 457, 179 N. W. 723.

2778. Cruel and inhuman treatment—The cruelty may be inflicted through others employed by the spouse. Rose v. Rose, 132 Minn. 340, 156 N. W. 664.

Communication of venereal disease as ground for divorce. 5 A. L. R. 1016; 8 Id. 1534.

(81) Mullen v. Mullen, 135 Minn. 179, 160 N. W. 494; O'Neil v. O'Neil, — Minn. —, 182 N. W. 438.

(88) Rose v. Rose, 132 Minn. 340, 156 N. W. 664; O'Neil v. O'Neil, — Minn. —, 182 N. W. 438; Wulke v. Wulke, — Minn. —, 183 N. W. 349.

(89) Eberhart v. Eberhart, — Minn. —, 183 N. W. 140. See Wandersee v. Wandersee, 132 Minn. 321, 156 N. W. 348.

2779. Imprisonment—The statute, as amended by Laws 1909, c. 443, has a retroactive operation. It applies to a sentence to imprisonment prior to its enactment. The only limitation is that the sentence must be one imposed after the marriage. Long v. Long, 135 Minn. 259, 160 N. W. 687.

A finding held sufficient to show a sentence to imprisonment in a state prison. Long v. Long, 135 Minn. 259, 160 N. W. 687.

DEFENCES

2781. Collusion—Collusion as a bar. 2 A. L. R. 699.

2782. Condonation—(93) See note, 6 A. L. R. 1157 (condonation without cohabitation).

2783a. Former judgment—Res judicata—A wife brought an action for divorce on the ground of cruel and inhuman treatment. The divorce was denied. After the lapse of a year since the wife left, the husband brought this action for divorce on the ground of desertion. She denied the desertion, and counterclaimed for support, alleging that the husband's mistreatment had compelled her to leave him. It is held, following Stocking v. Stocking, 76 Minn. 292, 79 N. W. 172, 668, that the first action is not res judicata of the issues raised by the answer in the second action. Wulke v. Wulke, — Minn. —, 183 N. Y. 349. See § 5189.

ACTION FOR DIVORCE

2784. Jurisdiction—Conflict of laws—To each state belongs the exclusive right and power of determining upon the status of its resident and domiciled citizens and subjects, in respect to marriage and divorce. State v. Armington, 25 Minn. 29; Rose v. Rose, 132 Minn. 340, 156 N. W. 664.

In an action for divorce it is the marriage status and not the cohabitation of the parties which is the subject-matter of the jurisdiction. Thurs-

ton v. Thurston, 58 Minn. 279, 59 N. W. 1017; Rose v. Rose, 132 Minn. 340, 156 N. W. 664.

The courts of this state have jurisdiction to decree a divorce for any cause allowed by its laws, notwithstanding the fact that the defendant was at no time a resident of this state, and without regard to the fact that the offence was committed outside of this state, and without regard to the fact that the parties were not living together as husband and wife at the time the offence was committed. Rose v. Rose, 132 Minn. 340, 156 N. W. 664.

2786. State interested—An action for divorce differs from an ordinary action. The state is interested in seeing that a divorce is granted only on lawful grounds and in a lawful manner. It is for this reason that a court will not grant a divorce upon consent of the parties unless lawful ground exists therefor. Until a decree is entered the court will seek the truth from whatever source it may come. Brockman v. Brockman, 133 Minn. 148, 157 N. W. 1086.

2787. In rem—An action for divorce is in rem, the res being the marriage status or relation existing between the parties. Searles v. Searles, 140 Minn. 385, 168 N. W. 153.

2788. Venue—The statute is probably inapplicable to an independent action for alimony. Searles v. Searles, 140 Minn. 385, 168 N. W. 133.

2789. Residence of plaintiff—Evidence held to justify a finding that plaintiff resided in the county where the action was brought. Searles v. Searles, 140 Minn. 385, 168 N. W. 133.

Evidence held to justify a finding of residence within the state for the statutory period. Laird v. Laird, — Minn. —, 182 N. W. 955.

2790. Summons—Publication—A personal judgment or decree for alimony, rendered in a divorce case against a non-resident of the state where the only service is by publication of the summons, is void, as is such a judgment rendered where the defendant is a resident of this state and can be found therein and the only service is by publication. But where the defendant is a resident of this state, but cannot be found therein, because he secretes himself within the state, so service cannot well be made, the court acquires jurisdiction, on a service by publication only, to render a personal judgment for alimony. The affidavit and order for the publication of the summons in this case were sufficient to authorize service by publication and contained no irregularities that affected the validity of the service. Roberts v. Roberts, 135 Minn. 397, 161 N. W. 148.

2791. Complaint—(13) 2 A. L. R. 1621.

(16) O'Neil v. O'Neil, — Minn. —, 182 N. W. 438.

2795. Corroboration—(28) Brockman v. Brockman, 133 Minn. 148, 151, 157 N. W. 1086.

2796a. Evidence—Sufficiency—Evidence held to justify findings that neither party was entitled to a divorce. Kopichke v. Kopichke, 140 Minn. 503, 167 N. W. 1047.

2799. Judgment—Relief allowable—The judgment may require the husband to restore to the wife any of her property in his possession. Wolf, Habein & Co. v. Mapson, 146 Minn. 174, 178 N. W. 318.

(40) Searles v. Searles, 140 Minn. 385, 168 N. W. 153.

(41) Brockman v. Brockman, 133 Minn. 148, 157 N. W. 1086.

See Digest, §§ 2783, 5189 (res judicata); § 2805 (modification—alimony); § 5011 (opening default); §§ 5013, 5131, 5133 (vacation); § 5101 (amendment); § 5207 (foreign judgment—full faith and credit).

See L. R. A. 1917B, 409 (grounds for attacking judgment).

2799a. Same—Division of property—Statute—G. S. 1913, § 7124, providing for a division between husband and wife, where the husband is granted a divorce, of property in the name of the wife which she acquired through the husband during the marriage, applies to the property involved in this action, acquired by the wife in the manner stated in the opinion and a division thereof was thereby authorized. The conclusion of the trial court that the wife acquired the property through the husband as a voluntary transfer without consideration is sustained by the evidence. Whether the statute would apply to property in the name of the wife which she acquired through the husband but for a consideration paid him, or where the property was transferred to the wife by the husband to defraud creditors, quære? O'Neil v. O'Neil, — Minn. —, 182 N. W. 438. See 5 Minn. L .Rev. 296, 558.

In the absence of statutory authority the courts have no power in divorce proceedings to deal with the property right of the parties. The doctrine of community property, as applied to the marriage relation, in force in some of the states of this country, exists only by statute, has never been adopted or made a part of the law of this state, and a distribution of property in divorce proceedings cannot be made thereunder. Nelson v. Nelson, — Minn. —, 183 N. W. 354.

CUSTODY OF CHILDREN

2800. In general—In awarding the custody of minor children their welfare is the controlling consideration. Wandersee v. Wandersee, 132 Minn. 321, 152 N. W. 348; State v. Galson, 132 Minn. 467, 156 N. W. 1; Waldref v. Waldref, 135 Minn. 473, 159 N. W. 1068; Eberhart v. Eberhart, — Minn. —, 183 N. W. 140.

The court has discretionary power to award the custody of minor children to a third party pending the action. Ratcliffe v. Ratcliffe, 135 Minn. 307, 160 N. W. 778.

A decree awarded the custody of a child to the mother. The father moved that the decree be modified so as to permit him to visit the child at stated intervals. It was held not an abuse of discretion to deny the motion. Waldref v. Waldref, 135 Minn. 473, 159 N. W. 1068.

In an action by a wife for a divorce in which she fails to establish facts authorizing either a divorce or decree of separation, but in which it appears that the parties are living apart, the court may award the custody of the children to her and require the husband to contribute toward their support. Jacobs v. Jacobs, 136 Minn. 190, 161 N. W. 525.

The defendant should have been granted leave to visit his children at reasonable times. A new trial is unnecessary to enable him to obtain this privilege. He may obtain it by application to the district court after the case has been remanded. Dorsey v. Dorsey, 142 Minn. 279, 171 N. W. 933.

Devided custody is not desirable. A son of the parties, five years old, under the circumstances of this case, should be given into the custody of the plaintiff, his mother, with liberal opportunity to defendant, his father, to visit and associate with him. Eberhart v. Eberhart, — Minn. —, 183 N. W. 140.

ALIMONY

2802. Pendente lite—Section 7727, G. S. 1913, does not permit the defendant in a divorce suit to have the application of the plaintiff for temporary alimony and custody of the minor children pending suit transferred to another judge by filing an affidavit of prejudice against the judge before whom the application is made. Ratcliffe v. Ratcliffe, 135 Minn. 307, 160 N. W. 778.

Temporary alimony, suit money, and attorney's fees are to be awarded cautiously. G. S. 1913, § 7119, does not authorize temporary alimony, suit money, and attorney's fees, unless necessary for the wife's support and proper presentation of her cause, and whether she has means of her own must be considered in determining the necessity therefor, though the fact that she has some property does not preclude court from awarding her temporary support money, and where her income is insufficient or not readily available it is proper. Wetter v. Wetter, 145 Minn. 499, 177 N. W. 491.

(49) Wetter v. Wetter, 145 Minn. 499, 177 N. W. 491.

(51) Spratt v. Spratt, 140 Minn. 510 166 N. W. 769, 167 N. W. 735; Eberhart v. Eberhart, — Minn. —, 183 N. W. 140.

2803. Permanent—In determining the one-third value of the husband's estate or income, unsecured debts need not be taken into account. The statute does not refer to net value. Weersing v. Weersing, 137 Minn. 480, 163 N. W. 658.

Under G. S. 1913, § 7140, the court has power to decree a specific portion of the property of the husband to the wife for her support. The court directed the husband to pay off a mortgage on his homestead, which was occupied by his wife and children, and to pay $50 per month for their support. If he failed to do so, he was ordered to pay her $60 per month and to pay the interest on the mortgage and the taxes on the homestead. Held, that the former alternative was optional, while the latter was obligatory in case performance of the first was refused. The foregoing

provision for the support of a wife and two minor children was not excessive; the husband's earning capacity being $150 per month. Dorsey v. Dorsey, 142 Minn. 279, 171 N. W. 933.

Where the husband was earning only enough for his own subsistence and had no property it was held that an award of thirty dollars a month was unwarranted. Larson v. Larson, 147 Minn. 457, 179 N. W. 723.

(54) Weersing v. Weersing, 137 Minn. 480, 163 N. W. 658. See note, 6 A. L. R. 192, (earning capacity of husband).

2804. Attorney's fees and suit money—Attorney's fees in the supreme court may be allowed in that court and included in the judgment for costs and disbursements, the application therefor having been held in abeyance until the determination of the appeal. Mullen v. Mullen, 135 Minn. 179, 160 N. W. 494.

Attorney's fees and suit money are to be allowed cautiously and only when necessary, and whether the wife has means of her own must be considered in determining the necessity therefor. Wetter v. Wetter, 145 Minn. 499, 177 N. W. 491.

In a divorce suit, costs including attorney's fees, are discretionary, and will not be disturbed on appeal. Larson v. Larson, 147 Minn. 457, 179 N. W. 723.

The supreme court may make an allowance for counsel fees and suit money in connection with an appeal in a divorce case, and where an application is made during the pendency of the appeal it may be continued to be determined on decision of the case. Eberhart v. Eberhart, — Minn. —, 183 N. W. 140.

(60) See § 2806.

2805. Revision of order or judgment—A correction of a decree of divorce, so as to more accurately express the decision of the court in respect to the alimony awarded, may be made at any time, where neither party to the suit nor any third party has, between the entry of the decree and its correction, changed positions, so as to be prejudiced by the correction. Section 7786, G. S. 1913, in excepting a final judgment in an action of divorce from the judgment which the courts may modify or amend, is not an inhibition against correcting or amending a decree of divorce as to alimony, but only against modifying or vacating the part of such decree which deals with the marriage status of the parties. Hoff v. Hoff, 133 Minn. 86, 157 N. W. 999.

When the defendant, after a judgment for alimony is rendered against him, acquires real estate, the court has power to revise, modify, and alter the judgment so as to make the alimony a specific lien on the real estate so acquired. Roberts v. Roberts, 135 Minn. 397, 161 N. W. 148.

The acquisition of property after the decree of divorce may be made the basis for a modification of an aware of alimony. Searles v. Searles, 140 Minn. 385, 168 N. W. 133.

The power of the court to revise an order or judgment for alimony is very broad under G. S. 1913, § 7129. Hartigan v. Hartigan, 145 Minn. 27, 176 N. W. 180.

In a proceeding to modify a decree awarding a wife permanent alimony, evidence held not to warrant the finding that the husband had any earning capacity beyond what was necessary for his own sustenance, so that an award of $30 a month was unwarranted. Larson v. Larson, 147 Minn. 457, 179 N. W. 723.

(64) Searles v. Searles, 140 Minn. 385, 168 N. W. 133; Hartigan v. Hartigan, 142 Minn. 274, 171 N. W. 925.

2805a. Effect of remarriage of divorced wife—The marriage of a divorced wife does not ipso facto cancel the obligation to pay the instalments of alimony awarded by the decree. It is, however, a change of condition of the divorced wife that, as to such allowances as were made for support merely, should strongly move the court to revise the decree upon application being made. Upon an application to revise the decree in respect to alimony for support merely, the court may in the exercise of sound judicial discretion cancel accrued instalments as well as cut off future instalments. Such alimony is not to be regarded, even as to accrued instalments, vested property rights. The showing in this case is such that the court below may have considered the alimony awarded to have been in part in lieu of a division of property accumulated by the joint efforts of the parties; but, even if that were not the case, there was no abuse of sound judicial discretion in the refusal to relieve defendant from accrued instalments, he, with full knowledge of plaintiff's remarriage and her claim to continued alimony, having refrained from seeking a revision of the decree. Hartigan v. Hartigan, 142 Minn. 274, 171 N. W. 925.

Where a divorce decree provides for alimony payable in instalments and the divorced wife is given no vested right therein, if it appears that a second marriage was planned before the action which dissolved the first was commenced, a sound public policy demands that the court discontinue instalments of alimony accruing after the plan of remarriage is carried into effect. Hartigan v. Hartigan, 145 Minn. 27, 176 N. W. 180.

2806. Action for support independent of divorce—A court of equity, independent of a proceeding for divorce or separation and without statutory authorization, has jurisdiction to decree the wife separate maintenance. In such action temporary support pendente lite may be given the wife. And an allowance may be made for attorney's fees and costs of suit. Robertson v. Robertson, 138 Minn. 290, 164 N. W. 980.

(67) Jacobs v. Jacobs, 136 Minn. 190, 161 N. W. 525; Robertson v. Robertson, 138 Minn. 290, 164 N. W. 980. See 6 A. L. R. 6 (defences available to husband); § 2807.

2807. Action for alimony—Jurisdiction—Venue—Probably an independent action for alimony need not be brought in the county where the plaintiff resides. Searles v. Searles, 140 Minn. 385, 168 N. W. 133.

The plaintiff and the defendant were married in Minnesota and resided there many years. The defendant went to the state of Washington and there obtained a divorce from the plaintiff upon substituted personal

service in Minnesota. The divorce is conceded to be valid. There was no determination as to alimony. The Washington action was in rem. The res was the marriage relation or status. Of that the Washington court had jurisdiction and might destroy it by its judgment and it did. The judgment of divorce is not res judicata upon the question of alimony and the plaintiff may maintain an independent action for alimony in Minnesota. In making an award of alimony the court properly took into account real property acquired by the defendant in Minnesota by inheritance after the decree of divorce and charged it with a lien for the alimony awarded. Searles v. Searles, 140 Minn. 385, 168 N. W. 133.

(69) See Pennington v Fourth Nat. Bank, 243 U. S. 269 (enforcement of alimony against non-resident).

2808. Exemptions—(71) 11 A. L. R. 123.

2809. As a lien—The court may make alimony a specific lien on the realty of the defendant by an order or judgment. Whether an order or judgment is necessary to create such a lien is an open question. Roberts v. Roberts, 135 Minn. 397, 161 N. W. 148.

DOMICIL

2813. Infants—Right of emancipated minor to acquire a new domicil. 33 Harv. L. Rev. 4.

Capacity of minor near maturity to change domicil. 5 A. L. R. 958.

(81) See 32 Harv. L. Rev. 175 (infant orphan).

2814. Married women—(83) See Harv. L. Rev. 786.

2816. Change—Evidence held to justify a finding of a change of domicil of origin. Seccomb v. Bovey, 135 Minn. 353, 160 N. W. 1018.

As a general rule of law a person under legal disability or restraint or persons in want of freedom are incapable of losing or gaining a residence by acts performed by them under the control of others. There must be an exercise of volition by persons free from restraint and capable of acting for themselves in order to acquire or lose a residence. A person imprisoned under operation of law does not thereby change his residence. Millett v. Pearson, 143 Minn. 187, 173 N. W. 411.

Domicil while journeying from old to new home. 5 A. L. R. 296.

2817. Evidence—Admissibility—Recitals of residence in a will or deed are entitled to great weight as evidence of domicil but they are not conclusive. Seccomb v. Bovey, 135 Minn. 353, 160 N. W. 1018.

With respect to the evidence necessary to prove an intention to change a domicil no positive rule can be laid down, but it may be proved by acts or declarations or both. Acts are generally regarded as more weighty than declarations, and written declarations more weighty than oral ones. Seccomb v. Bovey, 135 Minn. 353, 160 N. W. 1018.

2817a. Law and fact—The question of domicil is one of fact for the jury, unless the evidence is conclusive. Seccomb v. Bovey, 135 Minn. 353, 160 N. W. 1018.

DOWER

2818. In general—In this state we are far from common-law dower. In re Evans' Estate, 145 Minn. 252, 177 N. W. 128.

(91, 94) In re Evans' Estate, 145 Minn. 252, 177 N. W. 126.

DRAINS

IN GENERAL

2819. Basis of right to establish—(95) Erickschen v. Sibley County, 142 Minn. 37, 170 N. W. 883.

2820. Constitutionality of statutes—The legislature intended, by the provisions of G. S. 1913, § 5571, and the judicial ditch law as a whole, to make the county or counties in which a judicial ditch is proposed to be constructed primarily liable for the compensation and expenses of the engineer appointed by the court and of others who perform services in the proceeding, whether the ditch is established or the proceedings dismissed. Assuming, without deciding, that this would violate no constitutional provision, if the law provided for notice to the county, and a right and opportunity to be heard on the application to the court to allow, audit, and order paid such compensation and expenses, if it does not so provide, there is not due process of law. The provision in section 5571 that in case of a judicial ditch all "fees, per diem compensation and expenses shall be audited, allowed and paid upon the order of the judge of the district court having charge thereof," provides for no notice to the county, no right or opportunity to be heard, nor does any other provision of the law. This provision is unconstitutional, as not due process of law, and an order made thereunder is void. State v. District Court, 138 Minn. 204, 164 N. W. 815; State v. O'Brien, 138 Minn. 185, 164 N. W. 817; Gove v. Murray County, 147 Minn.. 24, 179 N. W. 569. See 2 Minn. L. Rev. 158.

Laws 1917, c. 442, authorizing courts to organize drainage and flood control districts is not unconstitutional as an unwarranted delegation of legislative functions and powers to the judiciary. State v. Flaherty, 140 Minn. 19, 167 N. W. 122.

Under the drainage law the county is an agency of the state in a judicial ditch proceeding in working out the drainage project. It is not a party, in the sense that a landowner is, nor in a proprietary capacity, nor are its property interests affected as are those of a landowner who is assessed for benefits, nor is it a party to the proceeding at all except as an agency of the state charged with the financing and working out of the project. The statute (G. S. 1913, § 5541) requires the auditor to issue warrants upon the preliminary or progress certificates of the engineer in charge. It does not provide for notice to the county. The statute is not unconstitutional for want of due process

because it does not require notice and notice need not be given nor is it unconstitutional because it does not provide for the service of notice upon the county of the institution of the proceeding sufficient to constitute due process against one a party in a proprietary capacity. State v. Hanson, 140 Minn. 28, 167 N. W. 114.

Where a judicial ditch has been established and the fund for its construction has been provided, and is in the county treasury, an appeal from a judgment against the county (obtained in the drainage proceeding) by the duly appointed engineers for services rendered under the provisions of section 5571, G. S. 1913, does not present a question of the violation of the due process of law requirement of the constitution, when the record discloses that due notice of hearing of the claim was given the county, and a hearing was had, at which the evidence, received without objection, conclusively established the correctness and legality of the claim represented by the judgment. Baugh v. Norman County, 140 Minn. 465, 168 N. W. 348.

A statute directing the district court to revive a drainage proceeding in which the petition for the establishment of the ditch has been denied on the merits and to hear and determine the matter de novo is invalid. In so far as section 5, c. 471, Gen. Laws 1919, so directs, it is unconstitutional. Petition of Siblerud, — Minn. —, 182 N. W. 168.

2821. Construction of statutes—The several drainage statutes, relating to the drainage of wet and overflowed agricultural lands are in pari materia, and should be construed together as one law. Wold v. Bankers Surety Co., 133 Minn. 90, 157 N. W. 998.

Drainage proceedings are purely statutory and their validity depends upon a strict compliance with the provisions of the statute by which they are regulated and controlled. State v. Nelson, 145 Minn. 31, 176 N. W. 181.

(6) State v. Nelson, 145 Minn. 31, 176 N. W. 181.

2821a. County legislative agent—Bonds—Contracts—Liability—In the drainage scheme of the statute the county is an agency of the state. The state may impose upon the county and its officers such duties as are appropriate to the working out of the drainage project. It requires the county to finance the undertaking. If all goes well assessments for benefits will pay the cost of the project. If loss occurs to the county it is incidental to its position as an agency of the state and such loss carries no suggestion of want of due process. It is clear that the failure to provide for notice to the county in connection with a preliminary or progress certificate or the issuance of a warrant does not render the statute unconstitutional for want of due process; nor does such result follow from the failure of the state to provide for service of notice of the ditch proceeding upon the county such as might be necessary to make one a party in a strict or the usual sense. The county is not a party, in the sense that a landowner is, nor in a proprietary capacity, and its property interests are not involved as are those of a landowner whose land is affected by assessments, nor is it a party to the proceedings at all except as an agency

of the state charged with the financing and working out of the project. Because of such duties cast upon it the statute requires notice of the proceeding to be filed with the auditor. G. S. 1913, §§ 5553–5561. It is merely an agency of the state. Viewed as such it is its duty to follow the statute. It is not in the position of a property owner, whose property is taken or affected, it is not an adversary, and the question of the sufficiency of notice to constitute due process is not present. State v. Hansen, 140 Minn. 28, 167 N. W. 114.

In drainage proceedings the county is not interested in a proprietary sense but is a party therto merely as a governmental agency. Alden v. Todd County, 140 Minn. 175, 167 N. W. 548.

After a county ditch had been duly established, the contract for construction let, and the work started it was discovered that a mistake had been made in the computation of the number of cubic yards to be removed, so that, if the price specified in the contract should be increased proportionately to the mistake, the cost of construction would largely exceed the estimated benefits to the lands affected. Nevertheless the contractors, the plaintiffs, proceeded with the construction. The work was accepted, and the contract price paid. In this action against the county to reform the contract so as to increase the contract price proportionately to the mistake in the calculation of the yardage of the ditch, and to recover such balance, it is held: No liability can be imposed upon a county in ditch proceedings except as provided by the drainage act. G. S. 1913, §§ 5523-5633. When the cost of the project exceeds the benefits assessed, the ditch cannot lawfully be established; and a contract for its construction at a price greater than the estimated benefits is void. Therefore the court could not reform the contract in this case so as to allow a recovery in excess of the benefits. The scheme of the drainage law is that no liability shall be incurred in the establishment and construction of a ditch beyond the amount of assessed benefits; and any attempt to exceed this amount must be considered as futile under the constitutional provision, forbidding the taking of private property for public uses without compensation. The county cannot be held liable for drainage construction under an implied contract, or on the theory that it has individually, or in a proprietary sense, received the benefit of the work. Alden v. Todd County, 140 Minn. 175, 167 N. W. 548.

The preliminary expenses in drainage proceedings may be paid by the county, without a hearing, where the county knows them to be just and true. Itasca County v. Ralph, 144 Minn. 446, 175 N. W. 899.

The county and certain of its officers in a public drainage proceeding under our statute act as agents of the law through which the project is carried into effect. In a public drainage proceeding the statute provides the manner and extent to which a county may become liable, and it can be made liable in no other way. Where a contractor for the construction of a public ditch placed his whole reliance upon a statement contained in the notice for bids as to the condition of the soil where the tile was to be laid, he has no cause of action against the officers or agents as individuals. A contractor for the construction of a public ditch is not entitled to

recover damages from the county or its officers based upon a statement in the notice for bids as to the character of the soil and because he encountered conditions more difficult and expensive in which to lay tile than he was led to expect from such statement. Counties and their officers and agents required by law to establish public drainage systems and to let contracts for the construction thereof to the lowest bidders upon public notice, are under no obligation to obtain information concerning the character of the soil or cost of the work for the benefit of the bidders; their sole duty in that regard being to the public. Cement Products Co. v. Martin County, 142 Minn. 480, 172 N. W. 702.

No election is necessary to authorize the issue of county drainage bonds. Pike v. Marshall, 146 Minn. 413, 178 N. W. 1006.

See § 2820.

2821b. Statutes not exclusive—Private contracts—The general statutes do not exclude private drainage by contract between owners of contiguous lands. Stoering v. Swanson, 139 Minn. 115, 165 N. W. 875; Hartle v. Neighbauer, 142 Minn. 438, 172 N. W. 498. See § 10157a.

2821c. Function of courts—In carrying out and applying the drainage statutes, the district court exercises judicial functions, and its findings of fact and conclusions of law are to be given the same force and effect as in ordinary actions between private parties. Petition of Siblerud, — Minn. —, 182 N. W. 168.

2822. Drainage of meandered lakes—Statute—A village whose streets extend to a meandered lake is a "riparian owner" thereon, and the lake cannot be drained without an affirmative vote of the voters of the village. The recession of the waters of a lake must be permanent, not temporary, in order to cause the lake to lose its character as such. Troska v. Brecht, 140 Minn. 233, 167 N. W. 1042.

The petition provided for by G. S. 1913, § 5525, is sufficient to confer jurisdiction upon a county board to act in a drainage proceeding which will result in the drainage of a meandered lake. Such a petition of necessity discloses that the drainage ditch to be dug passes through such lake, when the course of the ditch is described as prescribed by the statute, and the lake is made a connecting link in the ditch. Meandered lakes belong to the state in its sovereign capacity, in trust for the public. The right of the public to their enjoyment may not be destroyed, if they are of substantial public use, under the guise of protecting the public health, promoting public welfare, or reclaiming waste lands through drainage proceedings. The state has an interest in, and as the representative of the public is affected by, the drainage of a meandered lake, and it is the duty of county boards and courts to guard the interests of the state in proceedings brought to drain such a lake. Evidence considered, and held not to sustain a finding that Washington Lake is of no substantial public use, within the meaning of chapter 300, Laws 1915. Erickschen v. Sibley County, 142 Minn. 37, 170 N. W. 883.

In a judicial ditch proceeding in which a meandered lake is drained an apportionment and partition of the lake bed among the riparian owners

may be made at the final hearing without the petition and notice provided by G. S. 1913, § 5531. Storrs v. Brush, 142 Minn. 350, 172 N. W. 224.

The drainage of a meandered lake is forbidden unless it be of the class authorized to be drained by section 5523, G. S. 1913, as amended by Laws 1915, c. 300. Evidence considered and held to establish that Crow Lake in Stearns county is not within the class of lakes authorized to be drained by that statute. The case of County Ditch No. 34 in Sibley County, 142 Minn. 37, 170 N. W. 883, followed and applied. State v. District Court, 144 Minn. 78, 174 N. W. 522.

The final order in the ditch proceeding here involved directed the draining of a meandered lake pursuant to G .S. 1913, § 5523, as amended by Laws 1915, c. 300, § 1. Formerly the lake was of considerable depth, with well-defined banks and sandy beaches, and was concededly a public or navigable lake. Its outlet was damaged by freshets and worked back into the rim of the lake; and the waters receded, and there was some filling in of muck, and vegetable growth appeared, and the lake became of less public use. Shortly after the commencement of the ditch proceeding, and before the first hearing, the county board fixed the level of the lake, pursuant to G. S. 1913, § 5438 et seq., at a point below high-water mark. A dam was built at the outlet and the lake assumed the proportions of a public or navigable lake. Held, that, with the lake in the condition stated and more definitely described in the opinion, the order of the county board was valid, that it should have been given effect, and that the lake should not have been drained. State v. District Court, 146 Minn. 150, 178 N. W. 595.

2822a. Drainage and flood control districts—Chapter 442, Laws 1917, authorizing the courts to organize drainage and flood control districts in river basins abutting upon or adjoining boundary waters and to appoint a board of directors to carry the purpose of the act into effect, is not unconstitutional because of an unwarranted delegation of legislative functions and powers to the judiciary. State v. Flaherty, 140 Minn. 19, 167 N. W. 122.

2823. Obstruction—Plaintiff cannot raise the objection that the waters from defendants' lands reach the county ditch for the establishment of which such lands have not been assessed. Stoering v. Swanson, 139 Minn. 115, 165 N. W. 875.

In an action for obstructing a county ditch whereby water was thrown on a farm of plaintiff, held, that a nominal verdict was not so inadequate as to require a reversal and there were no errors in the charge and in the admission and exclusion of evidence. Koch v. Speiser, 145 Minn. 227, 176 N. W. 754.

ESTABLISHMENT, CONSTRUCTION AND REMEDIES

2824a. Jurisdiction—Presumption—It is not necessary, in proceedings under the drainage statute, that the record affirmatively show jurisdiction in all respects. The final order therein is prima facie evidence of the

authority to make the same, and the presumption continues until the contrary affirmatively appears. State v. Nelson, 137 Minn. 265, 161 N. W. 714, 163 N. W. 510.

2824b. Within municipal limits—The general drainage law authorizes the construction of ditches and drains whenever the prescribed conditions are found to exist, whether the lands to be drained lie within or without the corporate limits of a city or village. State v. District Court, 142 Minn. 164, 171 N. W. 310.

2825. Parties—While the state is not a party to drainage proceedings it has real and substantial rights to protect. Erickschen v. Sibley County, 142 Minn. 37, 170 N. W. 883; State v. District Court, 146 Minn. 150, 178 N. W. 595.

2826. Petition—The petition limits the scope of the subsequent proceedings. State v. Compton, 136 Minn. 143, 161 N. W. 378.

Under section 5525, G. S. 1913, as amended by chapter 441, § 4, Laws 1917, persons whose lands are described in the petition as affected or benefited by the proposed ditch, though not traversed by it, are qualified to sign as petitioners. State v. Grindeland, 143 Minn. 435, 174 N. W. 312.

The petition instituting such proceedings is a jurisdictional prerequisite of the authority of the court to act, and its effect is to be determined from the provisions of the drainage statute. State v. Nelson, 145 Minn. 31, 176 N. W. 181.

See § 2822.

2827. Notice of hearing on petition—A new notice of hearing upon an adjournment is necessary only where additional lands are included in an amended report of the engineer and viewers. State v. Nelson, 137 Minn. 265, 161 N. W. 714, 163 N. W. 510.

It is not shown that the preliminary notice in a drainage proceeding, required by section 5525, G. S. 1913, was not duly given as found by the court. The posting of three notices in a township is sufficient compliance, even though there be two election districts in the township. The record contains nothing to overcome the presumption, given by the statute to the order establishing the ditch, that proceedings prior thereto have been regular, including the giving of notice of final hearing. State v. District Court, 140 Minn. 375, 168 N. W. 184.

The record does not show that relator did not have notice of the preliminary hearing, and, even if he did not, the court had jurisdiction to establish the ditch, since no part thereof passes over relator's land. State v. Grindeland, 143 Minn. 435, 174 N. W. 312.

2828. Hearing on petition—Determination of utility of ditch and benefits—Procedure—The court has no authority to order the construction of a judicial ditch unless it finds that the ditch would be of public benefit and that the special benefits therefrom will exceed the total cost thereof. Anderson v. Pillsbury, 139 Minn. 332, 166 N. W. 405.

Evidence held to justify a finding that the benefits to be derived from

a proposed judicial ditch would not exceed the cost of construction. Anderson v. Pillsbury, 139 Minn. 332, 166 N. W. 405.

Evidence held sufficient to sustain the findings of the court to the effect that the lands of relators would be benefited by the proposed ditch. and that public interests will be promoted by the construction of the same. State v. Nelson, 137 Minn. 265, 161 N. W. 714, 163 N. W. 510.

The functions of the county board in a ditch proceeding are primarily legislative and only quasi judicial. The county board is not a court. Its proceedings are not proceedings in court. They are necessarily informal. The members are usually not lawyers. They are not governed by legal rules of evidence. The witnesses are usually for the most part officials, such as engineers and viewers, or parties to the proceeding. Parties appear usually without attorneys. Their contribution to the proceeding will, in practice, be found to be partly argument and partly statement of fact. State v. Truax, 139 Minn. 313, 166 N. W. 339.

The board may, in county ditch proceedings, hear parties and witnesses who appear before them without administering an oath. The statute which authorizes them to hear and consider the testimony of parties, viewers, and engineers, and other admissible testimony, is not a mandate to the board to hear no person except under oath. State v. Truax, 139 Minn. 313, 166 N. W. 339.

There was nothing of which relators can complain in the meeting of the interested parties, the engineer, and viewers with the court, after the testimony was closed, to check over the same and make needful computations. State v. District Court, 140 Minn. 375, 168 N. W. 184.

2828a. Adjournment of hearings—The court in drainage proceedings may under G. S. 1913, § 5531, adjourn the final hearing for the purpose of enabling the engineer and viewers to amend and correct their reports to conform to directions of the court, where no additional lands are included in such amendments, without giving a new notice of hearing. A new notice of hearing is necessary only where additional lands are included in the amended report. State v. Nelson, 137 Minn. 265, 161 N. W. 714, 163 N. W. 510.

2828b. Appointment of referees—An order, made by a judge of the district court, appointing a referee on all judicial ditches then pending or that might thereafter be instituted in such judicial district, is unauthorized by section 5571, G. S. 1913. State v. O'Brien, 138 Minn. 185, 164 N. W. 817.

2829. Appointment of viewers—Report—Whether a member of the town board of supervisors is disqualified as a matter of law as a viewer in drainage proceedings, where the proposed ditch if constructed will necessitate the assessment of his town for benefits to highways therein, may be doubted; but it is held that the proceedings are not rendered invalid, even though disqualified, where the other viewers are competent to act. State v. Nelson, 137 Minn. 265, 161 N. W. 714, 163 N. W. 510.

Record held not to show such defects in the report of viewers that the court could not base a finding thereon, when considered with other evi-

dence received at the hearing. State v. District Court, 140 Minn. 375, 168 N. W. 184.

While the drainage statute is somewhat complex, yet it provides for the appointment of three disinterested resident freeholders of the county, as viewers, to meet and prepare a tabular statement, showing, as far as practicable, the names of the owners of each tract of land to be benefited or damaged by the construction of the proposed drainage system, and when any such system drains, either in whole or in part, any public highway, or benefits the same so that the roadbed or traveled track will be made better, the viewers shall estimate the benefits arising therefrom to such highway or roadbed, and report the same as a part of such tabular statement. They shall also report as a part of such tabular statement the damages awarded to each town or municipality for injury to such highway or roadbed, and from the construction and maintenance of any bridges, culverts, or other works rendered necessary by the establishment of such systems stating the same separately. G. S. 1913, § 5528. In arriving at the amount of benefits which a town charged with the maintenance of a public highway should be assessed, the viewers may consider and determine, not only what benefits will be derived from the drainage of the highway, but as well the improvement or betterment of the same by reason of the construction of the bridges provided for in the engineer's plans and specifications. If the construction of such bridges will constitute an improvement to the highway, roadbed, or taveled track, or render the same more permanent, then the same should be considered a benefit to the extent of such betterment, and assessed accordingly. Lisbon v. Counties of Yellow Medicine and Lac Qui Parle, 142 Minn. 299, 172 N. W. 125.

2829a. Appointment of engineer—Survey—Plans and specifications—Report—An order directing a survey and appointing an engineer in judicial ditch proceedings is not a final determination of any rights of persons who may be affected by the establishment of the proposed ditch. State v. District Court, 134 Minn. 435, 159 N. W. 965.

A departure by the engineer in his report from the points of commencement and terminus of the proposed ditch, when found necessary to render effective and complete the proposed drain, is not fatal to the proceeding. State v. Nelson, 137 Minn. 265, 161 N. W. 714, 163 N. W. 510.

Certain work of engineers held not so improper as to prevent the court from proceeding. State v. District Court, 140 Minn. 375, 168 N. W. 184.

The statute requires the engineer to make a correct survey of the line of the ditch, drain, or water course from its source to its outlet, and make an itemized tabulation of the construction of all bridges or other construction work found necessary, together with the estimated cost thereof. G. S. 1913, § 5526. He shall also make a detailed and complete report of his doings, and submit therewith the necessary plans and specifications and a description of the land over which the ditch is surveyed. All plans, specifications, maps, or profiles shall be made in duplicate and

filed in the office of the clerk of court. G. S. 1913, § 5527. Lisbon v. Counties of Yellow Medicine and Lac Qui Parle, 142 Minn. 299, 172 N. W. 125.

It is the duty of an engineer to prepare and file plans and specifications for all bridges to be constructed, together with a statement of the estimated cost thereof, as a basis for the assessment of damages and benefits therein. The report of the engineer as to the size and character of bridges, when affirmed by the order establishing the ditch, is conclusive, and should be the foundation of the assessment of damages to the town required to construct the same. Lisbon v. Counties of Yellow Medicine and Lac Qui Parle, 142 Minn. 299, 172 N. W. 125.

Action by landowner against the duly appointed and qualified engineer of an open ditch and his surety for damages because of his misstatements to plaintiff, the viewers and county board, in respect to the depth of the ditch and the necessity of a bridge across it on plaintiff's premises. The reports of the engineer and viewers and the final order establishing the ditch were duly filed as required by law, but plaintiff did not appeal from the order. At the trial defendants' objection to the reception of any testimony on the ground that the complaint did not state a cause of action was sustained. Plaintiff appealed from an order denying a new trial. Held, that the plaintiff had full opportunity to examine the reports and final order and inform himself as to the exact provisions of the same. The statutes impose no duty on the engineer to advise the parties interested in the ditch proceedings and plaintiff had no right to rely upon statements made by the engineer. The complaint failed to state a cause of action. Goetze v. Van Krevelen, 142 Minn. 500, 172 N. W. 487.

See § 2820 (compensation of surveyor).

2829b. Notice on final hearing on reports of viewers and engineers—Certain drainage proceedings held invalid because notice of the final hearing upon the reports of the viewers and engineer were not given as required by statute. State v. Nelson, 142 Minn. 494, 171 N. W. 922.

2830. Laying out—Order—Modification of engineer's plans—Outlets—Bulkheads—Laterals—In a proceeding to lay out and establish a public ditch, an order made by a county board in effect refusing to establish the drainage system asked for in the petition terminates the power and jurisdiction of the board in such proceeding. Where a county board refuses to establish the ditch asked for in the petition, it is without authority to establish a ditch wholly within a drainage district other than the one sought to be drained by the ditch petitioned for, though the starting point of the ditch asked for in the petition is within such other drainage district. State v. Compton, 136 Minn. 143, 161 N. W. 378.

The record on appeal held to show an adequate outlet for a ditch. State v. Nelson, 137 Minn. 265, 161 N. W. 714, 163 N. W. 510.

The final order should definitely describe the ditch to be constructed. A provision therein for the construction of "bulkheads where necessary" is indefinite and uncertain and should be made certain by amendment. State v. Nelson, 137 Minn. 265, 161 N. W. 714, 163 N. W. 510.

The final order is presumptive evidence of the validity of each step taken in the proceedings. State v. Nelson, 137 Minn. 265, 161 N. W. 714, 163 N. W. 510.

A petition held to authorize certain needed laterals. State v. District Court, 140 Minn. 375, 168 N. W. 184.

Evidence held not to show that the presence of a railroad right of way through which a proposed ditch would pass was an obstacle to the establishment of the ditch. State v. District Court, 140 Minn. 375, 168 N. W. 184.

In an action for trespass, held, that the record did not show that a ditch was not confined to where it was located by the engineer and established by the order; that the burden was on plaintiff to prove to what extent, if any, defendants had worked upon lands not embraced within the ditch as laid out. Fletcher v. Glencoe Ditching Co., 141 Minn. 440, 170 N. W. 592.

The order of a judge establishing a drainage system and confirming the report of viewers is a final determination of the proceeding. In re Judicial Ditch No. 7, 142 Minn. 178, 171 N. W. 564.

Under the facts stated in the opinion there was not such a departure from the description of the route of a judicial ditch as to invalidate the order establishing it. The court directed the referee, who had been appointed in the ditch proceding, to report upon the plan of drainage adopted by the engineer. There was no error in doing so. The court did not err in adopting the plan of the engineer, with the modifications proposed by the referee, instead of the plan reported by the engineer. In re Judicial Ditch, 147 Minn. —, 180 N. W. 119.

The findings of the court under G. S. 1913, § 5532, are to be given the same force and effect as findings in ordinary civil actions. Petition of Siblerud, — Minn. —, 182 N. W. 168.

(21,22) See State v. Nelson, 137 Minn. 265, 161 N. W. 714, 163 N. W. 510; Fletcher v. Glencoe Ditching Co., 141 Minn. 440, 170 N. W. 592.

2830a. Second ditch—Lands included in prior ditch—Where a judicial ditch has been constructed which provides drainage for only a part of the lands in the drainage basin which require drainage, a second and more extensive judicial ditch which will provide drainage for lands not provided for by the first, and will also more efficiently drain the lands sought to be drained by the first, may be constructed and may include the former ditch as a part thereof for the purpose of widening and deepening the former ditch and extending it to a proper outlet. Bomsta v. Nelson, 137 Minn. 165, 163 N. W. 135.

2830b. Vacation of order—The court on motion may vacate its prior order establishing a ditch Troska v. Brecht, 140 Minn. 233, 167 N. W. 1042; Itasca County v. Ralph, 144 Minn. 446, 175 N. W. 899.

Appearing as a witness at the final hearing in a judicial ditch proceeding does not estop an objector from applying for a rehearing if he can show sufficient grounds therefor. Troska v. Brecht, 140 Minn. 233, 167 N. W. 1042.

2832. Irregularities and mistakes—Immaterial mistakes will be disregarded. Asquith v. Engstrom, 133 Minn. 113, 157 N. W. 1004 (mistake in initials of party in an order).

Various irregularities in proceedings held not fatal. State v. District Court, 140 Minn. 375, 168 N. W. 184.

See § 2821.

2833. Bond of petitioners—(28) State v. District Court, 134 Minn. 435, 159 N. W. 965 (judicial ditch—no showing that bond of petitioners was insufficient—if bond is insufficient district court may require a further bond); State v. District Court, 140 Minn. 375, 168 N. W. 184 (insufficiency of bond not jurisdictional); Itasca County v. Ralph, 144 Minn. 446, 175 N. W. 899 (party estopped from questioning order vacating order establishing ditch—there could be no prejudicial error in the admission of certain evidence in this case—amount of interest in verdict).

2834. Bond of contractors—Where the one to whom has been duly let the construction of a public ditch in a judicial proceeding abandons the contract, his bondsman who has undertaken to complete the ditch cannot, in a suit brought by claimants to recover for materials furnished or labor performed for the contractor in the prosecution of the work, set up as defence or plea in abatement that the ditch has not been completed and accepted. American Brick & Tile Co. v. Equitable Surety Co., 133 Minn. 54, 157 N. W. 901.

(29) Wold v. Bankers Surety Co., 133 Minn. 90, 157 N. W. 998 (provisions in the judicial and county drainage statutes declaring the contractor's bond given therein to secure the performance of the contract an "official bond," held applicable to the bond given in state drainage proceedings under Laws 1907, c. 470—unnecessary to comply with G. S. 1913, § 8249, requiring notice to the contractor and his surety before action on the bond); American Brick & Tile Co. v. Turnell, 143 Minn. 96, 173 N. W. 175 (finding that plaintiff had performed his contract held justified by the evidence—various facts held not to release surety). See § 9104a.

2834b. Compensation of engineers and other officers—Under G. S. 1913, § 5571, the county board is not authorized to award to the county treasurer compensation for collecting assessments for county ditches. Trovaton v. Pennington County, 135 Minn. 274, 160 N. W. 766.

2835. Contracts—Compensation of contractors—Engineer's certificate—A subcontract for a county drainage project provided that the contractor should pay the subcontractor for "excavation of extra yardage over and above the estimate, required to be done by the engineer, the sum of 9½ cents per cubic yard." Other provisions stated that the work should be done according to the plans and specifications on file with the county auditor. Held, that the extra yardage and work must be limited to such as the engineer might lawfully require under section 5526, G. S. 1913, which section became a part of the subcontract. The county, recognizing the necessity and value of the extra work, paid the

contractor thereon not only the 10 per cent permitted by the section cited, but $600 in addition, although the county auditor had not consented to any part thereof being ordered by the engineer. The contractor claimed that the extra work was done without knowledge or consent. It is held that all the money paid by the county should in justice be applied upon the large amount of extra work which the subcontractor performed, and no part thereof should go to the contractor; there not being an amount sufficient to pay the subcontractor the stipulated price for the extra work. Seastrand v. D. A. Foley & Co., 135 Minn. 5, 159 N. W. 1072.

G. S. 1913, § 5541, provides that the auditor shall issue warrants upon the preliminary or progress certificates of the engineer in charge. It does not provide for notice to the county and none need be given. State v. Hansen, 140 Minn. 28, 167 N. W. 114.

Plaintiff, having contracted to construct a judicial ditch of a specified depth, width and form, and having assumed all risks from the caving in or filling up of the ditch during the period of construction and having agreed to remedy any such defects and leave the ditch free from sand or mud, was required to have the ditch substantially of the depth, width and form specified in the contract at the time he tendered it for acceptance, and was not relieved from this obligation by the fact that an obstruction at the outlet of the ditch may have prevented the water from carrying away the sediment which washed into the ditch. Plaintiff's admission that some three miles of the ditch lacked at least a foot of having the required depth at the time he tendered it for acceptance conclusively shows that he had not substantially performed the contract and was not entitled to recover the final payment. The engineer's certificate, not having been approved, was no evidence of the completion of the ditch, and as the fact of its issuance was shown and conceded, its exclusion from evidence did not affect plaintiff's rights. Gilbertson v. Blue Earth County, 145 Minn. 236, 176 N. W. 762.

The refusal of a county board to approve the final certificate of the engineer provided for by section 5541, G. S. 1913, lays the foundation for an action on the contract. Testimony considered, and held to make a case for the jury both as to the cause of delay in completing the work of construction and as to whether there was substantial performance of the contract. Friederick v. Redwood County, 181 Minn. 324, 182 N. W. 514.

2835a. Enlargement and repair of ditches—The provision of section 5552, G. S. 1913, requiring the county board to keep public drainage ditches in repair, does not give authority to substantially deepen several miles of a ditch for the purpose of draining lands not drained by it as originally constructed. The provision of this section prescribing the manner in which the cost of enlarging a ditch to enable it to take care of water discharged from subsequently constructed tributary ditches shall be apportioned between the original ditch and such tributary ditches, and the manner in which the part so apportioned to each shall be as-

sessed against the property assessed for the original construction of the same, does not apply to or govern the making of an assessment for the cost of deepening part of a ditch for the purpose of draining and reclaiming lands not drained by the original ditch, where no tributory ditches have been constructed. Such work is, in all essential respects, the construction of a new ditch, and the cost thereof cannot be assessed against property receiving no benefit from the work. In re County Ditch, 147 Minn. 422, 180 N. W. 537.

The county board is invested with full power and jurisdiction to repair, deepen, widen and extend established drainage ditches. Certain proceedings under G. S. 1913, § 5552, as amended by Laws 1915, c. 300, held authorized by the statute and to have been taken in substantial conformity thereto. Fletcher v. Glencoe Ditching Co., 141 Minn. 440, 170 N. W. 592.

2835c. Remedies of landowners—Estoppel—A resident and taxpayer of a municipality cannot maintain certiorari to review a judgment against the municipality unless he is interested in some more direct way. State v. Nelson, 136 Minn. 272, 159 N. W. 758, 161 N. W. 576.

Where there is a proper petition and due service of notice of hearing thereon, an owner of property affected cannot attack the proceedings collaterally in an action of trespass. Fletcher v. Glencoe Ditching Co., 141 Minn. 440, 170 N. W. 592.

When a county ditch is regularly established by order of the county board and the assessment for benefits and damages is made and the ditch is constructed, the order is res adjudicata and the ditch proceeding is not subject to collateral attack; and when the ditch runs along a highway and the earth from the ditch is wasted upon the highway, as is authorized by the statute, and a turnpike is made, and thereby a swale or coulee across the highway is dammed, so that the surface waters, in time of high water, do not take their natural course across the highway, a landowner is not entitled to obtain in an independent action culverts or openings through the highway or turnpike, so that the flow of surface waters shall not be obstructed. Garrett v. Skorstad, 143 Minn. 256, 173 N. W. 406.

One who, after the order establishing a drainage project has been vacated, takes part in the subsequent proceeding therein to establish the project in a modified form, and appeals from the final order dismissing the proceeding, is concluded thereby from questioning the order vacating the order establishing the ditch. Itasca County v. Ralph, 144 Minn. 446, 175 N. W. 899.

2835d. Consolidation of drainage systems—Chapter 441, Laws 1917, authorizing the consolidation of two or more drainage systems, is to be read and interpreted in connection with the general drainage laws of the state and the statutes it amends. It does not authorize proceedings in the district court designed to secure the removal of defects in two existing county ditches, and the more efficient drainage of lands in two drainage systems, by cuting off a portion of one of the main ditches and

connecting it with the other, so as to carry the surplus waters of a drainage basin through a ridge surrounding it and away from their natural outlet from such basin, and to extend, deepen, and widen the ditches in both drainage areas in order that the adjoining lands may be properly drained. State v. Nelson, 145 Minn. 31, 176 N. W. 181.

2835e. Judicial review—Scope—The question of the necessity and propriety of proceedings of this character, including the necessity and propriety of draining particular tracts of lands, is one that is addressed to the judgment and discretion of the tribunal having jurisdiction of the matter, whose conclusions will be disturbed by the courts only when the evidence, taken as a whole, furnishes no legal basis for the decision of such tribunal. State v. Nelson, 137 Minn. 265, 161 N. W. 714, 163 N. W. 510.

2836. Appeal to district court—Notice of appeal—Bond—Jury trial—Trial de novo—Evidence—A demand for a jury trial in a judicial ditch proceeding under G. S. 1913, § 5534, is sufficient if it recites the statutory conditions upon which the right depends and from it the assessment and land intended are reasonably ascertainable. When one landowner conveys to another pending the ditch proceeding, and both join in the demand, only one bond is required. Whether upon the dismissal of a demand for jury trial formal judgment should be entered is not determined; but when judgment is entered the propriety of the dismissal is reviewable upon an appeal from it. Asquith v. Engstrom, 133 Minn. 113, 175 N. W. 1004.

A demand for a jury trial held sufficient though it did not describe the land assessed for benefits, the description appearing in the proceedings in which the appeal was taken. Sands v. Dysthe, 134 Minn. 290, 159 N. W. 629.

The appellant need not state or show in his notice of appeal or demand for a jury trial that he is aggrieved by the order or judgment appealed from. Anderson v. Meeker County, 46 Minn. 237, 48 N. W. 1022; Wermerskirchen v. Dysthe, 134 Minn. 291, 159 N. W. 629.

A demand for a jury trial held sufficient though the appellant did not connect himself by the demand with the title to any property assessed for benefits in the proceedings. Wermerskirchen v. Dysthe, 134 Minn. 291, 159 N. W. 629.

Record held not to show affirmatively want of jurisdiction on the ground that the notice of appeal and bond were not filed within the statutory time. Plaster v. Aitkin County, 135 Minn. 198, 160 N. W. 493.

The county has no special interest in the question of damages and benefits to be paid by and and to the owners of affected property, and no such interest to protect on an appeal to the district court from an award thereof. Dosland v. Clay County, 136 Minn. 140, 161 N. W. 382.

On appeal to the district court, under G. S. 1913, § 5589, from an order of a county board granting a drainage petition affecting a meandered lake, there is a trial de novo; the sole question being whether the lake is properly subject to drainage under chapter 300, Laws 1915. The find-

ings of the trial court on such appeal are entitled to the same weight as in ordinary cases tried by the court without a jury. Erickschen v. Sibley County, 142 Minn. 37, 170 N. W. 883.

An order amending the viewers' report after a public drainage system is established does not change the rule of evidence upon a trial before a jury to assess benefits. An order establishing a public drainage system and confirming the report of the viewers in no way changes the rule of evidence bearing upon the issue raised by a demand for a jury to assess benefits. A demand for a jury to assess benefits in a public drainage proceeding is a demand for a review by a jury of the decision of the court, and entitles the landowner to a trial de novo upon that question. Upon a trial before a jury to assess benefits in a public drainage proceeding, the landowner may show, not only the lay of his land, its condition, and present means of outlet, but as well the cost of draining his farm without the aid of the proposed system. In re Judicial Ditch No. 7, 142 Minn. 178, 171 N. W. 564.

An order establishing a judicial ditch is not appealable and cannot be attacked on an appeal taken to review a reassessment of benefits and damages. Falkenhagen v. Yellow Medicine County, 144 Minn. 257, 175 N. W. 102.

Where a jury trial is had to determine the benefits and damages which a farm will receive from the ditch, the viewers may testify as to the quantity of wet land on the farm and as to its value with and without the ditch, and such testimony does not infringe the rule that their assessment is not to be used as evidence at such trials. Falkenhagen v. Yellow Medicine County, 144 Minn. 257, 175 N. W. 102.

2837. Appeal to supreme court—On appeal from a judgment the propriety of a dismissal of a demand for a jury trial is reviewable. Asquith v. Engstrom, 133 Minn. 113, 157 N. W. 1004.

Although the statute does not allow an appeal from an order establishing a judicial ditch, it allows an appeal from a final order confirming an assessment therefor, and upon such appeal the question may be raised that the assessment is void for lack of authority to construct the ditch. Bomsta v. Nelson, 137 Minn. 165, 163 N. W. 135.

An order vacating a final order establishing a ditch and granting a rehearing of the issues involved is not appealable. Brecht v. Troska, 137 Minn. 466, 163 N. W. 126.

No appeal lies from an order establishing a judicial ditch. Falkenhagen v. Yellow Medicine County, 144 Minn. 275, 175 N. W. 102.

2838. Certiorari—Certiorari will not lie to review an order directing a survey and appointing an engineer in judicial ditch proceedings under G. S. 1913, c. 44. State v. District Court, 134 Minn. 435, 159 N. W. 965.

A village was assessed for connecting its drainage system with a proposed ditch. The village was a party to the proceedings but took no appeal. There were no defects or errors in the proceedings rendering the judgment void, or affecting relator in his capacity as owner of lands assessed. Held, that the relator, though a resident and taxpayer of the

village, could not maintain certiorari to review the judgment authorizing such connection or assessing the village therefor. State v. Nelson, 136 Minn. 272, 159 N. W. 758, 161 N. W. 576.

In the absence of a full and complete record, certified on certiorari in review of drainage proceedings, this court will act upon the certificate of the trial court as to the facts therein stated and which are not otherwise shown by the record. State v. Nelson, 137 Minn. 265, 161 N. W. 714, 163 N. W. 510.

On certiorari to review an order establishing a judicial ditch, the amount of damages and benefits to particular lands cannot be considered. The mode in which they were determined in this instance is not shown to be fatally objectionable. In order to determine whether or not there is evidence to support the order establishing a ditch, there must be a settled case, or else a certificate by the trial court as to the accuracy of the record presented on certiorari. State v. District Court, 140 Minn. 375, 168 N. W. 184.

The sufficiency of the evidence to sustain an order of the district court, made in the course of drainage proceedings and brought to the supreme court for review upon a writ of certiorari, cannot be considered in the absence of a settled case or certificate of the trial judge as to the accuracy of the record returned. The inquiry is limited to questions of law disclosed by the return to the writ. State v. Nelson, 145 Minn. 31, 176 N. W. 181.

(38) State v. Nelson, 137 Minn. 265, 161 N. W. 714, 163 N. W. 510.

2839. Injunction—(40) Garrett v. Skorstad, 143 Minn. 256, 173 N. W. 406.

ASSESSMENTS

2840. Constitutionality—Cannot exceed benefits—The whole scheme of the drainage law is that no liability shall be incurred in the establishment and construction of a ditch beyond the amount of the assessed benefits. Any attempt to exceed this amount is contrary to the constitutional provision against taking private property for a public use without compensation. Alden v. Todd County, 140 Minn. 175, 167 N. W. 548.

(43) See In re County Ditch, 147 Minn. 422, 180 N. W. 537.

2840a. Lands must be benefited—The cost of constructing a ditch cannot be assessed against lands not benefited thereby. In re County Ditch, 147 Minn. 422, 180 N. W. 537.

2841a. Damages—Benefits—Award—Certain damages awarded held large but not so excessive as to justify a reversal. Plaster v. Aitkin County, 135 Minn. 198, 160 N. W. 493.

Where a new channel is made in a river by public authorities under the drainage statutes, necessitating a new railroad bridge over the river, it is the uncompensated duty of the railroad company to build the bridge at its own expense and it is improper to award it damages therefor. Chicago etc. Ry. Co. v. Sprague, 140 Minn. 1, 167 N. W. 124.

Damages to a landowner are secured and need not be paid before construction begins where there is an appeal. Fletcher v. Glencoe Ditching Co., 141 Minn. 440, 170 N. W. 592.

In a trial, upon a demand for a jury to assess damages in such proceeding, it is error to admit testimony as to what kind of bridges should be constructed, the same having been provided for in the plans and specifications of the official engineer. The damages to which a town is entitled on account of bridges provided for in public drainage proceedings is the cost of the construction and maintenance of the same, less the value of the wreckage from bridges to be replaced. The rule requiring a railroad company to construct and maintain bridges across the channel of a public ditch has no application to a municipality having the care and maintenance of public highways. Lisbon v. Counties of Yellow Medicine and Lac Qui Parle, 142 Minn. 299, 172 N. W. 125.

The court properly directed the jury to determine what sort of a farm crossing the average farmer would construct over the ditch, and what sort of fence would be suitable along it, and to allow for such a crossing and for the amount of such fence made necessary by the ditch, in fixing appellant's damages. Falkenhagen v. Yellow Medicine County, 144 Minn. 257, 175 N. W. 102.

The evidence did not require a finding that the cost of construction exceeded the benefits or that benefits were arbitrarily assessed by the viewers at amounts sufficient to meet the statutory requirement that the cost of construction shall not exceed the benefits. In re Judicial Ditch, 147 Minn. —, 180 N. W. 119.

The findings fixing the amount of benefits and damages which will result from the construction of the proposed ditch across plaintiff's land are sustained by the evidence. Halvorson v. Chippewa County, 140 Minn. 155, 167 N. W. 425.

2842. Exemptions—The evidence warrants a finding that part of a tract of railroad property was owned and operated for railway purposes and was exempt from a ditch assessment and part of the tract was not so operated and was not so exempt. In passing on the validity of an assessment where part of a tract is exempt the court should find as a conclusion what part is subject to the assessment. Where a single assessment is made against an entire tract and part of the tract is exempt, the whole assessment cannot stand against the property not exempt. The objection that part of the tract is exempt and the assessment therefore invalid may be raised by answer in proceedings to enforce delinquent taxes. State v. Chicago etc. Ry. Co., 141 Minn. 472, 170 N. W. 613.

2843. Additional assessments—Second ditch—Where a second ditch is established, if land which has been assessed for the first ditch receives an additional benefit from the second ditch, it may be assessed for the second ditch in an amount not exceeding the additional benefit so received. Bomsta v. Nelson, 137 Minn. 165, 163 N. W. 135.

2843a. Abatement by state tax commission—The Minnesota state tax commission has power on a proper showing to abate an assessment of benefits levied in proceedings to construct a county ditch. Such an assessment is an assessment levied by a municipality for local improvements. Such abatement or reduction may be made after the ditch is established and the assessment confirmed. State v. Minnesota Tax Commission, 137 Minn. 37, 162 N. W. 686.

2843b. Action by landowner to recover—Action by landowner to recover certain assessments paid for the construction of a judicial ditch and to vacate the unpaid assessments. The engineer refused to accept the completed ditch. Since then neither the contractor's bondsmen, the county nor those beneficially interested have taken any action. There has been no abandonment of the project. It has never been judicially decided whether the contractor is in default. On the contract price the county still withholds $1,247 because of the non-acceptance of the ditch. Held, that the plaintiff does not have a right of recovery. Werner v. Meeker County, 145 Minn. 495, 175 N. W. 996.

2844a. Application for judgment—What defences available—If the court was without power to construct the ditch it was without power to make an assessment therefor and this objection may be raised. Bomsta v. Nelson, 137 Minn. 165, 163 N. W. 135.

Loss of right to contest assessment by estoppel, waiver and the like. 9 A. L. R. 842.

DURESS

2848. Definition—(55) See Snyder v. Samuelson, 140 Minn. 57, 167 N. W. 287.

(58) Snyder v. Samuelson, 140 Minn. 57, 167 N. W. 287.

2849. Effect—Remedies—Where a contract is procured by duress the injured party may plead the duress as a defence to an action on the contract. Snyder v. Samuelson, 140 Minn. 57, 167 N. W. 287.

2850a. Evidence—Sufficiency—Evidence held sufficient to justify a finding of duress. Snyder v. Samuelson, 140 Minn. 57, 167 N. W. 287.

EASEMENTS

2851. Definition—(64) See Brechet v. Johnson Hardware Co., 139 Minn. 436, 166 N. W. 1070.

2852. Not favored—Construed strictly—(71) John A. Stees Co. v. Reinhardt, 142 Minn. 340, 172 N. W. 219.

2853. Acquisition—The term "appurtenances" is an apt one for conveying an easement, but its use is unnecessary to transfer an existing easement actually appurtenant. Leuthold v. John A. Stees Co., 141 Minn. 213, 169 N. W. 709.

Possibly an easement in the public may rest on the doctrine of estoppel. Evidence held not to show that an owner was estopepd from denying such an easement. John A. Stees Co. v. Reinhardt, 142 Minn. 340, 172 N. W. 219.

(73) John A. Stees Co. v. Reinhardt, 142 Minn. 340, 172 N. W. 219. See § 121.

(75) Leuthold v. John A. Stees Co., 141 Minn. 213, 169 N. W. 709 (certain wall and sewer easements held to pass by a mortgage and its foreclosure and subsequent transfers).

2853a. Termination—The plaintiffs and the defendant own adjoining tracts. In 1886 the predecessor in title of the defendant gave F. a 15-year ground lease expiring on October 13, 1901. In 1887 the predecessors in title of the plaintiffs gave F. an easement in the wall of the building on their tract, and an easement of way for a sewer, for which F. was to pay a stipulated amount yearly. The easements by their terms expired on October 13, 1901. F. mortgaged the ground lease in 1891, the mortgage was foreclosed, title was held in the interest of F. through various conveyances until 1897, when a transfer was made to the son of the reversioner, who apparently took in his interest; the transfer being in effect a surrender by F. and a release of him by the reversioner. The reversioner took possession. He conveyed to the defendant in 1915. Nothing was paid for the use of the easements after 1896 or 1897. The defendant claims that it has title to the easements by adverse possession. The plaintiffs claim restitution and a recovery of the value of the use. Judgment was entered in accordance with the claim of the plaintiffs. The ground lease was the dominant estate. There cannot be created in favor of an estate for years an easement which will survive it and bind the reversion or the servient estate. The easements were at an end as early as October 13, 1901, and the reversion and the servient estate were not bound by them or by the covenants in the instruments creating them. The finding that the defendant used the easements under an agreement implied in fact to pay for their use is not sustained. Leuthold v. John A. Stees Co., 141 Minn. 213, 169 N. W. 709.

2855. Abandonment—An easement may be lost by abandonment though originating in grant. Mineral Land Investment Co. v. Bishop Iron Co., 134 Minn. 412, 159 N. W. 966. See § 2863.

2855a. Loss by destruction of building—Where an easement has been granted for a particular purpose in connection with a particular building, it is extinguished by a destruction of that building. A grant of the right to use a hall or stairway in a certain building gives no interest in the soil which will survive a destruction of the building, and the right ceases whenever the building is destroyed without the fault of the owner of the servient estate, and the owner of the easement will not acquire any right in a new building which may be erected in the place of the one destroyed. Brechet v. Johnson Hardware Co., 139 Minn. 436, 166 N. W. 1070.

PRIVATE WAYS

2857. Acquisition—Deeds construed—An ambiguity in a description of a grant of a right of way may be solved by considering the circumstances attending the grant and the practical construction the parties themselves gave the description by the location and maintenance of the way for many years in a certain definite place. Bruns v. Willems, 142 Minn. 473, 172 N. W. 772.

(81) Bruns v. Willems, 142 Minn. 473, 172 N. W. 772.

(82) Aldrich v. Soucheray, 133 Minn. 382, 158 N. W. 637.

2858. Appurtenant or in gross—Deeds to the defendants of portions of lot A in a plat contained this clause: "Excepting the easterly fifteen feet of said lot A, which is reserved for a foot and bicycle path for the benefit at all times of any and all of the owners of any of the land in said East Shore Park." It is held that these deeds, construed in the light of attendant circumstances, created an easement in the land conveyed appurtenant to the other land in the plat. Aldrich v. Soucheray, 133 Minn. 382, 158 N. W. 637.

An easement of right of way may be appurtenant to a tract of land even though not touched by the way granted, when it clearly appears that such was the intention. Proof of intention is aided by the rule that an easement in gross will never be presumed when, in the light of all the circumstances under which it was granted, it can be fairly construed appurtenant. Bruns v. Willems, 142 Minn. 473, 172 N. W. 772.

(82) Bruns v. Willems, 142 Minn. 473, 172 N. W. 772.

2859. Of necessity—(85) 34 Harv. L. Rev. 88.

2860. Transfer of land—(86) 8 A. L. R. 1368.

2862a. Use—Limitations—Effect of lease—Estoppel—In accordance with a former decision of this court that a passageway in controversy designed to serve the property of both plaintiff and defendant should be maintained at a level best adapted to serve the interests of both, the trial court found that that level was the level of the sidewalk at one end of the way. Neither the terms of a 25-year lease of the ground beneath the surface of the way and of other adjacent property, nor the conduct of the parties under the lease, established the level at which the way should be maintained after the lease expired. The conduct of the parties during the term of the lease did not work an estoppel as to the level at which the way should be subsequently maintained. Silence of plaintiff's grantor while defendant constructed the floor of a building to be served by the way at a particular level could not estop plaintiff, since there is no evidence that this grantor knew of the level at which defendant was constructing its floor. Defendant could not itself fix the level by first improving its property. Defendant, in constructing its building without having the level of the way established, took its chances on the level it adopted being held a proper one. The finding of the trial court that

the level of the sidewalk is the level best adapted to serve the property of both, is sustained by the evidence, as is also the finding that defendant can conform its building to said level at less cost and damage than plaintiff would sustain by the mantenance of the way on an incline as it is at present maintained by defendant. Kretz v. Fireproof Storage Co., 133 Minn. 285, 158 N. W. 397.

The interests of both the servient and dominant estate must be considered in the use made of an easement. Bruns v. Willems, 142 Minn. 473, 172 N. W. 772.

In order to make out a cause of action against the owner of an easement of right of way for grading and improving the roadway, the onus is upon the owner of the servient estate to show that the work was improperly done, or unnecessarily injured the latter's use of the land. The finding that there was no injury to plaintiff's rights from defendant's work upon the right of way is sustained. Bruns v. Willems, 142 Minn. 473, 172 N. W. 772.

2862b. Extinguishment—Extinguishment by acquisition of another means of egress to highway. 34 Harv. L. Rev. 88.

2863. Abandonment—(89) See Bruns v. Willems, 142 Minn. 473, 172 N. W. 772 (admissibility of evidence to show no abandonment).

2864. Repair—(90) Bruns v. Willems, 142 Minn. 473, 172 N. W. 772.

EJECTMENT

IN GENERAL

2865. Nature of action—(92) Iverson v. Iverson, 140 Minn. 157, 167 N. W. 483.

PARTIES

2870. Who may maintain action—One in actual possession of a parcel of land under a claim of right may maintain ejectment against a naked trespasser who has ousted him from such possession, but the evidence in this case shows neither such possession nor such ouster as entitles plaintiff to recover. Post v. Sumner, 137 Minn. 201, 163 N. W. 161.

An administrator may maintain an action without joining the heirs of devisees. Crane v. Veley, — Minn. —, 182 N. W. 915.

(14) Post v. Sumner, 137 Minn. 201, 163 N. W. 161.

COMPLAINT

2875. Allegation of title—(33) See Roy v. Dannehr, 137 Minn. 464, 162 N. W. 1050.

2880. Description of premises—The complaint should contain a description of the premises sufficiently definite so that the land may be located and the proper judgment entered. Roy v. Dannehr, 137 Minn. 464, 162 N. W. 1050.

The description of land sought to be recovered in ejectment must be legally sufficient to identify it, or the description must be such that by reference to monuments, or known or described or designated objects, the land sought to be recovered can be identified and located. A description of a strip of land commencing at a quarter corner, following the quarter line south to a road, thence going along the road southwesterly to the south line of a 40, and thence to a designated road, without showing the definite location on either side of the quarter line, or road, or 40 line, and indefinite as to width in all except the first course, is insufficient. Engmark v. Peterson, 145 Minn. 365, 177 N. W. 125.

ANSWER

2884. General denial—Evidence admissible under—(52–54) L. R. A. 1918F, 247.

2885. Particular answers construed—(55) Sandberg v. Clausen, 134 Minn. 321, 159 N. W. 752 (held not to show an oral agreement that could be specifically enforced, or such part performance of an oral agreement as would take it out of the statute of frauds, or facts entitling defendant to a lien on the land).

DEFENCES

2886. Title in third party—(56) See Crane v. Veley, — Minn. —, 182 N. W. 915.

(57) See Post v. Sumner, 137 Minn. 201, 163 N. W. 161.

2887. Equitable defences—The defendant may plead that the deed on which plaintiff relies is void because of the incompetence of the grantor and ask for its cancelation. Crane v. Veley, — Minn. —, 182 N. W. 915.

(58) McDonald v. Whipps, 137 Minn. 450, 163 N. W. 746. See Sandberg v. Clausen, 134 Minn. 321, 159 N. W. 752.

2890. Miscellaneous defences—In an action by a grantee against his grantor who has remained in possession the grantor may defeat recovery by proof that the deed was given to defraud his creditors or for any other unlawful purpose, where the parties are in pari delicto. Iverson v. Iverson, 140 Minn. 157, 167 N. W. 483.

The grantor in the deed is now deceased. She left a will giving to the grantee the land covered by the deed. Probate of the will was contested by defendant, who is a son of the testator. The will was disallowed by the probate court and an appeal is now pending. These facts do no preclude defendant from maintaining his defence based on possession. Crane v. Veley, — Minn. —, 182 N. W. 915.

PROOF

2892. Burden of proof—Plaintiff must rely on the strength of his own title. A defendant in possession cannot be ejected by a false claim of

title in plaintiff because another claim of title alleged by plaintiff has not been determind. Crane v. Veley, — Minn. —, 182 N. W. 915.

(64) Post v. Sumner, 137 Minn. 201, 163 N. W. 161.

2893. Prima facie proof—The plaintiff cannot prove title by adverse possession through the possession of those who recognized defendant's grantor as the owner. Post v. Sumner, 137 Minn. 201, 163 N. W. 161.

(69) 7 A. L. R. 871.

(72) Post v. Sumner, 137 Minn. 201, 163 N. W. 161.

(73) 7 A. L. R. 860.

2897. Identity of persons and names in title deeds—(80) 5 A. L. R. 428. See § 6917.

2897a. Evidence—Sufficiency—Evidence held to justify a judgment for defendant notwithstanding the verdict. Roy v. Dannehr, 137 Minn. 464, 162 N. W. 1050.

Evidence held to justify a directed verdict for defendant. Henry v. Hutchins, 146 Minn. 381, 178 N. W. 807.

DAMAGES AND MESNE PROFITS

2900. Measure of damages—(86) Ford Motor Co. v. Minneapolis, 147 Minn. 211, 179 N. W. 907 (questioning Poehler v. Reese, 78 Minn. 71, 80 N. W. 847).

VERDICT AND JUDGMENT

2906. Judgment—Relief allowable—The title of plaintiff may be adjudged to be subject to certain specific incumbrances which have been canceled or discharged, such discharge or cancelation being properly vacated and the lien of the incumbrances restored of record by the same judgment. Henry v. Hutchins, 146 Minn. 381, 178 N. W. 807.

When the plaintiff invites the determination of a question he cannot complain that the judgment determines it. Crane v. Veley, — Minn. —, 182 N. W. 915.

Plaintiff sued as administrator of the estate of the grantee in the deed. There are heirs who are not parties to the suit. It was not error for the court to adjudge that the deed is void and that the record of the deed and the registration certificate issued thereon be canceled. Crane v. Veley, — Minn. —, 182 N. W. 915.

ELECTION

2909. Definition—(4) Mechling v. McAllister, 135 Minn. 357, 160 N. W. 1016; Kelleher v. Kelleher, 140 Minn. 409, 168 N. W. 586. See § 10300; 32 Harv. L. Rev. 288 (conflict of laws).

ELECTION OF REMEDIES

2914. Finality of election—By bringing an action for the rescission of a contract for fraud one does not necessarily bar himself from subsequently affirming the contract and recovering damages for the fraud. Freeman v. Fehr, 132 Minn. 384, 157 N. W. 587.

An unsuccessful action for rescission on the ground of fraud is not a bar to a subsequent action for damages for the same fraud. Gunderson v. Halvorson, 140 Minn. 292, 168 N. W. 8.

An offer to rescind a contract for fraud does not bar a subsequent action for rescission. Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736.

An action for damages on an unreformed instrument is a bar to a subsequent action for its reformation. Eder v. Fink, 147 Minn. 438, 180 N. W. 542.

(9) Middlestad v. Minneapolis, 147 Minn. 186, 179 N. W. 890.

(10) Freeman v. Fehr, 132 Minn. 384, 157 N. W. 587; Collopy v. Modern Brotherhood, 133 Minn. 409, 158 N. W. 625; Southworth v. Rosendahl, 133 Minn. 447, 158 N. W. 717; Kremer v. Lewis, 137 Minn. 368, 163 N. W. 732; Gunderson v. Halvorson, 140 Minn. 292, 168 N. W. 8. See Wessel v. Cook, 132 Minn. 442, 445, 157 N. W. 705.

(11) Kremer v. Lewis, 137 Minn. 368, 163 N. W. 732.

See § 1815.

ELECTIONS

RIGHT TO VOTE

2919. Constitutional right—(25) State v. McKinley, 132 Minn. 48, 155 N. W. 1064; Opsahl v. Johnson, 138 Minn. 42, 163 N. W. 988 (right of Indians to vote).

NOMINATION OF CANDIDATES

2929. By direct vote—Primary election—The presidential preference primary election act is constitutional. Under such act, a candidate for delegate to the national convention of a political party cannot file his affidavit for candidacy with the secretary of state until there is a candidate for President whom he can specify in the affidavit as his choice. When the affidavit of a candidate for presidential elector, which stated the candidate's preference in respect to presidential candidates, was presented before the expiration of the time for filing names for candidates for President, the secretary of state properly declined to accept it. The affidavit of a candidate for delegate to such convention presented after expiration of the time for filing names of candidates for President must specify his choice among such candidates. The affidavit of a candidate for presidential elector need not state that he pledges himself to vote for

the person who was the state's choice at the primary in March. State v. Schmahl, 132 Minn. 221 156 N. W. 8, 116.

The primary election takes the place of the party caucus and convention. A voter cannot participate in the selection of the candidates of more than one party or of a party with which he does not affiliate. The primary election is in effect a separate primary for each party. Party voters express their choice on separate party ballots. The statute regulates the method of selection but the primary is essentially a party primary, except as to the selection of candidates for non-partisan offices. Sawyer v. Frankson, 134 Minn. 258, 159 N. W. 1.

In a contest of the right of a successful candidate at a primary election to the nomination on the ground that he violated the Corrupt Practices Act, the contestants must be voters qualified to participate in the selection of candidates of the party of which the contestee was the nominee, the office involved being partisan. Sawyer v. Frankson, 134 Minn. 258, 159 N. W. 1.

A person cannot be excluded from being a candidate for United States senator because he is disqualified under the state constitution. Federal law determines the qualifications of United States senators. State v. Schmahl, 140 Minn. 219, 167 N. W. 481.

The law of primary elections. 2 Minn. L. Rev. 97, 192.

One who files as a candidate for office as a member of a political party which becomes defunct before the election may, notwithstanding his candidacy, affiliate with another political party, and may at a succeeding election file for nomination as the candidate of such other party. State v. Schmahl, 140 Minn. 220, 167 N. W. 797.

(44) State v. Schmahl, 132 Minn. 221, 156 N. W. 8, 116 (presidential primary election law held constitutional).

(49) Flaten v. Kvale, 146 Minn. 463, 179 N. W. 213 (contest for violation of Corrupt Practices Act).

(50) Johnson v. Bauchle, — Minn. —, 182 N. W. 987.

2933a. Contests must precede election—Contests for nomination as party candidates for public office must be settled before the general election, and, when not, those whose names go upon the official ballots as the regular nominees are entitled to all the benefits therefrom, whether they, perchance, could have been in contest proceedings ousted of the right or not. Johnson v. Dosland, 103 Minn. 147, 114 N. W. 465; Johnson v. Bauchle, — Minn. —, 182 N. W. 987.

BALLOTS

2944a. Conclusive as to candidates—When an official ballot is delivered to a voter at an election by the election officers and voted by him, it is conclusive as to the right of the persons whose names are printed thereon to be candidates, and it must be counted for the person voted for though he was not legally entitled to have his name printed thereon as a candidate. Johnson v. Bauchle, — Minn. —, 182 N. W. 987.

2945. Correction—Who may move—Effect of failure to move—Estoppel—When a candidate or an elector neglects to take steps, under section 398, G. S. 1913, to have the name of a person not entitled to appear on the official ballot stricken therefrom, he cannot after the election is held raise a valid objection to counting the votes properly marked for such person; there being no claim that the latter had violated any provision of the election laws. Johnson v. Bauchle, — Minn. —, 182 N. W. 987.

(75) Johnson v. Bauchle, — Minn. —, 182 N. W. 987.

2947. Intention of voter controls—Statutory rules—(80) Johnson v. Bauchle, — Minn. —, 182 N. W. 987.

2948. Immaterial markings—(82) Doepke v. King, 132 Minn. 290, 156 N. W. 125.

2949. Indefinite and conflicting markings—(85) Doepke v. King, 132 Minn. 290, 156 N. W. 125.

2956. Markings to identify voter—To make a marking for identification illegal it is not necessary that the voter put his own name or initials thereon. It is equally illegal for him to put the name of another or a fictitious name on his ballot for identification. Such a ballot must be excluded whether the votor acted wilfully, ignorantly or innocently. Doepke v. King, 132 Minn. 290, 156 N. W. 125.

(96) Doepke v. King, 132 Minn. 290, 156 N. W. 125.

COUNT OF VOTE, RETURNS AND CANVASS

2967. Unlawful nominee on ballot—(12) See Johnson v. Bauchle, — Minn. —, 182 N. W. 987.

See § 2944a.

2968. Meaning of vote and voting—Casting a blank ballot is not voting. Powers v. Chisholm, 146 Minn. 308, 178 N. W. 607.

2972a. Illegal ballots excluded and not counted—Illegal ballots should be excluded and not counted for any purpose. It is immaterial whether they are cast by an illegal voter, or by one who exhibits his vote before casting it, or by one who marks his ballot so that it can be identified. Eikmeier v. Steffen, 131 Minn. 287, 155 N. W. 92; Doepke v. King, 132 Minn. 290, 156 N. W. 125.

2973a. Majority vote—What constitutes—In determining majorities blank ballots are not to be counted. Powers v. Chisholm, 146 Minn. 308, 178 N. W. 607.

2973b. Pro rata deduction for illegal votes—Purging an election of illegal votes by deducting a pro rata part of them from the votes for each candidate is justifiable only when it is impossible to show for whom they were actually cast. Berg v. Veit, 136 Minn. 443, 162 N. W. 552.

2975. County canvassing board—The board has no authority to determine whether a candidate has violated a law. See Dale v. Johnson, 143 Minn. 225, 173 N. W. 417.

Under section 357, G. S. 1913, the court may order a canvassing board to reconvene after its adjournment to correct an error apparent on the face of the returns. Haroldson v. Norman, 146 Minn. 426, 178 N. W. 1003.

2976. State canvassing board—Where an error has been made by a county canvassing board and the state canvassing board has acted upon it, the state board may be directed to reconvene and correct their proceedings to conform to the facts. Haroldson v. Norman, 146 Minn. 426, 178 N. W. 1003.

2977. Municipal canvassing boards—The result of a municipal election as returned by the election officers, cannot be collaterally attacked by quo warranto proceedings. The remedy is a contest as provided by statute. State v. Kinney, 146 Minn. 311, 178 N. W. 815.

2977a. Certificate of canvassing board—The certificate of the proper canvassing board declaring the result of an election is prima facie evidence of such result, and places upon a contestant the burden of showing that the person declared elected did not receive a majority of the legal votes. The probative force of such certificate is not overcome by offering in evidence a part of the tabulated statement of votes not inconsistent therewith. Berg v. Veit, 136 Minn. 443, 162 N. W. 522.

2978. Certificate of election by auditor—If a candidate fails to file his statement of expenses as required by statute, it is the duty of the auditor to refuse him a certificate of election. Dale v. Johnson, 143 Minn. 225, 173 N. W. 417.

(33) See Berg v. Veit, 136 Minn. 443, 162 N. W. 522.

(34) 32 Harv. L. Rev. 83.

CONTESTS

2979. Nature—It is a civil and not a criminal proceeding. Hawley v. Wallace, 137 Minn. 183, 163 N. W. 127.

2980. Application of statute—(37) See Hawley v. Wallace, 137 Minn. 183, 163 N. W. 127.

2981. Jurisdiction of court—Municipal charter provisions—Statutory modes exclusive—Collateral attack—The charter of the city of Minneapolis, which provides that "the city council shall be the judge of the election of its own members," but does not make it the "sole" or "exclusive" judge, does not deprive the court of jurisdiction to entertain a contest under the general election law. Hawley v. Wallace, 137 Minn. 183, 163 N. W. 127.

Where the petition for an election contest is signed by the requisite number of legally qualified petitioners and the notice has been duly served, the contestee cannot divest the court of jurisdiction by showing at the trial that certain of the petitioners had been induced to sign the petition by false representations, and evidence offered for that purpose

was properly excluded. Exrieder v. O'Keefe, 143 Minn. 278, 173 N. W. 434.

In quo warranto proceedings to test the validity of the annexation of territory to a village, held, that the legality of the votes cast or the rightful authority of the persons who acted as judges of election to officiate could not be inquired into; that such matters should be determined, if at all, in an election contest. State v. Kinney, 146 Minn. 311, 178 N. W. 815.

2982a. Petition under G. S. 1913, § 599—Withdrawal of names—Answer or demurrer—A proceeding to contest the election of a town officer, charged with a violation of the corrupt practices act, based upon a statutory petition, signed by 25 or more qualified electors, is a proceeding in which the public has such an interest that an elector who signed such petition may not withdraw his name therefrom, after the petition has been served and acted upon by the court. In such contest, the petition and notice of contest, under sections 529 and 599, G. S. 1913, serves the purpose of a complaint in an ordinary civil action, and the proceeding is subject to the same rules of practice; and where the petition contains all the averments necessary to give the court jurisdiction, the contestee must, in order to avail himself of the question of the legal capacity of the contestants to bring the contest, do so by demurrer or answer, otherwise he will be deemed to have waived the same. Miller v. Maier, 136 Minn. 231, 161 N. W. 513.

2983. Notice of appeal—The words "the election," in section 525, G. S. 1913, in reference to instituting a contest by service of a notice, if given their ordinary meaning, can refer only to the day appointed for casting the votes. The words "election" and "final canvass," as used in that section, are not synonymous. A notice of contest which fixes the time for taking depositions relative to the points on which the contest was to be made, at more than forty days after the election, did not comply with the requirements of section 525. State v. Nelson, 141 Minn. 499, 169 N. W. 788.

See § 2982a.

2986. Inspection of ballots before trial—Before a judge may issue an order under section 530, G. S. 1913, for an inspection of ballots before preparing for trial, it must be made to appear that contest has been instituted in accordance with the provisions of section 525. State v. Nelson, 141 Minn. 499, 169 N. W. 788.

(51) State v. Nelson, 141 Minn. 499, 169 N. W. 788.

2990. Burden and degree of proof—The certificate of the proper canvassing board declaring the result of an election is prima facie evidence of such result, and places upon a contestant the burden of showing that the person declared elected did not receive a majority of the legal votes. The probative effect of such certificate is not overcome by offering in evidence a part of the tabulated statement of votes not inconsistent therewith. Where contestant bases his contest upon the fact

that votes were cast by nonresidents, it is incumbent upon him to show that enough of such votes were cast for contestee to change the result. He may do this by the best evidence available tending to show for whom such votes were cast. Berg v. Veit, 136 Minn. 443, 162 N. W. 522.

(58) Rees v. Nash, 142 Minn. 260, 171 N. W. 781.

2991. Evidence—Admissibility—(59) Berg v. Veit, 136 Minn. 443, 162 N. W. 522 (certificate of canvassing board prima facie evidence—votes of non-residents—evidence to show that there were enough to change result—inference from failure to produce available evidence); Hawley v. Wallace, 137 Minn. 183, 163 N. W. 127 (contestant may call contestee as witness but latter cannot be required to give testimony that would incriminate him).

2991a. Evidence—Sufficiency—Evidence held to justify findings against a contestant for the office of county auditor. Hoffman v. Downs, 145 Minn. 465, 177 N. W. 669.

2991b. Determination of contest—Judgment—Section 599, G. S. 1913, where it provides that in contests over nominations the court shall pronounce whether incumbent or contestant was duly nominated, and the person so declared nominated shall have his name printed on the official ballot, has no application where the contest is for a violation of the Corrupt Practices Act, unless it involves the question of which candidate received a plurality of the votes. Flaten v. Kvale, 146 Minn. 463, 179 N. W. 213.

2993. Legislative contests—Testimony before justices of peace—(61) See State v. Nelson, 141 Minn. 499, 169 N. W. 788.

CORRUPT PRACTICES ACT

2993c. Furnishing liquor to voters—A candidate for a public office, who during his campaign by word of mouth solicits the vote of an elector who has the right to vote for him at such election and at the same time dispenses intoxicating liquor to such elector, brings himself clearly within the terms and meaning of the statute; nor can a holding that such acts on the part of a candidate amount to mere hospitality or that they are trivial and unimportant be sustained. To so hold would destroy the purpose and effect of the statute. Miller v. Maier, 136 Minn. 231, 161 N. W. 513. See 2 A. L. R. 402 (treating voter).

Evidence held to justify a finding that a candidate furnished liquor to voters contrary to the statute and a judgment of ouster. Exrieder v. O'Keefe, 143 Minn. 278, 173 N. W. 434.

2994. Campaign expenses—Affidavits—A dismissal of an election contest for insufficiency of the evidence to prove a charge of excessive expenditures by a candidate held justified. Rees v. Nash, 142 Minn. 260, 171 N. W. 781.

If a candidate fails to file his statement of expenses as required by statute it is the duty of the auditor to refuse him a certificate of election. Dale v. Johnson, 143 Minn. 225, 173 N. W. 417.

2994b. Campaign literature—The evidence sustains a finding that the contestee in an election contest published, within the meaning of G. S. 1913, § 573, certain statements relative to the contestant. Such statements were false statements relative to the contestant, were intended to affect voting at the election and tended to do so, were not trivial and unimportant but were deliberate, serious and material, and were in violation of G. S. 1913, §§ 573, 599, 600. Hawley v. Wallace, 137 Minn. 183, 163 N. W. 127.

The evidence sustains a finding that contestee in a contest for a nomination at a primary election published, within the meaning of G. S. 1913, § 573, certain false statements relative to his opponent, tending, and intended, to affect voting at such primary. Flaten v. Kvale, 146 Minn. 463, 179 N. W. 213.

CRIMINAL OFFENCES

2995a. Casting fraudulent ballots—Defendant was indicted with others, for the crime of putting fraudulent ballots into the ballot box at a city election. The state's claim was that, according to a general plan or conspiracy in which defendant participated, the names of fictitious persons were registered, that on the night before election defendant and others marked a number of fictitious ballots and that defendant deposited the ballots in the box on election day. Defendant was convicted. The evidence of defendant's participation in the crime was sufficient to sustain his conviction. It was not error to receive evidence of fraudulent registration on registration day as part of the conspiracy in which defendant participated although defendant was not present at the time of registration. State v. Lyons, 144 Minn. 348, 175 N. W. 689.

ELECTRICITY

2996. Electric companies—Liability for negligence—Evidence held to justify a finding that an electric power company was negligent in cutting one of its wires, while a fire was raging, whereby a patron was prevented from saving his property from the fire. Mullen v. Otter Tail Power Co., 134 Minn. 65, 158 N. W. 732.

The plaintiff's intestate, a child between five and six years old, was killed by coming in contact with a wire of a fence which had been electrified by a live wire of the defendant, on one of its transmission lines, which broke and fell upon it. The wire broke at 4:30 in the morning and the plaintiff's intestate was killed about 8:30. Assuming that the break was caused by lightning, and therefore that the defendant was not responsible for it, it was a question of fact for the jury whether the defendant,

having notice at 4:30, by means of instruments in its plant provided for such purpose, of disturbances on its line, and of the probable breaking of two wires, was negligent in failing sooner to locate the break and prevent harm coming from it. There was no error in not charging that the break was caused by lightning. The evidence did not show, as a matter of law, that the parents of the child, who are the sole beneficiaries of this action, were negligent. Drimel v. Union Power Co., 139 Minn. 122, 165 N. W. 1058.

(64) Kieffer v. Wisconsin R. L. & P. Co., 137 Minn. 112, 162 N. W. 1065 (trespasser on roof of building injured by having a wire which he was taking from the roof coming in contact with the transmission wires of defendant, a power company—the company owned the building—plaintiff was an employee of a third party who was taking some machinery from the building—directed verdict for defendant sustained).

(65) Drimel v. Union Power Co., 139 Minn. 122, 165 N. W. 1058.

2996c. Rates—It will be presumed that rates specified in a contract between a municipal corporation and the grantee of a franchise to operate an electric light plant are reasonable, and the electric light company has the burden of proving that they are so low that a refusal to sanction an increase would result in depriving it of its property without due process of law, even though the ordinance granting the franchise and the contract itself do not unqualifiedly prohibit the company from increasing its rates. The rates charged by a public service corporation for service furnished to the inhabitants of a municipality may be regulated by contract as well as by ordinance. Regulation by ordinance calls for the exercise of governmental functions, and by contract for the exercise of the business or proprietary powers of the municipality. A municipal corporation is entitled to a temporary injunction restraining an electric light company, operating under a contract fixing rates, from refusing to furnish service at the contract rates when it is protected by a bond securing it against loss in case it is finally decided that it should have been permitted to put into effect increased service rates. Belle Plaine v. Northern Power Co., 142 Minn. 361, 172 N. W. 217.

2996d. Contracts—An order of the district court, requiring a public service corporation, under a contract, to furnish a municipal corporation with a current of electricity for lights for 17 hours each day, where the contract calls for about 11 hours service, exceeds the terms of the contract, and is unauthorizied. Clinton v. Otter Tail Power Co., 140 Minn. 252, 167 N. W. 794.

EMBEZZLEMENT

3001. Indictment—Embezzlement by bailee—An indictment for embezzlement by a bailee, following the language of the statute, held sufficient. State v. Marx, 139 Minn. 448, 166 N. W. 1082.

3008. Evidence—Sufficiency—Evidence held sufficient to justify a conviction of a bailee for hire. State v. Marx, 139 Minn. 448, 166 N. W. 1082.

EMINENT DOMAIN

IN GENERAL

3013. Nature—(36) Northern Pacific Ry. Co. v. Pioneer Fuel Co., 148 Minn. —, 181 N. W. 341.

3014. Legislative discretion—(42) State v. Montevideo, 142 Minn. 157, 171 N. W. 314; State v. Houghton, 144 Minn. 1, 174 N. W. 885, 176 N. W. 159.

(43) State v. Houghton, 144 Minn. 1, 174 N. W. 885, 176 N. W. 159.

3016. When title passes—(48) Ford Motor Co. v. Minneapolis, 147 Minn. 211, 179 N. W. 907. See Ford Motor Co. v. Minneapolis, 143 Minn. 392, 173 N. W. 713.

3017. What constitutes a taking—Requiring a railroad company to construct side tracks to industrial plants and to pay a part of the expense thereof is not a taking of private property without compensation. Ochs v. Chicago & N. W. Ry. Co., 135 Minn. 323, 160 N. W. 866.

(55) 8 A. L. R. 1301.

WHO MAY EXERCISE

3018. In general—The power of eminent domain inheres in the state as an attribute of its sovereignty and is vested in the legislature and may be directly exercised or delegated to governmental agencies or administrative bodies. Northern Pacific Ry. Co. v. Pioneer Fuel Co., 148 Minn. —, 181 N. W. 341.

3021. Railroad companies—The statute relating to the exercise of the right of eminent domain (sections 5395, 5397, G. S. 1913), and not an order of the Railroad and Warehouse Commission, made pursuant to chapter 287, Gen. Laws 1917, imposes the duty and is the source of the right of a railroad company to institute a proceeding to condemn land for side tracks to grain elevators, and is also the source of the jurisdiction of the court to entertain the proceeding. The fact that the owner of a grain elevator has acquired an easement entitling him to special privileges in making use of an existing side track, which is to be extended, does not deprive a railroad company of the right to condemn the land required for such extension. Northern Pacific Ry. Co. v. Pioneer Fuel Co., 148 Minn. —, 181 N. W. 341. See § 10148.

3022. Municipalities—Municipalities authorized to take private property for certain designated purposes can take such property for no purposes other than those so designated. They can no more take it for some other public purpose than they can take it for some private purpose. Whether a municipality has been given power to take private property for the purpose for which it is sought to be taken, and whether such purpose is a public purpose, are questions for the courts; but if such power has been given and the purpose be a public purpose, the necessity

and propriety of taking the property is a legislative question, over which the courts have no control. The city of Minneapolis has power to condemn land for streets and alleys, but not for a railroad right of way. The undisputed facts show clearly that under the guise of laying out an alley the city is attempting to take the relator's land for a railroad right of way. It may not thus pervert its power. The relator is not estopped from invoking the aid of the courts as the agreement upon which the claim of estoppel is based relates only to a part of the property sought to be taken. State v. District Court, 133 Minn. 221, 158 N. W. 240.

The board of water commissioners of the city of St. Paul is a mere agency of the city, and its authority to exercise the power of eminent domain is derived from the charter of the city and must be exercised as provided in such charter. Board of Water Commissioners v. Roselawn Cemetery, 138 Minn. 458, 165 N. W. 279.

A municipality may be authorized to condemn land outside but adjacent to its territory. Hobart v. Minneapolis, 139 Minn. 368, 166 N. W. 411.

(87) State v. Montevideo, 142 Minn. 157, 171 N. W. 314.

THE PUBLIC USE

3024. What constitutes—In general—The present tendency is to extend rather than to restrict the conception of what constitutes a public use. State v. Houghton, 141 Minn. 1, 174 N. W. 885, 176 N. W. 159.

The constitution of this state does not define what constitutes a public use nor does it prohibit the legislature from determining what constitutes such use. State v. Houghton, 144 Minn. 1, 174 N. W. 885, 176 N. W. 159.

To render a use public it is not essential that the public should obtain physical use of the premises condemned. State v. Houghton, 144 Minn. 1, 174 N. W. 885, 176 N. W. 159.

Aesthetic considerations may have weight in determining whether a use is public. State v. Houghton, 144 Minn. 1, 174 N. W. 885, 176 N. W. 159. See 29 Harv. L. Rev. 860.

The fact that provision is made for compensation does not affect the question whether a taking is for a public use. State v. Houghton, 144 Minn. 1, 174 N. W. 885, 176 N. W. 159.

No question is made of the right under proper authorization to condemn property for boulevards or for pleasure drives or for public parks or for public baths or for public playgrounds or for libraries and museums or for numerous other purposes which contribute to the general good and well-being of the community. In such cases there is a public use. State v. Houghton, 144 Minn. 1, 174 N. W. 885, 176 N. W. 159.

(92) State v. Houghton, 144 Minn. 1, 174 N. W. 885, 176 N. W. 159.

(93) Contra. State v. Houghton, 144 Minn. 1, 174 N. W. 885, 176 N. W. 159.

(94) State v. Houghton, 144 Minn. 1, 174 N. W. 885, 176 N. W. 159. See Range Sand-Lime Brick Co. v. Great Northern Ry. Co., 137 Minn. 314, 163 N. W. 656; Green v. Frazier, 253 U. S. 233 (as to what is a pub-

lic purpose in the law of taxation—liberal view adopted); 32 Harv. L. Rev 169.

3024a. Presumption that property is being taken for public use—The presumption is that property taken under the power of eminent domain is being taken for the purpose stated in the condemnation proceedings; but this presumption is not conclusive, and whenever it clearly appears that under the guise of taking the property for a proper purpose it is in fact being taken for an improper purpose, it is the duty of the courts to intervene for the protection of the property owner. State v. District Court, 133 Minn. 221, 158 N. W. 240. See State v. District Court, 136 Minn. 475, 162 N. W. 1087.

3025. Held a public use—A side track to an adjacent manufacturing plant, the track to be operated as part of the railroad system. Ochs v. Chicago & N. W. Ry. Co., 135 Minn. 323, 160 N. W. 866.

A spur track to an industrial plant. Range Sand-Lime Brick Co. v. Great Northern Ry. Co., 137 Minn. 314, 163 N. W. 656.

Condemnation of property against its use for an apartment building under Laws 1915, c. 128. State v. Houghton, 144 Minn. 1, 174 N. W. 885, 176 N. W. 159.

A public potato warehouse on a railroad right of way. Simmons v. Northern Pacific Ry. Co., 147 Minn. 313, 180 N. W. 114.

A railroad side track to a grain warehouse on a right of way. Northern Pacific Ry. Co. v. Pioneer Fuel Co., 148 Minn. —, 181 N. W. 341.

Charging property with a special assessment for local improvement. In re Concord Street Assessment, 148 Minn. —, 181 N. W. 859.

(5) See Simmons v. Northern Pacific Ry. Co., 147 Minn. 313, 180 N. W. 114.

3026. Held not a public use—The use of an alley in a city by a railroad. State v. District Court, 133 Minn. 221, 158 N. W. 240. See State v. District Court, 136 Minn. 475, 162 N. W. 1087.

3027. Province of courts and legislature—While the question what constitutes a public use is ultimately a judicial question, great deference is paid to the declared policy of the legislature. If a public use be declared by the legislature the courts will hold the use public, unless it manifestly appears by the provisions of the act that they can have no tendency to advance and promote such public use. The question as it presents itself to the courts is not whether the use is public, but whether the legislature might reasonably have considered it public. The presumption is that a use is public if the legislature has declared it to be such, and the decision of the legislature must be treated with the consideration due to a co-ordinate department of the government of the state. State v. Houghton, 144 Minn. 1, 174 N. W. 885, 176 N. W. 159.

(12) State v. District Court, 133 Minn. 221, 158 N .W. 240; State v. Houghton, 144 Minn. 1, 174 N. W. 885, 176 N. W. 159.

3028. Private use forbidden—(14) State v. District Court, 133 Minn. 221, 158 N. W. 240.

3029. Streets, alleys, etc.—An alley laid out and established by public authority is a "public highway," and private property taken therefor presumptively is taken for a public use; and the burden is upon the property owner who asserts the contrary to prove it. State v. Montevideo, 142 Minn. 157, 171 N. W. 314.

WHAT MAY BE TAKEN

3032. Land already devoted to public use—The rule that property already devoted to one public use cannot be taken for another public use without express authority therefor does not apply to property which has not actually been put to the prior use and is not shown to be actually and presently needed therefor. The property in controversy has not been actually put to a public use and is not shown to be needed therefor. Board of Water Commissioners v. Roselawn Cemetery, 138 Minn. 458, 165 N. W. 279. See 12 A. L. R. 1502.

3037. Easements—(36) See Northern Pacific Ry. Co. v. Pioneer Fuel Co., 148 Minn. —, 181 N. W. 341.

RIGHTS ACQUIRED

3040. Construction of grants—Under the charter of St. Paul the council may condemn and take land and structures thereon or as much thereof as may be necessary for the purpose of the improvement. Sullwood v. St. Paul, 138 Minn. 271, 164 N. W. 983.

(39) Sullwood v. St. Paul, 138 Minn. 271, 164 N. W. 983.

COMPENSATION

3048. Provision for—The provisions of G. S. 1913, §§ 1506, 1579, providing for the payment of damages by municipalities in certain cases, do not apply to proceedings under a municipal charter. Rowe v. Minneapolis, 135 Minn. 243, 160 N. W. 775.

A resolution of a city council condemning land for an alley had no validity as authorizing an actual taking of the land unless supplemented by the assessment and award of damages. State v. Montevideo, 135 Minn. 436, 161 N. W. 154.

In ditch proceedings under the statutes the damages to a landowner are secured and need not be paid before construction begins where there is an appeal. Fletcher v. Glencoe Ditching Co., 141 Minn. 440, 170 N. W. 592.

The provision for compensation is largely a matter of legislative discretion. State v. Houghton, 144 Minn. 1, 174 N. W. 895, 176 N. W. 159.

3049. What constitutes a damage—Under a constitutional provision that "private property shall not be taken, destroyed or damaged for public use without just compensation therefor first paid or secured" (Const. art. 1, § 13, as amended November 3, 1896), a property owner may re-

cover for special pecuniary damage to private property through the construction and operation of a railroad though the damage is consequential and results from structures or operations that do not invade his land. This does not give a right of recovery for acts which under general rules of law do not constitute actionable wrong. The right of recovery is substantially the same as against one not armed with the power of eminent domain. The reasonableness or necessity of the location of the structure is not the test of liability nor is negligence in its operation the sole test. The test is whether the structure is a private nuisance for which an action for damages will lie at common law. If statutory authority is given for the structure, it cannot be a public nuisance but it may be a private nuisance. The legislature cannot authorize the maintenance of a nuisance without compensation to one specially injured thereby. Stuhl v. Great Northern Ry. Co., 136 Minn. 158, 161 N. W. 501.

3054. Elements of value—(4) Kafka v. Davidson, 135 Minn. 389, 160 N. W. 1021.

3055. Benefits from improvements—(11) See L. R. A. 1916F, 980 (improvements made by taker before condemnation).

3056. Allowance for benefits—Upon a trial to determine the amount of benefits to which a landowner is entitled for the taking of a portion of his farm for a public highway, the benefit flowing to such land from drainage may be considered and offset against the value of the land taken when the proof is sufficiently certain and direct. Burg v. Rosedale, 143 Minn. 424, 174 N. W. 309.

Right to set off benefits against damages. L. R. A. 1918A, 884.

(14) 33 Harv. L. Rev. 981.

3057. Elements of damage—Part of tract taken by railroad—In determining damages to a farm by the taking of a part thereof by a railway in a condemnation proceeding, it is proper to show the use of the land so taken by the company. It appearing that the use made by the railroad company converted the land taken, and the public highway therein included, into a railroad yard, necessitating the use of another and longer road into the nearby village, and also that the farm of respondent was deprived of certain advantages derived from the existence of the road, it was not error to refuse a requested instruction that obstructions of the road could not affect the damages to be awarded. An error in permitting an inquiry as to the tracks being planked where laid in the road, is not shown to have entered into the computation of damages so as to require a new trial. Great Northern Ry. Co. v. Johannsen, 142 Minn. 208, 171 N. W. 775.

(21) See 10 A. L. R. 451.

3058. Commensurate with interest taken—Where a leasehold estate is taken the measure of damages is the fair market value of the estate so taken. If only a part is taken the measure of damages is the difference between the value of the entire estate and the value of the part not taken. Kafka v. Davidson, 135 Minn. 389, 160 N. W. 1021.

Where a lease was terminable by a notice of sixty days and the payment of fifteen hundred dollars, the lessee's damages could not exceed that amount together with the excess of rental value over the rent reserved in the lease for such period of sixty days. Kafka v. Davidson. 135 Minn. 389, 160 N. W. 1021. See 1 Minn. L. Rev. 281.

(33) Chicago G. W. R. Co. v. Zahner, 145 Minn. 312, 177 N. W. 350.

3060. Valuation as of what date—(35) Ford Motor Co. v. Minneapolis, 143 Minn. 392, 173 N. W. 713.

3068. Evidence of market value—General rule—Evidence of profits of business conducted on premises as evidence of market value. 7 A. L. R. 163.

3069. Evidence—Admissibility as to value—It may be shown that the market value of premises had been enhanced by long use as a tobacco store. It is not proper to prove the amount of profits, the loss of profits, the depreciation of fixtures, or the expense of moving. Kafka v. Davidson, 135 Minn. 389, 160 N. W. 1021.

3076. To whom payable—Several parties—Any party entitled to share in the award may bring an action for his share against any other party to whom such share has been paid. To bar a party from sharing in the award on the ground that it had been determined in the condemnation proceedings that he was entitled to no part thereof, it must be shown affirmatively that the question was in fact considered and determined in such proceedings. There is no such showing in this case. Plaintiff is entitled only to the proportional part of the award which the amount of his damage bears to the amount of all the damage to the property; and to recover must show the amount of his own damage, and that defendant has received more than defendant's share of the award. Kafka v. Davidson, 135 Minn. 389, 160 N. W. 1021.

In an action by a lessee to recover from his lessor a part of an award held, that the evidence was sufficient to justify submitting the case to the jury. Kafka v. Davidson, 138 Minn. 301, 164 N. W. 980.

3078. Waiver—(80) Evans v. Northern Pacific Ry. Co., 117 Minn. 4, 134 N. W. 294; Peterson v. Northern Pacific Ry. Co., 132 Minn. 265, 156 N. W. 121.

3078a. Damages paid do not bar recovery for future injuries—Damages awarded in condemnation proceedings do not bar a recovery for future injuries resulting from a negligent maintenance and operation of a railroad. A railroad company is bound to keep pace with the development of the country and to meet new conditions. It is bound at all times to maintain its road so as not to injure adjacent property unnecessarily or unreasonably. Peterson v. Northern Pacific Ry. Co., 132 Minn. 265, 156 N. W. 121.

PROCEDURE IN GENERAL

3079. Nature—In general—Proceedings before legislative or administrative tribunals given charge of condemnation proceedings are necessarily informal, and need not follow court practice, unless so required by statute. State v. Montevideo, 142 Minn. 157, 171 N. W. 314.

(82) Kafka v. Davidson, 135 Minn. 389, 160 N. W. 1021; Great Northern Ry. Co. v. Minneapolis, 136 Minn. 1, 161 N. W. 231.

3080. Legislative discretion—(83) State v. Montevideo, 142 Minn. 157, 171 N. W. 314; Sete v. Houghton, 144 Minn. 1, 174 N. W. 885, 176 N. W. 159.

3082. Impartial tribunal—The constitutional rights of the property owner are fully protected when an appeal is given from the decision of the legislative board, and, in the absence of such appeal, when the question of public or private use may be reviewed by the court on certiorari. State v. Montevideo, 142 Minn. 157, 171 N. W. 314.

The motives of the tribunal charged with condemnation proceedings are not open to judicial inquiry, except perhaps in case of fraud or collusion with private interests. The burden of showing such fraud or collusion is on the property owner. State v. Montevideo, 142 Minn. 157, 171 N. W. 314.

A commission of disinterested freeholders for the assessment of damages and benefits, appointed by the board or tribunal having the proceeding in charge, the commissioners being required to take and subscribe an oath to act fairly and impartially, constitutes an impartial tribunal before which the property owner may appear and be heard. Langford v. County Commissioners of Ramsey County, 16 Minn. 375 (Gil. 333), distinguished. State v. Montevideo, 142 Minn. 157, 171 N. W. 314.

(86) State v. Montevideo, 142 Minn. 157, 171 N. W. 314.

(88) State v. Montevideo, 142 Minn. 157, 171 N. W. 314; Great Northern Ry. Co. v. Minneapolis, 142 Minn. 308, 172 N. W. 135.

3085. Notice—It is not essential that the name of the owner appear in a published notice. The test is whether the publication is of such a character as to create a reasonable presumption that, if the owner is present and taking care of his property, he will receive information of what is proposed and when and where he may be heard. Great Northern Ry. Co. v. Minneapolis, 136 Minn. 1, 161 N. W. 231; Id., 142 Minn. 308, 172 N. W. 135.

The provisions of G. S. 1913, §§ 1566–1572, for notice to the owners of the property to be taken, are sufficient. Great Northern Ry. Co. v. Minneapolis, 136 Minn. 1, 161 N. W. 231; Id., 142 Minn. 308, 172 N. W. 135.

In proceedings to condemn private property for a public use, the owner thereof is not entitled to a judicial hearing upon the question whether public interests justify the improvement for which the property

is proposed to be taken. The question of public necessity in such proceeding is purely legislative, and the determination thereof by the legislative tribunal is open to review by the court only when and to the extent granted by statute. The property owner is entitled to a judicial hearing at some stage of the proceeding upon the question whether a particular use for which his property is proposed to be taken is public or private. But he is not entitled to a hearing upon that question along the lines of judicial procedure before the legislative tribunal having the condemnation proceeding in charge. State v. Montevideo, 142 Minn. 157, 171 N. W. 314. See Great Northern Ry. Co. v. Minneapolis, 142 Minn. 308, 172 N. W. 135.

Commissioners appointed to award damages for land taken in street widening proceedings, under G. S. 1913, §§ 1566–1572, do not represent the city, and notice to them is not notice to the city. Great Northern Ry. Co. v. Minneapolis, 142 Minn. 308, 172 N. W. 135.

(96) State v. Montevideo, 142 Minn. 157, 171 N. W. 314; Bragg v. Weaver, 251 U. S. 57.

(97) Great Northern Ry. Co. v. Minneapolis, 136 Minn. 1, 161 N. W. 231; Rost v. O'Connor, 145 Minn. 81, 176 N. W. 166.

(98) Great Northern Ry. Co. v. Minneapolis, 136 Minn. 1, 161 N. W. 231; Id., 142 Minn. 308, 172 N. W. 135.

3091. Discontinuance or abandonment—The abandonment of proceedings is sometimes governed by municipal charter provisions. Rowe v. Minneapolis, 135 Minn. 243, 160 N. W. 775.

Rights of owner upon abandonment of proceedings. 3 Minn. L. Rev. 263.

(16) Rowe v. Minneapolis, 135 Minn. 243, 160 N. W. 775. See 31 Harv. L. Rev. 791, L. R. A. 1916C, 644.

3091a. Presumption of regularity—Proceedings before a legislative body authorized by statute to take and condemn private property for a public use, in the absence of some showing to the contrary, will be presumed by the courts to have been in compliance with the requirements of the law authorizing the same. Hobart v. Minneapolis, 139 Minn. 368, 166 N. W. 411.

PROCEDURE BEFORE COMMISSIONERS UNDER GENERAL STATUTES

3093. Petition—Corporate name—The statute provides that the proceeding shall be taken by a corporation in its corporate or official name and by the governing body thereof. When a petition is signed by attorneys of the corporation instead of by the governing body thereof the action of the attorneys may be ratified by the corporation. By taking possession of the land and laying the tracks, after executing a bond as provided by G. S. 1913, § 5407, a railroad company ratifies the action of its attorneys who signed and filed the petition for condemnation in its behalf. Northern Pacific Ry. Co. v. Pioneer Fuel Co., 148 Minn. —, 181 N. W. 341.

3099. Assessment and award of damages—Where the city of St. Paul condemns part of a lot for street purposes upon which there is a building occupied by tenants, the award of damages may be made in gross and be apportioned thereafter between the various parties in interest according to their interests. Kafka v. Davidson, 135 Minn. 389, 160 N. W. 1021.

3101. Conclusiveness of award—(66) See Kafka v. Davidson, 135 Minn. 389, 160 N. W. 1021.

See § 3078a (future injury).

3103. Interest on award—(74) See Ford Motor Co. v. Minneapolis, 143 Minn. 392, 173 N. W. 713; § 3116.

PROCEDURE IN DISTRICT COURT

3107. Appeal to district court—All persons entitled to a share of the award are entitled to appeal therefrom. Kafka v. Davidson, 135 Minn. 389, 160 N. W. 1021.

3109. Bond—(93) Northern Pacific Co. v. Pioneer Fuel Co., 148 Minn. —, 181 N. W. 341 (giving of bond and taking possession a ratification of acts of attorneys in signing and filing petition for condemnation).

3110. Issues—The appeal from the award of commissioners under the St. Paul charter is limited to the question of damages and raises no question as to the regularity or sufficiency of the proceedings. But if power to take the property be lacking, power to award damages is also lacking, and appellant is not debarred from raising the question that taking the property in controversy is beyond the power conferred by the charter. Board of Water Commissioners v. Roselawn Cemetery, 138 Minn. 458, 165 N. W. 279.

(94, 95) See Board of Water Commissioners v. Roselawn Cemetery, 138 Minn. 458, 165 N. W. 279.

3116. Interest—Deduction of rental value—Unless otherwise provided land taken under the power of eminent domain is deemed to have been taken at the date of the filing of the award of damages, and if the damages are reassessed on appeal such reassessment is to be made with respect to the value and condition of the property at the time of the original award and as of that date, and the landowner is entitled to interest from the date of the original award on the amount of the award as finally fixed and determined less the value of whatever beneficial use he may have made of the land after the filing of the original award. It is presumed that an award made on appeal was made as of the date of the original award and that it did not include interest. The city of Minneapolis established an alley under the power of eminent domain. On appeal to the district court from the award of damages, they were reassessed. Thereafter the landowner applied for the allowance of interest from the date of the original award and the city claimed an offset thereto for the use made of the land by the landowner after that date. Held: That the court had authority to allow the interest and also to determine the amount, if any, to which the city was entitled as an offset thereto, and

that the court should have allowed the interest less a proper deduction for whatever use the landowner was shown to have made of the land. Ford Motor Co. v. Minneapolis, 143 Minn. 392, 173 N. W. 713.

(21, 22) Ford Motor Co. v. Minneapolis, 143 Minn. 392, 173 N. W. 713; Id., 147 Minn. 211, 179 N. W. 907.

The sum which the taker of land under the right of eminent domain is entitled to offset against the interest accruing on the award, because of the use made of the land taken by the owner, between the filing of the first award and the payment of the final award is the fair rental value of the part actually occupied. The burden is upon the party claiming the offset to prove the extent of the use, as well as the rental value. Ford Motor Co. v. Minneapolis, 147 Minn. 211, 179 N. W. 907.

3117. Judgment—(27) See State v. District Court, 128 Minn. 432, 151 N. W. 144; Kafka v. Davidson, 135 Minn. 389, 160 N. W. 1021.

PROCEDURE UNDER G. S. 1913, §§ 1566–1572

3121a. Notice—Naming owners in plat and survey—In proceedings to condemn private property for the purpose of widening a street under G. S. 1913, §§ 1566-1572, the plat and survey filed showed the character, course, and extent of the improvement, and the property to be taken or interfered with. In giving the name of the owner of each parcel "so far as the engineer can readily ascertain the same," as required by the statute, the plat named "H. K. Feye" as the owner of a tract a part of which was proposed to be taken. Plaintiff was the owner of record of a four-fifths interest in this tract, but it was not named as such owner on the plat or in the published notices given, nor was any award of damages made to it for the land so taken; the award made and confirmed being to Feye. In this action to enjoin defendant from taking possession of and erecting structures for street purposes on the strip taken it is held: The provisions of the statute as to notice to the owners of property proposed to be taken or interfered with were complied with. The omission to name plaintiff on the plat or in the notices as the owner of the tract in question was not a fatal departure from the requirement that the names of owners be stated "so far as they can readily be ascertained." The provisions of the statute as to notice to the owners of property proposed to be taken or interfered with constitute due process of law. It is not necessary that the statute require the names of owners to be stated on the plat or in the notices. The fact that no compensation in excess of benefits to land not taken was awarded for the property of plaintiff taken in the proceedings is not sufficient to show there was not due process of law, in that plaintiff was deprived of its property without just compensation, or that there was a violation of the constitutional provision that private property shall not be taken for public use without just compensation. The record in the condemnation proceedings sufficiently shows that plaintiff's interest in the strip was condemned, as well as the interest of Feye. Great Northern Ry. Co. v. Minneapolis, 136 Minn. 1, 166 N. W. 231; Id., 142 Minn. 308, 172 N. W. 135.

PROCEDURE UNDER MUNICIPAL CHARTERS

3122. In general—Under the charter of the city of Montevideo the resolution of the city council condemning property for an alley is the final act of expropriation and reviewable on certiorari, not being reviewable on an appeal from the assessment of damages and benefits provided by the charter. State v. Montevideo, 135 Minn. 436, 161 N. W. 154.

The procedure provided by the charter of the city of Montevideo has been sustained against various objections. State v. Montevideo, 142 Minn. 157, 171 N. W. 314.

(39) Kafka v. Davidson, 135 Minn. 389, 160 N. W. 1021 (effect of determination of board of public works as to damages—leasehold estate —award in gross—appeal—recovery of share of award); Board of Water Commissioners v. Roselawn Cemetery, 138 Minn. 458, 165 N. W. 279 (placing appeal to district court on calendar—no right to jury trial for assessment of damages—discretionary power of court to grant jury trial—scope of powers of board of water commissioners—scope of appeal —power to take property may be raised—taking property already devoted to a public use—basis of value in fixing damages held proper).

(40) Rowe v. Minneapolis, 135 Minn. 243, 160 N. W. 775 (council may abandon proceedings at any time during their pendency, before or after award—abandonment may be effected by resolution of council—immaterial that city has taken possession pending proceedings—if city was in possession before proceedings were commenced it need not surrender possession as a condition to abandonment—resolution of abandonment may be passed at same meeting at which the award is reported to the council—resolution may be passed without giving landowner a hearing), Hobart v. Minneapolis, 139 Minn. 368, 166 N. W. 411 (park commissioners authorized by Sp. Laws 1889, c. 30, to condemn land adjacent to city for park purposes—special act not affected by general statutes subsequently enacted—proceedings presumptively regular); Great Northern Ry. Co. v. Minneapolis, 142 Minn. 308, 172 N. W. 135 (duty of municipal officers to ascertain name of owner—reliance on "division record" in auditor's office—plat of land to be taken—necessity of giving names of owners—possession as notice of title—notice to commissioners appointed to award damages for land taken in street widening proceedings, under G. S. 1913, §§ 1566–1572, not notice to city—proceedings held due process of law). See § 3121a.

REMEDIES OF LANDOWNER

3128. Action for damages—(74) Stuhl v. Great Northern Ry. Co., 136 Minn. 158, 161 N. W. 501.

EMPLOYER'S LIABILITY ACT—See Master and Servant, §§ 5854a–5854z (state workmen's compensation act); §§ 5963b, 5963c (state railroad employer's liability act); §§ 6022a–6022p (federal safety appliance and employer's liability acts).

EQUITABLE CONVERSION

3132. Definition—(89) See In re Evans' Estate, 145 Minn. 252, 177 N. W. 126.

EQUITY

3134. Definition—(91) See 31 Harv. L. Rev. 822 (different senses of word "equitable").

3136. Equity acts in personam—Extraterritorial force of decrees. 31 Harv. L. Rev. 646.

3137. Adequate remedy at law—If the plaintiff has no adequate remedy at law when the action in equity is brought the fact that he thereafter has one will not abate the action. Kanevsky v. National Council, 132 Minn. 422, 157 N. W. 646; Dawson v. Kentucky Distilleries & Warehouse Co., 255 U. S. —.

The fact that the adverse party will lose the right to a jury trial has been held not to defeat an application for an injunction against the prosecution of an action at law on a benefit certificate. Kanevsky v. National Council, 132 Minn. 422, 157 N. W. 646.

An action in equity to cancel a benefit certificate will not lie after the death of the insured for then the society has an adequate remedy at law by way of defence to an action on the certificate, and for the further reason that the adverse party would be unjustly deprived of a jury trial. Kanevsky v. National Council, 132 Minn. 422, 157 N. W. 646.

(99) Ziebarth v. Donaldson, 141 Minn. 70, 169 N. W. 253.

(3–5) National Council v. Scheiber, 141 Minn. 41, 169 N. W. 272.

See Digest, §§ 1182, 2839, 4472, 4476, 8342, 8776, 8885.

3138. Equity grants full relief—In equity the kinds and forms of specific remedies are as unlimited as the powers of such courts to shape relief awarded in accordance with the circumstances of the particular case. Hoffman Motor Truck Co. v. Erickson, 124 Minn. 279, 144 N. W. 952.

When a court of equity once acquires jurisdiction of the parties and the subject-matter, it will retain jurisdiction and proceed to a decree, and as an incident will restrain the prosecution of subsequent actions at law which interfere with the exercise of its jurisdiction. Kanevsky v. National Council, 132 Minn. 422, 157 N. W. 646.

A court of equity may mould the relief so as to work out full justice between the parties in a practical manner. See Bergstrom v. Pickett, 148 Minn. —, 181 N. W. 343.

Equity will sometimes grant damages when the specific equitable relief sought is denied. See §§ 1203, 8814.

See §§ 1203, 5041, 8338–8340, 8813, 8814.

3139. Showing to secure equitable relief—Whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy. Stronge-Warner Co. v. H. Choate & Co., — Minn. —, 182 N. W. 712.

3142. Equitable maxims—(13) Scott v. Austin, 36 Minn. 460, 32 N. W. 89, 864; Krelwitz v. McDonald, 135 Minn. 408, 161 N. W. 156; Patterson v. Wyman, 142 Minn. 70, 170 N. W. 928; Stronge-Warner Co. v. H. Choate & Co., — Minn. —, 182 N. W. 712.

(15) See Godley v. Weisman, 133 Minn. 1, 157 N. W. 711, 158 N. W. 333 (a party held not to have forfeited his right to enforce by injunction a restriction against the building of a duplex house by the fact that a portion of his own house extended beyond the dividing line); 4 A. L. R. 44.

See 34 Harv. L. Rev. 809.

ESCROWS

3145. Definition—What constitutes—Where a deed is delivered to a third party to be subsequently delivered by him to the grantee, if the future delivery is to depend upon the payment of money, or the performance of some other condition, it will be deemed an escrow. If it is merely to wait the lapse of time, or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor's deed presently. Hagen v. Hagen, 136 Minn. 121, 161 N. W. 380.

(26) Hagen v. Hagen, 136 Minn. 121, 161 N. W. 380.

3146. The depositary—A deposit in escrow of title deeds or other documents, by agreement of the parties, to be delivered by the custodian to the person ultimately entitled to them only after performance of the conditions of the escrow, is not invalid because the person agreed upon as custodian happens to the agent of one of them. Henry v. Hutchins, 146 Minn. 381, 178 N. W. 807.

(27) See 5 Minn. L. Rev. 287.

(29) Henry v. Hutchins, 146 Minn. 381, 178 N. W. 807.

3148a. Modification of conditions—Parol—Parol evidence is admissible to prove a subsequent modification of written conditions. Malley v. Quinn, 132 Minn. 254, 156 N. W. 263.

3148b. Time of performance of conditions—The question of what constitutes a reasonable time for the performance of a contract, where no specific time is agreed upon, is ordinarily one of fact to be determined by the jury; but on the facts stated in the opinion it is held that there was no error in an instruction to the jury that a stated time was unreasonable as a matter of law. Henry v. Hutchins, 146 Minn. 381, 178 N. W. 807.

3153. Wrongful delivery—Cancelation—Delivery of a deed contrary to the terms of the escrow passes no title to the property described in the deed. Henry v. Hutchins, 146 Minn. 381, 178 N. W. 807; Bergstrom v. Pickett, 148 Minn. —, 181 N. W. 343.

The defendant Pickett procured plaintiff to exchange a certain piece of real estate for the stock and fixtures of a grocery store, Pickett agreeing to give plaintiff a mortgage on the real estate in case the grocery stock failed to inventory a certain amount. Plaintiff was put in possession of the grocery stock and his deed was put in escrow, to be delivered only after full settlement with Pickett. The deed was delivered before full settlement and Pickett conveyed the real estate to a purchaser who had notice of the facts. The delivery of the deed passed no title. As against Pickett or any purchaser from him with notice, plaintiff had a right to have it canceled. It was not necessary that plaintiff offer to return before bringing a suit for cancelation. Selling from the stock and replenishing it in the usual course of business, the stock being kept of equal value and character, did not, as a matter of law, amount to a ratification of the fraud or bar plaintiff's right to a decree of cancelation. The issue of defendant's right to a specific performance was not pleaded or litigated or raised in the trial court and it will not therefore be determined on appeal. Bergstrom v. Pickett, 148 Minn. —, 181 N. W. 343.

A delivery before performance of the conditions of the escrow, unless performance be waived, is ineffective and confers no rights on the person receiving it. An intention to waive performance should be made to appear clearly or arise by necessary implication from the facts disclosed. Evidence held not to show a waiver within this rule and there was no error in the refusal of the court to submit the question to the jury. Henry v. Hutchins, 146 Minn. 381, 178 N. W. 807.

(38) See L. R. A. 1917E, 907.

ESTATES

IN GENERAL

3156. Estates of freehold—An inheritable estate in land is an estate of freehold. The holder of an inheritable estate is a freeholder. A vendee under an executory contract for a conveyance of land has an estate of freehold in the land. In re Consolidation of School Districts, 140 Minn. 475, 168 N. W. 552.

A vendor in an executory contract for the sale of land may have a freehold estate. School District v. Schmidt, 146 Minn. 403, 178 N. W. 892.

3157. Estates in fee simple—The right of alienation is an inherent and inseparable quality of an estate in fee simple, and any limitations or restrictions against all alienation, even for a limited time, are void as

repugnant to the estate granted. House v. O'Leary, 136 Minn. 126, 161 N. W. 392.

3158. Estates less than freehold—For years—An estate for years may be a dominant estate or a servient estate. Leuthold v. John A. Stees Co.. 141 Minn. 213, 169 N. W. 709.

3159. Estates in possession and in expectancy—(47) See 3 Minn. L. Rev. 320; 4 Id. 307.

3160. Future estates—(48, 49) See 3 Minn. L. Rev. 320; 4 Id. 307.

3163. Reversionary estates—The grantor in a timber deed held to have a contingent reversionary interest in the timber which he might convey or reserve to himself in a deed of the land subsequently executed. International Lumber Co. v. Staude, 144 Minn. 356, 175 N. W. 909.

(52) See 3 Minn. L. Rev. 320; 4 Id. 307.

3163c. Accumulation of rents and profits—An accumulation of rents and profits of realty may be directed by will or deed, for the benefit of one or more persons, under the restrictions and limitations prescribed by G. S. 1913, §§ 6687, 6688. Royalties from mining leases are rents and profits of realty within the meaning of the statute. Minnesota Loan & Trust Co. v. Douglas, 135 Minn. 413, 161 N. W. 158.

LIFE ESTATES

3165. Creation—Reserved in grant of fee—An owner may grant a fee and reserve to himself a life estate. Vessey v. Dwyer, 116 N. W. 245, 133 Minn. 613; Ekblaw v. Nelson, 124 Minn. 335, 144 N. W. 1094; Shaughnessy v. Shaughnessy, 135 Minn. 262, 160 N. W. 769; Hagen v. Hagen, 136 Minn. 121, 161 N. W. 380.

By the very nature of the transaction a grantor reserves possession during life, or a life estate, when he delivers a deed to a third person for the grantee, with directions to give it to the latter upon the death of the grantor. Hagen v. Hagen, 136 Minn. 121, 161 N. W. 380.

(56) In re Meldrum's Estate, — Minn. —, 183 N. W. 835.

3166. In personalty—(57) Ekblaw v. Nelson, 124 Minn. 335, 144 N. W. 1094; Shaughnessy v. Shaughnessy, 135 Minn. 262, 160 N. W. 769.

3168a. Power to enjoy or anticipate principal—Rights and duties of life tenant with power to anticipate or enjoy principal. 2 A. L. R. 1243.

3169. Right to income—Dividends—(60) See L. R. A. 1916D, 211.

REMAINDERS

3172. Vested remainders—(63) In re Meldrum's Estate — Minn. —, 183 N. W. 835. See 4 Minn. L. Rev. 323.

3173. Contingent remainders—(64) Savela v. Erickson, 138 Minn. 93, 163 N. W. 1029. See 4 Minn. L. Rev. 323.

ESTOPPEL

EQUITABLE ESTOPPEL

3186. Nature—The effect of estoppel and waiver is often the same. Malley v. Quinn, 132 Minn. 254, 259, 156 N. W. 263.

(97) Mooney v. Farmers Mercantile & Elevator Co., 138 Minn. 199, 164 N. W. 804.

3189. Facts equally known by both parties—One cannot invoke the doctrine of estoppel unless he was ignorant of the true situation when he acted. He cannot claim ignorance when the law charges him with knowledge. Chicago etc. Ry. Co. v. Greenberg, 139 Minn. 428, 166 N. W. 1073.

3191. Reliance on act or representation—(19) Ortonville Elevator & Milling Co. v. Luff, 136 Minn. 450, 162 N. W. 885. See § 156.

3197. Representations as to public law—(33) 31 Harv. L. Rev. 655 (exceptions to general rule).

3198. Preventing performance of act—(34) Reinky v. Findley Electric Co., 147 Minn. 161, 180 N. W. 236.

3199. Leaving blank to be filled by another—(35) Schauble v. Hedding, 138 Minn. 187, 164 N. W. 808.

3200. Failure to assert title to property—(36) Northern Timber Products Co. v. Stone-Ordean-Wells Co., 148 Minn. —, 180 N. W. 920.

3204. Clothing another with the indicia of ownership—Where the true owner of personal property allows another to appear as the owner of and as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, the owner thereof will be estopped from questioning the title of such innocent purchaser to such property. Olsen v. Great Northern Ry. Co., 139 Minn. 316, 166 N. W. 331.

(40) See 7 A. L. R. 678 (allowing another to use chattel in his business).

3204a. Accepting and retaining benefits of transaction—An estoppel may arise from accepting and retaining the benefit of a transaction, with full knowledge of the facts, when the party may accept or reject without serious inconvenience. Fuller v. Johnson, 139 Minn. 110, 165 N. W. 874. See § 184.

A party cannot accept the benefits of an unauthorized contract and at the same time repudiate it. Dickinson v. Citizens Ice & Fuel Co., 139 Minn. 201, 165 N. W. 1056. See § 184.

3204b. Recitals in contracts—One who executes and delivers a contract for the payment of money containing a representation to the effect that it is free from all equities not disclosed therein is estopped

from asserting undisclosed equities against a good faith purchaser. Guaranty Securities Co. v. Exchange State Bank, 148 Minn. —, 180 N. W. 919.

3207. **Disclaimer of interest in property**—(43) See Bergh v. Calmenson, 136 Minn. 322, 162 N. W. 353.

3209. **Application to realty**—In 1909, plaintiff's husband executed and delivered to defendants a warranty deed of land owned by him. The deed appeared on its face to have been executed and acknowledged by plaintiff, but in fact she did not execute or acknowledge it. In this action brought in 1915, in which plaintiff claims an undivided one-third interest in the land, her husband having died in 1910, it is held that the findings to the effect that plaintiff had full knowledge of the transaction immediately after it occurred, acquiesced therein, accepted and retained the benefits thereof, are sustained by the evidence, and warrant the conclusion that plaintiff is equitably estopped from maintaining the action. Fuller v. Johnson, 139 Minn. 110, 165 N. W. 874.

An owner who permits his real property to appear of record in the name of another knowing that he is engaged in business and buying on credit, and such other represents himself to be the owner and obtains credit upon the faith of his apparent and asserted title, may be equitably estopped as against creditors extending credit on the faith of such apparent and asserted ownership from claiming that his title is not subject to their claims, though he makes no representations himself and knows of none being made by the debtor. Bergin v. Blackwood, 141 Minn. 325, 170 N. W. 508.

Possibly an easement in the public may be acquired by estoppel. Evidence held not to show that an owner was estopped from denying such an easement. John A. Stees Co. v. Reinhardt, 142 Minn. 340, 172 N. W. 219.

The finding of fact, that plaintiff is estopped by his conduct from asserting title to the land as against the mortgage of defendant bank, is sustained by the evidence. Wendlandt v. Security State Bank, 141 Minn. 462, 170 N. W. 612.

Plaintiffs, husband and wife, joined in the sale and conveyance of the land involved in the action, which at the time constituted their homestead; the grantee fraudulently caused the deed to be recorded in violation of an agreement not to do so until the purchase price of the property had been paid; he thereby defrauded plaintiffs, for he never paid the instalment of the purchase price agreed upon; the grantee mortgaged the property to defendant Fitzgerald to secure the payment of $4,000, then loaned to him, and the mortgage was duly recorded; the loan of the money by Fitzgerald was bona fide, in reliance upon the validity of the title of the grantee, and without notice of the rights of plaintiffs. It is held that on the facts stated plaintiffs are estopped to question the validity of the mortgage. The inquiry made by defendant of the husband as to the rights of plaintiffs in or to the land, particularly stated in the opinion, was specific and clear, and put him to the disclosure of any claim then existing in their favor. Separate inquiry of

the wife, on the facts here disclosed, was not necessary. The evidence sustains the findings of the trial court, and the facts found sustain the conclusions of law. Havel v. Costello, 144 Minn. 441, 175 N. W. 1001.

3210. Who may invoke doctrine—One who has been guilty of actual fraud cannot invoke an estoppel against the defrauded party. Stephon v. Topic, 147 Minn. 263, 180 N. W. 221.

3211. Against state—The state is not estopped by the fact that the forger of state warrants is a trusted state employee, nor by any act or omission of any of its officers or agents. State v. Merchants Nat. Bank, 145 Minn. 322, 177 N. W. 135.

(53) State v. Merchants Nat. Bank, 145 Minn. 322, 177 N. W. 135. See In re Thorne's Estate, 145 Minn. 412, 177 N. W. 638.

(54) See Duluth v. Duluth St. Ry. Co., 137 Minn. 286, 163 N. W. 659.

3217. Miscellaneous cases—(61) Bofferding v. Alden, 134 Minn. 482, 159 N. W. 946 (maker of note delivered it to a person not a payee who indorsed it with his own name and forged the payee's name—plaintiff called up maker by telephone and asked if the note was all right—held, that maker was estopped from setting up defence that payee's name was forged); Stoering v. Swanson, 139 Minn. 115, 165 N. W. 875 (drainage ditch constructed by adjoining landowners to improve their lands—each owner estopped from closing ditch).

(62) Ortonville Elevator & Milling Co. v. Luff, 136 Minn. 450, 162 N. W. 885 (note of partners to a corporation—one partner manager of corporation—sale of assets of firm to other partner who agreed to pay certain firm debts excluding note—claim of estoppel against corporation by certain statements of manager—other claims of estoppel considered); Stephon v. Topic, 147 Minn. 263, 180 N. W. 221 (wife not estopped from maintaining action to set aside fraudulent conveyance).

INCONSISTENT POSITIONS

3218. In legal proceedings—Defendants having stipulated that an action to replevy property, in their possession at the time of the trial, should be submitted to the jury as an action for the conversion of such property, and the action having been so submitted, and a verdict having been returned for damages for the conversion of the property, they are estopped from thereafter asserting that it was error to submit the case upon that theory. Olson v. Moulster, 137 Minn. 96, 162 N. W. 1068.

The rule requiring consistency of action in judicial proceedings is not an arbitrary, inflexible rule. It has no application where a party in choosing a particular course has no real free choice. Spratt v. Spratt, 140 Minn. 510, 166 N. W. 769, 167 N. W. 735. See § 287.

By his conduct at the trial a party may be estopped from asserting that the judgment is a bar to certain relief in a subsequent action. Przyblyski v. Pellowski, 141 Minn. 193, 169 N. W. 707.

(63) Leonard v. Schall, 132 Minn. 446, 157 N. W. 723.

(64) See Dickinson v. Citizens Ice & Fuel Co., 139 Minn. 201, 165 N. W. 1056.

EVIDENCE

IN GENERAL

3220. Legislative control—The legislature can make a presumption conclusive unless such presumption would impair some constitutional right. State v. District Court, 139 Minn. 409, 166 N. W. 772.

(71) See State v. Equitable Surety Co., 140 Minn. 48, 167 N. W. 292.

3222. Rules of evidence should be practical—(74) Palon v. Great Northern Ry. Co., 135 Minn. 154, 160 N. W. 670.

3225. Proof and evidence distinguished—(80) State v. Nordstrom, 146 Minn. 136, 178 N. W. 164.

3226. Prima facie evidence—(81, 82) Riley v. Mankato Loan & Trust Co., 133 Minn. 289, 158 N. W. 391.

3227. Competent evidence—Competent evidence held to mean evidence legally sufficient, that is, legal in quality. In re Mason, 148 Minn. —, 181 N. W. 570.

3227a. Incompetent evidence unobjected to—The fact that evidence is admitted without objection does not give it any force, if it has no probative force as a matter of law. Irwin v. Pierro, 44 Minn. 490, 47 N. W. 154.

RELEVANCY AND ADMISSIBILITY IN GENERAL

3228. General rules of admissibility—(85) Johnson v. Sinclair, 140 Minn. 436, 168 N. W. 181.

3231. Direct evidence as to motive, intent, belief, knowledge, etc.—A grantee may testify directly that he took a conveyance in trust for another. State Bank v. Strandberg, 148 Minn. —, 180 N. W. 1006.

(93) Edwards v. Svea Fire & Life Ins. Co., 141 Minn. 285, 170 N. W. 206 (intention to pass title by deed); Johnson v. Holmes, 142 Minn. 54, 170 N. W. 709 (why a party remained in possession of realty after discovering the fraud of the vendor); In re School Dist. No. 58, 143 Minn. 169, 173 N. W. 850 (testimony of members of county board as to their intention and belief in voting for a detachment of territory from a school district); Collins v. Joyce, 146 Minn. 233, 178 N. W. 503 (testimony of a physician that he rendered certain services on the credit of an employer); National Fire Ins. Co. v. Itasca Lumber Co., 148 Minn. —, 181 N. W. 337 (intention of insured in omitting a reference to certain contracts of sale in making proof of loss).

3232. Facts supporting or rebutting inferences—(95) International R. & S. Corp. v. Miller, 135 Minn. 292, 160 N. W. 793 (action against manager of corporation to recover secret commission—certain check held admissible); Johnson v. Sinclair, 140 Minn. 436, 168 N. W. 181

(cost of removing a sawmill admissible on issue as to number of logs other party agreed to provide for sawing).

3233. Explanatory and introductory facts—Facts explanatory of material facts brought out by the adverse party are relevant and admissible. McWethy v. Norby, 143 Minn. 386, 173 N. W. 803.

3234. Circumstantial evidence—Perjury may be proved by circumstantial evidence if it establishes guilt beyond a reasonable doubt. State v. Storey, — Minn. —, 182 N. W. 613.

(97) State v. McCauley, 132 Minn. 225, 156 N. W. 280; State v. Ryan, 137 Minn. 78, 162 N. W. 893. See State v. Rickmier, 144 Minn 32, 174 N. W. 529 (charge as to circumstantial evidence).

3235. Evidence of evidentary facts must be direct—(98) See Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541 (rule held not violated).

3236. Motive—(99) Wentworth v. Butler, 134 Minn. 382, 159 N. W. 828. See § 2467.

3237. Whole of a conversation, contract, correspondence or document—There was no error in receiving in evidence a letter written by plaintiff to defendant immediately upon receiving from the latter a communication, introduced in evidence by defendant, purporting to confirm a prior verbal contract relating to the subject-matter of the action. Mooney v. Burgess, 142 Minn. 406, 172 N. W. 308.

(2) Stair v. McNulty, 133 Minn. 136, 157 N. W. 1073 (conversation); Aaberg v. Minnesota Commercial Mens' Assn., 143 Minn. 354, 173 N. W. 708 (introduction of part of insurance contract rendered admissible all other parts); State v. Schmoker, — Minn. —, 182 N. W. 957 (prosecution for rape—defendant cross-examined prosecutrix as to certain portions of her testimony on the preliminary examination—state held entitled to introduce other portions of such testimony explaining or supplementing that brought out by defendant). See §§ 10318, 10319.

3237a. Evidence admissible for some purposes and not for others—Evidence admissible for one purpose cannot be excluded because the jury may apply it to another. Upon request the court will caution the jury against such misapplication. It is uniformly conceded that the instructions of the court suffices for that purpose; and the better opinion is that the opponent of the evidence must ask for that instruction; otherwise he may be supposed to have waived it as unnecessary for his protection. State Bank v. Strandberg, 148 Minn. —, 180 N. W. 1006. See § 9789.

3238. Negative evidence—Negative evidence of witnesses who did not hear the whistle of a locomotive held not to overcome the testimony of the engineer that he blew his whistle. May v. Chicago etc. Ry. Co., 147 Minn. 310, 180 N. W. 218.

(4) Robinson v. Pence Automobile Co., 140 Minn. 332, 168 N. W. 10 (absence of customary record that a servant was using a master's automobile on business).

(5) Zenner v. Great Northern Ry. Co., 135 Minn. 37, 159 N. W. 1087. See Plachetko v. Chicago, B. & Q. R. Co., 139 Minn. 278, 166 N. W. 338 (positive evidence that bell was rung not overcome by testimony of witnesses who were absorbed in their work and who could only testify that they were not conscious of its ringing and could not say whether it did or not).

3239. Evidence improperly obtained—(6) See Burdeau v. McDowell, 255 U. S. — (incriminating papers stolen by private parties—use by government).

3241. Immaterial facts—Remote facts—Ordinarily it is not material for the jury to know whether plaintiff or defendant subpoenaed a witness who has given important testimony on a vital issue in the case. Barrett v. Van Duzee, 139 Minn. 351, 166 N. W. 407.

Testimony as to conditions a year after the cause of action arose are admissible, where there is evidence that conditions had not changed in the meantime. Koch v. Speiser, 145 Minn. 227, 176 N. W. 754.

(8) State v. Monroe, 142 Minn. 394, 172 N. W. 313 (larceny—evidence to show system held not too remote); State v. District Court, 142 Minn. 420, 172 N. W. 311 (held error to admit testimony of physician as to condition of a person some months before his death); International R. & S. Corp. v. Miller, 135 Minn. 292, 160 N. W. 793 (action to recover secret commission received by manager of corporation—certain bank checks held admissible); In re Olson's Estate, — Minn. —, 180 N. W. 1009 (issue as to undue influence in making of will—evidence to show testamentary intentions long before execution of will held too remote).

(12) Kalland v. Brainerd, 141 Minn. 119, 169 N. W. 475; State v. Rutledge, 142 Minn. 117, 171 N. W. 275; Kessler v. Von Bank, 144 Minn. 220, 174 N. W. 839.

3242. Character of parties to action—In a civil action it is not permissible to attack the character or reputation of one accused of wrongdoing by proof of prior acts of like nature toward others. Nickolay v. Orr, 142 Minn. 346, 172 N. W. 222.

In civil actions involving moral turpitude a defendant may introduce evidence of his good character. This is an exception to the general rule and not to be extended. In an action for indecent assault defendant may introduce evidence of his good character, but until he does so his character is not in issue and not subject to direct attack. Nickolay v. Orr, 142 Minn. 346, 172 N. W. 222.

3243. Customary practice or course of business—(14) Suits v. Order of United Commercial Travelers, 139 Minn. 246, 166 N. W. 222 (sending notices to members of benefit society).

3245. Telephone messages—Necessity and sufficiency of identification of speaker. L. R. A. 1918D, 720; 2 Minn. L. Rev. 543. See § 9588.

3246. Experiments not in presence of jury—(17) McAlpine v. Fidelity & Casualty Co., 134 Minn. 192, 158 N. W. 967; Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541. See 8 A. L. R. 18.

3247. Value—Bankruptcy schedule made under the direction of a party to an action and verified by his oath held admissible against him as an admission on the value of the bankrupt estate which he purchased from the estate. Sodergren v. Nelson, 131 Minn. 466, 155 N. W. 760.

The value of a stock of merchandise may be proved by an invoice thereof showing the purchase price and by expert testimony of the value of the articles entered. It cannot be proved by the value placed on the inventoried articles by an expert who does not see the goods and is not produced as a witness, but who merely notes their value on the invoice from an inspection of the invoice. Knopfler v. Flynn, 135 Minn. 333, 160 N. W. 860.

The condition of a corporation a year or more after a transaction, not shown to have existed at that time, or to be due to causes then existing, does not prove the value of its stock at the time of the transaction. Heidegger v. Burg, 137 Minn. 53, 162 N. W. 889.

The value of services in a particular occupation may sometimes be proved by custom. Matloch v. Jerabek, 138 Minn. 128, 164 N. W. 587.

The plaintiff was an apprenticed bricklayer. His apprenticeship would expire six months after his injury. It was not error to admit proof of the wages of a journeyman bricklayer in the community as bearing on damages. Kalland v. Brainerd, 141 Minn. 119, 169 N. W. 475.

(18) Rushfeldt v. Tall, 137 Minn. 281, 163 N. W. 505; McGuire v. Chambers, 148 Minn. —, 180 N. W. 1013.

(29) See Matloch v. Jerabek, 138 Minn. 128, 164 N. W. 587.

(34) Heidegger v. Burg, 137 Minn. 53, 162 N. W. 889; Howe v. Gray, 144 Minn. 122, 174 N. W. 612 (the par value of corporate stock may be taken as the actual value in the absence of other evidence). See State v. Wells Fargo Co., 146 Minn. 444, 179 N. W. 221.

3248. Value to prove agreed price—(38) See Johnson v. Sinclair, 140 Minn. 436, 168 N. W. 181.

3249. Identity of persons or things—Evidence held sufficient to justify a finding as to the identity of a person driving an automobile at the time of an accident. Robinson v. Pence Automobile Co., 140 Minn. 332, 168 N. W. 10.

A sample of corn introduced in evidence held sufficiently identified. McGuire v. Chambers, 148 Minn. —, 180 N. W. 1013.

(40) Robinson v. Pence Automobile Co., 140 Minn. 332, 168 N. W. 10.

3249a. Dates—Certain letters on immaterial subjects were properly admitted for the sole purpose of fixing a date. James E. Carlson, Inc. v. Babler, 144 Minn. 125, 174 N. W. 824.

3251. Modern tendency to admit evidence freely—Discretion of trial court—The modern tendency is to enlarge the discretion of the trial

court in the admission of evidence. See Kalland v. Brainerd, 141 Minn. 119, 169 N. W. 475; Kessler v. Von Bank, 144 Minn. 220, 174 N. W. 839: Gasser v. Great Northern Ins. Co., 145 Minn. 205, 176 N. W. 484; §§ 3252, 3259, 3260, 3264, 3267, 3293, 3301, 3312, 3315, 3316, 3322.

(43) Berryhill v. Clark, 137 Minn. 135, 163 N. W. 137; Kalland v. Brainerd, 141 Minn. 119, 169 N. W. 475. See Dawson v. Northwestern Construction Co., 137 Minn. 352, 163 N. W. 772; Anker v. Chicago G. W. R. Co., 140 Minn. 63, 67, 167 N. W. 278.

(46) Long v. Conn, 147 Minn. 77, 179 N. W. 644; Matteson v. Blaisdell, — Minn. —, 182 N. W. 442. See Dawson v. Northwestern Construction Co., 137 Minn. 352, 163 N. W. 772; Carnegie Dock & Fuel Co. v. Midland Lumber & Coal Co., — Minn. —, 182 N. W. 515.

3251a. Evidence of trailing persons by bloodhounds—Even were testimony as to trailing of criminals by bloodhounds held admissible, a question not decided, there was no foundation laid for its reception in this case, nor was the testimony excluded of any probative value whatever. The statute under which county commissioners may authorize the sheriff of a county to purchase a pair of bloodhounds to be kept for use in pursuing and apprehending criminals and fugitives does not affect the rules of evidence. Crosby v. Moriarity, 148 Minn. —, 181 N. W. 199.

SIMILAR AND COLLATERAL FACTS

3252. Collateral facts—Discretion of trial court—The admission of collateral circumstances corroborative of a party's witness rests largely in the discretion of the trial court. Bartlett v. Ryan, 141 Minn. 76, 169 N. W. 421.

(48) State Elevator Co. v. Great Northern Ry. Co., 133 Minn. 295, 158 N. W. 399; Wentworth v. Butler, 134 Minn. 382, 159 N. W. 828; Holloway v. Dickinson, 137 Minn. 410, 163 N. W. 791; National Elevator Co. v. Great Northern Ry. Co., 141 Minn. 407, 170 N. W. 515.

3253. Similar facts—Facts of a continuous nature—In an action for breach of warranty in the sale of a machine, held, that evidence that other similar machines of the same make developed the same imperfections was admissible to show that the fault was in the structual design and plan of the machine, and did not arise from defective detachable parts. Harris v. Simplex Tractor Co., 140 Minn. 278, 167 N. W. 1045.

Where the issue was whether a shipment of goods was made in a reasonable time, evidence of the time taken in a number of other shipments between the same points was held admissible. National Elevator Co. v. Great Northern Ry. Co., 141 Minn. 407, 170 N. W. 515.

Where it was a question whether certain ether administered to a patient was pure, the effect of ether from the same container upon other patients was held admissible. Moehlenbrock v. Parke, Davis & Co., 145 Minn. 100, 176 N. W. 169.

(54) See Digest, §§ 7053, 8626.

(56) Schmitt v. Minneapolis, 138 Minn. 193, 164 N. W. 801 (issue as to existence and location of a defect in a bridge causing an accident—testimony of a witness who examined the bridge two weeks after the accident held admissible to locate the place); Koch v. Speiser, 145 Minn. 227, 176 N. W. 754 (action for wilful obstruction of a public ditch—evidence as to conditions a year after the cause of action arose held admissible, conditions not having changed in the meanwhile); State v. Rogers, 145 Minn. 303, 177 N. W. 358 (disorderly house—character of place shortly before and after time charged may be shown).

REAL EVIDENCE

3258. Physical objects—In general—In an action for personal injury resulting in the loss of a hand, the supreme court held it proper to exclude the amputated hand and disapproved the conduct of counsel in offering it. Evans v. Chicago etc. Ry. Co., 133 Minn. 293, 158 N. W. 335.

3259. Maps, diagrams, plats, etc.—A plat made a year after the cause of action arose has been held admissible, upon a showing that the conditions had not changed in the meanwhile. Koch v. Speiser, 145 Minn. 227, 176 N. W. 754.

An unofficial plat of land made by a surveyor who has surveyed the land from his notes of the survey is admissible, if he testifies that the plat correctly shows the acreage, though his notes are not in evidence. The sufficiency of the verification of such a plat is a matter addressed to the discretion of the trial court. Kries v. Warrick, — Minn. —, 182 N. W. 998.

3260. Photographs—The rule is liberal in favor of receiving photographs when they illustrate a situation and are not misleading. Their admission, however, rests largely in the discretion of the trial court. Lentz v. Minneapolis etc. R. Co., 135 Minn. 310, 160 N. W. 794.

The introduction of photographs in evidence rests largely in the sound discretion of the trial court, and no abuse of such discretion appears in the rulings here challenged. State v. Hines. — Minn. —, 182 N. W. 450.

(67) Laurisch v. Minneapolis etc. Traction Co., 132 Minn. 114, 155 N. W. 1074 (action for personal injury caused by collision with train—photograph of damaged automobile held properly admitted—photograph of engine like the one on the train held properly excluded); Lentz v. Minneapolis etc. R. Co., 135 Minn. 310, 160 N. W. 794 (action for personal injury—photograph of locus in quo taken several months after accident excluded); Peterson v. Mystic Workers, 141 Minn. 175, 169 N. W. 598 (action on insurance policy—issue as to health of insured—photograph of insured taken in camp admitted in corroboration of testimony that he had gone on a hunting expedition).

3261. Experiments in presence of jury—(70) See note, 8 A. L. R. 18.

BEST AND SECONDARY EVIDENCE

3264. Nature and scope of rule—Discretion of trial court—The cost of a thing may be proved by opinion evidence though it is possible to produce the builder or one having personal knowledge of the cost. Kempf v. Ranger, 132 Minn. 64, 155 N. W. 1059.

A party may prove the execution and contents of a lost deed without first producing the subscribing witnesses thereto. Berryhill v. Clark, 137 Minn. 135, 163 N. W. 137.

Much must be left to the discretion of the trial court in determining whether to admit secondary evidence. Gasser v. Great Northern Ins. Co., 145 Minn. 205, 176 N. W. 484.

3265. Real or apparent exceptions—The best evidence rule has been held not violated by allowing a witness to testify that he drew a contract from a memorandum that he took from a contract shown to him by the defendants. Wessel v. Cook, 132 Minn. 442, 157 N. W. 705.

The best evidence rule does not prevent an officer of a bank from testifying as to the state of a checking account, as, for example, that a depositor had checked out the entire amount to his credit before a certain event. Finseth v. Scherer, 138 Minn. 355, 165 N. W. 124.

In an action by a depositor to recover a bank deposit, he can show by parol that he made a deposit and need not require the production of the bank's books; and conversations with one in the bank designated cashier and acting as such may be shown without proof of his appointment and actual authority. Such testimony is not objectionable as not the best evidence, or as stating a conclusion, or because the authority of the cashier was not shown. Larson v. Citizens State Bank, 142 Minn. 334, 172 N. W. 125.

(75, 76) Slimmer v. State Bank, 134 Minn. 349, 159 N. W. 795.

(86) Larson v. Citizens State Bank, 142 Minn. 334, 172 N. W. 125.

(88) See §§ 1975, 1976.

3267. Relaxation of rule—Discretion of trial court—Much must be left to the discretion of the trial court in determining whether to admit secondary evidence. Gasser v. Great Northern Ins. Co., 145 Minn. 205, 176 N. W. 484.

3268. Secondary evidence admitted without objection—(91) State v. Goldstein & Smiloweitz, 135 Minn. 465, 160 N. W. 783.

3270. Primary evidence out of jurisdiction—If a document is part of a record of a foreign court, or if it belongs to any public officer of another jurisdiction, secondary evidence thereof is admissible. Gasser v. Great Northern Ins. Co., 145 Minn. 205, 176 N. W. 484.

Where a document is beyond the jurisdiction of the court, and not in the custody or control of a party, some effort should be made to produce it before offering secondary evidence, the nature of the effort depending on the circumstances of the case. The matter is left to the discretion of

the trial court, as are other questions pertaining to the sufficiency of the foundation for reception of secondary evidence. There was no abuse of discretion in this case in receiving secondary evidence of a document in the possession of a third party out of the state and who had declined to produce it except on certain unwarranted conditions. Gasser v. Great Northern Ins. Co., 145 Minn. 205, 176 N. W. 484.

(94) L. R. A. 1917D, 530.

3273. Primary evidence lost or destroyed—Secondary evidence of a lost instrument is admissible though the law requires the instrument to be in writting. This applies to a lost letter acknowledging the paternity of a bastard. Anderson v. Oleson, 143 Minn. 328, 173 N. W. 665.

(97) Anderson v. Oleson, 143 Minn. 328, 173 N. W. 665.

3274. Requisite search for lost document—(1) Latourell v. Hobart, 135 Minn. 109, 160 N. W. 259; Anderson v. Oleson, 143 Minn. 328, 173 N. W. 665.

(2) Latourell v. Hobart, 135 Minn. 109, 160 N. W. 259; Cookson v. Hill, 146 Minn. 165, 178 N. W. 591. See Gasser v. Great Northern Ins. Co., 145 Minn. 205, 176 N. W. 484.

3276. Title to realty—When title to realty is only incidentally or collaterally in issue it may be proved by the direct testimony of the alleged owner. Marchio v. Duluth, 133 Minn. 470, 158 N. W. 612.

Title to realty may generally be proved prima facie by evidence of possession. See § 7858.

See §§ 2891–2897.

3279. Duplicate originals—Letterpress and carbon copies—(13) 30 Harv. L. Rev. 764.

3284. Notice to produce—In a criminal prosecution the defendant cannot be required to produce a document in his possession for use at the trial, and showing that it is in his possession is a sufficient foundation for the introduction of secondary evidence of its contents. State v. Minor, 137 Minn. 254, 163 N. W. 514; State v. Dunn, 140 Minn. 308, 168 N. W. 2.

(20) Kenyon Co. v. Johnson, 144 Minn. 48, 174 N. W. 436.

HEARSAY

3286. General rule—(30) Ruppert v. Meulling, 132 Minn. 33, 155 N. W. 1039 (statement of agent that he was such); State v. Solem, 135 Minn. 200, 160 N. W. 491 (prosecution for administering poison—statements of county officials to defendant while in jail that defendant's little boy had told a neighbor's boy that deceased had said that she was going to die because defendant had given her poison); Knopfler v. Flynn, 135 Minn. 333, 160 N. W. 860 (notations of value placed on an invoice of merchandise by one not called as a witness who did not see the goods and did not make the invoice); In re Consolidation of School Districts, 140 Minn. 475, 168 N. W. 552 (statement of a person that he had no interest in

certain land); Richardson v. Northern American Life & Casualty Co., 142 Minn. 295, 172 N. W. 131 (letter written by a physician who had treated insured about the date of the insurance addressed to the insurance company and stating the physical condition of the insured as he found from examination—letter was no part of proofs of death and was not procured at instance of the beneficiary); Rux v. Adam, 143 Minn. 35, 172 N. W. 912 (recital of consideration in a deed).

3287a. Self-serving declarations—Self-serving declarations in pleadings. 1 A. L. R. 39.

3291. Exceptions—(37) See Finch, Van Slyck & McConville v. Vanasek, 132 Minn. 9, 155 N. W. 754.

VARIOUS EXCEPTIONS TO HEARSAY RULE

3292a. Statements showing competency or incompetency—When a person's competency is in issue his declarations and conversations about the time involved, showing his comprehension of affairs or the reverse, are admissible. Wheeler v. McKeon, 137 Minn. 92, 162 N. W. 1070. See §§ 1731, 10210.

3293. Statements of intention or purpose—It was within the discretion of the trial court to receive testimony that the insured had expressed the belief that it was wrong to commit suicide without specifically limiting the proof to declarations made immediately preceding the date of his death. Farrar v. Locomotive Engineers etc. Ins. Assn., 143 Minn. 468, 173 N. W. 705.

Declarations of intention to do some act in the future are often admissible to characterize the act when done, though, if such declarations are remote from the performance of the act, their admission in evidence is of little weight; but the extent to which such evidence is admissible is largely within the trial court's discretion. Kessler v. Von Bank, 144 Minn. 220, 174 N. W. 839.

(45) Walso v. Latterner, 140 Minn. 455, 168 N. W. 353 (declarations of a depositor indicating an intention that the deposit should be in trust for another); State Bank v. Strandberg, 148 Minn. —, 180 N. W. 1006 (action to set aside fraudulent conveyance—conversations between grantors, husband and wife, showing absence of fraudulent intent held admissible). See State v. District Court, 145 Minn. 127, 176 N. W. 165 (declaration of a person's intention of joining the army held properly excluded as immaterial).

3294a. Statements showing character of place—In a prosecution for keeping a disorderly house it is competent to prove what visitors and inmates said therein to show its character. State v. Terrett, 131 Minn. 349, 154 N. W. 1073; State v. Rogers, 145 Minn. 303, 177 N. W. 358.

3298. Statements of decedents against interest—(55) See Sons v. Sons, 145 Minn. 367, 177 N. W. 498 (statements of parent as to gifts to children.

3299. Reputation—To prove partnership. L. R. A. 1918D, 505.
(60) State v. Rogers, 145 Minn. 303, 177 N. W. 358.

RES GESTAE

3300. General rule—(68) State v. Newell, 134 Minn. 384, 159 N. W. 829 (prosecution for abortion—declarations of woman while under treatment and before abortion as to treatment given her by defendant held admissible); State v. Gilbert, 141 Minn. 263, 169 N. W. 790 (prosecution for discouraging enlistment—heckling statements made by members of an audience addressed by defendant, to which he replied, held admissible).

(69) Roach v. Great Northern Ry. Co., 133 Minn. 257, 158 N. W. 232 (personal injury causing death—statements of injured person as to cause of accident made about forty-five minutes after the accident held admissible).

3301. Time of statement—Discretion of trial court—In passing upon the admissibility of testimony claimed to constitute a part of the res gestae the trial court determines whether unsworn statements are so accredited that they may go to the jury and be weighed and valued by it; and in determining this it considers whether the statements are spontaneous, whether there was an opportunity of fabrication or a likelihood of it, the lapse of time between the act and the declaration relating to it, the attendant excitement, the mental and physical condition of the declarant, and other circumstanecs important in determining whether the trustworthiness of the unsworn statements is such that they may safely go to the jury. In reviewing the trial court's ruling the supreme court defers to its determination of the preliminary facts bearing upon the propriety of receiving the testimony. To this extent its admissibility is within the sound judgment of the trial court. Roach v. Great Northern Ry. Co., 133 Minn. 257, 158 N. W. 232.

(75) Roach v. Great Northern Ry. Co., 133 Minn. 257, 158 N. W. 232.

EVIDENCE AT FORMER TRIAL

3306a. Identity of parties and issues—In order to render evidence at a former trial admissible absolute identity of parties and issues is not essential. The test is whether the party against whom the testimony is offered had adequate opportunity by cross-examination on the former trial to sift the testimony. Palon v. Great Northern Ry. Co., 135 Minn. 154, 160 N. W. 670.

3307. Witness out of state—It is an open question whether the testimony of a party to an action given on a former trial is admissible on a subsequent trial on the ground that he is then out of the state. Haack v. Coughlan, 134 Minn. 78, 158 N. W. 908.

Error in excluding evidence at a former trial cannot be reviewed unless

the record shows the materiality of the evidence in the subsequent action. Haack v. Coughlan, 134 Minn. 78, 158 N. W. 908.

The testimony of a witness at a former trial is admissible if he is a non-resident and not within the jurisdiction of the court, or is absent by the act or procurement of the party against whom the testimony is offered. Palon v. Great Northern Ry. Co., 135 Minn. 154, 160 N. W. 670.

(86) Farrar v. Locomotive Engineers etc. Ins. Assn., 143 Minn. 468, 173 N. W. 705.

3308. Death of witness—(90) Palon v. Great Northern Ry. Co., 135 Minn. 154, 160 N. W. 670.

OPINION EVIDENCE—NON-EXPERTS

3311. General rule—(2) Dalton Adding Machine Co. v. Bailey, 137 Minn. 61, 162 N. W. 1059 (question to a sales agent as to whether under instructions from his principal he was authorized to sell sample machines); Farmers Store & Warehouse Assn. v. Barlow, — Minn. —, 182 N. W. 447 (held proper to exclude opinion of a witness, not called as an expert, as to the diseases of potatoes).

3312. Scope of rule—Not strictly enforced—Discretion of trial court—Opinion evidence is not rendered inadmissible by the fact that a witness with first-hand information might be produced. Kempf v. Ranger, 132 Minn. 64, 155 N. W. 1059.

The admission of opinion evidence rests largely in the discretion of the trial court. Patterson v. Blatti, 133 Minn. 23, 157 N. W. 717.

The supreme court is not strict in its attitude against conclusions of a witness. Licensed Retail Liquor Dealers Assn. v. Denton, 144 Minn. 81, 174 N. W. 526.

(7) Hylaman v. Midland Ins. Co., 136 Minn. 132, 161 N. W. 385.

3313. Laying foundation—(11) Finberg v. St. Paul Gas Light Co., 141 Minn. 486, 170 N. W. 696; Walso v. Latterner, 143 Minn. 364, 173 N. W. 711; In re Olson's Estate, 148 Minn. —, 180 N. W. 1009.

3313a. Stipulated testimony—Where the parties by stipulation make an admission without reservation as to what testimony an absent witness would give if present and stipulate that their admissions may be used as evidence, it may be so used, though in the form of conclusions. Behrens v. Kruse, 132 Minn. 69, 155 N. W. 1065, 156 N. W. 1.

3315. Facts which can only be described by an opinion—Discretion of trial court—Where the truth must ultimately rest in inference or opinion, and it is impossible by description to reproduce the things seen by the witness so as to enable jurors to comprehend them as they are comprehended by one who has had the benefit of personal observation, it is proper to receive opinion evidence. An opinion of one who saw marks on plaintiff's thumb that the marks were teeth marks or were caused by a bite, held admissible within this rule. Patterson v. Blatti, 133 Minn. 23, 157 N. W. 717.

The admission of evidence of this nature rests very much in the discretion of the trial court. Hylaman v. Midland Ins. Co., 136 Minn. 132, 161 N. W. 385.

(13) Patterson v. Blatti, 133 Minn. 23, 157 N. W. 717; Hylaman v. Midland Ins. Co., 136 Minn. 132, 161 N. W. 385; Plaude v. Mississippi & Rum River Boom Co., 141 Minn. 170, 169 N. W. 600; L. R. A. 1918A, 662.

3316. Sanity—Mental condition—Discretion of trial court—It is difficult for the average witness to give testimony of much value upon such questions without giving his opinions formed by observing the acts and conduct of the person concerning whose capacity he is testifying. Of course, he should describe as well as he can the acts and conduct upon which his opinion is based to aid the jury in determining the weight to which his opinion is entitled. But, when he is called upon to testify concerning the mental capacity of a person with whom he has associated and whose acts and conduct he has observed his conclusions are admissible, and his testimony should not be restricted to a statement of the concrete facts which he is able to point out. Kraus v. National Bank of Commerce, 140 Minn. 108, 167 N. W. 353.

Whether a sufficient foundation has been laid for admitting the opinion of a non-expert witness as to mental competency is for the trial court to determine in the exercise of a reasonable judicial discretion. Walso v. Latterner, 143 Minn. 364, 173 N. W. 711.

(17) Swick v. Sheridan, 107 Minn. 130, 119 N. W. 791. See Walso v. Latterner, 143 Minn. 364, 173 N. W. 711.

3321a. Cost—When the cost of an article is material opinion evidence of one familiar with the cost of such articles is admissible. Kempf v. Ranger, 132 Minn. 64, 155 N. W. 1059.

3322. Value of property or services—Discretion of trial court—Officers and stockholders of a bankrupt corporation held qualified to testify as to the value of its plant. Sodergren v. Nelson, 131 Minn. 466, 155 N. W. 760.

The admission of opinion evidence as to value rests largely in the discretion of the trial court. Bergh v. Calmenson, 136 Minn. 322, 162 N. W. 353.

Where a witness testifies that he knows the value of certain property it is not error to allow him to testify thereto without any further showing of his qualification, if the adverse party expresses no desire to question the witness as to the source of his knowledge. Bergh v. Calmenson, 136 Minn. 322, 162 N. W. 353.

Farmers may testify as to the value of the use of farm land though it has no fixed rental or market value. Moorhead v. Minneapolis Seed Co., 139 Minn. 11, 165 N. W. 484.

The president of a village council, having no special or intimate knowledge of the nature or quality of the materials entering into the construction of a bridge owned by the village, does not come within the rule that the owner of property may testify to its value. McClure v. Browns Valley, 143 Minn. 339, 173 N. W. 672.

Farmers are competent to testify as to the value of farm land in their vicinity. Falkenhagen v. Yellow Medicine County, 144 Minn. 257, 175 N. W. 102.

(25) Knopfler v. Flynn, 135 Minn. 333, 160 N. W. 860.

(27) See Bergh v. Calmenson, 136 Minn. 322, 162 N. W. 353.

(29) Fairmont Gas Engine etc. Co. v. Crouch, 133 Minn. 167, 157 N. W. 1090; Bergh v. Calmenson, 136 Minn. 322, 162 N. W. 353; Egekvist v. Minnetonka & White Bear Nav. Co., 146 Minn. 474, 178 N. W. 238 (owner of automobile who had paid for repairs held competent to testify as to its value in its damaged condition). See McClure v. Browns Valley, 143 Minn. 339, 173 N. W. 672.

(32) Moorhead v. Minneapolis Seed Co., 139 Minn. 11, 165 N. W. 484 (value of use of farm—total failure of crop to germinate).

(36) Finberg v. St. Paul Gas Light Co., 141 Minn. 486, 170 N. W. 696.

3322a. Speed of train, automobile or other moving object—Any person of ordinary intelligence who can say that he is able to form an estimate as to the speed of a train, and that he saw it in motion with reasonable opportunity to observe its speed, is competent to give an opinion as to its speed; but a witness who did not see or hear the train until it was upon him is not competent to give evidence as to its speed, and his opinion if given is without probative force. Beecroft v. Great Northern Ry. Co., 134 Minn. 86, 158 N. W. 800.

The testimony of witnesses as to the speed of a train or other moving object is opinion evidence, never conclusive and often very unsatisfactory, especially when the witnesses are interested in the result. Casey v. Illinois Central R. Co., 134 Minn. 109, 158 N. W. 812.

A person approaching a railroad train who sees it when it is sixty feet away is competent to testify as to its speed if otherwise qualified. Zenner v. Great Northern Ry. Co., 135 Minn. 37, 159 N. W. 1087.

Any person of reasonable intelligence and ordinary experience in life may, without further qualification, give an opinion as to how fast an automobile which he has observed was going at the time. Dunkelbeck v. Meyer, 140 Minn. 283, 167 N. W. 1034.

3322b. Weight—The opinion of a party to the action as to the cause of a death is not conclusive and is of no greater force than that of any other person, based upon the same fact. The fact that at the time a witness formed his opinion he was greatly disturbed and suffering intense grief affects the weight of his opinion. Bursaw v. Plenge, 144 Minn. 459, 175 N. W. 1004.

OPINION EVIDENCE—EXPERTS

3325. When expert testimony admissible—General rule—(42) State v. Price, 135 Minn. 159, 160 N. W. 677; Hylaman v. Midland Ins. Co., 136 Minn. 132, 161 N. W. 385.

(43) State v. Price, 135 Minn. 159, 160 N. W. 677; Hylaman v. Midland Ins. Co., 136 Minn. 132, 161 N. W. 385; Madsen v. Latzke, 140 Minn. 325, 168 N. W. 11.

3326. Upon issuable facts—(44, 45) Sawyer v. Berthold, 116 Minn. 441, 134 N. W. 120; Viita v. Fleming, 132 Minn. 128, 155 N. W. 1077.
See §§ 7494, 7495.

3327. Cause of death—Disease—Physical condition, etc.—Medical experts—A medical expert may testify as to the probable manner in which wounds which he has examined and treated were produced. Hylaman v. Midland Ins. Co., 136 Minn. 132, 161 N. W. 385.

A medical expert has been allowed to give his opinion whether a rider of a bicycle could maintain an upright or rigid position on the wheel for an appreciable time after receiving a fatal fracture of the skull and other wounds on the head. Hylaman v. Midland Ins. Co., 136 Minn. 132, 161 N. W. 385.

A medical expert may give his opinion as to the ability of a person to engage in physical and mental exertion and to what extent. McKay v. Minnesota Commercial Men's Assn., 139 Minn. 192, 165 N. W. 1061.

An osteopathist is competent to testify as a medical expert. State v. District Court, 140 Minn. 216, 167 N. W. 1039.

A doctor who has examined a person or has noted his appearance at the time such person goes upon the operating table, who has performed the operation or has been present thereat, who has observed the effects of the anaesthetic administered, and who has been present at intervals until death ensues, is competent to express an opinion as to the cause of death. This is so, even if the doctor admits that the opinion expressed has been corroborated by the information he has obtained from others as to a subsequent analysis of the ether. Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541.

(47) State v. Price, 135 Minn. 159, 160 N. W. 677; State v. District Court, 140 Minn. 216, 167 N. W. 1039.

(49) Althoff v. Torrison, 140 Minn. 8, 167 N. W. 119.
See § 7494.

3329a. Surveys—A witness who has made a survey of land for the purpose of determining its acreage and who has computed the acreage from measurements taken by him may testify as to the acreage found by him without introduction of the notes in evidence. Kies v. Warrick, — Minn. —, 182 N. W. 998.

3330. Comparison of handwriting—(54) See 34 Harv. L. Rev. 788.

3331. Negligence—Due care, etc.—One qualified to testify as an expert in the use of X-ray machines may, from the result produced, give his opinion whether the machine was operated in a proper manner. Holt v. Ten Broeck, 134 Minn. 458, 159 N. W. 1073.

3332. Expert testimony held admissible—As to the distance within which a railroad train might have been stopped. Olthoff v. Great Northern Ry. Co., 135 Minn. 72, 160 N. W. 206.

Whether a wound was caused by a fall or by a blow. State v. Price, 135 Minn. 159, 160 N. W. 677.

As to whether a bicyclist could maintain an upright or rigid position on the wheel for an appreciable time after receiving a fatal fracture of the skull and other wounds on the head. Hylaman v. Midland Ins. Co., 136 Minn. 132, 161 N. W. 385.

As to the manner in which wounds were produced. Hylaman v. Midland Ins. Co., 136 Minn. 132, 161 N. W. 385.

As to what the result of certain treatment of a fractured arm would have been if the treatment had been followed. Peterson v. Branton, 137 Minn. 74, 162 N. W. 895.

As to the amount of earth in cars, as to the relative bulk of freshly dug earth and earth in a pit, and as to the method of estimating the amount of overhaul on the earth moved by a party over and above the estimate of the engineer. Dawson v. Northwestern Construction Co., 137 Minn. 352, 163 N. W. 772.

As to the movement of an automobile as indicated by wheel tracks on the pavement at the place of a collision the morning after. Carson v. Turrish, 140 Minn. 445, 168 N. W. 349.

As to whether a large ice floe that blocked a river would have passed but for the existence of certain piers and pilings. Plaude v. Mississippi & Rum River Boom Co., 141 Minn. 170, 169 N. W. 600.

As to the cost of replacing plumbing, fixtures, etc. Finberg v. St. Paul Gas Light Co., 141 Minn. 486, 170 N. W. 696.

3334. Conclusiveness of expert testimony—Where a physician is appointed by the court to examine a party his opinion as to the cause of injury or sickness is not conclusive on the court, at least if there is contrary evidence in the case. State v. District Court, 140 Minn. 216, 167 N. W. 1039.

Expert opinion evidence as to the market value of the iron ore in its actual condition held not conclusive, and that the trial court erred in directing the jury to return a verdict in harmony with such opinion. Remington v. Savage, — Minn. —, 182 N. W. 524.

Value and weight of expert testimony as to handwriting. L. R. A. 1918D, 642.

(17) Wentworth v. Butler, 134 Minn. 382, 159 N. W. 828; Moehlenbrock v. Parke, Davis & Co., 145 Minn. 100, 176 N. W. 169; Villiott v. Sovereign Camp of Woodmen, 145 Minn. 349, 177 N. W. 356 (as to whether an applicant for insurance had ever had syphilis—opinion of experts not conclusive); Remington v. Savage, — Minn. —, 182 N. W. 524.

(18) Jacobson v. Chicago etc. Ry. Co., 132 Minn. 181, 156 N. W. 251; Lamoreaux v. Weisman, 136 Minn. 207, 161 N. W. 504; Morris v. Wulke, 141 Minn. 27, 169 N. W. 22; Remington v. Savage, — Minn. —, 182 N. W. 524.

3335. Competency of experts—Question for trial court—Question on appeal—An osteopathic physician may testify as an expert as to matters of which he is shown to have expert knowledge, though he is not li-

censed as a regular physician. Althoff v. Torrison, 140 Minn. 8, 167 N. W. 119; State v. District Court, 140 Minn. 216, 167 N. W. 1039.

(23) Olthoff v. Great Northern Ry. Co., 135 Minn. 72, 160 N. W. 206; State v. Price, 135 Minn. 159, 160 N. W. 677; Althoff v. Torrison, 140 Minn. 8, 167 N. W. 119.

(26) Sodergren v. Nelson, 131 Minn. 466, 155 N. W. 760 (value of plant of bankrupt corporation—officers and stockholders held competent); McClure v. Browns Valley, 143 Minn. 339, 173 N. W. 672 (value of bridge—president of village council incompetent); Falkenhagen v. Yellow Medicine County, 144 Minn. 257, 175 N. W. 102 (value of farm lands—farmers in vicinity competent); Ristvedt v. Walters, 146 Minn. 146, 178 N. W. 166 (value of stock of merchandise—person in charge of stock held competent); Egekvist v. Minnetonka & White Bear Nav. Co., 146 Minn. 474, 178 N. W. 238 (owner of automobile who had paid for repairs held competent to testify as to its value in its damaged condition); Matteson v. Blaisdell, — Minn. —, 182 N. W. 442 (farmer qualified to give opinion of value of the labor of a boy fourteen years old on a farm); Hjorth v. Albert Lea Machinery Co., 142 Minn. 387, 172 N. W. 488 (value of tools at place of manufacture—witness held competent).

(27) Olthoff v. Great Northern Ry. Co., 135 Minn. 72, 160 N. W. 206 (distance within which a railroad train might have been stopped—witnesses held qualified though they were not trainmen or engineers); Lewiston Iron Works v. Vulcan Process Co., 139 Minn. 180, 165 N. W. 1071 (probable life of a welding apparatus); Finberg v. St. Paul Gas Light Co., 141 Minn. 486, 170 N. W. 696 (cost of replacing plumbing, fixtures, etc.).

3337. Opinions based on hypothetical questions—A hypothetical question calling for an opinion on facts testified to by another witness may exclude the opinion given by such witness. Nardinger v. Ladies of the Maccabees, 138 Minn. 16, 163 N. W. 785.

An objection to a question to a medical expert held not sufficiently specific to raise the point that it assumed as a fact a certain disease which was the main issue on the trial. State v. District Court, 140 Minn. 216, 167 N. W. 1039.

Objection that a hypothetical question assumes facts not in evidence must be raised on the trial and cannot be raised for the first time on appeal. Geiger v. Sanitary Farm Dairies, 146 Minn. 235, 178 N. W. 501.

(29) Crowley v. Farley, 129 Minn. 460, 152 N. W. 872.

(30) State v. District Court, 140 Minn. 216, 167 N. W. 1039.

3338. Opinions based on the evidence—In an action for malpractice an expert witness may base his opinion on the result alone, as disclosed by the evidence. Sawyer v. Berthold, 116 Minn. 441, 134 N. W. 120; Viita v. Fleming, 132 Minn. 128, 155 N. W. 1077.

An expert may give his opinion, based on the result as disclosed by the evidence, that medical treatment was proper or improper. Sawyer

v. Berthold, 116 Minn. 441, 134 N. W. 120; Holt v. Ten Broeck, 134 Minn. 458, 159 N. W. 1073.

An expert may give his opinion, based on the results as disclosed by the evidence, that an application of X-rays was proper or improper. Holt v. Ten Broeck, 134 Minn. 458, 159 N. W. 1073.

Immaterial misstatements of the evidence will be disregarded. Seith v. Minneapolis etc. Traction Co., 133 Minn. 367, 158 N. W. 611; Huettner v. Minneapolis etc. Traction Co., 133 Minn. 368, 158 N. W. 611; McNab v. Wallin, 133 Minn. 370, 158 N. W. 623.

(40) Ivanesovich v. North American L. & C. Co., 145 Minn. 175, 176 N. W. 502.

3339. Opinions based on personal knowledge and the evidence—(45) State v. District Court, 140 Minn. 216, 167 N. W. 1039.

3340. Opinions based on knowledge acquired out of court—A medical expert has been permitted to give his opinion that death was caused by impure ether though he admitted that his opinion was corroborated by the information received from others as to a subsequent analysis of the ether. Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541.

An opinion of the value of a stock of merchandise based on information obtained by the witness from dealers out of court, held properly excluded. State v. Ettenburg, 145 Minn. 39, 176 N. W. 171.

(46) State v. District Court, 140 Minn. 216, 167 N. W. 1039.

(49) See Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541.

3342. Cross-examination—A witness, who testified that the market value of plaintiff's farm was not diminished by the injury, except by the value of the acres washed away, was properly cross-examined upon what it would cost to restore the land to its condition before the injury occurred. Plaude v. Mississippi & Rum River Boom Co., 141 Minn. 170, 169 N. W. 600.

(52) State v. Kasper, 140 Minn. 259, 167 N. W. 1035; Ivanesovich v. North American L. & C. Co., 145 Minn. 175, 176 N. W. 502. See Ehrler v. Chicago, B. & Q. R. Co., 137 Minn. 245, 163 N. W. 506.

3343. Impeachment—(59) See Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541.

DOCUMENTARY EVIDENCE

3345. Account books—In an action for a commission as broker, held, that the books of account of defendants showing that the transaction involved was with another party instead of plaintiff were incompetent as against plaintiff. Clabots v. Ballweber, 133 Minn. 401, 158 N. W. 621.

Books of account of plaintiff, kept by the person in charge of his business, having every appearance of complete books of account, produced after testimony by plaintiff that he had books of account of the

business and in response to a request to produce his books of account, exhibited by him on other occasions as the books in which his records were kept, were sufficiently indentified to be competent evidence against plaintiff. Vath v. Wiechmann, 138 Minn. 87, 163 N. W. 1028.

Entries in books of account may be original entries, though transcribed from temporary memoranda which are not produced and not preserved, if the entries are substantially contemporaneous with the transaction. Courts should not be captious in reception of evidence of this kind. All business men do not keep their books of account in the same manner. Some keep them badly. If the books kept are intended as a true record of business transactions and are made in the usual course of business, contemporaneously with the transaction of which they purport to be a record, the court should be liberal in receiving them. Keller Electric Co. v. Burg, 140 Minn. 360, 168 N. W. 98.

Where the items sold were entered in plaintiff's journal at the time of the transactions from temporary memoranda made on a desk pad or in a pocket memorandum book by the salesman, the journal is the book of original entry, and plaintiff's account books, when properly verified, are admissible in evidence without the production of such desk pad or memorandum book. Lampert Lumber Co. v. Fleisher, 142 Minn. 150, 171 N. W. 309.

Effect of death of adverse party on admissibility of book accounts. 6 A. L. R. 756.

Loose-leaf ledger slips. 33 Harv. L. Rev. 982.

(63) See Clabots v. Ballweber, 133 Minn. 400, 158 N. W. 621; State v. District Court, 145 Minn. 127, 176 N. W. 165.

(65) Vath v. Wiechmann, 138 Minn. 87, 163 N. W. 1028.

(67) Keller Electric Co. v. Burg, 140 Minn. 360, 168 N. W. 98. See Force Bros. v. Gottwald, — Minn. —, 183 N. W. 356.

(77) See Clabots v. Ballweber, 133 Minn. 400, 158 N. W. 621.

3346. Regular entries—Memoranda—Business records, etc.—Checking sheets, constituting the record which the parties stipulated should be kept of the business, properly verified by the clerks who made the entries thereon, held admissible. J. Walter Thompson Co. v. Minneapolis Cereal Co., 133 Minn. 316, 158 N. W. 424.

Error in the admission of a memorandum made by a witness is without prejudice if he testifies without objection to everything material therein. Grimes v. Minneapolis etc. Traction Co., 133 Minn. 442, 158 N. W. 719.

The correctness of plaintiff's record of receipts and expenditures having been established by the one who made the entries, it was properly received in evidence as a memorandum in connection with his testimony. Force Bros. v. Gottwald, — Minn. —, 183 N. W. 356.

An invoice of a stock of merchandise taken by third parties, the defendant having been invited to participate, has been held admissible in an action for fraud of defendant in representing that the merchandise was of a certain invoice value. Knopfler v. Flynn, 135 Minn. 333, 160 N. W. 860.

Admissibility of single card from card system. 33 Harv. L. Rev. 982; L. R. A. 1916A, 634.

(80) Knopfler v. Flynn, 135 Minn. 333, 160 N. W. 860 (invoice of merchandise); Dawson v. Northwestern Construction Co., 137 Minn. 352, 163 N. W. 772 (slip kept by plaintiff's foreman and bookkeeper of the number of cars of earth moved by plaintiff in an excavating job—cars were counted by foreman and others, including plaintiff, who reported their count to foreman). See Grimes v. Minneapolis etc. Traction Co., 133 Minn. 442, 158 N. W. 719 (memorandum made by an agent of a railroad company as to an agreement for the location of a station filed with the records of the company); 29 Harv. L. Rev. 863 (supplementing memory with business records); 33 Id. 982 (workmen's time slips and cashier's deposit slips—single card in card system); De Vita v. Payne. — Minn. —, 184 N. W. 184; § 3259.

(86) See Hyde v. Kloos, 134 Minn. 165, 158 N. W. 920.

3347. Official records of public officers—A supplemental birth certificate, furnished at the instance of the state board of health by the proper village official, filed, preserved and found in the office of the clerk of the district court as required by the then existing law, is not inadmissible evidence, although irregular. Hyde v. Kloos, 134 Minn. 165, 158 N. W. 920.

3349. Certified copies of public records—(99) Hyde v. Kloos, 134 Minn. 165, 158 N. W. 920 (birth records).

3349a. Private records—Record of births—A record of the birth of a person made by a mere acquaintance of the family, while not admissible as substantive evidence to prove the date of birth, may be received in corroboration of the testimony of the one who made the record that at the time she made it she had knowledge of the facts to which she testified. Hyde v. Kloos, 134 Minn. 165, 158 N. W. 920.

3354. Records of surveys—Where a surveyor surveyed land, made notes of his survey, and from those notes made a plat of the land showing the acreage, and he testifies that the plat correctly shows the acreage, the plat may be received in evidence, though the surveyor's notes are not in evidence. Kies v. Warrick, — Minn. —, 182 N. W. 998. See § 3259.

3357. Hospital records—A hospital clinical record is probably admissible to prove the facts regularly recorded therein. Manning v. Chicago G. W. R. Co., 135 Minn. 229, 160 N. W. 787.

3358. Books—Scientific treatises—It was error to admit, over objection, pages from a standard text-book, the general rule being that scientific works are inadmissible as substantive evidence, either on direct or cross-examination. But the error must be held harmless, for it is not pointed out, nor is it apparent, that the pages so received were at variance with others standard authors read to the jury, by consent, or with the expert testimony of appellant. Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541. See § 3343.

3360. Foreign judicial records—Properly certified records of the proceedings in the Wisconsin court, including the report of the executor trustee and the final decree were admissible in evidence, and the trial court erred in excluding them. Whittaker v. Meeds, 146 Minn. 160, 178 N. W. 597.

3361. Foreign non-judicial records—The error in admitting a town plat of Sioux City, Iowa, purporting to be certified to by an officer of that state, the same not being authenticated as provided by the federal statute, and there being no foundation laid for its introduction under our practice was without prejudice, for the evidence received without objection proved all that the plat tends to prove. Bowers v. Chicago etc. Ry. Co., 141 Minn. 385, 170 N. W. 226.

A merger of corporations under the statutes of New York may be proved by exemplified copies of the records of the secretary of state of New York. Barron G. Collier, Inc. v. Kindy, 146 Minn. 279, 178 N. W. 584.

(29) Bowers v. Chicago etc. Ry. Co., 141 Minn. 385, 170 N. W. 226.

3362. Ancient deeds and other documents—(33) 6 A. L. R. 1437 (recitals in ancient deed as evidence of facts recited against stranger to title).

3363. Authentication—Necessity—Discretion of trial court—(34) Ikenberry v. New York Life Ins. Co., 134 Minn. 432, 159 N. W. 955 (telegram); George E. Lennon, Inc. v. McDermott, 136 Minn. 30, 161 N. W. 211 (sufficient foundation laid for admission of bank signature card signed by defendant); Rittle v. St. Paul City Ry. Co., — Minn. —, 183 N. W. 146 (affidavit of injured party as to accident—properly verified by witness who testified that he read it over to affiant before she signed it). See 9 A. L. R. 984 (authentication of letters).

(35) 9 A. L. R. 984.

(36) Halstead v. Minnesota Tribune Co., 147 Minn. 294, 180 N. W. 556.

3365. Signatures presumed true—Statute—In the case of a corporation the execution must be denied under oath by an officer or representative of the corporation who is shown to have sufficient knowledge of the facts to be able to state authoritatively that the corporation did not execute the instrument. A denial by a stockholder not shown to have such knowledge has been held insufficient. National City Bank v. Zimmer Vacuum Renovator Co., 132 Minn. 211, 156 N. W. 265.

Where a corporation denies the execution of certain promissory notes, and one of its officers, who shows himself qualified to speak authoritatively for it, makes oath that the notes were not executed by such corporation, section 8448, G. S. 1913, does not make the fact that the notes purport to have been executed by the corporation evidence of such execution. Bloomingdale v. Cushman, 134 Minn. 445, 159 N. W. 1078.

(43-47) National City Bank v. Zimmer Vacuum Renovator Co., 132 Minn. 211, 156 N. W. 265.

(45) Bloomingdale v. Cushman, 134 Minn. 445, 159 N. W. 1078.

PAROL EVIDENCE

3368. General rule—Contracts—Defendant could not prove a contemporaneous oral agreement, varying written contract, though the reply to the answer alleging such agreement was a mere denial, and did allege that the contract was written. Commercial Jewelry Co. v. Bowen, 145 Minn. 487, 175 N. W. 995.

(63) Giltner v. Quirk, 131 Minn. 472, 155 N. W. 760; Lake Harriet State Bank v. Miller, 138 Minn. 481, 164 N. W. 989; State Bank v. Pangrel, 139 Minn. 19, 165 N. W. 479; Wade v. Nat. Bank of Commerce, 144 Minn. 187, 174 N. W. 889.

(64) Emkee v. Ashton, 139 Minn. 443, 166 N. W. 1079; Stavanau v. Gray, 143 Minn. 1, 172 N. W. 885. See § 1075; L. R. A. 1916E, 221.

(68) Anderson v. Van Doren, 142 Minn. 237, 172 N. W. 117; Commercial Jewelry Co. v. Bowen, 145 Minn. 487, 175 N. W. 995. See Farmers Handy Wagon Co. v. Askegaard, 143 Minn. 13, 172 N. W. 881.

(70) Northwestern Fuel Co. v. Boston Ins. Co., 131 Minn. 19, 154 N. W. 515.

(73) See Summit Mercantile Co. v. Daigle, 146 Minn. 218, 178 N. W. 588.

(74) Duholm v. Chicago etc. Ry. Co., 146 Minn. 1, 177 N. W. 772.

(76) Virginia & Rainy Lake Co. v. Helmer, 140 Minn. 135, 167 N. W. 355 (compromise and settlement); Allen v. Torbert, 140 Minn. 195, 167 N. W. 1033 (contract of employment of real estate broker); Segerstrom v. Holland Piano Mfg. Co., 142 Minn. 104, 170 N. W. 930 (contract for corporate stock).

3369. Nature and basis of rule—(78) See Farmers Handy Wagon Co. v. Askegaard, 143 Minn. 13, 172 N. W. 881.

3370. Necessity of valid written instrument—(80) International Harvester Co. v. Swenson, 135 Minn. 141, 160 N. W. 255; Farmers Handy Wagon Co. v. Askegaard, 143 Minn. 13, 172 N. W. 881.

3371. Parties—(81) Ristvedt v. Walters, 146 Minn. 146, 178 N. W. 166,

3373. Consideration—The consideration or inducement for signing a note as surety may be shown by parol. Minneapolis Brewing Co. v. Yahnke, 148 Minn. —, 181 N. W. 331.

Although an option contract recites the payment of a consideration, it may be impeached by showing absence of consideration. Morrison v. Johnson, 148 Minn. —, 181 N. W. 945.

(87) 12 A. L. R. 354 (additional consideration).

(89) State Bank v. Pangerl, 139 Minn. 19, 165 N. W. 479; Morrison v. Johnson, 148 Minn. —, 181 N. W. 945.

3375. Modification—(99) Malley v. Quinn, 132 Minn. 254, 156 N. W. 263. See Meyer v. Keating, 135 Minn. 25, 159 N. W. 1091.

3376. Facts invalidating contract—Fraud, illegality, etc.—Parol evidence is admissible to prove that a buyer had knowledge of latent de-

fects in goods before he bought and so could not rely on an implied warranty. Anderson v. Van Doren, 142 Minn. 237, 172 N. W. 117.

It may be shown by parol that a written instrument was not intended as a reality, but as a sham and pretence to deceive creditors. Summit Mercantile Co. v. Daigle, 146 Minn. 218, 178 N. W. 588.

Evidence of the fraud is admissible though it may in effect contradict some of the terms of the written contract, when taken as a whole it tends to prove that the contract was induced and brought about by the alleged fraud. Remington v. Savage, — Minn. —, 182 N. W. 524.

(3) See § 270.

(4) Nelson v. Berkner, 139 Minn. 301, 166 N. W. 347; Roseberry v. Hart-Parr Co., 145 Minn. 142, 176 N. W. 175; Duholm v. Chicago etc. Ry. Co., 146 Minn. 1, 177 N. W. 772; Remington v. Savage, — Minn. —, 182 N. W. 524. See § 10063.

(10) Duholm v. Chicago etc. Ry. Co., 146 Minn. 1, 177 N. W. 772; Nygard v. Minneapolis St. Ry. Co., 147 Minn. 109, 179 N. W. 642.

3377. Conditional delivery—(11) American Multigraph Sales Co. v. Grant, 135 Minn. 208, 160 N. W. 676; Galbraith v. Clark, 138 Minn. 255, 164 N. W. 902; Flick v. Ellis-Hall Co., 138 Minn. 364, 165 N. W. 135; Wade v. Nat. Bank of Commerce, 144 Minn. 187, 174 N. W. 889. See Lake Harriet State Bank v. Miller, 138 Minn. 481, 164 N. W. 989; Bryan v. Capital Trust & Sav. Bank, 144 Minn. 434, 175 N. W. 897; L. R. A. 1917C, 306.

(12) See 5 Minn. L. Rev. 287.

3378. Oral agreement referred to in writing—Contract to convey in exchange certain land of one of the parties "agreed upon." Held, that oral evidence was admissible to prove what the parties agreed as to the value of such land. Nelson v. McElroy, 140 Minn. 429, 168 N. W. 179, 587.

(13) Nelson v. McElroy, 140 Minn. 429, 168 N. W. 179, 587.

3379. Writing in part performance of oral contract—The rule, that proof of a contemporaneous oral agreement is not admissible to contradict or vary the terms of a written contract, does not apply where the contract itself is oral and the written instrument is given merely in part performance of it. In such cases the rights of the parties rest on the oral contract, and while the written agreement may not be disputed as to the matters covered by it, the other terms of the contract may be proven by parol. Independent Harvester Co. v. Malzohn, 147 Minn. 145, 179 N. W. 727.

(14) Independent Harvester Co. v. Malzohn, 147 Minn. 145, 179 N. W. 727.

3381. Condition subsequent—(16) See Minneapolis Brewing Co. v. Yahnke, 148 Minn. —, 181 N. W. 331.

3382. Agreement that contract should not be binding—(17) See Summit Mercantile Co. v. Daigle, 146 Minn. 218, 178 N. W. 588 (questioning the general rule stated in the text); L. R. A. 1917B, 263.

3385. Instrument given as security—It may be shown by parol that a chattel mortgage was not intended as a reality, but as a sham and pretence to deceive creditors. Summit Mercantile Co. v. Daigle, 146 Minn. 218, 178 N. W. 588.

3386. Terms and conditions implied by law—(23) Anderson v. Van Doren, 142 Minn. 237, 172 N. W. 117.

3387. Warranties—Parol evidence is admissible to prove that a buyer had knowledge of latent defects in goods before he bought them. Anderson v. Van Doren, 142 Minn. 237, 172 N. W. 117.

3389. Official records—(29) See 34 Harv. L. Rev. 679.

3391. Receipts—(36) See § 44.

3392. Incomplete written contracts—(38) Wessel v. Cook, 132 Minn. 442, 157 N. W. 705; Farmers Handy Wagon Co. v. Askegaard, 143 Minn. 13, 172 N. W. 881; Wade v. Nat. Bank of Commerce, 144 Minn. 187, 174 N. W. 889.

3393. Distinct collateral contract—(40) See Virginia & Rainy Lake Co. v. Helmer, 140 Minn. 135. 167 N. W. 355 (case held not within exception).

3395. Facts held not to vary instrument—(51) Minneapolis Brewing Co. v. Yahnke, 148 Minn. —, 181 N. W. 331.

3396. Rule generally inapplicable to strangers—In an action on a promise of a vendee, embodied in a written bill of sale, to pay a debt owing by the vendor to plaintiff, the written promise cannot be varied by parol. Germain v. Great Northern Lumber Co., 143 Minn. 311, 173 N. W. 667.

Application of rule to criminal prosecutions. 34 Harv. L. Rev. 790.

(57) Rupley v. Fraser, 132 Minn. 311, 156 N. W. 350; King v. Hartford Fire Ins. Co., 133 Minn. 322, 158 N. W. 435. See L. R. A. 1916A, 592.

(58) Meyer v. Keating, 135 Minn. 25, 159 N. W. 1091; Germain v. Great Northern Lumber Co., 143 Minn. 311, 173 N. W. 667; Geiger v. Sanitary Farm Dairies, 146 Minn. 235, 178 N. W. 501.

PAROL EVIDENCE TO AID IN CONSTRUCTION

3399. Prior conversations and preliminary negotiations—Evidence of prior conversations and negotiations of the parties concerning the subject-matter of an instrument are inadmissible in aid of construction if the instrument is unambiguous. Northwestern Fuel Co. v. Boston Ins. Co., 131 Minn. 19, 154 N. W. 519; Anderson v. Upper Cuyuna Land Co., 132 Minn. 382, 157 N. W. 581.

Prior conversations and negotiations are inadmissible to vary or contradict a subsequent written contract. Segerstrom v. Holland Piano Mfg. Co., 142 Minn. 104, 170 N. W. 930. See § 3369.

(64) Sell v. Lenz, — Minn. —, 183 N. W. 135.

3400. To show surrounding circumstances—(66) McCullough v. Georgia Casualty Co., 137 Minn. 88, 162 N. W. 894.

(67) Seastrand v. D. A. Foley & Co., 135 Minn. 5, 159 N. W. 1072; Goodrich v. Northwestern Tel. Exchange Co., 148 Minn. —, 181 N. W. 333.

3407. When instrument plain on face—(82) Anderson v. Upper Cuyuna Land Co., 132 Minn. 382, 157 N. W. 581.

(83) James River Nat. Bank v. Thuet, 135 Minn. 30, 159 N. W. 1093.

(85) Union Bank v. Shea, 57 Minn. 180, 58 N. W. 985 (acceptance of draft); James River Nat. Bank v. Thuet, 135 Minn. 30, 159 N. W. 1093 (Id.); Sell v. Lenz, — Minn. —, 183 N. W. 135 (memorandum of sale of stock of merchandise—"invoice price" construed to mean retail price and not wholesale or inventory price, in view of the oral negotiations and conduct of the parties putting a practical construction on the contract).

ADMISSIONS

3409. By party—Where the defendant admits the ultimate facts pleaded in the complaint he cannot insist that the plaintiff must either plead or prove the subsidiary facts which go to make up the ultimate facts. Sclawr v. St. Paul, 132 Minn. 238, 156 N. W. 283.

Ordinarily, when a party makes an admission upon the witness stand, and it is not in any manner qualified, the adverse party may rest his case upon it. If the admission is qualified, or is inconsistent with his other testimony, it is evidence against him, but it is not conclusive, especially when based on estimate or calculation. State v. District Court, 134 Minn. 324, 159 N. W. 755.

A certain credit memorandum, executed by the plaintiff in favor of the defendant, held evidence of a proper offset, in the nature of an admission, but not conclusive. General Electric Co. v. Jordan, 137 Minn. 107, 162 N. W. 1061.

(90) Sodergren v. Nelson, 131 Minn. 466, 155 N. W. 760 (schedules in bankruptcy made under the direction of a party to an action and verified by his oath); George E. Lennon, Inc. v. McDermott, 136 Minn. 30, 161 N. W. 211 (bank signature card signed by defendant); Baxter v. Brandenburg, 137 Minn. 259, 163 N. W. 516 (proof of claim against an estate); Thaden v. Bagan, 139 Minn. 46, 165 N. W. 864 (action by broker for commission—his failure to list the claim as a credit for taxation held admissible against him); Thorkeldson v. Nicholson, 145 Minn. 491, 175 N. W. 1008 (action for malpractice—admission of defendant of wrong treatment); Collins v. Joyce, 146 Minn. 233, 178 N. W. 503 (assurance by a master to a physician that he would pay him for services to a servant made after the services were rendered held admissible as an admission of a contract previously made); Rittle v. St. Paul City Ry. Co., — Minn. —, 183 N. W. 146 (action for personal injuries—affidavit of injured party procured by defendant).

(98) George Gorton Machine Co. v. Grignon, 137 Minn. 378, 163 N.

W. 748; George E. Lennon, Inc. v. McDermott, 136 Minn. 30, 161 N. W. 211 (sufficient foundation laid for admission of bank signature card signed by defendant); Rittle v. St. Paul City Ry. Co., — Minn. —, 183 N. W. 146 (affidavit of injured party as to accident—properly verified by witness who testified that he read it over to affiant before she signed it).

3410. By agents or servants—Plaintiff was the agent of defendant, authorized and directed to transact business with third parties. In an action between them involving the business so transacted, it was proper to admit the correspondence and contracts between plaintiff and such third parties in relation thereto. J. Walter Thompson Co. v. Minneapolis Cereal Co., 133 Minn. 316, 158 N. W. 424.

While it is the general rule that the declarations of a servant made in the transaction of his master's business are admissible against the master in an action involving the transaction and where the master and the one to whom the declarations were made are the opposing litigants, this rule has been held inapplicable to the testimony of a servant given in a previous trial between other parties. Remick v. Langfitt, 141 Minn. 36, 169 N. W. 149.

An agent, acting within the scope of his authority, may make an admission in behalf of his principal as to a past transaction. Rosenberger v. H. E. Wilcox Motor Co., 145 Minn. 408, 177 N. W. 625.

(1) Grimes v. Minneapolis etc. Traction Co., 133 Minn. 442, 158 N. W. 719; H. L. Elliott Jobbing Co. v. Chicago etc. Ry. Co., 136 Minn. 138, 161 N. W. 390; Rosenberger v. H. E. Wilcox Motor Co., 145 Minn. 408, 177 N. W. 625; Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229.

(5) H. L. Elliott Jobbing Co. v. Chicago etc. Ry. Co., 136 Minn. 138, 161 N. W. 390.

See § 3418 (admissions by corporate officers).

3411a. By associates in joint enterprise—When any number of persons associate themselves together in the prosecution of a common plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them. Hitchman Coal & Coke Co. v. Mitchell, 245 U S. 229.

3412. By attorneys—A claim that the insured did not comply with the provisions of a policy in regard to notifying the company of his condition, held sufficiently disposed of by an admission of counsel upon the trial. Zimmerman v. Bankers Casualty Co., 138 Minn. 442, 165 N. W. 271.

3417. By former owners—(27) See McWethy v. Norby, 143 Minn. 386, 173 N. W. 803 (admissions of former owner of note in disparagement of the title of the indorsee).

(28) Sons v. Sons, 145 Minn. 367, 177 N. W. 498.

3418. By corporate officers—Where stock in a corporation is sold on the strength of a representation of facts which show it to be worth par,

an admission that by reason of certain conditions its value was at that time only forty cents on the dollar, is not a mere expression of opinion, but an admission of a fact. Statements made by the president of a corporation at the office of the corporation, while he is in charge of the business of the corporation and in the course of negotiations within the scope of the general authority of the president, may be shown as admissions against the corporation. An agent of a corporation, if acting within the scope of his authority, may make an admission in behalf of the corporation as to a past transaction. Rosenberger v. H. E. Wilcox Motor Co., 145 Minn. 408, 177 N. W. 625.

(33) Sodergren v. Nelson, 131 Minn. 466, 155 N. W. 760; Ortonville Elevator & Milling Co. v. Luff, 136 Minn. 450, 162 N. W. 885; Rosenberger v. H. E. Wilcox Motor Co., 145 Minn. 408, 177 N. W. 625; Northern Timber Products Co. v. Stone-Ordean-Wells Co., 148 Minn. —, 180 N. W. 920.

3420. By silence—(36) See 34 Harv. L. Rev. 205 (silence of person under arrest).

3421. By strangers—Legatees and devises—The declarations of one of two or more legatees or devisees are not admissible against the others. Benrud v. Anderson, 144 Minn. 111, 174 N. W. 617.

3423a. Stipulated testimony—Where parties by stipulation make an admission without reservation as to what testimony an absent witness would give if present, and stipulate that their admission may be used as evidence, it may be so used, though in the form of conclusions. Behrens v. Kruse, 132 Minn. 69, 155 N. W. 1065, 156 N. W. 1.

3424. In pleadings—Where the defendant admits in his answer the ultimate facts pleaded in the complaint, he cannot insist that plaintiff must either plead or prove the subsidiary facts which go to make up the ultimate facts. Sclawr v. St. Paul, 132 Minn. 238, 156 N. W. 283.

The pleadings are a part of the record in the case, and either party has the full benefit of any statement or admission contained in the pleading of the opposite party without putting such pleading in evidence. If it is desired that pleadings go to the jury, they must be put in evidence. An offer of pleadings must be specific. Antel v. St. Paul City Ry. Co., 133 Minn. 156, 157 N. W. 1073.

One cannot take advantage of an admission in a pleading of the adverse party and at the same time reject a portion of the pleading which qualifies or explains the admission. Ryan v. Simms, 147 Minn. 98, 179 N. W. 683.

A pleading, made and verified by a party in another action, is competent evidence, so far as relevant, in an action to which he is a party. Farmers Co-operative Exchange Co. v. Fidelity & Deposit Co., — Minn. —, 182 N. W. 1008.

(42) Baxter v. Brandenburg, 137 Minn. 259, 163 N. W. 516.

(43) Farmers Co-operative Exchange Co. v. Fidelity & Deposit Co., — Minn. —, 182 N. W. 1008.

3424a. Statements of value to assessor—Statements of value made to the assessor may be received in evidence as admissions. Rosenberger v. H. E. Wilcox Motor Co., 145 Minn. 408, 177 N. W. 625.

3428. Weight—The weight to be attached to oral admissions is for the jury, but the court may give cautionary instructions in relation thereto. If such instructions are given they must not unduly disparage or minimize the effect of such evidence. Blume v. Chicago etc. Ry. Co., 133 Minn. 348, 158 N. W. 418; Thaden v. Bagan, 139 Minn. 46, 165 N. W. 864.

(50) Blume v. Chicago etc. Ry. Co., 133 Minn. 348, 158 N. W. 418.

3429. Conclusiveness—(53) Edwards v. Svea Fire & Life Ins. Co., 141 Minn. 285, 170 N. W. 206.

PRESUMPTIONS

3430. Nature and effect—Whether a presumption is overcome is a question for the jury or trial court unless the evidence is conclusive. Stein v. Kemp, 132 Minn. 44, 155 N. W. 1052.

A presumption on a matter of fact, when it is not merely a disguise for some other principal, means that common experience shows the fact to be so generally true that courts may notice the truth. Greer v. United States, 245 U. S. 559.

3431. Presumptions of fact—(60) Shaughnessy v. Shaughnessy, 135 Minn. 262, 160 N. W. 769.

3432. Conclusive presumptions—The legislature in declaring that a particular fact shall be conclusively presumed does not establish a presumption in the ordinary sense of the term, but rather a rule of law to the effect that in the case specified the nonexistence of the fact presumed is immaterial. The legislature can make a presumption conclusive unless such presumption would cut off or impair some right given and protected by the constitution. State v. District Court, 139 Minn. 409, 166 N. W. 772.

3434. Death—Person not heard of for seven years—(66) Swanson v. Modern Brotherhood, 135 Minn. 304, 160 N. W. 779. See Ann. Cas. 1918D, 758 (facts which must be shown).

(66) Boynton v. Modern Woodmen, 148 Minn. —, 181 N. W. 327.

(67) Swanson v. Modern Brotherhood, 135 Minn. 304, 160 N. W. 779.

3435. Performance of official duty—It will be presumed that officers of a bank performed their duty with reference to trust funds. State v. Anding, 132 Minn. 36, 155 N. W. 1048.

(68) Great Northern Bridge Co. v. Finlayson, 133 Minn. 270, 158 N. W. 392 (appropriation by town board for construction of bridge—presumption that appropriation is within limits of fund); Byrne v. St. Paul, 137 Minn. 235, 163 N. W. 162 (municipal officers accepting resignation of employee of municipality); Hammer v. Narverud, 142 Minn. 199, 171 N. W. 770 (county auditor—filing certified copy of certificate of election with secretary of state). See Digest, §§ 9170–9172.

3436. Legality and regularity—(77) Caldwell Milling & Elevator Co. v. L. L. May Co., 141 Minn. 255, 169 N. W. 797 (that the president of a mercantile corporation is a director and stockholder).

3438. Continuance of fact—Presumption of continuance of relation of master and servant. Pettee v. Noyes, 133 Minn. 109, 157 N. W. 995.

Where a person began work for another at a certain price, a charge that he presumptively continued to work at that price for a reasonable time while the conditions remained the same, held not erroneous under the circumstances. Ramstad v. Thunem, 136 Minn. 222, 161 N. W. 413.

3439. Character—Chastity—There is no presumption that an accused person is of good character. Greer v. United States, 245 U. S. 559.

(99) Nickolay v. Orr, 142 Minn. 346, 172 N. W. 222.

3441. Intention and knowledge—(9) Minneapolis Brewing Co. v. Bagley, 142 Minn. 16, 170 N. W. 704.

3442. Love of life—Suicide—When violent death is shown, the presumption arises that it was not self-inflicted. As between death and suicide the law supposes accident until the contrary is shown. State v. District Court, 138 Minn. 138, 164 N. W. 582.

(12) Olsson v. Midland Ins. Co., 138 Minn. 424, 165 N. W. 474; Farrar v. Locomotive Engineers etc. Ins. Assn., 143 Minn. 468, 173 N. W. 705.

3444. Failure to call witness or to testify.—Where a party fails to produce available evidence it is a permissible inference that it is unfavorable to him. Berg v. Veit, 136 Minn. 443, 162 N. W. 522.

(15) Bartlett v. Ryan, 141 Minn. 76, 169 N. W. 421; First Nat. Bank v. Anderson, 144 Minn. 288, 175 N. W. 544.

3445. Receipt of mail in due course—The presumption that a properly mailed letter will, in the due course of mail, reach the person to whom it is addressed has application only where the act of mailing is unquestioned or conclusively shown. Suits v. Order of United Commercial Travelers, 139 Minn. 246, 166 N. W. 222.

(18) Legal News Publishing Co. v. George C. Knispel Cigar Co., 142 Minn. 413, 172 N. W. 317 (proof of receipt of notice to discontinue newspaper); Powers v. Fidelity & Casualty Co., 144 Minn. 282, 175 N. W. 111.

See §§ 7754-7755a.

3447. Miscellaneous presumptions—Presumptively the consideration for a contract is paid by the person to be benefited by the contract. Stone-Ordean-Wells Co. v. Helmer, 142 Minn. 263, 171 N. W. 924.

JUDICIAL NOTICE

3448. Nature—(30) State v. Kusick, 148 Minn. —, 180 N. W. 1021.

3449. By the jury—The court may instruct the jury as to facts of which judicial notice will be taken. State v. Solie, 137 Minn. 279, 163 N. W. 505.

3451. Matters of common knowledge—The usually traveled routes by railroad in the state. Jakutis v. Illinois Central R. Co., 133 Minn. 33, 157 N. W. 896.

That patented articles generally bear on their face the number of the patent. Tarara v. Novelty Electric Mfg. Co., 136 Minn. 216, 161 N. W. 409.

The facts surrounding the practice of sabotage and other methods of terrorism. State v. Moilen, 140 Minn. 112, 167 N. W. 345.

The fact that the United States was at war with Germany in June, 1917, and that the Red Cross society was an agency by which the citizens of Minnesota and of the whole United States were assisting the government in prosecuting the war. State v. Hartung, 141 Minn. 207, 169 N. W. 712.

The fact that the sensibilities of persons vary. Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N. W. 805.

The fact that the address of an owner of a railroad right of way to be crossed by a proposed ditch could not well be ascertained by inquiry at the county treasurer's office, as the right of way would not be entered as taxable land. State v. District Court, 140 Minn. 375, 168 N. W. 184.

Courts take judicial notice of matters of common knowledge, of the notorious facts of commerce and industry, of the general succession of seasons, of general climatic conditions, of seedtime and harvest time, and of the general course of agriculture. Casper v. Frederick, 146 Minn. 112, 177 N. W. 936.

The recent fall in the purchasing power of money. Hillstrom v. Mannheimer Bros., 146 Minn. 202, 178 N. W. 881.

That automobiles in the hands of careless and reckless drivers have become one of the most active agents of accidental death and destruction. State v. Hines, — Minn. —, 182 N. W. 450.

(47) State v. Solie, 137 Minn. 279, 163 N. W. 505.

3452. Laws and ordinances of this state—Federal laws and departmental rules—A court will take notice that one statute affords no relief from the evils designed to be met by another statute. State v. Flaherty, 140 Minn. 19, 167 N. W. 122.

When an ordinance is pleaded as provided by G. S. 1913, § 7773, the court is bound to take judicial notice thereof. Buhner v. Reusse, 144 Minn. 450, 175 N. W. 1005.

Judicial notice is taken of the rules and regulations of the executive departments of the federal government at Washington. Talbot v. First & Security Nat. Bank, 145 Minn. 12, 176 N. W. 184.

(72) State v. Kusick, 148 Minn. —, 180 N. W. 1021 (local option statute).

(77, 78) State v. Kusick, 148 Minn. —, 180 N. W. 1021.

3453. Laws of sister states—Foreign laws—Our courts do not take judicial notice of the laws of foreign countries. Traders Trust Co. v. Davidson, 146 Minn. 224, 178 N. W. 735.

(81, 82) Farmers State Bank v. Walsh, 133 Minn. 230, 158 N. W. 253. See § 3786.

3455. Judicial proceedings—(84) Marcus v. National Council, 134 Minn. 338, 159 N. W. 835.

3456. Political and governmental matters—Judicial notice will not be taken that a county has by an election come under the county local option statute. State v. Kusick, 148 Minn. —, 180 N. W. 1021.

(93) State v. Kusick, 148 Minn. —, 180 N. W. 1021.

3460. Calendar—Dates and days—(7) Hughes v. Globe Indemnity Co., 139 Minn. 417, 166 N. W. 1075. See 8.A. L. R. 63 (judicial notice of the day of the week on which a certain day of the month falls).

3462. Elections—Judicial notice will not be taken that a county has by an election come under the local option statute. State v. Kusick, 148 Minn. —, 180 N. W. 1021.

3467. Facts not judicially noticed—Miscellaneous cases—The custom of farmers to replant in case of seeds not germinating. Casper v. Frederick, 146 Minn. 112, 177 N. W. 936.

That a county has by an election come under the county local option statute. State v. Kusick, 148 Minn. —, 180 N. W. 1021.

The amount of travel on an avenue from its name alone. Engel v. Minneapolis St. Ry. Co., — Minn. —, 183 N. W. 842.

BURDEN OF PROOF

3468. Definitions and distinctions—Strictly, the burden of proof never shifts in the trial of a lawsuit. The burden of evidence may shift. When the evidence is all in, the preponderance thereof must be in favor of the litigant who, under the pleadings and the nature of the cause of action or defence, has the burden of proof; otherwise the decision will go to the other party. Lebens v. Wolf, 138 Minn. 435, 165 N. W. 276.

(20) See State v. Nordstrom, 146 Minn. 136, 178 N. W. 164.

(21) Riley v. Mankato Loan & Trust Co., 133 Minn. 289, 158 N. W. 391; Shaughnessy v. Shaughnessy, 135 Minn. 262, 160 N. W. 769; Lebens v. Wolf, 138 Minn. 435, 165 N. W. 276.

3469. Burden of establishing allegations—What a party is bound to plead he is bound to prove. Hughes v. Globe Indemnity Co., 139 Minn. 417, 166 N. W. 1075.

(22) Leonard v. Schall, 132 Minn. 446, 157 N. W. 723 (modification of contract); Shaughnessy v. Shaughnessy, 135 Minn. 262, 160 N. W. 769; Hughes v. Globe Indemnity Co., 139 Minn. 417, 166 N. W. 1075.

(23) Bryan v. Capital Trust & Sav. Bank, 144 Minn. 434, 175 N. W. 897.

3470. Burden of going forward with the evidence—The defendant is not bound to offer evidence until the plaintiff has made a case which, if unexplained, would justify a recovery. McGillivray v. Great Northern Ry. Co., 138 Minn. 278, 164 N. W. 922.

(26) Riley v. Mankato Loan & Trust Co., 133 Minn. 289, 158 N. W. 391.

3472. Erroneous assumption of burden—(30) Nardinger v. Ladies of the Maccabees, 138 Minn. 16, 163 N. W. 785.

DEGREE OF PROOF REQUIRED

3473. In general—(38) Summit Mercantile Co. v. Daigle, 146 Minn. 218, 178 N. W. 588. See § 1731.

EXCHANGE OF PROPERTY

3474. Definition—What constitutes—A certain contract construed and held to be one of sale and not one for an exchange of properties. Westfall v. Ellis, 141 Minn. 377, 170 N. W. 339.

The fact that payment may be made in property or in cash, at the option of the purchaser, is not decisive in determining whether a contract is one of sale or exchange. Westfall v. Ellis, 141 Minn. 377, 170 N. W. 339.

3475. Offer to exchange—(44) Horan v. Stevens, 135 Minn. 43, 159 N. W. 1085.

3476. Particular contracts construed—The evidence made a case for the jury upon the question whether, in an exchange of lands by the plaintiff and the defendant, a designated sum of money was retained by the plaintiff under an agreement with the defendant as to the payment of a disputed ditch assessment. McCrabb v. Graf, 148 Minn. —, 180 N. W. 1018.

(45) Nelson v. McElroy, 140 Minn. 429, 168 N. W. 179, 587 (exchange of land—indefinite description).

3477a. Non-performance by one party—Recovery by other party—Where A and B agree to exchange lands and A conveys to B in pursuance of the agreement and B fails to convey as agreed, A can recover from B the value of the land conveyed or the agreed price. It is immaterial that the contract while executory was too indefinite for enforcement or was unenforceable under the statute of frauds. Nelson v. McElroy, 140 Minn. 429, 168 N. W. 179, 587.

3478. Excuse for non-performance—The pendency of certain abatement proceedings held not an excuse for non-performance. Abernethy v. Halk, 139 Minn. 252, 166 N. W. 218.

3479. Fraud—(50) Smith v. O'Dean, 132 Minn. 361, 157 N. W. 503; Brody v. Foster, 134 Minn. 91, 158 N. W. 824; Knopfler v. Flynn, 135 Minn. 333, 160 N. W. 860; Heidegger v. Burg, 137 Minn. 53, 162 N. W. 889; Bullock v. Ferch, 137 Minn. 232, 163 N. W. 159; Abernethy v. Halk, 139 Minn. 252, 166 N. W. 218; Schmidt v. Thompson, 140 Minn. 180, 167 N. W. 543; Otterstetter v. Stenerson Bros. Lumber Co., 143 Minn. 442, 174 N. W. 305; Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W.

736; Neelund v. Hansen, 144 Minn. 228, 175 N. W. 538; Perkins v. Orfield, 145 Minn. 68, 176 N. W. 157; Ristvedt v. Walters, 146 Minn. 146, 178 N. W. 166; Kies v. Searles, 146 Minn. 359, 178 N. W. 811; Langley v. Mohr, 146 Minn. 394, 178 N. W. 943; Townsend v. Jahr, 147 Minn. 30, 179 N. W. 486; Johnson v. Donovan, 148 Minn. —, 181 N. W. 332; O'Connell v. Holler, — Minn. —, 182 N. W. 617. See §§ 10059-10069.

3479a. Waiver of fraud—The evidence does not conclusively show a waiver of the misrepresentations. The contract for the exchange of the farms had been consummated when plaintiff discovered the fraud so far as the transfer of the title was concerned, but not as to the part thereof relating to the leasing. When defendant refused to rescind and threw upon plaintiff the duty to harvest and care for the crops, his so doing should not be construed as a waiver of the fraud. Furthermore, the deeding and the leasing may be considered as divisible parts of the contract, so that the one could be rescinded and the other carried out. Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736.

3480. Election of remedies—A defrauded party by offering to rescind does not thereby forego his equitable remedy of rescission. He still has his election to sue in equity for rescission or at law for damages. Bauer v. O'Brien Land Co,. 144 Minn. 130, 174 N. W. 736. See § 1815.

3480a. Default—Right to possession—Replevin—The defendant was in possession of personal property, to recover which this action of replevin is brought, under a contract executed in part and in part executory with the company of which the plaintiff is receiver. The company defaulted in a respect which substantially deprived the defendant of the benefit of the contract. Up to that time the defendant had performed. He refused to perform further because of the plaintiff's default. The contract provided that upon default he would surrender possession. It is held that he was justified in refusing to perform, that he had an equitable interest in the property though not a legal title, and that the plaintiff is not entitled to possession. Allen v. Grady, 134 Minn. 118, 158 N. W. 811.

3482. Measure of damages—(56) Nelson v. Gjestrum, 118 Minn. 284, 136 N. W. 858; Brody v. Foster, 134 Minn. 91, 158 N. W. 824; Knopfler v. Flynn, 135 Minn. 333, 160 N. W. 860; Schmidt v. Thompson, 140 Minn. 180, 167 N. W. 543 (damages held not excessive); Otterstetter v. Stenerson Bros. Lumber Co., 143 Minn. 443, 174 N. W. 305; Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736; Ristvedt v. Walters, 146 Minn. 146, 178 N. W. 166; Townsend v. Jahr, 147 Minn. 30, 179 N. W. 486. See § 3841.

EXCHANGES

3484. Certificate of membership property—A membership in a chamber of commerce or stock exchange is personal property and may be attached and sold on execution. Wagner v. Farmers Co-operative Exchange Co., 147 Minn. 376, 180 N. W. 231.

3485. Conditions of membership—Discipline of members—Expulsion—The board of directors of a live stock exchange incorporated pursuant to the provisions of chapter 138, General Laws of Minnesota for 1883, when acting upon charges against a member of the exchange, are protected by the rule that an action for damages does not lie against one whose acts, however erroneous they may have been, were done in the exercise of judicial authority clearly conferred, no matter by what motives they may have been prompted. When it is sought to hold a corporation for a tort, the doctrine of respondeat superior applies. If the acts of the board of directors of a live stock exchange, in finding a member guilty of uncommercial conduct, fining him therefor, and suspending him from membership for non-payment of the fine, did not give rise to a cause of action by such member against them individually or collectively, there is no foundation for an action against the exchange based on an allegation that the fine and suspension were solely due to malice on its part. Melady v. South St. Paul Live Stock Exchange, 142 Minn. 194, 171 N. W. 806.

3488a. Sales on—Rules—When title passes—Sales made on the Minneapolis Chamber of Commerce are governed by the rules and customs of the chamber. Under these rules grain on track sold in carload lots is to be weighed by the state weigher at the time it is unloaded and is to be paid for before two o'clock of the day on which such weights are given out. Plaintiff sold a carload of grain on the floor of the chamber to R. J. Johnstone, who immediately resold it to a third party, who again resold it. It was switched to an elevator, where it was unloaded, weighed and mixed with other grain. Johnstone failed to pay at the prescribed time and on the same day plaintiff notified Johnstone's vendee, who then had the proceeds of the grain, that the grain, not having been paid for, belonged to him. Held, that the finding of the trial court that the sale was for cash, that delivery of the grain was conditional on payment, that the condition had not been waived, and that plaintiff remained owner of the grain and entitled to its proceeds, is sustained by the evidence. Dalrymple v. Randall, Gee & Mitchell Co., 144 Minn. 27, 174 N. W. 520.

EXECUTION

IN GENERAL

3489. Nature—Means of enforcing judgment—The fact that an execution cannot be issued on a judgment may have a bearing on its status, but a judgment may be complete as a cause of action though there is no right to an execution thereon. J. L. Bieder Co. v. Rose, 138 Minn. 121, 164 N. W. 586.

An attachment is made for the purpose of holding the property until an execution may be levied thereon. The execution does not interfere with property in custodia legis. Both writs are in one and the same action, and supplement each other to give adequate relief to the party intended. Wagner v. Farmers Co-operative Exchange Co., 147 Minn. 376, 180 N. W. 231.

PROPERTY SUBJECT TO EXECUTION

3510. Held subject to levy—A membership in a chamber of commerce or stock exchange. Wagner v. Farmers Co-operative Exchange Co., 147 Minn. 376, 180 N. W. 231.

(31) Union Investment Co. v. Abell, 148 Minn. —, 181 N. W. 353.

(32) Shraiberg v. Hanson, 138 Minn. 80, 163 N. W. 1032.

(43) 1 A. L. R. 653.

3511. Held not subject to levy—Where a vendor has received the entire purchase price and has executed and delivered a deed under which the purchaser has taken possession of the property, but which is inoperative because the name of the grantee has not been inserted therein, the vendor retains no attachable interest in the property but merely holds the bare legal title as trustee for the purchaser; and a creditor who has notice of the rights of the purchaser cannot acquire a lien on the property under a writ of attachment against the vendor. Union Investment Co. v. Abell, 148 Minn. —, 181 N. W. 353.

LEVY

3522a. Lien of levy on personalty lost by lapse of time—When a levy is made, under an execution, on personal property in the hands of a third party, a receipt taken by the officer pursuant to G. S. 1913, § 7935, and no further steps taken for the period of seven months, the levy becomes ineffectual as a lien against such property. Holland v. Nichols, 136 Minn. 354, 162 N. W. 468.

SALE

3533. Modes and terms of sale—Collateral attack—Collateral attack on sale. 1 A. L. R. 1431.

3536. Title and rights of purchaser of realty—See § 5033.

REDEMPTION FROM SALE OF REALTY

3541. By creditors—No creditor can redeem from an execution sale unless he has a lien on the property sought to be redeemed. Beigler v. Chamberlain, 145 Minn. 104, 176 N. W. 49. See §§ 6405-6410.

SUPPLEMENTARY PROCEEDINGS

3549. Receiver—A receiver appointed in proceedings supplementary to execution, solely in the interests of a particular creditor, is not entitled to attorney's fees for the prosecution of an action to set aside an alleged fraudulent conveyance of property, where the creditor could have maintained the same action in his own name without resorting to the receivership proceedings. Small v. Anderson, 139 Minn. 292, 166 N. W. 340.

(14) Small v. Anderson, 139 Minn. 292, 166 N. W. 340.

WRONGFUL LEVY

3553. Liability of execution creditor—(36) See L. Christian & Co. v. Chicago etc. Ry. Co., 135 Minn. 45, 159 N. W. 1082.

EXECUTORS AND ADMINISTRATORS

ADMINISTRATION IN GENERAL

3558. Nature and object—(49) Fridley v. Farmers & Mechanics Sav. Bank, 136 Minn. 333, 162 N. W. 454.

3558a. Jurisdictional facts—Death of decedent—The death of the decedent and the existence of an estate within the jurisdiction are the two fundamental, jurisdictional facts upon which administration is based. If the supposed decedent is in fact alive when administration on his estate is initiated the proceedings are absolutely void, subject to collateral attack, and a protection to no one, though acting in good faith in reliance thereon. Fridley v. Farmers & Mechanics Sav. Bank, 136 Minn. 333, 162 N. W. 454.

3558b. Domicil of decedent—Where personal property is left by a decedent in this state the probate courts of this state have jurisdiction to determine his domicil for purposes of administration on such property. Iowa v. Slimmer, 248 U. S. 115.

The determination of the domicil of the decedent, for the purposes of administration on his estate, by the courts of one state, is not conclusive upon the courts of another state. Baker v. Baker, Eccles & Co., 242 U. S. 394.

3560. Control of probate court—(51) Fisher v. Hintz, 145 Minn. 161, 176 N. W. 177.

LETTERS OF ADMINISTRATION

3561. Who entitled to letters—To entitle the consul of a foreign country to be appointed administrator of the estate of a deceased resident of this state, he must show that the decedent was a citizen of the foreign country. Wallerstedt v. Trank, 146 Minn. 230, 178 N. W. 738.

(54) Wallerstedt v. Trank, 146 Minn. 230, 178 N. W. 738 (nephew and creditor held properly appointed).

3563. Effect—Collateral attack—The administration of the estate of a deceased person is a proceeding in rem. When the person alleged to be deceased is in fact dead and in fact left an estate within the territorial jurisdiction of the probate court, such court has jurisdiction over the subject-matter of administering such estate. When the power of a particular probate court to administer a particular estate is invoked by a petition proper in form, and the court has jurisdiction of the subject-matter, its jurisdiction attaches to such particular estate when it takes control of the estate by the appointment of an executor or administrator, or in such other manner as the law prescribes. If in such case letters of administration be issued to a person not entitled thereto, they are voidable and may be revoked, but are not void ab initio. They are effective to the extent necessary to protect those who in good faith have acted in reliance upon them. Fridley v. Farmers & Mechanics Sav. Bank, 130 Minn. 333, 162 N. W. 454.

One against whom an administrator asserts a right of action has no standing in the probate court to object to the administrator whom the court has appointed unless the appointment is void on the face of the record. State v. Probate Court, — Minn. —, 184 N. W. 43.

POWERS, DUTIES AND LIABILITIES OF REPRESENTATIVES

3564a. Officers of probate court and subject to its control—Representatives are officers of the probate court and subject to its orders. Fisher v. Hintz, 145 Minn. 161, 176 N. W. 177.

3565a. Relation to heirs and creditors—An executor or administrator has no authority to represent the heirs or creditors in the administration of an estate, except in so far as he is required to conserve the estate for all interested therein. State v. Probate Court, 145 Minn. 344, 177 N. W. 354.

3567. Right to realty—Taking possession—The representative is for most purposes only a custodian of the real estate during the period of administration and for purposes of administration only. Glencoe Ditching Co. v. Martin, 148 Minn. —, 181 N. W. 108.

(68) Glencoe Ditching Co. v. Martin, 148 Minn. —, 181 N. W. 108.

3568. Right to personalty—Taking possession—It is not always the duty of a representative to take actual possession of the personal property

of the estate. See Poupore v. Stone-Ordean-Wells Co., 133 Minn. 421, 158 N. W. 703.

3569. Contracts—An administrator has no power to bind the estate by a contract for an extensive drainage ditch improvement upon the land of the estate. If he contracts for such improvement he binds himself alone. Glencoe Ditching Co. v. Martin, 148 Minn. —, 181 N. W. 108.

(79) Glencoe Ditching Co. v. Martin, 148 Minn. —, 181 N. W. 108.

3572. Lease of realty—(84) Glencoe Ditching Co. v. Martin, 148 Minn. —, 181 N. W. 108.

3573. Sale of personalty—(85) Williams v. Cobb, 242 U. S. 307.

3575. Funeral expenses—Tombstone—A representative may be allowed a reasonable sum in the settlement of his account for a tombstone over the grave of the decedent. State v. Probate Court, 138 Minn. 107, 164 N. W. 365.

3576. Loss of assets—A representative is not liable for the loss of assets unless the loss is through his fault. Poupore v. Stone-Ordean-Wells Co., 133 Minn. 421, 158 N. W. 703 (railroad ties piled on railroad right of way stolen without fault of representative—held that his account was not chargeable therefor).

3580. Bond—Liability—The general bond of a representative covers a sale of realty under license from the court. The special bond required upon such a sale is a cumulative remedy. Frederickson v. American Surety Co., 135 Minn. 346, 160 N. W. 859.

(92) See 8 A. L. R. 84 (whether bond covers debt due decedent from representative).

3583. Administrator de bonis non—(18, 19) 3 A. L. R. 1252 (right to recover proceeds of estate converted by his predecessor).

3585. De facto administrators—(26) Findley v. Farmers & Mechanics Sav. Bank, 136 Minn. 333, 162 N. W. 454.

ASSETS

3586. What are assets—Situs—Insurance money payable to the wife of the decedent is not assets of his estate. Rose v. Marchessault, 146 Minn. 6, 177 N. W. 658.

For the purpose of founding administration, simple contract debts are assets at the domicil of the debtor, even where a bill of exchange or promissory note has been given as evidence. Baker v. Baker, Eccles & Co., 242 U. S. 394.

The state which has created a corporation has such control over the transfer of its shares of stock that it may administer upon the shares of a deceased owner. Baker v. Baker, Eccles & Co., 242 U. S. 394.

Notes and bonds of a non-resident in the hands of an agent in this state may have a situs here for purposes of administration. Iowa v. Slimmer, 248 U. S. 115.

A claim for death by wrongful act arising under a foreign statute is sufficient foundation for administration here though it is the only asset of the estate in this state. State v. Probate Court, — Minn. —, 184 N. W. 43.

3587. Property fraudulently conveyed—In an action by an administrator to recover assets obtained through a fraudulent transfer, held, that the exclusive remedy was an action under G. S. 1913, § 7131, and that trover or replevin would not lie. Kemp v. Holz, — Minn. —, 183 N. W. 287.

(37) See Kemp v. Holz, — Minn. —, 183 N. W. 287.

CLAIMS

3592. Necessity of presenting claims to probate court—Statute—A pecuniary obligation imposed upon the estate of a deceased person by a contract made in his lifetime constitutes a "claim," within the meaning of the statutes for the presentation and allowance of claims against such estates, even though it could not be enforced against decedent in his lifetime. Hayford v. Daugherty, 144 Minn. 89, 174 N. W. 442.

The bar of the statute is absolute and cannot be waived by the representative. Statutes of non-claim are applied more rigorously than general statutes of limitation. State v. Probate Court, 145 Minn. 344, 177 N. W. 354. See note, 11 A. L. R. 246.

Claims against estates of decedents are not "presented" to the probate court until placed in the custody of the court, or until filed or made a matter of record therein. Handing to and leaving such claims with the administrator is not a compliance with the law. State v. Probate Court, 145 Minn. 344, 177 N. W. 354.

3593a. Claims not yet due—Where the maker of a promissory note dies, the note, even though not due, is provable as claim against the estate presently payable, the same as if past due. Such is also the case where one of two or more makers of a joint and several promissory note not due dies. If the holder of such a note files it as a claim against the estate of a deceased maker, and it is allowed and paid by the executor or administrator, a suit for contribution against the comakers accrues at once. Bolles v. Boyer, 141 Minn. 404, 170 N. W. 229.

3593b. Outlawed claims—It is provided by statute that no claim or demand, or offset thereto, shall be allowed which was barred by the statute of limitations when filed. G. S. 1913, § 7325; State v. Probate Court, 145 Minn. 344, 177 N. W. 354. See Wagner v. Seaberg, 138 Minn. 37, 163 N. W. 975 (statute of limitations held not to have run against a claim by a son for services); Welsh v. Welsh's Estate, 148 Minn. —, 181 N. W. 356 (claim for services under an agreement whereby decedent promised to pay for them by a conveyance of land or in cash if no conveyance was made held not outlawed).

3593c. Claim of state for care of insane decedent—Statute—Chapter 409, Laws 1917, does not give the state a right to take a distributive share in the estate of a deceased person who was an inmate of and maintained at the expense of the state at one of its hospitals for the insane. As to the class of persons referred to in the act and their estates, the rights of the state are those of a creditor only. Upon a review and consideration of the statutes of this state relating to the payment of the expense of maintaining inmates of state hospitals for the insane, it is held that, prior to the legislation enacted in 1917, the state was required to support such inmates at its own expense. Chapter 409, Laws 1917, is not to be given a retrospective effect. State v. Probate Court, 142 Minn. 283, 171 N. W. 928.

3594. Held provable in probate court—A claim for the support of the invalid wife of the decedent furnished at the request of the guardian of the decedent, the latter being insane. Matthews v. Mires, 135 Minn. 94, 160 N. W. 187.

A claim by a wife for reimbursement for money contributed for the purchase of family necessities. Kosanke v. Kosanke, 137 Minn. 115, 162 N. W. 1060.

A claim of a son of decedent for services. Wagner v. Seaberg, 138 Minn. 37, 163 N. W. 975.

A claim for services under an agreement whereby decedent promised to pay for them by a conveyance of land or in cash if no conveyance was made. Welsh v. Welsh's Estate, 148 Minn. —, 181 N. W. 356.

(68) Savage v. Minnesota Loan & Trust Co., 142 Minn. 187, 171 N. W. 778.

3596. Mode of presenting claims—(84) See Baxter v. Brandenburg, 137 Minn. 259, 163 N. W. 516.

3597. Order limiting time to present claims—When the decedent leaves no property except a homestead no order need be made. Ramstadt v. Thunem, 136 Minn. 222, 161 N. W. 413.

(85) State v. Probate Court, 145 Minn. 344, 177 N. W. 354.

3598. Extension of time to present claims—Applications to file claims in probate court after the time limited by statute has expired are addressed to the sound discretion of the probate court. The claimant must show good cause why he did not file his claim in time, and he must proceed with diligence after discovery of default. A delay in filing a claim or making application therefor for a period of eight months after instructions to an attorney to present the claim, seven months after the attorney was advised when the time expired, six months after the time did expire, four months after the attorney was reminded of the default, and until the time for hearing on the final account of administration, is such laches that there was no abuse of discretion in denying an application to receive such claim. State v. Ross, 133 Minn. 172, 157 N. W. 1075.

The probate court is without power to permit a claim to be presented for allowance after the expiration of one year and six months from the

making of the order limiting the time for creditors to present claims and the publication of the notice of such order. Even if the fraudulent representations of the administrator induced a creditor of the decedent to omit to present his claim to the probate court within the limitation above stated, there is no remedy against the estate, for by no act of the administrator can the bar of the nonclaim statute be waived or lifted after once closed. State v. Probate Court, 145 Minn. 344, 177 N. W. 354.

(89) See State v. Probate Court, 142 Minn. 499, 172 N. W. 210.

3599. Proof of claim as an admission—Estoppel—Proof of a claim against an estate is not conclusive upon the claimant in a collateral proceeding by way of estoppel, though admissible as an admission. Baxter v. Brandenburg, 137 Minn. 259, 163 N. W. 516.

3599a. Offsets—Duty of representative—The representative is required by statute to file in court a written statement of any offsets he claims against the claims filed. G. S. 1913, § 7324; State v. Probate Court, 145 Minn. 344, 177 N. W. 354.

3607. Order allowing or disallowing claims—The allowance of a claim has the effect of a judgment against the estate and so far as the estate is concerned the claim is merged in the judgment. Bolles v. Boyer, 141 Minn. 404, 170 N. W. 229.

(10) Bolles v. Boyer, 141 Minn. 404, 170 N. W. 229.

3608. Payment—Duty of representative—(16) Bolles v. Boyer, 141 Minn. 404, 170 N. W. 229 (allowed claims payable at once).

3610. Order of payment when estate insolvent—The priority given by G. S. 1913, § 7338, for funeral expenses and for expenses of last sickness, for which a recovery is sought, is in the distribution of the assets of the decedent's estate, of which insurance money payable to the wife is not a part. Rose v. Marchessault, 146 Minn. 6, 177 N. W. 658.

3613a. Evidence—Sufficiency—Respondent filed a claim in probate court against decedent's estate for services rendered between April, 1903, and January, 1916, to be paid for out of decedent's estate after her death. Held, that the evidence justified the verdict of the jury that such a contract existed, and that respondent is entitled to recover in the sum of $7,500. Savage v. Minnesota Loan & Trust Co., 142 Minn. 187, 171 N. W. 778.

SALES OF REALTY

3620. License—Sale under power in will—(55) See Whittaker v. Meeds, 146 Minn. 160, 178 N. W. 597 (sale by executor under a power in the will long after his discharge and without application to the court held invalid). See § 10285.

3622. Bond—The special bond required on a sale of realty under a license from the court is a cumulative remedy. The general bond of the representative also covers such a sale. Frederickson v. American Surety Co., 135 Minn. 346, 160 N. W. 859.

3624. Representative cannot purchase—(69) Wilson v. Erickson, 147 Minn. 260, 180 N. W. 93. See L. R. A. 1918B, 7.

3635. Vacation—(8) See Wilson v. Erickson, 147 Minn. 260, 180 N. W. 93.

ACCOUNTING AND DISCHARGE

3641. Jurisdiction—One who obtains possession of the personal property of a decedent as administrator of his estate may be required by the probate court to account for and deliver to the widow of decedent the portion of such property she is entitled to select as her statutory allowance.

An action by the widow to recover such property, or its value, cannot be brought in the first instance in the district court. The probate court controls the property through the administrator, and its jurisdiction over him and over the estate is exclusive. Fischer v. Hintz, 145 Minn. 161, 176 N. W. 177.

(16) See Slingerland v. Norton, 136 Minn. 204, 161 N. W. 497; § 3669. See § 2759.

3644. Account—Items allowable—By Laws 1921, c. 210, it is provided that "whenever a person named as executor in any will or codicil defends such will or codicil, either for the purpose of having it admitted to probate, sustained as the will of decedent making lawful disposition of his estate, or establishing the intent of the testator, such court may allow out of the estate of decedent to such person, whether successful or not, his reasonable fees and expenses, reasonable attorney's fees and the necessary disbursements of such proceeding." Prior to this statute the rule was otherwise. Kelly v. Kennedy, 133 Minn. 278, 158 N. W. 395; Minnesota Loan & Trust Co. v. Pettie, 144 Minn. 244, 175 N. W. 540. See 10 A. L. R. 783; 4 Minn. L. Rev. 282.

An account of an administrator held not chargeable with the value of certain personal property of the estate lost without his fault. Pourpore v. Stone-Ordean-Wells Co., 133 Minn. 421, 158 N. W. 703.

A reasonable amount may be allowed for a tombstone over the grave of the decedent. State v. Probate Court, 138 Minn. 107, 164 N. W. 365.

The representative may be charged on account of a fraudulent sale of realty. Wilson v. Erickson, 147 Minn. 260, 180 N. W. 93.

3646. Compensation of representatives—It is within the province of the probate court to determine the amount due each executor for his services, but where that court, instead of doing so, allows a lump sum for the services of all the executors, the district court may apportion such sum between the executors in proportion to the services which they have respectively rendered the estate. Slingerland v. Norton, 136 Minn. 204, 161 N. W. 497.

(33) See Laws 1921, c. 210.

3650. Discharge of representative—After his discharge an executor cannot exercise a power of sale in the will. Whittaker v. Meeds, 146 Minn. 160, 178 N. W. 597. See § 10285.

(43) In re Peavey's Estate, 144 Minn. 208, 175 N. W. 105.

FINAL DECREE OF DISTRIBUTION

3654. Partial distribution—In making partial distribution the court has jurisdiction to construe a will. In re Peavey's Estate, 144 Minn. 208, 175 N. W. 105.

3658. Powers of court—The court has no authority to assign realty to a grantee of an heir or devisee. See Laws 1919, c. 299 (curative act).

Regularly the court cannot assign the property according to an agreement of the beneficiaries of the estate, contrary to the terms of a will or the statutes of descent and distribution. See Rogers v. Benz, 136 Minn. 83, 92g, 921, 161 N. W. 395, 1056; State v. Probate Court, 143 Minn. 77, 172 N. W. 902; Laws 1919, c. 299.

The court has no power to determine the rights of persons claiming adversely to the estate through a deed from the decedent. Rux v. Adam, 143 Minn. 35, 172 N. W. 912.

The probate court had jurisdiction to construe the will for the purpose of determining to whom distribution should be made. Regular proceeding demands the entry of a decree of distribution by the probate court. That court alone can discharge the executor and determine the devolution of title to the property of the estate. If the executor has transferred property in anticipation of a proper decree, such decree may subsequently be made. In re Peavey's Estate, 144 Minn. 208, 175 N. W. 105.

In making distribution the decree admitting a will to probate is conclusive as to all the issues involved therein. Bogart v. Taylor, 144 Minn. 454, 175 N. W. 913.

It is the duty of the court to hear and determine all questions as to advancements. Bruski v. Bruski, — Minn. —, 182 N. W. 620.

(62) Long v. Willsey, 132 Minn. 316, 156 N. W. 349; In re Peavey's Estate, 144 Minn. 208, 175 N. W. 105

3660. Effect—Res judicata—The decree is conclusive upon infants and persons not in being interested in the estate. Savela v. Erickson, 138 Minn. 93, 163 N. W. 1029.

A final decree determining that certain land constituted the homestead of the decedent at the time of his death is not conclusive upon one claiming adversely to the estate through a deed from the decedent. Rux v. Adam, 143 Minn. 35, 172 N. W. 912.

It is not conclusive against parties claiming adversely to the estate. Rux v. Adam, 143 Minn. 35, 172 N. W. 912.

The decree is conclusive in computing an inheritance tax, though it was entered in pursuance of an amicable settlement entered into by beneficiaries of the estate. State v. Probate Court, 143 Minn. 77, 172 N. W. 902.

(74) Savela v. Erickson, 138 Minn. 93, 163 N. W. 1029; Rickert v. Wardell, 142 Minn. 96, 170 N. W. 915.

(77) Rickert v. Wardell, 142 Minn. 96, 170 N. W. 915.

3661. Right to distributive share—Retainer—Right of retainer in respect of debt of heir, legatee of distributee. 1 A. L. R. 991.

3662a. Filing in office of register of deeds—Provision is made by statute for filing a copy of the decree in the office of the register of deeds of any county wherein land affected is situated. G. S. 1913, § 7391; Butterwick v. Fuller & Johnson Mfg. Co., 140 Minn. 327, 168 N. W. 18.

3663. Construction—In the case of the estate of a testate the final decree of the probate court necessarily construes the will in distributing the estate, and, unless made subject to the provisions of the will or unless ambiguous or uncertain on its face, the will may not be resorted to for the purpose of modifying or affecting the decree. A final decree of distribution which in absolute and unequivocal terms has assigned the whole estate to one person is not affected with uncertainty or ambiguity by a recital that the distribution is in accordance with the terms of the will. Long v. Willsey, 102 Minn. 316, 156 N. W. 349.

A decree of distribution held not so clearly inconsistent with the provisions of a will as to demonstrate that such provisions were overlooked by the court. Robinson v. Thomson, 137 Minn. 446, 163 N. W. 786.

3663a. Action to set aside for fraud or mistake—An equitable action may be maintained in the district court to set aside a final decree of distribution obtained by fraud or by reason of a mistake of fact, at least where there is no adequate remedy by motion in the probate court. No such action will lie on account of error, in the absence of fraud or mistake. Leighton v. Bruce, 132 Minn. 176, 156 N. W. 285; Robinson v. Thomson, 137 Minn. 446, 163 N. W. 786; Savela v. Erickson, 138 Minn. 93, 163 N. W. 1029; Bruski v. Bruski, — Minn. —, 182 N. W. 620; Schmitz v. Martin, — Minn. —, 183 N. W. 978.

Evidence held to justify a finding that a final decree of distribution was not obtained by fraud or mistake; that a written instrument purporting to be a relinquishment of a daughter's prospective right to inherit a portion of her father's estate, was procured by the undue influence of the father, now deceased, and that another instrument of the same nature was not signed by a son of the deceased. Bruski v. Bruski, — Minn. —, 182 N. W. 620.

Evidence held to justify a finding that a final decree was procured by fraud. Schmitz v. Martin, — Minn. —, 183 N. W. 978.

3663b. Vacation or amendment on motion—The probate court has no power to amend its decree after the time to appeal therefrom has expired, unless in case of fraud, mistake or surprise. Leighton v. Bruce, 132 Minn. 176, 156 N. W. 285.

RESIGNATION AND REMOVAL OF REPRESENTATIVES

3665. Resignation—(83) See 8 A. L. R. 175.

3666. Removal—(84) See 8 A. L. R. 175 (what effects removal).

ACTIONS BY AND AGAINST REPRESENTATIVES

3667. Actions by representatives—A representative may maintain an action for royalties under a mining lease executed by the decedent, accruing during the year for redemption from a sale on foreclosure of a mortgage executed by the decedent. Orr v. Bennett, 135 Minn. 443, 161 N. W. 165.

The personal representative of a decedent can maintain an action to set aside the decedent's contract of sale of real property upon the ground of mental incompetency. Wheeler v. McKeon, 137 Minn. 92, 162 N. W. 1070. See 1 A. L. R. 1517.

A representative has been held not entitled to maintain trover or replevin for certain assets obtained by defendant through a fraudulent transfer, the remedy being an action under G. S. 1913, § 7131. Kemp v. Holz, — Minn. —, 183 N. W. 287.

(86) Crane v. Veley, — Minn. —, 182 N. W. 915.

3669. Actions against representatives—An action will not lie in the district court against a representative for an accounting pending administration proceedings. Fischer v. Hintz, 141 Minn. 161, 176 N. W. 177.

Where a representative is sued upon a cause of action against him in his individual capacity and on a cause of action in his representative capacity he may demur for misjoinder. Fischer v. Hintz, 145 Minn. 161, 176 N. W. 177.

(97) Fischer v. Hintz, 145 Minn. 161, 176 N. W. 177.

FOREIGN EXECUTORS AND ADMINISTRATORS

3677. Powers—In general—Power to discharge or assign debt. 10 A. L. R. 276.

3678a. Discharge—The final decree of the county court of the state of Wisconsin, wherein the will was probated, and to which the executor trustee made report and received his discharge, in the absence of a showing that the court was without jurisdiction, is final and conclusive on the courts of this state. Whittaker v. Meeds, 146 Minn. 160, 178 N. W. 597.

ANCILLARY ADMINISTRATION

3679. In general—An ancillary representative may doubtless be called to account in this state as to his proceedings herein. Whittaker v. Meeds, 146 Minn. 160, 178 N. W. 597.

3679a. Distribution—The court has power either to distribute the residue of the estate according to the terms of the will applicable thereto, or to direct that it be transmitted to the domiciliary representative. G. S. 1913, § 7278; Iowa v. Slimmer, 248 U. S. 115.

EXEMPTIONS

3684. Family provisions—The statute exempts necessary provisions for one year's support of the debtor and his family. Berkner v. Lewis, 133 Minn. 375, 158 N. W. 612.

3686. Food for stock—The statute exempts necessary food for one year's support of exempted livestock. Berkner v. Lewis, 133 Minn. 375, 158 N. W. 612.

3688. Tools and stock in trade—A non-resident owner of a membership in a chamber of commerce or stock exchange cannot claim the membership exempt as a tool of his trade. Wagner v. Farmers Co-operative Exchange Co., 147 Minn. 376, 180 N. W. 231.

(51–53) See 9 A. L. R. 1259.

(54) 4 A. L. R. 300.

(55) 2 A. L. R. 818 (what are tools).

3689. Insurance—The statute exempts moneys arising from fire or other insurance upon property exempt from sale on execution. This applies to insurance on a homestead against one furnishing material for its construction. Remington v. Sabin, 132 Minn. 372, 157 N. W. 504.

Under G. S. 1913, §§ 3548, 7951, insurance money payable on a policy on the life of the husband to his wife is exempt from attachment by garnishment in an action against the widow. Rose v. Marchessault, 146 Minn. 6, 177 N. W. 658. See § 3692.

(59) See 6 A. L. R. 610 (duration of exemption); L. R. A. 1917F, 1143 (inuring to estate).

3692. Funds of beneficial associations—(62) Rose v. Marchessault, 146 Minn. 6, 177 N. W. 658. See Logan v. Modern Woodmen, 137 Minn. 221, 163 N. W. 292; § 3689.

EXPLOSIVES

3699. Explosions—Liability for negligence—Proximate cause—Res ipsa loquitur—Acquiescence by a parent in the use by his child of explosives which he has found where they had been negligently left by a stranger destroys the latter's responsibility for injury to the child caused by the explosives. Peterson v. Martin, 138 Minn. 195, 164 N. W. 813.

Leaving a small box of dynamite caps in a granary on a plate which is nine feet and ten inches from the floor is not of itself such negligence as will render the lessor liable for injury to the lessee's child, who is injured while playing with the caps. Peterson v. Martin, 138 Minn. 195, 164 N. W. 813.

The owner of premises on which a dangerous explosive is found is

not liable for resulting injuries unless chargeable with notice of the existence and presence of the explosive. Larson v. Duluth, M. & N. Ry. Co., 142 Minn. 366, 172 N. W. 762.

Liability of manufacturer or vendor of explosives. See McCrossin v. Noyes Bros. & Cutler, 143 Minn. 181, 173 N. W. 566.

In action for damages by fire from a sale to plaintiff of gasolene, or a mixture of gasolene and kerosene, instead of kerosene, evidence held not insufficient to support a verdict for plaintiff. Farnham v. Lilly, 148 Minn. —, 180 N. W. 775.

Defendant's driver, in filling a tank with kerosene, negligently permitted the oil to overflow. The tank was in the basement of a building occupied by plaintiff and others. Employees of the owner of the tank soaked up the oil with sawdust and shavings, some of which were left near a furnace located in the basement. In replenishing the fire in the furnace, an occupant of the building used a shovel with which the oily sawdust had presumably been scraped together. There was an instantaneous fire, and the building and plaintiff's property therein were destroyed. Held: That the outbreak of a fire was within the range of reasonable foresight, and that a jury might have found that defendant was bound to anticipate it as probable; that the fact that damage would not have happened but for defendant's original negligent act did not, as a matter of law, necessitate the conclusion that such act was the proximate cause of plaintiff's injury; that the owner of the tank who attempted to remove the oil and the occupant of the building who added fuel to the furnace fire were independent responsible agents, whose acts intervened between defendant's negligence and plaintiff's injury, and hence the negligence of the defendant was not the proximate cause of the injury. Childs v. Standard Oil Co., — Minn. —, 182 N. W. 1000.

Violation of statute or ordinance. 12 A. L. R. 1309.

(76) Erickson v. W. J. Gleason & Co., 145 Minn. 64, 176 N. W. 199 (leaving a box of dynamite caps exposed and unguarded in an open drainage dipper near a public highway where many persons were liable to pass, held to justify a finding of negligence).

(77) Schmidt v. Capital Candy Co., 139 Minn. 378, 166 N. W. 502; Erickson v. W. J. Gleason & Co., 145 Minn. 64, 176 N. W. 199. See L. R. A. 1917A, 1295.

(78) Banner Laundry Co. v. Great Eastern Casualty Co., 148 Minn.—, 180 N. W. 997.

3700. Blasting—Liability for trespass—(79) See 33 Harv. L. Rev. 542, 667; L. R. A. 1917A, 1016.

3700a. Gasolene—Colored receptacles—Statute—Section 8764, G. S. 1913, relating to the sale of gasolene, is intended to protect persons from dangers arising from mistaking gasolene for something else. If the disobedience of the statute results in injury to one for whose protection it is passed liability follows. The evidence justified the jury in finding that defendant's disobedience of the statute was the proximate cause of the

injury to plaintiff. Defendant sold and delivered gasolene in a can not colored or tagged as required by statute, and the can was placed by a third person beside other cans containing kerosene. The act of such person was not an efficient intervening cause of the injury to plaintiff, relieving defendant from liability. Assuming that contributory negligence is a defence to an action founded on a violation of the statute, the evidence fell short of conclusively establishing its existence. Farrell v. G. O. Miller Co., 147 Minn. 52, 179 N. W. 566. See 12 A. L. R. 1309.

3700b. Kerosene—Using to light fire—A person who uses kerosene in lighting a fire is not necessarily guilty of negligence, though a distinction is to be drawn between its use for lighting a new fire and its use for reviving one partially extinct. Farrell v. G. O. Miller Co., 147 Minn. 52, 179 N. W. 566.

3700c. Fireworks, etc.—Ordinance—Construction—Section 2 of Ordinance No. 2395 of the city of St. Paul considered, and construed to prohibit the sale or disposition of such "fireworks and explosives" only as are dangerous to persons or property on account of their dangerous character as an explosive. Schmidt v. Capital Candy Co., 139 Minn. 378, 166 N. W. 502.

EXTRADITION

3703. Duty and discretion of Governor—The Governor may take notice of the laws of the demanding state. Hogan v. O'Neil, 255 U. S. —.

3705. Who is a fugitive from justice—One may be a fugitive from justice though he remained in the state where he committed the crime until the statute of limitations of that state had run against a prosecution therefor. Biddinger v. Commissioner of Police, 245 U. S. 24.

The fact that the accused left the demanding state with the knowledge and consent of the prosecuting witness renders him none the less a fugitive from justice. A prosecuting witness cannot thus interfere with the due administration of the criminal laws, or with the prosecution of persons charged with crime. The date of the alleged crime as stated in the indictment is immaterial, since the commission thereof may be shown to have occurred on any preceding date within the statute of limitations. State v. Wagener, 145 Minn. 377, 177 N. W. 346.

(86) State v. Boekenoogen, 140 Minn. 120, 167 N. W. 301; Hogan v. O'Neil, 255 U. S. —.

3707. Proof that person demanded is a fugitive—(91) State v. Langum, 135 Minn. 320, 160 N. W. 858; State v. Boekenoogen, 140 Minn. 120, 167 N. W. 301.

3708. Sufficiency of requisition papers—The affidavit referred to in section 5278, Rev. St. of U. S. (U. S. Comp. St. § 10126), as authorizing a requisition, may also be the complaint, sworn to and filed in the municipal court of Chicago, upon which a judge of said court ordered a warrant

for relator's apprehension. State v. Sheriff of Hennepin County, — Minn. —, 182 N. W. 640.

(94) State v. Sheriff of Hennepin County, 148 Minn. —, 181 N. W. 640.

(96) See State v. Sheriff of Hennepin County, 148 Minn. —, 181 N. W. 640.

3709. Sufficiency of warrant—The warrant should require the sheriff to convey the accused to the state line and there surrender him to the agent appointed by the demanding state. State v. Sheriff of Hennepin County, 148 Minn. —, 181 N. W. 640.

3710a. Retaking prisoner after wrongful discharge—Where a prisoner in custody under a warrant of extradition is wrongfully discharged he may be taken into custody again under the same warrant. State v. Langum, 135 Minn. 320, 160 N. W. 858.

3713. Review by courts—Habeas corpus—To overcome the effect to be given the Governor's warrant in an extradition case, the evidence must clearly and satisfactorily demonstrate that the person therein named was not in the demandant state at or about the time the crime for which he is indicted was committed. The evidence is held not to come up to this measure of proof. State v. Langum, 135 Minn. 320, 160 N. W. 858.

If the extradition papers are regular on their face, every intendment is indulged in favor of their validity on habeas corpus, and the burden is on the prisoner to show that some one of the conditions of extradition prescribed by the statutes has not been met. State v. Boekenoogen, 140 Minn. 120, 167 N. W. 301.

In determining whether the accused is a fugitive from justice a court on habeas corpus does not act on a mere preponderance of evidence. It must be made to appear clearly and satisfactorily that he is not a fugitive from justice. Habeas corpus is not a proper proceeding in which to try a question of alibi. The guilt or innocence of the accused cannot be tried. State v. Boekenoogen, 140 Minn. 120, 167 N. W. 301.

The guilt or innocence of the accused cannot be inquired into on habeas corpus. State v. Wagener, 145 Minn. 377, 177 N. W. 346.

Where the good faith of the prosecution has been passed upon by the Governor it cannot be reviewed on habeas corpus. The guilt or innocence of the accused cannot be inquired into. State v. Sheriff of Hennepin County, 148 Minn. —, 181 N. W. 640.

G. S. 1913, § 9038, gives to one requisitioned by the chief executive of another state the right to test the validity of the rendition proceeding. To that end the sheriff is required not to surrender the fugitive arrested therein until he has had an opportunity to apply for a writ of habeas corpus. State v. Sheriff of Hennepin County, 148 Minn. —, 181 N. W. 640.

The defence of the statute of limitations cannot be considered. Biddinger v. Commissioner of Police, 245 U. S. 24.

(9) State v. Langum, 135 Minn. 320, 168 N. W. 858; State v. Boekenoogen, 140 Minn. 120, 167 N. W. 301.

3713a. Custody of accused pending appeal—An appeal to the supreme court stays all proceedings. It is the duty of the sheriff to retain the custody of the accused pending such appeal. State v. Sheriff of Hennepin County, 148 Minn. —, 181 N. W. 640.

FACTORS

3714. Definition—A factor or commission merchant is both a bailee and a sales agent. Blackorby v. Friend, Crosby & Co., 134 Minn. 1, 158 N. W. 708.

3714a. Regulation—Commission charges—The business of commission men buying and selling stock at public stockyards is so affected with a public interest that the state may fix reasonable commission charges; and Laws Ex. Sess. 1919, c. 39, giving the Railroad and Warehouse Commission authority to fix reasonable commission charges, is constitutional. State v. Rogers & Rogers, — Minn. —, 182 N. W. 1005.

3715a. Estoppel of factor to attack title of consignor—A factor or commission merchant is estopped from attacking the title of the consignor to the proceeds of the property consigned to and sold by him until he has delivered such proceeds to the consignor. There are some exceptions to this rule, as where the factor has yielded to a paramount title asserted by a third party without his connivance, or where fraud is practiced upon him. Blackorby v. Friend, Crosby & Co., 134 Minn. 1, 158 N. W. 708.

3721. Reimbursement of factor—(25) See Monroe v. Rehfeld, 132 Minn. 81, 155 N. W. 1042.

3726. Conversion—In an action for the conversion of a carload of grain by a commission merchant the defence was that the grain belonged to one T, who was heavily indebted and on the verge of bankruptcy, that the shipment was made in the name of plaintiff as a pretence and cover to keep the same from T's creditors; that at the time the grain was received by defendant, T was indebted to him in a sum nearly equal to the value of the grain. Held, that the evidence justified a verdict for the plaintiff and that the burden of proof as to the fraud was on defendant. Holden v. Maxfield, 94 Minn. 27, 101 N. W. 955.

3727. Lien—Evidence held not to show that a factor had a lien under the laws of North Dakota. Blackorby v. Friend, Crosby & Co., 134 Minn. 1, 158 N. W. 708.

FALSE IMPRISONMENT

3728. What constitutes—(35) Ehrhardt v. Wells, Fargo & Co., 134 Minn. 58, 158 N. W. 721; Hilla v. Jensen, — Minn. —, 182 N. W. 902.

3730. Probable cause—(41) Ehrhardt v. Wells, Fargo & Co., 134 Minn. 58, 158 N. W. 721.

3733. Damages—(46) Ehrhardt v. Wells, Fargo & Co., 134 Minn. 58, 158 N. W. 721; Kelley v. Great Northern Ry. Co., 142 Minn. 492, 171 N. W. 276.

(48) Ehrhardt v. Wells, Fargo & Co., 134 Minn. 58, 158 N. W. 721 (plaintiff imprisoned in filthy jail twenty-one days—physically neglected—notoriety given case by newspaper—humiliation—exemplary damages authorized—verdict for $4,250 held not excessive); Kelley v. Great Northern Ry. Co., 142 Minn. 492, 171 N. W. 276 (sleeping car porter arrested and confined in cold, filthy, vermin infested jail three days—verdict for $1,000 sustained); Hilla v. Jensen, — Minn. —, 182 N. W. 902 (arrested and put in city jail for short time—verdict for $80).

FALSE PRETENCES

3738. Evidence—Admissibility—(65) State v. Friedman, 146 Minn. 373, 178 N. W. 895 (evidence of a system of cheats and swindles of the same general nature as that charged held admissible).

3739. Evidence—Sufficiency—The evidence was sufficient to support the conviction of the defendant of the crime of swindling. It would justify the jury in finding that he was the directing head of a gang of swindlers, two of whom actually perpetrated the crime charged in the indictment, and that defendant, though not present when the crime was committed, was concerned in it and shared in the division of the money obtained from the victim. State v. Friedman, 146 Minn. 373, 178 N. W. 895.

FAMILY AUTOMOBILE DOCTRINE—See Master and Servant, § 5834b.

FEDERAL COURTS

3746. Conflict with state courts—An order vacating a prior order directing a receiver to turn over certain moneys to a claimant held not an interference with the jurisdiction of a federal court of this state wherein the right of the claimant to the moneys was being litigated. Pulver v. Commercial Security Co., 135 Minn. 286, 160 N. W. 781.

Where actions involving the same subject-matter and issues are begun in both a state and federal court, the court in which the action is first commenced has priority. McCormick v. Robinson, 139 Minn. 483, 167 N. W. 271.

3747. When decisions controlling on state courts—The decisions of the federal supreme court as to what constitutes due process of law are controlling on state courts. See Digest, § 1640.

The decisions of the federal courts upon questions of general commercial law should be followed by the state courts in the interest of uniformity. Palm Vacuum Cleaner Co. v. Bjornstad, 136 Minn. 38, 161 N. W. 215. See Digest, § 882.

The construction of treaties by the federal courts is conclusive on state courts. Johnstown Land Co. v. Brainerd Brewing Co., 142 Minn. 291, 172 N. W. 211.

The decisions of the federal courts as to what constitutes interstate commerce are controlling on state courts. Outcault Advertising Co. v. Citizens State Bank, 147 Minn. 449, 180 N. W. 705. See §§ 4894–4897.

(86) Furst v. W. B. & W. G. Jordan, 142 Minn. 230, 171 N. W. 772.

3748. Following decisions of state courts—The federal supreme court does not concern itself with the correctness of the construction which state courts put upon their state statutes. They mean to the federal supreme court what the state courts say they mean. Taking such meaning the supreme court determines whether they offend the federal constitution. Seamer v. Great Northern Ry. Co., 142 Minn. 376, 172 N. W. 765.

In determining the liability of stockholders the federal courts follow the local law. State Bank v. Kenney Band Instrument Co., 143 Minn. 236, 173 N. W. 560.

3750. Writ of error from federal supreme court—Stay—See § 331a.

3752a. Act relating to federal appeals—The act of February 13, 1911, 36 Stat. 901 (U. S. Comp. St. §§ 1656, 1657), has no application to procedure in a state court. Chance v. Hawkinson, — Minn. —, 182 N. W. 911.

FEDERAL EMPLOYER'S LIABILITY ACT—See Master and Servant, §§ 6022a–6022p.

FEDERAL SAFETY APPLIANCE ACT—See Master and Servant, §§ 6022a–6022p.

FENCES

3755. Partition fences—Statute—Right to remove. 8 A. L. R. 1644.

(96) 6 A. L. R. 212 (constitutionality of fencing laws).

FERRIES

3757. Liability for negligence—A municipality has been held not liable for negligence in the operation of a ferry across a river outside its corporate limits. Peterson v. Jordan, 135 Minn. 384, 160 N. W. 1026.

FICTIONS—See Implied or Quasi Contracts, § 4300; Maxims and General Principles, § 6028e.

FINES

3761. Commitment until payment—Under common-law rules and the practice that generally obtains, when a fine is imposed as punishment for an offence, the judgment or sentence contains an order or direction that the prisoner stand committed until the fine is paid, or for such definite time as the law permits. It is true that such order or direction has been held not to be a part of the judgment or sentence so that its omission would render the judgment void. But the omission is considered a defect. State v. Rice, 145 Minn. 359, 177 N. W. 348.

Where a statute provides for punishment by fine and imprisonment, the period of commitment for non-payment of the fine cannot exceed the limit of imprisonment prescribed by the statute. State v. Nordstrom, 146 Minn. 136, 178 N. W. 164.

(23) State v. Nordstrom, 146 Minn. 136, 178 N. W. 164.

FIRES

3763a. State fire marshal—Duties—The suppression of arson and the investigation of the cause, origin and circumstances of fires and the enforcement of the laws in relation thereto, are made the duties of the state fire marshal by G. S. 1913, § 5130. Moriarty v. Almich, 141 Minn. 237, 169 N. W. 798.

3763b. Precautions against spread—The general statute declaring it a misdemeanor to set a fire without proper precautions to prevent its spread held inapplicable. Commercial Union Assur. Co. v. Foley Bros., 141 Minn. 258, 169 N. W. 793.

3763c. Dilapidated buildings liable to take fire—Abatement by state fire marshal—Chapter 469, Laws 1917, authorizing the state fire marshal to condemn and order torn down a building which by reason of age, dilapidated condition, or other defect is especially liable to fire, and is so situated as to endanger life and limb or other buildings or property in the vicinity, is a valid exercise of the police power of the state. A structure coming within the purview of the statute may be regarded as a

nuisance and abated as such. The evidence sustains the finding that the building condemned is especially liable to fire and dangerous to life and surrounding structures. A building in the condition established by the finding is in fact a nuisance, even if that term is not used either in the findings or the statute mentioned. York v. Hargadine, 142 Minn. 219, 171 N. W. 773.

The findings taken together demonstrate that the building condemned in its present condition is especially liable to fire and is so situated as to endanger life and limb and other property. But the evidence does not support the finding that the building is beyond repair. On the contrary, it appears that by proper repair and alteration it will be as free from danger as any wooden building can be made. In that situation it was unreasonable and arbitrary to order the destruction without giving the owner the option to alter and repair. State Fire Marshal v. Fitzpatrick, — Minn. —, 183 N. W. 141.

3763d. Wilfully burning property of another—The evidence amply sustains the verdict that defendants did not set or cause to be set the fire which destroyed plaintiff's barn. Crosby v. Moriarity, 148 Minn. —. 181 N. W. 199.

3764. Liability for negligence—One who is on the premises of another as licensee is not liable for the damages caused by a fire thereon, without negligence on his part, while he is occupying the premises. Keithley v. Hettinger, 133 Minn. 36, 157 N. W. 897.

Liability for loss or injury from fire may be limited by contract. Commercial Union Assur. Co. v. Foley Bros., 141 Minn. 258, 169 N. W. 793.

3764a. Fire escapes—Statute—A restaurant conducted in a room on the third floor of a four story building wherein there were no sleeping rooms held not to come within the provisions of G. S. 1913, § 5120. Arcade Investment Co. v. Hawley, 139 Minn. 27, 165 N. W. 477.

3764d. Burden of proof—It is the well-established general rule that the destruction of property by fire, either upon the premises where it starts or is kindled, or on other property to which it is communicated, does not raise a presumption of negligence, either in the kindling or management of the fire, and that in all such cases the burden of proof is upon the plaintiff to show that the damage was caused by the negligence of the party kindling the fire or allowing the same to spread. Keithley v. Hettinger, 133 Minn. 36, 157 N. W. 897.

3764e. Law and fact—Even though the facts warrant an application of the doctrine of res ipsa loquitur, the question of negligence is for the jury unless the evidence is conclusive. Keithley v. Hettinger, 133 Minn. 36, 157 N. W. 897.

FIREWORKS—See Explosives, § 3700c; Municipal Corporations, § 6776.

FIXTURES

3765. Definition—(34) Review Printing Co. v. Hartford Fire Ins. Co., 133 Minn. 213, 158 N. W. 39.

3766. General principles—Tests—An article annexed to the freehold but which can be removed without substantial injury to the realty may remain a chattel if the circumstances show that such was the intention. Hanson v. Voss, 144 Minn. 264, 175 N. W. 113.

Fixtures pass to a subsequent purchaser without notice of the rights of third parties. See Hanson v. Voss, 144 Minn. 264, 175 N. W. 113.

(35) Hanson v. Voss, 144 Minn. 264, 175 N. W. 113. See Review Printing Co. v. Hartford Fire Ins. Co., 133 Minn. 213, 158 N. W. 39.

(38) Hanson v. Voss, 144 Minn. 264, 175 N. W. 113.

3767. Law and fact—Whether a hot water heating plant was so installed in a building as to become a part of the realty, held a question for the jury. Cohen v. Whitcomb, 142 Minn. 20, 170 N. W. 851.

(39, 40) Cohen v. Whitcomb, 142 Minn. 20, 170 N. W. 851.

3769. Effect of annexation—Fixtures pass to a subsequent purchaser of the realty without notice of the rights of third parties. See Hanson v. Voss, 144 Minn. 264, 175 N. W. 113.

(42) Kafka v. Davidson, 135 Minn. 389, 396, 160 N. W. 1021.

3770. Building erected on lands of another—(43) Kafka v. Davidson, 135 Minn. 389, 396, 160 N. W. 1021.

3770b. Articles installed in apartment house by holder of ground lease—Rights of third parties—Where the holder of a ground lease erects an apartment building and installs a gas range and a door bed in each flat and thereafter forfeits his lease, these articles will pass as fixtures to the owner of the realty if no rights of third parties are infringed and there be no agreement to the contrary. As against third parties having rights in these ranges and beds, the landowner is in substantially the same position as a prior mortgagee of the land. Where the holder of the ground lease purchased these ranges and beds under a conditional contract of sale by which title and right of removal remained in the vendors and after defaulting in his payments transferred all his rights in them to a third party, not concerned in the real estate, whom the vendors accepted as the purchaser in his stead, he never had the right to make them a part of the realty and such third party is entitled to them as against the landowner. The rule requiring a tenant to remove his removable fixtures at or before the end of his term does not apply to a person in the position of such third party. Hanson v. Voss, 144 Minn. 264, 175 N. W. 113.

3770c. Rights of chattel mortgagees—The holder of a chattel mortgage on an article annexed to realty is generally entitled to such article as against the owner of the realty, or the holder of a mortgage or other lien thereon. Hanson v. Voss, 144 Minn. 264, 175 N. W. 113.

3771. Time in which to remove—The rule requiring a tenant to remove what are frequently termed removable fixtures at or before the end of his term does not apply where the duration of the term is uncertain, or to a third party having a claim thereon. Hanson v. Voss, 144 Minn. 264, 175 N. W. 113.

3773. Held a part of realty—A dismantled freight hoisting elevator. Bergh v. Calmenson, 136 Minn. 322, 162 N. W. 353.

A hot water heating plant. Cohen v. Whitcomb, 142 Minn. 20, 170 N. W. 851.

Gas ranges and door beds installed in an apartment house by the holder of a ground lease. Hanson v. Voss, 144 Minn. 264, 175 N. W. 113. See 7 A. L. R. 1578.

3775a. Evidence—Sufficiency—In an action to recover the value of certain saloon fixtures, held that the evidence justified the verdict. Jung Brewing Co. v. Rund, 141 Minn. 205, 169 N. W. 706.

FOOD

3776. Milk—Validity of regulations. L. R. A. 1917C, 243.

FOOTPRINTS—See Criminal Law, § 2468a.

FOREIGN CORPORATIONS—See Corporations, §§ 2185–2193; Process, § 7814.

FOREIGN LAWS

3786. Presumptions—In the absence of pleading or proof as to the statutory law of another state, it is presumed that the common law is in force in such state, and the rights of the parties will be determined under its rules applicable thereto. Dettis v. Western Union Tel. Co., 141 Minn. 361, 170 N. W. 334.

(93) Farmers State Bank v. Walsh, 133 Minn. 230, 158 N. W. 253; Beard v. Chicago etc. Ry. Co., 134 Minn. 162, 158 N. W. 815; Dettis v. Western Union Tel. Co., 141 Minn. 361, 170 N. W. 334; Watters v. Northern Pacific Ry. Co., 141 Minn. 480, 170 N. W. 703; A. B. Klise Lumber Co. v. Enkema, 148 Minn. —, 181 Minn. 201.

(94) Farmers State Bank v. Walsh, 133 Minn. 230, 158 N. W. 253; Beard v. Chicago etc. Ry. Co., 134 Minn. 162, 158 N. W. 815.

3788. How proved—(98) 6 A. L. R. 1344 (weight of oral testimony).

3789. Necessity of pleading—Not judicially noticed—Though a foreign law is not pleaded, if the case is tried as governed by such a law it will be so considered on appeal. Pickering v. Northern Pacific Ry. Co., 132 Minn. 205, 156 N. W. 3.

(3) Nash v. Minneapolis & St. Louis R. Co., 141 Minn. 148, 169 N. W. 540.

3791. Law and fact—(7) 31 Harv. L. Rev. 896.

FORFEITURES

3793. Relief against—The law will indulge in no presumptions favorable to a forfeiture. Ibs v. Hartford Life Ins. Co., 119 Minn. 113, 137 N. W. 289.

Forfeitures should not be permitted upon uncertain or doubtful inferences. Barber Asphalt Paving Co. v. St. Paul, 136 Minn. 396, 162 N. W. 470.

Forfeiture for breach of contract. 5 Minn. L. Rev. 329.

(10) See Barber Asphalt Paving Co. v. St. Paul, 136 Minn. 396, 162 N. W. 470.

FRANCHISES

3810. Property—(66) 31 Harv. L. Rev. 802.

3813. Construction—Public officers probably cannot fritter away the rights of the public by any practical construction which they place on a franchise. Duluth v. Duluth St. Ry. Co., 137 Minn. 286, 163 N. W. 659.

(69) Duluth v. Duluth St. Ry. Co., 137 Minn. 286, 163 N. W. 659; Red Wing v. Wisconsin etc. Co., 139 Minn. 240, 166 N. W. 175

3815 Interference—Injunction—The holder of a franchise may enjoin a competitor illegally doing business without a license. 31 Harv. L. Rev. 802.

FRAUD

WHAT CONSTITUTES

3816. Definition—In determining what constitutes fraud and in allowing a recovery therefor the rules in this state are liberal. Woodward v. Western Canada Colonization Co., 134 Minn. 8, 158 N. W. 706.

A bad motive is not an essential element of a fraud. Schlechter v. Felton, 134 Minn. 143, 158 N. W. 813.

Fraud is a species of tort. Schlechter v. Felton, 134 Minn. 143, 158 N. W. 813.

3817. In law and in equity—(78) See § 3833.

3818. Essentials of deceit—A bad motive is not an essential element of fraud. Schlechter v. Felton, 134 Minn. 143, 158 N. W. 813.

3819. Intention to deceive—Knowledge of falsity—Equity may grant relief for innocent representations. See § 1189.

One cannot falsely assert a fact to be true and induce another to rely upon such statement to his prejudice, and thereafter hide behind a claim that he did not know it was false at the time he asserted it. Jacobson v. Chicago etc. Ry. Co., 132 Minn. 181, 156 N. W. 251.

Where a person makes a false representation of a material fact, susceptible of knowledge and relating to a matter in which he has an interest, and as to which he may be expected to have knowledge, and makes such statement unqualifiedly and as of his own knowledge, and with intent to induce action, the statement constitutes a legal fraud, and after it has been acted on by another to his damage the person making it cannot be heard to say that he honestly believed that the statement he made was true. Such honest belief is not a defence to an action for fraud. Schlechter v. Felton, 134 Minn. 143, 158 N. W. 813; Helvetia Copper Co. v. Hart-Parr Co., 137 Minn. 321, 163 N. W. 665.

An instruction to the jury, that there must have been an intention on the part of the defendant to deceive, or there can be no recovery, was not error under the facts in this case. Neelund v. Hansen, 144 Minn. 228, 175 N. W. 538.

Actual corrupt intent is not essential. There may be a recovery for innocent misrepresentations in an action at law for deceit. Duholm v. Chicago etc. Ry. Co., 146 Minn. 1, 177 N. W. 772. See §§ 3824, 3826.

If one makes false representations based on information derived from others and at the same time discloses the source of his information and does not assert that the representations are true or state the facts as of his own knowledge, he is not liable for deceit; otherwise if he asserts positively that the representations are true. Ristvedt v. Watters, 146 Minn. 146, 178 N. W. 166.

Misrepresentations may avoid a release though they were made in good faith with no intention to deceive. Bingham v. Chicago etc. Ry. Co., 148 Minn. —, 181 N. W. 845. See § 8374.

(86) See Neelund v. Hansen, 144 Minn. 228, 175 N. W. 538.

(87) Jacobson v. Chicago etc. Ry. Co., 132 Minn. 181, 156 N. W. 251; Schlechter v. Felton, 134 Minn. 143, 158 N. W. 813; Knopfler v. Flynn, 135 Minn. 333, 160 N. W. 860; Shane v. Jacobson, 136 Minn. 386, 162 N. W. 472; Helvetia Copper Co. v. Hart-Parr Co., 137 Minn. 321, 163 N. W. 665; Perkins v. Orfield, 145 Minn. 68, 176 N. W. 157; Ristvedt v. Watters, 146 Minn. 146, 178 N. W. 166.

(88) Jacobson v. Chicago etc. Ry. Co., 132 Minn. 181, 156 N. W. 251; Schlechter v. Felton, 134 Minn. 143, 158 N. W. 813; Knopfler v. Flynn, 135 Minn. 333, 160 N. W. 860.

(89) Schlechter v. Felton, 134 Minn. 143, 158 N. W. 813.

3820. Materiality of representations—(92) Johnson v. Olsen, 134 Minn. 53, 158 N. W. 805 (representations as to double glazing in a contract for glazing certain sash).

See §§ 8589–8593, 10059–10066.

3821. Acting upon representations—Independent investigation—The fact that representations are so incredible that ordinary people would not

believe them is a proper consideration for the jury in determining whether the plaintiff believed and relied on them. Kempf v. Ranger, 132 Minn. 64, 68, 155 N. W. 1059.

If the buyer does not rely upon the representations of the seller but upon his own investigations he cannot maintain an action for deceit; but if he made only a partial investigation and relied in part upon such representations and was deceived to his injury he may maintain the action. Kraus v. National Bank of Commerce, 140 Minn. 108, 167 N. W. 353; Schmidt v. Thompson, 140 Minn. 180, 167 N. W. 543.

A partial investigation does not defeat recovery where the party relies in part on the fraudulent representations. Tarara v. Novelty Electric Mfg. Co., 136 Minn. 216, 161 N. W. 409; Heidegger v. Burg, 137 Minn. 53, 162 N. W. 889.

The mere fact that a party was suspicious that something was wrong does not show conclusively that he did not rely on the representations. Perkins v. Orfield, 145 Minn. 68, 176 N. W. 157.

(94) Lundquist v. Peterson, 134 Minn. 279, 158 N. W. 426, 159 N. W. 569.

(95) R. W. Bonyea Piano Co. v. Wendt, 135 Minn. 374, 160 N. W. 1030; Tarara v. Novelty Electric Mfg. Co., 136 Minn. 216, 161 N. W. 409; Heidegger v. Burg, 137 Minn. 53, 162 N. W. 889; Kraus v. National Bank of Commerce, 140 Minn. 108, 167 N. W. 353; Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736.

(96) Kraus v. National Bank of Commerce, 140 Minn. 108, 167 N. W. 353; Schonberg v. Haubris, 141 Minn. 188, 169 N. W. 546.

See §§ 8589, 10067.

3822. Negligence of party defrauded—A person seeking relief on the ground of fraud must pay attention to those things that are within the reach of his observation and not close his eyes to patent facts. Kempf v. Ranger, 132 Minn Minn. 64, 155 N. W. 1059.

The buyer cannot predicate deceit upon representations of the seller which he knew were false when he made his purchase; but if he in fact relied upon false representations in ignorance of their falsity and was deceived to his injury, he may maintain his action although the means of knowledge and the circumstances were such that a person of ordinary prudence and alertness ought not to have been deceived. The question is whether he was actually deceived, and is to be determined as a question of fact from a consideration of all the attending circumstances including the means of knowledge available and the degree of judgment, caution and alertness which he really possessed and exercised. Kraus v. National Bank of Commerce, 140 Minn. 108, 167 N. W. 353. See Kempf v. Ranger, 132 Minn. 64, 155 N. W. 1059.

As between the original parties, one who has been induced by fraud to enter into a written contract may be relieved against its terms, though he was negligent in signing it without reading it. Duholm v. Chicago etc. Ry. Co., 146 Minn. 1, 177 N. W. 772. See § 3832; L. R. A. 1917F, 637.

(97, 98) See Kempf v. Ranger, 132 Minn. 64, 155 N. W. 1059; Kraus v. National Bank of Commerce, 140 Minn. 108, 167 N. W. 353; § 1188.

(99) Tarara v. Novelty Electric Mfg. Co., 136 Minn. 216, 161 N. W. 409; Kraus v. National Bank of Commerce, 140 Minn. 108, 167 N. W. 353.

(1) Tarara v. Novelty Electric Mfg. Co., 136 Minn. 216, 161 N. W. 409.

(3) Humphrey v. Sievers, 137 Minn. 373, 163 N. W. 737.

3823. Concealment and silence—Evidence held not to show such a relation between the parties that fraud could be predicated on a non-disclosure of facts. Thorpe v. Cooley, 138 Minn. 431, 165 N. W. 265.

If a person makes a representation believing it to be true but afterward discovers it to be false, he must not allow the party to go on and act on the faith of the representations; if he does so he is guilty of fraud. Great Northern Exploration Co. v. Mizen, — Minn. —, 184 N. W. 20.

(6) Humphrey v. Sievers, 137 Minn. 373, 163 N. W. 737.

3824. Expressions of opinion—Fraud may be predicated on an innocent misrepresentation of a physician as to the extent of personal injuries and the probability of recovery. Jacobson v. Chicago etc. Ry. Co., 132 Minn. 181, 156 N. W. 251; Vineseck v. Great Northern Ry. Co., 136 Minn. 96 161 N. W. 494; Althoff v. Torrison, 140 Minn. 8, 167 N. W. 119; Enger v. Great Northern Ry. Co., 141 Minn. 86, 169 N. W. 474; Kjerkerud v. Minneapolis etc. Ry. Co., 148 Minn. —, 181 N. W. 843; Bingham v. Chicago etc. Ry. Co., 148 Minn. —, 181 N. W. 845.

A representation of the "invoice value" of a stock of merchandise offered in exchange of property is one of fact and not of mere opinion. Knopfler v. Flynn, 135 Minn. 333, 160 N. W. 860.

Representations of a manufacturer that a machine when equipped with new attachments will be in good condition and capable of developing a certain power are not mere expressions of opinion and are actionable though made in good faith and without intention to deceive. Helvetia Copper Co. v. Hart-Parr Co., 137 Minn. 321, 163 N. W. 665.

(11) Thorpe v. Cooley, 138 Minn. 431, 165 N. W. 265 (statement of opinion that certain bonds of a corporation were as good as gold and that they could be sold).

See §§ 8589–8593, 10059–10069.

3825. Misrepresentations of law—(16) First Nat. Bank v. Schirmer, 134 Minn. 387, 159 N. W. 800. See § 1019.

3826. Innocent misrepresentations—A misrepresentation of a material fact may be actionable at law or ground for relief in equity though it was innocently made without any intention to deceive. Kempf v. Ranger, 132 Minn. 64, 68, 155 N. W. 1059; Jacobson v. Chicago etc. Ry. Co., 132 Minn. 181, 156 N. W. 251; Schlechter v. Felton, 134 Minn. 143, 158 N. W. 813 (overruling dictum in O'Brien v. American Bridge Co., 110 Minn. 364, 125 N. W. 1012); Knopfler v. Flynn, 135 Minn. 333, 160 N. W. 860; Vineseck v. Great Northern Ry. Co., 136 Minn. 96, 161 N. W. 494; Shane v. Jacobson, 136 Minn. 386, 162 N. W. 472; Helvetia Copper Co. v.

Hart-Parr Co., 137 Minn. 321, 163 N. W. 665; Fawkes v. Knapp, 138 Minn. 384, 165 N. W. 236; Smith v. Great Northern Ry. Co., 139 Minn. 343, 166 N. W. 350; Althoff v. Torrison, 140 Minn. 8, 167 N. W. 119; Enger v. Great Northern Ry. Co., 141 Minn. 86, 169 N. W. 474; Perkins v. Orfield, 145 Minn. 68, 176 N. W. 157; Duholm v. Chicago etc. Ry. Co., 146 Minn. 1, 177 N. W. 772; Kjerkerud v. Minneapolis etc. Ry. Co., 148 Minn. —, 181 N. W. 843; Bingham v. Chicago etc. Ry. Co., 148 Minn. —, 181 N. W. 845. See §§ 1189, 3819, 8374.

(18) See §§ 1189, 3819.

3827. Promises and statements of intention—(19) Nelson v. Berkner, 139 Minn. 301, 166 N. W. 347.

(20) Arcade Invest. Co. v. Hawley, 139 Minn. 27, 165 N. W. 477; Nelson v. Berkner, 139 Minn. 301, 166 N. W. 347. See § 10063; 34 Harv. L. Rev. 557.

3828. Necessity of damage—To entitle a party to a contract to rescind the same for fraud and recover back what he paid, it is not necessary that he plead or prove that he was damaged in any particular amount or suffered any real injury. Straabe v. Jackson, 134 Minn. 179, 158 N. W. 915; Fawkes v. Knapp, 138 Minn. 384, 165 N. W. 236. See §§ 1810, 3832.

3828a. Misrepresentation by disinterested third party—A false representation, made by a party having no interest in the transaction to which the statement relates, is not sufficient to sustain an action for deceit, if the party does not know that the statements are false, and honestly intends to tell the truth. Neelund v. Hansen, 144 Minn. 228, 175 N. W. 538.

3829. Communication through third person—(23) Perkins v. Orfield, 145 Minn. 68, 176 N. W. 157.

3832. Signatures obtained by fraud—Statute—No pleading or proof of damages is necessary to make out the defence. Where, after an oral agreement, one party undertakes to prepare the written contract, his presentation of the writing for signature by the other party is a representation that it is the same in effect as their oral contract. Providence Jewelry Co. v. Crowe, 113 Minn. 209, 129 N. W. 224; National Cash Register Co. v. Merrigan, 148 Minn. —, 181 N. W. 585.

(29) Duholm v. Chicago etc. Ry. Co., 146 Minn. 1, 177 N. W. 772; National Cash Register Co. v. Merrigan, 148 Minn. —, 181 N. W. 585.

3832a. Use of fine print in contracts—Courts frequently relieve parties from provisions in contracts which by reason of fine print or other device are easily susceptible of being overlooked or not understood by the party bound by them. Caution, however, should be used in affording relief in such cases. Stevens v. Pearson, 138 Minn. 72, 163 N. W. 769.

3833. Abuse of confidence—Confidential relation—Constructive fraud—An evidentiary presumption of fact arising from confidential relations does not shift the burden of proof. Shaughnessy v. Shaughnessy, 135 Minn. 262, 160 N. W. 769.

Fraud will be presumed when there has been a transaction between persons occupying a fiduciary relationship, whereby one in whom confidence was reposed, or who possessed controlling influence over the other, obtained benefits without consideration, or for an inadequate consideration. The onus is on a person obtaining such benefits to show that he acted righteously. There can be no valid contract between two such persons except after a full and fair communication and explanation of every material particular within the knowledge of the one who seeks to uphold it against the other, if it appears that the former possessed influence which he abused, or had gained confidence which he betrayed. Malchow v. Malchow, 143 Minn. 53, 172 N. W. 915.

Persons about to marry one another are presumed to stand in a confidential relation, but the presumption is not conclusive. Malchow v. Malchow, 143 Minn. 53, 172 N. W. 915.

Plaintiff's testate sold to two of defendants certain stock in a corporation in which all were actively engaged, taking in payment a note secured by the stock as collateral, payable only out of dividends on the stock. This action is brought to set aside the transfer, not on the ground of misrepresentation or deceit, but of constructive fraud. The principle of law invoked is, that he who bargains in a matter of advantage with a person placing confidence in him, cannot be permitted to get the better of the bargain. The facts do not bring the case within that principle. Deceased acted understandingly and with free volition. His acts bound him. The nature of the consideration, under the circumstances of the case, raises no presumption of fraud. Failure to secure independent legal advice is not, in itself, ground for avoiding the transaction. The fact that the transaction also involved the creation of a trust making defendants trustees and deceased a beneficiary, does not affect the validity of the transfer of stock. Peavey v. Wells, 139 Minn. 174, 165 N. W. 1063.

(35) Rogers v. Benz, 136 Minn. 83, 161 N. W. 395, 1056; Peavey v. Wells, 139 Minn. 174, 165 N. W. 1063; Malchow v. Malchow, 143 Minn. 53, 172 N. W. 915. See Rosenberg v. Nelson, 145 Minn. 455, 177 N. W. 659 (evidence held not to show fiduciary relation).

3833a. Joining fraudulent transaction after its inception—One who joins a fraudulent scheme or transaction after its inception is deemed to have been a party to it from its inception. Gammons v. Gulbranson, 78 Minn. 21, 80 N. W. 779; Koochiching County v. Elder, 145 Minn. 77, 176 N. W. 195.

3833b. Waiver—Confirmation—Ratification—Where a note is procured by fraud the giving of a renewal note after discovery of the fraud is a waiver of the fraud. Thorpe v. Cooley, 138 Minn. 431, 165 N. W. 265.

Where an instrument, without consideration, is invoked as a confirmation or ratification of a prior release induced by fraud, it may be shown that it was also induced by fraud and for that reason ineffectual as a confirmation. Oestreich v. Chicago etc. Ry. Co., 140 Minn. 280, 167 N. W. 1032.

See §§ 1018, 1810, 8607, 8612, 10067a.

See L. R. A. 1918A, 106.

ACTIONS

3836. Pleading—A charge of fraud not pleaded nor voluntarily litigated on the trial cannot be made the basis for relief. If a party pleads specific charges of fraud he is limited in his proof accordingly. Thorpe v. Cooley, 138 Minn. 431, 165 N. W. 265.

When fraud is disclosed for the first time on a trial the defrauded party may have the advantage of the defence without having pleaded it. Stronge-Warner Co. v. H. Choate & Co., — Minn. —, 182 N. W. 712.

(40) Flick v. Ellis-Hall Co., 138 Minn. 364, 165 N. W. 135; Greenfield v. Minnesota M. & D. Co., 138 Minn. 446, 165 N. W. 274; McQuaid Market House Co. v. Home Ins. Co., 147 Minn. 254, 180 N. W. 97.

(42, 43) See Helvetia Copper Co. v. Hart-Parr Co., 137 Minn. 321, 163 N. W. 665 (unnecessary to prove knowledge of falsity though alleged).

(44) See § 3828.

(45) Germain v. Great Northern Lumber Co., 143 Minn. 311, 173 N. W. 667; James v. Carlson, Inc. v. Babler, 144 Minn. 125, 174 N. W. 824.

(47) Thorpe v. Cooley, 138 Minn. 431, 165 N. W. 265.

3837. Presumption and burden of proof—An evidentiary presumption of fact arising from confidential relations does not shift the burden of proof. Shaughnessy v. Shaughnessy, 135 Minn. 262, 160 N. W. 769.

(49) Rosenberg v. Nelson, 145 Minn. 455, 177 N. W. 659.

(50) See Rosenberg v. Nelson, 145 Minn. 455, 177 N. W. 659 (evidence held not to show fiduciary relation).

3838. Evidence—Admissibility—In an action to rescind a contract for fraud, any representations made prior to the making of the contract may be considered. This is true even though an earlier contract was entered into between the parties embodying similar terms, if such earlier contract was repudiated and abandoned. Kempf v. Ranger, 132 Minn. 64, 155 N. W. 1059.

An invoice of a stock of merchandise held admissible in an action for fraud in representing that the merchandise was of a certain invoice value. Knopfler v. Flynn, 135 Minn. 333, 160 N. W. 860.

Want of consideration may be decisive evidence of fraud where there is great inequality between the contracting parties or a relation of trust and confidence between them. In itself, it does not establish fraud unless it is so gross as to shock the conscience of any man who heard the terms. Peavey v. Wells, 139 Minn. 174, 165 N. W. 1063.

Where a charge of fraud depends on the testimony of plaintiff great latitude should be allowed on his cross-examination. Zeglin v. Tetzlaff, 146 Minn. 397, 178 N. W. 954.

(52) Tarara v. Novelty Electric Mfg. Co., 136 Minn. 216, 161 N. W. 409 (fraud in sale of corporate stock—testimony of officers concerning value of patent claimed to be owned by corporation and cartons displaying number of patent properly admitted); Tysdal v. Bergh, 142 Minn. 288, 172 N. W. 130 (fact that after discovery of fraud in sale of land pur-

chaser took a deed and gave defendant a large mortgage on the land without claiming any offset for fraud held admissible); Roseberry v. Hart-Parr Co., 145 Minn. 142, 176 N. W. 175 (fraud in misrepresenting factory price of a tractor—evidence as to such price held admissible); Koochiching County v. Elder, 145 Minn. 77, 176 N. W. 195 (all the circumstances of a fraudulent transaction—its history).

3839. Evidence—Sufficiency—Evidence held sufficient to justify a finding of fraud. Tarara v. Novelty Electric Mfg. Co., 136 Minn. 216, 161 N. W. 409; Heidegger v. Burg, 137 Minn. 53, 162 N. W. 889; Schmidt v. Thompson, 140 Minn. 180, 167 N. W. 543; Ristvedt v. Watters, 146 Minn. 146, 178 N. W. 166.

Evidence as to damages held insufficient to justify the verdict. Heidegger v. Burg, 137 Minn. 53, 162 N. W. 889.

The evidence in an action for deceit in the exchange of lands, which the court dismissed at the close of the plaintiff's case, examined and held not to show, when the plaintiff rested, actionable fraud nor a legal measure of the loss, if any, sustained by the plaintiff in the transaction. Bullock v. Ferch, 137 Minn. 232, 163 N. W. 159.

Evidence held to justify a verdict for defendant. Neelund v. Hansen, 144 Minn. 228, 175 N. W. 538.

In an action of deceit for fraudulent representations as to property given in part payment of property purchased of the plaintiff there was a verdict against the defendants Mohr and the Walwer Company and a verdict was directed in favor of the defendant Hennepin Company. Held, that the evidence would not sustain a finding that the Hennepin Company participated in Mohr's fraud, whereby it acquired title to the plaintiff's property, and by so doing became liable in an action of deceit, and that the court rightly directed a verdict in its favor. Langley v. Mohr, 146 Minn. 394, 178 N. W. 943.

Plaintiffs purchased a farm of defendant and gave in part payment a house and lot. There is evidence, sufficient to sustain a finding of the jury, that plaintiffs were induced to make the purchase by misrepresentation on the part of defendant. Townsend v. Jahr, 147 Minn. 30, 179 N. W. 486.

3840. Law and fact—Whether a party relied on representations is a question for the jury, unless the evidence is conclusive. Kraus v. National Bank of Commerce, 140 Minn. 108, 167 N. W. 353; Schmidt v. Thompson, 140 Minn. 180, 167 N. W. 543.

(60) Humphrey v. Sievers, 137 Minn. 373, 163 N. W. 737; Vath v. Wiechmann, 138 Minn. 87, 163 N. W. 1028; Kraus v. National Bank of Commerce, 140 Minn. 108, 167 N. W. 353; Schmidt v. Thompson, 140 Minn. 180, 167 N. W. 543; Tysdal v. Bergh, 142 Minn. 288, 172 N. W. 130; Langley v. Mohr, 146 Minn. 394, 178 N. W. 943 (directed verdict for defendant sustained); National Cash Register Co. v. Merrigan, 148 Minn. —, 181 N. W. 585.

3841. Measure of damages—While it is the general rule that the defrauded party is entitled to recover the difference in the value of what he was induced to part with and the value of what he got in the transaction, special circumstances require a different measure of damages. An application of the general rule would sometimes give the defrauded party too much and sometimes too little. Shane v. Jacobson, 136 Minn. 386, 162 N. W. 472.

Where, in an action to recover damages for deceit in the sale of a farm, it appears that the only false representation relied on related to the existence upon the farm of an improvement which might readily be made at any time at an expense easily ascertainable, and also that the representation could not have induced any other action on the part of the purchaser than merely to agree to swell the price paid by an amount equal to the cost or value of the improvement, the recovery should be limited to the expense or cost of constructing the improvement and perhaps, the loss of rental value while it is being constructed, such amount being the only natural and proximate loss resulting from such particular misrepresentation. The court erred in excluding evidence relating to the cost of making such improvement, and as to what additional value the farm would have from the same. Although the representation was confined to a part of the farm, it was not error to receive evidence as to the character of the other part, since the farm was sold as a whole for a lump price. Shane v. Jacobson, 136 Minn. 386, 162 N. W. 472.

In an action for damages for fraud in the lease of a farm and sale of certain live stock on the farm, held, that plaintiff was not entitled to recover as damages the value of the feed consumed by the live stock while he occupied the farm. Przyblyski v. Pellowski, 141 Minn. 193, 169 N. W. 707.

In an action for damages for deceit in a transaction for the exchange of real property, the general rule of damages is the difference in value of what the plaintiffs were induced to part with and the value of what they received. The plaintiffs are entitled to recover, under the proofs and findings of the trial court, the difference between the value of the real estate parted with, plus the amount of the mortgage assumed, and the mortgage given by them, and the value of the land which they received in the transaction. There was no error in admitting proof of the amount of expense plaintiffs were put to in moving to and from the farm, under the pleadings. Nor was the same prejudicial; the court holding adversely to plaintiffs' contention as to a rescission. Otterstetter v. Stenerson Bros. Lumber Co., 143 Minn. 442, 174 N. W. 305.

In a case of fraud in the exchange of farms, held, that the measure of restitution was the value of the farm which plaintiff parted with at the time the trade was made, and not what defendant afterwards received on a sale thereof. Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736.

It is firmly established in this state that compensation, and not loss of bargain, is the measure of damages in actions founded on deceit induc-

ing the making of a contract. Compensation is measured by the difference in value between what was parted with and what was received. In the case of a lease, where there are stated definite periods for which a stipulated rent is to be paid, the amount of such rent for any one period ordinarily measures what the tenant parts with, and the value of the use of the premises measures what he receives for that period. The tenant, with full knowledge of the deceit that has been practiced, should not be permitted thereafter to enter upon any subsequent rental interval period and hold in reserve an action for damages for the deceit. The law requires the one wronged to use diligence to prevent accumulation of damages. Defiel v. Rosenberg, 144 Minn. 166, 174 N. W. 838; O'Neil v. Davidson, 147 Minn. 240, 180 N. W. 102.

The measure of damages varies with the facts of the particular case, the defrauded party being entitled to all the damages naturally and proximately resulting from the fraud. Townsend v. Jahr, 147 Minn 30, 179 N. W. 486.

The measure of damages in an action for fraud in the exchange of property is the loss naturally and proximately resulting from the fraud. This will usually be the difference between what the plaintiff parted with and what he got. If the purchase price has been paid, it will usually be the difference between the value of the land purchased and the purchase price. If the purchase price has not been fully paid, and the obligation to pay the balance has been discharged by foreclosure of a purchase-money mortgage, the amount unpaid does not constitute any part of the plaintiff's damage. Townsend v. Jahr, 147 Minn. 30, 179 N. W. 486.

(61) Shane v. Jacobson, 136 Minn. 386, 162 N. W. 472 (sale of farm); Barthelemy v. Foley Elevator Co., 141 Minn. 423, 170 N. W. 513 (sale—distinction between measure of damages for fraud and for breach of warranty); Townsend v. Jahr, 147 Minn. 30, 179 N. W. 486 (exchange of property).

(62) Brady v. Foster, 134 Minn. 91, 158 N. W. 824 (exchange of land—interest); Knopfler v. Flynn, 135 Minn. 333, 160 N. W. 860 (exchange of land for stock of merchandise); Heidegger v. Burg, 137 Minn. 53, 162 N. W. 889 (exchange of land for stock of merchandise—measure of damages the difference between the value of the land and the value of the stock at the time of the transaction—error to charge that the measure of damages was the difference between the value of the stock if it had been worth par, as represented, and its actual value, it not being proved or admitted that the value of the land was the same as the par value of the stock); Bullock v. Ferch, 137 Minn. 232, 163 N. W. 159 (exchange of farms); Otterstetter v. Steenerson Bros. Lumber Co., 143 Minn. 442, 174 N. W. 305 (exchange of land); Townsend v. Jahr, 147 Minn. 30, 179 N. W. 486 (exchange of property); O'Neil v. Davidson, 147 Minn. 240, 180 N. W. 102 (lease). See O'Connell v. Holler, — Minn. —, 182 N. W. 617 (exchange of land—rule agreed upon by counsel given by court without disparaging comment though the court disagreed); §§ 3482, 10100.

(63) Townsend v. Jahr, 147 Minn. 30, 179 N. W. 486.

FRAUDULENT CONVEYANCES

WHAT CONSTITUTES

3842. The statute—The law of fraudulent conveyances is now largely governed by the Uniform Fraudulent Conveyance Act. Laws 1921, c. 415.

3844. Voidable not void—Good between parties—A fraudulent conveyance is avoidable at the instance of creditors only to the extent it may obstruct the enforcement of their claims. Aiken v. Timm, 147 Minn. 317, 180 N. W. 234. See § 3850.

A fraudulent conveyance is good between the parties. See § 3899.

(72) Boyum v. Jordan, 146 Minn. 66, 178 N. W. 158; Aiken v. Timm, 147 Minn. 317, 180 N. W. 234. See Summit Mercantile Co. v. Daigle, 146 Minn. 218, 178 N. W. 588.

3850. Property must be appropriable—(85) Berkner v. Lewis, 133 Minn. 375, 158 N. W. 612; Thysell v. McDonald, 134 Minn. 400, 159 N. W. 958. See §§ 4199, 4216.

(86) Berkner v. Lewis, 133 Minn. 375, 158 N. W. 612.

3851. Grantee—Knowledge of fraud—(92) Mackall v. Pocock, 136 Minn. 8, 161 N. W. 228.

3852. Preferences—Fraudulent judgment—In an action for a decree declaring the lien of a certain judgment inferior to the lien of a judgment in plaintiff's favor against the same defendant, subsequently recovered, it is held: That the evidence sustains the findings of the trial court to the effect that the judgment complained of was procured by the fraud and collusion of the parties, for the purpose of incumbering certain land owned by defendant, and thereby defrauding creditors, particularly plaintiff, and that the claim upon which the judgment was founded was not a bona fide indebtedness of the defendant. A judgment founded upon a valid indebtedness though procured by plaintiff with the active co-operation and consent of defendant for the purpose of giving to plaintiff a paramount lien upon certain land, and to thereby delay other present and prospective creditors of defendant, constitutes a preference, and, in the absence of some special benefit to the debtor, is avoidable only in bankruptcy or insolvency proceedings. Such a preference is not void at common law even though the parties were prompted by bad motives, unless the debtor, with the co-operation of the preferred creditor, thereby secured some special advantage to himself, aside from the accomplishment of his purpose to prefer the particular creditor and the results necessarily incident to such preference. Petersdorf v. Malz, 136 Minn. 374, 162 N. W. 474.

3854. Trust for debtor—Statute—Section 7010, G. S. 1913, applies to realty as well as personalty. The grantee in a deed to which the statute relates, by accepting the deed, becomes a trustee for the grantor's creditors. If he sells the land the trust attaches to the proceeds of the sale. The

deserted wife of a grantor who executes a deed falling within the definition of the statute may be entitled to assert all the rights of a creditor. Stephon v. Topic, 147 Minn. 263, 180 N. W. 221.

(98) Stephon v. Topic, 147 Minn. 263, 180 N. W. 221; Johnson v. Union Investment Co., — Minn. —, 182 N. W. 955.

(99) Stephon v. Topic, 147 Minn. 263, 180 N. W. 221.

3855. Sale of chattels—Change of possession—Statute—(7, 8) See Coulter v. Meining, 143 Minn. 104, 172 N. W. 910.

3856. Sale of stock of merchandise—Statute—(16) See 33 Harv. L. Rev. 717; 5 Minn. L. Rev. 557 (query whether a chattel mortgage is within statute); L. R. A. 1917F, 230 (notice to creditors).

3857. Assignment of debt—Filing—Statute—Failure to file the assignment of a debt as required by G. S. 1913, § 7017, does not render such assignment absolutely void, but casts upon the assignee the burden of proving that it was made in good faith and for a valuable consideration. Leonard v. Farrington, 124 Minn. 160, 144 N. W. 763.

The presumption created by G. S. 1913, § 7017, that an unfiled assignment of a debt is fraudulent as to creditors of the assignor, can be overcome only by facts showing that the assignment was made in good faith and for a valuable consideration, and the burden of proof is with the assignee. Evidence that the assignor was indebted to the assignee at the time of the assignment in an amount exceeding the assigned debt, with no evidence that the assignment was made and accepted in pro tanto discharge of the debt, or as good-faith security for its payment, and no evidence that the assignment was not colorable merely, held insufficient to require the conclusion that the presumption was overcome. The mere existence of the indebtedness from the assignor to the assignee will not justify the court in assuming that the assignment was made in discharge thereof, or as further security for the payment of the same, or in good faith. The recital in the assignment of "value received," though as between the parties prima facie evidence of a valuable consideration, and a sufficient expression thereof to satisfy the statute of frauds, is not evidence against third persons in proof of a consideration in fact, or of the good faith of the transaction, sufficient to overcome the statutory presumption of fraud. National Surety Co. v. Winslow, 143 Minn. 66, 173 N. W. 181.

(19) Telford v. Henrickscn, 120 Minn. 427, 139 N. W. 94; Leonard v. Farrington, 124 Minn. 160, 144 N. W. 763; First State Bank v. Woehler, 140 Minn. 32, 167 N. W. 276.

3858. Transfers between near relatives—Parent and child—A child remaining in the family after becoming of age is not entitled to pay for services rendered unless the services were performed pursuant to a prior agreement for compensation therefor; but where such services are performed pursuant to a prior agreement for compensation, they constitute a valid consideration for a conveyance of real estate. Thysell v. McDonald, 134 Minn. 400, 159 N. W. 958.

3859. Transfers between husband and wife—Where a husband makes a fraudulent conveyance to his wife and the proceeds of such conveyance are invested in personal property and the title taken in the name of the wife as a part of a general scheme to defraud creditors, the latter may reach such personal property. Hoover v. Carver, 135 Minn. 105, 160 N. W. 249.

Consideration in conveyances between husband and wife in fraud of creditors. 33 Harv. L. Rev. 303.

(22) United Norwegian Church v. Csaszar, 141 Minn. 459, 170 N. W. 694; State Bank v. Strandberg, 148 Minn. —, 180 N. W. 1006. See Hoover v. Carver, 135 Minn. 105, 160 N. W. 249; Coulter v. Meining, 143 Minn. 104, 172 N. W. 910; § 4199.

(24) Coulter v. Meining, 143 Minn. 104, 172 N. W. 910. See § 3873.

See Digest, §§ 4259-4266.

VOLUNTARY TRANSFERS

3870. Definition—(36) See Ryan v. Simms, 147 Minn. 98, 179 N. W. 683.

3872. Not fraudulent per se—(38) Ryan v. Simms, 147 Minn. 98, 179 N. W. 683.

3873. Presumptively fraudulent—Where a debtor conveys unexempt property without consideration and without retaining sufficient other property to pay his then existing debts, the conveyance is void as against prior creditors. Thysell v. McDonald, 134 Minn. 400, 159 N. W. 958.

A subsequent creditor of the husband cannot avoid the gift without proof that it was actually intended to defraud creditors, and that its purpose and effect was to prejudice them. Neither can he avoid it merely because it may have been made to defraud the husband's existing creditors. In determining whether a valid gift has been made, the law takes cognizance of the facilities with which fraud may be accomplished under the pretence of gifts between husband and wife and of the fact that their everyday life is so blended that it is often difficult to know whether personal property kept where the family resides belongs to one or the other. Coulter v. Meining, 143 Minn. 104, 173 N. W. 910.

(39) Thysell v. McDonald, 134 Minn. 400, 159 N. W. 958; Ryan v. Simms, 147 Minn. 98, 179 N. W. 683. See Lebens v. Nelson, — Minn. —, 181 N. W. 350 (creditor whose claim is founded on a running account as an "existing creditor").

(40) Coulter v. Meining, 143 Minn. 104, 172 N. W. 910.

3875. Transfers for future support—It is generally held that, where support has been furnished in good faith, it becomes a valuable consideration, and the conveyance will not be set aside in the absence of a showing that it was made with fraudulent intent of which the grantee had notice. Until the support is furnished the conveyance has the infirmity

of being voluntary, but it may be validated by the subsequent performance of the agreement to support. Ryan v. Simms, 147 Minn. 98, 179 N. W. 683. See note, 2 A. L. R. 1438.

The owner of a lot transferred it to her sister by a deed which stated the consideration to be "$1 and other good and valuable considerations." The deed was attacked by one who was a creditor of the grantor at the time of its execution. The answer of the grantee alleged that her agreement to support the grantor was the other good and valuable consideration mentioned in the deed, and that she had partially performed the agreement. Plaintiff offered no proof except the judgment and the testimony of a witness that the grantor had sold her household goods and left this state after making the deed. Held that, from the allegations of the answer and the proof offered by plaintiff, the court was not bound to conclude as a matter of law that the deed was a voluntary conveyance which should be presumed to have been made to defraud creditors. Ryan v. Simms, 147 Minn. 98, 179 N. W. 683.

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS

3877. Fraudulent provisions—(48) Boyum v. Jordan, 146 Minn. 66, 178 N. W. 158.

3880. To force a compromise—A provision in the deed authorizing a compromise with creditors, or an agreement between assignor and assignee to purchase claims at a discount, is illegal. Boyum v. Jordan, 146 Minn. 66, 178 N. W. 158.

(56) Boyum v. Jordan, 146 Minn. 66, 178 N. W. 158.

3881. Assignment must be absolute—(58) Boyum v. Jordan, 146 Minn. 66, 178 N. W. 158.

CHATTEL MORTGAGES

3884. General rule—(61) See Summit Mercantile Co. v. Daigle, 146 Minn. 218, 178 N. W. 588.

3885. Retention of possession by mortgagor—Plaintiffs, as second mortgagees, in these replevin actions attacked the title of defendants claiming under a prior chattel mortgage on the ground that the first mortgage was fraudulent as to creditors. The court found the first mortgage was executed in good faith and not with intent to hinder or defraud creditors. It is held: The finding is not demonstrably wrong even if the first mortgage was given with the understanding and agreement that part of the mortgaged property might be consumed by the animals, also mortgaged, or with the understanding that the mortgagor, a farmer, might use sufficient for his living from the mortgaged property, the mortgage covering all the crop and animals on the farm, since the property so needed is exempt from the reach of creditors. Berkner v. Lewis, 133 Minn. 375, 158 N. W. 612.

(63) Berkner v. Lewis, 133 Minn. 375, 158 N. W. 612.

RIGHTS AND LIABILITIES OF GRANTEES

3890. Title of grantee—In an action to set aside a conveyance of real property as fraudulent and void as to creditors, the evidence is held to sustain a finding that the conveyance, absolute in form, though not fraudulent, was intended as security for money loaned by the grantee to the grantor and therefore a mortgage. The question of the purpose of the conveyance in that respect was necessarily involved under the issues made by the pleadings. George Benz & Sons v. Barto, 147 Minn. 322, 180 N. W. 111.

(75) See Stephon v. Topic, 147 Minn. 263, 180 N. W. 221.

3891. Reimbursement—(78) Stephon v. Topic, 147 Minn. 263, 180 N. W. 221. See George Benz & Sons v. Barto, 147 Minn. 322, 180 N. W. 111; 8 A. L. R. 527.

3893. Liability of grantee to creditors—Where the grantor and grantee in a deed conspire to commit a fraud on the grantor's creditors, the grantee is answerable to the creditors for the proceeds of the sale of the property without deduction for the grantor's indebtedness to him and without reimbursement or indemnity. Stephon v. Topic, 147 Minn. 263, 180 N. W. 221.

A wife may avoid a conveyance made to defraud her of her interest in her husband's property. Stephon v. Topic, 147 Minn. 263, 180 N. W. 221.

(81) Stephon v. Topic, 147 Minn. 263, 180 N. W. 221; 8 A. L. R. 527.

WHO MAY AVOID

3898. In general—(97) Small v. Anderson, 139 Minn. 292, 166 N. W. 340.

3899. Good between the parties—(12) Redman v. Hayes, 116 Minn. 403, 133 N. W. 1016; Underleak v. Scott, 117 Minn. 136, 134 N. W. 731; Thysell v. McDonald, 134 Minn. 400, 159 N. W. 958; Kemp v. Holz, — Minn. —, 183 N. W. 287. See Iverson v. Iverson, 140 Minn. 157, 167 N. W. 483.

3900. Subsequent creditors—Where a creditor has a claim at the time of a conveyance the fact that the claim is transformed into a judgment after the conveyance does not render him a subsequent creditor. Gould v. Svendsgaard, 141 Minn. 437, 170 N. W. 595.

Evidence held to justify findings that a judgment creditor was a subsequent creditor and that a conveyance was not fraudulent as to him. Johnson v. Union Investment Co., — Minn. —, 182 N. W. 955. See § 3854.

A conveyance may be fraudulent as to subsequent creditors, as when its purpose and effect is to defraud creditors whom it is expected the grantor will have; or when the conveyance is really in trust for the use

of the grantor and is intended as a cover. Johnson v. Union Investment Co., — Minn. —, 182 N. W. 955. See Laws 1921, c. 415.

(18) See Levens v. Nelson, 148 Minn. —, 181 N. W. 350 (creditor on running account as existing creditor).

(18–20) Johnson v. Union Investment Co., — Minn. —, 182 N. W 955.

3904. Others than creditors—Wife—(27) See Stephon v. Topic, 147 Minn. 263, 180 N. W. 221.

REMEDIES OF CREDITORS

3905. Election—(28) Small v. Anderson, 139 Minn. 292, 166 N. W. 340; Aikin v. Timm, 147 Minn. 317, 180 N. W. 234.

BURDEN OF PROOF

3908. Proof of debt—(45, 46) Johnson v. Union Investment Co., — Minn. —, 182 N. W. 955.

EVIDENCE

3910. In general—A general scheme to defraud creditors may be shown by evidence of transactions between husband and wife. Hoover v. Carver, 135 Minn. 105, 160 N. W. 249. See § 4259.

(51) Hoover v. Carver, 135 Minn. 105, 160 N. W. 249.

3911. Direct evidence as to intent—(53) State Bank v. Strandberg, 148 Minn. —, 180 N. W. 1006.

3913. Circumstantial evidence—(55) State Bank v. Strandberg, 148 Minn. —, 180 N. W. 1006.

3915. Cross-examination—(57) See Zeglin v. Tetzlaff, 146 Minn. 397, 178 N. W. 954.

3920. Miscellaneous cases—(65) State Bank v. Strandberg, 148 Minn. —, 180 N. W. 1006 (conversations between grantors, husband and wife, showing absence of fraudulent intent—evidence as to care bestowed by wife on father-in-law from whom husband and wife acquired title).

ACTION TO SET ASIDE

3922. Limitation of actions—(71, 72) Stephon v. Topic, 147 Minn. 263, 180 N. W. 221 (statute held inapplicable).

3925. Complaint—A complaint to set aside a conveyance from a debtor to his wife held sufficient. United Norwegian Church v. Csaszar, 141 Minn. 459, 170 N. W. 694.

(89) See United Norwegian Church v. Csaszar, 141 Minn. 459, 170 N. W. 694.

3928. Law and fact—(5) Hoover v. Carver, 135 Minn. 105, 160 N. W. 249; First State Bank v. Woehler, 140 Minn. 32, 167 N. W. 276.

3929. Evidence—Sufficiency—Findings—Evidence held to justify a finding that a conveyance, absolute in form, though not fraudulent, was intended as a mortgage to secure money loaned by the grantee to the grantor. George Benz & Sons v. Barto, 147 Minn. 322, 180 N. W. 111.

Evidence held to justify a finding of fraud. Small v. Anderson, 139 Minn. 292, 166 N. W. 340.

Evidence held to justify a verdict for defendants. State Bank v. Strandberg, 148 Minn. —, 180 N. W. 1006.

3930. Judgment—Relief allowable—The property may be ordered sold subject to rights of the grantee. George Benz & Sons v. Barto, 147 Minn. 322, 180 N. W. 111.

(9) Aiken v. Timm, 147 Minn. 317, 180 N. W. 234.

FUNERAL HOMES—See Municipal Corporations, § 6525.

GAMING

3941. Gambling—What constitutes—Playing any game for cigars or drinks, or under an agreement that the loser shall treat to cigars or drinks or other refreshments is gambling. Shaking dice for cigars is gambling. Zotalis v. Cannellos, 138 Minn. 179, 164 N. W. 807; Santrizos v. Public Drug Co., 143 Minn. 222, 173 N. W. 563. See L. R. A. 1918A, 1068.

3946a. Allowing house to be used for gambling—Any person who suffers gambling devices to be used for the purpose of gambling in any building owned, occupied or controlled by him, is guilty of a criminal offence. Zotalis v. Cannelos, 138 Minn. 179, 164 N. W. 807.

GARAGE—See Livery Stable and Garage Keepers, § 5673a; Nuisance, § 7255.

GARNISHMENT

IN GENERAL

3949. Nature—Garnishment is a proceeding in the nature of an involuntary suit by the defendant against the garnishee for the benefit of the plaintiff. The garnishee must be one against whom the defendant has a right of action. Lind v. Hurd, 148 Minn. —, 181 N. W. 326.

(40) Wipperman Mercantile Co. v. Jacobson, 133 Minn. 326, 158 N. W. 606.

(44) Pennington v. Fourth Nat. Bank, 243 U. S. 269.

3952. What will defeat—Dismissal of main action—A dismissal of the main action operates to discharge the garnishment and no judgment

can be rendered against the garnishee thereafter. Holland v. Nichols, 136 Minn. 354, 162 N. W. 468.

EFFECT

3957. **Property affected**—The debt is not impounded until the service of the garnishee summons on the garnishee. First State Bank v. Woehler, 140 Minn. 32, 167 N. W. 276.

In the case of an interest-bearing debt subsequently accruing interest as well as the principal is held. Savings Bank v. Loewe, 242 U. S. 357.

The evidence does not compel the court to find that defendant assigned to intervener, or to the one to whose rights intervener claims to be subrogated, the fund or debt reached by the garnishment. Jackson Nat. Bank v. Christensen, 146 Minn. 303, 178 N. W. 494.

(62) First State Bank v. Woehler, 140 Minn. 32, 167 N. W. 276. See L. R. A. 1916E, 81, 1916D, 365.

JURISDICTION

3961. **In general**—If the defendant is a non-resident and summons is served on him only by publication the judgment is not enforceable against him personally, but it is enforceable as to the property garnished, and is binding on him to that extent. Wipperman Mercantile Co. v. Jacobson, 133 Minn. 326, 158 N. W. 606. See § 7836.

A garnishee may be heard to object to the jurisdiction of the court for the failure to serve the summons in the main action upon defendant therein. Spotts v. Beebe, — Minn. —, 182 N. W. 167.

Where the judgment in an action for the recovery of money is void on the face of the record, no valid garnishment proceedings can be predicated thereon. Spotts v. Beebe, — Minn. —, 182 N. W. 167.

(68) Wipperman Mercantile Co. v. Jacobson, 133 Minn. 326, 158 N. W. 606.

(71) Spotts v. Beebe, — Minn. —, 182 N. W. 167.

3961a. **Delay in serving summons on defendant**—Where there is an unreasonable delay in the service of the summons upon the defendant, the action will lapse, and thereafter no longer be deemed pending. The delay stated in the opinion held unreasonable. Spotts v. Beebe, —, Minn. —, 182 N. W. 167.

3962. **Not dependent on situs of debt**—(75) Pennington v. Fourth Nat. Bank, 243 U. S. 269. See 27 Harv. L. Rev. 117.

3963. **Debt owing to non-resident**—Bank deposits of a non-resident may be garnished. Pennington v. Fourth Nat. Bank, 243 U. S. 269.

(76, 77) 27 Harv. L. Rev. 117; 31 Id. 909.

(79) See Baltimore & Ohio Ry. Co. v. Hostetter, 240 U. S. 620; 32 Harv. L. Rev. 575.

WHAT GARNISHABLE

3965. Judgments—Verdicts—A judgment is sufficient upon which to base garnishment proceedings, though upon appeal from an order denying a new trial without a supersedeas the order is affirmed on condition that the plaintiff consent to a reduction of the verdict within a stated time after the going down of the remittitur, and that otherwise there be a new trial; neither party having caused the remittitur to be filed. Mahr v. Maryland Casualty Co., 132 Minn. 336, 156 N. W. 668.

A verdict upon which no judgment has been entered is not subject to garnishment. Lind v. Hurd, 148 Minn. —, 181 N. W. 326.

3966. Held garnishable—A debt owing by an insurance company, on a judgment against the insured, the company having appeared and defended the action as provided by the policy. Mahr v. Maryland Casualty Co., 132 Minn. 336, 156 N. W. 668.

Judgment having been entered against defendant upon a claim against which the casualty company had insured him under a policy substantially the same in effect as the policy considered in Patterson v. Adan, 119 Minn. 308, 138 N. W. 281, the liability of the company upon its policy was subject to garnishment under the rule announced in that case and followed in subsequent cases. Powers v. Wilson, 139 Minn. 309, 166 N. W. 401.

(91) See 33 Harv. L. Rev. 109.

3967. Held not garnishable—Insurance money exempt under the provisions of G. S. 1913, § 7951(13). Remington v. Sabin, 132 Minn. 372, 157 N. W. 504. See Imperial Elevator Co. v. Bennett, 127 Minn. 256, 149 N. W. 372.

Under G. S. 1913, § 3548, and section 7951, subds. 14, 15, insurance money payable on a policy on the life of the husband to his wife is exempt from attachment by garnishment in an action against the widow. Rose v. Marchessault, 146 Minn. 6, 177 N. W. 658.

A verdict upon which no judgment has been entered. Lind v. Hurd, 148 Minn. —, 181 N. W. 326.

(1) L. R. A. 1918C, 731.

(2) Lind v. Hurd, 148 Minn. —, 181 N. W. 326.

(3) See L. R. A. 1916E, 452.

PRACTICE IN GENERAL

3969. Garnishee summons—Record held to show that a defect in the service of summons on the garnishee was waived by consent of the parties. National Surety Co. v. Winslow, 143 Minn. 66, 173 N. W. 181.

3970. Service of garnishee summons and notice on defendant—Service of notice to appear and take part in the examination of the garnishee, and of an application to file a supplemental complaint against the garnishee,

is not necessary to bring defendant into court as he is already in court so far as the property seized is concerned. If an affidavit is filed that defendant is a non-resident and that affiant believes that he is not within the state, it is not necessary to serve any notice upon him in garnishee proceedings. Wipperman Mercantile Co. v. Jacobson, 133 Minn. 326, 158 N. W. 606.

(24) See 32 Harv. L. Rev. 575.

3976. Dissolution on motion—An order of dismissal held not res judicata as to issues in the main action. Campbell Electric Co. v. Christian, 141 Minn. 296, 170 N. W. 199. See § 6510.

DISCLOSURE

3984. Set-off—Where an insurance company is garnished on a judgment in an action defended by the company pursuant to the policy it may offset premiums earned on the policy, the insured not having been discharged in bankruptcy. If the insured has been discharged in bankruptcy the company cannot set off claims arising before bankruptcy and provable therein. Truan v. London Guarantee & Accident Co., 124 Minn. 339, 145 N. W. 26; Mahr v. Maryland Casualty Co., 132 Minn. 336, 156 N. W. 668.

SUPPLEMENTAL COMPLAINT

3995. Practice—Notice of motion for leave to file a supplemental complaint need not be served on the defendant if he is a non-resident and an affidavit is filed that he is a non-resident and not within the state. Wipperman Mercantile Co. v. Jacobson, 133 Minn. 326, 158 N. W. 606.

(70) Wipperman Mercantile Co. v. Jacobson, 133 Minn. 326, 158 N. W. 606.

THIRD PARTIES AS CLAIMANTS

4004. Burden of proof—(98 Mattox v. Curtis, 140 Minn. 506, 167 N. W. 424. See National Surety Co. v. Winslow, 143 Minn. 66, 173 N. W. 181.

4005a. Evidence—Sufficiency—Testimony considered, and held sufficient to support a finding that the plaintiff was the owner of the fund in the possession of the garnishee, and that intervener had no interest therein, and that the complaint in intervention be dismissed upon the merits. H. A. Dreves Co. v. Bad Axe Grain Co., — Minn. —, 183 N. W. 285.

JUDGMENT

4008. When proper—Where, subsequent to a full disclosure by a garnishee, the venue in the main action is changed to another county and there dismissed, such dismissal, in effect, discharges the garnishment,

as no judgment, under the provisions of G. S. 1913, § 7872, can be rendered against a garnishee until after judgment is rendered against the defendant. Holland v. Nichols, 136 Minn. 354, 162 N. W. 468.

The point is not well taken that, because the disclosure revealed that intervener claims the fund disclosed, no judgment could be entered against the garnishee. The claim was litigated at the instance of intervener and found to be without merit. Both garnishee and intervener are bound by the result. If any clerical defects exist in the judgment as entered, the remedy is in the court below; but, granting their existence, we fail to see how the defects or irregularities complained of can possibly prejudice intervener. Jackson Nat. Bank v. Christensen, 146 Minn. 303, 178 N. W. 494.

4013. Effect—If the defendant is a non-resident and summons is served on him by publication only the judgment is not enforceable against him personally, but it is enforceable as to the property garnished, and is binding on him to that extent. Wipperman Mercantile Co. v. Jacobson, 133 Minn. 326, 158 N. W. 606. See § 7836.

Where a third party intervenes and judgment is entered against the garnishee, the claim of the intervener being found without merit, the judgment binds both garnishee and intervener. Jackson Nat. Bank v. Christensen, 146 Minn. 303, 178 N. W. 494.

4017. Opening default—(24) See State v. Kane, 144 Minn. 225, 174 N. W. 884 (appeal to district court from order of justice court denying application).

GAS

4018. Liability for escaping gas—(26) Grimes v. Minneapolis Gaslight Co., 133 Minn. 394, 158 N. W. 623 (evidence held to justify a finding that defendant was not negligent).

(27) Grimes v. Minneapolis Gaslight Co., 133 Minn. 394, 158 N. W. 623.

4019. Supply by public service corporations—Rates—The provisions for arbitrating the rates to be charged by defendant, the holder of a franchise contract, for furnishing the city of Red Wing and its inhabitants with gas, apply to the rates to the private consumers as well as to the municipality. The city has an interest in maintaining the arbitration provision of the franchise in behalf of its inhabitants for whom it acted when granting the franchise; and since the right of the city and its inhabitants to relief rests upon common ground, this action will lie if there be a threatened breach of the contract as to the gas consuming inhabitants, for thereby a multiplicity of suits is avoided. Red Wing v. Wisconsin etc. Co., 139 Minn. 240, 166 N. W. 175.

(30) Minneapolis Gas Light Co. v. Minneapolis, 140 Minn. 400, 168 N. W. 588 (a judgment entered by consent of the parties thereto, fixing the rate to be charged for gas for a definite period ending November 1,

1918, and until again fixed under and pursuant to an ordinance, held final and binding on the parties).

GASOLENE—See Explosives, § 3700a.

GIFTS

4020. Requisites—To constitute a valid gift inter vivos, the donor must deliver the property to the donee, or to some one for him, with intent to vest title in the donee, and without reserving any right to reclaim the property. McDonald v. Larson, 142 Minn. 244, 171 N. W. 811.

4023. A contract—Irrevocable—(36) Peavey v. Wells, 136 Minn. 180, 161 N. W. 508; Kauffman v. Kauffman, 137 Minn. 457, 163 N. W. 780; Snyder v. Samuelson, 140 Minn. 57, 167 N. W. 287.

4026. Delivery—Returning certificates of deposit to a donor merely to secure their renewal has been held not to avoid a fully executed prior gift thereof. McDonald v. Larson, 142 Minn. 244, 171 N. W. 811.

The law relating to delivery and change of possession is flexible, accommodating itself to the nature of the property and the situation and circumstances of each case. If the article, at the time of the transfer, is in the hands of one who has a lien upon it, notice to him of such transfer is sufficient to constitute a delivery as against subsequent attaching creditors. Coulter v. Meining, 143 Minn. 104, 172 N. W. 910.

Gift of corporate stock, 4 Minn. L. Rev. 70.

(41) See Larson v. Lund, 109 Minn. 372, 123 N. W. 1070.

(44) Coulter v. Meining, 143 Minn. 104, 172 N. W. 910.

4027. Acceptance—Where a gift is wholly beneficial to the donee, with no burdens imposed, his acceptance is presumed as a matter of law. Walso v. Latterner, 140 Minn. 455, 168 N. W. 353.

(45) Walso v. Latterner, 140 Minn. 455, 168 N. W. 353.

4028. Consideration—(48) Peavey v. Wells, 136 Minn. 180, 161 N. W. 508.

4030. Of money in a bank—Returning certificates of deposit to a donor merely to secure their renewal has been held not to avoid a fully executed prior gift thereof. McDonald v. Larson, 142 Minn. 244, 171 N. W. 811.

Evidence held to justify a finding of a valid gift, inter vivos, of funds represented by certain certificates of deposit. McDonald v. Larson, 142 Minn. 244, 171 N. W. 811.

The plaintiff's intestate made a deposit of money belonging to her in the defendant bank to the account of herself and her sister with the provision that either might withdraw it and that upon the death of one it should belong to the survivor. There was evidence justifying the inference that the deceased intended to give her sister a present joint

ownership in the deposit with the right of sole owneship if she survived. It is held that the evidence sustains the finding of an executed gift inter vivos, and that upon the death of the decedent the deposit belonged to her sister and the plaintiff cannot recover of the bank. McLeod v Hennepin County Sav. Bank, 145 Minn. 299, 176 N. W. 987. See Kemp v. Holz, — Minn. —, 183 N. W. 287.

A claim was duly allowed against an estate, and, there being a deficiency of assets, the administrator sued defendant, alleging that he was indebted to decedent and had wrongfully converted to his use a certain savings bank deposit of decedent's, changed some six months before decedent died to the joint account of decedent and defendant, and "payable to the order of either of the survivors." The administrator conceded that the change of the account amounted to an executed gift, but claimed it to be void as against the creditor named. It is held, in view of the concession and the pleading the court was justified in finding, in effect, that there was no conversion. The complaint contained no allegation that a gift or transfer had been to defendant, or any grounds for avoiding it in behalf of a creditor existing at the time it was made. And the court was not required to make findings on issues not presented by the pleadings and which cannot be held to have been litigated by consent. Kemp v. Holz, — Minn. —, 183 N. W. 287.

(54) See L. R. A. 1917C, 550.

4031. Of realty—(57) Lindell v. Lindell, 135 Minn. 368, 160 N. W. 103; Drager v. Seegert, 138 Minn. 6, 163 N. W. 756; Barrett v. Thielen, 140 Minn. 266, 167 N. W. 1030. See § 8885.

4033. To take effect after death of donor—A gift to take effect upon the death of the donor, no present interest passing to the donee, and the control and the right of recall remaining with the donor, is not effective nor enforceable upon the donor's death. But a gift passing a present interest is effective according to its terms. And a gift with the right of enjoyment postponed until the donor's death, the subject of the gift being left with a third person with instructions to deliver upon the death of the donor, and with no right of recall, is effectual upon the donor's death. In the first instance there is no executed or completed gift; in the others there is. McDonald v. Larson, 142 Minn. 244, 171 N. W. 811; McLeod v. Hennepin County Sav. Bank, 145 Minn. 299, 176 N. W. 987. See note, 3 A. L. R. 902.

Effect of oral direction to a debtor to pay the debt to a donee at the creditor's death. 34 Harv. L. Rev. 664.

4037. Evidence—Admissibility—Where a controversy arises as to whether property previously given by a father was given to one or all of his children, his statement that he gave it to one is not admissible against the others. Sons v. Sons, 145 Minn. 367, 177 N. W. 498.

(67) Coulter v. Meining, 143 Minn. 104, 172 N. W. 910 (conduct of parties subsequent to date of alleged gift). See L. R. A. 1916E, 288 (subsequent declarations of donor).

4039. Evidence—Sufficiency—(70) McDonald v. Larson, 142 Minn. 244, 171 N. W. 811; McLeod v. Hennepin County Sav. Bank, 145 Minn. 299, 176 N. W. 987.

GOOD WILL

4045. A species of property—(78) Johnson v. Bruzek, 142 Minn. 454, 172 N. W. 700.

4046. Sale—The name of a partnership passes with a sale of the firm business and good will. Twin City Brief Printing Co. v. Review Pub. Co., 139 Minn. 358, 166 N. W. 413.

Where a sale of the entire business and property of a partnership, including the good will, is a firm transaction, separate conveyances by the individual partners have the same force and effect as a single conveyance executed in the name of the firm; and a transfer, thus effected, carries with it the right in the purchaser to the future use of the partnership name. Twin City Brief Printing Co. v. Review Pub. Co., 139 Minn. 358, 166 N. W. 413.

The good will of a business is property, tangible only as an incident of, or as connected with, a going concern, and is not susceptible of being disposed of independently. It passes to the purchaser of the assets of a partnership at an assignee's sale, although not expressly mentioned, where all such assets have been transferred. Johnson v. Bruzek, 142 Minn. 454, 172 N. W. 700.

GRAND JURY

4046a. Function—Grand juries perform most important public functions, and are a great security * * * against vindictive persecutions, either by the government, or by political partisans, or by private enemies. State v. Ernster, 147 Minn. 81, 179 N. W. 640.

4047. Preparation of jury list by county board—(87, 88) See State v. Van Vleet, 139 Minn. 144, 165 N. W. 962.

4054. Challenge to panel—There may be a challenge to the panel on the ground that there was irregularity in drawing the names of the jurors in the presence of an officer who was not qualified. State v. Van Vleet, 139 Minn. 144, 165 N. W. 962.

(12) State v. Van Vleet, 139 Minn. 144, 165 N. W. 962.

4060. Evidence on which indictment found—On a charge of adultery the other spouse is not a competent witness without the consent of the accused. State v. Marshall, 140 Minn. 363, 168 N. W. 174.

(30) W. J. Burns International Detective Agency v. Holt, 138 Minn. 165, 164 N. W. 590; State v. Ernster, 147 Minn. 81, 179 N. W. 640.

4061a. Presence of unauthorized persons—Delegations, committees, or individuals not witnesses, may not appear before a grand jury for or against an indictment. The common law respecting grand jury functions, as supplemented by our statutory enactments, clearly intends that there shall be no star chamber proceedings at which persons may come, either by delegations or singly, to advise or urge action on the part of the jury, whether to indict or to find a no bill. It is supposed that witnesses only shall appear, one at a time, and give competent evidence, and upon evidence so given, and that alone, the jury are to determine whether a person should be accused of crime. If those interested in prosecuting may send a delegation to the grand jury to induce the finding of a bill, so may the criminal send his delegation and lawyer to persuade that no bill be found. The grand jury is supposed to be a fearless and impartial investigator of crime, and to the more fully accomplish this purpose the law seeks to provide against every influence of outsiders, and specifies that the mere presence of an unauthorized person when a witness testifies, or when the case is discussed, or the vote taken is fatal to the indictment. State v. Ernster, 147 Minn. 81, 179 N. W. 640.

4062a. Minutes—The statute provides that the clerk of the jury shall preserve the minutes of their proceedings, but not of the votes of the individual members on a presentment or indictment, or of the evidence given before them. It is only when a presentment is returned that the evidence is to be reduced to writing and preserved. State v. Ernster, 147 Minn. 81, 179 N. W. 640.

The minutes of a grand jury are competent evidence on a motion to quash an indictment found by it. State v. Ernster, 147 Minn. 81, 179 N. W. 640.

4063. Impeachment of indictment by grand juror—See §§ 4064, 4424.

4064. Secrecy—Duty of grand jurors—A grand juror may not testify to conversations, had when none but his fellow members were present, relative to matters considered by them in the discharge of their duties. The secrecy enjoined by law in this respect is permanent. W. J. Burns International Detective Agency v. Holt, 138 Minn. 165, 164 N. W. 590.

Whether a grand juror is competent to testify that unauthorized persons attended a session when the charge, embraced in the indictment, was under consideration, quaere. State v. Ernster, 147 Minn. 81, 179 N. W. 640.

On a motion to quash an indictment a member of the grand jury that found it may not disclose the evidence upon which it was found, or the fact that hearsay or otherwise incompetent evidence was received. State v. Ernster, 147 Minn. 81, 179 N. W. 640.

(40) W. J. Burns International Detective Agency v. Holt, 138 Minn. 165, 164 N. W. 590.

4065a. Contracts—Employment of detectives—That a grand jury received reports concerning crime conditions in the county from plaintiff, a detective agency, or heard the testimony of its detectives, or that some

of its members made partial payments for the services it rendered, does not tend to establish a contract of employment between the plaintiff and the members of the grand jury personally; for such contract even if not void as against public policy, would be so at variance with the usual and fair procedure under the law that it ought not be allowed to rest on inferences. W. J. Burns International Detective Agency v. Holt, 138 Minn. 165, 164 N. W. 590.

GROUND LEASE—See Fixtures, § 3770b.

GUARANTY

4070. What constitutes—(49) See Petrich v. Berkner, 142 Minn. 451, 172 N. W. 770.

4070a. Execution—Whether a person executed a written guaranty held a question for the jury. Bradshaw v. Hoff, 139 Minn. 503, 166 N. W. 329.

4071. Consideration—The possible advantage to one as a stockholder of a corporation is not a sufficient consideration. Northern Nat. Bank v. Douglas, 135 Minn. 81, 160 N. W. 193.

A recital of a consideration in a guaranty which does not state by whom or to whom paid permits proof from the guarantor that he did not receive any and that as to him the instrument is without consideration. Northern Nat. Bank v. Douglas, 135 Minn. 81, 160 N. W. 193.

The defence of want of consideration for a promise to answer for the debt of another is not favored. American Multigraph Sales Co. v. Grant, 135 Minn. 208, 160 N. W. 676.

A contract attached to and delivered with a certificate of corporation stock sold the same day recited the purchase of the stock and the payment of the price, and stipulated that the vendors agree to pay a percentage of the price annually for five years. It is held that the agreement is upon a sufficient consideration and that the consideration is expressed on the face of the agreement. Alger v. Minnesota Loan & Trust Co., 135 Minn. 235, 159 N. W. 565, 160 N. W. 765.

(51) Northern Nat. Bank v. Douglas, 135 Minn. 81, 160 N. W. 193; Stone-Ordean-Wells Co. v. Helmer, 142 Minn. 263, 171 N. W. 924.

4073. Construction—In general—A commercial guaranty should not be strictly construed, but should receive a fair and reasonable construction to carry out the intention of the parties. Bradshaw v. Sibert, 134 Minn. 186, 158 N. W. 830.

Special rules of construction apply to guaranty bonds issued by paid bonding companies. Such bonds are in the nature of insurance contracts and construed accordingly. First Nat. Bank v. Iowa Bonding & Casualty Co., — Minn. —, 183 N. W. 832.

4074. Particular contracts construed—(59) Bradshaw v. Sibert, 134 Minn. 186, 158 N. W. 830 (guaranty of payment of goods to be furnished a retailer—limitation of liability to four hundred dollars—held a continuing guaranty during the time specified); Northern Nat. Bank v. Douglas, 135 Minn. 81, 160 N. W. 193 (guaranty of all sums owing or to become owing to the guarantee by a certain corporation); Halloran v. Jacob Schmidt Brewing Co., 137 Minn. 141, 162 N. W. 1082 (guaranty of payment of rent under a lease of premises to be used for a saloon).

4076. Guaranty of payment—(61) First Nat. Bank v. Schirmer, 134 Minn. 387, 159 N. W. 800. See First Nat. Bank v. Rush City Starch Co., 119 Minn. 51, 137 N. W. 179.

4077. Guaranty of collection—A guaranty "against loss" is a guaranty of collection, and before resort can be had to the guarantor on such a guaranty, the creditor must exhaust his remedy against the principal. Wyman, Partridge & Co. v. Bible, — Minn. —, 184 N. W. 45.

4079. Limited or continuing—A writing wherein, in consideration of plaintiffs' furnishing to a person named therein merchandise as desired by such person for four months after a specified date, defendant agreed to be liable for the same, is construed to be a continuing guaranty during the time stated. Only the extent of defendant's liability, and not the amount of merchandise to be furnished, was limited by the proviso: "Provided, however, that my liability on this guaranty shall not exceed the sum of $400." Bradshaw v. Sibert, 134 Minn. 186, 158 N. W. 830.

Whether the guaranty involved in this case covered purchases of goods made nineteen months after the guaranty was given was, under the circumstances of the case, a question for the jury. Wyman, Partridge & Co. v. Bible, — Minn. —, 184 N. W. 45.

(71) Wyman, Partridge & Co. v. Bible, — Minn. —, 184 N. W. 45. See Stone-Ordean-Wells Co. v. Taylor, 139 Minn. 432, 166 N. W. 1069. See Ann. Cas. 1918E, 609.

(72) Wyman, Partridge & Co. v. Bible, — Minn. —, 184 N. W. 45.

4079a. Co-guarantors—Discharge of one—Effect—A surety on a continuing guaranty has a right to stand on the precise terms of his contract. He can be held to no other or different contract. The discharge of one of the cosureties on a continuing guaranty affects the contract as to all, and amounts to a release of the other cosureties for liabilities subsequently incurred. Stone-Ordean-Wells Co. v. Taylor, 139 Minn. 432, 166 N. W. 1069.

4080. Contribution—(74) Stone-Ordean-Wells Co. v. Taylor, 139 Minn. 432, 166 N. W. 1069.

DISCHARGE OF GUARANTOR

4082. Neglect to pursue principal—Where the indorsement of a note is in the form of a guaranty of payment, the creditor is not bound to

pursue the maker, or to record a mortgage securing the payment of the note, not assigned to him, in order to protect the guarantor. First Nat. Bank v. Schirmer, 134 Minn. 387, 159 N. W. 800.

(77) First Nat. Bank v. Schirmer, 134 Minn. 387, 159 N. W. 800.

4083a. Release of principal—Guaranty of payment by bonding company—The plaintiff bought a certificate of deposit issued by a bank at Tower on November 15, 1918. Its indorsers had recently purchased it from the payee. After the sale to the plaintiff the indorsers applied orally to the defendant for a bond guaranteeing payment, and paid the customary premium. It was issued on November 22, and was received by the plaintiff on November 30, at which time, in consideration of the bond, it released its indorsers. At the time of the oral application, it was contemplated that the Tower bank would make a formal written application, and it did so under date of December 2. The bond described the certificate of deposit, gave the name of the payee, and stated that it inured to the benefit of every subsequent holder for value. The Tower bank defaulted, and the plaintiff brought suit on the bond. The bond is construed to inure to the benefit of the plaintiff bank. Upon payment of the certificate of deposit by the bond company, the latter would have no recourse against the indorsers to the plaintiff, or against any one except the Tower bank; and the release of the indorser by the plaintiff did not harm the defendant nor discharge the bond. Such a bond is in the nature of an insurance contract, and is construed in favor of those whose protection is intended. First Nat. Bank v. Iowa Bonding & Casualty Co., — Minn. —, 183 N. W. 832.

4084. Failure of plaintiff to perform—Where defendant guarantees the payment of a note which is secured by a mortgage a failure of plaintiff to record the mortgage in accordance with his express promise to do so may release the defendant. First Nat. Bank v. Schirmer, 134 Minn. 387, 159 N. W. 800.

STEPS TO CHARGE GUARANTOR

4089. Acceptance and notice—Where plaintiff promised to make a loan on receiving a certain guaranty of payment thereof and such guaranty was thereafter furnished, he was not bound to give notice to the guarantors of the acceptance of the guaranty before making the loan. National City Bank v. Zimmer Vacuum Renovator Co., 132 Minn. 211, 156 N. W. 265.

A certain letter of credit held to constitute an unconditional promise to pay by the guarantor and not to require notice of acceptance thereof by the creditor. Stone-Ordean-Wells Co. v. Helmer, 142 Minn. 263, 171 N. W. 924.

No notice of acceptance is necessary where the contract of guaranty on its face acknowledges the receipt of a valuable consideration by the guarantor, however small, is definite as to the time and duration and the amount of the indebtedness to be assumed and paid, and contains a

specific and unconditional promise to pay the same on default of the principal debtor. Stone-Ordean-Wells Co. v. Helmer, 142 Minn. 263, 171 N. W. 924.

An agreement to accept an offer of guaranty is necessary to complete a valid contract, but the agreement to accept may precede the execution of the guaranty by the guarantor, and when it does, no further notice to the guarantor of acceptance by the guarantee is necessary. Wyman, Partridge & Co. v. Bible, — Minn. —, 184 N. W. 45.

(89) Northern Nat. Bank v. Douglas, 135 Minn. 81, 160 N. W. 193. See Stone-Ordean-Wells Co. v. Helmer, 142 Minn. 263, 171 N. W. 924.

(91) Northern Nat. Bank v. Douglas, 135 Minn. 81, 160 N. W. 193.

4091. Exhausting securities—Guaranty of collection—(97) See First Nat. Bank v. Schirmer, 134 Minn. 387, 159 N. W. 800.

4092. Suit against principal—(98) See § 4082.

ACTIONS

4093a. Parties—Who may enforce a guaranty. 1 A. L. R. 861.

4095a. Evidence—Sufficiency—Evidence held not to justify a recovery against a guarantor for the reason that the transaction did not fall within the guaranty, the credit having been granted by one other than the guarantee. Northern Nat. Bank v. Douglas, 135 Minn. 81, 160 N. W. 193.

GUARDIAN AND WARD

IN GENERAL

4096. Jurisdiction—See § 2759.

4097. Control of court—(9) State v. Probate Court, — Minn. —, 184 N. W. 27.

4099. Appointment—In general—(13) 1 A. L. R. 919.

4103. Bond of guardian—The matter of the sale of the ward's real property, when rendered necessary by the condition of the estate, and all acts pertaining thereto, including an accounting for the proceeds of the sale, are duties imposed upon the guardian by statute, the faithful performance of which is secured by the guardian's general bond. The special or sale bond is additional or cumulative security, and not a substitute for the general bond. Frederickson v. American Surety Co., 135 Minn. 346, 160 N. W. 859.

4105. Natural guardians—Natural guardians have no control over the property of their wards. 6 A. L. R. 115.

4107a. Contracts of guardian—An action for the breach of a contract to sell and convey certain realty held not to involve the personal lia-

bility of the guardian for the breach. Richardson v. Kotek, 123 Minn. 360, 143 N. W. 973.

It is the general rule that a guardian has no authority to bind the estate of the ward by contract. Matthews v. Mires, 135 Minn. 94, 160 N. W. 187. See § 4526.

4108a. Sales of realty—Special bond—The special bond required of a guardian upon the sale of realty is a cumulative remedy. His general bond covers such a sale. Frederickson v. American Surety Co., 135 Minn. 346, 160 N. W. 859.

See Digest, §§ 3614–3640.

ACCOUNTING AND SETTLEMENT

4122. Charges and credits—The guardian may be charged on account of a fraudulent sale of property of the ward. Wilson v. Erickson, 147 Minn. 260, 180 N. W. 93.

(54) See Matthews v. Mires, 135 Minn. 94, 160 N. W. 187.

4125. Settlement—Effect of settlement out of court. L. R. A. 1916E, 863.

ACTIONS

4126a. Against guardian—The district court has jurisdiction of an action by a ward against his guardian and purchasers from him to set aside a fraudulent sale by the guardian. Wilson v. Erickson, 147 Minn. 260, 180 N. W. 93.

HABEAS CORPUS

4127. Nature of remedy—Independent of other actions or proceedings—A writ of habeas corpus initiates an independent proceeding which cannot be stayed or suspended by a stay of proceedings in another action, although the ultimate rights of the parties may depend on the result of such other action. State v. Spratt, — Minn. —, 184 N. W. 31.

4129. Scope of the remedy—Not a substitute for appeal—A person held only by virtue of a judgment void for want of jurisdiction is not put to an appeal or writ of error, but may be released on habeas corpus. State v. Reed, 132 Minn. 295, 156 N. W. 127. See § 4132.

A person who is at liberty on bail is not imprisoned or restrained and is not entitled to the writ. A person at liberty on bail who voluntarily surrenders himself into the custody of an officer of the law cannot invoke the writ. State v. Konshak, 136 Minn. 331, 162 N. W. 353.

A sentence imposed by a justice of the peace for a criminal offence, falling within the jurisdiction of that court, may not be assailed as void in a habeas corpus proceeding on the ground that the docket entries of the justice do not show that the accused waived a jury. State v. Rice, 145 Minn. 359, 177 N. W. 348.

It is only where the court pronounces a judgment in a criminal case which is not authorized by law, under the indictment, whether the trial has proceeded regularly or otherwise, that such judgment can be said to be void so as to require the discharge of the defendant upon habeas corpus. State v. Brown, — Minn. —, 183 N. W. 669.

The reception of inadmissible evidence does not render a judgment subject to collateral attack on habeas corpus. State v. Superintendent of Workhouse, 146 Minn. 140, 178 N. W. 610.

Testing indictment by habeas corpus. L. R. A. 1918B, 1156.

(68) State v. Konshak, 136 Minn. 331, 162 N. W. 353.

(69) State v. Reed, 132 Minn. 295, 156 N. W. 127; State v. Carver, 143 Minn. 27, 172 N. W. 771; State v. Brown, — Minn. —, 183 N. W. 669. See State v. Rice, 145 Minn. 359, 177 N. W. 348.

See § 3713 (review of extradition proceedings).

4132. Person held under final judgment of competent tribunal—Jurisdiction in this connection means not only jurisdiction of the person and subject-matter but also jurisdiction to render the particular judgment. If a court was not authorized to render the particular judgment, it was not a "competent tribunal" within the meaning of the statute. If a court imposes an excessive sentence the convict may be released on habeas corpus after serving the maximum term authorized by law under the indictment. State v. Reed, 132 Minn. 295, 156 N. W. 127.

One imprisoned under a judgment of a justice of the peace which the justice was not authorized to render, may be released on habeas corpus. State v. Rice, 145 Minn. 359, 177 N. W. 348.

(76) State v. Reed, 132 Minn. 295, 156 N. W. 127.

4133. To determine custody of children—The court may make such provision for the care and custody of the child as will best secure its welfare. The welfare of the child is the controlling consideration. Jacobs v. Jacobs, 136 Minn. 190, 161 N. W. 525.

Upon an appeal in habeas corpus proceedings, pursuant to section 8312, G. S. 1913, where the controversy is as to the custody of a minor, the best interests of the child are the controlling consideration. Evidence considered, and found to require a direction that the minor remain with his present custodian until further order. State v. Krueger, 143 Minn. 149, 173 N. W. 414.

(79) State v. Galson, 132 Minn. 467, 156 N. W. 1; Id., 136 Minn. 470, 162 N. W. 1087; State v. Armstrong, 141 Minn. 47, 169 N. W. 249; State v. Pelowski, 145 Minn. 383, 177 N. W. 627; State v. Beardsley, — Minn. —, 183 N. W. 956. See § 7297.

4138. Traverse of return—(90) State v. Beardsley, — Minn. —, 183 N. W. 956.

4140. Remanding—Where the conviction is validan d only the sentence void, a defendant is not entitled to an unconditional discharge upon a writ of habeas corpus. If the sentence exceeds the penalty which the court had power to impose, it is void as to the excess; but the defend-

ant cannot be discharged on habeas corpus until he has performed the part which the court had power to impose if it be severable from the unlawful part. If the sentence is wholly void the defendant will be remanded for a lawful sentence. State v. Reed, 138 Minn. 465, 163 N. W. 984.

(95) State v. Reed, 138 Minn. 465, 163 N. W. 984.

4142. Appeal to supreme court—An order discharging relator in habeas corpus proceedings is appealable though no stay is obtained in the court below. State v. Langum, 135 Minn. 320, 160 N. W. 858.

The supreme court may grant a stay to enable the relator to obtain a review by the federal supreme court. State v. Langum, 135 Minn. 320, 160 N. W. 858.

On appeal in proceedings to determine the custody of a child, ordered, that respondent have the care and custody of the child until the further order of the district court. Galson v. Galson, 136 Minn. 470, 162 N. W. 1087.

An appeal to the supreme court is authorized in extradition proceedings. No bond is required. The appeal stays all proceedings and it is the duty of the sheriff to retain the custody of the accused pending the appeal. State v. Sheriff of Hennepin County, 148 Minn. —, 181 N. W. 640.

Where the good faith of the prosecution has been passed upon by the Governor in extradition proceedings it cannot be reviewed on habeas corpus. The guilt or innocence of the accused cannot be inquired into. State v. Sheriff of Hennepin County, 148 Minn. —, 181 N. W. 640.

On appeal from the judgment of the district court in a habeas corpus proceeding to determine the custody of a child, there is a trial of the issue de novo, although the parties stipulated that the cause should be heard and decided solely upon the record in the district court, and this court will ascertain as best it may from the return to the writ, which was not traversed, what is for the best interests of the child. The presumption that a mother is a fit and suitable person to be intrusted with the care of her infant child was not overcome by the uncontroverted allegations of the return. State v. Beardsley, — Minn. —, 183 N. W. 956.

(97) See 10 A. L. R. 385 (right of state or public officer to appeal).

(1) State v. Beardsley, — Minn. —, 183 N. W. 956.

HAWKERS AND PEDDLERS

4143. Definition—(11) See L. R. A. 1916A, 1293.

4145. Regulation—Peddlers may be required by local authorities to take out a license though their business crosses state lines. Wagner v. Covington, 251 U. S. 95.

(13) Buhner v. Reusse, 144 Minn. 450, 175 N. W. 1005 (transient merchants—license—what constitutes violation of ordinance).

HEALTH

4152b. Offensive trades—Rendering plants—The evidence on an appeal to the district court pursuant to G. S. 1913, §§ 4666–4668, from an order of a town board denying an application to operate a rendering plant within the limits of the town, is held to sustain a finding that the action of the town board was arbitrary, oppressive and unreasonable. Hunstiger v. Kilian, 136 Minn. 64, 161 N. W. 263.

4153. Construction of statutes—(29, 30) See note, 8 A. L. R. 836.

4153a. Infectious diseases—Reports—The laws of this state have been framed to protect the people, collectively and individually, from the spread of communicable diseases. Scarlet fever is classed as such a disease. The state board of health is charged with the duty of prescribing regulations for the disinfection and quarantine of persons and places as an incident in the treatment of all infectious diseases, and physicians are required to report all infectious cases to their local boards of health. Skillings v. Allen, 143 Minn. 323, 173 N. W. 663.

HEDGING—See Wagers, § 10133a.

HIGHWAYS

LAW OF THE ROAD—COLLISIONS

4162a. Statutory regulation—Violation of statutes negligence per se—Contributory negligence—Proximate cause—A violation of the statutes constituting the law of the road is negligence per se, but the doctrine of contributory negligence applies. Schaar v. Conforth, 128 Minn. 460, 151 N. W. 275; Benson v. Larson, 133 Minn. 346, 158 N. W. 426; Riser v. Smith, 136 Minn. 417, 162 N. W. 520; Hillstrom v. Mannheimer Bros., 146 Minn. 202, 178 N. W. 881; Unmacht v. Whitney, 146 Minn. 327, 178 N. W. 886; Thomas v. Stevenson, 146 Minn. 272, 178 N. W. 1021; Elvidge v. Stronge & Warner Co., 148 Minn. —, 181 N. W. 346. See §§ 4167a, 6976.

The violation of the statutes constituting the law of the road by the plaintiff at the time of the accident will not defeat a recovery unless it was the proximate cause of the injury, without which it would not have occurred. Elvidge v. Stronge & Warner Co., 148 Minn. —, 181 N. W. 346. See 12 A. L. R. 458.

4163. Vehicles meeting—Turning to right—(52) Morken v. St. Pierre, 147 Minn. 106, 179 N. W. 681.

(53) See Kennedy v. Webster, 137 Minn. 335, 163 N. W. 519.

4164. Vehicles passing—Turning to left—Duty to yield for passage— The fact that the driver of a vehicle fails to give way to one passing from behind is not negligence unless the road is of sufficient width to permit passing and he knew or ought to have known of the purpose to pass. It is the duty of one passing from the rear to give a signal indicating his desire to pass. Evidence of the speed at which defendant passed held admissible. Dunkelbeck v. Meyer, 140 Minn. 283, 167 N. W. 1034.

The duty of a person operating a motorcar on a highway, toward one following at a more rapid pace, is to yield room enough for the latter to pass, when it is needful and practicable and when requested. Reader v. Ottis, 147 Minn. —, 180 N. W. 117.

4164a. Keeping to right of center of road—Intersections—Evidence held not to show conclusively that a bicyclist passed to the left of the center of the intersection of streets contrary to G. S. 1913, § 2634. Kennedy v. Webster, 137 Minn. 335, 163 N. W. 519.

Passing to the left of the center of the intersection of streets is probably conclusive of contributory negligence. Kennedy v. Webster, 137 Minn. 335, 163 N. W. 519.

After passing the center of the intersection of the streets a bicyclist was held, under the circumstances, not governed by the statutory law of the road, but by the common-law rule of ordinary care. Kennedy v. Webster, 137 Minn. 335, 163 N. W. 519.

See § 4167c.

4164e. Right of way at intersections—It is provided by statute that "the driver of any vehicle approaching or crossing a street or highway intersection shall give the right of way to any other vehicle approaching from his right on the intersecting street or highway, and shall have the right of way at such crossings over any vehicle approaching from his left on such intersecting street or highway." Laws 1919, c. 119, § 22; Carson v. Turrish, 140 Minn. 445, 168 N. W. 349; Hillstrom v. Mannheimer Bros., 146 Minn. 202, 178 N. W. 881.

Where neither party sees the other in time to avoid a collision the question of right of way is unimportant. A statement in a charge in such a case that plaintiff had the right of way at the time of the collision held not substantially prejudicial in view of the facts and of the charge as a whole. Johnson v. Brastad, 143 Minn. 332, 173 N. W. 668.

The statute does not warrant drivers of vehicles in taking close chances. When a driver approaches a street intersection, if he sees a vehicle approaching from his right, and near enough so that there is reasonable danger of collision if both proceed, then it is his duty to yield the right of way. Gibbs v. Almstrom, 145 Minn. 35, 176 N. W. 173.

The law of the road is not unyielding. It does not invariably give the vehicle to the right of the intersection the preference. Regard must be had to surrounding circumstances; and, in connection with state and municipal traffic regulations, the drivers of vehicles upon the public

streets always must be mindful of the abiding rule requiring the exercise of due care to avoid collision. The statute in question does not warrant drivers of vehicles in taking close chances, but, nevertheless, the court or jury is warranted in taking it into consideration in passing on the question of a plaintiff's contributory negligence. Syck v. Duluth St. Ry. Co., 146 Minn. 118, 177 N. W. 944.

The provision added to section 2552, G. S. 1913, by section 22, c. 119, Laws 1917, relating to the right of way at street intersections, applies to street cars. Syck v. Duluth St. Ry. Co., 146 Minn. 118, 177 N. W. 944.

Subdivision 2, § 22, c. 119, Laws 1917, providing that the driver of any vehicle, approaching or crossing a street or highway intersection, shall give the right of way to any other vehicle approaching from his right, construed and applied. Ignorance of the rule created by the statute is not a valid excuse for a failure of its observance. The rule of the statute is one of convenience, and was intended to standardize duties and obligations at intersecting highways and streets, but does not absolve one having the prior right from independent acts of negligence at such crossings. Rosenau v. Peterson, 147 Minn. 95, 179 N. W. 647.

Both cars reached the intersection practically at the same time, the plaintiff's a little ahead. Plaintiff saw defendant's car when it was about forty feet from the intersection. He made no effort to slacken his speed. He thought he could clear the crossing ahead of defendant's car. The collision occurred near the center of the intersection. The right front wheel of plaintiff's car struck the left side running board of defendant's car, which was approaching from the right, and, under chapter 119, § 22, Laws of 1917, had the right of way. Under the provisions of that statute the plaintiff was guilty of contributory negligence as a matter of law, if his testimony can be relied upon. Where an operator of an automobile approaching an intersection under such circumstances undertakes to cross the same, entirely disregarding the provisions of the statute, and thereby contributes to an injury, he does so at his peril. This statute should be rigidly adhered to as a means of safety to the traveling public. Lindahl v. Morse, 148 Minn. —, 181 N. W. 323.

4164f. Right of way as between main and side streets—There is no general rule giving vehicles on a main traveled street priority over vehicles on a side street at intersections. Carson v. Turrish, 140 Minn 445, 168 N. W. 349. See § 4165.

4165. Municipal regulation—The provision of the Minneapolis traffic ordinance that vehicles upon certain designated streets shall have the right of way, at street intersections, over vehicles upon the intersecting streets is not abrogated by the motor vehicle law. Plaintiff brought suit for injuries sustained in a collision at a street intersection between defendant's automobile and the automobile in which she was riding. The ordinance gave the right of way at this intersection to vehicles upon the street along which defendant was proceeding. The court ruled that the ordinance had been abrogated. Held prejudicial error. Bruce v. Ryan, 138 Minn. 264, 164 N. W. 982.

4166. Relative rights of pedestrians and vehicles—It is not contributory negligence as a matter of law for a pedestrian to cross a street elsewhere than at a regular crossing. Collins v. Dodge, 37 Minn. 503, 35 N. W. 368; Bolstad v. Armour & Co., 124 Minn. 155, 144 N. W. 462. See note, 3 A. L. R. 1113.

Persons may not heedlessly attempt to cross a street without looking to see whether other travelers are not also using or about to use the same crossing. Those about to cross a public street are in duty bound to use their eyes to observe the condition of the travel along that street from both directions. Syck v. Duluth St. Ry. Co., 146 Minn. 188, 177 N. W. 944.

(56) Kennedy v. Webster, 137 Minn. 335, 163 N. W. 519; Johnson v. Brastad, 143 Minn. 332, 173 N. W. 668; Hillstrom v. Mannheimer Bros., 146 Minn. 202, 178 N. W. 881; Unmacht v. Whitney, 146 Minn. 327, 178 N. W. 886. See Carson v. Turrish, 140 Minn. 445, 168 N. W. 349.

4166a. Collisions between teams and pedestrians—Plaintiff struck by carriage as he was walking diagonally across a corner of a city street. Negligence of defendant and contributory negligence of plaintiff held questions for the jury. Verdict for plaintiff sustained. Bolstad v. Armour & Co., 124 Minn. 155, 144 N. W. 462.

Plaintiff alighted from a street car and as he was passing around the rear end of the car toward the other side of the street was struck by defendant's ice delivery team. Held, that defendant's negligence and plaintiff's contributory negligence were questions for the jury. Lindell v. Citizens Ice & Fuel Co., 143 Minn. 479, 172 N. W. 802.

4166c. Collisions between teams and bicyclists—Collision between team and bicyclist at street intersection. Team at point in street where it had no right to be. Defendant's negligence and plaintiff's contributory negligence held questions for the jury. Verdict for plaintiff sustained. Notaro v. Mandel, 138 Minn. 422, 165 N. W. 267.

AUTOMOBILES AND OTHER MOTOR VEHICLES

4167. Right to use streets and roads—Not dangerous instrumentalities—An automobile is not classed with dangerous agencies like dynamite, and cannot be regarded as dangerous per se so as to render the owner liable on that ground alone for injuries resulting from its use, but the use of an automobile is fraught with more danger than the use of some other vehicles, and there is no objection to language in the charge to the jury calling attention to that fact. State v. Goldstone, 144 Minn. 405, 175 N. W. 892.

Courts refuse to treat automobiles as dangerous instrumentalities generally, but they take notice of the fact that in the hands of careless and reckless drivers they have become one of the most active agents of accidental death and destruction. State v. Hines, — Minn. —, 182 N. W. 450.

Reciprocal duty of automobilists and children in street. L. R. A. 1918A, 245.

(58) See §§ 4167a–4167n.

4167a. Speed—Regulation—G. S. 1913, § 2637, does not forbid the enactment of an ordinance imposing a wheelage tax on motor vehicles. Park v. Duluth, 134 Minn. 296, 159 N. W. 627.

Violation of a speed ordinance by an automobilist is negligence per se though the police of the city have resolved not to enforce it. Riser v. Smith, 136 Minn. 417, 162 N. W. 520.

The motor vehicle law (G. S. 1913, § 2637) annuls all city and village ordinances regulating or limiting the use or speed of motor vehicles, and undoubtedly abrogates all other municipal regulations which are inconsistent with it. Bruce v. Ryan, 138 Minn. 264, 164 N. W. 982. See § 4165.

It is proper to give the jury the statutes regulating speed, etc., when the evidence makes them applicable. Powers v. Wilson, 138 Minn. 407, 165 N. W. 231.

Section 2635, G. S. 1913, making it a penal offence to drive a motor vehicle, at a speed greater than is reasonable and proper having regard to the traffic, or so as to endanger life, limb or property, is not void for indefiniteness and it is valid. State v. Goldstone, 144 Minn. 405, 175 N. W. 892.

G. S. 1913, § 2635, as amended by Laws 1917, c. 475, makes certain speed prima facie evidence of negligence, but not conclusive evidence State v. Goldstone, 144 Minn. 405, 175 N. W. 892; Holland v. Yellow Cab Co., 144 Minn. 475, 175 N. W. 536.

Where two or more persons are unlawfully and negligently racing automobiles on a public highway, in concert, and thereby injure another, all are liable in damages for such injuries. Testimony considered, and held sufficient to require the submission of the question of the respondents' negligence to the jury. Racing automobiles upon a public highway is such an act of negligence as to make the parties thereto responsible for injuries resulting to others therefrom, nor does it necessarily relieve them from such liability, because the injured party happens to be in one of such racing cars. Reader v. Ottis, 147 Minn. —, 180 N. W. 117.

Our statute provides, in effect, that no person shall drive a motor vehicle upon any public highway of this state at a speed greater than is reasonable and proper, having regard to the traffic and use of the highway, or so as to endanger the life or limb or injure the property of any person. It also provides that if the speed of any motor vehicle operated on any highway outside of an incorporated city, town, or village exceeds twenty-five miles an hour for a distance of one-quarter of a mile, such rate of speed shall be prima facie evidence that the person operating the same is running at a rate of speed greater than is reasonable and proper. G. S. 1913, § 2635. Reader v. Ottis, 147 Minn. —, 180 N. W. 117.

G. S. 1913, § 2635, regulating the speed of motor vehicles in cities and

villages, is not to be construed as permissive in purpose; it merely sets a limit, an excess of which will constitute presumptive evidence of negligence. Notwithstanding the limit there prescribed, the speed of such vehicles in cities and villages must be measured by the conditions and dangers with which the driver is for the time surrounded, such as will constitute ordinary care in the particular case. Hinkel v. Stemper, 148 Minn. —, 180 N. W. 918.

A policeman is not chargeable with a violation of the Motor Vehicle Act solely because, while pursuing a lawbreaker to place him under arrest, he operates a motorcycle in a manner prohibited by the act. The words "police patrol wagons," as used in G. S. 1913, § 2619, include motorcycles, when operated by policemen in patrolling streets and highways. A peace officer in pursuit of a lawbreaker is required to observe the care which a reasonably prudent man would exercise in the discharge of official duties of a like nature under like circumstances. Edberg v. Johnson, — Minn. —, 184 N. W. 12.

4167b. Registration—Registration of an automobile is prima facie evidence of ownership in the person to whom the license is issued. The effect of the statute is not to make the question of ownership one for the jury in all cases. The direct evidence of ownership may be such as to require a peremptory instruction. Uphoff v. McCormick, 139 Minn. 392, 166 N. W. 788.

4167c. Duty to keep to right of center of road—Intersections—At the intersection of public highways it is the duty of the driver to keep to the right of the intersection of the centers of such highways when turning to the right, and to pass to the right of such intersection when turning to the left. Kokesh v. Price, 136 Minn. 304, 161 N. W. 715.

It is the duty of a driver of a motor vehicle to keep to the right of the center of a street or road. Riser v. Smith, 136 Minn. 417, 162 N. W. 520.

The duties of the driver of an automobile about to pass over a street intersection are regulated by statute. By showing a violation of the statutes applicable to the situation negligence is established, and, if an injury resulted from the disobedience of the statutes, liability follows, but may be avoided by establishing the contributory negligence of the person injured. Hillstrom v. Mannheimer Bros., 146 Minn. 202, 178 N. W. 881.

The driver of a vehicle is required by statute to keep, at all times, to the right of the center of a street on which he may be driving. Failure to do so constitutes actionable negligence. Unmacht v. Whitney, 146 Minn. 327, 178 N. W. 886.

A truck of defendants, turning to the left at a street corner, collided with plaintiff's motorcycle. From the evidence the jury might find that the truck was traveling in the center of the street and in turning, kept to the left of the street intersection. Such conduct is in violation of a statute and constitutes negligence per se. Elvidge v. Stronge & Warner Co., 148 Minn. —, 181 N. W. 346.

The fact that plaintiff was traveling to the left of the center of the

street, if it constituted negligence, was not conclusive against plaintiff, since the jury might find that this conduct did not help to cause the accident. Elvidge v. Stronge & Warner Co., 148 Minn. —, 181 N. W. 346. See § 4164a.

4167e. Duty to signal—Sounding horn—Extending hand—The statute provides that "upon approaching a pedestrian who is upon the traveled part of a highway, and not upon a sidewalk, * * * every person operating a motor vehicle shall slow down and give a timely signal with his bell, horn or other device for signaling." This does not apply where one steps in front of an automobile so that the driver, though in the exercise of due care, has no opportunity to see him and to take the statutory precautions. Benson v. Larson, 133 Minn. 346, 158 N. W. 426.

It is proper for the court to instruct the jury as to the duty of a driver to give warnings when approaching pedestrians and at intersections of highways, and to read to the jury portions of the statutes relating to such duty. Allen v. Johnson, 144 Minn. 333, 175 N. W. 545.

In an action for personal injuries, suffered by plaintiff as a result of a rear end collision with an auto-truck by a motorcycle, driven by him, which collision was caused by the sudden slackening of the speed of the truck in turning the same around in the middle of the block, without notice by extending the hand of the operator or otherwise, held, that the evidence supports the verdict. Stapp v. Jerabek, 144 Minn. 439, 175 N. W. 1003.

Defendant contends that the court erred in instructing the jury that, if the driver failed to sound his horn on approaching plaintiff, he was chargeable with negligence for failing to comply with this statutory requirement. Defendant argues that, as plaintiff saw the cab, he had all the warning that a signal would have given, and that failing to sound the horn could not have been the proximate cause of the accident. This might be true if the cab had been coming toward plaintiff when he saw it; but it was not according to his testimony, and he did not see it after it turned in his direction. Offerman v. Yellow Cab Co., 144 Minn. 478, 175 N. W. 537.

G. S. 1913, § 2632, provides that "every motor vehicle operated upon the public highway * * * shall be provided with * * * a suitable, adequate bell, horn, or other device for signaling," and that "upon approaching an intersecting highway, or a curve or a corner in a highway where the operative's view is obstructed, every person operating a motor vehicle shall slow down and give a timely signal with his bell, horn or other device for signaling." Plaintiff gave no signal at any time and had no signaling device. It is doubtful whether this statute applies to a motor vehicle approaching a street intersection where the view is unobstructed. Elvidge v. Stronge & Warner Co., 148 Minn. —, 181 N. W. 346.

It may be negligence for the driver not to extend his hand so as to indicate his intention of turning a corner. Evidence of a custom to do is admissible. Elvedge v. Stronge & Warner Co., 148 Minn. —, 181 N. W. 346.

Plaintiff attempted to pass defendant's truck at the street crossing without giving any signal. The court, in effect, charged that this was negligence. The evidence is not conclusive that this conduct of plaintiff contributed to the collision. The truck driver may have had knowledge of plaintiff's approach. He denied it but testified that he was looking in plaintiff's direction. The jury might find that he saw plaintiff. Elvidge v. Stronge & Warner Co., 148 Minn. —, 181 N. W. 346.

4167f. Duty to slow down in approaching street car taking on or discharging passengers—The driver of an automobile, in passing a street car on the side opposite the car gates, which car has stopped at the regular place to receive and discharge passengers, is bound to anticipate the probable sudden appearance of persons around the rear end of the car, and must give signals of his approach and have his automobile under control, as precautionary measures to avoid injury to them. Evidence tending to show that defendant without signal drove his automobile at a high rate of speed by and close to a standing street car, from which passengers were alighting, striking and injuring plaintiff as he stepped from behind the car, held properly submitted to the jury upon the issue of defendant's negligence. The verdict exonerating plaintiff from the charge of contributory negligence is sustained by the evidence. Johnson v. Johnson, 137 Minn. 198, 163 N. W. 160.

4167g. Duty when meeting or passing woman, child or aged person driving a horse—It is provided by G. S. 1913, § 2634, par. 2, that the driver of an auto upon meeting a team driven by a woman shall, upon the team exhibiting signs of fright, stop the auto, and if such signs of fright continue shall stop the motor. The plaintiff's wife was driving a team on a country road. An auto driven by one of the defendants approached from the opposite direction. There was evidence that the horses exhibited signs of fright, and that such fright continued. The driver of the auto, before reaching the team, and when close to it, turned aside into a trail or byroad and stopped the auto, but not the motor, and awaited the passing of the team. It is held that the auto and the team did not meet within the meaning of the statute, and that independently of the statute there was no basis for a finding of negligence. Affeld v. Murphy, 137 Minn. 331, 163 N. W. 530.

4167h. Collision between automobiles and pedestrians—Evidence held to justify a recovery for the death of a street sweeper run over by an automobile while he was at work on a city street. Hade v. Simmons, 132 Minn. 344, 157 N. W. 506.

The driver of a motor vehicle who fails to observe the requirements of a statute intended for the protection of pedestrians is liable for injuries proximately resulting from such failure though his conduct may not have been negligent in the absence of a statute; and under the evidence the charge of the court upon this point was without substantial error. Benson v. Larson, 133 Minn. 346, 158 N. W. 426.

Plaintiff was struck while walking diagonally across a street in a

southeasterly direction. A motor sprinkler was coming from the north on the westerly side of the street a few feet west of the center line. Still farther to the north, on the same side of the street, the defendant was coming in his automobile. The defendant turned to the left to pass the water sprinkler which was in operation. At this moment plaintiff was hastening across the street in front of the approaching sprinkler, and he and the automobile collided just east of the center line of the street. Verdict for defendant sustained. Benson v. Larson, 133 Minn. 346, 158 N. W. 426.

Plaintiff was struck by an automobile just as he was stepping from the curb to the pavement at the intersection of two streets. A street car was approaching the intersection. Defendant did not stop to let the street car pass but shot ahead and in front of it, compelling the street car to stop in the middle of the intersection. Plaintiff saw the street car but not the automobile before he stepped from the curb. Defendant was negligent in shooting ahead of the street car at high speed. Verdict for plaintiff sustained. Archer v. Skahen, 137 Minn. 432, 163 N. W. 784.

While a large auto truck some seven or eight feet high was standing at the curb in front of a store on the north side of Lake street in the city of Minneapolis and about fifty feet east of the intersection of that street with Lyndale avenue, plaintiff came out of the store and proceeded west along the sidewalk twelve or fifteen feet beyond the truck and then started diagonally across Lake street toward the southeast corner of the intersection of the two streets. As she stepped from the sidewalk to the street, she looked toward the east and saw nothing upon the street in that direction except the truck; she then looked toward the west, and when she had passed into the street about five feet outside the truck, again looked toward the east and saw the automobile at a short distance coming directly toward her at a high rate of speed. It swerved toward the curb as if to pass behind her, and she hurried forward; it then swerved toward the center of the street, and she was struck by the headlight or fender on the left side of the machine. When she looked eastward the first time, the automobile was apparently hidden from view by the truck. Under these circumstances, we cannot say that she was guilty of contributory negligence as a matter of law, and the action of the court in submitting the question to the jury was correct. Theisen v. Durst, 138 Minn. 353, 165 N. W. 128.

Plaintiff was struck by an automobile as she was crossing University avenue in St. Paul in the evening of a rainy night. She had just crossed two street car tracks in safety. Defendant's wind shield was in place and covered with mist so that the driver could not see, yet he was driving twenty or twenty-five miles an hour. The lights of his car were dim. Evidence held to justify a verdict for plaintiff and to make the question of her contributory negligence one for the jury. Defendant's car was driven by his son, a boy seventeen years old. Powers v. Wilson, 138 Minn. 407, 165 N. W. 231.

Plaintiff, a blind man, alighted from a street car and started toward the sidewalk without knowing that an automobile was approaching. Before reaching the curb he was struck by an automobile driven by defendant. The accident occurred in broad daylight and defendant, when two hundred feet away, saw plaintiff alight from the street car and watched him as he walked toward the sidewalk, but he did not know that he was blind and assumed that he would not place himself in the path of the automobile. Held, that the negligence of defendant and the contributory negligence of plaintiff were questions for the jury. Hefferon v. Reeves, 140 Minn. 505, 167 N. W. 423.

Defendant was operating his automobile upon a street known as Mary Place in the city of Minneapolis. As he approached Eleventh street, which crosses Mary Place at right angles, plaintiff stepped from the sidewalk, intending to cross Mary Place on the crosswalk, and walked directly into or against the automobile, and was thrown to the ground and injured. He was struck by the rear wheel and rear fender; a step forward as he came up to the moving automobile brought his foot directly in the path of the rear wheel, and the toe of his shoe was run over. The accident occurred at about 1 o'clock in the afternoon of June 2, 1917. There were no obstructions to a clear view up and down the street plaintiff was intending to cross, and he testified that he looked in both directions, but did not see the approaching automobile, though it must have been in plain view at the time and not far away. It appears in this connection that plaintiff's eyesight is defective, and no doubt that accounts for his failure to see the automobile. There is, however, no evidence that defendant knew anything about his defective vision, or that the particular situation, in the movements of plaintiff or otherwise, was such as to suggest the same. Held, that a verdict was properly directed for defendant. Provinsal v. Peterson, 141 Minn. 122, 169 N. W. 481.

Held not error to exclude evidence that defendant was driving at an excessive speed where it was clear that such speed had nothing to do with the accident. Plaintiff did not see the automobile approaching, but deliberately walked into its course. Provinsal v. Peterson, 141 Minn. 122, 169 N. W. 481.

Evidence held to make the question of defendant's negligence one for the jury and to justify a verdict for defendant. Olson v. Moorhead, 142 Minn. 267, 171 N. W. 923.

Defendant seventy-seven years old and with defective sight and hearing was driving an automobile on a city street. He drove over a boy of seven. The street was crowded and the boy ran from behind another conveyance. Defendant was driving four or five miles an hour. He testified that he saw the boy at a distance of four or five feet from the car. On other occasions he is alleged to have said he did not see the boy at all. His automobile passed clear over the boy. Held, the evidence raised an issue of fact as to his negligence. The question of the boy's contributory negligence was for the jury. The court charged the

jury that in determining the contributory negligence of the boy they should take his age into account and that in determining the negligence of defendant they might take into account his age and infirmities. This plainly meant that such facts were to be considered extenuation in both cases. This was erroneous as to defendant. When one injures others, his negligence is to be judged by the standard of care usually exercised by the ordinarily prudent normal man. Roberts v. Ring, 143 Minn. 151, 173 N. W. 437.

Plaintiff was struck by an auto truck at the intersection of city streets. On leaving the curb to cross the street plaintiff looked both ways and saw no street cars or other vehicles approaching. He did not look again while crossing and was struck by the truck before he saw it approaching. Held, that the question of his contributory negligence was a question for the jury. The question of right of way was not important as neither party saw the other in time to avoid the collision. A statement in the charge that plaintiff was entitled to the right of way was not substantially prejudicial in view of the facts and the charge as a whole. Johnson v. Brastad, 143 Minn. 332, 173 N. W. 668.

Decedent was struck by an automobile as she was crossing the street at the intersection of two streets in a city in broad daylight. Defendant was driving her automobile at an excessive speed. There was a street car and a standing truck near the place of accident. In passing between the street car and truck defendant first saw decedent hurriedly crossing the street toward the car evidently to board it. The street was wet and slippery and the automobile skidded. Evidence held to justify a verdict against defendant, the questions of negligence and contributory negligence being for the jury. Plasch v. Fass, 144 Minn. 44, 174 N. W. 438.

The evidence sustains a finding of the jury that the defendant, whose auto came into collision with the plaintiff, was negligent; and it was not such as to require a finding that the plaintiff was negligent. There was no error in calling the attention of the jury to the dangers attendant upon the use of an automobile, when explaining the care required, and the charge was not to the effect thaat an auto is a dangerous instrumentality. There was no error in instructing as to the duty of a driver to give warnings, nor in reading a portion of G. S. 1913, § 2632, relative to the duties of a driver when approaching a pedestrian or a street intersection. There was no prejudicial error in instructing the jury that the defendant claimed that the plaintiff walked in front of his auto and was injured, although his claim was that he walked into it. Allen v. Johnson, 144 Minn. 333, 175 N. W. 545.

Evidence held to justify a finding that decedent was killed by being run over by an automobile and not by jumping from a carriage. Bursaw v. Plenge, 144 Minn. 459, 175 N. W. 1004.

In an action for the wrongful death of plaintiff's intestate, caused by being run over by an automobile negligently operated by defendant, the evidence is held to support the verdict, and that there was no reversible error in the rulings of the court in the admission or exclusion of evidence. Bursaw v. Plenge, 144 Minn. 459, 175 N. W. 1004.

Collision between taxicab and pedestrian at intersection of city streets. Judgment for plaintiff sustained. Offerman v. Yellow Cab Co., 144 Minn. 478, 175 N. W. 537.

There is evidence that an employee of one of the defendants drove a truck, before daylight in the morning, past a street car and across a street intersection, at a speed of twenty-five miles an hour, without a light or the giving of signal, and collided with a pedestrian at the street intersection. The jury's finding of negligence is sustained. When a driver approaches a street intersection, with view obstructed he must be on the lookout for cross traffic, and must have his vehicle under such control that he may stop it as occasion requires. Geiger v. Sanitary Farm Dairies, 146 Minn. 235, 178 N. W. 501.

Plaintiff was struck by an automobile as she stepped from curb to pavement. The street had parking down the center. Defendant failed to keep to right of center of street. The accident occurred about 10 o'clock on a dark, murky evening. Plaintiff did not see the lights on the car, if in fact they were lighted, and was wholly unaware of the approach of the car. Contributory negligence for jury. Verdict for plaintiff sustained. Unmacht v. Whitney, 146 Minn. 327, 178 N. W. 886

Plaintiff and his wife were struck by an automobile on a city street. It was raining and they were under an umbrella. Automobile running at execssive speed slewed around on the wet pavement and struck them as the driver turned out to avoid them. The vision of the driver was obscured by the darkness, rain and wet wind shield. Held, that the questions of negligence and contributory negligence were for the jury. Gibson v. Gray Motor Co., 147 Minn. 134, 179 N. W. 729.

The accident occurred at the intersection of Nicollet avenue and Seventh street in the city of Minneapolis, which cross at right angles. Plaintiff was walking out on Nicollet avenue; her destination being her home on Twelfth street South. As she reached the curb on Seventh street, and before attempting to cross she paused and looked to the right, and noticed that the travel was along Nicollet avenue in harmony with directions of a semaphore in charge of a traffic officer at that point. She then started across the street, and when she reached the center thereof the semaphore was changed, and the traffic then proceeded across Nicollet avenue from both directions on Seventh street. She saw for the first time after passing the center of the street an automobile truck approaching her from behind, which overtook and struck her down, causing the injuries complained of. Questions of negligence and contributory negligence held for the jury. Hinket v. Stemper, 148 Minn. —, 180 N. W. 918.

4167i. Collisions between automobiles, trucks, etc.—Collision between a jitney automobile bus and a motor truck at a street crossing in a city. Plaintiff, driving the bus, claimed that defendant, driving the truck, slowed down or stopped and signaled plaintiff to proceed, and then unexpectedly proceeded. Defendant claimed that plaintiff was driving at an excessive speed. To avoid the collision, plaintiff turned his machine

sharply to one side so that it struck or skidded against the curb. Verdict for defendant held justified by the evidence. Fransen v. Martin Falk Paper Co., 135 Minn. 284, 160 N. W. 789.

Evidence held not conclusive that car in which plaintiff was riding reached a street intersection appreciably in advance of defendant's car. Bruce v. Ryan, 138 Minn. 264, 164 N. W. 982.

Collision between two automobiles at intersection of main traveled street and a side street. Defendant was driving at an excessive speed on main street. Evidence held to justify a verdict for plaintiff. Carson v. Turrish, 140 Minn. 445, 168 N. W. 349.

The evidence sustains the finding of the court that the defendant negligently ran its auto truck into the auto of the plaintiff which was parked along the side of a village street. An ordinance of the village prohibited the parking of an auto within twenty feet of a hydrant. That the plaintiff's auto was so parked did not prevent a recovery. Denson v. McDonald Bros., 144 Minn. 252, 175 N. W. 108.

Collision between touring car and taxicab at intersection of city streets. Plaintiff was a passenger in the touring car and had no control over the driver. Plaintiff's contributory negligence held not to appear as a matter of law because the touring car was exceeding the speed limit prescribed by G. S. 1913, § 2635, as amended by Laws 1917, c. 475. Judgment for plaintiff sustained. Holland v. Yellow Cab Co., 144 Minn. 475, 175 N. W. 536.

Collision between automobiles at intersection of city streets. Evidence held to justify a verdict for plaintiff. Gibbs v. Almstrom, 145 Minn. 35, 176 N. W. 173.

Collision between two automobiles going in opposite directions on a country road. Evidence held to justify a verdict for defendant. New trial granted for erroneous charge as to contributory negligence. Hamden v. Miller, 145 Minn. 483; 175 N. W. 891.

Collision between automobile and delivery truck at intersection of streets. Defendant violated the statutes. Plaintiff's contributory negligence held for jury. Verdict for plaintiff sustained. Hillstrom v. Mannheimer Bros., 146 Minn. 202, 178 N. W. 881.

On the facts stated in the opinion it is held that both parties are chargeable with negligence contributing to and causing a collision between their respective automobiles at a highway crossing and that neither can recover from the other. Rosenau v. Peterson, 147 Minn. 95, 179 N. W. 647.

4167j. Collisions between automobiles and teams—Plaintiff was driving a horse and carriage. Defendant passed him from behind in an automobile. As defendant turned into the road after passing, some poles in the automobile struck plaintiff's horse and caused him to run away, injuring plaintiff and his carriage. Evidence held to justify a finding that defendant was negligent and plaintiff was not. Dunkelbeck v. Meyer, 140 Minn. 283, 167 N. W. 1034.

Collision between motor truck and team, killing driver of team. Truck

was being backed to sidewalk to discharge load. Teamster was using his team to pull out a stalled wagon. Truck was moved forward in preparation for backing as team pulled stalled wagon out and there was a collision whereby the teamster was crushed between a wagon wheel and the truck. Verdict for plaintiff sustained. Young v. Avery Co., 141 Minn. 483, 170 N. W. 693.

4167k. Collisions between automobiles and bicycles or motorcycles— Collision between bicyclist and motor truck. Contributory negligence of bicyclist held a question for the jury. Evidence held to justify a verdict for plaintiff. Boll v. C. S. Brackett Co., 134 Minn. 268, 158 N. W. 609, 159 N. W. 1095.

Collision between a bicyclist and automobile at intersection of city streets. Evidence held to justify a verdict for plaintiff. Wentworth v. Butler, 134 Minn. 382, 159 N. W. 828.

Plaintiff was riding a motorcycle going north on the right hand side of a city street. Defendant was driving an automobile going south. Ahead of defendant was another automobile. Defendant turned to the left to pass the automobile and in the act collided with plaintiff. In turning defendant crossed the center of the street and was exceeding the speed limit set by the city ordinance. Held, that defendant was negligent and plaintiff was not. Riser v. Smith, 136 Minn. 417, 162 N. W. 520.

A boy eleven years old riding on a bicycle was injured by collision with an automobile at a street intersection. The evidence is that the boy crossed in front of the automobile. The driver of the automobile did not see him and there is evidence that the automobile suddenly increased speed while the boy was passing in front of it. Held, there was evidence that the driver of the automobile was negligent. The question of contributory negligence was for the jury. Kennedy v. Webster, 137 Minn. 335, 163 N. W. 519.

Bicyclist, a boy ten or eleven years old, struck and killed by an automobile as he suddenly turned to the left to cross a street. The automobile was following the bicycle at a speed of twenty to twenty-five miles an hour. The question of negligence on the part of defendant and of contributory negligence on the part of the boy was submitted to the jury, who returned a verdict for the defendant. Held, that the evidence justified the verdict. Kelly v. McKeown, 139 Minn. 285, 166 N. W. 329.

Plaintiff, a boy eighteen years old, was riding on a motorcycle south on a country road, on the right side, about nine o'clock on a summer evening, going about fifteen miles an hour. Defendant was driving his automobile north, going ten or twelve miles an hour. They met at a point where the road was lined on both sides with trees and made darker by them. The light on plaintiff's bicycle was burning. When they were about one hundred and fifty feet apart, defendant turned on his lights, the one on the right side alone working, and commenced to turn out, but his left hind wheel was still on the track when the collision occurred.

Plaintiff claimed that when one light was turned on his eyes were dazzled thereby, and that there being but one light he supposed that it was a spot light. Spot lights are carried on the left of the windshield. This led him to think that the automobile was safely out of the track. Held. that it was error to order judgment for defendant. Williams v. Larson, 140 Minn. 468, 168 N. W. 348.

In an action for personal injuries, suffered by plaintiff as a result of a rear end collision with an auto truck by a motorcycle, driven by him, which collision was caused by the sudden slackening of the speed of the truck in turning the same around in the middle of the block, without notice by extending the hand of the operator or otherwise, held, that the evidence supports the verdict for plaintiff. Stapp v. Jerabek, 144 Minn. 439, 175 N. W. 1003.

A boy thirteen years old, while riding a bicycle on a city street, was struck and run over by defendant's automobile. Verdict for plaintiff sustained. In its charge to the jury on the question of the contributory negligence of the boy, the court did not err in saying: "Did he shut his eyes to that which he was bound to see and which was obvious?" The court followed that question by saying both parties were bound to the reasonable use of all their senses for the prevention of accidents and to the exercise of such reasonable caution as an ordinarily careful and prudent person would exercise under like circumstances. Rasten v. Calderwood, 145 Minn. 493, 175 N. W. 1007.

The evidence is sufficient to sustain the finding that the driver of the automobile negligently failed to turn to the right as required by the law of the road. Morken v. St. Pierre, 147 Minn. 106, 179 N. W. 681.

Plaintiff, riding a motorcycle, attempted to pass defendant's truck at a street crossing without signaling and while riding to the left of the center of the street. Defendant was driving in the center of the street and suddenly turned to the left of the center of the street at a street intersection, failing to extend his hand to indicate his intention of turning. Plaintiff failed to signal before approaching intersection. Verdict for plaintiff sustained. Elvidge v. Stronge & Warner Co., 148 Minn. —, 181 N. W. 346.

4167l. Frightening horses—Plaintiff was driving a wagon loaded with furniture going south on a city street. An auto van of defendant came from the east on an intersecting street and turned toward plaintiff from the south and at first was on the west side of the street on which plaintiff was driving. The van had curtains which flapped and made a noise, causing plaintiff's horses to take fright and run away damaging the furniture. Evidence held to justify verdict for plaintiff. La Brash v. Wall, 134 Minn. 130, 158 N. W. 723.

4167m. Collisions with animals—Collision between automobile and cow on highway. Action for damages. Under a complaint charging negligence in general terms, held that plaintiff might prove all the circumstances. Saylor v. The Motor Inn, 136 Minn. 466, 162 N. W. 71.

4167n. Duty to have headlights—Section 2632, G. S. 1913, requires motor vehicles to be equipped with headlights, the rays of light from which shall be visible for 200 feet ahead. Whether failure to carry such a light was a proximate cause of injury to one approaching an automobile from the side was a question for the jury. Thomas v. Stevenson, 146 Minn. 272, 178 N. W. 1021. See Geiger v. Sanitary Farm Dairies, 146 Minn. 235, 178 N. W. 501; Laws 1921, c. 472, § 4.

USE

4168. In general—The use of a highway for purposes of play or recreation is a proper use, at least if it does not interfere with public travel. Barrett v. Princeton, 135 Minn. 56, 160 N. W. 190.

Except as expressly provided otherwise all persons have an equal right in the use of a highway and must respect the reciprocal rights of others and exercise reasonable care to avoid injuring them. Each must exercise his right in a reasonable manner and is required to exercise care commensurate with the risk involved, under the circumstances of each case, to avoid harming others. Carson v. Turrish, 140 Minn. 445, 168 N. W. 349.

See §§ 4166, 4167.

4171. Pedestrians—One ejecting a person from a building upon a street is bound to exercise reasonable care to avoid injuring bystanders on the street. Feeney v. Mehlinger, 136 Minn. 42, 161 N. W. 220.

The owners and occupants of buildings on streets are bound to exercise reasonable care to avoid injuring pedestrians on the street by falling objects from the buildings. See Digest, § 6996.

(64) Thoorsell v. Virginia, 138 Minn. 55, 163 N. W. 976.

4172. Bicycles—(65) Notaro v. Mandel, 138 Minn. 422, 165 N. W. 267.

4173. Fire department—The fire apparatus of a city, while on its way to a fire, is excepted from the speed restrictions imposed by the motor-vehicle act, though the fire is outside the city limits. Hubert v. Granzow, 131 Minn. 361, 155 N. W. 204.

4174. Moving buildings—(68) Collar v. Bingham Lake Rural Tel. Co., 132 Minn. 110, 155 N. W. 1075. See § 9584.

4175. Deposit of merchandise or other material—A public alley is not a proper place in which to keep a skid except when in use in a transfer business by the abutting owner. Rothenberger v. Powers Fuel etc. Co., 148 Minn. —, 181 N. W. 641.

The abutting owner has no right to use the street or sidewalk for the deposit, exhibition or sale of goods. 6 A. L. R. 1314.

(69) See Rothenberger v. Powers Fuel etc. Co., 148 Minn. —, 181 N. W. 641; Boecher v. St. Paul, — Minn. —, 182 N. W. 908.

4177. Frightening horses—Frightening horse by riding bicycle. Thompson v. Dodge, 58 Minn. 555, 60 N. W. 545.

Transporting or conducting object that frightens horses. 5 A. L. R. 940.

(72) See La Brash v. Wall, 134 Minn. 130, 158 N. W. 723 (flapping curtains on an auto van).

OBSTRUCTION

4179. What constitutes—Liability of highway contractor for barricading or obstructing street. 7 A. L. R. 1203.

(74) Smith v. St. Paul, 137 Minn. 109, 162 N. W. 1062 (trap door and wooden covering over a trap door leading to an area under a public alley).

RIGHTS OF ABUTTING OWNERS

4182. In general—Abutting owner has no right to use street, including sidewalk, for the deposit, exhibition or sale of goods. 6 A. L. R. 1314.

(85) Rost v. O'Connor, 145 Minn. 81, 176 N. W. 166.

4183. Fee to center—The fee in a street may be acquired by adverse possession, subject to the right of the public easement. Rupley v. Fraser, 132 Minn. 311, 156 N. W. 350.

(87) Rupley v. Fraser, 132 Minn. 311, 156 N. W. 350; Rost v. O'Connor, 145 Minn. 81, 176 N. W. 166; Pederson v. Rushford, 146 Minn. 133, 177 N. W. 943. See § 4186.

4184. Right of access—(89) Maletta v. Oliver Iron Mining Co., 135 Minn. 175, 160 N. W. 771; Wrigley v. Yellow Cab Co., — Minn. —, 182 N. W. 170.

(90) Maletta v. Oliver Iron Mining Co., 135 Minn. 175, 160 N. W. 771.

4186. Right to soil, minerals, trees, etc.—The title of the owner of land abutting on a public highway extends to the center of the road and includes all trees standing and growing therein, of which he can be deprived for the public use by due process of law only. Rost v. O'Connor, 145 Minn. 81, 176 N. W. 166. See note, 9 A. L. R. 1269.

The abutting lot owner owns to the center of the street or alley, and his ownership includes trees growing therein. The public has but an easement and the abutting owner may use his land for a purpose compatible with the use of the public easement. Applying the principles stated, it is held that the defendants were liable for removing a woodshed and cutting down and converting a tree growing in an alley upon which the plaintiff's property abutted. Pederson v. Rushford, 146 Minn. 133, 177 N. W. 943.

Right to lay pipes, build ways, vaults etc., under surface of street. 7 A. L. R. 646.

(92) Rost v. O'Connor, 145 Minn. 81, 176 N. W. 166. See L. R. A. 1917F, 389 (right of abutting owner to remove trees).

4189. Remedies—Upon the showing made it was within the discretion of the trial court to grant a temporary injunction restraining the de-

fendant cab company from installing a call telephone in the street upon a building immediately adjacent to the premises occupied by the plaintiff. Wrigley v. Yellow Cab Co., — Minn. —, 182 N. W. 170.

(95) Wrigley v. Yellow Cab Co., — Minn. —, 182 N. W. 170.

LIABILITIES OF ABUTTING OWNERS

4190. Negligence—See §§ 6845, 6996.

HOLIDAYS

4191. What acts prohibited—The service of a summons in a civil action on any of the days declared legal holidays by G. S. 1913, § 9412(6) is void and confers no jurisdiction. Farmers Implement Co. v. Sandberg, 132 Minn. 389, 157 N. W. 642.

HOMESTEAD

IN GENERAL

4192. Definition—What constitutes—Eighty acres of land and the dwelling house thereon, owned by a married man who had left his wife and children, and which were occupied by him with a woman unlawfuly living with him as his wife, constituted his homestead as defined by G. S. 1913, § 6957. Rux v. Adam, 143 Minn. 35, 172 N. W. 912.

4193. Object and general policy of law—(8) Bacon v. Mirau, 148 Minn. —, 181 N. W. 579.

4196. Title essential to support exemption—(21) Shraiberg v. Hanson, 138 Minn. 80, 163 N. W. 1032 (interest of vendee in executory contract for sale of land).

(22) Gilbert v. Case, 136 Minn. 257, 161 N. W. 515.

4197. Title may be in husband or wife or in both—The title to a part of the land occupied by a husband and wife as a homestead may be in the husband and the title to the remainder in the wife, holding by separate titles and not in common. Gilbert v. Case, 136 Minn. 257, 161 N. W. 515.

(27) Small v. Anderson, 139 Minn. 292, 166 N. W. 340; Oxborough v. St. Martin, 142 Minn. 34, 170 N. W. 707. See Millett v. Minnesota Crushed Stone Co., 145 Minn. 475, 177 N. W. 641.

4199. Insolvent debtor may buy a homestead—A judgment debtor transferred to his wife all his unexempt property, in consideration of a transfer by his wife to him of certain real property which the debtor thereafter claimed as his homestead, and as such exempt from sale on

execution. His claim was that the transaction was had for the sole purpose of acquiring a homestead, but the evidence tended to show that the aprties then occupied the particular property as a family home, though the title was of record in the wife's name. It is held that the findings of the trial court to the effect that the transaction was entered into by the parties for the purpose of defrauding the creditors of the husband are sustained by the evidence. The rule stated and applied in Jacoby v. Parkland Brewing Co., 41 Minn. 227, 43 N. W. 52, should not be extended to a case where the debtor has existing homestead rights in property standing of record in the wife's name. Small v. Anderson, 139 Minn. 292, 166 N. W. 340.

(30) See 5 Minn. L. Rev. 383.

4204. Size of homestead in cities—(39) State v. Minnesota Tax Commission, 135 Minn. 205, 160 N. W. 498

4207. No limitation on use except occupancy as a home—(43–45) Stauning v. Crookston Mercantile Co., 134 Minn. 478, 159 N. W. 788.

(45) Bacon v. Mirau, 148 Minn. —, 181 N. W. 579.

LIABILITY FOR DEBTS

4208a. Creditors acquire no rights by unauthorized levy—A creditor, seeking a mere money judgment for a debt which under no statutory or constitutional provision is, or may be adjudged, a lien upon the homestead of the defendant, cannot, by procuring an attachment to be issued in the action and a levy to be made upon such homestead, acquire a lien thereon, so as to give the right of redemption. Defendant's failure to move to vacate the attachment, granted on the ground that he was a non-resident, and his failure to move to set aside the levy, does not conclude him either on the question of residency or of homestead right; and he may still assert, in a proper action, his homestead right in the property upon which the levy was made, and have the levy and all proceedings taken thereunder adjudged null and void. Beigler v. Chamberlin, 145 Minn. 104, 176 N. W. 49.

4210. Exception in favor of mechanics and materialmen—Where the owner of a homestead insures the same against loss by fire and the property is subsequently destroyed, the person who furnished material for the construction of the building, in the absence of some contract stipulation, has no claim to or lien upon the insurance money, by force of section 12, art. 1, of the constitution or otherwise, and such insurance money is exempt from garnishment under subdivision 13, § 7951, G. S. 1913. Remington v. Sabin, 132 Minn. 372, 157 N. W. 504.

(51) L. R. A. 1918D, 1055.

(52) Ramstadt v. Thunem, 136 Minn. 222, 161 N. W. 413.

TRANSFER AND INCUMBRANCE

4211. Necessity of husband and wife joining in conveyance—Statute— An agreement by a husband to give a town a right of way for a road across his homestead is void if his wife does not join or consent. Warsaw v. Bakken, 133 Minn. 128, 156 N. W. 7, 157 N. W. 1089.

In an action brought against the husband alone, the wife not being a party, the court entered judgment directing the defendant and his wife to convey to plaintiff an undivided half interest in land the title to which was in defendant and which was the homestead of defendant and his wife, adjudging that in case of failure to convey the judgment stand as a conveyance. Defendant and his wife did not convey, nor did either of them. Held, that the judgment was void both as to the wife and the husband. Brokl v. Brokl, 133 Minn. 218, 158 N. W. 250.

A conveyance of the homestead not executed as required by statute is void; but the grantors may by their conduct estop themselves from asserting its invalidity. Where both husband and wife intended to convey the homestead, and both executed and delivered formal deeds for the purpose of conveying it, a subsequent purchaser, who in good faith has purchased the land and placed himself in such position that the repudiation of such deeds will work manifest injustice to him, may invoke the protection of the doctrine of estoppel. The finding of the trial court that plaintiff is estopped from asserting the invalidity of the conveyance here in question is sustained by the evidence. Bullock v. Miley, 133 Minn. 261, 158 N. W. 244.

A contract for the sale of the homestead, of which the husband and wife are owners as joint tenants, is not invalid for all purposes upon the ground that the same was executed by the wife without the husband joining therein, under section, 6961, G. S. 1913, the husband thereafter confirming the same and both husband and wife being ready and willing to perform the conditions thereof and offering so to do. The sole object of the statute is to prevent the alienation of the homestead without both husband and wife joining therein. The statute was not intended for the protection of the purchaser, and may be enforced against him by the wife, her husband being ready and willing to join with her therein. Lennartz v. Montgomery, 138 Minn. 170, 164 N. W. 899.

Husband and wife must join in a lease of a homestead. Oxborough v. St. Martin, 142 Minn. 34, 170 N. W. 707.

A deed not signed by the lawful wife of the grantor is void and it is immaterial that she is not living with him. Rux v. Adam, 143 Minn. 35, 173 N. W. 912.

A husband may lease a portion of a homestead for a period of six months without his wife joining in the lease, if the lease does not interfere with the use of the property as a homestead. Bacon v. Mirau, 148 Minn. —, 181 N. W. 579.

(58) Rux v. Adam, 143 Minn. 35, 172 N. W. 912.

(70) See Kelly v. First State Bank, 145 Minn. 331, 177 N. W. 347.

(71) Warsaw v. Bakken, 133 Minn. 128, 156 N. W. 7, 157 N. W. 1089 (evidence held not to show an estoppel); Bullock v. Miley, 133 Minn. 261, 158 N. W. 244. See Fuller v. Johnson, 139 Minn. 110, 165 N. W. 874; Havel v. Costello, 144 Minn. 441, 175 N. W. 1001; State Bank v. Strandberg, 148 Minn.—, 180 N. W. 1006.

(81) Bullock v. Miley, 133 Minn. 261, 158 N. W. 244.

ENFORCEMENT AND PROTECTION OF RIGHT

4213. Selection after levy—Statute—(83) Beigler v. Chamberlin, 145 Minn. 104, 176 N. W. 49.

ABANDONMENT, WAIVER, FORFEITURE AND ESTOPPEL

4215. Removal—Notice of claim—Statute—While it is proper, speaking generally, to allow proof of a homestead claimant's intention to return and retain the premises as a homestead, yet in this case the plaintiff's own testimony was conclusive against her, and the exclusion of the proof of her intention was without prejudice to her rights. Hall v. Holland, 138 Minn. 403, 165 N. W. 235.

Where an owner ceases to occupy his homestead for six consecutive months without filing the statutory notice, a judgment constituting a lien on his property in the county attaches to the homestead at the expiration of the six months. Hall v. Holland, 138 Minn. 403, 165 N. W. 235.

On March 16, 1916, O. was the owner of and occupied the premises in question with his wife, as their homestead. On that day he shot and killed his wife, and was immediately arrested and lodged in jail, where he remained until June, when he was convicted and sentenced to the state prison for life. Held, that said premises continued to be his homestead until he conveyed the same to plaintiff in May, 1916. Millett v Pearson, 143 Minn. 187, 173 N. W. 411.

A homesteader does not lose his rights by an involuntary removal from his homestead when committed to an insane asylum. Beigler v. Chamberlin, 145 Minn. 104, 176 N. W. 49.

(97) Millett v. Pearson, 143 Minn. 187, 173 N. W. 411.

(99) Hall v. Holland, 138 Minn. 403, 165 N. W. 235.

4216. Sale or removal—Effect—Statute—As against creditors, a deed conveying both a homestead and unexempt land is valid as to the homestead, even if fraudulent as to the unexempt land. Thysell v. McDonald, 134 Minn. 400, 159 N. W. 958.

Husband and wife may convey a homestead owned by either to whomsoever they choose, free from any and all claims of creditors against either of them, with certain exceptions. Oxborough v. St. Martin, 142 Minn. 34, 170 N. W. 707.

(7) Thysell v. McDonald, 134 Minn. 400, 159 N. W. 958.

4216a. Waiver—Confession of judgment—A statement in a confession of judgment, upon a promissory note given for borrowed money, waiving defendant's right and benefit of the law exempting property from sale on execution, does not subject defendant's homestead to levy under execution issued upon such judgment. Benning v. Hessler, 144 Minn. 403, 175 N. W. 682.

A homesteader loses no rights by failing to move to vacate an unauthorized levy on his homestead. Beigler v. Chamberlin, 145 Minn. 104, 176 N. W. 49.

4217. Estoppel—(11) See Havel v. Costello, 144 Minn. 441, 175 N. W. 100; § 4211.

RIGHTS OF SURVIVING SPOUSE AND CHILDREN

4220. Descent to surviving spouse—Upon the death of the owner intestate the homestead descends to his surviving spouse and children. Their rights vest on the day of his death, without any acts on their part or on the part of the probate court. Rux v. Adam, 143 Minn. 35, 172 N. W. 912; In re Murphy's Estate, 146 Minn. 418, 179 N. W. 728.

(20) Rux v. Adam, 143 Minn. 35, 172 N. W. 912; In re Murphy's Estate, 146 Minn. 418, 179 N. W. 728.

4221. Assent of spouse to testamentary disposition—Under Rev. Laws 1905, § 3647, a testamentary disposition of the homestead in a will which makes no provision for the surviving spouse is void unless and until such surviving spouse consents thereto in writing. No provision being made for the surviving spouse, she was not put to her election under section 3649, and never lost the right to claim that the disposition was void. Upon her death before the probate of the will, the children of the testator have the right to insist that the homestead should descend as provided by the statute, unaffected by the will. The contestants, sons of the testator, to whom he devised no interest in the homestead, are not estopped from claiming that the disposition thereof was invalid. Hawkinson v. Oleson, 140 Minn. 298, 168 N. W. 13.

(23) Hawkinson v. Oleson, 140 Minn. 298, 168 N. W. 13.

4222. Election of surviving spouse to take under will—(31) See Hawkinson v. Oleson, 140 Minn. 298, 168 N. W. 13.

4224. Exemption from debts of decedent—(33) Rogers v. Benz, 136 Minn. 83, 161 N. W. 395, 1056.

HOMICIDE

4225. Definition—Murder in the first degree involves a premeditated design to effect death; and murder in the second degree a design to effect death but without deliberation and premeditation. State v. Nelson, 148 Minn.—, 181 N. W. 850.

4230. By conspirators—The court correctly stated to the jury the facts which must exist to justify the conviction of the defendant; and it did not err in refusing a requested instruction making the defendant's guilt dependent upon his intent or purpose when he went to the place of killing, irrespective of his intent or purpose when the killing occurred, or his aiding or abetting therein. State v. Shea,— Minn —, 182 N. W. 445.

The evidence did not require a finding that the defendant entered into an arrangement with certain of his codefendants to commit a burglary, that the killing for which he was indicted was agreed upon by his codefendants alone, that it was not in furtherance of the burglary, and that he was not present aiding or abetting; and it sustains a finding that he entered into an arrangement with certain of his codefendants for the killing, and was present aiding and abetting. State v. Shea,— Minn.—, 182 N. W. 445.

(12) See State v. Pennington,— Minn.—, 182 N. W. 962.

4232a. Justifiable homicide by officer—Evidence held not to show that the killing of an escaping prisoner by a public officer was justifiable. Haack v. Coughlan, 134 Minn. 78, 158 N. W. 908.

4233. Murder in second degree—The jury may find a design to effect death from the force and brutal manner in which blows were evidently struck by a deadly weapon. State v. Pennington,— Minn.—, 182 N. W. 962.

4234. Murder in third degree—Murder in the third degree may be committed, without an intent to kill, by one while engaged in the commission of a felony. State v. Nelson, 148 Minn.—, 181 N. W. 850.

4240a. Manslaughter in first degree—Manslaughter in the first degree may be committed, without an intent to kill, by one while engaged in the commission of a misdemeanor. State v. Nelson, 148 Minn. —, 181 N. W. 850.

To constitute manslaughter in the first degree where the killing is in a "cruel and unusual manner" there must be some refinement or excess of cruelty approaching barbarity and especially shocking. State v. Abdo,— Minn.—, 183 N. W. 143.

4241. Manslaughter in second degree—Defendant driving an automobile on a public highway struck a pedestrian. The evidence is sufficient to establish that defendant was guilty of culpable negligence, and

that the pedestrian was injured thereby. The evidence, that the pedestrian was previously in good physical condition, that he was knocked down and run over, was picked up unconscious, and died in a few hours, is sufficient to establish that the contact with the car caused his death. No expert testimony is necessary. It is the infliction of death by culpable negligence that constitutes manslaughter in the second degree under subdivision 3, section 8612, of our statutes. Disobedience of section 2635 may constitute culpable negligence. It was not error to refuse to instruct the jury that negligence, to be punishable criminally, must be foolhardy. An automobile is not to be classed with dangerous agencies like dynamite, and cannot be regarded as dangerous per se so as to render its owner liable on that ground alone for injuries resulting from its use, but the use of an automobile is fraught with more danger than the use of some other vehicles, and there is no objection to language in the charge to the jury calling attention to that fact. Judgment affirmed. State v. Goldstone, 144 Minn. 405, 175 N. W. 892.

The charge in the indictment being that the crime was committed by driving an automobile at excessive and unlawful speed against a car in which the person killed was riding, it was proper for the court to call the attention of the jury to the statute requiring drivers to slow down the speed on approaching highway crossings; the testimony showing that the collision occurred at or near such a crossing. State v. Hines. — Minn. —, 182 N. W. 450.

The defendant was convicted of manslaughter in the first degree under the statute defining manslaughter in the first degree as an unjustifiable killing committed "in the heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon," upon the theory that in the heat of passion he intentionally knocked or threw the deceased over a stairway banister in an apartment house to the landing twenty-eight feet below, whereby he was killed, though he did not intend killing him. The evidence was such as to justify a finding that the defendant in the heat of passion struck the deceased with his fist and knocked or pushed him against the banister, but with no intention of putting him over, or of doing more than strike him or push him against the banister, or of doing him harm at all other than such as would naturally result from striking or pushing him. It is held that the defendant was entitled to an instruction submitting manslaughter in the second degree, defined by the statute as an unjustifiable killing "in the heat of passion, but not by a deadly weapon or by use of means either cruel or unusual." State v. Abdo, — Minn. —, 183 N. W. 143.

Failure to provide medical or surgical attention. 10 A. L. R. 1137.

Improper treatment of disease. 9 A. L. R. 211.

4244. Indictment for manslaughter in second degree—An indictment for manslaughter in the second degree for killing a person by running into him with an automobile held sufficient. State v. Hines, — Minn. —, 182 N. W. 450.

4245. Self-defence—Evidence held to justify a finding that defendant did not act in justifiable self-defence. State v. Dubestein, 136 Minn. 325, 162 N. W. 358.

(81) Brown v. United States, 255 U. S. —.

(82) 29 Harv. L. Rev. 544 (scope of doctrine that a man's house is his castle).

4245a. Law and fact—The evidence made it a question of fact whether the defendant, indicted with several others, was present at the killing, for which he was indicted and which was directly accomplished by one of his codefendants. State v. Shea, — Minn. —, 182 N. W. 445.

4246. Evidence—Admissibility—(89) State v. Dunn, 140 Minn. 308, 168 N. W. 2 (oral evidence of a letter written to defendant).

(90) State v. Henrionnet, 142 Minn. 1, 170 N. W. 699 (what was said by decedent immediately preceding the shooting—exclusion not error because relevancy and materiality not made to appear).

4247. Evidence—Sufficiency—In a prosecution for causing death by administering poison, held, that the indictment justified a finding that the death of deceased was caused by poison but did not justify a finding that defendant administered the poison. State v. Solem, 135 Minn. 200, 160 N. W. 491.

Appellant's wife, who had been granted a decree of separation from him, was murdered ,and he, with four other persons, were jointly indicted for the crime. Appellant had a separate trial, at which the one who actually committed the deed and another accomplice then present testified for the state. Neither had had any direct communication with appellant. The theory of the state was that the alleged accomplice who procured these two witnesses to do the killing acted for appellant. It is held: The evidence, aside from that given by the accomplices, is strong and persuasive that appellant not only had a motive, but had formed a fixed purpose, to procure some one to kill his wife, and that the actual murderer was procured by appellant's agent to carry out that purpose. State v. Dunn, 140 Minn. 308, 168 N. W. 2.

The verdict of guilty of murder in the first degree is not sustained by the evidence; and the evidence did not justify a submission of either murder in the first or in the second degree. State v. Nelson, 148 Minn.—, 181 N. W. 850.

The evidence was such as to justify the submission of murder in the third degree and manslaughter in the first. State v. Nelson, 148 Minn.—, 181 N. W. 850.

Evidence held insufficient to justify a conviction. State v. Pennington, — Minn. —, 182 N. W. 962.

(91) State v. Price, 135 Minn. 159, 160 N. W. 677; State v. Dubestein, 136 Minn. 325, 162 N. W. 358; State v. Dunn, 140 Minn. 308, 168 N. W. 2; State v. Henrionnet, 142 Minn. 1, 170 N. W. 699; State v. Shea, — Minn. —, 182 N. W. 445; State v. Hines,— Minn. —, 182 N. W. 450; State v. Pennington, — Minn.. —, 182 N. W. 962.

4247a. Conviction of lesser offence—If the facts proved under an indictment for murder in the first degree warrant a conviction of manslaughter in the second degree, the defendant upon request is entitled to the submission of such degree of manslaughter. State v. Abdo, — Minn. —, 183 N. W. 143. See § 2486(80).

HOSPITALS

4249. State hospitals for insane—Prior to 1917 the state was required to maintain inmates at its own expense without recourse against their estates. State v. Probate Court, 142 Minn. 283, 171 N. W. 928. See § 3593a.

4250a. Liability on contract or for tort—A hospital may be liable on the ground of negligence in connection with infectious diseases. See Skillings v. Allen, 143 Minn. 323; 173 N. W. 663.

A pneumonia patient in defendant's hospital, suffering from delirium, was left alone in a second story room. A few minutes later the window was found open and the patient was lying dead on the ground below. This was sufficient evidence to sustain a finding that he was killed by the fall. There is sufficient evidence that his death was due to the negligence of defendant and its employees. Defendant is of the class commonly known as charitable corporations. Its hospital was founded and its buildings erected partly by money donated, and partly by money borrowed. It is not maintained for profit, but most of its patients are pay patients, and the receipts for these largely exceed the cost of maintenance. Defendant is liable in damages for decedent's death. Mulliner v. Evangelischer, etc. Synod, 144 Minn. 392, 175 N. W. 699. See 4 Minn. L. Rev. 533.

Hospitals are liable for breach of contract or for tort. See Mullinger v. Evangelischer, etc. Synod, 144 Minn. 392, 175 N. W. 699.

HUSBAND AND WIFE

IN GENERAL

4251. Gifts between—When property is purchased by a husband as a gift to his wife, with knowledge on the part of the vendor before the bargain is consummated that the property is bought for the wife, and that the title is to pass to her directly, there is a sufficient delivery to sustain the gift, although she does not get actual possession until later. A delivery through a third person is sufficient if he holds the property for the wife. Coulter v. Meining, 143 Minn. 104, 172 N. W. 910.

Evidence held to justify a finding of a valid gift of an automobile by a husband to his wife. Coulter v. Meining, 143 Minn. 104, 172 N. W. 910.

4252. Grants to—Tenants in common—Where two persons are named as grantees in a deed, the presumption is that their interests in the land conveyed are equal. This presumption, however, is not conclusive and the true interest of each may be shown. The fact that the grantees are husband and wife does not change the rule. Where a mortgage runs to husband and wife, it is presumed that their respective interests in the debt it secures are equal, but such presumption is not conclusive and the true interest of each may be shown. Dorsey v. Dorsey, 142 Minn. 279, 171 N. W. 933.

4252a. Community property doctrine—The doctrine of community property between husband and wife has no existence in this state. Nelson v. Nelson, — Minn. —, 183 N. W. 354; Gummison v. Johnson, — Minn. —, 183 N. W. 515.

4253. Joint tenancy—Survivorship—(4) See 33 Harv. L. Rev. 983.

4256. Necessity of wife joining in husband's deeds—A wife may be estopped from denying that she joined in her husband's deed. Fuller v. Johnson, 139 Minn. 110, 165 N. W. 874. See § 3209.

(8) Kelly v. First State Bank, 145 Minn. 331, 177 N. W. 347 (mortgage by husband alone will create a lien on his interest).

WIFE'S SEPARATE LEGAL EXISTENCE

4258. In general—The statute (G. S. 1913, § 7142), by which many of the common-law disabilities of married women are removed, has reference to the management, control and protection of her property rights. It does not give her a separate legal existence to the extent of authorizing an action between husband and wife for a personal tort. Drake v. Drake, 145 Minn. 388, 177 N. W. 624.

(20) See 4 A. L. R. 266 (effect of coverture upon criminal responsibility of women).

4259. Her separate property—Plaintiff having brought suit to recover from defendant certain personal property seized by him as sheriff under an execution against plaintiff's husband, evidence in respect to the transactions by which her husband's farm had been transferred to plaintiff was properly admitted as bearing upon the question as to whether there was a scheme to defraud and as to whether the produce of the farm belonged to plaintiff or her husband. Under our statute a married woman may carry on business on her own account, independently of her husband the same as if unmarried, and the avails of her contracts and industry are not liable for his debts. Property purchased by a married woman upon her individual credit, without applying upon the purchase price any property, or the proceeds of any property, derived from or through her husband, cannot be taken for his debts. The major portion of the property seized by defendant was so purchased by plaintiff, and the seizure was wrongful. If the transfer of the farm

to plaintiff was made with intent to defraud creditors of her husband, whether she can hold the produce of the farm as against such creditors depends upon whether she, acting in good faith, raised such produce for her own use and benefit; and this is ordinarily a question for the jury. Hoover v. Carver, 135 Minn. 105, 160 N. W. 249.

(24, 32) Hoover v. Carver, 135 Minn. 105, 160 N. W. 249.

4262. Husband as agent of wife—A wife may rely on misrepresentations made to her by a third party through her husband acting as her agent. Perkins v. Orfield, 145 Minn. 68, 176 N. W. 157.

(37) Davis v. Haugen, 133 Minn. 423, 158 N. W. 705.

4262a. Wife as agent of husband—A wife may act as the agent of her husband with certain exceptions. Plasch v. Fass, 144 Minn. 44, 174 N. W. 438. See § 4274.

4263. Wife may purchase husband's property—(38) Davis v. Haugen, 133 Minn. 423, 158 N. W. 705 (property of husband transferred to wife in satisfaction of debt of husband to wife—validity of transfer sustained as against creditors of husband).

4266. Husband carrying on farm for wife—(42) Hoover v. Carver, 135 Minn. 105, 160 N. W. 249.

LIABILITIES OF WIFE

4267. Estoppel—(43) Fuller v. Johnson, 139 Minn. 110, 165 N. W. 874. See Havel v. Costello, 144 Minn. 441, 175 N. W. 1001; L. R. A. 1916C, 240.

4268. For household necessaries—Statute—The statute does not change the rule that, as between husband and wife, the duty to furnish such necessaries rests on the husband. Where the wife pays for such necessaries out of her own funds as a contribution toward the family expenses and without expecting reimbursement therefor, she is not entitled to recover the amount so paid from the estate of her husband, but where she makes such payment without an understanding that it is a contribution by her to such expenses, for which no reimbursement is expected, she has a claim therefor against his estate. Kosanke v. Kosanke, 137 Minn. 115, 162 N. W. 1060.

Under G. S. 1913, § 7146, making the husband and wife "jointly and severally liable for all necessary household articles and supplies furnished to and used by the family," the wife is not liable for the rent of the family home leased to her husband. Lewis v. France, 137 Minn. 333, 163 N. W. 656.

(44) L. R. A. 1917F, 861.

4271. For her torts—A wife cannot be sued by her husband for a personal tort. Drake v. Drake, 145 Minn. 388, 177 N. W. 624.

4271a. For her husband's torts—See § 4262; 12 A. L. R. 1459.

RIGHTS OF HUSBAND

4272. Head of family—(51) See Millett v. Minnesota Crushed Stone Co., 145 Minn. 475, 177 N. W. 641.

LIABILITIES OF HUSBAND

4274. For torts of wife—The husband is liable for the negligence of his wife in the operation of an automobile furnished by him for the comfort and pleasure of the family, and which he permits her to use for that purpose. Plasch v. Fass, 144 Minn. 44, 174 N. W. 438. See § 5834b.

G. S. 1913, § 7146, declaring the husband not liable for the torts of his wife, abolished the rule of the common law in such cases, but was not intended to include torts committed by the wife while acting as his agent or representative, under authority expressly or impliedly conferred upon her. Plasch v. Fass, 144 Minn. 44, 174 N. W. 438.

(56) See Plasch v. Fass, 144 Minn. 44, 174 N. W. 438.

4276. On contracts of wife for necessaries—The husband is not liable to third parties for necessaries furnished the wife after he has paid the temporary alimony awarded in her action against him for divorce, she then living apart from him. Wolf, Habein & Co. v. Mapson, 146 Minn. 174, 178 N. W. 318.

Attorney's fees and expenses in a replevin action brought by a wife against her husband to obtain possession of property detained by him are not "necessaries" for which he is liable. Wolf, Habein & Co. v. Mapson, 146 Minn. 174, 178 N. W. 318.

A husband has been held liable for attorney's services rendered in protecting the wife against his ill treatment or against criminal offences, especially those instituted on his complaint. Wolf, Habein & Co. v. Mapson, 146 Minn. 174, 178 N. W. 318.

(62) L. R. A. 1917A, 958

INCHOATE INTEREST IN EACH OTHER'S REALTY

4279. Nature—A wife has marital rights in property purchased by her husband, the title to which is taken in another in trust for the husband. Baxter v. Brandenburg, 137 Minn. 259, 163 N. W. 516.

Where one is bound to make inquiry as to the title of a married man, a separate inquiry as to the interest of his wife is not generally necessary on account of her inchoate statutory interest. Havel v. Costello, 144 Minn. 441, 175 N. W. 1001.

(76) State v. Probate Court, 177 Minn. 238, 163 N. W. 285.

See Laws 1921, c. 333.

4280. Loss—The evidence supports the finding that certain conveyances were made with the fraudulent purpose of depriving plaintiff of

the right to secure support for herself and children by resorting to the land conveyed. Stephon v. Topic, 147 Minn. 263, 180 N. W. 221.

(89) Havel v. Costello, 144 Minn. 441, 175 N. W. 1001.

(91) 12 A. L. R. 1347 (joining in husband's mortgage).

See Laws 1921, c. 333.

CONTRACTS AND CONVEYANCES

4281. Contracts—In general—Where a husband buys property and takes title in the name of another with a trust in favor of himself, his wife has marital rights in such property, and her rights are a sufficient consideration for a check given by the husband to the wife in recognition of such rights. Baxter v. Brandenburg, 137 Minn. 259, 163 N. W. 516,

(94) L. R. A. 1917D, 268.

4283. Separation agreements—A provision in a separation agreement that the husband shall pay for the maintenance and support of the wife and a certain sum per month "for and during the term of her natural life, or while this separation continues," is not abrogated by a subsequent divorce procured by the husband, the judgment in which makes no provision for the maintenance or support of the wife. Hertz v. Hertz, 136 Minn. 188, 161 N. W. 402.

The first two payments promised to be made by the defendant to the plaintiff in a post nuptial contract, which was made after the separation of the parties and is recited in the opinion, are held supported by a consideration, and not in contravention of any public policy of the state; and the validity of the contract in other respects is not determined. Vanderburgh v. Vanderburgh, 148 Minn. —, 180 N. W. 999.

Effect of fraud or mistake in separation agreements. 5 A. L. R. 823.

(8) See Vanderburgh v. Vanderburgh, 148 Minn. —, 180 N. W. 999.

4285. Antenuptial contracts—Antenuptial contracts are not against public policy, but are regarded with favor as conducive to the welfare of the parties making them, and will be sustained whenever equitably and fairly made. Fraud will be presumed when there has been a transaction between persons occupying a fiduciary relationship, whereby one in whom confidence was reposed, or who possessed controlling influence over the other, obtained benefits without consideration, or for an inadequate consideration. The onus is on a person obtaining such benefits to show that he acted righteously. There can be no valid contract between two persons except after a full and fair communication and explanation of every material particular within the knowledge of the one who seeks to uphold it against the other, if it appears that the former possessed influence which he abused, or had gained confidence which he betrayed. In determining the validity of a contract between parties when one stands in a fiduciary relation to the other, inadequacy of consideration is an important factor; but no obligation rests upon a man about to marry to secure his prospective wife a due proportion of all his property,

under penalty, if he does not, of having his contract with her decreed prima facie a fraud upon his part. The relations of a man and woman betrothed to one another are presumably, but not invariably, confidential. Under the evidence the trial court was not bound to find that the parties to the antenuptial contract here involved occupied a confidential relationship when it was executed. Malchow v. Malchow, 143 Minn. 53, 172 N. W. 915.

Antenuptial contracts are sustained when they are free from fraud, violative of no statute, are equitably and fairly made, and are fair and reasonable in their terms. The entire absence of provision for the wife imposes upon the husband the burden of showing that there was no fraud or concealment and that the prospective wife knew the extent, character and value of the prospective husband's property and the nature and extent of her rights as wife and widow. By antenuptial contract involved in this case, the prospective wife, a woman without means, surrendered all marital property rights and received nothing in return. The evidence on the part of the husband did not rebut the presumption arising and the decision of the trial court setting aside such contract is sustained. Welsh v. Welsh, — Minn. —, 184 N. W. 38.

(10) Malchow v. Malchow, 143 Minn. 53, 172 N. W. 915.

ACTIONS

4288. When a wife may sue husband—(15) Robertson v. Robertson, 138 Minn. 290, 164 N. W. 980. See § 2806.

(16) Drake v. Drake, 145 Minn. 388, 177 N. W. 624. See 6 A. L. R. 1038 (assault and battery); 34 Harv. L. Rev. 676 (communicating venereal disease by sexual intercourse); 1 Minn. L. Rev. 82.

4288a. Separate actions for damages to property—Husband and wife cannot have separate actions for damages to property owned by one. Millett v. Minnesota Crushed Stone Co., 145 Minn. 475, 177 N. W. 641.

4288b. Husband cannot sue wife for personal tort—The husband cannot maintain against his wife an action in equity to restrain and enjoin the commission of acts towards him which amount to nothing more than a tort or series of torts. The rule applies to acts and conduct on the part of the wife commonly known as nagging. The Married Woman's Act (G. S. 1913, § 7142) was not intended to vest in either husband or wife a right of action of that kind. Drake v. Drake, 145 Minn. 388, 177 N. W. 624.

4289. By or against wife—Necessity of joing husband—A wife has been held authorized to maintain an action for the reformation of an insurance policy on her property negotiated by her husband and inadvertly taken in his name. A prior action brought on the policy by plaintiff's husband in which he asserted ownership of the property, she not being a party to the action and not having authorized her husband to bring it, did not estop her from maintaining an action for the reforma-

tion of the policy and a recovery thereon in her own right, the husband's action having been dismissed without a trial prior to the trial of her action. Sundin v. County Fire Ins. Co., 144 Minn. 100, 174 N. W. 729.

4289a. By or against husband—Necessity of joining wife—If a wife is not made a party a judgment affecting a homestead, cannot operate as a conveyance thereof. Brokl v. Brokl, 133 Minn. 218, 158 N. W. 250.

4292. By wife for nuisance—A wife who owns the family home may sue for damages to it and to the family resulting from a nuisance. Millett v. Minnesota Crushed Stone Co., 145 Minn. 475, 177 N. W. 641. See § 7288.

4292a. By wife for injury to home—A wife has an interest in the homestead of herself and husband, though the legal title thereto is in him, and she is entitled to the peaceful and quiet enjoyment thereof. Any unlawful invasion of such right is a legal wrong against her for which she may maintain an action. Lesch v. Great Northern Ry. Co., 97 Minn. 503, 106 N. W. 955. See Millett v. Minnesota Crushed Stone Co., 145 Minn. 471, 177 N. W. 641.

A wife who owns the family home may sue for damages to it and to the family resulting from a nuisance. Millett v. Minnesota Crushed Stone Co., 145 Minn. 475, 177 N. W. 641.

4293a. By wife to set aside fraudulent conveyances—A wife may maintain an action to set aside a conveyance fraudulently made to deprive her of her interest in her husband's property. Stephon v. Topic, 147 Minn. 263, 180 N. W. 221. See § 3904.

4294. For alienation of husband's affections—The right of action is not defeated by a subsequent divorce. 34 Harv. L. Rev. 214.

4295. For alienation of wife's affections—In order to recover damages for alienating the affections of his wife, a husband must show that the defendant took an active and intentional part in causing the estrangement. Such an action will not lie where it is grounded solely upon the negligence of the defendant. Lillegren v. William J. Burns International Detective Agency, 135 Minn. 60, 160 N. W. 203.

In an action for alienation of the affections of the wife and for damages resulting, an allegation in defendant's answer, setting forth a statement of the trial court contained in the decree of divorce, as to defendant's treatment of his wife prior to the commencement of the action for divorce, held properly stricken from the answer. Mullen v. Devenney, 136 Minn. 343, 162 N. W. 448.

The arts used and acts done by defendant in alienating the affections of plaintiff's wife are matters of evidence which need not be pleaded. If pleaded and some are not proved, the court is not required to instruct the jury that there is no evidence that defendant was guilty of those not proved, even though plaintiff's counsel read the complaint to the jury in making his opening statement. The charge to the jury definitely limited

them to the consideration of defendant's conduct as shown by the evidence and correctly stated the ultimate facts which plaintiff must establish to make out a case. Mullen v. Devenney, — Minn. —, 183 N. W. 350.

4296. By husband for injuries to wife—In an action by a husband in his individual capacity to recover for injuries to his wife, negligence on his part which contributes to the injury is a bar to his recovery. Kokesh v. Price, 136 Minn. 304, 161 N. W. 715.

A verdict for $300 in favor of a husband held not excessive though there was no evidence of money outlay on his part and the evidence of damage was meager. The wife was unable to perform her usual duties for several months and her injury was permanent. Schmitt v. Minneapolis, 138 Minn. 474, 164 N. W. 801.

If the wife has no cause of action for substantial damages the husband has none. Greenfield v. Unique Theatre Co., 146 Minn. 17, 177 N. W. 666.

(34) McNab v. Wallin, 133 Minn. 370, 158 N. W. 623 (verdict in favor of husband for loss of services and companionship of wife for $1,750 held excessive and reduced on appeal to $1,000).

4297. For criminal conversation—(37) See 32 Harv. L. Rev. 576.

CRIMES

4299. Non-support of wife—(39) 3 A. L. R. 107.

4299a. Same—Suspension of judgment on bond for support—In an action upon a statutory bond, executed under the provisions of section 8667, G. S. 1913, as amended by chapter 213, Laws 1917, § 2, held, that the answers raised no issue, which required proof to entitle plaintiff to judgment, and that the motion for judgment on the pleadings and record was properly granted. Drake v. Drake, — Minn. —, 182 N. W. 717.

IMPLIED OR QUASI CONTRACTS

4300. Definition and nature—The use of the term "contract" rests solely on a legal fiction. Such obligations were originally called contractual or quasi contractual in order to secure their enforcement by the common-law action of assumpsit at a time when it was considered that a right could not be enforced unless it could be fitted into some existing form of remedy. To maintain assumpsit, it was necessary that there should be a promise and to meet this requirement the courts resorted to the fiction of a promise where none in fact existed. Even now, long after the abolition of assumpsit as a form of action, these obligations are commonly expressed in terms of contract. There is no necessity for doing so. Since technical forms of action have been abolished, the use of legal fiction is gone and the fiction ought to be abandoned. Fargo Foundry Co. v. Calloway, 148 Minn. —, 181 N. W. 584.

(45) Fargo Foundry Co. v. Calloway, 148 Minn. —, 181 N. W. 584.
(46) See Mascall v. Reitmeier, 145 Minn. 214, 176 N. W. 486.

4302. Illegal contracts—See § 6703.

4305a. When full performance of contract is impossible—Where defendant has been prevented from performing his agreement by reason of the occurrence of an unforeseen event such as there was here, and the plaintiff has performed his part of the agreement, he may maintain an action based on the quasi contractual obligation which arose, without reference to the assent of the defendant, from his receipt of benefits which he may not justly retain without making compensation for them. The principle is also applicable to cases where one has paid money to the use of another to satisfy a claim which the latter should have paid. Apparently the principle will not be extended so as to include cases where the contract is not severable, and the consideration cannot be apportioned to the separate items of defendant's agreement, although there have been vigorous criticisms of this conclusion. Mascall v. Reitmeier, 145 Minn. 214, 176 N. W. 486.

4308a. Measure of damages—Where a contract is illegal and recovery is sought for labor and materials upon quasi contract the contract does not control. The measure of damages is not the reasonable value of the labor and materials but the benefit received by the defendant. If some part of the work is of value and another part a detriment, the net benefit is the measure of damages. Fargo Foundry Co. v. Calloway, 148 Minn. —, 181 N. W. 584.

The general measure of damages in quasi contract is the amount of unjust enrichment received by defendant. 19 Yale L. Journal 609; 33 Harv. L. Rev. 376.

IMPROVEMENTS

OCCUPYING CLAIMANTS' ACT

4315. What is color of title—(70) See 6 A. L. R. 100 (applicability of statute to government lands).

4317. Notice—Good faith—Findings of want of good faith held justified by the evidence. Aiken v. Timm, 147 Minn. 317, 180 N. W. 234.

(79) See Swedish-American Nat. Bank v. Connecticut Mut. Life Ins. Co., 83 Minn. 377, 384, 86 N. W. 420.

(82) Rux v. Adam, 143 Minn. 35, 172 N. W. 912.

4319. When taxes must have been paid—Good faith—Findings of want of good faith in the payment of taxes held justified by the evidence. Aiken v. Timm, 147 Minn. 317, 180 N. W. 234.

4324. Burden of proof—Under the statute, one claiming compensation for improvements made on the land of another must prove, among other things, want of actual notice of the claim upon which the action to recover possession is founded previous to the time of making the im-

provements, and the payment of a valuable consideration for the land. Rux v. Adam, 143 Minn. 35, 172 N. W. 912.

4326. Evidence—Admissibility—A recital of consideration in the deed to the occupant is not proof of the payment thereof as against a third person. Rux v. Adam, 143 Minn. 35, 172 N. W. 912.

4326a. Evidence—Sufficiency—Evidence held not to require a finding that a claimant was entitled to compensation for improvements made on a homestead. Rux v. Adam, 143 Minn. 35, 172 N. W. 912.

INCEST

4331a. Evidence—Admissibility—Evidence that the woman in an incest case, who testified that another person than the defendant was the father of her child, which was claimed by the state to be the result of incestuous intercourse with the defendant, was much in company with such other person at a material time was competent; but upon the record its exclusion was not prejudicial error which should result in a new trial. State v. Huebsch, 146 Minn. 34, 177 N. W. 779.

INCOMPETENTS

4332. Guardians—The proceeding is not adversary and the alleged incompetent cannot be called as for cross-examination under G. S. 1913, § 8377. There should be findings of fact and conclusions of law on appeal in the district court. Wood v. Wood, 137 Minn. 252, 163 N. W. 297.

The findings of fact and conclusions of law, to the effect that respondent was of sound mind and entirely capable of caring for his own person and property, and should not remain under guardianship, are sustained by the evidence. No prejudicial error is disclosed in the record. Hallenberg v. Hallenberg, 144 Minn. 39, 174 N. W. 443.

(17) Wood v. Wood, 137 Minn. 252, 163 N. W. 297 (evidence held to justify a finding of competency—error in the exclusion of evidence held not prejudicial); Sterling v. Miller, 138 Minn. 192, 164 N. W. 812 (finding of competency sustained); Wood v. Wood, 140 Minn. 130, 167 N. W. 358 (new trial granted for newly discovered evidence of acts of the alleged incompetent after the trial).

INDEMNITY

4337. Particular contracts construed—A contract which in plain terms obligates one party to save another harmless from any and all claims is not limited by an especial reference to particular claims. Where language is unequivocal, rules of construction have no application. A contract to indemnify against claims on account of contracts, not intended to indemnify against subsequent breaches generally, may apply to subsequent breaches arising out of acts of an agent under a contract previously made authorizing him to perform such acts. Whether it was the duty of the party indemnified to violate the contracts with its agents in order to mitigate damages is to be determined by the test whether a reasonably prudent and diligent person would take such a course. Northern Welding Co. v. Jordan, — Minn. —, 184 N. W. 39.

4340. Notice to indemnitor of action—Where an indemnitor is under obligation to defend against a claim and defence is tendered and refused, the indemnitor is liable for the reasonable expense of the defence. Northern Welding Co. v. Jordan. — Minn. —, 184 N. W. 39.

(43) See Fidelity & Casualty Co. v. Northwestern Tel. Exchange Co., 140 Minn. 229, 167 N. W. 800.

4341. Res judicata—(44) Mahr v. Maryland Casualty Co., 132 Minn. 336, 156 N. W. 668.

4342. Between wrongdoers—Generally there is no right of indemnity between joint wrongdoers. An exception arises where the parties are not in pari delicto, as where the injury results from a violation of a duty which one owes to the other, so that, as between themselves, the act or omission of one is the primary cause of the injury. The present case falls within the exception and plaintiff was entitled to indemnity from the defendant. Fidelity & Casualty Co. v. Northwestern Tel. Exchange Co., 140 Minn. 229, 167 N. W. 800.

An electric company used the poles of defendant at a fixed charge. Each company strung and maintained its own wires. The wires were customarily so securely attached to the poles as to sustain the weight of a man standing thereon, and men of both companies used the wires as a footing in going up and down the poles. An employee of the electric company, using the wire of defendant for this purpose, fell and was injured because of a defective fastening. The employee sued the electric company. Defendant was tendered the defence but did not defend. The employee had a verdict. Plaintiff, as insurer of the electric company, settled the verdict at a discount. The settlement was a provident one. The electric company and defendant were both liable, defendant because of its own neglect in not securly fastening the wire, the electric company, for its failure to discover the defect and avoid its consequences. Plaintiff was not entitled to recover attorney's fees, costs and

disbursements incurred and paid in defending the action brought by the employee. Fidelity & Casualty Co. v. Northwestern Tel. Exchange Co., 140 Minn. 229, 167 N. W. 800.

As a general rule one guilty of positive fraud is not entitled to reimbursement or indemnity. Stephon v. Topic, 147 Minn. 263, 180 N. W. 221.

(45) 34 Harv. L. Rev. 215 (exceptions). See § 1924.

4343. Fidelity bonds—(47) See §§ 48751; 9105.

INDIANS

4347. Status of tribal Indians—Indians of the Red Lake band of Chippewas, inhabiting the Red Lake Indian Reservation as wards of the government, are "residents" of the state within the meaning of article 7 of the constitution. To entitle a non-citizen mixed blood Indian to the right of suffrage, his adoption of the habits and customs of civilization must go to the extent of submitting himself to the laws of the state. The evidence and findings established that the persons referred to were tribal Indians, residing upon the reservation as wards of the government, owing no allegiance to the laws of the state, not taxable, and not bearing any of the burdens to which other voters are subject. Opsahl v. Johnson, 138 Minn. 42, 163 N. W. 988.

(54) La Framboise v. Day 136 Minn. 239, 161 N. W. 529; Opsahl v. Johnson, 138 Minn. 42, 163 N. W. 988.

(55–58) Opsahl v. Johnson, 138 Minn. 42, 163 N. W. 988.

4347a. Marriage and divorce—A marriage of Indians according to the customs of their tribe will be recognized as valid in the state courts. Earl v. Godley, 42 Minn. 361, 44 Minn. 254.

Where a half-breed marries an Indian woman according to Indian custom, lives with her as her husband in the tribal haunts, and is there divorced from her according to Indian custom, such divorce will be recognized by the courts of the state as terminating the marriage relation. The evidence sustains a finding that plaintiff's mother, and the half-breed, claimed by plaintiff to be his father, were divorced four years before plaintiff was born, and that he is not the son or an heir of the half-breed. La Framboise v. Day, 136 Minn. 239, 161 N. W. 529.

4348. White Earth reservation—Operation of state laws—(60) See Opsahl v. Johnson, 138 Minn. 42, 163 N. W. 988.

4350. Treaty with Chippewa Indians—Operation of state laws—Intoxicating liquors—The provisions of the statutes of this state relative to licensing the sale of intoxicating liquors by the different municipalities thereof have no force or effect in the territory covered by and included in the treaty between the federal government and the Chippewa Indians in 1855. The treaty and the various stipulations thereof are

paramount and superior to state laws within that territory, and thereby the sale of intoxicating liquors therein has at all times since the date thereof been expressly prohibited. Minneapolis Brewing Co. v. Bagley, 142 Minn. 16, 170 N. W. 704.

The prohibitory clause of the treaty with the Chippewa Indians of May 22, 1855, is valid, and any contract in furtherance of a purpose to violate it is void. Johnstown Land Co. v. Brainerd Brewing Co., 142 Minn. 291, 172 N. W. 211.

4351. Lands—Allotment—Patents—Conveyances—Under the federal statutes after a patent is issued to an Indian, questions as to the validity of his subsequent transfers of the land are controlled by state laws. Luck Land Co. v. Dickson, 132 Minn. 396, 157 N. W. 655, affirmed, 242 U. S. 371.

In issuing a patent to land in fee simple to a mixed-blood Chippewa Indian of the White Earth Indian reservation, the officials of the United States necessarily determined that the Indian was an adult. Such determination is conclusive as to the Indian's right to take and hold title, except in a direct action to set aside the patent. The issuance of the patent, while an adjudication of the patentee's right thereto, and of his title to the land, does not prevent the courts of this state from inquiring into the question of the Indian's age for the purpose of determining the validity of a conveyance from him. Luck Land Co. v. Dickson, 132 Minn. 396, 157 N. W. 655, affirmed, 242 U. S. 371.

A title based on a "trust patent" issued by the federal government to an Indian of the White Earth Indian Reservation under the allotment act of Feb. 8, 1887, and acts supplementary thereto, held not a marketable title. Geray v. Mahnomen Land Co., 143 Minn. 383, 173 N. W. 871.

The Clapp Amendment of June 21, 1906, as amended March 1, 1907, emancipated adult mixed-blood Indian allottees from federal guardianship, and by implication gave to the probate courts of this state jurisdiction to administer the estates and determine the heirs of such mixed-blood allottees, whether death occurred before or after the passage of the amendments. Baker v. McCarthy, 145 Minn. 167, 176 N. W. 643.

The title of the land involved in this case, derived from the federal government through an allotment to a mixed-blood Indian of the White Earth Reservation, held to have completely vested of record in defendants prior to the date fixed for the performance of the contract; there was no fraud, the vendors are not insolvent, and the vendee cannot complain of a prior defect in the record title. Smith v. Kurtzenacker, 147 Minn. 398, 180 N. W. 243.

The character of the allottee as a mixed-blood Indian had not then been determined, and for that reason the record title was incomplete. Smith v. Kurtzenacker, 147 Minn. 398, 180 N. W. 243.

Indian land titles in Minnesota. 2 Minn. L. Rev. 177.

See § 10024.

4353a. Sale of lands—Exemption of proceeds—See Vachon v. Nichols-Chisholm Lumber Company, 126 Minn. 303, 320, 144 N. W. 223, 148 N. W. 288.

INDICTMENT

FINDING AND PRESENTMENT

4358. Indorsing names of witnesses—Where the grand jury in good faith indorsed on the indictment the names of the witnesses upon whose evidence it is asserted the indictment was found, the indictment will not be set aside because of the claim that other witnesses were examined. It must be conclusively presumed that the indictment was found on the evidence of the witnesses named. State v. Rickmier, 144 Minn. 32, 174 N. W. 529.

CONSTRUCTION AND SUFFICIENCY IN GENERAL

4360. Certainty—Where the facts constituting the violation of a statute are specifically pleaded the indictment is good though it does not charge a commission of the crime in general terms. State v. Rolph, 140 Minn. 190, 167 N. W. 553.

Where a criminal statute specifies several ways in which an offence thereunder may be committed, an indictment which merely alleges that defendant violated the statute is demurrable. State v. Spartz, 140 Minn. 203, 167 N. W. 547.

Where an indictment charged a public officer with failing to surrender to his successor "divers papers and books appertaining to his said office," it was held that the description of the papers was too general. State v. Cook, 141 Minn. 495, 169 N. W. 599.

(94) State v. Byhre, 137 Minn. 195, 163 N. W. 282. See State v. Hartung, 141 Minn. 207, 169 N. W. 712.

4365. Formal defects disregarded—(15) State v. Hartung, 141 Minn. 207, 169 N. W. 712; State v. Lyons, 147 Minn. 41, 179 N. W. 484.

4366. The charging part—(21) State v. Rolph, 140 Minn. 190, 167 N. W. 553.

MODE OF CHARGING OFFENCE

4371. Caption—The caption forms no part of the specific charge. State v. Rolph, 140 Minn. 190, 167 N. W. 553.

4374. Alleging date of offence—Proof—(48) State v. Clark, — Minn. —, 182 N. W. 452. See State v. Wagener, 145 Minn. 377, 177 N. W. 346.

(53) State v. Kampert, 139 Minn. 132, 165 N. W. 972; State v. Boekenoogen, 140 Minn. 120, 167 N. W. 301; State v. Clark, — Minn. —, 182 N. W. 452.

4379. Following language of statute or ordinance—(74) State v. Byhre, 137 Minn. 195, 163 N. W. 282; State v. Marx, 139 Minn. 448, 166 N. W. 1082; State v. Danaher, 141 Minn. 490, 169 N. W. 420.

(75) See State v. Danaher, 141 Minn. 490, 169 N. W. 420.

4380. Negativing exceptions—If a proviso withdraws a case from the operation of the enacting clause, which, but for the proviso, would be within it, the proviso need not be negatived. State v. Minor, 137 Minn. 254, 163 N. W. 514.

The statute makes it a misdemeanor to fail to provide hotels, above a certain size, with standpipes for fire protection; but also provides that, if for lack of waterworks or steam to operate pumps a stand pipe is not practicable, other fire protection shall be provided. Held, that this latter provision need not be negatived in a complaint charging a failure to install a standpipe, but if a standpipe be impracticable that fact may be shown as a defence. State v. Minor, 137 Minn. 254, 163 N. W. 514.

(81-83) State v. Minor, 137 Minn. 254, 163 N. W. 514.

(83) State v. Bohl, 144 Minn. 437, 175 N. W. 915; State v. Nordstrom, 146 Minn. 136, 178 N. W. 164.

4382. Every essential element of the offence must be alleged—(88) State v. Hartung, 141 Minn. 207, 169 N. W. 712.

(89) See State v. Washed Sand & Gravel Co., 136 Minn. 361, 162 N. W. 451.

4385. Facts must be alleged directly and not inferentially—(92) See State v. Lyons, 147 Minn. 41, 179 N. W. 484.

4390. Intent—Knowledge—(1) State v. Washed Sand & Gravel Co., 136 Minn. 361, 162 N. W. 451 (knowledge of defendant as to false weight).

4401. Bill of particulars—If an indictment is so general that it fails to give defendant adequate notice of the charge the court should require a bill of particulars. The propriety of such a requirement depends on the facts of the particular case. The matter rests largely in the discretion of the trial court. On a prosecution for carnal abuse of a child, held not error to require a bill of particulars as to time and place. State v. Wassing, 141 Minn. 106, 169 N. W. 485.

DUPLICITY

4405. In general—The reason for the rule against duplicity is that the defendant ought not to be embarrassed or confused in making his defence by the necessity of meeting several distinct accusations founded on disconnected acts and requiring the production of evidence of a different nature. The rule does not apply where the indictment charges an offence consisting of several distinct acts which are in fact to be construed as one continuous act or transaction. It applies to misdemeanors as well as felonies. State v. Gopher Tire & Rubber Co., 146 Minn. 52, 177 N. W. 937.

(42) State v. Gopher Tire & Rubber Co., 146 Minn. 52, 177 N. W. 937.

4407. Objection—How taken—(45) State v. Byhre, 137 Minn. 195, 163 N. W. 282.

4413. Indictments held not double—An indictment against two county officers for being interested in county contracts contrary to G. S. 1913, § 1089. State v. Byhre, 137 Minn. 195, 163 N. W. 282.

An indictment under Laws 1917, c. 429, known as the Blue Sky Law. State v. Gopher Tire & Rubber Co., 146 Minn. 52, 177 N. W. 937.

ELECTION BY STATE

4414. In general—An indictment for carnal abuse of child charged the commission of the offence on or about March 1, 1917, in Minneapolis, Hennepin County, Minnesota. There was evidence of several acts of intercourse. It was not error to refuse to require the state to elect until the close of the state's case on which alleged offence it proposed to rely. The time when such an election is required rests largely in the discretion of the trial court. State v. Wassing, 141 Minn. 106, 169 N. W. 485.

DEMURRER

4416. Grounds—That two defendants were jointly indicted for being interested in county contracts contrary to G. S. 1913, § 1089, held not a ground for demurrer. State v. Byhre, 137 Minn. 195, 163 N. W. 282.

4417. Allowance—Effect as a bar—(77) State v. Johnson, 139 Minn. 500, 166 N. W. 123.

SETTING ASIDE ON MOTION

4420. Statutory grounds—A case is under consideration when a witness is being examined before a grand jury. State v. Slocum, 111 Minn. 318, 126 N. W. 1096; State v. Ernster, 147 Minn. 81, 179 N. W. 640.

From the minutes of the grand jury that found the indictment and from the testimony of the members of a committee from a former grand jury, it clearly appears that this committee appeared at a session of the grand jury and made statements as to the investigations made by the former grand jury of the charge against the defendants, the evidence heard, and the reasons for not taking action. This appearance of the committee constitutes a legal cause for quashing the indictment. State v. Ernster, 147 Minn. 81, 179 N. W. 640.

4421. Statutory grounds not exclusive—(88) State v. Ernster, 147 Minn. 81, 179 N. W. 640.

(90) State v. Marshall, 140 Minn. 363, 168 N. W. 174.

4422. Held not grounds for setting aside indictment—That a jury panel was drawn by the clerk of court in the presence of a justice of the peace who had not filed his official bond. State v. Van Vleet, 139 Minn. 144, 165 N. W. 926.

The fact that incompetent evidence was received by the grand jury. State v. Marshall, 140 Minn. 363, 168 N. W. 174; State v. Ruther, 141 Minn. 488, 168 N. W. 587; State v Ernster, 147 Minn. 81, 179 N. W. 640.

(94) State v. Rickmier, 144 Minn. 32, 174 N. W. 529.
(3) State v. Van Vleet, 130 Minn. 144, 165 N. W. 962.

4424. Affidavits on motion—On such motion a member of the grand jury that found the indictment may not disclose the evidence upon which it was found, or whether hearsay or incompetent evidence was received. State v. Ernster, 147 Minn. 81, 179 N. W. 640.

Affidavits upon information and belief were properly excluded from consideration on a motion to quash the indictment. State v. Ernster, 147 Minn. 81, 179 N. W. 640.
(6) State v. Rickmier, 144 Minn. 32, 174 N. W. 529.

VARIANCE

4427. In general—The state need not prove every allegation in an indictment. It is enough if it proves a crime alleged. State v. Goldstone, 144 Minn. 405, 175 N. W. 892.

Where the indictment charges the commission of acts which constitute the crime as defined in one subdivision of the statute, the accused cannot be convicted under that indictment by proving the commission of different acts which would constitute the crime as defined in a different subdivision. State v. Christofferson, — Minn. —, 182 N. W. 961.

AMENDMENT

4430. In general—(44) See 7 A. L. R. 1516.

INFANTS

IN GENERAL

4433. Entitled to protection of law—Rights of unborn children in law of torts. 34 Harv. L. Rev. 549.

CONTRACTS

4441. Deeds—Evidence held to justify a finding that the grantor of a deed through whom a party claimed title was a minor when he executed it. Hyde v. Kloos, 134 Minn. 165, 158 N. W. 920.

4443. Executed personal contracts—To be "fair and reasonable" the contract must be a provident one, advantageous to the infant, and not one wasting his estate. Berglund v. American Multigraph Sales Co., 135 Minn. 67, 160 N. W. 191.

Plaintiff, while a minor, entered into a contract with defendant for the purchase on installments of a multigraph machine and accessories. After making certain payments, defendant took the goods from plaintiff's pos-

session, with his consent, for his failure to comply with the terms of the contract. After reaching his majority plaintiff disaffirmed the contract and brought this action to recover the payments so made by him. It is held: If there was no fraud on the part of defendant, and the contract was a provident one for him he is entitled to recover the payments made with a deduction for the benefits received by him from the use of the goods while in his possession. It was not necessary for defendant to plead that there was no fraud, or that the contract was a provident one. The evidence sustains the verdict to the effect that there was no fraud, and that the contract was fair and reasonable, a provident one for the minor to enter into. The amount to be charged the minor for the use of the goods is not for their reasonable rental value during the time they were in his possession, but the amount of benefits actually received by plaintiff from their use. The allowance made by the jury for such benefits is not supported by the evidence. Berglund v. American Multigraph Sales Co., 135 Minn. 67, 160 N. W. 191. See note, 11 A. L. R. 491.

(77) See 34 Harv. L. Rev. 436.

4445. Ratification and confirmation—There may be ratification without knowledge that the contract was voidable. 29 Harv. L. Rev. 452.

See § 1896.

4449. Estoppel—(94) See 6 A. L. R. 416; 3 Minn. L. Rev. 273.

4450. Burden of proof—In an action to recover payments made by an infant on his contracts the burden is on the defendant to prove that the contract was free from fraud and a provident one for the infant to make, but the defendant is not bound to allege these facts in his answer. Berglund v. American Multigraph Sales Co., 135 Minn. 67, 160 N. W. 191.

GUARDIAN AD LITEM

4453. Necessity of appointing a guardian at litem—Where a minor improperly sues in his own name by his father and the want of capacity to sue is waived, it is proper for the court to appoint a guardian ad litem to prosecute the action. Dalsgaard v. Meierding, 140 Minn. 388. 168 N. W. 584.

4454. Effect of infant appearing without guardian—Where a minor sues in his own name without a guardian and the want of capacity to sue is waived by a failure to demur, it is proper for the court to appoint a guardian ad litem to prosecute the action. Dalsgaard v. Meierding, 140 Minn. 388, 168 N. W. 584.

One of six defendants was a minor, but was over 20 years old, at the trial. He was ably defended by the same attorney who defended the others. He admitted wrongfully. After verdict he asked for appointment of a guardian ad litem and for a new trial on the ground of his infancy. The application was presented by the attorney who represented him on the other trial. No other attorney was suggested. No prejudice was shown. After he became of age the motion for a new

trial was denied. Held no error. Muenkel v. Muenkel, 143 Minn. 29, 173 N. W. 184.

(12-13) Muenkel v. Muenkel, 143 Minn. 29, 173 N. W. 184.

4455. Powers—Not a party—Power to bind infant for attorney's fees. 7 A. L. R. 108.

4458. Appointment of guardian before service of summons improper—(22) 1 A. L. R. 919.

CRIMES

4465a. Endangering life or health of infants—An indictment under G. S. 1913, § 8669, held sufficient. State v. Kasper, 140 Minn. 259, 167 N. W. 1035.

Evidence in a prosecution under G. S. 1913, § 8669, held barely sufficient to sustain a conviction and a new trial granted for errors in the admission of evidence and in the charge. State v. Kasper, 140 Minn. 259, 167 N. W. 1035.

4466. Use of firearms—The fact that a boy thirteen years old was injured while using a shotgun contrary to G. S. 1913, § 8804, under orders of his master, held not to bar him from recovering from his master. The violation of the statute was a mere incident and not the proximate cause of the injury. Kunda v. Briarcombe Farm Co., — Minn. —, 183 N. W. 134.

DEPENDENT CHILDREN

4466a. Custody—Guardianship of state board of control—Termination by juvenile court—Chapter 397, Laws 1917, is construed to give the juvenile court, committing a dependent or neglected child to the guardianship of the state board of control, the power to terminate such guardianship, at any time before the child is legally adopted, when the parent proves to the satisfaction of the court that he or she is able and willing to properly support, care for, and educate the child. State v. Probate Court, — Minn. —, 184 N. W. 27.

4466b. Mother's pensions—Chapter 223, Laws 1917, known as the Mother's Pension Act, construed, and held to apply to a mother with dependent children to support, although she has been divorced from her husband. In re Koopman, 146 Minn. 36, 177 N. W. 777.

INITIATIVE AND REFERENDUM—See Municipal Corporations, §§ 6540, 6763a, 6784a; L. R. A. 1917B, 15.

INJUNCTION

IN GENERAL

4467. Definition and nature—An injunction operates in personam. State v. District Court, 140 Minn. 494, 168 N. W. 589.

4468. Mandatory injunctions—A mandatory injunction may issue on the application of the Railroad and Warehouse Commission to enforce its orders in certain cases. State v. Four Lakes Tel. Co., 141 Minn. 124, 169 N. W. 480.

Mandatory injunction to remove encroaching building or wall. 2 Minn. L. Rev. 229.

See § 4494.

4469. Rights must be clear—(35) See Godley v. Weisman, 133 Minn. 1, 157 N. W. 711, 158 N. W. 333.

4470. Injury must be real and reasonably certain—An injunction should never go beyond the requirements of the particular case. Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N. W. 805.

4471. Threatened injury must be irreparable—Whatever jurisdiction, if any, a court of equity may possess to restrain by injunction the exercise of a legal right in the enforcement of a remedy given by express contract, it should be exercised only to prevent manifest injustice and irreparable injury. Moller v. Robertson, 146 Minn. 265, 178 N. W. 590.

(40) Menter Co. v. Brock, 147 Minn. 407, 180 N. W. 553,

4472. Adequate remedy at law—(43) Keiver v. Koochiching County, 141 Minn. 64, 169 N. W. 254.

(44) Hanson v. Beulieu, 145 Minn. 119, 176 N. W. 178.

4473. Prevention of multiplicity of actions—(52) Red Wing v. Wisconsin etc. Co., 139 Minn. 240, 166 N. W. 175.

4474a. Extent—An injunction should never go beyond the requirements of the particular case. Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N. W. 805.

4475. Strangers to action cannot be enjoined—One having knowledge of a judgment may be bound by it though not a party to the action. L. Christian & Co. v. Chicago etc. Ry. Co., 135 Minn. 45, 159 N. W. 1082.

4475a. Effect—Running of time—The orderly administration of the law should not expose a litigant to punishment for not doing an act which a court, acting within its jurisdiction and authority, has commanded him to refrain from doing. State v. Chicago etc. Ry. Co., 130 Minn. 144, 153 N. W. 320.

The period during which the performance of an act is stayed by injunction forms no part of the time within which such performance is al-

lowed or required by law. G. S. 1913, § 7888; Williams v. Evans, 139 Minn. 32, 42, 165 N. W. 495.

SUBJECTS OF PROTECTION AND RELIEF

4476. Trespass to realty—An injunction will issue to restrain the obstruction by the defendant of a private way to which the plaintiff is entitled over the land of the defendant. Aldrich v. Soucheray, 133 Minn. 382, 158 N. W. 637.

When the facts proved at the trial call for injunctive relief the court has no discretion to withhold it. Currie v. Silvernale, 142 Minn. 254, 171 N. W. 782.

(57) Drake v. Chicago etc. Ry. Co., 136 Minn. 366, 162 N. W. 453; Currie v. Silvernale, 142 Minn. 254, 171 N. W. 782; Hanson v. Beaulieu, 145 Minn. 119, 176 N. W. 178.

4477. Other actions and proceedings—When a court of equity once acquires jurisdiction of the parties and subject-matter it will retain jurisdiction and proceed to a decree, and as an incident will restrain the prosecution of subsequent actions at law which interfere with the exercise of its jurisdiction. Kanevsky v. National Council, 132 Minn. 422, 157 N. W. 646.

While one party to a contract is in good faith appealing to a court of equity for relief therefrom the other party thereto should not be permitted in the meantime to avail himself of a statute to complete a forfeiture of the contract, and he may be restrained from doing so. Freeman v. Fehr, 132 Minn. 384, 157 N. W. 587; Straabe v. Jackson, 134 Minn. 179, 158 N. W. 915.

It is an open question whether equity will enjoin the prosecution of an action at law on a policy of insurance when cancelation in the equity suit is sought upon the ground of a breach of a condition subsequent. Sillerman v. National Council, 137 Minn. 428, 163 N. W. 783.

The court properly denied the application of the defendant to restrain the plaintiff's beneficiaries in an insurance policy, from proceeding to recover thereon, which application was made upon the ground that there was pending at the time of the death of the insured an action to cancel said policy, in which action the beneficiaries were substituted in lieu of the defendant, since jurisdiction to make such substitution was not acquired. Sillerman v. National Council, 137 Minn. 428, 163 N. W. 783.

The enforcement of a judgment of a municipal court cannot be restrained by the district court on the ground that defendant suffered the judgment by default through inadvertence and mistake and the time for applying to the municipal court for relief has expired. Erlitz v. Barclay, 138 Minn. 480, 164 N. W. 905.

In an action by lessees to restrain lessors from prosecuting unlawful detainer proceedings against plaintiffs for non-payment of rent, held, that the findings of the court were justified by the evidence and that an in-

junction was properly denied. Clinton Film Service Co. v. Conan, 140 Minn. 94, 167 N. W. 289.

4477a. Actions in this state by non-residents—A court of this state cannot enjoin the prosecution of an action in the courts of this state by a non-resident, where it has jurisdiction of the parties and subject-matter, if, in consequence thereof, he would be compelled to bring his action in the courts of another state. A citizen of another state has the same right to appeal to our courts as a citizen of this state. Davis v. Minneapolis etc. Ry. Co., 134 Minn. 455, 159 N. W. 1084.

4477b. Effect on domestic proceedings of injunctions issued by foreign courts—A court of this state will not refrain from proceeding with the trial of a transitory action brought by a non-resident plaintiff merely because he has been restrained by a court of the state of his residence from presecuting the action in this state. State v. District Court, 140 Minn. 494, 168 N. W. 589.

Where a litigant in a domestic court resorts to injunction, issued by a foreign court, tending to hamper improperly the exercise of jurisdiction by the domestic court, the latter may subject him to coercive measures designed to make its jurisdiction effective. Lipman v. Bechhoefer, 141 Minn. 131, 169 N. W. 536.

4478. Foreign actions and proceedings—(65) Wilser v. Wilser, 132 Minn. 167, 156 N. W. 271 (restraining order issued in connection with an order of interpleader); State v. District Court, 140 Minn. 494, 168 N. W. 589. See Davis v. Minneapolis etc. Ry. Co., 134 Minn. 455, 159 N. W. 1084; 33 Harv. L. Rev. 92, 425.

4478b. Torts—Acts of organized labor—Injunction will rarely be granted to restrain a number of lawful acts on the theory that they constitute an unlawful whole. George J. Grant Const. Co. v. St. Paul Building Trades Council, 136 Minn. 167, 161 N. W. 520, 1055.

There is considerable conflict of authority as to the conditions under which an injunction will be granted to restrain the acts of organized labor. George J. Grant Const. Co. v. St. Paul Building Trades Council, 136 Minn. 167, 161 N. W. 520, 1055; Steffes v. Motion Picture Machine Operators Union, 136 Minn. 200, 161 N. W. 524; Roraback v. Motion Picture Machine Operators Union, 140 Minn. 481, 168 N. W. 766. See Duplex Printing Press Co. v. Deering, 254 U. S. 443; Digest, §§ 1566, 9674; 2 Minn. L. Rev. 524; 4 Id. 544; 34 Harv. L. Rev. 880.

4479. Contracts—A court of equity will enjoin the exercise of a legal right in the enforcement of a remedy given by express contract, if it has jurisdiction in any such case at all, only to prevent manifest injustice and irrreparable injury. Moller v. Robertson, 146 Minn. 265, 178 N. W. 590.

Courts are very slow to grant injunctions against the breach of a restrictive covenant respecting personal employment. Menter Co. v. Brock, 147 Minn. 407, 180 N. W. 553.

Plaintiff was conducting a retail millinery business in defendant's dry

goods department store under a contract which provided that plaintiff should conduct its department with the same degree of refinement and energy as the other departments in the store were conducted. Plaintiff's business was conducted ostensibly as if owned by defendant. On learning that plaintiff was to open a similar business in a competing department store, defendant gave notice that its contract with plaintiff would be terminated before its expiration. Plaintiff sued to restrain defendant from so doing and for damages. Before trial plaintiff removed because of defendant's interference. From the judgment awarding damages until the commencement of suit, and restoring possession, both parties appeal. It is held: The nature of the contract and the facts were such that if plaintiff was entitled to any relief at all it should have been limited to compensation in damages. The finding that plaintiff had failed to perform a substantial part of the contract precluded a court of equity from granting relief. In the absence of the finding mentioned, plaintiff would have been entitled to recover under the allegations of the complaint for the loss of profits during the whole time that it was deprived of doing business under the contract. The evidence did not show the contract to have been procured by fraud or collusion so as to justify a denial of relief. Stronge & Warner Co. v. H. Choate & Co., — Minn. —, 182 N. W. 712.

An injunction may be granted to enjoin the breach of a contract when necessary to prevent irreparable injury. The matter rests largely in the discretion of the trial court. A mandatory injunction requiring affirmative acts in the performance of contracts is to be granted only in exceptional cases and sparingly. Bennett v. Fox Film Corp., — Minn. —, 182 N. W. 905.

Restrictive covenants in a deed are enforceable by injunction. Godley v. Weisman, 133 Minn. 1, 157 N. W. 711, 158 N. W. 333. See §§ 2393, 2676.

Equity will sometimes enjoin the enforcement of contracts. Burnett v. Supflow, 134 Minn. 407, 159 N. W. 951.

A permanent injunction held properly granted to restrain the closing of an opening into an alley whereby an owner of adjoining property was cut off from access to his property from the rear of adjoining property, contrary to a contract between the adjoining owners. Sharkey v. Batcher, 139 Minn. 337, 166 N. W. 350.

(68) Goodrich v. Northwestern Tel. Exchange Co., 148 Minn. —, 181 N. W. 333 (contract fixing telephone rates); Bennett v. Fox Film Corp., — Minn. —, 182 N. W. 905.

(70) Menter Co. v. Brock, 147 Minn. 407, 180 N. W. 553. See § 8436.

4480. Municipal affairs—A citizen and taxpayer cannot enjoin the vacation of a street unless he will be specially injured thereby. Thorpe v. Ada, 137 Minn. 86, 162 N. W. 886.

A citizen and taxpayer may not invoke the restraining power of a court of equity to enjoin the officers of a municipal corporation from leasing a building not needed for public use, unless it is shown that such municipal

corporation and its officers are acting ultra vires, and where such unauthorized acts may affect injuriously the rights of those complaining. Anderson v. Montevideo, 137 Minn. 179, 162 N. W. 1073.

An order granting a temporary injunction restraining the city of St. Paul from executing an order for the removal of an alleged obstruction to the use of a public alley declared by the city a public nuisance held not an abuse of discretion. Smith v. St. Paul, 137 Minn. 109, 162 N. W. 1062.

A municipality may seek an injunction for the protection of its own interests and the interests of its citizens. Red Wing v. Wisconsin etc. Co., 139 Minn. 240, 166 N. W. 175. See § 4019.

The board of county commissioners ought not to be enjoined from considering the claim of one not a party to the injunction suit, unless it is very clear that no such claim can exist, for the taxpayer interested has an adequate remedy by appeal from the allowance of the claim by the county board. Keiver v. Koochiching County, 141 Minn. 64, 169 N. W. 254.

Held, following the rule that public rights and public interest should be vindicated and prosecuted by public authority, to the exclusion of suits by private persons: (a) That the validity of the incorporation of a village organized under the provisions of chapter 9, G. S. 1913, can be inquired into only at the instance of the state in appropriate quo warranto proceedings; and (b) that a private suit to restrain the election of officers after the proceedings have been completed, and the organization has on the face of record become legally constituted cannot be maintained. Whether legislative proceedings under the statute may be interrupted and enjoined before completion thereof by private suit, quaere? Hammer v. Narverud, 142 Minn. 199, 171 N. W. 770.

The courts will interfere in such matters in exceptional cases, and only when the threatened action of the municipality is forbidden by law and therefore illegal, or where the consummation thereof will in itself result in irreparable injury, cause a multiplicity of suits, or violate previously existing contractual rights. Meyers v. Knott, 144 Minn. 199, 174 N. W. 842.

(75) Rydeen v. Clearwater County, 139 Minn. 329, 166 N. W. 334.

(76) Meyers v. Knott, 144 Minn. 199, 174 N. W. 842.

4488. Enforcement of unconstitutional statutes—Powers of federal courts—The railroad rates prescribed by Laws 1907, c. 232, were the lawful rates for transporting intrastate shipments from the time that act declared such rates to be in effect, though their enforcement was for a time enjoined by the federal Circuit Court. Solum v. Northern Pacific Ry. Co., 133 Minn. 93, 157 N. W. 996; L. Christian & Co. v. Chicago etc. Ry. Co., 135 Minn. 45, 159 N. W. 1082.

(92) See State v. District Court, 141 Minn. 1, 168 N. W. 821.

TEMPORARY INJUNCTION

4490. When authorized—Discretion of trial court—Question on appeal—In an action by the vendee in a contract for the sale of land to recover payments made thereunder on the theory that the vendee had rescinded the contract for the fraud of the vendor, the court granted an injunctional order restraining the vendor during the pendency of the action from attempting to cancel the contract by giving notice under the statute. Held, that the order was not forbidden by the statute, though its only value to plaintiff was in case he failed to prevail in the action. It is sufficient if the injunction protected a right which the plaintiff had if he failed in the action. Freeman v. Fehr, 132 Minn. 384, 157 N. W. 587. See Straabe v. Jackson, 134 Minn. 179, 158 N. W. 915.

The refusal of a temporary injunction to plaintiff upon pleadings and affidavits is, for purposes of review, deemed a finding that the allegations of the complaint are not true in so far as they are denied. George J. Grant Const. Co. v. St. Paul Building Trades Council, 136 Minn. 167, 161 N. W. 520, 1055.

Where the trial on conflicting pleadings and affidavits denies a temporary injunction, the supreme court on appeal from such an order will assume a state of facts as favorable to the defendants as the showing made by them will sustain. Steffes v. Motion Picture Machine Operators Union, 136 Minn. 200, 161 N. W. 524.

Granting or refusing a temporary injunction rests so largely in the discretion of the trial court that an appellate court is not justified in interfering unless the action of the trial court is clearly erroneous and will result in an injury which it is the duty of the court to prevent. The supreme court will very rarely grant a temporary injunction which has been denied by the trial court. Roraback v. Motion Picture Machine Operators Union, 140 Minn. 481, 168 N. W. 766.

While the granting of a temporary injunction rests largely in the discretion of the court, the court has no discretion to withhold a permanent injunction where the facts proved on a trial require that form of relief under well settled principles. Currie v. Silvernale, 142 Minn. 254, 171 N. W. 782.

The supreme court will not interfere with the action of a trial court in granting or refusing a temporary injunction, where the evidence as to the facts is conflicting and no irreparable injury impends. Twitchell v. Cummings, 128 Minn. 391, 151 N. W. 139; Belle Plaine v. Northern Power Co., 142 Minn. 361, 172 N. W. 217.

On an appeal from an order refusing an injunction pendente lite, the order must be taken as resolving against the appellant all questions of fact which the evidence leaves in doubt. Berman v. Minneapolis Photo Engraving Co., 144 Minn. 146, 174 N. W. 735.

The question whether a temporary injunction should issue in any particular case rests in the sound judgment and discretion of the trial court. Where the facts are in dispute and the legal rights of the parties are thus

left in doubt, the action of the court in granting a writ for the preservation and protection of rights pending the suit will rarely be interfered with on appeal. Goodrich v. Northwestern Tel. Exchange Co., 148 Minn. —, 181 N. W. 333.

(95) Conkey v. Dike, 17 Minn. 457 (434) (granted to enjoin foreclosure of mortgage); Pineo v. Heffelfinger, 29 Minn. 183, 12 N. W. 522 (order refusing to dissolve injunction against foreclosure of mortgage reversed); Rockwood v. Davenport, 37 Minn. 533, 35 N. W. 377 (denied to enjoin clerk from entering a judgment nunc pro tunc); Myers v. Duluth Transfer Ry. Co., 53 Minn. 335, 55 N. W. 140 (properly denied to restrain construction of railroad over certain premises); Gorton v. Forest City, 67 Minn. 36, 69 N. W. 478 (writ restraining defendant from opening a public highway properly dissolved); McGregor v. Case, 80 Minn. 214, 83 N. W. 140 (denied to restrain water board from cutting off a water supply for failure of patron to pay rates); Fuller v. Schutz,, 88 Minn. 372, 93 N. W. 118 (granted to restrain sale of interest in patent); Felt v. Elmquist, 104 Minn. 33, 115 N. W. 746 (granted to restrain removal of obstruction at outlet of a lake); Haugen v. Sundseth, 106 Minn. 129, 118 N. W. 666 (granted to restrain a defendant from engaging in a business); Watters v. Mankato, 106 Minn. 161, 118 N. W. 358 (writ restraining defendant from building a bridge properly dissolved); Meagher v. Schussler, 106 Minn. 539, 118 N. W. 664 (denied to restrain a school district from selling bonds); Holmes v. Park Rapids Lumber Co., 108 Minn. 196, 121 N. W. 877 (granted to restrain cutting of timber); Mitchell v. St. Paul, 114 Minn. 141, 130 N. W. 66 (granted to restrain city from paying a claim); Ekeberg v. Mackay, 114 Minn. 501, 131 N. W. 787 (granted to restrain foreclosure of a mortgage); Kelling c. Edwards, 116 Minn. 484, 134 N. W. 221 (denied to restrain performance of a drainage contract); Dalberg v. Lundgren, 118 Minn. 219, 136 N. W. 742 (denied to restrain construction of a drainage ditch); Minneapolis Gaslight Co. v. Minneapolis, 123 Minn. 231, 143 N. W. 728 (denied to restrain city from publishing and putting into effect an ordinance fixing gas rates); Davis v. Forrestal, 124 Minn. 10, 144 N. W. 423 (denied to restrain commencement of an action); Velie v. Richardson,, 126 Minn. 334, 148 N. W. 286 (granted to restrain breach of restrictive covenant in a deed); Potter v. Engler, 130 Minn. 510, 153 N. W. 1088 (denied to restrain removal of timber); Cornell v. Upper Michigan Land Co., 131 Minn. 337, 155 N. W. 99 (granted to restrain disposition of certain promissory notes); Twitchell v. Cummings, 128 Minn. 391, 151 N. W. 139 (granted to restrain removal of sand and gravel); Minnesota Stove Co. v. Cavanaugh, 131 Minn. 458, 155 N. W. 638 (granted against picketing—order modified on appeal); Freeman v. Fehr, 132 Minn. 384, 157 N. W. 587 (restraining service of statutory notice to cancel land contract); Lincoln County v. Curtis, 134 Minn. 473, 159 N. W. 129 (restraining sheriff from locking doors and preventing occupation of county building by certain county officers); George J. Grant Const. Co. v. St. Paul Building Trades Council, 136 Minn. 167, 161 N. W. 520, 1055 (denial of injunction against labor organiza-

tion); Steffes v. Motion Picture M. O. Union, 136 Minn. 200, 161 N. W. 524 (denial of injunction to restrain labor organization from displaying "unfair" placard); Smith v. St. Paul, 137 Minn. 109, 162 N. W. 1062 (order restraining a city from executing an order for the removal of an alleged obstruction to the use of a public alley, declared by the city a public nuisance); Red Wing v. Wisconsin etc. Co., 139 Minn. 240, 166 N. W. 175 (restraining a public service corporation from putting into effect increased gas rates); Roraback v. Motion Picture Machine Operators Union, 140 Minn. 481, 168 N. W. 766 (denial of injunction against "bannering" by a labor union); Trauernicht v. Richter, 141 Minn. 496, 169 N. W. 701 (granted to restrain violation of building permit); Belle Plaine v. Northern Power Co., 142 Minn. 361 ,172 N. W. 217 (granted to restrain public service corporation from refusing to furnish electric service at contract rates); Berman v. Minneapolis Photo Eng. Co., 144 Minn. 146, 174 N. W. 735 (denied to restrain stockholder from selling or voting certain stock); Meyers v. Knott, 144 Minn. 199, 174 N. W. 842 (denied to restrain calling and conducting a municipal election with reference to a street railway franchise); Hanson v. Beaulieu, 145 Minn. 119, 176 N. W. 178 (granted to restrain violation of a party-wall agreement); Yellow Cab Co. v. Becker, 145 Minn. 152, 176 N. W. 345 (granted to restrain use of taxicabs of same color as those of plaintiff); G. O. Miller Telephone Co. v. Minimum Wage Commission, 145 Minn. 262, 177 N. W. 341 (granted by trial court to restrain enforcement of certain orders of the Minimum Wage Commission—order reversed on appeal); Goodrich v. Northwestern Tel. Exchange Co., 148 Minn. —, 181 N. W. 333 (granted to restrain telephone company from putting into effect increased rates); Wrigley v. Yellow Cab Co., — Minn. —, 182 N. W. 170 (granted to restrain a cab company from installing a call telephone in a street upon a building immediately adjacent to the premises occupied by plaintiff); Bennett v. Fox Film Corp., — Minn. —, 182 N. W. 905 (granted to restrain the breach of a contract).

4494. Mandatory—(2) Bennett v. Fox Film Corp., — Minn. —, 182 N. W. 905.

4495. When equities denied—(3) Red Wing v. Wisconsin etc. Co., 139 Minn. 240, 166 N. W. 175.

4499. Bond—Judgment entered upon stipulation of the parties, pursuant to an amicable settlement of the case, does not give rise to liability on the bond. Downs v. American Surety Co., 132 Minn. 201, 156 N. W. 5.

When the sole action is to secure a permanent injunction, and a temporary injunction giving substantially the relief prayed is issued and remains in effect during the pendency of the action, and judgment is rendered in favor of defendant, the reasonable value of counsel fees incurred in defending the action are recoverable in an action on the injunction bond. Pelkey v. National Surety Co., 143 Minn. 176, 173 N. W. 435.

In an action on an injunction bond the defendants cannot relitigate the

merits involved in the action for an injunction; and where the action was to enjoin the maintenance of an icehouse and the carrying on of an ice business on certain premises an order of the city inspector of buildings made about the time of the commencement of the action directing the tearing down of the icehouse is not a bar to an action on the injunction bond. If the defendants in the action on the bond can avail themselves of the order of the building inspector as bearing upon the question of damages, the validity of the order is subject to attack by the plaintiff. An order of a municipal officer or board, in the exercise of a police power, restricting the use of property or ordering its destruction, may not amount to the taking of property without due process and the owner may not be entitled to an injunction; but at some time and in some way he is entitled to have determined in a judicial proceeding the rightfulness of the taking or destruction. The plaintiff sustained some damage, aside from counsel fees incurred, by reason of the injunction. Whether his evidence shows any loss of profits is in doubt; and if there was a loss it was small. Pelkey v. National Surety Co., 143 Minn. 176, 173 N. W. 435.

(16, 18) Pelkey v. National Surety Co., 143 Minn. 176, 173 N. W. 435.

(19) Pelkey v. National Surety Co., 143 Minn. 176, 173 N. W. 435. See Downs v. American Surety Co., 132 Minn. 201, 156 N. W. 5.

PROCEDURE

4499a. Parties—Plaintiff and intervener held entitled to maintain an action to restrain a redemption from a mortgage foreclosure sale. Burns v. Burns, 124 Minn. 176, 144 N. W. 761.

4500. Pleading—In general—(24) See Red Wing v. Wisconsin etc. Co., 139 Minn. 240, 166 N. W. 175.

4501. Complaint for damages and injunction—(28) See Stronge & Warner Co. v. H. Choate & Co., — Minn. —, 182 N. W. 712.

4502d. Judgment—Relief allowable—Where the plaintiff asks for an injunction and damages he may be awarded the latter and denied the former. Stronge & Warner Co. v. H. Choate & Co., — Minn. —, 182 N. W. 712. See § 4501.

4502e. Taking further testimony—Further testimony should be taken to determine whether defendant may not remove or mitigate the annoyances complained of without seriously interfering with the prosecution of its business and such relief afforded to plaintiffs as may be justified by the additional evidence produced. Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N. W. 805.

4503. Modification and vacation of permanent injunctions—A judgment perpetually enjoining a railroad company from occupying a city street, on the ground that the right to do so has not been regularly acquired, should be vacated when the right is acquired by a proper

franchise and condemnation proceedings, and the court may in its discretion modify the injunction on proper terms before the condemnation proceeding is complete. Larson v. Minnesota N. W. Electric Ry. Co., 136 Minn. 423, 162 N. W. 523.

(30) Larson v. Minnesota N. W. Electric Ry. Co., 136 Minn. 423, 162 N. W. 523.

VIOLATION

4505. Justification—A preliminary injunction restraining the holding of an election, issued by a court having no jurisdiction of the subject-matter of the action, did not affect the validity of the election held in violation of the injunction. State v. Kinney, 146 Minn. 311, 178 N. W. 815.

INNKEEPERS

4508. Who is a guest—The relation of innkeeper and guest involves the obligation to furnish accommodation on the one hand, and the obligation to pay on the other. Generally a person becomes a guest when he registers and engages accommodation. He may, however, be a guest before doing either. Handing baggage to a porter or bell boy of the inn may commence the relation if the parties contemplate that accommodation be engaged. But one does not become a guest by merely handing his satchel to such employee when he does not intend to engage such accommodation. Parker v. Dixon, 132 Minn. 367, 157 N. W. 583. See 23 L. R. A. (N. S.) 1107; 34 Id. 420; 39 Id. 1085.

(37) 12 A. L. R. 261 (effect of payment by week, month or the like).

4511. Liability for loss of goods—The common-law liability of an innkeeper applies only to guests. It does not apply to one who comes to the inn intending only to avail himself without expense of the facilities and comforts which the innkeeper furnishes free to the public at large. Parker v. Dixon, 132 Minn. 367, 157 N. W. 583.

(42) Parker v. Dixon, 132 Minn. 367, 157 N. W. 583.

(43) 31 Harv. L. Rev. 1166.

4512a. Liability for unfit food—A hotel or restaurant may be liable on implied contract for unfit food sold to guests. See Friend v. Childs Dining Hall Co., 231 Mass. 65, 120 N. E. 407; 5 A. L. R. 1115.

4515a. Fire protection—Statute—In a prosecution for failure to provide fire protection contrary to G. S. 1913, § 5119, held, that the complaint was sufficient and that a conviction was justified by the evidence. State v. Minor, 137 Minn. 254, 163 N. W. 514.

INSANE PERSONS

IN GENERAL

4517. Evidence of insanity—Declarations of an accused person on issue of his insanity. 8 A. L. R. 1219.

Appointment of guardian as evidence of insanity. 7 A. L. R. 568.

(59) 6 A. L. R. 1486 (necessity of showing that insanity of relatives was of a hereditary or transmissible type).

CONTRACTS

4519. Mental capacity to contract—Evidence held to show that a grantor was qualified to execute a deed. Klinkert v. Streissguth, 145 Minn. 336, 177 N. W. 363.

4520. Ratification in lucid intervals—(66) See Wood v. Newell, — Minn. —, 182 N. W. 965.

4521. Disaffirmance on restoration to capacity—(67) See Wood v. Newell, — Minn. —, 182 N. W. 965.

4522. Executed contracts—When voidable—Evidence held to justify a finding that one was of unsound mind and incompetent to transact business when he executed a certain chattel mortgage and that the plaintiff, an assignee of the mortgage, acquired no rights thereunder. Bauman v. Krieg, 133 Minn. 196, 158 N. W. 40.

One who loans money to an insane person upon a promissory note without knowledge or notice of his insanity can recover upon it; and in this case the evidence sustains the finding that the plaintiff, loaning money to the defendant on his note, was without knowledge or notice of his insanity. Merchants Nat. Bank v. Coyle, 143 Minn. 440, 174 N. W. 309.

A contract with a person of unsound mind will not be set aside or annulled at his suit after restoration to normal condition, where it appears that it was entered into in good faith and without fraud, for a fair consideration, and without notice of the disability to the other contracting party, and no inequitable advantage has been derived therefrom. The vendee in an executory contract for the sale of land, though he has not the fee title, may invoke the rule and thus prevent the annulment of the contract. Wood v. Newell, — Minn. —, 182 N. W. 965.

(68) Merchants Nat. Bank v. Coyle, 143 Minn. 440, 174 N. W. 309; Wood v. Newell, — Minn. —, 182 N. W. 965.

(73) Merchants Nat. Bank v. Coyle, 143 Minn. 440, 174 N. W. 309.

COMMITMENT

4523. Proceedings for commitment—Under the provisions of the statutes relating to examination and commitment of persons alleged to be

insane, the probate court has no jurisdiction to inquire into the mental condition of a person not actually within the territorial limits of the county, whether a legal resident of the county or not. State v. Hense, 135 Minn. 99, 160 N. W. 198.

GUARDIANS

4526. Powers and duties—A guardian of an insane person, clothed with the management and control of the ward's property and affairs, is authorized, without first obtaining the approval of the probate court, to employ an attendant to care for and render assistance to the invalid wife of the ward. When such employment is necessary, and the employment is in good faith, without purpose to unnecessarily burden the estate with expense, the reasonable value of the services rendered thereunder is a valid claim against the estate of the ward. Matthews v. Mires, 135 Minn. 94, 160 N. W. 187.

RESTORATION TO CAPACITY

4528. Proceedings for restoration to capacity—The proceedings provided by R. L. 1905, § 3831, apply only to persons under guardianship. Northfoss v. Welch, 116 Minn. 62, 68, 133 N. W. 82.

An order restoring a person under guardianship to capacity held justified by the evidence. Hallenberg v. Hallenberg, 144 Minn. 39, 174 N. W. 443.

INSURANCE

IN GENERAL

4640. Definition and nature—A fire insurance policy is a mere personal contract of indemnity against loss by the insured. It does not attach to the property or go with it as an incident. The insurance money does not stand in the place of property destroyed. Remington v. Sabin, 132 Minn. 372, 157 N. W. 504.

4641. Insurable interest—A mortgagor of personalty has an insurable interest, at least if he has possession. King v. Hartford Fire Ins. Co., 133 Minn. 322, 158 N. W. 435.

A leasehold interest may be insured by the holder. Kahn v. American Ins. Co., 137 Minn. 16, 162 N. W. 685.

To give one an insurable interest in the subject insured, it is not necessary that he should have an absolute right of propery therein. He has an insurable interest if, by the destruction of the property, he will suffer a loss whether he has or has not any title to, lien upon, or possession of the property itself. Banner Laundry Co. v. Great Eastern Casualty Co., 148 Minn. —, 180 N. W. 997.

A tenant in common or co-owner has an insurable interest. National Fire Ins. Co. v. Itasca Timber Co., 148 Minn. —, 181 N. W. 337.

A seller of wood in a wood yard not segregated and still in his posses-

sion held to have an insurable interest. National Fire Ins. Co. v. Itasca Lumber Co., 148 Minn. —, 181 N. W. 337.

The holder of a life estate has an insurable interest. Collins v. St. Paul Fire & Marine Ins. Co., 44 Minn. 440, 46 N. W. 906.

4642. Contract to insure—Breach—Damages—There is evidence that plaintiff, holding certain policies of insurance about to expire, told the insurance agent to "renew them all just the way they were before," and promised that her husband would call and pay the premiums and that the agent assented. Held, sufficient to establish a contract to insure. The payment of the premium is not a prerequisite to the maintenance of an action for damages for breach of such a contract, unless payment is made a condition precedent. An agent to insure is authorized to make a contract to insure. Eifert v. Hartford Fire Ins. Co., 148 Minn. —, 180 N. W. 996.

(32) See Wiebeler v. Milwaukee Mechanics Mut. Ins. Co., 30 Minn. 464, 16 N. W. 363; Ames-Brooks Co. v. Aetna Ins. Co., 83 Minn. 346, 86 N. W. 344.

THE CONTRACT

4645a. Policy defined—A policy is, properly speaking, a contract to indemnify the insured in respect to some interest which he has, against the perils to which he considers that it will be liable. Also, the formal instrument in which the contract of insurance is usually embodied is known as the policy. Aaberg v. Minnesota Commercial Men's Assn., 143 Minn. 354, 173 N. W. 708.

4646. The policy the contract—Attaching papers—Statute—The statute is applicable to fidelity bonds issued by compensated bonding companies. Pearson v. United States F. & G. Co., 138 Minn. 240, 164 N. W. 919.

That a copy of the application is attached to the policy as is required by statute, and retained by the insured, does not as a matter of law charge him with knowledge of the representations written therein or estop his beneficiary from showing that they were not in fact made. Olsson v. Midland Ins. Co., 138 Minn. 424, 165 N. W. 474; Gruberski v. Brotherhood of American Yoemen, — Minn. —, 182 N. W. 716.

The statute does not apply to contracts of health and accident insurance. Aaberg v. Minnesota Commercial Men's Assn., 143 Minn. 354, 173 N. W. 708.

4647. Oral contract—An oral contract of present insurance or for insurance to be effective from date is valid. Quinn-Shepherdson Co. v. United States F. & G. Co., 142 Minn. 428, 172 N. W. 693.

A parol contract for present insurance made by a local agent of an insurance company, if within the scope of his authority, is binding upon the company. Koivisto v. Bankers & Merchants Ins. Co., 148 Minn. —, 181 N. W. 580.

Defendant's local agent had power to take applications for insurance,

receive premiums, and deliver policies when issued at defendant's home office. He had a state license authorizing him to conduct all lawful business of the defendant in this state. It was defendant's practice to date its policies back to correspond with the date of the applications. Premiums were applied in part to pay for insurance from that date. Held that, in view of its practice, its agent should be presumed to have implied authority to make a binding preliminary contract of insurance to attach on the day when an application was taken and the premium paid and to continue until a policy was issued or the application rejected and the applicant notified, and a finding that he had authority to make such a contract was justified. Koivisto v. Bankers & Merchants Ins. Co., 148 Minn. —, 181 N. W. 580.

The evidence required the submission to the jury of an issue as to the existence of an alleged oral contract of insurance of the fidelity of plaintiff's employees and supports the jury's finding that the parties had entered into such a contract. The contents of the letter set out in the report of this case on the former appeal (142 Minn. 431, 172 N. W. 693). are not inconsistent with an inference that at some time before it was written the parties had arrived at an agreement for insurance. Quinn-Shepherdson Co. v. United States F. & G. Co., — Minn. —, 183 N. W. 347.

(40) See Wieland v. St. Louis County Farmers Mut. Fire Ins. Co., 146 Minn. 255, 178 N. W. 499.

4648. Executory contract to insure—An oral contract to issue a policy in the future, to be effective from the present, may be enforced specifically and a recovery given, or damages may be awarded for a breach. Quinn-Shepherdson Co. v. United States F. & G. Co., 142 Minn. 428, 172 N. W. 693.

4649. Parties—Partnership—A policy of fire insurance was issued to a partnership which was subsequently incorporated. Thereafter, with knowledge of the incorporation, the insurer renewed the policy in the name of the partnership. A loss occurred while the second policy was in force. In an action on the latter policy it was held that the insurer was liable. Lenning v. Retail Merchant's Mutual Fire Ins. Co., 138 Minn. 233, 164 N. W. 908.

4652. Meeting of minds—Acceptance of application—(47) Haley v. Sharon Township Mut. Fire Ins. Co., 147 Minn. 190, 179 N. W. 895.

(48) See 33 Harv. L. Rev. 198.

4652a. Mistake—The evidence justified the court in finding that the policy did not express the actual agreement of the parties and that its failure so to do was the result of the mistake of the secretary of the company in writing the policy. Such a mistake is sufficient ground for a reformation of the policy at the suit of the company. The negligence of the secretary in writing the policy so that it did not correctly express the actual agreement of the parties was not a bar to the right of the company to have the policy reformed. Haley v. Sharon Township Mut. Fire Ins. Co., 147 Minn. 190, 179 N. W. 895.

4653. Acceptance of policy—The delivery of the policy to the insured and his retention of it is not conclusive evidence that after the application was made and accepted the parties agreed to modify their original contract so as to cover property described in the policy instead of that described in the application. Haley v. Sharon Township Mut. Fire Ins. Co., 147 Minn. 190, 179 N. W. 895.

See § 4776.

4654. Execution and delivery of policy—Evidence held to justify a finding that a policy never became effective by delivery. Maryland v. L. R. Christenson, — Minn. —, 182 N. W. 951.

Delivery of life insurance policy. 33 Harv. L. Rev. 198.

4655. When takes effect—In certain lines of insurance it is common to cover the insured from the time the application is made. Quinn-Shepherdson Co. v. United States F. & G. Co., 142 Minn. 428, 172 N. W. 693.

(53, 55) See 6 A. L. R. 774.

4659. Construction—A policy insuring a leasehold interest is governed by the same rules of construction as an ordinary fire insurance policy. Kahn v. American Ins. Co., 137 Minn. 16, 162 N. W. 685.

The surrounding circumstances may be considered in determining the meaning of the language used in the policy. McCullough v. Georgia Casualty Co., 137 Minn. 88, 162 N. W. 894.

The general rule of construction against the insurer applies to questions in an application for insurance. Villiott v. Sovereign Camp of Woodmen, 145 Minn. 349, 177 N. W. 356.

The policy is to be given a prospective operation only in the absence of express provision to the contrary. See First Nat. Bank v. Iowa Bonding & Casualty Co., — Minn. —, 183 N. W. 830, 834.

(60) Review Printing Co. v. Hartford Fire Ins. Co., 133 Minn. 213, 158 N. W. 39; Duluth St. Ry. Co. v. Fidelity & Deposit Co., 136 Minn. 299, 161 N. W. 595; Trost v. Delaware etc. Ins. Co., 137 Minn. 208, 163 N. W. 290; Fitzgibbons v. Bowen, 139 Minn. 197, 165 N. W. 1059; Phillips v. Duluth Casualty Assn., 140 Minn. 245, 168 N. W. 9; State v. District Court, 141 Minn. 348, 170 N. W. 218; Moskovitz v. Travelers Indemnity Co., 144 Minn. 98, 174 N. W. 616; Zenith Box & Lumber Co. v. Nat. Union Fire Ins. Co., 144 Minn. 386, 175 N. W. 894; Villiott v. Sovereign Camp of Woodmen, 145 Minn. 349, 177 N. W. 356; Cohen v. Chicago Bonding & Ins. Co., 146 Minn. 222, 178 N. W. 485; Olson v. Great Eastern Casualty Co., — Minn. —, 183 N. W. 826.

(61) National Fire Ins. Co. v. Itasca Lumber Co., — Minn. —, 181 N. W. 337.

See § 4830.

4659a. Surrender and cancelation—Evidence held to justify a finding that a policy was surrendered to the company and canceled. Maryland v. L. R. Christenson, — Minn. —, 182 N. W. 951. See § 4694.

APPLICATION

4662. Act of applicant—(75) See Olsson v. Midland Ins. Co., 138 Minn. 424, 165 N. W. 474; Gruberski v. Brotherhood of American Yoemen, — Minn. —, 182 N. W. 716.

4662a. Construction—Questions in an application will be construed strongly against the insurer. Villiott v. Sovereign Camp of Woodmen, 145 Minn. 349, 177 N. W. 356.

WARRANTIES AND REPRESENTATIONS

4665. Statutory regulation—Materiality—Under the statute a material misrepresentation, made with intent to deceive and defraud, avoids the policy. A material misrepresentation, not made with intent to deceive and defraud, does not avoid the policy, unless the matter misrepresented increases the risk of loss; and if it does increase the risk of loss, the policy is avoided, regardless of the intent with which it was made. An immaterial misrepresentation, though made with intent to deceive and defraud, does not avoid the policy. Olsson v. Midland Ins. Co., 138 Minn. 424, 165 N. W. 474.

The statute applies to bonds to secure the fidelity of employees W. A. Thomas Co. v. National Surety Co., 142 Minn. 460, 172 N. W. 697.

G. S. 1913, § 3300, does not apply to mutual benefit societies. Farm v. Royal Neighbors, 145 Minn. 193, 176 N. W. 489.

(80) McAlpine v. Fidelity & Casualty Co., 134 Minn. 192, 158 N. W. 967; Pearson v. United States F. & G. Co., 138 Minn. 240, 164 N. W. 919; Olsson v. Midland Ins. Co., 138 Minn. 424, 165 N. W. 474; Zimmerman v. Bankers Casualty Co., 138 Minn. 442, 165 N. W. 271; W. A. Thomas Co. v. National Surety Co., 142 Minn. 460, 172 N. W. 697. See McCullough v Georgia Casualty Co., 137 Minn. 88, 162 N. W. 894.

(81) Farm v. Royal Neighbors, 145 Minn. 193, 176 N. W. 489.

4666. Test of materiality—G. S. 1913, § 3300, does not apply to mutual benefit societies. Farm v. Royal Neighbors, 145 Minn. 193, 176 N. W. 489.

The fact that the insured has at some time suffered from hernia does not necessarily increase the risk as a matter of law. Ivanesovich v. North American L. & C. Co., 145 Minn. 175, 176 N. W. 502.

4667. Warranty of truth of answers—The contract warranted the answers to the questions in the medical examination to be literally true. The answers in controversy related to matters material to the risk, and if they were made and were not true their falsity avoided the contract. An instruction to the effect that, although false answers were knowingly made, the plaintiffs were entitled to recover unless the matters misrepresented increased the risk, was error. Farm v. Royal Neighbors, 145 Minn. 193, 176 N. W. 489.

Plaintiff, in a form of application for insurance prepared by itself, in one question asked as to insanity of parents, grandparents, uncles and aunts of the applicant, and in another asked as to the health of parents, grandparents, brothers and sisters. The applicant was justified in assuming that information as to insanity of brothers and sisters was not there desired. Villiott v. Sovereign Camp of Woodmen, 145 Minn. 349, 177 N. W. 356.

4669. Representations as to health—In questions concerning health, the word may be limited to physical and not mental health, so as not to include insanity. An insane person may be in good health. Villiott v. Sovereign Camp of Woodmen, 145 Minn. 349, 177 N. W. 356.

(87) Powers v. Fidelity & Casualty Co., 144 Minn. 282, 175 N. W. 111. See Ivanesovich v. North American L. & C. Co., 145 Minn. 175, 176 N. W. 502.

4670. Concealment—Incomplete answers—(89) See Villiott v. Sovereign Camp of Woodmen, 145 Minn. 349, 177 N. W. 356.

4673. Effect of misrepresentations—The effect of misrepresentations is now defined by statute. See § 4665.

Under the statute a misrepresentation of a fact which increases the risk of loss avoids the policy, regardless of the intent with which it was made. Johnson v. National Life Ins. Co., 123 Minn. 453, 144 N. W. 218; W. A. Thomas Co. v. National Surety Co., 142 Minn. 460, 172 N. W. 697.

A misrepresentation does not render a policy absolutely void but voidable at the election of the insurer. Madden v. Interstate etc. Assn., 139 Minn. 6, 165 N. W. 482.

(92) Johnson v. National Life Ins. Co., 123 Minn. 453, 144 N. W. 218; W. A. Thomas Co. v. National Surety Co., 142 Minn. 460, 172 N. W. 697. See §§ 4665–4667.

4674. Effect of various representations considered—Representations that the insured had not had fits or hernia or received medical or surgical attention within five years are material under a statute avoiding a policy for misrepresentations which "materially affected either the acceptance of the risk or the hazard assumed." Olsson v. Midland Ins. Co., 138 Minn. 424, 165 N. W. 474.

A representation that a contractor did not "operate a steam or electric railroad, switch or sidetrack in connection with the risks." McCullough v. Georgia Casualty Co., 137 Minn. 88, 162 N. W. 894.

As to pregnancy. Gruberski v. Brotherhood of American Yoemen, — Minn. —, 182 N. W. 716.

As to family history. L. R. A. 1917C, 866.

(96) Boynton v. Modern Woodmen, 148 Minn. —, 181 N. W. 327.

(98) Olsson v. Midland Ins. Co., 138 Minn. 424, 165 N. W. 474; Zimmerman v. Bankers Casualty Co., 138 Minn. 442, 165 N. W. 271; Madden v. Interstate etc. Assn., 139 Minn. 6, 165 N. W. 482; Peterson v. Mystic Workers, 141 Minn. 175, 169 N. W. 598; Richardson v. North American Life & Casualty Co., 142 Minn. 295, 172 N. W. 131; Powers v.

Fidelity & Casualty Co., 144 Minn. 282, 175 N. W. 111; Ivanesovich v. North American L. & C Co., 145 Minn. 175, 176 N. W. 502; Farm v. Royal Neighbors, 145 Minn. 193, 176 N. W. 489; Villiott v. Sovereign Camp of Woodmen, 145 Minn. 349, 177 N. W. 356.

(6) Olsson v. Midland Ins. Co., 138 Minn. 424, 165 N. W. 474; Zimmerman v. Bankers Casualty Co., 138 Minn. 442, 165 N. W. 271.

(8) 1 A. L. R. 459.

4674a. Evidence—Sufficiency—The evidence does not conclusively show that the representation that the insured had not had fits or hernia was false. The evidence does not conclusively show that a representation that the insured had not received medical or surgical attention within five years was false. The evidence does not conclusively show that statements contained in the application of the insured to the effect that he had never had fits or hernia and had not received medical or surgical attention within five years were knowingly made nor that the insured knowingly made false representations as to hernia, fits or medical or surgical attention, and judgment for the defendant notwithstanding the verdict for the plaintiff should not have been entered. Olsson v. Midland Ins. Co., 138 Minn. 424, 165 N. W. 474.

WAIVER, ESTOPPEL AND ELECTION

4675. Definitions and distinctions—(9) Bowman v. Surety Fund Life Ins. Co., — Minn. —, 182 N. W. 991.

4676. Waiver—What constitutes—In general—(11) Bowman v. Surety Fund Life Ins. Co., — Minn. —, 182 N. W. 991.

4677. Stipulations against waiver—The provision in the policy, that no condition therein shall be waived, except by written indorsement signed by a designated officer, does not apply to the conditions to be performed after the occurrence of the loss, or of the event upon which a loss may be predicated. C. S. Brackett & Co. v. General Accident etc. Corp., Ltd., 140 Minn. 271, 167 N. W. 798.

(14) See Bowman v. Surety Fund Life Ins. Co., — Minn. —, 182 N. W. 991.

4683. Failure to return premiums, etc.—(22) Madden v. Interstate etc. Assn., 139 Minn. 6, 165 N. W. 482. See § 4840.

4684. Acceptance of premiums, etc.—G. S. 1913, § 3306, and the by-laws of the company, which form a part of the insurance contract, to the effect that a failure to pay the premium within the time thereby prescribed shall without notice or other act on the part of the company void the contract, do not preclude a waiver of such payment by the acts and conduct of the insurance company. Lenning v. Retail Merchants Mutual Fire Ins. Co., 138 Minn. 233, 164 N. W. 908.

There is a special statute regulating the effect of a reinstatement by

the acceptance of delinquent premiums in the case of accident insurance. Ward v. Merchants Life & Casualty Co., 139 Minn. 262, 166 N. W. 221.

4686. Conduct after forfeiture—A policy of accident insurance provided that the insurer might at any time cancel the policy upon a return of the unearned portion of the premium paid. In the application the insured made a false representation of a character giving the insurer a right of forfeiture. After an accident the insurer, with knowledge of the false representation, canceled the policy under the provision mentioned returning the premium unearned at that time. It is held that the facts stated evidence as a matter of law a waiver of forfeiture upon the ground of the misrepresentation in the application. Madden v. Interstate etc. Assn., 139 Minn. 6, 165 N. W. 482.

The insurance policy in suit is construed as not excepting a risk resulting from the insured entering military service in time of war without the written consent of the company, but as imposing in such event a condition which the company might waive if it chose, and that evidence that the company after notice of the death of the insured in service wrote the beneficiary in terms consistent with the view that the policy was in force and inconsistent with a claim of present forfeiture, and, as if it intended to pay, asked her to send formal notice of death, and later asked her to send formal proofs of death, which she obtained with some trouble, justified a finding of waiver. Bowman v. Surety Fund Life Ins. Co., — Minn. —, 182 N. W. 991.

(27) Madden v. Interstate etc. Assn., 139 Minn. 6, 165 N. W. 482; Bowman v. Surety Fund Life Ins. Co., — Minn. —, 182 N. W. 991.

4688. Authority of agent—An insurance broker has no implied authority to waive a condition as to the time in which to bring an action on a policy. Segal v. Bart, 140 Minn. 167, 167 N. W. 481.

The doctrine of waiver applies to mutual companies as well as stock companies. Officers of a mutual company are not held to a stricter adherence to by-laws than officers of a stock company. Wieland v. St. Louis County Farmers Mut. Fire Ins. Co., 146 Minn. 255, 178 N. W. 499.

As a general rule any agent having power to execute contracts of insurance has authority to waive a condition of payment. Wieland v St. Louis County Farmers Mut. Fire Ins. Co., 146 Minn. 255, 178 N. W. 499.

The evidence sustains the finding of the jury that the acts claimed to constitute a waiver, which were done at the home office in the name of the company, by the secretary to the medical director, in response to correspondence, were corporate acts, and were not within the provision of the policy against waiver by an agent. Bowman v. Surety Fund Life Ins. Co., — Minn. —, 182 N. W. 991.

(31) See Bowman v. Surety Fund Life Ins. Co., — Minn. —, 182 N. W. 991.

CANCELATION AND RESCISSION

4694. When cancelation authorized—Mutual consent—Whether the policy had been canceled by mutual consent was a question of fact for

the jury. Bemidji Iron Works Co. v. Agricultural Ins. Co., 148 Minn. —, 181 N. W. 340. See § 4659a.

INSURANCE AGENTS AND BROKERS

4699. Local and general—(57) Zenith Box & Lumber Co. v. Nat. Union Fire Ins. Co., 144 Minn. 386, 175 N. W. 894.

4701. Brokers—Where two brokers are competing to secure the same customer for the same principal, the one through whose efforts the business is secured is entitled to the commission, though he was not the first to solicit the customer, and though the one who first did so has not abandoned the quest. Esterly-Hoppin Co. v. Burns, 135 Minn. 1, 159 N. W. 1069.

Where two brokers sought the same customer for the same principal, it was held that the evidence justified a finding that one of them procured the insurance and was entitled to the commission. Esterly-Hoppin Co. v. Burns, 135 Minn. 1, 159 N. W. 1069.

An insurance broker has no implied authority to waive a condition as to the time in which to bring action on a policy. Segal v. Bart, 140 Minn. 167, 167 N. W. 481.

An insurance agent, who, without the knowledge of the insured, procures another agent to write the risk, dividing commissions with him, is not authorized, as an agent of the insured, to make terms, or to bind the insured by stipulations not embodied in the policies and not known to him, and the insurer is not entitled to have the policies reformed to conform to terms agreed upon between the insurance agents. Zenith Box & Lumber Co. v. Nat. Union Fire Ins. Co., 144 Minn. 386, 175 N. W. 894.

An insurance broker is not the general agent of the insurer. He has no implied authority to bind the insurer by agreements not embodied in the policy. Zenith Box & Lumber Co. v. Nat. Union Fire Ins Co., 144 Minn. 386, 175 N. W. 894.

(59) See Segal v. Bart, 140 Minn. 167, 167 N. W. 481; Zenith Box & Lumber Co. v. Nat. Union Fire Ins. Co., 144 Minn. 386, 175 N. W. 894.

4704. Authority—In general—General agents are proper persons upon whom to serve notice of an accident unless the policy provides otherwise. C. S. Brackett & Co. v. General Accident etc. Corp., Ltd., 140 Minn. 271, 167 N. W. 798.

An agent to insure is authorized to make a contract to insure. Eifert v. Hartford Fire Ins. Co., 148 Minn. —, 180 N. W. 996.

The powers of an agent are prima facie co-extensive with the business intrusted to his care and will not be narrowly construed nor restricted by limitations not communicated to those with whom he deals. Powers specifically granted to him carry with them by implication such other and incidental powers as are directly appropriate to the specific powers granted. Koivisto v. Bankers & Merchants Ins. Co., 148 Minn. —, 181 N. W. 580.

(74) Hoidale v. Cooley, 143 Minn. 430, 174 N. W. 413.
(75) Althoff v. Torrison, 140 Minn. 8, 167 N. W. 119.

4706. Limitations in policy on authority of agent—(79) See Roseberry v. Hart-Parr Co., 145 Minn. 142, 176 N. W. 175.

4715. Agency contract—Action for breach—In an action for damages for the breach of an agency contract, held, that an order requiring an answer to be made more definite and certain and striking out a portion thereof was within the discretion of the court. Hart v. Lincoln Nat. Life Ins. Co., 144 Minn. 155, 174 N. W. 740.

4716a. Unauthorized assignment of premium notes—Rights of parties—An insurance agent to whom policies were intrusted for delivery to an applicant for insurance on payment of the first premiums in cash, disobeyed instructions, delivered the policies and took the applicant's notes payable to the applicant and indorsed in blank. An assignee of the notes after maturity sued on them. The insurance company claimed the notes as its own, and intervened. Held, it had a right to intervene and the complaint in intervention stated a case. On learning of the agent's unauthorized act, the insurance company had three courses open: First, it might repudiate his act and demand a return of the policies. Second, it might charge the agent with its share of the premiums, in which event the notes would belong to the agent. Third, it might ratify his act and demand the notes. This, the court found, the company did do. The evidence sustains this finding. The agent being entitled to 70 per cent of the premium represented by the notes, unless other facts are involved, judgment should be for his assignee for 70 per cent of the amount and for the company for the balance. Hoidale v. Cooley, 143 Minn. 430, 174 N. W. 413.

4717. Preparing applications—Statements in the application for a benefit certificate in a fraternal beneficiary society were made warranties, which, if not true, annulled the certificate issued. In an action on the certificate, the defence was that in response to a question in the application, material to the risk, the insured had given an untrue answer to defendant's medical examiner, who propounded the question and inserted the answer. It is held: The evidence made it a jury question whether or not the answer inserted was the answer given by the insured. The fact that the certificate, containing a copy of the application and the answer mentioned, was retained for three months without objection, is not, as a matter of law, conclusive that the insured adopted the false answer as her own; the testimony being that she could not read and did not understand the English language. Gruberski v. Brotherhood of American Yoemen, — Minn. —, 182 N. W. 716.

Where the agent of an insurance company, authorized to procure applications and forward them to the company, makes out an application incorrectly, notwithstanding that all the facts are correctly stated to him by the applicant, the error is chargeable to the insurer, and not to the in-

sured, and such statement will not have the effect of avoiding the policy. Zimmerman v. Bankers Casualty Co., 138 Minn. 442, 165 N. W. 271.

(96) Mahoney v. Minnesota Farmers Mut. Ins. Co., 136 Minn. 34, 161 N. W. 217; Olsson v. Midland Ins. Co., 138 Minn. 424, 165 N. W. 474; Zimmerman v. Bankers Casualty Co., 138 Minn. 442, 165 N. W. 271; Gruberski v. Brotherhood of American Yoemen, — Minn. —, 182 N. W. 716.

(99) Zimmerman v. Bankers Casualty Co., 138 Minn. 442, 165 N. W. 271.

(1) Gruberski v. Brotherhood of American Yoemen, — Minn. —, 182 N. W. 716. See § 4662.

INSURANCE COMPANIES

4721. Ultra vires contracts—(8) Trost v. Delaware etc. Ins. Co., 137 Minn. 208, 163 N. W. 290. See § 4743a.

FOREIGN INSURANCE COMPANIES

4723. Statutory prerequisites—(15) See State v. Reiter, 140 Minn. 491, 168 N. W. 714.

4725. Stipulation for service of process—Where a foreign insurance corporation has been duly authorized to do business in this state and has filed with the insurance commissioner the instrument appointing him and his successors its attorney upon whom process may be served as provided by statute so long as any liability remains outstanding in this state, the stipulation of the corporation in regard to the service of process becomes an obligation of the company precisely as though it were incorporated in the policies issued in this state to citizens thereof, and thereafter actions growing out of policies issued in this state may be commenced by service of the summons upon the insurance commissioner, as provided by statute, whether the corporation continues to do business in this state or not. A foreign insurance corporation duly authorized to do business in this state went out of business and transferred its business and obligations to defendant, a foreign corporation which has never been authorized to do business in this state. Defendant assumed the liabilities of its assignors and predecessors. Held, that one of the liabilities assumed by defendant is the stipulation contained in the instrument theretofore filed by its assignors in the office of the insurance commissioner of this state, and that service of the summons upon the insurance commissioner in an action on an insurance contract made by its predecessor while doing business in this state subjects the defendant to the jurisdiction of the courts of this state. Braunstein v. Fraternal Union, 133 Minn. 8, 157 N. W. 721.

(17) See Wold v. Minnesota Commercial Men's Assn., 136 Minn. 380, 162 N. W. 461 (similar statute of Wisconsin—estoppel of company to deny compliance with statute).

ACTIONS

4732. Limitation of actions—The statute of limitations held not to bar plaintiff's cause of action, since it did not accrue upon the mere occurrence of his permanent and total disability, but only upon his election thereafter to take under the provision of the certificate for a surrender thereof and payment to him of one-half of the death benefit in case of a permanent and total disability, make a demand therefor, present defendant with sufficient proof of his right thereto, and upon defendant's wrongful rejection of the demand. Collopy v. Modern Brotherhood, 133 Minn. 409, 158 N. W. 625.

The limitation may be fixed by contract. See § 5600.

4733. Time before an action may be brought after a loss—(44) Collopy v. Modern Brotherhood, 133 Minn. 409, 158 N. W. 625 (provisions for notice and limitation of time for bringing suit held inapplicable); Banner Laundry Co. v. Great Eastern Casualty Co., 148 Minn.—, 180 N. W. 997 (denial of all liability under policy held a waiver of provision).

4734. Parties plaintiff—Where, under a policy of insurance, different specific amounts are payable to different beneficiaries, their interests are several rather than joint, and each must bring a separate action for his share. Stolorow v. National Council, 132 Minn. 27, 155 N. W. 756; National Council v. Schreiber, 141 Minn. 41, 169 N. W. 272.

A wife has been held authorized to maintain an action for the reformation of a policy and for a recovery thereon as reformed, the policy covering property of the wife and having been negotiated by her husband and inadvertently taken out in his name. Sundin v. County Fire Ins. Co., 144 Minn. 100, 174 N. W. 729.

4735. Complaint—(65) Eifert v. Hartford Fire Ins. Co., 148 Minn.—, 180 N. W. 996 (complaint for breach of contract to insure sustained against objection first made on appeal).

4736. Answer—New matter—In an action on an accident policy the defendant may plead that the insured committed suicide and that he was killed by the beneficiary. McAlpine v. Fidelity & Casualty Co., 134 Minn. 192, 158 N. W. 967.

In an action on an accident policy the fact that the insured committed suicide or was killed by a third party is not new matter but is admissible under a general denial. McAlpine v. Fidelity & Casualty Co., 134 Minn. 192, 158 N. W. 967.

4736a. Reply—Departure—A reply denying that settlement of all claims under the policy had been made, and alleging that, if a release of the claim of the insured was given, it was procured by fraud of an agent of the insurer, is not a departure from the complaint, which alleged that no payment of the claim had been made. Rechtzigel v. National Casualty Co., 143 Minn. 302, 173 N. W. 670.

4737. Issues—(72) Pampusch v. National Council, 145 Minn. 71, 176 N. W. 158 (issue fixed by stipulation).

4738. Burden of proof—In an action on an accident policy the burden of proving that death was accidental is on the plaintiff and the burden is not on the defendant to prove that the insured committed suicide or was killed by a third party. Huestis v. Aetna Life Ins. Co., 131 Minn. 461, 155 N. W. 643; McAlpine v. Fidelity & Casualty Co., 134 Minn. 192, 158 N. W. 967.

Burden of proving that a misrepresentation was material and increased the risk, held on the insurer. Ivanesovich v. North American L. & C. Co., 145 Minn. 175, 176 N. W. 502.

(73) Olsson v. Midland Ins. Co., 138 Minn. 424, 165 N. W. 474; Powers v. Fidelity & Casualty Co., 144 Minn. 282, 175 N. W. 111.

(75) Olsson v. Midland Ins. Co., 138 Minn. 424, 165 N. W. 474; Farrar v. Locomotive Engineers etc. Ins. Assn., 143 Minn. 468, 173 N. W. 705. See § 4811.

4740. Law and fact—Whether the insured unnecessarily exposed himself to an obvious risk of injury is a question for the jury, unless the evidence is conclusive. Gillis v. Duluth Casualty Assn., 133 Minn. 238, 158 N. W. 252.

Whether there was a breach of a warranty of freedom from disease held a question for the jury. Peterson v. Mystic Workers, 141 Minn. 175, 169 N. W. 598.

Whether the insured made statements in his application for a health and accident policy which were false held a question for the jury. Powers v. Fidelity & Casualty Co., 144 Minn. 282, 175 N. W. 111.

Whether the insured came to his death as the result of an accident held a question for the jury. Powers v. Fidelity & Casualty Co., 144 Minn. 282, 175 N. W. 111.

Evidence held to justify the court in holding as a matter of law that the insured was not in good health when he was reinstated in a benefit society. Pampusch v. National Council, 145 Minn. 71, 176 N. W. 158.

Under the evidence the court properly left the jury to determine whether, if plaintiff made false statements in his application with regard to having had hernia, it materially affected either the acceptance of the risk or the hazard assumed by the insurer. Ivanesovich v. North American L. & C. Co., 145 Minn. 175, 176 N. W. 502.

The evidence of defendant was not conclusive of falsity of a statement in the application that applicant had never had syphilis. The opinion of experts on that point was not conclusive. That question was properly submitted to the jury. Villiott v. Sovereign Camp of Woodmen, 145 Minn. 349, 177 N. W. 356.

(88) Ivanesovich v. North American L. & C. Co., 145 Minn. 175, 176 N. W. 502.

(89) Farrar v. Locomotive Engineers etc. Ins. Assn., 143 Minn. 468, 173 N. W. 705.

(90) Powers v. Fidelity & Casualty Co., 144 Minn. 282, 175 N. W. 111.
(94) Ivanesovich v. North American L. & C. Co., 145 Minn. 175, 176 N. W. 502; Farm v. Royal Neighbors, 145 Minn. 193, 176 N. W. 489.

4741. Evidence—Admissibility—(98) Havlicek v. Western Bohemian Fraternal Assn., 138 Minn. 62, 163 N. W. 985 (books of mutual benefit society showing standing of member as to payment of dues); Petersun v. Mystic Workers, 141 Minn. 175, 169 N. W. 598 (photograph of insured taken in camp in corroboration of testimony that he went on a hunting expedition); Richardson v. North American Life & Casualty Co., 142 Minn. 295, 172 N. W. 131 (held not error to allow the insured to read to the jury certain answers to questions found in one of the documents composing the proofs of death); Aaberg v. Minnesota Commercial Men's Assn., 143 Minn. 354, 173 N. W. 708 (all the provisions of a contract of accident insurance); Farrar v. Locomotive Engineers etc. Ins. Assn., 143 Minn. 468, 173 N. W. 705 (issue of suicide—fact that insured had expressed the belief that it was wrong to commit suicide).
(99) Petersun v. Mystic Workers, 141 Minn. 175, 169 N. W. 598 (what a witness advised the insured to do in regard to procuring the insurance); Richardson v. North American Life & Casualty Co., 142 Minn. 295, 172 N. W. 131 (a letter written by a physician who had treated the insured).

4741a. Evidence—Sufficiency—Evidence held to justify a finding that plaintiff was entitled to a disability pension. Fitzgibbons v. Bowen, 139 Minn. 197, 165 N. W. 1059.
Evidence held to justify a finding that a letter claimed to have been mailed by the insurer to the insured was not mailed to or received by the latter. Suits v. Order of United Commercial Travelers, 139 Minn. 246, 166 N. W. 222.
Evidence held to justify a finding that there was no breach of a warranty of health. Petersun v. Mystic Workers, 141 Minn. 175, 169 N. W. 598.
In this action on an insurance policy for accidental injury causing hernia, the court did not err in denying the motion of defendant for judgment non obstante. Ivanesovich v. North American L. & C. Co., 145 Minn. 175, 176 N. W. 502.
The verdict of the jury to the effect that there was no violation of the contract by the insured in the intemperate use of intoxicating liquor is sustained by the evidence. Boynton v. Modern Woodmen, 148 Minn. —, 181 N. W. 327.

MUTUAL INSURANCE

4743a. Policy contrary to by-laws—Estoppel of company—The plaintiff applied to the defendant, a township mutual fire insurance company, for insurance on certain farm property situate on certain described land, and included in his application was a "threshing separator on or off

premises." The application purported to be made in accordance with the constitution and by-law. Its form was prescribed by the directors and a by-law attached to the policy provided that the application and the policy constituted an insurance contract. The defendant issued a policy upon the application in which the property was described as a "threshing separator." It promised indemnity in case of loss "as specified in the constitution, and by-laws herein given." Attached was an abstract of the by-laws. A by-law, not included or mentioned in the abstract, provided that the company would insure steam threshers only while in store. The plaintiff had knowledge of the by-law. His separator was a steam thresher and was not in store, but was off the premises and in operation when destroyed. The company had authority under the statute to insure the separator when in operation. The plaintiff paid the required premium and assumed the liability which attaches to a member in a mutual company. The policy should be construed strictly against the insurer and favorably to the insured; and so construed it covered the separator, though at the time of the loss it was not in store, but was off the premises described in the complaint and was in operation threshing. The contract was authorized by the statute and was not, so far as the pleadings show, forbidden by the articles of incorporation, and was not ultra vires because of the by-law; and, in any event, a company which under the circumstances recited issues a policy and receives the premium will not be heard to say that the contract of insurance is beyond its corporate powers. Trost v. Delaware etc. Ins. Co., 137 Minn. 208, 163 N. W. 290.

4744. Payment of premiums—Waiver—The evidence sustains the verdict to the effect that defendant waived prepayment of the premium when the application for insurance was made and accepted. There being nothing in the statute or in the articles of incorporation forbidding a township mutual fire insurance company to extend credit to an applicant for insurance, or to waive prepayment of the premium, the officer of such company, having authority to accept insurance and issue policies, may, upon the receipt of an application for immediate insurance agree to extend credit for the payment of the premium, or waive prepayment of the same, even though a by-law provides that insurance will take effect on the day when the application and undertaking is signed by the applicant, and the premium and fees paid to the director or authorized agent taking the application. Wieland v. St. Louis County Farmers Mut. Fire Ins. Co., 146 Minn. 255, 178 N. W. 499.

4749. Notice of constitution and by-laws—(11) Trost v. Delaware etc. Ins. Co., 137 Minn. 208, 163 N. W. 290.

4750. Amendment of by-laws—Notice—See § 4818.

4750a. Waiver of by-laws—A mutual life insurance company may waive a mere by-law. Wieland v. St. Louis County Farmers Mut. Fire Ins. Co., 146 Minn. 255, 178 N. W. 499.

4753. Assessments—See § 4730.

FIRE INSURANCE

IN GENERAL

4759. The standard policy—Township mutual companies are not required to use the standard policy. Trost v. Delaware etc. Ins. Co., 137 Minn. 208, 163 N. W. 290.

In prescribing the form of standard policy, the legislature sought to secure uniformity in all contracts of fire insurance by requiring all companies to use the same form of policy instead of as many different forms as there were companies writing insurance. Its use is compulsory. With such changes as are authorized by statute, it is the only form of fire insurance contract which may lawfully be used in this state. Its provisions not only constitute the contract between the insurer and the insured, but the law governing the rights of the parties as well. The statute does not prohibit a company from printing in or attaching to the policy terms or conditions not found in the standard form, provided they are not inconsistent with or a waiver of any of the provisions of such form. So far as the conditions and provisions of the form go they are controlling, and may not be omitted, changed, or waived, though provisions not conflicting with them may be added when necessary to express the terms of a contract of insurance which is authorized by the statute. Heim v. American Alliance Ins. Co., 147 Minn. 283, 180 N. W. 225.

The declaration of the legislature as to forms of contracts of insurance, being within its constitutional powers, is the public policy of the state. The statute is remedial and is to be construed liberally, to suppress the mischief it was designed to prevent and to promote its intended objects. Heim v. American Alliance Ins. Co., 147 Minn. 283, 180 N. W. 225.

(25) Heim v. American Alliance Ins. Co., 147 Minn. 283, 180 N. W. 225.

4760. Riders—Rent insurance—In insuring the owner of a building against loss of rents in consequence of fire, a fire insurance company may not lawfully use a rider upon a standard policy prescribed by statute, which provides for any method of determining liability that results in limiting the recovery to less than the actual loss and less than the amount of insurance. Heim v. American Alliance Ins. Co., 147 Minn. 283, 180 N. W. 225.

THE INSURED PROPERTY

4761. Description—Blanket policies—Certain policies of insurance on forest products at eight locations "on Saari Brothers Railroad" are held to be blanket policies, not prorated among the specific locations, but covering each to the full amount. Such policies are also held to

cover products adjacent to locations specified, not piled or banked, but ready for loading, and left for the purpose of being loaded without being banked. Such products were "situated" at such locations within the meaning of the policies. Zenith Box & Lumber Co. v. Nat. Union Fire Ins. Co., 144 Minn. 386, 175 N. W. 894.

(31) Review Printing Co. v. Hartford Fire Ins. Co., 133 Minn. 213, 158 N. W. 39; Trost v. Delaware Farmers Mut. Fire Ins. Co., 137 Minn. 208, 163 N. W. 290; Dodge Elevator Co. v. Hartford Fire Ins. Co., 139 Minn. 75, 165 N. W. 487; Zenith Box & Lumber Co. v. Nat. Union Fire Ins. Co., 144 Minn. 386, 175 N. W. 894.

(40) Trost v. Delaware Farmers Mut. Fire Ins. Co., 137 Minn. 208, 163 N. W. 290 (policy held to cover separator though at the time of loss it was not in store but was off the premises described in the complaint and was in operation threshing); Review Printing Co. v. Hartford Fire Ins. Co., 133 Minn. 213, 158 N. W. 39 (contents of printing shop—policy covered "printing presses, type, furniture and fixtures, electric motors, imposing stones and such other merchandise, furniture and fixtures as are usually kept and used in a printing office"—policy held to cover a linotype machine); Dodge Elevator Co. v. Hartford Fire Ins. Co., 139 Minn. 75, 165 N. W. 487 (grain loaded in car on railroad track for shipment and for which a bill of lading has been issued held within the terms of a policy).

CONDITIONS

4766. Other insurance—Evidence held not to show other insurance avoiding the liability of defendant. Edwards v. Svea Fire & Life Ins. Co., 141 Minn. 285, 170 N. W. 206.

4767. Removal of property—The sale and removal of parts of a stock of merchandise does not avoid a policy. This principle has been applied to the sale and removal of wood in a wood yard. National Fire Ins. Co. v. Itasca Lumber Co., 148 Minn. —, 181 N. W. 337.

A sale and removal of a part of the insured property held to invalidate the policy only as to such property removed. Bemidji Iron Works Co. v. Agricultural Ins. Co., 148 Minn. —, 181 N. W. 340.

(59) Trost v. Delaware etc. Ins. Co., 137 Minn. 208, 163 N. W. 290.

4767a. Nature of occupancy—A policy insured buildings while one was "occupied as a dwelling house," and the other while "occupied as a barn." Evidence held to show that they were so occupied. Sundin v. County Fire Ins. Co., 144 Minn. 100, 174 N. W. 729.

4768. Vacancy—Permit—Action against insurer for damages because insured was required to pay for a vacancy permit. Demurrer to complaint sustained. Williams v. Boston Ins. Co., 135 Minn. 483, 160 N. W. 664.

4769. Increased risk—Evidence held to justify a finding that there was no material change in the risk where a bill of sale amounting to a

chattel mortgage was given for the insured property, the possession not changing. King v. Hartford Fire Ins. Co., 133 Minn. 322, 158 N. W 435.

(69) King v. Hartford Fire Ins. Co., 133 Minn. 322, 158 N. W. 435.

4770. Payment of premiums—Waiver—Prompt payment of premiums may be waived notwithstanding G. S. 1913, § 3306, and the by-laws of the company, which form a part of the contract. Lenning v. Retail Merchants Mutual Fire Ins. Co., 138 Minn. 233, 164 N. W. 908.

An officer of a township mutual fire insurance company has been held authorized to waive prepayment of premiums. Wieland v. St. Louis County Farmers Mut. Fire Ins. Co., 146 Minn. 255, 178 N. W. 499.

The prepayment of the premium is not a condition precedent to an action for the breach of a contract to insure unless the contract so provides. Eifert v. Hartford Fire Ins. Co., 148 Minn. —, 180 N. W. 996.

(79) See Wieland v. St. Louis County Farmers Mut. Fire Ins. Co., 146 Minn. 255, 178 N. W. 499.

4772. Keeping prohibited articles—Construction and effect of provisions against keeping prohibited articles. L. R. A. 1917C, 278.

4774. Sale—Assignment—Transfer of interest—A policy provided that it should become void if the property insured was "assigned" without the permission of the insurer. The insured gave a bill of sale of the property as security for a debt, retaining possession. Held, that this was not an assignment of the property within the meaning of the policy. King v. Hartford Fire Ins. Co., 133 Minn. 322, 158 N. W. 435. See Ann. Cas. 1918D, 862.

Grain covered by a policy was destroyed when loaded in a car on a railroad track for shipment. A bill of lading had been issued for the grain by the railroad company, wherein the insured was the consignee as well as the consignor and owned the grain. Held, that there was no change in the interest or title or possession such as to avoid the policy. Dodge Elevator Co. v. Hartford Fire Ins. Co., 139 Minn. 75, 165 N. W. 487.

Failure of the insured to inform the insurer of the existence and cancelation of certain contracts for the sale of wood in a wood yard held not to avoid a policy. National Fire Ins. Co. v. Itasca Lumber Co., 148 Minn. —, 181 N. W. 337.

Sales from a stock of merchandise will not work a forfeiture though the policy contains a non-alienation clause. This principle has been applied to sales of wood in a wood yard. National Fire Ins. Co. v. Itasca Lumber Co., 148 Minn. —, 181 N. W. 337.

A sale of a part of the property insured held to invalidate the policy only as to such part. Bemidji Iron Works Co. v. Agricultural Ins. Co., 148 Minn. —, 181 N. W. 340.

(90) 32 Harv. L. Rev. 732.

4776. Effect of conditions—(5) Haley v. Sharon Township Mut. Fire Ins. Co., 147 Minn. 190, 179 N. W. 895.

4778. Fraud and false swearing—To constitute fraud or false swearing which will work a forfeiture of insurance, there must be a false statement wilfully made with respect to a material matter with the intention of thereby deceiving the insurer. Ordinarily the question is for the jury. National Fire Ins. Co. v. Itasca Lumber Co., 148 Minn. —, 181 N. W. 337.

LOSS

4781a. Amount—Loss of rent from fire—A policy of insurance against loss of rent, due to a fire which rendered the insured property untenantable, provided for payment of the actual loss sustained, "not exceeding the sum insured, nor one-twelfth of that amount for any one month." A fire occurred, rendering the company liable for the loss, and the same was amicably adjusted at an amount equal to one-half the face of the policy, which was paid. A second fire occurred some three months later, resulting in a further loss. It is held that the policy remained in force after the first loss at one-half the amount thereof, and that the monthly payments to be made in discharge of liability under the second loss are limited to one-twelfth of that amount, and not one-twelfth of the original sum insured. Van Nest v. Citizens Ins. Co., 134 Minn. 94, 158 N. W. 725.

4781c. Leasehold interests—Where a policy insures against loss to a leasehold interest, the contract relations between the lessor and lessee and a settlement of their differences arising from a fire to the leased premises do not concern the insurer. Kahn v. American Ins. Co., 137 Minn. 16, 162 N. W. 685.

NOTICE AND PROOF OF LOSS

4782. Condition precedent—Substantial compliance—(18) Hagstrom v. American Fidelity Co., 137 Minn. 391, 163 N. W. 670.

4787. Time of furnishing—The giving of an oral notice is a circumstance to be considered in determining whether a subsequent written notice was given in time. C. S. Brackett & Co. v. General Accident etc. Corp., 140 Minn. 271, 167 N. W. 798.

(23) See Hagstrom v. American Fidelity Co., 137 Minn. 391, 163 N. W. 670; C. S. Brackett & Co. v. General Accident etc. Corp., 140 Minn. 271, 167 N. W. 798.

(25) See Hagstrom v. American Fidelity Co., 137 Minn. 391, 163 N. W. 670.

4788. Service by mail—(28) See Powers v. Fidelity & Casualty Co., 144 Minn. 282, 175 N. W. 111.

4789. Waiver—(32) See C. S. Brackett & Co. v. General Accident etc. Corp., 140 Minn. 271, 167 N. W. 798.

ADJUSTMENT OF LOSS

4792a. Fraud—Actions were brought by two fire insurance companies to recover as damages the amounts paid to the holder of the policies to settle a loss. The actions were brought on the ground that settlement was procured by the fraudulent concealment of the existence and subsequent cancelation of certain contracts for the sale of a portion of the property insured. The property consisted of mill wood. The contracts were made after the policies were issued and were canceled after the fire. Held: That the evidence presented a question for the jury with respect to the quantity of wood burned, the quantity saved, and whether enough wood was saved to enable the defendant to fulfil the contracts. That defendant's failure to inform the insurance companies of the existence of the contracts and their cancelation did not avoid the policies. That the fact that the wood sold had not been segregated in defendant's yard and that all the wood was in its possession gave defendant an insurable interest in the property. That false swearing which will work a forfeiture of insurance must relate to a material matter and be wilful and intentional. As a general rule it is for the jury to say whether there has been such false swearing. That the trial court erred in directing verdicts in plaintiff's favor. National Fire Ins. Co. v. Itasca Lumber Co., 148 Minn. —, 181 N. W. 337.

ARBITRATION

4793. Condition precedent—(47) See Mahoney v. Minnesota Farmers Mut. Ins. Co., 136 Minn. 34, 161 N. W. 217.

4794. Board of appraisers—Practice—That appraisers chosen in such cases have frequently acted in other insurance disputes is no disqualification, nor evidence of bias or prejudice. It is a matter of common experience that both parties in controversies of the kind prefer and in fact choose appraisers with known fitness for the particular class of service. Nor is it a disqualification that the person chosen as umpire happens to be an attorney at law, and had previously been employed by the adjuster representing the insured. To disqualify either there must be shown some act or acts of misconduct prejudical to the interests of the party complaining. McQuaid Market House Co. v. Home Ins. Co., 147 Minn. 254, 180 N. W. 97.

In the absence of a statute otherwise providing, an award of arbitrators made under the standard form of fire insurance policies need not set out in detail the facts made the basis thereof, but may be in the form of general conclusions, with a statement of the gross allowance made. The requirement of the policy that the sound value and damage shall be ascertained and separately stated applies to "use and occupancy" insurance. McQuaid Market House Co. v. Home Ins. Co., 147 Minn. 254, 180 N. W. 97.

The appraisement of the loss provided for by this and other standard

form policies, takes the form of the common-law arbitration, and the procedure of inquiry and investigation, together with the award and its contents, are governed by the general rules of law upon that subject. The general statutes on the subject of arbitration and award do not apply. McQuaid Market House Co. v. Home Ins. Co., 147 Minn. 254, 180 N. W. 97.

(52) McQuaid Market House Co. v. Home Ins. Co., 147 Minn. 254, 180 N. W. 97.

4797. Setting aside award—An answer charging bias and unfairness on the part of the appraisers in general terms held insufficient, and judgment on the pleadings was properly granted in favor of plaintiff. McQuaid Market House Co. v. Home Ins. Co., 147 Minn. 254, 180 N. W. 97.

An award is attended with every presumption of validity, and when attacked for fraud or on other permissible grounds the burden to overcome the same rests with the attacking party. The grounds of the attack must be presented by direct and specific allegations of the facts relied upon. Allegations in the form of general conclusions will not suffice. McQuaid Market House Co. v. Home Ins. Co., 147 Minn. 254, 180 N. W. 97.

(60, 61) McQuaid Market House Co. v. Home Ins. Co., 147 Minn. 254, 180 N. W. 97.

PAYMENT OF LOSS

4800. Time—Damages for delay—Complaint construed and held to present a cause of action for breach of contract, not in tort, and that the items of damage claimed for the malicious and wrongful delay of defendants in adjusting the insurance loss complained of do not come within the rule of damages in such cases and cannot be recovered. Independent Grocery Co. v. Sun Ins. Co., 146 Minn. 214, 178 N. W. 582.

4801. To whom—A fire insurance policy is a mere personal contract of indemnity against loss by the insured. It does not attach to the property or go with it as an incident. In the absence of contract, or of facts constituting an estoppel, the insured is entitled to the insurance money, and his rights are superior to one having or claiming a lien on the property by mortgage or otherwise. Remington v. Sabin, 132 Minn. 372, 157 N. W. 504.

4803. Amount—It was the purpose of the legislature to secure to the insured payment in full of the loss up to the amount written in the policy. G. S. 1913, §§ 3318, 3322. Heim v. American Alliance Ins. Co., 147 Minn. 283, 180 N. W. 225. See § 4781a.

4805. Pro rata liability—Blanket policy—Certain policies of insurance on forest products at eight locations "on Saari Brothers Railroad," held to be blanket policies not prorated among the specific locations, but covering each to the full amount. Zenith Box & Lumber Co. v. Nat. Union Fire Ins. Co., 144 Minn. 386, 175 N. W. 894.

LIFE INSURANCE

4808a. Industrial life insurance—The distinguishing feature of industrial life insurance is that it does not require a medical examination of the insured. It is sometimes taken without the knowledge of the insured. The premiums are small, often five cents a week. The amount of the insurance is usually very small, hardly more than enough to pay burial expenses and to give slight temporary relief. The agents of the company solicit the insurance and call weekly or monthly and make collections. The insured are usually wage earners of small incomes. Such insurance often covers a family. While the premiums are small it is expensive insurance. The legislation in the different states upon the subject varies and the law is not well settled, but courts are inclined to construe such policies in favor of the insured. McAlpine v. Fidelity & Casualty Co., 134 Minn. 192, 158 N. W. 967.

G. S. 1913, § 4367, providing that statements made in the application as to the age, physical condition and family history of the insured shall be valid and binding upon the company, unless wilfully false or intentionally misleading, applies to industrial life insurance companies. McAlpine v. Fidelity & Casualty Co., 134 Minn. 192, 158 N. W. 967.

4809. Condition as to health—Evidence held to show conclusively that the insured was not in good health at the time he was reinstated in a benefit society. Pampusch v. National Council, 145 Minn. 71, 176 N. W. 158.

4810a. Death in military service—A policy construed as not excepting a risk resulting from the insured entering military service in time of war without the written consent of the company, but as imposing in such event a condition which the company might waive. Bowman v. Surety Fund Life Ins. Co., — Minn. —, 182 N. W. 991.

4811. Suicide of insured—Under an accident policy silent as to the effect of suicide the insurer is liable though the insured committed suicide if at the time he was insane. Olsson v. Midland Ins. Co., 138 Minn. 424, 165 N. W. 474.

If the evidence in an action on a policy of accident insurance is consistent with the theory of accidental death, the presumption which the law raises from the ordinary motives and principles of human conduct requires a finding against suicide. When, by the terms of such policy there can be no recovery in case of death unless death was caused by accidental means, the burden of proving that it was so caused rests on the plaintiff. Evidence considered and held, within the rules above stated, to be of such a nature that reasonable minds might properly reach different conclusions as to the inferences fairly deducible therefrom, and that the trial court did not err in permitting a verdict of accidental death to stand. Farrar v. Locomotive Engineers etc. Ins. Assn., 143 Minn. 468, 173 N. W. 705.

(85) Olsson v. Midland Ins. Co., 138 Minn. 424, 165 N. W. 474.

(88) Farrar v. Locomotive Engineers etc. Ins. Co., 143 Minn. 468, 173 N. W. 705.

(89) Olsson v. Midland Ins. Co., 138 Minn. 424, 165 N. W. 474; Farrar v. Locomotive Engineers etc. Ins. Assn., 143 Minn. 468, 173 N. W. 705. See Huestis v. Aetna Life Ins. Co., 131 Minn. 461, 155 N. W. 643 (accident policy); McAlpine v. Fidelity & Casualty Co., 134 Minn. 192, 158 N. W. 967 (accident policy).

(90) See Northwestern Mut. Life Ins. Co. v. Johnson, 254 U. S. 96.

4811a. Murder of insured by beneficiary—Though by murdering the insured the beneficiary forfeits the right to the proceeds of the policy, the murder does not absolve the insurer from liability to others. In such case the sole heir of the deceased, who would take upon the death of an eligible beneficiary, may recover. Sharpless v. Grand Lodge, 135 Minn. 35, 159 N. W. 1086. See 7 A. L. R. 828 (right of executor or administrator to recover); 1 Minn. L. Rev. 66.

4812. To whom payable—Where the insured was murdered by the beneficiary named in the policy it was held that the sole heir of the insured might recover. Possibly in such case the personal representative might recover. Sharpless v. Grand Lodge, 135 Minn. 35, 159 N. W. 1086. See 7 A. L. R. 828 (right of executor or administrator to recover).

4815. Proof of death—Evidence held sufficient to justify a finding of death based on an application of the presumption of death from absence for more than seven years. Swanson v. Modern Brotherhood, 135 Minn. 304, 160 N. W. 779.

As a general rule proofs of death are admissible only for the purpose of showing compliance with the terms of the contract by which they are required to be made. Richardson v. North American Life & Casualty Co., 142 Minn. 295, 172 N. W. 131.

4816. Payment of premiums—Notes—The delivery at the same time of an insurance policy, a promissory note for the premium therefor, and a written contract concerning a return of the "premium" held to constitute one transaction. And when so considered, in the light of surrounding circumstances, the contract should be construed as an agreement that the payee in the note was to return it to the maker, if, at any time within sixty days, the maker obtained more satisfactory insurance than contained in the policy mentioned, thus making the delivery conditional. The fact being proved beyond dispute that under the agreement plaintiff was entitled to the possession of the note, the sole issue left was whether defendant purchased the same without notice of the agreement, and the court correctly charged that the burden was upon defendant to show itself a bona fide holder in due course, without notice. There was no error in admitting oral testimony to the effect that the delivery of the promissory note was conditional, nor as to what should be done with the insurance policy if other insurance was effected, since nothing in regard to that matter is contained in the written instrument then delivered. The

written contract referred to did not permit a transfer of the note before the expiration of the sixty days therein specified. The evidence is sufficient to warrant the jury in finding that defendant was not a bona fide holder of the note, in due course, without notice. The evidence does not show plaintiff estopped from claiming a return of the note. Wade v. Nat. Bank of Commerce, 144 Minn. 187, 174 N. W. 889.

Date from which premium periods are to be computed. 6 A. L. R. 774.

MUTUAL BENEFIT INSURANCE

4817b. Governed by separate code—Chapter 345 of the Laws of 1907 (G. S. 1913, §§ 3537-3567), established a complete code for the government and regulation of fraternal beneficiary associations, and superseded all prior statutes relating to such associations, and section 3300, G. S. 1913, being section 1623, Rev. Laws 1905, does not apply to them. Farm v. Royal Neighbors, 145 Minn. 193, 176 N. W. 489.

4818. Constitution and by-laws constitute contract—Change—The adoption of an amendment to the constitution at a meeting of such a society may be shown by parol, where the minutes of the meeting contain no record, and there is no requirement, charter or statutory, that such matters shall be recorded. Such proof may be made, if material between the litigants, though the society is not a party to the suit. State v. Barnes, 136 Minn. 438, 162 N. W. 513, 1050.

An amendment of the by-laws of a mutual beneficiary association subsequent to the date of a particular insurance contract, by which the presumption of death arising from such unexplained disappearance was abrogated and in place thereof a provision made to the effect that no inference of death by disappearance should arise until the expiration of the insured's life expectancy, is unreasonable and therefore void. Boynton v. Modern Woodmen, 148 Minn. —, 181 N. W. 327.

Right of society to raise rates. 11 A. L. R. 644.

(18) Logan v. Modern Woodmen, 137 Minn. 221, 163 N. W. 292.

(21) Boynton v. Modern Woodmen, 148 Minn. —, 181 N. W. 327. See 33 Harv. L. Rev. 979.

4819a. Representative form of government—A statute (G. S. 1913, §§ 3537-3539) requiring such societies to have a representative form of government is not contravened by a provision of the constitution that jurisdictions must have a reasonable minimum of members before they are entitled to representation in the supreme council of the order. State v. Barnes, 136 Minn. 438, 162 N. W. 513, 1050.

4822b. Expulsion of members—The laws of plaintiff society provide for trial of members before a committee, give the committee power to pronounce sentence of expulsion, provide for appeal to the national council of the society, and make the judgment of the trial committee final if not appealed from. Such provisions are part of the contract between the society and its members and are valid. The method of appeal must be

reasonable and must not impose undue hardship. The provisions for appeal in this case are not unreasonable. A void judgment does not impose on the member the obligation to appeal. A judgment is void if the committee has been given no power to render it, or if the charge, if established, does not justify it, or if jurisdiction of the accused has not been acquired. But if the member have notice of the trial and appears and is heard, and the committee renders a judgment which it has jurisdiction to render, and the laws of the order provide for an appeal and provide that all decisions not appealed from are final, then the member, if he wishes to challenge the judgment, must appeal within the order and cannot, without so doing, resort to the courts. Mere irregularities in the preparation of the notice or in the manner in which charges are preferred, do not render the judgment void. The trial may be such a sham that a court of justice will declare it void, but certain expressions of one member of the trial committee in advance of the trial in this case, it is held did not, in view of all the facts, render the judgment expelling defendant void, nor did they justify a finding that the committee prejudged defendant's case. National Council v. Turovh, 135 Minn. 455, 161 N. W. 225.

Before a member can be lawfully expelled he must be given reasonable notice and opportunity to prepare and present his defence. Burmaster v. Alwin, 138 Minn. 383, 165 N. W. 135.

Evidence held not to justify a finding that a member was suspended. Macknick v. Switchmen's Union, 140 Minn. 104, 167 N. W. 351.

4822c. Officers—Abandonment of office—The incumbent of an office in a fraternal society, who is a candidate for re-election, and who with knowledge of all the facts, voluntarily and without protest, yields the office to one declared elected as his successor, abandons the office, and thereafter is as effectually out of office as if he had resigned. State v. Barnes, 136 Minn. 438, 162 N. W. 513, 1050.

4822d. Trust relation between society and members—There may be a trust relation between a society and its members so that the member may rely upon the society to make disclosure of facts within its knowledge. Marcus v. National Council, 134 Minn. 338, 159 N. W. 835.

A fraternal society sustains no relation of trust toward one who brings a lawsuit against it to enforce an alleged liability under the beneficiary certificate of a member whom the society has undertaken to expel. Marcus v. National Council, 134 Minn. 338, 159 N. W. 835.

4823. Beneficiaries—Where the insured was murdered by the beneficiary named in the policy it was held that the sole heir of the insured might recover. Possibly in such case the personal representative might recover. Sharpless v. Grand Lodge, 135 Minn. 35, 159 N. W. 1086. See 7 A. L. R. 828 (right of executor or administrator to recover); 30 Harv. L. Rev. 622, 34 Id. 788.

Where the by-laws of a fraternal association are made a part of the contract of insurance, and provide that no part of the benefit fund shall be paid to any person not bearing a specified relationship to the assured,

the designation of a beneficiary not bearing such relationship is invalid. Where the by-laws provide that, in case an ineligible person is named as beneficiary, the insurance shall be payable to the widow and children of the assured, the association cannot refuse to receive assessments on the ground the beneficiary name is ineligible; and the acceptance of such assessments does not operate as a waiver of the provision which made such beneficiaries ineligible. Paying the money into court was not an admission of liability to any particular claimant, but a demand that the court protect the association against double liability by determining to whom the money rightfully belonged. Where the designation of an eligible beneficiary has been duly canceled in the manner prescribed by the contract, the designation of an ineligible beneficiary in the new benefit certificate does not operate to revive or reinstate such canceled designation, where the by-laws provide that in such event the new certificate shall remain in force and be payable to certain eligible beneficiaries designated therein. The by-laws declare void any and all attempts of the insured to dispose of the fund otherwise than provided in the contract, and an ineligible beneficiary acquired no interest therein by paying assessments under an agreement with the insured to share in it. The designated beneficiary being ineligible, the by-laws made the children of the insured his beneficiaries. Logan v. Modern Woodmen, 137 Minn. 221, 163 N. W. 292.

Plaintiff's son died while a member of defendant union, and the laws of the union entitled plaintiff to a "death benefit," if she was "dependent for support in whole or in part" upon her son at the time of his death. Held that the evidence made the question as to whether she was so dependent a question of fact for determination by the trial court. Potz v. Cigarmakers International Union, 140 Minn. 339, 168 N. W. 126.

Where the constitution of a fraternal society provides that when a named beneficiary predeceases the insured the fund shall be paid, at the death of the insured, to certain relatives, naming them, held that the words "father or mother" as used therein include "stepfather and stepmother." McGaughey v. Grand Lodge, 148 Minn. —, 180 N. W. 1001.

Disposition of fund upon failure of beneficiary. L. R. A. 1918A, 1120.

4824. Change of beneficiaries—Where the designation of an eligible beneficiary has been duly canceled in the manner prescribed by the contract, the designation of an ineligible beneficiary in the new certificate does not operate to revive or reinstate such canceled designation where the by-laws provide that in such event the new certificate shall remain in force and be payable to certain eligible beneficiaries designated therein. Logan v. Modern Woodmen, 137 Minn. 221, 163 N. W. 292.

Change without compliance with provisions of policy. 5 Minn. L. Rev. 66.

(46) Supreme Council v. Behrend, 247 U. S. 394.

4828. Assignment of benefit—There may be an enforceable equitable assignment of a benefit when not prohibited by the laws of the society or a statute. Logan v. Modern Woodmen, 137 Minn. 221, 163 N. W. 292.

4829. Representations of applicant—(54) Nardinger v. Ladies of the Maccabees, 138 Minn. 16, 163 N. W. 785; Petersun v. Mystic Workers, 141 Minn. 175, 169 N. W. 598; Farm v. Royal Neighbors, 145 Minn. 193, 176 N. W. 489; Villiott v. Sovereign Camp of Woodmen, 145 Minn. 349, 177 N. W. 356; Boynton v. Modern Woodmen, 148 Minn. —, 181 N. W. 327; Gruberski v. Brotherhood of American Yoemen, — Minn. —, 182 N. W. 716.

(55) See § 4817b.

4830. Construction—(56–59) O'Connor v. Modern Woodmen, 110 Minn. 18, 124 N. W. 454; Wising v. Brotherhood of American Yeomen, 132 Minn. 303, 156 N. W. 247; Fitzgibbons v. Bowen, 139 Minn. 197, 165 N. W. 1059; McGaughey v. Grand Lodge, 148 Minn. —, 180 N. W. 1001.

4831a. Use of intoxicating liquors—The rule is settled in this state that, to constitute a violation of the provisions of an insurance contract restricting the use of intoxicating liquors, the habit of the insured in that respect must have been of such a nature and so intemperately followed as to impair his health, mental faculties, or otherwise render the insurance risk more hazardous. O'Connor v. Modern Woodmen, 110 Minn. 18, 124 N. W. 454; Wising v. Brotherhood of American Yeomen, 132 Minn. 303, 156 N. W. 247; Boynton v. Modern Woodmen, 148 Minn. —, 181 N. W. 327. See § 4674.

4831b. Exemptions from liability—Whether an exemption from liability for death "from complications arising directly or indirectly from pregnancy, or children, or the consequences thereof," is void as against public policy is an open question. Nardinger v. Ladies of the Maccabees, 138 Minn. 16, 163 N. W. 785.

4832. Disability—Evidence held to justify a finding that plaintiff was afflicted with "permanent and total disability" rendering him "unable to carry on or conduct any vocation" within the meaning of a certificate. Collopy v. Modern Brotherhood, 133 Minn. 409, 158 N. W. 625.

(63) See McKay v. Minnesota Commercial Men's Assn., 139 Minn. 192, 165 N. W. 1061; Fitzgibbons v. Bowen, 139 Minn. 197, 165 N. W. 1059 (disability entitling insured to a disability pension).

4832a. Disability pension fund—Where a mutual organization, devoted to the general welfare of its members, adopts and provides for a disability pension plan in its by-laws, the rule of construction applicable to such by-law is the same as applied to a contract of insurance prepared by an insurance company, and a liberal construction will be given in favor of the rights of the member. Fitzgibbons v. Bowen, 139 Minn. 197, 165 N. W. 1059.

4834. Provisions against resort to courts—(66) National Council v. Turovh, 135 Minn. 455, 161 N. W. 225.

4836a. Relief from assessments pending strike—The membership of defendant corporation is composed of switchmen engaged in the service of

some railroad company. The laws of the order provide for the payment of fixed dues and assessments on the first day of each succeeding month and declare a suspension of the member who fails to make such payments. During a strike in which the members of the association were participants defendant adopted a rule or order by which it was provided that members who were unable to pay their assessments during the strike would be carried by the association upon a written request by the member filed with the secretary of the local council. It is held that to protect their rights in the association the members were under obligation to pay the monthly assessments as they fell due, or file with the local secretary a request to be relieved therefrom. The failure to do either would under the laws of the association operate as a suspension of the delinquent member. Macknick v. Switchmen's Union, 140 Minn. 104, 167 N. W. 351.

4839. Forfeiture for non-payment of dues or assessments—(85) 8 A. L. R. 395.

(86) Havlicek v. Western Bohemian Fraternal Assn., 138 Minn. 62, 163 N. W. 985; Macknick v. Switchmen's Union, 140 Minn. 104, 167 N. W. 351.

4840. Return of assessments when certificate void—(88) Madden v. Interstate etc. Assn., 139 Minn. 6, 165 N. W. 482.

4841. Waiver and estoppel—An officer of the local lodge of the defendant association from time to time, at the request of the insured, advanced assessments coming due and paid them to the association. He did not assume to overlook or excuse defaults, but advanced money to avoid them. He made similar advances for others. No assessments were advanced by the local lodge for the insured nor did it consent to noncompliance with the constitution of the association. Held, that the evidence made no question of waiver for the jury either through the conduct of such officer or of the local lodge. Prior to the death of the insured, and when he stood suspended from the benefits of insurance because of a failure to pay assessments, the officer of the local lodge sent him a statement of amounts due, which included amounts which he had advanced him, with a notice that they must be paid by a specified day, prior to which day the deceased died. The day specified was the day on which a third unpaid assessment would result in a suspension by the provisions of the constitution. This notice was not one required by the constitution. Held, that its effect was not to recognize the insured as in good standing, with insurance in effect until the day specified, and that it did not, alone or in connection with other acts, constitute a waiver by the company. Havlicek v. Western Bohemian Fraternal Assn., 138 Minn. 62, 163 N. W. 985.

The practice and custom of defendant, an accident benefit insurance association, in permitting and receiving from its members the payment of dues and assessments after the due date thereof, held not only a waiver of the failure to pay within the time fixed by the laws of the order, but al-

so a waiver of the by-laws declaring a forfeiture for the default and an estoppel to invoke the same in an action on the contract. Suits v. Order of United Commercial Travelers, 139 Minn. 246, 166 N. W. 222.

The question of waiver is ordinarily for the jury. Kozlak v. Polish National Alliance, 145 Minn. 247, 176 N. W. 911.

A member of a fraternal beneficiary society, composed of subordinate lodges or groups belonged successively to two different groups. At the time of his death he was in arrears in payment of his assessments. In an action by his beneficiaries, evidence of conduct of the first group, amounting to a waiver of prompt payment of assessments, was admissible. The action of this group was the action of the defendant, and deceased was entitled to rely upon it, even after he joined another group, unless notice was brought home to him that a different policy was to be pursued. Kozlak v. Polish National Alliance, 145 Minn. 247, 176 N. W. 911.

Waiver of conditions of reinstatement. L. R. A. 1917C, 260.

Waiver by subordinate lodge. 6 A. L. R. 535, 599.

(89) Suits v. Order of United Commercial Travelers, 139 Minn. 246, 166 N. W. 222; Kozlak v. Polish National Alliance, 145 Minn. 247, 176 N. W. 911. See Havlicek v. Western Bohemian Fraternal Assn., 138 Minn. 62, 163 N. W. 985; Lenning v. Retail Merchants Mutual Fire Ins. Co., 138 Minn. 233, 164 N. W. 908; Ward v. Merchants Life & Casualty Co., 138 Minn. 262, 166 N. W. 221 (special statute regulating effect of a reinstatement by the acceptance of delinquent premiums in the case of accident insurance).

(97) Havlicek v. Western Bohemian Fraternal Assn., 138 Minn. 62, 163 N. W. 985.

4843. Suspension and reinstatement—A tender or payment of delinquent dues after the death of the insured will not work a reinstatement. Havlicek v. Western Bohemian Fraternal Assn., 138 Minn. 62, 163 N. W. 985.

On the night before the day when deceased died, and when he stood suspended, though subject to reinstatement in the manner provided by the constitution, a check for the amount of his unpaid assessments was sent by another in his behalf by mail to the financial secretary. The latter received it after the death of the insured, refused to accept it, and returned it to the sender. Held, that such sending and receipt of the check did not work a reinstatement of the insured. Havilcek v. Western Bohemian Fraternal Assn., 138 Minn. 62, 163 N. W. 985.

The provisions of the laws of the association limiting its liability where a suspended member has been restored or reinstated to good standing to injuries thereafter suffered have no application where no suspension was declared, or where a suspension, occurring automatically by reason of the default, has been waived by the association. Suits v. Order of United Commercial Travelers, 139 Minn. 246, 166 N. W. 222.

There is a special statute regulating the effect of a reinstatement by the acceptance of delinquent premiums in the case of accident insurance. Ward v. Merchants Life & Casualty Co., 139 Minn. 262, 166 N. W. 221.

The findings of the trial court to the effect that defendant ordered and declared the suspension of decedent in this case, and thereon wrongfully repudiated all liability on the certificate of membership, are not sustained by the evidence. Macknick v. Switchmen's Union, 140 Minn. 104, 167 N. W. 351.

A provision of the contract that the member, if suspended for non-payment of an assessment, may be reinstated on payment of the delinquent assessment, subject to the approval of the board of directors, does not give the association the right to arbitrarily refuse reinstatement. It must act reasonably and with fairness to the insured. Hinchliffe v. Minnesota Commercial Men's Assn., 142 Minn. 204, 171 N. W. 776.

The evidence conclusively showed that the insured was not in good health at the time of his reinstatement; and the court rightly directed a verdict for the defendant. Pampusch v. National Council, 145 Minn. 71, 176 N. W. 158.

4844. Proof of claim—Death—Waiver—A membership certificate issued by defendant, a fraternal beneficiary society, provided that: "No action can or shall be maintained on this certificate until after proofs of death and claimant's rights to benefits as provided in the laws of the order have been filed with the National Secretary," etc. Held, that this provision made it a condition precedent to the right of action that the beneficiaries named in the certificate present to defendant the proofs specified. Defendant did not waive such proofs, either by pleading inconsistent defences or by denial of liability in the answer. The defences were not inconsistent, for they might all be true. The denial of liability in order to effect a waiver of proofs of loss must have preceded the institution of the suit. There is no such denial pleaded. Abramovitz v. National Council, 134 Minn. 302, 159 N. W. 624.

A certificate exempted the insurer from liability for death from complications arising from pregnancy or childbirth. Held, that the evidence justified a finding that death did not result from such cause. Nordinger v. Ladies of the Maccabees, 138 Minn. 16, 163 N. W. 785.

Receiving the proofs of claim in evidence "for all the purposes for which they are properly admissible" was not error. McKay v. Minnesota Commercial Men's Assn., 139 Minn. 192, 165 N. W. 1061.

In an action involving the rule that the unexplained disappearance of a person without tidings for a period of seven years or more raises an inference or presumption of death, the evidence is held to support the presumption and to justify the verdict of the jury. Boynton v. Modern Woodmen, 148 Minn. —, 181 N. W. 327.

Waiver of proof of claim by subordinate lodge. 6 A. L. R. 535.

4852. Burden of proof—In an action on a death benefit certificate in a beneficiary association the production of the certificate and of proof of death makes a prima facie case and casts upon the defendant the burden of proving lapse of membership. Hinchliffe v. Minnesota Commercial Men's Assn., 142 Minn. 204, 171 N. W. 776. See Abramovitz v. National Council, 134 Minn. 302, 159 N. W. 624.

(19) Wising v. Brotherhood of American Yoemen, 132 Minn. 303, 156 N. W. 247 (that a member became addicted to the intemperate use of intoxicating liquors contrary to the provisions of the contract); Abramovitz v. National Council, 134 Minn. 302, 159 N. W. 624 (burden on plaintiff to prove that proofs of death and claimant's rights to benefits were made to society as required by certificate); Nardinger v. Ladies of the Maccabees, 138 Minn. 16, 163 N. W. 785 (burden on insurer to prove that death resulted from an excepted cause though plaintiff negatives such fact in his complaint).

See Digest, § 4738.

4853. Pleading—(20) Abramovitz v. National Council, 134 Minn. 302, 159 N. W. 624 (answer held not to waive proofs of death and plaintiff's right to benefits by defences pleaded—defences not inconsistent—reply admitted allegations of answer as to payment of monthly assessments); Fitzgibbons v. Bowen, 139 Minn. 197, 165 N. W. 1059 (complaint for the recovery of a disability pension held to state a cause of action); Hinchliffe v. Minnesota Commercial Men's Assn., 142 Minn. 204, 171 N. W. 776 (answer that long prior to his death deceased "permitted his insurance to lapse by reason of his failure, refusal and neglect to pay the assessments duly levied against him, and that by reason thereof his membership lapsed, and all his insurance in said association became null, void and of no effect," held sufficient against objection first raised on the trial). See Digest, §§ 4735-4737.

4853a. Evidence—Sufficiency—Evidence held sufficient to justify a recovery on a benefit certificate. Wising v. Brotherhood of American Yoemen, 132 Minn. 303, 156 N. W. 247.

MUTUAL HAIL INSURANCE

4865b. Arbitration—A provision for arbitration in a policy held inapplicable where there was no disagreement as to the amount of the loss. Mahoney v. Minnesota Farmers Mut. Ins. Co., 136 Minn. 34, 161 N. W. 217.

EMPLOYER'S LIABILITY INSURANCE

4866a. Withdrawal—Having once assumed the defence, the insurer cannot relieve itself of this measure of liability by an unwarranted withdrawal from the case. There was no impropriety in an agreement by the employer to prosecute the suit for the benefit of the employee nor in counsel commenting on that fact. Under such circumstances, the employer may recover expenses incurred in defence of the employee's action after the insurer withdrew, without payment of such expenses. Standard Printing Co. v. Fidelity & Deposit Co., 138 Minn. 304, 164 N. W. 1022.

4867. Construction of policies—The contractors for the construction of a highway, in their application for an insurance policy to cover risks

under the Workmen's Compensation Act, stated that they did not "operate a steam railroad, switch, or side track in connection with the risks." The policy issued and accepted contained the same language. They used and operated in their work "dinkey" steam locomotives drawing Peteler dump cars upon temporary tracks of steel rails and wooden ties. This fact was not known to the insurer when the policy was issued. Held, the statement was a misrepresentation of a fact material to the risk and made void the policy. McCullough v. Georgia Casualty Co., 137 Minn. 88, 162 N. W. 894.

(38) State v. District Court, 141 Minn. 348, 170 N. W. 218 (policy held applicable to employee traveling out of state in course of his employment).

4867a. Notice to insurer of accident, claim or action—A provision, contained in a policy of liability insurance, by which the insured is required to give "immediate notice" of the occurrence of an injury covered by the contract, imposes upon the insured the duty to give such notice within a reasonable time, is of the essence of the contract, and a condition precedent to the right of action thereon, and a failure to give the same operates to release the insurer from liability. A notice, given fifty-two days after the occurrence of the injury, held not within a reasonable time, and therefore not a compliance with the contract. Hagstrom v. American Fidelity Co., 137 Minn. 391, 163 N. W. 670.

The fact that the insured did not have personal knowledge of the accident does not excuse him from serving notice on the insurer. Notice to an agent or foreman of the insured is notice to him. Hagstrom v. American Fidelity Co., 137 Minn. 391, 163 N. W. 670.

4868c. Judgment against insured—Liability of insurer—When the insurer, in an employer's liability policy, assumes the exclusive control of the defence of suit upon an employee's claim, it becomes liable for the payment of a judgment obtained by the employee and an action may be maintained by the employer to recover from the insurer the amount of the judgment for the benefit of the employee without payment of the judgment. Standard Printing Co. v. Fidelity & Deposit Co., 138 Minn. 304, 164 N. W. 1022.

HEALTH AND ACCIDENT INSURANCE

4869a. Governed by separate code—Laws 1913, c. 156, established a complete and separate code regulating health and accident insurance. G. S. 1913, § 3292, relating to the embodiment of conditions in the policy does not apply to such insurance. Aaberg v. Minnesota Commercial Men's Assn., 143 Minn. 354, 173 N. W. 708.

4870a. What constitutes contract—Policy—Application of statutes—Plaintiff was insured by defendant against disability resulting from accidental injuries and sued on the contract. Defendant had issued to him a certificate of membership which contained none of the substantive

provisions of the contract but stated that his application and the by-laws constituted the contract. No other policy was issued. Plaintiff put his certificate of membership in evidence, and proved the provision of the application and the by-law which included the part of the contract on which he relied to establish his cause of action, but on his objection the court excluded the remainder of the application and the remainder of the by-laws which included the part of the contract on which defendant relied to establish its defence. Held, error. Plaintiff's claim that this evidence was not admissible under the pleadings cannot be sustained. The word "policy" as used in the statute usually refers to the written instrument in which the contract of insurance is embodied. The certificate, the application and the by-laws constitute the only contract contemplated by the parties in the present case and is the only existing contract. This contract violates the provisions of chapter 156, Laws 1913, but is valid by virtue of section 9 of that act (section 3530, G. S. 1913) and must be given effect as provided in that section. By proving the provisions of the application and by-laws on which his cause of action rested, plaintiff gave defendant the right to prove the provisions of these documents on which its defence rested even if defendant would not have had this right otherwise. Defendant is not within section 3536, G. S. 1913, as its membership is not confined to traveling salesmen. Aaberg v. Minnesota Commercial Men's Assn., 143 Minn. 354, 173 N. W. 708.

4871. Representations of applicant—Waiver—Reinstatement—Construction—In an action on an accident policy, the provisions of Rev. Laws 1905, § 1623 (G. S. 1913, § 3300), relative to misrepresentations by the insured, control, and not the provisions of Rev. Laws 1905, § 1693 (G. S. 1913, § 3467), relative to misstatements as to age, physical condition, and family history in an application where the policy is issued without previous medical examination or without the knowledge or consent of the insured, the policy having been written and the death claimed to be accidental having occurred prior to the going into effect of Laws 1913, c. 156 (G. S. 1913, §§ 3522-3535), section 6 of which provides what shall be the effect of a false statement in an application for an accident policy. McAlpine v. Fidelity & Casualty Co., 134 Minn. 192, 158 N. W. 967.

A policy of accident insurance contained a provision authorized by section 3524, G. S. 1913, to the effect that the acceptance by the insurer of delinquent premiums should reinstate the policy, but only to cover accidental injuries thereafter sustained. Held, that the provision is valid, and, as to insurance companies operating under the statute, operates as a modification of the rule applied in Mueller v. Grand Grove, 69 Minn. 236, 72 N. W. 48, and to exclude liability for injuries suffered by the insured when the policy is under suspension by reason of the default. Ward v. Merchants Life & Casualty Co., 139 Minn. 262, 166 N. W. 221.

(42) Olsson v. Midland Ins. Co., 138 Minn. 424, 165 N. W. 474; Zimmerman v. Bankers Casualty Co., 138 Minn. 442, 165 N. W. 271; Powers v. Fidelity & Casualty Co., 144 Minn. 282, 175 N. W. 111; Ivanesovich v. North American L. & C. Co., 145 Minn. 175, 176 N. W. 502.

(43) Madden v. Interstate etc. Assn., 139 Minn. 6, 165 N. W. 482; Suits v. Order of United Commercial Travelers, 139 Minn. 246, 166 N. W. 222; Rechtzigel v. National Casualty Co., 143 Minn. 302, 173 N. W. 670.

4871a. What constitutes an accident—The killing of the insured by a third person, not the beneficiary, may be an accident within the terms of a policy. McAlpine v. Fidelity & Casualty Co., 134 Minn. 192, 158 N. W. 967.

The proof made a case of accidental injury under the policy and not one of special indemnity resulting from illness. Ivanesovich v. North American L. & C. Co., 145 Minn. 175, 176 N. W. 502.

Death or injury resulting from voluntary act of insured. 7 A. L. R. 1131.

See § 5854e.

4871c. Payment of premiums—The liability of the insurer became absolute when the accident occurred, and the right to indemnity, payable in future instalments, was not contingent upon the payment of premiums falling due after the date of the accident. Rechtzigel v. National Casualty Co., 143 Minn. 302, 173 N. W. 670.

4871d. Total disability—Plaintiff, a traveling salesman, was injured in a railway collision. The fact that he continued his journey and two days later made another journey did not establish as a matter of law that his disability to follow his vocation was not total at the time of the accident, and instructions to that effect were properly refused. An instruction which was sufficiently covered by the general charge was also properly refused. McKay v. Minnesota Commercial Men's Assn., 139 Minn. 192, 165 N. W. 1061.

4872. Various provisions of policies construed—A provision insuring "against liability or death resulting directly and independently of all other causes from bodily injuries effected solely through external, violent and accidental means, suicide (sane or insane) not included." Huestis v. Aetna Life Ins. Co., 131 Minn. 461, 155 N. W. 643.

A policy of accident insurance provided for double indemnity when the injury was sustained "while riding as a passenger on any railway passenger car." Held, that the insured when on the platform of a car preparatory to getting off, in the way provided by the carrier, or in the act of doing so, was within the meaning of the policy riding as a passenger on a railway passenger car. Gillis v. Duluth Casualty Assn., 133 Minn. 238, 158 N. W. 252.

A policy of accident insurance exempted the insurer from liability in case the accident resulted from "unnecessary exposure to obvious risk of injury." Held, that the insured, a passenger on a railway train, did not as a matter of law expose himself to obvious risk of injury, within the meaning of the policy, by going upon the platform of a moving car preparatory to getting off at a station; and the trial court properly sub-

mitted the question of unnecessary exposure to the jury. Gillis v. Duluth Casualty Assn., 133 Minn. 238, 158 N. W. 252.

A provision for liability "if death shall result from such injuries alone, and not proximately from some disease induced or aggravated by said injuries, and within three calendar months after the date on which the injuries were received." Hickey v. Ministers Casualty Union, 133 Minn. 215, 158 N. W. 45.

A provision insuring against "bodily injury sustained * * * through accidental means (excluding suicide, sane or insane, or any attempt thereat, sane or insane), and resulting directly, independently, exclusively of all other causes, in * * * death." McAlpine v. Fidelity & Casualty Co., 134 Minn. 192, 158 N. W. 967.

A provision limiting liability for a loss of a foot unless it should "result solely from such injury within ninety days from the date of accident." Orenstein v. Preferred Accident Ins. Co., 138 Minn. 10, 163 N. W. 747.

The insured was accidentally hurled against and under a passing train of cars, and thereby sustained injuries resulting in the loss of his left arm and the fingers of his right hand. Held, to be but one accident and one loss, within the meaning of an accident insurance policy, for which he was entitled to the full monthly accident indemnity provided for in the policy, during total disability not exceeding forty-eight months. Kangas v. Standard Accident Ins. Co., 138 Minn. 418, 165 N. W. 268.

Indorsed on the back of a policy were these words: "This policy provides indemnity for a loss of life, limb, sight or time by accidental means, and for loss of time or life by sickness to the extent herein provided." In the policy itself there was no specific reference to death resulting from sickness. Held, that the policy covered death from sickness as well as from accident. Phillips v. Duluth Casualty Co., 140 Minn. 245, 168 N. W. 9.

By the terms of the policy here involved, the insured was entitled to indemnity for total disability caused by accident if he was under the care of a physician during the period of disability, even though there was no medical treatment of his injury. Rechtzigel v. National Casualty Co., 143 Minn. 302, 173 N. W. 670.

A provision requiring the insured to furnish physician's reports as a condition precedent to the maintenance of an action thereon has no application where the insurer asserts that it has made settlement in full and is released from further liability. Rechtzigel v. National Casualty Co., 143 Minn. 302, 176 N. W. 670.

(48) See Aaberg v. Minnesota Commercial Men's Assn., 143 Minn. covered thereby. Orenstein v. Preferred Accident Ins. Co., 138 Minn. 409, 158 N. W. 625.

(51) See Gillis v. Duluth Casualty Assn., 133 Minn. 238, 158 N. W. 252.

4873. Disease concurrent cause—Evidence held to justify a finding that death was caused by injuries received in an accident, and not proximately from a disease induced or aggravated by such injuries. Hickey v. Ministers Casualty Union, 133 Minn. 215, 158 N. W. 45.

4873b. Limitation on time of injury after accident—The accident insurance policy, issued by defendant, insured plaintiff against disability or death resulting from bodily injury effected through external, violent, and accidental means, and provided that if the loss of either foot should "result solely from such injury within ninety days from the date of the accident," the defendant would pay him a sum certain. Plaintiff suffered an accident to a toe on his left foot, within the meaning of the policy, on May 22, 1915. About three months later infection set in, and it became necessary to amputate the foot September 25, 1915. The loss did not take place within the time specified in the policy, and is not covered thereby. Orenstein v. Preferred Accident Ins. Co., 138 Minn. 10, 163 N. W. 747.

4874. Negligence of insured—Assumption of risk—Whether the insured unnecessarily exposed himself to an obvious risk of injury is a question for the jury, unless the evidence is conclusive. Gillis v. Duluth Casualty Assn., 133 Minn. 238, 158 N. W. 252.

(57) See Gillis v. Duluth Casualty Assn., 133 Minn. 238, 158 N. W. 252.

4874b. Suicide—The burden of proving that the insured committed suicide is not on the defendant. The plaintiff is bound to prove that the death was accidental and the defendant may prove suicide under a general denial. In other words suicide is not an affirmative defence. Huestis v. Aetna Life Ins. Co., 131 Minn. 461, 155 N. W. 643; McAlpine v. Fidelity & Casualty Co, 134 Minn. 192, 158 N. W. 967.

Evidence held to justify a verdict of accidental death where the defence was suicide. Farrar v. Locomotive Engineers etc. Ins. Assn., 143 Minn. 468, 173 N. W. 705.

4874c. Reports on condition of insured—The claim that the insured did not comply with the provisions of the policy, in regard to notifying the company of his condition, is sufficiently disposed of by the admission of counsel upon the trial. Zimmerman v. Bankers Casualty Co., 138 Minn. 442, 165 N. W. 271.

4874d. Notice of accident—Under an insurance policy, which provides that written notice of injury must be given within twenty days after the date of the accident, but failure to give such notice within that time shall not invalidate the claim, if it was given as soon as reasonably possible, the mailing of a letter properly addressed to the general agent of the company, with postage paid, was sufficient to make a question of notice for the jury. Powers v. Fidelity & Casualty Co., 144 Minn. 282, 175 N. W. 111. See note, 7 A. L. R. 186 (reasonableness of notice for jury).

4874e. Notice of death or loss—Notice of loss, in the form of a verified statement made in duplicate, one copy being properly mailed to the company at its office in New York, and the other to its authorized agent in St. Paul, so that the agent might receive the same in the ordinary course

of mail within the time limited for giving such notice, is sufficient. Powers v. Fidelity & Casualty Co., 144 Minn. 282, 175 N. W. 111.

4875. Death—Cause—Proof—Sufficiency of evidence—The burden of proving that death was accidental is on the plaintiff. The burden is not on the defendant to prove that the insured committed suicide. Huestis v. Aetna Life Ins. Co., 131 Minn. 461, 155 N. W. 643; McAlpine v. Fidelity & Casualty Co., 134 Minn. 192, 158 N. W. 967.

The burden of proving that the death of the insured was caused by a third person, not the beneficiary, thus constituting an accident within the policy, is on the plaintiff. McAlpine v. Fidelity & Casualty Co., 134 Minn. 192, 158 N. W. 967.

Evidence held sufficient to justify a finding that the insured, while riding a bicycle and attempting to pass a wagon loaded with lumber on a bridge, met his death by a collision with the wagon within the terms of a policy. Hylaman v. Midland Ins. Co., 136 Minn. 132, 161 N. W. 385.

Evidence held to justify a finding that the insured came to his death by an accident caused by the breaking of the round of a ladder on which he was standing. Powers v. Fidelity & Casualty Co., 144 Minn. 282, 175 N. W. 111.

LIABILITY INSURANCE

4875e. Notice of accident and claim—Waiver—In an action on a policy insuring against liability for accidents in the operation of automobiles, held, that the question whether a notice of the accident was served on the insurer in time was for the jury, and that a provision in the policy against waiver of conditions did not apply to conditions to be performed after the accident. C. S. Brackett & Co. v. General Accident etc. Corp., Ltd., 140 Minn. 271, 167 N. W. 798.

4875f. Liability for damage by automobile—Defendant insurance company issued a policy to plaintiff insuring him against loss by reason of liability imposed by law for the destruction of or injury to the property of others arising from plaintiff's ownership, maintenance or use of certain automobiles A clause of the policy provided that "the company's liability is limited to the actual intrinsic value of the property damaged or destroyed at the time of its damage or destruction, which shall not be greater than the actual cost of the repair or replacement thereof." One of plaintiff's automobiles collided with another car and damaged it, under circumstances which rendered plaintiff liable. Defendant paid the owner of the injured car the amount of the bill for repairs paid by him. Thereafter the owner of the injured car recovered a judgment against plaintiff for the depreciation in the value of his car caused by the accident over and above the amount paid for repairs. Plaintiff paid this judgment, and brought this action to recover the amount so paid, with attorney's fees, from defendant under the policy. Held, by a majority of the court that the limitation clause above quoted does not limit the liability of defendant to the actual cost of repairs made, when it appears

that they do not and cannot make the car as good as it was before the accident, and that plaintiff may recover the amount of the judgment paid by him for depreciation in the value of the car, with attorney's fees incurred in defending the suit. Christison v. St. Paul Fire & Marine Ins. Co., 138 Minn. 51, 163 N. W. 980.

Defendant issued a policy, insuring plaintiff against loss from liability for damages by reason of its ownership and use of motor delivery trucks. The policy did not cover liability if a truck was being driven by any person contrary to the statutory age limit of the state. While a truck was being driven by an employee over 16 and under 18 years of age, who held a state license as a chauffeur, there was a collision with another automobile, and plaintiff was held liable for damages. Held, that plaintiff's truck was not being driven contrary to the statutory age limit of this state (G. S. 1913, section 2621, and section 2638, as amended by section 4, c. 33, Laws 1915), and therefore the proposed answer stated no defence. Mannheimer Bros. v. Kansas Casualty & Surety Co., 147 Minn. 350, 180 N. W. 229.

Defendant issued its policy of indemnity insurance thereby agreeing to indemnify and protect plaintiff, within the limits therein stated, from loss on account of injuries caused to third persons from the operation of its auto truck; and, further, to defend all actions brought against plaintiff to recover such injuries. Held, that the refusal of the insurance company to conduct the defence of an action so brought does not expose it to greater liability to the insured for injuries to the persons complaining than the amount stated in the policy. The measure of liability for a breach of the contract in that respect is: (1) The amount stated as for injuries to third persons; and (2) all necessary costs and expenses incurred by the insured in defending the action. The insurance company is not entitled to a reduction of its liability for such cost and expense in proportion as its maximum liability bears to the amount so claimed by the injured party. The contract to defend is indivisible and extends to the whole case, regardless of the amount involved or whether it exceeds or does not exceed the liability of the insurance company. Counsel for defendant who was employed to defend the action following the refusal of defendant to do so, at the conclusion of the litigation presented a bill for his services which plaintiff acquiesced in, and paid. There being no suggestion of fraud or collusion, or basis to justify an inference of an exorbitant charge, the presentation and payment of the bill is held sufficient evidence of reasonable value to justify the allowance thereof as an item incurred in the defence of the action. The rule applied in Mitchell v. Davies, 51 Minn. 168, 53 N. W. 363, should not be extended to include a showing of that kind. The findings of the trial court that defendant repudiated its liability and refused to defend the action are sustained by the evidence. Mannheimer Bros. v. Kansas Casualty & Surety Co., — Minn. —, 184 N. W. 189.

Automobile liability insurance. 6 A. L. R. 376.

CASUALTY INSURANCE

4875g. Liability of insurer—Defence of action—As the policy required the casualty company to defend the action at its own expense and contained no provision requiring defendant to furnish a supersedeas bond in case of appeal and the company accepted and used a bond for costs, his failure to furnish a supersedeas bond did not release the company from liability. The verdict was for $12,500; the policy for $5,000. An appeal was taken to this court without giving bond to stay proceedings Thereafter plaintiff entered judgment and issued an execution under which she seized all of defendant's property. Defendant then made an agreement for settlement conditioned upon the company paying the amount of the policy. The company refused to pay and continued the litigation to a final conclusion. Held, that making this conditional agreement did not release the company as its rights were not affected thereby. Powers v. Wilson, 139 Minn. 309, 166 N. W. 401.

4875h. Insurance against injury to automobile—In an action on a policy of insurance insuring plaintiff against injury to his automobile through a collision, it is held that the evidence does not show that the automobile was being used at the time in the unlawful transportation of intoxicating liquor. The policy covered loss by collision when the auto was being used for "pleasure and business calls." It is held that the use made by the plaintiff of his auto was within the terms of the policy. The damages are not excessive. Cohen v. Chicago Bonding & Ins. Co., 146 Minn. 222, 178 N. W. 485.

4875i. Insurance of glass—A policy of insurance covering loss sustained by a lessee of a building by reason of the breakage of glass by causes beyond his control protects him upon his liability to replace broken glass according to the terms of his lease. Proof of breakage is proof of a cause of action founded on the policy unless there is an affirmative showing that the breakage was within an exception of the policy. Glass was broken in consequence of the explosion of a steam boiler located in the building and owned and operated by the lessee. The evidence showed that the explosion was due to the sticking of the safety valve. Whether the fact of the explosion did or did not make the doctrine of res ipsa loquitur applicable is not material, because it appeared that the sticking of the valve was due either to some unknown cause or an unusual occurrence not likely to happen and only remotely or slightly probable. Negligence cannot be predicated upon such an occurrence, and the cause of the explosion was not within the control of the insured. The fact that the owner of the building had not enforced the covenant in the lease for the replacement of the broken glass did not preclude a recovery on the policy. The denial by the insurer of any liability upon the policy entitled the insured to sue without giving the insurer an opportunity to replace the glass under an option reserved in the policy and without waiting for the expiration of the time allowed for

the making of a settlement under the policy. Banner Laundry Co. v. Great Eastern Casualty Co., 148 Minn. —, 180 N. W. 997.

BURGLARY AND ROBBERY INSURANCE

4875j. Burglary insurance—Liability—The defendant issued to the plaintiff a policy of burglar insurance by which it promised indemnity against loss by felonious entry into his safe by actual force of which there were visable marks upon the safe by tools or explosives, etc. Liability was excluded if entry was effected by opening the door by a key or the manipulation of the lock. The plaintiff sustained a loss. The entry of the outer door was effected by the manipulation of the lock. The entrance through the inner door was effected by the use of a hammer and chisel, and there were visible marks of the forcible entry. Held, that the defendant is liable on the policy. Moskovitz v. Travelers Indemnity Co., 144 Minn. 98, 174 N. W. 616. See L. R. A. 1918B, 565.

Under the terms of a burglary insurance policy, there was no liability "unless books and accounts are kept by the assured in such a manner that the exact amount of loss may be accurately determined therefrom by the company." The court correctly instructed that if the books and accounts kept were such that, with the assistance of those who kept them, or understood the system, the amount of the loss could be ascertained the condition was not violated. The goods specifically named in the coverage clause of such a policy cannot be excluded by some general prior exception therein. There was not sufficient proof to go to the jury of the defence that plaintiff had prevented the insurer from settling with the owners of the goods lost, nor was the question properly raised at the trial. Defendant cannot be heard to complain of the charge relating to lost fur-lined garments, since it accorded with the language of the policy construed most favorably to it. Olson v. Great Eastern Casualty Co., — Minn. —, 183 N. W. 826.

4875k. What constitutes robbery—Defendant insured plaintiff against direct loss by robbery by force and violence commonly known as highway robbery or holdup. Plaintiff's treasurer, with a large amount of money in an inside pocket of a coat buttoned up, encountered three thieves in an elevator. One crowded him against the others and thus distracted his attention while the other two filched his money without his realizing it at the time. This was robbery. Robbery implies the use of force, or, putting in fear, but if the thief jostles his victim for the purpose of diverting his attention and, while his attention is so diverted, picks his pockets, the crime is robbery. Duluth St. Ry. Co. v. Fidelity & Deposit Co., 136 Minn. 299, 161 N. W. 595. See L. R. A. 1917D, 687.

FIDELITY INSURANCE

4875l. In general—Bonds issued by surety companies guaranteeing to employers the fidelity of employees are in most respects contracts of

insurance and governed accordingly. Pearson v. United States F. & G. Co., 138 Minn. 240, 164 N. W. 919; Quinn-Shepherdson Co. v. United States F. & G. Co., 142 Minn. 428, 172 N. W. 693. See § 9105.

G. S. 1913, § 3292, is applicable to such bonds. Pearson v United States F. & G. Co., 138 Minn. 240, 164 N. W. 919.

Such bonds are not within the statute of frauds and may be oral. Quinn-Shepherdson Co. v. United States F. & G. Co., 142 Minn. 428, 172 N. W. 693.

INTEREST

4881. After maturity of debt—(69) See Greenfield v. Taylor, 141 Minn. 399, 170 N. W. 345.

(69-72) 12 A. L. R. 367; L. R. A. 1916E, 726.

4883. On verdicts and judgments—At common law judgments do not bear interest. Pierce v. United States, 255 U. S. —.

4884. When begins to run—Time at which interest is payable under will or contract. 10 A. L. R. 997.

4885. Computation—Partial payments—(82) Lundquist v. Peterson, 134 Minn. 279, 158 N. W. 426, 159 N. W. 569; Porten v. Peterson, 139 Minn. 152, 166 N. W. 183.

4886. Effect of tender to stop interest—A tender or offer of payment made by the answer of the vendee in an action to enforce rights granted by an executory contract for the sale of land is not sufficient to bar interest on the purchase price after the date of the offer so made, even though the offer would not have been accepted had the tender been made in money. Greenfield v. Taylor, 141 Minn. 399, 170 N. W. 345.

INTERPLEADER

4892. Under statute—Where a party is ordered to interplead and his right to a fund paid into court by a defendant depends upon the power of the court to relieve him from the legal consequences of an accepted bid, he is not entitled to a jury trial. St. Nicholas Church v. Kropp, 135 Minn. 115, 160 N. W. 500.

There can be no "interpleader," either under G. S. 1913, § 7764, or at common law, except where there are rival claimants to the subject-matter in litigation; each claiming or asserting an interest in the property or fund, of which the person seeking the relief is the indifferent holder. Alton & Peters v. Merritt, 145 Minn. 426, 177 N. W. 770.

The owner of real property, who enters into separate contracts with two independent real estate brokers for the sale thereof, agreeing thereby to pay each a commission, if he produces a purchaser ready, able, and willing to buy the same at a specified price per acre, and each subse-

quently claims to have performed his contract and to be entitled to the agreed compensation, is not entitled to have the brokers interplead and contest the right to one commission. Alton & Peters v. Merritt, 145 Minn. 426, 177 N. W. 770.

The statutory remedy is available to a defendant sued in the municipal court of Minneapolis. The only showing the statute requires for granting an order of substitution is that another than the plaintiff makes a claim for the money or debt sued for and that there is no collusion between such claimant and the defendant. The defendant need not show that such claim is valid. T[illegible]re was no abuse of discretion in opening a default judgment entered during the pendency of the hearing of the order to show cause why claimant should not be substituted. Certain irregularities in the proceedings held harmless or readily rectified on application to the trial court. Metropolitan Nat. Bank v. Hennepin County Sav. Bank, — Minn. —, 183 N. W. 821.

(2) Slimmer v. State Bank, 122 Minn. 187, 142 N. W. 144; Id., 134 Minn. 349, 159 N. W. 795; Wilser v. Wilser, 132 Minn. 167, 156 N. W. 271.

See 30 Yale L. Journal 814 (modernizing interpleader).

INTERSTATE COMMERCE

4894. What constitutes—Where a commodity is shipped from one state into another, its identity not preserved, mingled with other property of like character, held there for sale and not designed for any particular purchaser, or for re-shipment to any particular place, it becomes a part of the general mass of the property of the state and is no longer the subject of interstate commerce. Principle applied to gasolene shipped into the state in tank cars and there stored in storage tanks for sale and re-shipment. State v. Bartles Oil Co., 132 Minn. 138, 155 N. W. 1035; State v. Pure Oil Co., 134 Minn. 101, 158 N. W. 723, affirmed, 248 U. S 158.

The sale and shipment of goods from one state to another constitutes interstate commerce. Fisher v. Wellworth Mills Co., 133 Minn. 240, 158 N. W. 239.

A sale of a machine by a foreign corporation to a resident of this state, coupled with an incidental agreement to instal it in the residence of the purchaser in this state, has been held not interstate commerce. Palm Vacuum Cleaner Co. v. Bjornstad, 136 Minn. 38, 161 N. W. 215. See § 2187.

What constitutes interstate commerce is so far a federal question that the decisions of the federal courts are controlling on state courts. Palm Vacuum Cleaner Co. v. Bjornstad, 136 Minn. 38, 161 N. W. 215 Outcault Advertising Co. v. Citizens State Bank, 147 Minn. 449, 180 N. W. 705.

Certain transactions held interstate commerce. American Brick & Tile Co. v. Turnell, 143 Minn. 96, 173 N. W. 175.

Interstate commerce is not confined to the sale of commodities. Out-

cault Advertising Co. v. Citizens State Bank, 147 Minn. 449, 180 N. W. 705.

(11) State v. National Cash Register Co., 136 Minn. 460, 161 N. W. 1054.

(13) See Burkee v. Great Northern Ry. Co., 133 Minn. 200, 158 N. W. 41.

See §§ 1205c, 1205f, 1246, 2187, 4895, 4896a, 4897, 6022b–6022p, 7814, 8124, 9121, 9586b, 9670a.

4895. Exclusive jurisdiction of Congress—Congress has not legislated with reference to employer's liability in connection with interstate commerce by water and until it does so such legislation is within the province of the several states. The Workmen's Compensation Act of this state is not an unauthorized interference with such commerce. Lindstrom v. Mutual Steamship Co., 132 Minn. 328, 156 N. W. 699. See § 98.

Interstate commerce is now governed exclusively by the laws enacted by Congress and by the common-law principles accepted and enforced by the federal courts, to the exclusion of state laws and state rules and policies. Northwestern Consolidated Milling Co. v. Chicago, B. & Q. R. Co., 135 Minn. 363, 160 N. W. 1028.

The whole subject of interstate commerce is now regulated by federal laws so far as the rights and liabilities of the carriers and holders of bills of lading are concerned Lowitz v. Chicago etc. Ry. Co., 136 Minn. 227, 161 N. W. 411.

(17) State v. Bartles Oil Co., 132 Minn. 138, 155 N. W. 1035; State v. Pure Oil Co., 134 Minn. 101, 158 N. W. 723, affirmed, 248 U. S. 158.

See §§ 1205c, 1205f, 1246, 2187, 4895, 4896a, 4897, 6022b–6022p, 7814, 8124, 9121, 9586b, 9670a.

4896a. Held to interfere with interstate commerce—A statute requiring persons doing business in this state under a trade name to file a certificate. Fisher v. Wellworth Mills Co., 133 Minn. 240, 158 N. W. 239.

4897. Held not to interfere with interstate commerce—A law imposing a gross earnings tax on freight line companies. State v. Cudahy Packing Co., 129 Minn. 30, 151 N. W. 410, affirmed, 246 U. S. 450.

A law providing for the testing of gasolene for gravity, requiring it to be branded "unsafe for illuminating purposes," and requiring the word "gasolene" to be branded and the gravity stenciled on every barrel or package. State v. Bartles Oil Co., 132 Minn. 138, 155 N. W. 1035; State v. Pure Oil Co., 134 Minn. 101, 158 N. W. 723, affirmed, 248 U. S. 158.

A seizure under a writ of replevin of goods in the hands of a common carrier at their destination after an interstate transportation. Burkee v. Great Northern Ry. Co., 133 Minn. 200, 158 N. W. 41.

A judgment declaring the distance tariff act of 1913 applicable to traffic under a through traffic agreement between two railroads in this

state and requiring compliance with an order of the Railroad & Warehouse Commission applying such act. State v. Chicago etc. Ry. Co., 139 Minn. 55, 165 N. W. 869.

INTERVENTION

4899. Nature of interest entitling party to intervene—(32) Johnson v. First State Bank, 144 Minn. 363, 175 N. W. 612; Podratz v. Nemitz, 145 Minn. 422, 177 N. W. 769.

(33) Hoidale v. Cooley, 143 Minn. 430, 174 N. W. 413.

4901a. Intervener bound by theory of trial—An intervener is bound by the theory upon which he tries his claim in intervention. An intervener claiming a commission on the sale of a farm held not entitled to judgment notwithstanding the verdict or a new trial, there being no error on which plaintiff's verdict could be set aside, and the intervener having come into the case and tried it on the theory that defendants were to pay a commission to the one only who was the procuring cause of the sale. Podratz v. Nemitz, 145 Minn. 422, 177 N. W. 769.

INTOXICATING LIQUORS

CONSTITUTIONALITY OF STATUTES

4905. In general—Laws 1915, c. 23, known as the county option law, has been held constitutional against the objection that it infringes the rights of cities operating under home rule charters. State v. International Falls, 132 Minn. 298, 156 N. W. 249.

The prohibition act of 1919 has been held constitutional against various objections. State v. Hosmer, 144 Minn. 342, 175 N. W. 683; State v. Brothers, 144 Minn. 337, 175 N. W. 685.

STATE AND FEDERAL PROHIBITION

4905a. State prohibition act of 1919—Construction and effect—Conflict between state and federal laws—Chapter 455, Laws 1919, is not unconstitutional as a delegation of legislative power to Congress. If an act of the legislature is complete in itself, the legislature may provide that its operation shall be contingent on the existence of an act of Congress of a certain purport. The statute does not contain more than one subject. There is but one general subject, the prohibition of the liquor traffic. The provisions making places where liquors are manufactured and sold nuisances, and providing for their abatement, are germane to this general subject. The provision that the statute is intended to provide for the enforcement of the War Prohibition Act of Congress (Act Nov. 21, 1918, c. 212, 40 Stat. 1047) does not constitute a separate sub-

ject. The statute prohibits the transportation of liquor whether for purposes of sale or otherwise, medicinal and other permitted purposes excepted. In order to make the enforcement of prohibition effective, the legislature may prohibit traffic in beverages near to intoxicants, though not actually intoxicating. The fact that the legislature declares such beverages intoxicating does not invalidate such prohibition. It is within the power of the legislature to prohibit the manufacture, transportation, and sale of liquor containing one-half per cent of alcohol. The statute is not in conflict with the act of Congress. That it is broader in its prohibitions does not invalidate it. State v. Brothers, 144 Minn. 337, 175 N. W. 685.

Chapter 455, Laws of 1919, expresses a purpose to provide for the enforcement of the act of Congress "commonly known as War Prohibition." This does not limit the operation of the statute to the matters prohibited by the act of Congress, if, by its terms, it is broader than the act of Congress. The state statute is a separate, complete and independent act. A state statute, absolutely prohibiting, within the limits of the state, the manufacture and sale of intoxicating liquors, is a warranted exercise of the police power of the state. It is not in contravention of our state constitution or of the constitution of the United States. The ultimate purpose of prohibition is to prevent the excessive use of intoxicating liquors. To accomplish that purpose, and to prevent evasions, the legislature may prohibit the traffic, the sale, the transportation, the possession, and the manufacture even for the use of the manufacturer. It is not necessary, in an indictment under our statute, to allege that the liquor was potable as a beverage. The prohibitions of our statute are not limited to liquors manufactured from grains, cereals, fruit, or other food products. The statute forbids the manufacture of intoxicating liquor for the private use of the manufacturer. State v. Hosmer, 144 Minn. 342, 175 N. W. 683.

LOCAL OPTION

4906. In general—In determining the legality of votes cast and the construction of informal ballots the rules governing ballots in general elections apply. Doepke v. King, 132 Minn. 290, 156 N. W. 125.

Illegal votes cannot be counted in determining the number of votes cast or for any purpose. Doepke v. King, 132 Minn. 290, 156 N. W. 125.

Evidence held to show that the majority of the votes cast at the election under the county option law of 1915 was for prohibition. Doepke v. King, 132 Minn. 290, 156 N. W. 125.

Chapter 23 of the Laws of 1915, known as the county option law, does not infringe the rights granted by section 36 of article 4 of the constitution to cities operating under so-called home rule charters, and is valid. Where, under and pursuant to the county option law, a county votes to prohibit the sale of intoxicating liquors therein, the power to issue licenses for the sale of such liquors is withdrawn from every municipality

within such county, including cities operating under so-called home rule charters. State v. International Falls, 132 Minn. 298, 156 N. W. 249.

A license to sell intoxicating liquors in a city situated in a county which has voted to prohibit such sale is invalid, if for a term beginning after the result of the election has been declared, even though the license is issued before the election. State v. White, 132 Minn. 470, 156 N. W. 251.

The penalties of the local option statute (Laws 1915, c. 23, § 13) are directed against the seller and not against the buyer; and one who purchases intoxicating liquor in a dry county at the solicitation of another, and with his money and for his use and as his agent, in good faith, and not as a subterfuge or for purposes of evasion, does not commit an offence. The law, however, does not countenance an evasion or subterfuge. The claimed agency must be exercised in good faith and not to hide a participation in an illegal traffic. The evidence in this case was such as to make the defence of agency in good faith for the jury and the court by charging that there was no defence of agency in good faith erroneously deprived the defendant of the right to have the question determined by the jury. State v. Provencher, 135 Minn. 214, 160 N. W. 673.

It is probably illegal to deal in intoxicating liquors in quantities of more than five gallons in a county which has adopted prohibition. State v. Northern Pacific Ry. Co., 139 Minn. 334, 166 N. W. 351.

The adoption of prohibition by a county deprives all municipalities therein of the power to grant licenses for the sale of liquors. Virginia v. Erickson, 141 Minn. 21, 168 N. W. 821.

Judicial notice will not be taken that a county has by an election come under the statute. State v. Kusick, 148 Minn. —, 180 N. W. 1021.

LICENSES.

4908. Who required to be licensed—(59) State v. Northern Pacific Ry. Co., 139 Minn. 334, 166 N. W. 351.

4910. Issuance—Authority of mayor—In the city of Rochester liquor licenses are granted by the city council. The mayor is required to sign all licenses, but he has no option to refuse to sign a license regularly granted by the council. The issuance of a license is a matter calling for the exercise of judgment and discretion on the part of the council. Their discretion cannot be controlled or reviewed, nor can the mayor or the court dictate as to the manner or the fulness of their investigation. The character, record, and fitness of the applicant for a license are matters for the council to pass upon. State v. Reiter, 140 Minn. 491, 168 N. W. 714.

4911. Granting a matter of discretion—Mandamus—Mandamus will not lie to control or restrict the discretion given to a city council in respect to the issuance of a liquor license, but in the present case it sufficiently appears that the license was refused solely because its issuance

had been prohibited by an ordinance adopted under the initiative provisions of the city charter, and not in the exercise of the discretion reposed in the council. State v. Duluth, 134 Minn. 355, 159 N. W. 792.

The granting of a license by a city council cannot be controlled by the mayor of the city unless the charter so provides. State v. Reiter, 140 Minn. 491, 168 N. W. 714. See § 4910.

(68) See State v. Reiter, 140 Minn. 491, 168 N. W. 714.

4913. Delegation of power to municipalities—The power to prohibit the sale of intoxicating liquor within its limits may be given to a city by its charter. The general laws regulating the liquor traffic imposed regulations and restrictions more stringent than those theretofore existing, which the municipalities of the state could not abrogate or lessen; but such municipalities were free to impose any further restrictions authorized by their respective charters or other laws. It is not contrary to the public policy of the state to give the power to prohibit such traffic to a city of the first class, and such power may be given to a city of that class by a home rule charter. The former charter of the city of Duluth limited the control of the city over the liquor traffic so that the city could regulate but not prohibit such traffic; but the present charter, after continuing in force all powers previously possessed by the city, granted, in addition thereto, "All municipal power * * * of every name and nature whatsoever." Held, that "all municipal power" includes all powers generally recognized as powers which may properly be exercised by municipal corporations, and that the liquor traffic may be prohibited under the grant of such power. State v. Duluth, 134 Minn. 355, 159 N. W. 792.

4914. Conflict between general laws and municipal charter and ordinances—Virginia, in St. Louis county, is a city governed by a home rule charter adopted prior to the local option act of 1915 (Gen. St. Supp. 1917, §§ 3161—1 to 3161—18). In 1917, an election under the local option statute resulted in favor of prohibition, which became effective on March 15, 1918. By an ordinance approved May 13, 1918, the common council prohibited the sale of intoxicating liquor in the city. The relator was convicted of a violation of this ordinance. On habeas corpus he attacks the validity of the ordinance upon the ground that the council was without charter authority to enact a prohibitory ordinance, and upon the ground that a sale, being a crime under the local option statute, could not under the charter be made an offence against the city. The charter granted the council express power to license and regulate the sale of intoxicating liquor. The effect of the adoption of prohibition was to suspend the power to license and regulate. It may be conceded that prior to the adoption of prohibition the council was without authority to pass a prohibitory ordinance, but only to license and regulate, since the grant of the power to license and regulate was a limitation. But after such adoption, in the exercise of the police power definitely granted though in general terms by the welfare clause of the charter giving it specific authority to legislate for the safety of the community, the preservation

of peace and good order, and the suppression of vice, it had such authority. The fact that the sale of intoxicating liquor in the city was made an offence against the state by the local option statute did not prevent the council in the exercise of the police power from making such a sale an offence against the municipality by an ordinance not inconsistent with the state law. Virginia v. Erickson, 141 Minn. 21, 168 N. W. 821.

(91) See State v. International Falls, 132 Minn. 298, 156 N. W. 249.

(92) State v. Duluth, 134 Minn. 355, 159 N. W. 792. See § 4913.

(97) Virginia v. Erickson, 141 Minn. 21, 168 N. W. 821. See § 6759.

4915. Ordinances held valid—An ordinance under a home rule charter prohibiting the sale of intoxicating liquors within the city and forbidding the issuance of licenses therefor. State v. Duluth, 134 Minn. 355, 159 N. W. 355.

An ordinance prohibiting the sale of liquor in a city in a county which had adopted prohibition. Virginia v. Erickson, 141 Minn. 21, 168 N. W. 821.

4917. License fees—Voluntary payment—Recovery—Money voluntarily paid to local municipal authorities, without mistake of fact, for a license to sell intoxicating liquors in that territory cannot be recovered back by the person by whom the payment was made, or by his assignee, upon the happening of an adverse local option election. In the absence of statute otherwise providing, the municipal authorities in such case have no authority to order a repayment of the license fee upon the occurrence of such election, or otherwise, and an attempt to do so is null and void. Section 3150, subd. 2, G. S. 1913, has no application to license illegally granted in the Indian Territory referred to. Minneapolis Brewing Co. v. Bagley, 142 Minn. 16, 170 N. W. 704.

A licensee to whom a liquor license is unlawfully issued by a city, cannot recover the license fee voluntarily paid, even though it was paid in the belief that the license might lawfully issue. The fact that a nisi prius court had erroneously held that the city had the right to license the sale of liquor does not give the licensee a right of recovery. Courtright v. Detroit, — Minn. —, 183 N. W. 346.

(10) See Minneapolis Brewing Co. v. Bagley, 142 Minn. 16, 170 N. W. 704.

4918. Bond—Liability—An action may be brought on the bond without leave of court. Wunsewich v. Olson, 137 Minn. 98, 162 N. W. 1054.

Plaintiff's son became intoxicated and was struck and killed by a locomotive. Held a question for the jury whether the accident was due to his drunken condition and whether such condition was in part due to liquor sold to him by defendant when he was drunk. Complaint sustained. Wunsewich v. Olson, 137 Minn. 98, 162 N. W. 1054.

If the liability of a saloon keeper and the surety on his license bond is joint and several, as it probably is, the surety may be sued alone. If the liability is joint, and the action is brought against the surety alone, it is simply a nonjoinder of a party defendant, and must be taken advan-

tage of by demurrer or answer, or it is waived. The bond in this case was executed in the name of and on behalf of defendant by an agent who had authority to so execute it, and is the bond of defendant. The evidence sustains the finding of the jury that the proximate cause of death of plaintiff's husband was intoxication, produced by liquor sold him by the saloon keeper. The sale was in violation of the statute and the terms of the bond, in that it was made on Sunday, made to an habitual drunkard, and to an intoxicated person. A sale to an habitual drunkard was a violation of the statutes and of the terms of the bond, and may form the basis of liability on the part of the surety, although no written notice had been given the saloon keeper. The fact that the sale was made on Sunday makes it unlawful and a violation of the bond. Liability ensues if the sale was the proximate cause of damage. Posch v. Lion Bonding & Surety Co., 137 Minn. 169, 163 N. W. 131.

A sale of intoxicating liquor by a licensed saloon keeper on Sunday is illegal, and under G. S. 1913, § 3200, liability ensues for the proximate result of it. The evidence sustains the finding of the jury that the plaintiff's husband purchased intoxicating liquor in the saloon of each of the defendants on a Sunday, became intoxicated by its use, and as a proximate result of his intoxication was drowned. To render a licensed saloon keeper liable for an illegal sale his sale need not be the sole cause of intoxication. It is enough if it is a co-operating, or concurring or proximately contributing cause. The charge of the court upon this point was correct. The verdict is not excessive. Fest v. Olson, 138 Minn. 31, 163 N. W. 798.

A surety company is not subject to the provision of the statute that no person already a surety on a license bond shall be accepted as a surety on another. State v. Reiter, 140 Minn. 491, 168 N. W. 714.

Action to recover for death of plaintiff's husband, alleged to have been caused by the use of intoxicating liquor unlawfully furnished to the deceased by defendant. Held, that the trial court properly directed a verdict for defendant at the close of plaintiff's case, upon the ground of failure of proof of an unlawful furnishing of liquor. Gorse v. Gouze, 141 Minn. 97, 169 N. W. 423.

A sale of intoxicating liquor by a saloon keeper to an intoxicated person is an illegal act rendering him and the surety on his bond jointly and severally liable for such damages as proximately result therefrom. One entitled to maintain an action for damages so resulting does not release the surety on the bond by failing to file in the probate court a claim for such damages against the estate of a saloon keeper who dies before the action is brought. Section 3200, G. S. 1913, confers a right of action for injury to his or her means of support upon each child of a person whose death is proximately caused by the illegal sale of intoxicating liquors, whether the child is a minor or an adult. The evidence would justify a jury in finding that plaintiff, an adult daughter living in the home maintained by her father, was injured in her means of support by her father's death. The evidence does not show conclusively

that the father met his death as the result of his wanton attack upon an intoxicated man. If the judgment against the widow and minor children of the deceased saloon keeper was not proper, it may be corrected by application to the district court. Miles v. National Surety Co., — Minn. —, 182 N. W. 996.

CRIMINAL OFFENCES.

4919a. What constitutes a sale—The statute provides that the terms "sell" and "sale" shall include barters, gifts, and all means of furnishing liquor in violation or evasion of law. G. S. 1913, § 3188; State v. Provencher, 135 Minn. 214, 160 N. W. 673.

4919b. Purchasing liquor—The liquor laws are aimed against the sale rather than the purchase of liquor. Purchasers and their actual and good-faith agents are not within the penalties of such laws and they are not accomplices or abettors in the illegal sale, unless the statute provides otherwise. State v. Provencher, 135 Minn. 214, 160 N. W. 673.

4920. Sales without license—The definition given in section 3188, G. S. 1913, of the meaning of the terms "sale" and "sell" in chapter 16, G. S. 1913, relating to the sale of intoxicating liquors, is sufficiently clear and complete and may be given to the jury without further explanation. State v. Meyers, 132 Minn. 4, 155 N. W. 766.

Whether it is a defence to a prosecution under G. S. 1913, § 3109, that the liquor was furnished simply as a matter of sociability and hospitality is an open question. Held, no error to refuse an instruction to that effect where no such issue was involved. State v. Meyers, 132 Minn. 4, 155 N. W. 766.

4923. Sales to Indians—(33) Opsahl v. Johnson, 138 Minn. 42, 163 N. W. 988.

4924. Sales to minors—It is provided by G. S. 1913, § 3179, that one who in behalf of a minor purchases intoxicating liquors commits an offence. State v. Provencher, 135 Minn. 214, 160 N. W. 673.

(36) State v. Dombroski, 145 Minn. 278, 176 N. W. 985.

4924a. Sales to intoxicated persons—A sale of intoxicating liquor by a saloon keeper to an intoxicated person is an illegal act rendering him and the surety on his bond jointly and severally liable for such damages as proximately result therefrom. Miles v. National Surety Co., — Minn. —, 182 N. W. 996.

4925. Sales to habitual drunkards—(39) State v. Dombroski, 145 Minn. 278, 176 N. W. 985.

4926. Sales on Sunday—A sale of intoxicating liquor by a licensed saloon keeper on Sunday is illegal and under G. S. 1913, § 3200, liability ensues for the proximate results of such a sale. Fest v. Olson, 138 Minn. 31, 163 N. W. 798.

4928. Unlicensed drinking places—Blind pigs—The complaint charges the commission of the offence of keeping "an unlicensed drinking place."

G. S. 1913, § 3169. Public drinking places are defined as "saloons, public bars, and other places of business or public resort where liquor is commonly sold in quantities less than five gallons, or to be drunk on the premises." G. S. 1913, § 3162. This evidently contemplates licensed drinking places. Other sections in the immediate connection regulate the conduct of drinking places, their closing at stated times, the posting of a license, etc. The term "unlicensed drinking place" is not defined. State v. Northern Pacific Ry. Co., 139 Minn. 334, 166 N. W. 351.

CRIMINAL PROSECUTIONS.

4929. Jurisdiction—A justice of the peace has no jurisdiction of a prosecution under the county option law. State v. Northern Pacific Ry. Co., 139 Minn. 334, 166 N. W. 351.

4938a. Indictment for manufacturing liquor contrary to Laws 1919, c. 455—In an indictment for illegal manufacture of intoxicating liquor, contrary to chapter 455, Laws 1919, it is not necessary to negative a proviso of the statute which permits the use of alcohol in the manufacture of certain articles. The test to determine whether a proviso must be negatived, is, whether it is descriptive of the offence charged. This proviso is not descriptive of the offence charged. State v. Nordstrom, 146 Minn. 136, 178 N. W. 164.

4939. Duplicity in indictments or complaints—(84) State v. Gopher Tire & Rubber Co., 146 Minn. 52, 177 N. W. 937.

4941. Variance—An instruction that defendant might be convicted on proof of commission of the offence charged at any time within three years was not prejudicial error, the evidence having been devoted wholly to proof of a particular offence on a particular day. State v. Radke, 139 Minn. 276, 166 N. W. 346.

4943. Proof of kind of liquor unnecessary—An instruction that it made no difference by what name the liquor was called so long as it was intoxicating was proper. State v. Radke, 139 Minn. 276, 166 N. W. 346.

4944. What are intoxicating liquors—The prohibition act of 1919 defines intoxicating liquor as "any distilled, fermented, spirituous, vinous or malt liquor of any kind potable as a beverage." State v. Hosmer, 144 Minn 342, 175 N. W. 683.

Test of intoxicating quality of liquor. 4 A. L. R. 1137.

4945. Evidence—Admissibility—(4) State v. Logan, 135 Minn. 387, 160 N. W. 1015 (sale in dry territory—defendant introduced evidence that there was no liquor at his place of business subsequent to a date long prior to that of the alleged sale in corroboration of his claim that he did not sell—held not error to allow the state in rebuttal to contradict such evidence—freight bill of liquor shipped to defendant); State v. Gesell, 137 Minn. 43, 162 N. W. 683 (evidence of other illegal sales by

defendant held admissible—express receipts showing shipments of liquor to defendant held admissible); State v. Van Vleet, 139 Minn. 144, 165 N. W. 962 (evidence of other sales held admissible); State v. Mamer, 139 Minn. 265, 166 N. W. 345 (shortly after the alleged sale was made defendant was arrested charged with the sale and also with keeping an unlicensed drinking place—he appeared before a justice of the peace, pleaded guilty of the latter offence and offered to plead guilty of the illegal sale, but the justice refused to accept this plea for want of jurisdiction—held that these proceedings before the justice were admissible as admissions of guilt); State v. Johnson, 140 Minn. 73, 167 N. W. 283 (evidence as to identification of defendant).

4946. Evidence—Sufficiency—Evidence held to justify a conviction for selling liquor in a county where such sales were prohibited. State v. Van Vleet, 139 Minn. 144, 165 N. W. 962.

Evidence held to justify a conviction for storing, keeping and having in possession for sale intoxicating liquors contrary to Laws 1915, c. 23. State v. Olson, 141 Minn. 82, 169 N. W. 419.

Evidence held to justify a conviction for selling liquor in a dry county. State v. Zuponcic, 142 Minn. 448, 172 N. W. 693.

Evidence held not to justify a conviction for keeping an unlicensed drinking place in violation of G. S. 1913, § 3169. State v. Northern Pacific Ry. Co., 139 Minn. 334, 166 N. W. 351.

Evidence held to justify a conviction for manufacturing liquor contrary to Laws 1919, c. 455. State v. Nordstrom, 146 Minn. 136, 178 N. W. 164.

(6) State v. Meyers, 132 Minn. 4, 155 N. W. 766; State v. Thorvildson, 135 Minn. 98, 160 N. W. 247; State v. Radke, 139 Minn. 276, 166 N. W. 346; State v. Mamer, 139 Minn. 265, 166 N. W. 345; Duluth v. Gervais, 146 Minn. 469, 177 N. W. 763.

4947. Punishment—A defendant cannot complain on appeal that the punishment of a fine is not imposed in addition to imprisonment, though the statute provides for both fine and imprisonment. He may apply to the trial court for a correction of the sentence if he desires. State v. Mamer, 139 Minn. 265, 166 N. W. 345; State v. Radke, 139 Minn. 276, 166 N. W. 346.

JITNEY BUSSES—See Municipal Corporations, § 6768.

JOINT ADVENTURE

4949. Quasi partnership—Obligations of members—A complaint held to show a partnership to buy and sell land rather than a joint adventure for that purpose. Moore v. Thorpe, 133 Minn. 244, 158 N. W. 235.

A contract for the purchase, development and sale of lands held a joint enterprise, and a subsequent agreement between the parties for a

termination of the rights of the parties under certain conditions held lawful and effective for that purpose. Allen v. Velie, 137 Minn. 191, 163 N. W. 280.

A joint adventure can arise only by contract or agreement between the parties to join their efforts in furtherance of a particular transaction or series of transactions. And in the absence of express limitations in that respect each party to such adventure is subject to all losses and liabilities, and entitled to share equally in the profits of the undertaking. The relationship is substantially that of a partnership. National Surety Co. v. Winslow, 143 Minn. 66, 173 N. W. 181.

A certain contract, whereby one person agreed to furnish money for the purchase of materials and the payment of labor necessary to carry out a building contract by another, held not to create the relation of joint adventure or partnership. National Surety Co. v. Winslow, 143 Minn. 66, 173 N. W. 181.

An agreement by two parties to combine their money, efforts, skill and knowledge, and purchase land for resale or for dealing with it at a profit, is a partnership agreement, or a joint adventure having in general the legal incidents of a partnership. Hammel v. Feigh, 143 Minn. 115, 173 N. W. 570.

The evidence sustains the court's findings, that certain land purchased and taken in the name of one of the defendants, was purchased by the parties jointly and for their common benefit, that certain personal property placed upon the farm by their father was given to them all jointly, that certain money advanced to them to make the purchase was furnished to all jointly, and that all the money used for that purpose was furnished equally by all. Where adult members of the same family work a farm together and by their joint efforts produce money to pay incumbrances on the land they may be regarded as making joint and equal contribution. Sons v. Sons, 145 Minn. 367, 177 N. W. 498.

Effect of failure of party to pay his share of expenses. 11 A. L. R. 432.

(21) 33 Harv. L. Rev. 852 (partnership and joint adventure distinguished); 4 Minn. L. Rev. 299.

JOINT TENANCY

4951. Survivorship—(24) See 3 Minn. L. Rev. 348.

JUDGES

4954. Vacancies—Appointment and election to fill—(27–31) Brown v. Smallwood, 130 Minn. 492, 153 N. W. 953; Windom v. Duluth, 137 Minn. 154, 162 N. W. 1075. See § 8011 (removal by Governor).

4955. De facto—(32) Windom v. Duluth, 137 Minn. 154, 162 N. W. 1075. See § 5262.

4957. Salaries—As to salaries during suspension by Governor, see § 8006.

4959. Not civilly liable for judicial acts—This immunity is extended to arbitrators and to all whose acts are of a quasi judicial nature. Melady v. South St. Paul Live Stock Exchange, 142 Minn. 194, 171 N. W. 806. See § 3485.

A public officer whose functions are judicial or quasi judicial, cannot be called upon to respond in damages for the honest exercise of his judgment within his jurisdiction, however erroneous his judgment may be. Roerig v. Houghton, 144 Minn. 231, 175 N. W. 542.

(37) Melady v. South St. Paul Live Stock Exchange, 142 Minn. 194, 171 N. W. 806.

4962. Disqualification—Affidavit of prejudice—(45) Ratcliffe v. Ratcliffe, 135 Minn. 307, 160 N. W. 778 (statute inapplicable to application for temporary alimony in an action for divorce and for the custody of minor children pending the action—statute is limited to regular trials of issuable facts).

Waiver of disqualification. 5 A. L. R. 1588

(44) See 8 A. L. R. 295 (ownership of stock); 11 A. L. R. 1325 (relationship to attorney).

JUDGMENTS

IN GENERAL

4963. Definition—(49) See Nason v. Barrett, 141 Minn. 220, 169 N. W. 804 (what constitutes a "final judgment").

4964. Nature—A judgment may be complete as a cause of action though there is no right to an execution thereon. J. L. Bieder Co. v. Rose, 138 Minn. 121, 164 N. W. 586.

4967. In rem and in personam—A court must acquire jurisdiction over the person of a defendant before it can render a judgment in personam against him. Traders Trust Co. v. Davidson, 146 Minn. 224, 178 N. W. 735. See §§ 7812a, 7831, 7835, 7836.

A judgment in personal property tax proceedings possesses all the elements of a judgment in personam. State v. Security Nat. Bank, 143 Minn. 408, 173 N. W. 885.

4972a. Apportionment—It is a general rule that a judgment is an entirety and cannot be apportioned. Lebens v. Nelson, 148 Minn. —, 181 N. W. 350.

CONFESSION OF JUDGMENT

4974a. Warrant of attorney—A warrant of attorney to enter a judgment by confession must be strictly followed. Gundlach v. Park, 140 Minn. 78, 165 N. W. 969, 167 N. W. 302.

4975. Duty of clerk to enter—Under the present statute the judgment must be indorsed on the statement by the clerk. Prior to the Revised Laws 1905, it was held not fatal if there was no judgment indorsed on the statement, if there was a judgment entered in the judgment book. McCue v. Weibeler, 135 Minn. 432, 161 N. W. 143.

4977. Who may attack judgment—The judgment debtor may attack the judgment on the ground that the warrant of attorney under which it was entered was exceeded or deviated from. Gundlach v. Park, 140 Minn. 78, 165 N. W. 969, 167 N. W. 302.

In Illinois the judgment debtor may attack the judgment on the ground of fraud or want of consideration in the contract on which it is based. Gundlach v. Park, 140 Minn. 78, 165 N. W. 969, 167 N. W. 302.

(70) See Petersdorf v. Matz, 136 Minn. 374, 162 N. W. 474.

See § 5210.

OFFER OF JUDGMENT

4983. Requisites of offer—The offer may be made in an answer. Watkins v. W. E. Neiler Co., 135 Minn. 343, 160 N. W. 864.

4987. Effect of refusal—Defendant, having by its answer tendered judgment for the amount found due and the costs accrued to the time of the service of the answer, was entitled to tax subsequent costs under section 7826, G. S. 1913. Watkins v. W. E. Neiler Co., 135 Minn. 343, 160 N. W. 864.

ON DEFAULT

4996. Relief which may be awarded—(15) See Gundlach v. Park, 140 Minn. 78. 90, 165 N. W. 969, 167 N W. 302; Schill v. Korthof, 147 Minn. 443, 180 N. W. 703.

OPENING DEFAULT ON PUBLICATION OF SUMMONS

5003. A matter of right—(30) Pedersen v. Newton, 139 Minn. 24, 165 N. W. 378.

5005. A good defence sufficient cause—(33) Pedersen v. Newton, 139 Minn. 24, 165 N. W. 378.

5006. Diligence in making application—(36-38) Pederson v. Newton 139 Minn. 24, 165 N. W. 378 (evidence held to justify denial of application on the ground of laches).

5008. Question on appeal—(41) Pedersen v. Newton, 139 Minn. 24, 165 N. W. 378.

OPENING DEFAULT JUDGMENTS IN GENERAL

5011. Application of statute—It is applicable to a judgment under the Workmen's Compensation Act. State v. District Court, 134 Minn. 189, 158 N. W. 825.

It is applicable to drainage proceedings. Troska v. Brecht, 140 Minn. 233, 167 N. W. 1042.

It is inapplicable to proceedings for the registration of title. Murphy v. Bogen, — Minn. —, 182 N. W. 449.

It is inapplicable to a lump sum settlement under the Workmen's Compensation Act. Integrity Mut. Casualty Co. v. Nelson, — Minn. —, 183 N. W. 837.

(57) Hoff v. Hoff, 133 Minn. 86, 157 N. W. 999 (scope of exception); Laird v. Laird, — Minn. —, 182 N. W. 955.

5012. A matter of discretion—The fact that the adverse party lives at a distance and will be put to great inconvenience and expense if the application is granted is a consideration of weight against granting it. Randall v. Randall, 133 Minn. 63, 157 N. W. 903; Slatoski v. Jendro, 134 Minn. 328, 159 N. W. 752.

The court may not arbitrarily grant or refuse the relief, but must exercise judicial discretion. Grady v. Maurice L. Rothschild & Co., 145 Minn. 74, 176 N. W. 153.

(62) J. I. Case Threshing Machine Co. v. Bielejeski, 147 Minn. 69, 179 N. W. 638; Flanery v. Kusha, 147 Minn. 156, 179 N. W. 902.

5013. Relief to be granted liberally—A judgment for divorce will be opened on very slight grounds where there has been no remarriage. Brockman v. Brockman, 133 Minn. 148, 157 N. W. 1086.

(67) Flanery v. Kusha, 147 Minn. 156, 179 N. W. 902.

(68) First Nat. Bank v. Coon, 139 Minn. 320, 166 N. W. 400.

(69) J. I. Case Threshing Machine Co. v. Bielejeski, 147 Minn. 69, 179 N. W. 638.

5015. Time of application—Diligence—Laches—An application to vacate a judgment made more than nine months after the defendant acquired knowledge of it, and the same period after he had been advised by a competent attorney of what steps he must take to be relieved from it, unless excused, comes too late. Illness, the nature of which does not appear, but which admittedly does not incapacitate the defendant from understanding his rights or giving directions as to litigation, is not a good excuse, particularly where the showing is strong that defendant acquiesced in the judgment until stirred to action by a third party. National Council v. Canter, 132 Minn. 354, 157 N. W. 586.

An application to be relieved from a default judgment must be made within one year after notice thereof. Section 7786, G. S. 1913. Upon

the conflicting affidavits referred to in the opinion, the court was justified in finding that defendant did not have notice of the judgment more than one year prior to the making of her application to vacate it. Flanery v. Kusha, 147 Minn. 156, 179 N. W. 902.

If the application was made and notice of its hearing given within one year after notice of the judgment, the court has jurisdiction to give relief, even though the hearing is noticed for a date subsequent to the expiration of the year. Flanery v. Kusha, 147 Minn. 156, 179 N. W. 902.

(76) National Council v. Canter, 132 Minn. 354, 157 N. W. 586; De Costa v. Jorgenson, 137 Minn. 472, 163 N. W. 1069; Flanery v. Kusha, 147 Minn. 156, 179 N. W. 902.

(77) National Council v. Canter, 132 Minn. 354, 157 N. W. 586.

5019. Applicant must have meritorious defence—In an action to try title a bona fide claim of title is a meritorious defence. Everdell v. Addison, 136 Minn. 319, 162 N. W. 352.

The statute of frauds is a meritorious defence. See Upton Mill & Elevator Co. v. Baldwin Flour Mills, 147 Minn. 205, 179 N. W. 904.

(84) Slatoski v. Jendro, 134 Minn. 328, 159 N. W. 752; Everdell v. Addison, 136 Minn. 319, 162 N. W. 352; Standard L. & P. Co. v. Twin City M. S. Co., 138 Minn. 294, 164 N. W. 986; Grady v. Maurice L. Rothschild & Co., 145 Minn. 74, 176 N. W. 153; Paper, Calmenson & Co. v Sigelman, — Minn. —, 183 N. W. 136; Gummison v. Johnson, — Minn. —, 183 N. W. 515 (proposed answer held not to show a defence). See L. R. A. 1916F, 839.

(89) Standard L. & P. Co. v. Twin City M. S. Co., 138 Minn. 294, 164 N. W. 986.

5020. Affidavit of merits—There is no statutory requirement of an affidavit of merits on application by a defendant for relief from default and for leave to answer. The rules of the district court require an affidavit of merits in such a case, but the court may waive this requirement, if it fairly appears from the record that the defendant has a good defence on the merits. Grady v. Maurice L. Rothschild & Co., 145 Minn. 74, 176 N. W. 153; Haisch v. Coulter, 145 Minn. 115, 176 N. W. 155.

(90) Selover v. Streckfus Steamboat Line, 136 Minn. 426, 162 N. W. 518; Grady v. Maurice L. Rothschild & Co., 145 Minn. 74, 176 N. W. 153.

(92) Grady v. Maurice L. Rothschild & Co., 145 Minn. 74, 176 N. W. 153.

5022. Counter affdavits—(98) Standard L. & P. Co. v. Twin City M. S. Co., 138 Minn. 294, 164 N. W. 986.

5025. Excusable neglect—Where a party had personal knowledge of the pendency of an action against him and employed an attorney to defend it, but thereafter showed complete indifference to it and did not consult his attorney with reference to it, though they lived near each other in the same city, and the adverse party lived in a remote state

and would be put to great expense and trouble if the judgment were opened, it was held an abuse of discretion to open the judgment. Randall v. Randall, 133 Minn. 63, 157 N. W. 903. See Slatoski v. Jendro, 134 Minn. 328, 159 N. W. 752.

Evidence held to show inexcusable neglect of counsel and indifference and want of diligence on the part of the defendant. Slatoski v. Jendro, 134 Minn 328, 159 N. W. 752.

Defendant was foreign-born; neither read nor understood English; was inexperienced in business, and was advised by a friend that she need not answer a summons and complaint which were served on her; the property sold under execution on the default judgment entered against her was worth many times the amount of the judgment. These facts justified the court in excusing defendant from the consequences of her default. Flanery v. Kusha, 147 Minn. 156, 179 N. W. 902.

(8) Barta v. Nestaval, 133 Minn. 116, 157 N. W. 1076; Everdell v. Addison, 136 Minn. 319, 162 N. W. 352. See State v. Ross, 133 Minn. 172, 157 N. W. 1075.

(10) Randall v. Randall, 133 Minn. 63, 157 N. W. 903.

(17) Paper, Calmenson & Co. v. Sigelman, — Minn. —, 183 N. W. 136.

5026. Surprise—Where a case was called sooner than expected because cases were taken up and disposed of out of their regular order on the calendar, it was held error not to open a default occasioned thereby. Litigants are entitled to rely on the rule of court that cases will be tried in their order on the calendar. First Nat. Bank v. Coon, 139 Minn. 320, 166 N. W. 400.

Where a surviving partner supposed that a continuance would be granted to allow a substitution of the personal representative of a deceased partner, a motion to open the judgment was held properly denied. Reliable Engine Co. v. Ferch Bros., 145 Minn. 420, 177 N. W. 657.

Where a demurrer was overruled with leave to plaintiff to amend his complaint and the clerk entered a judgment for defendant on his own motion and without the knowledge of either party, it was held proper to vacate the judgment and permit plaintiff to serve and file his amended complaint. Strand v. Chicago G. W. Ry. C., 147 Minn. 1, 179 N. W. 369.

5027. Mistake—In an action to try title a default may be opened because of a misunderstanding of the attorney of the defendant as to the latter's title. Everdell v. Addison, 136 Minn. 319, 162 N. W. 352.

That an attorney at law assumed, on account of the similarity of the heading of the summons and complaint, that his client's case was in the same court in which counsel had other cases, will not excuse a default; the summons and complaint being in his possession. Selover v. Streckfus Steamboat Line, 136 Minn. 426, 162 N. W. 518.

It was held proper to grant relief where an attorney gave directions that an answer be served and supposed, until the time for service had expired, that it had been served. Grady v. Maurice L. Rothschild & Co., 145 Minn. 74, 176 N. W. 153.

A mistake of law, as well as a mistake of fact, may afford ground for relief from a judgment. Flanery v. Kusha, 147 Minn. 156, 179 N. W. 902.

5031. Renewal of motion—After a denial of a motion to vacate a judgment, it may be renewed, though the consent of the court to its renewal is not obtained until the second motion is brought on to be heard. Fletcher v. Southern Colonization Co., 148 Minn. —, 181 N. W. 205.

5033. Bona fide purchasers—One who purchases from a judgment creditor takes his title subject to defeat by the subsequent vacation of the judgment. He does not stand in the position of a purchaser at a judicial sale, but gets only the title the judgment creditor had. Flanery v. Kusha, 147 Minn. 156, 179 N. W. 902.

(46, 47) Flanery v. Kusha, 147 Minn. 156, 179 N. W. 902.

5035. Question on appeal—If the affidavits of defendant are sufficient to establish any state of facts warranting the opening of the judgment an order granting the relief must be affirmed. Barta v. Nestaval, 133 Minn. 116, 157 N. W. 1076.

Where an order denying a motion recited that the order was based on the failure of the proposed answer to state a defence, it was held that the only question on appeal was as to the sufficiency of the proposed defence. Mannheimer Bros. v. Kansas Casualty & Surety Co., 147 Minn. 350, 180 N. W. 229.

(52) State v. Schultz, 131 Minn. 488, 154 N. W. 659; Barta v. Nestaval, 133 Minn. 116, 157 N. W. 1076; United States F. & G. Co. v. Johnson, 133 Minn. 462, 157 N. W. 1069; Slatoski v. Jendro, 134 Minn. 328, 159 N. W. 752; Everdell v. Addison, 136 Minn. 319, 162 N. W. 352; Selover v. Streckfus Steamboat Line, 136 Minn. 426, 162 N. W. 518; De Costa v. Jorgenson, 137 Minn. 472, 163 N. W. 1069; Steinkemper v. Beckman, 138 Minn. 477, 164 N. W. 802; Grady v. Maurice L. Rothschild & Co., 145 Minn. 74, 176 N. W. 153; Haisch v. Coulter, 145 Minn. 115, 176 N. W. 155; Reliable Engine Co. v. Ferch Bros. 145 Minn. 420, 177 N. W. 657; Strand v. Chicago G. W. R. Co., 147 Minn. 1, 179 N. W. 369; J. I. Case Threshing Machine Co. v. Bielejeski, 147 Minn. 69, 179 N. W. 638; Flanery v. Kusha, 147 Minn. 156, 179 N. W. 902; Paper, Calmenson & Co. v. Sigelman, — Minn. —, 183 N. W. 136; Gummison v. Johnson, — Minn. —, 183 N. W. 515.

(54) National Council v. Canter, 132 Minn. 354, 157 N. W. 586; Randall v. Randall, 133 Minn. 63, 157 N. W. 903; First Nat. Bank v. Coon, 139 Minn. 320, 166 N. W. 400.

ENTRY

5036. By the clerk—In Ramsey county it is the practice not to enter judgment in actions tried by the court without a jury, until the form of the judgment is approved by the judge. National Council v. Silver, 138 Minn. 32, 164 N. W. 1015.

5037. Notice—Upon an application for the entry of a judgment nunc pro tunc notice to parties affected is necessary when the application is based wholly or in part on evidence dehors the record. Kenning v. Reichel, — Minn. —, 182 N. W. 517. See Digest, § 5107.

5038. Signing by clerk—(64) Alger v. Minnesota Loan & Trust Co., 135 Minn. 235, 159 N. W. 565, 160 N. W. 765.

5040. Necessity of an order of court—In Ramsey county it is the practice not to enter judgment, in actions tried by the court without a jury, until the form of the judgment is approved by the judge. National Council v. Silver, 138 Minn. 330, 164 N. W. 1015.

5041. Relief allowable—In an equitable action the judgment may be moulded so as to give full and adequate relief to all the parties and for the protection of all the interests represented. Thwing v. McDonald, 134 Minn. 148, 158 N. W. 820; Burnett v. Sulflow, 134 Minn. 407, 159 N. W. 951; Bergstrom v. Pickett, 148 Minn. —, 181 N. W. 343. See § 3138.

An issue not pleaded nor voluntarily litigated on the trial cannot be made the basis of relief. Thorpe v. Cooley, 138 Minn. 431, 165 N. W. 265.

Where the court orders an amendment of the pleadings to conform to the proof, relief should be given according to the facts proved, without regard to the original pleadings. Wampa v. Lyshik, 144 Minn. 274, 175 N. W. 301.

Where an action is tried at the plaintiff's instance on the theory that it is an action of replevin he cannot claim judgment as for conversion. Grice v. Berkner, 148 Minn. —, 180 N. W. 923.

Where a party invites a determination of a question he cannot complain that the judgment determines it. Crane v. Veley, — Minn. —, 182 N. W. 915.

(84) Clinton Film Service Co. v. Conan, 140 Minn. 94, 167 N. W. W. 289; Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736.

(85) Helvetia Copper Co. v. Hart-Parr Co., 137 Minn. 321, 163 N. W. 655; Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736.

5041a. Alternative judgment—Election—Where the findings order a judgment giving one party an alternative, such party need not indicate his choice of alternatives until the judgment is entered. National Council v. Silver, 138 Minn. 330, 164 N. W. 1015.

5046. Judgment after death of party—A judgment entered for or against a person who was dead at the commencement of the action is void. Poupore v. Stone-Ordean-Wells Co., 132 Minn. 409, 157 N. W. 648.

Power to enter judgment nunc pro tunc after death of party. 3 A. L. R. 1403.

(15) Poupore v. Stone-Ordean-Wells Co., 132 Minn. 409, 157 N. W. 648; National Council v. Scheiber, 137 Minn. 423, 163 N. W. 781;

Supornick v. National Council, 141 Minn. 306, 170 N. W. 507; Supornick v. National Council, 147 Minn. 469, 180 N. W. 773.

JUDGMENT ROLL

5054. Contents—The pleadings are a part of the judgment roll and either party has full benefit of any statement or admission in a pleading of the adverse party without putting such pleading in evidence. Antel v. St. Paul City Ry. Co., 133 Minn. 156, 157 N. W. 1073.

LIEN

5066. Nature—(75) See 29 Harv. L. Rev. 755.

5068. To what estates and interests—The lien follows the land into the hands of heirs. In re Langevin, 45 Minn. 429, 47 N. W. 1133.

(83) Oxborough v. St. Martin, 142 Minn. 34, 170 N. W. 707.

(85) School District v. Schmidt, 146 Minn. 403, 178 N. W. 892. See Butterwick v. Fuller & Johnson Mfg. Co., 140 Minn. 327, 168 N. W. 18.

(87) Shraiberg v. Hanson, 138 Minn. 80, 163 N. W. 1032.

See § 8307.

5070. Priority of liens—Fraud—Where a judgment is procured through fraud and collusion the lien thereof may sometimes be subordinated to the lien of a subsequent judgment procured by the defrauded party. Petersdorf v. Malz, 136 Minn. 374, 162 N. W. 474. See In re Langevin, 45 Minn. 429, 47 N. W. 1133 (a judgment creditor may always assail or defend against anything which may divest his lien).

(98) See 29 Harv. L. Rev. 756.

JUDGMENT NOTWITHSTANDING THE VERDICT—UNDER STATUTE

5076. Application of statute—The statute is applicable to an action in a state court under the federal Employer's Liability Act, though it is contrary to the practice of the federal courts. Marshall v. Chicago etc. Ry. Co., 133 Minn. 460, 157 N. W. 638.

5079. Motion for directed verdict necessary—(21) Bowder v. Gillis, 132 Minn. 189, 156 N. W. 2.

5080. Motion for judgment—Where an alternative motion for judgment or for a new trial is made and determined upon the minutes, the court is not required to entertain a second motion, based upon a proposed settled case. McManus v. Duluth, 147 Minn. 200, 179 N. W. 906.

5082. When judgment may be ordered—In an action for death by wrongful act, to entitle the defendant to judgment notwithstanding the verdict on the ground that the deceased was guilty of contributory negligence, it is not enough that the verdict is manifestly against the preponderance of the evidence. The undisputed evidence must con-

clusively establish a state of facts from which no other reasonable inference can be drawn, except that the deceased was guilty of contributory negligence. Sheehy v. Minneapolis & St. Louis R. Co., 132 Minn. 307, 156 N. W. 346.

Where the trial court submits a case to the jury on a ground of negligence which does not show liability, but the pleadings and evidence make a case on grounds not submitted, a new trial, and not judgment notwithstanding the verdict, is the proper remedy. Maijala v. Great Northern Ry. Co., 133 Minn. 301, 158 N. W. 430.

Judgment cannot be ordered for errors of law or procedure on the trial. Hoggarth v. Minneapolis & St. Louis R. Co., 138 Minn. 472, 164 N. W. 658.

If it is possible that the plaintiff may be entitled to recover on a different theory or ground of recovery than that disclosed by his complaint, judgment should not be ordered. Wavra v. Karr, 142 Minn. 248, 172 N. W. 118.

Where the prevailing party has adduced direct and positive testimony of the existence of facts which, if found true by the jury, clearly call for the verdict rendered, the opposing litigant is not entitled to judgment notwithstanding, unless such testimony is demonstrably false, and it is made to appear that the defect in the proof could not be remedied on another trial. Amy v. Wallace-Robinson Lumber Co., 143 Minn. 427, 174 N. W. 433.

Judgment should not be ordered because of error in receiving evidence under the pleadings or in submitting issues. Wampa v. Lyshik, 144 Minn. 274, 175 N. W. 301.

Judgment may be ordered against a party though there have been two trials of the action, each resulting in his favor. Summit Mercantile Co. v. Daigle, 146 Minn. 218, 178 N. W. 588.

(28) Fairmount Gas etc. Engine Co. v. Crouch, 133 Minn. 167, 157 N. W. 1090; Palyo v. Northern Pacific Ry. Co., 144 Minn. 398, 175 N. W. 687; Kjerkerud v. Minneapolis etc. Ry. Co., 148 Minn. —, 181 N. W. 843.

(30) Schaefer v. Marshall Milling Co., 133 Minn. 73, 157 N. W. 993; National Cash Register Co. v. Merrigan, 148 Minn. —, 181 N. W. 585.

(31) Fairmont Gas Engine etc. Co. v. Crouch, 133 Minn. 167, 157 N. W. 1090; Farmers State Bank v. Walsh, 133 Minn. 230, 158 N. W. 253; Galbraith v. Clark, 138 Minn. 255, 164 N. W. 902; Alink v. Chicago etc. Ry. Co., 141 Minn. 55, 169 N. W. 250; Olson v. Great Northern Ry. Co., 141 Minn. 73, 169 N. W. 482; Kjerkerud v. Minneapolis etc. Ry. Co., 148 Minn. —, 181 N. W. 843; Hume v. Duluth etc. R. Co., — Minn. —, 183 N. W. 288.

(32) Aylmer v. Northwestern Mutual Invest. Co., 138 Minn. 148, 164 N. W. 659; Carlstrom v. North Star Concrete Co., 138 Minn. 151, 164 N. W. 661; Gorgenson v. Great Northern Ry. Co., 138 Minn. 267, 164 N. W. 904; Willett v. Chicago etc. Ry. Co., 139 Minn. 288, 166 N. W. 342; Schmidt v. Capital Candy Co., 139 Minn. 378, 166 N. W.

502; La Plant v. Loveland, 142 Minn. 89, 170 N. W. 920; Larson v. Duluth, M. & N. Ry. Co., 142 Minn. 366, 172 N. W. 762.

(33) Amy v. Wallace-Robinson Lumber Co., 143 Minn. 427, 174 N. W. 433.

(34) Nicholas v. Kissel Motor Car Co., 134 Minn. 137, 174 N. W. 733; Williams v. Larson, 140 Minn. 468, 168 N. W. 348; Amy v. Wallace-Robinson Lumber Co., 143 Minn. 427, 174 N. W. 433; Hume v. Duluth etc. R. Co., — Minn. —, 183 N. W. 288.

5084. Appealability of order on motion—Where defendant moves in the alternative for judgment non obstante or for a new trial, and the motion for judgment is denied and a new trial ordered without stating the reasons therefor, the order is not appealable. Snure v. Joseph Schlitz Brewing Co., 139 Minn. 516, 166 N. W. 1068.

(39) Carlstrom v. North Star Concrete Co., 132 Minn. 467, 155 N. W. 1039; Allen v. Torbert, 140 Minn. 195, 167 N. W. 1033.

5086. Disposition of case on appeal—Where the plaintiff makes the usual alternative motion for judgment notwithstanding, or a new trial, and the court grants judgment and denies a new trial, and upon the defendants' appeal the order is reversed upon the ground that judgment should not have been granted, the order so far as it denies the new trial will be treated as formal, the reversal here as vacating it, and upon the going down of the remittitur the court will consider anew the motion for a new trial. Kies v. Searles, 146 Minn. 359, 178 N. W. 811.

(46) Wessel v. Gigrich, 106 Minn. 467, 119 N. W. 242; Farmers State Bank v. Walsh, 133 Minn. 230, 158 N. W. 253; Joseph v. Chicago etc. Ry. Co., 135 Minn. 239, 160 N. W. 689.

See § 393.

5087. Waiver of right to new trial—A motion for judgment notwithstanding the verdict does not bar a subsequent motion for a new trial. The trial court may entertain a motion for a new trial after the decision upon an appeal from a judgment, there having been a motion for judgment notwithstanding the verdict, but no motion for a new trial. Smith v. Minneapolis St. Ry. Co., 134 Minn. 292, 157 N. W. 499, 159 N. W. 623.

SETTING OFF JUDGMENTS

5088. In general—(60, 61) See § 711.

AMENDMENT OF JUDGMENTS AND JUDICIAL RECORDS

5090a. Statutory authority—G. S. 1913, §§ 7746, 7786, enlarge, define and regulate the inherent power of the district court to amend its records, and proceedings, including its final judgments. They apply to special proceedings as well as ordinary actions. Troska v. Brecht, 140 Minn. 233, 167 N. W. 1042. See Digest, §§ 5010, 5011.

5091. To be made with caution—(74) See note, 10 A. L. R. 526.

5092. Generally a matter of discretion—When matter of right—In general, the allowance of amendments is within the discretion of the trial court, but where the mistake is conceded, where it is material, where the judgment is unexecuted, and the parties are still in statu quo, and the rights of no third parties have intervened, the parties are entitled to a correction as a matter of right, and it is the duty of the court to make the correction. Mere delay does not bar the right. National Council v. Silver, 138 Minn. 330, 164 N. W. 1015.

5092a. Successive motions—Estoppel—The fact that an application asking the judge to change his judicial opinion is denied, because made court to make the correction. Mere delay does not bar the right. National Council v. Silver, 138 Minn. 330, 164 N. W. 1015.

5093. Notice of motion—There should be notice to the adverse party and to any other person whose title to property will be affected by the entry of the proposed judgment. Kenning v. Reichel — Minn. —, 182 N. W. 517.

(77) Kenning v. Reichel, — Minn. —, 182 N. W. 517.

5095. Within what time—After term—After time to appeal—Where amendment is a matter of right it is the duty of the court to make it at any time. Mere delay does not bar the right. Clerical mistakes of the court or clerk may be corrected at any time, no rights of third parties being affected. The correction of mistakes so that the determination made by the court shall become effective is always within the power of the court. Such power does not expire with the termination of the right of appeal. On the other hand, the court cannot reverse or modify its decision by an amendment after the time to appeal therefrom has expired. National Council v. Silver, 138 Minn. 330, 164 N. W. 1015; Connelly v. Carnegie Dock & Fuel Co., 148 Minn. —, 181 N. W. 857. See § 5101.

5096. Who may oppose motion—While a stranger to an action may not oppose a motion to amend a judgment to correct clerical mistakes, he may no doubt oppose an amendment which would affect his property rights. See §§ 5093, 5107.

5097. Extrinsic evidence admissible—(85) Kenning v. Reichel, — Minn. —, 182 N. W. 517. See A. L. R. 1127 (amendment of record in criminal cases after term on evidence dehors record).

5098. Clerical mistakes of judge—In an action of replevin a verdict was directed and judgment was entered for the plaintiff for the recovery of possession of property located in a certain building. No issue was tried by the jury. The plaintiff offered no evidence of right of possession except a chattel mortgage covering property contained in the building at its date, but not after-acquired property, and no issue was tried as to the right of possession of property afterwards put with

that mortgaged. By mistake and inadvertence a verdict was directed and judgment entered for the recovery of possession generally. On motion of the defendant made within the time for appeal the court, a judge other than the one presiding at the trial sitting, amended the judgment by limiting the recovery of possession to the property included in the mortgage Held no error. Northwestern Mutual Invest. Co. v. Aylmer, 138 Minn. 140, 164 N. W. 661.

(87) Hoff v. Hoff, 133 Minn. 86, 157 N. W. 999; Pulver v. Commercial Security Co., 135 Minn. 286, 160 N. W. 781.

(89) Gross v. Lincoln, 137 Minn. 152, 163 N. W. 126 (mistake in indorsing the wrong date of filing on an appeal notice and bond); National Council v. Silver, 138 Minn. 330, 164 N. W. 1015. See note, 10 A. L. R. 526.

5100. Judgment not authorized by order—Where the clerk of the court by mistake enters a judgment other than that ordered by the judge, the mistake should be corrected and a judgment entered determining the case as the court ordered it determined. Such correction may be made after the time for appeal has expired. National Council v. Silver, 138 Minn. 330, 164 N. W. 1015.

(90) National Council v. Silver, 138 Minn. 330, 164 N. W. 1015. See 10 A. L. R. 526.

5101. Modification of judgment on motion—Judicial error—A judgment may be modified on motion so as to make it more accurately express the intention of the court, at least if the rights of third parties would not be prejudiced. Hoff v. Hoff, 133 Minn. 86, 157 N. W. 999.

The exception in G. S. 1913, § 7786, in relation to judgments of divorce, is limited to an amendment or modification of that part of the judgment affecting the marriage status of the parties. Other parts of the judgment may be modified or amended under the same conditions as ordinary judgments. Hoff v. Hoff, 133 Minn. 86, 157 N. W. 999.

A judgment under the Workmen's Compensation Act may be modified on motion under G. S. 1913, § 8313. State v. District Court, 134 Minn. 189, 158 N. W. 825.

The rule that a judgment cannot be modified, amended or vacated after the expiration of the time to appeal therefrom does not apply when the ground is fraud, clerical mistake or misprision of the court. Pulver v. Commercial Security Co., 135 Minn. 286, 160 N. W. 781.

After the time to appeal from a judgment has expired, it cannot be changed on motion for judicial error therein. National Council v. Silver, 138 Minn. 330, 164 N. W. 1015; Connelly v. Carnegie Dock & Fuel Co., 148 Minn. —, 181 N. W. 857.

Whether a trial court, before an appeal has been taken or the time to appeal expired, may amend its judgment on motion to the extent of completely reversing its decision, is still an open question. Wold v. Wold, 138 Minn. 409, 165 N. W. 229.

(92) Cherveny v. Hemza, 134 Minn. 39, 158 N. W. 810; Pulver v

Commercial Security Co., 135 Minn. 286, 160 N. W. 781; Gross v. Lincoln, 137 Minn. 152, 163 N. W. 126; National Council v. Silver, 138 Minn. 330, 164 N. W. 1015; Connelly v. Carnegie Dock & Fuel Co., 148 Minn. —, 181 N. W. 857.

See § 2805.

5104. Amendment of names of parties—A mistake in the name of a plaintiff may be corrected by amendment at any time, the court having acquired jurisdiction. Trustees v. United States F. & G. Co., 133 Minn. 429, 158 N. W. 709.

See § 7701.

5106. Replacing lost records—Both by statute and at common law a court of record has power to supply or complete its records by directing a copy of a lost summons to be filed in place of the orginal. State v. Le Roy Sargent & Co., 145 Minn. 448, 177 N. W. 633.

5107. Rights of third parties—(7) See Hoff v. Hoff, 133 Minn. 86, 157 N. W. 999.

VACATION

5108a. Statutory power—G. S. 1913, §§ 7746, 7786, enlarge, define and regulate the inherent power of the court to vacate judgments, and apply to special proceedings as well as ordinary civil actions. Troska v. Brecht, 140 Minn. 233, 167 N. W. 1042.

The statute is applicable to an order establishing a ditch. Itasca County v. Ralph, 144 Minn. 446, 175 N. W. 899.

The district court may, in its discretion, at any time within one year after notice thereof, for good cause shown, modify or set aside its judgments, orders, or proceedings, whether made in or out of term. O'Hara v. Western Mortgage Loan Co., 147 Minn. 417, 180 N. W. 701.

5109. Inherent power—(12) Itasca County v. Ralph, 144 Minn. 446, 175 N. W. 899.

5114. Laches—(21) See Pulver v. Commercial Security Co., 135 Minn. 286, 160 N. W. 781.

5116a. Renewal of motion—After a denial of a motion to vacate a judgment, it may be renewed, though the consent of the court to its renewal is not obtained until the second motion is brought on to be heard. Fletcher v. Southern Colonization Co., 148 Minn. —, 181 N. W. 205. See § 5031.

5117. Void judgment—Remedy by motion or action—An action may be maintained to set aside a judgment upon the ground that no process was served or jurisdiction acquired in any manner. Miller v. First Nat. Bank, 133 Minn. 463, 157 N. W. 1069.

Where a judgment is entered against a party after his death the remedy is by motion and not by an independent action to set aside. Supornick v. National Council, 147 Minn. 469, 180 N. W. 773. See § 5046.

(26) Evangelical Lutheran Hospital Assn. v. Schultz, 136 Minn. 459, 161 N. W. 1054.

(29) Supornick v. National Council, 141 Minn. 306, 170 N. W. 507.

5118. Want of jurisdiction—A summons required defendant to serve his answer on the plaintiff at his office in a designated city in this state, when, in fact, the plaintiff was a non-resident and had no office in such city. Held, that the judgment was properly set aside on motion. Francis v. Knerr, — Minn. —, 182 N. W. 988.

(32) Evangelical Lutheran Hospital Assn. v. Schultz, 136 Minn. 459, 161 N. W. 1054.

(41) Fletcher v. Southern Colonization Co., 148 Minn. —, 181 N. W. 205.

5121a. Newly discovered evidence—New trial—Courts exercise great caution in granting new trials on the ground of newly discovered evidence. They exercise still greater caution in annulling a judgment on that ground when relief is sought in a separate action after the time for motion for a new trial has expired. Relief of this kind is granted in equity only when it appears clearly that manifest injustice will follow if the relief be withheld. The pleadings and affidavits in this case do not contain sufficient showing for vacation of a former judgment on this ground. Krahn v. J. L. Owens Co., 138 Minn. 374, 165 N. W. 129. See § 7088.

5122. Fraud—(48) See Pulver v. Commercial Security Co., 135 Minn. 286, 160 N. W. 781.

5123. Surprise—It has been held proper to vacate a judgment and permit a defendant to interpose an amended answer presenting a defence of fraud which had been abandoned by the attorney at the trial. Eder v. Nelson, 134 Minn. 307, 159 N. W. 626.

(50) See Troska v. Brecht, 140 Minn. 233, 167 N. W. 1042.

5124. Appeal—(53) Eder v. Nelson, 134 Minn. 307, 159 N. W. 626.

EQUITABLE ACTION TO VACATE FOR FRAUD

5125. When lies—If a decree of distribution of a probate court is obtained by fraud, or is the result of a mistake of fact, a court of equity may grant relief. But in the absence of fraud or mistake, such a decree is conclusive, though erroneous. Leighton v. Bruce, 132 Minn. 176, 156 N. W. 285. See § 3663a.

STATUTORY ACTION TO VACATE FOR FRAUD

5126. Nature of action—The statute affords relief to an extent not obtainable under any procedure in law or equity existing prior to its enactment. McCue v. Weibeler, 135 Minn. 432, 161 N. W. 143.

(60) Brockman v. Brockman, 133 Minn. 148, 157 N. W. 1086.

(61) Clark v. Marvin, 140 Minn. 285, 167 N. W. 1029.

5127. Validity and construction of statute—(63) McCue v. Weibeler, 135 Minn. 432, 161 N. W. 143.

(66) Brockman v. Brockman, 133 Minn. 148, 157 N. W. 1086.

5128. For perjury—Proceedings subsequent to the judgment are immaterial. Young v. Lindquist, 126 Minn. 414, 148 N. W. 455; Miller v. First Nat. Bank, 133 Minn. 463, 157 N. W. 1069.

Though the facts to which the alleged false testimony related were within the knowledge of the prevailing party in the suit in which fraud is charged, this is not important if evidence as to the true facts could readily be obtained. Marcus v. National Council, 134 Minn. 338, 159 N. W. 835.

(68) Miller v. First Nat. Bank, 133 Minn. 463, 157 N. W. 1069; Marcus v. National Council, 134 Minn. 338, 159 N. W. 835.

5129. For fraudulent practices—The statute gives a right of action for fraud in invoking the jurisdiction of the court, or in preventing the adverse party from defending the action, or inducing him not to do so. Brockman v. Brockman, 133 Minn. 148, 157 N. W. 1086.

The fact that a copy of the summons was not mailed to plaintiff as defendant in the action in which the judgment was rendered, as stated in the affidavit of publication, is sufficient to sustain an aciton under the statute. Clark v. Marvin, 140 Minn. 285, 167 N. W. 1029.

(69) Brockman v. Brockman, 133 Minn. 148, 157 N. W. 1086.

5131. Judgment for divorce—(72) Brockman v. Brockman, 133 Minn. 148, 157 N. W. 1086 (relief denied for laches of plaintiff when defendant had remarried).

5134. Laches—A plaintiff denied relief from a judgment of divorce on the ground of laches, the other party having remarried. Brockman v. Brockman, 133 Minn. 148, 157 N. W. 1086.

5135. Pleading—A complaint to set aside a judgment of divorce for fraud held demurrable on the ground of laches. Brockman v. Brockman, 133 Minn. 148, 157 N. W. 1086.

A complaint under the statute held not to state a cause of action. Marcus v. National Council, 134 Minn. 338, 159 N. W. 835.

A complaint, brought to set aside a judgment obtained by means of an alleged fraudulent act or practice of the prevailing party, must, by clear, direct, and positive averments, show that the action is brought within the time stated in section 7910, G. S. 1913. The complaint in this case does not contain such allegations, and it is also defective in other respects. McCue v. Weibeler, 135 Minn. 432, 161 N. W. 143.

(76) McCue v. Weibeler, 135 Minn. 432, 161 N. W. 143.

5136. Relief allowable—(79) Miller v. First Nat. Bank, 133 Minn. 463, 157 N. W. 1069 (rule of Henry v. Meighen, 46 Minn. 548, 49 N. W. 323, held inapplicable).

COLLATERAL ATTACK

5137. In general—By party at whose instance judgment was entered. 3 A. L. R. 535.

5138. What constitutes—Determining the nature of a judgment by examining its face does not constitute a collateral attack. Downs v. American Surety Co., 132 Minn. 201, 156 N. W. 5.

A collateral attack may be in the form of a motion for a new trial. Jones v. Wellcome, 141 Minn. 352, 170 N. W. 224.

See L. R. A. 1918D, 470.

5139. For want of jurisdiction over the subject-matter—(88) See Marin v. Augedahl, 247 N. W. 142.

(89) See Bomsta v. Nelson, 137 Minn. 165, 163 N. W. 135; Gundlach v. Park, 140 Minn. 78, 165 N. W. 969, 167 N. W. 302.

5140. For want of jurisdiction of particular issues—(90) State v. Reed, 132 Minn. 295, 156 N. W. 127. See Dickerman Investment Co. v. Oliver Iron Mining Co., 135 Minn. 254, 160 N. W. 776; Bomsta v. Nelson, 137 Minn. 165, 163 N. W. 135.

5141. For want of jurisdiction over the person—(92) Jones v. Wellcome, 141 Minn. 352, 170 N. W. 224; Greenfield v. Hill City Land, L. & L. Co., 141 Minn. 393, 170 N. W. 343.

(93) Greenfield v. Hill City Land, L. & L. Co., 141 Minn. 393, 170 N. W. 343.

5142. For want of jurisdiction to award the relief granted—(99) State v. Reed, 132 Minn. 295, 156 N. W. 127.

5145. For error or irregularity—(5) Dickerman Investment Co. v. Oliver Iron Mining Co., 135 Minn. 254, 160 N. W. 776 (action to foreclose mortgage—litigation of adverse paramount title); Jones v. Wellcome, 141 Minn. 352, 170 N. W. 224.

(15) Marin v. Augedahl, 247 U. S. 142.

ACTIONS ON JUDGMENTS

5148. Nature—A judgment may be complete as a cause of action though there is no right to an execution thereon. J. L. Bieder Co. v. Rose, 138 Minn. 121, 164 N. W. 586.

5149. Action will lie on domestic judgment—(24) See L. R. A. 1917A, 189.

5150. Limitation of actions—An Illinois judgment, entered August 13, 1907, was not outlawed March 16, 1916, under the Illinois statutes which provide that no execution shall issue on a judgment after seven years, but that action of debt on the judgment may be brought within twenty years after the date of the judgment. Section 7709, G. S. 1913, which

provides that when a cause of action has arisen outside of this state, and by the laws of the place where it arose action thereon is barred by lapse of time, no such action shall be maintained in this state, has no application to such a case. J. L. Bieder Co. v. Rose, 138 Minn. 121, 164 N. W. 586.

(26) J. L. Bieder Co. v. Rose, 138 Minn. 121, 164 N. W. 586.

AS EVIDENCE

5154. Evidence of rendition and legal consequences—(36) Farmers State Bank v. McGrath, 141 Minn. 281, 170 N. W. 209 (judgment in action against maker and payee of a note, by which the payment of the note was conclusively established as against the payee, held admissible as evidence of payment against an indorsee with notice).

5155. Between parties and privies—A judgment in an action between the maker and payee of a note, by which the payment of the note as between those parties was conclusively established as against the payee, has been held admissible against an indorsee with notice, on the ground that he took subject to all equities and defences against the payee. Farmers State Bank v. McGrath, 141 Minn. 281, 170 N. W. 209.

5156. Not evidence against strangers of facts on which based—(38) Nokleby v. Docken, 134 Minn. 318, 159 N. W. 757; Stammers v. Larson, 142 Minn. 240, 171 N. W. 809; Bogstad v. Anderson, 143 Minn. 336, 173 N. W. 674.

(40) Gratiot County State Bank v. Johnson, 249 U. S. 246 (adjudication of bankruptcy).

5158. Evidence of debt and relation of debtor and creditor—(44) See Farmers State Bank v. McGrath, 141 Minn. 281, 170 N. W. 209; § 3908.

(45) See Gould v. Svendsgaard, 141 Minn. 437, 170 N. W. 595; § 3908.

AS A BAR OR ESTOPPEL—RES JUDICATA

5159. Basis of doctrine—(46) Vineseck v. Great Northern Ry. Co., 136 Minn. 96, 161 N. W. 494.

5160. Doctrine to be applied cautiously—(47) Leonard v Schall, 132 Minn. 446, 157 N. W. 723.

5161. Distinction between estoppel by judgment and estoppel by verdict—(48) Leonard v. Schall, 132 Minn. 446, 157 N. W. 723.

5162. Estoppel by verdict—Different cause of action—A former judgment does not operate as an estoppel by verdict except as to facts shown to have been directly and distinctly put in issue, and the finding of which was necessary to uphold the judgment. It should appear with certainty that the court or jury must have found the fact in order to reach the verdict or decision; in other words, that the finding of fact

was necessarily involved. Leonard v. Schall, 132 Minn. 446, 157 N. W. 723.

Plaintiff brought suit to recover for services and alleged both an express contract and quantum meruit. On defendant's motion plaintiff elected to rely on quantum meruit. On the trial defendant insisted that plaintiff could not recover because the services had been rendered under an express contract; he also insisted that they had been paid for in full. The court directed the jury to return a verdict for defendant if the services had been rendered under an express contract; he also directed them to return a verdict for defendant if the services had been paid for in full. He directed them to return a verdict for plaintiff if no express cantract existed and the services had not been paid for in full. They returned a verdict for defendant and judgment was entered thereon. subsequently plaintiff brought the present suit upon the express contract asserted by defendant in the former suit. Held: (1) That the doctrine of estoppel by judgment does not apply as the present suit is not based upon the same cause of action as the former, and, if it were, that defendant is estopped from now asserting that fact. (2) That the doctrine of estoppel by verdict does not apply as it does not appear that the issues in the present suit were necessarily determined by the judgment in the former. Leonard v. Schall 132 Minn. 446, 157 N. W. 723. See Southworth v. Rosendahl, 133 Minn. 447, 158 N. W. 717.

A judgment in favor of a purchaser of defendant's property on the ground that he was a bona fide purchaser thereof does not estop plaintiff from bringing proceedings to reach money in the hands of a third party paid by such purchaser for such property. Wipperman Mercantile Co. v. Jacobson, 133 Minn. 326, 158 N. W. 606.

The doctrine of estoppel by verdict applies only when it affirmatively appears that the identical issue sought to be litigated in the second suit has not only been actually litigated and determined in the former suit but that such determination was necessary to warrant the judgment rendered in the former suit. For a judgment to operate as an estoppel by verdict it must appear that the controlling facts presented in the second suit existed at the time of the former litigation and that the issue adjudicated in the first suit is the identical issue involved in the second suit; and it must not appear that the controlling facts have changed since the former trial. State v. Great Northern Ry. Co., 134 Minn. 249, 158 N. W. 972.

It is not essential that the parties in the two actions are the same. It ie enough if the parties to the particular issue were adversary parties in the former action as to such issue and that it was determined therein upon the merits. Cronan v. Wolfe, 138 Minn. 308, 164 N. W. 1018

(49) Granite City Bank v. Tvedt, 146 Minn. 12, 177 N. W. 767 (issue as to validity of claim of creditor—adjudication of bankruptcy); Bates v. Bodie, 245 U. S. 520.

(50) State v. Great Northern Ry. Co., 134 Minn. 249, 158 N. W. 972.

(52) Anderson v. Butterick Pub. Co., 132 Minn. 30, 155 N. W. 1045

(issue as to extension of a contract); Orr v. Bennett, 135 Minn. 443, 161 N. W. 165 (issues as to title and right to rents or royalties from a mining lease); Cronan v. Wolfe, 138 Minn. 308, 164 N. W. 1018 (issues as to right to a commission on the sale of land); Iverson v. Iverson, 140 Minn. 157, 167 N. W. 483 (issue as to right to possession of land); Benz v. Rogers, 141 Minn. 93, 169 N. W. 477 (issue as to validity of contract of widow and other beneficiaries of a will disposing of the property contrary to the will); Venie v. Harriet State Bank, 146 Minn. 142, 178 N. W. 170 (issue as to fraud of promoter of a corporation in converting money and property contributed by his associates for the prospective corporation); Loe v. Bjorkman Bros., 146 Minn. 471, 178 N. W. 316 (issue as to performance of contract in an action for the contract price for installing a heating plant).

(53) Przyblyski v. Pellowski, 141 Minn. 193, 169 N. W. 707. See Bates v. Bodie, 245 U. S. 520 (reference to pleadings to determine issues); Oklahoma v. Texas, 255 U. S. —.

(57) Anderson v. Butterick Pub. Co., 132 Minn. 30, 155 N. W. 1045; Leonard v. Schall, 132 Minn. 446, 157 N. W. 723; Wipperman Mercantile Co. v. Jacobson, 133 Minn. 326, 158 N. W. 606; State v. Great Northern Ry. Co., 134 Minn. 249, 158 N. W. 972; James v. Pettis, 134 Minn. 438, 159 N. W. 953; Orr v. Bennett, 135 Minn. 443, 161 N. W. 165. See § 8058.

(59) Leonard v. Schall, 132 Minn 446, 157 N. W. 723.

(60) Barrett v. Thielen, 140 Minn. 266, 167 N. W. 1030.

(61) Orr v. Bennett, 135 Minn. 443, 161 N. W. 165; Wulke v. Wulke, — Minn. —, 183 N. W. 349.

5163. Estoppel by judgment—Former judgment as a bar—General rule—A party by his conduct on the trial may be estopped from asserting in a subsequent action that two causes of action are the same. Leonard v. Schall, 132 Minn. 446, 157 Minn. N. W. 723.

To determine the scope of the judgment in the former action, the entire record thereof may be examined. Przyblyski v. Pellowski, 141 Minn. 193, 169 N. W. 707. See Digest, §§ 5162, 5179.

Where a party has but one cause of action and in an action thereon obtains only partial relief, the judgment therein is nevertheless a bar to further relief in a subsequent action. Przyblyski v. Pellowski, 141 Minn. 193, 169 N. W. 707.

The scope of an estoppel by judgment may be limited by the court in its determination and by the conduct and understanding of the parties at the trial. Przyblyski v. Pellowski, 141 Minn. 193, 169 N. W. 707.

A judgment is not conclusive of any question which, from the nature of the case or the form of action, could not have been adjudicated in the case in which it was rendered. Ash Sheep Co. v. United States, 252 U. S. 159.

Item omitted from issues through ignorance, fraud or mistake. 2 A. L. R. 534. See § 5167.

(62) Przyblyski v. Pellowski, 141 Minn. 193, 169 N. W. 707; Seastrand v. D. A. Foley & Co., 144 Minn. 239, 175 N. W. 117; Eder v. Fink, 147 Minn. 438, 180 N. W. 542; Bates v. Bodie, 245 U S. 520.

(63) Przyblyski v. Pellowski, 141 Minn. 193, 169 N. W. 707.

(64) Thomas v. Joslin, 36 Minn. 1, 29 N. W. 344; Eder v. Fink, 147 Minn. 438, 180 N. W. 542.

5164. Verdict or findings must pass into judgment—It is the adjudication which makes a finding in a former action res judicata; and if a finding, without a judgment having been entered, is ever a bar in subsequent litigation, it must be upon an issue in the case where it is made, and there must be something equivalent to an estoppel operating against the party seeking to assert the contrary of it. Held, that the court correctly excluded a finding offered as a bar. State v. Brooks-Scanlon Lumber Co., 137 Minn. 71, 162 N. W. 1054.

(67) State v. Brooks-Scanlon Lumber Co., 137 Minn. 71, 162 N. W 1054.

5165. Estoppel must be mutual—(70) See Cronon v. Wolfe, 138 Minn. 308, 164 N. W. 1018.

5166. Not a bar to subsequently accruing rights—The same principle applies to estoppel by verdict. If the controlling facts have materially changed since the former action there is no estoppel by verdict. State v. Great Northern Ry. Co., 134 Minn. 249, 158 N. W. 972.

A judgment does not affect after-acquired rights nor preclude a party from availing himself of them. An action for money had and received, to recover money received by defendant after judgment in a former action between the same parties, is not barred by the former judgment unless the principle on which plaintiff now seeks to recover was determined adversely to plaintiff. Seastrand v. D. A. Foley & Co., 144 Minn. 239, 175 N. W. 117.

(71) State v. Great Northern Ry. Co., 134 Minn. 249, 158 N. W. 972; Clinton Film Service Co., v. Conan, 140 Minn. 94, 167 N. W. 289; Seastrand v. D. A. Foley & Co., 144 Minn. 239, 175 N. W. 117. See Vineseck v. Great Northern Ry. Co., 136 Minn. 96, 161 N. W. 494.

5167. Indivisible causes of action—Splitting—The rule against splitting a cause of action into several parts and bringing an action upon each is primarily for the benefit of defendant in the action, which he may waive, or preclude himself from invoking by his fraud. Where an item of a single cause of action is omitted from the complaint in an action brought to recover thereon by reason of the fraud of defendant, or the clearly established mutual mistake of the parties, the judgment in such action is not res judicata as to the omitted item. In such case, a subsequent action may be brought upon the omitted item without first applying for a vacation of the former judgment. Such vacation of the judgment is unnecessary. Vineseck v. Great Northern Ry. Co., 136 Minn. 96, 161 N. W. 494.

There is authority for the proposition that where plaintiff is ignorant of all the items of his cause of action when the action is brought, or where an item is omitted through mistake, the judgment rendered therein will not bar a subsequent action for the omitted items. See Vineseck v. Great Northern Ry. Co., 136 Minn. 96, 161 N. W. 494; 2 A. L. R. 534 (items omitted from issues by ignorance, fraud or mistake).

(72) Vineseck v. Great Northern Ry. Co., 136 Minn. 96, 161 N. W. 494; Hyett v. Northwestern Hospital, 147 Minn. 413, 180 N. W. 552.

(73) Vineseck v Great Northern Ry. Co., 136 Minn. 96, 161 N. W. 494.

5168. Independent causes of action—Judgment against claim based on original form of indebtedness as res judicata as to claim based on new or substituted obligation. 4 A. L. R. 1173.

(76) Leonard v. Schall, 132 Minn. 446, 157 N. W. 723. See 4 A. L. R. 1173.

5170. Merger of original cause of action—A judgment merges the cause of action so that the judgment creditor may not maintain another action against the judgment debtor upon the original cause of action. But the doctrine of merger is calculated to promote justice and will be carried no farther than the ends of justice require. The judgment does not annihilate the debt. The essential nature of the cause of action remains unchanged. The law of merger does not forbid all inquiry into the nature of the cause of action. If the prevailing party was entitled to certain privileges, or exemption from certain burdens, under his contract he may be entitled to the same privileges and exemptions under his judgment. Whenever justice requires it, the judgment will generally be construed not as a new debt but as an old debt in a new form. Gould v. Svendsgaard, 141 Minn. 437, 170 N. W. 595.

At law the cause of action is merged in the judgment but in equity the duty of the defendant is not necessarily merged in the decree. 33 Harv. L. Rev. 424.

(81) Bolles v. Boyer, 141 Minn. 404, 170 N. W. 229; Hamer v. New York Railways Co., 244 U. S. 266.

5172. Who may assert—One not a party defending—(83) Bogstad v. Anderson, 143 Minn. 336, 173 N. W. 674.

5173. Who are privies—A creditor at whose instance a sheriff seizes property may be in privity with the sheriff and bound by a judgment in an action brought by the owner of the property against the sheriff. Wipperman Mercantile Co. v. Jacobson, 133 Minn. 326, 158 N. W. 606.

A judgment in an action between the maker and payee of a note, by which the payment of the note as between those parties was conclusively established as against the payee, has been held admissible against an indorsee with notice, on the ground that he took subject to all equities and defences against the payee. Farmers State Bank v. McGrath, 141 Minn. 281, 170 N. W. 209.

A wife held not estopped by an action brought by her husband. Sundin v. County Fire Ins. Co., 144 Minn. 100, 174 N. W. 729.

(89) Greenfield v. Hill City Land, L. & L. Co., 141 Minn. 393, 170 N. W. 343. See Digest, §§ 2078, 2148.

(93) Postal Telegraph-Cable Co. v. Newport, 247 U. S. 464 (no privity when the former action was brought after the conveyance). See § 5155.

5176. Persons answerable over—Sureties—Indemnitors—(97) Balch v. Hooper, 32 Minn. 158, 20 N. W. 124 (surety on administrator's bond—accounting); Mahr v. Maryland Casualty Co., 132 Minn. 336, 156 N. W. 668 (indemnitor—liability insurance); Trustees v. United States F. & G. Co., 133 Minn. 429, 158 N. W. 709 (surety on contractor's bond—misnomer of plaintiff held not to take case out of general rule); Milavetz v. Oberg, 138 Minn. 215, 164 N. W. 910 (sureties on bond against mechanics' liens); Jordan v. Van Duzee, 139 Minn. 103, 165 N. W. 877 (seller of personalty warranting title). See § 4868c.

5179. Judgment must be on the merits—(7) Benz v. Rogers, 141 Minn. 93, 169 N. W. 477.

5179a. Judgment determining construction of contract—Where a court by its judgment determines the construction of a contract between the parties, that construction is final and cannot again be made the subject of litigation between them. The legislature cannot, by subsequent enactment, change the rights of the parties under the contract. Seastrand v. D. A. Foley & Co., 144 Minn. 239, 175 N. W. 117.

5180. Judgment of dismissal—Nonsuit—(8) State v. Chicago etc. Ry. Co., 135 Minn. 277, 160 N. W. 773; Smith v. Hendelan, 136 Minn. 44, 161 N. W. 221. See Sundin v. County Fire Ins. Co., 144 Minn. 100, 174 N. W. 729.

(9) See Sundin v. County Fire Ins. Co., 144 Minn. 100, 174 N. W. 729.

(13) Benz v. Rogers, 144 Minn. 93, 169 N. W. 477.

5182. Judgment on the pleadings—(17) Van Slyke v. Andrews, 146 Minn. 316, 178 N. W. 959.

5183. Judgment on demurrer—A judgment recovered by defendant on demurrer to the complaint because the plaintiff mistook his remedy does not reach the merits of the case, and is not a bar to a new action founded upon the proper remedy. State v. District Court, 136 Minn. 151, 161 N. W. 388.

(20) State v. District Court, 136 Minn. 151, 161 N. W. 388. See Van Slyke v. Andrews, 146 Minn. 316, 178 N. W. 959.

5184a. Judgment entered by consent of parties—A judgment entered by consent of the parties thereto, fixing the rate to be charged for gas for a definite period ending November 1, 1918, and until again fixed under and pursuant to an ordinance, is final and binding upon the

parties. Minneapolis Gas Light Co. v. Minneapolis, 140 Minn. 400, 168 N. W. 588.

5185. Judgment on joint obligation—(23) 1 A. L. R. 1601.

5187. Vacated judgment—(26) See Brokl v. Brokl, 133 Minn. 334, 158 N. W. 436.

5189. Judgment in action for divorce—A foreign judgment of divorce held not a bar to an independent action for alimony. Searles v. Searles, 140 Minn. 385, 168 N. W. 133.

(28) Bates v. Bodie, 245 U. S. 520 (alimony). See Gummison v. Johnson, — Minn. —, 183 N. W. 515; Digest, § 2799.

5198. Time when judgment rendered immaterial—(39) Benz v. Rogers, 141 Minn. 93, 169 N. W. 477.

5198a. Immaterial that court could not have entertained prior action—It is immaterial that the court in which a judgment is offered as a bar or estoppel could not have entertained the action in which the judgment was rendered. Thus, a court of law may receive in evidence a decree of a court of equity determining equitable issues which the court of law could not itself determine. Benz v. Rogers, 141 Minn. 93, 169 N. W. 477.

5201. Effect of appeal—An appeal with a supersedeas bond does not vacate or annul the judgment appealed from, and the matters determined by it remain res judicata until it is reversed. State v. Spratt, — Minn. —, 184 N. W. 31.

(43) See Brokl v. Brokl, 133 Minn. 334, 158 N. W. 436.

5201a. Estoppel by conduct at trial—By his conduct at the trial a party may be estopped from asserting in a subsequent action that a matter is res judicata. Przyblyski v. Pellowski, 141 Minn. 193, 169 N. W. 707.

5203. Stipulation of parties—A judgment was entered pursuant to a stipulation of the parties, without judicial action by the court, purporting to validate a contract which divested a municipality of its police power. Held, that the judgment did not validate the contract and did not conclude the parties in a subsequent action so far as the contract was concerned. State v. Great Northern Ry. Co., 134 Minn. 249, 158 N. W. 972.

A judgment against a municipality, not rendered as the judicial act of a court, but entered pursuant to a stipulation of the officers of the municipality, is void if such officers lacked power to bind the municipality. St. Paul v. Chicago etc. Ry. Co., 139 Minn. 322, 166 N. W. 335.

5205. Held a bar—A judgment in an action for personal injuries, held a bar to a subsequent action for damages to property resulting from the same tortious act. King v. Chicago etc. Ry. Co., 80 Minn. 83, 82 N. W. 1113. See § 5167(73).

A judgment in an action for the purchase price of certain personal property, held a bar to an action for the conversion of the property, the plaintiff claiming in the latter action that in the former action no deduction was made in the amount of indebtedness for certain property returned. Peltier v. Nadeau, 138 Minn. 126, 164 N. W. 578.

A judgment in an action to cancel a deed, held a bar to ejectment to recover the land covered by the deed. Iverson v. Iverson, 140 Minn. 157, 167 N. W. 483.

A judgment in an action to charge defendant as an indorser on an instrument alleged to have been negotiable, held a bar to a subsequent action between the same parties for a reformation of defendant's indorsement of the instrument. Eder v. Fink, 147 Minn. 438, 180 N. W. 542.

(62) See Eder v. Fink, 147 Minn. 438, 180 N. W. 542.

5206. Held not a bar—A judgment for defendant in an action for services based on a quantum meruit count, held not a bar to a subsequent action for the same services on an express contract, the two causes of action being different, and the trial being conducted on the theory that there could not be a recovery in the first action on proof of an express contract, and the defendant being estopped by his conduct in the first action from claiming in the second that the two causes of action were the same. Leonard v. Schall, 132 Minn. 446, 157 N. W. 723. See Southworth v. Rosendahl, 133 Minn. 447, 158 N. W. 717.

A judgment for the defendant in an action for services on an express contract, held not a bar to a subsequent action on a quantum meruit for the same services. Southworth v. Rosendahl, 133 Minn. 447, 158 N. W. 717.

A judgment in an action by a mortgagee in a chattel mortgage against a purchaser from the mortgagee wherein the complaint charged that the mortgagor, without the consent of plaintiff, sold a part of the mortgaged property and delivered the money to defendant, and that defendant converted it to his own use, held not a bar to an action wherein the complaint alleged that defendant converted the mortgaged property. James v. Pettis, 134 Minn. 438, 159 N. W. 953.

A judgment in an action for personal injuries, held not a bar to a subsequent action for injuries which subsequently developed. Vineseck v. Great Northern Ry. Co., 136 Minn. 96, 161 N. W. 494.

An action at law for damages for the wrongful death of plaintiff's intestate, founded upon the alleged negligence of defendant, between whom and deceased the relation of master and servant existed, in which judgment for defendant was ordered and entered on a demurrer to the complaint, for the reason that plaintiff's remedy was under the Workmen's Compensation Act (G. S. 1913, §§ 8195-8230), does not involve the same issues as are presented in a proceeding under that statute, and the judgment rendered in such action is not res judicata, or a bar to the compensation proceeding. State v. District Court, 136 Minn. 151, 161 N. W. 388.

An action for rescission on the ground of fraud, held not a bar to a subsequent action for damages for the same fraud. Gunderson v. Halvorson, 140 Minn. 292, 168 N. W. 8.

A judgment in unlawful detainer proceedings held not a bar where the rights of the parties had been subsequently materially changed by improvements made by the lessor under a contract with the lessee. Clinton Film Service Co. v. Conan, 140 Minn. 94, 167 N. W. 289.

A foreign judgment of divorce, held not a bar to an independent action for alimony. Searles v. Searles, 140 Minn. 385, 168 N. W. 133.

A judgment in an action for rescission of a lease of a farm and a bill of sale of certain live stock and other personal property upon the farm, held not a bar to a subsequent action for recovery of damages sustained in respect to the personal property by reason of the farm being subject to floods, the subject of such damages being excluded by the court in the former action from the adjudication. Przblyski v. Pellowski, 141 Minn. 193, 169 N. W. 707.

A judgment in an action for the conversion of certain corn, held not a bar to an action on certain promissory notes. Berkner v. Olson, 143 Minn. 214, 173 N. W. 568.

A judgment on a contract for extra work, held not a bar to an action for money had and received. Seastrand v. D. A. Foley & Co., 144 Minn. 239, 175 N. W. 117.

A judgment for the contract price of goods sold, held not a bar to an action for a breach of warranty. Loe v. Bjorkman Bros., 146 Minn. 471, 178 N. W. 316.

A recovery of nominal damages in an equity suit to restrain a trespass, held not a bar to an action to recover a statutory penalty for the same trespass. Ash Sheep Co. v. United States, 252 U. S. 159.

(74) Loe v. Bjorkman Bros., 146 Minn. 471, 178 N. W. 316.

FOREIGN JUDGMENTS

5207. Full faith and credit—A judgment of a probate court of Massachusetts holding a will invalid because not executed according to the laws of that state, held not binding on a probate court of this state, where such judgment was entered subsequent to the one by the probate court of this state. Seccomb v. Bovey, 135 Minn. 353, 160 N. W. 1018.

A foreign judgment is entitled to the same faith and credit in another state as in the state of its rendition and no more. When sued on in another state it is open to the same defences that might have been asserted in the courts of the state of its rendition. Gundlach v. Park, 140 Minn. 78, 165 N. W. 969, 167 N. W. 302. See 2 Minn. L. Rev. 546.

The general rule applies to judgments of divorce so far as the marriage status is concerned. Thurston v. Thurston, 58 Minn. 279, 59 N. W. 1017; Searles v. Searles, 140 Minn. 385, 168 N. W. 133; Gummison v. Johnson, — Minn. —183 N. W. 515.

A judgment by a court in this state in proceedings for the enforcement of an attorney's lien, held not a violation of this provision of the

federal constitution. Scharmann v. Union Pacific Ry. Co., 144 Minn. 290, 175 N. W. 554.

A judgment of a court of a sister state must be given full faith and credit and action thereon allowed, though the orginal cause of action on which it is based could not have been maintained in this state. Kenney v. Supreme Lodge, 252 U. S. 411.

(99) Gundlach v. Park, 140 Minn. 78, 165 N. W. 969, 167 N. W. 302; Whittaker v. Meeds, 146 Minn. 160, 178 N. W. 597(final decree of foreign court discharging an executor trustee); Bates v. Bodie, 245 U. S. 520 (decree granting divorce with alimony); Marin v. Augedahl, 247 U. S. 142 (order assessing stockholders in an insolvent corporation under Minnesota statute).

5207a. Judgments of foreign countries—Foreign judgments will be given no greater effect here than the foreign country gives to like judgments of our courts. While a foreign court of general jurisdiction which renders a judgment in personam is generally presumed to have had purisdiction of the subject-matter and of the parties unless want of jurisdiction is discolsed by the record, there are several exceptions to this rule. If the defendant was beyond the jurisdiction of the court and did not voluntarily appear therein, there is no presumption of jurisdiction over him and the party asserting the judgment must prove the existence of the facts necessary to establish such jurisdiction. If authority to render the judgment rests on a statute and the proceedings are not according to the course of the common law, nothing is presumed in favor of the judgment, and the record must show the existence of all the facts necessary to authorize the court to render it. Giving a proxy to vote at a shareholder's meeting against having the corporation appeal from a winding-up order made by a foreign court does not authorize such court to render a personal judgment against the shareholder, although the meeting was called by order of the court. Traders Trust Co. v. Davidson, 146 Minn. 224, 178 N. W. 735.

5208. Collateral attack—In an action on a foreign judgment want of jurisdiction may be shown. In this case the evidence was not such as to sustain a finding that a warrant of attorney to confess judgment was not executed by the defendant and a verdict was properly directed for the plaintiff. Citizens State Bank v. Mellquist, 136 Minn. 19, 161 N. W. 210.

If fraud is a defence to an action on the judgment in the state of its rendition it is a defence to an action thereon in another state. The same is true of any other defence such as want of consideration in the contract on which it is based. Gundlach v. Park, 140 Minn. 78, 165 N. W. 969, 167 N. W. 302.

(2) Citizens State Bank v. Mellquist, 136 Minn. 19, 161 N. W. 210; Wold v. Minnesota Commercial Men's Assn., 136 Minn. 380, 162 N. W. 461; Gundlach v. Park, 140 Minn. 78, 165 N. W. 969, 167 N. W. 302; Baker v. Baker, Eccles & Co., 242 U. S. 394. See Traders Trust Co. v. Davidson, 146 Minn. 224, 178 N. W. 735.

(3) See Traders Trust Co. v. Davidson, 146 Minn. 224, 178 N. W. 735.
(4) See Gundlach v. Park, 140 Minn. 78, 165 N. W. 969, 167 N. W. 302.
(5) Marin v. Augedahl, 247 U. S. 142. See Gundlach v. Park, 140 Minn. 78, 165 N. W. 969, 167 N. W. 302.

5210. Actions on—Enforcement of foreign equitable decrees.—17 Mich. L. Rev. 527; 33 Harv. L. Rev. 423.
Effect of appeal from judgment on right to enforce it in another state. 5 A. L. R. 1269.
(8) Wold v. Minnesota Commercial Men's Assn., 136 Minn. 380, 162 N. W. 461.

JUDICIAL SALES

5211. What constitutes—A sale made by a receiver is a judicial sale. Northland Pine Co. v. Northern Insulating Co., 145 Minn. 395, 177 N. W. 635.

5212. Manner of sale—In the absence of statutory regulation, the time, manner, terms of sale, and notice thereof are matters to be determined by the court having jurisdiction of the proceedings and control of the property. The court may modify its directions respecting such sales. Northland Pine Co. v. Northern Insulating Co., 145 Minn. 395, 177 N. W. 635.
(16) Northland Pine Co. v. Northern Insulating Co., 145 Minn. 395, 177 N. W. 635.

5214. Vacation of judgment—Rights of purchasers—(18) Flanery v. Kusha, 147 Minn. 156, 179 N. W. 902. See § 5033.

5215. Title of purchaser—Caveat emptor—A purchaser from a judgment creditor does not stand in the position of a purchaser at a judicial sale. Flanery v. Kusha, 147 Minn. 156, 179 N. W. 902.

5216. Irregularities—A court is justified in refusing to set aside a sale on the ground that it was made en masse, in the absence of a showing of fraud, prejudice, or injustice resulting from making the sale in that way. Northland Pine Co. v. Northern Insulating Co., 145 Minn. 395, 177 N. W. 635.
Collateral attack. 1 A. L. R. 1431.
(22) Northland Pine Co. v. Northern Insulating Co., 145 Minn. 395, 177 N. W. 635.

5219. Confirmation—Effect of advance bid to defeat confirmation. 11 A. L. R. 399.

5220. Inadequate price—A judicial sale of property, unless made for such a grossly inadequate price as to raise an inference of unfairness, fraud or mistake, will not be set aside on the ground of inadequacy of the purchase price. It is largely within the sound discretion of the court having control of the property to grant or deny an application to vacate

a sale on the ground that the price paid was inadequate. It is the purpose of the law that a judicial sale should be final. It will not be set aside for irregularities unless injury has resulted to the party complaining. Northland Pine Co. v. Northern Insulating Co., 145 Minn. 395, 177 N. W. 635. See Ann. Cas. 1914D, 1.

JURY

IN GENERAL

5226a. Not civilly liable—A juror is not civilly liable for damages for his acts as juror, whatever his motives may have been. See Melady v. South St. Paul Live Stock Exchange, 142 Minn. 194, 171 N. W. 806.

RIGHT TO JURY TRIAL IN CIVIL ACTIONS

5227. Constitutional provision—(41, 44) Hawley v. Wallace, 137 Minn. 183, 163 N. W. 127.

5228. Statutory provision—There is no reason for a jury trial in a tax title case where all the issues are controlled by the records in the tax proceedings. Johnson v. Murphy, 133 Minn. 456, 158 N. W. 701.

(48) Hawley v. Wallace, 137 Minn. 183, 163 N. W. 127; Williams v. Howes, 137 Minn. 462, 162 N. W. 1049.

(49) Hawley v. Wallace, 137 Minn. 183, 163 N. W. 127.

5228a. Time for demanding jury trial—A demand for jury trial at the time the case is called for trial is seasonable. Williams v. Howes, 137 Minn. 462, 162 N. W. 1049. See § 5234.

5229. Right determined by complaint—(51) Williams v. Howes, 137 Minn. 462, 162 N. W. 1049.

5230. Legal actions—In general—In a legal action for the recovery of money only the plaintiff is entitled to a jury trial regardless of the nature of the defences or counter-claims set up in the answer. Williams v. Howes, 137 Minn. 462, 162 N. W. 1049.

The plaintiff is entitled to a jury trial in an action at law for damages for fraud, though the defendant pleads equities and asks for reformation. Williams v. Howes, 137 Minn. 462, 162 N. W. 1049.

5231. Equitable actions—(63) Larson v. Larson, 133 Minn. 452, 158 N. W. 707.

5232. Actions including both legal and equitable causes of action—(64) Williams v. Howes, 137 Minn. 462, 162 N. W. 1049 (rule inapplicable to a legal action wherein a legal cause of action is interposed by way of counterclaim).

(65) Williams v. Howes, 137 Minn. 462, 162 N. W. 1049.

5233. Miscellaneous actions and proceedings—There is no constitutional or statutory right to a jury trial in proceedings under G. S. 1913, § 6646, for the enforcement of the liability of stockholders of an insolvent corporation. Finch, Van Slyck & McConville v. Vanasek, 132 Minn. 9, 155 N. W. 754.

One defendant held title to land impressed with a trust in favor of the plaintiff. He conveyed to his codefendant, who had notice of the plaintiff's rights. Such codefendant conveyed to a third person having like notice. It is held under the facts stated that the plaintiff had no cause of action at law against the defendants for damages and was not entitled to a trial by jury. Larson v. Larson, 133 Minn. 452, 158 N. W. 707.

Where a party is ordered to interplead and his right to a fund paid into court by a defendant depends upon the power of the court to relieve him from the legal consequences of an accepted bid, he is not entitled to a jury trial. St. Nicholas Church v. Kropp, 135 Minn. 115, 160 N. W. 500.

(68) See § 5777.

(69) Board of Water Commissioners v. Roselawn Cemetery, 138 Minn. 458, 165 N. W. 279; State v. Houghton, 141 Minn. 1, 174 N. W. 885, 176 N. W. 159.

(71) Brazil v. Sibley County, 139 Minn. 458, 166 N. W. 1077.

(76) Hawley v. Wallace, 137 Minn. 183, 163 N. W. 127.

(80) Johnson v. Murphy, 133 Minn. 456, 158 N. W. 701.

5234. Waiver of trial by jury in civil cases—In a legal action the plaintiff does not waive his right to a jury trial by demanding that all the issues be tried by a jury, though the answer sets up an equitable counterclaim triable by the court. Williams v. Howes, 137 Minn. 462, 162 N. W. 1049.

(8) Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736; Boyea v. Besch, 144 Minn. 254, 174 N. W. 894.

RIGHT TO JURY TRIAL IN CRIMINAL ACTIONS

5235. Constitutional right—(22) State v. Broms, 139 Minn. 402, 166 N. W. 771.

5236. Waiver of right—(30) State v. Carver, 143 Minn. 27, 172 N. W. 771; State v. Rice, 145 Minn. 359, 177 N. W. 348.

SUMMONING AND DRAWING

5237. Statutes directory—Waiver—(34) Wrabeck v. Suchomel, 145 Minn. 468, 177 N. W. 764.

5239a. Drawing panels—The clerk of the district court drew the panels of the grand and petit jury, for the term of court at which defendant was indicted and tried, in the presence of the sheriff and a person who

had been duly elected a justice of the peace, had taken the oath of office, had received from his predecessor the records and files pertaining to the office, and who had for a week performed all the duties of the office in both civil and criminal cases, but whose official bond had not been filed. Held, that the person so present at the drawing of the jury panels was a de facto justice of the peace and his official act, in being the proper person to be present at such drawing, under section 9101, G. S. 1913, cannot be questioned by a motion to set aside the indictment or by a challenge to the petit jury panel. State v. Van Vleet, 139 Minn. 144, 165 N. W. 962.

5240. Special venire—In selecting jurors summoned on a special venire, section 7971, Gen. St. Supp. 1917, was disregarded, but there was no objection until after the return of the verdict. Held, that by failing to make timely objection the plaintiff waived any right he may have had to insist that the jurors be selected as provided by the statute. Wrabek v. Suchomel, 145 Minn. 468, 177 N. W. 764.

5241a. Selection in counties of over 100,000 inhabitants—Under G. S. 1913, § 7972, the judges or a majority of them are authorized to prepare supplementary lists in case of a deficiency of jurors. The general statute has been held applicable to the municipal court of St. Paul. State v. Weingarth, 134 Minn. 309, 159 N. W. 789.

IMPANELING

5248. Challenge to panel—A panel cannot be challenged on the ground that the clerk drew the names of the jurors in the presence of a justice of the peace who had not filed his bond, but who was a de facto officer. State v. Van Vleet, 139 Minn. 144, 165 N. W. 962.

5252. Examination of juror—While a jury was being selected defendant's attorney testified that a certain insurance company was interested in the defence of the case. The attorney for the plaintiff then called the defendant and asked him if this was true. It was held that it was not prejudicial error for the trial court to overrule an objection to this question, but the conduct of the attorney of the plaintiff was strongly disapproved by the supreme court. Viita v. Fleming, 132 Minn. 128, 155 N. W. 1077.

In a suit for damages resulting from negligence, plaintiff may show that defendant is insured against liability upon such claims, as a basis for questioning prospective jurors as to whether they have any interest in the insurance company. It is error to intimate to the jury that defendant is protected by such insurance, without presenting evidence that such is the fact. In examining prospective jurors, a party may elicit such information as is necessary to enable him to determine whether the jurors are interested in the result of the suit or biased against the bringing of such suits, but should not be permitted to excite prejudice against the adverse party through an abuse of this privilege.

The nature and extent of such examination rests largely in the discretion of the trial court, and a new trial will not be granted where it appears that no substantial prejudice resulted, although objectionable statements may have been made in connection with such examination. Northwestern Fuel Co. v. Minneapolis St. Ry. Co., 134 Minn. 378, 159 N. W. 832.

Held not error to allow counsel for plaintiff to examine defendant, in the presence of jurymen but before a jury was impaneled, as to whether he had liability insurance. Archer v. Skahen ,137 Minn. 432, 163 N. W. 784.

A juror was asked whether he was acquainted with any of the attorneys in the case. He answered, "No." He was a nominal party to a suit which the attorney for the defendant tried six years before. They did not recognize one another until the trial was nearly over. The juror says he had no prejudice or feeling of any sort in the matter. It does not appear that the defendant's rights were prejudiced. State v. Chodos, 147 Minn. 420, 180 N. W. 536.

(83) Northwestern Fuel Co. v. Minneapolis St. Ry. Co., 134 Minn. 378, 159 N. W. 832.

(84) Northwestern Fuel Co. v. Minneapolis St. Ry. Co., 134 Minn. 378, 159 N. W. 832. See Viita v. Fleming, 132 Minn. 128, 155 N. W. 1077; Archer v. Skahen, 137 Minn. 432, 163 N. W. 784.

JUSTICES OF THE PEACE

APPOINTMENT, QUALIFICATIONS AND TENURE

5262. De facto justice—A justice who had been duly elected, took the oath of office, received the records and files of the office from his predecessor, and discharged the duties of the office for a week, but had not filed his official bond when he took part in drawing a jury panel. Held, that he was a de facto justice. State v. Van Vleet, 139 Minn. 144, 165 N. W. 962.

Validity of acts. L. R. A. 1918D, 1079.

JURISDICTION AND POWERS

5263. Limited to county—Denied in certain cities—Justices of the peace have no jurisdiction of offences committed within the limits of a city or village wherein a municipal court is organized and existing, either for the purpose of trial or for the purpose of holding a preliminary examination. State v. Kelley, 139 Minn. 462, 167 N. W. 110.

5268. Place of holding court and of return of process—(36) See State v. Schulz, 142 Minn. 112, 171 N. W. 263.

PROCEDURE

5290. Statutory provisions to be followed strictly—(1) State v. Rice, 145 Minn. 359, 177 N. W. 348.

5292. Transfer of action to district court by stipulation—A stipulation transferring an action to the district court construed as authorizing the latter court to proceed to a determination of the action on the merits, the action being within the original jurisdiction of such court. Baudette v. Miller, 146 Minn. 477, 178 N. W. 315.

5295. Summons—Defects or informalities as to return day. 6 A. L. R. 841.

APPEAL TO DISTRICT COURT

5320. Who may appeal and in what cases—G. S. 1913, § 7887, gives an appeal to the district court from an order made by a justice of the peace under section 7871, denying an application for relief from a default judgment in garnishment proceedings. State v. Kane, 144 Minn. 225, 174 N. W. 884.

5321a. Time—An appeal must be taken within ten days after entry of judgment. Wagner v. Olson, 134 Minn. 475, 159 N. W. 751.

5322. Notice of appeal—Unless the notice of appeal from a judgment rendered by a justice of the peace states upon which one of the two allowable grounds it is taken, no jurisdiction is acquired by the appellate court, and the latter has no power to amend the notice. The statute, however, expressly authorizes, but does not require, the appellate court to enter judgment affirming the judgment of the justice court where for any cause the appeal is dismissed. By asking for that only which the statute authorizes the court to grant on a dismissal for lack of jurisdiction, there was no general appearance; nor was there such appearance by the admission of service of plaintiff's notice of motion to amend the notice of appeal and by opposing the granting of the motion. Spicer v. Kennedy, 144 Minn. 158, 174 N. W. 821.

(41) Santala v. Hill, 143 Minn. 289, 173 N. W. 651.

(48) Spicer v. Kennedy, 144 Minn. 158, 174 N. W. 821.

5324. Bond—Stay—An appeal, with a bond, from an order denying an application for relief from a default in garnishment proceedings, will stay all proceedings as in an ordinary civil action. State v. Kane, 144 Minn. 225, 174 N. W. 884.

5327. Entry of appeal on district court calendar—When an appeal has not been taken within ten days after entry of judgment as provided by G. S. 1913, § 7602, a judge of the district court is without jurisdiction to order the appeal placed on the calendar for trial. Wagner v. Olson, 134 Minn. 475, 159 N. W. 751.

5332. Status of case after appeal—(30) See State v. Kane, 144 Minn. 225, 174 N. W. 884.

5334. Unauthorized appeal—Waiver—(34) See Burns v. Millers Mut. Casualty Co., 146 Minn. 356, 178 N. W. 812.

5337. Judgment of affirmance on dismissal or default—Asking for a dismissal under the statute does not constitute a general appearance, or a consent to try a cause not properly in court. Spicer v. Kennedy, 144 Minn. 158, 174 N. W. 821.

(38) Spicer v. Kennedy, 144 Minn. 158, 174 N. W. 821.

CRIMINAL JURISDICTION AND PROCEDURE

5345. Entries in docket—The failure of the docket to show that an accused person waived a jury cannot be taken advantage of on habeas corpus. State v. Rice. 145 Minn. 359, 177 N. W. 348.

5346. Jury trial—Where, as in this state, a trial by jury in a prosecution for a misdemeanor may be waived, a failure on the part of the justice to impanel a jury upon a plea of not guilty being entered is a mere error not affecting the jurisdiction, and does not entitle the prisoner to be discharged on habeas corpus. State v. Carver, 143 Minn. 27, 172 N. W. 771.

(64) State v. Carver, 143 Minn. 27, 172 N. W. 771; State v. Rice, 145 Minn. 359, 177 N. W. 348.

5347. Judgment on conviction—One sentenced to pay a fine in a justice court cannot be imprisoned to enforce payment, unless the justice so determines when the sentence is pronounced and therein specifies the duration of the confinement for non-payment. State v. Rice, 145 Minn. 359, 177 N. W. 348.

JUVENILE COURTS

5349a. Jurisdiction—Where an illegitimate child is in lawful custody of a person other than its parent, by virtue of an order of the district court in habeas corpus proceedings, a juvenile court has no power to interfere with the custody of such child. State v. Juvenile Court, 147 Minn. 222. 179 N. W. 1006.

See 4466a.

KEROSENE—See Explosives, § 3700b.

LACHES

5331. General principles—A court of equity will not bar a claim, enforceable in an action at law, for a delay of less than the statutory period, at least, unless it be shown that the enforcement of the claim will result in substantial injury to innocent parties. McRae v. Feigh, 143 Minn. 241, 173 N. W. 655.

The rule applicable to the defence of laches does not depend entirely upon the lapse of time. It is an equitable defence based upon grounds of public policy. A party may be barred by laches when the delay is so long and the circumstances of such character as to establish a relinquishment or abandonment of the right. Ricker v. J. L. Owens Co., — Minn. —, 182 N. W. 960.

(88) Brockman v. Brockman, 133 Minn. 148, 157 N. W. 1086; Ricker v. J. L. Owens Co., — Minn. —, 182 N. W. 960.

(90) Brockman v. Brockman, 133 Minn. 148, 157 N. W. 1086; Ricker v. J. L. Owens Co., — Minn. —, 182 N. W. 960.

(91, 92) Brockman v Brockman, 133 Minn. 148, 157 N. W. 1086.

5354. Cannot affect statutes of limitation—(1) Kremer v. Lewis, 137 Minn. 368, 163 N. W. 732; Greenfield v. Hill City Land, L. & L. Co., 141 Minn. 393, 170 N. W. 343. See Glaze v. Stryker, 135 Minn. 186, 160 N. W. 490 (action involving tax title).

5356. Of public officers and agents—(4) Utah Power & Light Co. v. United States, 243 U. S. 389; Chesapeake & Del. Canal Co., v. United States, 250 U. S. 123.

5339. Pleading—(7, 8) Brockman v. Brockman, 133 Minn. 148, 157 N. W. 1086 (complaint to vacate judgment for divorce for fraud held demurrable for laches)

5360. Application of doctrine in particular cases—(10) Kanevsky v. National Council, 132 Minn. 442, 157 N. W. 646 (injunction against prosecution of action on a benefit certificate pending action to cancel certificate); Brockman v. Brockman, 133 Minn. 148, 157 N. W. 1086 (action to vacate judgment of divorce for fraud); Greenfield v. Hill City Land, L. & L. Co., 141 Minn. 393, 170 N. W. 343 (appointment of a receiver); McRae v. Feigh, 143 Minn. 241, 173 N. W. 655 (action by broker for commissions and for a receiver); Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N. W. 805 (action to enjoin a nuisance); Ricker v. J. L. Owens Co., — Minn. —, 182 N. W. 960 (action to rescind a contract for sale of corporate stock).

See § 1196.

LANDLORD AND TENANT

IN GENERAL

5261. When relation exists—In determining whether an instrument creates the relation of landlord and tenant, form is not controlling and it is immaterial what the parties called the instrument. The contract must be construed as a whole and in the light of the surrounding circumstances. Beecher v. Spain, 140 Minn. 255, 167 N. W. 793.

(11) See Beecher v. Spain, 140 Minn. 255, 167 N. W. 793 (contract construed to create relation of landlord and tenant).

5363. Tenant cannot deny landlord's title—The estoppel is not avoided by the mere fact that the landlord asserted that he was the owner when in truth he was not. Harwood v. Meloney, 139 Minn. 212, 166 N. W. 125.

(17) Harwood v. Meloney, 139 Minn. 212, 166 N. W. 125; Beitz v. Buendiger, 144 Minn. 52, 174 N. W. 440.

(25) Harwood v. Meloney, 139 Minn. 212, 166 N. W. 125. See note, 2 A. L. R. 359.

5366. Wrongful eviction of tenant by landlord—Damages—Plaintiff obtained the key to the leased premises and took possession as assignee of the lessee. He then had considerable bulky property in the leased building. He has never surrendered the key to the lessors nor removed his property from the building, and is therefore not in position to sue for constructive eviction; there having been no active interference by the lessors with his possession. There cannot be constructive eviction without a complete abandonment of possession by the tenant. Bowder v. Gillis, 132 Minn. 189, 156 N. W. 2.

Damages for an eviction held not excessive. Bacon v. Mirau, 148 Minn. —, 181 N. W. 579.

See § 5410.

5368. Duty to make repairs—Where a city condemned a part of leased premises and cut in two a building thereon, it was held that the landlord owed no duty to the tenant to build a new wall. Kafka v. Davidson, 135 Minn. 389, 160 N. W. 1021.

(38) See § 5402.

5369. Unsafe premises—Liability of landlord and tenant—A loose, unstable plank stool, or step, of crude make, provided by the lessor to make the passage from the basement more convenient, the floor being twelve inches lower than the threshold of the door leading to the basement stairway, was not such a part of the structure or fixed conveniences of the leased premises that the lessor owed no duty to see that it was a reasonably safe contrivance for the use of the lessees; the lessor having retained control and care of the basement and passage thereto for the common use of the several lessees of the building. Its character, use,

and place where used were such that it cannot be said to have been a part of the premises within the rule that a lessor, though retaining control of parts of leased premises for the common use of different lessees, is not bound to make changes or alterations, so that the parts under his control will be more safe for the lessees than at the time of letting. McNab v. Wallin, 133 Minn. 370, 158 N. W. 623.

Evidence held not to justify a verdict for damages in favor of an employee of a tenant for neglect of the landlord to heat the premises as provided in the lease. Hansman v. Western Union Tel. Co., 136 Minn. 212, 161 N. W. 512.

The fact that it is the duty of a landlord to keep premises in a safe condition does not absolve a tenant from liability to third persons for his negligence in allowing the premises to be in an unsafe condition. A tenant has been held liable to a third person rightfully on the premises for the negligence of a servant of the tenant in leaving open the gate of an elevator shaft. A gate, designed to close the opening in an elevator shaft automatically when the elevator was moved up or down, was defective, and frequently failed to drop into place. It was the duty of the owner of the building containing the elevator to keep it in repair. He failed to do so. Part of the building was occupied by tenants. They and their employees knew of the defective condition of the gate. Appellant was one of the tenants, and had a right in common with the the other occupants of the building, to use the elevator as an adjunct to its business. Respondent came upon the premises, at the invitation of one of the appellant's cotenants, to deliver goods to such cotenant. There was evidence tending to show that just prior to his coming an employee of appellant had taken the elevator to the second floor and that the gate had not dropped into place. Respondent fell into the open shaft and was injured. Held: (1) That the evidence would justify a jury in finding that appellant's employee operated the elevator in a negligent manner. (2) That he was operating it in the course of his employment and not for purposes personal to himself. (3) That respondent was rightfully on the premises. (4) That the failure of the owner of the building to keep the gate in repair did not absolve his tenants from responsibility for the negligence of their employees while operating the elevator, and that such tenants had possession and control of it for the purpose of operating it as an adjunct to their business. (5) That respondent was not guilty of contributory negligence as a matter of law. (6) That the evidence as a whole was sufficient to sustain a verdict in his favor. Staley v. Theo. Hamm Brewing Co., 142 Minn. 399, 172 N. W. 491.

A lessor who leases property with a covenant to keep it properly heated is liable to an employee of his tenant for a negligent failure to heat properly. The evidence sustains a finding that the defendant telephone company negligently failed to heat properly premises leased to the telegraph company in the employ of which the plaintiff was. The evidence does not require a finding that the plaintiff was at fault in car-

ing for herself or in remaining at work under the conditions to which she was subjected while working for the telegraph company so as to prevent a recovery from the telephone company for its negligent failure to heat. Hansman v. Western Union Tel. Co. 144 Minn. 56, 174 N. W. 434.

(34) Keegan v. G. Heilman Brewing Co., 129 Minn. 496, 152 N. W. 877; Kafka v. Davidson, 135 Minn. 389, 160 N. W. 1021.

(40) See 8 A. L. R. 772.

(41) 1 Minn. L. Rev. 339.

(43) McNab v. Wallin, 133 Minn. 370, 158 N. W. 623.

See L. R. A. 1916F, 1081 (liability of landlord to persons in privity with tenant); L. R. A. 1916F, 1140 (liability of landlord for injury to employee of tenant); L. R. A. 1916F, 1152 (liability of landlord for injury to wife of tenant).

5374a. Abandonment of premises by tenant in winter—Statute— Under a statute (Laws 1915, c. 213) which imposes a penalty upon a tenant who shall, between November 15th and April 15th, remove from, abandon, or vacate a building occupied by him and containing pipes liable to freeze, without giving three days' notice, a tenant who leaves the premises, without intention of returning, in inclement winter weather, "abandons" the premises, though he may not have actually removed his property therefrom. The question whether defendant in this case abandoned a house occupied by him, and whether the abandonment caused damage to plaintiff, should have been submitted to the jury. Gibbons v. Yunker, 142 Minn. 99, 170 N. W. 917.

In an action under Laws 1915, c. 213, held, that the evidence justified a verdict for the tenant; that it was proper for the court to point out to the jury that the abandonment must have taken place prior to the injury; that if the freezing occurred before defendant formed the intention to abandon the premises, there could be no recovery for failure to give the notice required by the statute. Gibbons v. Yunker, 145 Minn. 401, 177 N. W. 632.

HOLDING OVER

5380. Effect at common law—(75) See George C. Lauer Stone & Const. Co. v. Armour & Co., — Minn. —, 183 N. W. 819.

See § 5433.

LEASES

5382. Definition—Within some statutes a lease for a term not exceeding three years is not a conveyance. Bacon v. Mirau, 148 Minn. —, 181 N. W. 579.

5383. What constitutes—A certain instrument held a present contract of leasing and not an agreement to make a lease in the future. Force Bros. v. Gottwald. — Minn. —, 183 N. W. 356.

5391. Restrictions on use—Immoral or illegal uses—The provision in a lease that the lessees were to use the leased premises "for a saloon and for no other purpose," when taken with other provisions therein, must be construed as meaning the ordinary liquor saloon or grogshop. A fair construction of the lease is that the parties provided against the event that, through no fault of the lessees, it might for any cause become unlawful to conduct the liquor business on the premises, and that then the lessees could terminate the lease by giving notice. It was perfectly proper for them so to do, and their agreement should be enforced. The word "saloon" in the lease means a place for selling intoxicating liquors at retail and not a place for public entertainment such as a dance hall or temperance saloon. Halloran v. Jacob Schmidt Brewing Co., 137 Minn. 141, 162 N. W. 1082.

Shaking dice for cigars is "gambling" within the meaning of the provision in a lease which authorizes the lessor to terminate the same in case gambling is allowed upon the premises. Zotalis v. Cannellos, 138 Minn. 179, 164 N. W. 807; Santrizos v. Public Drug Co., 143 Minn. 222, 173 N. W. 563.

Immoral conduct, in the generally accepted meaning and understanding thereof, includes only such acts and practices as are inconsistent with decency, good order, and propriety of personal conduct. A stipulation in a lease of a building in which the tenant was to conduct a book store, prohibiting immoral practices on the premises, construed in the light of the facts before the parties when the contract was entered into, does not include the sale of books or magazines of an immoral nature. A restriction of the sale of such books was not in the minds of the parties at the time, and the expression "immoral practices" as used in the lease is therefore to be construed in harmony with the general standards of moral conduct. Paust v. Georgian, 147 Minn. 149, 179 N. W. 735.

5392. Continuing condition—Waiver—(9) Zotalis v. Cannellos, 138 Minn. 179, 164 N. W. 807. See § 5439.

5396. Covenants as to destruction, etc. of buildings—Leases sometimes contain provisions for a termination of the lease at the election of the lessor in case the buildings are destroyed or damaged by fire or other cause. Kahn v. American Ins. Co., 137 Minn. 16, 162 N. W. 685.

(29) Wolfson v. Zimmerman, 132 Minn. 192, 156 N. W. 119.

5397. Covenants as to repairs, etc.—A contract to repair an appliance cannot be construed as an agreement to instal a new one. The measure of damages to a tenant for breach by a landlord of an agreement to repair is the diminished rental value of the building by reason of the failure to repair. Warren v. Hodges, 137 Minn. 389, 163 N. W. 739.

(21) See Brechet v. Johnson Hardware Co., 139 Minn. 436, 166 N. W. 1070.

See §§ 5368, 5402.

5398. Covenants to surrender in good condition—A lease obligated the lessee to deliver up the premises at the end of the term in as good order and condition and state of repair as they were at the time of the letting, reasonable use and wear and inevitable accident excepted. When the premises were surrendered the furnace was cracked. Proof of these facts made it incumbent on the tenant to prove that the damage was due to the excepted cause. Under the evidence in the case a finding for plaintiff is sustained. Rustad v. Lampert, — Minn. —, 183 N. W. 843.

5399. Covenants to pay taxes and assessments—An agreement in a contract of lease, that the lessee shall pay all taxes and assessments levied against the property subsequent to the date when the lease takes effect, held to apply to a reassessment levied to raise a deficiency in an original assessment for street improvements. Theo. Hamm Brewing Co. v. Northwestern Trust Co., 135 Minn. 314, 160 N. W. 792.

5400. Covenants to insure—See Ann. Cas. 1918E, 299.

5401. Covenants as to heat and elevator service—A landlord is liable for damages for breach of contract to heat a leased residence. Where, however, an option to vacate is given, and no reason appears why the premises are not vacated, there can be no recovery of damages which accrued after the allowance of a reasonable time to vacate. Hanes v. Viehman Realty Co., 146 Minn. 320, 178 N. W. 587.

(33) Hansman v. Western Union Tel. Co., 136 Minn. 212, 161 N W. 512 (covenant to heat—action by employee of tenant); Keiper v. Anderson, 138 Minn. 392, 165 N. W. 237. See Hansman v. Western Union Tel. Co., 144 Minn. 56, 174 N. W. 434; § 5369.

5402. Covenants as to improvements—Under a covenant in a lease that "any improvements, repairs or alternations" made by the lessee in or to the building shall become the property of the lessor and not be removed at the termination of the lease held that, to constitute an improvement within the meaning of the covenant, a hot-water heating plant must be so installed therein as to become a part of the realty. Whether a hot-water heating plant was so installed in a building as to become a part of the realty was a question of fact, properly submitted to the jury. Cohen v. Whitcomb, 142 Minn. 20, 170 N. W. 851.

Ordinarily the measure of damages for a breach by the lessor of a covenant to make improvements is the difference between the rental value of the premises in their actual condition and in the condition in which the lessor agreed to put them. But where the lessor rents the premises for a business which cannot be carried on in cold weather without artificial heat, and agrees to furnish and instal the apparatus necessary to provide such heat, and the business after being established and operated during the warm months is interrupted by his failure to instal such apparatus, he is liable to the lessee for loss of profits if such loss was a direct consequence of this breach of the contract, and the

amount thereof is not contingent or speculative, but is shown with reasonable certainty. The amount of such loss resulting from the interruption of an established business may be shown by showing the amount of profits for a reasonable period immediately preceding such interruption if the other conditions were substantially the same. Force Bros. v. Gottwald, — Minn. —, 183 N. W. 356.

The measure of general damages for the failure of the landlord to improve or repair rented premises is diminished rental value. Special damages, if recovered must be alleged and proved. In this case special damages were not alleged and the court properly submitted diminished rental value as the measure of damages. The verdict sustains the finding both as to the right of recovery and the amount. Griebe v. Hagen, — Minn. —, 184 N. W. 19.

(34) Clinton Film Service Co. v. Conan, 140 Minn. 94, 167 N. W. 289 (issue as to whether certain improvements stipulated for at the time the lease was made had been fully completed and as to whether a subsequent contract as to improvements ever became operative). See Luthey v. Joyce, 132 Minn. 451, 157 N. W. 708 (tenant held not entitled to compensation for improvements where he was entitled to an extension of the lease whereby provision was made for allowance for improvements on the rent).

See §§ 5368, 5397.

5403a. Stipulations exempting lessor from liability—A stipulation, in a lease of a building for commercial purposes, exempting the lessor from liability for loss or injury to the goods of the lessee occasioned by a fire "howsoever coming upon or being within" the leased premises, construed, and held to include a fire caused by the negligence of the lessor. A stipulation of that kind, where unaffected by public interests or public policy, and not prohibited by statute, is valid and enforceable. Commercial Union Assur. Co. v. Foley Bros., 141 Minn. 258, 169 N. W. 793.

5404. Privilege of lessee to purchase—Does option to purchase continue where tenant for term holds over. 34 Harv. L. Rev. 437.

5406. Subletting—Assignment of lease as breach of covenant against subletting. 7 A. L. R. 249.

(45) Zotalis v. Cannellos, 138 Minn. 179, 164 N. W. 807.

(47) Bowder v. Gillis, 132 Minn. 189, 156 N. W. 2.

5407. Surrender—Where the parties to a five-year lease in writing agree oraly that it shall be terminated and the lessee vacates and the lessor repossesses himself of the premises, the lease is effectually terminated. C. S. Brackett Co. v. Lofgren, 140 Minn. 52, 167 N. W. 274.

(54, 61) 3 A. L. R. 1080 (reletting of premises by landlord).

See § 8877 (statute of frauds).

5408. Assignment—In an action for damages against defendants, as lessors, for refusing to give written consent to the assignment of a lease by the lessee to plaintiff, evidence held to justify a finding that plaintiff

procured the assignment of the lease relying upon the assurance of the lessors that such transfer would be acceptable to them. Bowder v. Gillis, 132 Minn. 189, 156 N. W. 2.

A contract for a lease is not assignable. A landlord has a right to choose his tenant. Holford v. Crowe, 136 Minn. 20, 161 N. W. 213.

(67) Halford v. Crowe, 136 Minn. 20, 161 N. W. 213.

5409. Modification—Evidence held to justify a finding that a contract with reference to improvements and a reduction of the rent never became operative. Clinton Film Service Co. v. Conan, 140 Minn. 94, 167 N. W. 289.

(74) C. S. Brackett Co. v. Lofgren, 140 Minn. 52, 167 N. W. 274 (oral modification of written lease reducing future rent acted upon by the parties held binding though without consideration). See § 5421a.

5410. Repudiation—Wrongful termination—Damages—If the landlord wrongfully terminates the lease, the lessee may recover all damages resulting from being deprived of the benefits of the contract for the unexpired term, including profits of an established business in appropriate cases. Stronge & Warner Co. v. H. Choate & Co., — Minn. —, 182 N. W. 712.

(77) See Gardiner v. Butler & Co., 245 U. S. 603; 34 Harv. L. Rev. 217 (duty to relet to minimize damages).

See § 5366.

5412. Termination—In an action upon an insurance policy insuring lessees' leasehold interest against loss by fire, where the lease contains a provision: That in case the premises or any part thereof or any part of the buildings of lessors of which they form a part shall be destroyed or damaged by fire or other unadvoidable casualty, then the lease and the term demised shall terminate at the election of the lessor—held, that the lessor was, under the evidence, within his legal right in terminating the lease. Kahn v. American Ins. Co., 137 Minn. 16, 162 N. W. 685.

In a settlement had subsequent to notice by the lessor to terminate a lease under the provisions thereof, and after the commencement of an action in unlawful detainer to recover possession of the leased premises, the including of rent accruing after service of such notice in the settlement, under the circumstances in this case, held not to be a waiver of the notice to terminate the lease. Kahn v. American Ins. Co., 137 Minn. 16, 162 N. W. 685.

A provision in a lease that upon default for sixty days by the lessee in payment of rent, the lease shall become ended and determined, gives an option of termination to the lessor, which he may avail himself of or waive, as he sees fit. It does not give the lessee the right to secure a termination of the lease by his own default. Lowenthal v. Newlon, 138 Minn. 248, 164 N. W. 905.

Plaintiff sold his business to McBride, taking notes for instalments of the purchase price. As part of the same transaction, plaintiff leased to defendant, for a long term, the premises where the business was con-

ducted. The lease was terminable by defendant in event McBride defaulted in his payments, but was to become absolute on all payments being made. McBride becoming embarrassed, plaintiff agreed to accept the notes of McBride for an amount less than the amount due, a third party assuming part of the obligation. It was agreed that the new notes should stand substituted for the old, and be secured in the same manner by the lease, and that plaintiff should hold the same rights in event of default as under the old agreement. Defendant was not a party to this agreement, but assented to it. Held, defendant had the same right of cancelation, for default by McBride, after the new agreement as before. It was not necessary that defendant be a party to the new agreement between plaintiff and McBride. If it assented to it, the new notes became substituted for the old, for all purposes. Mikolas v. Val Blatz Brewing Co., 147 Minn. 230, 180 Minn. 109.

Held, on the facts stated in the opinion, that the term of the lease under which defendant was occupying the premises in question had not been terminated by the act of the parties or otherwise at the time plaintiff made demand for increased rent as a condition to continued possession by defendant, and that the demand to that effect was without basis for its support and of no force or effect. The evidence was insufficient to present an issue of fact for the jury, and a verdict was properly directed for defendant. George C. Lauer Stone & Const. Co. v. Armour & Co., — Minn. — 183 N. W. 819.

It is generally held that a lease by a life tenant is terminated by his death. 6 A. L. R. 1503.

See §§ 5407, 8877 (statute of frauds).

5413. Renewals—Under the terms of a written lease which gives the lessee, at the expiration of one year, "the privilege of four years more at his option," a new lease is not required, and the landlord cannot be compelled to execute a lease for the additional time; upon the exercise of the option by the tenant the original lease becomes a lease for the additional term. Luthey v. Joyce, 132 Minn. 451, 157 N. W. 708. See L. R. A. 1916E, 1237.

The lease under which defendants as lessees occupied certain premises contained a renewal provision. This provision under the allegations of the complaint, must be construed to give the lessees the right of renewal in case the parties, before the expiration of the original term, should mutually decide and agree upon the monthly rent to be paid during the additional term, and cannot be held to grant the lessees the right of renewal upon the same rent as the original term. Sanford v. Tuchelt, 133 Minn. 233, 158 N. W. 245. See 32 L. R. A. (N. S.) 201.

(87) Sanford v. Tuchelt, 133 Minn. 233, 158 N. W. 245.

(88) Luthey v. Joyce, 132 Minn. 451, 157 N. W. 708.

5417. Fraud—Even if it be conceded that the jury might properly find from the evidence that the tenant was induced to execute the lease because of a fraudulent promise of the landlord that no restaurant would

be permitted in the building, the tenant by paying rent after a restaurant was installed precluded herself from rescinding the lease, for with full knowledge of the alleged fraud she recognized the binding force of the contract. Arcade Investment Co. v. Hawley, 139 Minn. 27, 165 N. W. 477.

Where a lessee has been induced to execute a lease through misrepresentation and deceit of the lessor, the lessee may not after he has full knowledge of the fraud remain in possession and recover damages arising through the fraud practiced during the unexpired part of the term. He may recover all damages sustained up to the discovery of the fraud. O'Neil v. Davidson, 147 Minn. 240, 180 N. W. 102.

(93) O'Neil v. Davidson, 147 Minn. 240, 180 N. W. 102 (rescission denied because lessee remained in possession and paid several instalments after knowledge of fraud).

5417a. Breach of covenants—Measure of damages—See § 5484.

5419. Contracts to lease—(97) Glaubits v. Meyer, — Minn. —, 182 N. W. 1002.

RENT

5419a. When follows title—In the absence of express provision to the contrary rents follow the title to the land. Orr v. Bennett, 135 Minn. 443, 161 N. W. 165. See § 5419b.

Rents past due are mere choses in action, personal demands for money due, and they are not a mere incident of ownership of the land. Orr v. Bennett, 135 Minn. 443, 161 N. W. 165.

5419b. Unaccrued—Nature—Unaccrued rents are not personal property. They are incorporeal hereditaments. They are an incident to the reversion and follow the land. Though separable from the land, they are, until such separation, part of the land. State v. Royal Mineral Assn., 132 Minn. 232, 156 N. W. 128.

5421a. Reduction—Consideration—Where a landlord orally agreed with his tenant without consideration to reduce future rent stipulated in a written lease and the tenant thereafter paid rent at the reduced rate and the landlord accepted it and receipted therefor without objection, it was held that the landlord could not recover the amount rebated on the ground that the agreement was without consideration. C. S. Brackett Co. v. Lofgren, 140 Minn. 52, 167 N. W. 274. See § 5409.

5423a. To whom payable—Though a lessee was notified by a resolution of the directors of lessor corporation and that all rentals should be paid to its treasurer, no recovery can be had for rent thereafter paid by check mailed to lessor and received by its secretary, who indorsed it as such, cashed it and appropriated the money to his own use. Gjertsen Realty Co. v. Holland Invest. Co., 148 Minn. —, 180 N. W. 774.

5424. Destruction, etc. of buildings—Statute—Evidence held to justify a finding that the premises were rendered untenantable by a fire. Wolfson v. Zimmerman, 132 Minn. 192, 156 N. W. 119.

Lessee held not to have waived his right to terminate a lease by remaining in possession after a fire pending the adjustment of his claim for insurance for the loss. Wolfson v. Zimmerman, 132 Minn. 192, 156 N. W. 119.

A city condemned a part of leased premises and cut in two a building thereon, thereby rendering the building untenantable. In consequence the tenant vacated. His liability to pay rent thereupon ceased by virtue of the statute and his lease terminated. Kafka v. Davidson, 135 Minn. 389, 160 N. W. 1021.

(9) Wolfson v. Zimmerman, 132 Minn. 192, 156 N. W. 119; Warren v. Hodges, 137 Minn. 389, 163 N. W. 739.

5425. Buildings becoming untenantable, etc.—(16) 4 A. L. R. 1453.

5425a. Constructive eviction—What constitutes—When the beneficial enjoyment of leased premises is so interfered with by the lessor as fairly to justify an abandonment by the lessee there is a constructive eviction. It does not suppose an actual ouster or dispossession by the lessor. The plaintiff conducted an extensive fruit, confectionery, cigar and flower store. He sublet a space 10 by 49 feet to the defendant for use as a drug store. There was no separation of the portion leased. The defendant, claiming a constructive eviction, abandoned the premises and refused to pay rent. It claimed that there was a constructive eviction by the shutting off of the lights, by the obstruction of its space by a weighing machine, by the refusal of the plaintiff to furnish it a key, by the interference with its business by mechanical and other music, and by petty gambling and disorder, all in the plaintiff's portion of the store. It is held that the evidence did not require a finding of facts constituting a constructive eviction. Santrizos v. Public Drug Co., 143 Minn. 222, 173 N. W. 563.

5427. Effect of re-entry—Wrongful eviction—Where a landlord wrongfully evicts his tenant from a part of the demised premises the whole rent is suspended until the possession of such part has been restored to the tenant. Harwood v. Meloney, 139 Minn. 212, 166 N. W. 125.

5429. Effect of assignment—The assignment of a lease does not relieve the lessee from liability on a covenant for rent. Both the lessee and his assignee are liable and the landlord may sue either. Holford v. Crowe, 136 Minn. 20, 161 N. W. 213.

5432b. Effect of forfeiture for condition broken—Recovery of advance payments of rent—Where a tenant voluntarily pays an instalment of rent before it is due and the lease is thereafter terminated for his default before such instalment becomes due, he is not entitled to have it returned. Thomas Peebles & Co. v. Sherman, 148 Minn. —, 181 N. W. 715.

Where a lease is terminated for a default of the tenant after he has

made "an advance payment of rent," the landlord is entitled to retain such advance payment, although the lease was terminated before the beginning of that part of the term upon which such advance payment was to be applied. Thomas Peebles & Co. v. Sherman, 148 Minn. —, 181 N. W. 715.

5433. Tenant holding over—Where at the end of the term a lessor takes possession of a part of the leased premises not then occupied by the lessee, but the lessee retains possession of the remainder and refuses to vacate, the lessor may treat him as holding over under the lease as to the part retained by him, and may collect a proportionate part of the rental for the term during which he continues to occupy it. Harwood v. Meloney, 139 Minn. 212, 166 N. W. 125.

See §§ 5380–5381.

FORFEITURE AND RE-ENTRY

5437. In general—A stipulation for a forfeiture upon the non-payment of rent does not give the lessee a right to terminate the lease for his own default. Such a stipulation operates in favor of the lessor only. Lowenthal v. Newlon, 138 Minn. 248, 164 N. W. 905.

Waste by a tenant as ground for forfeiture. 3 A. L. R. 672.

5439. Waiver—Receipt of rent—By accepting rent after knowledge of a breach of the conditions of the lease, the lessor waives the right to re-enter for such breach, but does not waive the right to re-enter for a similar breach committed thereafter. The lessor accepted rent with knowledge that a part of the building had been sublet; but the remainder of the building was sublet thereafter, and he is entitled to re-enter for this subsequent breach of the condition against subletting. Zotalis v. Cannellos, 138 Minn. 179, 164 N. W. 807.

Where a lease is subject to forfeiture for condition broken, and the landlord, with knowledge thereof, accepts subsequently accruing rent, such acceptance operates as an election to continue the lease in force and as a waiver of the right to forfeit it. But the acceptance of such subsequently accruing rent waives only those rights of forfeiture then known to the landlord. It does not waive the right to terminate the lease for a prior breach of its conditions not known to him at the time he received the rent. Thomas Peebles & Co. v. Sherman, 148 Minn. — 181 N. W. 715.

(48) 34 Harv. L. Rev. 203.

NOTICE TO QUIT

5447. Waiver—(67) 34 Harv. L. Rev. 203 (acceptance of rent).

SUMMARY ACTION BY LANDLORD FOR POSSESSION—UNLAWFUL DETAINER.

5449. When action lies—(75, 80) Beecher v. Spain, 140 Minn. 255, 167 N. W. 793.

5460. Defences—In an action on the ground of non-payment of rent it is no defence that the landlord has failed to make repairs as agreed or that the premises are untenantable. Warren v. Hodges, 137 Minn. 389, 163 N. W. 739.

(9) Warren v. Hodges, 137 Minn. 389, 163 N. W. 739.

5475. Appeal—An appeal cannot be taken from an order for judgment. Layton v. Lee, 146 Minn. 478, 178 N. W. 735.

ACTIONS FOR RENT

5477. Pleading—(46) Lowenthal v. Newlon, 138 Minn. 248, 164 N. W. 905 (answer held to contain no sufficient allegation of acceptance by the lessors of surrender of the premises).

5482a. Evidence—Sufficiency—Evidence held to justify a verdict for defendant. H. W. Wilson Co. v. Northwestern School Supply Co., 134 Minn. 140, 158 N. W. 828.

RENTING ON SHARES—FARM CONTRACTS

5484. Rights of parties—Accounting—Damages for breach of contract—In an action involving merely a question of fact as to whether a landlord had received his share of the crops, held that the evidence justified the verdict. Dow v. Bastrom, 136 Minn. 372, 162 N. W. 465.

Action by landlord for value of corn which should have been husked and delivered at an elevator by the tenant under the terms of the lease. Defence that on account of hail and failure to mature only a small quantity of fodder corn was raised and that was fed to the tenant's cattle. Instructions as to the measure of damages held not prejudicial. Verdict held not to show prejudice. Steinkemper v. Beckman, 138 Minn. 477, 164 N. W. 802.

By a cropping contract the owner of the land agreed to supply all necessary seed, and that it should be of good quality; the seed delivered to the cropper by the owner's agent was filled with foul seeds of various sorts, and as a whole was unfit for seeding purposes; the cropper was fully aware of the inferior character of the seed and of its unfitness for use, but nevertheless accepted the same and used it in cropping the land; the result was a substantial crop failure. It is held, on the facts stated, that the cropper is not entitled to recover as damages for the failure of the owner to provide seed of good quality the value of a crop that probably would have been produced had the seed been of that

quality. The fact that the cropper at the time of the delivery of the seed objected to it as unfit for use does not change the rule of damages stated, for he could not with knowledge of the inferior quality, whether he objected to it or not, make use thereof and thus enhance his damages. Wavra v. Karr, 142 Minn. 248, 172 N. W. 118.

In an action by a landlord against a tenant under a farm lease for an accounting and for his share of a crop, held that findings in favor of plaintiff were sustained by the evidence. Boyea v. Besch, 144 Minn. 254, 174 N. W. 894.

The evidence sustains the trial court's peremptory instruction that the defendant was under obligation to fall-plow certain land rented by him of the plaintiff. Under the facts stated in the opinion the measure of damages for the defendant's failure to plow was the difference in the rental value for one year of the land plowed and unplowed. There was evidence to sustain a verdict based on the measure of damages stated. Meisch v. Safranski, 147 Minn. 122, 179 N. W. 685.

The court's instructions, to which no exceptions are taken, and the evidence, justified the jury in finding for defendant on the two counterclaims submitted, in an amount sufficient to wipe out the claim of plaintiff, and awarding the verdict given in favor of defendant. The agreement out of which the counterclaims arose cannot be held void for want of consideration. The lease obligated the tenant to pay cash rent of three dollars per acre for the hay and pasture land on the farm. The court correctly held that no cash rent was payable upon the acreage in a slough, so covered with water that neither hay nor pasturage could grow thereon. Miller v. Clark, 147 Minn. 130, 179 N. W. 731.

The parties made a contract under which plaintiff was to take possession of defendant's farm, paying a cash rent for the pasture and meadow land and delivering one-half of the crops harvested to defendant, the latter to furnish the seed and pay one-half of the threshing bill. Defendant refused to let plaintiff into possession, and in this action for damages it is held: As against objection first made on the trial the complaint is sufficient to allow proof of special and general damages. The evidence did not justify the submission of special damages, there being no proof that defendant knew that plaintiff had the stock on account of which the damages were claimed, either when the contract was made or when breached. The measure of general damages was the difference between the actual rental value at the time of the breach and the rent or compensation reserved in the contract, and the charge was misleading in suggesting that in addition profits might be added. Glaubitz v. Meyer, — Minn. —, 182 N. W. 1002.

Measure of damages for breach of cropping contract. L. R. A. 1918B, 1056.

Damages for loss of prospective crops. 34 Harv. L. Rev. 662.

(63) See 2 Minn. L. Rev. 43.

(70) Brekken v. Wensel, 144 Minn. 218, 174 N. W. 831.

LARCENY

5486. Different forms—The commission of petit larceny is necessarily included in grand larceny. Each of the several forms of larceny involves a simply larceny. The fact of its having been committed in a building merely aggravates the offence and increases the punishment. State v. Morris, — Minn. —, 182 N. W. 721.

5487. Simple larceny—Nature and elements of offence—To take a thing from a person it is necessary that the taker should at some particular moment have adverse possession of the thing. But this independent absolute control need endure only for a moment. Where a defendant took an automobile standing in a street and drove it several blocks it was held that there was a sufficient taking. State v. Maddaus, 137 Minn. 249, 163 N. W. 507.

(78) State v. Edmons, 132 Minn. 465, 156 N. W. 1086.

(80, 83) State v. Maddaus, 137 Minn. 249, 163 N. W. 507.

5490. Indictment for simple larceny—(92) State v. Hartung, 141 Minn. 207, 169 N. W. 712.

(1) State v. Lyons, 147 Minn. 41, 179 N. W. 484 (indictment held sufficient though it contained no direct allegation that the property obtained was a check or bill of exchange, or that words between the quotation marks were a copy of the check).

5496. Possession of stolen goods—The instructions to the jury, in a prosecution for grand larceny, to the effect that if the jury found from the evidence that certain money taken from defendant at the time of his arrest was the identical money that had been stolen from complainant they should consider with the other evidence in the case the failure of defendant to become a witness in his own behalf and explain away such possession, held a violation of section 8376, G. S. 1913, and prejudicial error. The court may, in such case, state to the jury the general rule that the unexplained possession of stolen property is presumptive evidence that the person so in possession stole the same, but cannot, in the face of the statute, go farther and expressly direct the jury to consider the failure of defendant to take the witness stand in support of his defence and explain his possession of the stolen property. State v. Richman, 143 Minn. 314, 173 N. W. 718.

If a defendant's explanation of his possession of recently stolen property is such that, taken in connection with all the other evidence in the case, a reasonable doubt of his guilt remains, an acquittal should follow. State v. Couplin, 146 Minn. 189, 178 N. W. 486.

(12) State v. Monroe, 142 Minn. 394, 172 N. W. 313; State v. Couplin, 146 Minn. 189, 178 N. W. 486; State v. Morgan, 146 Minn 197, 178 N. W. 489.

5497. Evidence—Admissibility—(13) State v. Monroe, 142 Minn. 394, 172 N. W. 313 (evidence of a general system practiced by defendant in

stealing and selling stolen automobiles held admissible); State v. Chodos, 147 Minn. 420, 180 N. W. 536 (evidence bearing on the probability of defendant's story held admissible); State v. Morris, — Minn. —, 182 N. W. 721 (evidence relating to collateral matters properly excluded—evidence of taking by accomplice of other articles than those described in the indictment admissible); State v. Pugliese, — Minn. —, 182 N. W. 958 (other thefts forming part of same transaction held admissible).

5498. Evidence—Sufficiency—The evidence sustains the verdict. The jury could find that defendant and the two others indicted with him had possession of recently stolen goods under such circumstances that they either participated in the actual felonious taking, or planned, aided, or abetted the same. State v. Morgan, 146 Minn. 197, 178 N. W. 489.

(14) State v. Ryan, 137 Minn. 78, 162 N. W. 893; State v. Maddaus, 137 Minn. 249, 163 N. W. 507; State v. Monroe, 142 Minn. 394, 172 N. W. 313; State v. Rickmier, 144 Minn. 32, 174 N. W. 529; State v. Couplin, 146 Minn. 189, 178 N. W. 486; State v Morgan, 146 Minn. 197, 178 N. W. 489; State v. Lyons, 147 Minn. 41, 179 N. W. 484 (check obtained from maker by false pretences and the use of forged tax receipts); State v. Hass, 147 Minn. 269, 180 N. W. 94; State v. Chodos, 147 Minn. 420, 180 N. W. 536; State v. Morris, — Minn. —, 182 N. W. 721; State v. Pugliese, — Minn —, 182 N. W. 958.

(15) State v. Edmonds, 132 Minn. 465, 156 N. W. 1086.

5498a. Instructions—The charge adequately guarded the rights of defendant against a conviction on the indictment herein upon proof merely of having stolen property in his possession, knowing it to be such. State v. Morgan, 146 Minn. 197, 178 N. W. 489.

5500. Conviction for lesser offence—One indicted for larceny in the first degree may be allowed to plead guilty of larceny in the second degree. State v. Levine, 146 Minn. 187, 178 N. W. 491.

Upon a charge of grand larceny a conviction may be had for petit larceny. State v. Morris, — Minn. —, 182 N. W. 721.

LAUNDRIES—See Municipal Corporations, § 6525.

LETTERS OF CREDIT—See Contracts, § 1772.

LIBEL AND SLANDER

IN GENERAL

5503. Who liable—(33) Paton v. Great Northwestern Tel. Co., 141 Minn. 430, 170 N. W. 511.

5505. Intention—Good faith—(42) Keating v. Prudential Casualty Co., 140 Minn. 391, 168 N. W. 178. See 29 Harv. L. Rev. 533 (negligence in the law of defamation).

5507. Publication—Evidence held to justify a finding that a slander was uttered in the hearing of third parties. Roemer v. Jacob Schmidt Brewing Co., 132 Minn. 399, 157 N. W. 640.

WHAT ACTIONABLE

5510. Construction of language—Evidence held to justify a finding that an article published in a newspaper in a foreign language charged that plaintiff was not a citizen of this country. MacInnis v. National Herald Printing Co., 140 Minn. 171, 167 N. W. 550.

(62) Ernster v. Eltgroth, — Minn. —, 182 N. W. 709.

5512. Words apparently innocent actionable by averment—Words not defamatory on their face may be defamatory by reason of the circumstances under which they were used. If, under the circumstances, the words would naturally be understood by the persons to whom they are addressed as charging plaintiff with a crime or as otherwise defamatory, they are actionable. Keating v. Prudential Casualty Co., 140 Minn. 391, 168 N. W. 178.

5514. Spoken words imputing a crime—To render words actionable per se, in an action for slander, it is not necessary that they bear a criminal import. If, in their ordinary acceptation the words spoken would naturally and presumably be understood as importing a charge of crime, they are prima facie actionable. Ernster v. Eltgroth, — Minn. —, 182 N. W. 709.

5515. Words held actionable per se as charging a crime—Charging that a person was a thief and that it could be proved. McCusky v. Kuhlmann, 147 Minn. 460, 179 N. W. 1000.

Charging an unmarried woman with incontinence. Ernster v. Eltgroth, — Minn. —, 182 N. W. 709.

(88, 2) 11 A. L. R. 669.

5517. Words tending to bring one into hatred, contempt or ridicule—It is actionable per se to publish a written charge that an incumbent of a public office and a candidate for re-election is not a citizen, when citizenship is a requisite of eligibility for the office. MacInnis v. National Herald Printing Co., 140 Minn. 171, 167 N. W. 550.

(10) Hrdlicka v. Warner, 144 Minn. 277, 175 N. W. 299.

5518. Defamation in relation to business or calling—In general—A false written charge made to the post office department that a rural mail carrier was threatening the boys of draft age along his line that they would be sent to France if they joined the Nonpartisan League is libelous per se. Hrdicka v. Warner, 144 Minn. 277, 175 N. W. 299.

A discharge certificate or "clearance" issued by an employer to his employee held not actionable per se. Cleary v. Great Northern Ry. Co., 147 Minn. 403, 180 N. W. 545.

(31) Manion v. Jewel Tea Co., 135 Minn. 250, 160 N. W. 767;

Hrdlicka v. Warner, 144 Minn. 277, 175 N. W. 299 ; Northwestern Detective Agency v. Winona Hotel Co., 147 Minn. 203, 179 N. W. 1001.

5519. Defamation of business men—It is actionable per se to say to the customers of a salesman that he is a thief and ought to be sent to the penitentiary and that he failed to turn in money to his employer. Manion v. Jewel Tea Co., 135 Minn. 250, 160 N. W. 767.

It has been held actionable to charge an insurance agent with not reporting or collecting premiums, with the inference that he had collected and misappropriated them. Keating v. Prudential Casualty Co., 140 Minn. 391, 168 N. W. 178.

A written false statement relative to the failure of a business man to pay a hotel bill under circumstances indicating want of business integrity, held actionable per se. Northwestern Detective Agency v. Winona Hotel Co., 147 Minn. 203, 179 N. W. 1001.

5520. Defamation of professional men—It is libelous to charge that a minister's relationship with girls is such as to throw grave suspicion on his purity in life. Patmont v. International Christian Missionary Assn., 142 Minn. 147, 171 N. W. 302.

5521. Defamation of public officers—A false written charge that an incumbent of a public office and a candidate for re-election is not a citizen, when citizenship is a requisite of eligibility, is libelous per se. MacInnis v. National Herald Printing Co., 140 Minn. 171, 167 N. W. 550.

Spoken words disparaging another in his office or calling are actionable or slanderous per se though not charging a crime. It is held that the words spoken of the plaintiff, the banker of the village and treasurer of the school district which included it, did not as a matter of law disparage the plaintiff in his office or calling, and that it was not error to refuse to direct a verdict in his favor. Schnobrich v. Venske, 146 Minn. 21, 177 N. W. 778.

(43) See L. R. A. 1918E, 21.

See § 5525.

PRIVILEGED COMMUNICATIONS

5524. Judicial proceedings—(62) 12 A. L. R. 1247 (testimony of witnesses).

5525. Criticism of candidates for office and public officers—(64–67) See L. R. A. 1918E, 21.

5526. Statements made in discharge of duty—Telegraph companies—A telegraph company is liable in damages to a wife for sending to her husband a defamatory message, neither true nor privileged, concerning her. The court properly instructed the jury that the sending of the defamatory message was privileged if the operator acted carefully and in good faith, but was not privileged if he was negligent or wanting in good faith. Receiving from an utter stranger a message charging plain-

tiff with adultery, and sending it to her husband without any knowledge as to its truth, or as to whether the writer was entitled to send it as a privileged communication, and without making any inquiry, made the good faith of the operator a question for the jury. Paton v. Great Northwestern Tel. Co., 141 Minn. 430, 170 N. W. 511.

A conversation between an employer and an employee in the private office of the employer, a local manager of the employer being present, in the course of which the employer charged the employee with being a thief, held qualifiedly privileged. The plaintiff could not recover because he failed to prove actual malice. The fact that the conversation was overheard by persons in an adjoining room was not such a publication as to remove it from the protection of the privilege. McKenzie v. Wm. J. Burns International Detective Agency, — Minn. —, 183 N. W. 516.

(68) Hoff v. Pure Oil Co., 147 Minn. 195, 179 N. W. 891. See Paton v. Great Northwestern Tel. Co., 141 Minn. 430, 170 N. W. 511.

(68–72) Patmont v. International Christian Missionary Assn., 142 Minn. 147, 171 N. W. 302.

(71) Keating v. Prudential Casualty Co., 140 Minn. 391, 168 N. W. 178; Hoff v. Pure Oil Co., 147 Minn. 195, 179 N. W. 89.

(72) Keating v. Prudential Casualty Co., 140 Minn. 391, 168 N. W. 178.

(76) McKenzie v. Wm. J. Burns International Detective Agency, — Minn. —, 183 N. W. 516.

(78) Keating v. Prudential Casualty Co., 140 Minn. 391, 168 N. W. 178; Paton v. Great Northwestern Tel. Co., 141 Minn. 430, 170 N. W. 511; Hoff v. Pure Oil Co., 147 Minn. 195, 179 N. W. 891.

5529. Matter held privileged—A religious corporation maintaining a church and a bible college is, upon hearing reports derogatory of the character of the dean of its college, qualifiedly privileged in directing an investigation, and in entering its action reciting the nature of the reports on its corporate records, and in calling the attention thereto of its officers directly interested, and it cannot be charged with libel for so doing, except upon proof of actual malice. One cannot escape liability for the spread of libelous matter by stating it as a matter of rumor or report; but a defendant situated as stated in the preceding paragraph, seeking to avail itself of the defence of qualified privilege, and to rebut proof of malice, may show that rumors or reports as to the character of the plaintiff, of the kind which it sought to investigate, came to its attention prior to corporate action, and that it honestly and in good faith and without malice acted thereon and ordered an investigation, and in this case it was error to refuse evidence of such rumors and reports coming to the defendant. Patmont v. International Christian Missionary Assn., 142 Minn. 147, 171 N. W. 302.

Confidential questions and answers concerning the standing of a former employee made in connection with an application by the em-

ployee to a bonding company for a bond. Hoff v. Pure Oil Co., 147 Minn. 195, 179 N. W. 891.

A conversation between an employer and his employee in the office of the employer, a local manager of the employer being present, concerning the question of whether the employee had overdrawn his account. McKenzie v. Wm. J. Burns International Detective Agency, — Minn. —, 183 N. W. 516.

5530. Matter held not privileged—A letter sent by an insurance company to policyholders inferentially charging an agent of the company with collecting and misappropriating premiums. Keating v. Prudential Casualty Co., 140 Minn. 391, 168 N. W. 178.

A telegram charging a wife with adultery. Paton v. Great Northwestern Tel. Co., 141 Minn. 430, 170 N. W. 511.

JUSTIFICATION AND MITIGATION

5531. Justification—The truth as a defence—The truth of an alleged libel is a complete defence in an action for damages, where no special damages are pleaded. Hoff v. Pure Oil Co., 147 Minn. 195, 179 N. W. 891.

(7) Hrdlicka v. Warner, 144 Minn. 277, 175 N. W. 299.

SLANDER OF PROPERTY OR TITLE

5538. In general—The utterance of false and malicious statements, disparaging the title to property in which one has an interest, if the statements are untrue and cause damage, constitutes slander of title. Maliciously filing for record an instrument known to be inoperative is a false and malicious statement within the rule, but where a man does no more than file for record an instrument which he has a right to file, he commits no wrong. Defendant advanced $1,500 to Jass on a second mortgage on land. The mortgage was fully executed by Jass and delivered to the bank. His wife was to call later and execute it. While it was held for that purpose, Jass and wife conveyed to plaintiff, by deed which was recorded. Jass told defendant that plaintiff was advised of defendant's mortgage. Defendant thereupon recorded its mortgage and thereby, plaintiff claims, caused him damage. If defendant had lost its mortgage lien, then the question whether the recording of the mortgage was a wrong depended on the question whether the act was done in good faith. There is no evidence of bad faith. Defendant was within its rights in placing its second mortgage on record. Kelly v. First State Bank, 145 Minn. 331, 177 N. W. 347.

ACTIONS

5540. Alleging good reputation of plaintiff—(47) Wrabek v. Suchomel, 145 Minn. 468, 177 N. W. 764.

5547. Alleging publication by defendant—An allegation that the publication, made by the corporation defendant's manager, was made as its agent, is sufficient as a pleading to charge the defendant with responsibility for his act. Northwestern Detective Agency v. Winona Hotel Co., 147 Minn. 203, 179 N. W. 1001.

5551. Alleging matter in mitigation—Where the complaint alleges injury to the reputation of the plaintiff, a general denial puts his reputation in issue and evidence that it is bad is admissible in mitigation of damages. Wrabek v. Suchomel, 145 Minn. 468, 177 N. W. 764.

5554. Variance—(85) See note, 2 A. L. R. 367.

5555. Evidence—Admissibility—In general—Evidence of rumors concerning plaintiff bearing out the charge made is generally inadmissible, but on an issue of privilege it is admissible to show good faith and honesty and want of malice in defendant. Patmont v. International Christian Missionary Assn., 142 Minn. 147, 171 N. W. 302.

(91) Hrdlicka v. Warner, 144 Minn. 277, 175 N. W. 299 (charge that mail carrier was threatening boys of draft age along his route that they would be sent to France if they joined the Non-partisan League —evidence of other threats similar to those charged—written statement of boy to whom it was charged that threat was made to effect that he had not been threatened).

5560. Law and fact in actions for libel—Evidence held to justify instructions that as a matter of law the charge was untrue. Hrdlicka v. Warner, 144 Minn. 277, 175 N. W. 299.

(11, 12) Paton v. Great Northern Ry. Co., 141 Minn. 430, 170 N. W. 511.

5562. Evidence—Sufficiency—Evidence held insufficient to justify a verdict for plaintiff. Tierney v. National Surety Co., 135 Minn. 484, 157 N. W. 497.

No cause of action for libel was proved or attempted to be proved. Cleary v. Great Northern Ry. Co., 147 Minn. 403, 180 N. W. 545.

(17) MacInnis v. National Herald Printing Co., 140 Minn. 171, 167 N. W. 550; Keating v. Prudential Casualty Co., 140 Minn. 391, 168 N. W. 178; Hrdlicka v. Warner, 144 Minn. 277, 175 N. W. 299; McCusky v. Kuhlmann, 147 Minn. 460, 179 N. W. 1000.

5563. Exemplary damages—Evidence to justify—(21) MacInnis v. National Herald Printing Co., 140 Minn. 171, 167 N. W. 550; Paton v. Great Northwestern Tel. Co., 141 Minn. 430, 170 N. W. 511; Hrdlicka v. Warner, 144 Minn. 277, 175 N. W. 299 (evidence of actual malice held sufficient to justify submission of question of exemplary damages to jury); McCusky v. Kuhlmann, 147 Minn. 460, 179 N. W. 1000.

(22) MacInnis v. National Herald Printing Co., 140 Minn. 171, 167 N. W. 550.

(23) Paton v. Great Northwestern Tel. Co., 141 Minn. 430, 170 N. W. 511.

(25, 26) 12 A. L. R. 1026.

5564. Excessive damages—(30) Roemer v. Jacob Schmidt Brewing Co., 132 Minn. 399, 157 N. W. 640 (slander by agent of corporation—verdict, $3,000—reduced by trial court to $2,000—held excessive on appeal and new trial granted); MacInnis v. National Herald Printing Co., 140 Minn. 171, 167 N. W. 550 (libel of public officer—verdict for $750 held not excessive); Paton v. Great Northwestern Tel. Co., 141 Minn. 430, 170 N. W. 510 (charging a wife with adultery—verdict for $1,800 sustained); McCusky v. Kuhlmann, 147 Minn. 460, 179 N. W. 1000 (charging young mechanic with being a thief—evidence justifying a finding of actual malice and award of exemplary damages—verdict for $1,008.50 held not excessive).

LICENSES

5572. What constitutes—One in possession of premises by permission of a tenant who is entitled to possession is not a trespasser but a licensee. Keithley v. Hettinger, 133 Minn. 36, 157 N. W. 897.

(40) Rosentein v. Gottfried, 145 Minn. 243, 176 N. W. 844 (right to enter and remove grass or timber).

5573. Protection for acts—One who is on the premises of another as a licensee is not liable for the damages caused by a fire thereon, without negligence on his part, while he is occupying the premises. Keithley v. Hettinger, 133 Minn. 36, 157 N. W. 897.

5576. Revocation—(46) See Stoering v. Swanson, 139 Minn. 115, 165 N. W. 875.

LIENS

5577. Definition and nature—Nature of equitable liens. 33 Harv. L. Rev. 423.

5579a. On motor vehicles for labor or materials—Statute—Where upon different dates and as separate transactions labor or material is furnished for the repair of a motor vehicle, a single lien statement may be filed therefor, provided the item first furnished was so furnished within sixty days of the date of filing the statement. Reed v. Horton, 135 Minn. 17, 159 N. W. 1080.

The word "owner" in the statute includes a conditional vendee and a mortgagor in possession. Reed v. Horton, 135 Minn. 17, 159 N. W. 1080.

5581. On funds—The contract recited in the opinion, disclosing certain financial and business relations between defendant and interveners, held not to vest in the latter any right, by way of equitable lien or otherwise, to the fund in litigation superior or paramount to that of a garnishment creditor. National Surety Co. v. Winslow, 143 Minn. 66, 173 N. W. 181.

5584. Waiver and loss—Where a lienholder refused to surrender the property until his claim against it was paid but was not asked and did not state the amount of his claim, he did not lose his lien by claiming an excessive amount in the suit brought against him for the property. Grice v. Berkner, 148 Minn. —, 180 N. W. 923.

LIMITATION OF ACTIONS

IN GENERAL

5587. Generally affects remedy alone—(73) Standard Salt & Cement Co. v. National Surety Co., 134 Minn. 121, 158 N. W. 802.

5588. Cannot compel party to bring action against adverse claimants—(75) Fitger v. Alger, Smith & Co., 130 Minn. 520, 153 N. W. 997; Jentzen v. Pruter, 148 Minn. —, 180 N. W. 1004.

5589. Constitutional questions—Legislative discretion—Vested rights—The repeal of a statute of limitations leaves the action without a limitation. Standard Salt & Cement Co. v. National Surety Co., 134 Minn. 121, 158 N. W. 802.

The legislature has no constitutional power to limit the time to commence an action to vindicate a right under an existing contract to a date anterior to the inception of any cause of action arising out of the contract. A statute which in this manner bars the existing contract rights of claimants without affording them an opportunity to assert them is not a statute of limitations, but an attempt to arbitrarily impair the obligation of the contract. Jentzen v. Pruter, 148 Minn. —, 180 N. W. 1004.

(76) Standard Salt & Cement Co. v. National Surety Co., 134 Minn. 121, 158 N. W. 802; Northern Counties Land Co. v. Excelsior Land etc. Co., 146 Minn. 207, 178 N. W. 497.

(77) Northern Counties Land Co. v. Excelsior Land etc. Co., 146 Minn. 207, 178 N. W. 497.

(78) Standard Salt & Cement Co. v. National Surety Co., 134 Minn. 121, 158 N. W. 802.

5595. Construction of statutes—Prospective or retroactive—A statute of limitations operates prospectively unless a legislative intent to give it a retrospective operation is clear. The postponement of the time when a limitation statute becomes effective evidences an intent to make it of retrospective operation. Where the amending statute materially changes the statute amended, making desirable a postponement of its operation to permit an adjustment to changed provisions, the argument that the limitation was intended to be retrospective is less cogent; and when such limitation, if retrospective, is radical and harsh, and the changes in the substantive provisions of the statute furnish an adequate reason for a postponement, such postponement should not be held to

show an intent to make the statute retrospective. Chapter 209, Laws 1915, approved April 21, 1915, and effective July 1, 1915, amending the Workmen's Compensation Act of 1913, Laws 1913, c. 467, and providing a limitation of one year after injury in which a workman may commence his action, the effect being, if the act is retrospective, to require accrued causes of action to be brought within 70 days after the passage of the statute, was not retrospective. State v. General Accident etc. Corp., 134 Minn. 21, 158 N. W. 715.

(89) State v. General Accident etc. Corp., 134 Minn. 21, 158 N. W. 715; State v. District Court, 138 Minn. 213, 164 N. W. 812.

5596. In equity—(92) McRae v. Feigh, 143 Minn. 241, 173 N. W. 655.

5600. Limitation by contract—Stipulations in a contract limiting the time within which an action may be brought thereon are valid when not unreasonable, though the time therein fixed may vary from that fixed by the statute of limitations. When the stipulated limitation is not unreasonable, and the event which sets it in motion is definite, certain, and bound to occur, and neither party has the power indefinitely or unreasonably to postpone or suspend the right to sue pending the happening of some other event subsequent to that sipulated as the one which sets such limitation in motion, the stipulation in the contract is valid and binding. Kulberg v. Supreme Council, 135 Minn. 150, 160 N. W. 685.

RUNNING OF STATUTE

5602. In general—A cause of action may accrue so as to set the statute running, though an order of court making an assessment as a basis for an action is a prerequisite to the commencement thereof. Shearer v. Christy, 136 Minn. 111, 161 N. W. 498.

The renunciation and repudiation of a contract by one of the parties thereto does not set the statute in motion against the other party though it gives him an election to sue at once. Wold v. Wold, 138 Minn. 409, 165 N. W. 229.

The time of the running of the statute may be extended by an agreement of the parties for an extension of time in which to complete a construction contract. Newton v. Southern Colonization Co., 145 Minn. 164, 176 N. W. 501.

A verbal denial of the existence of a contract or a declaration of an intention not to comply with its terms by one of the parties, prior to the time he is required to perform the same and after the other party has fully performed, does not set the statute of limitations running as against the other party. Matteson v. Blaisdell, — Minn. —, 182 N. W. 442.

(8) See Callopy v. Modern Brotherhood, 133 Minn. 409, 158 N. W. 625; Shearer v. Christy, 136 Minn. 111, 161 N. W. 498.

(13) Shearer v. Christy, 136 Minn. 111, 161 N. W. 498.

(15) See Matteson v. Blaisdell, — Minn. —, 182 N. W. 442.

See § 4732.

5603. Computation of time—(16) Haack v. Coughlan, 134 Minn. 78, 158 N. W. 908.

5604. When action is deemed begun—Statute—In determining whether a cause of action is barred by the statute of limitations the day upon which it accrued is excluded. The statute is tolled as to a particular cause of action when the complaint is drawn and the summons thereon is served, even though the complaint be demurrable; for, if it be, an amended complaint may be served, provided the cause of action therein is the same cause attempted to be stated in the original complaint. Haack v. Coughlan, 134 Minn. 78, 158 N. W. 908.

5605. In particular cases—An action against a surety on the bond of a police officer. Haack v. Coughlan, 134 Minn. 78, 158 N. W. 908.

A cause of action to recover payments for the transportation of freight in excess of the rates fixed by Laws 1907, c. 232 (G. S. 1913, §§ 4298–4304), accrued when payments were made and not upon the dissolution of an injunction then in force restraining the putting into effect of the statutory rates. L. Christian & Co. v. Chicago etc. Ry. Co., 135 Minn. 45, 159 N. W. 1082.

An action against a stockholder to enforce his constitutional liability to creditors. Shearer v. Christy, 136 Minn. 111, 161 N. W. 498.

Action for repairs of pavement which were made during three successive years on separate orders for each year's work. The price of each year's work became due on its completion and the statute began to run from that. Steele v. Duluth, 136 Minn. 288, 161 N. W. 593.

An action to enforce a contract to make one an heir and provide for him by will. Wold v. Wold, 138 Minn. 409, 165 N. W. 229.

A contract required the construction of a railroad by December 31, 1912. When that date arrived a substantial part of the work had been done, but it had not been completed. The obligor asked further indulgence and continued the work of construction. The other party acquiesced. Held, the conduct of the parties operated to extend the time of completion of the construction of the railroad for a reasonable time after December 31, 1912, and the statute of limitation did not begin to run upon the cause of action for breach of that provision of the contract until the expiration of such reasonable time. Newton v. Southern Colonization Co., 145 Minn. 164, 176 N. W. 501.

A cause of action for specific performance of a contract to devise property accrued at the death of the promisor and was not barred by the statute of limitations by reason of the fact that more than six years before his death he sold and conveyed the property to a stranger. Colby v. Street, 146 Minn. 290, 178 N. W. 599.

A contract for services to be paid for by a conveyance or in cash if no conveyance was made. Welsh v. Welsh's Estate, 148 Minn. —, 181 N. W. 356.

Action for the reasonable value of services rendered under a contract whereby defendant promised to pay for them by a devise. Thereafter

defendant conveyed the land which he promised to devise to plaintiff. Matteson v. Blaisdell, — Minn. —, 182 N. W. 442.

(37) Wagner v. Seaberg, 138 Minn. 37, 163 N. W. 975; Savage v. Minnesota Loan & Trust Co., 142 Minn. 187, 171 N. W. 778. See Colby v. Street, 146 Minn. 290, 178 N. W. 599; Welsh v. Welsh's Estate, 148 Minn. —, 181 N. W. 356.

5610. Absence from state—Statute—(55) McRae v. Feigh, 143 Minn. 241, 173 N. W. 655.

5612. Causes of action arising out of state—Statute—The statute has been held inapplicable to an action on a foreign judgment. J. L. Bieder Co. v. Rose, 138 Minn. 121, 164 N. W. 586.

At the time of the commencement of the action the claim for services rendered under the contract was barred by the statute of limitations of the state of Florida, and by force of G. S. 1913, § 7709, of this state, is also barred here. Kamper v. Hunter Land Co., 146 Minn. 337, 178 N. W. 747.

The statute is constitutional. Canadian Northern Ry. Co. v Eggen, 252 U. S. 553.

5613. Disabilities—Statute—(71) L. Christian & Co. v. Chicago etc. Ry. Co., 135 Minn. 45, 159 N. W. 1082.

5618. Effect of injunction—Under the statute the period of statutory limitation is not extended for more than five years by an injunction staying an action, nor in any case for more than one year after disability ceases. Whether a cause of action in a party restrained by an injunction remaining in force until the lapse of the statutory period is barred, or whether he is entitled to relief in equity, is an open question. L. Christian & Co. v. Chicago etc. Ry. Co., 135 Minn. 45, 159 N. W. 1082. See § 4475a.

5622. Amendment of pleading—(83) Gilbert v. Gilbert, 120 Minn. 45, 138 N. W. 943; Haack v. Coughlan, 134 Minn. 78, 158 N. W. 908; Strand v Chicago G. W. R. Co., 147 Minn. 1, 179 N. W. 369 (amended complaint held not to set up a new cause of action.

NEW PROMISE AND ACKNOWLEDGMENT

5624. Sufficiency of promise or acknowledgment—If a promise sued on is a mere promise to pay an outlawed debt the debt must be identified. Baxter v. Brandenburg, 137 Minn. 259, 163 N. W. 516.

A new promise in writing made either before or after the debt is outlawed starts a new period of limitation. The new promise must identify the debt, but specific reference to it is not necessary if the language with certainty covers it. Language that would be sufficiently specific in a bond is sufficiently specific in a new promise. A promise to pay all claims of a class is sufficient. A letter to the public signed by a railroad company, promising to refund the difference between a statutory freight

rate and a higher rate collected, on all shipments made during a period of litigation to determine the validity of the statutory rate, is sufficiently definite. Big Diamond Milling Co. v. Chicago etc Ry. Co., 142 Minn. 181, 171 N. W. 799.

An unaccepted offer of compromise is generally held insufficient. 12 A. L. R. 544.

(87, 90) Baxter v. Brandenburg, 137 Minn. 259, 163 N. W. 516.

5629. Conditional promise—A conditional new promise becomes effectual to revive a claim on fulfilment of the condition by the creditor or on his readiness to fulfil. Where a promise was to pay properly supported claims and the plaintiff submitted claims supported by proof, whereupon the defendant expressed regret that plaintiff had taken the time and trouble to furnish proof and declined the claims for the sole reason that its own records had been destroyed so that it was unable to verify the claims, defendant will not be heard to complain that plaintiff's claims were not properly supported. Big Diamond Milling Co. v. Chicago etc. Ry. Co., 142 Minn. 181, 171 N. W. 799.

5631. Account stated—(97) 34 Harv. L. Rev. 560.

PART PAYMENT

5641. Indorsement of payment on notes—(15) Riley v. Mankato Loan & Trust Co., 133 Minn. 289, 158 N. W. 391.

5647a. Burden of proof—Where a note shows on its face that it is more than six years past due, if the holder relies upon part payment to avoid the bar of the statute of limitations, the burden is upon him to prove it. When indorsement of payment purporting to have been made within six years appears on the note, it is error to charge the jury that the burden is on the defendant to prove that the payment was not made at the date of the indorsement. Riley v. Mankato Loan & Trust Co., 133 Minn. 289, 158 N. W. 391.

PARTICULAR ACTIONS

5648. Actions on contracts and obligations generally—An action for malpractice falls within this provision. Burke v. Mayland, — Minn. —, 184 N. W. 32.

(43) See Welsh v. Welsh's Estate, 148 Minn. —, 181 N. W. 356.

5650. Actions on running accounts not mutual—(52) See Steele v. Duluth, 136 Minn. 288, 161 N. W. 593.

5652. Actions for relief on the ground of fraud—Evidence held to justify a finding that an action was commenced within six years after the plaintiff discovered the facts constituting the fraud, and that he was not put upon inquiry by facts in his possession which if pursued would have resulted in an earlier discovery. Lundquist v. Peterson, 134 Minn. 279, 158 N. W. 426, 159 N. W. 569.

(59) Lundquist v. Peterson, 134 Minn. 279, 158 N. W. 426, 159 N. W. 569.

5655. Actions for various torts—An action for malpractice held not to fall within the two-year limitation. Burke v. Mayland, — Minn. —, 184 N. W. 32.

PLEADING AND BURDEN OF PROOF

5659. Demurrer—(95) Riley v. Mankato Loan & Trust Co., 133 Minn. 289, 158 N. W. 391; Beach v. Gendler, — Minn. —, 182 N. W. 607.

5660. Anticipating defence in complaint—Fraud—(99) Lundquist v. Peterson, 134 Minn. 279, 158 N. W. 426, 159 N. W. 569. See § 5135.

5661. Waiver by not pleading—Where the principal on an official bond appeared and answered without claiming the bar of the statute, it was held that his surety could not claim that the statute had run against his principal and that for that reason the surety could not be held. Haack v. Coughlan, 134 Minn. 78, 158 N. W. 908.

(5) Haack v. Coughlin, 134 Minn. 78, 158 N. W. 908.

5664. Amendment of complaint—(11) Haack v. Coughlan, 134 Minn. 78, 158 N. W. 908.

5666a. Sufficiency of plea—The plea is not in the approved form. But it appears from the face of the complaint that the time designated by the compensation statute for the instituting of any proceeding thereunder had expired when this suit was brought. A demurrer on the ground that it appears from the face of the complaint that no cause of action is stated would have been well taken and raised the bar of the statute. We think the plea in the form made should be held as effective as a general demurrer of the sort mentioned. No objection to the form of plea was made at the trial. Beach v. Gendler, — Minn. —, 182 N. W. 607.

5666b. Burden of proof—If the statute of limitation is pleaded as a defence, and the issue is presented by the evidence, it is proper to charge the jury that the defendant has the burden of proof upon such issues. Matteson v. Blaisdell, — Minn. —, 182 N. W. 442. See § 5647a.

LIS PENDENS

5669. Statutory notice of lis pendens—(24, 25) Trask v. Bodson, 141 Minn. 114, 169 N. W. 489.

5670. Duration—(29) See 10 A. L. R. 415.

LIVERY STABLE AND GARAGE KEEPERS

5673a. Public garage—Liability for loss of property—Burden of proof —Notice of non-liability—When an auto is stolen from a public garage the burden is upon the garage keeper of proving that the loss did not come from his negligence; and this is not merely the burden of going forward with proofs, or a shifting burden, but the burden of proving to the jury that the loss did not come from his negligence. The charge of the court was sufficiently favorable to the defendant; and the evidence was not such as to require a finding that there was not negligence of the defendant causing the loss. The court did not err in refusing to receive evidence of notices posted about the garage, not shown to have come to the attention of the plaintiff, disclaiming liability in case of loss by theft. Hoel v. Flour City Fuel & Transfer Co., 144 Minn. 280, 175 N. W. 300.

Where an automobile is stolen from a public garage in which it had been stored for pay, the burden is on the garage keeper to show that he was free from negligence. It appearing that defendant had a large number of automobiles in storage and had no one at the garage during the night, that the thieves entered through a window which may have been left open by defendant's employees, and that the doors through which automobiles passed could be opened from the inside of the building at any time by simply unhooking an iron hasp from a staple in the wall, the court cannot say as a matter of law that defendant was free from negligence, and the finding of the jury must stand. The amount of the verdict was justified by the evidence. The charge was correct and we find no reversible errors in the rulings at the trial. Steenson v. Flour City Fuel & Transfer Co., 144 Minn. 375, 175 N. W. 681. See Newman v. Flour City Fuel & Transfer Co., 144 Minn. 473, 175 N. W. 682.

LOGS AND LOGGING

CONTRACTS AND CONVEYANCES

5674. Sale of logs or lumber—(45) Jock v. O'Malley, 138 Minn. 388, 165 N. W. 233 (sale of lumber piled on a designated tract of land—meaning of "mill run").

5675. Sale of standing timber—Deeds—Licenses to cut timber—A deed of timber lands, part of which were covered by outstanding timber deeds, contained a clause granting the land subject to the provisions of the timber deeds, and another clause reserving to the grantor the timber on all the land described in his deed. Held, that the reservation clause should be construed to apply only to timber which had not already been sold and conveyed. International Lumber Co. v. Staude, 144 Minn. 356, 175 N. W. 909.

One of the provisions of a timber deed was that the grantee should cut and remove the timber within fifteen years from the date of the deed,

and that during that time and as long as the timber was not cut he should have the exclusive right to occupy the lands on which the timber was located and should pay all taxes which fell due prior to the cutting of the timber. Held, that the grantor in such deed had a contingent reversionary interest in the timber, which he might convey or reserve to himself in a deed of the land subsequently executed. International Lumber Co. v. Staude, 144 Minn. 356, 175 N. W. 909.

(50) Itasca Lumber Co. v. Johnson, 135 Minn. 467, 160 N. W. 784 (mortgage on land—agreement to pay off—foreclosure—agreement to buy at foreclosure sale as part of consideration for timber deed—findings of court sustained); Bell Lumber Co. v. Seaman, 136 Minn. 106, 161 N. W. 383 (timber deed authorizing holder to cut and remove all merchantable timber standing on the land); Virginia & Rainy Lake Co. v. Helmer, 140 Minn. 135, 167 N. W. 355 (timber deed).

5676. Contracts for cutting, hauling and banking logs—(51) Bell Lumber Co. v. Seaman, 136 Minn. 106, 161 N. W. 383 (contract to cut and remove all merchantable timber covered by a timber deed and bank it at "county road yard").

5677. Contracts for sawing logs—(52) Johnson v. Sinclair, 140 Minn. 436, 168 N. W. 181 (controversy as to amount of logs one party agreed to furnish for sawing).

SCALING

5683. Scale bills as evidence—(65) Carnegie Dock & Fuel Co. v. Midland Lumber & Coal Co., — Minn. —, 182 N. W. 515. See State v. Equitable Surety Co., 140 Minn. 48, 167 N. W. 292.

5684. Impeachment of scale bills—(69) See Carnegie Dock & Fuel Co v. Midland Lumber & Coal Co., — Minn. —, 182 N. W. 515.

DRIVING, FLOATING, RAFTING AND BOOMING LOGS

5691. Boom companies—Powers and liabilities—Booms and piers—Where logs are cast upon the land of a riparian owner the owner of the logs may enter upon the land to remove the logs. Plaude v. Mississippi & Rum River Boom Co., 141 Minn. 170, 169 N. W. 600.

The evidence justified the jury in finding that the negligence of the defendant was the cause of the formation of an immense ice and log jam in the Mississippi river, resulting in the overflow and damage to plaintiff's land. It was not error to receive evidence that defendant's works in the river had, during the course of time, changed the natural conditions of the river bed, and created sand bars and obstructions therein. The defendant was liable for the injury to the soil occasioned when it removed the logs from plaintiff's land. The damages are not excessive. Plaude v. Mississippi & Rum River Boom Co., 141 Minn. 170, 169 N. W. 600.

LIENS

5701. Assignment of lien—Statute—By the enactment of chapter 309, Laws of 1905 (section 3858, G. S. 1913), which contains no repealing clause, it was not the legislative intent to repeal or modify the provisions of section 7059, G. S. 1913, as to giving notice of the assignment of wages for labor upon timber products. A time check issued by a contractor to a laborer, containing a memorandum of the labor and the amount he is entitled to receive therefor, is evidence of his claim for such labor, and the indorsement in blank of such check and delivery thereof is an assignment in writing of the claim as required by section 7059 of the statutes. Sheldon v. Padgett, 144 Minn. 141, 174 N. W. 827.

5702. Lien statement—In perfecting a lien statement for wages for labor upon timber products under the provisions of section 7059, G. S. 1913, where the timber products are not all marked by registered log marks, it is sufficient to attach the original assignments of the claims to the statement filed in the office of the surveyor general of logs and lumber, and copies of such assignments to the statement filed with the clerk of the district court of the county. Sheldon v. Padgett, 144 Minn. 141, 174 N. W. 827. See Watson v. Padgett, 144 Minn. 462, 174 N. W. 829.

5703. Enforcement—The issuance of time checks to laborers for work performed held evidence of the completion of the work. Sheldon v. Padgett, 144 Minn. 141, 174 N. W. 827.

5704. Judgment—Costs—Attorney's fees—In an action to enforce a lien for wages for labor upon timber products, claimant is, under the provisions of section 7067, G. S. 1913, entitled to recover $10 statutory costs, and in addition thereto $20 attorney's fees. Sheldon v. Padgett, 144 Minn. 141, 174 N. W. 827.

LOST INSTRUMENTS

5716. Evidence—Admissibility—A party may prove the execution and contents of a lost deed without first producing the subscribing witnesses thereto. Berryhill v. Clark, 137 Minn. 135, 163 N. W. 137.

(70, 71) Latourell v. Hobart, 135 Minn. 109, 160 N. W. 259.

5717. Evidence—Sufficiency—(72) See Berryhill v. Clark, 137 Minn. 135, 163 N. W. 137.

LUMBER YARDS—See Municipal Corporations, §§ 6756, 6768, 6773, 6776.

MAIMING

5721. What constitutes—Intent—The word "wilfully" in this connection means designedly or intentionally. If the act is intentionally done it is immaterial that the defendant did not intend the particular injury inflicted. State v. Damuth, 135 Minn. 76, 160 N. W. 196.

Grievous bodily harm may result from an assault though the assailant is unarmed. State v. Damuth, 135 Minn. 76, 160 N. W. 196.

(78) See L. R. A. 1916E, 494.

5722a. Conviction for lesser offence—Under an indictment charging mayhem there may be a conviction for assault in the second degree, or possibly in the third degree, for an assault and battery is necessarily included in the commission of the crime of maiming. State v. Damuth, 135 Minn. 76, 160 N. W. 196. See § 2486.

MALICIOUS PROSECUTION

5725. Public policy to protect prosecutor—(86) Eastman v. Leiser Co., 148 Minn. —, 181 N. W. 109.

5726. Who may be liable—(88, 89) Eastman v. Leiser Co., 148 Minn. —, 181 N. W. 109.

5727. Termination of proceeding—(91) See Martin v. Cedar Lake Ice Co., 145 Minn. 452, 177 N. W. 631.

5728. Conviction of plaintiff—Reversal on appeal—(97) Buhner v. Reusse, 144 Minn. 450, 175 N. W. 1005.

5729. Institution or instigation of proceedings—Defendants preferred charges of arson against the plaintiff to a grand jury, in September. 1914, but no indictment was returned. Thereafter the state fire marshal investigated the origin of the fire and submitted a transcript of the evidence obtained, together with a suggestion that the matter be submitted to the next grand jury, to the county attorney, whereupon the county attorney caused a subpoena to be served upon all witnesses, to be and appear before the grand jury at the September, 1915, term of court, which resulted in the finding of the indictment and prosecution complained of. Held, that the defendants did not institute the prosecution before the grand jury that returned the indictment, so as to render them liable, for want of probable cause, in an action for malicious prosecution. Moriarty v. Almich, 141 Minn. 247, 169 N. W. 798.

One who sets the machinery of the criminal law in motion causes the "prosecution," as that term is used in the law of malicious prosecution. The evidence is sufficient to show that defendant Leiser Company's employees caused the prosecution of plaintiff. Eastman v. Leiser Co., 148 Minn. —, 181 N. W. 109.

(1) Eastman v. Leiser Co., 148 Minn. —, 181 N. W. 109.

5730. What constitutes probable cause—Want of probable cause is the gist of an action for malicious prosecution. Martin v. Cedar Lake Ice Co., 145 Minn. 452, 177 N. W. 631.

(2) Jones v. Flaherty, 139 Minn. 97, 165 N. W. 963.

(3) Buhner v. Reusse, 144 Minn. 450, 175 N. W. 1005.

(9) Buhner v. Reusse, 144 Minn. 450, 175 N. W. 1005; Martin v. Cedar Lake Ice Co., 145 Minn. 452, 177 N. W. 631.

5731. Advice of counsel—To relieve one who institutes a criminal prosecution from liability therefor on the ground that he acted on the advice of counsel, or on the ground that he merely presented the facts to a magistrate who exercised his own judgment in causing the arrest, it must appear that he fully and fairly disclosed to them all the material facts known to him, and whether he has done so is ordinarily a question for the jury. Dombrovske v. Dombrovske, 137 Minn. 56, 162 N. W. 891.

Advice of justice of peace, magistrate or layman, 12 A. L. R. 1230.

(13) Dombrovske v. Dombrovske, 137 Minn. 56, 162 N. W. 891; Jones v. Flaherty, 139 Minn. 97, 165 N. W. 963.

(17) Jones v. Flaherty, 139 Minn. 97, 165 N. W. 963.

(20, 21) Dombrovske v. Dombrovske, 137 Minn. 56, 162 N. W. 891.

5732. Duty to make inquiry—(24) Dombrovske v. Dombrovske, 137 Minn. 56, 162 N. W. 891; Eastman v. Leiser Co., 148 Minn. —, 181 N. W. 109. See note, 5 A. L. R. 1688.

5735. Malice inferable from want of probable cause—(34) Martin v. Cedar Lake Ice Co., 145 Minn. 452, 177 N. W. 631; Eastman v. Leiser Co., 148 Minn. —, 181 N. W. 109. See L. R. A. 1918A, 872.

5743. Burden of proof—(47) Jones v. Flaherty, 139 Minn. 97, 165 N. W. 963; Eastman v. Leiser Co., 148 Minn. —, 181 N. W. 109.

5744. Law and fact—In an action for malicious prosecution the question as to whether probable cause existed for the prosecution is for the court; but this rule is not absolute and where the evidence is conflicting or different inferences may be drawn from it, the question may properly be submitted to the jury. Dombrovske v. Dombrovske, 137 Minn. 56, 162 N. W. 891.

When the facts relating to probable cause are undisputed, the question whether it has been established is for the court. Buhner v. Reusse, 144 Minn. 450, 175 N. W. 1005.

(50) Dombrovske v. Dombrovske, 137 Minn. 56, 162 N. W. 891; Buhner v. Reuse, 144 Minn. 450, 175 N. W. 1005; Eastman v. Leiser Co., 148 Minn. —, 181 N. W. 109.

(54) Dombrovske v. Dombrovske, 137 Minn. 56, 162 N. W. 891.

5745. Damages—(63) Jones v. Flaherty, 139 Minn. 97, 165 N. W. 963 (verdict for $1,125 held excessive and reduced to $600).

5748. Evidence—Sufficiency—Evidence held to justify a verdict for defendant. Klehr v. Geis, 135 Minn. 475, 160 N. W. 1033.

(95) Dombrovske v. Dombrovske, 137 Minn. 56, 162 N. W. 891; Jones v. Flaherty, 139 Minn. 97, 165 N. W. 963; Eastman v. Leiser Co., 148 Minn.—, 181 N. W. 109.

(98) Buhner v. Reusse, 144 Minn. 450, 175 N. W. 1005.

5749. Question of probable cause on appeal—If the issue of probable cause is submitted generally to the jury upon controverted facts, the court of review will assume the existence of facts as favorable to the jury's determination as the evidence will sustain and then decide whether those facts and the inferences which the court may draw from them establish want of probable cause. Eastman v. Leiser Co., 148 Minn.—, 181 N. W. 109.

5750. Malicious prosecution of civil action—A plaintiff cannot maintain an action for malicious prosecution of a civil suit wherein judgment was obtained against him upon the claim sued on. The existence of the judgment establishes the validity of the claim so that the transfer thereof prior to suit cannot be held wrongful. Martin v. Cedar Lake Ice Co., 145 Minn. 452, 177 N. W. 631.

Arrest of person or seizure of property as a condition of action. L. R. A. 1918D, 550.

5751. Malicious attachment—To maintain an action for malicious attachment, the plaintiff must allege and show that the attachment was vacated in the action in which it issued on the ground that it was unwarranted by the facts; or that he had no opportunity to make a motion to vacate it. If he could have traversed the affidavit and tested the validity of the attachment in the original action and failed to do so, he cannot maintain an action for malicious attachment although the attachment may have been vacated by giving the statutory bond or by proceedings in bankruptcy. Furst v. W. B. & W. G. Jordan, 142 Minn. 230, 171 N. W. 772.

(5) See Northern Timber Products Co. v. Stone-Ordean-Wells Co., 148 Minn.—, 180 N. W. 920 (action for conversion with allegations of malicious attachment).

MANDAMUS

IN GENERAL

5752. Definition and nature—Mandamus does not perform the office of a writ of error and cannot be used for the purpose of reviewing the decision of an officer, board or tribunal which acted within the jurisdiction conferred upon it by law. It will not lie to control or coerce the discretion vested in any municipal or executive officer. It will lie only to compel the performance of a duty which the law clearly and posi-

tively requires the officer, board or tribunal to perform. State v. Wunderlich, 144 Minn. 368, 175 N. W. 677.

(6) See 33 Harv. L. Rev. 462.

5753. Matters of discretion—(11) State v. Anding, 132 Minn. 36, 155 N. W. 1048; Olson v. Honett, 133 Minn. 160, 157 N. W. 1092, 1103; State v. Minneapolis, 140 Minn. 433, 168 N. W. 188; State v. Wunderlich, 144 Minn. 368, 175 N. W. 677. See § 4911.

(12) State v. Anding, 132 Minn. 36, 155 N. W. 1048; Olson v Honett, 133 Minn. 160, 157 N. W. 1092, 1103.

5754a. Laches—The writ may be denied on the ground of laches. United States v. Lane, 249 U. S. 367.

5756 Right and duty must be clear and complete—The right must be so clear as not to admit of any reasonable controversy. State v. City Council, 121 Minn. 182, 141 N. W. 97; Olson v. Honett, 133 Minn. 160, 157 N. W. 1092, 1103.

It must appear that it is the clear duty of the officer to perform the act at the particular time and in the particular manner in which it is demanded of him. Olson v. Honett, 133 Minn. 160, 157 N. W. 1092, 1103.

(17) State v. Minneapolis, 140 Minn. 433, 168 N. W. 188.

5758. Misconduct of applicant—Where a candidate had failed to file a statement of his expenses as required by statute it was held proper to deny his application for a writ to compel the county auditor to issue him a certificate of election. Dale v. Johnson, 143 Minn. 225, 173 N. W. 417.

(19) Dale v. Johnson, 143 Minn. 225, 173 N. W. 417.

5759. When it would be futile—A public officer will not be compelled to do an act in furtherance of a project when it is apparent that the project must fail because those whose duty it is to provide the necessary funds will not do so, or are unable to provide them. State v. Anding, 132 Minn. 36, 40, 155 N. W. 1048.

Mandamus will not issue to compel the doing of an act which has already been done, or which the respondent is willing to do without coercion. It will not issue to compel the revocation of a building permit for a defect which has been corrected, or which the parties concerned are ready and willing to correct. State v. Nash, 134 Minn. 73, 158 N. W. 730.

5760. Unauthorized or illegal acts—(21) State v. Duluth, 134 Minn. 355, 159 N. W. 792.

5762. Duties resulting from office—While mandamus may be a proper remedy to compel the members of a town board to repair a public road when they refuse to exercise any discretion in the matter, or perform their duty in an arbitrary or capricious manner, the applicant for the writ must show a clear right to the relief demanded. Olson v. Honett, 133 Minn. 160, 157 N. W. 1092, 1103.

5762a. Unincorporated societies and associations—Mandamus will not generally lie to regulate the affairs of unincorporated societies or associa-

tions. but where a partnership is charged by law with the duty of furnishing a public utility, mandamus is a proper remedy to enforce it. State v. Four Lakes Tel. Co., 141 Minn. 124, 169 N. W. 480.

ACTS WHICH MAY BE COMPELLED

5763. Right to office—Election contests—(25) 30 Harv. L. Rev. 767.

5763a. Reinstatement of removed appointive officer—While mandamus will lie to reinstate an appointee removed in violation of law, it will not lie to reverse the decision of an officer empowered by law to determine as a matter of fact whether cause for removal existed. The commissioner of education having removed the relator in the exercise of the power vested in him by the charter and having followed the procedure prescribed by the charter for making such removals and the reasons assigned for the removal being sufficient to justify it, his decision cannot be reviewed by mandamus. State v. Wunderlich, 144 Minn. 368, 175 N. W. 677.

5764. Orders of railroad and warehouse commission—(28) State v. Chicago etc. Ry. Co., 139 Minn. 55, 165 N. W. 869; State v. Four Lakes Tel. Co., 141 Minn. 124, 169 N. W. 480.

5764a. Change of venue—Mandamus is the appropriate remedy for reviewing or challenging an order changing the venue of an action. Winegar v. Martin, — Minn. —, 182 N. W. 513. See L. R. A. 1917F, 914.

5766. Mandamus granted—Miscellaneous cases—To compel a county auditor to consider and pass on bids for the construction of a state rural highway. State v. Anding, 132 Minn. 36, 155 N. W. 1048.

To compel a corporation and its officers to allow a stockholder to inspect the corporate records. State v. Displayograph Co., 135 Minn. 479, 160 N. W. 486.

To compel a chairman of a school board to sign the contract of a teacher. State v. Middleton, 137 Minn. 33, 162 N. W. 688.

To compel a building inspector to issue a permit for a building. Meyers v. Houghton, 137 Minn. 481, 163 N. W. 754.

To compel a city council to accept and approve a plat. State v. Minneapolis, 140 Minn. 433, 168 N. W. 188.

To compel a mayor to sign a liquor license. State v. Reiter, 140 Minn. 491, 168 N. W. 714.

To compel a district court to proceed with the trial of a transitory action brought by a non-resident. State v. District Court, 140 Minn. 494, 168 N. W. 589.

To compel a telephone company to furnish certain service to an individual State v. Four Lakes Tel. Co., 141 Minn. 124, 169 N. W. 480.

To compel a county auditor to cancel the record of the payment of certain taxes and to re-extend the same as originally levied and assessed, and to make a refundment of taxes paid, and not to accept in payment

of certain delinquent taxes less than a certain amount. State v. Erickson, 147 Minn. 453, 180 N. W. 544.

To compel payment of salary of public officer or employee. 5 A. L. R. 572.

(36) State v. Great Northern Ry. Co., 134 Minn. 249, 158 N. W. 972. See Digest, § 8121.

(46) State v. District Court, 146 Minn. 422, 178 N. W. 1004; Winegar v. Martin, — Minn. —, 182 N. W. 513. See L. R. A. 1917F, 914.

5767. Mandamus denied—Miscellaneous cases—To compel a town board to repair a public road. Olson v. Honett, 133 Minn. 160, 157 N. W. 1092, 1103.

To compel a city building inspector to revoke a building license for alleged defects in a drainage system for the roof water of a building. State v. Nash, 134 Minn. 73, 158 N. W. 730.

To compel a railroad company to depress its tracks in a city, the city not having adopted any plan for the grades at adjacent crossings. State v. Chicago etc. Ry. Co., 135 Minn. 277, 160 N. W. 773.

To compel a city council to issue a liquor license. State v. Duluth, 134 Minn. 355, 159 N. W. 792.

To compel a county auditor to issue a certificate of election to a candidate who had failed to file a statement of his expenses as required by statute. Dale v. Johnson, 143 Minn. 225, 173 N. W. 417.

To compel a municipal commissioner of education to reinstate a school teacher who had been removed in pursuance of the municipal charter. State v. Wunderlich, 144 Minn. 368, 157 N. W. 677.

(72) See Haroldson v. Norman, 146 Minn. 426, 178 N. W. 1003 (doubting the correctness of Clark v. Buchanan).

PROCEDURE

5769. Parties defendant—In mandamus to compel the repair of public roads the persons composing the town board may properly be made defendants. Olson v. Honett, 133 Minn. 160, 157 N. W. 1092, 1103.

5770. On whose information issued—(29, 30) Olson v. Honett, 133 Minn. 160, 157 N. W. 1092, 1103.

5771. Successive applications—Res judicata—A determination on a motion to quash or dismiss, at the closs of plaintiff's case, is not res judicata. State v. Chicago etc. Ry. Co., 135 Minn. 277, 160 N. W. 773.

5773. Demand before suit—(35) 5 A. L. R. 572.

5776. Pleading—To state a case for the issuance of a writ to compel a town board to repair roads, facts must be pleaded which clearly negative that the repairs sought to be compelled are those which the law leaves to the board to perform in such manner and at such times as its discretion and judgment dictate. Olson v. Honett, 133 Minn. 160, 157 N. W. 1092, 1103.

Allegations in the petition and writ may be upon information and belief where they cannot be truthfully made as of personal knowledge. State v. Duluth, 134 Minn. 355, 159 N. W. 792.

(43) Olson v. Honett, 133 Minn. 160, 157 N. W. 1092, 1103 (petition and writ to compel repair of public roads by town board held too vague and indefinite).

5777. Jury trial—Where the facts are admitted or not controverted it is not error to deny a jury trial. State v. Anding, 132 Minn. 36, 155 N. W. 1048.

5781. Appeal—Scope of review—Weight given findings of trial court—Upon appeal in mandamus proceedings to compel the issuance of a permit for the erection of a factory within a prescribed residential district in a city of the first class, the order of the trial court will be reversed only where there is no evidence reasonably tending to sustain the findings of the trial court. State v. Houghton, 142 Minn. 28, 170 N. W. 853.

No appeal lies from an order granting or denying a motion for judgment on the pleadings. State v. Penney, 144 Minn. 463, 174 N. W. 611.

In reviewing the determination of an administrative board or commission the supreme court will go no further than to inquire whether it kept within its jurisdiction, whether it proceeded upon the proper theory of the law, whether its action was arbitrary or opressive or unreasonable and so the exercise of its will and not of its judgment, and whether there was evidence upon which it might reasonably make the determination which it made. State v. State Securities Commission, 145 Minn. 221, 176 N. W. 759. See § 397b.

MARITIME LIENS

5782. State and federal jurisdiction—(59) See Lindstrom v. Mutual Steamship Co., 132 Minn. 328, 334, 156 N. W. 669; Corsica Transit Co. v. W. S. Moore Grain Co., 253 Fed. 689.

MARRIAGE

5784. A civil contract—A contract may be entered into by correspondence. Great Northern Ry. Co. v. Johnson, 254 Fed. 683. See 32 Harv. L. Rev. 848; 33 Id. 13.

5788a. Remarriage after divorce within prohibited time—Effect of remarriage within prohibited time on property rights. Conflict of laws. 32 Harv. L. Rev. 574.

5792. Indian marriages—(75) La Framboise v. Day, 136 Minn. 239, 161 N. W. 529.

5793. Presumptions—Conflict of presumptions on successive marriages by the same person. 30 Harv. L. Rev. 500.

Presumption of validity of second marriage. 34 Harv. L. Rev. 790; Ann. Cas. 1918E, 609.

5797. Annulment—Grounds—Statute—In an action to annul a marriage contract upon the ground that one of the parties thereto was an epileptic at the time of the marriage, proof that the defendant was an epileptic at the time of such marriage is not, in the absence of a showing of fraud on the part of the afflicted party in concealing the epileptic condition, sufficient to warrant a decree of annulment. The legislature not having prescribed epilepsy as a ground for annulment of marriage, and the courts of the state never having recognized that disease as a cause for nullifying a marriage contract, the judgment of the trial court denying such relief is justified, notwithstanding a finding of fact that the defendant was an epileptic at the time of the marriage. Behsman v. Behsman, 144 Minn. 95, 174 N. W. 611. See 7 A. L. R. 1501.

Jurisdiction to annul a marriage. 32 Harv. L. Rev. 806.

Venereal disease as ground for annulment. 5 A. L. R. 1016; 8 Id. 1534.

Right to alimony, counsel fees or suit money. 4 A. L. R. 926.

(90) 11 A. L. R. 931 (false claim that husband was cause of existing pregnancy).

(91) 34 Harv. L. Rev. 218.

(93) 32 Harv. L. Rev. 822.

MARSHALING ASSETS AND SECURITIES

5798. In general—(94) See Morrison County Lumber Co. v. Duclos, 138 Minn. 20, 163 N. W. 734.

MASTER AND SERVANT

THE CONTRACT

5801. When relation exists—Where a house-mover, with the consent of a telephone company, removes the wires of the company to permit the moving of a house along a street, he is acting in furtherance of his own business rather than that of the company, and is not the servant of the company, but a mere licensee. Collar v. Bingham Lake Rural Tel. Co., 132 Minn. 110, 155 N. W. 1075.

Relation of master and servant held to exist between a master and student elevator operator training for a license, though he was operating the elevator at the time of the accident in the absence of the instructor. Pettee v. Noyes, 133 Minn. 109, 157 N. W. 995.

See § 3438 (presumption of continuance).

5801a. Necessity of license—The employment of a student elevator operator in training for a license under G. S. 1913, § 1432, is not illegal under that statute. Pettee v. Noyes, 133 Minn. 109, 157 N. W. 995.

5808. Duration—Particular contracts construed—Duration of contract where no term specified. 11 A. L. R. 469.

(8) Costello v. Siems-Carey Co., 140 Minn. 208, 167 N. W. 551 (contract entered into by telegrams held to be for two years—use of word "about" held not to render time immaterial or the contract terminable at will).

ABANDONMENT OF CONTRACT BY SERVANT

5811. Without cause—Recovery—(12) Totten v. Kipp, 132 Minn. 459, 157 N. W. 713 (contract for definite terms not proved). See Magnuson v. Stevens Bros., 146 Minn. 38, 177 N. W. 29.

WAGES

5811a. Agreed compensation—Presumption of continuance—Where a person began work for another at a certain agreed compensation, a charge that he presumptively continued to work at that rate for a reasonable time while the conditions remained the same, held not erroneous under the circumstances. Ramstadt v. Thunem, 136 Minn. 222, 161 N. W. 413.

5812. Particular contracts construed—(14) Leonard v. Schall, 132 Minn. 446, 157 N. W. 723 (employment of attorney to conduct lawsuits and prepare cases).

5812a. Minimum wages—Statute—Powers of Minimum Wage Commission—Chapter 547, Laws 1913 (G. S. 1913, §§ 3904-3923), establishing a minimum wage commission and providing for the determination and establishment of minimum wages for women and minors, is a valid exercise of the police power of the state. Williams v. Evans, 139 Minn. 32, 165 N. W. 495. See 31 Harv. L. Rev. 1013, 1165; 1 Minn. L. Rev. 471; 2 Id. 1.

The defendant Minimum Wage Commission made two orders, one, quoted in the opinion, fixing the minimum wages of women and minors, and the other, referred to in the opinion, fixing the wages of learners and apprentices. This action was brought by an employer to restrain the commission from putting the orders into effect. An order for a temporary injunction was made upon the pleadings from which the defendant appeals. The minimum wage statute intends that the minimum rates of wages, which the commission is authorized to fix, shall be based on occupations; and it does not authorize a blanket minimum for women or for minors operative upon all without reference to wage conditions in the different occupations. It intends an investigation and a determination of wage conditions in the particular occupations to which the minimum rates are made applicable. The commission is authorized to

establish legal minimum rates of wages if "after investigation of any occupation the commission is of opinion that the wages paid to one-sixth or more of the women or minors employed therein are less than living wages." The authority to fix a minimum is not given when upon an investigation the commission is of the opinion that one-sixth of the total women workers, or of the total minor workers, employed in the state are receiving less than a living wage. There must be one-sixth or more receiving less than a living wage in the particular occupation to which the order is made applicable. The order of the commission recited that it was "of the opinion that the wages paid to one-sixth or more of the women and minors employed in this state are less than living wages." The opinion recited did not authorize the fixing of a minimum wage. The statute, however, does not require that the order fixing the minimum shall contain a recital or finding that the required one-sixth is receiving less than a living wage. The answer alleged an investigation by the commission as a result of which it was of the opinion that one-sixth of the women workers and one-sixth of the minor workers in each occupation in the state, including those within the class employed by the plaintiff, were receiving less than a living wage. The order is not invalid because of the recital nor is the commission concluded by it; and under the allegation of the answer the order is valid. The statute intends a separate investigation and determination for women and minors. The minimum wage may be the same for each or it may be different. The order is not invalid because it fixes the same minimum for both. The order fixes the minimum wage for a work week of 48 hours, which it adopts as the basic week for the purpose of fixing a minimum, and provides for an increase for each hour in excess. The commission has no authority to fix hours of labor and the order does not do so. It adopts 48 hours as the basic work week for fixing the minimum wage; and it is not invalid because it allows an addition to the minimum for each hour in excess of the basic 48 hour week. The order requires the payment of the prescribed minimum for a period of labor not to exceed 48 hours per week. It does not require the payment of the weekly minimum when the employee does not devote his time to the earning of a living wage but in connection with another calling or with no calling works a few hours per day or a few hours per week or renders intermittent service. The statute does not apply to such a situation. The order is not invalid, because in fixing the minimum wage a distinction is made between cities of 5,000 inhabitants or more and cities of less than 5,000. The statute contemplates that because of differences in living cost the minimum may not be uniform throughout the state. The order fixing the minimum for learners and apprentices is not invalid, because it fixes a different minimum for successive periods of service during the period of learning or apprenticeship, nor because of the classification which it makes. The Minimum Wage Commission is an administrative body to which neither legislative nor judicial powers are delegated. In a review by injunction of its orders the court is limited to a review of such as are made without

jurisdiction or under a mistaken interpretation of the law or which are so arbitrary or unreasonable as to deprive one of the guaranteed protection of his property rights. G. O. Miller Telephone Co. v. Minimum Wage Commission, 145 Minn. 262, 177 N. W. 341.

5813. In absence of agreement—Continuing in employment after expiration of original term. L. R. A. 1918C, 706.

(15) See Digest, §§ 1155, 10368.

5814. To be determined by master—(16) See F. A. Stocker Realty Co. v. Porter, — Minn. —, 182 N. W. 993.

5815. When payable—Semi-monthly payment by public service corporations. G. S. 1917 Supp. § 3861. See 34 Harv. L. Rev. 327; 12 A. L. R. 612.

(17) See note, 2 A. L. R. 522.

DISCHARGE OF SERVANT

5824. Grounds—Grounds for discharging servant employed in executive or supervisory capacity. L. R. A. 1918C, 1030.

5825. Dissatisfaction with services—(31) See 6 A. L. R. 1497 (work of a more or less mechanical nature); L. R. A. 1918C, 1030.

5832a. Record of discharge—When plaintiff was dismissed from defendant's employ, it made this entry on its records: "Relieved, on account unable to properly handle work assigned and men." In this action for damages, a verdict for defendant was rightfully directed, for the reason that there was no testimony tending to show that plaintiff was prevented from obtaining employment because of the entry. Nor was there any evidence of any violation of section 8890, G. S. 1913. The mere entry upon defendant's own records of the cause of this discharge was not a "blacklisting," within the meaning of the statute. Cleary v. Great Northern Ry. Co., 147 Minn. 403, 180 N. W. 545.

MASTER'S LIABILITY FOR SERVANT'S TORTS

5833. In general—A master is liable for a slander uttered by his servant in the course of his employment and while engaged in furthering the master's business. There is no distinction between slander and libel as respects the liability of the master. Roemer v. Jacob Schmidt Brewing Co., 132 Minn. 399, 157 N. W. 640; Manion v. Jewel Tea Co., 135 Minn. 250, 160 N. W. 767.

An office clerk of an express company went to the assistant auditor of the company in charge of the office to ask for a raise in salary. In the colloquy that followed warm words were passed and the employee announced that he would quit his job, in language which the assistant auditor considered insolent. As the employee was walking away the assistant auditor followed him and kicked him. Held, that the act was

not within the scope of the employment of the assistant auditor and the express company is not liable for his act. Sunderland v. Northern Express Co., 133 Minn. 158, 157 N. W. 1085.

The question whether an employer is liable for a slander uttered by an employee is determined by the same principles applicable to other torts. The employer is liable if the slander is uttered by the employee in the course of his employment, with a view to furthering the employer's business, and not for a purpose personal to himself. Within this rule, the defendant is liable for a slander of plaintiff, a former employee, uttered by a managing agent while trying to hold customers procured by plaintiff while in defendant's employ and which is calculated to prevent plaintiff from taking the customers with him. Manion v. Jewel Tea Co., 135 Minn. 250, 160 N. W. 767.

The owner of an automobile or other vehicle is liable to his guest for an injury while riding therein caused by the negligence of the driver. See Marinos v. Chicago & N. W. Ry. Co., 142 Minn. 469, 172 N. W. 706.

The doctrine of respondeat superior is founded on the theory that what one does through another, he does himself. Exceptions to the general rule of liability are disfavored and substantial ground therefor must affirmatively appear. Mulliner v. Evangelischer etc. Synod, 144 Minn. 392, 175 N. W. 699.

The rule of respondeat superior is bottomed on the principle that he who expects to derive advantage from an act which is done by another for him, must answer for an injury which a third person may sustain from it. New York Central R. Co. v. White, 243 U. S. 188.

The liability of the master for the acts of his servant does not rest on fault of the former. Arizona Copper Co. v. Hammer, 250 U. S. 400, 432.

Liability for injury inflicted by servant with firearms. 10 A. L. R. 1087.

See § 7305a. (liability of parent for torts of child).

(40) Sunderland v. Northern Express Co., 133 Minn. 158, 157 N. W. 1085; Larson v. Duluth, M. & N. Ry. Co., 142 Minn. 366, 172 N. W. 762; Staley v. Theo. Hamm Brewing Co., 142 Minn. 399, 172 N. W. 491; Marinos v. Chicago & N. W. Ry. Co., 142 Minn. 469, 172 N. W. 706; Daigle v. Summit Mercantile Co., 144 Minn. 178, 174 N. W. 830. See Hade v. Simmons, 132 Minn. 344, 157 N. W. 506.

5834. Who are servants—Borrowers—A mere borrower of an automobile or other personal property is not a servant of the owner so as to render the latter liable for the negligence of the former. Mogle v. A. W. Scott Co., 144 Minn. 173, 174 N. W. 832.

While an employer may loan his servant to another so that for the time being he ceases to be the servant of the former and becomes the servant of the latter, the facts are not sufficient to establish as a matter of law that defendant had done so in this instance. At most, whether defendant had loaned the truck and driver to the society in the sense that it had surrendered all right of control over them for the time being,

or was using them for the purpose of performing a service which it had undertaken to perform, was a question for the jury. Conroy v. Murphy Transfer Co., 148 Minn. —, 180 N. W. 704.

Where another employee acts under authority of a manager of a store owned by a corporation the corporation is liable for the acts of both. Eastman v. Leiser Co., 148 Minn. —, 181 N. W. 109.

(44) See State v. District Court, 138 Minn. 416, 165 N. W. 268; Wilde v. Pearson, 140 Minn. 394, 168 N. W. 582.

(45) White v. Great Northern Ry. Co., 142 Minn. 50, 170 N. W. 849.

5834a. Liability of letter of vehicles for hire—Negligence of driver— Action for personal injuries resulting from the negligence of the driver of a truck in a parade. Proof that defendant, for hire, had furnished the truck and driver to a society for the purpose of the parade does not establish, as a matter of law, that responsibility for the negligence of the driver had passed from defendant to the society. Conroy v. Murphy Transfer Co., 148 Minn. —, 180 N. W. 704.

See 33 Harv. L. Rev. 714.

5834b. Family automobile doctrine—The head of a family who provides an automobile for the use of the family is liable for the negligence of any member of his family in driving it with his permission. The doctrine is a development of the rules applicable to the relation of master and servant and principal and agent rendered necessary by the common use of the automobile. Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745; Kayser v. Van Nest, 125 Minn. 277, 146 N. W. 1091; Jensen v. Fischer, 134 Minn. 366, 159 N. W. 827; Uphoff v. McCormick, 139 Minn. 392, 166 N. W. 788; Johnson v. Evans, 141 Minn. 356, 170 N. W. 220; Johnson v. Smith, 143 Minn. 350, 173 N. W. 675; Plasch v. Foss, 144 Minn. 44, 174 N. W. 438; Mogle v. A. W. Scott Co., 144 Minn. 173, 174 N. W. 832; Menton v. L. Patterson Mercantile Co., 145 Minn. 310, 176 N. W. 991; Morken v. St. Pierre, 147 Minn. —, 179 N. W. 681; Emanuelson v. Johnson, — Minn. —, 182 N. W. 521. See 5 A. L. R. 226; 10 Id. 1449.

The doctrine does not apply to a case where an employer permits his servant to use his automobile for the personal convenience or pleasure of the servant. Mogle v. A. W. Scott Co., 144 Minn. 173, 174 N. W. 832; Menton v. L. Patterson Mercantile Co., 145 Minn. 310, 176 N. W. 991; Morken v. St. Pierre, 147 Minn. 106, 179 N. W. 681.

Whether the doctrine applies where an automobile is owned and kept by some member of the family other than the head is an open question. Morken v. St. Pierre, 147 Minn. 106, 179 N. W. 681.

Evidence held not to justify a finding that the owner of an automobile, a brother of the driver, kept it as a family car. Morken v. St. Pierre, 147 Minn. 106, 179 N. W. 681.

Plaintiff was injured in a collision with an automobile owned and kept by respondent for family use. It was alleged that the collision was due to the negligence of respondent's son, a codefendant. It is held that

the evidence made respondent's liability for his son's negligence a question for the jury, although no witness contradicted the testimony of respondent and his son that, when the son requested permission to use the car on that occasion, permission was refused, whereupon the son without respondent's knowledge took the car; for the record discloses circumstances which a jury may properly consider in passing upon the credibility of this testimony from interested witnesses. Jensen v. Fischer, 134 Minn. 366, 159 N. W. 827.

Whether a father was liable for his son's negligence in driving the former's automobile, held a question for the jury. Jensen v. Fischer, 138 Minn. 483, 165 N. W. 1055.

Where a parent keeps an automobile for the use of her family, and a daughter sixteen years of age takes the same in the absence of the parent and turns it over to a stranger, who operates the same, in the absence of the daughter, so negligently as to cause injury to others, the parent is not responsible for such negligence. Wilde v. Pearson, 140 Minn. 394, 168 N. W. 582.

A daughter, twenty-four years of age, living at home, borrowed an automobile of a neighbor to take guests at her home to a railroad station. As she was starting home she ran into a pedestrian near the tracks. She and her father were sued for the injury, and there was a verdict for plaintiff. Held, that the evidence justified the court in submitting the issue as to both defendants to the jury and justified the verdict. Emanuelson v. Johnson, — Minn. —, 182 N. W. 521.

5835. Independent contractors—The fact that the contract between the parties provides that the employer shall not be liable for the negligence of the other party or his agents or servants does not affect the liability of the employer therefor to third parties. Boll v. C. S. Brackett Co., 134 Minn. 268, 158 N. W. 609, 159 N. W. 1095.

(46) 34 Harv. L. Rev. 551 (exception in case of inherently dangerous undertakings).

(49, 55) Boll v. C. S. Brackett Co., 134 Minn. 268, 158 N. W. 609, 159 N. W. 1095.

5837. Ratification—(59) L. R. A. 1918B, 155.

5840. Evidence—Sufficiency—Action for damages caused by collision with an automobile. There is some evidence that the automobile that caused the injury belonged to defendant and that it was driven by a man who drove it at times for defendant and at times on his own account. The evidence is not sufficient to sustain a finding that at the time of the collision he was using it in the course of defendant's employment. Robinson v. Pence Automobile Co., 140 Minn. 332, 168 N. W. 10.

Where a workman was apparently struck by a piece of concrete as he was descending a ladder in a building in the course of construction and it was claimed that a servant of defendant let the concrete fall, it was held that this was mere conjecture and that the evidence was insuf-

ficient to justify a verdict for plaintiff. Travelers Ins. Co. v. Healy P. & H. Co., 147 Minn. 91, 179 N. W. 686.

5841. Law and fact—The owner of an automobile requested B to take it and without compensation drive some third parties, as a courtesy extended to them by the owner. There was a collision with another automobile on the drive concededly through the negligence of B. Held, that the owner was liable as a matter of law. Hutchinson v. Fawkes, 147 Minn. 307, 180 N. W. 116.

(63) Manion v. Jewel Tea Co., 135 Minn. 250, 160 N. W. 767; Larson v. Duluth, M. & N. Ry. Co., 142 Minn. 366, 172 N. W. 762; Marinos v. Chicago & N. W. Ry. Co., 142 Minn. 469, 172 N. W. 706; Menton v. L. Patterson Mercantile Co., 145 Minn. 310, 176 N. W. 991 (verdict properly directed for defendant).

5842. Master held liable—Where a servant driving a motor truck collided with a bicyclist on a city street. Boll v. C. S. Brackett Co., 134 Minn. 268, 158 N. W. 609, 159 N. W. 1095.

Where a servant of a tenant of a building negligently left the gate of an elevator shaft open. Staley v. Theo. Hamm Brewing Co., 142 Minn. 399, 172 N. W. 491.

Where a railroad roadmaster, while taking a prospective employee on his gasolene car to a place where the employee might be employed on construction work, negligently operated the car so that it was derailed and the employee was injured. Marinos v. Chicago & N. W. Ry. Co., 142 Minn. 469, 172 N. W. 706.

Where a deputy sheriff committed an assault and battery while serving a summons. Daigle v. Summit Mercantile Co., 144 Minn. 178, 174 N. W. 830.

Where a servant was driving an automobile. Johnson v. Norman, 147 Minn. 61, 179 N. W. 560.

Where a boy fourteen years old, under the control of his mother, the defendant, who was riding with him, was driving an automobile and failed to turn to the right when meeting a motorcycle. Morken v. St. Pierre, 147 Minn. 106, 179 N. W. 681.

Where the owner of an automobile requested B to take it and without compensation drive some third parties, as a courtesy extended to them by the owner, and there was a collision with another automobile through the negligence of B.. Hutchinson v. Fawkes, 147 Minn. 307, 180 N. W. 116.

Where a local manager of a store, owned by a foreign corporation, and a saleswoman, acting at the instigation of the manager, instituted criminal proceedings against a purchaser at the store for passing a forged check. Eastman v. Leiser Co., 148 Minn. —, 181 N. W. 109.

5843. Master held not liable—Where a servant drove an automobile for his own private purposes. Robinson v. Pence Automobile Co., 140 Minn. 332, 168 N. W. 10; Mogle v. A. W. Scott Co., 144 Minn. 173, 174 N. W. 832; Menton v. L. Patterson Mercantile Co., 145 Minn. 310, 176 N. W. 991.

Defendant had a crew engaged in removing a platform at one of its stations. A member of the crew found a revolver in a leather case which had been hidden under the platform by some unknown person and handed it to one Mayer, the "gang boss." Mayer attempted to break it open and in the attempt discharged it wounding plaintiff, another employee. Held that Mayer while manipulating the revolver was not "engaged in furthering defendant's business," and that defendant is not liable for the consequences of such manipulation. Larson v. Duluth, M. & N. Ry. Co., 142 Minn. 366, 172 N. W. 762.

Where the owner of an automobile allowed his brother to drive it. Morken v. St. Pierre, 147 Minn. 106, 179 N. W. 681.

See § 7305a.

ACTIONS FOR BREACH OF CONTRACT AND FOR WAGES

5848. Seeking other employment—The principle that an employee wrongfully discharged must use reasonable diligence in seeking other employment has no application to this case. The theory on which the case was tried and won was that during substantially the whole month the parties were acting under the contract, and that plaintiff had not been discharged. McFarland v. L. M. Summerville, Inc., 141 Minn. 343, 170 N. W. 214.

(99) Barron G. Collier, Inc. v. Kindy, 146 Minn. 279, 178 N. W. 584.

5849. Defences—In an action for wages as a bookkeeper at an agreed salary, it was too late for defendant, after the lapse of almost three years, to assert that the services were worthless, when they were accepted without serious complaint and with opportunity to know what kind of work was being done by plaintiff. Miller v. Owens, 140 Minn. 351, 168 N. W. 50.

Action to recover a monthly instalment of salary under an employment contract. The main defence was that the contract had been canceled by consent. The jury found that the contract had not been canceled. The evidence sustains this finding. McFarland v. L. M. Summerville, Inc., 141 Minn. 343, 170 N. W. 214.

Disobedience of orders is a ground for discharge. Whether there was a wrongful discharge for alleged disobedience of orders by the manager of the bond department of a bank, held a question for the jury. Bacon v. Bankers Trust & Sav. Bank, 143 Minn. 318, 173 N. W. 719.

5850. Damages—Where a servant is employed to do a particular piece of work for a stipulated amount and the master wrongfully discharges him he may recover the entire amount if the damages cannot be apportioned. Moyer v. Cantieny, 41 Minn. 242, 42 N. W. 1060.

Where the employment is rightfully terminated by the master the servant is sometimes limited to the reasonable value of his services and cannot recover the agreed wages. See Southworth v. Rosendahl, 133 Minn. 447, 158 N. W. 717.

(2) See Barron G. Collier, Inc. v. Kindy, 146 Minn. 279, 178 N. W. 584.
(3) 8 A. L. R. 338.

5851. Burden of proof—Whether, after making the original contract, the parties made a subsequent contract by which certain services were not to be paid for under the original contract, was a question for the jury; and the burden of establishing such modification of the original contract was on the defendant. Leonard v. Schall, 132 Minn. 446, 157 N. W. 723.

5852. Evidence—Admissibility—(7) Remick v. Langfitt, 141 Minn. 36, 169 N. W. 149 (action for services of detectives—held proper to exclude offer of defendant to show by the stenographer in certain criminal prosecutions what plaintiff's detectives testified to therein as to the manner in which the work was done or that one of the detectives had been convicted of crime).

5853. Evidence—Sufficiency—(8) Totten v. Kipp, 132 Minn. 459, 157 N. W. 713; Romstadt v. Thunem, 136 Minn. 222, 161 N. W. 413 (presumption as to continuance of agreed price for services); Miller v. Owens, 140 Minn. 351, 168 N. W. 50; Remick v. Langfitt, 141 Minn. 36, 169 N. W. 149 (action against mayor for services of detectives in discovering illegal liquor traffic and procuring evidence for prosecutions); Bacon v. Bankers Trust & Sav. Bank, 143 Minn. 318, 173 N. W. 719.

WORKMEN'S COMPENSATION ACT

5854a. Constitutionality—The act is not an unconstitutional interference with interstate commerce by water, Congress not having legislated upon that subject. Lindstrom v. Mutual Steamship Co., 132 Minn. 328, 156 N. W. 669. See § 98.

The provisions of the law are obligatory only on those who elect to become subject to it, and those who voluntarily assume the liabilities imposed by the law in order to secure the benefits conferred by it have been deprived of no constitutional right. State v. District Court, 139 Minn. 409, 166 N. W. 772.

5854b. Construction—Exclusive remedy—Accidents out of state—Railroads excepted—What law governs—Theory and policy of act—Third party employer—Generally the substantive law in force at the time of the injury governs, but in case of death the law in force at the time of the death governs. State v. District Court, 131 Minn. 96, 154 N. W. 661; State v. District Court, 132 Minn. 249, 156 N. W. 120; State v. General Accident etc. Corp., 134 Minn. 21, 158 N. W. 715; Soderstrom v. Curry & Whyte, Inc., 143 Minn. 154, 173 N. W. 649.

A basic thought underlying the act is that the business or industry shall in the first instance pay for accidental injuries as a business expense or a part of the cost of production. It may absorb it or it may put it partly or wholly on the consumer if it can. The economic tendency is to push it along just as it is to shift the burden of unrestrained

personal injury litigation. State v. District Court, 139 Minn. 205, 166 N. W. 185. See 3 A. L. R. 1347; 3 Harv. L. Rev. 619.

The whole scheme of our statute is one of reciprocal concessions by employer and employee, from which benefits and protection fall to each which without the law neither could demand or recover; of benefit to the employee for he is thereby given protection for injuries impairing his earning capacity, without regard to the culpability of the employer, when without the statute he would be remediless. In consideration of this insured compensation and protection by the acceptance of the act he by necessary implication relinquishes his common-law remedies, and thus places a limit on his rights to that measured and granted by the act. In return for the required payment of compensation for the accidental injury, for which the common law furnishes the employee no relief, the employer is protected from the suit at law for the negligent injury. Thus we have the reciprocal yielding and giving up of rights existing at common law for the new and enlarged rights and remedies given by the act. That this comes about by force of compulsory legislation in no way alters the legal character of the relation of the parties. That the legislature was within its authority in so enacting, in the interests of the general welfare and in regulation of rights, duties, and obligations between employer and employee as a class, has been affirmed by all the courts where compensation acts have been sustained. Hyett v. Northwestern Hospital, 147 Minn. 413, 180 N. W. 552.

The act is general in its terms and applies to all cases within the territorial jurisdiction of the state which are not excepted. Section 8202 excepts "any employer acting as a common carrier when engaged in interstate or foreign commerce by railroad," and "any employee of such common carrier injured or killed while so engaged." There is no exception of such carriers by water or of the employees of such carriers. Lindstrom v. Mutual Steamship Co., 132 Minn. 328, 156 N. W 669. See § 98.

Since the adoption of the act, the question of liability in cases to which it is applicable, and the amount thereof, are to be determined by it. Lindstrom v. Mutual Steamship Co., 132 Minn. 328, 156 N. W. 669.

The act is to be construed with reference to conditions at the death of the workman. State v. District Court, 133 Minn. 265, 158 N. W. 250.

The act is highly remedial in its nature and should be liberally construed and applied to accomplish the beneficial puposes intended. State v. District Court, 133 Minn. 439, 158 N. W. 700; State v. General Accident etc. Corp., 134 Minn. 21, 158 N. W. 715; State v. Nye, 136 Minn. 50, 161 N. W. 224; State v. District Court, 141 Minn. 83, 169 N. W. 488; State v. District Court, 143 Minn. 144, 172 N. W. 897; Zinken v. Melrose Granite Co., 143 Minn. 397, 173 N. W. 857; Kraker v. Nett, 148 Minn. —, 180 N. W. 1014.

The act cannot be so construed as to exclude an accidental injury merely because the workman might recover larger damages by resorting to other remedies. Both employer and employee must be treated with

the same fairness. Mahowald v. Thompson-Starrett Co., 134 Minn. 113, 158 N. W. 913.

The act applies to accidents outside the state in connection with business done in the state and incident to it. State v. District Court, 139 Minn. 205, 166 N. W. 185; State v. District Court, 140 Minn. 427, 168 N. W. 177; State v. District Court, 141 Minn. 61, 169 N. W. 274; State v. District Court, 141 Minn. 348, 170 N. W. 218; Stansberry v. Monitor Stove Co., — Minn. —, 183 N. W. 977.

The act is elective. By becoming subject to it the employer and employee agree that the employer will pay and the employee receive for an accidental injury the compensation fixed by the statute and that the employee will forego his common-law right of action. It is not important who is at fault or whether any one is. The right to compensation is not based on tort. It is contractual. The relator's husband was a resident of North Dakota. He entered into a contract of employment with a Minnesota corporation doing a grain brokerage business in Minnesota and having its place of business in Minneapolis and so far as appears none elsewhere. The contract was made there. It contemplated that he should solicit business for the corporation in Minnesota, North Dakota and elsewhere. An automobile was furnished him for use in his work. While using it in the course of his employment it accidentally overturned at a point in North Dakota and he was killed. Under these facts it is held that the Minnesota compensation act is applicable and an award of compensation should be made. State v. District Court, 139 Minn. 205, 166 N. W. 185.

The act does not repeal by implication section 52 of the charter of St. Paul, providing for compensation for firemen injured in the course of their employment. Markley v. St. Paul, 142 Minn. 356, 172 N. W. 215.

The act creates new substantive rights and is not a mere amendment of the common law. It goes far beyond merely affording new remedial rights for old substantive rights. It works a fundamental change in the obligations of employers to employees. Soderstrom v. Curry & Whyte, Inc., 143 Minn. 154, 173 N. W. 649.

Under Laws 1915, c. 193, common carriers by steam railroads are exempted from the operation of the act. The Great Northern Express Company does not come within the exemption. State v. District Court, 142 Minn. 410, 172 N. W. 310.

To entitle a third party employer, whose negligent act causes injury to the employee of another, to the protection of the Workmen's Compensation Act, it must appear that the act complained of arose out of or had some relation to the business carried on by him, as to which he was an employer within the meaning of the statute. The mere fact that he is an employer of labor is not sufficient to bring him within that provision of the act. Such an employer is not necessarily engaged in the work of his employment or in the conduct of the affairs thereof when going from his residence to his place of business, though he makes use of an automobile owned by him as a means of conveyance. An injured

employee may maintain an action against such third party employer notwithstanding a settlement had with his own employer and the payment of the amount agreed upon. Podgorski v. Kerwin, 144 Minn. 313, 175 N. W. 694.

When the act was amended by chapter 193, Laws of 1915, so as to exclude employees of all railroad companies operating steam railroads as common carriers, the legislative intent was that private steam railroads not engaged as common carriers should remain therein. A private steam railroad, not engaged as a common carrier, which has not given notice of election not to be bound by the act, remains within the act, and liable to injured employee, precisely as other employers. State v. District Court, 145 Minn. 181, 176 N. W. 749.

In so far as it provides compensation to an employee accidentally or otherwise injured in the course of his employment, the act is exclusive of all other remedies. Where a particular injury results in part in a temporary or permanent disability, and in part in the disfigurement of the person of the employee, or other injury not amounting to a disability, the employee is limited in his relief to that given by the act, and an action at law for the injury not amounting to a disability cannot be maintained. If elements of damage of that character, always present in the law of negligence, are deemed proper to be included in the compensation proceedings, the change should come about by an amendment of the statute. Hyett v. Northwestern Hospital, 147 Minn. 413, 180 N. W. 552.

The act applies to an interstate common carrier by express. Pushor v. American Railway Express Co., — Minn. —, 183 N. W. 839

A foreign corporation whose northwestern business is localized at a branch in a city of this state is, as to employees of such branch, within the act. Stansberry v. Monitor Stove Co., — Minn. —, 183 N. W. 977.

Section 8, chapter 209, Laws 1915, which limits the time to recover under the act, to one year after the occurrence of the injury, does not apply to claims that accrued before the passage of the 1915 statute. State v. District Court, 138 Minn. 213, 164 N. W. 812.

The act is inapplicable in admiralty. See § 98.

Who are "employers" within the act. L. R. A. 1918F, 179.

See L. R. A. 1916A, 23; 1917D, 89 (construction in general).

5854c. Election to come within act—Presumption—Persons coming within the act are presumed to have elected to adopt it unless they elect otherwise. Mahowald v. Thompson-Starrett Co., 134 Minn. 113, 158 N. W. 913.

See L. R. A. 1917D, 90.

5854d. Who are employees within act—Minors—Farm laborers, domestic servants and casual employees excepted—Municipal employees—The provision in the act making it applicable to minors "who are legally permitted to work under the laws of the state," was intended to exclude from the statute minors whose employment is prohibited by law. See G. S. 1913, §§ 3848, 3871; Pettee v. Noyes, 133 Minn. 109, 112, 157 N. W. 995; Westerlund v. Kettle River Co., 137 Minn. 24, 162 N. W. 680.

A student elevator operator, eighteen years old, in training for a license, held an employee within the act, though he was operating the elevator at the time of the accident in the absence of the instructor. Pettee v. Noyes, 133 Minn. 109, 157 N. W. 995.

Evidence held to justify a finding that a deceased workman was an employee within the meaning of the act at the time of the injury and not an independent contractor. State v. District Court, 133 Minn. 402, 158 N. W. 615.

A bartender in a saloon held within the act. State v. District Court, 134 Minn. 16, 158 N. W. 713.

A policeman of the city of Duluth, not appointed for a regular term of office, held within the act. State v. District Court, 134 Minn. 26, 158 N. W. 790.

A fireman of the city of Duluth killed while in the performance of his duty has been held within the act and it was held immaterial that he was a member of the Duluth Firemen's Relief Association and that his dependents drew benefits therefrom. State v. District Court, 134 Minn. 28, 158 N. W. 791.

A teamster driving a team for a manufacturing company held within the act. Mahowald v. Thompson-Starrett Co., 134 Minn. 113, 158 N. W. 913.

The erection of a temporary shed by defendant, upon a farm owned but not operated by him, cannot be held to be an employment within the usual course of the trade, business, profession, or occupation of defendant, so as to make him liable under the act to a person accidentally injured in such erection while casually employed. State v. District Court, 138 Minn. 103, 164 N. W. 366.

Relator was engaged in the retail sale and delivery of coal and other fuel; one of his wagons loaded with coal for delivery to a purchaser became mired and the team hitched thereto were unable to remove it; the driver in charge thereof requested plaintiff, who was passing the scene, to assist in releasing the wagon, and in complying with the request plaintiff was injured. Held, that though not otherwise in relator's employ, plaintiff was its servant and employee in rendering the assistance stated; that the driver of the wagon so mired had implied authority to employ him for the temporary purpose, and the plaintiff is entitled for the injury suffered by him in rendering the assistance to appropriate relief under the act. State v. District Court, 138 Minn. 416, 165 N. W. 268. See 31 Harv. L. Rev. 797.

An employee of one who owns a steam thresher and threshes grain for farmers under contract, is, while employed about the threshing machine in the course of threshing grain upon a farm, a "farm laborer," and is excepted from the operation of the act. State v. District Court, 140 Minn. 398, 168 N. W. 130.

A contractor residing at Faribault, Minn., did a general contracting business throughout the Northwest. He had a general office at Faribault and from there conducted his business. A general foreman re-

siding in Minnesota and hired in Minnesota was injured while employed on a job at Minot, N. D., and later died. Held, the business was localized in Minnesota, and the employment of deceased was referable to the business conducted in Minnesota, and the Minnesota Compensation Act applied. State v. District Court, 140 Minn. 427, 168 N. W. 177.

A person was injured while engaged in distributing advertising matter about a city at the instance of the Y. M. C. A. The record did not show whether he was acting under employment for compensation. Held, that the act did not apply. Palm v. Minneapolis, 143 Minn. 477, 172 N. W. 958.

The owner of a rented farm, when building a barn on the farm for farm use, is not within the act. State v. District Court, 145 Minn. 123, 176 N. W. 164.

Evidence held to justify a finding that the relation of employer and employee did not exist between the parties. State v. District Court, 145 Minn. 127, 176 N. W. 165.

Relator, who lets its rig, team, and teamster to do hauling at stipulated monthly payments out of which relator paid the teamster weekly wages is responsible to the teamster under the act, for an accident occurring to the teamster while so hauling for the one to whom he was let. State v. District Court, 147 Minn. 12, 179 N. W. 216.

In the form in which it was enacted the act applied to policemen and firemen in the service of the city of St. Paul, and so remained until the passage of chapter 176, Laws 1919. The presence at the time of the enactment of that law of provisions in the charter of the city of St. Paul for the relief of injured policemen and firemen furnishes no sufficient basis for an inference that the legislature intended to exclude the employees of St. Paul from the act. Segale v. St. Paul City Ry. Co., 148 Minn. —, 180 N. W. 777.

An employee of an interstate carrier by express is within the act. Pushor v. American Railway Express Co., — Minn. —, 183 N. W. 839.

A traveling salesman of a foreign corporation having its northwestern business localized in a city of this state held within the act of this state though injured in an accident out of the state. Stansberry v. Monitor Stove Co., — Minn. —, 183 N. W. 977.

Who are employees within the act. L. R. A. 1918F, 201.

Casual employment. L. R. A. 1918F, 215.

See L. R. A. 1917D, 145.

5854e. Injury must arise out of and in the course of the employment— Where a bartender was struck in the eye by a drinking glass thrown by a drunken patron of the saloon, it was held that the injury arose out of and in the course of the employment, the evidence showing that the glass was not thrown in a personal altercation between the bartender and the drunken man. State v. District Court, 134 Minn. 16, 158 N. W. 713.

It is not essential that the risk be one that might reasonably have been anticipated or peculiar to the particular employment. It may be

external to the employment if the employment exposes the employee to it in a special degree. Mahowald v. Thompson-Starrett Co., 134 Minn. 113, 158 N. W. 913.

A teamster driving a team along a public street was killed by the fall of steel beams that were being hoisted into a building in the process of erection. Held, that his death was caused by an accident arising out of and in the course of his employment. Though the risk from the accident was external to the employment, yet the employment caused a special degree of exposure to the risk. Mahowald v. Thompson-Starrett Co., 134 Minn. 113, 158 N. W. 913.

Evidence that a boy seventeen years old in good health, while working on a wet cement floor, dropped dead at the moment of contact with an electric wire or socket attached to it, held to justify a finding that he died an accidental and not a natural death. State v. District Court, 134 Minn. 324, 159 N. W. 755.

A death caused by the rupture of a blood vessel from a strain in using a wheelbarrow, held to arise out of and in the course of the decedent's employment. State v. District Court, 137 Minn. 30, 162 N. W. 678.

A workman received an injury to his eye, caused by a flying particle of iron ore; the particle of ore was removed from the eye by a fellow workman by means of a match and a handkerchief, which handkerchief had been in use for several days; the eye was then washed with water from a trough used in common by numerous other miners; gonorrheal infection soon set in, causing the total loss of the sight of the eye; the workman was not afflicted with the disease. Held, that the injury so received was accidental, within the meaning of the workmen's compensation statute, and that the findings of the trial court are sustained by the evidence. State v. District Court, 137 Minn. 435, 163 N. W. 755.

The death of a stone cutter in a quarry due to over exertion and falling on a pile of stone while in his work, held to be an accident arising out of and in the course of his employment. State v. District Court, 137 Minn. 318, 163 N. W. 667.

Where the work and the condition of the place where it is carried on expose the employee to the happening of an event causing the accident, there is no longer a risk to which all are exposed, and the result is an "accident arising out of the employment." State v. District Court, 138 Minn. 250, 164 N. W. 916.

The freezing of a janitor while engaged in shoveling snow from the sidewalks of a building in severely cold weather held to arise out of his employment. State v. District Court, 138 Minn. 260, 164 N. W. 917.

A workman froze his thumb while working as a swamper. His work required him to cut and handle timber, and his hands came in contact with the snow. His work was several miles from camp, and there were no facilities for warming. The weather was severely cold. A finding that the freezing arose out of the employment is sustained by the evidence. State v. District Court, 138 Minn. 131, 164 N. W. 585.

Workmen injured when off duty are not entitled to the benefit of the act. Otto v. Duluth St. Ry. Co., 138 Minn. 312, 164 N. W. 1020.

It (the injury) "arises out of" the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises "out of" the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence. State v. District Court, 138 Minn. 326, 164 N. W. 1012.

A messenger boy, who in performing his duties traverses the streets of a city, departs from the scope of his employment when he climbs upon a passing vehicle, not owned or controlled by his employer, for the purposes of expediting his work, so that an accident which befalls him when upon such vehicle cannot be said to arise out of and in the course of his employment. State v. District Court, 138 Minn. 326, 164 N. W. 1012. See 2 Minn. L. Rev. 154.

Evidence held to justify a finding that death from blood poisoning from a scratch on the hand of a workman engaged in loading and unloading bags into and from box cars arose out of and in the course of his employment. State v. District Court, 139 Minn. 30, 165 N. W. 478.

The act excludes "an injury caused by the act of a third person or fellow employee intended to injure the employee because of reasons personal to him, and not directed against him as an employee, or because of his employment." An assault on a female teacher after she had left the schoolhouse grounds on her way home after the day's work, held not an accident arising out of her employment and to fall within the above exception to the act. State v. District Court, 140 Minn. 470, 168 N. W. 555.

Where a night watchman in an apartment house fell down a flight of steps as he was taking some letters from the desk of the house to the mail box on the sidewalk, it was held that the evidence justified a finding that the injury arose out of and in the course of his employment. State v. District Court, 140 Minn. 216, 167 N. W. 1039.

An employee working in the relator's factory was hit and injured by a missile thrown by a fellow worker. The court found that it was

customary for some of the workmen to throw at one another and at others, that the relator knew of the custom or should have known of it in the exercise of diligence, that the injured employee was at the time engaged in his work, and that he did not then and had not at any time engaged with his fellow worker in sport of such kind. There was evidence that the employee had never engaged with any of the employees in such sport and that he had complained to the relator of the acts of his coworker. Held, that the ultimate finding that the injury arose out of the employment within the meaning of the act is sustained. State v. District Court, 140 Minn. 75, 167 N. W. 283. See L. R. A. 1918E, 504.

A member of a threshing crew fell from the deck of a separator after repairing a straw blower and was injured. Held, that the injury arose out of and in the course of his employment. State v. District Court, 140 Minn. 398, 168 N. W. 130.

Respondent's husband resided at Bismark, N. D. He was in the employ of the relator, whose principal place of business was at Minneapolis, Minn. He received a salary and traveling expenses, excepting board while at his home. His duties were to solicit the shipment of grain, from west of the Missouri river, to relator, for sale on commission. While on his way home from his field of labor on Sunday morning, he came to his death by accidental drowning, while attempting to cross the Missouri in a rowboat. Held, that his dependents are entitled to recover compensation under the Minnesota Workmen's Compensation Act. State v. District Court, 141 Minn. 61, 169 N. W. 274.

Where a workman has completed his day's work and has left the premises where he was employed and is not then engaged in performing any service of his employment and meets with an accident, he is not within the act. Erickson v. St. Paul City Ry. Co., 141 Minn. 166, 169 N. W. 532.

Findings that decedent met his death in an automobile accident when not engaged in the course of his employment and when engaged in furthering his own personal interests, held justified by the evidence. State v. District Court, 142 Minn. 335, 172 N. W. 133.

The evidence sustains a finding that an accident resulting in the death of the decedent, a traveling man, who was driving an auto furnished by his employer and was on his way to his home, which was the point from which he worked, arose in the course of his employment. State v. District Court, 141 Minn. 348, 170 N. W. 218.

An employee of an express company was working in a warehouse without a water closet. He went under a freight car standing on a side track near the warehouse to respond to a call of nature and was killed by a movement of the car. Held, that the accident arose out of and within the course of his employment. State v. District Court, 142 Minn. 410, 172 N. W. 310.

The finding that the evidence fails to prove that relator's husband came to his death as the result of an accident arising out of and in the course of his employment must be regarded as in effect a finding that he

did not die from such cause. The evidence is such that the finding cannot be set aside under the rule announced in State Niessen v. District Court, 142 Minn. 335, 172 N. W. 133. State v. District Court, 142 Minn. 420, 172 N. W. 311.

Evidence held to justify a finding that a starter of elevators in a hotel met death by falling down an elevator shaft in the course of her employment, though she had "punched out," had removed her uniform and was about to leave for home. State v. District Court, 143 Minn. 144, 172 N. W. 897.

Evidence held to justify a finding that lime was splashed into the eyes of a stone mason by a fellow workman and that both eyes were injured thereby. Zinken v. Melrose Granite Co., 143 Minn. 397, 173 N. W. 857.

A driver of a laundry company, whose duty it was to gather laundry, was struck by an auto truck, while he was walking to the shop of the company with a bag of laundry which he had gathered. Held, that as a matter of law his injury arose out of and in the course of his employment. Hansen v. Northwestern Fuel Co., 144 Minn. 105, 174 N. W. 726.

The relator's husband worked for Minneapolis, driving a sprinkler. He furnished his services and the use of his team and the running gears of his wagon for a stated daily compensation. He worked eight hours a day, from eight in the morning until five in the evening, with an hour off at noon. He fed and stabled his team at his own expense. One evening, after his day's work was done, he was killed by one of his horses while he was caring for it in his stable. Held, that the accident did not arise out of his employment and that he was not entitled to compensation under the act. State v. District Court, 144 Minn. 259, 175 N. W. 110.

It is a well-settled general rule that an injury suffered by an employee in going to or returning from the employer's premises where the work of his employment is carried on, except in special instances not here involved, does not arise out of his employment and entitle him to compensation. Podgorski v. Kerwin, 144 Minn. 313, 175 N. W. 694; Nesbitt v. Twin City Forge & Foundry Co., 145 Minn. 286, 177 N. W. 131; Koubek v. Gerens, 147 Minn. 366, 180 N. W. 219.

Plaintiff was injured while driving an automobile. Evidence held to justify a finding that at the time of the accident he was not using the car in furtherance of the employer's business. Gibbs v. Almstrom, 145 Minn. 35, 176 N. W. 173.

Construing subsection (i), § 8230, Gen. St. 1913, it is held an accidental injury to a workman sustained while he was riding to his place of work in a conveyance furnished by his employer in compliance with one of the terms of the contract of employment and for the use of his employees, but in which the workman was not directed or required to ride, does not arise out of and in the course of the employment; it appearing that the injury was received before, and not during, the hours of the workman's service, when his employer had no control over him and be-

fore the beginning of the period covered by his wages. Nesbitt v. Twin City Forge & Foundry Co., 145 Minn. 286, 177 N. W. 131. See 10 A. L. R. 165.

The evidence discloses no facts which will justify an inference that "Hodgkin's disease," from which the employee died, resulted from ulcerations in the mucous membrane of his nose, or that those ulcerations were caused by inhaling the fumes of hydrochloric acid used by him in his work as a tinner, and the findings to that effect rest wholly on conjecture. State v. District Court, 145 Minn. 444, 177 N. W. 644.

Defendant's employee, whose duties required him to visit the local agents or dealers in the state and get in personal contact with them, was killed when a sheriff's posse attempted to stop an automobile in which he was riding at the invitation of one of such local dealers. Held, that the findings that the injury was accidental, and that it arose out of and in the course of the employment, are sustained by the evidence. Wold v. Chevrolet Motor Co., 147 Minn. 17, 179 N. W. 219.

Some courts have stated the rule to be that the accident arises out of the employment when it can be said reasonably to have been contemplated as the result of the exposure of the employment. Wold v. Chevrolet Motor Co., 147 Minn. 17, 179 N. W. 219.

Employee in lumber yard lost an eye by getting cement in it while putting loose cement in a sack on a windy day. Evidence held to justify a finding that injury arose out of and in the course of his employment. Kraker v. Nett, 148 Minn. —, 180 N. W. 1014.

An employee injured during the course of his employment, though by the wilful act of a coemployee, is within the act, if there is some causal relation between the employment and the injury, that is if the injury be one which may be seen to have had its origin in the nature of the employment. An injury inflicted by a coemployee as a result of a quarrel over the manner of doing their work is within the rule. Hinchuk v. Swift & Co., — Minn. —, 182 N. W. 622.

A teamster, who in a fit of anger beats one of the horses he is employed to care for and drive, his anger being provoked by a cause wholly foreign to the employment, is not entitled to compensation under the Workmen's Compensation Act, if injured by a kick from the horse when he is so beating it. Neither the evidence nor the findings show that, when he was kicked, the workman was in the act of cleaning the horse. A statement that he was, found only in the trial judge's memorandum, is not the equivalent of a specific finding that such was the fact. Harris v. Kaul, — Minn. —, 183 N. W. 828.

It is not deemed wise to attempt to define the phrase "accident arising out of and in the course of employment." It is doubtful if anything can be said that would make clearer the meaning of the language. The phrase occurs, not only in our own act, but in the English act, and in the acts of many of our states. It admits of an inexhaustible variety of application, according to the nature of the employment and the character of the facts proved. Harris v. Kaul, — Minn. —, 183 N. W. 828.

Where a traveling salesman, obliged to stop at hotels in the course of his travels and to furnish his employer with a list of the cities on his itinerary, the names of the hotels at which he is to stop and the time he is to be at each hotel, is killed while attempting to escape during a fire in one of such hotels in which he is stopping, compensation may be recovered. Stansberry v. Monitor Stove Co., — Minn. —, 183 N. W. 977.

See L. R. A. 1916A, 232, 314, 317, 320, 331; Id. 1917D, 114; Id. 1918F, 896.

5854f. Compensation to injured workmen—Disability—Evidence held to justify a finding that a workman was totally disabled. State v. District Court, 132 Minn. 251, 156 N. W. 278.

The statute specifies certain injuries which shall be deemed permanent total disability, but these are not exclusive. Cases must be passed upon as they arise, and no hard and fast rules can be formulated as to what constitutes total disability. State v. District Court, 133 Minn. 439, 158 N. W. 700.

Claimant, a working man, was injured by an accident arising out of and in the course of his employment. His injuries resulted in the total destruction of sight in the right eye, an impairment of vision to the extent of 95 per cent in the left eye (by the aid of glasses the vision in the left eye could be increased to about one-third normal), and other injuries which affected his head so that he could not stoop or bend over without pain. There was evidence tending to show that he would not be able to do any work or engage in any occupation to earn a livelihood. Held, that the finding of the trial court that claimant was permanently totally disabled is supported by the evidence. State v. District Court, 133 Minn. 439, 158 N. W. 700.

Under section 25 of the act, as amended by Laws 1915, c. 209, the court has no authority to commute the periodical payments by awarding a lump sum judgment in lieu thereof, unless the parties agree. It is only in rare cases that a court should approve of commutation. In most cases it is much better for the workman and his family that the compensation be paid in instalments corresponding to the payment of his wages. In cases of slight injury the statute leaves the matter to the agreement of the parties without approval by the court. State v. District Court, 134 Minn. 16, 158 N. W. 713.

An award in excess of one hundred dollars for medical services held erroneous. State v. District Court, 134 Minn. 16, 158 N. W. 713.

The joint answer of the employer and insurer alleged that defendants were ready and willing to pay plaintiff the compensation due him under the act, and willing to pay reasonable hospital and medical expenses. Under this answer plaintiff was not obliged to prove compliance with the provisions of the act necessary to make the insurer liable directly to the injured workman, and defendants are barred from resisting the claim for medical expenses set up in the complaint on the ground that

their own physician was ready to perform the services. State v. District Court, 136 Minn. 147, 161 N. W. 391.

The only injury of a permanent nature was a fracture of the right heel bone, resulting in some difficulty and pain in walking, and a deformed condition of the foot. This was a "permanent partial disability," but there was not the loss of a foot, nor a permanent loss of the use of such member. Under the provisions of the act, it was error to allow compensation at the rate and for the period specified in case of loss of a foot. State v. District Court, 136 Minn. 147, 161 N. W. 391.

Where an employee suffers two distinct injuries, for each of which he is entitled to compensation under the act, the payments should not be made to run concurrently, where the aggregate of both will exceed the maximum weekly allowance as prescribed by section 8207, clause "a," G. S. 1913, but should by the judgment of the court be required to be made separately, one following the other. State v. District Court, 136 Minn. 447, 162 N. W. 527.

The findings of the trial court that the injury involved in the action, suffered by an employee while engaged in the discharge of his duties, constituted a temporary partial disability, and not a permanent partial disability, held sustained by the evidence. Porter v. Ritchie, 138 Minn. 135, 164 N. W. 581.

A compensation of nine dollars a week during the period of disability, not exceeding three hundred weeks, held justified by the evidence and the statute. State v. District Court, 138 Minn. 416, 165 N. W. 268.

Evidence held to justify a certain allowance for last sickness and burial. State v. District Court, 139 Minn. 409, 166 N. W. 772.

The term "member" of the body as used in the act includes arms and legs. Zinken v. Melrose Granite Co., 143 Minn. 397, 173 N. W. 857.

A settlement made by the workman with his employer and the insurer of the employer on the mutual assumption that he was entitled to compensation for the loss of one eye only, and a release executed on the same assumption, do not bar him from thereafter claiming compensation for the injury to the other eye. A workman's left eye had been injured so that one-half of his ability to see with it was lost. Thereafter, in the course of his employment, both eyes were injured, the right so badly that it became necessary to remove it, and the left to such an extent that, although he is not totally blind, he can no longer follow any occupation. Held, that he is entitled to the compensation for permanent partial disability which is fixed by the schedule found in section 4, c. 209, G. L. 1915, that the amount of compensation is not determined by the clause in the schedule covering the loss of one eye, but by the clause which provides that the compensation shall be 50 per cent. of the difference between the wage of the workman at the time of his injury and the wage he is able to earn in his partially disabled condition for a period not exceeding three hundred weeks. Zinken v. Melrose Granite Co., 143 Minn. 397, 173 N. W. 857.

The intent and purpose of the act was to secure to an injured employee compensation to the extent of the disability actually sustained, and the

provisions as to payments for specific injuries must yield thereto; when taken together, they create a greater disability. State v. District Court, 144 Minn. 198, 174 N. W. 826.

The findings of the trial court that the injuries referred to in the opinion created a permanent partial disability of plaintiff's hand held sustained by the evidence. State v. District Court, 144 Minn. 198, 174 N. W. 826.

The act provides that in case of permanent partial disability the loss of the use of a member shall draw the same compensation as is given for the loss of such member. For the loss of a leg compensation for 175 weeks at 60 per cent. of daily wages is given. The employee suffered a fracture of the upper end of the thigh bone. It did not unite. The result of the injury, more definitely stated in the opinion, is greater than the loss of the use of the leg, and the employee at the time of the trial two years after the accident was unable to work. His disability at that time and since his injury was total. Held, that under the findings of the trial court he was not limited to compensation for 175 weeks as for the loss of the use of his leg, but was entitled to compensation for 300 weeks on the basis of temporary total disability. State v. District Court, 146 Minn. 283, 178 N. W. 594.

Where a workman sustains an injury which results in the partial loss of the sight of one eye, he is entitled to compensation during that part of 100 weeks which the extent of injury to the eye bears to its total loss, at the rate prescribed for the loss of an eye. The liability for the compensation prescribed in the statute for the injuries enumerated therein is absolute and not dependent upon an actual decrease in earnings. The term "member" as used in the act includes the eye. Chiovitte v. Zenith Furnace Co., 148 Minn. —, 181 N. W. 643.

See § 5854s (readjustment of award); L. R. A. 1917D, 167–179.

5854g. Dependents—Who are—Evidence held to justify a finding that the claimant was partially dependent. State v. District Court, 132 Minn. 249, 156 N. W. 120.

Subdivision 9 of the act, providing for the payment of compensation to certain children on the remarriage of the widow, does not apply to a child adopted by the widow after her husband's death. It may include children of a widow by a former marriage and children adopted by the deceased during his lifetime. State v. District Court, 133 Minn. 265, 158 N. W. 250.

Under the act as amended by Laws 1915, c. 209, a widowed daughter, thirty years old, deriving a part of her support from her father, held a partial dependent and within the act. State v. District Court, 134 Minn. 131, 158 N. W. 798.

The test of dependency is not whether the claimants could support life without the contributions of the deceased, but whether they regularly received from his wages part of their income or means of living. State v. District Court, 134 Minn. 324, 159 N. W. 755.

Deceased earned $7.50 a week. He gave it all to his parents, and lived with them, receiving his lodging, board and clothing. His father earned $18 a week. There was no other family income. The family consisted of the parents, deceased, and three sisters. This evidence is sufficient to sustain a finding that the parents regularly derived part of their support from the wages of deceased and were partially dependent upon him. In view of this testimony, a statement made by the father on cross-examination that the amount earned by deceased was not enough to pay for his board and clothing, is not decisive of the case. An estimate given by a party on the witness stand, if out of harmony with his other testimony, is not conclusive. State v. District Court, 134 Minn. 324, 159 N. W. 755.

Evidence held to justify a finding that the widow of decedent was not voluntarily living separate and apart from him so as to be deprived of the presumption of total dependency. The expression "voluntarily living apart from her husband" as used in the act means the free and intentional choice of the wife deliberately made and acted upon. State v. District Court, 137 Minn. 283, 163 N. W. 509.

Evidence held to justify a finding that parents of a deceased workman were partially dependent upon him and an order for compensation in accordance therewith. State v. District Court, 137 Minn. 467, 163 N. W. 1070.

While the evidence shows that plaintiff was living apart from her husband, it fails to show that she was doing so voluntarily. State v. District Court, 139 Minn. 409, 166 N. W. 772.

The provision in the act that the surviving wife shall be conclusively presumed to be wholly dependent upon her husband infringed no constitutional right of the relator and is valid. State v. District Court, 139 Minn. 409, 166 N. W. 772.

Children under sixteen years of age are conclusively presumed to be dependents. State v. District Cout, 143 Minn. 144, 172 N. W. 897.

Where the employee accidentally killed is the mother of several children under sixteen years of age, and the father had for several years prior to her death deserted the family, such children are to be regarded as "orphans," coming within subdivision 10, § 5, c. 209, Laws 1915, for the purpose of fixing the amount to be paid under the act. State v. District Court, 143 Minn. 144, 172 N. W. 897.

The finding that the relator was voluntarily living apart from her husband must stand, as reasonable minds might reach different conclusions in respect to the fact. The fact that she was voluntarily living apart from her husband removed the presumption of dependency, and the evidence shows no actual dependency within the meaning of the statute. State v. District Court, 146 Minn. 59, 177 N. W. 934.

Under the act a wife is conclusively presumed to be wholly dependent upon her husband unless voluntarily living apart from him. The trial court found that plaintiff was so dependent. Applying the rule stated in State ex rel. Neissen v. District Court, 142 Minn. 335, 172 N. W. 133, it

is held that the finding is sustained. Hinchuk v. Swift & Co., — Minn. —, 182 N. W. 622.

Parents of a minor son, living with them regularly and giving his wages to his mother, are his partial dependents, even though the father's earnings were sufficient to maintain the family, if they had not been expended in the purchase of the house which it occupied. Pushor v. American Railway Express Co., — Minn. —, 183 N. W. 839.

Who are dependents. L. R. A. 1917D, 157; 1918F, 483.

5854h. Allowance to dependents—Under Laws 1913, c. 467, § 14, subds. 13, 15, 17, a partially dependent sister of a deceased workman is entitled to the minimum fixed by subdivision 17. State v. District Court, 132 Minn. 249, 156 N. W. 120.

Under section 17 of the act, the monthly contributions of a workman to his mother should be considered as part of her "total income," in determining the amount she is entitled to recover as a partial dependent. State v. District Court, 133 Minn. 454, 158 N. W. 792.

The right of dependents to compensation is not affected by the fact that the deceased workman had insurance and they derive benefit from it. State v. District Court, 134 Minn. 28, 158 N. W. 791.

Under Laws 1913, c. 467, the minimum death benefit to be paid to partial dependents is six dollars a week. State v. District Court, 134 Minn. 324, 159 N. W. 755.

Instalments payable in the future do not bear interest. State v. District Court, 145 Minn. 444, 177 N. W. 644.

In 1918 the maximum amount which the compensation law allowed to dependents in case of death was the sum of eleven dollars per week. State v. District Court, 145 Minn. 444, 177 N. W. 644.

See L. R. A. 1917D, 164.

5854i. Demand on employer not necessary—Notice of injury—No notice of the injury need be served on the employer if he had actual knowledge thereof. A finding that an employer had "actual notice" held equivalent to a finding of actual knowledge and justified by the evidence. State v. District Court, 132 Minn. 251, 156 N. W. 278.

Evidence held to justify a finding that an employer had actual knowledge of the occurrence of the injury within ninety days after it happened. Kraker v. Nett, 148 Minn. —, 180 N. W. 1014.

See L. R. A. 1917D, 135–141; 1918E, 556.

5854j. Hearing—Proceedings summary—Venue—Burden of proof—Findings of fact—The proceedings under G. S. 1913, § 8225, are summary in their nature. When the real parties in interest have pleaded and a reasonable time has been given to all to prepare for trial, the court may proceed to hear and determine the controversy. State v. District Court, 133 Minn. 402, 158 N. W. 615.

The burden of proof is on the claimants to show a right to the benefits of the act. State v. District Court, 134 Minn. 324, 159 N. W. 755.

The statute contemplates findings to be made after hearing of testi-

mony, or, perhaps, upon stipulated facts. State v. District Court, 138 Minn. 326, 164 N. W. 1012.

The proceedings are informal and are intended to be inexpensive. State v. District Court, 139 Minn. 409, 166 N. W. 772.

The statutes providing for a change of venue are inapplicable. State v. District Court, 142 Minn. 503, 172 N. W. 486.

See L. R. A. 1917D, 181.

5854k. Attorney's fees and lien—Proceedings under the act are informal and are intended to be inexpensive; and only extraordinary circumstances will justify the allowance of an attorney's lien for any considerable part of the amount awarded. State v. District Court, 139 Minn. 409, 166 N. W. 772.

The attorney of an injured employee, giving a receipt releasing employer from liability in consideration of payments on a settlement approved by the court, held not entitled to recover attorney's fees from employee under the act. Johnson v. Lundin Bros., 144 Minn. 470, 175 N. W. 302.

5854l. Similar acts of other states—The language of similar statutes in other states varies so much from that of our own that the decisions of other states construing their statutes are generally of little or no assistance here. State v. District Court, 133 Minn. 439, 158 N. W. 700.

The fact that a case is governed by a workmen's compensation act of another state is a matter of defence, to be pleaded and its application shown. Nash v. Minneapolis & St. L. R. Co., 141 Minn. 148, 169 N. W. 540.

To entitle an employer to the benefits and protection of the Workmen's Compensation Act of the state of Iowa (Code Supp. 1913, §§ 2477m to 2477m51), he must comply with the insurance provisions thereof and insure the liability thereby created within the time therein provided, a failure to do which will expose him to liability to the same extent as before the compensation law was enacted. The insurance provisions of that act took effect and became operative and in force on July 1, 1913. An order relieving the employer from the insurance provisions of the act, which is authorized on a showing of solvency and ability to pay, can have no retroactive operation, and does not affect or impair a right of action at law which accrued to an employee or his next of kin prior to the date when the employer became subject to the act. Nash v. Minneapolis & St. Louis R. Co., 144 Minn. 322, 175 N. W. 610.

5854m. What is an accident—Freezing is a personal injury caused by accident within the act. State v. District Court, 138 Minn. 131, 164 N. W. 585.

Typhoid fever caused by drinking infected water is not an accident within the act. State v. District Court, 138 Minn. 210, 164 N. W. 810.

Sunstroke is a personal injury caused by accident within the act. State v. District Court, 138 Minn. 250, 164 N. W. 916.

That a death is unnatural imports a violent agency as the cause. State v. District Court, 138 Minn. 250, 164 N. W. 916.

Freezing is a personal injury caused by accident within the act. State v. District Court, 138 Minn. 260, 164 N. W. 917.

The word "accident" means "an unexpected or unforeseen event, happening suddenly and violently, with or without human fault and producing at the time injury to the physical structure of the body." State v. District Court, 137 Minn. 30, 162 N. W. 678.

A death caused by the rupture of a blood vessel from a strain in using a wheelbarrow held an "accident" within the act. State v. District Court, 137 Minn. 30, 162 N. W. 678.

Acute dilatation of the heart is an accident within the act. State v. District Court, 142 Minn. 420, 172 N. W. 311.

Being killed by a sheriff's posse while riding in an automobile which the posse was attempting to stop by shooting at the tires held an accident. Wold v. Chevrolet Motor Co., 147 Minn. 17, 179 N. W. 219.

What constitutes an accident. L. R. A. 1917D, 103; 1918F, 867.

See cases under § 5854E.

5854n. Employment must be in usual course of business or occupation of employer—A corporation engaged in the retail lumber and building business decided to enlarge its business by adding coal and other fuel. To carry out this plan it was necessary to build a coal shed. Plaintiff was employed by the corporation to do a specific part of the work of constructing the shed. In the course of such employment he was injured. Held, that the employment was in the usual course of business of the corporation and the plaintiff was entitled to compensation under the act. State v. District Court, 141 Minn. 83, 169 N. W. 488.

The phrase "usual course of the business or occupation" is to be liberally construed in favor of workmen. State v. District Court, 141 Minn. 83, 169 N. W. 488.

5854o. Intoxication of employee—The statute exempts the employer from liability when intoxication is the "natural and proximate cause" of the accident. Evidence held to justify a finding that an accident resulting in death was not caused by intoxication. State v. District Court, 141 Minn. 348, 170 N. W. 218.

Whether the intoxication of the injured employee or the condition of the stairway which he was required to use in going to his place of work was the proximate cause of his injury was one of fact for the trial court. The intoxication was not the natural cause of the injury, and on facts stated in the opinion the trial court was not bound to find that it was the proximate cause thereof, within the meaning of the act. State v. District Court, 145 Minn. 96, 176 N. W. 155.

5854p. Wilful negligence of employee—It is immaterial that the injured employee was at fault at the time of the accident, if not wilfully so. State v. District Court, 141 Minn. 61, 169 N. W. 274.

A finding that decedent was not guilty of wilful negligence held jus-

tified by the evidence. State v. District Court, 142 Minn. 410, 172 N. W. 310.

Serious and wilful misconduct of employee. 4 A. L. R. 116; L. R. A. 1917D, 133.

5854q. Injuries by other than employer or fellow employee—Third party provision—Common-law action by employee—Subrogation—The act applies to an injury caused by an employer who is not the employer of the injured employee. Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71; Lindstrom v. Mutual Steamship Co., 132 Minn. 328, 156 N. W. 669.

Section 33 of the act, respecting injuries to an employee resulting from the act of a third person not his employer, has no reference where such third person is not subject to the provisions of the act. The fact that the third person is an officer or agent of a corporation which is subject to the statute does not render the statute applicable unless the officer was acting in the course of his authority for the corporation, and to such an extent as to render the corporation liable for his act. Hade v. Simmons, 132 Minn. 344, 157 N. W. 506.

The employer's right to recover the amount which he has been compelled to pay to his employee's dependents from a third party, whose act was the cause of the accident, depends on whether the negligence of such third party was the proximate cause of the injury. Carlson v. Minneapolis St. Ry. Co., 143 Minn. 129, 173 N. W. 405.

The act provides that the person injured may proceed under the act against his employer, or against a third party by a common-law action for negligence. To recover against the third party he must prove his common-law cause of action. If he recovers in a common-law action he can have no greater amount than that fixed by the act. If he takes under the act his employer is subrogated to his common-law action against the third party and his recovery is limited to the amount payable under the act. The statute gives no right to proceed against the third party under the act. Carlson v. Minneapolis St. Ry. Co., 143 Minn. 129, 173 N. W. 405; Hansen v. Northwestern Fuel Co., 144 Minn. 105, 174 N. W. 726. See Holmquist v. Curtis Lumber & Mill Co., 144 Minn. 163, 175 N. W. 103.

The act does not authorize an action by an employee thereunder, but if an employee brings a common-law action against a third party and such party, at the close of the testimony, moves that the case be dismissed as a common-law action and that the court either grant or deny compensation under the act, the court may fix the compensation thereunder and the third party cannot complain. Hansen v. Northwestern Fuel Co., 144 Minn. 105, 174 N. W. 726.

The right of action against the third person not subject to the act is expressly given to the employee notwithstanding settlement has been made with his employer. The statute is clear on the subject, and a recovery in such an action necessarily will conclude all parties and not expose the third party to a second suit. Such is the rule in practically all

of the states having statutory provisions similar to our own. Podgorski v. Kerwin, 144 Minn. 313, 175 N. W. 694.

Defendant was an employer and was under the compensation act and was engaged in the conduct of his business. Plaintiff and his employer were likewise under the act. Plaintiff was driving an automobile belonging to his employer. The automobile had been assigned to another employee of the same employer, but one doing business in other territory, and was being taken by plaintiff from a railroad station at the request of this fellow employee and solely as an accommodation to him. The evidence sustains a finding that the accident did not arise in the course of plaintiff's employment and that the case is not within the third party provision of the act. Gibbs v. Almstrom, 145 Minn. 35, 176 N. W. 173.

The evidence does not call for a finding that the employee was injured by the act of a third person or fellow employee intended to injure him because of reasons personal to him, so as to be excluded by subdivision (i), § 8230, G. S. 1913, from compensation. Wold v. Chevrolet Motor Co., 147 Minn. 17, 179 N. W. 219.

Under G. S. 1913, § 8229 (1), an employer against whom an award of periodical payments is made under the Compensation Act in favor of an employee or dependent, where the injury or death was caused by the negligence of a third party, all being under the Compensation Act, may have an award against the third party like that which the employee or dependent might have had, and need not await the payment of the entire amount due on the award against him before having his rights against the third party fixed and determined. Metropolitan Milk Co. v. Minneapolis St. Ry. Co., — Minn. —, 183 N. W. 830.

See L. R. A. 1917D, 98.

5854r. Cause of death or disability—Accident or suicide—Evidence held to justify a finding that the death of a mason's helper was caused by the rupture of a blood vessel by muscular strain in using a wheelbarrow. State v. District Court, 137 Minn. 30, 162 N. W. 678.

When violent death is shown, the presumption arises that it was not self-inflicted. As between accident and suicide, the law supposes accident until the contrary is shown. The evidence in this case is not conclusive of suicide and sustains a finding of accident. State v. District Court, 138 Minn. 138, 164 N. W. 582. See 5 A. L. R. 1680.

An employee died six weeks after an injury sustained in his employment. Held, that the evidence justified a finding that his death was caused by the injury and not solely by disease. State v. District Court, 138 Minn. 334, 164 N. W. 1012.

Evidence held to justify a finding that the death of a workman was cause by blood poisoning from a scratch on the hand. State v. District Court, 139 Minn. 30, 165 N. W. 478.

Evidence held to justify a finding that the death of a workman resulted from injuries which he received while engaged in the performance of his duties. He fell and struck upon his head and was unconscious for a few

moments. Two or three days afterward he resumed his duties and performed his work as usual for a week or more when he was discharged. During this period he appeared to be in his normal condition except that an impediment in his speech seemed to be more pronounced than theretofore. On February 19 he entered a hospital where he died on March 3. State v. District Court, 139 Minn. 409, 166 N. W. 772.

Evidence held to justify a finding that the disability of an employee was due to falling down a flight of steps in the course of his employment. State v. District Court, 140 Minn. 216, 167 N. W. 1039.

Where an employee died of apoplexy shortly after having his hand cut by a saw in the course of his employment, a finding that death was caused by the accident was held justified by the evidence. State v. District Court, 147 Minn. 10, 179 N. W. 217.

Proximate cause under act. 3 Minn. L. Rev. 123.

5854s. Readjustment of award—An award is subject to readjustment as an award of an amount payable periodically for more than six months when the payments voluntarily paid prior to the award under a concession of liability, and taken into consideration in making the award, together with those directed to be made by the award, exceed periodical payments for such period though the payments directed by the award to be made are not for so long a period as six months. State v. Nye, 136 Minn. 50, 161 N. W. 224; State v. District Court, 146 Minn. 283, 178 N. W. 594.

Section 27 of the act, providing for an application by either party after six months to modify the award on the ground of increase or decrease of capacity, applies only to cases where the capacity of the injured man has increased or decreased since the award was made, and is not a remedy for the correction of errors in fixing the compensation. State v. District Court, 136 Minn. 147, 161 N. W. 391.

5854t. Settlement—Release—Setting aside—A settlement between plaintiff and his employer under the act, by which the employer was released from all claims on account of injury to the plaintiff, held not to operate as a settlement or release of any claim for malpractice which plaintiff might have against physicians who treated him at the instance of the employer. Viita v. Fleming, 132 Minn. 128, 155 N. W. 1077.

Where an employer and an employee agreed, with the court's approval, as to the compensation for a temporary disability, a subsequent release executed by the employee without consideration or the approval of the court was not a "settlement" within G. S. 1913, § 8216, authorizing settlements and did not affect the original settlement. Clarkson v. Northwestern Consolidated Milling Co., 145 Minn. 489, 175 N. W. 997, 176 N. W. 960.

Application to set aside a settlement on the ground of fraud and newly discovered evidence held properly denied. State v. District Court, 146 Minn. 476, 178 N. W. 1002.

A lump sum settlement in proceedings under the Workmen's Compensation Act, entered into by the parties under the provisions of G.

S. 1913, §§ 8216 and 8222, approved by the trial court and formally confirmed by its judgment, and paid by the employer, in the absence of fraud or deception is final, and not open to readjustment. It was within the power of the legislature to declare such settlements final, and, when not challenged for fraud, the courts are without authority, inherent or otherwise, to nullify the legislative declaration to that effect. G. S. 1913, § 7786, is inapplicable. Integrity Mut. Casualty Co. v. Nelson, — Minn. —, 183 N. W. 837.

5854u. Physicians—Compensation—The Workmen's Compensation Act, in force in 1917, did not give to a physician or surgeon who furnished medical treatment to an injured employee a right of action for the value thereof against an employer who had not requested or consented to the furnishing of the treatment by such physician or surgeon. Nor in any event can an employer be held liable for such treatment, in the absence of a finding that he either consented thereto or that he refused or was unable to furnish needed treatment. Even were liability to suit conceded, it could not be maintained if brought after the time specified in the act. That this action was brought too late appeared from the face of the complaint, and the plea of the bar of the limitation provision was well taken. Beach v. Gendler, — Minn. —, 182 N. W. 607.

An employer, though operating under the act, may agree, with a physician called by him to treat an injured employee, to pay the full value of the physician's services. The evidence in this case sustains a finding that defendants made such an agreement. Collins v. Joyce, 146 Minn. 233, 178 N. W. 503.

5854v. Benefit insurance—Plaintiff, while in the employ of one of defendants, was injured by the negligence of a third party. The injury was one for which his employer was liable to make compensation under the Compensation Act, but plaintiff sued the third party, and recovered in settlement more than the compensation allowed by the Compensation Act. Plaintiff also held a benefit certificate issued by defendant's benefit department and now sues for benefits under that certificate. Plaintiff's contract with defendant's benefit department entitled him to benefits in event of death or disability for which compensation or damages are not required by law to be paid by his employer. This being a case in which liability of the employer arose under the Compensation Act, liability under the benefit certificate does not arise. The fact that the payment of damages by the railroad company discharged the liability of the employer does not give rise to liability under the benefit certificate. Holmquist v. Curtis Lumber & Mill Work Co., 144 Minn. 163, 175 N. W. 103.

5854w. Limitation of actions—Laws 1915, c. 209, providing a limitation of one year after injury in which a workman may commence his action, held not retrospective in operation. State v. General Accident etc. Corp., 134 Minn. 21, 158 N. W. 715.

5854x. Findings and judgment—Amendment—Reduction of verdict—New trials not contemplated—The act does not contemplate applications to the trial court for amendments of its findings or conclusions or for a new trial. Such an application is not necessary to secure a review on appeal to the supreme court. State v. District Court, 134 Minn. 16, 158 N. W. 713.

Where the liability of the defendant is established and the extent thereof is less than the verdict, the trial court should not grant a new trial but should reduce the verdict to the amount authorized by the act. Mahowald v. Thompson-Starrett Co., 134 Minn. 113, 158 N. W. 913.

A judgment under the act may be opened and modified in case of newly discovered evidence. G. S. 1913, § 7786, allowing relief within a year, applies. A new trial for newly discovered evidence is not authorized. State v. District Court, 134 Minn. 189, 158 N. W. 825. See Integrity Mut. Casualty Co. v. Nelson, — Minn. —, 183 N. W. 837.

The judgment in a compensation case cannot be amended by the district court because of judicial error in it after the time for review in the supreme court has passed. G. S. 1913, § 8222, providing for the modification of a judgment on the ground of "increase or decrease of incapacity," does not authorize a modification because of judicial error in determining the amount of the award. Connelly v. Carnegie Dock & Fuel Co., 148 Minn. —, 181 N. W. 857.

5854y. Common-law action by employee against employer—Action against insurer—Where an action is brought at common law in a case to which the act applies the court may retain the case and proceed under the act. Mahowald v. Thompson-Starrett Co., 133 Minn. 113, 158 N. W. 913; State v. District Court, 136 Minn. 151, 161 N. W. 388.

Where an employer insures his workmen under the provisions of the act, it is not necessary to the maintenance of an action against the insurer that the notice provided for in G. S. 1913, § 8227, be filed in the office of the labor commissioner of the state before the accident causing the injury occurs. State v. District Court, 133 Minn. 402, 158 N. W. 615.

The common-law action and a proceeding under part 2 of the compensation statute are essentially different in many important respects, though each has a common object, namely, compensation for the injury or death complained of. The action at law is founded upon negligence, a showing of which is necessary to a right of recovery. The action proceeds in its course through the courts in harmony with established procedure, including the right of trial by jury. The compensation proceeding is controlled in a general way by the procedure prescribed by the statute creating the remedy; the hearing or trial before the court is summary, without a jury, and the element of negligence is not a necessary issue therein. The amount which may be recovered in the common-law action, for an injury to the person, is limited to reasonable compensation, and recovery may be had for pain and suffering occasioned by the injury; the recovery under the compensation statute is limited to the amount and during the period of time therein specifically stated,

and there is no compensation for pain and suffering. The judgment in the common-law action is final and conclusive as to amount, but the compensation judgment may be modified under particular circumstances. Section 8222, G. S. 1913. In the action at law all persons whose wrongful act contributes to cause the injury may be jointly sued, and full relief had against each; under the compensation statute the employer alone can be made a party defendant, and by subrogation he succeeds upon payment of the compensation judgment to the rights of the injured party against the third person who may have contributed to the injury. Sections 8229, 8230, G. S. 1913. These and many other elements of the compensation proceeding differentiate it from the action at law in substantial respects and render the rule of res judicata inapplicable. State v. District Court, 136 Minn. 151, 161 N. W. 388.

Where a master is sued by his servant for negligence and he claims that the exclusive remedy of the servant is under the Workmen's Compensation Act, the burden is on the master to show that the servant was performing services for the master at the time of the accident, within the scope of his employment. Otto v. Duluth St. Ry. Co., 138 Minn. 312, 164 N. W. 1020; Koubek v. Gerens, 147 Minn. 366, 180 N. W. 219.

In an action brought in the municipal court, the complaint alleged that defendant assumed and agreed to pay the liabilities of an insurance company, which had insured plaintiff's employer under the provisions of the Workmen's Compensation Act, and that such company was indebted to plaintiff in a stated sum on account of a personal injury he had sustained in the course of his employment at a time when he and his employer were both subject to the act. Held, that the complaint failed to state a cause of action, and that the cause of action plaintiff atempted to allege was not within the jurisdiction of the municipal court. Burns v. Millers Mut. Casualty Co., 146 Minn. 356, 178 N. W. 812.

5854z. Certiorari—Scope of review—Weight given findings of trial court—Upon certiorari issued on the relation of the one against whom judgment fixing the compensation is entered, the claimant cannot have the record reviewed. State v. District Court, 132 Minn. 249, 156 N. W. 120.

The writ of certiorari does not bring to this court for review orders in a compensation proceeding not in their nature appealable. It does not lie to review an order for judgment on the pleadings, for such an order is not in its nature appealable. It lies to review the judgment entered pursuant to such an order. State v. District Court, 139 Minn. 205, 166 N. W. 185.

The findings of fact made by the trial court in proceedings under the act are not conclusive, but will be reviewed on certiorari to the extent of determining whether they are supported by sufficient competent evidence. The question presented on such review is one of law, and in the decision thereof the court will be guided by the general rule that a question of law arises on the evidence where an impartial consideration thereof, together with permissible inferences from facts shown, will lead rea-

sonable minds to but one conclusion. If reasonable minds may reach different conclusions, the question of the sufficiency of the evidence becomes one of fact, and the findings of the trial court thereon will be sustained. State v. District Court, 142 Minn. 335, 172 N. W. 133; State v. District Court, 142 Minn. 420, 172 N. W. 311; Zinken v. Melrose Granite Co., 143 Minn. 397, 173 N. W. 857; State v. District Court, 143 Minn. 144, 172 N. W. 897; State v. District Court, 145 Minn. 96, 176 N. W. 155; State v. District Court, 145 Minn. 127, 176 N. W. 1065; State v. District Court, 145 Minn. 444, 177 N. W. 644; State v. District Court, 146 Minn. 59, 177 N. W. 934; State v. District Court, 147 Minn. 10, 179 N. W. 217; Kaker v. Nett, 148 Minn. —, 180 N. W. 1014; Harris v. Kaul, — Minn. —, 183 N. W. 828. See State v. District Court, 137 Minn. 435, 163 N. W. 755.

See § 331 (liability on bond).

MASTER'S LIABILITY TO SERVANT FOR NEGLIGENCE

IN GENERAL

5855. Duty of master—In general—The general principle of the law of negligence that a person is not liable on the ground of negligence for an act or omission if it could not reasonably have been foreseen under the circumstances that such act or omission was likely to result in injury to any one, is applicable to a master. Beard v. Chicago etc. Ry. Co., 134 Minn. 162, 158 N. W. 815. See Digest, § 7008.

A master is not bound to guard against unforeseeable dangers. Larson v. Duluth, M. & N. Ry. Co., 142 Minn. 366, 172 N. W. 762. See Digest, § 7008.

A master is not liable to a servant unless he owed a duty to the servant under the circumstances. It is not enough that he owed a duty to others. McGillivray v. Great Northern Ry. Co., 145 Minn. 51, 176 N. W. 200.

(13) Larson v. Duluth, M. & N. Ry. Co., 142 Minn. 366, 172 N. W. 762.

(14) Weireter v. Great Northern Ry. Co., 146 Minn. 350, 178 N. W. 887. See §§ 5861, 7049.

5857. Volunteers—An employee, not in active service and not a naked volunteer, engaged with the permission of other employees of a railway company in a transaction of interest as well to himself as to the company, is entitled to the same protection against the negligence of the company as if he were at the time attending to his own duties. White v. Great Northern Ry. Co., 142 Minn. 50, 170 N. W. 849.

(18) White v. Great Northern Ry. Co., 142 Minn. 50, 170 N. W. 849.

5858. Servants off duty—(23) See Otto v. Duluth St. Ry. Co., 138 Minn. 312, 164 N. W. 1020; White v. Great Northern Ry. Co., 142 Minn.

50, 170 N. W. 849; Nesbitt v. Twin City Forge & Foundry Co., 145 Minn. 286, 177 N. W. 131 (servant going to and returning from work).

See § 5854e.

5859. Employing children in dangerous work—Statute—The statute is inapplicable to an action in a state court under the federal Employer's Liability Act. Maijala v. Great Northern Ry. Co., 133 Minn. 301, 158 N. W. 430.

The employment of minors in certain trades and occupations is prohibited by G. S. 1913, §§ 3848, 3870. The concluding clause of those sections, following the enumeration of certain prohibited employments, held to include employments which are dangerous to the life and limb of the minor, though not similar in character to the class of work there specifically enumerated. As so construed, the statute is not unconstitutional, as leaving the basis of the prohibition, namely, the dangerous character of the work, to doubt or uncertainty. Westerlund v. Kettle River Co., 137 Minn. 24, 162 N. W. 680.

The plaintiff, a minor under sixteen, was injured while working at a grinder with an unguarded intake gear in the defendant's meat shop. He claimed that he was put to work at the grinder by one Victor, who to some extent, was in charge, and that the work was a dangerous employment forbidden by G. S. 1913, §§ 3848, 3870, to boys under sixteen. No other fault was attached to Victor. Unless the plaintiff was employed in violation of the statute, he could not maintain a common-law action, for, if his employment was "legally permitted," his rights and the liability of the defendant were fixed by the Workmen's Compensation Act. The court stated to the jury the effect of the statute and the conditions under which the defendant would be liable for the act of Victor in putting the plaintiff at work, and referred to his authority, express or imulied in fact, as the representative of the defendant. After a verdict for the plaintiff it granted a new trial upon the ground that it submitted to the jury the wrong test of the vice principalship of Victor, that is, the rank or grade of service, instead of the non-delegable character of the duty resting upon the defendant. Held, that the charge adopted the proper test of vice principalship, namely, the non-delegable character of the duty imposed upon the defendant; that it properly stated the circumstances under which the defendant would be liable for Victor's act; and that a new trial should not have been granted because of the alleged error in the charge. Gutmann v. Anderson, 142 Minn. 141, 171 N. W. 303.

The statute, G. S. 1913, § 3848, prohibits the employment of a child under sixteen in certain dangerous employments. The defence of the child's contributory negligence, or of his assumption of risk, is not open to an employer who violates the statute. The statute provides that in an action brought against the employer of such a child such employer shall not be deemed to have violated the statute if he has obtained and kept on file an affidavit of the parent or guardian to the effect that the child is not less than sixteen. This, when the child is under sixteen, is

the only defence against the charge of a violation of the statute; and a representation by the boy, and by his father and mother, who are, under the statute, the beneficiaries of a cause of action for his death, that he was not less than sixteen, is not a defence to such an action. Dusha v. Virginia & Rainy Lake Co., 145 Minn. 171, 176 N. W. 482.

A master delivered to his servant, a minor under the age of thirteen years, a shotgun, and ordered and directed him to go out and therewith shoot and scare the birds from the master's cornfields, thus to save the crop from destruction; the servant complied with the order, and while in the performance thereof the gun, in some accidental way, was discharged, seriously injuring the servant's foot. In an action by the servant for the injury it is held: That the question of the proximate cause of the injury, if not one of law arising from the facts stated, was one of fact for the jury. If the act of the master was the proximate cause of the injury, the fact that in accepting the gun and taking it into his possession for the purpose stated the servant technically violated the provisions of G. S. 1913, § 8804, will not defeat his right of action for the wrong of the master. The technical violation of the statute by the servant was a mere incident, and not the moving cause leading to the injury. Kunda v. Briarcombe Farm Co., — Minn. —, 183 N. W. 134.

The duty of an employer in engaging and placing a minor at a dangerous employment is largely measured by the capacity of the minor to comprehend and avoid the dangers of such employment. In determining the capacity of a minor to perform the work and avoid the dangers of a particular employment, the character of the work, the circumstances under which it is to be performed, and the previous experience of the minor should be considered. Clark v. Goche, — Minn. —, 182 N. W. 436.

See §§ 5934, 5951, 5971, 7029.

5860. Failure to give customary signals—(29) Sheehy v. Minneapolis & St. Louis R. Co., 132 Minn. 307, 156 N. W. 346; Hurley v. Illinois Central R. Co., 133 Minn. 101, 157 N. W. 1005; Plachetko v. Chicago, B. & Q. R. Co., 139 Minn. 278, 166 N. W. 338; Molstad v. Minneapolis etc. R. Co., 143 Minn. 260, 173 N. W. 563. See § 5936.

5861. Failure to conform to customary practice—A failure to ascertain whether a brakeman is ready for a stop signal in switching before giving such signal has been held to justify a recovery for resulting injury. Thompson v. Minneapolis & St. Louis R. Co., 133 Minn. 203, 158 N. W. 42.

(31) Sheehy v. Minneapolis & St. Louis R. Co., 132 Minn. 307, 156 N. W. 346; Thompson v. Minneapolis & St. Louis R. Co., 133 Minn. 203, 158 N. W. 42.

5862a. Duty to assist servant in peril—Negligence of fellow servants—Evidence held insufficient to justify a verdict of negligence in the failure of fellow servants to go to the rescue of plaintiff when in a position of peril. Kivak v. Great Northern Ry. Co., 143 Minn. 196, 173 N. W. 421.

5865a. Duty to regard warnings given by strangers—The evidence sustains the finding of the jury that the negligence of the defendant railway company's engineer in failing to obey a stop signal given by a stranger was a proximate cause of the injury to the plaintiff, the fireman on his engine. The defendant owed no duty to the fireman to stop at the railway platform in response to a flag stop; and it would not be chargeable with liability merely because of the failure of the engineer to obey the flag stop, though it so happened that, not obeying the signal, he ran into an unknown danger. There was no error in refusing to give a specific instruction stating the conditions which would excuse the engineer for not responding to a stop signal given by a stranger, when the question of his duty in respect of obedience to stop signals was fully covered by the charge. McGillivray v. Great Northern Ry. Co., 145 Minn. 51, 176 N. W. 200.

5866. Notice—Notice to a switching yard foreman of the existence of a telephone wire strung across tracks so low as to endanger brakemen on passing trains, held notice to the master. Riley v. Minneapolis & St. Louis R. Co., 132 Minn. 195, 156 N. W. 272.

5867. Proximate cause—(39) Burch v. Hoy & Elzy Co., 131 Minn. 475, 155 N. W. 767; Thompson v. Minneapolis & St. Louis R. Co., 133 Minn. 203, 158 N. W. 42; Ehrler v. Chicago, B. & Q. R. Co., 137 Minn. 245, 163 N. W. 506; Prendergast v. Chicago, B. & Q. R. Co., 138 Minn. 298, 164 N. W. 923; Carr v. Minneapolis etc. Ry. Co., 140 Minn. 91, 167 N. W. 299; White v. Great Northern Ry. Co., 142 Minn. 50, 170 N. W. 849; McGillivray v. Great Northern Ry. Co., 145 Minn. 51, 176 N. W. 200; Kunda v. Briarcombe Farm Co., — Minn. —, 183 N. W 134. See § 5854r.

PERSONAL OR ABSOLUTE DUTIES OF MASTER

5868. In general—The so-called absolute duties of the master are subject to the general principle that if a person has no reasonable ground to anticipate that a particular act will result in injury to anybody, the act is not negligent. Beard v. Chicago etc. Ry. Co., 134 Minn. 162, 158 N. W. 815.

It may also be the absolute duty of a master to furnish a servant with safe materials with which to do the work, when the work is fraught with danger. Beard v. Chicago etc. Ry. Co., 134 Minn. 162, 158 N. W. 815. See § 5873a.

The law puts upon the employer certain duties or obligations which are non-delegable in the sense that he cannot authorize them to be done by some one else and escape responsibility for the manner or lack of their doing. They can be discharged only by performance. Such in general is the furnishing of a reasonably safe place in which to work; the furnishing of reasonably safe tools and instrumentalities; the proper supervision of the work in certain cases; sometimes warning and instructing; the guarding or fencing of machinery; and in general the

doing of such things as are necessary to meet the positive requirements of a statute enacted for the safety of employees. Gutmann v. Anderson, 142 Minn. 141, 171 N. W. 303.

(48) Gutmann v. Anderson, 142 Minn. 141, 171 N. W. 303.

DUTY TO FURNISH SAFE PLACE IN WHICH TO WORK

5869. General rule—It is not the duty of a railroad company to keep down the iron aprons on gravel train cars so as to make it safe for the trainmen to pass from one car to another. Maijala v. Great Northern Ry. Co., 133 Minn. 301, 158 N. W. 430.

The general principle of the law of negligence that a person is not liable on the ground of negligence for an act or omission if it could not reasonably have been foreseen under the circumstances that such act or omission was likely to result in injury to any one, is applicable to a master in this connection. Beard v. Chicago etc. Ry. Co., 134 Minn. 162, 158 N. W. 815. See Digest, § 7008.

The duty to furnish a reasonably safe place in which to work requires the master to take proper precautions to guard against those dangers which ordinary sagacity and foresight ought to anticipate as likely to attend the performance of the work, but does not require him to guard against unforeseeable dangers. Larson v. Duluth, M. & N. Ry. Co., 142 Minn. 366, 172 N. W. 762.

(52) Larson v. Duluth, M. & N. R. Co., 142 Minn. 366, 172 N. W. 762. See O'Reilly v. Powers Mercantile Co., 144 Minn. 261, 175 N. W. 116.

(54) See O'Reilly v. Powers Mercantile Co., 144 Minn. 261, 175 N. W. 116.

5872. Duty of railroad companies as to tracks, etc.—In general—A recovery sustained where a switchman was caught by a telephone wire strung across the tracks so low as to be dangerous to brakemen on passing trains. Riley v. Minneapolis & St. Louis R. Co., 132 Minn. 195, 156 N. W. 272.

It is negligent for a railroad company to leave a baggage truck near the tracks on a station platform so that it may strike brakemen riding on the side of passing freight cars in switching operations. Nelson v. Chicago etc. Ry. Co., 139 Minn. 52, 165 N. W. 866.

(60) McNaney v. Chicago etc. Ry. Co., 132 Minn. 391, 157 N. W. 650 (exposed drain box in road bed); Kelley v. Chicago, B. & Q. R. Co., 142 Minn. 44, 170 N. W. 886 (pile of cinders between track and platform at station).

5873. Snow and ice in railroad yards—The general rule is that a railroad company is not liable to its employees for injuries resulting from climatic conditions, such as ice and snow; but within its yard limits it must exercise a degree of care commensurate with the risk to prevent the accumulation of snow and ice in such quantity, form and location

as to be a menace to the safety of its employees working in its yards. Lundeen v. Great Northern Ry. Co., 141 Minn. 180, 169 N. W. 702.

5875b. Use of dazzling headlights in switching yards—Negligence may be predicated on the use of too powerful headlights on locomotives engaged in switching operations. Roach v. Great Northern Ry. Co, 133 Minn. 257, 158 N. W. 232.

5877. Servant voluntarily selecting unsafe place—The rule that a servant who voluntarily selects a place for the performance of his work other than that provided by the master, and is injured from defects in the place so selected, is not entitled to recover for such injuries, followed and applied. Kivak v. Great Northern Ry. Co., 134 Minn. 196, 173 N. W. 421.

5879. Place made unsafe by independent contractor—(71) Riley v. Minneapolis & St. Louis R. Co., 132 Minn. 195, 156 N. W. 272.

5882. Leased premises—(76) See Hansman v. Western Union Tel. Co., 136 Minn. 212, 161 N. W. 512 (workroom not properly heated).

5883. Particular places—(79) Riley v. Minneapolis & St. Louis R. Co., 132 Minn. 195, 156 N. W. 272 (telephone wire sagging over tracks); Roach v. Great Northern Ry. Co., 133 Minn. 257, 158 N. W. 232 (switching yards—using too powerful headlight on locomotive); Maijala v. Great Northern Ry. Co., 133 Minn. 301, 158 N. W. 430 (gravel train—company not bound to keep down iron aprons between cars); Manning v. Chicago G. W. R. Co., 135 Minn. 229, 160 N. W. 787 (rotten ties causing derailment); Hansman v. Western Union Tel. Co., 136 Minn. 212, 161 N. W. 512 (office not properly heated); Ehrler v. Chicago, B. & Q. R. Co., 137 Minn. 245, 163 N. W. 506 (apron between locomotive and tender); Nelson v. Chicago etc. Ry. Co., 139 Minn. 52, 165 N. W. 866 (baggage truck left near tracks on station platform); Enger v. Great Northern Ry. Co., 141 Minn. 86, 169 N. W. 474 (a roundhouse for locomotive engines, dangerous from being filled with steam from engine "blowing off"); Kelley v. Chicago, B. & Q. R. Co., 142 Minn. 44, 170 N. W. 886 (pile of cinders between track and platform at station); Brown v. Duluth etc. Ry. Co., 147 Minn. 167, 179 N. W. 1003 (coal-loading platform so near tracks as to endanger engineer leaning out of cab).

DUTY TO FURNISH SAFE INSTRUMENTALITIES

5884. General rule—The general principle of the law of negligence that a person is not liable on the ground of negligence for an act or omission if it could not reasonably have been foreseen under the circumstances that such act or omission was likely to result in injury to any one, is applicable to a master in this connection. Beard v. Chicago etc. Ry. Co., 134 Minn. 162, 158 N. W. 815. See Digest, § 7008.

5888. Duty continuing—Inspection and repair—A daily inspection is not necessary in the case of a simple appliance such as a bolt and nut holding together the two ends of a chain. Olson v. Great Northern Ry. Co., 141 Minn. 73, 169 N. W. 482.

(15) Prendergast v. Chicago, B. & Q. R. Co., 138 Minn. 298, 164 N. W. 923.

(17) Kromer v. Minneapolis etc. Ry. Co., 139 Minn. 424, 166 N. W. 1072 (a steel wrench used in a roundhouse to loosen a burr on an engine held within the exception); Olson v. Great Northern Ry. Co., 141 Minn. 73, 169 N. W. 482 (bolt).

5890. Master's knowledge of defects—(22) Prendergast v. Chicago, B. & Q. R. Co., 138 Minn. 298, 164 N. W. 923.

5893. Best and safest machinery not required—(27) Olson v. Great Northern Ry. Co., 141 Minn. 73, 169 N. W. 482.

5895. Guards or fences for dangerous machinery—Statute—Evidence held insufficient to justify a recovery where an operator of an unguarded "gainer" was hit in the eye by a small piece of a knot thrown from the timber which he was feeding into the machine. There was no evidence that any guard in common use would prevent such an accident. The accident was one which could not reasonably have been foreseen. The natural tendency of the machine was to throw particles to the floor and away from the operator. No such accident had ever occurred before. Beard v. Chicago etc. Ry. Co., 134 Minn. 162, 158 N. W. 815.

(33) Beard v. Chicago etc. Ry. Co., 134 Minn. 162, 158 N. W. 815.

(36) See Dusha v. Virginia & Rainy Lake Co., 145 Minn. 171, 176 N. W. 482.

(40) See Curwen v. Appleton Mfg. Co., 133 Minn. 28, 157 N. W. 889.

5896. Barriers for elevator shafts—Statute—G. S. 1913, § 3873, requiring every hoistway, elevator well and hatchway in any factory, mill, workshop, storehouse, or store to be guarded and protected by substantial barriers, held to apply to a building wherein is maintained a "hatchway" or trapdoor as a means of access to the basement, though the business carried on therein is that of the ordinary saloon; there being present upon the premises employees for whose protection the statute was enacted; the building is a "store" within the meaning of the statute. The proprietor of such place who is injured by falling into a trapdoor located on the main floor thereof, which should have been guarded as required by the statute, the door being raised and left open by a third person, is not entitled to recover against such person, though the act of leaving the door open was one of negligence, for the failure of compliance with the statute is the proximate cause of the injury. Kelly v. Theo. Hamm Brewing Co., 140 Minn. 371, 168 N. W. 131.

5898. Automatic couplers—Grab irons—Grab irons are within the federal safety appliance act. McNaney v. Chicago etc. Ry. Co., 132 Minn. 391, 157 N. W. 650. See § 6022h.

5910. Scaffolds—A recovery for an injury resulting from the fall of a pudlock scaffold held justified by the evidence. Burch v. Hoy & Elzy Co., 131 Minn. 475, 155 N. W. 767.

5913. Law and fact—(78) White v. Great Northern Ry. Co., 142 Minn. 50, 170 N. W. 849.

5915. Particular instrumentalities—A grab iron or handhold on a railroad car. McNaney v. Chicago etc. Ry. Co., 132 Minn. 391, 157 N. W. 650.

Headlight on locomotive engine. Roach v. Great Northern Ry. Co., 133 Minn. 257, 158 N. W. 232.

A "gainer" machine in railroad shop. Beard v. Chicago etc. Ry. Co., 134 Minn. 162, 158 N. W. 815.

A steel wrench. Kromer v. Minneapolis etc. Ry. Co., 139 Minn. 424, 166 N. W. 1072.

An automatic closet tank in a railroad station, the porcelain top being broken with sharp jagged edges. Carr v. Minneapolis etc. Ry. Co., 140 Minn. 91, 167 N. W. 299.

A chain, with ends held together by a bolt and nut, used to attach a trailer to handcar. Olson v. Great Northern Ry. Co., 141 Minn. 73, 169 N. W. 482.

A mowing machine. Clark v. Goche, — Minn. —, 182 N. W. 436.

(80) Manning v. Chicago G. W. R. Co., 135 Minn. 229, 160 N. W. 787 (rotten ties causing derailment).

(82) Smith v. Great Northern Ry. Co., 132 Minn. 147, 153 N. W. 513, 155 N. W. 1040 (step on locomotive tender too near platform at station); Ehrler v. Chicago, B. & Q. R. Co., 137 Minn. 245, 163 N. W. 506 (apron between locomotive and tender); Castle v. Union Pacific R. Co., 139 Minn. 396, 166 N. W. 767 (coal left on foot board making it slippery); Miller v. Chicago, B. & Q. R. Co., 140 Minn. 14, 167 N. W. 117 (projecting jagged bar); White v. Great Northern Ry. Co., 142 Minn. 50, 170 N. W. 849 (step on tank of tender).

(83) Cramer v. Chicago etc. Ry. Co., 134 Minn. 61, 158 N. W. 796 (absence of lower rung on ladder).

(13) Burch v. Hoy & Elzy Co., 131 Minn. 475, 155 N. W. 767.

DUTY TO EMPLOY FIT SERVANTS

5916. General rule—(47) See 8 A. L. R. 574; 11 Id. 783.

DUTY TO WARN AND INSTRUCT

5929. General rule—There is no duty unless the master knew or ought to have known of the danger. O'Reilly v. Powers Mercantile Co., 144 Minn. 261, 175 N. W. 116.

Duty to warn against occupational diseases. 6 A. L. R. 355.

(75) Maijala v. Great Northern Ry. Co., 133 Minn. 301, 158 N. W.

430; O'Reilly v. Powers Mercantile Co., 144 Minn. 261, 175 N. W. 116 (danger from working in infected room).

5930. Duty absolute—(76) Schaefer v. Marshall Milling Co., 133 Minn. 73, 157 N. W. 993.

5934. Immature servants—If a master, with knowledge of the dangerous character of an act he desires done, commands a young and inexperienced servant to perform it without apprising him of the danger or giving him adequate instructions how to do it with safety, he is chargeable with negligence. Schaefer v. Marshall Milling Co., 133 Minn. 73, 157 N. W. 993. See Kunda v. Braircombe Farm Co., — Minn. —, 183 N. W. 134.

(81) Schaefer v. Marshall Milling Co., 133 Minn. 73, 157 N. W. 993; Clark v. Goche, — Minn. —, 182 N. W. 436.

(83) Maijala v. Great Northern Ry. Co., 133 Minn. 301, 158 N. W. 430.

5936. Duty to warn railroad sectionmen, switchmen, brakemen and yardmen—Switching operations—Where an employee is working about standing cars in a switching yard to the knowledge of the master, warnings must be given of switching operations causing a movement of the cars, at least if it is customary to give them. Hurley v. Illinois Central R. Co., 133 Minn. 101, 157 N. W. 1005.

In the absence of some custom, or of the presence of persons on or near the track ahead, it is not negligence to run an engine through a switching yard without ringing a bell. Beecroft v. Great Northern Ry. Co., 134 Minn. 86, 158 N. W. 800.

An engine with water tank attached was backing through a switching yard. There was a footboard across the front of the engine and one across the rear of the tank. Two men were stationed, one on each end of the engine footboard so that one could look ahead, on each side of the engine. Held, negligence could not be predicated on the failure to keep another man on the footboard of the tank. Beecroft v. Great Northern Ry. Co., 134 Minn. 86, 158 N. W. 800.

It is ordinarily the duty of a railroad company pushing a string of cars in switching yards to have a man stationed on the forward car to give warning to employees about the yards. Price v. Great Northern Ry. Co., 134 Minn. 89, 158 N. W. 825.

An engine was backed against a string of freight cars without warning to a rear brakeman who was in the act of placing a red light on the rear car. Held, that trainmen were not negligent in not anticipating that the brakeman was in such a position of danger that he would be injured by making the coupling without warning him. Gorgenson v. Great Northern Ry. Co., 138 Minn. 267, 164 N. W. 904.

In switching yards it is the duty of engineers to keep a lookout for workmen on the tracks and to give them warnings. Molstad v. Minneapolis etc. R. Co., 143 Minn. 260, 173 N. W. 563.

An engine of defendant railroad company ran over a track workman

working in the dark on the tracks, with a lighted lantern beside him. There is evidence that the engineer and fireman were negligent in failing to give customary signals and failing to keep a proper lookout ahead. Molstad v. Minneapolis etc. R. Co., 143 Minn. 260, 173 N. W. 563.

The evidence is sufficient to raise a question of fact as to whether a railroad switchman, who was throwing a switch, knew or had reason to believe, that a car, which was standing nearby, was about to be moved. Where only one engine is moving in a railroad yard, the rules for determining negligence toward a member of the engine crew, are substantially the same as they would be in any other locality. The evidence is such as to raise an issue of fact, as to whether defendant's employees were negligent, in moving an engine upon plaintiff's decedent, without warning. Thayer v. Hines, 145 Minn. 240, 176 N. W. 752.

In switching yards there is ordinarily no duty to give warning to servants familiar with the operations of the yard of the approach of a switching engine. There is no duty to keep ringing the bell of the engine or sounding the whistle. Weireter v. Great Northern Ry. Co., 146 Minn. 350, 178 N. W. 887.

The proper mode of conducting switching operations in extensive switchyards of a railroad company cannot be determined by jurors from their own knowledge without the aid of evidence. Weireter v. Great Northern Ry. Co., 146 Minn. 350, 178 N. W. 887.

In a railroad yard, where engines and cars are constantly moving to and fro and all men employed about the yard know that moving engines and cars may be encountered on any track at any time, there is ordinarily no obligation on the part of the railroad company to give warning of their approach to employees familiar with the operation of the yard. Ciebattone v. Chicago G. W. R. Co., 146 Minn. 362, 178 N. W. 890.

The evidence does not show that defendants failed to give timely warning to a section man of the approach of a car switched to a track where he was at work after discovering that he was unaware of its approach, and they cannot be charged with wanton negligence. Ciebattone v. Chicago G. W. R. Co., 146 Minn. 362, 178 N. W. 890.

The plaintiff's intestate, an employee of the defendant, was run over and killed in the nighttime by a train of the defendant, when he was lying on his speeder some two or three miles from a station. The station agent had been told between two and three hours before the train left the station that a speeder was then on the track. He did not tell the trainmen. Held, under the facts stated in the opinion, that the station agent was not negligent in failing to notify the trainmen, and that the engineer, in whatever he did at the time of the accident, was not negligent. May v. Chicago etc. Ry. Co., 147 Minn. 310, 180 N. W. 218.

(90) Olthoff v. Great Northern Ry. Co., 135 Minn. 72, 160 N. W. 216.

(91) Hurley v. Illinois Central R. Co., 133 Minn. 101, 157 N. W. 1005; Molstad v. Minneapolis etc. R. Co., 143 Minn. 260, 173 N. W. 563. See Beecroft v. Great Northern Ry. Co., 134 Minn. 86, 158 N. W. 800.

(92) See Beecroft v. Great Northern Ry. Co., 134 Minn. 86, 158 N. W. 800.

See Digest, §§ 5938, 6017.

5937. Servant ordered to dangerous place without warning—Plaintiff's intestate, while in defendant's employ as a teamster, was directed to go with his horses and wagon to a certain place in an alley on defendant's premises to do certain work. While he was so engaged, defendant caused a whistle to be sounded, frightening the horses, causing them to run away, and so injuring plaintiff's intestate that he died shortly thereafter. The place where plaintiff's intestate was at work was rendered peculiarly dangerous when the whistle was blown by reason of the unusually startling effects of the sounds at that point, which invariably frightened horses, causing them to attempt to run away. Plaintiff's intestate did not know of these dangers and was not warned thereof. He had never been at this place when the whistle was sounded. Held, that the evidence was sufficient to present to the jury the question whether defendant was negligent. Gahagen v. George A. Hormel & Co., 133 Minn. 356, 158 N. W. 618.

In an action against an employer to recover damages for illness claimed to have been caused by inhaling disease germs, while at work in a room where fur garments were stored, as the result of the alleged negligence of the master in failing to notify the plaintiff of the dangerous condition of such room, held, that the court was justified, under the evidence, in directing a verdict for the defendant. O'Reilly v. Powers Mercantile Co., 144 Minn. 261, 175 N. W. 116.

The plaintiff was engaged in thawing out ore in an ore pocket in the defendant's dock, using a hose which extended over the rail of a track. The foreman told him that a train was coming in on his track, and to take out the hose. It was his duty to take out the hose when a train came in on the track on which he was working, and this he would do without a direction when he saw a train coming. While endeavoring to take out the hose, moving hurriedly, it being nighttime and the atmosphere misty because of the accumulated steam, he made a misstep and fell into the ore pocket and was injured. Held, that the direction of the foreman was not negligent. Hansen v. Duluth & I. R. R. Co., 144 Minn. 330, 175 N. W. 549.

(93) See Hansen v. Duluth & I. R. R. Co., 144 Minn. 330, 175 N. W. 549.

5938. Duty to give warnings of impending dangers—(94) See Sheehy v. Minneapolis & St. Louis R. Co., 132 Minn. 307, 156 N. W. 346 (kicking cars across a highway where a flagman is stationed).

See § 5936.

5942. Law and fact—(1) Hurley v. Illinois Central R. Co., 133 Minn. 101, 157 N. W. 1005; Maijala v. Great Northern Ry. Co., 133 Minn. 301, 158 N. W. 430; Gahagen v. Geo. H. Hormel & Co., 133 Minn. 356, 158 N. W. 618.

(2) Plachetko v. Chicago, B. & Q. R. Co., 139 Minn. 278, 166 N. W. 338; O'Reilly v. Powers Mercantile Co., 144 Minn. 261, 175 N. W. 116; Weireter v. Great Northern Ry. Co., 146 Minn. 350, 178 N. W. 887; Ciebattone v. Chicago G. W. R. Co., 146 Minn. 362, 178 N. W. 890; May v. Chicago etc. Ry. Co., 147 Minn. 310, 180 N. W. 218.

5942a. Evidence of warning—Ringing of bell—Sufficiency—In this action for wrongful death alleged to have been caused by defendant's negligent failure to give the customary warnings before moving cars in a repair yard, it is held: The evidence affirmatively shows that the customary warning was given deceased by calling out in his presence that the cars between which he was caught were about to be moved. The testimony fails to show that defendant omitted to ring the bell on the locomotive at the time the cars were moved. The positive direct testimony of witnesses to the fact that the bell was ringing was not overcome, nor made a question for the jury, by the equivocal impeachment of one or two witnesses, nor by the testimony of others who were absorbed in their work, and who could only testify that they were not conscious of its ringing, and could not say whether it did or not. Plachetko v. Chicago, B. & Q. R. Co., 139 Minn. 278, 166 N. W. 338. See Digest, § 3238.

DUTY TO ISSUE ORDERS

5944. In general—An order of a foreman to an employee on an ore dock to remove a hose from railroad tracks on account of an approaching train, held not negligent, it being the duty of the employee to remove the hose under the circumstances without any orders. Hansen v. Duluth & I. R. R. Co., 144 Minn. 330, 175 N. W. 549.

DUTY TO FURNISH SAFE MATERIALS

5944a. Unforeseeable accident—If a person has no reasonable ground to anticipate that a particular act will result in any injury to anybody, the act is not negligent. Tested by this rule, the proprietor of a wood working plant is not under duty to furnish his woodworkers with timbers free from knots, lest a knot may fly out when work is being done upon them and cause injury. Beard v. Chicago etc. Ry. Co., 134 Minn. 162, 158 N. W. 815.

FELLOW SERVANTS

5949. Vice-principals—(18) Schaefer v. Marshall Milling Co., 133 Minn. 73, 157 N. W. 993; Gutmann v. Anderson, 142 Minn. 141, 171 N. W. 303.

(19) Gutmann v. Anderson, 142 Minn. 141, 171 N. W. 303.

5950. Superintendents, foremen, etc.—(22) See Gutmann v. Anderson, 142 Minn. 141, 171 N. W. 303.

(23) See Riley v. Minneapolis & St. Louis R. Co., 132 Minn. 195, 156 N. W. 272.

5953. Law and fact—(26) Schaefer v. Marshall Milling Co., 133 Minn. 73, 157 N. W. 993.

STATUTE AS TO RAILWAY FELLOW SERVANTS

5955. Statute constitutional—The statute has been radically changed by Laws 1915, c. 187. Seamer v. Great Northern Ry. Co., 142 Minn. 376, 172 N. W. 765; State v. District Court, 145 Minn. 181, 176 N. W. 749. See § 5963b.

5957. Construction of statute—The statute applies to the negligence of a fellow servant in neglecting to remove a thing rendering the place of work dangerous or in not notifying a superior officer thereof. Riley v. Minneapolis & St. Louis R. Co., 132 Minn. 195, 156 N. W. 272.

The act of 1915 is not limited to "railroad hazards." Larson v. Duluth, M. & N. Ry. Co., 142 Minn. 366, 172 N. W. 762; Seamer v. Great Northern Ry. Co., 142 Minn. 376, 172 N. W. 765.

(65) See Laws 1915, c. 187.

5958. Who liable under statute—(73) See McCullough v. Georgia Casualty Co., 137 Minn. 88, 162 N. W. 894.

5959. Statute held applicable—To switchmen caught by telephone wire extended over tracks. Riley v. Minneapolis & St. Louis R. Co., 132 Minn. 195, 156 N. W. 272.

To sectionman struck with a pick by a fellow servant while the two were engaged in putting in new ties. Oestreich v. Chicago etc. Ry. Co., 140 Minn. 280, 167 N. W. 1032.

(89) McGillivray v. Great Northern Ry. Co., 145 Minn. 51, 176 N. W. 200.

5962. Contributory negligence—The common-law rule has been abolished and the comparative negligence rule adopted by Laws 1915, c. 187.

STATE RAILROAD EMPLOYER'S LIABILITY ACT OF 1915

5963b. Act constitutional—The act has been held constitutional against the objection that its title is insufficient and that it is class legislation. Seamer v. Great Northern Ry. Co., 142 Minn. 376, 172 N. W. 765. See State v. District Court, 145 Minn. 181, 176 N. W. 749.

5963c. Construction and application of act—Chapter 187, Laws of 1915, imposes on a steam railway company liability for injury to an employee caused by the negligence of a fellow servant while acting in the course and within the scope of his employment although the injury did not result from a "railroad hazard." Larson v. Duluth, M. & N. Ry. Co., 142 Minn. 366, 172 N. W. 762.

The benefits of the act are given "any employee suffering injury while engaged in such employment," or "while engaged in the line of his employment." The defendant is a common carrier steam railroad

operating lines within and without the state. It maintains an office building in St. Paul, two or three blocks distant from its railroad lines, which it uses as an administration building. The plaintiff was employed in the transportation office in a clerical capacity. In this office the movement of cars and trains was directed, and records thereof kept, and such work was essential in the operation of the railroad system. The plaintiff, while engaged in the line of her employment, was injured as she was getting into an elevator in the building through the negligence of the elevator boy who was her fellow servant. Held, that the statute applies to employees in her situation. Seamer v. Great Northern Ry. Co., 142 Minn. 376, 172 N. W. 765.

ASSUMPTION OF RISK

5964. General rule—The doctrine of assumption of risk has been limited by Laws 1915, c. 187, as respects employees of railroad companies. Seamer v. Great Northern Ry. Co., 142 Minn. 376, 172 N. W. 765.

It has been said that a servant does not assume the risk of "unusual" negligence. Molstad v. Minneapolis etc. R. Co., 143 Minn. 260, 173 N. W. 563.

(10) Lancette v. Great Northern Ry. Co., 140 Minn. 488, 168 N. W. 634 (coupling cars—brakeman does not assume risk of bringing cars together for the purpose of making an automatic coupling with unusual speed and violence).

5966. Not a form of contributory negligence—While the defences of contributory negligence and assumption of risk are distinct they often blend in the proof. Casey v. Illinois Central R. Co., 134 Minn. 109, 158 N. W. 812.

(17) Casey v. Illinois Central R. Co., 134 Minn. 109, 158 N. W. 812.

5969. Effect of violation of statute—The doctrine of assumption of risk does not apply to an action under G. S. 1913, § 3848, prohibiting the employment of children under sixteen in certain work. Dusha v. Virginia & Rainy Lake Co., 145 Minn. 171, 176 N. W. 482.

(22) See Laws 1915, c. 187; §§ 5895-5899, 6000.

5970. Servant must appreciate risk—(23) Kapsotes v. Great Northern Ry. Co., 132 Minn. 435, 157 N. W. 713; Roach v. Great Northern Ry. Co., 133 Minn. 257, 158 N. W. 232; Carr v. Minneapolis etc. Ry. Co., 140 Minn. 91, 167 N. W. 299.

5971. Effect of age and intelligence of servant—A minor in the employ of another assumes the risks incident to his employment of all such apparent dangers as he is capable of comprehending and avoiding. The question of the assumption of risks and of contributory negligence hinges upon the question of the capacity of the minor for the particular work in which he was engaged. Clark v. Goche, — Minn. —, 182 N. W. 436.

(25) Schaefer v Marshall Milling Co., 133 Minn. 73, 157 N. W. 993.

5974. Obvious dangers—The rule that a servant assumes the risk of obvious dangers is not favored and is to be applied cautiously. See Roach v. Great Northern Ry. Co., 133 Minn. 257, 158 N. W. 232.

5979. Risk of defective instrumentalities—This rule has been abrogated as to railroad employees. Laws 1915, c. 187.

5983. Promise of master to remedy defects—The evidence sustains a finding of the jury that the plaintiff remained in the employment of the defendant, appreciating the risk of working about an unguarded lubricating glass, in reliance upon a promise that it should be guarded, and under such circumstances as to transfer the risk. Smith v. Great Northern Ry. Co., 139 Minn. 343, 166 N. W. 350.

5988. Acting under orders—(58) Kapsotes v. Great Northern Ry. Co., 132 Minn. 435, 157 N. W. 713; Schaefer v. Marshall Milling Co., 133 Minn. 73, 157 N. W. 993.

5992a. Railroad employees absorbed in work—See Price v. Great Northern Ry. Co., 134 Minn. 89, 158 N. W. 825; Ashe v. Minneapolis etc. Ry. Co., 138 Minn. 176, 164 N. W. 803.

5994. Negligence of fellow servants—It has been held that a servant does not assume the risk of "unusual" negligence of fellow servants. Molstad v. Minneapolis etc. R. Co., 143 Minn. 260, 173 N. W. 563.

5997. Burden of proof—(69) Schaefer v. Marshall Milling Co., 133 Minn. 73, 157 N. W. 993.

5998. Law and fact—(70) Kapsotes v. Great Northern Ry. Co., 132 Minn. 435, 157 N. W. 713; Schaefer v. Marshall Milling Co., 133 Minn. 73, 157 N. W. 993; Thompson v. Minneapolis & St. Louis R. Co., 133 Minn. 203, 158 N. W. 42; Roach v. Great Northern Ry. Co., 133 Minn. 257, 158 N. W. 232; Miller v. Chicago, B. & Q. R. Co., 140 Minn. 14, 167 N. W. 117; Lancette v. Great Northern Ry. Co., 140 Minn. 488, 168 N. W. 634; Enger v. Great Northern Ry. Co., 141 Minn. 86, 169 N. W. 474; Dunn v. Great Northern Ry. Co., 141 Minn. 191, 169 N. W. 602; Thayer v. Hines, 145 Minn. 240, 176 N. W. 752; Brown v. Duluth etc. Ry. Co., 147 Minn. 167, 179 N. W. 1003; Clark v. Goche, — Minn. —, 182 N. W. 436.

(71) Carr v. Minneapolis etc. Ry. Co., 140 Minn. 91, 167 N. W. 299; Southern Pacific Ry. Co. v. Berkshire, 254 U. S. 415.

CONTRIBUTORY NEGLIGENCE

6000. Effect of statutes—The common-law doctrine of contributory negligence has been abrogated by statute so far as railroad employees are concerned and the doctrine of comparative negligence adopted. Laws 1915, c. 187; Seamer v. Great Northern Ry. Co., 142 Minn. 376, 172 N. W. 765.

Where the violation of a statute for the safety of employees by a railroad company contributes to the death or injury of an employee the

company is liable regardless of the negligence of the employee. Laws 1915, c. 187, § 3.

The fact that a boy thirteen years old was using a shotgun in violation of G. S. 1913, § 8804. held not to bar him from recovering against his master for an injury from the gun while using it under orders from the master. Kunda v. Briarcombe Farm Co., — Minn. —, 183 N. W. 134.

6000a. Comparative negligence—Statutes of other states—The accident occurred in South Dakota, where the doctrine of comparative negligence obtains. Contributory negligence on the part of the plaintiff did not bar a recovery. Dunn v. Great Northern Ry. Co., 141 Minn. 191, 169 N. W. 602.

The doctrine of comparative negligence has been adopted in this state as regards railroad employees by Laws 1915, c. 187. Seamer v. Great Northern Ry. Co., 142 Minn. 376, 172 N. W. 765.

6001. Sudden emergency—Distracting circumstances—(76) Schaefer v. Marshall Milling Co., 133 Minn. 73, 157 N. W. 993.

6002. Wilful or wanton injury—(78) Ashe v. Minneapolis etc. Ry. Co., 138 Minn. 176, 164 N. W. 803; Ciebattone v. Chicago G. W. R. Co., 146 Minn. 362, 178 N. W. 890.

6007. Disobeying orders of superior—(88) Schaefer v. Marshall Milling Co., 133 Minn. 73, 157 N. W. 993.

6008. Taking position of danger unnecessarily—Plaintiff, a switchman in a yard with two tracks, called respectively the east-bound and west-bound tracks, was guarding his train approaching on the west-bound track. He stood between the east and west bound tracks and within the sweep of an engine on the east-bound track. There was no necessity of his standing so near that track. He knew that a train was due on that track in a minute or two, yet he stood with his back to it until it struck him. Held, he was guilty of contributory negligence. Ashe v. Minneapolis etc. Ry. Co., 138 Minn. 176, 164 N. W. 803.

(89) Ashe v. Minneapolis etc. Ry. Co., 138 Minn. 176, 164 N. W. 803. See Thompson v. Minneapolis & St. Louis R. Co., 133 Minn. 203, 158 N. W. 42; Kelley v. Chicago, B. & Q. R. Co., 142 Minn. 44, 170 N. W. 886.

6013. Failure to use safety appliances—(95) See Curwen v. Appleton Mfg. Co., 133 Minn. 28, 157 N. W. 899; Thompson v. Minneapolis & St. Louis R. Co., 133 Minn. 203, 158 N. W. 42.

6014. Failure to observe rules or orders of master—A bulletin issued by a railway company, admonishing its employees not to ride on the pilots of engines "more than is absolutely necessary," does not, as a matter of law, make it an act of negligence for one of them to ride on a step fastened to the pilot while the engine is headed towards a car to which it is to be coupled. Kelley v. Chicago, B. & Q. R. Co., 142 Minn. 44, 170 N. W. 886.

6015. Coupling cars—It is not negligent as a matter of law for a brakeman to stand on the end sill of a car and from there uncouple it with his hands, though he might have swung around and stood on the side stirrup and uncoupled from there with the use of the pin-lifter. Thompson v. Minneapolis & St. Louis R. Co., 133 Minn 203, 158 N. W. 42.

6016. Miscellaneous cases—(11) Sheehy v. Minneapolis & St. Louis R. Co., 132 Minn. 307, 156 N. W. 346 (flagman at highway crossing killed by being struck and run over by a box car kicked across the highway without warning); Schaefer v. Marshall Milling Co., 133 Minn. 73, 157 N. W. 993 (boy eighteen years old—helper in grain elevator—ordered by foreman in an emergency to grab a wire cable in a chute used to elevate grain by means of an endless chain fitted with metallic cups); Price v. Great Northern Ry. Co., 134 Minn. 89, 158 N. W. 825 (track repairer in switching yards absorbed in work struck by string of cars pushed in switching operations); Grant v. Minneapolis etc. Traction Co., 136 Minn. 155, 161 N. W. 400 (failure of brakeman uncoupling cars to observe that safety chains had not been uncoupled held a remote cause of the accident); Ashe v. Minneapolis etc. Ry. Co., 138 Minn. 176, 164 N. W. 803 (switchman unnecessarily taking position of danger between two tracks in switching yards—not absorbed in work); Nelson v. Chicago etc. Ry. Co., 139 Minn. 52, 165 N. W. 866 (brakeman riding on side of freight car with feet in stirrup in switching operations—failure to look both ways—struck by baggage truck near tracks); Carr v. Minneapolis etc. Ry. Co., 140 Minn. 91, 167 N. W. 299 (matron of railroad station attempting to flush an automatic closet tank by putting her hand into it and raising the lever); Oestreich v. Chicago etc. Ry. Co., 140 Minn. 280, 167 N. W. 1032 (sectionmen putting in new ties in place of decayed ones—plaintiff struck in foot by pick swung by fellow servant); Kelley v. Chicago, B. & Q. R. Co., 142 Minn. 44, 170 N. W. 886 (conductor of freight train riding on step of foot board fastened to lower part of pilot of engine—stepping off at station to get his switching list while train was going past station at a speed of from twelve to fifteen miles an hour); Thayer v. Hines, 145 Minn. 240, 176 N. W. 752 (switchman in yards taking position of danger near switch it was his duty to throw); Brown v Duluth etc. Ry. Co., 147 Minn. 167, 179 N. W. 1003 (engineer of locomotive leaning out of cab).

CASES CLASSIFIED

6017. Injuries to railroad employees—Brakeman injured while riding on the rear end step of a locomotive tender—stirrup and step out of alignment and extended several inches beyond face of tender. Smith v. Great Northern Ry. Co., 132 Minn. 147, 153 N. W. 513; 155 N. W. 1040.

Switchman caught by telephone wire extending across tracks. Riley v. Minneapolis & St. Louis R. Co., 132 Minn. 195, 156 N. W. 272.

Flagman at highway crossing killed by being struck and run over by a box car suddenly and without customary warning driven across high-

way--car stood on tracks near highway without its brakes being set—other cars driven against it without customary warning and with excessive force. Sheehy v. Minneapolis & St. Louis R. Co., 132 Minn. 307, 156 N. W. 346.

Brakeman run over by caboose of freight train which he was attempting to board—insecure grab iron on caboose—foot caught in drain box in road bed. McNaney v. Chicago etc. Ry. Co., 132 Minn. 391, 157 N. W. 650.

Member of crew removing rails from track under directions of foreman—foreman directed crew to pull rail free from adjoining rail without first loosening the bolts which fastened the clip plates to the adjoining rail--plaintiff was at free end of rail to be pulled loose—rail was pulled loose suddenly and was thrown on plaintiff's ankle—work was hastened by foreman and done in an unusual manner. Kapsotes v. Great Northern Ry. Co., 132 Minn. 435, 157 N. W. 713.

Switching foreman taking numbers of cars killed while working about a string of cars in a switching yard—cars were kicked against standing cars without customary warning—switchman in charge of operations knew that deceased was working about standing cars. Hurley v. Illinois Central R. Co., 133 Minn. 101, 157 N. W. 1005.

Brakeman killed while uncoupling cars—went from top of car down end ladder and stood on the end sill and from there uncoupled the cars with his hands though he might have swung around the end of the car and stood on the side stirrup and used the pin-lifter—accident due to conductor's giving stop signal without knowing whether the brakeman was ready—car stopped suddenly and he was jerked off. Thompson v. Minneapolis & St. Louis R. Co., 133 Minn. 203, 158 N. W. 42.

Switchman's helper run over and killed by a car shunted on to a side track by an engine working on the lead—the engine carried a headlight so powerful that it dazzled the deceased and caused his injury. Roach v. Great Northern Ry. Co., 133 Minn. 257, 158 N. W. 232.

Boy fifteen years old employed as a section hand transferred by foreman to work in unloading a gravel train—iron aprons between cars not lowered—while boy was passing over train in motion just before reaching place of unloading he fell between cars because the iron apron was not lowered. Maijala v. Great Northern Ry Co., 133 Minn. 301, 158 N. W. 430.

Brakeman hit by locomotive as he was walking between tracks in leaving his work--some evidence that bell of locomotive was not rung. Davis v. Chicago etc. Ry. Co., 134 Minn. 49, 158 N. W. 911.

Switchman in railroad yards injured while descending from a box car on the ladder, falling by reason of the absence of the lower rung of the ladder. Cramer v. Chicago etc. Ry. Co., 134 Minn. 61, 158 N. W. 796.

Switchman walking across tracks in switching yards struck by engine backing on a lead track—trainmen stationed on front foot board of engine but none on rear—bell not rung. Beecroft v. Great Northern Ry. Co., 134 Minn. 86, 158 N. W. 800.

Track repairer killed while working in switching yards by a string of cars being pushed over the tracks upon which he was working—no brakeman was placed on the forward car to warn employees of the approach of the cars. Price v. Great Northern Ry. Co., 134 Minn. 89, 158 N. W. 825.

Conductor of freight train injured by car on which he was riding being thrown from track—a string of cars was being pushed on a side track around a sharp reverse curve at considerable speed—plaintiff was riding on a forward car—sole charge of negligence was defective track—verdict for defendant sustained. Casey v. Illinois Central R. Co., 134 Minn. 109, 158 N. W. 812.

Locomotive fireman injured by derailment of engine due to rotten ties on a curve of the road. Manning v. Chicago G. W. R. Co., 135 Minn. 229, 160 N. W. 787.

Fireman injured by apron between locomotive and tender being pressed up as the train rounded a curve—floor of engine and floor of tender not level. Ehler v. Chicago, B. & Q. R. Co., 137 Minn. 245, 163 N. W. 506.

Switching foreman injured by one car bumping into another car at the end of which he was crossing the track—he had been placing a block under the latter car to prevent its moving—the movement of the cars was proximately caused by a defective coupler. Clapper v. Dickinson, 137 Minn. 415, 163 N. W. 752.

Switchman unnecessarily taking dangerous position between two tracks in switching yards struck by passing train. Ashe v. Minneapolis etc. Ry. Co., 138 Minn. 176, 164 N. W. 803.

Rear brakeman on freight train killed by cars being pushed back violently when he was in the act of placing a red light on the rear car in the evening. Gorgenson v. Great Northern Ry. Co., 138 Minn. 267, 164 N. W. 904.

Fireman injured by derailment of engine at a highway crossing by sand and gravel on the tracks. McGillivray v. Great Northern Ry. Co., 138 Minn. 278, 164 N. W. 922.

Switchman injured, while standing between two tracks in a switch-yard, by being struck in the face by a bunch of wires attached to a stake pocket on one of the cars of a train moving past him. Prendergast v. Chicago, B. & Q. R. Co., 138 Minn. 298, 164 N. W. 923.

Brakeman riding on side of freight car with feet in the stirrup brushed off and under wheels by striking a baggage truck left on a station platform near the tracks. Nelson v. Chicago etc. Ry. Co., 139 Minn. 52, 165 N. W. 866.

Member of repair crew killed by being caught between the bumpers of two cars as he was in the act of crossing a track in repair yards. Plachetko v. Chicago, B. & Q. R. Co., 139 Minn. 278, 166 N. W. 338.

Workman in roundhouse injured by breaking or explosion of a lubricating glass. Smith v. Great Northern Ry. Co., 139 Minn. 343, 166 N. W. 350.

Switchman killed by slipping from the footboard of a backing engine which he was attempting to mount. There was coal on the foot board. Castle v. Union Pacific R. Co., 139 Minn. 396, 166 N. W. 767.

Machinist in roundhouse injured by slipping of wrench which was being used to loosen a burr on an engine. Kromer v. Minneapolis etc. Ry. Co., 139 Minn. 424, 166 N. W. 1072.

Foreman of switching crew riding on a rod extending across the front of an engine with his back to the boiler thrown from the engine in getting down by having the clothing of one leg caught in the jagged end of a bar extending above and in the same direction as the footboard and projecting slightly beyond an upright brace to which it was fastened—engine moving backward in switching operations—customary for switchmen to take such a position. Miller v. Chicago, B. & Q. R. Co., 140 Minn. 14, 167 N. W. 117.

Rear end collision between passenger and freight train at station—engineer of passenger train injured by jumping from cab. McLain v. Chicago G. W. R. Co., 140 Minn. 35, 167 N. W. 349.

Brakeman thrown from top of box car by cars being brought together for the purpose of making an automatic coupling with unusual speed and violence. Lancette v. Great Northern Ry. Co., 140 Minn. 488, 168 N. W. 634.

Brakeman on freight train in stepping from the tender of a locomotive to avoid a collision in switching operations was carried by his momentum upon a parallel track and was struck by a string of moving cars which had been kicked down that track. The night was dark and the engine was negligently run at a speed of about fifteen miles an hour. The speed was suddenly increased after the brakeman mounted the engine. Robinson v. Minneapolis etc. Ry. Co., 141 Minn. 28, 169 N. W. 146.

Head brakeman on freight train mounted flat car to release handbrake thrown from car and under wheels by violent stopping jerks caused by the engineer negligently applying and releasing the straight air. Fry v. Minneapolis etc. Ry. Co., 141 Minn. 32, 169 N. W. 147.

Machinist in roundhouse injured by stepping into engine pit. The roundhouse was full of steam from an engine "blowing off." Plaintiff could see only imperfectly though he was carrying a torch. He was going to the rear of the tender of his engine to close an angle cock in the discharge of his duty. The negligence charged was allowing the roundhouse to be filled with steam. Enger v. Great Northern Ry. Co., 141 Minn. 86, 169 N. W. 474.

Member of bridge crew injured by falling from gasolene motor car driven at an excessive speed by the foreman of the crew. The day was windy and cold. Plaintiff fell while in the act of putting on his mackinaw. Dunn v. Great Northern Ry. Co., 141 Minn. 191, 169 N. W. 602.

Conductor on freight train, alighting from an engine as is was running past a station at a speed of from twelve to fifteen miles an hour, stepped into a pile of cinders, lost his footing, fell between the platform

and track, and was dragged several feet by the train. The cinders had leaked from a train loaded with cinders in charge of the conductor the day previous to the accident. Kelley v. Chicago, B. & Q. R. Co., 142 Minn. 44, 170 N. W. 886.

Freight brakeman killed by falling from tender of engine. He had mounted the tender to obtain a bucket of coal for a fire in the caboose. In descending on the slanting tank of the tender he slipped, owing to a defective step thereon. White v. Great Northern Ry. Co., 142 Minn. 50, 170 N. W. 849.

Member of building crew injured by accidental discharge of revolver in hands of crew boss who was opening it to see if it was loaded. The revolver was discovered by member of crew under a station platform which the crew was tearing up. Larson v. Duluth, M. & N. Ry. Co., 142 Minn. 366, 172, N. W. 762.

Workman in shopyards engaged in unloading and rolling to a place of storage large, heavy iron tires, injured by one of the tires getting beyond his control and falling on his foot. Kivak v. Great Northern Ry. Co., 143 Minn. 196, 173 N. W. 421.

Yard foreman run over and killed by engine while he was clearing ice and snow from a switch in the yards in the nighttime. He had a lighted lantern near him. Molstad v. Minneapolis etc. Ry. Co., 143 Minn. 260, 173 N. W. 563.

Fireman on passenger locomotive injured by derailment of train at crossing. Third parties had placed sand on the crossing to facilitate an automobile race. As the train approached it was warned by signals but the engineer disregarded them. McGillivray v. Great Northern Ry. Co., 145 Minn. 51, 176 N. W. 200.

Switchman in switching yards killed by being struck by box car kicked by engine as he was standing near a switch which it was his duty to throw. There was no light, signal or lookout on the car and it was a dark evening. Thayer v. Hines, 145 Minn. 240, 176 N. W. 752.

Watchman in switching yards run over and killed by cars being kicked against some cars in front of which he was crossing the tracks—no signals given of the approach of the engine—accident occurred in daytime and the switching operation was conducted in the usual manner. Weireter v. Great Northern Ry. Co., 146 Minn. 350, 178 N. W. 887.

Yard foreman met accidental death by stepping on a chunk of coal upon the steps leading up to a locomotive cab. Reeves v. Chicago etc. Ry. Co., 147 Minn. 114, 179 N. W. 689.

Locomotive engineer killed by striking his head against a coal-loading platform near the track at a station. He was leaning out of the cab to watch the operation of an injector which caused trouble. He knew of the presence of the platform. Brown v. Duluth etc. Ry. Co., 147 Minn. 167, 179 N. W. 1003.

Workman in charge of pumps along the line killed by a train while he was lying on his speeder or gasolene car some two or three miles from a station. May v. Chicago etc. Ry. Co., 147 Minn. 310, 180 N. W. 218.

Freight conductor fell while mounting a car on account of a defective grabiron on the top of the car. Appleby v. Payne, — Minn. —, 182 N. W. 901.

(12) Grant v. Minneapolis etc. Traction Co., 136 Minn. 155, 161 N. W. 400 (engine backed while brakeman was unfastening safety chains after the coupler and hose had been uncoupled—conductor standing by and signalling engineer).

(13) Olthoff v. Great Northern Ry. Co., 135 Minn. 72, 160 N. W. 206 (handcar left on track run into by train—piece of handcar struck plaintiff—sectionmen had left handcar on track while they went to rescue of motorist in near road—approaching train whistled and they rushed back to remove handcar but they were caught in the act and jumped to save themselves); Oestreich v. Chicago etc. Ry. Co., 140 Minn. 280, 167 N. W. 1032 (removing decayed ties and installing new ones—fellow servant intending to strike pick into a tie missed it and struck plaintiff's foot); Olson v. Great Northern Ry. Co., 141 Minn. 73, 169 N. W. 482 (riding on handcar operated by a gasolene motor—pushcar being hauled as a trailer—pushcar attached to handcar by a chain with ends held by a bolt and nut—nut worked off and handcar and trailer separated—plaintiff fell between them and was struck by trailer); Ciebattone v. Chicago G. W. R. Co., 146 Minn. 362, 178 N. W. 890 (replacing angle bars on rails in switching yards struck by car kicked on the track without warning).

6019. Injuries to workmen in factories, mills and workshops—Boy eighteen years old working as a helper in a grain elevator had the first joint of a finger pulled off while attempting to disengage a moving cable in a chute in which grain was elevated by means of an endless belt fitted with metal cups—it was obviously dangerous to handle the cable while the machinery was in motion but the boy was inexperienced and acted under orders of his foreman in an emergency. Schaefer v. Marshall Milling Co., 133 Minn. 73, 157 N. W. 993.

Woodworker in railroad shops operating a gainer machine struck in the eye by a small piece of a knot thrown out of a timber which he was feeding the machine. Beard v. Chicago etc. Ry. Co., 134 Minn. 162, 158 N. W. 815.

6021. Injuries to servants in elevators—Student elevator operator in training for a license injured while operating elevator in absence of instructor—left elevator door open while on an errand—car shifted in his absence—on his return he stepped through door thinking elevator was there and fell down shaft. Pettee v. Noyes, 133 Minn. 109, 157 N. W. 995.

6022. Miscellaneous cases—Bricklayer injured by fall of pudlock scaffold due to insufficient nailing and failure to place cleats under cross pieces. Burch v. Hoy & Elzy Co., 131 Minn. 475, 155 N. W. 767.

Teamster ordered to drive to a certain point in an alleyway of a manufacturing plant where the whistle of the plant sounded with extreme

shrillness and always frightened horses—master gave employee no warnings and the latter was ignorant of the peculiar danger—his horses ran away when the whistle was blown and he was killed. Gahagen v. Geo. A. Hormel & Co., 133 Minn. 356, 158 N. W. 618.

Teamster killed by the fall of steel beams being raised from the street to a building in the process of erection. Mahowald v. Thompson-Starrett Co., 134 Minn. 113, 158 N. W. 913.

Telegraph operator injured by failure to keep office properly heated. Hansman v. Western Union Tel. Co., 136 Minn. 212, 161 N. W. 512.

Matron in railroad station scratched her hand on the edge of a broken porcelain top to an automatic closet tank which she was attempting to flush. Carr v. Minneapolis etc. Ry. Co., 140 Minn. 91, 167 N. W. 299.

A minor working in a meat market injured by having his hand caught in a meat grinder. Gutmann v. Anderson, 142 Minn. 141, 171 N. W. 303.

Carpenter employed in repair of a moth proof room for storing furs claimed to have been infected with disease germs. O'Reilly v. Powers Mercantile Co., 144 Minn. 261, 175 N. W. 116.

Workman on ore dock engaged in the nighttime in thawing out an ore pocket with a steam hose attached to an adjacent engine, was injured by falling into a pocket as he was hurrying to remove the hose from the tracks on account of an approaching train. Hansen v. Duluth & I. R. R. Co., 144 Minn. 330, 175 N. W. 549.

Boy fourteen years old thrown upon the cutting bar of a mowing machine which he was driving. Clark v. Goche, — Minn. —, 182 N. W. 436.

Boy thirteen years old shot by gun which he was using under orders of master in killing blackbirds. Kunda v. Briarcombe Farm Co., — Minn. —, 183 N. W. 134.

FEDERAL SAFETY APPLIANCE AND EMPLOYER'S LIABILITY ACTS

6022b. Construction—Application—Section 2 of the Supplemental Safety Appliance Act, enacted by Congress and approved April 14, 1910, construed in connection with section 3 of the same act, and held to impose the absolute duty upon interstate railroad companies of maintaining the appliance and equipment of their cars in secure and safe condition for use, and that the statute became and remained in full force and operation after July 1, 1911. Section 3 of the Safety Appliance Act provides for a uniform standard of such car equipment applicable to all interstate roads; and an order of the Interstate Commerce Commission, fixing a time for compliance with its order prescribing such uniform standard, did not affect the provisions of section 2, or suspend the operation thereof. Coleman v. Illinois Central R. Co., 132 Minn. 22, 155 N. W. 763; Illinois Central R. Co. v. Williams, 242 U. S. 462.

When liability is based upon the federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, it must be shown that the employer is a common carrier by railroad engaged in interstate commerce, and that

the employee is employed by the carrier in such commerce at the time of his injury. Hurley v. Illinois Central R. Co., 133 Minn. 101, 157 N. W. 1005.

An interstate railway carrier is liable in damages to an employee injured in the discharge of his duties, regardless of the position he may have occupied at the time he was injured, where the carrier's failure to comply with the federal Safety Appliance Act is the proximate cause of such injury. Clapper v. Dickinson, 137 Minn. 415, 163 N. W. 752.

In an action under the federal Employers' Liability Act, the terms "negligence" and "contributory negligence" are to be used and interpreted in the light of the common law, as construed and applied by the federal courts, free from legislative interference. The act establishes a rule intended to operate uniformly in all the states, as respects interstate commerce, and in that field it is both paramount and exclusive. It can neither be extended nor abridged by common or statutory laws of a state. McLain v. Chicago G. W. R. Co., 140 Minn. 35, 167 N. W. 349. See 12 A. L. R. 693.

A violation of the Safety Appliance Act creates an absolute liability. Slater v. Chicago etc. R. Co., 146 Minn. 390, 178 N. W. 813.

While the Safety Appliance Act imposes an absolute liability a defect caused by a trespasser may be such as not to give rise to liability. Slater v. Chicago etc. Ry. Co., 146 Minn. 390, 178 N. W. 813.

A recovery in an action based on the Safety Appliance Act is not prevented by the Workmen's Compensation Act of the state where the accident occurred, though in terms applicable, and though the train movement was intrastate. Kraemer v. Chicago & N. W. Ry. Co., 148 Minn. —, 181 N. W. 847.

There is implied in the Safety Appliance Act a right to recover for death, though the act does not in express terms provide for a survival of the cause of action; and the personal representative of an employee killed on an interstate road because of a violation by the road of the Safety Appliance Act can recover in an action based on the statute, though the train movement in which the deceased was engaged was intrastate. The record shows that the plaintiff is the administratrix and the sole beneficiary. Kraemer v. Chicago & N. W. Ry. Co., 148 Minn. —, 181 N. W. 847.

6022c. Enforceable in state courts—State procedure governs—In an action in a state court the statute authorizing a five-sixth verdict is applicable. Winters v. Minneapolis & St. Louis R. Co., 126 Minn. 260, 148 N. W. 106; Bombolis v. Minneapolis & St. Louis R. Co., 128 Minn. 112, 158 N. W. 385; Marshall v. Chicago etc. Ry. Co., 133 Minn. 460, 157 N. W. 638; Cramer v. Chicago etc. Ry. Co., 134 Minn. 61, 158 N. W. 796; State v. Longwell, 135 Minn. 65, 160 N. W. 189; Minneapolis & St. Louis R. Co. v. Bombolis, 241 U. S. 211; Chicago etc. Ry. Co. v. Ward, 252 U. S. 18.

In an action under the federal statutes in a state court state statutory grounds of negligence are inapplicable. Knapp v. Great Northern Ry.

Co., 130 Minn. 405, 153 N. W. 848; Maijala v. Great Northern Ry. Co., 133 Minn. 301, 158 N. W. 430. See § 6022b.

In an action in a state court under the federal statutes, a common-law rule of liability applied in the federal courts, may be applied in the state court. The negligence of a master in sending an immature servant to work in a new place of increased danger without giving him due warnings and instructions will support an action under the federal Employer's Liability Act. Maijala v. Great Northern Ry. Co., 133 Minn. 301, 158 N. W. 430.

To what extent, if any, the common law of the state is applicable in an action under the federal statutes in a state court, is undetermined. See Maijala v. Great Northern Ry. Co., 133 Minn. 301, 305, 158 N. W. 430.

In an action in a state court the statute authorizing judgment notwithstanding the verdict is applicable. Marshall v. Chicago etc. Ry. Co., 133 Minn. 460, 157 N. W. 638.

In an action in a state court the rules of procedure thereof control. Manning v. Chicago G. W. R. Co., 135 Minn. 229, 160 N. W. 787; Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211; Dickinson v. Stiles, 246 U. S. 631; Chicago etc. Ry. Co. v. Ward, 252 U. S. 18.

In an action in the state courts federal rules of substantive law apply. The question of burden of proof of negligence is a matter of substantive law within this rule. Manning v. Chicago G. W. R. Co., 135 Minn. 229, 160 N. W. 787; New Orleans & N. E. R. Co. v. Harris, 247 U. S. 367.

When the federal Employer's Liability Act is applicable it is exclusive. Manning v. Chicago G. W. R. Co., 135 Minn. 229, 160 N. W. 787.

In an action in the state courts an attorney has a lien on the cause of action under the state statute and it may be enforced in the action. Holloway v. Dickinson, 137 Minn. 410, 163 N. W. 791, affirmed, 246 U. S. 631.

The state and federal courts have concurrent jurisdiction. Proceedings of an attorney in the original action to enforce his statutory lien on the cause of action cannot be removed to the federal court on the ground of diversity of citizenship. Miner v. Chicago, B. & Q. R. Co., 147 Minn. 21, 179 N. W. 483.

Applicability of state statutes and rules of law. 12 A. L. R. 693.

6022d. What constitutes interstate commerce—What employees within act—A freight conductor employed on a round trip between two points in the same state is not engaged in interstate commerce while making his return trip with a train devoted solely to domestic commerce, because his train on the trip out carried interstate freight. Illinois Central R. Co. v. Peery, 242 U. S. 292, reversing Peery v. Illinois Central R. Co., 123 Minn. 264, 143 N. W. 724, 128 Minn. 119, 150 N. W. 382.

A machinist in a roundhouse repairing an engine which immediately prior and subsequent thereto was used to haul both interstate and intrastate freight, held not engaged in interstate commerce. Minneapolis & St. Louis R. Co. v. Winters, 242 U. S. 353. See Winters v. Minneapolis & St. Louis R. Co., 126 Minn. 260, 148 N. W. 106, 131 Minn. 181, 154 N. W. 964, 131 Minn. 496, 155 N. W. 1103.

The Safety Appliance Act applies where a switching crew is making up cars in a railroad yard for immediate transportation out of the state; the tracks of the yard being used to make up and transfer interstate cars, and in general for interstate transportation; the couplers on the interstate cars moved at the time in the process of transfer being defective. Hurley v. Illinois Central R. Co., 133 Minn. 101, 157 N. W. 1005.

Where the evidence shows that the plaintiff's intestate, a switchman, was employed in switching cars in one of the defendant's yards, putting them into strings of cars for transportation into another state, the only transportation by railroad out of the state being such as was given by the switching crew, and the cars being destined for immediate interstate transportation, a finding that he was employed in interstate commerce is justified. Hurley v. Illinois Central R. Co., 133 Minn. 101, 157 N. W. 1005.

A brakeman on a train engaged in interstate commerce delayed several hours before leaving after the arrival of his train at its destination. His delay was caused by falling asleep. In leaving his work he walked between two tracks and was hit by a locomotive approaching from behind. Held, that the question whether the delay removed him from the protection of the federal Employers' Liability Act was for the jury. Davis v. Chicago etc. Ry. Co., 134 Minn. 49, 158 N. W. 911.

It must appear that the employee is within the class for whose protection the statutes were enacted. Clapper v. Dickinson, 137 Minn. 415, 163 N. W. 752.

The plaintiff's intestate, an engineer, was taking a number of empty cars from a point on a spur line to a yard on the main line in the same state, where they were to be put upon a siding and used where convenience required. They had no present further destination. It is held that the deceased was not employed in "interstate commerce" and was not within the provisions of the federal Employers' Act. The Safety Appliance Act applies to an intrastate train movement on an interstate railroad; and the plaintiff's intestate, in taking seventeen cars from a yard on a spur track to a yard on the main line, a distance of three miles, using a switch engine, having no caboose, and operating without train orders, was engaged in a "train movement," as distinguished from a "switching movement," and was within the protection of the Safety Appliance Act. Kraemer v. Chicago & N. W. Ry. Co., 148 Minn. —, 181 N. W. 847.

Flagman at public crossing whose duty it was to flag both interstate and intrastate trains, held employed in interstate commerce, regardless of whether the particular train which he was flagging at the time of the accident was an interstate or intrastate train. Philadelphia & Reading Ry. Co. v. Di Donato, 255 U. S. —.

A trainman employed on a freight train made up of freight cars and freight, both interstate and intrastate, held employed in interstate commerce. Philadelphia & Reading Ry. Co. v. Polk, 255 U. S. —.

What employees are engaged in interstate commerce. 10 A. L. R. 1184.

6022e. Defective couplers—Negligence may be inferred from the mere opening of an automatic coupler while a train is in motion. Gotschall v. Minneapolis & St. L. R. Co., 125 Minn. 525, 147 N. W. 430, 130 Minn. 33, 153 N. W. 120, affirmed, 244 U. S. 66.

The test of the application of the Safety Appliance Act requiring the use of automatic couplers on cars, to the use of a car not equipped with such couplers, is the use of such car on a railroad which is a highway of interstate commerce and not its actual use at the time in moving interstate traffic; and the car and not the train is the unit in determining the application of the act; and a switching operation moving interstate cars may be within its application. Hurley v. Illinois Central R. Co., 133 Minn. 101, 157 N. W. 1005.

Evidence held to justify a finding that certain couplers were defective in that the knuckles would not open except by hand. Hurley v. Illinois Central R. Co., 133 Minn. 101, 157 N. W. 1005.

A violation of the federal Safety Appliance Act may be established by proof that repeated efforts to work the lever of an automatic coupler, in the manner it is designed to be worked by switchmen in railroad operations, failed to lift the coupling pin. Davis v. Minneapolis & St. Louis R. Co., 134 Minn. 369, 159 N. W. 802.

Whether couplers are such as the statute requires or are in a defective condition are questions for the jury, unless the evidence is conclusive. Davis v. Minneapolis & St. Louis R. Co., 134 Minn. 369, 159 N. W. 802.

A defective coupler held the proximate cause of an injury though the employee was not engaged in coupling or uncoupling cars at the time of the accident. Clapper v. Dickinson, 137 Minn. 415, 163 N. W. 752.

To recover for injury arising from a defective coupler, it is not material that the employee did not receive the injury in attempting to effect a coupling between cars. Clapper v. Dickinson, 137 Minn. 415, 163 N. W. 752.

6022f. Defective air hose and brakes—The failure to have the air brakes coupled so as to be under engine control, as required by the Safety Appliance Act, was a proximate cause of the death of the plaintiff's intestate who was killed in a derailment by the cars not under air control crowding the tender into the engine cab and crushing him against the boiler head. Kraemer v. Chicago & N. W. Ry. Co., 148 Minn. —, 181 N. W. 847.

6022h. Defective cars and engines—Handholds, grab irons, steps, ladders, running boards, etc.—Under the federal act as amended every grab iron or handhold, step, ladder and running board must be secure. McNaney v. Chicago etc. Ry. Co., 132 Minn. 391, 157 N. W. 650; Cramer v. Chicago etc. Ry. Co., 134 Minn. 61, 158 N. W. 796.

Evidence held sufficient to justify a recovery for injuries to a brakeman

due to a defective grab iron on the caboose of a freight train. McNaney v. Chicago etc. Ry. Co., 132 Minn. 391, 157 N. W. 650.

Evidence held sufficient to justify a recovery for an injury due to the absence of a lower rung on a ladder of a box car. Cramer v. Chicago etc. Ry. Co., 134 Minn. 61, 158 N. W. 796.

An inequality of three inches between the floor of a locomotive and the floor of its tender is a violation of the federal statute. Ehrler v. Chicago, B. & Q. R. Co., 137 Minn. 245, 163 N. W. 506.

The federal Safety Appliance Act, which requires cars operated in interstate commerce to be equipped with secure running boards, was not violated where it appears that a trespasser, without the knowledge of the railroad or its servants, displaced an ice bunker cover so that it projected upon the running board, causing plaintiff, a brakeman, to trip over it; the running board itself remaining all the time mechanically perfect and secure. Slater v. Chicago etc. Ry. Co., 146 Minn. 390, 178 N. W. 813.

The presence of a piece of coal upon a step leading to a locomotive cab does not constitute a violation of the federal Safety Appliance Act. Nor does the federal Boiler Inspection Act, so called, guarantee the employee against such obstruction. Reeves v. Chicago etc. Ry. Co., 147 Minn. 114, 179 N. W. 689.

6022j. Negligence of fellow servants—Evidence held to justify a finding that a fellow servant of the plaintiff's intestate, who caused cars to be kicked against a string of cars about which the intestate was working, knowing him to be there, and contrary to the custom, was negligent. Hurley v. Illinois Central R. Co., 133 Minn. 101, 157 N. W. 1005.

Under the federal Employers' Liability Act an employee does not assume the risk of the negligence of a fellow servant; and under the evidence the plaintiff's intestate, who went from the top of the car down the end ladder and stood on the end sill and from there uncoupled, did not assume as a matter of law the risk of a negligent stop signal given by the conductor, nor did he assume as a matter of law the risk of an improper switching operation, nor was he chargeable as a matter of law with an assumption of risk because he did not swing around the end of the car and stand in the side stirrup and uncouple from there by the use of the pin lifter. Thompson v. Minneapolis & St. Louis R. Co., 133 Minn. 203, 158 N. W. 42.

6022k. Contributory negligence—Findings as to damages—Failure of the court to refer in its charge to the statutory rule with reference to contributory negligence held not prejudicial. Riley v. Minneapolis & St. Louis R. Co., 132 Minn. 195, 156 N. W. 272.

Contributory negligence is not a bar to an action but it may be proved in reduction of damages. Casey v. Illinois Central R. Co., 134 Minn. 109, 158 N. W. 812; Clapper v. Dickinson, 137 Minn. 415, 163 N. W. 752.

The burden of proving contributory negligence is on the defendant. McLain v. Chicago G. W. R. Co., 140 Minn. 35, 167 N. W. 349.

Under the federal Employers' Liability Act a municipal speed ordi-

nance is not admissible to prove contributory negligence on the part of an engineer, in an action for damages for injury to his person, while engaged in interstate commerce. McLain v. Chicago G. W. R. Co., 140 Minn. 35, 167 N. W. 349.

The court may require the jury to make special findings as to damages, fixing the full damages and separately the amount by which such damages should be diminished if plaintiff was not free from negligence. Kelley v. Chicago, B. & Q. R. Co., 142 Minn. 44, 170 N. W. 886.

It will be presumed that the jury obeyed instructions to diminish the amount of damages in proportion to the amount of negligence attributable to the servant. If it is clear that the jury disregarded such instructions the verdict may be reduced accordingly by either the trial or appellate court. Kelley v. Chicago, B. & Q. R. Co., 142 Minn. 44, 170 N. W. 886.

6022l. Assumption of risk—Failure of the court to refer in its charge to the statutory rule as to assumption of risk held not prejudicial. Riley v. Minneapolis & St. Louis R. Co., 132 Minn. 195, 156 N. W. 272.

A brakeman held not to have assumed the risk, as a matter of law, of uncoupling cars with his hands while standing on the end sill, though he might have swung around and stood on the side stirrup and uncoupled from there by the use of the pinlifter. Thompson v. Minneapolis & St Louis R. Co., 133 Minn. 203, 158 N. W. 42.

Evidence held not to make a case for an application of the doctrine of assumption of risk. Instructions as to assumption of risk held erroneous but not prejudicial. Casey v. Illinois Central R. Co., 134 Minn. 109, 158 N. W. 812.

Assumption of risk is a defence under the Employer's Liability Act where the injury was caused otherwise than by the violation of some statute enacted for the safety of employees. Chicago etc. Ry. Co. v. Ward, 252 U. S. 18; Casey v. Illinois Central R. Co., 134 Minn. 109, 158 N. W. 812; Pryor v. Williams, 254 U. S. 43 (defective claw bar used by employee); Southern Pacific Ry. Co. v. Berkshire, 254 U. S. 415 (mail crane near track).

6022m. Pleading—An amendment of a complaint so as to change the action from under the federal Employers' Liability Act to one under the statutes of Iowa, held not to introduce a new cause of action. Nash v. Minneapolis & St. Louis R. Co., 141 Minn. 148, 169 N. W. 540. See 3 Minn. L. Rev. 132.

Amendment of complaint after statute of limitations has run. 8 A. L. R. 1405.

6022n. Contracts contrary to acts void—See § 8088a..

6022o. Burden of proof—Res ipsa loquitur—The rule of res ipsa loquitur is applicable in proper cases under the federal acts. Minneapolis & St. Louis R. Co. v. Gotschall, 244 U. S. 66; Rose v. Minneapolis etc Ry. Co., 121 Minn. 363, 141 N. W. 487; Wiles v. Great Northern Ry.

Co., 125 Minn. 348, 147 N. W. 427; Gotschall v. Minneapolis & St. Louis R. Co., 125 Minn. 525, 147 N. W. 430; Id., 130 Minn. 33, 153 N. W. 120; Manning v. Chicago G. W. R. Co., 135 Minn. 229, 160 N. W. 787; Reeves v. Chicago etc. Ry. Co., 147 Minn. 114, 179 N W. 689. See § 7044.

That an employee engaged in interstate commerce met accidental death by stepping on a chunk of coal upon the steps leading up to a locomotive cab is not prima facie proof of the employer's negligence under the rule of res ipsa loquitur. Reeves v. Chicago etc. Ry. Co., 147 Minn. 114, 179 N. W. 689.

6022p. Proximate cause—It must be made to appear that the defective instrumentality was the proximate cause of the injury. Davis v. Minneapolis & St. Louis R. Co., 134 Minn. 369, 159 N. W. 802.

A defective coupler held the proximate cause of an injury though the employee was not engaged in coupling or uncoupling a car at the time of the accident. Clapper v. Dickinson, 137 Minn. 415, 163 N. W. 752. See Lang v. New York Central R. Co., 255 U. S. —.

ACTIONS

6023. Parties defendant—(83) See McGillivray v. Great Northern Ry. Co., 145 Minn. 51, 176 N. W. 200.

6024. Pleading—(84) McNaney v. Chicago etc. Ry. Co., 132 Minn. 391, 157 N. W. 650 (complaint held to state a cause of action for failure to furnish a safe place in which to work); Strand v. Chicago G. W. R. Co., 147 Minn. 1, 179 N. W. 369 (amended complaint held not to change cause of action—omission to allege specifically that defendant operated a steam railroad so as to bring the case within Laws 1915, c. 187, held not a ground for reversal). See § 6022m.

6025. Evidence—Admissibility—(86) Burch v. Hoy & Elzy Co., 131 Minn. 475, 155 N. W. 767 (customary practice of placing cleats under the cross pieces of a pudlock scaffold); Roach v. Great Northern Ry. Co., 133 Minn. 257, 158 N. W. 232 (declarations of injured servant shortly after accident as to cause thereof held admissible as part of the res gestæ).

6027. Burden of proof—Res ipsa loquitur—(89) Manning v. Chicago G. W. R. Co., 135 Minn. 229, 160 N. W. 787 (derailment caused by rotten ties—res ipsa loquitur applicable); McGillivray v. Great Northern Ry. Co., 138 Minn. 278, 164 N. W. 922 (res ipsa loquitur held inapplicable). See L. R. A. 1917E, 4 (res ipsa loquitur); § 6022o

6027a. Verdict—Action against master and servant—Effect of verdict for servant. L. R. A. 1917E, 1029.

MAXIMS AND GENERAL PRINCIPLES

6028a. Test of a sound rule of law—Justice—Courts are not inclined to permit a legal rule to be pushed to the point where it accomplishes injustice unless the rule is absolute, and the case clearly falls within its scope. Mascall v. Reitmeier, 145 Minn. 214, 176 N. W. 486.

Law is not scientific for the sake of science. Being scientific as a means toward an end, it must be judged by the results it achieves, not by the niceties of its internal structure; it must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation. Roscoe Pound, 8 Col. L. Rev. 605.

6028b. Practical considerations more important than logical consistency—Practical considerations are controlling in the formulation of rules of evidence. Palon v. Great Northern Ry. Co., 135 Minn. 154, 160 N. W. 670.

A rule of pleading which works well in practice is not to be changed merely to secure logical consistency. H. L. Elliott Jobbing Co. v. Chicago etc. Ry. Co., 136 Minn. 138, 161 N. W. 390.

The practical working of a rule is more important than its logical consistency with general principles. H. L. Elliott Jobbing Co. v. Chicago etc. Ry. Co., 136 Minn. 138, 161 N. W. 390.

Practical considerations are more important than logical consistency. State v. Probate Court, 137 Minn. 238, 244, 163 N. W. 285.

Practical considerations are controlling. Greer v. Equity Co-operative Exchange, 137 Minn. 300, 163 N. W. 527.

When common understanding and practice have established a way it is a waste of time to wander in bypaths of logic. Justice Holmes, Ruddy v. Rossi, 248 U. S. 104.

6028e. Fictions of common law—There is no place for fiction in modern law. At a time when it was thought that no new right could be recognized, unless it could be enforced through some old form of procedure, a fiction which undertook to clothe a newly recognized right with the semblance of the garb of an old one, may have served a purpose, but fictions of the law never did deceive, nor can they now serve any real useful purpose. They should not be allowed to help or hurt any man's cause, but should be discarded as the archaic contrivances which they are. Heywood v. Northern Assur. Co., 133 Minn. 360, 158 N. W. 632.

6029. English maxims—(92) Jones v. Blair, 137 Minn. 306, 163 N. W. 523.

6030. Latin maxims—(19) Rosenau v. Peterson, 147 Minn. 95, 179 N. W. 647.

(21) Iverson v. Iverson, 140 Minn. 157, 167 N. W. 483.

(32) Kretz v. Fireproof Storage Co., 133 Minn. 285, 158 N. W. 397.

MECHANICS' LIENS

IN GENERAL

6031. Nature—(52) Standard Salt & Cement Co. v. National Surety Co., 134 Minn. 121, 158 N. W. 802.

6032. Application of statutes—(27) Standard Salt & Cement Co. v. National Surety Co., 134 Minn. 121, 158 N. W. 802 (effect of adoption of new charter on bond given under former charter).

6033. Construction of statutes—The purpose of the statute is to protect laborers and materialmen and it should be liberally construed to accomplish that purpose. Berglund & Peterson v. Wright, — Minn. —, 182 N. W. 624. See § 6077.

6035. Basis of lien is consent of owner—Testimony considered, and held sufficient, coupled with the presumption flowing from the undisputed facts, to sustain a finding that the improvement to real property was made with the knowledge and consent of the owner in fee of the premises. J. L. Mueller Furnace Co. v. Bahneman, 144 Minn. 119, 174 N. W. 614.

To authorize improvements means something more than merely giving permission to make them; it means an affirmative grant to the right to make them. Berglund & Peterson v. Wright, — Minn. —, 182 N. W. 624.

Improvements cannot be charged as a lien against land unless made with the consent of the owner. But the legislature may provide that an owner who fails to disclaim responsibility for improvements made with his knowledge shall be deemed to have authorized them. Berglund & Peterson v. Wright, — Minn. —, 182 N. W. 624.

(64) Berglund & Peterson v. Wright, — Minn. —, 182 N. W. 624.

6037. Improvements by persons not owners—Consent of owners—Notice—Statute—The burden of proving notice is on the owner. Stravs v. Steckbauer, 136 Minn. 69, 161 N. W. 259.

The statute (G. S. 1913, § 7024) provides, in effect, that all persons, except incumbrancers, having an interest in land shall be deemed to have authorized improvements made thereon with their knowledge, "in so far as to subject their interests to liens therefor," unless they shall disclaim responsibility for such improvements in the prescribed manner. The purpose of the statute is to protect laborers and materialmen and it should be liberally construed to accomplish that purpose. The lien is founded on the duty which, under the statute, the owner owes to laborers and materialmen. Where only one of several part owners knows that an improvement is being made and he fails to disclaim responsibility therefor, his interest in the land may be charged with a lien for the entire improvement. Berglund & Peterson v. Wright, — Minn. —, 182 N. W. 624.

(68) Stravs v. Steckbauer, 136 Minn. 69, 161 N. W. 259.
(69) Berglund & Peterson v. Wright, — Minn. —, 182 N. W. 624.
(70) Stravs v. Steckbauer, 136 Minn. 69, 161 N. W. 259.
(72) See L. R. A. 1917D, 577 (improvements by lessees).

PROPERTY SUBJECT TO LIEN

6039. Interests subject to lien—Who are owners—The lien will extend to whatever interest the owner has in the land. Brown v. Marine Home Tel. Co., 137 Minn. 460, 162 N. W. 884.

Without authority a Minnesota telephone company extended one of its lines into Wisconsin, the switchboard for which was in Minnesota. Claimants performed work on its lines in both states. Held, that they could enforce their lien for the entire claim on the company's plant in Minnesota. Brown v. Marine Home Tel. Co., 137 Minn. 460, 162 N. W. 884.

The interest of a part owner may be subjected to a lien for the entire cost of improvements made at his instance or with his consent. Berglund & Peterson v. Wright, — Minn. —, 182 N. W. 624.

Lien on building distinct from land. L. R. A. 1917C, 1119.

(83) Brown v. Marine Home Tel. Co., 137 Minn. 460, 162 N. W. 884.
(84) 4 A. L. R. 1025 (agency of husband).

6040. Covers land and buildings—The statute gives a lien upon the premises improved, not exceeding one acre in an incorporated city. Northland Pine Co. v. Melin Bros., 142 Minn. 233, 171 N. W. 808.

6044. Railways, telegraph and telephone lines, etc.—(97) See Brown v. Marine Home Tel. Co., 137 Minn. 460, 162 N. W. 884 (line extending into Wisconsin—work done on line there and in this state—lien for entire claim enforceable against company's plant in this state).

RIGHT TO LIEN

6046. When materials are "furnished"—(99) Stravs v. Steckbauer, 136 Minn. 69, 161 N. W. 259.

6048. Materials furnished for particular building but not used therein—(5) Northland Pine Co. v. Northern Insulating Co., 145 Minn. 395, 177 N. W. 635.

6052a. Who are contractors—One who contracts to furnish the steel work for a building and who is required by his contract to "fabricate" a substantial part of it according to the plans and specifications for the building is a contractor as distinguished from a materialman under the Mechanics' Lien Law. That such contractor is a broker, not engaged in that sort of work, and performs his contract through a subcontractor, does not change his relation to the building from that of a contractor to that of a materialman. Illinois Steel Warehouse Co. v. Hennepin Lumber Co., — Minn. —, 182 N. W. 994. See Digest, § 6061.

6053. Subcontractors—A subcontractor constructed a tile roof on a concrete base constructed by the general contractor. The subcontractor proceeded with his work under peremptory directions from the general contractor after objecting that the base was defective. Held, that the general contractor could not urge that the subcontractor was negligent. Evidence held to justify a finding that the subcontractor was not negligent. Breen v. Cameron, 132 Minn. 357, 157 N. W. 500.

(15) Illinois Steel Warehouse Co. v. Hennepin Lumber Co., — Minn. —, 182 N. W. 994.

(16) Breen v. Cameron, 132 Minn. 357, 157 N. W. 500.

6060. Held entitled to a lien—A lien may be enforced for lumber furnished for forms in the construction of a concrete foundation for a building, though it was not incorporated into the structure in such a way as to become an integral part thereof. Stravs v. Steckbauer, 136 Minn. 69, 161 N. W. 259.

One furnishing material to a subcontractor in the second degree. Illinois Steel Warehouse Co. v. Hennepin Lumber Co., — Minn. —, 182 N. W. 994.

(31) Illinois Steel Warehouse Co. v. Hennepin Lumber Co., — Minn. —, 182 N. W. 994.

6061. Held not entitled to lien—(39) See Illinois Steel Warehouse Co. v. Hennepin Lumber Co., — Minn. —, 182 N. W. 994.

PRIORITIES

6062. When a lien attaches—Under G. S. 1913, § 7023, where a building is erected, all liens attach at the time the first item of material or labor is furnished for the beginning of the improvement, and this is true though the architect prepared plans some time earlier. Erickson v. Ireland, 134 Minn. 156, 158 N. W. 918.

(41) Stravs v. Steckbauer, 136 Minn. 69, 161 N. W. 259.

6065. Priority between mechanics' liens and mortgages—A mortgage to secure future advances which the mortgagee obligates himself to make has priority over mechanics' liens which attach, after the mortgage is given, but before the money is paid out. Erickson v. Ireland, 134 Minn. 156, 158 N. W. 918.

Mechanics' liens on which redemption from a foreclosure sale is made are not thereby merged or extinguished, but the liens survive so far as may be necessary to protect the parties redeeming. Northland Pine Co. v. Northern Insulating Co., 145 inn. 395, 177 N. W. 635.

(44) Carr-Cullen Co. v. Cooper, 144 Minn. 380, 175 N. W. 696.

(46) 5 A. L. R. 398 (priority as between mortgage for future advances and mechanics' liens).

LOSS, WAIVER AND SATISFACTION

6069. Arrest or abandonment of work—Where material is furnished and delivered upon the premises for an improvement thereon, in good faith, the lien attaches at the time of delivery, and will not be defeated by abandonment of the improvement. Stravs v. Steckbauer, 136 Minn. 69, 161 N. W. 259.

6074. Claiming more than due—The evidence did not require a finding that the lien claimant in his statement "knowingly demanded in such statement more than is justly due" and thereby was deprived by G. S. 1913, § 7085, of a lien. Hydraulic Press Brick Co. v. Mortgage Land Invest. Co., 144 Minn. 24, 173 N. W. 849.

6075. Payment of account—Evidence held to show part payment for material furnished. L. J. Mueller Furnace Co. v. Colvin, 146 Minn. 252, 178 N. W. 496.

When a debtor pays generally on a continuous account, neither he nor his creditor making an application of the payment, the law applies it to the first item on the debit side. Applying this rule, it is held that a heating company, which bought material of the plaintiff for use and which it used in a house of the defendant, paid the plaintiff, and that the plaintiff cannot enforce a lien. L. J. Mueller Furnace Co. v. Burkhart, — Minn. —, 182 N. W. 909.

(62) See L. J. Mueller Furnace Co. v. Colvin, 146 Minn. 252, 178 N. W. 496.

6076. Performance of contract—The evidence sustains a finding that certain boilers and fixtures were accepted and were substantially of the character sold. Hydraulic Press Brick Co. v. Mortgage Land Invest. Co., 144 Minn. 24, 173 N. W. 849.

In this action to foreclose a mechanic's lien, the evidence sustains the findings that plaintiffs had substantially performed their contract, so that what small defects existed could be remedied at a cost of not to exceed twenty-five dollars; that the time for completing the contract had been waived by defendant; and that certain extra work had been done for which additional compensation should be made. Middlestadt v. Kostendick, 144 Minn. 319, 175 N. W. 553.

Facts held to show a sufficient consideration for a modified contract under which a subcontractor claiming a lien finished a job of painting. W. K. Morrison Co. v. Slonzynski, 145 Minn. 485, 175 N. W. 992.

(64) Middlestadt v. Kostendick, 144 Minn. 319, 175 N. W. 553.

LIEN STATEMENT

6077. In general—Substantial compliance with statute necessary—The statutory requirements as to the form and contents of the lien statement must be complied with in all substantial respects. Bowman Lumber Co. v. Piersol, 147 Minn. 300, 180 N. W. 106.

A lien statement, which fails to state definitely the value of the material and the particular tract of land sought to be charged therewith, as required by G. S. 1913, § 7026, fails of compliance with the statute in a substantial respect, and cannot be amended to supply the defect. Bowman Lumber Co. v. Piersol, 147 Minn. 300, 180 N. W. 106.

(71) Bowman Lumber Co. v. Piersol, 147 Minn. 300, 180 N. W. 106 (same rule under present statute); H. S. Johnson Co. v. Ludwigson, — Minn. —, 182 N. W. 619 (id).

(72) Bowman Lumber Co. v. Piersol, — Minn. —, 180 N. W. 106 (defect held not a mere inaccuracy cured by statute); H. S. Johnson Co. v. Ludwigson, — Minn. —, 182 N. W. 619 (court liberal in applying statute but the essential requirements of the statute must be substantially complied with).

6079. Description of premises—Errors of description are not fatal if the property improved and subject to the lien may be identified. Morrison County Lumber Co. v. Duclos, 138 Minn. 20, 163 N. W. 734.

If, when the false, inaccurate, or misleading parts in a mechanic's lien statement are eliminated, there is not a sufficient description left to identify the premises intended to be charged with the lien with reasonable certainty, it cannot serve as the basis of a foreclosure decree. In the instant case the description and recitals in the lien statement filed in every particular identified the premises adjoining those intended to be charged with the lien, and nothing in such statement could be construed as describing or identifying the premises for which the material was furnished. H. S. Johnson Co. v. Ludwigson, — Minn. —, 182 N. W. 619.

(80) Morrison County Lumber Co. v. Duclos, 138 Minn. 20, 163 N. W. 734; H. S. Johnson Co. v. Ludwigson, — Minn. —, 182 N. W. 619.

(81) Morrison County Lumber Co. v. Duclos, 138 Minn. 20, 163 N. W. 734.

6082. On building on several lots—(92, 93) See 10 A. L. R. 1026.

6083. Two or more buildings—Separate lots or tracts—The statute gives a mechanic's lien upon the premises improved not exceeding one acre in an incorporated city. A lienholder who furnishes material for buildings upon adjoining lots may file one statement for his entire claim, or he may apportion it. This action was brought to foreclose a lien upon two adjoining blocks, exceeding one acre in extent, between which there was a street. The buildings were flat buildings covering both blocks. Some of the lien claimants filed on both blocks, some on one of them, and some on particular lots in one or the other. The case was tried upon the theory that the flat buildings constituted one improvement and one enterprise, and that the two blocks were one tract, and that all the lien claimants were entitled to a lien upon both blocks regardless of whether the liens which they filed claimed it. All the parties assented to this theory and judgment was entered in accordance with it. Under such circumstances the appellant, the assignee of a claimant who filed a lien on a part of one block, and whose lien, along with all others, was

spread by the judgment over both blocks, and adjudged co-ordinate, cannot, on appeal from the judgment, complain of it. Northland Pine Co. v. Melin Bros., 142 Minn. 233, 171 N. W. 808.

The evidence is stated, and held to require a finding that a materialman contributed to the erection of six dwelling houses on eight adjoining lots under and pursuant to the purposes of one general contract and had a right to file one lien statement for its entire claim, embracing all the lots, as provided by section 7027, G. S. 1913. Carr-Cullen Co. v. Cooper, 144 Minn. 380, 175 N. W. 696.

One general lien statement cannot be made to cover several separate noncontiguous tracts of land for material furnished in the improvement thereof, though each tract be owned by the same person, to whom the material was furnished, where no attempt is made therein to apportion or specify the amount or value of the material furnished as to each Material furnished in the improvement of one such tract cannot be made a charge against the other separate tracts. Bowman Lumber Co. v. Piersol, 147 Minn. 300, 180 N. W. 106.

(94) Carr-Cullen Co. v. Cooper, 144 Minn. 380, 175 N. W. 696. See 10 A. L. R. 1026.

6086. Verification—Where, in executing a lien statement, an authorized agent of the claimant signs his name immediately below the verification and above the jurat, the signing constitutes a sufficient subscription thereto. L. J. Mueller Furnace Co. v. Bahneman, 144 Minn. 119, 174 N. W. 614.

6087. Time of filing—If the work being done is one continuous work constituting one job, though there are several agreements for the furnishing of different materials, each being a separate contract for some part of the general work, a lien filed within ninety days after the last item preserves a lien for all. If the contracts are separate and distinct and unrelated, not in connection with a continuous work or job, a lien claim filed does not preserve a lien upon materials furnished prior to the ninety days. Paine & Nixon Co. v. Dahlvick, 136 Minn. 57, 161 N. W. 257.

After the completion of a contract for building a dwelling house, the owners had a door installed in an opening for which the plans had not provided a door. The material for this work was the only item furnished within ninety days of the filing of plaintiff's lien. Held that the evidence sustains the finding that this material was furnished in accomplishing the general purpose of the original contract and that the lien is valid as to prior items. Heimbach Lumber Co. v. Spear, 140 Minn. 276, 167 N. W. 1041.

The uncontradicted evidence shows that a contractor completed a house and the owner accepted and took possession of it more than ninety days before a materialman filed his lien statement. Held, that storm sash, furnished for a sun porch after the owner accepted the house and less than ninety days before the statement was filed, were not furnished

to accomplish the general purpose of the original contract between the owner and the contractor, but under a new and independent contract to add something to the house not contemplated while it was under construction or before it was completed and accepted, and that the time for filing a lien was not extended by the furnishing of such sash. Villaume Box & Lumber Co. v. Condon, 146 Minn. 156, 178 N. W. 492.

Evidence held to justify a finding that material was not all furnished under one contract. Northland Pine Co. v. Newstrom, — Minn. —, 182 N. W. 612.

(3) Paine & Nixon Co. v. Dahlvick, 136 Minn. 57, 161 N. W. 257; Heimbach Lumber Co. v. Spear, 140 Minn. 276, 167 N. W. 1041. See Reed v. Horton, 135 Minn. 17, 159 N. W. 1080.

(4) Paine & Nixon Co. v. Dahlvick, 136 Minn. 57, 161 N. W. 257.

(5) See Northland Pine Co. v. Newstrom, — Minn. —, 182 N. W. 612.

(7) Villaume Box & Lumber Co. v. Condon, 146 Minn. 156, 178 N. W. 492.

6090. Amendment—A statement which fails to state definitely the value of the material and the particular tract of land sought to be charged therewith is fatally defective and cannot be cured by amendment after the time for filing has expired. Bowman Lumber Co. v. Pearsol, 147 Minn. 300, 180 N. W. 106.

After the lien has ceased to exist courts have no power to revive or create one by so amending a lien statement erroneously filed upon another property that it will describe the property intended. H. S. Johnson Co. v. Ludwigson, — Minn. —, 182 N. W. 619.

INDEMNITY BONDS AGAINST LIENS

6093. Indemnifying bonds of contractors—(22) Kildall Fish Co. v. Giguere, 136 Minn. 401, 162 N. W. 671 (paid surety not released by certain changes in plans and specifications—not released by failure of owner to give notice of failure of contractor to complete contract in time agreed upon—held proper to refuse to permit surety to prove that contractor did not apply payments to payment of material and labor—surety not released or its liability reduced because of loss to principal because of delays of owner and other contractors); Milavetz v. Oberg, 138 Minn. 215, 164 N. W. 910 (surety not released by changes authorized by contract—surety not released by payments in advance of completion—finding that plaintiff complied with contract as to payment during progress of work sustained—surety bound by judgment in action to enforce liens—measure of damages). See § 9104a.

6095. Indemnifying bonds of grantors—(26) Segal v. Bart, 140 Minn. 167, 167 N. W. 481 (bond held to cover liens already filed as well as those filed thereafter for the erection of the building—evidence held to justify finding that defendant waived a provision in bond limiting the time for bringing suit thereon—held proper to admit evidence of acts and assurances of an agent of defendant as to waiver as a basis for estoppel).

ACTION TO FORECLOSE

6097. Nature—(30) Gale-Gunner Lumber Co. v. Melin Bros., 136 Minn. 118, 161 N. W. 387.

(31) Northland Pine Co. v. Melin Bros., 136 Minn. 236, 161 N. W. 407.

6098. Only one action allowable—Consolidation of separate actions—(32) Gale-Gunner Lumber Co. v. Melin Bros., 136 Minn. 118, 161 N. W. 387.

6100. Limitation of actions—A lien claimant who does not, within one year after furnishing the last item of the labor or material, make a subsequent mortgagee a party to an action wherein the lien is foreclosed, or asserted, loses his priority, and the lien is gone as to such mortgagee. Morrison County Lumber Co. v. Duclos, 138 Minn. 20, 163 N. W. 734.

(34) Morrison County Lumber Co. v. Duclos, 138 Minn. 20, 163 N. W. 734; Bauman v. Metzger, 145 Minn. 133, 176 N. W. 497.

(42) Bauman v. Metzger, 145 Minn. 133, 176 N. W. 497.

6101. Parties—(46) Morrison County Lumber Co. v. Duclos, 138 Minn. 20, 163 N. W. 734.

6102. Summons—Appearance—A voluntary appearance is equivalent to the service of summons. Carr-Cullen Co. v. Cooper, 144 Minn. 380, 175 N. W. 696.

6103. Lis pendens—The failure of one who is proceeding to foreclose a mechanic's lien to file a notice of lis pendens, as required by section 7030, G. S. 1913, cannot be taken advantage of for the first time on appeal to this court. Carr-Cullen Co. v. Cooper, 144 Minn. 380, 175 N. W. 696.

6103a. Receiver—A receiver may be appointed in an action to foreclose a mechanic's lien, providing there is a sufficient showing that it is necessary to the protection or preservation of the property. Northland Pine Co. v. Melin Bros., 136 Minn. 236, 161 N. W. 407.

In an action to foreclose a mechanic's lien a receiver may be appointed to take possession of, lease, or otherwise handle the property for the benefit of all the parties, under the direction of the court, upon a petition of one of the lien claimants, where a sale has been had and confirmation thereof denied, asking that a receiver be appointed to sell and dispose of such property, and to take charge and handle the same under the direction of the court. Dezurik v. Iblings, 139 Minn. 480, 167 N. W. 116.

6104. Complaint—(72) L. J. Mueller Furnace Co. v. Buckart, 140 Minn. 500, 167 N. W. 286.

6107. Answer—Counterclaim—A lien claimant may assert a mechanic's lien by answer in actions brought by another lien claimant to foreclose its lien on the same property, and may enforce its lien in such actions as to all persons who are made parties thereto within one year from the

date of furnishing the last item mentioned in its lien statement. Carr-Cullen Co. v. Cooper, 144 Minn. 380, 175 N. W. 696.

An answer has no effect until filed. Bauman v. Metzger, 145 Minn. 133, 176 N. W. 497.

The owner may set up a counterclaim in tort connected with the subject of the action. Bauman v. Metzger, 145 Minn. 133, 176 N. W. 497.

(78) Gale-Gunner Lumber Co. v. Melin Bros., 136 Minn. 118, 161 N. W. 387.

6108. Reply unnecessary—(81) Gale-Gunner Lumber Co. v. Melin Bros., 136 Minn. 118, 161 N. W. 387.

6110. Burden of proof—(87) Stravs v. Steckbauer, 136 Minn. 69, 161 N. W. 259.

6111. Evidence—Admissibility—In an action to foreclose a mechanic's lien for improvements made after the foreclosure of a prior mortgage upon the property but begun before the time to redeem from the foreclosure expired the lienholder may prove that the time for redemption from the mortgage sale had been extended by agreement between the owner and the purchaser at the mortgage sale. The allegations of the answer interposed by the purchaser at the mortgage sale are in issue without further pleading, and the lienholder may prove an extension of the time to redeem from such sale, although he has not alleged such extension. Gale-Gunner Lumber Co. v. Melin Bros., 136 Minn. 118, 161 N. W. 387.

The claim of the owners for loss of rent resulting from a breach of the written contract to which they were not parties was correctly excluded. Bauman v. Metzger, 145 Minn. 133, 176 N. W. 497.

6112. Evidence—Sufficiency—In an action to enforce a mechanic's lien the evidence is held to sustain a finding that certain materials were furnished on the basis of reasonable value and not at a price fixed by special contract. Hydraulic Press Brick Co. v. Mortgage Land Invest. Co., 144 Minn. 24, 173 N. W. 849.

(89) Breen v. Cameron, 132 Minn. 357, 157 N. W. 500; Hydraulic Press Brick Co. v. Mortgage Land Invest. Co., 142 Minn. 497, 172 N. W. 958; Id., 144 Minn. 24, 173 N. W. 849; Middlestadt v. Kostendick, 144 Minn. 319, 175 N. W. 553; Madsen v. Latzke, 140 Minn. 325, 168 N. W. 11 (counterclaim for breach of warranty—findings for defendant held justified by the evidence); L. J. Mueller Furnace Co. v. Bahneman, 144 Minn. 119, 174 N. W. 614; W. K. Morrison Co. v. Slonzynski, 145 Minn. 485, 175 N. W. 992; Northland Pine Co. v. Newstrom, — Minn. —, 182 N. W. 612; Illinois Steel Warehouse Co. v. Hennepin Lumber Co., — Minn. —, 182 N. W. 994.

(90) Breen v. Cameron, 132 Minn. 357, 175 N. W. 500; Northland Pine Co. v. Bjorklund, 145 Minn. 352, 177 N. W. 353 (evidence held not to justify finding that material was furnished at the time stated in the lien statement or at all).

6113. Judgment—Relief allowable—Where distribution is ordered in favor of a mortgagee, it is proper to include costs of sale already had on foreclosure by advertisement as part of the mortgagee's claim. Erickson v. Ireland, 134 Minn. 156, 158 N. W. 918.

Where a mortgage exists on a tract of land, and thereafter mechanics' liens attach to a part thereof, the court may not in an action to foreclose the latter, apportion the mortgage debt so as to fix only a certain amount thereof upon the part charged with the mechanics' liens. Two of the mechanics' lien statements here involved stated that the materials were furnished for the construction of a brick manufacturing plant, of a named owner, upon a certain 100-acre tract. In selecting the 40 acres, to which the lien must be confined, the court included 20 acres not described in the said lien statements, but which belonged to the owner of the plant and were used and adapted for the manufacture of brick. The error in the description in the lien statement did not preclude the selection made. Morrison County Lumber Co. v. Duclos, 138 Minn. 20, 163 N. W. 734.

Appellant should have been given judgment for a lien upon the whole of the real property described in its lien statement for the full amount of its claim. Such amount should be apportioned among the several owners of the property so that its lien against each of the six parcels into which the eight lots were divided will be limited to the sum which the court found to be the value of the materials furnished by appellant which entered into the construction of the house located thereon. Carr-Cullen Co. v. Cooper, 145 Minn. 380, 175 N. W. 696.

(91) See Westlund v. Westerberg Lumber Co. v. Lindsay, 140 Minn. 518, 168 N. W. 96 (rule for determining amount of judgment under facts of particular case stated—interest—costs accrued to lien claimants and paid by defendant).

(93) Bauman v. Metzger, 145 Minn. 133, 176 N. W. 497.

(99) See Schill v. Korthof, 147 Minn. 443, 180 N. W. 703

6114. Costs—Attorney's fees—(2) Middlestadt v. Kostendick, 144 Minn. 319, 175 N. W. 553 (amount of attorney's fees in discretion of court). See 11 A. L. R. 884.

MERGER

6117. Of estates and interests in realty—(7) See Schill v. Korthof, 147 Minn. 443, 180 N. W. 703.

(8) See 5 Minn. L. Rev. 132.

MIDDLEMAN—See Brokers, § 1146.

MINES AND MINERALS

6122. State mining leases—A state mining lease is not a conveyance of ore in place, but is a lease in fact as well as form. State v. Cavour Mining Co., 143 Minn. 271, 173 N. W. 415; State v. Hobart Iron Co., 143 Minn. 457, 176 N. W. 758.

A state mining lease is in fact as it is in form a lease and not a conveyance of ore in place. It provides that there shall be a minimum output of 5,000 tons annually, and that in case such amount is not removed the lessee shall pay the state a royalty of 25 cents per ton on 5,000 tons. There is no provision that if the lessee does not in any one year take such amount the required annual payment paid the state for such year may be applied wholly or in part on ore taken in subsequent years in excess of the stipulated minimum. It is held that the minimum royalty is the agreed compensation for the use and occupancy for a year of the property demised for the purposes and uses and in the manner and with the rights fixed by the lease, and for it the lessee gets, among other things, the right to take within the year 5,000 tons of ore; that it is not the purchase price of 5,000 tons of ore which if not taken within the year may be subsequently taken; that it is not advance royalty; and that the lessee who takes in a given year no ore or less than the minimum cannot have his annual payment of $1,250 for such year applied wholly or in part on royalties accruing in subsequent years on ore mined in such years in excess of the minimum. State v. Cavour Mining Co., 143 Minn. 271, 173 N. W. 415.

By the state mining lease lands are leased "for the purpose of exploring for, mining, taking out, and removing therefrom the merchantable shipping iron ore." The lessee agrees to pay the state "for all the iron ore mined and removed * * * at the rate of 25 cents a ton." In the defendant's mine operated under a state lease is a body of low-grade ore which cannot be used in the furnaces under present furnace methods. It can be mined and washed in a washing plant constructed upon the leased premises and the concentrates be shipped to the furnaces and sold and a profit result after paying the mining, washing, and transportation charges and the royalty. No profit will result if the mined ore is shipped to the furnaces, and washed there, the cost of transportation being such as to prevent. Held, that the mined iron ore before washing is the ore referred to in the lease and upon it the lessee must pay the royalty of 25 cents per ton and not upon the lesser tonnage of concentrates. State v. Hobart Iron Co., 143 Minn. 457, 172 N. W. 899, 175 N. W. 100.

The holding that a lessee under a state mining lease, taking low-grade ore from the mine in the manner of ordinary good mining, must pay on the tonnage of the product, although under present furnace methods it is not directly usable in the furnaces, and not on the reduced tonnage of concentrates resulting from such product after it is

taken to the washer and there treated or "beneficiated," does not offend the contract or due process provisions of the federal constitution. State v. Hobart Iron Co., 143 Minn. 457, 176 N. W. 758.

6123. Private mining leases and contracts—Construction—Leases are a proper means for developing and working mines. They are not ordinarily a sale of the ore in place. Royalties or incomes from mining leases are rents and profits of real estate. Minnesota Loan & Trust Co. v. Douglas, 135 Minn. 413, 161 N. W. 158.

The defendant and two others entered into an agreement having as its object the development of a mining property on the Cuyuna range, an option on which was taken in the name of the defendant. The plaintiff corporation was organized to forward the project. The defendant's two associates were the officers of the company. Stock was issued to the defendant in consideration of the transfer of the option. A certain amount was equally divided among the three promoters, and another amount was donated to the corporation to be sold for the purpose of raising working capital for development. The defendant was a practical mining engineer, was in charge of the work of development, and was active in the affairs of the company. Shortly before the option expired the defendant entered into an agreement with the plaintiff whereby he might have the option at an agreed price and make such use of it, or of a lease taken under it, as he could. He took a lease and sold it for the price which he gave for the option and in addition a specified royalty on the output. Held, under the facts stated in the opinion, that there was a relation of confidence and trust between the defendant and the plaintiff and its stockholders, and that he could not retain for himself the advance royalty received. Great Northern Exploration Co. v. Mizen, — Minn. —, 184 N. W. 20.

(17) State v. Royal Mineral Assn., 132 Minn. 232, 156 N. W. 128 (certain mining leases held leases in fact as well as in name—amounts stipulated to be paid by the lessees held rents); Mineral Land Investment Co. v. Bishop Iron Co., 134 Minn. 412, 159 N. W. 966 (50 year option for a 30 year mining lease, given for a valuable consideration, the optionee not expressly agreeing to explore within a particular time and no such undertaking being properly implied, held not abandoned or forfeited for failure of optionee to explore or take lease—option not void as suspending power of alienation illegally—option not contrary to public policy as an unreasonable restriction on use and enjoyment and alienation of property—optionee not barred by statute of limitations); Orr v. Bennett, 135 Minn. 443, 161 N. W. 165 (foreclosure of mortgage on leased land—right of mortgagor to royalties during year of redemption—former judgment between parties held not an adjudication of right to royalties); McRae v. Feigh, 143 Minn. 241, 173 N. W. 655 (general nature of leases to explore for ore and develop mines commented upon); Von Baumbach v. Sargent Land Co., 242 U. S. 503 (certain instruments held mining leases).

6123a. Reservation in deeds of mining rights—See Mineral Land Investment Co. v. Bishop Iron Co., 134 Minn. 412, 159 N. W. 966.

6123b. Wrongful mining—Damages—Credit for expenditures—Right of trespasser to credit for expenditures. 7 A. L. R. 908.

MINIMUM WAGE COMMISSION—See Master and Servant, § 5812a.

MISTAKE

6124. Equitable relief—Mistake of law or fact—Equity will deny relief when the fact is equally unknown to both parties or is doubtful from its own nature. Eastman v. St. Anthony Falls Water Power Co., 24 Minn. 437; Becthold v. King, 134 Minn. 105, 158 N. W. 910.

Where the mistake is due to the carelessness of the scrivener in reducing the agreement to writing equity will grant relief though the mistake was not mutual. Haley v. Sharon Township Mut. Fire Ins. Co., 147 Minn. 190, 179 N. W. 895.

For a mistake of one of the parties to a contract equity will sometimes grant rescission but not reformation. See §§ 1192, 8328, 8329.

(19) See Costello v. Sykes, 143 Minn. 109, 172 N. W. 907; 32 Harv. L. Rev. 283 (mistake of law as ground for relief).

(22) See Costello v. Sykes, 143 Minn. 109, 172 N. W. 907.

6125a. At law—Mistake is not a matter within the exclusive jurisdiction of equity. It may be used defensively in an action at law. Nygard v. Minneapolis St. Ry. Co., 147 Minn. 109, 179 N. W. 642. See Digest, §§ 1023, 1743.

6125b. Election of remedies—Mistake gives rise to an election of remedies the same as fraud. Thwing v. Davidson, 33 Minn. 186, 22 N. W. 293; Becthold v. King, 134 Minn. 105, 158 N. W. 910.

MONEY HAD AND RECEIVED

6126. Nature of action—(26) Grand Lodge v. Towne, 136 Minn. 72, 161 N. W. 403; Seastrand v. D. A. Foley & Co., 144 Minn. 239, 175 N. W. 117.

(27) Heywood v. Northern Assur. Co., 133 Minn. 360, 158 N. W. 632.

6127. Fiction of a contract—To say that the law supplies the privity and the promise is but to indulge in legal fiction. There is no place for fiction in modern law. At a time when it was thought that no new right could be recognized unless it could be enforced through some old form of procedure, a fiction which undertook to clothe a newly recognized right with the semblance of the garb of an old one, may have

served a purpose, but fictions of the law never did deceive, nor can they now serve any real useful purpose. They should not be allowed to help or to hurt any man's cause, but should be discarded as the archaic contrivances which they are. If a man has suffered a wrong which on recognized principles of right and justice the law ought to redress a remedy should be given him, otherwise not. It seems to us better to say with frankness that neither privity nor promise is required at all. Heywood v. Northern Assur. Co., 133 Minn. 360, 158 N. W. 632.

(28-31) Fargo Foundry Co. v. Calloway, 148 Minn. —, 181 N. W. 584.

(29) Seastrand v. D. A. Foley & Co., 144 Minn. 239, 175 N. W. 117.

6128. When action lies—In general—The action for money had and received was invented to secure relief from restrictions of the common-law forms of procedure which afforded no remedy in too many cases of merit. The action is a modified form of the action of assumpsit. It is founded on the principle that no one ought to unjustly enrich himself at the expense of another, and the gist of the action is that the defendant has received money which in equity and good conscience should have been paid to the plaintiff, and under such circumstances that he ought, by the ties of natural justice, to pay over. Heywood v. Northern Assur. Co., 133 Minn. 360, 158 N. W. 632.

The action does not fail because the payment did not destroy plaintiff's right of action against his debtor who has paid the money to defendant. Nor is privity or promise necessary to sustain the action. To say that the law supplies the promise is but to indulge in legal fiction. There is no place for legal fiction in modern law. Heywood v. Northern Assur. Co., 133 Minn. 360, 158 N. W. 632.

It is undesirable to limit the scope of the action by any hard and fast rules of exclusion. The action has proved such a convenient and efficient instrument for the administration of justice, unhampered by technical rules, that courts are inclined to extend rather than restrict its scope. Heywood v. Northern Assur. Co., 133 Minn. 360, 158 N. W. 632.

Our supreme court is disposed to extend rather than to restrict the scope of the action. Seastrand v. D. A. Foley & Co., 144 Minn. 239, 175 N. W. 117.

In some cases there is language to the effect that the money received must be the money of plaintiff. But from this it must not be understood that the money must have been money which plaintiff ever had or the proceeds of property or the issue of a fund which plaintiff ever possessed, or money to which plaintiff ever had the legal title. The one essential is that the money in equity and good conscience belongs to plaintiff. Seastrand v. D. A. Foley & Co., 144 Minn. 239, 175 N. W. 117.

(32) Heywood v. Northern Assur. Co., 133 Minn. 360, 158 N. W. 632; Grand Lodge v. Towne, 136 Minn. 72, 161 N. W. 403; Seastrand v. D. A. Foley & Co., 144 Minn. 239, 175 N. W. 117; Wampa v. Lyshik, 144 Minn. 274, 175 N. W. 301.

(33) Seastrand v. D. A. Foley & Co., 144 Minn. 239, 175 N. W. 117.
(37) Heywood v. Northern Assur. Co., 133 Minn. 360, 158 N. W. 632.

6129. When action lies—Miscellaneous cases—An action will lie for the recovery of money refunded by a carrier for overcharges and paid to the wrong person. Jennison Bros. & Co. v. Dixon, 133 Minn. 268, 158 N. W. 398.

An action will lie where one person procures a payment of money which he knows is due to another. Heywood v. Northern Assur. Co., 133 Minn. 360, 158 N. W. 632. See Ann. Cas. 1918D, 245.

An action will lie for the recovery of an overpayment due to a mutual mistake of fact. It will possibly lie where the mistake is solely on the part of the plaintiff. Becthold v. King, 134 Minn. 105, 158 N. W. 910.

One who receives money under a forged or stolen instrument is bound to restore it to the person entitled thereto, though innocent of negligence or other wrong, in the absence of special equities. Cooper, Myers & Co. v. Smith, 139 Minn. 382, 166 N. W. 504.

Money paid under an illegal contract where there has been a partial performance by the other party. Ditkof v. Lifshitz, 141 Minn. 88, 169 N. W. 483.

Plaintiff, a subcontractor, in good faith performed extra work in construction of a drainage ditch. He sued defendant, the contractor, for the price of the extra work. The court held that the amount of extra work was in excess of what the county could pay under the law, and that defendant's contract did not obligate it to pay plaintiff therefor. Later, a law was passed, permitting such payment and the county then made payment to defendant for the full value of the work performed by plaintiff. Held, that plaintiff may recover in an action for money had and received. Seastrand v. D. A. Foley & Co., 144 Minn. 239, 175 N. W. 117.

Plaintiffs deposited money with defendant to apply on the price of tractors under a contract they proposed to make with him. The parties having failed to enter into the contract, plaintiffs were entitled to the return of the money and the court was justified in directing a verdict. Nelson v. Rohweder, 147 Minn. 325, 180 N. W. 223.

(38) See Galbraith v. Wood, 124 Minn. 210, 144 N. W. 945; Grand Lodge v. Towne, 136 Minn. 72, 161 N. W. 403.

(42) Miller v. Ginsberg, 134 Minn. 397, 159 N. W. 950; Tarara v. Novelty Electric Mfg. Co., 136 Minn. 216, 161 N. W. 409.

(43) Miller v. Ginsberg, 134 Minn. 397, 159 N. W. 950.

(52) L. Christian & Co. v. Chicago etc. Ry. Co., 135 Minn. 45, 159 N. W. 1082.

6133. Parties defendant—In an action based on fraud in the sale of corporate stock officers of the corporation participating in the fraud may be joined and a recovery may be had against them. Tarara v. Electric Mfg. Co., 136 Minn. 216, 161 N. W. 409.

An action will lie against an agent so long as the money remains in his hands or if he has paid it over to his principal with knowledge or notice of the paramount right of plaintiff; otherwise if he has paid it over to his principal without such knowledge or notice. Kremer v. Lewis, 137 Minn. 368, 163 N. W. 732.

(58) See § 6703.

6134a. Limitation of actions—Laches—The statutory limitation of six years is sometimes applicable. Jorgenson v. Jorgenson, 81 Minn. 428, 84 N. W. 221; Welsh v. Welsh's Estate, 148 Minn. —, 181 N. W. 356.

The doctrine of laches held inapplicable and the statute of limitations held not to have run. Kremer v. Lewis, 137 Minn. 368, 163 N. W. 732.

6135. Pleading—It is not necessary to allege the fictitious promise implied by law. Heywood v. Northern Assur. Co., 133 Minn. 360, 158 N. W. 632. See Digest, § 1905.

A complaint held to state a cause of action. Seastrand v. D. A. Foley & Co., 144 Minn. 239, 175 N. W. 117; Wampa v. Lyshik, 144 Minn. 274, 175 N. W. 301.

6136. Various defences—It is sometimes a defence that the defendant cannot be placed in statu quo, or has irrevocably and materially changed his position to his loss by reason of the payment, or in good faith and without negligence has paid the money over to a third party who, so far as he is concerned, is entitled to it. Grand Lodge v. Towne, 136 Minn. 72, 161 N. W. 403.

In an action against an agent it is a good defence that he has paid over the money to his principal without knowledge or notice of the paramount right of the claimant; otherwise if had such knowledge or notice before paying it over. Kremer v. Lewis, 137 Minn. 368, 163 N. W. 732.

It is always a good defence that the plaintiff has no equitable right to the money. Houck v. Hubbard Milling Co., 140 Minn. 186, 167 N. W. 1038 (seller held not entitled to money refunded by carrier for overcharges).

6137. Damages—Interest—Whether special damages are ever recoverable in this form of action is an open question. Evidence held not to justify special damages incurred prior to the discovery of the fraud on which the action was predicated. Tarara v. Novelty Electric Mfg. Co., 136 Minn. 216, 161 N. W. 409.

Evidence held not to show passion or prejudice in the award of damages. Courtney v. Nagle, 144 Minn. 65, 174 N. W. 436.

(73) Tarara v. Novelty Electric Mfg. Co., 136 Minn. 216, 161 N. W. 409.

6137b. Judgment—Relief allowable—The amount paid by plaintiff for taxes held recoverable. Kremer v. Lewis, 137 Minn. 368, 163 N. W. 732.

The complaint stated a cause of action for money had and received. The testimony admitted tended to prove a contract for the payment of money, and the court, after ordering the pleadings amended to conform to the proof, charged the jury that, if they found such contract to have been made, plaintiff should recover. There was a verdict for plaintiff. Held, that in granting defendant's motion for judgment notwithstanding the verdict the court erred in so far as the order was based upon the ground that no recovery on contract could be had under the complaint. Nor can the order be justified on the ground that there was no evidence to sustain a recovery under the law as given in the charge. Wampa v. Lyshik, 144 Minn. 274, 175 N. W. 301.

6137c. Conflict of laws—Where the transactions involved in an action took place in another state it was claimed that the law of that state should determine whether an action for money had and received would lie. The question what law should govern was not determined, it appearing that the law of that state was the same as that of this. Heywood v. Northern Assur. Co., 133 Minn. 360, 158 N. W. 632.

MONEY LENT

6141a. Evidence—Sufficiency—Evidence held sufficient to justify findings for plaintiff. Miller v. Kontz, 140 Minn. 499, 167 N. W. 1047.

MONEY PAID

6142. When action lies—(82) See Monroe v. Rehfeld, 132 Minn. 81, 155 N. W. 1042; Beigler v. Chamberlin, 138 Minn. 377, 165 N. W. 128.

MORATORIUM—See Army and Navy, § 510b; Bills and Notes, § 886a; Conflict of Laws, § 1546.

MORTGAGES

IN GENERAL

6145. Definition and nature—A mortgage may be in the form of a trust deed. See Hohag v. Northland Pine Co., 147 Minn. 38, 179 N. W. 485.

6146. Once a mortgage always a mortgage—(3) First Nat. Bank v. Coon, 143 Minn. 262, 173 N. W. 431.

6148. An incident of the debt—A note secured by mortgage may be enforced without regard to the mortgage. Hewitt v. Dredge, 133 Minn. 171, 157 N. W. 1080.

(8) See 2 Minn. L. Rev. 218 (debt barred by statute of limitations).

EQUITABLE MORTGAGES

6150. In general—(12, 19) Jentzen v. Pruter, 148 Minn. —, 180 N. W. 1004.

6152. Held to constitute an equitable mortgage or lien—The evidence sustains the findings of the trial court that defendant's ancestor purchased certain land at a foreclosure sale pursuant to an agreement that he should advance, as a loan, the money necessary for that purpose, and take and hold the legal title as security for its repayment, and that the transaction created but a mortgage interest. The interest obtained by a purchaser at a mortgage foreclosure sale, if intended as a security only, may be declared to be a mortgage interest. Jentzen v. Pruter, 148 Minn. —, 180 N. W. 1004.

ABSOLUTE DEED AS MORTGAGE

6154. In general—In ejectment the defendant may show that the deed under which plaintiff claims is in fact a mortgage, as between plaintiff and defendant, though defendant is not the grantor in the deed. McDonald v. Whipps, 137 Minn. 450, 163 N. W. 746.

(37) George Benz & Sons v. Barto, 147 Minn. 322, 180 N. W. 111.

(45) McDonald v. Whipps, 137 Minn. 450, 163 N. W. 746.

See L. R. A. 1916B, 18 (exhaustive note on the general subject).

6155. Intention how proved—Parol evidence—The ruling of the trial court excluding a resolution of the board of directors of the grantor on the subject of the execution of the deed, on its face purporting to authorize the execution of a trust deed for the purposes of security, held not reversible error, since it was not shown to have been known to the grantee at the time of the transaction. Such resolution was not admissible to show a mistake in the conditions and stipulations of the deed. Minneapolis Holding Co. v. Landers-Morrison-Christenson Co., 141 Minn. 127, 169 N. W. 534.

(47) L. R. A. 1916B, 60.

(49) Citizens Bank v. Meyer, — Minn. —, 182 N. W. 913.

(50) See Minneapolis Holding Co. v. Landers-Morrison-Christenson Co., 141 Minn. 127, 169 N. W. 534.

(54) McDonald v. Whipps, 137 Minn. 450, 163 N. W. 746.

(55) McDonald v. Whipps, 137 Minn. 450, 163 N. W. 746; Citizens Bank v. Meyer, — Minn. —, 182 N. W. 913.

6156. Deed and bond to reconvey—A warranty deed containing a provision that the grantor may defeat it by paying a specified sum with-

in a specified time is to be given the effect intended by the parties at the time it was executed. This intention is to be ascertained from the written instrument or instruments and the attendant facts and circumstances. A deed and an agreement to reconvey on payment of a specified sum is prima facie a conditional sale, but if the purpose be to secure a debt the transaction results in a mortgage. If no debt existed and the grantor assumed no obligation to make the specified payment, this is strong evidence that the parties intended the deed to take effect as a conveyance subject to an option in the grantor to reacquire the property. The fact that after the execution of the deed the grantor paid no taxes or incumbrances against the land, exercised no act of ownership over it, and made no claim to it, and that the grantee took possession of it, paid the taxes and incumbrances on it, and sold and conveyed it as owner is evidence that they intended the deed to operate as a conveyance. The evidence justified the trial court in finding that the instrument in controversy was a deed, not a mortgage, and vested title in the grantee subject to a right to repurchase. Citizens Bank v. Meyer, — Minn. —, 182 N. W. 913.

(57, 59, 60) Citizens Bank v. Meyer, — Minn. —, 182 N. W. 913.

6157. Degree of proof required—Sufficiency.—In an action to have a conveyance in the form of a warranty deed declared a mortgage, and to recover the difference between the value of the land and the amount owing on the mortgage, the trial court found for the defendant. Held, that the findings of the trial court in favor of the defendant were not justified by the evidence. Higgins v. Farmers State Bank, 137 Minn. 326, 163 N. W. 522.

Evidence held to justify a finding that a deed was intended as a mortgage. McDonald v. Whipps, 137 Minn. 450, 163 N. W. 746.

Evidence held to justify a finding that an absolute deed was not a mortgage. First Nat. Bank v. Coon, 143 Minn. 262, 173 N. W. 431.

(65) McDonald v. Whipps, 137 Minn. 450, 163 N. W. 746; Minneapolis Holding Co. v. Landers-Morrison-Christenson Co., 141 Minn. 127, 169 N. W. 534 (finding that deed was intended as absolute justified by the evidence). See Summit Mercantile Co. v. Daigle, 146 Minn. 218, 178 N. W. 588. See L. R. A. 1916B, 192.

6159. Burden of proof—(69) First Nat. Bank v. Coon, 143 Minn. 262, 173 N. W. 431. See L. R. A. 1916B, 185.

6166a. Limitation of actions—Laws 1913, c. 209 (G. S. 1913, §§ 8078–8080) limiting the time within which an action may be brought to declare a conveyance a mortgage to fifteen years, has no application to a conveyance made before its passage, given to secure a debt not to mature within fifteen years after the statute becomes operative. The legislature has no constitutional power to limit the time to commence an action under an existing contract to a date anterior to the inception of any cause of action arising out of the contract. Jenzen v. Pruter, 148 Minn. —, 180 N. W. 1004.

PARTIES

6168. Who may take a mortgage—To husband and wife—Where a mortgage runs to husband and wife it is presumed that their respective interests in the debt it secures are equal, but such presumption is not conclusive and the true interest of each may be shown. Dorsey v. Dorsey, 142 Minn. 279, 171 N. W. 933.

RECORDING

6180. Effect as notice—In general—The record in one county of a mortgage containing an after-acquired property provision is not constructive notice to a subsequent incumbrancer of property afterwards acquired by the mortgagor in another county. Minnesota Loan & Trust Co. v. Peteler Car Co., 132 Minn. 277, 156 N. W. 255.

SUBJECT-MATTER

6181a. After-acquired property—A mortgage covering "all real estate, buildings, structures, plant, and machinery of said grantor, whether now owned, or which may hereafter be acquired by it in the state of Minnesota, including the following described real estate in the county of Hennepin," is sufficient to cover real estate a mile and one-half or two miles away in the same general locality afterwards acquired and used by the mortgagor for the same corporate purposes as the property specifically described; and the execution of such mortgage is sufficiently authorized though the language of the stockholders' resolution is less definite than the description in the mortgage, the form of the mortgage being approved by the board of directors. Minnesota Loan & Trust Co. v. Peteler Car Co., 132 Minn. 277, 156 N. W. 255. See 21 L. R. A. (N. S.) 843.

6186. Fixtures—A prior mortgagee cannot hold as a part of the realty articles annexed to it by the mortgagor, but to which the latter never acquired title. Hanson v. Voss, 144 Minn. 264, 175 N. W. 113.

(35) See Hanson v. Voss, 144 Minn. 264, 175 N. W. 113.

DEBT OR OBLIGATION SECURED

6193. Future advances—A mortgage upon real estate was given before the construction of any building thereon. Construction of a building was commenced before money was paid out by the mortgagee, but the whole amount was later paid out in payment of bills for the construction. The evidence sustains a finding that at the time the mortgage was given the mortgagee agreed to make advances as above stated. Erickson v. Ireland, 134 Minn. 156, 158 N. W. 918.

(44, 45) Erickson v. Ireland, 134 Minn. 156, 158 N. W. 918.

6198. One mortgage—Several notes—Priority—It is competent for bondholders whose bonds are secured by a single mortgage or trust deed to agree among themselves that one shall have priority over the rest. Hohag v. Northland Pine Co., 147 Minn. 38, 179 N. W. 485.

(51) Burnside v. Craig, 140 Minn. 404, 168 N. W. 175.

PERSONAL LIABILITY TO PAY MORTGAGE DEBT

6205. Liability on note and mortgage distinct—A note due in the future, according to its terms, is not brought to maturity by a foreclosure under a power authorizing the mortgagee to declare the whole debt due upon default in any provisions in the mortgage. An action thereon for a deficiency on the foreclosure cannot be maintained until the note is due according to its terms. Burnside v. Craig, 140 Minn. 404, 168 N. W. 175.

A note made and payable in one state is governed by the law of that state though it is secured by a mortgage on land in another state. Patterson v. Wyman, 142 Minn. 70, 170 N. W. 928.

(82) Burnside v. Craig, 140 Minn. 404, 168 N. W. 175. See Greenfield v. Taylor, 141 Minn. 399, 170 N. W. 345 (note and mortgage separate instruments).

CONFLICT AND PRIORITY OF LIENS

6209. Priority of purchase-money mortgages—(8) See Radke v. Myers, 140 Minn. 138, 167 N. W. 360.

6211. Priority among mortgages irrespective of the recording act—S. had a first mortgage and F. a second mortgage. A mechanic's lien was foreclosed against the mortgaged property. The judgment adjudged that the lien was prior to the S. mortgage and subsequent to the F. mortgage. S. purchased at the foreclosure sale in the name of another and there was no redemption. Held, that as between S. and F. the mortgage of S. was alive and prior to the lien of the mortgage of F. Schill v. Korthof, 147 Minn. 443, 180 N. W. 703.

6212. Conflict between mortgages and judgment liens—See § 8307.

6214a. Conflict between mortgage and vendor's lien—A mortgage held subject to the lien of a vendor reserved by the deed and contract for the deed, the deed being expressly made subject to the terms of the contract so that the mortgagee had notice of the reserved lien of the vendor. Rosendahl v. Mudbaden Sulphur Springs Co., 144 Minn. 361, 175 N. W. 609.

RIGHTS AND LIABILITIES OF MORTGAGOR

6219. Right to rents and profits—Under the statutes of Minnesota a mortgagor of land is entitled to the full usufruct of the mortgaged land until his rights therein are barred by foreclosure of the mortgage and

expiration of the period of redemption. This applies to rents and royalties accruing under a mining lease. This right he cannot, by stipulation in the mortgage or contemporaneous with it, contract away. Nor can the act of the sheriff in making a sale of rents and profits on foreclosure by advertisement detract anything from the rights of the mortgagor. Orr v. Bennett, 135 Minn. 443, 161 N. W. 165.

Provisions in mortgage as to rents and profits. 4 A. L. R. 1405.

RIGHTS AND LIABILITIES OF MORTGAGEE

6227. Right to possession—(62, 65, 67) Orr v. Bennett, 135 Minn. 443, 161 N. W. 165.

RIGHTS AND LIABILITIES OF SUCCESSIVE MORTGAGEES

6236. In general—A second mortgagee has the right to insist that the mortgagor apply the rents and profits arising out of the property mortgaged upon those charges which unless paid become additional liens thereon superior to those of such second mortgagee, when it is made to appear that otherwise the latter's security will become inadequate and he would stand to lose his claim. Donnelly v. Butts, 137 Minn. 1, 162 N. W. 674.

PAYMENT AND PERFORMANCE

6264. Fraud, accident, or mistake in payment or discharge—Reinstatement of mortgage released or discharged by mistake. L. R. A. 1917E, 1055.

ESTOPPEL

6267. Mortgagor held estopped—A judgment holding the mortgagor estopped by his conduct from asserting the fact that an attempted foreclosure of the mortgage is void is not binding on the holder of a judgment lien who was not a party thereto and whose lien, although subject to the mortgage, attached before the void foreclosure, and such judgment is not evidence against him of the facts on which it was founded. Stammers v. Larson, 142 Minn. 240, 171 N. W. 809.

Land in controversy was subject to three mortgages, the second and third were given by the owner and the first she had assumed and agreed to pay. The first had been foreclosed and the time for redemption was about to expire. The third mortgagee took an assignment of the certificate of sale. The court found that part of the consideration was paid by the owner and part by the third mortgagee, that both were parties in interest in the assignment and that they took the assignment in the name of the third mortgagee pursuant to a collusive agreement between them for the purpose of depriving the second mortgagee of her security. There is evidence to sustain these findings. Held, the owner was estopped from asserting the assigned certificate against the

second mortgagee and, in view of the arrangement between the owner and the third mortgagee, the latter had no better right than the owner. Westberg v. Pettiford, — Minn. —, 182 N. W. 441.

From asserting or acquiring an outstanding title to defeat mortgage. L. R. A. 1918B, 734.

6271. Miscellaneous cases—(39) Stammers v. Larson, 142 Minn. 240, 171 N. W. 809 (one claiming under a judgment lien held not estopped from asserting the invalidity of a foreclosure and not bound by a judgment holding the mortgagor estopped).

MERGER

6273. Facts held not to cause a merger—S. had a first mortgage and F. a second mortgage. A mechanic's lien was foreclosed against the mortgaged property. The judgment adjudged that the lien was prior to the S. mortgage and subsequent to the F. mortgage. S. purchased at the foreclosure sale in the name of another and there was no redemption. Held, that as between S. and F. the mortgage of S. was alive and prior to the lien of the mortgage of F. Schill v. Korthof, 147 Minn. 443, 180 N. W. 703.

INSURANCE

6275. In general—Where a policy is made payable to a mortgagee as his interest may appear any surplus after satisfying the mortgage belongs to the insured and is exempt under G. S. 1913, § 7951 (13). Remington v. Sabin, 132 Minn. 372, 157 N. W. 504.

Application of insurance money received by mortgagee. 11 A. L. R. 1295

(52) See Remington v. Sabin, 132 Minn. 372, 157 N. W. 504.

(58) See 11 A. L. R. 1295.

(62) See Remington v. Sabin, 132 Minn. 372, 157 N. W. 504.

ASSIGNMENT OF MORTGAGE

6283. What passes by assignment—An assignee of a mortgage becomes the legal owner thereof and may enforce it. Minnesota Loan & Trust Co. v. Peteler Car Co., 132 Minn. 277, 156 N. W. 255.

ASSUMPTION OF MORTGAGE

6289. What constitutes—(3) L. R. A. 1917C, 592.

6293. Grantor must be personally liable—(13) 12 A. L. R. 1528.

6295. Land becomes primary fund—Grantor a surety—(26) A. B. Klise Lumber Co. v. Enkema, 148 Minn. —, 181 N. W. 201.

(27) Minnesota Loan & Trust Co. v. Peteler Car Co., 132 Minn. 277, 156 N. W. 255.

(29) A. B. Klise Lumber Co. v. Enkema, 148 Minn. —, 181 N. W. 201.

6299. Estoppel of purchaser and his privies—(35) L. R. A. 1917C, 832. (41) Westberg v. Pettiford, — Minn. —, 182 N. W. 441.

6301. Unauthorized insertion of assumption clause—Mistake—Effect of insertion of assumption clause by mistake. L. R. A. 1918A, 1003.

FORECLOSURE BY ADVERTISEMENT

6305. General nature of proceeding—The proceeding is in no sense judicial, for the power or authority of the court is in no way invoked or involved therein. Taylor v. McGregor State Bank, 144 Minn. 249, 174 N. W. 893.

(65) See Taylor v. McGregor State Bank, 144 Minn. 249, 174 N. W. 893.

6311. Within what time—(96) See Jentzen v. Pruter, 148 Minn. —, 180 N. W. 1004.

6313. Effect of sale in extinguishing debt—While a note secured by a mortgage is discharged by a foreclosure it is only by legal fiction that it can be said to be paid thereby. Townsend v. Jahr, 147 Minn. 30, 179 N. W. 486.

(5) See Wood v. Pacific Surety Co., 116 Minn. 474, 134 N. W. 127; Townsend v. Jahr, 147 Minn. 30, 179 N. W. 486.

6314. Effect of sale in exhausting lien—(8) Hage v. Drake Marble & Tile Co., 145 Minn. 113, 176 N. W. 192.

6315. Foreclosure for instalment of principal or interest—Where a mortgage is foreclosed for nonpayment of an instalment, the mortgagee may bid in the property for the full amount of the mortgage debt, and after satisfying the amount then due may apply the surplus in paying the amount not then due, but must pay any further surplus to the mortgagor. Failure to pay such further surplus to the mortgagor gives him a cause of action against the mortgagee, but does not invalidate the sale. Kleinman v. Neubert, 142 Minn. 424, 172 N. W. 315.

6317. Authority of agent—(18) First Nat. Bank v. Coon, 143 Minn. 262, 173 N. W. 431

PREREQUISITES

6318. Default—(26) Moller v. Robertson, 146 Minn. 265, 178 N. W. 590.

NOTICE OF SALE

6326. By whom signed—Names of the parties—(73) First Nat. Bank v. Coon, 143 Minn. 262, 173 N. W. 431.

6329. Amount claimed to be due—When the foreclosure is for the non-payment of an instalment it is not necessary to refer to deferred instalments. Kleinman v. Neubert, 142 Minn. 424, 172 N. W. 315.

The amount claimed to be due in the notice in no manner limits or determines the amount which may be bid at the sale. Kleinman v. Neubert, 142 Minn. 424, 172 N. W. 315.

Where the mortgagee elects to declare the whole amount due upon default in the payment of interest the whole amount of the principal debt secured and the overdue interest is the amount to be claimed due in the notice. Moller v. Robertson, 146 Minn. 265, 178 N. W. 590.

(85) Moller v. Robertson, 146 Minn. 265, 178 N. W. 590.

6337. Service of notice—The presence within a building upon mortgaged premises, with windows and doors closed and locked, of a large amount of household goods and chattels, furniture and kitchen utensils, though no person be at the time actually residing therein, is evidence of "actual possession and occupancy" within the meaning of G. S. 1913, § 8111, and sufficient to require a service of the notice of foreclosure as there provided. St. Paul Swimming Pool v. First State Bank, — Minn. —, 182 N. W. 514.

(19) Jankowitz v. Kaplan, 138 Minn. 452, 165 N. W. 275.

(20) See Pomroy v. Beattie, 139 Minn. 127, 165 N. W. 960.

SALE

6347. For inadequate price—See § 5220.

6349. Separate tracts must be sold separately—Where the property consists of contiguous lots occupied by two buildings and no request is made to sell them separately, a sale in one parcel is valid. Kleinman v. Neubert, 142 Minn. 424, 172 N. W. 315.

(58) Kleinman v. Neubert, 142 Minn. 424, 172 N. W. 315. See Northland Pine Co. v. Northern Insulating Co., 145 Mnn. 395, 177 N. W. 635.

6351. Disposal of proceeds of sale by sheriff—Surplus—The statute provides that where the mortgage is payable in instalments, "the proceeds of sale, after satisfying the instalment due, with interest, taxes paid, and costs of sale, shall be applied towards the payment of the residue of the sum secured by such mortgage, and not due and payable at the time of such sale; and, if such residue does not bear interest, such application shall be made with rebate of the legal interest for the time during which the residue shall not be due and payable; and the surplus, if any, shall be paid to the mortgagor, his legal representatives or assigns." G. S. 1913, § 8130. Kleinman v. Neubert, 142 Minn. 424, 172 N. W. 315.

The lien is transferred to the proceeds out of which secured debts must be paid, whether due or not. Hage v. Drake Marble & Tile Co., 145 Minn. 113, 176 N. W. 192.

(75) Hage v. Drake Marble & Tile Co., 145 Minn. 113, 176 N. W. 192.

(82) Kleinman v. Neubert, 142 Minn. 424, 172 N. W. 315; Hage v. Drake Marble & Tile Co., 145 Minn. 113, 176 N. W. 192.

See § 6449.

6355. Waiver of irregularities by mortgagor—(5) Kleinman v. Neubert, 142 Minn. 424, 172 N. W. 315.

RIGHTS AND LIABILITIES OF PURCHASER

6368. Succeeds to rights of mortgagee—(82) Knapp v. Foley, 140 Minn. 423, 168 N. W. 183.

6371. Right to crops—Rents and profits—(95) Orr v. Bennett, 135 Minn. 443, 161 N. W. 165.

6374. Right to sue on covenants in mortgage—The purchaser may sue on a covenant of seizin. Knapp v. Foley, 140 Minn. 423, 168 N. W. 183.

REDEMPTION—IN GENERAL

6391. Right to redeem and right to foreclose how far reciprocal—(37) See Jentzen v. Pruter, 148 Minn. —, 180 N. W. 1004.

6392. Extension of time to redeem—(40) See Locke v. Darelius, 140 Minn. 206, 168 N. W. 24.

6395a. Contract of settlement fixing rights of parties—The plaintiff mortgaged certain property which he owned and under foreclosures the defendants acquired apparent legal title. The plaintiff claimed that the foreclosures were premature and the defendant's title invalid. In an action to obtain possession brought by the defendant against the plaintiff it was stipulated by way of settlement that if the plaintiff would surrender possession without a writ of ouster the defendant would give him a contract of sale for the property upon terms then agreed upon. Possession was accordingly surrendered and the contract was executed. It is held that the contract measures the rights of the parties and that the plaintiff is not entitled to redeem upon the theory that the defendant waived the rights acquired under the foreclosures and was a mortgagee in possession, nor upon the theory that the mortgage relation was continued and the time of payment of the mortgage indebtedness extended, nor upon the theory that there was an avoidable release of the equity of redemption. Locke v. Darelius, 140 Minn. 206, 168 N. W. 24.

6396. Release or sale to mortgagee—(46) Jentzen v. Pruter, 148 Minn. —, 180 N. W. 1004 (deed from mortgagor to mortgagee—no presumption that it was given as further security). See Locke v. Darelius, 140 Minn. 206, 168 N. W. 24.

REDEMPTION BY MORTGAGOR OR ASSIGNS

6400. Time in which to redeem—Extension—(64) See Locke v. Darelius, 140 Minn. 206, 168 N. W. 24.

REDEMPTION BY CREDITORS

6405. Nature of right—The right of a creditor to redeem from a foreclosure sale is purely statutory, and the redemption can be effected only by complying with the requirements of the statute. Moore v. Penney, 141 Minn. 454, 170 N. W. 599.

(77) Moore v. Penney, 141 Minn. 454, 170 N. W. 599.

6410. Who may redeem as creditors—A creditor, seeking a mere money judgment for a debt which, under no statutory or constitutional provision, is, or may be adjudged, a lien upon the homestead of the defendant, cannot, by procuring an attachment to be issued in the action and a levy to be made upon such homestead, acquire a lien thereon, so as to give the right of redemption. Beigler v. Chamberlin, 145 Minn. 104, 176 N. W. 49.

The attaching creditor was not entitled to redeem from the foreclosure of a prior mortgage as a creditor having a lien, and his attempt to do so gave him no interest in the property, and his subsequent mortgage to plaintiff gave plaintiff no interest therein. Union Investment Co. v. Abell, 148 Minn. —, 181 N. W. 353.

(86) Moore v. Penney, 141 Minn. 454, 170 N. W. 599.

6412. General plan of procedure—(12) Moore v. Penney, 141 Minn. 454, 170 N. W. 599.

6416. Tacking subsequent liens—Necessity of redeeming from one's self—To preserve any rights under a junior lien, the junior creditor must redeem thereunder from the senior creditor who made the redemption next prior in time, even if he himself be such senior creditor. If such senior creditor also holds the junior lien next in line, he may redeem thereunder from himself as senior creditor by filing the necessary proofs of such redemption without going through the useless form of paying money to himself; but such redemption operates to satisfy and discharge the debt secured by the senior lien for the reason that under the statute no redemption can be made without paying such debt. Moore v. Penney, 141 Minn. 454, 170 N. W. 599.

(30) Moore v. Penney, 141 Minn. 454, 170 N. W. 599; Schill v. Korthof, 147 Minn. 443, 180 N. W. 703.

(31) Moore v. Penney, 141 Minn. 454, 170 N. W. 599.

6418. Amount necessary to redeem—(52) Moore v. Penney, 141 Minn. 454, 170 N. W. 599.

6423. Effect—Interest acquired—Satisfaction of debt—Where a junior lienholder redeems from himself as a senior lienholder and redemptioner the redemption operates to satisfy and discharge the debt secured by the senior lien, for the reason that under the statute no redemption can be made without paying such debt. Moore v. Penney, 141 Minn. 454, 170 N. W. 599.

Mechanics' liens on which redemption from a mortgage foreclosure sale is made are not thereby merged or extinguished, but the liens survive so far as may be necessary to protect the parties redeeming. The redemption satisfies the debt due to the creditor redeeming only to the extent of the value of the property less the sum paid to effect redemption. Northland Pine Co. v. Northern Insulating Co., 145 Minn. 395, 177 N. W. 635.

(70, 71) See Northland Pine Co. v. Northern Insulating Co., 145 Minn. 395, 177 N. W. 635.

FORECLOSURE BY ACTION

6431. Limitation of actions—Laws 1909, c. 181, limiting the time in which to foreclose a mortgage to fifteen years from the date of the mortgage, unless the time of maturity of the debt is stated in the mortgage, is not operative to limit the right to foreclose an existing mortgage to fifteen years from its date, if the right to foreclose did not accrue until after the expiration of fifteen years. Jentzen v. Pruter, 148 Minn. —, 180 N. W. 1004.

(10) See G. S. 1913, § 7698 (applicable to all forms of foreclosure).

6434. Parties—(24) See Dickerman Investment Co. v. Oliver Iron Mining Co., 135 Minn. 254, 160 N. W. 776.

6435. Pleading—(33) See Dickerman Investment Co. v. Oliver Iron Mining Co., 135 Minn. 254, 160 N. W. 776.

6438. Issues that may be litigated—(56) Dickerman Investment Co. v. Oliver Iron Mining Co., 135 Minn. 254, 160 N. W. 776 (adverse title paramount to mortgage cannot be litigated over objection).

6442. Judgment—Relief allowable—(70) See Dickerman Investment Co. v. Oliver Iron Mining Co., 135 Minn. 254, 160 N. W. 776.

6446. Who bound by judgment—An adverse title paramount to the mortgage cannot over objection be litigated in a foreclosure action. The litigation of such title is not without jurisdiction though it may be error. When the complaint alleges that a defendant claims an interest or lien which if valid is subsequent to the mortgage he is bound by a decree so adjudging, subject to his right to correct it on appeal, and he cannot attack it collaterally. Where such defendant holds an interest as a naked trustee for an undisclosed beneficiary the beneficiary is bound by such decree; and this is true though the mortgagees and the beneficiary entered into an agreement for a foreclosure under which title to all except the interest claimed by such defendant was to be acquired and passed to the beneficiary. Dickerman Investment Co. v. Oliver Iron Mining Co., 135 Minn. 254, 160 N. W. 776.

6449. Distribution of proceeds of sale—Surplus—The rule that the proceeds of a foreclosure sale should be applied pro rata toward the payment of all the notes, or to all debts secured by the mortgage, applies only where the notes are owned by different persons, or where there

is more than one debt secured by the mortgage. It does not apply where there is but one debt and all the notes are owned by one person. Burnside v. Craig, 140 Minn. 404, 168 N. W. 175.

A deed of trust, to secure the bonds of numerous creditors including plaintiff, provided that the claim of plaintiff should be a first lien, and be preferred in payment from whatsoever source or manner paid. On default, the trustee at the written direction of the creditors, including plaintiff, foreclosed and bid in the property for less than the amount of all claims and later sold the property for a still smaller amount. Held, plaintiff's priority of claim was impressed on the property bid in and his right of priority was not waived by his assent to a foreclosure sale for less than the amount of all claims. Hohag v. Northland Pine Co., 147 Minn. 38, 179 N. W. 485.

The defendant Steele gave the plaintiff Schill a mortgage and later gave the defendant Forsyth a mortgage on the same property subject to Schill's mortgage. A mechanic's lien was foreclosed against the property. The judgment adjudged that the lien was prior to the Schill mortgage and subsequent to the Forsyth mortgage. Schill purchased at the foreclosure sale in the name of another, and there was no redemption. Held, that as between Schill and Forsyth Schill's mortgage is alive and prior to the lien of the Forsyth mortgage, and that he can foreclose. In the distribution on a sale the Schill mortgage will first be satisfied and then the Forsyth mortgage. Though the interest acquired under the mechanic's lien foreclosure, and now owned by Schill, is ahead of the Schill mortgage, it cannot be put ahead of the Forsyth mortgage Schill v. Korthof, 147 Minn. 443, 180 N. W. 703.

(96) Burnside v. Craig, 140 Minn. 404, 168 N. W. 175. See Hohag v. Northland Pine Co., 147 Minn. 38, 179 N. W. 485.

See Digest, § 6351.

RECEIVER

6456. Effect of statute—(20) Justus v. Fagerstrom, 145 Minn. 189, 176 N. W. 645.

6458. At instance of junior mortgagee—Where the security is adequate, the mortgagor solvent, taxes and insurance paid to date and the property well cared for, the court will not appoint a receiver of the mortgaged property on foreclosure of a second mortgage because of a few months' default of one instalment of interest and one of principal, due on the first mortgage. Failure to pay interest due on a prior mortgage is a species of waste, but it will justify the appointment of a receiver pending foreclosure only where it endangers the adequacy of the security. Justus v. Fagerstrom, 141 Minn. 323, 170 N. W. 201.

(22) Donnelly v. Butts, 137 Minn. 1, 162 N. W. 674. See Justus v. Fagerstrom, 145 Minn. 189, 176 N. W. 645.

6459. Grounds for appointment—While neither insolvency of the mortgagor nor insufficiency of the security, separately or combined, war-

rant the appointment of a receiver in a suit to foreclose a real estate mortgage, still the appointment may be justified when in addition to those facts it is made to appear that the rents and profits of the property have been appropriated by the mortgagor to his own use and he has suffered taxes on the premises to remain unpaid together with large items of overdue interest upon prior mortgages, thus depreciating the security. Donnelly v. Butts, 137 Minn. 1, 162 N. W. 674.

(23) Justus v. Fagerstrom, 141 Minn. 323, 170 N. W. 201; Id., 145 Minn. 189, 176 N. W. 645.

6460. A matter of discretion—(26) See Justus v. Fagerstrom, 145 Minn. 189, 176 N. W. 645 (order appointing receiver reversed).

MARSHALING SECURITIES

6466. In general—(35) See George Benz & Sons v. Barto, 147 Minn. 322, 180 N. W. 111.

(36) See State Bank v. Strandberg, 148 Minn. —, 180 N. W. 1006.

INJUNCTION

6471. Injunction to restrain sale denied—The fact that there was litigation pending involving the ownership of the mortgage and uncertainty as to the proper person to whom to pay interest held not to justify an injunction to restrain a sale. Moller v. Robertson, 146 Minn. 265, 178 N. W. 590.

6472. Miscellaneous cases—Action to enjoin a mortgagee from redeeming on the ground that the mortgage was without consideration and void. Held, that plaintiff and intervener were entitled to maintain the action by virtue of their interest in the land covered by the mortgage, and that plaintiff's cause of action did not accrue until appellant refused to release the mortgage or asserted its validity. Burns v. Burns, 124 Minn. 176, 144 Minn. 761.

ACTIONS

6484. Action for deficiency—An action for a deficiency upon foreclosure cannot be maintained on a note secured by the mortgage until the note is due according to its terms. This is true though the mortgage provides that the mortgagee may declare the whole amount due upon any default in any of the provisions in the mortgage. This rule applies though the action for a deficiency is based on a covenant in the mortgage to pay the debt at the time and in the manner specified in the note. Burnside v. Craig, 140 Minn. 404, 168 N. W. 175.

6486. Action to redeem from mortgage—(16) See Jentzen v. Pruter, 148 Minn. —, 180 N. W. 1004.

MOTHER'S PENSIONS—See Infants, § 4466b.

MOTIONS AND ORDERS

MOTIONS

6493. Scope of remedy—(83) Beigler v. Chamberlin, 145 Minn. 104, 176 N. W. 49.

6497. Notice of motion—A party may not complain that an order was made without notice, where he has been accorded all the rights to which he would be entitled if such order had not been made. Barrette v. Merlin Bros., 146 Minn. 92, 177 N. W. 933.

(95) Northwestern Nat. Bank v. Mickelson-Shapiro Co., 134 Minn. 422, 159 N. W. 948.

6499a. Findings—Findings of fact are not necessary on a motion, but they are sometimes proper to present the case in an effective manner for review. Fletcher v. Taylor, — Minn. —, 182 N. W. 437. See § 9849(46).

6502. Renewal of motion—The fact that an application asking the judge to change his judicial opinion is denied because made too late does not bar a subsequent application to correct a mistake. National Council v. Silver, 138 Minn. 330, 164 N. W. 1015.

Consent of the court to a renewal of a motion may be made when the second motion is brought on to be heard. Fletcher v. Southern Colonization Co., 148 Minn. —, 181 N. W. 205.

(28) See Brogger v. Chicago etc. Ry. Co., 137 Minn. 338, 163 N. W. 662, 164 N. W. 368.

ORDERS

6509. Imposing terms or conditions—(53) Murray v. Mulligan, 135 Minn. 471, 160 N. W. 1032.

6510. Res judicata—The fact that an application asking the judge to change his judicial opinion is denied because too late does not bar a subsequent application to correct a mistake. National Council v. Silver, 138 Minn. 330, 164 N. W. 1015.

If an order discharging a garnishee or dismissing a garnishment proceeding may in any case be held res judicata as to any issue presented by the pleadings in the main action, it should be so held only when it appears that such issue was directly involved, and that there was a full hearing on the merits thereof on the motion to dismiss or discharge. Within this rule, it is held that the order dismissing the garnishment proceedings in this case is not res judicata of the issue presented by the pleadings in the main action as to the character of the transactions out of which the several causes of action arose. Campbell Electric Co. v. Christian, 141 Minn. 296, 170 N. W. 199.

(54) See Pulver v. Commercial Security Co., 135 Minn. 286, 160 N.

W. 781; Brogger v. Chicago etc. Ry. Co., 137 Minn. 338, 163 N. W. 662, 164 N. W. 368 (administrative order of Railroad and Warehouse Commission); Beigler v. Chamberlin, 145 Minn. 104, 176 N. W. 49.

(56) Campbell Electric Co. v. Christian, 141 Minn. 296, 170 N. W 199; Beigler v. Chamberlin, 145 Minn. 104, 176 N. W. 49.

6511. Collateral attack—An ex parte order appointing a receiver, made by a court having jurisdiction over the subject-matter of an action, is within the rule forbidding collateral attacks upon the judgments and orders of such a court. Greenfield v. Hill City Land, L. & L. Co., 141 Minn. 393, 170 N. W. 343.

6512. Vacation and amendment—Upon proper notice an order dismissing an action may be vacated on motion and the action reinstated. Rishmiller v. Denver & Rio Grande R. Co., 134 Minn. 261, 159 N. W. 272.

G. S. 1913, §§ 7746, 7786, enlarge, define and regulate the inherent power of a court to vacate its orders, and apply to special proceedings as well as ordinary civil actions. Troska v. Brecht, 140 Minn. 233, 167 N. W. 1042.

The district court may, in its discretion at any time within one year after notice thereof, for good cause shown, modify or set aside its orders, whether made in or out of term. O'Hara v. Western Mortgage Loan Co., 147 Minn. 417, 180 N. W. 701.

(60) Pulver v. Commercial Security Co., 135 Minn 286, 160 N. W. 781; Gross v. Lincoln, 137 Minn. 152, 163 N. W. 126; Troska v. Brecht, 140 Minn. 233, 167 N. W. 1042; Scheurer v. Great Northern Ry. Co., 141 Minn. 503, 170 N. W. 505 (amendment of order granting new trial); O'Hara v. Western Mortgage Loan Co., 147 Minn. 417, 180 N. W. 701 (order disallowing a claim against a corporation in the hands of a receiver held properly vacated as improvidently made). See § 7784.

ORDERS TO SHOW CAUSE

6513. As a short notice—One cannot complain of want of notice of hearing on an order to show cause if thereafter, upon application made, he is heard on the merits. Northwestern Nat. Bank v. Mickelson-Shapiro Co., 134 Minn. 422, 159 N. W. 948.

An order to show cause, in proper form and properly served, is as effective as a statutory notice of motion to bring into court the party to whom it is directed and to give jurisdiction over him. Larson v. Minnesota N. W. Electric Ry. Co., 136 Minn. 423, 162 N. W. 523.

It is provided by statute that the court may by order to show cause shorten the usual eight days notice of motion. No other reference is made, in the statute, to orders to show cause. But the power of the district court to issue such orders is not statutory. It is one of the inherent powers of the court. It is common to issue such an order where a restraining order is necessary. It is not unusual to issue such an order where the court deems it wise for any reason to fix the time for hear-

ing, whether the purpose is to fix a shorter or longer time than eight days. While the court will not usually issue such orders without some excuse therefor, still if it does do so, the order is always effective when duly served, and it is a substitute for the ordinary notice of hearing if it contains all the requisite elements of a notice. Defects which go merely to the form of the order do not go to the jurisdiction of the court, and objection based thereon should be seasonably raised in the trial court. Larson v. Minnesota N. W. Electric Ry. Co., 136 Minn. 423, 162 N. W. 523.

MOTOR VEHICLES—See Highways, §§ 4163–4167n (law of road-regulation); Liens, § 5579a.

MUNICIPAL CORPORATIONS

IN GENERAL

6517. Nature—All municipal corporations, whether cities, villages, towns, school districts or counties, are agencies of the state for the administration of the law and the preservation of order in the local communities. They are created for the public convenience and welfare and can be organized only by direct legislation or through subordinate tribunals to which the power of organization is expressly granted. Hammer v. Narverud, 142 Minn. 199, 171 N. W. 770.

(78) State v. Holm, 138 Minn. 281, 164 N. W. 989; Hammer v. Narverud, 142 Minn. 199, 171 N. W. 770

(80) See Belle Plaine v. Northern Power Co., 142 Minn. 361, 172 N. W. 217.

6519. Boroughs—(84) See Belle Plaine v. Northern Power Co., 142 Minn. 361, 172 N. W. 217.

6521. Boundaries—Lakes—All lakes or parts of lakes wholly or partly within the territory comprising the city of Minneapolis, as defined and set off by chapter 10, Special Laws 1887, to the extent within the same, are embraced in the municipal limits and subject to the authority and jurisdiction of the city; the shores thereof not being made the municipal boundary line. Lake Nokomis is so situated, being partly within and partly without the city, and the construction of a bridge over and across the same by the city is within the authority conferred by chapter 6, Laws 1919. Minneapolis Real Estate Board v. Minneapolis, 145 Minn. 379, 177 N. W. 494.

6525. Building permits—Building restrictions in residential districts—Offensive trades in certain districts—An owner cannot be prohibited under the police power from erecting a store, flat building, or apartment house, in a residential district. State v. Houghton, 134 Minn. 226, 158 N. W. 1017; State v. Minneapolis, 136 Minn. 479, 162 N. W. 477;

Vorlander v. Hokenson, 145 Minn. 484, 175 N. W. 995. See State v. Houghton, 144 Minn. 1, 174 N. W. 885, 176 N. W. 159; 4 Minn. L. Rev. 50.

Under the general welfare clause cities may prescribe districts within which no business or occupation of a noxious or offensive character, or which tends to interfere with the comfort and prosperity of others, may be carried on. State v. Houghton, 134 Minn. 226, 158 N. W. 1017; St. Paul v. Kessler, 146 Minn. 124, 178 N. W. 171. See 6 A. L. R. 1597 (location of laundries).

In a city of the first class, a residence district having been established, one asking permission to erect a factory therein has the burden to show that the proposed industry will not impair or seriously interfere with a proper enjoyment of the property in such district for residential purposes. State v. Houghton, 142 Minn. 28, 170 N. W. 853. See Meyers v. Houghton, 137 Minn. 481, 163 N. W. 754.

The title of Laws 1915, c. 128, providing for residential districts in cities of the first class and authorizing condemnation therefor, is sufficient. The restriction in the act as to apartment houses in such districts is constitutional. State v. Houghton, 144 Minn. 1, 174 N. W. 885, 176 N. W. 159.

Neither a municipality nor an officer thereof is liable for damages to individuals in enforcing ordinances relating to restricted districts. Roerig v. Houghton, 144 Minn. 231, 175 N. W. 542.

Chapter 128, Laws 1915, empowering cities of the first class to establish residential districts by the use of the right of eminent domain, did not take away or impair the authority, theretofore granted such cities, to regulate, restrict, or prohibit within certain districts occupations or businesses which therein may be considered nuisances. Undertaking establishments and so-called funeral homes may properly be held a nuisance in districts of a city occupied exclusively for residences, and an ordinance prohibiting them therein is valid, provided the city has been granted the authority to restrict or prohibit nuisances. St. Paul v. Kessler, 146 Minn. 124, 178 N. W. 171.

A city ordinance, prohibiting the maintenance of an undertaking establishment and so-called funeral home, in a residential part of the city, held to be valid. Meagher v. Kessler, 147 Minn. 182, 179 N. W. 732.

INCORPORATION OF VILLAGES

6527. Territory—Annexation—In proceedings under G. S. 1913, § 1801, for the annexation of territory to a village, held, that a petition for an election to determine such annexation was not signed by five legal voters; that the petition conferred no jurisdiction on the village council either to entertain the petition or to call an election, and that all the proceedings were consequently void. State v. McKinley, 132 Minn. 48, 155 N. W. 1064.

Although the territory has been annexed to an existing village in conformity to the statutory requirements, the courts are not precluded from determining whether such territory is so conditioned as to be capable of annexation. The legislature has committed the determination of that question, in the first instance, to the village council and the legal voters of the territory to be annexed, and the courts should not set aside such determination, unless the evidence is clear that the annexed territory is not so conditioned as properly to be subjected to village government. Under that rule it is held that the annexation herein challenged should not be disturbed. State v. Kinney, 146 Minn. 311, 178 N. W. 815.

6528. Village de facto—(98) Hammer v. Narverud, 142 Minn. 199, 171 N. W. 770.

HOME RULE CHARTERS

6537. Nature—The adoption of a home rule charter is legislation and authority which it furnishes to city officers is legislative authority. Park v. Duluth, 134 Minn. 296, 159 N. W. 627.

(15) Park v. Duluth, 134 Minn. 296, 159 N. W. 627.

6538. Scope and contents—Where a new charter contains a provision that the city shall have all powers possessed prior to its adoption, but subject to the restrictions contained in the new charter, all powers not inconsistent with the new charter are continued. Park v. Duluth, 134 Minn. 296, 159 N. W. 627.

A grant of "all municipal power" in a home rule charter includes all powers generally recognized as powers which may be properly exercised by municipal corporations. It includes the power to prohibit the use of intoxicating liquors. State v. Duluth, 134 Minn. 355, 159 N. W. 792.

A home rule charter may provide for the regulation of the sale of intoxicating liquors. State v. Duluth, 134 Minn. 355, 159 N. W. 792. See § 4913.

A home rule charter may merely continue powers enjoyed under a former charter, with the restrictions thereto, or it may enlarge such powers and remove such restrictions. State v. Duluth, 134 Minn. 355, 159 N. W. 792. See § 4913.

(16) State v. International Falls, 132 Minn. 298, 156 N. W. 249, Park v. Duluth, 134 Minn. 296, 159 N. W. 627; Markley v. St. Paul, 142 Minn. 356, 172 N. W. 215.

6539. Harmony with state laws—The county option law of 1915 does not infringe the constitutional rights of cities operating under home rule charters. Where a county votes for prohibition under that law, the power to issue licenses for the sale of intoxicating liquors is withdrawn from every municipality of such county, including cities operating under home rule charters. State v. International Falls, 132 Minn. 298, 156 N. W. 249; State v. White, 132 Minn. 470, 156 N. W. 251.

(23) State v. International Falls, 132 Minn. 298, 156 N. W. 249.

(24) State v. International Falls, 132 Minn. 298, 156 N. W. 249; Park v. Duluth, 134 Minn. 296, 159 N. W. 627; Markley v. St. Paul, 142 Minn. 356, 172 N. W. 215.

6539a. Commission form of government—See State v. Duluth, 134 Minn. 355, 159 N. W. 792.

6540. Legislative body—Initiative and referendum—The constitutional requirement that the charter shall provide a legislative body for the city is not violated by conferring the power of initiative and referendum upon the electors of the city after establishing such legislative body. State v. Duluth, 134 Minn. 355, 159 N. W. 792.

LEGISLATIVE CONTROL

6548. In general—As caretaker of public streets a municipality acts merely as a governmental agency. The legislature may at any time modify, limit or revoke such agency. State v. Holm, 138 Minn. 281, 164 N. W. 989

OFFICERS

6563. Resignation—Plaintiff was in the employ of the city of St. Paul, as an inspector in the department of public health. Upon a reorganization of the department he was required to file with the department a formal written resignation, to be accepted whenever the department deemed for the best interests of the service. Plaintiff filed such resignation, it was later accepted, and he thereupon relinquished his position and obtained other employment. There was no fraud or coercion or purpose to set at naught the civil service requirements of the city charter. Held, that by the resignation and subsequent conduct plaintiff voluntarily relinquished the position held by him, and the method by which that result came about was not a violation of the civil service policy of the city. The resignation was effectual though not addressed to the city commissioner, whose jurisdiction extended over the health department. It was addressed to the active official having in charge the details of the department; and, whether the acceptance was by the commissioner or not, he was advised thereof and acquiesced therein. Byrne v. St. Paul, 137 Minn. 235, 163 N. W. 162.

(61) Sclawr v. St. Paul, 132 Minn. 238, 156 N. W. 283.

6564. Removal—A municipal body or official, having power to appoint an officer or subordinate, has power to remove such appointee in the absence of any law restricting that power. Where an appointee can be removed only for cause he is entitled to a hearing and an opportunity to refute the charges against him unless the law prescribes a different procedure for making such removals. Where the law authorizes an officer to remove an appointee if in his judgment a cause for such removal exists and prescribes the procedure which he shall follow in making

the removal, the only questions open to examination by the courts are whether the prescribed procedure has been followed and whether the reasons assigned for the removal are sufficient to justify it. State v. Wunderlich, 144 Minn. 368, 175 N. W. 677; State v. Board of Public Welfare, — Minn. —, 183 N. W. 521.

Unless otherwise provided the power to discharge an officer or employee rests in the officer or board appointing him. Where an officer or employee is entitled to a hearing before removal or discharge such hearing is to be held before the officer or board having the power of removal or discharge, unless otherwise provided. State v. Board of Public Welfare, — Minn. —, 183 N. W. 521.

(65) Markus v. Duluth, 138 Minn. 225, 164 N. W. 906 (civil service regulations); Gude v. Duluth, 144 Minn. 109, 174 N. W. 614 (Id).

(66) State v. Minneapolis, 138 Minn. 182, 164 N. W. 806; State v. Board of Public Welfare, — Minn. —, 183 N. W. 521 (authority of public welfare board to discharge employees—hearing—reference to civil service commission—act preferring honorably discharged soldiers—voluntary appearance of employee before board—waiver of notice).

(67) Byrne v. St. Paul, 137 Minn. 235, 163 N. W. 162 (acceptance of resignation of employee held not in violation of civil service rules); State v. Wunderlich, 144 Minn. 368, 175 N. W. 677.

6567. Notice to officers notice to municipality—Commissioners appointed to award damages for land taken in street widening proceedings under G. S. 1913, §§ 1566–1572, do not represent the city, and notice to them is not notice to it. Great Northern Ry. Co. v. Minneapolis, 142 Minn. 308, 172 N. W. 135.

(73) See § 6823.

COUNCIL

6573. President—Under the present charter of St. Paul there is no president of the council. State v. Weingarth, 134 Minn. 309, 159 N. W. 789.

6575. Powers—Power to correct minutes. 3 A. L. R. 1308.

FISCAL AFFAIRS

6579. Limit of indebtedness—The statute limiting the indebtedness to be incurred by a municipality is upon a somewhat different footing from one which selects the agency or method for contracting a municipal debt. The limit of indebtedness fixed by the legislature may not be exceeded, except by the legislature's express sanction, no matter whether the indebtedness is contracted by the governing body or by the majority vote of the electors of the municipality. Pike v. Marshall, 146 Minn. 413, 178 N. W. 1006.

In computing the eight-mill levy limited by the Crookston charter the special levy for relief sewers is not to be included. In re Delinquent Taxes, 147 Minn. 344, 180 N. W. 240.

What constitutes creation of indebtedness. L. R. A. 1917E, 437.

6585a. Cities in two or more counties—Road and bridge funds—Cities of the fourth class situated in two or more counties have exclusive power to expend all moneys arising from taxation for roads, bridges and streets upon the real and personal property within their corporate limits. State v. Dakota County, 142 Minn. 223, 171 N. W. 801.

LEGAL DEPARTMENT

6587. Special counsel—In the absence of some restriction in its charter or in the general laws of the state, the city council of a city may undoubtedly employ a special attorney to undertake litigation in which the city may be engaged. Under our tax system, the county attorney is charged with the duty of conducting proceedings for the collection of general taxes against real and personal property. A city has no power to employ counsel to assist the county attorney in performance of such duty. Thwing v. International Falls, 148 Minn. —, 180 N. W. 1017.

Under the charter of the city of International Falls, the city attorney is charged with the duty of conducting all civil suits, prosecutions, and proceedings in which the city is interested, and the city council has no power to employ a special attorney to conduct litigation in which it may have an interest. Thwing v. International Falls, 148 Minn. —, 180 N. W. 1017.

POLICE DEPARTMENT

6589. Policemen executive officers—(15) See State v. District Court, 134 Minn 26, 158 N. W. 790.

6590. Eligibility—(16) Sclawr v. St. Paul, 132 Minn. 238, 156 N. W. 283.

6591. Appointment—Term—A policeman holding during good behavior has no regular term of office. State v. District Court, 134 Minn. 26, 158 N. W. 790.

6593. Compensation—(21) Sclawr v. St. Paul, 132 Minn. 238, 156 N. W. 283 (action for wages of patrolman in St. Paul—sufficiency of complaint—admissions in answer—motion of defendant for dismissal properly denied—charge as to "acquiesced" and "abandonment" held not erroneous—verdict for plaintiff not excessive).

6594. Powers of policemen—The city policeman was not known to the early common law. He is a creature of statute. His duties are in the main defined by statute or ordinance. The duties that he actually performs have been enlarged somewhat by custom and also by rules and regulations of his department which are not in any sense statutes. As modern cities are constituted and managed, it is important that there

be some quick and ready means of discovering defects in streets and some one in authority to whom such defects may be expeditiously reported. This seems to be a very appropriate function to impose on the police department, and we are of the opinion that the mayor as chief magistrate of the city, having "control and supervision of its police force" may very properly be regarded as vested with power to impose this duty upon the police by rules and regulations looking to that end. In fact, where, as in this case, such rules have been in force and have been notoriously acted upon for thirty years, they must be deemed to have the sanction and approval of every branch of the city government. Engel v. Minneapolis, 138 Minn. 438, 165 N. W. 278.

FIRE DEPARTMENT

6603. Liability for negligence of firemen—In providing fire protection a city is exercising a governmental function and is not liable for the negligent performance of duties devolving upon its fire department. Hillstrom v. St. Paul, 134 Minn. 451, 159 N. W. 1076.

(34) Hillstrom v. St. Paul, 134 Minn. 451, 159 N. W. 1076. See 9 A. L. R. 143.

6605a. Pensions—Relief—The source of revenue, so far as it depends on the bounty of the state, may be withdrawn at any time. State v. District Court, 134 Minn. 28, 158 N. W. 791.

An active member of the Minneapolis fire department and also of the Minneapolis fire department relief association, by failing to make application to be placed upon the pension roll of the association for seven years, taken in connection with his subsequent conduct, abandoned and relinquished all right to any relief under the provisions of its articles and by-laws. Davis v. Minneapolis Fire Dept Relief Assn., 137 Minn. 397, 163 N. W. 743.

A member of the Minneapolis fire department relief association made application to be placed upon its pension roll, which application was denied. No other steps were taken for over twelve years, when this action was brought. Held, that the cause of action was barred by the statute of limitations. Lund v. Minneapolis Fire Dept. Relief Assn., 137 Minn. 395, 163 N. W. 742.

An active member of the Minneapolis fire department, by retiring therefrom, ceases to longer remain a member of the relief association, and by his resignation and subsequent conduct, he abandoned and relinquished all right to any relief under the provisions of the articles and by-laws of the association. Schwartz v. Minneapolis Fire Dept. Relief Assn., 137 Minn. 399, 163 N. W. 744.

The Workmen's Compensation Act does not repeal by implication section 52 of the Charter of the City of St. Paul, providing compensation for a fireman injured in the course of his employment. Markley v. St. Paul, 142 Minn. 356, 172 N. W. 215.

STREETS AND ALLEYS—IN GENERAL

6618. Municipal control—In general—As caretaker of public streets a municipality acts merely as a governmental agency. The legislature may at any time modify, limit or revoke such agency. State v. Holm, 138 Minn. 281, 164 N. W. 989.

A municipality has been held authorized to permit private individuals to construct a sewer in its streets. Lee v. Scriver, 143 Minn. 17, 172 N. W. 802.

6619. Granting special privileges in streets—Building operations—Immunities—The law recognizes that when buildings are being constructed in cities it is sometimes necessary to occupy a portion of the adjacent street, and permits the builder to occupy so much thereof as may be necessary to enable him to carry on his operations. The city may control and regulate the extent and manner in which the street may be used for such purpose, and where the sidewalk is obstructed may require the builder to provide a temporary passageway for pedestrians. Boecher v. St. Paul, — Minn. —, 182 N. W. 908. See § 6845a.

6620. Municipality cannot surrender control—(56) See Lee v. Scriver, 143 Minn. 17, 172 N. W. 802.

6621. Laying out—In proceedings for laying out an alley over and across private property, under the authority conferred by a municipal charter, it is held: That the provisions of the charter providing for an appeal "from an assessment of damages and benefits" do not afford an aggrieved party the right upon such appeal to be heard to question the regularity of the proceedings, the jurisdiction of the municipal council, or the validity of the provisions of the charter authorizing the proceeding. The resolution of the municipal council laying out the alley and directing the taking of private property therefor is the final order of expropriation and reviewable on certiorari, since the validity thereof cannot be challenged on the appeal. State v. Montevideo, 135 Minn. 436, 161 N. W. 154.

6622. Abandonment of proceedings—(62) Rowe v. Minneapolis, 135 Minn. 243, 160 N. W. 775.

6622a. Widening—Commissioners appointed to award damages for land taken in street widening proceedings, under G. S. 1913, §§ 1566–1572, do not represent the city, and notice to them is not notice to it. Great Northern Ry. Co. v. Minneapolis, 142 Minn. 308, 172 N. W. 135.

6623. Vacation—Damages—Injunction—In an action by an abutting owner to recover damages for obstructing access to his property situated on a platted village street, resulting from the vacation of a plat, held, that under the evidence plaintiff suffered damage as a matter of law; that a judgment vacating a portion of the plat, not including plaintiff's property, did not bar a recovery of damages; and that the evi-

dence justified a recovery of the amount of the verdict. Maletta v. Oliver Iron Mining Co., 135 Minn. 175, 160 N. W. 771.

The record shows conclusively that plaintiff's access to his property will not be interfered with by the vacation of a portion of a street for depot purposes, and that he will suffer no injury different in kind from that suffered by the public generally. He therefore cannot maintain this action to enjoin the vacation. Thorpe v. Ada, 137 Minn. 86, 162 N. W. 886.

6625. Paving, curbing, etc.—Chapter 65, Laws of 1919, does not apply to cities of the fourth class having home rule charters, and hence does not apply to the city of Warren. Lodoen v. Warren, 146 Minn. 181, 178 N. W. 741.

Chapter 65, Laws 1919, authorizes the city council of a city of the fourth class, not having a home rule charter, to contract for the pavement of streets and to issue certificates of indebtedness to pay the cost thereof, without submitting the proposition of such issue to the electors of the city for approval or rejection. Pike v. Marshall, 146 Minn. 413, 178 N. W. 1006.

(73) Steele v. Duluth, 136 Minn. 288, 161 N. W. 593 (guaranty clause in contract for paving held to be a guaranty of good material and workmanship only—evidence held to justify finding that certain defects in a pavement were not due to defective material or workmanship—action by contractor against municipality for certain repairs—limitation of actions—certain claims outlawed—contract construed).

STREETS—GRADING

6629. Authority to grade—See § 6625.

6637. Lateral support—(88) See 7 A. L. R. 806; 2 Minn. L. Rev. 206.

6641. Removal of soil, trees, etc.—Municipal authorities, having in charge the care and maintenance of the public roads, no doubt possess the general right to cut down trees standing therein, when so located as to impair the usefulness of the way. The right is inherent and arises from the general obligation imposed upon them by law, within the limits of funds at their disposal, to keep and maintain the roads and highways within their respective jurisdictions in suitable condition for public use. Rost v. O'Connor, 145 Minn. 81, 176 N. W. 166.

(96) See Rost v. O'Connor, 145 Minn. 81, 176 N. W. 166.

(99) See Rost v. O'Connor, 145 Minn. 81, 176 N. W. 166; Pederson v. Rushford, 146 Minn. 133, 177 N. W. 943.

6645a. Liability of contractors—Liability of contractors on street work for injuries resulting from barricading or obstructing street. 7 A. L. R. 1203.

6650. Damages from change of grade—Liability—The general rule of damages for injuries resulting to abutting property from street improve-

ments made by municipal authority is the difference in the value of the property before and after the improvements are made. In the determination of which consideration will be given to the reasonable cost and expense necessary to a restoration of the property to its former condition of usefulness, including the construction of a retaining wall where necessary, and other items of specific repairs rendered necessary by the change of the street grade. The property owner is not entitled to the items of special damage referred to in addition to the diminution in value. The fact that a retaining wall, made necessary by such improvements, encroaches for the space of about eight inches upon a strip of land reserved for boulevarding purposes between the sidewalk and the lot line, held not a bar to the property owner's right to damages caused by the street improvements, and the fact of such encroachment does not constitute an equity pleadable as a defence under G. S. 1913, § 7756. The conclusions of the trial court that defendant was not entitled to affirmative relief under its equitable defence are sustained by the evidence. Berg v. Chisholm, 143 Minn. 267, 173 N. W. 423.

(16) Berg v. Chisholm, 143 Minn. 267, 173 N. W. 423.

(17) Berg v. Chisholm, 143 Minn. 267, 173 N. W. 423. See Marchio v. Duluth, 133 Minn. 470, 158 N. W. 612.

SEWERS AND DRAINS

6653a. Sewer districts—Special tax by districts—The home rule charter of Crookston provides for the payment of the cost of construction of relief sewers by a levy upon the taxable property of sewer districts into which the council is authorized to divide the city and not by special assessments against the property. There is no constitutional invalidity in a provision for paying for a sewer by general or district taxation instead of by local assessment. There is not given the property owner an opportunity to be heard upon the proposed division of the city into sewer districts, nor upon the propriety of constructing relief sewers nor upon the levy to pay therefor. The levy for relief sewers, added to the levy for the general fund, exceeds the eight mills limited by the charter for the general fund. It is held: That neither the charter nor the legislative act of the council dividing the city into sewer districts is unconstitutional for want of due process. That the charter provision providing for the construction of relief sewers, and the levy of taxes to pay therefor, are not invalid for want of due process. That in computing the eight-mill levy limited by the charter for the general fund the levy for relief sewers is not to be included. In re Delinquent Taxes, 147 Minn. 344, 180 N. W. 240.

6659. Connections—Liability for use—(29) See Lee v. Scriver, 143 Minn. 17, 172 N. W. 802.

6660a. Drains from roofs—Under the building code of the city of St. Paul, the building inspector may permit the construction of a drainage

system for roof water wholly separate from the sewerage system of the building. State v. Nash, 134 Minn. 73, 158 N. W. 730.

6661a. Discharging sewage on adjacent property—Nuisance—Injunction—In this action to enjoin the defendant village and its officers from discharging sewage upon plaintiff's land, the court found that a ditch maintained by the village for surface drainage collected the overflow from cesspools, sinks, and septic tanks, and, through a tile drain constructed by the village, discharged the same together with surface waters upon and over plaintiff's land to its detriment and injury. It was also found that the village officers had no knowledge of the discharge of sewage into the ditch, and that the village was not responsible therefor. It is held: The invasion of plaintiff's land as found by the court constituted a nuisance entitling plaintiff to an injunction against its continuance by the village. That, if notice was necessary before suit, the officers of the village had knowledge and notice thereof, and the finding to the contrary is not sustained by the evidence, nor was the defence of want of notice made. If a municipality invades private property and creates a nuisance thereon, the injured party is entitled to relief, and it is immaterial how or by what means the municipality or its officers caused the injury. Joyce v. Janesville, 132 Minn. 121, 155 N. W. 1067.

Facts held to justify an injunction against the discharge of sewage upon adjacent property. Nienow v. Mapleton, 144 Minn. 60, 174 N. W. 517.

See § 10172.

6669a. Private sewers under municipal license—Liability for cost—Certain property owners in the city of Northfield constructed a sewer in the street in front of their property at their own expense under an ordinance which authorized them to do so, and which provided that any person desiring to connect with the sewer should be permitted to make such connections on paying his proportionate part of the cost thereof. Defendant connected his property with an extension of the sewer constructed by other parties. The parties who had defrayed the expense of constructing the original sewer brought suit to collect from defendant his proportionate part of the cost thereof. Held, that all the plaintiffs except two had legal capacity to sue; that these two could be stricken from the complaint or disregarded; that any defect of parties had been waived; that the ordinance is not void as delegating non-delegable powers to the grantees therein; that defendant is not absolved from the obligation to pay his proportionate part of the cost of the sewer by the fact that he connected with it through an extension constructed by other parties; and that defendant's claim that the amounts expended by plaintiffs have already been repaid to them is without support in the evidence. Lee v. Scriver, 143 Minn. 17, 172 N. W. 802.

WATER AND LIGHT PLANTS

6669b. Proprietary capacity—In establishing and maintaining a lighting system a municipality acts in its proprietary or quasi private capacity, not in its governmental capacity. It cannot clear its streets for such a system by removing the appliances of a private corporation having a prior right without making compensation therefor. Los Angeles v. Los Angeles Gas & Electric Corp., 251 U. S. 32.

6679a. Liability of municipality for negligence—Liability for furnishing impure water. 34 Harv. L. Rev. 88; 5 A. L. R. 1402.

POWERS—IN GENERAL

6684. Statutory—(65) Peterson v. Jordan, 135 Minn. 384, 160 N. W. 1026.

6687. Business enterprises—A municipality has no right to construct buildings primarily for rent. Anderson v. Montevideo, 137 Minn. 179, 162 N. W. 1073.

6689. Miscellaneous powers—The council of any village or of any city of the fourth class may appropriate and expend such reasonable sums, as it may deem proper to assist in the improvement and maintenance of roads lying beyond its boundaries and leading into it, and to improve and maintain bridges and ferries thereon, whether they are within or without the county in which it is situated. G. S. 1913, § 1797; Peterson v. Jordan, 135 Minn. 384, 160 N. W. 1026.

6691. Delegation of powers—(76) Lee v. Scriver, 143 Minn. 17, 172 N. W. 802. See State v. Great Northern Ry. Co., 134 Minn. 249, 158 N. W. 972.

6692. Delegation of legislative power to municipalities—The powers conferred by chapter 65 of Laws 1919, are charter powers as distinguished from the power to adopt local by-laws or ordinances. Although the legislature can delegate to municipalities the power to adopt local by-laws or ordinances, it cannot delegate to them the power to adopt what, in their nature, are essentially charter powers, except by providing for the adoption of so-called home rule charters under and pursuant to section 36 of article 4 of the constitution. Lodoen v. Warren, 146 Minn. 181, 178 N. W. 741.

PROPERTY

6693. Power to hold and convey—The statutes of the state authorize cities to accept grants of realty. A city may receive a gift of realty, at least if it is suitable for a public purpose and the acceptance will ease the city of its obligations or lighten the burdens of its citizens. It

may receive a gift of realty for use in the care of its poor. Hjelm v. St. Cloud, 134 Minn. 343, 159 N. W. 833. See § 6717.

Where a person deeds realty to a city in consideration of a promise of the city to support him for the remainder of his life, and the city duly performs its promise, the deed cannot be set aside by his heirs after his death, though the city was not authorized to make the promise. Hjelm v. St. Cloud, 134 Minn. 343, 159 N. W. 833.

6695. Municipal building—Use—Lease—Where a municipal corporation, in good faith, erects a building for municipal purposes, and includes therein an auditorium which is no longer needed for public use, and the leasing thereof will lighten the burden of taxation, the municipality has a legal right to lease the same for private use. Anderson v. Montevideo, 137 Minn. 179, 162 N. W. 1073.

A village incorporated under Laws 1885, c. 145, though it did not reorganize under Rev. Laws 1905, §§ 698, 699 (G. S. 1913, §§ 1202, 1203), has authority to construct a village hall for the transaction of public business. Such authority is not expressly conferred, but it is incidental to the maintenance of village government. Powers v. Chisholm, 146 Minn. 308, 178 N. W. 607.

(80) See § 4480.

CONTRACTS

6696. Distinction between governmental and proprietary powers—(81) Belle Plaine v. Northern Power Co., 142 Minn. 361, 172 N. W. 217.

6698. Impairing corporate powers—A municipality cannot divest itself of any part of its police power. A contract between a city and a railroad company whereby the city agreed to maintain a bridge over the tracks of the company held void. A judgment declaring such contract valid was entered pursuant to stipulation of the parties but without judicial action by the court. Held, that the stipulation and judgment were void, so far as the contract was concerned. State v. Great Northern Ry. Co., 134 Minn. 249, 158 N. W. 972. See Digest, § 1606.

(83) See Mount Pleasant v. Florence, 138 Minn. 359, 165 N. W. 126.

6700. Duration—(85) See Mount Pleasant v. Florence, 138 Minn. 359, 165 N. W. 126.

6703. Implied or quasi contracts—Money or property obtained on illegal contract—Where a village contracts for a municipal improvement which it has power to make, but the contract is void because not made after competitive bidding as required by law, the village is obliged to pay for any benefit it receives through performance of the contract, not because of the contract, but because of a general obligation to do justice. The measure of recovery is not the value of material and cost of labor, but the amount of benefit the village receives. If some part of the work is of value and another part a detriment, the net benefit is the measure of the obligation of the city to pay. Fargo Foundry Co. v. Calloway, 148 Minn. —, 181 N. W. 584.

(88) See Tracy Cement Tile Co. v. Tracy, 143 Minn. 415, 176 N. W. 189.

See §§ 2288, 6717.

6703a. Requisite votes—Charters sometimes provide that contracts shall be made only by a certain proportionate vote of all the council. See Tracy Cement Tile Co. v. Tracy, 143 Minn. 415, 176 N. W. 189.

6704. Formal requisites—(89) See Tracy Cement Tile Co. v. Tracy, 143 Minn. 415, 176 N. W. 189.

6705. Preliminary estimates—(91) See Tracy Cement Tile Co. v. Tracy, 143 Minn. 415, 176 N. W. 189.

6707. Bids—Certified check—Award to lowest bidder—The commissioner of public works of the city of St. Paul pursuant to the order of the common council, published a notice inviting bids for furnishing the city with 345 tons of asphalt for resurfacing certain streets. The notice stated that a bond for 20 per cent. of the bids or a certified check for 10 per cent. thereof must accompany each bid "as a surety for the making and execution of a contract." This language does not indicate an intention to regard the bond or check as liquidated damages, nor can that construction be placed upon it when the situation of the parties and the surrounding circumstances are given due weight. A provision found in a section of the charter relating to bids not of the sort here involved does not authorize a forfeiture of plaintiff's checks as liquidated damages. Barber Asphalt Paving Co. v. St. Paul, 136 Minn. 396, 162 N. W. 470.

(95) Fargo Foundry Co. v. Calloway, 148 Minn. —, 181 N W. 584 (statute not followed—contract void—recovery on quasi contract). See § 6703.

6710. Ratification—A provision of a city charter that, "every ordinance, order or resolution, appropriating money, creating any liability of the city, awarding or approving of any contract for the payment of money, shall require a four-fifths vote of all the members of the city council" applies to a contract creating an obligation on the part of the city to furnish steam for power. Such a contract authorized by three of five councilmen is of no effect. Such a contract being one which the city has power to make, may be subsequently ratified. Ratification can only be by the city council acting as a body. It may be effected by any action or contract which gives to the contract the stamp of approval and this may be done by acquiescence with knowledge of the facts. The evidence of ratification in this case is insufficient. There is no evidence of knowledge on the part of the absent members of the terms of the contract. Tracy Cement Tile Co. v. Tracy, 143 Minn. 415, 176 N. W. 189.

(5) See 4 Minn. L. Rev. 160.

6712. Municipal officers cannot be interested in contracts—(9. 10) L. R. A. 1917C, 1099 (effect of officer being a stockholder in a corporation contracting with municipality).

6717. Unauthorized or ultra vires contracts—A person not a pauper conveyed land to a city, upon the city's promise to furnish him support during his natural life and burial upon his death. The city fully performed. The evidence sustains a finding that deceased had mental capacity to contract. It is not important whether the obligation assumed could have been enforced against the city, so long as it remained executory. The city had power to acquire land such as this for municipal purposes. The contract having been fully executed on both sides, and the grantor having received his full consideration for the grant, neither he nor his heirs can recall the title to the land conveyed. Hjelm v. St. Cloud, 134 Minn. 343, 159 N. W. 833.

(17) Tracy Cement Tile Co. v. Tracy, 143 Minn. 415, 176 N. W. 189. See Alden v. Todd County, 140 Minn. 175, 167 N. W. 548; § 6703.

6718. Notice of powers—(18) McClure v. Browns Valley, 143 Minn. 339, 173 N. W. 672.

BONDS OF PUBLIC CONTRACTORS

6720. Under general statutes—The bond required to be given by the one to whom is let the construction of a state rural highway, and conditioned as provided by section 8245, G. S. 1913, secures the payment of labor, skill and material furnished in repairs upon tools and machinery employed in the construction of the highway, and also for the reasonable value or agreed price of the use of appropriate tools and machinery furnished during and in the construction; but it does not secure payment of the purchase price of tools or machinery sold to the contractor and which become a part of his equipment, although the same are sold for the particular contract and are necessary and appropriate for that purpose. Miller v. American Bonding Co., 133 Minn. 336, 158 N. W. 432.

Under G. S. 1913, § 8245, the bond is required to be given for the use of the obligee and of all persons doing work or furnishing skill, tools, machinery, or materials under, or for the purpose of, such contract, conditioned for the payment, as they become due, of all just claims for such work, tools, machinery, skill and materials, for the completion of the contract in accordance with its terms, for saving the obligee harmless from all costs and charges that may accrue on account of the doing of the work specified. Dawson v. Northwestern Construction Co., 137 Minn. 352, 163 N. W. 772. See § 9104a.

Plaintiff did not obtain leave of court before bringing action on the bond. Conceding that G. S. 1913, § 8244, applies, and that it was necessary to obtain such leave, defendants waived the point by not raising it by demurrer or answer. Dawson v. Northwestern Construction Co., 137 Minn. 352, 163 N. W. 772.

Not being plaintiffs in the action, but being brought in as defendants by order of the court, it was not necessary for each claimant, before he could have the benefit of the bond, to give the surety notice of his

claim under G. S. 1913, § 8249. Dawson v. Northwestern Construction Co., 137 Minn. 352, 163 N. W. 772.

A surety on the bond of a public contractor held not entitled to subrogation as against a bank loaning money to the contractor after the execution of the bond. New Amsterdam Casualty Co. v. Wurtz, 145 Minn. 438, 177 N. W. 664.

A school district held bound to make payments in accordance with its contract though the surety on the contractor's bond had notified it not to pay orders given by the contractor. New Amsterdam Casualty Co. v. Wurtz, 145 Minn. 438, 177 N. W. 664.

The rules of strict construction which are applied for the protection of ordinary sureties do not apply to the bonds of public contractors. Illinois Surety Co. v. John Davis Co., 244 U. S. 376.

Groceries and provisions furnished to contractor for use in a boarding house for laborers held within bond. Brogan v. National Surety Co., 246 U. S. 257.

6721. Under charter provisions—(28) Standard Salt and Cement Co. v. National Surety Co., 134 Minn. 121, 158 N. W. 802.

BONDS

6722. What constitutes—(31) Pike v. Marshall, 146 Minn. 413, 178 N. W. 1006.

6723. Authority to issue—(34) Minneapolis Real Estate Board v. Minneapolis, 145 Minn. 379, 177 N. W. 494 (bridge bonds issued by Minneapolis under Laws 1919, c. 6).

6724a. Resolution of expediency—The statute requires a resolution of expediency to be first adopted by the governing body of the municipality. The statute is applicable to school districts. State v. Board of Education, 139 Minn. 94, 165 N. W. 880.

6725. Necessity of popular vote—Whether a popular vote shall be made necessary before creating a bonded indebtedness is a legislative question with which the courts have no concern. Pike v. Marshall, 146 Minn. 413, 178 N. W. 1006.

Chapter 65, Laws 1919, authorizes the city council of a city of the fourth class, not having a home rule charter, to contract for the pavement of streets and to issue certificates of indebtedness to pay the cost thereof, without submitting the proposition of such issue to the electors of the city for approval or rejection. Pike v. Marshall, 146 Minn. 413, 178 N. W. 1006.

6726. Election to determine issue—Requisite majority—The statute which provides for the submission of the question of the issuance of bonds to the voters requires a majority of "five-eighths of those voting on the question." The proposition to issue bonds was submitted at a regular village election, at which officers were elected. Separate ballots

and ballot boxes for officers and for the bond proposition were provided. Each voter used a ballot of each kind. Held, that blank bond ballots should be rejected in determining the number upon which the five-eighths is computed. Powers v. Chisholm, 146 Minn. 308, 178 N. W. 607.

6732. Negotiation—Par value—A sale with a commission to the buyer is a sale at a discount and violates a provision against a sale below par. Koochiching County v. Elder, 145 Minn. 77, 176 N. W. 195.

6737. Estoppel—Liability of municipality for money received for unlawfully issued bonds. 7 A. L. R. 353.

CLAIMS

6739. Notice of claim—General statute—If the notice fairly apprises the municipality of the grounds of the claim that its wrongful acts caused the damage, and of the facts made the basis of the claim, it is sufficient though it does not minutely set forth all thereof in detail. Weber v. Minneapolis, 132 Minn. 170, 156 N. W. 287.

The statute is inapplicable to an action for damages and injunction for a nuisance caused by a municipality. Joyce v. Janesville, 132 Minn. 121, 155 N. W. 1007; Nienow v. Mapleton, 144 Minn. 60, 174 N. W. 517.

No notice of claim is necessary before bringing an action for damages from a change in the grade line of a street and filling up to such line. Johnson v. Duluth, 133 Minn. 405, 158 N. W. 616.

The general statute provides a uniform rule applicable to all municipalities and supersedes all charter provisions, whether in a home rule charter or not. Johnson v. Duluth, 133 Minn. 405, 158 N. W. 616.

A notice of claim sufficiently states the circumstances if the defect causing the injury is pointed out so that a full investigation may be had. It need not be as specific as the complaint in an action to enforce the claim, but must assign the same defect as the cause of the injury. Under this rule, a "patch of ice," given in the notice as the cause of plaintiff's injury, is a sufficient designation of the circumstances to admit proof of "an uneven ridge of ice," the defect alleged in the complaint. Anderson v. Minneapolis, 138 Minn. 350, 165 N. W. 134.

A notice is to be liberally construed in favor of the injured party. Its sufficiency is not to be tested by the rules applicable to a pleading. Hampton v. Duluth, 140 Minn. 303, 168 N. W. 20.

(76) Johnson v. Duluth, 133 Minn. 405, 158 N. W. 616.

(81) Anderson v. Minneapolis, 138 Minn. 350, 165 N. W. 134; Hampton v. Duluth, 140 Minn. 303, 168 N. W. 20.

(82) Hampton v. Duluth, 140 Minn. 303, 168 N. W. 20.

(98) See Weber v. Minneapolis, 132 Minn. 170, 156 N. W. 287; Anderson v. Minneapolis, 138 Minn. 350, 165 N. W. 134.

6741. Presentation—G. S. 1913, § 1300, which provides for audit of money demands against villages, does not apply to a claim for damages to land on account of change of grade of a street. It applies only to

claims susceptible of audit according to ordinary business usage. Manson v. Chisholm, 142 Minn. 94, 170 N. W. 924; Berg v. Chisholm, 143 Minn. 267, 173 N. W. 423.

ORDINANCES

6752. Consistency with constitution and general laws—Though an ordinance adopted under legislative authority is presumed valid, it must be declared invalid by the courts if it is clearly contrary to the state or federal constitution. State v. Houghton, 134 Minn. 226, 158 N. W. 1017.

Impairment of contracts. 31 Harv. L. Rev. 879.

(26) State v. Houghton, 134 Minn. 226, 158 N. W. 1017; Bruce v. Ryan, 138 Minn. 264, 164 N. W. 982; St. Paul v. Kessler, 146 Minn. 124, 178 N. W. 171.

6754. Restraint of trade—Requiring commodities to be sold in a specified quantity or weight. 6 A. L. R. 429.

6756. Held reasonable—An ordinance prohibiting undertaking establishments and funeral homes or parlors in resident districts. St. Paul v. Kessler, 146 Minn. 124, 178 N. W. 171; Meagher v. Kessler, 147 Minn. 182, 179 N. W. 732.

An ordinance regulating plumbers. State v. Foss, 147 Minn. 281, 180 N. W. 104.

An ordinance prohibiting lumber yards without the consent of the city council. State v. Rosenstein, 148 Minn. —, 181 N. W. 107.

(46) L. R. A. 1917C, 243.

6758. Varying conditions—A valid regulating ordinance may possibly be rendered invalid by a change of conditions which renders it arbitrary and confiscatory. Sullivan v. Shreveport, 251 U. S. 169.

6759. Concurrent with general law—(63) Virginia v. Erickson, 141 Minn. 21, 168 N. W. 821. See § 4914.

6760. Void in part—An ordinance may be valid as to some persons and not as to others. Park v. Duluth, 134 Minn. 296, 159 N. W. 627.

(64) State v. Duluth, 134 Minn. 355, 159 N. W. 792.

6761. Who may attack—One cannot attack an ordinance on the ground that it is unreasonable and invalid as to others. Park v. Duluth, 134 Minn. 296, 158 N. W. 627.

6763. Authority to enact—In general—A municipality cannot divest itself of its police power by contract or otherwise. See §§ 1606, 8121.

A municipality has been held authorized to allow private individuals to construct sewers in its streets. Lee v. Scriver, 143 Minn. 17, 172 N. W. 802.

(69) State v. Duluth, 134 Minn. 355, 159 N. W. 792; Virginia v. Erickson, 141 Minn. 21, 168 N. W. 821.

(70) State v. Duluth, 134 Minn. 355, 159 N. W. 792.

6763a. Same—After repeal on referendum—When, under the charter of the city of Duluth, a sufficient referendum petition, protesting against an ordinance, is presented to the city council, and the ordinance is repealed, the council cannot pass the same ordinance again, or one like it in all essential features, but it may pass an ordinance on the same subject-matter, providing it acts in good faith and not for the purpose of evading the referendum provisions of the charter, and providing the new ordinance differs from the old in essential features. The second ordinance in this case differs in essential and important particulars from the one protested against by the referendum petition; there is no evidence that the council in passing it acted in bad faith or with intent to evade the charter provisions, and the ordinance was valid. State v. Meining, 133 Minn. 98, 157 N. W. 991.

6768. Held authorized by charter—An ordinance regulating jitney busses. State v. Meining, 133 Minn. 98, 157 N. W. 991. See L. R. A. 1918B, 912.

An ordinance imposing a wheelage tax on vehicles. Park v. Duluth, 134 Minn. 296, 159 N. W. 627.

An ordinance prohibiting undertaking or embalming or mortuary chapel, etc., in a residence district. St. Paul v. Kessler, 146 Minn. 124, 178 N. W. 171.

An ordinance prohibiting lumber yards without the consent of the city council. State v. Rosenstein, 148 Minn. —, 181 N. W. 107.

6773. Class legislation—Classification is primarily a legislative question. If it is made on a reasonable basis, and applies without discrimination to all similarly situated, it is valid. Park v. Duluth, 134 Minn. 296, 159 N. W. 627.

An ordinance prohibiting lumber yards without the consent of the city council held not to invade the constitutional rights of those engaged in that business. State v. Rosenstein, 148 Minn. —, 181 N. W. 107.

6774. Construction—(17) Commercial Club v. Chicago etc. Ry. Co., 142 Minn. 169, 171 N. W. 312.

6776. Particular ordinances construed—An ordinance regulating drains from the roofs of buildings. State v. Nash, 134 Minn. 73, 158 N. W. 730.

An ordinance regulating the sale and use of fireworks and explosives. Schmidt v. Capitol Candy Co., 139 Minn. 378, 166 N. W. 502.

An ordinance regulating plumbers. State v. Foss, 147 Minn. 281, 180 N. W. 104.

An ordinance prohibiting lumber yards without the consent of the city council. State v. Rosenstein, 148 Minn. —, 181 N. W. 107.

(44) Commercial Club v. Chicago etc. Ry. Co., 142 Minn. 169, 171 N. W. 312.

6777. Effect—On whom binding—An ordinance is binding though the police of the city have resolved not to enforce it. Riser v. Smith, 136 Minn. 417, 162 N. W. 520.

6779. Private action on—(49) See § 6976.

6784a. Referendum proceedings—In order to suspend the going into effect of an ordinance by referendum proceedings under the charter of the city of Duluth, a proper petition, signed by the requisite number of qualified voters, must be filed in the office of the city clerk before the date when the ordinance becomes the law. Whether such petition must be presented to the city council before the date when the law becomes operative is not decided. The Duluth charter provides that the city clerk shall ascertain from the voters' register whether the petition is signed by the requisite number of qualified electors. Held, that a compliance in good faith by the clerk with this provision of the charter is all that is required. Certain provisions of section 50 of the charter, relating to amendments to a recall petition within ten days after the date of the clerk's certificate finding it insufficient, do not apply to a petition for referendum under the facts in the instant case, where it appears that such amendment would postpone the date on which the ordinance takes effect. Where an original petition for a referendum is found insufficient, amendments thereto, or amended petitions or additional parts of a petition, filed after the ordinance has gone into effect, are of no validity, and do not operate to suspend the ordinance. The charter of the city of Duluth provides that the petition for referendum may be contained in several parts or papers, each of which must be verified by one of the electors who signed the same. Held, that a section of a petition, verified by a person who did not sign such section, is of no validity whatever. Aad Temple Building Assn. v. Duluth, 135 Minn. 221, 160 N. W. 682.

6786. Requisite votes—A charter provision requiring a four-fifths vote held applicable to a contract creating an obligation on the part of the city to furnish steam for power. Such a contract authorized by three of five councilmen is of no effect. Tracy Cement Co. v. Tracy, 143 Minn. 415, 176 N. W. 189.

6788. Approval by mayor—A franchise ordinance for a street railway company, adopted under Laws 1915, c. 124, by a majority vote of the city council, need not be submitted to the mayor of the city for his approval. Meyers v. Knott, 144 Minn. 199, 174 N. W. 842.

6793. Pleading—(76) Buhner v. Reusse, 144 Minn. 450, 175 N. W 1005.

LICENSING EMPLOYMENTS, ETC

6794. Nature and scope of power—A municipality may be authorized to impose a wheelage tax on vehicles and to adopt a licensing system therefor. Park v. Duluth, 134 Minn. 296, 159 N. W. 627.

An ordinance for the licensing of plumbers held not unconstitutional as unduly restricting the right to labor. State v. Foss, 147 Minn. 281, 180 N. W. 104.

6799. Discrimination among applicants—The fact that a city council discriminated against a person in denying him a license, is no defence to a prosecution against him for a violation of the ordinance under which he applied for the license. State v. Rosenstein, 148 Minn. —, 181 N. W. 107.

6800. License fees—Recovery—An ordinance regulating licenses for vehicles has been held not invalid because all licenses expired at the same time or because it provided a minimum of one-quarter of the annual tax for a portion of the year. Park v. Duluth, 134 Minn. 296, 159 N. W. 627.

It is well-settled law that where license fees are paid voluntarily by the applicant for a license, without mistake of fact, the municipality receiving the same, in the absence of a statute otherwise providing, is not liable for a return of the money even though exacted under an unconstitutional statute, or otherwise be not a legal demand. Minneapolis Brewing Co. v. Bagley, 142 Minn. 16, 170 N. W. 704.

(96) Park v. Duluth, 134 Minn. 296, 159 N. W. 627.

(97) See Park v. Duluth, 134 Minn. 296, 159 N. W. 627.

PROSECUTIONS UNDER ORDINANCES

6804. Complaint—All the essential elements of the offence must be alleged. In a complaint under an ordinance against sales at short weight, if the knowledge of the short weight is an essential element of the offence it must be alleged. State v. Washed Sand & Gravel Co., 136 Minn. 361, 162 N. W. 451.

A complaint for a violation of an ordinance against disorderly conduct and breach of the peace held sufficient. State v. Broms, 139 Minn. 402, 166 N. W. 771.

6805. Defences—A person violating the ordinance cannot be heard to urge in defence a claim that the city council in refusing a permit acted arbitrarily and discriminated against him. Whatever remedy may be available in the correction of arbitrary discrimination of the kind stated, it is not found in a defiance of the law by a commission of the prohibited act. State v. Rosenstein, 148 Minn. —, 181 N. W. 107.

6806. Evidence—Sufficiency—Evidence held sufficient to justify a conviction for the violation of an ordinance against disorderly conduct and breach of the peace. State v. Broms, 139 Minn. 402, 166 N. W. 771.

Evidence held sufficient to justify a conviction for doing the business of a plumber without a license. State v. Foss, 147 Minn. 281, 180 N. W. 104.

LIABILITY FOR TORTS

6808. In general—Distinction between corporate and public powers—A municipality is not liable for a failure to exercise its governmental powers. Curran v. Chicago G. W. R. Co., 134 Minn. 392, 159 N. W. 955.

In establishing and maintaining a lighting system a municipality acts

in its proprietary or quasi private capacity, not in its governmental capacity. Los Angeles v. Los Angeles Gas & Electric Corp., 251 U. S. 32.

The sprinkling of streets to keep down the dust is a governmental or public act. Harris v. District of Columbia, 255 U. S. —.

(17, 18) See Roerig v. Houghton, 144 Minn. 231, 175 N. W. 542.

6809. Exercise of public or governmental powers—A municipality is not liable for failure to exercise its governmental powers. Curran v. Chicago G. W. R. Co., 134 Minn. 392, 159 N. W. 955.

In providing fire protection a municipality is exercising a governmental function and is not liable for its negligence therein. Hillstrom v. St. Paul, 134 Minn. 451, 159 N. W. 1076.

A municipality has been held not liable for negligence in the operation of a ferry across a river outside the corporate limits. Peterson v. Jordan, 135 Minn. 384, 160 N. W. 1026.

A municipality is not liable for the acts of its officers under a void ordinance, if the ordinance was enacted in the exercise of its governmental powers. Roerig v. Houghton, 144 Minn. 231, 175 N. W. 542.

A municipality is not liable for the acts of its officers in the enforcement of its police regulations. Roerig v. Houghton, 144 Minn. 231, 175 N. W. 542.

Neither a municipal corporation nor its administrative officers are liable in damages suffered by third persons in consequence of judicial proceedings conducted in behalf of the municipality in the exercise of its governmental functions. Roerig v. Houghton, 144 Minn. 231, 175 N. W. 542.

While a municipality is not liable for consequential damages to adjacent property necessarily resulting from the improvement of a highway, it is liable for positive trespass committed in making such improvements. Liability is not limited to cases of positive trespass. As respects adjacent property, a municipality in possession of a highway stands in the position of owner, with the same liability as a private owner for damages to adjacent lands caused by acts done in the management and control of the highway. Newman v. St. Louis County, 145 Minn. 129, 176 N. W. 191.

(24, 26) See Roerig v. Houghton, 144 Minn. 231, 175 N. W. 542.

6810. Exercise of corporate or proprietary powers—If a municipality invades private property and creates a nuisance thereon, the injured party is entitled to relief and it is immaterial how or by what means the municipality or its officers caused the injury. Joyce v. Janesville, 132 Minn. 121, 155 N. W. 1067.

As respects adjacent property a municipality in possession of a highway is in the position of an owner, with the same liability as a private owner for damages to adjacent lands caused by acts done in the management and control of the highway. Newman v. St. Louis County, 145 Minn. 129, 176 N. W. 191.

6813. Ultra vires acts—(35) Peterson v. Jordan, 135 Minn. 384, 160 N. W. 1026 (operation of ferry beyond corporate limits).

6814. Exceptional rule as to streets, etc.—(39) Newman v. St. Louis County, 145 Minn. 129, 176 N. W. 191.

LIABILITY FOR DEFECTIVE STREETS AND SIDEWALKS

6818. Liability for defective streets—In general—A municipality is not bound to guard against unusual accidents which cannot reasonably be expected to happen. If it maintains its streets in a safe condition for the ordinary hazards of travel it discharges its full duty. Briglia v. St. Paul, 134 Minn. 97, 158 N. W. 794.

A city is not generally bound to improve and make fit for travel the whole width of an outlying street. If it improves and keeps in condition a roadway of sufficient width for the ordinary demands of travel, that is sufficient. But, it must not create or suffer any pitfall within the traveled portion, or so near to it that a traveler, though in the exercise of due care, may fall therein. Miller v. Duluth, 134 Minn. 418, 159 N. W. 960.

A municipality is not excused from liability because the dangerous condition of a street is caused by negligence in caring for an instrumentality used by its fire department. Hillstrom v. St. Paul, 134 Minn. 451, 159 N. W. 1076.

A municipality owes this duty of care to persons using streets or sidewalks for purposes of play or recreation, as well as to those who are using them for travel. Barrett v. Princeton, 135 Minn. 56, 160 N. W. 190.

The liability to pedestrians extends to those who are crossing streets elsewhere than at a regular crossing. Thoorsell v. Virginia, 138 Minn. 55, 163 N. W. 976.

A municipality is not liable where it could not reasonably have been anticipated under the circumstances that a defect would cause injury to any one. It is not liable for unforeseeable accidents. Dorgan v. St. Paul, 138 Minn. 347, 165 N. W. 131; O'Keefe v. Dietz, 142 Minn. 445, 172 N. W. 696. See §§ 7002, 7008.

It is practically impossible in this climate to keep streets perfectly safe in the spring of the year when accumulations of snow and ice are melting. What constitutes reasonable care on the part of a municipality is affected by this fact. Anderson v. Minneapolis, 138 Minn. 350, 165 N. W. 134.

A municipality is bound to act with reference to the fact that aged persons with impaired eyesight rightfully drive on streets. Ihlen v. Edgerton, 140 Minn. 322, 168 N. W. 12.

(44) Miller v. Duluth, 134 Minn. 418, 159 N. W. 960; Hillstrom v. St. Paul, 134 Minn. 451, 159 N. W. 1076. See, as to liability for roads outside corporate limits, Peterson v. Jordan, 135 Minn. 384, 160 N. W. 1026.

(45) Briglia v. St. Paul, 134 Minn. 97, 158 N. W. 794; Olson v. St. Paul, 141 Minn. 434, 170 N. W. 586; O'Keefe v. Dietz, 142 Minn. 445, 172 N. W. 696.

(46) Briglia v. St. Paul, 134 Minn. 97, 158 N. W. 794.

(48) Dorgan v. St. Paul, 138 Minn. 347, 165 N. W. 131; Olson v. St. Paul, 141 Minn. 434, 170 N. W. 586.

(53) Hillstrom v. St. Paul, 134 Minn. 451, 159 N. W. 1076; Killeen v. St. Cloud, 136 Minn. 66, 161 N. W. 260; Thoorsell v. Virginia, 138 Minn. 55, 163 N. W. 976

(58) 11 A. L. R. 1343 (injuries from building operations under license from municipality).

6819. Boulevards—(61) Palm v. Minneapolis, 143 Minn. 477, 172 N. W. 958.

6819a. Roads beyond corporate limits—G. S. 1913, § 1719, does not place on a city of the fourth class the duty of maintaining and keeping in repair highways beyond its boundaries and leading into it, for the improvement and maintenance of which the city has appropriated money. Peterson v. Jordan, 135 Minn. 384, 160 N. W. 1026.

6820. Adjacent premises—The owner of a building fronting upon, but four feet back from, a public street, in the construction of a sidewalk along the street line, extended the same over his private property and up to the building for the purpose of affording an approach thereto. It is held, that the record fails to show a duty on the part of the municipality to take charge of the extended walk, or to keep the same in repair, and that for an injury occurring by reason of a defect therein the municipality is not liable. Holmwood v. Duluth, 134 Minn. 137, 158 N. W. 827.

(62) Briglia v. St. Paul, 134 Minn. 97, 158 N. W. 794. See Miller v. Duluth, 134 Minn. 418, 159 N. W. 960.

6821. When liability begins—A city is not obliged to grade or improve all platted streets within its limits. If, however, an ungraded street is frequented by travel and the city have notice of the fact, it must keep such street in a reasonably safe condition for travel. Miller v. Duluth, 134 Minn. 418, 159 N. W. 960.

(64) Miller v. Duluth, 134 Minn. 418, 159 N. W. 960.

6823. Notice to municipality of defects—Where a pile of sand in a street had remained unguarded for several nights it was held a question for the jury whether the city was chargeable with notice of its unguarded condition. Killeen v. St. Cloud, 136 Minn. 66, 161 N. W. 260.

Where a defect in a street paving was due to the general decay and wearing away of the wood about a hard knot in a creosote block, it was held that it must have continued so long as to charge the city with notice of it. Estabrook v. Duluth, 142 Minn. 318, 172 N. W. 123.

The plaintiff was injured by tripping or falling upon a stone placed at the intersection of the two sidewalks by the owner of the corner lot,

which was terraced to the two streets. The stone rested wholly upon the lot, and was within the property line, except that some four or five inches above the sidewalk its rounded side projected, at one point, one-half an inch beyond the property line. Held, that the evidence showed no actionable negligence and that a verdict was properly directed for the defendants. O'Keefe v. Dietz, 142 Minn. 445, 172 N. W. 696.

(71, 72) Killeen v. St. Cloud, 136 Minn. 66, 161 N. W. 260.

(73) Miller v. Duluth, 134 Minn. 418, 159 N. W. 960; Estabrook v. Duluth, 142 Minn. 318, 172 N. W. 123.

(75) Engel v. Minneapolis, 138 Minn. 438, 165 N. W. 278 (under charter of Minneapolis and rules of police force notice to a police officer in charge of a police precinct of a defect in a street held actual notice to the city). See L. R. A. 1918B, 649.

6825. Duty to maintain guards, railings, etc.—It is negligence for a city to permit an excavation four feet deep in the middle of a traveled road, with the bank above the excavation only sixteen feet wide, without guard or railing, and without light at night where the course of travel and the surrounding conditions are in the nature of an invitation to pass along the top of the bank. Miller v. Duluth, 134 Minn. 418, 159 N. W. 960.

The plaintiff's intestates, boys about seven years of age, were killed by the caving in of a sewer trench which the defendant village was constructing through the center of one of its principal streets. The trench was left open and uncurbed for a time during the course of construction. The soil was sandy and liable to cave. The boys were on the street for play. Close by was the courthouse yard which they used as a playground. Boys came to the trench at times. All this the contractor in charge knew. When seen they were always warned away. At the time of the accident no one saw them. It is held that the boys, though using the street for purposes of play, were not trespassers; that the defendant was liable if negligent; but that under the evidence it was not negligent and the action was properly dismissed by the court. Barrett v. Princeton, 135 Minn. 56, 160 N. W. 190.

The failure to maintain a guard about a trench, near a curb in a street, dug in an accumulation of snow and ice to allow the water to pass off has been held not negligent. Dorgan v. St. Paul, 138 Minn. 347, 165 N. W. 131.

Evidence held sufficient to justify a recovery where plaintiff fell into an unguarded trench for a water main. Hendrickson v. Benson, 139 Minn. 511, 166 N. W. 1084.

(84) Briglia v. St. Paul, 134 Minn. 97, 158 N. W. 794 (city held not bound to maintain a fence along the edge of a bluff adjacent to a street). See Miller v. Duluth, 134 Minn. 418, 159 N. W. 960.

6826. Notice of decayed wood—(86) See Hillstrom v. St. Paul, 134 Minn. 451, 159 N. W. 1076.

6827. Lights about obstructions, etc.—It is the duty of those who place building material in a city street to guard it by lights or other

proper warning signals during the hours of darkness, but this fact does not absolve the city from the duty to exercise reasonable care to keep its streets safe for public use. In such case, however, the city is not liable unless it knew, or ought to have known, that those who placed the material in the street failed to properly guard it. Where an injury occcurred because such an obstruction was unguarded at night, and the evidence shows that it had remained unguarded for several preceding nights, whether the city was chargeable with notice that the obstruction was unguarded was a question for the jury. Killeen v. St. Cloud, 136 Minn. 66, 161 N. W. 260.

A municipality is not bound to set lights about an excavation so that they will be beyond the reach of children. Brown v. Minneapolis, 136 Minn. 177, 161 N. W. 503.

A city placed a kerosene lantern on a plank upon a pile of sand near an excavation in a street. A child was found with the lantern in the excavation, the lantern and the child's clothing in flames. There was no evidence as to how the accident occurred. Held, that the city was not liable. Brown v. Minneapolis, 136 Minn. 177, 161 N. W. 503.

It has been said in one of our decisions that it is the duty of a municipality to place "red" lights at night about an excavation in a street. This was doubtless an inadvertence. A white light would undoubtedly be sufficient. Brown v. Minneapolis, 136 Minn. 177, 161 N. W. 503.

(88) Thoorsell v. Virginia, 138 Minn. 55, 163 N. W. 976. See Williams v. Arthur A. Dobson Co., 139 Minn. 288, 166 N. W. 189.

6829. Ice and snow on sidewalks—The duty of the city to keep its walks in a safe condition for travel is not limited to structural defects, but extends as well to dangerous accumulations of ice and snow. The necessity and importance of the rule depends largely upon the latitude. The only rule of general application, therefore, must be that of reasonable care in view of climatic and other conditions. Snowstorms are frequent during the winter season in this locality. They come without warning, and all the walks are covered at the same time, so as to render them practically impassable. They must be put into safe condition within a reasonable time, or the municipality will be liable for damages occurring from their being so out of repair. That is, liable for neglecting to exercise reasonable care in keeping them safe. Olson v. St. Paul, 141 Minn. 434, 170 N. W. 586.

Where a municipality negligently permits snow and ice to accumulate upon its sidewalks to such an extent and for such time that slippery ridges are formed therein from travel thereon, thus rendering the walks unsafe and dangerous for public use, it renders itself liable for injuries sustained in consequence thereof. McManus v. Duluth, 147 Minn. 200, 179 N. W. 906.

(90) Rasmusen v. Duluth, 133 Minn. 134, 157 N. W. 1088.

(91) Anderson v. St. Cloud, 133 Minn. 467, 158 N. W. 417 (ridge of ice and snow across sidewalk); Anderson v. Minneapolis, 138 Minn.

350, 165 N. W. 134; Olson v. St. Paul, 141 Minn. 434, 170 N. W. 586; McManus v. Duluth, 147 Minn. 200, 179 N. W. 906.

6831. Defects and obstructions in streets—A recovery sustained where plaintiff slipped on a smooth iron cover to a sloping manhole in a street crossing. The manhole projected a little above the level of the crossing. At the time of the accident it was covered with a thin coating of ice and snow. Rasmusen v. Duluth, 133 Minn. 134, 157 N. W. 1088.

A recovery sustained where a pole supporting a telegraph wire and alarm box of the fire alarm system of the city fell and killed a boy playing in the street. The pole fell because of its rotten condition. Hillstrom v. St. Paul, 134 Minn. 451, 159 N. W. 1076.

A hole in a pavement left by a property owner after installing a water pipe. Thoorsell v. Virginia, 138 Minn. 55, 163 N. W. 976.

The digging of a trench from six to ten feet long and three feet wide at the top in snow and ice along the curb in a public street, in the spring of the year during the breaking up season, and leaving the same unguarded, does not, under the showing in this case, constitute actionable negligence. Dorgan v. St. Paul, 138 Minn. 347, 165 N. W. 131.

A rope across a street to prevent the passage of vehicles during a celebration. Ihlen v. Edgerton, 140 Minn. 322, 168 N. W. 2.

A small hole in a pavement at a street crossing caused by the gradual decay and wearing away of the wood about a hard knot in a creasote block. Estabrook v. Duluth, 142 Minn. 318, 172 N. W. 123.

(94) Miller v. Duluth, 134 Minn. 418, 159 N. W. 960; Barrett v. Princeton, 135 Minn. 56, 160 N. W. 190; Henrickson v. Benson, 139 Minn. 511, 166 N. W. 1084.

(97) See Williams v. Arthur A. Dobson Co., 139 Minn. 228, 166 N. W. 189.

6832. Liability for defective sidewalks—A municipality is not ordinarily liable for a defective sidewalk running from the street line to an adjacent building. Holwood v. Duluth, 134 Minn. 137, 158 N. W. 827.

(23) O'Keefe v. Dietz, 142 Minn. 445, 172 N. W. 696.

6833. Defects in sidewalks—(33) McGuire v. Caledonia, 140 Minn. 151, 167 N. W. 425.

See § 6991 (open trapdoors and coalholes in sidewalk).

6838. Contributory negligence—It is not negligence per se for a pedestrian to cross a street at a place other than a regular crossing. Thoorsell v. Virginia, 138 Minn. 55, 163 N. W. 976.

The question of contributory negligence is for the jury, unless the evidence is conclusive. Williams v. Arthur A. Dobson Co., 139 Minn. 228, 166 N. W. 189 (plaintiff fell into an open sewer trench).

Whether plaintiff was negligent in driving his automobile against a rope stretched across a street to prevent the passage of vehicles during a celebration, held a question for the jury. Ihlen v. Edgerton, 140 Minn. 322, 168 N. W. 12.

(45) Thoorsell v. Virginia, 138 Minn. 55, 163 N. W. 976. See McGuire v. Caledonia, 140 Minn. 151, 167 N. W. 425.

(51) Thoorsell v. Virginia, 138 Minn. 55, 163 N. W. 976.

6840. Pleading—An allegation of the service of a notice of claim as required by statute is necessary when the statute is applicable, but the municipality may waive the defect. A private individual who is a co-defendant cannot raise any objection. State v. Quinn, 132 Minn. 219, 156 N. W. 284.

6842. Law and fact—Whether the plaintiff was guilty of contributory negligence is a question for the jury, unless the evidence is conclusive. McGuire v. Caledonia, 140 Minn. 151, 167 N. W. 425. See § 6838.

(59) Rasmusen v. Duluth, 133 Minn. 134, 157 N. W. 1088; Briglia v. St. Paul, 134 Minn. 97, 158 N. W. 794; Thoorsell v. Virginia, 138 Minn. 55, 163 N. W. 976; Williams v. Arthur A. Dobson Co., 139 Minn. 228, 166 N. W. 189; Ihlen v. Edgerton, 140 Minn. 322, 168 N. W. 12; Estabrook v. Duluth, 142 Minn. 318, 172 N. W. 123; O'Keefe v. Dietz, 142 Minn. 445, 172 N. W. 696 (verdict properly directed for defendant).

6843. Evidence—Admissibility—(60) McGuire v. Caledonia, 140 Minn. 151, 167 N. W. 425 (street commissioner required by court to produce in court decayed plank which caused the accident); Olson v. St. Paul, 141 Minn. 434, 170 N. W. 586 (evidence of the number of miles of sidewalk in the city as bearing on the time in which it ought to remove snow from its sidewalks).

6844. Evidence—Sufficiency—(62) Rasmusen v. Duluth, 133 Minn. 134, 157 N. W. 1088; Anderson v. St. Cloud, 133 Minn. 467, 158 N. W. 417; Hendrickson v. Benson, 139 Minn. 511, 166 N. W. 1084; Estabrook v. Duluth, 142 Minn. 318, 172 N. W. 123; McManus v. Duluth, 147 Minn. 200, 179 N. W. 906.

(63) Barrett v. Princeton, 135 Minn. 56, 160 N. W. 190; O'Keefe v. Dietz, 142 Minn. 445, 172 N. W. 696.

6845. Liability of abutting owners—Lot owners are not liable to pedestrians for injuries caused by stumbling or slipping on accumulations of snow and ice which form from natural causes on the adjacent sidewalk. Boecher v. St. Paul, — Minn. —, 182 N. W. 908.

An abutting owner has been held liable for keeping a long, heavy skid standing on edge in a public alley without support to prevent its falling over and naturally attractive to children. Rothenberger v. Powers Fuel etc. Co., 148 Minn. —, 181 N. W. 641.

Liability for dangerous condition beside a highway or frequented path. L. R. A. 1918A, 849.

6845a. Liability of contractor for temporary walk—Where a builder engaged in erecting a building is authorized by the city to occupy a portion of the adjacent street and to lay a temporary walk around the obstruction, his acts done under and within the authority granted are lawful, and he is not liable to a pedestrian for injuries caused by stumbling

or slipping on an accumulation of snow and ice formed by natural causes on a temporary walk constructed under such authority. Boecher v. St. Paul, — Minn. —, 182 N. W. 908.

ACTIONS

6846. Limitation of actions—Under R. L. 1905, § 768, and the charter of the city of St. Paul, section 690, prior to the enactment of Laws 1913, c. 391 (G. S. 1913, §§ 1786–1789), effective July 1, 1913, the limitation of one year after injury in which to bring suit did not apply when the claim was based upon a negligent failure of the city to observe a duty imposed upon it by law as an employer. Schultz v. St. Paul, 124 Minn. 257, 144 N. W. 955.

SPECIAL ASSESSMENTS FOR LOCAL IMPROVEMENTS

6850. Definition of special assessment—(82) St. Paul v. Oakland Cemetery Assn., 134 Minn. 441, 159 N. W. 962.

6850a. Not exclusive method of paying for local improvements—It is not necessary that local improvements should be paid for by special assessment. They may be paid for by a general levy against districts. In re Delinquent Taxes, 147 Minn. 344, 180 N. W. 240.

6852. Works held local improvements—(2) State v. Minnesota Tax Commission, 137 Minn. 37, 162 N. W. 686.

6858. Authority of municipalities statutory—Strict contruction—(22) St. Paul v. Oakland Cemetery Assn., 134 Minn. 441, 159 N. W. 962.

6860. Constitutional requirement of equality—Frontage plan—(32) Withnell v. Ruecking Construction Co., 249 U. S. 63. See L. R. A. 1917D, 372.

6861. Cannot materially exceed cost of work—(36) State v. Board of Public Works, 134 Minn. 204, 158 N. W. 977.

6862. Cannot exceed benefit—Special assessments for local improvements rest upon the theory that the property so assessed is specially benefited by the improvement, and a special assessment which exceeds the amount of such special benefit is, as to such excess, a taking of private property for public use without just compensation. In re Concord Street Assessment, 148 Minn. —, 181 N. W. 859.

(38) St. Paul v. Oakland Cemetery Assn., 134 Minn. 441, 159 N. W. 962; Alden v. Todd County, 140 Minn. 175, 167 N. W. 548.

(39) See comments of Justice Holmes in Louisville v. Barber Asphalt Co., 197 U. S. 430, 433, 434; 29 Harv. L. Rev. 696.

6865. Fixing limits of taxing district—Apportionment—The division of a city into sewer districts is a legislative or administrative proceeding and not judicial. Notice and an opportunity to be heard is not a

requirement of due process of law. In re Delinquent Taxes, 147 Minn. 344, 180 N. W. 240.

(47) In re Concord Street Assessment, 148 Minn. —, 181 N. W. 859.

6866. Apportionment within a single taxing district—The apportionment of assessments is a legislative function. Unless there is a clear abuse of legislative prerogative the courts cannot interfere. If the question of what property is benefited is a matter upon which reasonable men may differ, then there is no ground for the application of the rule that the board proceeded upon an illegal principle or an erroneous rule of law. Hughes v. Farnsworth, 137 Minn. 295, 163 N. W. 525.

Lots abutting on a portion of a street where there are street car tracks may be assessed less than lots on another portion of the street where there are no tracks. Hughes v. Farnsworth, 137 Minn. 295, 163 N. W. 525.

The apportionment of assessments is a legislative and not a judicial function. In re Concord Street Assessment, 148 Minn. —, 181 N. W. 859.

(51) Hughes v. Farnsworth, 137 Minn. 295, 163 N. W. 525.

6874. Lien—Priority—Last lien takes precedence over prior liens. 5 A. L. R. 1301.

6875a. Payment in instalments—Provision is made by statute for payment of assessments for street paving in annual instalments. G. S. 1913, §§ 1416–1421; State v. Board of Public Works, 134 Minn. 204, 158 N. W. 977.

6877. Exemptions—Public school property may, by legislative authority, be subjected to assessment for local city improvements. As a general rule tax and assessment laws are understood to apply to private, and not to public, property; and though such laws are general in their terms, they do not apply to public property unless the intent to so apply them affirmatively appears. Under the Duluth charter the only remedy provided for the enforcement of payment of the assessment is one not applicable to public property. No other remedy can be implied. This fact is strongly indicative of an intent that such property shall not be subject to the assessment; and it is held that, under the charter, public school property is not subject to assessment. State v. Board of Education, 133 Minn. 386, 158 N. W. 635.

G. S. 1913, § 6286, exempting public cemetery associations, is constitutional. St. Paul v. Oakland Cemetery Assn., 134 Minn. 441, 159 N. W. 962.

A private cemetery, owned and operated by the Diocese of St. Paul, a religious corporation, has been held not exempt, no plat of the property having been filed for record as required by G. S. 1913, § 6316. Diocese of St. Paul v. St. Paul, 138 Minn. 67, 163 N. W. 978.

(82) State v. Chicago etc. Ry. Co., 140 Minn. 440, 168 N. W. 180; St. Paul v. Chicago, B. & Q. R. Co., 143 Minn. 449, 174 N. W. 310. See § 9552; Choctow, O. & G. R. Co. v. Mackey, 255 U. S. —.

6878. Assessment how far conclusive on courts—The provision in the Red Wing charter that an assessment when confirmed shall be final and conclusive, does not mean that the order of the board is final and conclusive upon questions of law when it is up for review before the court in the same proceeding in the manner provided by law. State v. Board of Public Works, 134 Minn. 204, 158 N. W. 977.

In the award of damages and assessment of benefits where the improvement, when considered in connection with the property affected, is such that honest minds might differ, the apportionment thereof is a legislative function, and the courts will not interfere in the absence of a clear abuse of discretion. Sullwood v. St. Paul, 138 Minn. 271, 164 N. W. 983

The apportionment of special assessments for benefits derived from a public improvement is a legislative function. The conclusion of the city council or board of public works on that question will be accepted as final unless the members of the body making the assessment failed to exercise their judgment or proceeded upon an illegal principle or an erroneous rule of law. Duluth v. Duluth St. Ry. Co., 145 Minn. 55, 176 N. W. 47.

Under the home rule charter of St. Paul assessments for local improvements are made in accordance with benefits. Their apportionment is legislative in character. The determination of the assessing body is not conclusive. If made upon a demonstrable mistake of fact or upon the application of an eroneous principle it is subject to review. The court upon the application for a confirmation of an assessment may modify it because excessive, or may strike out a parcel upon the ground that no benefits accrued to it. In re Concord Street Assessment, 148 Minn. —, 181 N. W. 859.

(84) Duluth v. Duluth St. Ry. Co., 145 Minn. 55, 176 N. W. 47.

(87) Diocese of St. Paul v. St. Paul, 138 Minn. 67, 163 N. W. 978. See Hughes v. Farnsworth, 137 Minn. 295, 163 N. W. 525; § 6892.

(90, 96) See Duluth v. Duluth St. Ry. Co., 145 Minn. 55, 176 N. W. 47.

6879. Notice to owner—The property owner has no constitutional right to notice of the fixing of taxing districts. In re Delinquent Taxes, 147 Minn. 344, 180 N. W. 240.

(98, 1) In re Delinquent Taxes, 147 Minn. 344, 180 N. W. 240.

6880. A proceeding in rem—(8) State v. Board of Education, 133 Minn. 386, 158 N. W. 635.

See § 9281.

6882a. Enforcement—Two general methods—See State v. Board of Public Works, 134 Minn. 204, 158 N. W. 977.

6883. Application for judgment—Objections admissible—Upon an application for judgment under the St. Paul home rule charter the court may modify an assessment because it is excessive, or may strike out a parcel upon the ground that no benefits accrued to it. In re Concord Street Assessment, 148 Minn. —, 181 N. W. 859.

(12) See State v. Board of Public Works, 134 Minn. 204, 158 N. W. 977; § 6892.

(14) State v. Board of Public Works, 134 Minn. 204, 158 N. W. 977. See § 9334.

6887a. Estoppel of owner—Waiver—See note, 9 A. L. R. 634, 842.

6888. Recovery when improvement abandoned—G. S. 1913, § 1793, held inapplicable to a claim of a city against a street railway company for repaving a street between the tracks of the company. Duluth v. Duluth St. Ry. Co., 145 Minn. 55, 176 N. W. 47.

6892. Cases under charter of St. Paul—(34) Hughes v. Farnsworth, 137 Minn. 295, 163 N. W. 525 (assessments for cost of paving streets must be in proportion to benefits conferred by the improvement—assessment of benefits by commissioner of finance and city council how far conclusive on courts—determination of taxing officers that lots abutting on a portion of a street where there are street car tracks derive less benefit from the pavement of the street than lots fronting on another portion on which there is no car line, is within the power of such officers and will not be disturbed by the courts); Diocese of St. Paul v. St. Paul, 138 Minn. 67, 163 N. W. 978 (assessment against Calvary cemetery for sewer sustained—in determining that the lands composing the cemetery were benefited by the improvement it is not shown that the common council made a demonstrable mistake of fact or applied an erroneous rule of law); Sullwood v. St. Paul, 138 Minn. 271, 164 N. W. 983 (definition of "resident owners" under § 243—award of damages and assessment of benefits by council how far conclusive on courts—classification of owners in § 243 not invalid under federal constitution—extent of property that may be condemned); St. Paul v. Chicago, B. & Q. R. Co., 143 Minn. 449, 174 N. W. 310 (upon application for judgment confirming an assessment testimony is admissible to prove that the assessment was not made under a mistake of fact or upon erroneous principles of law—if it appears that part of a lot is exempt the judgment should eliminate that part from the assessment roll); In re Concord Street Assessment, 148 Minn. —, 181 N. W. 859 (assessment under home rule charter—determination of assessing body how far conclusive on courts—upon application for a confirmation of an assessment court may modify it because excessive or strike out a parcel on the ground that no benefit accrued to it—review of findings of court on appeal to supreme court—force given to findings of trial court—evidence held to justify finding that certain property was not benefited and that other property was assessed in excess of benefits).

6894. Cases under charter of Duluth—(36) Duluth v. Duluth St. Ry. Co., 145 Minn. 55, 176 N. W. 47 (liability of street railway company to reimburse city for repaving street between tracks).

6898. Cases under various charters—Under the laws of the state applicable to Red Wing, paving assessments may be made payable in in-

stalments, and in such case they are certified to the county treasurer and are collected and enforced with and in the same manner as general taxes. The provision of the Red Wing charter that an assessment when confirmed shall be final and conclusive, does not mean that the order of the board of public works is final and conclusive upon questions of law when it is up for review before the court in the same proceeding in the manner provided by law. State v. Board of Public Works, 134 Minn. 204, 158 N. W. 977.

MUNICIPAL COURTS

ORGANIZED UNDER GENERAL LAW

6900b. Jurisdiction—Where a criminal offence is committed within a city having a municipal court, the municipal court of another city has no jurisdiction of such offence either for the purpose of trial or for the purpose of holding a preliminary examination. State v. Kelley, 139 Minn. 462, 167 N. W. 110.

A municipal court has no jurisdiction of an action predicated on the Workmen's Compensation Act. Burns v. Millers Mut. Casualty Co., 146 Minn. 356, 178 N. W. 812.

6905. Appeal to district court—An appeal held properly dismissed because proof of service of the notice of appeal did not show a valid service. Santala v. Hill, 143 Minn. 289, 173 N. W. 651.

Appeals to the district court from municipal courts created by virtue of chapter 229, Gen. Laws 1895, must now be taken in the manner prescribed by chapter 283, Gen. Laws 1917. Burns v. Millers Mut. Casualty Co., 146 Minn. 356, 178 N. W. 812.

Objection to an appeal held waived by voluntarily appearing and arguing a demurrer, after a motion for dismissal was denied. Burns v. Millers Mut. Casualty Co., 146 Minn. 356, 178 N. W. 812.

ORGANIZED UNDER SPECIAL LAW

6906. Of Minneapolis—(55) Metropolitan Nat. Bank v. Hennepin County Sav. Bank, — Minn. —, 183 N. W. 821 (G. S. 1913, § 7764, providing for interpleader, applicable).

6907. Of St. Paul—(56) State v. Weingarth, 134 Minn. 309, 159 N. W. 789 (judges may make list of persons to serve as jurors—they may select "supplementary lists" whenever from any cause there is a deficiency of persons qualified to serve as jurors in the original or supplementary lists).

6908. Of Duluth—(57) Windom v. Duluth, 137 Minn. 154, 162 N. W. 1075 (action for salary by judge holding over—de facto judge); Duluth v. Ross, 140 Minn. 161, 167 N. W. 485 (clerk and surety on his bond

held liable for malfeasance of deputy clerk in misappropriating moneys coming into his hands in the performance of his official duties).

6909. Of Mankato—(58) Evangelical Lutheran Hospital Assn. v. Schultz, 136 Minn. 459, 161 N. W. 1054 (service on defendant in another county did not give court jurisdiction—judgment in district court a nullity and properly vacated).

NAMES

6913. Initials—While it is advisable in judicial proceedings to give a Christian name in full the use of initials alone is generally sufficient. This is even true in the service of process by publication. Where the title to land of record stood in the name of Charles H. McCutchen, it was held that a publication of summons in an action to quiet title to the land, wherein he was described as C. H. McCutchen, was sufficient. Trask v. Bodson, 141 Minn. 114, 169 N. W. 489

6917. Identity—(72) Horning v. Sweet, 27 Minn. 277, 6 N. W. 782. See Hyde v. Kloos, 134 Minn. 165, 158 N. W. 920; 5 A. L. R. 428.

6919. Mistakes not generally fatal—See §§ 6913, 7701.

6924. Misnomer—Pleading—Objection by motion—At common law an objection on the ground of misnomer was reached by a plea in abatement. Under our practice it is reached by motion. Wise v. Chicago etc. Ry. Co., Relief Depart., 133 Minn. 434, 158 N. W. 711.

NARCOTIC DRUGS—See Poisons, § 7753a.

NATURAL LAW—As to whether there is such a thing as so-called "natural law" see Justice Holmes, 32 Harv. L. Rev. 40.

NAVIGABLE WATERS

IN GENERAL

6926. Public and private waters—Lakes—The recession of the waters of a lake must be permanent in order to cause the lake to lose its character as such. Troska v. Brecht, 140 Minn. 233, 167 N. W. 1042.

(13) See Erickschen v. Sibley County, 142 Minn. 37, 170 N. W. 883.

PUBLIC USES OTHER THAN NAVIGATION

6937. In general—It is the settled policy of the state to preserve its inland waters for the recreation and enjoyment of the public, if such waters are susceptible of beneficial public use for fishing, fowling, and boating,

and are the source of a supply of ice. Erickschen v. Sibley County, 142 Minn. 37, 170 N. W. 883.

6943. Floating logs—(40) See § 5691.

RIPARIAN RIGHTS

6949. In general—Municipalities whose streets extend to navigable waters have the rights of a riparian owner, including the right to build wharves, landings and levees. Troska v. Brecht, 140 Minn. 233, 167 N. W. 1042.

6956. In lakes—An owner of land abutting on a lake is entitled to have the water maintained at the natural and ordinary level at all times. Erickson v. Minnesota & Ontario Power Co., 134 Minn. 209. 158 N. W. 979.

6960. Who are riparian owners—One may be a riparian owner and possess the rights thereof though he is not an owner in fee. A municipality whose streets extend to a meandered lake is a riparian owner thereon, and the lake cannot be drained without an affirmative vote of the voters thereof. Troska v. Brecht, 140 Minn. 233, 167 N. W. 1042..

LANDS UNDER NAVIGABLE WATERS

6961. Title held by state in trust—Meandered lakes belong to the state in its sovereign capacity in trust for the public. Erickschen v. Sibley County, 142 Minn. 37, 170 N. W. 883.

Rights in soil and minerals under public waters. 1 Minn. L. Rev. 34; 2 Id. 313, 429; L. R. A. 1916C, 150.

(75) State v. District Court, 146 Minn. 150, 178 N. W. 595.

See Boundaries, §§ 1067-1070.

CONVEYANCES AND CONTRACTS

6965. Private grants—A deed to land, located in a government lot bordering upon a meandered lake, described by metes and bounds, without any reference to the lake, in the absence of a showing to the contrary, conveys only the land embraced within the lines of the description, and does not carry with it any riparian rights. In arriving at the intention of the parties to a deed of land in a government lot bordering upon a meandered lake, the conveyance must be read and considered in the light of existing conditions, and parol evidence of the intention of the parties is inadmissible. Stavanau v. Gray, 143 Minn. 1. 172 N. W. 885.

(84) Stavanau v. Gray, 143 Minn. 1, 172 N. W. 885.

NE EXEAT

6968. In general—(91) See 8 A. L. R. 327 (to prevent avoidance of payment of alimony)

NEGLIGENCE

IN GENERAL

6970. Definition—The general standard of care has been applied to the operation of an X-ray machine. Holt v. Ten Broeck, 134 Minn. 458, 159 N. W. 1073.

The standard of care does not depend upon the individual, but is the degree of care usually exercised by the ordinarily prudent normal man. The age and infirmities of the individual cannot be considered. Roberts v. Ring, 143 Minn. 151, 173 N. W. 437.

If a thing is done in the usual or customary way there is ordinarily no negligence. Weireter v. Great Northern Ry. Co., 146 Minn. 350, 178 N. W. 887. See § 5855.

(6) Roberts v. Ring, 143 Minn. 151, 173 N. W. 437.

6973. Necessity of duty and breach—The duty may be imposed by law or by contract. Keiper v. Anderson, 138 Minn. 392, 165 N. W. 237.

(18) Carlstrom v. North Star Concrete Co., 138 Minn. 151, 164 N. W. 661; McGillivray v. Great Northern Ry. Co., 145 Minn. 51, 176 N. W. 200.

6974. General duty to exercise care—Doctrine of Heaven v. Pender—Every one is bound to exercise due care towards his neighbors in his acts and conduct, or rather omits or falls short of it at his peril; the peril, namely, of being liable to make good whatever harm may be a proved consequence of the default. Staley v. Theo. Hamm Brewing Co., 142 Minn. 399, 172 N. W. 491.

Generally speaking, one is responsible for the direct consequences of his negligent acts whenever he is placed in such a position with regard to another that it is obvious that if he does not use due care in his own conduct he will cause injury to that person. Skillings v. Allen, 143 Minn. 323, 173 N. W. 663.

The duty to exercise due care rests upon all persons. One is not relieved from liability because he is performing an act of charity or mercy. Charitable and religious organizations are not exempt. Mulliner v. Evangelischer etc. Synod, 144 Minn. 392, 175, N. W. 699.

(21) Stanley v. Theo. Hamm Brewing Co., 142 Minn. 399, 172 N. W. 491 (rule applied to leaving open the gate of an elevator shaft); Skillings v. Allen, 143 Minn. 323, 173 N. W. 663.

(22) See Feeney v. Mehlinger, 136 Minn. 42, 161 N. W. 220 (ejecting person from building and injuring another person on street).

6976. Duties created by statute or ordinance—A violation of the statutes constituting the law of the road constitutes negligence per se, but contributory negligence is a defence. See § 4162a.

Where the violation by a railroad company of a statute for the protection of its employees contributes to the death or injury of one of its employees its liability is absolute. Contributory negligence or assumption of risk is no defence. Laws 1915, c. 187.

A statute does not give rise to a liability for negligence unless its violation was the proximate cause of the injury. Curwen v. Appleton Mfg. Co., 133 Minn. 28, 157 N. W. 899; Benson v. Larson, 133 Minn. 346, 158 N. W. 426; Riser v. Smith, 136 Minn. 417, 162 N. W. 520. See Gillespie v. Great Northern Ry. Co., 124 Minn. 1, 144 N. W. 466.

Compliance with a statute or ordinance will not always free one of a charge of negligence. The circumstances may be such as to demand a higher degree of care than that set by a statute or ordinance. One is under the constant duty to exercise reasonable care. Zenner v. Great Northern Ry. Co., 135 Minn. 37, 159 N. W. 1087.

The violation of a speed ordinance constitutes negligence per se though the police of the city resolve not to enforce the ordinance. Riser v. Smith, 136 Minn. 417, 162 N. W. 520.

It must appear that the person injured is within the class for whose protection the statute or ordinance was enacted. Clapper v. Dickinson, 137 Minn. 415, 163 N. W. 752.

Statutes sometimes provide that a violation thereof shall be only prima facie evidence of negligence. See Holland v. Yellow Cab Co., 144 Minn. 475, 175 N. W. 536; § 4167a.

Contributory negligence and assumption of risk will not be admitted as defences to an action under a statute if the purpose of the statute would be defeated thereby. Dusha v. Virginia & Rainy Lake Co., 145 Minn. 171, 176 N. W. 482. See Farrell v. G. O. Miller Co., 147 Minn. 52, 179 N. W. 566; Guhl v. Warroad Stock, Grain & Produce Co., 147 Minn. 44, 179 N. W. 564.

Ignorance of a statute is no excuse for failure to observe it. Rosenau v. Peterson, 147 Minn. 95, 179 N. W. 647.

The fact that plaintiff at the time of the accident was violating a statute will not defeat recovery unless such violation was the proximate cause of the accident, without which it would not have occurred. Elvidge v. Stronge & Warner Co., 148 Minn. —, 181 N. W. 346.

The fact that a boy thirteen years old was injured while using a shotgun, contrary to G. S. 1913, § 8804, under orders of his master, held not to bar him from recovering from his master. The violation of the statute was a mere incident and not the proximate cause of the injury. Kunda v. Briarcombe Farm Co., — Minn. —, 183 N. W. 134.

(24) Peterson v. Northern Pacific Ry. Co., 132 Minn. 265, 156 N. W. 121 (G. S. 1913, § 4269, requiring railroad companies to keep clean their ditches and culverts); Curwen v. Appleton Mfg. Co., 133 Minn. 28, 157 N. W. 899 (statute requiring corn huskers and shredders to be

guarded); Benson v. Larson, 133 Minn. 346, 158 N. W. 426 (G. S. 1913. § 2632, requiring motor vehicles approaching pedestrians in streets to slow down and signal); Curran v. Chicago G. W. R. Co., 134 Minn. 392, 159 N. W. 955 (ordinance regulating speed of railroad); Zenner v. Great Northern Ry. Co., 135 Minn. 37, 159 N. W. 1087 (statutes imposing duties on railroads at crossings); Riser v. Smith, 136 Minn. 417, 162 N. W. 520 (speed ordinance for automobiles); Gibbons v. Yunker, 142 Minn. 99, 170 N. W. 917 (statute against abandonment of house by tenant in winter); Hillstrom v. Mannheimer Bros., 146 Minn. 202, 178 N. W. 881 (statutes constituting law of the road); Farrell v. G. O. Miller Co., 147 Minn. 52, 179 N. W. 566 (statute requiring gasolene to be put in colored recepticles); Elvidge v. Stronge & Warner Co., 148 Minn. —, 181 N. W. 346 (statute constituting law of road). See 1 Minn. L. Rev. 76.

(25) Guhl v. Warroad Stock, Grain & Produce Co., 147 Minn. 44, 179 N. W. 564 (statute requiring openings in ice to be guarded).

See §§ 4162a—4167n (law of road—automobiles and other motor vehicles); 6022a–6022p (federal safety appliance and employer's liability acts).

6977. Duties of humanity—(26) See Skillings v. Allen, 143 Minn. 323, 173 N. W. 663.

6980. Care toward children—One is not required to keep a constant watch to prevent children from coming to a dangerous place, or to use extraordinary care to prevent their approach. Barrett v. Princeton, 135 Minn. 56, 160 N. W. 190.

The law requires of him who deals in articles inherently dangerous in the use for which they are intended to refrain from placing the same in the hands of children of tender years, and, where such sales are made and injury results, the seller is answerable for the consequencs naturally and proximately resulting therefrom. Schmidt v. Capital Candy Co., 139 Minn. 378, 166 N. W. 502.

It is well known that children are liable to be in the public streets and alleys and to tarry and play or meddle with attractive things left about. This is a fact which all persons must be mindful of, and they should take care not to negligently leave upon the public ways dangerous appliances calculated to arouse the curiosity of the youthful mind. Rothenberger v. Powers Fuel etc. Co., 148 Minn. —, 181 N. W. 641.

A municipality is not bound to set lights about an excavation in a street so that they will be beyond the reach of children. Brown v. Minneapolis, 136 Minn. 177, 161 N. W. 503.

(29) See Palyo v. Northern Pacific Ry. Co., 144 Minn. 398, 175 N. W. 687; Rothenberger v. Powers Fuel etc. Co., 148 Minn. —, 181 N. W. 641; § 3699.

(30) Barrett v. Princeton, 135 Minn. 56, 160 N. W. 190.

6981. Care toward the sick and infirm—A municipality is bound to act with reference to the fact that aged persons with impaired eyesight rightfully use its streets and sidewalks. Ihlen v. Edgerton, 140 Minn. 322, 168 N. W. 12.

6982. Failure to follow customary practice—(32) Elvidge v. Stronge & Warner Co.. 148 Minn. —, 181 N. W. 346.

DANGEROUS PREMISES

6984. Persons on premises by invitation—An owner stretched a wire across one end of his lawn to prevent persons from walking across the grass. A person called at his house by invitation on business and in leaving did not walk down the walk to the sidewalk but cut across the lawn and was tripped by the wire. The owner stood in the doorway and saw the caller walk toward the wire. Held, that in taking this course the caller became a licensee and the owner was not bound to warn him of the presence of the wire. Mazey v. Loveland, 133 Minn. 210. 158 N. W. 44.

(37) Mazey v. Loveland, 133 Minn. 210, 158 N. W. 44; Lundeen v. Great Northern Ry. Co., 141 Minn. 180, 169 N. W. 702 (inspector of grain in switching yards of railroad); Staley v. Theo. Hamm Brewing Co., 142 Minn. 399, 172 N. W. 491. See 2 Minn. L. Rev. 530.

6985. Licensees—Intruders—(40) Mazey v. Loveland, 133 Minn. 210, 158 N. W. 44. See 2 Minn. L. Rev. 530.

6986. Trespassers—Where the owner of premises knows that trespassers are accustomed to use a path across them and makes no objection, he may be liable for maintaining a ditch across the path without guards or lights so that it is dangerous to pedestrians at night. McDonald v. Cuyuna Range Power Co., 144 Minn. 271, 175 N. W. 109.

(42) Kieffer v. Wisconsin R. L. & P. Co., 137 Minn. 112, 162 N. W. 1065.

6987. Duty of shopkeepers—A shopkeeper is under legal obligation to keep and maintain his premises in reasonably safe condition for use as to all whom he expressly or impliedly invites to enter the premises. Albrachten v. The Golden Rule, 135 Minn. 381, 160 N. W. 1012; Qber v. The Golden Rule, 146 Minn. 347, 178 N. W. 586.

Intersecting hallways in defendant's place of business, to which it invited the public to enter for the purposes of trade, were upon different floor levels; one hallway leading from another at right angles was upon a level three or four inches higher, and there was a four-inch step at the point of intersection. It is held that the presence of this step was not, standing alone, sufficient to charge defendant with negligence in the condition of its premises, nor to require the submission of the question to the jury. Negligence is not presumed, and if the step created a dangerous situation by reason of the absence of adequate light, the burden

was upon plaintiff to produce evidence that the hallways were unlighted. Albracten v. The Golden Rule, 135 Minn. 381, 160 N. W. 1012.

Evidence held to justify a recovery where a customer in a store tripped over the foot of a temporary frame erected in connection with a display of goods. Ober v. The Golden Rule, 146 Minn. 347, 178 N. W. 586.

(44) Albrachten v. The Golden Rule, 135 Minn. 381, 160 N. W. 1012; Ober v. The Golden Rule, 146 Minn. 347, 178 N. W. 586.

6988. Places of public entertainment—In this action to recover damages for injuries received in a fall on a stairway in a theater, it was alleged that the stairway was negligently constructed and left unlighted. There was no evidence that the fall was the result of any defect in the stairway. Whether it was left unlighted and thereby caused plaintiff to fall was made an issue for the jury. Barrett v. Van Duzee, 139 Minn. 351, 166 N. W. 407.

6989. Doctrine of turntable cases—Doctrine held inapplicable to a common kerosene lantern placed on a plank upon a pile of sand near an excavation in a street. Brown v. Minneapolis, 136 Minn. 177, 161 N. W. 503.

Doctrine held inapplicable to a skid in a public alley. Rothenberger v. Powers Fuel etc. Co., 148 Minn. —, 181 N. W. 641.

6990. Traps and concealed dangers—(56) O'Keefe v. Dietz, 142 Minn. 445, 172 N. W. 696. See McDonald v. Cuyuna Range Power Co., 144 Minn. 271, 175 N. W.109.

6991. Open trapdoors and coalholes in sidewalks—(57) Moquist v. Larson, — Minn. —, 182 N. W. 609 (action against farmer whose servant entered cellar to obtain garbage—no satisfactory evidence that servant was the person opening the trapdoor over which plaintiff stumbled—directed verdict for defendant sustained). See 11 A. L. R. 571 (negligence of third party).

6992. Negligence of third party—Surrender of control—When the presence or absence of danger depends upon the subsequent conduct of a person to whom control is surrendered, the previous possessor may be exonerated when the control is changed. But how far this principle will be carried is uncertain. Fidelity Title & Trust Co. v. Dubois Electric Co., 253 U. S. 212.

(58) See Staley v. Theo. Hamm Brewing Co., 142 Minn. 399, 172 N. W. 491.

6993. Contributory negligence—(61) McDonald v. Cuyuna Range Power Co., 144 Minn. 271, 175 N. W. 109 (trespasser using a path across private grounds on a dark night without a lantern—his contributory negligence held a question for the jury).

6994. Cases classified as to facts—A step three inches high in a hallway of a store. Albrachten v. The Golden Rule, 135 Minn. 381, 160 N. W. 1012.

A boulder placed on the corner of intersecting sidewalks to prevent pedestrians from cutting across the corner of the lot. O'Keefe v. Dietz, 142 Minn. 445, 172 N. W. 696.

The foot of a temporary frame erected in a store in connection with a display of goods. Ober v. The Golden Rule, 146 Minn. 347, 178 N. W. 586.

(62) McDonald v. Cuyuna Range Power Co., 144 Minn. 271, 175 N. W. 109.

(64) Staley v. Theo. Hamm Brewing Co., 142 Minn. 399, 172 N. W. 491.

MISCELLANEOUS FORMS OF NEGLIGENCE

6995. Liability of manufacturers and sellers of defective articles—Assuming that there was sufficient evidence to go to the jury upon the question whether respondent sold a corn husker and shredder in this state which did not comply with the statute (section 3884, G. S. 1913), in that it was not "so guarded that the person feeding said machine shall be compelled to stand at a reasonably safe distance from the snapping rollers," the court nevertheless did not err in dismissing the case as to respondent, the seller of the machine upon which plaintiff was injured; for it clearly appears that the violation of the statute, if such there were, was not the proximate cause of the injury. Curwen v. Appleton Mfg. Co., 133 Minn. 28, 157 N. W. 889.

A maker or vendor of a machine has a right to expect that the operators thereof will pursue the method of operation clearly called for by the design and construction of the machine itself, and make a reasonable use of the appliances thereon intended for safeguards as occasions arise. Curwen v. Appleton Mfg. Co., 133 Minn. 28, 157 N. W. 899.

Evidence held to justify a recovery for negligence in the manufacture and sale of a hair dye, containing a deleterious ingredient, which, when applied to plaintiff's scalp, caused a painful inflamation and eruption. Wilson v. Goldman, 133 Minn. 281, 158 N. W. 332.

A manufacturer of ether held liable for the death of a person to whom some of the ether was administered in connection with a surgical operation. Moehlenbrok v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541.

(80) See McCrossin v. Noyes Bros. & Cutler, 143 Minn. 181, 173 N. W. 566 (liability of manufacturer or vendor of dangerous articles); 29 Harv. L. Rev. 866; 32 Id. 89 (application of rule to manufacturer of food, drugs etc); 2 Minn. L. Rev. 397.

6995a. Breach of contract—Damage to third party—See § 5401.

6996. Falling objects—A long heavy skid standing on edge in a public alley without support to prevent its falling over and naturally attractive to children. Rothenberger v. Powers Fuel etc. Co., 148 Minn. —, 181 N. W. 641.

(83) 7 A. L. R. 204.

6997. Unguarded openings in ice—The statute requires every person removing ice from the waters of this state to guard the openings thus

made until ice has again formed to a thickness of at least six inches. The deceased was drowned in an opening made by defendants; and the evidence sustains the finding that the opening was not guarded, and that ice had not again formed therein to the thickness of six inches. Guhl v. Warroad Stock, Grain & Produce Co., 147 Minn. 44, 179 N. W. 564.

6998a. Noises—Frightening horses—See §§ 4167d; 4167g.

6998b. Leaving ditch unfilled—Injury to animals—The evidence in this case was insufficient to warrant submitting to the jury the question whether defendant, engaged in constructing a tile ditch across plaintiff's pasture under contract with the county, was negligent in not refilling the ditch before a cow of plaintiff fell into it. Carlstrom v. North Star Concrete Co., 138 Minn. 151, 164 N. W. 661.

6998c. Injuries to bystanders—Ejecting person from building—The evidence is held sufficient to sustain a finding of the jury that the defendant ejected a drunken man from his saloon with such force that he was thrown or fell upon a child standing on the street watching a parade and that in ejecting him he was negligent in respect of such child; and if his negligence resulted in injury to the child he is not relieved of liability because as respects the drunken man his conduct was rightful. Feeney v. Mehlinger, 136 Minn. 42, 161 N. W. 220.

6998d. Operation of machinery—X-rays—Evidence held to justify a recovery for a burn caused by negligent operation of an X-ray machine. Holt v. Ten Broeck, 134 Minn. 458, 159 N. W. 1073.

6998e. Injury to real property—To recover damages for injury to real property resulting from negligence the owner must wait until the injury or damage has actually happened. Damages based upon apprehension of future injury to real property, by an act yet to happen, are too remote and speculative. Johnson v. Rouchleau-Ray Iron Land Co., 140 Minn. 289, 168 N. W. 1.

PROXIMATE CAUSE

6999. In general—General discussion of legal cause. 33 Harv. L. Rev. 633.

(93) Curwen v. Appleton Mfg. Co., 133 Minn. 28, 157 N. W. 899.

(96) Northwestern Consolidated Milling Co. v. Chicago, B. & Q. R. Co., 135 Minn. 363, 160 N. W. 1028.

7000. Definition—The fact that an injury would not have happened but for the act of the defendant does not necessitate the conclusion that such act was the proximate cause of the injury. Childs v. Standard Oil Co., — Minn. —, 182 N. W. 1000.

(97) State v. District Court, 145 Minn. 96, 176 N. W. 155; Kunda v. Briarcombe Farm Co., — Minn. —, 183 N. W. 134. See Mullen v. Otter Tail Power Co., 130 Minn. 386, 153 N. W. 746; Id., 134 Minn. 65, 158 N. W. 732; Turner v. Chicago etc. Ry. Co., 136 Minn. 383, 162 N. W. 469.

(1) Clapper v. Dickinson, 137 Minn. 415, 163 N. W. 752; Childs v. Standard Oil Co., — Minn. —, 182 N. W. 1000.

(2) Northwestern Consolidated Milling Co. v. Chicago, B. & Q. R. Co., 135 Minn. 363, 160 N. W. 1028; Peterson v. Martin, 138 Minn. 195, 164 N. W. 813.

(3) Childs v. Standard Oil Co., — Minn. —, 182 N. W. 1000.

(4) Turner v. Chicago etc. Ry. Co., 136 Minn. 383, 162 N. W. 469.

(7) Childs v. Standard Oil Co., — Minn. —, 182 N. W. 1000.

(8) Farrell v. G. O. Miller Co., 147 Minn. 52, 179 N. W. 566; Childs v. Standard Oil Co., — Minn. —, 182 N. W. 1000.

7001. Existence and extent of liability distinct questions—(12) Childs v. Standard Oil Co., — Minn. —, 182 N. W. 1000.

7002. Foreseeable consequences—If a man does an act, and he knows, or by the exercise of reasonable foresight should have known, that in the event of a subsequent occurrence, which is not unlikely to happen, injury may result from his act, and such subsequent occurrence does happen and injury does result, the act committed is negligent, and will be deemed to be the proximate cause of the injury. Rothenberger v. Powers Fuel etc. Co., 148 Minn.—, 181 N. W. 641.

(15) Prendergast v. Chicago, B. & Q. R. Co., 138 Minn. 298, 164 N. W. 923; Carr v. Minneapolis etc. Ry. Co., 140 Minn. 91, 167 N. W. 299; Rothenberger v. Powers Fuel Co., 148 Minn. —, 181 N. W. 641.

(16) Childs v. Standard Oil Co., — Minn. —, 182 N. W. 1000.

7004. Condition or occasion not a cause—Inducing causes—(18) Kunda v. Briarcombe Farm Co., — Minn. —, 183 N. W. 134. See Denson v. McDonald Bros., 144 Minn. 252, 175 N. W. 108.

7005. Intervening causes—The causal connection may be broken by an act of God, such as an unprecendented flood, which could not reasonably have been foreseen and guarded against. Northwestern Consolidated Milling Co. v. Chicago, B. & Q. R. C., 135 Minn. 363, 160 N. W. 1028.

Where, subsequent to the original negligent act, a new and independent cause has intervened, of itself sufficient to stand as the cause of the injury, such facts will be considered the proximate cause of the injury, and the original negligence too remote; but where there is a conflict in the testimony as to the facts constituting the intervening cause, the question is for the jury. Peterson v. Martin, 138 Minn. 195, 164 N. W. 813.

(19) Farrell v. G. O. Miller Co., 147 Minn. 52, 179 N. W. 566; Childs v. Standard Oil Co., — Minn. —, 182 N. W. 1000; 33 Harv. L. Rev. 633.

(20) Northwestern Consolidated Milling Co. v. Chicago, B. & Q. R. Co., 135 Minn. 363, 160 N. W. 1028; Childs v. Standard Oil Co., — Minn. —, 182 N. W. 1000. See Mullen v. Otter Tail Power Co., 130 Minn. 386, 153 N. W. 746; Id., 134 Minn. 65, 158 N. W. 732; Anderson v. Minneapolis etc. Ry. Co., 146 Minn. 430, 179 N. W. 45.

7006. Concurrent negligence of several persons—Where two or more tortfeasors, by concurrent acts of negligence, which, although disconnected, yet, in combination, inflict injury, all are liable. Reader v. Ottis, 147 Minn. —, 180 N. W. 117. See § 9643.

(22) Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541; Gowan v. McAdoo, 143 Minn. 227, 173 N. W. 440; Palyo v. Northern Pacific Ry. Co., 144 Minn. 398, 175 N. W. 687; Reader v. Ottis, 147 Minn. —, 180 N. W. 117.

7007. Concurring causes—In general—Act of God—Where several concurring acts or conditions, one of them a wrongful act or omission, produce an injury, such wrongful act or omission is to be regarded as the proximate cause of the injury, if it be one which might reasonably have been anticipated from such act or omission, and which would not have occurred without it. Gowan v. McAdoo, 143 Minn. 227, 173 N. W. 440.

(23) Anderson v. Minneapolis etc. Ry. Co., 146 Minn. 430, 179 N. W. 45. See contra, Northwestern Consolidated Milling Co. v. Chicago, B. & Q. R. C., 135 Minn. 363, 160 N. W. 1028 (act of God—liability of carrier).

7008. Unforeseeable accidents—(24) Beard v. Chicago etc. Ry. Co., 134 Minn. 162, 158 N. W. 815; Kieffer v. Wisconsin R. L. & P. Co., 137 Minn. 112, 162 N. W. 1065; Dorgan v. St. Paul, 138 Minn. 347, 165 N. W. 131; Larson v. Duluth M. & N. Ry. Co., 142 Minn. 366, 172 N. W. 762; O'Keefe v. Dietz, 142 Minn. 445, 172 N. W. 696; Childs v. Standard Oil Co., — Minn. —, 182 N. W. 1000.

(25) Briglia v. St. Paul, 134 Minn. 97, 158 N. W. 794; Northwestern Consolidated Milling Co. v. Chicago, B. & Q. R. Co., 135 Minn. 363, 160 N. W. 1028; Banner Laundry Co. v. Great Eastern Casualty Co., 148 Minn. —, 180 N. W. 997; Childs v. Standard Oil Co., — Minn. —, 182 N. W. 1000.

7010. Diseased conditions—A surgical operation may be the proximate cause of death by aggravating a diseased condition. Clark v. George, 148 Minn. —, 180 N. W. 1011.

(27) See 33 Harv. L. Rev. 644.

7011. Law and fact—(28) Mullen v. Otter Tail Power Co., 134 Minn. 65, 158 N. W. 732; Briglia v. St. Paul, 134 Minn. 97, 158 N. W. 794; Turner v. Chicago etc. Ry. Co., 136 Minn. 383, 162 N. W. 469; Prendergast v Chicago, B. & Q. R. Co., 138 Minn. 298, 164 N. W. 923; Turner v. Minneapolis St. Ry. Co., 140 Minn. 248, 167 N. W. 1041; Draves v. Minneapolis etc. R. Co., 142 Minn. 321, 172 N. W. 128; Childs v. Standard Oil Co., — Minn. —, 182 N. W. 1000.

(29) Childs v. Standard Oil Co., — Minn. —, 182 N. W. 1000.

(30) Mullen v. Otter Tail Power Co,. 130 Minn. 386, 153 N. W. 746; Id., 134 Minn. 65, 158 N. W. 732; Peterson v. Martin, 138 Minn. 195, 164 N. W. 813; Childs v. Standard Oil Co., — Minn. —, 182 N. W. 1000 (natural connection of events held broken by independent responsible agents as a matter of law by a divided court).

CONTRIBUTORY NEGLIGENCE

7012. Definition—To defeat a recovery because of the contributory negligence of the plaintiff, such negligence must contribute proximately as a cause of the injury, but it need not be itself the proximate cause of it. Blume v. Chicago etc. Ry. Co., 133 Minn. 348, 158 N. W. 418.

(31) See Blume v. Chicago etc. Ry. Co., 133 Minn. 348, 158 N. W. 418 (erroneous definition in charge); Harnden v. Miller, 145 Minn. 483, 175 N. W. 891 (id.).

7014. Comparative negligence—The doctrine of comparative negligence applies to actions by railroad employees against their employers. Laws 1915, c. 187.

7015. Must contribute proximately to injury—To defeat a recovery because of the contributory negligence of the plaintiff, such negligence must contribute proximately as a cause of the injury, but it need not be itself the proximate cause of it. Blume v. Chicago etc. Ry. Co., 133 Minn. 348, 158 N. W. 418.

(42) See Grant v. Minneapolis etc. Traction Co., 136 Minn. 155, 161 N. W. 400.

7016. Simultaneous and successive acts of negligence—(44) See Grant v. Minneapolis etc. Traction Co., 136 Minn. 155, 161 N. W. 400.

7020. Sudden emergency—Imminent peril—Distracting circumstances—The failure of a bystander to warn of a peril is not a distracting circumstance. Knapp v. Northern Pacific Ry. Co., 139 Minn. 338, 166 N. W. 409.

Application of rule to automobilists. 6 A. L. R. 680.

(56) Fransen v. Martin Falk Paper Co., 135 Minn. 284, 160 N. W. 789; Anderson v. Great Northern Ry. Co., 147 Minn. —, 179 N. W. 687.

(57) Knapp v. Northern Pacific Ry. Co., 139 Minn. 338, 166 N. W. 409; Haleen v. St. Paul City Ry. Co., 141 Minn. 289, 170 N. W. 207. See Anderson v. Great Northern Ry. Co., 147 Minn. 118, 179 N. W. 687.

7023. Risking known danger—It has been held not negligent as a matter of law for a pedestrian to use a well known path across private grounds on a dark night without a lantern. McDonald v. Cuyuna Range Power Co., 144 Minn. 271, 175 N. W. 109.

(60) See Curwen v. Appleton Mfg. Co., 133 Minn. 28, 157 N. W. 899.

7023a. Failure to use safety appliances—A maker or vendor of a machine has a right to expect that the operators thereof will pursue the method of operation clearly called for by the design and construction of the machine itself, and make a reasonable use of the appliances thereon intended for safeguards as occasions arise. Curwen v. Appleton Mfg. Co., 133 Minn. 28, 157 N. W. 899.

7025. Attempting to save life or property—(65) Laurisch v. Minneapolis etc. Traction Co., 132 Minn. 114, 155 N. W. 1074; Draves v. Minneapolis etc. R. Co., 142 Minn. 321, 172 N. W. 128.

7027. Illegal conduct—Violation of statute—The fact that plaintiff at the time of the accident was violating a statute will not defeat recovery unless such violation was the proximate cause of the accident, without which it would not have occurred. Elvidge v. Strong & Warner Co., 148 Minn. —, 181 N. W. 346; Kunda v. Briarcombe Farm Co., — Minn. —, 183 N. W. 134.

(67) Denson v. McDonald Bros., 144 Minn. 252, 175 N. W. 108; Holland v. Yellow Cab Co., 144 Minn. 475, 175 N. W. 536; Kunda v. Briarcombe Farm Co., — Minn. —, 183 N. W. 134 (boy thirteen years old using a shotgun contrary to G. S. 1913, § 8804).

7028. Drunkenness—Where a person becomes intoxicated from the voluntary use of intoxicating liquor and in such condition wanders onto a railway track and there remains until he becomes unconscious from the effect of such liquor, and is run over and killed, such acts constitute contributory negligence so as to bar a recovery for his death in an action for ordinary negligence. Kaiser v. Minneapolis St. Ry. Co., 147 Minn. 278, 181 N. W. 569.

(68) State v. District Court, 145 Minn. 96, 176 N. W. 155; Guhl v. Warroad Stock, Grain & Produce Co., 147 Minn. 44, 179 N. W. 564.

7029. Children—A boy fifteen years old is required to exercise only such care as boys of his age, intelligence and experience usually exercise under similar circumstances. Erickson v. W. J. Gleason & Co., 145 Minn. 64, 176 N. W. 199.

(69) Roberts v. Ring, 143 Minn. 151, 173 N. W. 437; Erickson v. W. J. Gleason & Co., 145 Minn. 64, 176 N. W. 199; Rasten v. Calderwood, 145 Minn. 493, 175 N. W. 1007 (instruction as to care required of boy riding a bicycle held not misleading); Hughes v. Minneapolis St. Ry. Co., 146 Minn. 268, 178 N. W. 605; Clark v. Goche, — Minn. —, 182 N. W. 436.

See L. R. A. 1917F, 10, 123, 172, 195.

7031. Actions under statutes—The contributory negligence of the child is no defence to an action under G. S. 1913, § 3848, prohibiting the employment of children under sixteen in certain work. Dusha v. Virginia & Rainy Lake Co., 145 Minn. 171, 176 N. W. 482.

See § 6976.

7032. Burden of proof—Presumption of due care—(73) Carson v. Turrish, 140 Minn. 445, 168 N. W. 349.

(74) Barrett v. Dan Duzee, 139 Minn. 351, 166 N. W. 407.

(75) It is generally improper to state this presumption to the jury in the charge. Carson v. Turrish, 140 Minn. 445, 168 N. W. 349.

(01) Darrington v. Chicago & N. W. Ry. Co., 134 Minn. 30, 158 N. W. 727; Wesler v. Chicago etc. Ry. Co., 143 Minn. 159, 173 N. W. 565.

See § 2616 (action for death).

7033. Law and fact—The determination of the issue of contributory negligence by a jury cannot be disregarded, unless the proof was such that

reasonable minds could not draw therefrom different conclusions concerning the presence or absence of due care. Kelley v. Chicago, B. & Q. R. Co., 142 Minn. 44, 170 N. W. 886.

The legislature may require the question of contributory negligence to be submitted to the jury in all cases. Chicago etc. Ry. Co. v. Cole, 251 U. S. 54.

(76) Kelley v. Chicago, B & Q. R. Co., 142 Minn. 44, 170 N. W. 886; McDonald v. Cuyuna Range Power Co., 144 Minn. 271, 175 N. W. 109. See §§ 5999-6016, 8193.

7034. Question on appeal—(78) Kelley v. Chicago, B. & Q. R. Co., 142 Minn. 44, 170 N. W. 886.

7035. Effect—Contributory negligence does not defeat recovery in an action by a railroad employee against his employer, but it may be proved in reduction of damages. Where a violation by a railroad company of a statute for the protection of its employees contributes to an injury or death of an employee the employee cannot be found guilty of contributory negligence. Laws 1915, c. 187.

The effect of contributory negligence is not the same in admiralty law as in the common law. Lindstrom v. Mutual Steamship Co., 132 Minn. 328, 156 N. W. 669.

7036. Wilful or wanton negligence or injury—Under the common law of Wisconsin the term wanton or wilful or gross negligence, such as justifies a recovery though the plaintiff is himself negligent, imports a higher degree of delinquency than does such term under the law of Minnesota; and a charge giving the Minnesota law is erroneous when the Wisconsin law is the governing law. Under the evidence, applying the Wisconsin law, the defendant was not wantonly negligent so as to permit a recovery notwithstanding the negligence of the plaintiff's intestate. Pickering v. Northern Pacific Ry. Co., 132 Minn. 205, 156 N. W. 3.

There is no wanton negligence where both plaintiff and defendant think that the former is beyond the reach of the impending danger. In other words wanton negligence cannot be predicated on honest misjudgment. Ashe v. Minneapolis etc Ry. Co., 138 Minn. 176, 164 N. W. 803.

Where the jury find the defendant free from negligence a failure to submit the question of wilful negligence is harmless, even though there was some evidence tending to show such negligence. Olson v. Moorhead, 142 Minn. 267, 171 N. W. 923.

The question of wilful negligence held eliminated from the case by the verdict. Home Ins. Co. v. Chicago etc. Ry. Co., 146 Minn. 240, 178 N. W. 608.

Contributory negligence is not a defence to an action for wilful negligence. Kaiser v. Minneapolis St. Ry. Co., 147 Minn. 278, 181 N. W. 569.

(81) Pickering v. Northern Pacific Ry. Co., 132 Minn. 205, 156 N. W. 3; Ashe v. Minneapolis etc. Ry. Co., 138 Minn. 176, 164 N. W. 803.

(85) Ashe v. Minneapolis etc. Ry. Co., 138 Minn. 176, 164 N. W. 803;

Willett v. Chicago etc. Ry. Co., 139 Minn. 288, 166 N W 342; Knapp v. Northern Pacific Ry. Co., 139 Minn. 338, 166 N. W. 409; Draves v. Minneapolis etc. R. Co., 142 Minn. 321, 172 N. W. 128; Kaiser v. Minneapolis St. Ry. Co., 147 Minn. 278, 181 N. W. 569.

(86) Stock v. St. Paul City Ry. Co., 142 Minn. 315, 172 N. W. 122.

7036a. Abolition of defence—The legislature may abolish the defence of contributory negligence. Chicago etc. Ry. Co v. Cole., 251 U. S. 54.

As between railroad employers and employees the legislature has abolished the common-law defence of contributory negligence and adopted the comparative doctrine. Laws 1915, c. 187. See §§ 5963b, 5963c, 7035.

IMPUTED CONTRIBUTORY NEGLIGENCE

7037. In general—The negligence of the surgeons operating cannot be imputed to the patient, so as to relieve a third party whose negligent act has contributed to the patient's injury. Nor is the patient as to such third party engaged in a joint enterprise with the surgeons. Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541.

7038. Driver of vehicle and passenger—If the driver is the agent of the passenger his negligence is imputed to the passenger. Kokesh v. Price, 136 Minn. 304, 161 N. W. 705.

The mere fact that driver and passenger are husband and wife does not affect the general rule. Kokesh v. Price, 136 Minn. 304, 161 N. W. 715.

The test as to whether persons riding together are engaged in a joint enterprise is whether they are jointly operating or controlling the movements of the vehicle. The rule is founded on the theory of partnership or a relation akin to partnership. Kokesh v. Price, 136 Minn. 304, 161 N. W. 715.

Evidence held not to justify a finding of negligence on the part of plaintiff who was riding in a public auto bus and had no control over the driver, or to justify the submission of the question of his negligence to a jury. McDonald v. Mesaba Ry. Co., 137 Minn. 275, 163 N. W. 298.

Where a passenger in an automobile, on approaching a street intersection over which street cars are operated, hears a street car coming thereon at a high or dangerous rate of speed, it is a question for the jury whether, in the exercise of ordinary care, he should have warned the driver of the automobile, and whether a failure so to warn contributed to the collision, then occurring between the automobile and street car. Christison v. St. Paul City Ry. Co., 138 Minn. 456, 165 N. W. 273.

The negligence of the driver of an automobile hired by the plaintiff, who rode in it, but neither had nor assumed control, is not imputed to him. An instruction requested by the defendant, that the negligence of the driver is not imputed to a passenger "unless he had authority to control or was charged with a duty to control such driver, or had

reason to suspect a want of care or skill on the part of such driver," was properly refused. Kalland v. Brainerd, 141 Minn. 119, 169 N. W. 475.

Evidence held not to justify submitting to a jury the question of the contributory negligence of a passenger in an automobile. Johnson v. Smith, 143 Minn. 350, 173 N. W. 675.

While the negligence of the driver of a vehicle is not imputed to a passenger riding therein, still the passenger is required to exercise reasonable care for his own safety. Evidence held sufficient to justify the submission of the question of contributory negligence to the jury. Praught v. Great Northern Ry. Co., 144 Minn. 309, 175 N. W. 998 (passenger in automobile approaching a railroad crossing).

(91) Zenner v. Great Northern Ry. Co., 135 Minn. 37, 159 N. W. 1087 (plaintiff a gratuitous passenger in an automobile driven by another); Woll v. St. Paul City Ry. Co., 135 Minn. 190, 160 N. W. 672 (boy riding in sleigh driven by another boy—horse ran away—collision with street car); Kokesh v. Price, 136 Minn. 304, 161 N. W. 715 (husband and wife riding in automobile driven by husband— relation of husband and wife does not change rule—wife held not guilty of contributory negligence); McDonald v. Mesaba Ry. Co., 137 Minn. 275, 163 N. W. 298 (plaintiff riding in a public bus—no control over driver); Carson v. Turrish, 140 Minn. 445, 168 N. W. 349 (plaintiffs riding as guests in automobile); Kalland v. Brainerd, 141 Minn. 119, 169 N. W. 475 (negligence of driver of automobile hired by plaintiff not imputed to latter); Johnson v. Evans, 141 Minn. 356, 170 N. W. 220 (guest riding in automobile); Gowan v. McAdoo, 143 Minn. 227, 173 N. W. 440 (school children carried to and from school in a vehicle); Praught v. Great Northern Ry. Co., 144 Minn. 309, 175 N. W. 998 (passenger in automobile); Holland v. Yellow Cab Co., 144 Minn. 475, 175 N. W. 536 (passenger in touring car).

See § 1292.

7041. Parent, guardian or custodian of child—(94) See Peterson v Martin, 138 Minn. 195, 164 N. W. 813.

PRESUMPTIONS AND BURDEN OF PROOF

7042. No presumption of negligence—(96) Albrechten v. The Golden Rule, 135 Minn. 381, 160 N. W. 1012.

7043. Burden of proof—(98) Albrechten v. The Golden Rule, 135 Minn. 381, 160 N. W. 1012.

7044. Res ipsa loquitur—The rule of res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; they make a case to be decided by the jury, not that they forstall the

verdict. The rule does not convert the defendant's general denial into an affirmative defence. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff. Keithley v. Hettinger, 133 Minn. 36, 157 N. W. 897; Holt v. Ten Broeck, 134 Minn. 458, 159 N. W. 1073; Manning v. Chicago G. W. R. Co., 135 Minn. 229, 160 N. W. 787.

The doctrine is probably applicable to an action for injuries resulting from the use of a harmful hair dye. Wilson v. Goldman, 133 Minn. 281, 158 N. W. 332.

The rule of res ipsa loquitur does not shift the burden of proving the negligence charged but merely shifts the burden of going on with the evidence. Manning v. Chicago, G. W. R. Co., 135 Minn. 229, 160 N. W. 787 (erroneous charge held not reversible error).

The rule is inapplicable where the thing causing the accident is not under the exclusive control or possession of defendant. Rule held inapplicable where a railroad engine was derailed at a public crossing by sand and gravel on the tracks. McGillivray v. Great Northern Ry. Co., 138 Minn. 278, 164 N. W. 922.

The courts are at variance as to the application of the doctrine to ordinary boiler explosions. The majority rule is that it does not apply. Banner Laundry Co. v. Great Eastern Casualty Co., 148 Minn. —, 180 N. W. 997. See §3699.

Application of doctrine to automobile accidents. 12 A. L. R. 668.

(1) Holt v. Ten Broeck, 134 Minn. 458, 159 N. W. 1073 (application of X-rays); Manning v. Chicago G. W. R. Co., 135 Minn. 229, 160 N. W. 787 (action by servant against master—derailment of engine due to rotten rails—rule held applicable); Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541 (rule held inapplicable in case of death caused by the giving of impure ether to a patient to be operated upon); Reeves v. Chicago etc. Ry. Co., 147 Minn. 114, 179 N. W. 689 (rule held inapplicable where employee engaged in interstate commerce met accidental death by stepping on a chunk of coal upon the steps leading up to a locomotive cab).

(2) Gotschall v. Minneapolis & St. L. R. Co., 125 Minn. 525, 147 N. W. 430; 130 Minn. 33, 153 N. W. 120, affirmed, 244 U. S. 66; Manning v. Chicago G. W. R. Co., 135 Minn. 229, 160 N. W. 787; Reeves v. Chicago etc. Ry. Co., 147 Minn. 114, 179 N. W. 689. See § 6022o, 6027; L. R. A. 1917E, 4.

(3) Manning v. Chicago G. W. R. Co., 135 Minn. 229, 160 N. W. 787. See §§ 3699, 6022o, 6027.

7044a. Effects of proving customary practice—When a plaintiff's own case shows that the act of a defendant alleged to have been done negligently was done in the usual and customary way, the charge of negligence is not sustained, unless it can be said that the common experience of the ordinary juror is competent to fix the standard of care for the doing of the particular act involved. Weireter v. Great Northern Ry. Co., 146 Minn. 350, 178 N. W. 887.

7045. Bursting of steam boiler—(4) Banner Laundry Co. v. Great Eastern Casualty Co., 148 Minn. —, 180 N. W. 997.

7047. Degree of proof required—Speculation and conjecture—A finding of negligence cannot rest on testimony which is clearly inconsistent with the admitted or conclusively proved physical facts of the case. Larson v. Swift & Co., 116 Minn. 509, 134 N. W. 122; Davis v. Minneapolis & St. Louis R. Co., 134 Minn. 369, 159 N. W. 802.

If the evidence in a personal injury case leaves the question of causal connection between the injury and the alleged negligence a matter of conjecture only, the defendant is entitled to a directed verdict; but it is not necessary to prove such connection by direct evidence. It is sufficient if the substantial evidence furnishes a reasonable basis for the inference that the injury was caused by the negligence. La Pray v. Lavoris Chemical Co., 117 Minn. 152, 134 N. W. 313; Moquist v. Larson, — Minn. —, 182 N. W. 609.

To sustain a finding that a defective appliance caused an accident, it is necessary that some circumstances be shown which establish not only that the accident may have happened from the cause alleged, but which indicate, to some extent at least, that such was the cause. Hurley v. Illinois Central R. Co., 133 Minn. 101, 157 N. W. 1005.

Where the evidence of negligence was weak the supreme court refused to sustain a directed verdict on that ground, when it was not sustainable on the ground assigned by the trial court. Davis v. Chicago etc. Ry. Co., 134 Minn. 49, 158 N. W. 911.

(6) Burch v. Hoy & Elzy Co., 131 Minn. 475, 155 N. W. 767.

(7) Thompson v. Minneapolis & St. Louis R Co., 133 Minn. 203, 158 N. W. 42; Clark v. George, 148 Minn. —, 180 N. W. 1011; Moquist v. Larson, — Minn. —, 182 N. W. 609.

(8) Castle v. Union Pacific R. Co., 139 Minn. 396, 166 N. W. 767.

(9) Hurley v. Illinois Central R. Co., 133 Minn. 101, 157 N. W. 1005; Thompson v. Minneapolis & St. Louis R. Co., 133 Minn. 203, 158 N. W. 42; Davis v. Chicago etc. Ry. Co., 134 Minn. 49, 158 N. W. 911; Castle v. Union Pacific R. Co., 139 Minn. 396, 166 N. W. 767.

(10) Hurley v. Illinois Central R. Co., 133 Minn. 101, 157 N. W. 1005.

(12) Thompson v. Minneapolis & St. Louis R. Co., 133 Minn. 203, 158 N. W. 42.

(14) Hansman v. Western Union Tel. Co., 136 Minn. 212, 161 N. W. 512; O'Leary v. St. Paul City Ry. Co., 138 Minn. 163, 164 N. W. 659; McGillivray v. Great Northern Ry. Co., 138 Minn. 278, 164 N. W. 922; Lares v. Chicago, B. & Q. R. Co., 144 Minn. 170, 174 N. W. 834; O'Reilly v. Powers Mercantile Co., 144 Minn. 261, 174 N. W. 116; Travelers Ins. Co. v. Healy P. & H. Co., 147 Minn. 91, 179 N. W. 686; Skillings v. Allen, 148 Minn. —, 180 N. W. 916; Moquist v. Larson, — Minn. —, 182 N. W. 609.

LAW AND FACT

7048. In general—(19) Keithley v. Hettinger, 133 Minn. 36, 157 N. W. 897.

(23) Keithley v. Hettinger, 133 Minn. 36, 157 N. W. 897; Hurley v. Illinois Central R Co., 133 Minn. 101, 157 N. W. 1005; Davis v. Chicago etc. Ry. Co., 143 Minn. 49, 158 N. W. 911; O'Reilly v. Powers Mercantile Co., 144 Minn. 261, 175 N. W. 116.

(24) McDonald v. Mesaba Ry. Co., 137 Minn. 275, 163 N. W. 298; Kelley v. Chicago, B. & Q. R. Co., 142 Minn. 44, 170 N. W. 886.

EVIDENCE

7049. Customary practice—While customary practice is generally admissible on an issue of negligence, it has been held proper to exclude evidence of a general custom to give a right of way to vehicles on a main traveled street over vehicles on a side street at an intersection of the streets. Carson v. Turrish, 140 Minn. 445, 168 N. W. 349.

It is true that proving that something was done in the customary way does not necessarily prove that it was not done negligently. The usual way may be a negligent way. But, when a plaintiff shows that the act upon which negligence is predicated was performed in the customary way, the inference nearest at hand is that no negligence has been proved, and the action must fail unless he adduces some evidence by way of experts or otherwise that will justify the jury in concluding that, even though the act was done according to the usual custom, it was nevertheless negligently done, or unless it may be said that the common experience of the ordinary juror makes him competent to determine, without aid of evidence, whether or not the act was negligently performed. Weireter v. Great Northern Ry. Co., 146 Minn. 350, 178 N. W. 887.

(25) Burch v. Hoy & Elzy Co., 131 Minn. 475, 155 N. W. 767; Bjorgo v. First Nat. Bank, 132 Minn. 273, 156 N. W. 277; Elvidge v. Stronge & Warner Co., 148 Minn. —, 181 N. W. 346.

(26), Weireter v. Great Northern Ry. Co., 146 Minn. 350, 178 N. W. 887.

7051. Careful habit—(30)Marks v. Brown, 138 Minn. 405, 165 N. W. 265; Young v. Avery Co., 141 Minn. 483, 170 N. W. 693.

7053. Other accidents from same cause—(33) Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541; Id., 145 Minn. 100, 176 N. W. 169 (effect of ether from same container upon other patients).

7054. Private rules of conduct—(37) See 34 Harv. L. Rev. 213; L. R. A. 1917C, 793.

ACTIONS

7057a. Parties—Where the negligence of two concur as the proximate cause of an injury it is no defence for one sued to assert that the other is not also sued or by reason of the fellow servant rule is not liable. Pelowski v. J. R. Watkins Medical Co., 120 Minn. 108, 139 N. W. 289, 618.

Where two persons are sued as partners recovery does not depend upon proof of such relation. Jewison v. Dieudonne, 127 Minn. 163, 149 N. W. 20.

Where a city and a contractor causing an injury were joined as defendants and the city had full knowledge of the wrongful act, it was held proper to charge that the verdict should either be in favor of both defendants or against both. Kimball v. St. Paul, 128 Minn. 95, 150 N. W. 379.

The concurring negligence of one not a party to the action held not a defence. Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541.

Where several persons cause an injury through negligence they may be sued ether jointly or severally, though they were acting independently and without concert. Reader v. Ottis, 147 Minn. —, 180 N. W. 117. See §§ 7006, 7061, 9643.

7058. Complaint—General allegations of negligence are controlled by specific allegations. St. Paul Southern Electric Ry. Co. v. Flanagan, 138 Minn. 123, 164 N. W. 584.

(42) Viita v. Fleming, 132 Minn. 128, 155 N. W. 1077; Ziegler v. Cray, 143 Minn. 45, 172 N. W. 884. See Saylor v. The Motor Inn, 136 Minn. 466, 162 N. W. 71.

(43) Viita v. Fleming, 132 Minn. 128, 155 N. W. 1077.

(45) St. Paul Southern Electric Ry. Co., v. Flanagan, 138 Minn. 123, 164 N. W. 584.

(50) Draves v. Minneapolis etc. R. Co., 142 Minn. 321, 172 N. W. 128 (complaint held not to charge wilful or wanton negligence). See Stock v. St. Paul City Ry. Co., 142 Minn. 315, 172 N. W. 122 (complaint so framed as to charge both ordinary negligence and wilful or wanton negligence).

7059. Demurrer—Contributory negligence—(52) St. Paul Southern Electric Ry. Co. v. Flanagan, 138 Minn. 123, 164 N. W. 584.

7060. Answer—Contributory negligence new matter—General denial—Contributory negligence is an affirmative defence and must be specially pleaded. It may be pleaded in general terms, in other words, it is not necessary to specify wherein the negligence of the plaintiff contributed to the accident or injury. It is sufficient to allege that the negligence of the plaintiff was the cause, or the sole cause of the injury. An allegation "that the damage to the said automobile was caused by the negligence of the said plaintiff and its servant and employee, and not otherwise," has been held sufficient. H. L. Elliott Jobbing Co. v. Chicago etc. Ry. Co., 136 Minn. 138, 161 N. W. 390.

7061. Variance—Failure of proof—Under a general allegation of negligence the plaintiff may prove all the circumstances of the accident. Saylor v. The Motor Inn, 136 Minn. 466, 162 N. W. 71. See § 7058.

There is some authority to the effect that when several acts of negligence are alleged as concurring to produce the injury all must be

proved or there is a failure of proof. There are also some cases holding that by alleging that separate negligent acts of two or more defendants concurred in causing the injury, there can be no recovery if the negligent act charged against any one of the defendants is not proved. Probably neither of these rules prevails in this state. See Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541.

(55) See Saylor v. The Motor Inn, 136 Minn. 466, 162 N. W. 71; Anderson v. Minneapolis etc. Ry. Co., 146 Minn. 430, 179 N. W. 45 (amendment after verdict to cure variance).

(56) Archer v. Skahen, 137 Minn. 432, 163 N. W. 784; Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541.

NEWSPAPERS

7067a. Acceptance—Implied contract—Notice to discontinue—Proof of the proper mailing of a notice is evidence of its receipt in due course; and in this case there was sufficient evidence that the defendant mailed to the plaintiff, a newspaper publisher, a notice to discontinue sending its paper, and that the plaintiff received the notice. One may accept delivery and make use of a newspaper delivered to him, just as he may of other things, under such circumstances as to make a contract implied in fact between him and the publisher; but the evidence in this case did not require the finding of such a contract. Legal News Publishing Co. v. George C. Knispel Cigar Co., 142 Minn. 413, 172 N. W. 317.

NEW TRIAL

IN GENERAL

7069. Power to grant new trials inherent—Effect of statute—A new trial may be granted for mistake of the jury in writing out their verdict and returning it. Paul v. Pye, 135 Minn. 13, 159 N. W. 1070.

7070. Statute applicable to both legal and equitable actions—Reargument unauthorized—(71) See Krahn v. J. L. Owens Co., 136 Minn. 53, 161 N. W. 257.

7070a. Remedy by action after time to move has expired—Whether an action will lie in equity to secure a new trial for newly discovered evidence after the time to move for a new trial has expired is an open question. If it lies at all it is only in extraordinary cases to relieve against manifest injustice. To authorize a court of equity upon the ground of newly discovered evidence to relieve a party from a judgment and to grant a retrial of an issue presented by the pleadings and litigated on the trial of the action in which the judgment was rendered, long after the rendition of the judgment and after the expiration of the time

fixed by statute for a motion for a new trial, the showing of newly discovered evidence must be clear and specific, free from hearsay, and not left to doubt or conjecture, and be of a character to justify the conclusion that manifest injustice will result if the relief be not granted. Krahn v. J. L. Owens Co., 136 Minn. 53, 161 N. W. 257.

7072. Legislature cannot grant—(75) Petition of Siblerud, — Minn. —, 182 N. W. 168.

7073. Necessity of motion for new trial to secure review on appeal—When the trial is by a court without a jury a motion for a new trial is not necessary to secure a review on appeal of the sufficiency of the evidence to justify the findings, or to secure a review of rulings made on the trial if properly excepted to and assigned as error. Anker v. Chicago G. W. R. Co., 140 Minn. 63, 167 N. W. 278.

(80) Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541; Ivanesovich v. North American L. & C. Co., 145 Minn. 175, 176 N. W. 502.

(82) Anker v. Chicago G. W. R. Co., 140 Minn. 63, 167 N. W. 278; Hrdlicker v. Haberman, 140 Minn. 124, 167 N. W. 363.

See § 5854x (under Workmen's Compensation Act).

7074. Granted only for material error—De minimis—Nominal damages—Technical errors—Where the trial is by the court without a jury and the result is right and no other result could be reached, any errors committed by the court in arriving at the result are harmless. Nostdal v. Morehart, 132 Minn. 351, 356, 157 N. W. 584.

Where the plaintiff recovers only a nominal verdict a new trial will not be granted at the instance of the defendant where no important principle or substantial right is involved. Davis v. Haugen, 133 Minn. 423, 158 N. W. 705.

A plaintiff whose cause has been erroneously dismissed will not be granted a new trial in order to give him merely nominal damages, where there is no other right involved. But where the evidence shows that substantial damage has been suffered, though the amount has not been proved, or where a verdict for plaintiff would determine some matter of substantial right, a new trial should be granted. Erickson v. Minnesota & Ontario Power Co., 134 Minn. 209, 158 N. W. 979.

As a general rule a party cannot complain that a verdict is in amount more favorable to him than it might have been. Alden v. Sacramento Suburban Fruit Lands Co., 137 Minn. 161, 163 N. W. 133. See § 418.

(88) Erickson v. Minnesota & Ontario Power Co., 134 Minn. 209, 158 N. W. 979; State v. Truax, 139 Minn. 313, 166 N. W. 339; Howe v. Gray, 144 Minn. 122, 174 N. W. 612; Reinkey v. Findley Electric Co., 147 Minn. 161, 180 N. W. 236.

See §§ 416–418, 424, 2490.

7076. Waiver of right—(97) See § 5087.

(2) Smith v. Minneapolis St. Ry. Co., 134 Minn. 292, 157 N. W. 499, 159 N. W. 623.

7079. Of less than all the issues—Where error affects only the amount of damages a new trial may be granted upon that issue alone. Smith v. Great Northern Ry. Co., 133 Minn. 192, 158 N. W. 46.

Where the damages awarded are excessive it is common practice, in cases where a reduction of the verdict cannot be ordered, to grant a new trial on the single issue of the amount of damages. Appleby v. Payne, — Minn. —, 182 N. W. 901.

(8) Smith v. Great Northern Ry. Co., 133 Minn. 192, 158 N. W. 46; Hughes v. Globe Indemnity Co., 139 Minn. 417, 166 N. W. 1075; Helvetia Copper Co. v. Hart-Parr Co., 142 Minn. 74, 171 N. W. 272, 767; Appleby v. Payne, — Minn. —, 182 N. W. 901 See § 430.

7082. Effect of granting—Vacation of judgment—New notice of trial—Upon the granting of a new trial notice of trial is necessary to bring the case on for trial. Dr. Ward's Medical Co. v. Wolleat, — Minn. —, 182 N. W. 523.

When a new trial is granted, the trial had, and a verdict rendered, no proceeding by appeal, or otherwise, can reinstate the verdict rendered on the first trial. Ditkof v. Lifshitz, 141 Minn. 88, 169 N. W. 483.

The new trial is not controlled by the evidence or proceedings at the former trial. Quinn-Shepherdson Co. v. United States F. & G. Co., — Minn. —, 183 N. W. 347.

(14) Ditkof v. Lifshitz, 141 Minn. 88, 169 N. W. 483.

(15) Mahr v. Maryland Casualty Co., 132 Minn. 336, 156 N. W. 668; Harcum v. Benson, 135 Minn. 23, 160 N. W. 80.

(16) Holm v. Great Northern Ry. Co., 139 Minn. 258, 166 N. W. 224; Wilson v. Anderson, 145 Minn. 274, 177 N. W. 130; Quinn-Shepherdson Co. v. United States F. & G. Co., — Minn. —, 183 N. W. 347

(17) Wilson v. Anderson, 145 Minn. 274, 177 N. W. 130.

7084. Stating grounds in order granting a new trial—(23) McAlpine v. Fidelity & Casualty Co., 134 Minn. 192, 158 N. W. 967. See § 394.

TIME OF MOTION

7086. When made on minutes of court—(29) Pust v. Holtz, 134 Minn. 266, 159 N. W. 564 (motion made day after verdict held in time).

7087. When made on a case or bill of exceptions—Judgment was entered for the plaintiff and an appeal was taken by the defendant. More than six months afterwards, six months being the time within which an appeal may be taken, the judgment was affirmed. The defendant then moved for a new trial upon the ground of error and insufficiency of evidence. Held, that the motion was too late, that it would have been error to grant a new trial, and that the denial of it was right. Smith v. Minneapolis St. Ry. Co., 134 Minn. 292, 157 N. W. 499, 159 N. W. 623.

An appeal taken from an order denying a motion for a new trial, the grounds for the motion being alleged errors during the trial and insufficiency of the evidence, will not be considered on the merits when it

appears that before the motion was heard and the appeal taken more than six months had expired after judgment had been entered. The judgment was then free from an indirect attack by a motion for a new trial on the grounds stated. Churchill v. Overend, 142 Minn. 102, 170 N. W. 919.

(30, 32) Smith v. Minneapolis Street Ry. Co., 134 Minn. 292, 157 N. W. 499, 159 N. W. 623.

7088. When made on affidavits—(33) Smith v. Minneapolis Street Ry. Co., 134 Minn. 292, 157 N. W. 499, 159 N. W. 623.

(35) Krahn v. J. L. Owens Co., 138 Minn. 374, 165 N. W. 129. See State v. District Court, 134 Minn. 189, 158 N. W. 825; Smith v. Minneapolis St. Ry. Co., 134 Minn. 292, 157 N .W. 499, 159 N. W. 623; Krahn v. J. L. Owens Co., 136 Minn. 53, 161 N. W. 257.

7090. After appeal—Remand—Where a judgment is appealed from and affirmed a motion for a new trial for errors on the trial or for insufficiency of the evidence cannot be made after the time for appealing from the judgment has expired. Smith v. Minneapolis St. Ry. Co., 134 Minn. 292, 157 N. W. 499, 159 N. W. 623.

NOTICE OF MOTION

7091. Specification of errors or grounds of motion—When a motion for a new trial is based on erroneous instructions the instructions must be specified in the notice of motion, and the specification is insufficient when it embraces a large portion of the charge, dealing with several distinct propositions, many of which are treated correctly. State v. Shtemme, 133 Minn. 184, 158 N. W. 48.

The assignment of errors in the motion for a new trial does not take the place of assignments on appeal. Martinson v. State Bank, 137 Minn. 476, 163 N. W. 503.

Where the trial is by a court without a jury and the moving party specifies error in certain of the findings in his motion for a new trial, he is not concluded thereby but may assign error as to other findings on appeal. Hrdlicka v. Haberman, 140 Minn. 124, 167 N. W. 363.

The objection that damages are excessive, appearing to have been given under the influence of passion or prejudice, cannot be raised for the first time on appeal. It must be specified in the notice of motion and presented by a proper assignment on appeal. Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541.

Where no exception is taken to the instructions at the time they are given, and the notice of motion for a new trial does not set forth, as one of the grounds therefor, an alleged error in such instructions, it is too late to question their correctness for the first time on appeal. Barthelemy v. Foley Elevator Co., 141 Minn. 423, 170 N. W. 513.

Improper remarks of the court not excepted to on the trial cannot be assigned as error on appeal unless they were assigned as error in the

motion for a new trial. Mooney v. Burgess, 142 Minn. 406, 172 N. W. 308.

The technical objection to the refusal of the court to strike the case from the calendar will not be considered where the record shows no exception to the ruling and no error assigned thereon in the motion for a new trial. First Nat. Bank v. Coon, 143 Minn. 262, 173 N. W. 431.

(39) Bergh v. Calmenson, 136 Minn. 322, 162 N. W. 353; Gebhart v. Carlson, 136 Minn. 454, 161 N. W. 167; Darelius v. C. W. Lunquist Co., 136 Minn. 477, 162 N. W. 464; Lovell v. Beedle, 138 Minn. 12, 163 N. W. 778; Kelly v. McKeown, 139 Minn. 285, 166 N. W. 329; State v. Rutledge, 142 Minn. 117, 171 N. W. 275; Barthelemy v. Foley Elevator Co., 141 Minn. 423, 170 N. W. 513; Mooney v. Burgess, 142 Minn. 406, 172 N. W. 308; First Nat. Bank v. Coon, 143 Minn. 262, 173 N. W. 431; State Bank v. Ronan, 144 Minn. 236, 174 N. W. 892; Koch v. Speiser, 145 Minn. 227, 176 N. W. 754.

(43) Harvey v. Morse, 135 Minn. 476, 160 N. W. 79; Stravs v. Steckbauer, 136 Minn. 69, 161 N. W. 259; Holmstrom v. Barstad, 147 Minn. 172, 179 N. W. 737.

7094. On whom served—To entitle a defendant to urge as error the direction of a verdict in favor of a codefendant, the latter must be made a party to the motion for a new trial, when the motion is based in part on the claim that the court erred in so directing a verdict. Riley v. Minneapolis & St. Louis R. Co., 132 Minn. 195, 156 N. W. 272.

BASIS OF MOTION

7096. Affidavits—Minutes—Case or bill of exceptions—(53) McManus v. Duluth, 147 Minn. 200, 179 N. W. 906.

IRREGULARITY

7097. Statute—Construction—Opening a sealed verdict in the absence of the jury and not complying with the provisions of G. S. 1913, § 7812, has been held an irregularity requiring a new trial. Klemmer v. Biersdorf, 137 Minn. 474, 163 N. W. 527.

Failure to appoint a guardian ad litem for a minor defendant held no ground for a new trial, there being no showing of prejudice. Muenkel v. Muenkel, 143 Minn. 29, 173 N. W. 184.

See § 7069.

7098. Improper remarks of court—Improper remarks of the court not excepted to on the trial cannot be assigned as error on appeal unless they were assigned as error in the notice of motion for a new trial. Mooney v. Burgess, 142 Minn. 406, 172 N. W. 308.

(63) State v. Macbeth, 133 Minn. 425, 158 N. W. 793; Drager v. Seegert, 138 Minn. 6, 163 N. W. 756; Mckay v. Minnesota Commercial Men's Assn., 139 Minn. 192, 165 N. W. 1061; Barrett v. Van Duzee,

139 Minn. 351, 166 N. W. 407; McGuire v. Caledonia, 140 Minn. 151, 167 N. W. 425; State v. Ettenburg, 145 Minn. 39, 176 N. W. 171; State v. Liss, 145 Minn. 45, 176 N. W. 51; Koochiching County v. Elder, 145 Minn. 77, 176 N. W. 195; State v. Dallas, 145 Minn. 92, 176 N. W. 491; Bukachek v. Blazek, 145 Minn. 498, 177 N. W. 124; Zeglin v. Tetzlaff, 146 Minn. 397, 178 N. W. 954; State v. Townley, — Minn. —, 182 N W 773.

(64) La Brash v. Wall, 134 Minn. 130, 158 N. W. 723; Drager v. Seegert, 138 Minn. 6, 163 N. W. 756.

7099. Miscellaneous cases of misconduct of court—Examination of jurors in a criminal case by the judge in his chambers, during a recess, to ascertain whether they had been tampered with, counsel for both parties being present but not the accused, held not a ground for new trial. State v. Bragdon, 136 Minn. 348, 162 N. W. 465.

Permitting counsel to call and question the attorney for the adverse party as to why the latter was not in court so that he could be called for cross-examination, held not irregularity on the part of the court within the meaning of the statute. Gebhart v. Carlson, 136 Minn. 454, 161 N. W. 167.

(65) See State v. Kruse, 137 Minn. 468, 163 N. W. 125.

MISCONDUCT OF COUNSEL OR PREVAILING PARTY

7100. Corrupting or improperly influencing jurors—Where the prevailing party had some slight conversation with jurors not relating to the issues, it was held that the trial court properly denied a new trial. George Gorton Machine Co. v. Grignon, 137 Minn. 378, 163 N. W. 748.

7101a. Improper coaching of witnesses—An alleged misconduct of a party, or his attorney, to influence prospective witnesses in a lawsuit, is not a good ground for a new trial when it appears that the misconduct was made an issue at the trial and submitted to the jury under proper instructions. Stock v. St. Paul City Ry. Co., 142 Minn. 315, 172 N. W. 122.

7102. Improper remarks or argument of counsel—The object of a new trial for misconduct of counsel is not discipline. That the granting of a new trial is a deterrent of other misconduct is an incidental result. A new trial is granted because the conduct of counsel interferes with the administration of justice to the substantial prejudice of a litigant. Smith v. Great Northern Ry. Co., 133 Minn. 192, 158 N. W. 46; Hammel v. Feigh, 143 Minn. 115, 173 N. W. 570; Johnson v. Brastad, 143 Minn. 332, 173 N. W. 668.

In an action for personal injury counsel for plaintiff in his closing argument and just before its close said to the jury in substance, that it was their duty, or proper or advisable, for them to strike back at the defendant by returning a verdict for big money. Held, misconduct requiring a new trial. Smith v. Great Northern Ry. Co., 133 Minn. 192, 158 N. W. 46.

Whether a new trial should be granted for misconduct of counsel in his argument to the jury is usually within the sound discretion of the trial court; but it is error to refuse to charge the jury, upon request, to disregard improper remarks of counsel, and when such remarks constitute substantial prejudice a new trial will be ordered by this court; and in this case it is held that the misconduct of counsel was such as to require a new trial. Smith v. Great Northern Ry. Co., 133 Minn. 192, 158 N. W. 46.

There was impropriety in the conduct of counsel for plaintiff in stating before the jury that he could prove certain facts, which were wholly immaterial and of which proof was inadmissible. Whether a new trial should be granted for misconduct is largely within the discretion of the trial court. Held, that it was not error to refuse a new trial upon the ground of misconduct. Hammel v. Feigh, 143 Minn. 115, 173 N. W. 570.

The jury is a part of the court in the administration of justice. It is not swayed by every imprudent or wrongful remark of counsel. It must be credited with exercising good judgment. State v. Hass, 147 Minn. 269, 180 N. W. 94.

The trial court is in a much better position than the supreme court to determine whether an improper remark or argument of counsel was materially prejudicial. State v. Hass, 147 Minn. 269, 180 N. W. 94.

The remarks of the prosecuting attorney set out in the opinion were improper and highly prejudicial to the substantial rights of the defendant, and were continued notwithstanding repeated objections by his counsel. The prejudice they created was not overcome by the instructions to the jury, and defendant did not have a fair trial. The proof of his guilt was not so clear and conclusive that it can be held that he was not prejudiced by the line of argument persisted in by the prosecuting attorney, and his motion for a new trial should have been granted. State v. Bernstein, 148 Minn. —, 181 N. W. 947.

Misstatement of facts, or statement of facts not in evidence, as ground for reversal. L. R. A. 1918D, 4.

(70) Smith v. Great Northern Ry. Co., 133 Minn. 192, 158 N. W. 46 new trial granted on appeal); State v. Price, 135 Minn. 159. 160 N. W. 677; State v. Bragdon, 136 Minn. 348, 162 N. W. 465; Gebhart v. Carlson, 136 Minn. 454, 161 N. W. 167; Posch v. Lion Bonding & Surety Co., 137 Minn. 169, 163 N. W. 131; State v. Maddaus, 137 Minn. 249, 163 N. W. 507; State v. Krantz, 138 Minn. 114, 164 N. W. 579; State v. Kampert, 139 Minn. 132, 165 N. W. 972; McLain v. Chicago G. W. R. Co., 140 Minn. 35, 167 N. W. 349; Schmidt v. Thompson, 140 Minn. 180, 167 N. W. 543; State v. Dunn, 140 Minn. 308, 168 N. W. 2; Brown v. Martin County, 140 Minn. 508, 167 N. W. 543; State v. Wassing, 141 Minn. 106, 169 N. W. 485; State v. Monroe, 142 Minn. 394, 172 N. W. 313; Hammel v. Feigh, 143 Minn. 115, 173 N. W. 570; Johnson v. Brastad, 143 Minn. 332, 173 N. W. 668; Wade v. Nat. Bank of Commerce, 144 Minn. 187, 174 N. W. 889; Podgorski v. Kerwin, 144 Minn. 313, 175 N. W. 694; State v. Bohls, 144 Minn. 437, 175 N.

W. 915; State v. Ettenburg, 145 Minn. 39, 176 N. W. 171; State v. Liss. 145 Minn. 45, 176 N. W. 51; Wrabek v. Suchomel, 145 Minn. 468, 177 N. W. 764; State v. Couplin, 146 Minn. 189, 178 N. W. 486; State v. Friedman, 146 Minn. 373, 178 N. W. 895; Anderson v. Minneapolis etc. Ry. Co., 146 Minn. 430, 179 N. W. 45; State v. Hass, 147 Minn. 269, 180 N. W. 94 (prosecuting attorney referred to newspaper reports—argument condemned but order denying a new trial sustained); State v. Bernstein, 148 Minn.—, 181 N. W. 947 (new trial granted by supreme court for improper argument of prosecuting attorney); State v. Townley,— Minn.—, 182 N. W. 773; Mullen v. Devenney,— Minn.—, 183 N. W. 350.

See §§ 2478, 9799, 9800.

7103. Miscellaneous cases of misconduct of counsel—Expressing deep sorrow that the court had denied the jury a view of the locus in quo. Laurisch v. Minneapolis etc. Traction Co., 132 Minn. 114, 155 N. W. 1074.

After the attorney of the defendant had admitted that a certain insurance company was interested in the defence of the case the attorney for the plaintiff called the defendant and asked him if this was true. This conduct of the attorney for the plaintiff was held improper but not prejudicial. Viita v. Fleming, 132 Minn. 128, 155 N. W. 1077.

The persistent asking of improper questions held censurable but not to justify the granting of a new trial by the supreme court. Carson v. Turrish, 140 Minn. 445, 168 N. W. 349; Johnson v. Brastad, 143 Minn. 332, 173 N. W. 668.

Where counsel for plaintiff played cards with jurors in the lobby of a hotel in full view of the guests, including defendant and his counsel, a new trial was denied for want of prejudice, but the practice of counsel playing cards with jurors was condemned. Schmidt v. Thompson, 140 Minn. 180, 169 N. W. 543.

In a criminal case an attorney who represented neither the state nor the defendant interjected some remarks. Held, that it was improper but not prejudicial under the circumstances. State v. Wassing, 141 Minn. 106, 169 N. W. 485.

It cannot be held that counsel's persistence in asking certain questions after adverse rulings was such misconduct that a new trial should be granted; the questions apparently being asked in good faith, and not for the purpose of creating prejudice. State v. Morgan, 146 Minn. 197, 178 N. W. 489.

It is improper for counsel to put questions to an adverse witness ostensibly to lay a foundation for impeachment but with no intention of following it up. Mullen v. Devenney,— Minn.—, 183 N. W. 350.

(74) State v. Morgan, 146 Minn. 197, 178 N. W. 489. See State v. Dunn, 140 Minn. 308, 168 N. W. 2.

7103b. Necessity of objection—Objection to the misconduct of a party cannot be made for the first time on appeal. Darelius v. C. W. Lunquist, 136 Minn. 477, 162 N. W. 464.

MISCONDUCT OF JURY

7104. By trial court—A matter of discretion—Where the misconduct is without the knowledge or participation of the successful party, much liberality is indulged in sustaining the verdict, notwithstanding such misconduct. It is not the policy of the law to punish the successful litigant for the sins of the jury. Brown v. Duluth etc. Ry. Co., 147 Minn. 167, 179 N. W. 1003.

(75, 78) Brown v. Duluth etc. Ry. Co., 147 Minn. 167, 179 N. W. 1003.

7105. By supreme court—The trial court is in a much better position than the supreme court to determine whether misconduct was materially prejudicial or not. Brown v. Duluth etc. Ry. Co., 147 Minn. 167, 179 N. W. 1003.

(81) Brown v. Duluth etc. Ry. Co., 147 Minn. 167, 179 N. W. 1003.

7109. Affidavits of jurors and others—Admissibility—The affidavit of all the jurors may be received to show that, by a clerical error of the jury, the verdict returned in court was the opposite of the verdict unanimously agreed upon by them. Paul v. Pye, 135 Minn. 13, 159 N. W. 1070.

Affidavits of petit jurors may be considered upon a motion for a new trial, based upon their misconduct, in so far only as the misconduct relates to occurrences outside the jury room, or when they are not under the control of the court. They are not admissible to show the motives or reasons which actuated the jury in arriving at a verdict or disclose their discussions in the jury room. Brown v. Duluth etc. Ry. Co., 147 Minn. 167, 179 N. W. 1003.

(86, 92) Brown v. Duluth etc. Ry. Co., 147 Minn. 167, 179 N. W. 1003.

7113. Drinking intoxicating liquors—A party, who observes during the course of the trial that a juror is drunk and who does not at once apply to the court for relief, waives the right to thereafter challenge the verdict on the ground that the juror was not in condition to serve properly. Stock v. St. Paul City Ry. Co., 142 Minn. 315, 172 N. W. 122.

(4) Stock v. St. Paul City Ry. Co., 142 Minn. 315, 172 N. W. 122.

7115a. Quotient verdicts—A quotient verdict is one where the jury agree in advance that each shall set down on paper the amount of damages which, in his opinion, should be allowed, the sum of such amounts to be divided by twelve and the quotient accepted as the verdict. Such a verdict is irregular and will not ordinarily be allowed to stand. But a court will not set aside such a verdict simply by guessing that it was such on account of the amount thereof. Larson v. Wisconsin R. L. & P. Co., 138 Minn. 158, 164 N. W. 666; St. Martin v. Desnoyer, 1 Minn. 156 (131).

7115b. Compromise verdicts—There were two or more amounts entering the verdict upon which the jury were not concluded by the opinion or estimates of the witnesses, hence the verdict is not demonstrably

a "compromise" verdict. Lamoreaux v. Weisman, 136 Minn. 207, 161 N. W. 504.

The general rule is that a defendant cannot complain that a verdict is in amount more favorable to him than it might have been; but where the damages are not unliquidated, but are certain, and the plaintiff if entitled to anything is entitled to a specific sum, and the jury disregard the issues and the evidence and compromise between the right of recovery and the amount of it, giving a sum greatly less than the plaintiff should have if he recovered anything, the defendant may assail the verdict. This rule is applied to a case where the plaintiff, if entitled to anything, was entitled to 10 per cent of the selling price of one or both of two tracts of land, one of which was sold for $10,000 and the other for $2,500, the amount of the agreed compensation for the sale of both being $1,250, and the jury returned a verdict for $600. Alden v. Sacramento Suburban Fruit Lands Co., 137 Minn. 161, 163 N. W. 133.

7115c. Split verdicts—A verdict which palpably splits the difference between the parties without regard to the evidence cannot be permitted to stand. Blume v. Ronan, 141 Minn. 234, 169 N. W. 701.

7116a. Mistake of jury—A new trial may be granted for mistake of the jury in writing out their verdict and returning it. When a mistake is plainly shown there is little room for discretion in the court to refuse to act. Paul v. Pye, 135 Minn. 13, 159 N. W. 1070.

ACCIDENT OR SURPRISE

7117. By trial court—A matter of discretion—(15) Jones v. Wellcome, 141 Minn. 352, 170 N. W. 224.

7118. By supreme court—(17) Faley v. Learn, 139 Minn. 512, 166 N. W. 1067; Schwantz v. Kleiber, 141 Minn. 332, 170 N. W. 210; Reynolds v. Pike-Horning Granite Co.,— Minn. —, 182 N. W. 906.

7119. Objection on the trial—(20) Miszewski v. Baxter, 141 Minn. 224, 169 N. W. 800.

7120. Showing on motion—Affidavits—(24) Schwantz v. Kleiber, 141 Minn. 332, 170 N. W. 210.

7122. Cases in which motion denied—That a litigant produces proof in support of the allegations of his pleading cannot be held a legal surprise on his adversary. Miszewski v. Baxter, 141 Minn. 224, 169 N. W. 800.

Where the surprise claimed by plaintiff rested on the fact that defendant claimed that an indorsement of payment, admitted to have been made by plaintiff on a note in his possession executed by the mortgagor, should outweigh plaintiff's testimony that he had not received such payment, and not on the fact that unexpected evidence had been presented on the part of defendant. Schwantz v. Kleiber, 141 Minn. 332, 170 N. W. 210.

Where one of the jurors was a nominal party to an action which the attorney for the defendant tried six years before. State v. Chodos, 147 Minn. 420, 180 N. W. 536.

Where both parties departed somewhat from the claims asserted in their pleadings. Reynolds v. Pike-Horning Granite Co., — Minn. —, 182 N. W. 906.

(55) Wessel v. Cook, 132 Minn. 442, 157 N. W. 705.

NEWLY DISCOVERED EVIDENCE

7123. By trial court—To be granted with extreme caution—(71) Larson v. Wisconsin R. L. & P. Co., 138 Minn. 158, 164 N. W. 666; Krahn v. J. L. Owens Co., 138 Minn 374, 165 N. W. 129; Jordan v. Van Duzee, 139 Minn. 103, 165 N. W. 877.

7125. By supreme court—(73) Antel v. St. Paul City Ry. Co., 133 Minn. 156, 157 N. W. 1073; State v. Newell, 134 Minn. 384, 159 N. W. 829; Paine & Nixon Co. v. United States F. & G. Co., 135 Minn. 9, 159 N. W. 1075; International R. & S. Corp. v. Miller, 135 Minn. 292, 160 N. W. 793; La Framboise v. Day, 136 Minn. 239, 161 N. W. 529; Gilbert v. Case, 136 Minn. 257, 161 N. W. 515; Larson v. Wisconsin R. L. & P. Co., 138 Minn. 158, 164 N. W. 666; Jordan v. Van Duzee, 139 Minn. 103, 165 N. W. 877; Wood v. Wood, 140 Minn. 130, 167 N. W. 358 (order denying new trial reversed); National Elevator Co. v. Great Northern Ry. Co., 140 Minn. 382, 168 N. W. 134; Walso v. Latterner, 140 Minn. 455, 168 N. W. 353 (new trial granted by supreme court); In re Consolidation of School Districts, 140 Minn. 475, 168 N. W. 552; State v. Foster, 141 Minn. 140, 169 N. W. 529; Miszewski v. Baxter, 141 Minn. 224, 169 N. W. 800; Schwantz v. Kleiber, 141 Minn. 332, 170 N. W. 210; State v. Dallas, 145 Minn. 92, 176 N. W. 491; Ivanesovich v. North American L. & C. Co., 145 Minn. 175, 176 N. W. 502; State v Hines, — Minn. —, 182 N. W. 450.

7126. Motion for postponement condition precedent—(76) State v. Hines, — Minn. —, 182 N. W. 450.

7127. Showing on motion—(77) Krahn v. J. L. Owens Co., 136 Minn. 53, 161 N. W. 257; Schwantz v. Kleiber, 141 Minn. 332, 170 N. W. 210.

(80) Krahn v. J. L. Owens Co., 136 Minn. 53, 161 N. W. 257.

7127a. Facts arising subsequent to trial—Newly discovered evidence is any evidence newly discovered, whether the facts existed at the trial or not. A new trial may be granted on account of newly discovered evidence of facts arising after the trial. Wood v. Wood, 140 Minn. 130, 167 N. W. 358.

7128. Evidence must not have been discoverable before trial—Where the attorney of a party knew of the evidence in time to have produced it on the trial it was held proper to deny a motion for a new trial. La Framboise v. Day, 136 Minn. 239, 161 N. W. 529.

(83) In re Consolidation of School Districts, 140 Minn. 475, 168 N. W. 552; State v. Wassing, 141 Minn. 106, 169 N. W. 485; Miszewski v. Baxter, 141 Minn. 224, 169 N. W. 800; Schwantz v. Kleiber, 141 Minn. 332, 170 N. W. 210.

(88) Rosenberger v. H. E. Wilcox Motor Co., 145 Minn. 408, 177 N. W. 625.

7129. Evidence must not be merely contradictory or impeaching—(90) Jordan v. Van Duzee, 139 Minn. 103, 165 N. W. 877; In re Consolidation of School Districts, 140 Minn. 475, 168 N. W. 552; State v. Rutledge, 142 Minn. 117, 171 N. W. 275; State v. Dallas, 145 Minn. 92, 176 N. W. 491; State v. Friedman, 146 Minn. 373, 178 N. W. 895.

7130. Evidence must not be merely cumulative—(94) Laurisch v. Minneapolis etc. Traction Co., 132 Minn. 114, 155 N. W. 1074; Larson v. Wisconsin R. L. & P. Co., 138 Minn. 158, 164 N. W. 666; Jordan v Van Duzee, 139 Minn. 103, 165 N. W. 877; State v. Foster, 141 Minn. 140, 169 N. W. 529; Miszewski v. Baxter, 141 Minn. 224, 169 N. W. 800. See L. R. A. 1916C, 1162.

7131. Evidence must be likely to change result—The new evidence must be such that it would probably change the result. Jones v. Wellcome, 141 Minn. 352, 170 N. W. 224.

Where the new evidence was in the nature of an unauthorized collateral attack on a decree of registration of title to land, it was held that a new trial was properly denied. Jones v. Wellcome, 141 Minn. 352, 170 N. W. 224.

Where a verdict for defendant was directed at the close of the case and newly discovered evidence was so material that it would clearly have made the case one for the jury if it had been admitted on the trial, the supreme court granted a new trial.
Walso v. Latterner, 140 Minn. 455, 168 N. W. 353.

(4) Krahn v. J. L. Owens Co., 136 Minn. 53, 161 N. W. 257; Jordan v Van Duzee, 139 Minn. 103, 165 N. W. 877; Hendrickson v. Benson, 139 Minn. 511, 166 N. W. 1084; State v. Wassing, 141 Minn. 106, 169 N. W. 485; Jones v. Wellcome, 141 Minn. 352, 170 N. W. 224; State v. Rutledge, 142 Minn 117, 171 N. W. 275; Ivanesovich v. North American L. & C. Co., 145 Minn. 175, 176 N. W. 502; Brown v. Duluth etc. Ry. Co., 147 Minn. 167, 179 N. W. 1003.

7131b. Evidence affecting damages—Remitting excess—When the newly discovered evidence shows that the damages awarded were excessive the court may deny the motion for a new trial on condition that the prevailing party remit the excess. Podgorski v. Kerwin, 147 Minn. 103, 179 N. W. 679. See 5 Minn. L. Rev. 236.

EXCESSIVE OR INADEQUATE DAMAGES

7132. Statute—Under which subdivision motion to be made—(8) Leonard v. Rosendahl, 133 Minn. 320, 158 N. W. 419 (action for attorney's fees—motion may be under seventh subdivision).

7133. By trial court—A matter of discretion—Courts must exercise much circumspection in sustaining large verdicts where no injury can be seen and where the testimony of the person injured is the only evidence of its extent. Haugen v. Northern Pacific Ry. Co., 132 Minn. 54, 155 N. W. 1058.

(10) Hillstrom v. Mannheimer Bros. 146 Minn. 202, 178 N. W. 881.

See §§ 2595–2597.

7134. Necessity of passion or prejudice—In an action for breach of contract, held that it did not appear that the verdict was given under the influence of passion or prejudice. Lewiston Iron Works v. Vulcan Process Co., 139 Minn. 180, 165 N. W. 1071.

7135. When damages governed by fixed rules—(18) Courtney v. Nagle, 144 Minn. 65, 174 N. W. 436 (action for work and labor and for money had and received—evidence held not to show passion or prejudice).

7136. By supreme court—The supreme court will not fix a standard by which the damages for the loss of an arm or leg may be measured. Kelley v. Chicago, B. & Q. R. Co., 142 Minn. 44, 170 N. W. 886.

Where the evidence presents a fair question of fact as to the nature and extent of the injuries sued for, and the trial court approves the amount of the award, the supreme court will not interfere with the denial of a motion for a new trial. Lewis v. Olson, 147 Minn. 462, 180 N. W. 775.

When a new trial is granted it may be limited to the issue of damages. Appleby v. Payne,— Minn.—, 182 N. W. 901.

(19) Hillstrom v. Mannheimer Bros. 146 Minn. 202, 178 N. W. 881.

(20) Morrow v. Tourtellotte, 135 Minn. 248, 160 N. W. 665; McArdle v. Chicago etc. Ry. Co., 138 Minn. 379, 165 N. W. 232; Kelley v. Chicago, B. & Q. R. Co., 142 Minn. 44, 170 N. W. 886; Johnson v. Wolf, 142 Minn. 352, 172 N. W. 216; Daigle v. Summit Mercantile Co., 144 Minn. 178, 174 N. W. 830; Stanger v. Pandolfo, 144 Minn. 294, 175 N. W. 912; Stapp v. Jerabek, 144 Minn. 439, 175 N. W. 1003.

(22) Unmacht v. Whitney, 146 Minn. 327, 178 N. W. 886.

(23) Hillstrom v. Mannheimer Bros., 146 Minn. 202, 178 N. W. 881.

(24) Haugen v. Northern Pacific Ry. Co., 132 Minn. 54, 155 N. W. 1058: Appleby v. Payne, — Minn.—, 182 N. W. 901.

See §§ 2595–2597.

7138. Remitting excess—A court cannot reduce a verdict where there is no evidence upon which to base an intelligent judgment as to the proper amount of damages. The only remedy in such a case is a new trial. Haugen v. Northern Pacific Ry. Co., 132 Minn. 54, 155 N. W. 1058.

Where a verdict is for an amount larger than demanded in the complaint the court may deny a new trial on condition that plaintiff remit the excess. Morrow v. Tourtellotte, 135 Minn. 248, 160 N. W. 665.

Both the district and supreme court may cut down a verdict where it is clear that the jury disregarded an instruction to diminish the dam-

ages in the proportion that plaintiff's negligence bore to the total negligence. Kelley v. Chicago, B. & Q. R. Co., 142 Minn. 44, 170 N. W. 886.

In an action for personal injuries there was a verdict for the plaintiff. The court made an order denying a motion for a new trial made upon the ground, among others, of insufficiency of evidence and of excessive damages, and the order was affirmed on appeal. On the going down of the remittitur the defendant moved for a new trial upon the ground of newly discovered evidence, supported by affidavits, which went wholly to the question of damages, and which tended to show that the plaintiff had made a better recovery than was anticipated at the trial, and that the verdict was excessive. Held, that it was proper to make the order for a new trial conditional upon the plaintiff consenting to a reduction of the verdict; and, the plaintiff so consenting, the defendant cannot complain of the practice adopted. The order did not deprive him of a jury trial. Podgorski v. Kerwin, 147 Minn. 103, 179 N. W. 679.

(27) Podgorski v. Kerwin, 147 Minn. 103, 179 N. W. 679.

(29) Larson v. Wisconsin R. L. & P. Co., 138 Minn. 158, 164 N. W. 666; Scheurer v. Great Northern Ry. Co., 141 Minn. 503, 170 N. W. 505.

(30) Roemer v. Jacob Schmidt Brewing Co., 132 Minn. 399, 157 N. W. 604; Larson v. Wisconsin R. L. & P. Co., 138 Minn. 158, 164 N. W. 666.

(31) Morrow v. Tourtelotte, 135 Minn. 248, 160 N. W. 665; Lovell v. Beedle, 138 Minn. 12, 163 N. W. 778.

(32) Swaney v. Crawley, 133 Minn. 57, 157 N. W. 910; Remington v. Savage, — Minn. —, 182 N. W. 524 (new trial granted unless defendant waived all the damages awarded to him by the verdict).

See § 7131b.

7141. Inadequate damages—A verdict in a nominal amount for damages from flowage caused by obstruction of a drainage ditch is not, under the evidence in this case, so grossly inadequate as to warrant this court in granting a new trial. The question whether a new trial should be granted on such ground is one resting largely in the discretion of the trial court. Kock v. Speiser, 145 Minn. 227, 176 N. W. 754.

Nominal damages do not compensate for a substantial injury; but if the injury is nominal an award of damages not substantial in amount will not be disturbed as inadequate. Under the evidence referred to in the opinion the jury was justified in finding that an injury sustained by the plaintiff through the negligence of the defendant was trivial in character; and an award of damages nominal in amount was not inadequate. Greenfield v. Unique Theatre Co., 146 Minn. 17, 177 N. W. 666

(38) Leonard v. Rosendahl, 133 Minn. 320, 158 N. W. 320 (action for attorney's fees—verdict held inadequate and new trial granted by supreme court); Stenshoel v. Great Northern Ry. Co., 142 Minn. 14, 170 N. W. 695 (young woman—dislocation of knee-cap and laceration of some ligaments—several years required for complete recovery—considerable expense for hospital and medical attendance—verdict $500—

held inadequate on appeal and order denying new trial reversed); Hughes v. Minneapolis St. Ry. Co., 146 Minn. 268, 178 N. W. 605 (action for personal injuries—damages awarded held inadequate and new trial granted by supreme court).

(39) Wrabek v. Suchomel, 145 Minn. 468, 177 N. W. 764; Greenfield v. Unique Theatre Co., 146 Minn. 17, 177 N. W. 666.

(40) Podgorski v. Kerwin, 147 Minn. 103, 179 N. W. 679.

(42) McArdle v. Chicago etc. Ry. Co., 138 Minn. 379, 165 N. W. 232; Morris v. Wulke, 141 Minn. 27, 169 N. W. 22; Koch v. Speiser, 145 Minn. 227, 176 N. W. 754.

See § 428.

INSUFFICIENCY OF EVIDENCE

7146. By another judge—(57) Guest v. Northern Motor Car Co., — Minn. —, 183 N. W. 147.

7148. After trial by court—Where findings as to certain material facts are not justified by the evidence and the record contains evidence which might support the findings of other material facts, a new trial is properly granted. Jacobson v. Brasie Motor Car Co., 132 Minn. 417, 157 N. W. 645.

Findings which rest on speculation or conjecture cannot be sustained. State v. District Court, 145 Minn. 444, 177 N. W. 644. See Digest, §§ 7047, 7160.

7151. After successive verdicts—(66) Guest v. Northern Motor Car Co., — Minn. —, 183 N. W. 147.

(67) Johnson v. Sinclair, 140 Minn. 436, 168 N. W. 181; Guest v. Northern Motor Car Co., — Minn. —, 183 N. W. 147. See Thill v. Freiermuth, 139 Minn. 78, 165 N. W. 490.

7152. Remitting excess—A verdict will not be reduced but a new trial will be granted where it is doubtful whether the evidence justifies a verdict in any amount. Prelvitz v. Minnesota Transfer Co., 133 Minn. 131, 157 N. W. 1079.

7156. When rule of Hicks v. Stone applicable—It applies where the facts must be proved, not by a mere preponderence of the evidence, but by clear and convincing evidence. Rechtzigel v. National Casualty Co., 143 Minn. 302, 173 N. W. 670.

(86) State v. Minnesota & Ontario Paper Co., 147 Minn. 369, 180 N. W. 548.

7157. When order denying new trial reversed—(93) Sodergren v. Nelson, 131 Minn. 466, 155 N. W. 760; Cramer v. Chicago etc. Ry. Co., 134 Minn. 61, 158 N. W. 796; Grant v. Minneapolis etc. Traction Co., 136 Minn. 155, 161 N. W. 400; Rechtzigel v. National Casualty Co., 143 Minn. 302, 173 N. W. 670; C. W. La Moure Co. v. Cuyuna-Mille Lacs Iron Co., 147 Minn. 433, 180 N. W. 540.

(94) Rechtzigel v. National Casualty Co., 143 Minn. 302, 173 N. W. 670.

(96) Dawson v. Thuet Bros., 147 Minn. 429, 180 N. W. 534.

(98) Manchester v. Manchester, 131 Minn. 487, 154 N. W. 1102; In re Murphy's Estate, 148 Minn. —, 181 N. W. 320. See Petersun v. Mystic Workers, 141 Minn. 175, 169 N. W. 598.

7160. Verdicts based on speculation or conjecture—(3) Hansman v. Western Union Tel. Co., 136 Minn. 212, 161 N. W. 512; O'Leary v. St. Paul City Ry. Co., 138 Minn. 163, 164 N. W. 659. See State v. District Court, 145 Minn. 444, 177 N. W. 644 (finding of court); § 7047.

7160a. Verdicts based on testimony inconsistent with physical facts—When the admitted or conclusively proved physical facts in a case demonstrate to a certainty that the testimony of witnesses upon which the verdict necessarily rests is untrue, a new trial must be granted. Larson v. Swift & Co., 116 Minn. 509, 134 N. W. 122; Davis v. Minneapolis & St. Louis R. Co., 134 Minn. 369, 159 N. W. 802.

VERDICT CONTRARY TO LAW

7161. In general—A split verdict is contrary to law. Blume v. Ronan, 141 Minn. 234, 169 N. W. 701.

ERRORS OF LAW ON THE TRIAL

7162. What are errors on the trial—(17) Long v. Conn, 142 Minn. 502, 172 N. W. 958.

ERROR IN DRAWING OR IMPANELING THE JURY

7164. In general—A new trial will not be granted for error or misconduct in the examination of prospective jurors except for substantial prejudice. Northwestern Fuel Co. v. Minneapolis St. Ry. Co., 134 Minn. 378, 159 N. W. 832.

ERRONEOUS INSTRUCTIONS

7165. In general—In determining whether instructions are prejudicial they must be construed from the practical standpoint of the jury. Curran v. Chicago G. W. R. Co., 134 Minn. 392, 159 N. W. 955.

In determining whether an erroneous instruction was prejudicial the fact that the evidence is conflicting and uncertain and might reasonably have justified a contrary verdict is a proper consideration. Smith v. Chicago etc. Ry. Co., 134 Minn. 404, 159 N. W. 963.

(31, 32) Brown v. Duluth etc. Ry. Co., 147 Minn. 167, 179 N. W. 1003.

(33) De Vriendt v. Chicago G. W. R. Co., 144 Minn 467, 175 N. W. 99.

7166. How far discretionary—Question on appeal—(36) See Faley v. Learn, 139 Minn. 512, 166 N. W. 1067 (order granting new trial reversed on appeal).

7167. Inconsistent and contradictory instructions—(38) See Anderson v. Minneapolis etc. Ry. Co., 146 Minn. 430, 179 N. W. 45.

7168. When there are several issues—Where the special findings of the jury disclose the basis of the general verdict to be one for which, under the pleadings and evidence, defendant is liable, errors of the court in respect to other issues upon which defendant might or might not be liable are immaterial and no ground for a new trial. Clapper v. Dickinson, 137 Minn. 415, 163 N. W. 752.

Where the verdict may have been based upon an issue erroneously submitted to the jury, there must be a new trial unless it conclusively appears that the prevailing party was entitled to the verdict upon other grounds. Vasey v. Saari, 141 Minn. 103, 169 N. W. 478.

(39) Ward v. Allen, 138 Minn. 1, 163 N. W. 749.

(40) Clapper v. Dickinson, 137 Minn. 415, 163 N. W. 752.

7169. Charge in accordance with theory of trial—Harmless error—A party cannot complain of an erroneous instruction in harmony with his own requests. Curran v. Chicago G. W. R. Co., 134 Minn. 392, 159 N. W. 955.

A party cannot complain of a submission of a case in accordance with stipulations agreed to by him on the trial. Olson v. Moulster, 137 Minn. 96, 162 N. W. 1068.

7170. Where the verdict is right as a matter of law—Error in a charge in a civil action is not a ground for a new trial if the evidence is conclusive in favor of the verdict, or if there is no reasonable probability of a different result on a new trial. Brown v. Minneapolis, 136 Minn. 177, 161 N. W. 503.

(46) Darrington v. Chicago & N. W. Ry. Co., 134 Minn. 30, 158 N. W. 727; Brown v. Minneapolis, 136 Minn. 177, 161 N. W. 503; Rosenberg v. Nelson, 145 Minn. 455, 177 N. W. 659.

(48) Darrington v. Chicago & N. W. Ry. Co., 134 Minn. 30, 158 N. W. 727.

7171. Erroneous instructions disregarded—Where the court instructed the jury that if certain facts were established plaintiff could not recover, a verdict for plaintiff necessarily found that such facts had not been established, and the giving of such instruction, although erroneous, is not ground for reversal. McArdle v. Chicago etc. Ry. Co., 138 Minn. 379, 165 N. W. 232.

(51) See Olson v. Moorhead, 142 Minn. 267, 171 N. W. 923.

7172. Impertinent abstract instructions—(52) State v. Johnson, 140 Minn. 73, 167 N. W. 283.

7173. Party cannot complain of favorable charge—A defendant cannot complain of an instruction which permits the jury to find for plain-

tiff in a less amount than permissible under any issue made by the pleadings. George E. Lennon, Inc. v. McDermott, 136 Minn. 30, 161 N. W. 211.

An erroneous instruction that the burden of proof is on plaintiff cannot aid defendant in upsetting a verdict for plaintiff. Nardinger v. Ladies of the Maccabees, 138 Minn. 16, 163 N. W. 785.

(54) Staley v. Theo. Hamm Brewing Co., 142 Minn. 399, 172 N. W. 491; James E. Carlson, Inc. v. Babler, 144 Minn. 125, 174 N. W. 824; Hoel v Flour City Fuel & Transfer Co., 144 Minn. 280, 175 N. W. 300; McGillivray v. Great Northern Ry. Co., 145 Minn. 51, 176 N. W. 200.

7174. Improper submission of issues—No evidence—Conclusive evidence—Where it was alleged that defendant was negligent in that he was driving on the left side of the street, at a high rate of speed, and without giving warning, and there was evidence tending to prove each of these charges, a charge in language which might well be understood by the jury as authorizing a verdict for plaintiff only in case it was found that defendant was negligent in all three of the respects mentioned was held error requiring a new trial. Lipchick v. Ryan, 140 Minn. 514, 168 N. W. 49.

It was prejudicial error to refuse to withdraw from the jury charges of negligence of which there was no proof, in view of the fact that the court read to the jury the complaint wherein several negligent acts were charged, only one of which was attempted to be proved. Bowers v. Chicago etc. Ry. Co., 141 Minn. 385, 170 N. W. 226.

In an action for the alienation of a wife's affections, if the acts of the defendant are pleaded and some are not proved, the court is not bound to instruct the jury that there is no evidence that defendant was guilty of those not proved, even though plaintiff's counsel read the complaint to the jury in making his opening statement. Mullen v. Devenney, — Minn. —, 183 N. W. 350.

(55) See Chapko v. Chicago, B. & Q. R. Co., 138 Minn. 470, 164 N. W. 366.

7175. Improper withdrawal of issues—As the jury by their verdict necessarily found that defendants were free from negligence, the failure to submit to them the question of wilful negligence, even if there was some evidence tending to show such negligence, is not ground for reversal. Olson v. Moorhead, 142 Minn. 267, 171 N. W. 923.

(57) Keller Electric Co. v. Burg, 140 Minn. 360, 168 N. W. 98 (action for work and labor—charge held not to take from jury issue of amount of recovery). See Nelson v. Chicago etc. Ry. Co., 139 Minn. 52, 165 N. W. 866 (effect of failure to object to withdrawal of issue).

7176. Improper submission of issues—Submitting a case on a ground of negligence not alleged in the complaint or litigated by consent is a ground for new trial. Smith v. Chicago etc. Ry. Co., 134 Minn. 404, 159 N. W. 963.

(58) Smith v. Chicago etc. Ry. Co., 134 Minn. 404, 159 N. W. 963; Bowers v. Chicago etc. Ry. Co., 141 Minn. 385, 170 N. W. 226 (grounds of negligence not charged in complaint or made out by the evidence). See Woll v. St. Paul City Ry. Co., 135 Minn. 190, 160 N. W. 672 (held that no new issues were introduced by the charge and that the issues were properly limited); Mullen v. Devenney, — Minn. —, 183 N. W. 350.

7176a. Erroneous instructions as to measure of damages—Harmless error—An erroneous instruction as to the measure of damages for the breach of a contract to sell a mortgage, held not reversible error. Petrich v. Berkner, 142 Minn. 451, 172 N. W. 770.

Error in instructions as to damages is harmless when the verdict is for defendant. Mathwig v. Minneapolis etc. Ry. Co., 145 Minn. 429, 177 N. W. 643.

In an action by an attorney for compensation, an instruction that he was entitled to recover the contract price, where he had been discharged, was held erroneous and ground for a new trial, as he was only entitled to recover the reasonable value of his services. Lawler v. Dunn, 145 Minn. 281, 176 N. W. 989.

The finding of the jury that the plaintiff was not the procuring cause of the sale makes unimportant the charge of the court upon the amount of the recovery. Barr v. Olson, 147 Minn. 49, 179 N. W. 563.

7179. Failure to charge on particular point—A failure to instruct as to when a five-sixth verdict may be returned held not prejudicial. Brown v. Duluth etc. Ry. Co., 147 Minn. 167, 179 N. W. 1003.

(61) Smith v. Great Northern Ry. Co., 132 Minn. 147, 153 N. W. 513, 155 N. W. 1040; Riley v. Minneapolis & St. Louis R. Co., 132 Minn. 195, 156 N. W. 272; State v. Kasper, 140 Minn. 259, 167 N. W. 1035; State v. Gaularpp, 144 Minn. 86, 174 N. W. 445; Skillings v. Allen, 148 Minn. —, 180 N. W. 916 (failure to charge as to maxim falsus in uno, falsus in omnibus); State v. Hines, — Minn. —, 182 N. W. 450; Mullen v. Devenney, — Minn. —, 183 N. W. 350.

See § 9798.

7179a. Disparaging comments on state of law—In an action for injuries by a train at a crossing, that the court, in submitting to the jury the question whether the absence of flagman and gates or a gong constituted negligence, stated the absence of express law on the subject, held not prejudicial to plaintiff as a disparaging comment of the court. MacLeod v. Payne, — Minn. —, 182 N. W. 718. See § 9776.

ERRONEOUS ADMISSION OR EXCLUSION OF EVIDENCE

7180. Erroneous admission of evidence—Where the verdict is clearly right a new trial should not be granted for failure to lay a proper foundation for the admission of documentary evidence or the use of memoranda to refresh the memory of witnesses. Novotny v. Rynda, 137 Minn. 479, 163 N. W. 1070.

Error in the admission of evidence is no ground for a new trial if the other evidence is abundantly sufficient to justify the verdict and there is no prejudice to the substantial rights of the adverse party. Drager v. Seegert, 138 Minn. 6, 163 N. W. 756.

A new trial should be granted for the erroneous admission of evidence only when it is apparent that substantial prejudice resulted therefrom. Lenning v. Retail Merchants Mutual Fire Ins. Co., 138 Minn. 233, 164 N. W. 908; Fairchild v. Hovland, 139 Minn. 187, 165 N. W. 1053; Richardson v. North American Life & Casualty Co., 142 Minn. 295, 172 N. W. 131.

The trial court has a large discretion in determining the probable effect on the jury of an erroneous admission of evidence. Marks v. Brown, 138 Minn. 405, 165 N. W. 265.

(67) Marks v. Brown, 138 Minn. 405, 165 N. W. 265.

See § 2490.

7181. Exclusion of evidence—In general—A new trial is properly granted for the erroneous exclusion of evidence when the result might reasonably have been different if it had been admitted. Chapel v. Chapel, 137 Minn. 420, 163 N. W. 771.

Where the admitted evidence is weak and inconclusive and the jury might reasonably have found for either party thereon, a new trial will generally be granted for the erroneous exclusion of evidence so material that it might reasonably have changed the result if it had been admitted. Thaden v. Bagan, 139 Minn. 46, 165 N. W. 864.

The erroneous exclusion of all evidence of a valid defence is ground for a new trial. Taylor v. Duluth etc. Ry. Co., 139 Minn. 216, 166 N. W. 128.

The rejection of evidence will not warrant a reversal unless its admission might reasonably have resulted in a different verdict. Nelson v. Farrish, 143 Minn. 368, 173 N. W. 715.

7183. Immaterial evidence—There can be no reversible error in excluding evidence that did not tend to establish the facts which plaintiff failed to prove, and proof of which were indispensable to a recovery. Cleary v. Great Northern Ry. Co., 147 Minn. 403, 180 N. W. 545.

7184. Evidence as to facts otherwise proved—The exclusion of cumulative evidence is a ground for a new trial if it is so material that it might reasonably have changed the result. Palon v. Great Northern Ry. Co., 135 Minn. 154, 160 N. W. 670.

Error cannot be predicated upon the exclusion of evidence relating to matters not open to dispute. German v. McKay, 136 Minn. 433, 162 N. W. 527.

Error in admitting evidence is no ground for a new trial if the objecting party subsequently introduces the same evidence. Flick v. Ellis-Hall Co., 138 Minn. 364, 165 N. W. 135.

(74) Monroe v. Rehfeld, 132 Minn. 81, 155 N. W. 1042; Grimes v. Minneapolis etc. Traction Co., 133 Minn. 442, 158 N. W. 719; Knop-

fler v. Flynn, 135 Minn. 333, 160 N. W. 860; State v. Henrionnet, 142 Minn. 1, 170 N. W. 699; State Bank v. Ronan, 144 Minn. 236, 174 N. W. 892; Stanger v. Pandolfo, 144 Minn. 294, 175 N. W. 912.

7185. Error in order of proof—(76) Burch v. Hoy & Elzy Co., 131 Minn. 475, 155 N. W. 767; Antel v. St. Paul City Ry. Co., 133 Minn. 156, 157 N. W. 1073; Nardinger v. Ladies of the Maccabees, 138 Minn. 16, 163 N. W. 785.

7186. Evidence likely to prejudice jury against party—(77) Wolf, Habein & Co., v. Mapson, 146 Minn. 174, 178 N. W. 318.

7187. Evidence of fact admitted, undisputed or presumed—Excluding testimony to prove a fact which later in the trial was conceded cannot be prejudicial. Nor can error be predicated upon a ruling sustaining an objection to a question where a concession by the objector answers the question so that the party examining is seemingly satisfied. Fruen Cereal Co. v. Chenoweth, — Minn. —, 184 N. W. 30.

(78) Schwantz v. Kleiber, 141 Minn. 332, 170 N. W. 210; Fruen Cereal Co. v. Chenoweth, — Minn. —, 184 N. W. 30.

(79) State v. Henrionnet, 142 Minn. 1, 170 N. W. 699.

7192. Exclusion of evidence subsequently admitted—(85) McKenzie v. Duluth St. Ry. Co., 131 Minn. 482, 155 N. W. 758.

7195. Similar evidence admitted without objection—A party cannot complain of the reception a second time of evidence which he has once admitted without objection. Haeissig v. Decker, 139 Minn. 422, 166 N. W. 1085.

7202. Evidence in rebuttal of incompetent evidence—(98) See Mooney v. Burgess, 142 Minn. 406, 172 N. W. 308.

7205. Evidence relating to damages—Error in excluding material evidence relating to damages held a ground for new trial. Shane v. Jacobson, 136 Minn. 386, 162 N. W. 472.

A new trial will not be granted for error in the admission of evidence in relation to damages if it is clear that such evidence did not affect the assessment. Great Northern Ry. Co. v. Johannsen, 142 Minn. 208, 171 N. W. 775.

Where a general verdict for defendant is sustained any error in the admission or exclusion of evidence as to special damages claimed by plaintiff is immaterial. Northern Timber Products Co. v Stone-Ordean-Wells Co., 148 Minn. —, 180 N. W. 920.

7206. Error cured by striking out evidence—(7) Evans v. Chicago etc. Ry. Co., 133 Minn. 293, 158 N. W. 335 (error in admission of evidence of insurance in personal injury action held not cured by striking out); State v. Logan, 135 Minn. 387, 160 N. W. 1015; Brown v. Martin County, 140 Minn. 508, 167 N. W. 543; Koch v. Speiser, 145 Minn. 227, 176 N. W. 754.

7207. Error cured by instructions—(8) Evans v. Chicago etc. Ry. Co., 133 Minn. 293, 158 N. W. 335 (error in admission of evidence of insurance in personal injury action held not cured by instruction to disregard); Broun v. Martin County, 140 Minn. 508, 167 N. W. 543; State v. Rutledge, 142 Minn. 117, 171 N. W. 275.

7208. When trial is by the court without a jury—(9) Hyde v. Kloos, 134 Minn. 165, 158 N. W. 920; Clinton Film Service Co. v. Conan, 140 Minn. 94, 167 N. W. 289.

(10) Hyde v. Kloos, 134 Minn. 165, 158 N. W. 920.

(12) State v. Probate Court, 142 Minn. 420, 172 N. W. 311.

(14) Otterstetter v. Steenerson Bros. Lumber Co., 143 Minn. 442, 174 N. W. 305.

(15) Clinton Film Service Co. v. Conan, 140 Minn. 94, 167 N. W. 289.

NOTARIES PUBLIC

7226. Seal—Sufficiency of seal. 7 A. L. R. 1663.

NOTICE

7230. Actual and constructive distinguished—A finding of "actual notice" is equivalent to a finding of actual knowledge. State v. District Court, 132 Minn. 251, 156 N. W. 278.

7231. Constructive notice—In general—Where one is bound to make inquiry as to the title of a married man a separate inquiry as to the interest of his wife is not generally necessary. Havel v. Costello, 144 Minn. 441, 175 N. W. 1001.

(71) Brockman v. Brockman, 133 Minn. 148, 157 N. W. 1086; Cooper, Myers & Co. v. Smith, 139 Minn. 382, 166 N. W. 504; Northern Trust Co. v. Consolidated Elevator Co., 142 Minn. 132, 171 N. W. 265. See 34 Harv. L. Rev. 137 (notice in equity); §§ 5351. 5652.

(75) Snelling State Bank v. Clasen, 132 Minn. 404, 157 N. W. 643; Havel v. Costello, 144 Minn. 441, 175 N. W. 1001.

(76) Northern Trust Co. v. Consolidated Elevator Co., 142 Minn. 132, 171 N. W. 265.

7231a. Persons with common interest—Where the rights of purchasers for value are involved and in the absence of proof of partnership or agency, notice to one of several persons taking as joint tenants in common will not be notice to the others by mere force of their relationship. Minnesota Loan & Trust Co. v. Peteler Car Co., 132 Minn. 277, 156 N. W. 255.

7232. From possession of property—(78) See Great Northern Ry. Co. v. Minneapolis, 142 Minn. 308, 172 N. W. 135; § 10075.

7235a. When written notice required—When a statute requires notice to be given in judicial proceedings it must be in writing unless otherwise provided. Timm v. Brauch, 133 Minn. 20, 157 N. W. 709. See § 8727.

NOVATION

7238. Requisites—(84) L. R. A. 1918B, 113.

NUISANCE

WHAT CONSTITUTES

7240. Definition—(88) Joyce v. Janesville, 132 Minn. 121, 155 N. W. 1067. See State v. Houghton, 134 Minn. 226, 158 N. W. 1017.

7241. Sic utere tuo—(94) Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N. W. 805.

7241a. No vested right to maintain—There is no vested right to use property for purposes or in a manner injurious to public health. Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N. W. 805.

7242. Distinction between various kinds—Public and private—Nuisances are said to be of three kinds, those which are nuisances per se, those which in their nature are not nuisances, but may become so by reason of their locality, surroundings, or the manner in which they may be conducted, and those which in their nature may become nuisances, but as to which there may be honest differences of opinion. Such may be classified as public, private, and mixed nuisances. Megher v. Kessler, 147 Minn. 182, 179 N. W. 732.
(98) See § 7251.

7244. Exercise of lawful business in improper manner—Blasting in quarry—When the undisputed evidence shows substantial interference with the comfort of residents in the vicinity of a stone quarry, caused by blasting and dust, they are entitled to some relief in an action brought to restrain the defendant from operating the quarry in such a manner as to constitute a nuisance. If a lawful business is conducted in such a manner as to interfere materially with the physical comfort of persons of ordinary sensibilities and habits, who live near by, an injunction should be granted, permanently restraining its operation in such manner. A comparison of the injury defendant will suffer if an injunction is granted with the injury plaintiffs will suffer if it is denied does not furnish the test by which the action of the court should be controlled. A distinction may properly be drawn between cases involving a nuisance, caused by a factory or business which may be removed to another location, and those involving one caused by the operation of mines, quarries, and other enterprises for the development of the natu-

ral resources of land which must be conducted at a fixed place. An injunction should not be granted as readily in the latter as in the former class of cases. A landowner may be liable for maintaining a nuisance by reason of his mode of carrying on a lawful business, even though the annoyances complained of are ordinary incidents of such a business when properly conducted. Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N. W. 805; Millett v. Minnesota Crushed Stone Co., 145 Minn. 475, 177 N. W. 641.

Further testimony should be taken to determine whether defendant may not remove or mitigate the annoyances complained of without seriously interfering with the prosecution of its business and such relief afforded to plaintiffs as may be justified by the additional evidence produced. Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N. W. 805.

A landowner who has a deposit of limestone on his land may be liable for maintaining a nuisance though he operates his quarry without negligence. Rights of habitation are superior to the rights of trade and whenever they conflict the latter must yield. Such a business must be conducted in such a manner as not to interfere materially with the health or physical comfort of people living in the neighborhood. Millett v. Minnesota Crushed Stone Co., 145 Minn. 475, 177 N. W. 641.

Not every discomfort arising from operations on adjacent property justifies an injunction. Brede v. Minnesota Crushed Stone Co., 146 Minn. 406, 178 N. W. 820.

The facts stated in the opinion do not entitle plaintiffs to a judgment regulating the methods to be employed by defendant if, in the future, it should quarry stone on land, where it was not quarrying when the action was commenced and heard. The evidence sustains the findings relating to defendant's operations in blasting, and supports the conclusions of law prescribing the methods to be adhered to in conducting such operations. Noises caused by defendant's use of steam shovels in handling stone are not of such a character as to require a modification of the judgment. The provisions of the judgment for the control of dust caused by defendant's operations will adequately protect the plaintiff's from that source of annoyance. Brede v. Minnesota Crushed Stone Co., 146 Minn. 406, 178 N. W. 820.

(2) Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N. W. 805.

See § 6525 (obnoxious trades).

7245. Moving into neighborhood of nuisance—Little is left to the doctrine that a person who voluntarily moves into the neighborhood of a nuisance with knowledge of its existence cannot complain of it. Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N. W. 805.

(4) Joyce v. Janesville, 132 Minn. 121, 155 N. W. 1067; Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N. W. 805.

7247. Estoppel—Consent—A request that defendant quarry upon a certain portion of its premises is at most a license from those signing it,

and is subject to revocation. Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N. W. 805.

(6, 7) See Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N. W. 805.

7248. Exercise of due care no defence—(8) Millett v. Minnesota Crushed Stone Co., 145 Minn. 475, 177 N. W. 641.

7250. Power to declare things nuisances—The state fire marshal is authorized by statute to abate dangerous buildings under certain circumstances. York v. Hargadine, 142 Minn. 219, 171 N. W. 773. See § 3763c.

The power of the legislature to declare things a nuisance is very great but not without limit. See State v. Houghton, 134 Minn. 226, 158 N. W. 1017.

7251. Things authorized by legislature—(18) 30 Harv. L. Rev. 377.

(19, 20) Stuhl v. Great Northern Ry. Co., 136 Minn. 158, 161 N. W. 501.

7252. Nuisances legalized by municipalities—(24) See Smith v. St. Paul, 137 Minn. 109, 162 N. W. 1062.

7255. Things considered as nuisances—Discharge of municipal sewage upon private property. Joyce v. Janesville, 132 Minn. 121, 155 N. W. 1067.

Private garage. Trauernicht v. Richter, 141 Minn. 496, 169 N W. 701.

Blasting in a stone quarry and dust arising from a stone crusher. Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N. W. 805. See § 7244.

The discharge of sewage of a village into a county ditch and thence upon an adjacent farm. Nienow v. Mapleton, 144 Minn. 60, 174 N. W. 517.

A tile drain extending through a city and discharging offensive matter on adjacent land. Samons v. Westbrook, 145 Minn. 296, 176 N. W. 991.

A quarry, stone crushing plant and grinding mill. Millett v. Minnesota Crushed Stone Co., 145 Minn. 475, 177 N. W. 641.

Undertaking establishment and funeral home. St. Paul v. Kessler, 146 Minn. 124, 178 N. W. 171; Meagher v. Kessler, 147 Minn. 182, 179 N. W. 732. See 33 Harv. L. Rev. 613.

A stone quarry. Brede v. Minnesota Crushed Stone Co., 146 Minn. 406, 178 N. W. 820.

Noises caused by the use of steam shovels in handling stone in a quarry. Brede v. Minnesota Crushed Stone Co., 146 Minn. 406, 178 N. W. 820.

Store buildings and apartment houses in residential district. See § 6525.

Offensive trades. See §§ 6525, 7244.

(33) Ada v. Melberg, 135 Minn. 130, 160 N. W. 257.

(38) 6 A. L. R. 1575.

(40) Joyce v. Janesville, 132 Minn. 121, 155 N. W. 1067.
(48) Stuhl v. Great Northern Ry. Co., 136 Minn. 158, 161 N. W. 501.

WHO LIABLE

7264. Cities—See § 6660a.; 6810.

ABATEMENT WITHOUT PROCESS

7269. When allowable—Overhanging cornices and branches of trees and shrubs may be cut away as nuisances. See 32 Harv. L. Rev. 569.

ACTIONS IN GENERAL

7270a. Laches—The defence of laches is not available where for about two years plaintiffs have refrained from taking any action to restrain defendant from continuing to operate its quarry in the manner complained of and it has expended a large sum of money in making permanent improvements on the property where it conducts its business. Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N. W. 805. See 6 A. L. R. 1092 (laches as a defence).

7271. Injunction—An injunction may be granted to restrain an improper exercise of a lawful business. See § 7244.

For a continuing nuisance there is no adequate remedy at law. Joyce v. Janesville, 132 Minn. 121, 155 N. W. 1067.

An injunction will not be granted against a threatened nuisance unless it clearly appears by competent evidence that a nuisance will be brought into existence by the acts sought to be restrained and that the parties complaining will be injured unless the injunction is granted; but this does not mean that there must be absolute certainty of injury in order to justify an injunction. Nelson v. Swedish Evangelical Lutheran Cemetery Assn., 111 Minn. 149, 126 N. W. 723, 127 N. W. 626; Trauernicht v. Richter, 141 Minn. 496, 169 N. W. 701. See Wilder v. De Cou, 26 Minn. 10, 1 N. W. 48; 7 A. L. R. 749.

Though a complaint seeks an injunction the action may be converted into one at law for damages by the conduct of the trial. Ada v. Melberg, 135 Minn. 130, 160 N. W. 257.

Plaintiff was entitled to an injunction upon findings by the jury that at the time of the commencement of the action, and since its commencement, and at the time of the trial, the defendants maintained a nuisance upon or in the immediate vicinity of plaintiff's farm; the court having denied defendants' application to vacate such findings. Nienow v. Mapleton, 144 Minn. 60, 174 N. W. 517.

That a judgment enjoining quarrying operations does not specifically adjudge that, at the time of the commencement and continuing to the time of the trial, defendant was so conducting its business as to create a nuisance, is no ground for a modification incorporating a specific deter-

mination to that effect. Brede v. Minnesota Crushed Stone Co., 146 Minn. 406, 179 N. W. 638.

Where an undertaker purchases and uses, as a funeral home, a dwelling house situated in a strictly residential part of a city, and thereby infringes upon the repose and comfort of those residing in the neighborhood, depresses their spirits, and depreciates the value of their property, injunction is the proper remedy. Meagher v. Kessler, 147 Minn. 182, 179 N. W. 732.

Nuisance resulting from smoke alone as subject for injunctive relief. 6 A. L. R. 1575.

(88) Joyce v. Janesville, 132 Minn. 121, 155 N. W. 1067. See 34 Harv. L. Rev. 395.

(92) Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N. W. 805. See 34 Harv. L. Rev. 392.

7272. **Action for damages**—(93) Ada v. Melberg, 135 Minn. 130, 160 N. W. 257.

7274. **Parties**—Husband and wife cannot have separate actions for damages to property owned by one. Either husband or wife who owns the home of the family may maintain an action for damages to the family resulting from a nuisance. Millett v. Minnesota Crushed Stone Co., 145 Minn. 475, 177 N. W. 641.

The owner of a residence rendered inconvenient, uncomfortable, and unhealthy by a nuisance may recover the damages he suffers himself from the discomfort and sickness thereby inflicted upon his wife and other members of his family, though he may not, and they alone, may maintain an action for the direct personal injury to themselves. Millett v. Minnesota Crushed Stone Co., 145 Minn. 475, 179 N. W. 682.

Right of tenant to maintain action. 8 A. L. R. 611.

(3) See Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N. W. 805.

7275. **Notice to abate before suit**—In an action against a municipality for an injunction to abate a nuisance, held, that if notice was necessary before suit, the officers of the municipality had notice and knowledge of the nuisance, and the defence of want of notice was not made. Joyce v. Janesville, 132 Minn. 121, 155 N. W. 1067.

(6) Joyce v. Janesville, 132 Minn. 121, 155 N. W. 1067.

7276. **Successive actions for continuing nuisances**—(10) See L. R. A. 1916E, 997.

7283. **Evidence—Sufficiency**—The findings of the trial court to the effect that no nuisance was created on plaintiff's land by the drain constructed by defendant village was sustained by the evidence. Sammons v. Westbrook, 145 Minn. 296, 176 N. W. 991.

PRIVATE ACTION FOR PUBLIC NUISANCE

7285. **Private individual**—(40) See 2 Minn. L. Rev. 210.

DAMAGES

7288. Damages—A property owner whose property is injured by a nuisance may recover for the property damage sustained. This is generally the diminished rental value, if the property be rented, or the diminished value of the use if the property be used by the owner. Husband and wife cannot have separate actions for damages to property owned by one. This element of damage is recoverable only by the owner. Either husband or wife, who owns the homestead, may recover for inconvenience, physical discomfort, and illness suffered by such owner or any member of the family resulting from the nuisance. For this purpose the family is treated as a unit unless the facts be such as to give rise to a cause of action for personal injury. This element of damage is in addition to the diminished value of the use of the property. Millett v. Minnesota Crushed Stone Co., 145 Minn. 475, 177 N. W. 641, 179 N. W. 682.

(64) Millett v. Minnesota Crushed Stone Co., 145 Minn. 475, 177 N. W. 641, 179 N. W. 682. See Ada v. Melberg, 135 Minn. 130, 160 N. W. 257.

7289. To what time assessable—(73, 77) Ada v. Melberg, 135 Minn. 130, 160 N. W. 257.

7292. Action by wife—If a wife owns the home of the family she may recover damages resulting to the family from a nuisance. Millett v. Minnesota Crushed Stone Co., 145 Minn. 475, 177 N. W. 641, 179 N. W. 682.

OBSTRUCTING JUSTICE

7295a. Resisting an officer—Evidence held to justify a conviction for resisting an officer in the performance of his duties contrary to G. S. 1913, § 8538. State v. Keehn, 135 Minn. 211, 160 N. W. 666.

OFFENSIVE TRADES—See Health, § 4152b; Municipal Corporations, § 6525.

OPTIONS—See Abandonment, § 2; Landlord and Tenant, § 5404; Mines and Minerals, § 6123; Perpetuities, § 7480; Sales, § 8500a; Vendor and Purchaser, § 10016.

OPTIONS AND MARGINS—See Wagers, § 10133.

PARENT AND CHILD

PRESUMPTIONS

7296a. As to parentage of child—See 7 A. L. R. 329; 8 Id. 427.

RIGHTS OF PARENTS

7297. To custody of child—Under G. S. 1913, § 7442, father and mother are equally entitled to the custody of children. Jacobs v. Jacobs, 136 Minn. 190, 161 N. W. 525.

The best interest of the child is the controlling consideration in determining its custody, but the natural right of a parent cannot be set aside on sentimental grounds, nor upon the theory that perhaps the child would receive more tender care in the custody of others. Unless a parent is clearly unfit to have the custody it should be granted to him as against a third party. State v. Armstrong, 141 Minn. 47, 169 N. W. 249.

A father's right to the care and custody of his child is superior to that of any other person, and he should not be deprived of that right unless the best interests of the child so require. In determining whether the father or the child's maternal grandparents shall have the custody of the child in controversy, the court will consider the advantages likely to inure to the child from an agreement between the child's parents and grandparents that the latter should rear and educate her and make the same provisions in their will for her as for their own children; but such an agreement, while executory, is not controlling upon the question of custody. State v. Pelowski, 145 Minn. 383, 177 N. W. 627.

(9) State v. Armstrong, 141 Minn. 47, 169 N. W. 249.

(10) State v. Armstrong, 141 Minn. 47, 169 N. W. 249; State v. Pelowski, 145 Minn. 383, 177 N. W. 627

See § 4133.

7301. To recover for loss of services, etc.—(25) Skillings v. Allen, 143 Minn. 323, 173 N. W. 663.

DUTIES OF PARENTS

7302. To maintain child—The duty of the father to provide for his children continues whether they remain in his custody or not, unless the court, in some proceeding in which that question was involved and determined, has made express provision for their support of such a nature as to relieve him from further liability. His liability for their support is not limited by the regulations governing the allowance of alimony to the wife. Jacobs v. Jacobs, 136 Minn. 190, 161 N. W. 525.

Where a father abandons his minor children and thereby compels their mother, his divorced wife, to care for and support them, the law will imply a promise on the part of the father to reimburse the mother

for money spent in doing what he ought to have done. Beigler v. Chamberlin, 138 Minn. 377, 165 N. W. 128.

A father is liable for the support of his pauper child though he has emancipated him. Hendrickson v. Queen, — Minn. —, 182 N. W. 952.

(32) Jacobs v. Jacobs, 136 Minn. 190, 161 N. W. 525; Beigler v. Chamberlin, 138 Minn. 377, 165 N. W. 128; In re Koopman, 146 Minn. 36, 177 N. W. 777.

7303. To educate child—(35) See 29 Harv. L. Rev. 485 (right of parent to control religious education of child); 5 Minn. L. Rev. 304.

7305a. Liability of parents for torts of child—While it is the general rule that a parent is not liable for the torts of a child there may be liability under the principles of agency and master and servant. See § 5834b (family automobile doctrine).

7305b. Prosecution for non-support of child—The offence is of a continuing nature. State v. Clark, — Minn. —, 182 N. W. 452.

7305c. Prosecution for abandoning child—The elements of the offence of abandoning a child, as defined by chapter 213, Laws 1917 (G. S. Supp. 1917, §§ 8666–8668A), are the desertion of the child, the failure to support it, and an intent wholly to abandon it. There is a "desertion" when a parent quits the society of his child and renounces the duties he owes it. There is a "failure to support," though some contributions are made, if they are wholly inadequate. There is an "abandonment" if the desertion is accompanied by an intention entirely to forsake the child. The evidence sustained the verdict of guilty. The precise time at which the offence was committed was not a material ingredient of the offence itself. It was unnecessary to state it exactly in the indictment or to prove a commission of the offence at the time alleged, for the reason that it is a continuing one. There was no error in the instructions. State v. Clark, — Minn. —, 182 N. W. 452.

RIGHTS OF CHILD

7307. Recovery for services—Deeds—A child remaining in the family after becoming of age is not entitled to compensation from his parents for services rendered unless they were rendered in pursuance of an agreement for compensation. In the absence of such agreement a deed given by a parent to a child for such services is without consideration and may be avoided by prior creditors. But where such services are rendered in pursuance of an agreement for compensation they constitute a valid consideration for a deed from parent to child. Thysell v. McDonald, 134 Minn. 400, 159 N. W. 958.

A verdict for services rendered by a child held excessive. Lovell v. Beedle, 138 Minn. 12, 163 N. W. 778.

A verdict for services rendered by a child held not excessive. Wagner v. Seaberg, 138 Minn. 37, 163 N. W. 975.

Where the agreement is that the services shall not be paid for until

the parent's death, the statute of limitations does not begin to run until that event. Wagner v. Seaberg, 138 Minn. 37, 163 N. W. 975.

(39) Lovell v. Beedle, 138 Minn. 12, 163 N. W. 778; Wagner v. Seaberg, 138 Minn. 37, 163 N. W. 975.

EMANCIPATION

7309. What constitutes—Effect—The father of a pauper child is liable for his support under G. S. 1913, § 3067, though he has emancipated him. Hendrickson v. Queen, — Minn. —, 182 N. W. 952.

DEEDS AND GIFTS BETWEEN

7310. Presumptions—There is no such confidential or fiduciary relation between parent and child as to raise a presumption of fraud or undue influence in a deed from a parent to a child. Thill v. Freirmuth, 132 Minn. 242, 156 N. W. 260; Shaughnessy v. Shaughnessy, 135 Minn. 262, 160 N. W. 769.

Presumption of undue influence in conveyance from child to parent. 11 A. L. R. 735.

7311. Conveyances—Fraud and undue influence—(45) Thill v. Freiermuth, 132 Minn. 242, 156 N. W. 260 (what constitutes undue influence—burden of proof—circumstantial evidence—evidence held not to justify a finding that a deed from a father to a son was procured by undue influence); Shaughnessy v. Shaughnessy, 135 Minn. 262, 160 N. W. 769 (evidence held sufficient to justify finding of undue influence—burden of proof—erroneous charge as to burden of proof—delivery of deed—deed to take effect after death); Thill v. Freiermuth, 139 Minn. 78, 165 N. W. 490 (evidence held to justify a finding that a deed from father to son was procured by undue influence).

See § 2659 (consideration).

7312. Oral gifts of land by parent to child—(46) Drager v. Seegert, 138 Minn. 6, 163 N. W. 756. See Sons v. Sons, 145 Minn. 367, 177 N. W. 498; § 8885 (74).

PARTIES

7314. Definition—Qualifications—The term "parties" includes those who are directly interested in the subject-matter, and who have the right to control the proceedings, examine and cross-examine the witnesses, and appeal from the order or judgment finally entered. One is not a party merely because he is directly interested in the result, or has an independent claim he seeks to assert without being named as a party. State v. Tri-State T. & T. Co., 146 Minn. 247, 178 N. W. 603.

(48) Lee v. Scriver, 143 Minn. 17, 172 N. W. 802.

7314a. Stranger to action cannot take part—A stranger to an action cannot take any part therein, except to intervene or apply for leave to

become a party. Mann v. Flower, 26 Minn. 479, 5 N. W. 365; Hunt v. O'Leary, 78 Minn. 281, 80 N. W. 1120; State v. Tri-State T. & T. Co., 146 Minn. 247, 178 N. W. 603.

7316. **In equity**—(68) State v. District Court, — Minn. —, 182 N. W. 165.

7317. **Persons jointly interested**—Where, under a policy of insurance, different specific amounts are payable to different beneficiaries, their interests are several rather than joint, and each must bring a separate action for his share. Stolorow v. National Council, 132 Minn. 27, 155 N. W. 756; National Council v. Schreiber, 141 Minn. 41, 169 N. W. 272.

7319. **Wife as party**—If a wife is not made a party a judgment affecting a homestead cannot operate as a conveyance thereof. Brokl v. Brokl, 133 Minn. 218, 158 N. W. 250. See § 4289a.

7320. **Associates under common name—Statute**—The defendant union, an unincorporated voluntary association, is a trade union, having the interests and welfare of its members as an object. In addition it provides through dues received a union printers' home for infirm and invalid members, and old age pensions, and death benefits. The cause of action alleged arises from a wrongful refusal to admit the defendant to the home. Under the showing made, as set forth in the opinion, jurisdiction was acquired by service on a member of the defendant, as is provided by Gen. St. 1913, § 7689, for service when two or more do business as associates under a common name. Fitzpatrick v. International Typographical Union, — Minn. —, 184 N. W. 17.

(77) 33 Harv. L. Rev. 298.

(78, 80) See Fitzpatrick v. International Typographical Union, — Minn. —, 184 N. W. 17.

7322. **Want of capacity to sue—Remedy**—When the want of capacity to sue appears on the face of the complaint the objection must be taken by demurrer or it is waived. Stolorow v. National Council, 132 Minn. 27, 155 N. W. 756.

(90) Miller v. Maier, 136 Minn. 231, 161 N. W. 513; Dalsgaard v. Meierding, 140 Minn. 388, 168 N. W. 584.

DEFECT OF PARTIES

7323. **Demurrer or answer**—(91) Stolorow v. National Council, 132 Minn. 27, 155 N. W. 756; Posch v. Lion Bonding & Surety Co., 137 Minn. 169, 163 N. W. 131.

7324. **Objection must be specific**—(93) Lee v. Scriver, 143 Minn. 17, 172 N. W. 802; Ringquist v. Duluth, M. & N. Ry. Co., 145 Minn. 147, 176 N. W. 344.

MISJOINDER OF PARTIES

7326. **Misjoinder of parties plaintiff**—(97) See Lee v. Scriver, 143 Minn. 17, 172 N. W. 802.

SUBSTITUTION

7330. On transfer of interest—Where a plaintiff, pendente lite, assigns the proceeds of the litigation but not the cause of action, he still retains a sufficient interest therein to entitle him to continue the action as plaintiff. McKay v. Minnesota Commercial Men's Assn., 139 Minn. 192, 165 N. W. 1061.

(12) McKay v. Minnesota Commercial Men's Assn., 139 Minn. 192, 165 N. W. 1061.

(15) See McKay v. Minnesota Commercial Men's Assn., 139 Minn. 192, 165 N. W. 1061.

7331. On death of party—A non-resident cannot be substituted by a notice personally served upon him out of this state. National Council v. Scheiber, 137 Minn. 423, 163 N. W. 781; Sillerman v. National Council, 137 Minn. 428, 163 N. W. 783; National Council v. Schreiber, 141 Minn. 41, 169 N. W. 272.

Under G. S. 1913, § 7685, relating to substitution of parties on death of a party, the proceeding by motion for substitution is a substitute for the former bill of revivor, and the revival operates as a continuation of the original suit. National Council v. Scheiber, 137 Minn. 423, 163 N. W. 781.

In an action against several partners on a survivable cause of action the death of one of them does not give the others a right to have the personal representative of the deceased partner substituted. Reliable Engine Co. v. Ferch Bros., 145 Minn. 420, 177 N. W. 657.

(19) National Council v. Scheiber, 137 Minn. 423, 163 N. W. 781.

(23) See National Council v. Scheiber, 137 Minn. 423, 163 N. W. 781; Id., 141 Minn. 41, 169 N. W. 272.

See § 2621.

PARTITION

7333. Nature of action—(28) Hoerr v. Hoerr, 140 Minn. 223, 165 N. W. 472, 167 N. W. 735.

7334. When action lies—At early common law for reasons well understood, though not very satisfying, only estates in coparcenary were subject to compulsory partition. Until given a remedy by statute, joint tenants and tenants in common were without relief, unless equity assumed jurisdiction, as it early and effectively did. Courts of equity gave so much the more satisfactory relief that the early English statutes fell into disuse and were repealed. In making partition equity proceeded on equitable principles and made partition equal, when it could not be made so by equal division, by awarding compensation called owelty, charged against the greater interest given to one cotenant in favor of the lesser given to another. Hoerr v. Hoerr, 140 Minn. 223, 165 N. W. 472, 167 N. W. 735.

(35) 12 A. L. R. 644.

7336a. Equalization by compensation—Owelty—Statute—Under G. S. 1913, §§ 8038, 8039, the court may decree owelty to equalize partition though the owner receiving the larger share does not consent that his interest be charged with its payment. If the owner objects, owelty should be decreed with great caution and only when it is equitably necessary. It should not be decreed when it would be unreasonably burdensome, considering the condition of the party and the property. The statute prefers a division in specie. The supreme court will review a decree of owelty as freely as the general rule of appellate jurisdiction will permit. Hoerr v. Hoerr, 140 Minn. 23, 165 N. W. 472, 167 N. W. 735.

The statute discourages owelty to equalize partition. Keyser v. Hage, 143 Minn. 447, 174 N. W. 305.

7338. Pleading—(39) Getchell v. Freeman, 136 Minn. 476, 162 N. W. 463 (pleadings held to authorize determination of taxes).

7340a. Mortgage on interest of tenant in common—Where a tenant in common has given a mortgage on his undivided interest in the fee the court may shift the mortgage to the portion alloted to him, the mortgagee not complaining. In case of a sale the mortgage should be paid out of the portion of the proceeds awarded to the mortgagor. Hunt v. Meeker County Abstract & Loan Co., 135 Minn. 134, 160 N. W. 496.

7340b. Report of referees—Confirmation—Vacation—Where three referees are appointed by the court to make a partition of real estate, a partition reported and concurred in by two of them is valid and binding if approved by the court. The statute does not require such referees to make and report findings of evidentiary facts. The report has the force and effect of a verdict, and, where it has been approved by the trial court, it will not be set aside by this court on the ground that the referees erred in judgment unless manifestly inequitable. Robbins v. Hobart, 133 Minn. 49, 157 N. W. 908. See Hoerr v. Hoerr, 140 Minn. 223, 165 N. W. 472, 167 N. W. 735.

7341. Repairs and improvements—Reimbursement—Where a permanent improvement has been erected by one cotenant with the consent of the other, the court, in a case of partition, where a division is practicable, may award that portion of the land upon which the improvement is to the one who erected it, without taking its value into consideration, provided no injustice results to the other cotenant; but, if a division cannot be had and a sale is necessary, the court may determine in what amount the present value of the whole is enhanced by reason of such improvement, and direct that out of the proceeds of the sale the amount so determined be paid to the cotenant who made the improvement. The relation of landlord and tenant did not exist between the predecessors in interest of the parties hereto, so that the defendant is precluded from making a claim for the enhanced value given to the property by reason of the vault thereon erected by its predecessor in interest. Hunt v.

Meeker County Abstract & Loan Co., 135 Minn. 134, 160 N. W. 496. See 1 A. L. R. 1189.

(43) Hunt v. Meeker County Abstract & Loan Co., 135 Minn. 134, 160 N. W. 496.

7342. **Costs, charges and disbursements—Attorney's fees**—An equal apportionment of costs and disbursements has been held erroneous against a party who was not the prevailing party on the real issue tried. Hunt v. Meeker County Abstract & Loan Co., 135 Minn. 134, 160 N. W. 496.

(44) Hunt v. Meeker County Abstract & Loan Co., 135 Minn. 134, 160 N. W. 496. See Getchell v. Freeman, 136 Minn. 476, 162 N. W. 463 (apportionment of taxes).

7343. **Sale**—A sale should be ordered cautiously and only when equitably necessary. The statute prefers a division in specie. Hoerr v. Hoerr, 140 Minn. 223, 165 N. W. 472, 167 N. W. 735.

The statute prefers a partition of lands in kind to a sale of them and a division of the proceeds. A sale may be had when partition cannot be had without great prejudice to the owners. The evidence in this case tended to show difficulty in dividing the land sought to be partitioned into portions of equal value. There was an incumbrance covering the whole. The evidence sustains a finding that a partition could not be had without great prejudice and justifies a sale. Keyser v. Hage, 143 Minn. 447, 174 N. W. 305.

(46) Hunt v. Meeker County Abstract & Loan Co., 135 Minn. 134, 160 N. W. 496.

7344. **Evidence—Sufficiency**—(49) Getchell v. Freeman, 136 Minn. 476, 162 N. W. 463; Keyser v. Hage, 143 Minn. 447, 174 N. W. 305.

PARTNERSHIP

IN GENERAL

7345a. **Uniform Partnership Act**—The law of partnership in this state is now largely governed by the Uniform Partnership Act. Laws 1921, c. 487.

7346. **What constitutes**—Defendant Richardson-Kellett Company, a corporation, and the individual defendants, entered into an agreement by the terms of which the individual defendants were to furnish the money to purchase lands under an option held by the corporation, and to finance the sale of the lands; the corporation was to employ agents and manage the sale of the lands, the profits to be divided equally. This agreement construed and held to create a partnership between the corporation and the individual defendants. Plaintiff's contract to act as agent for the sale of the lands was made with the corporation only. There is no allegation that he knew that the individual de-

fendants were interested in the enterprise. Held, that this does not bar his right to recover of the individual defendants on the theory that there was a partnership. That the corporation was to have exclusive charge of selling the lands is not important. The individual defendants cannot escape the liability of a partner by the plea that the corporation was not authorized to enter into a partnership. Moore v. Thorpe, 133 Minn. 244, 158 N. W. 235.

A certain contract whereby one person agreed to furnish to another money for the purchase of materials and the payment of labor necessary for the latter to carry out a building contract, held not to create the relation of partnership. National Surety Co. v. Winslow, 143 Minn. 66, 173 N. W. 181.

A sharing of profits does not necessarily make a partnership. Hammel v. Feigh, 143 Minn. 115, 173 N. W. 570.

An agreement by two parties to combine their money and efforts and skill and knowledge and purchase land for the purpose of reselling or dealing with it at a profit is a partnership agreement or a joint adventure having in general the legal incidents of a partnership. Hammel v. Feigh, 143 Minn. 115, 173 N. W. 570.

(51) Moore v. Thorpe, 133 Minn. 244, 158 N. W. 235; National Surety Co. v. Winslow, 143 Minn. 66, 173 N. W. 181; Hammel v. Feigh, 143 Minn. 115, 173 N. W. 570.

(52) Moore v. Thorpe, 133 Minn. 244, 158 N. W. 235.

(53) Moore v. Thorpe, 133 Minn. 244, 158 N. W. 235; Hammel v. Feigh, 143 Minn. 115, 173 N. W. 570.

See Laws 1921, c. 487, §§ 6, 7.

7347. Not a separate person or entity—A partnership has not separate legal entity apart from the individual members thereof and the partnership is bound by the individual transactions of its members when had in the interest of firm affairs. Twin City Brief Printing Co. v. Review Pub. Co., 139 Minn. 358, 166 N. W. 413.

(60) See 28 Harv. L. Rev. 762; 29 Id. 158, 291, 838.

7348. Partnership by estoppel or holding out—(61) Wise v. Morrissey, 135 Minn. 481, 160 N. W. 487; Alton v. Electric Mfg. Co., 142 Minn. 358, 172 N. W. 212. See Laws 1921, c. 487, § 16.

7348a. Undisclosed partners—One dealing with a partnership may hold undisclosed partners on the same principle that an undisclosed principal may be held. Moore v. Thorpe, 133 Minn. 244, 158 N. W. 235.

7349. Evidence—Admissibility—Reputation to prove partnership. L. R. A. 1918D, 505.

7349a. Evidence—Sufficiency—Evidence held to justify a finding of a partnership. Altona v. Electric Mfg. Co., 142 Minn. 358, 172 N. W. 212.

Evidence held to justify a finding of a partnership to purchase a particular tract of land upon which there was a mine. Hammel v. Feigh, 143 Minn. 115, 173 N. W. 570.

7349b. Law and fact—Whether there was a partnership is a question for the jury, unless the evidence is conclusive. Miller Publishing Co. v. Orth, 133 Minn. 139, 157 N. W. 1083.

7349c. For what purposes may be organized—A partnership may be formed to acquire and hold stock in a corporation, but a partnership cannot do business as a corporation. Seitz v. Michel, 148 Minn. —, 181 N. W. 102.

7349d. Name—The firm name is an element of the partnership enterprise, a substantial asset thereof, and passes with a sale of the firm property and good will. Twin City Brief Printing Co. v. Review Pub. Co., 139 Minn. 358, 166 N. W. 416.

THE CONTRACT

7357. Particular contracts construed—(81) Moore v. Thorpe, 133 Minn. 244, 158 N. W. 235 (partnership to purchase and sell lands).

POWER OF PARTNER TO BIND FIRM

7358. In general—Whether a contract was made before or after the defendants formed a partnership held a question for the jury. Miller Publishing Co. v. Orth, 133 Minn. 139, 157 N. W. 1083.

A partnership has no separate legal entity apart from the individual members thereof and the partnership is bound by the individual transactions of its members when had in the interest of firm affairs. Twin City Brief Printing Co. v. Review Pub. Co., 139 Minn. 358, 166 N. W. 413.

Where one partner who has exclusive management of the partnership business makes a contract on behalf of the partnership, the other partner cannot relieve himself from liability thereon by showing that he had no knowledge of the making of the contract unless he also shows that it was outside the scope of the partnership business. Kenyon Co. v. Johnson, 144 Minn. 48, 174 N. W. 436.

Personal liability of partner contracting without authority. 4 A. L. R. 258.

(82) Miller Publishing Co. v. Orth, 133 Minn. 139, 157 N. W. 1083 (action for publication of advertisement of products of a flour mill by trade journal—contract made by one of three persons who had entered into an agreement for leasing, refitting and possibly operating a mill—if the agreement was for operating the mill the contract for advertising was within the scope of the firm business—if it was merely for leasing and refitting the mill the contract was not within the scope of the firm business—facts held for the jury—verdict for defendants sustained).

(83) Miller Publishing Co. v. Orth, 133 Minn. 139, 157 N. W. 1083.

(84) Twin City Brief Printing Co. v. Review Pub. Co., 139 Minn. 358, 166 N. W. 413.

See Laws 1921, c. 487, § 9.

7362. **Notice to one notice to all**—(89) Minnesota Loan & Trust Co. v. Peteler Car Co., 132 Minn. 277, 289, 156 N. W. 255. See Laws 1921, c. 487, § 12.

7367. **Held to have implied power**—(2) L. R. A. 1918A, 927.

7370. **Torts**—(14) McIntyre v. Kavanaugh, 242 U. S. 138. See Smith v. O'Dean, 132 Minn. 361, 157 N. W. 503 (fraud); Laws 1921, c. 487, § 13.

7372. **After dissolution**—See Laws 1921, c. 487, § 33.

7373. **Liability of new partner**—By entering into a firm one does not become personally liable for the previous frauds of other members of the firm. Smith v. O'Dean, 132 Minn. 361, 157 N. W. 503.
See Laws 1921, c. 487, § 17.

RIGHTS AND LIABILITIES INTER SE

7374. **Duty to observe good faith**—The rule of good faith does not prevent a partner from buying assets of the firm from an assignee for the benefit of creditors, in case there is no fraud or collusion. Johnson v. Bruzek, 142 Minn. 454, 172 N. W. 700.
(20) Lundquist v. Peterson, 134 Minn. 279, 158 N. W. 426, 159 N. W. 569; Johnson v. Bruzek, 142 Minn. 454, 172 N. W. 700.

7377. **Right to share in profits**—Action to recover a share of profits on a sale of land on the theory that there was a partnership agreement that the net profits should be treated as partnership earnings. Verdict for plaintiff. Order denying a new trial affirmed. Lewis v. Lawton, — Minn. —, 183 N. W. 517.

7379. **Management of business**—(28) Moore v. Thorpe, 133 Minn. 244, 158 N. W. 235. See Laws 1921, c. 487, § 18.

7380a. **Transactions between—Fraud**—Evidence held to justify a finding that defendants made fraudulent representations to plaintiff, at the time he transferred to them his interest in a partnership composed of defendants and plaintiff, as to the value of the firm property and the condition of the business, and concealed from him that they had used firm funds in acquiring property in their own names, and that plaintiff believed and relied on such representations and was induced thereby to make the transfer. Lundquist v. Peterson, 134 Minn. 279, 158 N. W. 426, 159 N. W. 569.

FIRM PROPERTY

7383. **Effect of conveyance to partnership**—Effect of designating grantee in deed or mortgage by firm name. 1 A. L. R. 564.
(44) See Glaze v. Stryker, 135 Minn. 186, 160 N. W. 490.

DISSOLUTION

7388. What effects—(52) Johnson v. Bruzek, 142 Minn. 454, 172 N. W. 700.

See Laws 1921, c. 487, § 31.

7389. Contracts for dissolution—Construction—The evidence sustains the finding that the contract for settlement of the partnership between plaintiff and defendant was not procured by fraudulent misrepresentations of plaintiff. Lines v. Wilson, 148 Minn. —, 181 N. W. 202.

(56) Lines v. Wilson, 148 Minn. —, 181 N. W. 202 (contract held to transfer to defendant all firm personalty including moneys on hand or on deposit and outstanding accounts—contract held not to require repayment or refund of amount paid for interest in the equity in the store where the business was conducted—in contract of dissolution defendant transferred all his interest in this real estate to plaintiffs).

7391. On death of partner—(58) Reliable Engine Co. v. Ferch Bros., 145 Minn. 420, 177 N. W. 657. See Laws 1921, c. 487, § 31.

7396. Powers and duties of surviving partners—A common-law assignment for the benefit of creditors made by copartners dissolves the partnership. After dissolution copartners occupy a fiduciary relation to one another while winding up the affairs of the partnership and making distribution of partnership effects, but are not disqualified because of their relationship from individually purchasing the assets of the firm when offered for sale by their assignee. If there was no fraud or collusion, a sale so made to one partner cannot be questioned by the others Johnson v. Bruzek, 142 Minn. 454, 172 N. W. 700.

(69) Reliable Engine Co. v. Ferch Bros., 145 Minn. 420, 177 N. W. 657.

7401. Distribution of assets—Right of partner to preference over creditors of copartner. 6 A. L. R. 160.

Division where one partner contributes services only. L. R. A. 1917E, 877.

See Laws 1921, c. 487, § 40.

7403. Accounting—(82) Lundquist v. Peterson, 134 Minn. 279, 158 N. W. 426, 159 N. W. 569 (fraud—no book accounts—use of firm funds in private business—held proper to allow plaintiff for the amount of his original investment, with interest, less sum received by him from firm—interest on advances and withdrawals how computed); Johnson v. Huhn, 137 Minn. 3, 162 N. W. 679 (milling business—findings held justified by the evidence); Lundquist v. Peterson, 138 Minn. 484, 165 N. W. 138 (case remanded with directions as to certain credits to be allowed).

See Laws 1921, c. 487, §§ 29-43.

7404. Receiver—Where there is enmity between partners or fraud and mismanagement a receiver may be appointed to wind up the affairs of the

partnership. See Green v. National Advertising & Amusement Co., 137 Minn. 65, 162 N. W. 1056.

The appointment of a receiver rests in the discretion of the trial court. Dahoot v. Colby, 146 Minn. 470, 177 N. W. 763.

ACTIONS

7406. Between partners—An action on a book account owing by one partner to the firm and included in the transfer of its assets to his former copartners cannot be defeated on the ground that it grew out of partnership transactions, and that the business has not been wound up. Johnson v. Bruzek, 142 Minn. 454, 172 N. W. 700.

Action by one partner against another for conversion of firm property. L. R. A. 1918F, 1125.

(89) See Johnson v. Bruzek, 142 Minn. 454, 172 N. W. 700.

PARTY WALLS

7412. In general—(6) See Hanson v. Beaulieu, 145 Minn. 119, 176 N. W. 178.

7413. Easement—(11) Hanson v. Beaulieu, 145 Minn. 119, 176 N. W. 178.

7415a. Liability for cost—Conveyance without payment—Injunction—The owners of adjoining lots made an oral agreement that the one who contemplated building on his lot might place one 12-inch stone and brick wall of the building with its center line on the division line between the two lots; that the builder should own the whole wall until the nonbuilder paid one-half of the cost of its contruction; that upon such payment being made he should be entitled to join any building he might erect to the wall and it should become a party wall. The wall was constructed as agreed; the nonbuilder conveyed without paying one-half of the cost and without erecting any structure upon his lot; one claiming through him undertook to erect a building and sink holes for joists in the wall without making payment. In this action to enjoin him, held, that the builder having fully performed acquired property rights in the wall that equity protects, although the agreement came within the statute of frauds; that the showing is sufficient that appellant had knowledge of the agreement when accepting the conveyance, and the wall itself was notice to put the buyer upon inquiry as to the occupant's rights; that the injury or trespass threatened by appellant was of a permanent nature to respondents' property rights and the temporary injunction was properly allowed; and that the injury may be considered irreparable. Hanson v. Beaulieu, 145 Minn. 119, 176 N. W. 178. See 4 Minn. L. Rev. 370.

7416. Contracts construed—(16) Hanson v. Beaulieu, 145 Minn. 119, 176 N. W. 178 (liability for cost).

PATENTS

7418. **Control of Congress exclusive—State legislation**—Chapter 140, Session Laws of South Dakota for the year 1905, by which all obligations taken in that state as and for the purchase price of patent rights, or rights claimed to be patent rights, construed, and held not to apply to obligations taken for the purchase of patented articles, as distinguished from the purchase of the patent or an interest therein. Granite City Bank v. Tvedt, 146 Minn. 12, 177 N. W. 767.

(19) See Granite City Bank v. Tvedt, 146 Minn. 12, 177 N. W. 767.

PAUPERS

7426. **Liability of relatives**—Evidence held not to show that a son of defendant to whom plaintiff rendered medical and surgical aid was a poor person unable to earn a livelihood within the meaning of G. S. 1913, § 3067. Brabec v. Boedigheimer, 132 Minn. 370, 157 N. W. 509. See L. R A. 1915F, 844.

The father of a minor, whom he has emancipated, is not thereby relieved from the obligation to support an indigent child imposed by section 3067, G. S. 1913. Hendrickson v. Queen, — Minn. —, 182 N. W. 952.

(31) Hendrickson v. Queen, — Minn. —, 182 N. W. 952.

7427. **Municipal liability**—The statutory law of this state is that every poor person shall be supported by his relatives named in the statute, in the order in which they are named; that if they refuse or fail to support him, he shall receive such relief as he may require from the county, town, city or village in which he has a settlement; that a minor, not emancipated and settled in his own right, shall have the same settlement as the parent with whom he last resided; and that whenever a person not having a legal settlement in the municipality where he is taken sick is in need of immediate relief, and is unable to depart therefrom, and is so sick as to render it unsafe or inhuman to remove him, he shall receive relief from such municipality. The expense incurred becomes a charge on the county, and it may recover the same from the municipality in which such person has his settlement. Sections 3067, 3069, 3071, 3096, G. S. 1913. Hendrickson v. Queen, — Minn. —, 182 N. W. 952.

The serious illness of a minor, born out of wedlock and residing with an uncle in the defendant town necessitated his removal to a hospital, where he was nursed by the plaintiff. She requested his alleged father to pay for her services after a stated time, but he declined. She then requested the defendant town to pay her, but it also declined. Held, that she was entitled to recover from the town, whether the minor had

a legal settlement therein or not, and without reference to the question of his paternity. Hendrickson v. Queen, — Minn. —, 182 N. W. 952.

7428a. Liability of county—Under Rev. Laws 1905, § 1511, subd. 2, in a county where the town system of caring for the poor is in force, the ultimate liability for the care of a pauper, who has no legal settlement anywhere in this state for the purposes of poor relief, does not rest upon the county in which is located the town where the pauper is when he becomes a charge. Iona v. Todd County, 135 Minn. 183, 160 N. W. 669.

7429. Actions between municipalities—(36, 37) Hendrickson v. Queen, — Minn. —, 182 N. W. 952.

(40) See Iona v. Todd County, 135 Minn. 183, 160 N. W. 669.

7430. Settlement—A minor, not emancipated and without a settlement in his own right, has the same settlement as the parent with whom he last resided. Hendrickson v. Queen, — Minn. —, 182 N. W. 952.

PAYMENT

IN GENERAL

7439a. To one not authorized to receive it—Effect—Payment to one not authorized to receive it does not discharge a debt. Trustees v. Merchants Nat. Bank, 139 Minn. 80, 165 N. W. 491.

7440. To joint obligees—Facts held not to bring a case within the general rule that payment to one of several joint obligees discharges the debt. Trustees v. Merchants Nat. Bank, 139 Minn. 80, 165 N. W. 491.

MEDIUM OF PAYMENT

7444. By promissory note—A promissory note given for an antecedent debt does not discharge the debt unless expressly given and received as absolute payment, and the burden of proof is upon the party asserting the fact to show that it was so given and received. That fact was not shown in this case. Way v. Mooers, 135 Minn. 339, 160 N. W. 1014.

The giving of notes for an antecedent debt, with the added signature of a new party, is not absolute payment unless the parties so agree. Mikolas v. Val Blatz Brewing Co., 147 Minn. 230, 180 N. W. 109.

(68, 72) Way v. Mooers, 135 Minn. 339, 160 N. W. 1014; Mikolas v. Val Blatz Brewing Co., 147 Minn. 230, 180 N. W. 109.

7445. By check—(77) J. I. Case Threshing Machine Co. v. Barbagos, 143 Minn. 8, 172 N. W. 882; Johnson v. First State Bank, 144 Minn. 363, 175 N. W. 612.

7446. By draft—When a debtor gives his creditor an order on his bank to pay an indebtedness, having money at the bank to pay it on presentation, and the creditor waives the right to demand cash and accepts bills of exchange from the bank in payment, the debt is satisfied, though the exchange proves worthless. Johnson v. First State Bank, 144 Minn. 363, 175 N. W. 612.

TIME OF PAYMENT

7448. Extension—A creditor cannot declare a forfeiture for non-payment during the time for which he has given an extension of time of payment, though the extension was without consideration. Reinkey v. Findley Electric Co., 147 Minn. 161, 180 N. W. 236.

RECEIPTS

7455. As evidence against strangers—(99) Enkema v. McIntyre, 136 Minn. 293, 161 N. W. 587. See Rux v. Adam, 143 Minn. 35, 172 N. W. 912 (recital of consideration in a deed).

APPLICATION OF PAYMENTS

7457. By the parties—The parties may by agreement apply a payment to a particular debt so as to create an equitable assignment of the money and give one of the parties a perfect legal title thereto. Slimmer v. State Bank, 134 Minn. 349, 159 N. W. 795.

7458. By the court—The general rule that where there is a single or continuous account consisting of several items, payments will be applied according to priority of time, does not apply where a third party has a superior and controlling equity entitling him to a different order of application. L. J. Mueller Furnace Co. v. Colvin, 146 Minn. 252, 178 N. W. 496.

(13) L. J. Mueller Furnace Co. v. Burkhart, — Minn. —, 182 N. W. 909. See Burnside v. Craig, 140 Minn. 404, 168 N. W. 175; L. J. Mueller Furnace Co. v. Colvin, 146 Minn. 252, 178 N. W. 496.

(14) 31 Harv. L. Rev. 311.

7460. Change of application—(21) L. J. Mueller Furnace Co. v. Colvin, 146 Minn. 252, 178 N. W. 496.

RECOVERY OF PAYMENTS

7461. Voluntary payments—The general rule applies to voluntary payments of rent. Thomas Peebles & Co. v. Sherman, 148 Minn. —, 181 N. W. 715.

(23) Thomas Peebles & Co. v. Sherman, 148 Minn. —, 181 N. W. 715.

(26) See Minneapolis Brewing Co. v. Bagley, 142 Minn. 16, 170 N. W. 704.

See § 4917 (recovery of license fees).

7462. Involuntary payments—Duress—(29) See 34 Harv. L. Rev. 791.

7464. Payments under mistake of fact—Relief will sometimes be denied where the payment is made on a known uncertainty rather than on a mutual mistake concerning the assumed existence of a fact, or where the fact is doubtful from its own nature. Eastman v. St. Anthony Falls Water Power Co., 24 Minn. 437; Becthold v. King, 134 Minn. 105, 158 N. W. 910.

Overpayment made under a mutual mistake of fact may be recovered, especially when the case presents a basis upon which the amount of the overpayment may be determined. Becthold v. King, 134 Minn. 105, 158 N. W. 910.

A recovery has been sustained where property descended to several children, two of whom were supposed to be dead, and one of the children bought out the interests of the other children and subsequently one of the children supposed to be dead returned and claimed his share of the estate. It was held that the purchaser from the other children might recover the excess paid for their respective shares. Becthold v. King, 134 Minn. 105, 158 N. W. 910.

Money paid under a mutual mistake of fact and without consideration may be recovered back unless defendant, in reliance upon the payment, has materially altered his position so that to compel repayment would be against conscience. Grand Lodge v. Towne, 136 Minn. 72, 161 N. W. 403.

Money paid under a mutual mistake of fact cannot be recovered back where the defendant, before discovery of the mistake, has in good faith paid the money over to a third party who, so far as he is concerned, is entitled to it. Grand Lodge v. Towne, 136 Minn. 72, 161 N. W. 403.

Where A forged a note and mortgage and procured money from B thereon and then forged another note and mortgage on the same land and procured a larger amount of money thereon from C, a part of which C paid to B in payment of the first mortgage, it was held that C might recover such payment from B, both C and B being ignorant of the forgeries and without negligence when they parted with their money. Grand Lodge v. Towne, 136 Minn. 72, 161 N. W. 403.

(46) Becthold v. King, 134 Minn. 105, 158 N. W. 910.

(48) Grand Lodge v. Towne, 136 Minn. 72, 161 N. W. 403.

(49) L. R. A. 1917E, 349 (altered position of payee).

7465. Payments under mistake of law—(50) See Becthold v. King, 134 Minn. 105, 158 N. W. 910; Minneapolis Brewing Co. v. Bagley, 142 Minn. 16, 170 N. W. 704.

7465a. Payments under illegal contracts—Money paid upon an illegal contract may sometimes be recovered as for money had and re-

ceived, where there has been a partial performance of the contract by the other party. Ditkof v. Lifshitz, 141 Minn. 88, 169 N. W. 483.

PLEADING

7468. In general—In an action on a note, where the complaint alleges non-payment, a general denial does not raise a material issue thereon. Payment must be pleaded by the defendant as new matter. First State Bank v. Utman, 136 Minn. 103, 161 N. W. 398.

A party sued for a balance due must plead partial payment. If he fails to do so he will be concluded in a subsequent action. Peltier v. Nadeau, 138 Minn. 126, 164 N. W. 578.

(54) First State Bank v. Utman, 136 Minn. 103, 161 N. W. 398.

(56) Lankester v. Fine, 134 Minn. 330, 159 N. W. 662.

(57) Contra, First State Bank v. Utman, 136 Minn. 103, 161 N. W. 398.

PENALTIES

7469. Definition—(62) See Patterson v. Wyman, 142 Minn. 70, 170 N. W. 928.

PERJURY

7475a. Evidence—Admissibility—Testimony tending to show that defendant participated in the fruits of bribery in connection with the case in which he is alleged to have given false testimony was proper. State v. Storey, — Minn. —, 182 N. W. 613.

Perjury may be proved by circumstantial evidence if it establishes guilt beyond a reasonable doubt. State v. Storey, — Minn. —, 182 N. W. 613.

PERPETUITIES

7480. Restraints on alienation—The common law of perpetuities is superseded by the statute, but the word "perpetuities" is retained in common use to designate restraints on alienation forbidden by the statute. Mineral Land Investment Co. v. Bishop Iron Co., 134 Minn. 412, 159 N. W. 966.

A fifty-year option for a thirty-year mining lease held not to offend the statute against perpetuities. Mineral Land Investment Co. v. Bishop Iron Co., 134 Minn. 412, 159 N. W. 966.

A devise of a remainder in fee to a son of the testator "provided that he shall not sell the said described premises for five years after his father's death," does not violate the statute against perpetuities as the restriction is imposed on the son only and would terminate at his

death, but the restriction is void as repugnant to the grant of a remainder in fee. House v. O'Leary, 136 Minn. 126, 161 N. W. 392.

The statute is inapplicable to burial lots in cemeteries. In re Little's Estate, 143 Minn. 298, 173 N. W. 659.

A trust to invest funds for the benefit of a class, as provided by subdivision 5, § 6710, G. S. 1913, is not invalid because it may suspend the power of alienation beyond the period fixed by statute, where personal property only is the subject of the trust. In re Bell's Will, 147 Minn. 62, 179 N. W. 650. See 34 Harv. L. Rev. 650.

(84) See 1 Minn. L. Rev. 154; 3 Id. 39.

PHYSICIANS AND SURGEONS

REGULAR PHYSICIANS AND SURGEONS

7482. Definition—(98) See State v. Rolph, 140 Minn. 190, 167 N. W. 553.

7483. Regulation—License—An indictment under G. S. 1913. § 4981, held sufficient though not in commendable form. State v. Rolph, 140 Minn. 190, 167 N. W. 553.

The act of a person who styles himself a doctor, in receiving a patient who has applied to him for medical attention, and examining such person and diagnosing his ailment or disease and recommending an operation as treatment therefor, is practicing medicine within the meaning of our statute, prohibiting the practice thereof without license, though he prescribes no drug and administers no specific treatment to the patient. State v. Rolph, 140 Minn. 190, 167 N. W. 553.

An indictment charging that, at a certain time and place, the person named therein did unlawfully practice medicine, and for a fee prescribe, direct, and recommend certain drugs and medicine for use and medicinal treatment (of a certain person) without a license so to do, states an offence under section 4981, G. S. 1913. Nor is it necessary, under such statute, that the indictment negative the exceptions in the statute; such exceptions not appearing in the enacting clause of the act. State v. Bohl, 144 Minn. 437, 175 N. W. 915.

(2) See 5 A. L. R. 94 (power to revoke license).

(7) State v. Rolph, 140 Minn. 190, 167 N. W. 553.

7483b. Existence of relation of physician and patient—Plaintiff's employer had an arrangement with defendants, physicians, who operated a hospital in Cloquet, by which the employer deducted a certain sum each month from the pay of each employee, and turned over the sums so deducted to defendants, who agreed, for such compensation to care for and treat all injured employees which the employer should send to them. Plaintiff was injured, and was taken to defendants' hospital and treated by them under this arrangement. Held, that the relation of patient and physician existed between plaintiff and defendants, and

that the latter owed plaintiff the duty to exercise ordinary care and skill in treating him. Viita v. Fleming, 132 Minn. 128, 155 N. W. 1077.

7485. Actions for services—(9) Cannon v. Minneapolis & St. L. R. Co., 136 Minn. 473, 162 N. W. 355 (no evidence that services rendered in aid of person injured while attempting to climb through defendant's freight train at a street crossing were rendered at the request of defendant).

DENTISTS

7486a. Negligence—In an action for negligence in doing dental work, held, that whether the treatment was proper and whether plaintiff's suffering was due to his own wilful insistence or to the negligence of defendant were questions of fact for the jury; that the evidence justified a verdict for plaintiff; that there were no substantial errors in the charge or in the admission or exclusion of evidence. Skar v. McKenney, 135 Minn. 477, 160 N. W. 247.

MALPRACTICE

7488. Standard of conduct—The locality affects somewhat the degree of skill and learning required, but the test is not the degree of skill and learning possessed by members of the profession in the particular town or city, but rather in similar localities or communities. Viita v. Fleming, 132 Minn. 128, 155 N. W. 1077.

Where an X-ray is applied to obtain information and not for curative purposes the care required is ordinary care, and it is not important whether the operator is a physician or not. Holt v. Ten Broeck, 134 Minn. 458, 159 N. W. 1073.

The duty of a physician to exercise care is not dependent upon an express contract of employment. It may arise wholly independent of contract. Skillings v. Allen, 143 Minn. 323, 173 N. W. 663.

A hospital physician is liable for negligence the same as one in private practice. See Mulliner v. Evangelischer etc. Synod, 144 Minn. 392, 175 N. W. 699.

The skill and diligence which the law requires of a physician or surgeon is such as is usually exercised by others of the same school. He is not ordinarily liable for mistake of judgment unless it is so marked as to constitute negligence. If a surgeon persists in the use of an anæsthetic after warning which would impel one of reasonable prudence to desist, he should be held to answer for the consequences. Moehlenbrock v. Parke, Davis & Co., 145 Minn. 100, 176 N. W. 169.

(17) Viita v. Fleming, 132 Minn. 128, 155 N. W. 1077; Moehlenbrock v. Parke, Davis & Co., 145 Minn. 100, 176 N. W. 169; Hayes v. Lufkin, 147 Minn. 225, 179 N. W. 1007; Clark v. George, 148 Minn. —, 180 N. W. 1011.

(19) Holt v. Ten Broeck, 134 Minn. 458, 159 N. W. 1073.

(20) Moehlenbrock v. Parke, Davis & Co., 145 Minn. 100, 176 N. W. 169.

7488a. Infectious diseases—Advice as to character of—A complaint states a cause of action when it is alleged therein that defendant, a physician, was employed by plaintiff to attend his minor daughter professionally while she was sick; that, knowing that the child's disease was scarlet fever, he negligently advised plaintiff's wife, who inquired in his behalf as well as in her own, that it was safe to visit the child, then in a hospital and under defendant's care; that he also advised her that it was safe to remove the child from the hospital to plaintiff's home, and that there was no danger that the disease would be communicated, although it was then at a stage when great danger of infection existed; and that plaintiff and his wife did not know of the infectious nature of the disease and relied on defendant's advice, and accordingly visited their child at the hospital and removed her to their home, and plaintiff thereby contracted scarlet fever to his damage. Skillings v. Allen, 143 Minn. 323, 173 N. W. 663.

7488b. Repetition of visits—Occasional calls—Continuance of treatment—A physician, if called generally, must give continued attention as the condition of the patient requires; if called only for an occasion he owes no duty to repeat his visit or continue his treatment. The evidence shows that defendant Portmann was called for particular occasions only. This did not affect his liability for what occurred on the occasions of his visits, but concerned only the question whether he owed a duty to give continued attendance. He was not liable for what was done by others during his absence. Nelson v. Farrish, 143 Minn. 368, 173 N. W. 715.

7489. Various forms of malpractice considered—Treating a fractured leg. Failure to use fracture box, or to take X-ray, or to apply an extension weight. Imperfect approximation of fractured ends of bones. Eversion of foot. Viita v. Fleming, 132 Minn. 128, 155 N. W. 1077.

Leaving gauze packs or sponges and a portion of a rubber drainage tube in a patient's body after an abdominal surgical operation. Baer v. Chowning, 135 Minn. 453, 161 N. W. 144.

Leaving hot flat irons in a bed with a mother and newly born baby whereby the baby was burned. Dalsgaard v. Meierding, 140 Minn. 388, 168 N. W. 584.

Administering impure ether for a surgical operation. Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541.

Treatment of osteomyelitis in the radius of a child. Nelson v. Farrish, 143 Minn. 368, 173 N. W. 715.

Manipulation of an arm. Nelson v. Farrish, 143 Minn. 368, 173 N. W. 715.

Administering unfit ether and improper care of patient after ether had been administered. Moehlenbrock v. Parke, Davis & Co., 145 Minn. 100, 176 N. W. 169.

Advising parents that they might safely receive a child into their home who had been treated for scarlet fever at defendant's hospital,

representing that the child had past the stage at which she might communicate the disease. Skillings v. Allen, 148 Minn. —, 180 N. W. 916.

Diagnosing a case of diphtheria as quinsy and lansing the throat of the patient. Clark v. George, 148 Minn. —, 180 N. W. 1011.

(22) Peterson v. Branton, 137 Minn. 74, 162 N. W. 895.

(27) Hayes v. Lufkin, 147 Minn. 225, 179 N. W. 1007.

7489a. Wrong diagnosis—One of the first duties of a physician called to attend a patient is to make a proper diagnosis and ascertain the patient's trouble, and a physician failing to bring to his diagnosis the proper degree of skill and care so as to enable him to administer the proper remedy is guilty of neglect of duty. Thorkeldson v. Nicholson, 145 Minn. 491, 175 N. W. 1008; Clark v. George, 148 Minn. —, 180 N. W. 1011.

7489b. Refusing operation—Instructions—Action for malpractice in treatment of a child afflicted with osteomyelitis in the radius. It appears that the proper treatment was by operation. The court instructed the jury that if defendants made a correct diagnosis and advised an operation and it was refused, defendants were not liable, that if they failed to diagnose and treat the child with reasonable skill, and such failure resulted in injury, they were liable for damages. Under the evidence the instruction was proper. The question whether plaintiff had proved that a better result would have followed an operation was in the case. The evidence is such as to sustain a verdict for defendants. Nelson v. Farrish, 143 Minn. 368, 173 N. W. 715.

7489c. Refusal of patient to follow treatment prescribed—Where a patient refuses to submit to the reasonable treatment prescribed by a surgeon, from that time on the fault is with the patient, and not with the surgeon. Peterson v. Branton, 137 Minn. 74, 162 N. W. 895.

7489d. Assistant of physician—Defendant Portmann's son treated the child on occasions and performed an operation. There is no claim of malpractice on his part and it is immaterial whether defendant Portmann was answerable for his acts. Nelson v. Farrish, 143 Minn. 368, 173 N. W. 715.

7490b. Limitation of actions—The action is not governed by the two-year statute of limitations applicable to actions for an assault, though it may involve an assault. Burke v. Mayland, — Minn. —, 184 N. W. 32.

7491. Burden of proof—(33) Nelson v. Farrish, 143 Minn. 368, 173 N. W. 715.

7491a. Proximate cause—Whether the negligence of the defendant caused the death of the patient held a question for the jury. Clark v. George, 148 Minn. —, 180 N. W. 1011.

7492. Burden of proof—(35) Baer v. Chowning, 135 Minn. 453, 161 N. W. 144; Thorkeldson v. Nicholson, 145 Minn. 491, 175 N. W. 1008; Clark v. George, 148 Minn. —, 180 N. W. 1011.

7493. Damages—(39) Viita v. Fleming, 132 Minn. 128, 155 N. W. 1077; Baer v. Chowning, 135 Minn. 453, 161 N. W. 144; Hayes v. Lufkin, 147 Minn. 225, 179 N. W. 1007.

7494. Evidence—Admissibility—In general—(40) Viita v. Fleming, 132 Minn. 128, 155 N. W. 1077 (expert may give his opinion, based on the result, that the treatment must have been improper—held proper under the pleadings to permit expert to testify as to the propriety of taking X-ray photographs); Peterson v. Branton, 137 Minn. 74, 162 N. W. 895 (where a patient refuses to submit to the reasonable treatment prescribed by his surgeon the surgeon may give in evidence his opinion of what the result would have been had the treatment which he prescribed been followed—evidence admissible under general denial); Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541 (action against surgeons and manufacturer of ether—identification of ether—analysis of ether—medical treatise—experiments—expert testimony); Moehlenbrock v. Parke, Davis & Co., 145 Minn. 100, 176 N. W. 169 (effect of use of ether from same container); Thorkeldson v. Nicholson, 145 Minn. 491, 175 N. W. 1008 (statement of physician in nature of admission that patient had been wrongly treated held admissible).

7495. Expert testimony—Expert testimony is not always necessary to make proof of malpractice. Moehlenbrock v. Parke, Davis & Co., 145 Minn. 100, 176 N. W. 169.

7496. Evidence—Sufficiency—Evidence held to justify a verdict for defendants. Nelson v. Farrish, 143 Minn. 368, 173 N. W. 715.

(43) Viita v. Fleming, 132 Minn. 128, 155 N. W. 1077; Baer v. Chowning, 135 Minn. 453, 161 N. W. 144; Dalsgaard v. Meierding, 140 Minn. 388, 168 N. W. 584; Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541; Moehlenbrock v. Parke, Davis & Co., 145 Minn. 100, 176 N. W. 169; Hayes v. Lufkin, 147 Minn. 225, 179 N. W. 1007.

(44) Skillings v. Allen, 148 Minn. —, 180 N. W. 916.

(45) Clark v. George, 148 Minn. —, 180 N. W. 1011.

(46) Nelson v. Farrish, 143 Minn. 368, 173 N. W. 715.

7496a. Pleading—A compliant for malpractice held to state a cause of action. Burke v. Mayland, — Minn. —, 184 N. W. 32.

PLATS—See Dedication, §§ 2633–2655; Evidence, § 3259.

PLEADING

IN GENERAL

7498. Object of pleadings—The purpose of the code system of pleading is to get the parties to a speedy trial on the merits. It is not to prevent the hearing of a cause of action or the interposition of a defence. The supreme court has said that it is not so much concerned with the development of an artistic and symmetrical system of pleading as it is with having a practical procedure which will result in a speedy determination of disputes upon the facts. McAlpine v. Fidelity & Casualty Co., 134 Minn. 192, 158 N. W. 967.

7498a. Pleadings are a means to an end—Of secondary importance—The rules of pleading are a means to an end. The end sought is that controversies may be litigated in an orderly manner and fairly to the parties. In laying down rules of pleading courts should have in view their practical working more than their logical consistency with general principles. H. L. Elliott Jobbing Co. v. Chicago etc. Ry. Co., 136 Minn. 138, 161 N. W. 390. See Dunnell, Minn. Pl. (2 ed.) § 6.

7499b. Time to plead—Extension—See State v. District Court, 136 Minn. 151, 161 N. W. 388.

JOINDER OF CAUSES OF ACTION

7499c. In general—The disposition of our supreme court is to be liberal in permitting the joinder of causes of action, especially in equitable actions. Seitz v. Michel, 141 Minn. 244, 170 N. W. 197.

7500. Arising out of same transaction—A complaint against two defendants alleging that their concurrent negligence caused an injury to the plaintiff is good against a demurrer for misjoinder of causes though the liability of one defendant rests upon the federal Employers' Liability Act, and that of the other upon the common law. Doyle v. St. Paul Union Depot Co., 134 Minn. 461, 159 N. W. 1081.

Several causes of action, including one for an accounting between the plaintiff and one of the defendants, one for a rescission on the ground of fraud of a sale of corporate stock by the plaintiff to another of the defendants, and several to compel certain individual defendants to make restoration to certain defendant corporations of exorbitant sums received as salaries, held improperly joined. Seitz v. Michel, 141 Minn. 244, 170 N. W. 197.

(60, 62) Harris v. Simplex Tractor Co., 140 Minn. 278, 167 N. W. 1045 (action for deceit and breach of warranty).

7502. Must affect all the parties—(65) Seitz v. Michel, 141 Minn. 244, 170 N. W. 197.

7502a. Individual and representative capacity—A cause of action against one in his individual capacity cannot be joined with one against him in a representative capacity. Objection to the misjoinder may be taken by demurrer. Fischer v. Hintz, 145 Minn. 161, 176 N. W. 177. See § 3669.

7503. Must be consistent—Two causes of action are not inconsistent unless they are contrary to one another, so that if one exists the negation or falsity of the other is necessarily inferred. Canellos v. Zotalis, 145 Minn. 292, 177 N. W. 133.

A complaint, which charges defendant with wrongfully and maliciously injuring plaintiff's business by interfering with and preventing a profitable sale of a portion thereof, and with the utterance, for the same purpose, of defamatory language concerning plaintiff, does not contain a double statement of a single cause of action, nor does it improperly mingle several inconsistent causes of action and state them as a single cause of action. Canellos v. Zotalis, 145 Minn. 292, 177 N. W. 133.

(67) Seitz v. Michel, 141 Minn. 244, 170 N. W. 197; Canellos v. Zotalis, 145 Minn. 292, 177 N. W. 133.

7504. Injury to person or property—Several acts of negligence—(70) See Nash v. Minneapolis & St. Louis R. Co., 141 Minn. 148, 169 N. W. 540.

7505. In equity—Multifariousness—(71) Seitz v. Michel, 141 Minn. 244, 170 N. W. 197; Delasca v. Grimes, 144 Minn. 67, 174 N. W. 523.

7508. Remedy for misjoinder—Where the fact that several causes of action are improperly united appears upon the face of the complaint the objection must be taken by demurrer or it is waived. Stolorow v. National Council, 132 Minn. 27, 155 N. W. 756.

If a complaint states several causes of action not inconsistent with each other, but improperly joined contrary to the provisions of section 7780, G. S. 1913, defendant can take advantage of such misjoinder only by demurrer or answer. If a complaint states several inconsistent causes of action, or contains a double statement of a single cause of action, it is within the discretion of the court to compel an election. Canellos v. Zotalis, 145 Minn. 292, 177 N. W. 133.

(74) Delasca v. Grimes, 144 Minn. 67, 174 N. W. 523; Canellos v. Zotalis, 145 Minn. 292, 177 N. W. 133. See § 7554.

ALLEGATIONS IN GENERAL

7515. Alternative allegations—(98) McCrossin v. Noyes Bros. & Cutler, 143 Minn. 181, 173 N. W. 566.

7516. Ultimate and not evidentiary facts must be alleged—Where the defendant admits the ultimate facts pleaded in the complaint, he cannot insist that the plaintiff must either plead or prove the subsidiary facts which go to make up the ultimate facts. Schawr v. St. Paul, 132 Minn. 238, 156 N. W. 283.

(99) Mullen v. Devenney,— Minn.—, 183 N. W. 350 (action for alienation of wife's affections).

7517. Facts and not conclusions of law must be alleged—An allegation of a conclusion of law is sufficient, when objection is first made on the trial, if the necessary facts may reasonably be inferred therefrom. Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 143 N. W. 253; Hinchliffe v. Minnesota Commercial Men's Assn., 142 Minn. 204, 171 N. W. 776; Kelly-How-Thompson Co. v. Merritt Development Co., 147 Minn. 153, 179 N. W. 897.

(8) Hinchliffe v. Minnesota Commercial Men's Assn., 142 Minn. 204, 171 N. W. 776 (that an assessment was "duly levied").

(9) McQuaid Market House Co. v. Home Ins. Co., 147 Minn. 254, 180 N. W. 97 (alleging bias and unfairness of appraisers in general terms).

COMPLAINT

7527. Separate statement of causes of action—When a complaint contains causes of action which cannot be properly united, and they are mingled and pleaded as one cause of action, the defendant may demur for misjoinder without first moving to have them stated separately. Fischer v Hintz, 145 Minn. 161, 176 N. W. 177.

(41) See Fischer v. Hintz, 145 Minn. 161, 176 N. W. 177.

7528a. Theory of case—If a complaint is drafted on a definite theory and no issues are tried by consent, plaintiff must recover upon that theory or not at all. Snider v. Lyons, 133 Minn. 68, 157 N. W. 1002.

Though a complaint is drafted on the theory of an equitable action the action may be converted into one at law for damages by the conduct of the trial and it will be so treated on appeal. Ada v. Melberg, 135 Minn. 130, 160 N. W. 257. See 32 Harv. L. Rev. 166 (criticising Jackson v. Strong, 222 N. Y. 149).

7531. Surplusage—(46) Moorman Mfg. Co. v. Haack, 135 Minn. 126, 160 N. W. 258; Helvetia Copper Co. v. Hart-Parr Co., 137 Minn. 321, 163 N. W. 665.

7532. Allegations on information and belief—(47) State v. Duluth, 134 Minn. 355, 159 N. W. 792.

7533. Conditions precedent—(50) St. Paul Sash, Door & Lumber Co. v. Berkner, 137 Minn. 402, 163 N. W. 668 (condition as to architect's final certificate as to performance of building contract and a condition for a written guaranty of a roof). See Abramovitz v. National Council, 134 Minn. 302, 159 N. W. 624.

7534. Conditions subsequent—(59) St. Paul Sash, Door & Lumber Co. v. Berkner, 137 Minn. 402, 163 N. W. 668.

7536. Duplicity—A complaint which charged defendant with wrongfully and maliciously injuring plaintiff's business by interfering with

and preventing a profitable sale of a portion thereof, and with the utterance, for the same purpose, of defamatory language concerning plaintiff, does not contain a double statement of a single cause of action. Canellos v. Zotalis, 145 Minn. 292, 177 N. W. 133.

(62) Canellos v. Zotalis, 145 Minn. 292, 177 N. W. 133.

7537. Demand for relief—A party cannot recover greater damages than he demands, but the court may deny a new trial on condition that plaintiff remit the excess. Morrow v. Tourtellotte, 135 Minn. 248, 160 N. W. 665.

(73) Tasler v. Peerless Tire Co., 144 Minn. 150, 174 N. W. 731.

CROSS-COMPLAINT

7538. In general—In action against a city, a casualty company, and others, for balance due on construction contract retained by city against claims against plaintiff by certain defendants, and to require proof of all claims, defence by casualty company, and general relief, the denial of leave to company to file a cross-complaint because it brought in a new and separate cause of action and would cause a third postponement was not an abuse of court's discretion. Ganley v. Pipestone, 143 Minn. 361, 173 N. W. 559.

(75) Ganley v. Pipestone, 143 Minn. 361, 173 N. W. 559.

DEMURRER

7542. Admits facts well pleaded and legal inferences therefrom—In the construction of a complaint on demurrer a court may perhaps be required to assume the truth of all the material allegations of the complaint well pleaded, regardless of what may appear in the records of the case. Marcus v. National Council, 134 Minn. 338, 159 N. W. 835.

A statute will not be declared unconstitutional solely on the strength of the rule that a demurrer admits the truth of the allegations of a complaint. Davidson v. Patnaude, 145 Minn. 371, 177 N. W. 495.

(80) Beigler v. Chamberlin, 145 Minn. 104, 176 N. W. 49.

7544. To part of pleading—A demurrer held not bad as being to a part only of a defence. Sandberg v. Clausen, 134 Minn. 321, 159 N. W. 752.

The trial court sustained a demurrer to a portion of an answer and struck out the balance as sham and frivolous. The answer did not state a defence. Held, that it was doubtful whether the practice was proper but the question was immaterial as the answer did not state a defence. State v. Reiter, 140 Minn. 491, 168 N. W. 714.

(86) Fischer v. Hintz, 145 Minn. 161, 176 N. W. 177.

7549. For insufficiency of the facts—General demurrer—The objection that a contract set out in a complaint is contrary to public policy may be raised by general demurrer. Seitz v. Michel, 148 Minn. —, 181 N. W 106.

7551. For defect of parties—(18) Lee v. Scriver, 143 Minn. 17, 172 N. W. 802. See § 7324.

7553. For pendency of another action—A demurrer to a complaint on the ground that another action is pending accomplishes the same purpose as a plea in abatement. To be good it must appear that a judgment in the former action would be a bar to a judgment in the second action. It is not good where the nature of the two actions is essentially different though they relate to the same subject-matter. Colby v. Street, 146 Minn. 290, 178 N. W. 599.

7554. For misjoinder of causes of action—Demurrer will lie for misjoinder where a party is sued in both a representative and individual capacity. Fischer v. Hintz, 145 Minn. 161, 176 N. W. 177.

When a complaint contains causes of action which cannot be properly united, and they are mingled and pleaded as one cause of action, the defendant may demur for misjoinder without first moving to have the several causes of action stated separately. Fischer v. Hintz, 145 Minn. 161, 176 N. W. 177.

7555. Defects for which demurrer will not lie—A demurrer will not lie for misnomer of parties. The remedy is by motion. Wise v. Chicago etc. Ry. Co. Relief Depart., 133 Minn. 434, 158 N. W. 711.

(33) Ziegler v. Cray, 143 Minn. 45, 172 N. W. 884.

7560. Amendment after demurrer—If a party to whose pleading a demurrer is sustained again proposes the same pleading, or one with additions which are clearly immaterial, and thus makes unfair use of the leave to amend, his amended pleading may be stricken out, if the ends of justice are promoted thereby. But it is error to strike out an amended pleading which presents a bona fide claim which the pleader is entitled to have considered and determined on the merits. Supornick v. National Council, 141 Minn. 306, 170 N. W. 507.

7561a. Waiver of error in overruling demurrer—On appeal from an order denying a new trial, a defendant will be held to have waived his right to assign as error an order overruling his demurrer to the complaint, where neither by answer nor at the trial by objection or motion did he challenge the sufficiency of the complaint on any of the grounds specified in his demurrer. Delasca v. Grimes, 144 Minn. 67, 174 N. W. 523.

7562. Pleading over—(61) Delasca v. Grimes, 144 Minn. 67, 174 N. W. 523.

(62) Northern Timber Products Co. v. Stone-Ordean-Wells Co., 143 Minn. 200, 173 N. W. 439.

ANSWER

7566. Denial of knowledge or information—(67) Taylor v. Duluth etc. Ry. Co., 139 Minn. 216, 166 N. W. 128.

7570. Non-traversable allegations—Allegations as to the value of attorney's fees in the action are not traversable. First State Bank v. Utman, 136 Minn. 103, 161 N. W. 398.

7574. Evidence admissible under general denial—(95) McAlpine v. Fidelity & Casualty Co., 134 Minn. 192, 158 N. W. 967 (action on accident insurance policy—fact that insured committed suicide or was killed by the beneficiary admissible); Peterson v. Branton, 137 Minn. 74, 162 N. W. 895 (action for malpractice—evidence that plaintiff refused to submit to reasonable treatment prescribed by defendant and opinion of defendant as to what the result of the treatment would have been); McDonald v. Union Hay Co., 143 Minn. 40, 172 N. W. 891 (action for breach of contract of sale—under general denial of breach evidence of custom affecting question of breach admissible); Wrabek v. Suchomel, 145 Minn. 468, 177 N. W. 764 (action for assault and battery and injury to reputation—bad reputation of plaintiff admissible); Glencoe Ditching Co. v. Martin, 148 Minn. —, 181 N. W. 108 (where plaintiff alleges a contract with defendant and performance by himself under a general denial defendant may prove that the contract entered into between them was different from that alleged and that the contract actually entered into was not performed by plaintiff).

(96) La Framboise v. Day, 136 Minn. 239, 161 N. W. 529 (action to determine adverse claims—complaint alleged marriage of a half-breed and plaintiff's mother and that plaintiff was son and heir—evidence of a divorce between them some years before the birth of plaintiff held admissible).

See § 7585 (evidence inadmissible under general denial).

7575. Objections not raised by answer—The objection of misnomer of parties cannot be raised by answer. The remedy is by motion. Wise v. Chicago etc. Ry. Co. Relief Depart., 133 Minn. 434, 158 N. W. 711.

7576a. Effect of denials to preclude defendant—If the defendant denies allegations of the complaint he cannot have the benefit of them as substantive evidence of a defence. Abramovitz v. National Council, 134 Minn. 302, 159 N. W. 624.

NEW MATTER CONSTITUTING A DEFENCE

7578. Definition—What constitutes—A modification of a contract sued upon is new matter constituting a defence. State v. Schurz, 143 Minn. 218, 173 N. W. 408.

7579. Matters in abatement—If the pendency of another action between the same parties appears on the face of the complaint, the objection must be taken by demurrer or it is waived. Stolorow v. National Council, 132 Minn. 27, 155 N. W. 756.

At common law an objection on the ground of misnomer of parties was reached by a plea in abatement. Under our practice the remedy is a

motion. Wise v. Chicago etc. Ry. Co. Relief Depart., 133 Minn. 434, 158 N. W. 711.

Matter in abatement is waived if not specifically raised. Halvorson v. Moranville, 137 Minn. 349, 163 N. W. 673.

7580. Several defences must be consistent—Record considered, and held, that the court was in error in holding the defences inconsistent, but, since both defences were litigated and fully submitted to the jury, no harm resulted to the defendant. Farmers Store & Warehouse Assn. v. Barlow, — Minn.. —, 182 N. W. 447.

(13, 16) McAlpine v. Fidelity & Casualty Co., 134 Minn. 192, 158 N. W. 967.

(18) McAlpine v. Fidelity & Casualty Co., 134 Minn. 192, 158 N. W. 967 (action on accident policy—defence that death was caused by accident and defence that it was caused by the beneficiary); Abramovitz v. National Council, 134 Minn. 302, 159 N. W. 624 (action on benefit certificate—answer alleged that certificate was obtained upon false representations as to age; that certain dues and assessments had not been paid; that the contract of membership provided that failure to pay assessments forfeits all right of membership and benefits; that no proofs of death and of the right of plaintiffs to benefits have been made as provided by the laws of the defendant; and that the action was not begun within the time limited by such laws); J. L. Owens Co. v. Chicago etc. Ry. Co., 142 Minn. 487, 171 N. W. 768 (action for conversion against common carrier—plaintiff claimed wrong delivery—defence that delivery was to plaintiff company and defence that goods were in storage ready for delivery); Farmers Store & Warehouse Assn. v. Barlow, — Minn. —, 182 N. W. 447 (action for goods sold and delivered—denial that defendant bought from plaintiff and fraud).

7581. Partial defences—(20) State v. Schurz, 143 Minn. 218, 173 N. W. 408.

7584. Hypothetical admissions—Defences hypothetically pleaded are not to be construed as admissions of the allegations of the complaint to which they are directed, upon which findings of fact may be predicated. Cookson v. Hill, 146 Minn. 165, 178 N. W. 591.

7585. Must be specially pleaded—Not admissible under denial—(25) Lankester v. Fine, 134 Minn. 330, 159 N. W. 622 (action for agreed value of professional services—accord and satisfaction held new matter); American Multigraph Sales Co. v. Grant, 135 Minn. 208, 160 N. W. 676 (action on note—illegality of consideration is new matter); First State Bank v. Utman, 136 Minn. 103, 161 N. W. 398 (payment); H. L. Elliott Jobbing Co. v. Chicago etc. Ry. Co., 136 Minn. 138, 161 N. W. 390 (contributory negligence); Nash v. Minneapolis & St. Louis R. Co., 141 Minn. 148, 169 N. W. 540 (existence of foreign Workmen's Compensation Act); Edwards v. Svea Fire & Life Ins. Co., 141 Minn. 285, 170 N. W. 206 (accord and satisfaction); Holbert-Haagensen Co. v. Kicher,

148 Minn. —, 180 N. W. 917 (action by broker for commission—fact that broker acted for both buyer and seller held new matter).

EQUITIES

7587. Nature—What constitutes—In an action for damages from the change of the grade of a street, a demand for an injunction against the maintenance of a retaining wall encroaching on the street line is not an "equity" within the statute. Berg v. Chisholm, 143 Minn. 267, 173 N. W. 423.

RECOUPMENT

7596. Pleading—(47) See Griffith v. Dowd, 133 Minn. 305, 158 N. W. 420 (a cause of action could not be counterclaimed because it arose subsequent to the commencement of the action—it could not be considered as one set up by supplemental answer by way of set-off or recoupment as the action had been dismissed).

COUNTERCLAIM

7599. As a defence—(52) See Greer v. Equity Co-operative Exchange, 137 Minn. 300, 163 N. W. 527.

7600. Construction of statute—(55) Blue Earth Valley Tel. Co. v. Commonwealth Utilities Co., 140 Minn. 198, 167 N. W. 554; Bauman v. Metzger, 145 Minn. 133, 176 N. W. 497.

7601. Must be an independent cause of action—In making division of a crop defendant added to plaintiff's share, without his knowledge, an additional quantity to satisfy a liability to him. The offer of the grain in satisfaction of the liability not having been accepted was not binding, and plaintiff having brought suit on several claims including such liability, defendant is entitled to have the value of the grain offset against whatever amount is due plaintiff. Brekken v. Wensel, 144 Minn. 218, 174 N. W. 831.

7602. Must exist against a plaintiff and in favor of a defendant—A cause of action in favor of the defendants against one of the plaintiffs in which no effective judgment can be entered without joining other parties with the plaintiff cannot be maintained without such parties are joined. Apelt v. Melin, 138 Minn. 269, 164 N. W. 979.

(59) See 10 A. L. R. 1252.

(61) Apelt v. Melin, 138 Minn. 269, 164 N. W. 979.

7605. Must exist in defendant at commencement of action—A cause of of action arising subsequent to the commencement of the action cannot be counterclaimed. Griffith v. Dowd, 133 Minn. 305, 158 N. W. 420.

Damages arising from the operation of a restraining order in an action cannot be counterclaimed in the same action. Blue Earth Valley Tel. Co. v. Commonwealth Utilities Co., 140 Minn. 198, 167 N. W. 554.

(75) Griffith v. Dowd, 133 Minn. 305, 158 N. W. 420; Blue Earth Valley Tel. Co. v. Commonwealth Utilities Co., 140 Minn. 198, 167 N. W. 554.

7608. Claims connected with the subject of the action—(81) Bauman v. Metzger, 145 Minn. 133, 176 N. W. 497.

(84) State v. Schurz, 143 Minn. 218, 173 N. W. 408; Bauman v. Metzger, 145 Minn. 133, 176 N. W. 497 (action to foreclose mechanic's lien —counterclaim of owner for damages for tort).

(85) Blue Earth Valley Tel. Co. v. Commonwealth Utilities Co., 140 Minn. 198, 167 N. W. 554.

See L. R. A. 1916C, 445.

7609. Claims arising out of the "transaction" alleged—(90) Mohr v. Hennepin Auto Co., 132 Minn. 415, 157 N. W. 639; State v. Schurz, 143 Minn. 218, 173 N. W. 408.

(91) Blue Earth Valley Tel. Co. v. Commonwealth Utilities Co., 140 Minn. 198, 167 N. W. 554.

See L. R. A. 1916C, 445.

7611. Claims ex contractu in actions ex contractu—(97) Mohr v. Hennepin County Auto Co., 132 Minn. 415, 157 N. W. 639 (answer held to state a counterclaim arising on contract and not for fraud); Griffith v. Dowd, 133 Minn. 305, 158 N. W. 420.

7613. Claims ex delicto—(6, 7) L. R. A. 1916C, 497.

7619. Mode of objecting to counterclaim—Waiver—Objection to a counterclaim may possibly be made by a motion to strike out. Apelt v. Melin, 138 Minn. 269, 164 N. W. 979.

The objection that counterclaims are not proper under G. S. 1913, § 7757, is waived if a settlement is made and the parties treat the demands upon which the counterclaims were founded as valid. Wildung v. Security Mtg. Co., 143 Minn. 251, 173 N. W. 429.

(17) Griffith v. Dowd, 133 Minn. 305, 158 N. W. 420; Apelt v. Melin, 138 Minn. 269, 164 N. W. 979.

7620. Failure to plead counterclaim—Effect—If a party does not plead and prove a counterclaim he cannot recover thereon or have the damages recoverable reduced by the amount thereof. Anderson v. Willson, 132 Minn. 364, 157 N. W. 582.

(22) See note, 8 A. L. R. 694.

REPLY

7627. Departure—In an action on a promissory note in which the answer alleges that the note was without consideration and never became effective, a reply which sets forth the contract under which the note was executed and the actual consideration therefor tends to show that such defence is not well founded, and is not a departure from the cause of action upon the note. Frost v. Jerousek, 138 Minn. 292, 164 N. W. 988.

Where a complaint is in the form of a quantum meruit an admission of an express contract in the reply is not a departure. Northwestern M. & T. Co. v. Swenson, 139 Minn. 365, 166 N. W. 406.

A reply denying that settlement of all claims under the policy had been made, and alleging that, if a release of the claim of the insured was given, it was procured by the fraud of an agent of the insurer, is not a departure from the complaint, which alleged that no payment of the claim had been made. Rechtzigel v. National Casualty Co., 143 Minn. 302, 173 N. W. 670.

(41) Butterwick v. Fuller & Johnson Mfg. Co., 140 Minn. 327, 168 N. W. 18 (action to determine adverse claims—held no departure in reply); Rechtzigel v. National Casualty Co., 143 Minn. 302, 173 N. W. 670.

7630. Waiver—(53) Kief v. Mills, 147 Minn. 138, 179 N. W. 724.

SUPPLEMENTAL PLEADINGS

7635. How far a matter of right—(62) McKay v. Minnesota Commercial Men's Assn., 139 Minn. 192, 165 N. W. 1061 (whether the filing of a supplemental pleading shall be permitted at the trial is discretionary with the trial court).

7637. Supplemental answer—Whether the filing of a supplemental answer shall be permitted at the trial is discretionary with the trial court. McKay v. Minnesota Commercial Men's Assn., 139 Minn. 192, 165 N. W. 1061.

VERIFICATION

7641. Statute—Sufficiency—(73) See 7 A. L. R. 4 (sufficiency—who may verify); Ann Cas. 1918D, 440 (waiver).

BILL OF PARTICULARS

7642. When demandable—A bill of particulars is not demandable in an action on an account stated, at least under a denial in the answer. Kelly-How-Thompson Co. v. Merritt Development Co., 147 Minn. 153, 179 N. W. 897.

The court did not exceed its discretion in permitting plaintiffs to prove their claim for services, although they had been four days late in serving their bill of particulars, nor in refusing to permit defendant to examine plaintiffs' accounts with other clients, and its failure to give such books to the jury was not prejudicial. Selover v. Hedwall, — Minn. —, 184 N. W. 180.

7643. Demand—Waiver—Where a complaint in an action for board and lodgings set out the dates between which the same were furnished, the number of meals and the number of lodgings, and the value of each, the failure of the plaintiff to furnish a bill of particulars in response to

a general demand therefor was held not presumptively prejudicial. Ewing v. Kirtland, 132 Minn. 8, 155 N. W. 617.

7644. **Effect**—Where a bill of particulars is furnished the defendant cannot complain that the complaint is not specific enough to admit proof of matters specified in the bill. J. Walter Thompson Co. v. Minneapolis Cereal Co., 133 Minn. 316, 158 N. W. 424.

Effect of bill of particulars on proof. 8 A. R. L. 550.

7645. **Remedy for failure to furnish**—(85) See Ewing v. Kirtland, 132 Minn. 8, 155 N. W. 617 (objection to the introduction of any evidence under complaint).

INDEFINITE PLEADINGS

7646. **In general**—In an action against a South Dakota corporation authorized to do business in Minnesota to compel the transfer upon its books of certain shares of capital stock purchased by plaintiff, with an answer alleging defendant's lien under a by-law and South Dakota statute on stock until it was paid in full, an order, requiring an amended answer setting out words or substance of by-law, was not an abuse of the court's discretion. Baer v. Waseca Milling Co., 143 Minn. 483, 173 N. W. 401.

(89) Ziegler v. Cray, 143 Minn. 45, 172 N. W. 884; Hart v. Lincoln Nat. Life Ins. Co., 144 Minn. 155, 174 N. W. 740.

7647. **Discretion of trial court**—(92) Baer v. Waseca Milling Co., 143 Minn. 483, 173 N. W. 401; Hart v. Lincoln Nat. Life Ins. Co., 144 Minn. 155, 174 N. W. 740.

7650a. **Effect on proof of granting motion**—An order requiring defendant to make its answer more definite and certain, by pleading specific instances of unlawful practices on the part of plaintiff, which were known to and relied upon by defendant as justification for canceling a contract with him, does not preclude defendant from showing other instances of misconduct by plaintiff which may subsequently come to defendant's knowledge. Hart. v Lincoln Nat. Life Ins. Co., 144 Minn. 155, 174 N. W. 740.

7651. **Order—Appeal**—An order requiring a pleading to be made more definite and certain, and directing that it be stricken out, unless the order is complied with, is appealable. Hart v. Lincoln Nat. Life Ins. Co., 144 Minn. 155, 174 N. W. 740.

IRRELEVANT PLEADINGS

7653. **Striking out**—The striking out of irrelevant matter lies in the discretion of the trial court, and its action will not be reversed on appeal except for a clear abuse of discretion. Hart v. Lincoln Nat. Life Ins. Co., 144 Minn. 155, 174 N. W. 740.

(6) Mullen v. Devenney, 136 Minn. 343, 162 N. W. 448.

7654. What constitutes—An assignment of commissions on renewal premiums on policies of life insurance recited that it was made as collateral security for the payment of premium notes which might be indorsed by the assignor to a bank, and that the bank should be entitled to receive such commissions upon giving written notice to the defendant setting forth the amount of plaintiff's obligations. Defendant's answer failed to allege that the bank held any notes on which plaintiff was liable, or that any notice to that effect had been given to defendant. It was within the discretion of the court to strike out that portion of defendant's answer which alleged the making of such assignment, and that the bank, by reason thereof, was a necessary party to the action. Hart v. Lincoln Nat. Life Ins. Co., 144 Minn. 155, 174 N. W. 740.

(9) Mullen v. Devenney, 136 Minn. 343, 162 N. W. 448; State v. Schurz, 143 Minn. 218, 173 N. W. 408.

SHAM PLEADINGS

7658. To be stricken out cautiously—A party is not entitled to have an answer stricken out as sham unless its falsity is clearly and indisputably shown. Fisher v. Wellworth Mills Co., 133 Minn. 240, 158 N. W. 239.

(15) J. I. Case Threshing Machine Co. v. Bargabos, 143 Minn. 8, 172 N. W. 882.

7660. Verified pleadings may be stricken out—(19) Fisher v. Wellworth Mills Co., 133 Minn. 240, 158 N. W. 239.

7661. Denials may be stricken out—(20) Prinz v. Melin, 144 Minn. 461, 174 N. W. 412; Cochrane-Sargent Co. v. Foote, 144 Minn. 474, 175 N. W. 538.

7666. Amendment discretionary—(28) Melin v. Maybury, 137 Minn. 478, 163 N. W. 1069; Cochrane-Sargent Co. v. Foote, 144 Minn. 474, 175 N. W. 538.

7667. Pleadings held sham or the reverse—(29) Fisher v. Wellworth Mills Co., 133 Minn. 240, 158 N. W. 239; Krahn v. J. L. Owens Co., 136 Minn. 53, 161 N. W. 257; Melin v. Maybury, 137 Minn. 478, 163 N. W. 1069; Licensed R. L. D. Assn. v. Denton, 140 Minn. 461, 168 N. W. 553; State v. Reiter, 140 Minn 491, 168 N. W. 714; Prinz v. Melin, 144 Minn. 461, 174 N. W. 412 (action on appeal bond—general denial held sham); Cochrane-Sargent Co. v. Foote, 144 Minn. 474, 175 N. W. 538; Venie v. Harriet State Bank, 146 Minn. 142, 178 N. W. 170.

(30) J. I. Case Threshing Machine Co. v. Bargabos, 143 Minn. 8, 172 N. W. 882.

FRIVOLOUS PLEADINGS

7668. Answer—Striking out—Amendment—On striking out an answer as frivolous it is discretionary with the court to allow the defend-

ant to serve an amended answer. Melin v. Maybury, 137 Minn. 478, 163 N. W. 1069.

An answer held properly stricken out as frivolous. Krahn v. J. L. Owens Co., 136 Minn. 53, 161 N. W. 257.

A reply held frivolous and properly stricken out. Venie v. Harriet State Bank, 146 Minn. 142, 178 N. W. 170.

(31) Fisher v. Wellworth Mills Co., 133 Minn. 240, 158 N. W. 239; Melin v. Maybury, 137 Minn. 478, 163 N. W. 1069; Licensed Retail Liquor Dealers Assn. v. Denton, 140 Minn. 461, 168 N. W. 553 (answer held not frivolous but sham). State v. Reiter, 140 Minn. 491, 168 N. W. 714

VARIANCE

7671. General rule—An issue not pleaded nor voluntarily litigated on the trial cannot be made the basis of relief. Thorpe v. Cooley, 138 Minn. 431, 165 N. W. 265.

(35) See Jackson v. Strong, 222 N. Y. 149; 32 Harv. L. Rev. 166.

See § 7528a (theory of case).

7672. Immaterial variance—A variance between pleading and proof is immaterial unless it actually misleads the adverse party to his prejudice, and when immaterial may be disregarded or an amendment may be directed. Gillespie v. Duluth, 137 Minn. 454, 163 N. W. 779.

(37) J. Walter Thompson Co. v. Minneapolis Cereal Co., 133 Minn. 316, 158 N. W. 424; Maletta v. Oliver Iron Mining Co., 135 Minn. 175, 160 N. W. 771; Gillespie v. Duluth, 137 Minn. 454, 163 N. W 779; McRae v. Feigh, 143 Minn. 241, 173 N. W. 655.

7673. Material variance—(38) See McRae v. Feigh, 143 Minn. 241, 173 N. W. 655.

7674. Fatal variance—Failure of proof—(39) See McRae v. Feigh, 143 Minn. 241, 173 N. W. 655.

7675. Waiver—Trial of issues by consent—Presumption—Defects in pleadings, not challenged, before or during the trial, by demurrer, motion, or specific objection, should not work a reversal, where the cause of action or defence has been litigated on the merits as if no defects in the pleadings existed. Segerstrom v. Holland Piano Mfg. Co., 142 Minn. 104, 170 N. W. 930.

(44) Brown v. California & Western Land Co., 145 Minn. 432, 177 N. W. 774; Kief v Mills, 147 Minn. 138, 179 N. W. 724.

(45) Dodson Fruit Co. v. Galanter, 145 Minn. 319, 177 N. W. 362.

(49) Taylor v. Duluth, etc. Ry. Co., 139 Minn. 216, 166 N. W. 128.

7676. Objections—When made—(50) Gaylord v. Rosander & Co., 148 Minn. —, 181 N. W. 583

IMMATERIAL DEFECTS DISREGARDED

7677. Statute—(56) Hinchliffe v. Minnesota Commercial Men's Assn., 142 Minn. 204, 171 N. W. 776.

WAIVER OF OBJECTIONS

7680. By failure to object to evidence—Error in overruling a demurrer may be waived by failing to object to the introduction of evidence. Delasca v. Grimes, 144 Minn. 67, 174 N. W. 523.

7681. Objections that are never waived—(71) See Delasca v. Grimes, 144 Minn. 67, 174 N. W. 523.

DISMISSAL FOR INSUFFICIENCY OF PLEADINGS

7682. Motion by defendant—As of right—(80) Delasca v. Grimes, 144 Minn. 67, 174 N. W. 523.

7684. Construction of complaint—(83) Haack v. Coughlan, 134 Minn. 78, 158 N. W. 908.

7685. Amendment to defeat motion—An action was dismissed on the ground that the complaint did not state a cause of action. The next day plaintiff moved for leave to amend his complaint so as to cure the defect, but his motion was denied. On appeal the supreme court reversed the order of the trial court with leave to plaintiff to amend his complaint. L. J. Mueller Furnace Co. v. Buckhart, 140 Minn. 500, 167 N. W. 286.

(87) Hinchliffe v. Minnesota Commercial Men's Assn., 142 Minn. 204, 171 N. W. 776.

OBJECTION TO EVIDENCE UNDER DEFECTIVE PLEADINGS

7687. By defendant—Insufficient complaint—Construction—It is discretionary with the court to allow the plaintiff to amend his complaint so as to obviate the objections urged by defendant. Hinchliffe v. Minnesota Commercial Men's Assn., 142 Minn. 204, 171 N. W. 776.

When objection is made on the trial to the introduction of any evidence under a complaint a cause of action will be spelled out even though the allegations may savor somewhat of legal conclusions. Kelly-How-Thompson Co. v. Merritt Development Co., 147 Minn. 153, 179 N. W. 897.

(90) Delasca v. Grimes, 144 Minn. 67, 174 N. W. 523.

(93) Ziegler v. Cray, 143 Minn. 45, 172 N. W. 884; Pierce v. Hanson, 147 Minn. 219, 179 N. W. 893; Kelly-How-Thompson Co. v. Merritt Development Co., 147 Minn. 153, 179 N. W. 897.

7688. By plaintiff—Insufficient answer—As against objection made after the trial is well advanced an answer will be sustained if by any reasonable intendment the facts necessary to constitute a defence may be inferred. Greater liberality will then be indulged than in the case of demurrer before trial. An allegation that an assessment was "duly levied" held sufficient against an objection raised on the trial. Hinchliffe v. Minnesota Commercial Men's Assn., 142 Minn. 204, 171 N. W. 776.

JUDGMENT ON THE PLEADINGS

7689. When allowable—Judgment on the pleadings cannot be ordered when they raise a material issue for trial. St. Paul v. Great Northern Ry. Co., 141 Minn. 428, 170 N. W. 512.

7690. When counterclaim pleaded—(3) See State v. Schurz, 143 Minn. 218, 173 N. W. 408.

7693. Motion admits facts well pleaded—(7) State v. Schurz, 143 Minn. 218, 173 N. W. 408.

7694. Construction of pleadings—(8) St. Paul v. Great Northern Ry. Co., 141 Minn. 428, 170 N. W. 512; Pierce v. Hanson, 147 Minn. 219, 179 N. W. 893.

AMENDMENT

7696. Discretion of trial court—The amendment of pleadings is a matter which lies almost wholly in the discretion of the trial court, and its action will not be reversed, except for a clear abuse of discretion. Considerations properly influencing the exercise of such discretion are the probability of the opposite party having been misled, the manner in which evidence to which an amendment relates came into the case, the scope of the amendment, and the stage the action has reached. Anderson v. Minneapolis etc. Ry. Co., 146 Minn. 430, 179 N. W. 45.

If the evidence to which the amendment relates was brought into the case by the adverse party or in response to an issue he introduced by his pleadings or proof there should be great liberality in allowing an amendment. Anderson v. Minneapolis etc. Ry. Co., 146 Minn. 430, 179 N. W. 45.

(11) Halloran v. Jacob Schmidt Brewing Co., 137 Minn. 141, 162 N. W. 1082; Finseth v. Scherer, 138 Minn. 355, 165 N. W. 124; Anderson v. Minneapolis etc. Ry. Co., 146 Minn. 430, 179 N. W. 45.

(13) Nash v. Minneapolis & St. Louis R. Co., 141 Minn. 148, 169 N. W. 540.

7697. To be allowed liberally—(14) Finseth v. Scherer, 138 Minn. 355, 165 N. W. 124; Anderson v. Minneapolis etc. Ry. Co., 146 Minn. 430, 179 N. W. 45.

7698. Dependent on stage of action—(16) Finseth v. Scherer, 138 Minn. 355, 165 N. W. 124; Ditkof v. Lifshitz, 141 Minn. 88, 169 N. W. 483; Commercial Jewelry Co. v. Bowen, 145 Minn. 487, 175 N. W. 995; Anderson v. Minneapolis etc. Ry. Co., 146 Minn. 430, 179 N. W. 45.

7699. Meritoriousness of defence—The statute of frauds is a meritorious defence. Halloran v. Jacob Schmidt Brewing Co., 137 Minn. 141, 162 N. W. 1082.

See § 5019.

7701. **As to parties**—A misnomer of the defendant railroad company by adding to its corporate name the words "Relief Department" was not a ground for dismissal, jurisdiction having been acquired, the defect was amendable as of course, and will be disregarded. Wise v. Chicago etc. Ry. Co. Relief Dept., 133 Minn. 434, 158 N. W. 711.

(20) Trustees v. United States F. & G. Co., 133 Minn. 429, 158 N. W. 709; Wise v. Chicago etc. Ry. Co. Relief Depart., 133 Minn. 434, 158 N. W. 711.

See § 5104.

7706. **Effect—Limitations**—(32) Nash v. Minneapolis & St. Louis R. Co., 141 Minn. 148, 169 N. W. 540.

7707. **Before trial**—(37) Ditkof v. Lifshitz, 141 Minn. 88, 169 N. W. 483.

7708. **On the trial—Discretion of trial court**—(39) Finseth v. Scherer, 138 Minn. 355, 165 N. W. 124; James v. Carlson, Inc. v. Babler, 144 Minn. 125, 174 N. W. 824; Guhl v. Warroad Stock, Grain & Produce Co., 147 Minn. 44, 179 N. W. 564.

(40) Seitz v. Michel, 148 Minn. —, 181 N. W. 102.

(41) Miller v Clark, 147 Minn. 130, 179 N. W. 731.

(42) Heuser v. Chicago, B. & Q. R. Co., 138 Minn. 286, 164 N. W. 984; Abernethy v. Halk, 139 Minn. 252, 166 N. W. 218; Kipp v. Welsh, 141 Minn. 291, 170 N. W. 222; American Brick & Tile Co. v. Turnell 143 Minn. 96, 173 N. W. 175; Licensed Retail Liquor Dealers Assn. v. Denton, 144 Minn. 81, 174 N. W. 526; Commercial Jewelry Co. v. Bowen, 145 Minn. 487, 175 N. W. 995; McQuaid Market House Co. v. Home Ins. Co., 147 Minn. 254, 180 N. W. 97.

7709. **Scope of allowable amendment of complaint**—It is proper to allow a complaint to be changed from one on a quantum meruit to one on an express contract. James E. Carlson, Inc. v. Babler, 144 Minn. 125, 174 N. W. 824.

(46) Anderson v. Minneapolis etc. Ry. Co., 146 Minn. 430, 179 N. W. 45. See Nash v. Minneapolis & St. Louis R. Co., 141 Minn. 148, 169 N. W. 540.

7711. **Scope of allowable amendment of answer**—The denial of a motion to amend the answer at the trial was within the trial court's discretion, where plaintiff was a non-resident, had taken his evidence by deposition, and had no witnesses present, and the amendment entirely changed the issues. Commercial Jewelry Co. v. Bowen, 145 Minn. 487, 175 N. W. 995.

7712. **To cure defective pleadings**—(51) Wise v. Chicago etc. Ry. Co. Relief Depart., 133 Minn. 434, 158 N. W. 711.

7713. **Conforming pleadings to proof**—The issue of negligence was not pleaded, but at the conclusion of the evidence, plaintiffs asked leave to amend their complaint to conform to the proof and so as to raise this

issue. The court ruled that the amendment would be allowed, submitted the special issue of negligence to a jury, and later allowed the amendment and made findings for plaintiffs. The allowance of this amendment and the consideration of this issue were within the discretion of the court. Where evidence is received without objection that it is not admissible under the pleadings, the court may, in its discretion, order the complaint amended, even after trial, to conform to the proof. Troutman v. Gates, 145 Minn. 1, 176 N. W. 187.

Where it appears from the evidence that a contract was modified after it was made, but was declared upon as originally made, the court may order the complaint amended to conform to the proof. Kociemba v. Kociemba, 146 Minn. 62, 177 N. W. 927.

There was no abuse of discretion in allowing an amendment to the complaint after verdict in a railroad fire case, where the defence was that plaintiff's property was destroyed by fires of unknown origin, and plaintiff's evidence in rebuttal tended to show that defendant was responsible for such fires, in addition to one originally alleged to have destroyed the property. Anderson v. Minneapolis etc. Ry. Co., 146 Minn. 430, 179 N. W. 45.

(52) Otterstetter v. Steenerson Bros. Lumber Co., 143 Minn. 442, 174 N. W. 305; Wampa v. Lyshik, 144 Minn. 274, 175 N. W. 301; Troutman v. Gates, 145 Minn. 1, 176 N. W. 187; Kociemba v. Kociemba, 146 Minn. 62, 177 N. W. 927; Anderson v. Minneapolis etc. Ry. Co., 146 Minn. 430, 179 N. W. 45; Stine v. Hines, 148 Minn. —, 181 N. W. 321; Gaylord v. Rosander & Co., 148 Minn. —, 181 N. W. 583. See L. R. A. 1916D, 841 (amendment of pleadings on appeal to conform to proof).

(53) See Ivanesovich v. North American L. & C. Co., 145 Minn. 175, 176 N. W. 502.

(55) Troutman v. Gates, 145 Minn. 1, 176 N. W. 187.

7713a. After trial—Held not error to deny a motion to amend an answer made after a directed verdict for plaintiff and denial of motion for a new trial. Commercial Jewelry Co. v. Bowen, 145 Minn. 487, 175 N. W. 995.

7716. After appeal and remand—Where a complaint states a cause of action for damages, under the federal Employers' Liability Act, for death by wrongful act occurring in the state of Iowa, and plaintiff recovered judgment, which was reversed upon appeal, an amendment of the complaint eliminating therefrom all allegations relating to interstate commerce and the application of the federal act, and pleading in lieu thereof certain statutes of the state of Iowa, does not constitute a departure from law to law, and the pleading of a new cause of action. Plaintiff has but one cause of action, viz. the wrongful act of the defendant in causing the injury to plaintiff's intestate which resulted in his death. This cause of action exists by virtue of the statute, which authorizes suit in such cases by the representative of the estate of the deceased person. Plaintiff having but one cause of action, the proposed amendment was in sup-

port of the original complaint, and the statute of limitations affords no defence. Nash v. Minneapolis & St. Louis R. Co., 141 Minn. 148, 169 N. W. 540.

After an appeal and remand the trial court may allow an amendment to conform to the proof rather than reduce the verdict. Ivanesovich v. North American L. & C. Co., 145 Minn. 175, 176 N. W. 502.

CONSTRUCTION

7718. **As affected by time**—During the course of a trial and after verdict pleadings receive a more liberal construction in favor of presenting the merits of the claim asserted and of the defence thereto than when challenged by demurrer or by motion before trial. Segerstrom v. Holland Piano Mfg. Co., 142 Minn. 104, 170 N. W. 930.

Great liberality will be indulged when objection is not made until the trial is well advanced and after much of the evidence of doubtful admissibility has been received without objection. Even an allegation of a conclusion of law will then be held sufficient, if the necessary facts may be reasonably inferred therefrom. Hinchliffe v. Minnesota Commercial Men's Assn., 142 Minn. 204, 171 N. W. 776.

(67) Segerstrom v. Holland Piano Mfg. Co., 142 Minn. 104, 170 N. W. 930.

7719. **Liberal construction**—Pleadings are a mere means to an end and the rules of pleading are to be liberally construed and applied so as to bring the parties to a speedy trial on the merits. It is more important that the system should work well in practice than that it should be artistic and symmetrical or logically consistent. McAlpine v. Fidelity & Casualty Co., 134 Minn. 192, 158 N. W. 967.

7724. **On demurrer**—(80) Colby v. Street, 146 Minn. 290, 178 N. W. 599.

7725. **On the trial**—When objection to a pleading is first made on the trial a cause of action or defence will be spelled out if reasonably possible, though the allegations of the pleading savor somewhat of legal conclusions. Kelly-How-Thompson Co. v. Merritt Development Co., 147 Minn. 153, 179 N. W 897. See § 7517.

7726. **On appeal**—The rule of liberal construction on appeal is especially true when the objection is general and the specific objection calling attention to the defect relied on is first made on appeal. Eifert v. Hartford Fire Ins. Co., 148 Minn. —, 180 N. W. 996.

(86) Segerstrom v. Holland Piano Mfg. Co., 142 Minn. 104, 170 N. W. 930; Eifert v. Hartford Fire Ins. Co., 148 Minn. —, 180 N. W. 996.

7727. **Aider by answer**—(90) Abramovitz v. National Council, 134 Minn. 302, 159 N. W. 624.

7729. **Aider by verdict**—(93) Segerstrom v. Holland Piano Mfg. Co., 142 Minn. 104, 170 N. W. 930.

OBJECTIONS ON APPEAL

7730. In general—Defects in pleadings not challenged, before or during trial, by demurrer, motion or specific objection, should not work a reversal where the cause of action or defence has been litigated on the merits as if no defects in the pleading existed. Segerstrom v. Holland Piano Mfg. Co., 142 Minn. 104, 170 N. W. 930.

7732. Failure to state cause of action—(96-98) Chicago etc. Ry. Co. v. Sprague, 140 Minn. 1, 167 N. W. 124.

(1) Strand v. Chicago G. W. R. Co., 147 Minn. 1, 179 N. W. 369.

PLEDGE

7738. Consideration—(21) Bank of Montreal v. Beecher, 133 Minn. 81, 157 N. W. 1070.

7742. Pledgee a bona fide purchaser—Where an indorsee of negotiable paper takes it as collateral security for the payment of a pre-existing debt he may enforce it for the full amount of the debt whatever the new consideration for the transfer may be. Bank of Montreal v. Beecher, 133 Minn. 81, 157 N. W. 1070.

See §§ 952, 7738.

7747. Negligence of pledgee—(48) 32 Harv. L. Rev. 578 (duty of pledgee to sue or foreclose on request of pledgor).

7751. Sale of property to satisfy debt—There is a warranty or representation that the pledgee has a subsisting pledge on the property, and if this is not true the purchaser is entitled to a return of the purchase price. Bogstad v. Anderson, 143 Minn. 336, 173 N. W. 674.

In directing the mortgage, assigned to defendants to secure the payments of the notes, to be sold and the proceeds of the sale to be applied not only in payment of the notes due, but also of the notes not yet due, the court did not err. Hage v. Drake Marble & Tile Co., 145 Minn. 113, 176 N. W. 192.

7752a. Agreement as to surplus—Equitable assignment—Plaintiff had in his possession collateral security for a debt due from a third party, who also owed the defendant. Held, that an agreement by the parties in interest that any sum received upon such collateral security in addition to the indebtedness first secured thereby should be applied on the debt due to defendant operated as an equitable assignment to defendant of such surplus, if any. Second Nat. Bank v. Sproat, 55 Minn. 14, 56 N. W. 254. See Slimmer v. State Bank, 134 Minn. 349, 159 N. W. 795.

PLUMBERS—See Municipal Corporations, §§ 6776, 6794, 6806.

POISONS

7753. Negligence in sale—In the absence of some statutory obligation, a vendor of another's proprietary compound owes no duty to the purchaser or the public to ascertain whether it contains ingredients that may be harmful or dangerous, if the compound be used for purposes other than those for which it was designed. In this action for wrongful death against the vendor of such compound, the complaint does not charge a violation of section 5039, G. S. 1913, since there are no allegations that Roach Doom, the compound sold and the one causing the death, contained any of the drugs specified in the section or any "commonly recognized poisons." A manufacturer of an article or compound imminently dangerous in kind owes to the public a positive and active duty to limit the danger, by labeling, or otherwise conveying knowledge of the danger; and a like duty rests upon a vendor, who knows of the dangerous qualities of the article sold by him, and knows that its label or name does not adequately convey knowledge to the purchaser or public of such danger. The complaint is held defective in not alleging that the compound sold was imminently dangerous, and in alleging in the alternative that defendant knew, or in the exercise of due care ought to have known, of the dangerous qualities, and in failing to allege positively the misleading or defective character of the label. McCrossin v. Noyes Bros. & Cutler, 143 Minn. 181, 173 N. W. 566.

(70) See Farrell v. G. O. Miller Co., 147 Minn. 52, 179 N. W. 566.

7753a. Narcotic drugs—Dispensing and prescribing—Section 1, chapter 260, Laws 1915, forbids the sale of narcotic drugs, but provides that pharmacists may dispense the same upon the written prescription of a physician and that a physician may administer such drug to a patient upon whom he is in professional attendance. There are exacting requirements as to records to be kept in both cases. Section 2 forbids any physician to furnish or prescribe any such drugs for the use of a habitual user, provided this shall not prevent a physician from prescribing in good faith for the use of any patient for treatment of the drug habit such substances as he may deem necessary. It was proper to instruct the jury that the statute makes a distinction between the dispensation of these drugs to habitual users and to ordinary patients, that in the case of patients not addicted the physician may prescribe them and also furnish them, but that in case of habitual users he may not furnish the drug but may only give a prescription to be filled by a pharmacist under the safeguards imposed by the law. The court refused to receive in evidence a stamp with which defendant said he stamped all containers of such drugs dispensed by him. A package found on the person to whom it is charged defendant sold morphine bore no stamp, but it is admitted that defendant furnished him the quantity of the drug found in his possession. **Held, no error.** State v. Whipple, 143 Minn. 403, 173 N. W. 801.

Chapter 260, Laws 1915, restricting the manufacture, sale, and dispensing of certain habit-forming narcotic drugs, as involved in State v. Whipple, 143 Minn. 403, 173 N. W. 801, recently decided, held not in conflict with the act of Congress known as the Harrison Anti-Narcotic Drug Act, and the judgment of conviction therein rendered is not unlawful as violative of the paramount legislative power of the federal Congress or otherwise. State v. Martinson, 144 Minn. 206, 174 N. W. 823, affirmed, 255 U. S. —.

POST OFFICE

7754a. Postmarks as evidence of date of mailing—The postmark on an envelope is evidence of the time of mailing, at least that the letter was not mailed a considerable time prior to the date of the postmark. The presence of other postmarks, not legible, does not destroy the probative force of a legible postmark. Kay v. Elsholtz, 138 Minn. 153, 164 N. W. 665; Hurley Bros. v. Haluptzok, 142 Minn. 269, 171 N. W. 928.

POWERS

7761. Powers in trust—A testamentary trust held a mere power in trust, vesting no title to the trust property in the trustee. Whittaker v. Meeds, 146 Minn. 160, 178 N. W. 597.

PROBATE COURT

IN GENERAL

7769. Judge—Term—Salary—As to removal by Governor see §§ 8006, 8011.

JURISDICTION

7770. In general—The jurisdiction of the probate courts over the estates of deceased persons and persons under guardianship is entire, exclusive, plenary, and, where the jurisdiction has attached, the court has full equity powers necessary to the settlement and distribution of the estate. It may apply the law to the facts whether the law be statutory, common law, or the principles of equity. State v. Probate Court, 133 Minn. 124, 155 N. W. 906, 158 N. W. 234.

The probate court has no general equitable or common-law jurisdiction in the exercise of which it may determine contested claims or title to real property asserted by those claiming by will or descent against strangers to the estate or asserted by strangers against those claiming through the estate; but in the exercise of its jurisdiction to ascertain

and impose an inheritance tax upon real property belonging to the estate, but not inventoried therein, there being no adjudication or proceeding looking to an adjudication of ownership in a court of competent general jurisdiction, it may determine the fact of ownership in the decedent at the time of his death upon which fact the right to impose a tax rests. State v. Probate Court, 140 Minn. 342, 168 N. W. 14.

It has no independent jurisdiction in equity or at law over controversies between the representatives of the estate, or those claiming under it, with strangers claiming adversely, nor of collateral actions. Wilson v. Erickson, 147 Minn. 260, 180 N. W. 93.

(5) State v. Probate Court, 133 Minn. 124, 155 N. W. 906, 158 N. W. 234.

(6) In re Peavey's Estate, 144 Minn. 208, 175 N. W. 105.

(10–12) State v. Probate Court, 133 Minn. 124, 155 N. W. 906, 158 N. W. 234; State v. Probate Court, 140 Minn. 342, 168 N. W. 14; Wilson v. Erickson, 147 Minn. 260, 180 N. W. 93.

(12) Malchow v. Malchow, 143 Minn. 53, 172 N. W. 915 (to determine the validity of an antenuptial agreement).

7773. County in which administration should be had—The fact that administration is had in the wrong county does not go to the jurisdiction of the court and the proceedings are not absolutely void and subject to collateral attack. Persons acting in good faith in reliance thereon are protected thereby. Fridley v. Farmers & Mechanics Sav. Bank, 136 Minn. 333, 162 N. W. 454.

7776. No general equity jurisdiction—While the probate courts have no general equity jurisdiction, yet as respects the subjects committed by the constitution to their exclusive jurisdiction, they have the plenary powers, legal or equitable, that any court has. They may apply the law to the facts whether the law be statutory, common law or rules of equity. They may apply equity rules in the settlement and distribution of an estate. They may apply the equitable doctrine of subrogation. State v. Probate Court, 133 Minn. 124, 155 N. W. 906, 158 N. W. 234.

(29, 30) State v. Benz, 133 Minn. 124, 155 N. W. 906, 158 N. W. 234; State v. Probate Court, 140 Minn. 342, 168 N. W. 14. See Wilson v. Erickson, 147 Minn. 260, 180 N. W. 93.

7777. When jurisdiction attaches—(31) Fridley v. Farmers & Mechanics Sav. Bank, 136 Minn. 333, 162 N. W. 454.

7778. Held to have jurisdiction—To order a representative to pay a surety entitled to be subrogated to the rights of a judgment creditor. State v. Probate Court, 133 Minn. 124, 155 N. W. 906, 158 N. W. 234.

To determine the amount of an inheritance tax. State v. Probate Court, 140 Minn. 342, 168 N. W. 14.

To determine the boundaries of a homestead of decedent in order to segregate it from the rest of the estate. Rux v. Adam, 143 Minn. 35, 172 N. W. 912.

To determine the validity of an antenuptial agreement, as affecting the right to a distributive share and statutory allowance. Malchow v. Malchow, 143 Minn. 53, 172 N. W. 915.

To administer the estates and determine the heirs of half-blood Indian allottees emancipated by the allottment of land under the Clapp Amendment of 1907. Baker v. McCarthy, 145 Minn. 167, 176 N. W. 643.

(32) In re Peavey's Estate, 144 Minn. 208, 175 N. W. 105.

(37) See Colby v. Street, 146 Minn. 290, 178 N. W. 599.

7779. Held not to have jurisdiction—To determine the boundaries of a homestead as against one claiming adversely to the estate. Rux v. Adam, 143 Minn. 35, 172 N. W. 912.

Of an action for the enforcement of the specific performance of a contract by which a deceased owner of land had agreed to devise it to plaintiff, where plaintiff seeks to impress property acquired with the proceeds of the sale of the land with a trust in his favor. Colby v. Street, 146 Minn. 290, 178 N. W. 599.

Of an action by a ward against his guardian and purchasers from him to set aside a fraudulent sale by the guardian. Wilson v. Erickson, 147 Minn. 260, 180 N. W. 93.

(39) Hause v. O'Leary, 136 Minn. 126, 161 N. W. 392; State v. Probate Court, 140 Minn. 342, 168 N. W. 14; Rux v. Adam, 143 Minn. 35, 172 N. W. 912.

RECORDS

7781. Books to be kept—Files—Entries—Evidence—The records of the probate court are not within the recording statutes. Persons generally are not charged with notice of the contents of a will in the office of a probate court. Butterwick v. Fuller & Johnson Mfg. Co., 140 Minn. 327, 168 N. W. 18.

PRACTICE

7783a. Notice of decisions—The notice required by G. S. 1913, § 7233, to be given by the judge, of orders, judgments or decrees, does not limit the time to appeal therefrom. Timm v. Brauch, 133 Minn. 20, 157 N. W. 709.

7784. Vacation and amendment of orders and decrees—The probate court has no power to amend a decree of distribution after the time to appeal therefrom has expired, unless in case of fraud, mistake or surprise. Leighton v. Bruce, 132 Minn. 176, 156 N. W. 285.

The probate court made a decree vesting in certain named persons a remainder left by will to "the grandchildren" of the testator. One grandchild had been born after the death of the testator and before the decree. Of this fact the court had no knowledge. Another was born after the decree but before the estate vested in enjoyment in the grandchildren. The rights of these were not presented to the court and no provision was made for them. The court had power after the estate vested in enjoy-

ment in the grandchildren to amend the final decree so as to protect the rights of these after-born children. Savela v. Erickson, 138 Minn. 93, 163 N. W. 1029.

(68) Savela v. Erickson, 138 Minn. 93, 163 N. W. 1029 (vacation of final decree).

APPEAL TO DISTRICT COURT

7785. Who may appeal—Executors and trustees under a will held entitled to appeal as aggrieved parties. State v. Probate Court, 133 Minn. 124, 155 N. W. 906.

A creditor, devisee, legatee or heir can appeal from an order allowing or disallowing a claim only in the event that the representative, after request, declines to appeal therefrom, and it is immaterial that the creditor, devisee, legatee or heir appeared in the probate court and opposed the allowance of the claim. This does not apply to the creditor whose claim is the subject of the order. O'Brien v. Murphy, 136 Minn. 327, 162 N. W. 356.

The representative is charged with the duty of looking after the interests of creditors, heirs, devisees and legatees, and it is his duty to take any appeal demanded by their interests. O'Brien v. Murphy, 136 Minn. 327, 162 N. W. 356.

7786. What orders, judgments and decrees appealable—(87) State v. Probate Court, 142 Minn. 283, 171 N. W. 928 (order on claim of state under Laws 1917, c. 409, for support of insane decedent in state hospital).

7788. Time—The notice required by section 7233, G. S. 1913, to be given by the judge of a probate court, to the parties appearing in his court at a trial, when such court renders an appealable order, judgment, or decree, is not a notice that limits the time of appeal therefrom. The notice mentioned in section 7492, G. S. 1913, is the one limiting the time to appeal, and it is held that this section should be so construed that the party aggrieved by the order, judgment, or decree of the probate court has six months from the date of the filing of such order, judgment, or decree within which to appeal, unless the adverse party has served him with a written notice of the decision of the probate court, in which case the right of appeal expires thirty days after the service of such notice. Timm v. Brauch, 133 Minn. 20, 157 N. W. 709.

7794. Trial in district court—Pleadings—Jury—Findings—On appeal from the probate court to the district court from the allowance of a will, the parties have no constitutional right nor statutory right to a trial by jury of the issues of testamentary capacity or undue influence. Whether such issues shall be submitted to a jury is within the discretion of the trial court. After issues are framed and after their submission to the jury and before the return of findings the court may, in the exercise of a sound discretion, withdraw them and itself make findings. In doing so in this case the court was within the exercise of a sound discretion, though there was evidence of a lack of testamentary capacity,

and though one of the grounds of the motion to withdraw the issues was that there was no such evidence, and though the court would not have been justified in directing a verdict upon such issue. Lewis v. Murray, 131 Minn. 439, 155 N. W. 392.

Upon the trial of proceedings for the appointment of a guardian findings of fact and conclusions of law should be made. Where none were made or asked for and the petitioner moved for a new trial, it was held, on the appeal from the order denying it, that he could not object to the absence of findings, and that, as there was only one issue, there was no prejudice. Wood v. Wood, 137 Minn. 252, 163 N. W. 297.

On appeal from an order of the probate court, the district court tries the case de novo, and with all the light then obtainable. New facts developing after the hearing in probate court may be received in evidence. A district court decree in another suit, involving issues over which the probate court had no jurisdiction, and entered during the pendency of the appeal, may be received in evidence, if pertinent to the issue. Benz v. Rogers, 141 Minn. 93, 169 N. W. 477.

The claim as filed in the probate court was for services rendered between April 23, 1903, and January 20, 1916. Upon the trial in district court respondent was allowed, over objection, to amend her claim so as to show that such services were rendered between April 23, 1903, and January 20, 1913. The item of services was not in any manner changed. Held not error. Savage v. Minnesota Loan & Trust Co., 142 Minn. 187, 171 N. W. 778.

(14) Benz v. Rogers, 141 Minn. 93, 169 N. W. 477; Lipman v. Bechhover, 141 Minn. 131, 169 N. W. 536.

(18) Mason v. Savage, 141 Minn. 346, 170 N. W. 585 (claim presented by complaint in district court held a departure from claim filed in probate court and complaint properly stricken out—fact that counsel for respondent retained the proposed pleading for more than twenty-four hours held immaterial); Savage v. Minnesota Loan & Trust Co., 142 Minn. 187, 171 N. W. 778.

(21) Wood v. Wood, 137 Minn. 252, 163 N. W. 297.

7794a. New trial—Where, after a probate court has refused to admit a will to probate, on appeal to the district court, a jury has found that the will was not signed by the testator, a new trial will be granted by the supreme court where there is such serious doubt of the correctness of the verdict as to justify reconsideration, although the evidence was conflicting. In re Murphy's Estate, 148 Minn. —, 181 N. W. 320.

7795. Judgment in district court—The probate court has no jurisdiction to determine a controversy between a devisee and one who claims to have succeeded to his rights in the estate, and an appeal from the probate court to the district court does not confer jurisdiction upon the latter court to determine such controversy. Hause v. O'Leary, 136 Minn. 126, 161 N. W. 392.

(24) Benz v. Rogers, 141 Minn. 93, 169 N. W. 477 (statute cited).

(26) Hause v. O'Leary, 136 Minn. 126, 161 N. W. 392; Benz v. Rogers, 141 Minn. 93, 169 N. W. 477.

PROCESS

SUMMONS—IN GENERAL

7802. Nature—When deemed process—A summons in a civil action is "process" within the meaning of the statute against the service of civil process on holidays. Farmers Implement Co. v. Sandberg, 132 Minn. 389, 157 N. W. 642.

(46) Flanery v. Kusha, 143 Minn. 308, 173 N. W. 652.

7803. Contents—The statute prescribing the requisites of a summons is to be liberally construed. Flanery v. Kusha, 143 Minn. 308, 173 N. W. 652.

The statute requires the summons to designate a place within the state at which the defendant is required to serve his answer upon the one who subscribes the summons. Francis v. Knerr, — Minn. —, 182 N. W. 988.

7804. Signature—A plaintiff who is not an attorney of this state may sign a summons in his own behalf, and the fact that his signature to it in behalf of his coplaintiff is invalid merely results in a defect of parties plaintiff, the objection to which is waived unless taken by answer or demurrer. Francis v. Knerr, — Minn. —, 182 N. W. 988.

7805. Defects—Waiver—There is no general rule as to what defects are jurisdictional. Flanery v. Kusha, 143 Minn. 308, 173 N. W. 652.

To acquire jurisdiction over a defendant by the service of a summons, the summons must, in substance, comply with the requirements of the statute. Francis v. Knerr, — Minn. —, 182 N. W. 988.

A summons which requires the defendant to serve his answer on the plaintiff at his office in a designated city in this state, when, in fact, the plaintiff is a non-resident and has no office in such city, does not comply in substance with the requirements of the statute and is a nullity. Francis v. Knerr, — Minn. —, 182 N. W. 988.

Defects or informalities as to return day. 6 A. L. R. 841.

Defects in copy served. L. R. A. 1917C, 8.

(52) First Nat. Bank v. Coon, 143 Minn. 262, 173 N. W. 431 (error in date for serving answer); Flanery v. Kusha, 143 Minn. 308, 173 N. W. 652 (omission of "days" after twenty held not fatal).

SERVICE OF SUMMONS

7807. Proper service essential—Holidays—The service of a summons in a civil action on any of the days declared legal holidays by G. S. 1913, § 9412(6) is void and confers no jurisdiction. Farmers Implement Co. v. Sandberg, 132 Minn. 389, 157 N. W. 642.

7808. By whom—In serving a summons in a county of which he is not an officer, a sheriff or his deputy acts in an individual and not an

official capacity. Daigle v. Summit Mercantile Co., 144 Minn. 178, 174 N. W. 830.

7809. **Persons exempt from service**—A resident of another state who comes into this state as a witness in a cause pending in one of our courts, and who is entitled to protection from the service of process while attending, does not lose the protection by not departing from the state on the first train after the termination of his service as such witness. Whether by taking a later train, within nine hours after the termination of his service, when other trains direct to the home of the witness left the state at an earlier hour, he unreasonably delayed his departure from the state presented a question of fact, and it is held that the court below did not err in holding that the delay was not unreasonable. Turner v. Randall, 134 Minn. 427, 159 N. W. 958. See 14 L. R. A. (N. S.) 663; 1 Minn. L. Rev. 96.

The exemption from service of civil process extended by law to a witness or a party to an action pending in this state who comes voluntarily into the state to give testimony on the trial of the action does not apply to an attorney for a non-resident party who comes into this state for the purpose of taking a deposition of a witness residing therein for use in the trial of an action pending in the state of the attorney's residence. Nelson v. McNulty, 135 Minn. 317, 160 N. W. 795.

Privilege of non-residents engaged in public duty. 33 Harv. L. Rev. 721.

Exemption of non-resident parties. L. R. A. 1916E, 1173.

(59) Turner v. Randall, 134 Minn. 427, 159 N. W. 958.

(60) Stewart v. Ramsay, 242 U. S. 128.

7811. **Persons with whom summons may be left**—A summons to a wife may be left with her husband at their home. The fact that he does not call her attention to it is immaterial. Miller v. First Nat. Bank, 133 Minn. 463, 157 N. W. 1069.

7812a. **On non-resident natural person—Agents**—In actions in personam personal service on a non-resident party out of the state is not due process and confers no jurisdiction. Pennoyer v. Neff, 95 U. S. 714; National Council v. Scheiber, 137 Minn. 423, 163 N. W. 781; Sillerman v. National Council, 137 Minn. 428, 163 N. W. 783. See Digest, §§ 7831, 7835, 7836; 32 Harv. L. Rev. 873.

The defendant in an action brought by the plaintiff insurance company against the insured as sole defendant to cancel a policy of insurance died after service of process and issue joined. The cause of action survived, and under G. S. 1913, § 7685, providing for a substitution in case of the death of a party, a non-resident beneficiary was substituted as defendant upon a notice personally served upon him in a foreign state. Held, that a service of notice without the state was not due process and that jurisdiction was not acquired. National Council v. Scheiber, 137 Minn. 423, 163 N. W. 781.

Personal service in this state on an agent of a non-resident natural person is invalid though the agent is here transacting business for his principal. Kading v. Waters, 137 Minn. 328, 163 N. W. 521.

7812b. On receivers—Receivers are natural persons and the method of service upon them is that prescribed by G. S. 1913, § 7732. Kading v. Waters, 137 Minn. 328, 163 N. W. 521.

7813. On domestic private corporations—Agents—A domestic corporation may appoint a resident agent or attorney with power to accept service of process in this state, and service of a summons on the person so appointed will confer jurisdiction on the court. Notwithstanding such appointment, service of process may be made in the manner prescribed by subdivision 2, § 7735, G. S. 1913, if a domestic corporation has no officer or managing agent in this state, but, if so made, after service upon an authorized agent, it is superfluous and adds nothing to the effect of the service already made. State v. LeRoy Sargent & Co., 145 Minn. 448, 177 N. W. 633.

7814. On foreign corporations—In general—Where a foreign corporation does business in this state without complying with the statute and is sued here on a cause of action arising out of such business, it is estopped from denying that it has complied with the statute. Kulberg v. Fraternal Union, 131 Minn. 131, 154 N. W. 748; Wold v. Minnesota Commercial Men's Assn., 136 Minn. 380, 162 N. W. 461.

A foreign corporation manufacturing shoes and entering into contracts with shoe stores in this state whereby the stores sold the shoes of the company exclusively and made reports to the company at stipulated times and to a certain extent were under the supervision of the company, held doing business within this state so as to authorize the service of summons on its agent here who had charge of its business in this state. Prigge v. Selz, Schwab & Co., 134 Minn. 245, 158 N. W. 975.

Under chapter 218, Laws 1913 (G. S. 1913, § 7735), providing that in an action against a foreign corporation service may be made on any agent for the solicitation of freight or passenger traffic in this state, jurisdiction may be acquired over a foreign corporation doing business in the state by service on such an agent in a transitory action, although the cause of action did not arise in the state. Rishmiller v. Denver & Rio Grande R. Co., 134 Minn. 261, 159 N. W. 272; Id., 134 Minn. 479, 159 N. W. 947; Merchants' Elevator Co. v. Chesapeake & Ohio Ry. Co., — Minn. —, 179 N. W. 734; Callahan v. Union Pacific Ry. Co., — Minn. —, 182 N. W. 1004.

The facts proved are sufficient to show that defendant, a mutual insurance association of this state, was doing business in the state of Wisconsin. As the Wisconsin statute required defendant, before doing business in Wisconsin, to consent that process could be served upon it by making service upon the insurance commissioner of that state, defendant is estopped from denying that it had given such consent. The Wisconsin court acquired jurisdiction over defendant by service of process upon

the insurance commissioner, and its judgment is binding upon defendant in a suit brought thereon in this state. Wold v. Minnesota Commercial Men's Assn., 136 Minn. 380, 162 N. W. 461.

A foreign corporation sent agents into this state to take orders and make contracts for the repair of fur garments. A controversy arising over one of such contracts it sent an agent into this state to adjust the matter. In an action growing out the matter, held, that jurisdiction over the corporation was acquired therein by service of the summons on such agent. Hagerty v. National Fur & Tanning Co., 137 Minn. 119, 162 N. W. 1068.

When a foreign corporation comes into one of our courts to have the service of summons upon it set aside, it has the burden of showing that it was not present in the state so as to be subject to service of process. Hagerty v. National Fur & Tanning Co., 137 Minn. 119, 162 N. W. 1068.

Where a foreign corporation sends its agent or representative into this state to solicit the sale of pulpwood to it, to be delivered in this state, and he procures contracts therefor signed by the seller of such pulpwood, and then forwards them to such corporation for its signature, it is "doing business in this state," and the service of a summons upon such agent within this state is a valid service upon the corporation. Duluth Log Co. v. Pulpwood Co., 137 Minn. 312, 163 N. W. 520.

Receivers of a foreign railroad corporation are not subject to the jurisdiction of the courts of this state, by the service of the summons in the manner provided by subdivision 3 of section 7735. G. S. 1913, where the cause of action arose out of a transaction had with the receivers in another state, and the railroad line in their control does not extend into this state and is not operated therein. Kading v. Waters, 137 Minn. 328, 163 N. W. 521.

In order to obtain jurisdiction over a foreign corporation by service upon an agent within this state, the authority of the agent and the business in which he is engaged must be of such a character that it may be said that in his person the corporation is present in the state. An agent authorized to take orders, make collections, make adjustments, and dispose of property of the corporation within the state is such an agent. Nienhauser v. Robertson Paper Co., 146 Minn. 244, 178 N. W. 504.

As a general rule, service of process on an agent of a foreign corporation will not confer jurisdiction, unless the corporation, when served, was transacting business in the state where the action is brought. Whether the rule holds good where the cause of action sued on arose on a contract made in the state where suit is brought quære. Service on the secretary of state is only authorized under section 6206, G. S. 1913, where the corporation has a resident agent to accept service who cannot be found within the county of his residence. In an action founded on a contract with a non-resident, which was entered into prior to the appointment of an agent, jurisdiction is not acquired by service on an agent subsequently appointed, where the corporation had theretofore

withdrawn from the state and the agent had resigned. The agency created by the appointment is for the benefit of those who have a right to rely upon its existence in transacting business with the corporation, and is not coupled with an interest in favor of one who theretofore dealt with the corporation. Fletcher v. Southern Colonization Co., 148 Minn. —, 181 N. W. 205; Keller v. Southern Colonization Co., 148 Minn. —, 181 N. W. 208; Chipman v. Thomas B. Jeffery Co., 251 U. S. 373.

Where a judgment was rendered in Montana on a certificate of insurance issued by defendant to a resident of that state, and service was had on a state official as authorized by the Montana statute, the judgment of the Montana court was valid, notwithstanding that the contract of insurance was a Minnesota contract, such contract having its inception in the Montana business of defendant, and involving the rights of a citizen of that state. Benn v. Minnesota Commercial Men's Assn., — Minn. —, 182 N. W. 999.

Service on a mere soliciting agent without further powers is ineffectual. People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79. See L. R. A. 1916E, 236.

Unless a foreign corporation is engaged in business in a state, it is not brought within the state by the presence there of its agents. If prior cases have a different bent, they must be considered as overruled. Chipman v. Thomas B. Jeffery Co., 251 U. S. 373.

(79) 30 Harv. L. Rev. 676.

(80) Hagerty v. National Fur & Tanning Co., 137 Minn. 119, 162 N. W. 1068; Duluth Log Co. v. Pulpwood Co., 137 Minn. 312, 163 N. W. 520; Fletcher v. Southern Colonization Co., 148 Minn. —, 181 N. W. 205. See Wold v. Minnesota Commercial Men's Assn., 136 Minn. 380, 162 N. W. 461; Benn v. Minnesota Commercial Men's Assn., — Minn. —, 182 N. W. 999.

(81) Fletcher v. Southern Colonization Co., 148 Minn. —, 181 N. W. 205.

(85) Ihlan v. Chicago etc. Ry. Co., 137 Minn. 204, 163 N. W. 283 (service on ticket and freight agent of foreign railroad company in hands of a foreign receiver held sufficient); Merchant's Elevator Co. v. Chesapeake & Ohio Ry. Co., 147 Minn. 188, 179 N. W. 734 (service on traffic solicitor sustained). See Kading v. Waters, 137 Minn. 328, 163 N. W. 521.

See 32 Harv. L. Rev. 871; 33 Id. 9; L. R. A. 1916F, 334.

7814a. On foreign benefit societies—See § 4725.

7815a. Delay in service—If there is unreasonable delay in the service of process after the commencement of an action the action will lapse. Spotts v. Beebe, — Minn. —, 182 N. W. 167.

PROOF OF SERVICE

7820. Supplying or amending proof nunc pro tunc—Both by statute and at common law a court of record has power to supply or complete its records by directing a copy of a lost summons to be filed in place of the original. State v. Le Roy Sargent & Co., 145 Minn. 448, 177 N. W. 633.

PUBLICATION OF SUMMONS

7821. In what cases authorized—Publication of summons is authorized against a resident of the state who is within the state but cannot be found therein because he conceals himself to avoid the service of process. Roberts v. Roberts, 135 Minn. 397, 161 N. W. 148. See § 7835.

Service by publication is not authorized where a person has left the state not intending to return. McDonald v. Mabee, 243 U. S. 90.

(8) Roberts v. Roberts, 135 Minn. 397, 161 N. W. 148. See Searles v. Searles, 140 Minn. 385, 168 N. W. 133 (under statute of the state of Washington similar to ours).

(9) Trask v. Bodson, 141 Minn. 114, 169 N. W. 489 (action to quiet title).

7823. Affidavit—In actions to quiet title the statute permits service by publication "when the subject of the action is real or personal property within the state," etc. (G. S. 1913, § 7738, subd. 5), and the affidavit is required to state such ground. An affidavit stated "that the subject of this action is real property in this state," but did not give the name of the state. Held, that the affidavit was sufficient and that jurisdiction was acquired. Smith v. Ince, 138 Minn. 223, 164 N. W. 903.

7825. Mailing copy of summons—See § 5129.

7830. Form of summons—Defects—Misnomer—In an action against C. H. McCutchen to quiet title to vacant and unoccupied real property, the record title of which was in Charles H. McCutchen, the property having been assessed and taxed under the name "C. H. McCutchen," by which the record owner was known in connection therewith, service of the summons by publication, together with a notice of lis pendens containing a full description of the land, constitutes constructive notice to the owner of the record title. Trask v. Bodson, 141 Minn. 114, 169 N. W. 489.

7835. Constitutionality of statutes—Jurisdiction to render a judgment either in personam or in rem may be acquired by publication of a summons against a resident of the state who is within the state, but cannot be found therein because he conceals himself to avoid the service of process. This applies to a personal judgment for alimony in an action for divorce. Roberts v. Roberts, 135 Minn. 397, 161 N. W. 148.

(48) Roberts v. Roberts, 135 Minn. 397, 161 N. W. 148. See 3 Minn. L. Rev. 49.

(49) See Kading v. Waters, 137 Minn. 328, 163 N. W. 521; Baker v. Baker, Eccles & Co., 242 U. S. 394; Flexner v. Farson, 248 U. S. 289; 33 Harv. L. Rev. 11; 3 Minn. L. Rev. 277.

7836. Extent of jurisdiction acquired over non-residents—A personal judgment for money against a person who has left the state not intending to return, rendered upon service by publication in a local newspaper, is void both in and out of the state. It is immaterial that the defendant is asserting the validity of the judgment. McDonald v. Mabee, 243 U. S. 90.

The power of the state to proceed against the property of an absent defendant is the same whether the obligation sought to be enforced is an admitted indebtedness or a contested claim. It is the same whether the claim is liquidated or is unliquidated, like a claim for damages in contract or in tort. It is likewise immaterial that the claim is, at the commencement of the suit, inchoate, to be perfected only by time or the action of the court. The only essentials to the exercise of the state's power are presence of the res within its borders, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard. Pennington v. Fourth Nat. Bank, 243 U. S. 269.

(50) Wipperman Mercantile Co. v. Jacobson, 133 Minn. 326, 158 N. W. 606; Roberts v. Roberts, 135 Minn. 397, 161 N. W. 148; National Council v. Scheiber, 137 Minn. 423, 163 N. W. 781; Heuser v. Chicago, B. & Q. R. Co., 138 Minn. 286, 164 N. W. 984; Traders Trust Co. v. Davidson, 146 Minn. 224, 178 N. W. 735; Baker v. Baker, Eccles & Co., 242 U. S. 394; Pennington v. Fourth Nat. Bank, 243 U. S. 269; McDonald v. Mabee, 243 U. S. 90.

ABUSE OF PROCESS

7837. What constitutes—A complaint held not to state a cause of action for malicious abuse of civil process. Martin v. Cedar Lake Ice Co., 145 Minn. 452, 177 N. W. 631.

PROHIBITION

7840. General nature and office of writ—(58) State v. Hense, 135 Minn. 99, 160 N. W. 198.

(59, 62) State v. Hense, 135 Minn. 99, 160 N. W. 198.

7842. Other adequate remedy—It has been held that there was no other adequate remedy by certiorari, appeal, writ of error, or otherwise, where a probate court was about to act in proceedings for the commitment of an alleged insane person not within the county of the court, the want of jurisdiction appearing dehors the record. State v. Hense, 135 Minn. 99, 160 N. W. 198.

(66, 67) State v. Hense, 135 Minn. 99, 160 N. W. 198 (certiorari and writ of error held not adequate remedies).

7845. When lies—In general—(70) State v. Hense, 135 Minn. 99, 160 N. W. 198.

7846. Writ granted—(77) State v. Hense, 135 Minn. 99, 160 N. W. 198 (to restrain probate court from proceeding to inquire into the sanity of an alleged insane person in commitment proceedings, such person not being within the county); State v. District Court, 136 Minn. 471, 162 N. W. 351 (to restrain trial of an action in the wrong county to which it had been improperly removed).

PROPERTY

IN GENERAL

7849. Definition and nature—The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. Block v. Hirsh, 254 U. S. 640.

7850a. Real or personal—Unaccrued rents are not personal property. They are incorporeal hereditaments. They are an incident to the reversion and follow the land. Though separable from the land, they are, until such separation, part of the land. State v. Royal Mineral Assn., 132 Minn. 232, 156 N. W. 128.

Credits are personal property. State v. Royal Mineral Assn., 132 Minn. 232, 156 N. W. 128.

7852. Above and below surface—Right to air space—Right to air space above realty. Overhanging cornices and branches of trees and shrubs. Trespass by airplane. 32 Harv. L. Rev. 569.

(91) See Godley v. Weisman, 133 Minn. 1, 157 N. W. 711, 158 N. W. 333 (portion of building extending over line); 29 Harv. L. Rev. 525 (right to air space above land).

TITLE

7854. Definition—What constitutes—The usual option does not give a legal or equitable title. It gives a legal right the exercise of which may result in the transfer of title. Mineral Land Investment Co. v. Bishop Iron Co., 134 Minn. 412, 159 N. W. 966.

OWNERSHIP

7855. Definition—Who is an owner—There is no distinction between absolute power of disposition and absolute ownership. Hershey v. Meeker County Bank, 71 Minn. 255, 266, 73 N. W. 967.

A mortgagor in possession and a conditional vendee is an "owner"

of the property within the statute giving a lien on motor vehicles for labor and materials. Reed v. Horton, 135 Minn. 17, 159 N. W. 1080.

(7) See note, 2 A. L. R. 778.

POSSESSION

7856. Definition—Constructive—The constructive possession of property as defined in the books is a fiction of the law, and as applied to movable chattels, except in attachment, garnishment, or other special proceedings, theoretically places the property with the person of the legal owner at his domicil. State v. Giller, 138 Minn. 369, 165 N. W. 132.

7858. As title or evidence of title to realty—Actual possession of realty is prima facie evidence of ownership in fee in the absence of evidence showing a superior title and in such case is sufficient proof of title to sustain an action for damages to the freehold. Gillespie v. Duluth, 137 Minn. 454, 163 N. W. 779.

(14) Trustees v. United States F. & G. Co., 133 Minn. 429, 158 N. W. 709; Marchio v. Duluth, 133 Minn. 470, 158 N. W. 612; Post v. Sumner, 137 Minn. 201, 163 N. W. 161; Gillespie v. Duluth, 137 Minn. 454, 163 N. W. 779.

(15) Trustees v. United States F. & G. Co., 133 Minn. 429, 158 N. W. 709; Crane v. Veley, — Minn. —, 182 N. W. 915.

(16) Post v. Sumner, 137 Minn. 201, 163 N. W. 161.

PUBLIC LANDS

LAND DEPARTMENT

7867. Exclusive jurisdiction—(38) See Minnesota v. Lane, 247 U. S. 231 (action by state held not to lie).

(39) See Catchcart v. Minnesota & Manitoba R. Co., 133 Minn. 14, 157 N. W. 719; Minnesota v. Lane, 247 U. S. 231 (action by state held not to lie).

7873. Construction of statutes—Force—(46) Cathcart v. Minnesota & Manitoba R. Co., 133 Minn. 14, 157 N. W. 719.

7874. Conclusions of law not binding on courts—(47) Cathcart v. Minnesota & Manitoba R. Co., 133 Minn. 14, 157 N. W. 719; Clearwater County State Bank v. Ricke, 137 Minn. 438, 163 N. W. 793; Id., 142 Minn. 493, 171 N. W. 922.

7875. Findings of fact—Conclusiveness—(48, 49) Clearwater County State Bank v. Ricke, 137 Minn. 438, 163 N. W. 793; Id., 142 Minn. 493, 171 N. W. 922. See note, L. R. A. 1918D, 597.

RAILROAD LAND GRANTS

7885. When right of company attaches—The right of the railroad company to lands granted under the act of Congress of July 2, 1864 (13 Stat. 365, c. 217), attaches upon the filing with and acceptance by the Interior Department of the map of definite location, but does not apply to lands upon which a homestead entry is pending. The act of Congress of March 3, 1871 (16 Stat. 588, c. 144), does not become effective until the filing of the release therein provided for with the Interior Department. Baker v. Berg, 138 Minn. 109, 164 N. W. 588.

7886. Withdrawal of lands granted—Where the Land Department transmitted to the district land office a map showing the 10 and 20 mile place and indemnity limits of the grant under the act of March 3, 1865 (13 Stat. 526, c. 105), and withdrew the odd-numbered sections within such limits from market, the withdrawal becomes effective and remains in force until revoked. Baker v. Berg, 138 Minn. 109, 164 N. W. 588.

7888. Indemnity lands—Selection—Withdrawal—It has long been settled that while a railroad company, after its definite location, acquires an interest in the odd-numbered sections within its place or granted limits, which interest relates back to the date of the granting act, the rule is otherwise as to lands within indemnity limits. As to lands of the latter class, the company acquires no interest in any specific section until a selection is made with the approval of the Land Department; and then its right relates to the date of the selection. Baker v. Berg, 138 Minn. 109, 164 N. W. 588.

(73) Payne v. Central Pacific Ry. Co., 255 U. S. —.

PATENT

7908. Necessity—The title to public land does not pass from the government until the issuance of a patent. Baker v. Berg, 138 Minn. 109, 164 N. W. 588.

7917. Conclusiveness—Collateral attack—The decision of the officers of the land department of the United States as to matters of fact is conclusive upon the courts. Where it is clear that these officers have misapplied the law, a court of equity may give appropriate relief. The question whether the officers of the land department correctly applied the law must be determined upon the facts there found or established. In an action to set aside a patent issued by the land department after litigation, it is incumbent on the plaintiff to allege and prove what facts were found or established in that litigation in such manner as to make it plain that the officers of the land department misapplied the law. Clearwater County State Bank v. Ricke, 137 Minn. 438, 163 N. W. 793; Id., 142 Minn. 493, 171 N. W. 922.

HOMESTEADS

7925. Lands subject to entry—By the Nelson Act of January 14, 1889 (25 Stat. 642, c. 24), and the acceptance thereof by the Chippewa Indians, lands within the Red Lake Indian Reservation were ceded to the United States. The Indian title was extinguished. These lands were not, however, ceded absolutely. They were appropriated to the purposes of an express trust, and were to be disposed of in a manner expressly designated to carry out the purposes of that trust. They were accordingly not "unappropriated public lands," and were not subject to entry under the homestead laws of the United States. Cathcart v. Minnesota & Manitoba R. Co., 133 Minn. 14, 157 N. W. 719.

7935. Exemption from liability for debts—(45) Ruddy v. Rossi, 248 U. S. 104 (exemption extends to debts incurred after final certificate and before patent).

STATE LANDS IN GENERAL

7949a. Purchase—Certificates—Assignment—Patents—Recording act—The holder of a certificate of sale of state land is the equitable owner of the land; an assignment of such certificate is a conveyance of real estate within the statutory definition thereof; and a good-faith purchaser who places his assignment on record is protected by the recording acts against a prior unrecorded assignment. A quitclaim deed conveys such equitable title. Where, after a good-faith purchaser has become the owner of the equitable title to the land by virtue of the recording acts, the holder of an unrecorded assignment pays the balance due the state and surrenders the certificate and receives a patent, the patent cannot be canceled and the legal title revested in the state at the suit of the equitable owner, but the patentee may be adjudged to hold the legal title in trust for the equitable owner, and may be required to convey it to him upon payment of the amount so paid to the state. Krelwitz v. McDonald, 135 Minn. 408, 161 N. W. 156. See Werntz v. Bolen, 135 Minn. 449, 161 N. W. 155.

SWAMP LANDS

7952. Certificate of sale—Rights of holder—(90) See Krelwitz v. McDonald, 135 Minn. 408, 161 N. W. 156.

TIMBER LANDS

7954a. Rescale of timber sold by state—The state sold timber under a statute which provides for payment on a scale made by the surveyor general, but providing that the state auditor may demand a rescale and that the rescale shall be conclusive as to the amount of timber cut. Parties may, without authority of any statute, stipulate in a contract of sale, that the quantity of the property sold shall be determined by the estimate of a designated person or official. Notice of the time or place of

making the estimate is not required by any rule of law unless contracted for, and a requirement of notice will not be implied. The making of such an estimate is not an arbitration, and the rules as to arbitration do not apply. The rescale is subject to impeachment for fraud or mistake, but there is no allegation of either in this case. The statute is constitutional. The state may, by statute, fix the terms on which it will sell its timber. When those terms are accepted by a purchaser, their enforcement is not a taking of property without due process of law. Nor does the statute fix rules of evidence. State v. Equitable Surety Co., 140 Minn. 48, 167 N. W. 292.

7955. Permits to cut timber—Assignment—Bonds—On issuance of a permit to a purchaser of state timber, the state takes a bond from the purchaser to secure the price. If the permit is assigned, it takes another bond from the assignee for the same purpose and keeps the original bond in force. The state is not required to exhaust its remedy on the second bond before resorting to the first. Separate actions on the bonds may be maintained. State v. Aetna Casualty & Surety Co., 140 Minn. 70, 167 N. W. 294.

As between the surety on the bond given under section 5277, G. S. 1913, upon obtaining a permit to cut and remove state timber, and the surety on the bond given under section 5279, upon an assignment of the permit, the latter surety is primarily liable for the failure of the assignee to pay the state for the timber he cut and removed. Aetna Casualty & Surety Co. v. Equitable Surety Co., 145 Minn. 326, 177 N. W. 137.

7957. Trespass—Action for penalty—In an action by the state to recover the value of certain lumber unlawfully cut under a timber permit, held, that a finding by the court in a former action was not res judicata as to the amount of timber cut and that the evidence justified the finding as to the amount taken by defendant. State v. Brooks-Scanlon Lumber Co., 137 Minn. 71, 162 N. W. 1054.

SCHOOL LANDS

7966. Certificate of sale—Rights of holder—The holder of a certificate of sale is the equitable owner of the land and assignment of such a certificate is a conveyance of land. An assignment with a blank for the name of the grantee is a nullity until the name of the grantee is inserted. Werntz v. Bolen, 135 Minn. 449, 161 N. W. 155.

(11) See Krelwitz v. McDonald, 135 Minn. 408, 161 N. W. 156.

7967. Patent—(14) Krelwitz v. McDonald, 135 Minn. 408, 161 N. W. 156. See § 7949a.

PUBLIC OFFICERS

IN GENERAL

7984. Definitions—(39) Duluth v. Ross, 140 Minn. 161, 167 N. W. 485 (clerk of municipal court of Duluth held a public officer). See State v. District Court, 134 Minn. 26, 158 N. W. 790; Digest, § 8739 (deputy sheriff is a public officer).

(40) State v. Gardner, 88 Minn. 130, 142, 92 N. W. 529; State v. District Court, 134 Minn. 26, 158 N. W. 790.

7985. Nature of public office—(42) See 4 A. L. R. 205 (power to abolish office).

7988. Term—The legislature cannot abridge or extend the constitutional term. State v. Windom, 131 Minn. 401, 155 N. W. 629; State v. Berg, 132 Minn. 426, 157 N. W. 652. See State v. Berg, 133 Minn. 65, 157 N. W. 907.

A "regular term of office" signifies a definite period of time. A policeman holding during good behavior has no "regular term of office." State v. District Court, 134 Minn. 26, 158 N. W. 790.

(53) State v. Berg, 132 Minn. 426, 157 N. W. 652.

7989. Resignation—Abandonment—(65) See State v. Barnes, 136 Minn. 438, 162 N. W. 513, 1050.

See § 7995.

7990. Vacancies—(66) State v. Berg, 132 Minn. 426, 157 N. W. 652 (expiration of constitutional term—clerk of court).

7991. Deputies—Liability of principal—Whether a public officer is liable for the acts of his deputy depends upon the nature of the office and of the act or omission of the deputy. Often the matter is regulated by statute. The clerk of the municipal court of Duluth has been held liable for the malfeasance of his deputy in appropriating to his own use moneys coming into his hands in the performance of his official duties. Duluth v. Ross, 140 Minn. 161, 167 N. W. 485. See § 8022.

ELIGIBILITY

7992. In general—Constitutional provision—The eligibility of a person to become a United States senator is determined by federal rather than state law. The state constitutional provision is inapplicable. State v. Schmahl, 140 Minn. 219, 167 N. W. 481.

The constitutional provision applies to all elective offices, constitutional or statutory. Hoffman v. Downs, 145 Minn. 465, 177 N. W. 669.

(73) Hoffman v. Downs, 145 Minn. 465, 177 N. W. 669.

7995. Incompatible offices—Where two offices are incompatible, acceptance of the second operates as a resignation of the first. Hoffman v. Downs, 145 Minn. 465, 177 N. W. 669.

(78) See L. R. A. 1917A, 216, 231.

7997. Legislative control—(80) Hoffman v. Downs, 145 Minn. 465, 177 N. W. 669.

POWERS, DUTIES AND LIABILITIES

7998. Functions of office—Statutory powers—A public officer selling under a statutory power has no power to sell for less than the amount fixed by the statute. Security Trust Co. v. Heyderstaedt, 64 Minn. 409, 67 N. W. 219; Arnold v. Cook County, 134 Minn. 373, 159 N. W. 825.

(82) Arnold v. Cook County, 134 Minn. 373, 159 N. W. 825.

7998a. Majority of several may act—Statute—It is provided by G. S. 1913, § 9411(3), that "words purporting to give a joint authority to three or more public officers or other persons shall be construed as conferring such authority upon a majority of them, unless it shall be otherwise expressly declared in the law giving the same." State v. Weingarth, 134 Minn. 309, 159 N. W. 789.

8001. Liability for negligence—Town officers are not liable to one injured on a highway because of their failure to keep it in repair. Bolland v. Gihlstorf, 134 Minn. 41, 158 N. W. 725.

A public officer, whose functions are judicial or quasi judicial, cannot be called on to respond in damages for the honest exercise of his judgment within his jurisdiction, however erroneous his judgment may be. A public officer, exercising only ministerial powers, is liable to one who sustains an injury by his malfeasance, misfeasance, or nonfeasance. A public officer or agent, engaged in a public duty in obedience to the command of a statute, should not suffer personally for an error in judgment. Roerig v. Houghton, 144 Minn. 231, 175 N. W. 542.

8004. Criminal liability—County officers are criminally liable for being interested in county contracts. State v. Byhre, 137 Minn. 195, 163 N. W. 282.

COMPENSATION

8005. Incident to title to office—De jure and de facto officers—The payment of the compensation to a de facto officer, who is installed in the office, with notice of the rights of the de jure officer, who is wrongfully excluded from the office, is no defence to an action by such de jure officer to recover the compensation for the period during his wrongful exclusion. Marcus v. Duluth, 138 Minn. 225, 164 N. W. 906; Gude v. Duluth, 144 Minn. 109, 174 N. W. 614.

Per diem compensation. 1 A. L. R. 276.

(94) Markus v. Duluth, 138 Minn. 225, 164 N. W. 906; Gude v. Duluth, 144 Minn. 109, 174 N. W. 614. See Windom v. Duluth, 137 Minn. 154,

162 N. W. 1075; Byrne v. St. Paul, 137 Minn. 235, 163 N. W. 162; § 8006.

(95) See Windom v. Duluth, 137 Minn. 154, 162 N. W. 1075.

8006. During suspension—The judge of probate appointed by the Governor upon the suspension of the probate judge is in office of right; and upon the determination by the supreme court that the removal was invalid the judge of probate who was removed cannot recover of the county the salary of the office for the period it was rightfully occupied by the Governor's appointee. Martin v. Dodge County, 146 Minn. 129, 178 N. W. 167.

(99) Markus v. Duluth, 138 Minn. 225, 164 N. W. 906; Gude v. Duluth, 144 Minn. 109, 174 N. W. 614; Martin v. Dodge County, 146 Minn. 129, 178 N. W. 167.

8008. None except as prescribed by law—(3) Libby v. Anoka County, 38 Minn. 448, 38 N. W. 205; Trovaton v. Pennington County, 135 Minn. 274, 160 N. W. 766; Dosland v. Clay County, 136 Minn. 140, 161 N. W. 382. See Digest, § 2322.

REMOVAL AND SUSPENSION

8010. In general—The conviction of a public officer of an infamous crime or one involving a violation of his official oath operates as a removal of the officer and creates a vacancy in his office. State v. Burnquist, 141 Minn. 308, 170 N. W. 201, 609.

The power of suspension is an incident of the power of removal. Burnap v. United States, 252 U. S. 512.

Where an officer or employee is entitled to a hearing before removal or discharge such hearing is to be held by the officer or board having the power of removal or discharge, unless otherwise provided. State v. Board of Public Welfare, — Minn. —, 183 N. W. 521.

(5) State v. Wunderlich, 144 Minn. 368, 175 N. W. 677; State v. Board of Public Welfare, — Minn. —, 183 N. W. 521; Burnap v. United States, 252 U. S. 512; 34 Harv. L. Rev. 679. See § 7985.

8010a. Under civil service regulations—In the absence of statute so declaring, the commencement of proceedings under civil service regulations for the removal of a public officer does not of itself operate as a suspension of the officer pending the proceeding, nor deprive him of the right to continue in the office and receive the compensation incident thereto. Proceedings for the removal of a public officer under civil service regulations, when removal can be made for cause only, are judicial in character, and an order of removal issued therein takes effect and becomes operative from its date. Where there is no suspension of the officer pending the proceeding, the order does not relate back to the date of commencement thereof. Markus v. Duluth, 138 Minn. 225, 164 N. W. 906; Gude v. Duluth, 144 Minn. 109, 174 N. W. 614.

8011. By Governor—Statute—The only authority in this state for the removal of an elective public officer, of the class to which the office of judge of probate belongs, so far as this case is concerned, is that granted and conferred by the provisions of the constitution and statutes above quoted. The authority so granted is exclusive, and renders inapplicable any remedy which, in the absence of statute, may perhaps exist at common law. The authority thus conferred limits the grounds of removal to acts constituting malfeasance in the performance of official duties, or such a failure to perform the duties as will constitute nonfeasance in office. Malfeasance in office, the basis of this proceeding, sometimes expressed as "misconduct in office," has a well-defined and a well-understood meaning, and refers to and includes only such misdeeds of a public officer as affect the performance of his official duties, to the exclusion of acts affecting his personal character as a private individual; the character of the man must be separated from his character as an officer. State v. Burnquist, 141 Minn. 308, 170 N. W. 201, 609.

In order to warrant the removal of an elective public officer under section 5724, G. S. 1913, the misconduct complained of must have some connection with or relation to the performance of the officer's official duties. Acts and conduct in opposition to the policy of the federal government in entering into the war with Germany, having no relation to the official duties of a judge of probate furnish no sufficient legal basis for an order by the Governor of the state removing an incumbent of that office. State v. Burnquist, 141 Minn. 308, 170 N. W. 201, 609.

Constitution, art. 13, §§ 1, 2, provides that certain officers may be impeached, and that the legislature may provide for the removal of inferior officers for malfeasance. By G. S. 1913, § 5724, provision is made for the removal of judges of probate and other county officers by the Governor. Judges of probate are among those for whose removal the constitution gives the legislature authority to provide, and under the statute the Governor has power to remove judges of probate for malfeasance. As incident to the power of removal the Governor has the power of suspension pending the hearing of the proceeding for removal. Suspension may be made without a hearing. Martin v. Dodge County, 146 Minn. 129, 178 N. W. 167.

While the courts cannot interfere with the exercise of the powers which the constitution vests in the Governor, his action in removing an officer from office may be reviewed by writ of certiorari, as that power rests only on an act of the legislature. The Governor may permit the petition for the removal of an officer to be amended by inserting additional charges therein, if the officer be given proper opportunity to meet such additional charges. Such proceedings are not governed by the strict rules which govern trials in court, and a decision supported by competent and relevant evidence cannot be reversed because other incompetent evidence may have been received. Proceedings for amotion from office are authorized for the good of the public service, not as a

punishment of the officer, and are remedial rather than penal in their nature. The rule that a defendant cannot be convicted in a criminal prosecution on the uncorroborated testimony of an accomplice does not apply in such a proceeding as this, yet such testimony should be carefully scrutinized. Proof of other offences, of the same nature as those charged, which tended to show a general course of conduct which embraced the commission of such offences, was admissible for the purpose of corroboration. The fact that the relator had been indicted, tried and acquitted in a federal court, on one of the charges set forth in the petition, did not bar the Governor from hearing and determining that charge in this proceeding. In re Mason, 148 Minn. —, 181 N. W. 570.

(8) Martin v. Dodge County, 146 Minn. 129, 178 N. W. 167.

DE FACTO OFFICES AND OFFICERS

8015. Officer holding over—(18) Windom v. Duluth, 137 Minn. 154, 162 N. W. 1075.

8016. Possession of office—(19) Windom v. Duluth, 137 Minn. 154, 162 N. W. 1075.

8017. Validity of acts—(20, 21) State v. Van Vleet, 139 Minn. 144, 165 N. W. 962.

OFFICIAL BONDS

8018. General and special bonds—(23) 4 A. L. R. 1431.

8022. Acts rendering sureties liable—Sureties upon an official bond are liable for unfaithful or improper conduct of the officer in the performance of acts or duties which the law authorized or required him to perform. They are also liable for a trespass upon person or property committed by the officer while acting within the scope of his official authority and while purporting to act in his official capacity. They are not liable for the acts of the officer committed wholly outside the scope of his official authority. Mower County v. American Bonding Co., 133 Minn. 274, 158 N. W. 394.

As between sureties contracting against official misconduct and those suffering from it the latter, paying an obligation resting upon the sureties as well, are superior in right. Cooper, Myers & Co. v. Smith, 139 Minn. 382, 166 N. W. 504.

Sureties are sometimes liable for the acts of a deputy of the principal officer. Duluth v. Ross, 140 Minn. 161, 167 N. W. 485. See 1 A. L. R. 222; 12 Id. 980.

(29) Cooper, Myers & Co. v. Smith, 139 Minn. 382, 166 N. W. 504.

CRIMES

8028. Auditing false claims—See § 2263a.

8028a. Refusing to surrender official documents to successor—An indictment under G. S. 1913, § 8542, for failure to surrender official documents to a successor held insufficient. State v. Cook, 141 Minn. 495, 169 N. W. 599.

QUIETING TITLE

ACTION TO REMOVE A CLOUD

8031. Who may maintain—One whose only claim to land is based on a contract from one who never had any interest in the land cannot maintain an action to be adjudged the equitable owner thereof. Werntz v. Bolen, 135 Minn. 449, 161 N. W. 155.

8038. Judgment—Relief allowable—In an action by an equitable owner to set aside a legal title the holder of the legal title may be adjudged to hold it in trust for the equitable owner, and may be required to convey it to him upon payment of the amount paid therefor, when such a requirement would be just under the circumstances. Krelwitz v. McDonald, 135 Minn. 408, 161 N. W. 156.

See § 8058.

STATUTORY ACTION TO DETERMINE ADVERSE CLAIMS

8042. What claims determinable—This form of action may be maintained to determine an adverse tax title, and payment into court of taxes is not a prerequisite. Deaver v. Napier, 139 Minn. 219, 166 N. W. 187.

8043. Who may maintain action—A vendee in an executory contract for the sale of realty may maintain an action against a third person. Porten v. Peterson, 139 Minn. 152, 166 N. W. 183.

(87) Porten v. Peterson, 139 Minn. 152, 166 N. W. 183.

8044. Possession and vacancy—Waiver—Where, in an action to determine adverse claim to real estate, defendants plead title in themselves and set out the source thereof, and also specify the source and defects which they claim in plaintiff's title, and the same is litigated upon the trial, they waive the right to claim that the action was improperly brought. Baker v. Berg, 138 Minn. 109, 164 N. W. 588.

(95) Baker v. Berg, 138 Minn. 109, 164 N. W. 588.

8046. Unknown defendants—Judgment against unknown parties. L. R. A. 1918F, 609.

8048. Complaint—(8) Deaver v. Napier, 139 Minn. 219, 166 N. W. 187.

8049. Answer—Where plaintiff alleged that he was the son and heir of A and B, it was held that evidence of a divorce between A and B some years before the birth of plaintiff was admissible under a general denial. La Framboise v. Day, 136 Minn. 239, 161 N. W. 529.

8052. Reply—Departure—Held that there was no departure in a reply. Butterwick v. Fuller & Johnson Mfg. Co., 140 Minn. 327, 168 N. W. 18.

8055. Burden of proof when plaintiff in possession—(48) Emkee v. Ahston, 139 Minn. 443, 166 N. W. 1079.

8056. Burden of proof when land vacant—Plaintiff must prevail on the strength of his own title and not on the weakness of the defendant's title. Northern Counties Land Co. v. Excelsior Land etc. Co., 146 Minn. 207, 178 N. W. 497.

The plaintiff, in an action to determine adverse claims to vacant and unoccupied real property, must establish his alleged title when put in issue, and the title tendered by him on the trial is open to attack by defendant, although his own title be in some respects defective. Whittaker v. Meeds, 146 Minn. 160, 178 N. W. 597.

(51) Whittaker v. Meeds, 146 Minn. 160, 178 N. W. 597.

(54) Emkee v. Ahston, 139 Minn. 443, 166 N. W. 1079; Whittaker v. Meeds, 146 Minn. 160, 178 N. W. 597.

8058. Judgment—Relief allowable—Rent follows the title in the absence of reservations and an adjudication of title generally involves the right to rent Orr v. Bennett, 135 Minn. 443, 161 N. W. 165.

A judgment for plaintiffs, in an action by creditors who have redeemed from a mortgage foreclosure sale, quieting title to the land and to a mining lease thereof, determining their redemption valid and determining a later attempted redemption invalid, is not an adjudication of their right to recover rents or royalties that accrued during the year allowed for redemption after foreclosure sale. Orr v. Bennett, 135 Minn. 443, 161 N. W. 165.

The plaintiff was deprived of no right given by Laws (Ex. Sess.) 1919, c. 5. Chance v. Hawkinson, — Minn. —, 182 N. W. 911.

Judgment against unknown parties. L. R. A. 1918F, 609.

See § 8038.

QUOTIENT VERDICTS—See New Trial, § 7115a.

QUO WARRANTO

WHEN LIES

8064. Public or municipal corporations—Quo warranto will lie at the instance of the state to test the validity of an annexation of territory to a village. State v. McKinley, 132 Minn. 48, 155 N. W. 1064.

Quo warranto, at the instance of the attorney general of the state, is the exclusive proceeding to determine the legal existence of a public corporation. Evens v. Anderson, 132 Minn. 59, 155 N. W. 1040.

Quo warranto will lie to test the legality of an annexation of territory

to an incorporated village. State v. Kinney, 146 Minn. 311, 178 N. W. 815.

(80) Evens v. Anderson, 132 Minn. 59, 155 N. W. 1040.

(85) Evens v. Anderson, 132 Minn. 59, 155 N. W. 1040; Hammer v. Narverud, 142 Minn. 199, 171 N. W. 770. See § 8070.

8065. Private corporations—(88) State v. Barnes, 136 Minn. 438, 162 N. W. 513, 1050 (office in mutual benefit society).

PROCEDURE

8069. Jurisdiction of supreme and district courts—To test the legality of an annexation of territory to an incorporated village the attorney general may elect to proceed either in the supreme court or the district court. State v. Kinney, 146 Minn. 311, 178 N. W. 815.

(1) State v. Kinney, 146 Minn. 311, 178 N. W. 815.

8070. Leave to file information—Discretion—Private relator—In proceedings by information in the nature of quo warranto, a relator who is not a claimant of the office may test the title of the incumbent to the office without proof that another has a better title. If no person is entitled to the office, there is a vacancy. State v. Barnes, 136 Minn. 438, 162 N. W. 513, 1050.

(4) See State v. Kinney, 146 Minn. 311, 178 N. W. 815.

(6) Hammer v. Narverud, 142 Minn. 199, 171 N. W. 770

8072. Burden of proof—One claiming an office can succeed only on the strength of his own title. State v. Oftedal, 72 Minn. 498, 75 N. W. 692; State v. Barnes, 136 Minn. 438, 162 N. W. 513, 1050.

RAILROAD AND WAREHOUSE COMMISSION

8075. General supervision over railroads—The commission is clothed by the act creating it, and by the various statutes defining its authority and jurisdiction, with general supervision of all railroads operating within this state. Much of the jurisdiction thus conferred is by specific legislation, though the full scope of its authority is not confined to those things which are specifically provided for. The commission may make such orders applicable generally to the railroad service as public interests may from time to time require. Of this there can be no serious doubt. Minneapolis Civic & Commerce Assn. v. Great Northern Ry. Co., 137 Minn. 10, 162 N. W. 689, 163 N. W. 294.

The commission is authorized to require a railroad to make any reasonable change in the operation of its road and the maintenance of stations and depots which will promote the security or convenience of the public. Brogger v. Chicago etc. Ry. Co., 137 Minn. 338, 163 N. W. 662, 164 N. W. 368.

(24) Minneapolis Civic & Commerce Assn. v. Great Northern Ry. Co., 137 Minn 10, 162 N. W. 689, 163 N. W. 294; Schain v. Great Northern Ry. Co., 137 Minn. 157, 162 N. W. 1079.

8077. Power over railroad rates—The commission has power to ascertain and determine what are reasonable and just rates. It is expressly authorized to unite two or more stations or commercial centers into a common rate point, and may designate the classes of freight which shall take common rates, and fix the mileage that shall govern between the common rate point and any and all other points in the state. St. Paul Association of Commerce v. Chicago etc. R. Co., 134 Minn. 217, 158 N. W. 982.

8078. Miscellaneous powers over railroads—The commission has power to determine whether a depot provided by a railroad company is suitable, and if not to require it to construct a suitable one. It may require that a new depot shall be constructed of such material and in such manner as to comply with the fire ordinances of the municipality. State v. Great Northern Ry. Co., 135 Minn. 19, 159 N. W. 1089; Commercial Club v. Chicago etc. Ry. Co., 142 Minn. 169, 171 N. W 312.

It may require railroad companies to construct sidetracks to industrial plants. Ochs v. Chicago & N. W. Ry. Co., 135 Minn. 323, 160 N. W. 866; Range Sand-Lime Brick Co. v. Great Northern Ry. Co., 137 Minn. 314, 163 N. W. 656. See § 8125a.

It may compel a railroad to discontinue charging switching charges in connection with a subordinate railroad which is substantially a part of its system though maintaining a separate corporate entity. Minneapolis Civic & Commerce Assn. v. Chicago etc. Ry. Co., 134 Minn. 169, 158 N. W. 817; Minneapolis Civic & Commerce Assn. v. Great Northern Ry. Co., 137 Minn. 10, 162 N. W. 689, 163 N. W. 294.

It may require a railroad company to make changes in its train service. Schain v. Great Northern Ry. Co., 137 Minn. 157, 162 N. W. 1079.

The commission ordered defendant to erect a new depot at St. James. Defendant offered to alter and improve the old depot, a wooden structure located within the fire limits. It is held: The section, in the ordinance establishing the fire limits providing that no wooden building within the limits could be raised, repaired, or enlarged should be construed as not prohibiting the ordinary upkeep repairs, but as directed against changes or alterations that to a substantial extent rebuild the structure. So construed, the ordinance is valid, and forbade the making of the alterations proposed by defendant. Aside from the question of the validity and applicability of the ordinance, the commission properly could take into consideration the impropriety of perpetuating a fire hazard in the business center of the city, and the desirability of a change in the location of the depot so as to make a street crossing more safe. There is no conflict between the provision referred to in the ordinance and sections 4390 and 4393, G. S. 1913. The order of the commission does not violate any provision of the state or federal constitutions, nor

does it come within the operation of Act Cong. March 21, 1918. Commercial Club v. Chicago etc. Ry. Co., 142 Minn. 169, 171 N. W. 312.

The commission cannot authorize a railroad company to abandon its road on the ground that it can be operated only at a loss. In re Duluth & N. M. Ry. Co., — Minn. —, 184 N. W. 186.

It cannot require a railroad company to install stock scales at its stations. Great Northern Ry. Co. v. Cahill, 253 U. S. 71.

(35) State v. Great Northern Ry. Co., 135 Minn. 19, 159 N. W. 189; Brogger v. Chicago etc. Ry. Co., 137 Minn. 338, 163 N. W. 662, 164 N. W. 368; Commercial Club v. Chicago etc. Ry. Co., 142 Minn. 169, 171 N. W. 312.

8078a. Administrative orders of commission—How far conclusive on courts—The legislative and administrative orders of the commission may be set aside by the courts if they are contrary to the state or federal constitution or laws, or are beyond the powers of the commission, or are based on a mistake of law, or are unsupported by evidence, or are so arbitrary and unreasonable as not to be within the reasonable discretion and judgment of the commission. Courts cannot pass on the wisdom or expediency of such orders. They ascribe to the findings of the commission the strength due to the judgments of a tribunal appointed by law and informed by experience. State v. Great Northern Ry. Co., 130 Minn. 57, 153 N. W. 247; State v. Great Northern Ry. Co., 135 Minn. 19, 159 N. W. 1089; Schain v. Great Northern Ry. Co., 137 Minn. 157, 162 N. W. 1079; Brogger v. Chicago etc. Ry. Co., 137 Minn. 338, 163 N. W. 662, 164 N. W. 368; Commercial Club v. Chicago etc. Ry. Co., 142 Minn. 169, 171 N. W. 312. See § 397b.

Declaring a depot unsuitable and requiring the construction of a suitable one is a legislative or administrative function. The courts may review the action of the commission in such a matter only so far as to determine whether it is reasonable. When supported by substantial evidence the action of the commission is final. State v. Great Northern Ry. Co., 135 Minn. 19, 159 N. W. 1089; Commercial Club v. Chicago etc. Ry. Co., 142 Minn. 169, 171 N. W. 312.

Administrative orders of the commission which are unreasonable may be set aside by the courts. It has been held unreasonable to require certain trains to stop at a village station and also to stop on flag at a junction with another railroad just outside the village. Brogger v. Chicago etc. Ry. Co., 137 Minn. 338, 163 N. W. 662, 164 N. W. 368.

8078c. General supervision over telephone companies—Laws 1915, c. 152, places all telephone companies doing business in this state under the supervision and control of the commission. State v. Holm, 138 Minn. 281, 164 N. W. 989.

By Laws 1915, c. 152, §§ 1, 2, the commission is given jurisdiction and supervisory powers over telephone companies the same as it has over railroad and express companies; and such jurisdiction extends to all companies which are engaged in furnishing telephone service, regardless of the character of their organization. The statute is not un-

constitutional as conferring judicial powers upon the commission. The powers conferred are administrative and legislative in character. The reasonableness of its orders is a judicial question reviewable on an appeal to the district court for which the statute provides. It was the duty of the telephone company to furnish reasonably adequate service and facilities for the public without discrimination. An order of the commission, directing that the same telephone facilities and service be furnished to a petitioner as to others, after the time for appeal and when none was taken became final, and was not subject to attack or review by the company on mandamus to enforce it. Mandamus is a proper remedy to compel the company to furnish the service directed. Although the general rule is that mandamus does not lie to regulate the affairs of unincorporated associations, such rule does not prevent the use of the writ to compel the performance of a duty cast by law upon public service associations. Besides the statute expressly authorizes the use by the attorney general of any appropriate writ without a distinction as to the character of the organization of the telephone company. State v. Four Lakes Tel. Co., 141 Minn. 124, 169 N. W. 480.

By chapter 152, Laws 1915, telephone companies were placed under the jurisdiction of the commission. The act provided that their rates should be subject to regulation by the commission, and that the statutes relating to its control of railroad and express companies should also apply to telephone companies, except as otherwise provided in the act. Whenever their rates were found to be unreasonable, the commission, on its own motion or upon complaint made to it, was authorized to prescribe reasonable rates to take the place of those found unreasonable. State v. Tri-State T. & T. Co., 146 Minn. 247, 178 N. W. 603. See Goodrich v. Northwestern Telephone Exchange Co., 148 Minn. —, 181 N. W. 333.

8078d. General supervision of stockyards—Commission charges.—Laws Ex. Sess. 1919, c. 39, giving to the commission authority to fix reasonable commission charges of commission men engaged in buying and selling stock at public stockyards, is constitutional. State v. Rogers & Rogers. — Minn. —, 182 N. W. 1005.

8079. Enforcement of orders—(37) State v. Four Lakes Tel. Co., 141 Minn. 124. 169 N. W. 480 (enforcement of orders by mandamus).

8080. Right to demand information—Power to compel production of papers and records. L. R. A. 1917F, 1202.

8080a. Successive applications for orders—Estoppel—The denial of an application to the commission for an administrative order is not a bar to a subsequent application. The commission may grant an order though it has previously denied an application for a similar order. Entertaining successive applications probably rests entirely in the discretion of the commission. Brogger v. Chicago etc. Ry. Co., 137 Minn. 338, 163 N. W. 662, 164 N. W. 368.

8082. Appeal to district court—Who may appeal—Force of findings by commission—Section 4192, G. S. 1913, prescribing the effect to be given by the courts to the findings and order of the commission in such matters and the duty of the courts in respect thereto, provides: "Such findings of fact shall be prima facie evidence of the matters therein stated, and the order shall be prima facie reasonable, and the burden of proof upon all issues raised by the appeal shall be on the appellant. If said court shall determine that the order appealed from is lawful and reasonable, it shall be affirmed and the order enforced as provided by law. If it shall be determined that the order is unlawful or unreasonable it shall be vacated and set aside." Brogger v. Chicago etc. Ry. Co., 137 Minn 338, 163 N. W. 662, 164 N. W. 368.

Under section 22, c. 152, Laws 1915, giving the right of appeal from an order of the commission to a party to the proceeding in which the order is made and to the attorney general, the term "party" is used in the same sense as "party to an action." The commission, by inviting a city in which a telephone company maintained an exchange to attend a hearing in a proceeding begun by the commission to determine the reasonableness of telephone rates, did not make such city a party to the proceeding, by permitting it to file objections to the rates in effect and to participate in the proceedings had before the commission. State v. Tri-State T. & T. Co., 146 Minn. 247, 178 N. W. 603.

8082a. Appeal to supreme court—After an appeal to the supreme court, held, that the district court had jurisdiction to vacate its prior order staying the operation of its judgment. State v. District Court, 136 Minn. 455, 161 N. W. 164.

RAILROADS

IN GENERAL

8083. What constitutes—An electric car operated on the tracks and right of way of a steam railroad company, and in the manner in which such roads are operated, is governed by the rules applicable to the operation of steam railroads, and not by those applicable to the operation of street cars. Curran v. Chicago G. W. R. Co., 134 Minn. 392, 159 N. W. 955.

(42) See Kline v. Minnesota Iron Co., 93 Minn. 63, 100 N. W. 68; McCullough v. Georgia Casualty Co., 137 Minn. 88, 162 N. W. 894.

8087. Subject to legislative regulation—The obligations and duties imposed upon railroad companies by their charters do not restrict the power of the state to impose such further duties as may be deemed essential or important for the safety of the public, the security of passengers and employees, or the protection of adjacent property. Peterson v. Northern Pacific Ry. Co., 132 Minn. 265, 156 N. W. 121

8088a. Relief department—The plaintiff suing upon his membership in the relief department of the defendant was not required to appeal within the department when no adverse decision was made and the official to whom he properly presented his claim refused to act. Under section 5 of the federal Employers' Liability Act providing that any contract, rule or regulation of a common carrier exempting it from liability shall be void, provided that it may set off its contribution to any insurance or relief benefit paid to the injured employee in his action under the act for his injuries, a regulation of the relief department that if the employee brings suit for his injuries the benefits accruing under his membership shall be forfeited is invalid, and the employee may recover on his membership certificate though he has pending an action against the company for his injuries. Wise v. Chicago etc. Ry. Co. Relief Depart., 133 Minn. 434, 158 N. W. 711.

8088b. Federal control during war—Actions—While the railroads were under federal control during the war actions were properly brought against the Director General of Railroads, and not against the railroad companies. Missouri Pacific Ry. Co. v. Ault, 255 U. S. —; Borsheim v. Great Northern Ry. Co., — Minn. —, 183 N. W. 519, overruling, Lavalle v. Northern Pacific Ry. Co., 143 Minn. 74. 172 N. W. 918; Gowan v. McAdoo, 143 Minn. 227, 173 N. W. 440; Palyo v. Northern Pacific Ry. Co., 144 Minn. 398, 175 N. W. 687; Rinquist v. Duluth, M. & N. Ry. Co., 145 Minn. 147, 176 N. W. 344; Anderson v. Minneapolis etc. Ry. Co., 146 Minn. 430, 179 N. W. 45.

The government was liable for a loss occurring by reason of a fire communicated by a locomotive engine of a railway company during federal control under the statute imposing upon railroads a liability for damages done by a fire so communicated. Ringquist v. Duluth, M. & N. Ry. Co., 145 Minn. 147, 176 N. W. 344; Borsheim v. Great Northern Ry. Co., — Minn. —, 183 N. W. 519.

8088c. Not bound to operate road at a loss—A railroad company cannot be compelled to continue the operation of its road at a loss. In re Duluth & N. M. Ry. Co., — Minn. —, 184 N. W. 186.

SALE, LEASE AND CONSOLIDATION

8091. Authority—The control of the Omaha by the Northwestern through ownership of the majority of the stock has been held not illegal. State v. Chicago & N. W. Ry. Co., 133 Minn. 413, 158 N. W. 627. See Minneapolis C. & C. Assn. v. Chicago etc. Ry. Co., 134 Minn. 169, 158 N. W. 817.

8095. Liability of lessor for negligence of lessee—Liability of railroad for injuries caused by negligence of another company using the road under a lease, license or contract. L. R. A. 1918E, 255.

OFFICERS AND EMPLOYEES

8099. Authority—Whether a chief engineer of a railroad company has authority to bind the company by an agreement to locate a station at a particular point has been raised but not determined. Grimes v. Minneapolis etc. Traction Co., 133 Minn. 442, 158 N. W. 719.

A freight agent and a claim agent held to have no authority to make admissions of negligence on the part of the company. H. L. Elliott Jobbing Co. v. Chicago etc. Ry. Co., 136 Minn. 138, 161 N. W. 390.

LOCATION OF ROAD

8102. Engineering problems—Injury to adjacent property—In the construction and maintenance of its road a railroad company is bound to avoid injuring adjacent property unnecessarily or unreasonably. Jungblum v. Minneapolis etc. Ry. Co., 70 Minn. 153, 72 N. W. 971; Peterson v. Northern Pacific Ry. Co., 132 Minn. 265, 156 N. W. 121.

RIGHT OF WAY

8107. Right-of-way deeds—Construction—(81) Chicago G. W. R. Co. v. Zahner, 145 Minn. 312, 177 N. W. 350 (deed construed to convey an easement and not a fee); 7 A. L. R. 817 (period covered by stipulation for maintenance of railroad).

8109a. Negligence in maintaining—A railroad company is bound to construct and maintain its right of way so as not to injure adjacent property unnecessarily or unreasonably. It must keep pace with the development of the country and maintain its right of way so as to meet changing conditions in the exercise of due care. Jungblum v. Minneapolis etc. Ry. Co., 70 Minn. 153, 72 N. W. 971; Peterson v. Northern Pacific Ry. Co., 132 Minn. 265, 156 N. W. 121.

8110. Title—Control—Lease or sale—A lease to an elevator company of lands belonging to a common carrier contained a covenant, which, it is claimed, relieved the carrier from liability for loss resulting from its own negligence in the performance of its duties as such common carrier, and that it consequently is void as against public policy. Held, that the covenant is independent of, and severable from, the other provisions of the contract, and conceding that it is void, it does not necessarily avoid the entire contract. A common carrier demised a grain elevator and other property to an elevator company. The lease contained a provision that the carrier should not be liable to the elevator company for loss of grain caused by fire communicated from the elevator company's elevator or buildings to such grain while in the possession of the carrier within one hundred feet of such elevator or buildings, even though a shipping receipt for the grain had been issued to the elevator company. Held, that this stipulation in the lease does not re-

lieve the carrier from liability for loss resulting from its own negligence. Millers Nat. Ins. Co. v. Minneapolis etc. Ry. Co., 132 Minn. 151, 156 N. W. 117.

An easement of a railroad company in its right of way is essentially different from other easements and is nearly equal to full ownership. A railroad company is held to the highest degree of care and the exercise of such care requires that it should have complete dominion over its right of way. Chicago G. W. R. Co. v. Zahner, 145 Minn. 312, 177 N. W. 350.

As a general rule a railroad company has practically the right to the uninterrupted and exclusive possession and control of the land between the lines of its location, necessary for conducting its business, except where it is built on a public highway or over public crossings; and the former owner has no right to occupy the land conveyed in any mode or for any purpose without the company's consent, as for the purpose of cultivating crops on the right of way, unless such rights or privileges are conceded by the company or reserved by the grantor. Chicago G. W. R. Co. v. Zahner, 145 Minn. 312, 177 N. W. 350.

Under an ordinary right of way deed a railroad company is entitled to the exclusive possession of the right of way easement. The owner of the servient estate is not entitled to a partial possession upon the theory that such possession will not disturb the railroad company; and the railroad company may recover possession without showing that it has immediate need for railway purposes of the portion occupied by the owner of the servient estate or that such occupancy disturbs the enjoyment of the right of way for railway purposes. Chicago G. W. R. Co. v. Zahner, 145 Minn. 312, 177 N. W. 350.

(01) Chicago G. W. R. Co. v. Zahner, 145 Minn. 312, 177 N. W. 350. See § 3042.

8110a. Spur tracks part of system—Spur tracks ordinarily constitute a part of the railroad system. Liedel v. Northern Pacific Ry. Co., 89 Minn. 284, 94 N. W. 877; Ochs v. Chicago & N. W. Ry. Co., 135 Minn. 323, 160 N. W. 866; Chicago G. W. R. Co. v. Zahner, 145 Minn. 312, 177 N. W. 350.

IN STREETS

8111. An additional servitude—The operation of a commercial railroad upon a public street imposes an additional servitude which a municipality cannot authorize; and one injured in his private rights by such use, as is the owner of the fee of the street, is entitled to relief against such use. He may have injunctive relief. Drake v. Chicago etc. Ry. Co., 136 Minn. 366, 162 N. W. 453.

A judgment perpetually enjoining a railroad company from occupying a city street, on the ground that the right to do so has not been regularly acquired, should be vacated when the right is acquired by a proper franchise and condemnation proceedings, and the court may, in its discretion, modify the injunction on proper terms before the con-

demnation proceedings are complete. Larson v. Minnesota N. W. Electric Ry. Co., 136 Minn. 423, 162 N. W. 523.

8114. Trespass—(93) See Drake v. Chicago etc. Ry. Co., 136 Minn. 366, 162 N. W. 453.

DUTY TO BUILD AND MAINTAIN HIGHWAY CROSSINGS

8119. Statutory duty—The statutes do not require an application of the rule of res ipsa loquitur to accidents at crossings. McGillivray v. Great Northern Ry. Co., 138 Minn. 278, 164 N. W. 922.

Railroad companies are required by G. S. 1913, §§ 4256, 4257, to maintain grade crossings in a safe and passable condition, easy for teams and vehicles to cross, and to maintain planks between the rails level with the tops of the rails. The planking at a crossing was below the required level, and the runners of a sleigh driven over it would stick on the rails, thus retarding its motion. Held, that if, as a consequence of the condition described, an occupant of a sleigh was injured because it was delayed in getting over the crossing in time to escape being struck by an approaching train, the railroad company would be liable to him for negligence in the maintenance of the crossing. Gowan v. McAdoo, 143 Minn. 227, 173 N. W. 440.

The statute is not a limitation on the police power of municipalities to make its streets safe and convenient for public travel across railroad grade crossings. State v. Chicago etc. Ry. Co., — Minn. —, 180 N. W. 925.

The state may require a railroad company, at its own expense, to make street crossings over its right of way reasonably safe and convenient for public use. Great Northern Ry. Co. v. Minnesota, 246 U. S. 434, affirming State v. Great Northern Ry. Co., 130 Minn. 480, 153 N. W. 879.

(6) Great Northern Ry. Co. v. Minnesota, 246 U. S. 434.

8120. Common-law duty to restore highway—(7) State v. Great Northern Ry. Co., 136 Minn. 164, 161 N. W. 506.

8121. Bridges or viaducts over tracks at crossings—A municipality cannot, by contract with a railroad company, divest itself of the power to enforce this duty of the company. State v. Great Northern Ry. Co., 134 Minn. 249, 158 N. W. 972.

Before a railroad company can be compelled by mandamus to build a bridge or depress its tracks there must be a legislative determination by the city of the public necessity therefor and the adoption by the city of a plan sufficiently specific to afford a working basis. If adjacent grades and crossings are affected there must be a general plan adopted. The plan adopted by the city may be modified by the court in mandamus proceedings. State v. Chicago etc. Ry. Co., 135 Minn. 277, 160 N. W. 773.

It is the duty of a railroad company to construct and maintain at its own expense necessary approaches to the bridges which it is re-

quired to build to carry streets over its tracks. No inflexible rule can be laid down as to what constitutes an approach to a bridge within this rule. A public street, leading to a bridge at a four per cent. grade, filled to its full width and at a height above abutting property which permits the use of such property for ordinary business purposes at street level, susceptible of all the uses of a public street, with sidewalk, curbing and other street improvements, is not "an approach to the bridge" which the railroad company is forever bound to maintain and keep in surface repair. State v. Great Northern Ry. Co., 136 Minn. 164, 161 N. W. 506.

It is the uncompensated duty of a commercial railroad which intersects a public street to construct and maintain a bridge over its tracks when reasonable public necessity and safety demand. The use of a street for street railway traffic is a public use in aid of public travel. When the use of such street for a street railway line becomes an appropriate use of the street, though it was not used at the time the bridge was constructed, it is the uncompensated duty of the railroad to strengthen it, if this be necessary, to make it fit for such use. It does not discharge its duty by maintaining a bridge adequate for passenger and vehicle traffic, and for all traffic except street railway traffic, when the use of the street for street railway traffic becomes an appropriate and needed use. St. Paul v. Great Northern Ry. Co., 138 Minn. 25, 163 N. W. 788.

A city, in the exercise of its police power, may compel a railway company to construct and thereafter maintain a bridge for the purpose of carrying a street over its tracks, if a bridge is necessary to enable the public to cross such tracks safely and conveniently. A stipulation that no obligation rested upon defendants to repair the bridge over their tracks here in question stated a conclusion of law, and a judgment to that effect entered pursuant thereto, without the judicial action of a court, is not a bar to a subsequent action by the city to compel defendants to repair such bridge. The subject-matter cannot be removed from the domain of the police power of the city by such a stipulation and judgment. There is no basis in the record for the contention that a part of the bridge was built outside the street and upon land owned by the Omaha Company. St. Paul v. Chicago etc. Ry. Co., 139 Minn. 322, 166 N. W. 335.

The uncompensated duty rests upon a railroad which intersects a street, which it carries over its tracks by a bridge, to maintain the surface of the bridge in fit condition for public travel and when worn out to replace it. The duty to do so is cast upon it in the exercise of the police power; and when it is required to do so it is not taxed for a public improvement from which it is exempted by the gross earnings statute. St. Paul v. Great Northern Ry. Co., 145 Minn. 355, 177 N. W. 492. See St. Paul v. Great Northern Ry. Co., 141 Minn. 428, 170 N. W. 512.

Duty of railroad company to build bridges over public drainage ditches. Lake Shore & M. S. Ry. Co. v. Clough, 242 U. S. 375. See § 8121b.

(8) State v. Great Northern Ry. Co., 134 Minn. 249, 158 N. W. 972; State v. Chicago etc. Ry. Co., 135 Minn. 277, 160 N. W. 773; State v. Great Northern Ry. Co., 136 Minn. 164, 161 N. W. 506; St. Paul v. Great Northern Ry. Co., 138 Minn. 25, 163 N. W. 788; St. Paul v. Chicago etc. Ry. Co., 139 Minn. 322, 166 N. W. 335; Chicago etc. Ry. Co. v. Sprague, 140 Minn. 1, 167 N. W. 124; St. Paul v. Great Northern Ry. Co., 145 Minn. 355, 177 N. W. 492; Great Northern Ry. Co. v. Minnesota, 246 U. S. 434, affirming State v. Great Northern Ry. Co., 130 Minn. 480, 153 N. W. 879. See State v. St. Paul etc. Ry. Co., 62 Minn. 450, 64 N. W. 1140.

8121a. Depression of tracks at crossings—On the trial of a proceeding in mandamus to compel the defendant railroad to depress its tracks at their intersection with West Seventh street in St. Paul and carry the street over them by a bridge, as directed by a city ordinance, it appeared that there were a number of streets parallel to West Seventh crossing the railroad at grade or in subways or on bridges and that if the depression was made it would be necessary to separate the grades at these crossings. The ordinance made no such direction and did not declare the necessity nor make a plan. It is held that the ordinance is an insufficient basis upon which to sustain the proceeding. State v. Chicago etc. Ry. Co., 135 Minn. 277, 160 N. W. 773.

By Sp. Laws 1879, c. 184, the right was granted the defendant to build its line between St. Paul and Minneapolis and it was provided that it should cross streets in St. Paul at grades fixed by a resolution of the council. The council in 1879 fixed the present grade. The power to compel a separation of grades at a crossing is legislative and referable to the police power. The police power cannot be surrendered nor divested nor abridged nor bartered away. The statute did not intend that the grade fixed by resolution might not afterwards be changed by the city if public safety required; and neither the statute, which is unrepealed, nor the resolution of the common council, now prevents the city in the exercise of the police power delegated to it from requiring a separation of grades at the defendant's expense, either by depressing its tracks and carrying the street over them at its present grade or by carrying the street over or under the present grade of the railroad. State v. Chicago etc. Ry. Co., 135 Minn. 277, 160 N. W. 773.

Abolishing grade crossing. Erie Railroad Co. v. Board of Public Utility Commissioners, 254 U. S. 394.

8121b. Bridges over rivers—When a new channel is made by public authorities in a river under drainage statutes necessitating a new railroad bridge over the river, it is the uncompensated duty of the railroad company to build the bridge at its own expense. Chicago etc. Ry. Co. v. Sprague, 140 Minn. 1, 167 N. W. 124. See Lake Shore & M. S. Ry. Co. v. Clough, 242 U. S. 375.

8121c. Paving at crossings—When public welfare, convenience, or safety requires a city street crossing a railroad right of way to be paved,

and the city council so determines, the city may in the exercise of its police power compel the railroad to pave the crossing at its own cost. The legislature has not limited the exercise of the police power granted a city to make its public streets safe and convenient for travel across railroad grade crossings, either by sections 4256 and 4257, G. S. 1913, or by any other statute. The city did not exercise its power arbitrarily or oppressively in this instance. The findings are supported by the evidence. State v. Chicago etc. Ry. Co., 148 Minn. — 180 N. W. 925.

8123. Liability for defective crossings—(15) Gowen v. McAdoo, 143 Minn. 227, 173 N. W. 440. See § 8119.

MISCELLANEOUS DUTIES

8124. To maintain stations and depots—A contract made by a railway company to locate a station on a designated tract of land is valid, unless it be shown that the interests of the public are prejudiced thereby; and the measure of damages for breach of such contract is the difference in the value of the land with the station and without it at the time of the breach. Grimes v. Minneapolis etc. Traction Co., 133 Minn. 442, 158 N. W. 719.

The Omaha Railway Company maintained a depot including a ticket and passenger station near the business center of the village of Butterfield several years. After another railway company had constructed another railroad intersecting the road of the Omaha Company a short distance outside the village limits, the two companies installed and maintained a joint ticket and passenger station at the junction, and the Omaha Company discontinued the use of its old depot for passenger business. On due application the Railroad and Warehouse Commission required the company to re-establish a ticket and passenger station at the old depot and to stop certain trains thereat, and also to stop the same trains at the junction station on flag. Held, that requiring the maintenance of a ticket and passenger station at the old depot and the stoppage thereat of local trains is not unreasonable or unlawful, but that it is unreasonable to require such trains also to stop at the junction station on flag. In determining whether the safety and convenience of the public will be promoted by a passenger service at the old depot, the commission may take into consideration the inconvenience and dangers attending the use of the junction station, and the fact that the business buildings of the village were, for convenience, constructed near the old depot while that depot was in use. A petition to extend the village limits so as to include the junction station within the village, made and rejected after the hearing before the commission, was properly excluded from the evidence presented to the court. The denial of two prior applications to reestablish passenger service at the old depot, made fifteen years ago, does not operate as an estoppel or bar to the present application. As only those trains which stop at way stations are required to stop at the old depot and such trains cannot be required to stop at the

junction station, the burden upon interstate commerce is not materially increased. Brogger v. Chicago etc. Ry. Co., 137 Minn. 338, 163 N. W. 662, 164 N. W. 368.

(19) Brogger v. Chicago etc. Ry. Co., 137 Minn. 338, 163 N. W. 662, 164 N. W. 368; Commercial Club v. Chicago etc. Ry. Co., 142 Minn. 169, 171 N. W. 312 (company required to build new depot—offer of company to alter and improve old depot refused—application of municipal ordinance respecting fire limits).

8124a. To instal stock scales—A railroad company cannot be required to instal stock scales at its stations by the order of a state administrative board. Great Northern Ry. Co. v. Cahill, 253 U. S. 71.

8125. Transfer facilities at crossings with other roads—It is provided by G. S. 1913, § 4407, that trains shall stop at all junctions and railroad crossings where transfer of passengers is required as at stations, and, as far as can reasonably be done, companies shall so adjust their timetables as to facilitate such transfer. In case trains on intersecting roads are due at any such junction or crossing at practically the same time, within two minutes of each other, the train first arriving shall wait for the other train five minutes, unless it is known that such train cannot arrive within said time. Any superintendent, engineer, conductor, or officer or employee of any railroad company who shall violate any of the provisions of this section, or cause a violation thereof, shall be guilty of a gross misdemeanor. Brogger v. Chicago etc. Ry. Co., 137 Minn. 338, 163 N. W. 662, 164 N. W. 368.

8125a. To construct side tracks to industrial plants—The state under its police power may require a railroad company to provide such side track facilities to industries adjacent to its tracks as shall be found to be necessary and reasonable under all the circumstances, and may apportion the necessary expense therefor between the company and the industry in such manner as shall be found to be reasonable. Ochs v. Chicago & N. & W. Ry. Co., 135 Minn. 323, 160 N. W. 866, affirmed, 249 U. S. 416. See 28 L. R. A. (N. S.) 1013.

A spur track required by an order of the Railroad and Warehouse Commission to be constructed by the defendant, in part at its own expense, to connect with the plaintiff's plant, was for a public use, and such order did not amount to the taking of property for private use. Such order was made in the exercise of the police power. The plaintiff was required to furnish the right of way and defray a portion of the cost of construction. A part was to be borne by the defendant. A reasonable public necessity was shown and the burden cast upon the defendant was not unreasonable. Held, that the order did not constitute a taking of property without due process in violation of the guaranties of the state or federal constitution. Range Sand-Lime Brick Co. v. Great Northern Ry. Co., 137 Minn. 314, 163 N. W. 656.

8129. To block frogs, etc.—(25) Hoggarth v. Minneapolis & St. L. R. Co., 138 Minn. 472, 164 N. W. 658 (plaintiff's foot was caught in an

unblocked frog of a switch on a side track to grain elevators—liability of defendant held question for jury).

8129a. To have headlights of certain power—G. S. 1913, § 4421, requires every locomotive engaged in road service to be equipped with an electric headlight of at least fifteen hundred candle power, measured without the aid of a reflector, and requires on every locomotive regularly used in switching cars or trains a headlight of at least fifty candle power, measured without the aid of a reflector. Roach v. Great Northern Ry. Co., 133 Minn. 257, 158 N. W. 232.

8129b. To keep ditches and culverts open—It is the statutory duty of a railroad company to keep its ditches and culverts clean between April 1 and November 1. Peterson v. Northern Pacific Ry. Co., 132 Minn. 265, 156 N. W. 121.

DUTY TO FENCE

8130. Statute—In general—Where the statute is inapplicable there may be a common-law duty to maintain fences or other guards to keep children and others from trespassing on tracks where they run along a street. Palyo v. Northern Pacific Ry. Co., 144 Minn. 398, 175 N. W. 687.

(29) See Palyo v. Northern Pacific Ry. Co., 144 Minn. 398, 175 N. W. 687.

8132. Duty to maintain and repair—(40) Turner v. Chicago etc. Ry. Co., 136 Minn. 383, 162 N. W. 469.

8133. Implied exceptions—The statute has been held inapplicable to tracks maintained under license from a municipality along a street duly dedicated to public travel, and which has never been vacated. Palyo v. Northern Pacific Ry. Co., 144 Minn. 398, 175 N. W. 687.

8139. Liability for failure to fence—(66) Turner v. Chicago etc. Ry. Co., 136 Minn. 383, 162 N. W. 469.

8145. Liability for animals killed or injured—Plaintiff's cows escaped from the pasture in which they were confined, by reason of a defect in the right of way fence of defendant, which fence extends on the line between the right of way and said pasture; the cows passed along the right of way and over certain cattle guards at a highway crossing, thence along the highway until they came to an adjoining farm; here they entered the yard surrounding the farmhouse, and by the family dog were frightened away, again going upon the right of way through an open gate placed in the right of way fence for the convenience of that farm, where they were soon after struck and killed by a passing train. The movements of the cows from the time of their escape from the pasture through the defective fence to the time they were killed by the train were for all practical purposes continuous and uninterrupted. Held, that the question whether the defect in the right of way fence through which the cows escaped from the pasture was the

proximate cause of their presence upon the right of way at the time they were struck and killed by the train was one of fact, and that the verdict of the jury thereon is sustained by the evidence. Turner v. Chicago etc. Ry. Co., 136 Minn. 383, 162 N. W. 469.

(75) Turner v. Chicago etc. Ry. Co., 136 Minn. 383, 162 N. W. 469.

LIABILITY FOR NEGLIGENCE—MISCELLANEOUS CASES

8153. Liability for noise, smoke, etc.—(99) 6 A. L. R. 723.

8155. Injury to trespassers on trains—(2) Todd v. Great Northern Ry. Co., 133 Minn. 145, 157 N. W. 1080 (boy about five years old in-injured in dropping from the side ladder of a freight car on which he was stealing a ride—trainmen did not know of his position—accident occurred at village crossing—flagman at crossing had seen boys about tracks some time before accident but did not see them stealing a ride—held proper to direct a verdict for defendant); Tuder v. Oregon Short Line R. Co., 135 Minn. 294, 160 N. W. 785 (trespasser riding on flat car loaded with crushed stone thrown under wheels by sudden jerk—evidence held not to require submission of case to jury on issue of wilful negligence).

8157b. Injuries from defective bridges—Evidence held sufficient to support the finding of the jury that the plaintiff sustained an injury while on the portion of a street bridge over the tracks of the defendant railway which it was under obligation to keep in condition for travel. It was not error to receive the testimony of a witness, who examined the bridge two weeks after the accident, and found a defect in the bridge corresponding to that claimed by the plaintiff; the purpose being to locate the place where the accident occurred. Schmitt v. Minneapolis, 138 Minn. 193, 164 N. W. 801.

8159. Proximate cause—(20) Palyo v. Northern Pacific Ry. Co., 144 Minn. 398, 175 N. W. 687.

INJURIES TO PERSONS ON OR NEAR TRACKS

8162. Duty to persons not trespassers—Where railroad tracks are laid along a public street, frequented by pedestrians, it is negligent for the company to push a string of freight cars along the tracks without a trainman on the forward car or other proper precautions against running down pedestrians. Bowers v. Chicago etc. Ry. Co., 141 Minn. 385, 170 N. W. 226.

(24) Lundeen v. Great Northern Ry. Co., 141 Minn. 180, 169 N. W. 702.

8163. Duty to licensees—(25) See Marinos v. Chicago & N. W. Ry. Co., 142 Minn. 469, 172 N. W. 706.

8164. Duty to trespassers—(26) Palon v. Great Northern Ry. Co., 135 Minn. 154, 160 N. W. 670; Willett v. Chicago etc. Ry. Co., 139 Minn. 288, 166 N. W. 342.

(27) See Darrington v. Chicago & N. W. Ry. Co., 134 Minn. 30, 158 N. W. 727; Palyo v. Northern Pacific Ry. Co., 144 Minn. 398, 175 N. W. 687.

8165. Who are trespassers—Persons walking on railroad bridges for their own convenience and without invitation from the company are generally trespassers. Willett v. Chicago etc. Ry. Co., 139 Minn. 288, 166 N. W. 342.

Defendant undertook to deliver at the Minneapolis flour mills freight shipped over its line, and included in the charges collected therefor the charge for switching its cars from its yards to the mills over the track of the Railway Transfer Company. It procured the transfer company to do this switching and permitted that company to inspect the cars before accepting them. This course of conduct had continued for many years. Held, that plaintiff, the inspector for the transfer company, was at least an invitee upon the premises of defendant while making such inspection. Lundeen v. Great Northern Ry. Co., 141 Minn. 180, 169 N. W. 702.

Where railroad tracks are laid lengthwise along a public street pedestrians walking on the tracks are not necessarily trespassers. Bowers v. Chicago etc. Ry. Co., 141 Minn. 385, 170 N. W. 226.

Children playing near tracks running along a public street held not trespassers. Palyo v. Northern Pacific Ry. Co., 144 Minn. 398, 175 N. W. 687.

(28) Palon v. Great Northern Ry. Co., 135 Minn. 154, 160 N. W. 670. See Marinos v. Chicago & N. W. Ry. Co., 142 Minn. 469, 172 N. W. 706.

(29) See § 8164.

8166. Wilful or wanton injury—(35) Pickering v. Northern Pacific Ry. Co., 132 Minn. 205, 156 N. W. 3; Darrington v. Chicago & N. W. Ry. Co., 134 Minn. 30, 158 N. W. 727; Willett v. Chicago etc. Ry. Co., 139 Minn. 288, 166 N. W. 342.

8167. Duty of engineer to keep lookout—(37) Willett v. Chicago etc. Ry. Co., 139 Minn. 288, 166 N. W. 342.

8169. Contributory negligence—Contributory negligence of children. L. R. A. 1917F, 123.

(39) Darrington v. Chicago & N. W. Ry. Co., 134 Minn. 30, 158 N. W. 727 (walking on railroad bridge so narrow that trains and pedestrians could not use it at the same time with safety—trains likely to use bridge at any time); Willett v. Chicago etc. Ry. Co., 139 Minn. 288, 166 N. W. 342 (walking on railroad bridge at night).

(40) Lundeen v. Great Northern Ry. Co., 141 Minn. 180, 169 N. W. 702 (inspector of grain walking on hard ridge of snow thrown up along tracks by snow plow); Bowers v. Chicago etc. Ry. Co., 141 Minn. 385, 170 N. W. 226 (pedestrian killed while walking along track running lengthwise along street); Pickering v. Northern Pacific Ry. Co., 132 Minn. 205, 156 N. W. 3 (laborer walking between parallel tracks—contributory negligence under Wisconsin law held for the jury).

8170. Duty to look and listen—The general rule is modified somewhat where a pedestrian is walking along tracks which are laid lengthwise along a public street. Bowers v. Chicago etc. Ry. Co., 141 Minn. 385, 170 N. W. 226. See Peaslee v. Railway Transfer Co., 120 Minn. 347, 139 N. W. 613.

8173. Cases classified as to facts—Walking between parallel tracks. Pickering v. Northern Pacific Ry. Co., 132 Minn. 205, 156 N. W. 3.

Defendant moved snow from certain tracks within its yard limits by running a snowplow over them which piled the snow in a hard ridge on each side of the tracks. It permitted these ridges to remain for several weeks. Plaintiff while traveling along a path on one of these ridges, in the performance of his duty, slipped on a patch of ice hidden from view by newly fallen snow, and slid under a passing train. Held, that the question of defendant's negligence, and of plaintiff's contributory negligence, was for the jury. Lundeen v. Great Northern Ry. Co., 141 Minn. 180, 169 N. W. 702.

A boy playing about tracks running along a public street had his toes run over by a train. A companion had thrown the boy's hat under the train and pushed him in after it. Paylo v. Northern Pacific Ry. Co., 144 Minn. 398, 175 N. W. 687.

(47) Bowers v. Chicago etc. Ry. Co., 141 Minn. 385, 170 N. W. 226.

(57) See Kaiser v. Minneapolis St. Ry. Co., 147 Minn. 278, 181 N. W. 569.

ACCIDENTS AT HIGHWAY CROSSINGS

8174. Duty of railroad company—In general—Due regard for the safety of the public and for its own interests requires a railroad company to have the brakes set on cars standing detached near crossings. Sheehy v. Minneapolis & St. Louis R. Co., 132 Minn. 307, 156 N. W. 346.

The railroad company has the right of way. This applies though the train is operated by electricity. Curran v. Chicago G. W. R. Co., 134 Minn. 392, 159 N. W. 955. See § 8186.

The court may, under proper circumstances, submit to the jury the question whether ordinary care requires that a railroad company, when approaching a busy street crossing, should take some further precaution for the protection of the public than the giving of the usual crossing whistle and the ringing of the engine bell, and whether ordinary care requires that the company maintain gates, a flagman, a system of automatic bells, or some other appliance to warn travelers of the approach of the train, although no statute or ordinance has required any of those particular precautions. Zenner v. Great Northern Ry. Co., 135 Minn. 37, 159 N. W 1087. See §§ 8176, 8178.

Whether a railroad company exercised due care is a question for the jury, unless the evidence is conclusive. Stepp v. Minneapolis & St. Louis R. Co., 137 Minn. 117, 162 N. W. 1051.

A vigilant outlook should be kept in operating trains where the presence of persons on or near the track is to be anticipated as reasonably

probable, notwithstanding the fact that a railroad company has the right of way at highway crossings. This right of precedence does not impose upon the traveler the whole duty of avoiding collisions, but both parties must exercise reasonable care to prevent injury. Gowan v. McAdoo, 143 Minn. 227, 173 N. W. 440.

The evidence stated in the opinion was not sufficient to warrant the submission to the jury of a charge of negligence on the part of a railroad company based on its failure to maintain a watchman, gates, automatic bells, or other signals at a highway crossing to warn travelers of the approach of trains. There is no hard and fast rule for determining whether there should be a submission of such a charge of negligence. The facts and circumstances of each case must be the guide to the trial courts in deciding upon the course to be followed. Hume v. Duluth & I. R. R. Co., — Minn. —, 183 N. W. 288. See §§ 8176, 8178.

8175. Duty to give signals—Statute—Reasonable care under the circumstances may require the giving of signals more frequently than required by statute or ordinance. Zenner v. Great Northern Ry. Co., 135 Minn. 37, 159 N. W. 1087.

(74) Laurisch v. Minneapolis etc. Traction Co., 132 Minn. 114, 155 N. W. 1074; Zenner v. Great Northern Ry. Co., 135 Minn. 37, 159 N. W. 1087.

(76) Zenner v. Great Northern Ry. Co., 135 Minn. 37, 159 N. W. 1087; Martin v. Minneapolis & St. L. R. Co., 138 Minn. 40, 163 N. W. 983.

(78) Zenner v. Great Northern Ry. Co., 135 Minn. 37, 159 N. W. 1087. See MacLeod v. Payne, — Minn. —, 182 N. W. 718.

See Digest, § 6976.

8175a. Duty to maintain headlights—Evidence held to justify a finding that an engine was without a headlight. Laurisch v. Minneapolis etc. Traction Co., 132 Minn. 114, 155 N. W. 1074. See § 8129a.

8176. Duty to maintain gates—Where a railroad company supplies safety gates at a crossing which it is in the habit of closing as its trains approach, the fact that the gates stand open is an assurance of safety and an invitation to travelers to pass. This is not, however, an unqualified assurance or invitation, for the traveler may not even then close his eyes and ears to danger. If he relies exclusively upon the assurance or invitation which is implied by the open gates he is negligent as a matter of law. If he does not rely exclusively on such assurance, the question whether he failed to exercise reasonable care under the circumstances is one of fact for the jury, unless only one reasonable inference can be drawn from the facts. Haugen v. Northern Pacific Ry. Co., 132 Minn. 54, 155 N. W. 1058. See 4 L. R. A. (N. S.) 521.

A municipality is not chargeable with negligence for failing to require railroad companies to maintain gates at crossings. Curran v. Chicago G. W. R. Co., 134 Minn. 392, 159 N. W. 955.

In cases not covered by statute, ordinance, or order of the Railroad & Warehouse Commission, it is a question for the jury, where the evi-

dence is not conclusive, whether reasonable care requires the maintenance of gates. Zenner v. Great Northern Ry. Co., 135 Minn. 37, 159 N. W. 1087; Gowan v. McAdoo, 143 Minn. 227, 173 N. W. 440; Hume v. Duluth & I. R. R. Co., — Minn. —, 183 N. W. 288; Engel v. Minneapolis St. Ry. Co., — Minn. —, 183 N. W. 842.

(92) Haugen v. Northern Pacific Ry. Co., 132 Minn. 54, 155 N. W. 1058; Stepp v. Minneapolis & St. L. R. Co., 137 Minn. 117, 162 N. W. 1051. See Martin v. Great Northern Ry. Co., 132 Minn. 78, 155 N. W. 1047 (plaintiff knew that gates were not operated at night when the accident occurred).

8178. Duty to maintain flagman—In cases not covered by statute, ordinance, or order of the Railroad and Warehouse Commission, it is a question for the jury, where the evidence is not conclusive, whether reasonable care requires the presence of flagman. Zenner v. Great Northern Ry. Co., 135 Minn. 37, 159 N. W. 1087; Gowan v. McAdoo, 143 Minn. 227, 173 N. W. 440; Hume v. Duluth & I. R. R. Co., — Minn.—, 183 N. W. 288; Engel v. Minneapolis St. Ry. Co., — Minn. —, 183 N. W. 842.

Evidence held to show quite strongly but not conclusively that there was a flagman at a crossing at the time of an accident. Stepp v. Minneapolis & St. L. R. Co., 137 Minn. 117, 162 N. W. 1051.

There was no express provision of law requiring the maintenance of a flagman, gates, or a gong at the particular crossing, and none were placed there by defendant. But the court submitted to the jury the question whether their absence, though not required by positive law, constituted negligence on the part of defendant. In this connection the court stated the absence of express law on the subject, and counsel contend that the effect thereof was prejudicial to plaintiff as a disparaging comment of the court. We are unable to take that view of the matter. MacLeod v. Payne, — Minn. —, 182 N. W. 718.

8180. Rate of speed—A jury may properly find that a train was negligently operated if it was run at a high rate of speed over a much-traveled village highway crossing where it struck a sleigh, which neither the engineer nor fireman observed until the team was on the track, although for a mile north of the crossing the track was straight, the train was running south, the team was approaching the crossing at a walk, and might have been seen by the fireman after it reached a point twenty-one feet from the track. Gowan v. McAdoo, 143 Minn. 227, 173 N. W. 440.

(3) Haugen v. Northern Pacific Ry. Co., 132 Minn. 54, 155 N. W. 1058; Laurisch v. Minneapolis etc. Traction Co., 132 Minn. 114, 155 N. W. 1074; Praught v. Great Northern Ry. Co., 144 Minn. 309, 175 N. W. 998.

8181. Backing trains over crossings—(12-14) De Vriendt v. Chicago G. W. R. Co., 144 Minn. 467, 175 N. W. 99.

(13) See Ball v. Great Northern Ry. Co., 142 Minn. 31, 170 N. W. 847.

8182. Kicking cars across street—Flying switch—(15) Ball v. Great Northern Ry. Co., 142 Minn. 31, 170 N. W. 847. See Sheehy v. Minneapolis & St. Louis R. Co., 132 Minn. 307, 156 N. W. 346.

8183. Assumption as to conduct of traveler—(16) Gowan v. McAdoo, 143 Minn. 227, 173 N. W. 440.

8186. Traveler not a trespasser but trains have right of way—In the nature of things, the trains or cars operated by railroads along their own right of way are not expected to give precedence to persons or vehicles at intersections of public highways. The necessity of rapid and safe public transportation forbids the slowing down of trains at every highway intersection, so as to give the traveler on the highway, who perchance is nearer the intersection, the right to cross first. Statutory enactments impliedly recognize that it is the duty of travelers on public highways to refrain from attempting to pass over a railroad grade crossing when there is danger of collision with an approaching train. The railroads are required by signs and signals to notify travelers on the highways of the existence of a railroad crossing and of the approach of their trains; this evidently with the purpose that no one shall attempt to cross when a train or car is so near that a collision might ensue. Travelers on public highways, approaching a railroad crossing, must give the right of way to advancing trains or cars. Curran v. Chicago G. W. R. Co., 134 Minn. 392, 159 N. W. 955; St. Paul Southern Electric Ry. Co. v. Flanagan, 138 Minn. 123, 164 N. W. 584; Gowan v. McAdoo, 143 Minn. 227, 173 N. W. 440.

While the railroad company has the right of way this fact does not impose upon the traveler the whole duty of avoiding collisions Both parties must exercise reasonable care to avoid collisions. Gowan v. McAdoo, 143 Minn. 227, 173 N. W. 440.

8186a. Concurrent negligence—The fact that the driver of a vehicle used to carry school children to and from school was guilty of negligence in driving upon a railroad track at a highway crossing does not defeat a recovery against the railroad company by a child injured because the engine struck the vehicle, if the company was also guilty of negligence which concurred with that of the driver to bring about a collision, and it would not have taken place but for such concurring negligence. Gowan v. McAdoo, 143 Minn. 227, 173 N. W. 440.

8187. Duty of traveler—In general—The traveler must act in recognition of the fact that trains have the right of way. See § 8186.

(22) Curran v. Chicago G. W. R. Co., 134 Minn. 392, 159 N. W. 955; Gowan v. McAdoo, 143 Minn. 227, 173 N. W. 440.

8188. Duty of traveler to look and listen—Where defendant drove a traction engine and grain separator upon the tracks of an electric railway, at a highway crossing, when there was a dense fog, without ascertaining whether a train, then known by him to be due, was approaching, and without notifying the operator of the train that he was attempting to make the crossing, it was held that the question of his negligence was for the jury. St. Paul Southern Electric Ry. Co. v. Flanagan, 138 Minn. 123, 164 N. W. 584.

We cannot hold that, because a highway at a railroad crossing is

sandy, and the driver of an automobile is required to give more attention to the road than would be necessary if it were hard and smooth, he is excused from looking for trains with the same degree of care as though he was traveling on a good road. If the road is so bad that he cannot take his eyes off it to look, without stopping his car, it is his duty to stop. If he does not get an unobstructed view of the track until he is close to it, it is still more imperative that he should look before attempting to cross. Anderson v. Great Northern Ry. Co., 147 Minn. 118, 179 N. W. 687.

(26) Haugen v. Northern Pacific Ry. Co., 132 Minn. 54, 155 N. W. 1058: Martin v. Great Northern Ry. Co., 132 Minn. 78, 155 N. W. 1047; St. Paul Southern Electric Ry. Co. v. Flanagan, 138 Minn. 123, 164 N. W. 584; Holm v. Great Northern Ry. Co., 139 Minn. 258, 166 N. W. 224; Knapp v. Northern Pacific Ry. Co., 139 Minn. 338, 166 N. W. 409; Praught v. Great Northern Ry. Co., 144 Minn. 309, 175 N. W. 998.

(28) Haugen v. Northern Pacific Ry. Co., 132 Minn. 54, 155 N. W. 1058; Martin v. Great Northern Ry. Co., 132 Minn. 78, 155 N. W. 1047.

(29) Haugen v. Northern Pacific Ry. Co., 132 Minn. 54, 155 N. W. 1058; Stepp v. Minneapolis & St. L. R. Co., 137 Minn. 117, 162 N. W. 1051. See L. R. A. 1916E, 821.

(30) See Curran v. Chicago G. W. R. Co., 134 Minn. 392, 159 N. W. 955.

(36) See Holm v. Great Northern Ry. Co., 139 Minn. 258, 166 N. W. 224.

(37) 1 A. L. R. 203.

8188a. Same—Duty of passenger in vehicle driven by another—A gratuitous passenger in an automobile held not negligent as a matter of law. Zenner v. Great Northern Ry. Co., 135 Minn. 37, 159 N. W. 1087.

8189. Presumption as to looking and listening—(38) Knapp v. Northern Pacific Ry. Co., 139 Minn. 338, 166 N. W. 409; Anderson v. Great Northern Ry. Co., 147 Minn. 118, 179 N. W. 687.

(40) Knapp v. Northern Pacific Ry. Co., 139 Minn. 338, 166 N. W. 409; Wesler v. Chicago etc. Ry. Co., 143 Minn. 159, 173 N. W. 565; Anderson v. Great Northern Ry. Co., 147 Minn. 118, 179 N. W. 687.

8190. Duty of taveler to stop—If the road at the approach to a crossing is so bad that an automobilist cannot take his eyes off it to look for approaching trains without stopping his car, it is his duty to stop it. Anderson v. Great Northern Ry. Co., 147 Minn. 118, 179 N. W. 687. See Hume v. Duluth & I. R. R. Co., — Minn. —, 183 N. W. 288.

(41) Anderson v. Great Northern Ry. Co., 147 Minn. 118, 179 N. W. 687.

8192. Assumption that company will not be negligent—(45) Anderson v. Great Northern Ry. Co., 147 Minn. 118, 179 N. W. 687.

8193. Contributory negligence—Law and fact—Evidence held sufficient to justify a finding that deceased was guilty of contributory negligence Curran v. Chicago G. W. R. Co., 134 Minn. 392, 159 N. W. 955.

It is a matter of common observation that most horses are frightened by the near approach of trains. In their fright they are apt to get beyond the control of the driver and plunge directly in the path of the train. This furnishes a reason for holding that ordinarily the question of contributory negligence is one for the jury, where the driver of the team would have to approach close to the railroad track before he could get an unobstructed view, and the train is coming at a high rate of speed. and without giving the required warning signals. With an automobile the situation is quite different. The driver has complete control of its movements. If he is running at a reasonable rate of speed, he can bring it to a quick stop especially on an upgrade on a sandy road, such as was here present. Anderson v. Great Northern Ry. Co., 147 Minn. 118, 179 N. W. 687. See Engel v. Minneapolis St. Ry. Co., — Minn. —, 183 N. W. 842.

Contributory negligence of children. L. R. A. 1917F, 123.

(46) Holm v. Great Northern Ry. Co., 139 Minn. 258, 166 N. W. 224; Knapp v. Northern Pacific Ry. Co., 139 Minn. 338, 166 N. W. 409; Anderson v. Great Northern Ry. Co., 147 Minn. 118, 179 N. W. 687.

(50) Martin v. Great Northern Ry. Co., 132 Minn. 78, 155 N. W. 1047 (city crossing—parallel tracks—dark evening—plaintiff a young man walking with his mother—tracks straight and level—freight train with brilliant headlight—might easily have been seen if plaintiff had looked in the direction of its approach before crossing track—no distracting circumstances or sudden emergency—gates raised but plaintiff admitted that he knew they were not operated at the time of the accident); Holm v Great Northern Ry. Co., 139 Minn. 258, 166 N. W. 224 (driver of team familiar with tracks at village crossing drove his team upon tracks without looking for regular fast passenger train which he knew was due —flagman was waiving his flag and driver would have seen it in time if he had looked); Knapp v. Northern Pacific Ry. Co., 139 Minn. 338, 166 N. W. 409 (village crossing—driver of automobile killed—familiar with situation—accident occurred at one o'clock in afternoon of clear day—view unobstructed toward train—automatic bell ringing—station and crossing whistles blown); Wesler v. Chicago etc. Ry. Co., 143 Minn. 159, 173 N. W. 565 (country crossing—in approaching crossing automobilist brought his car nearly to a stop when within a few feet of the tracks and then speeded ahead and was struck by engine and killed—had he exercised due care he must have seen engine in time to have avoided accident); Anderson v. Great Northern Ry. Co., 147 Minn. 118, 179 N. W. 687 (country crossing—automobilist familiar with crossing—at a point in road 58 feet from track view unobstructed for a distance of 1,320 feet in direction from which train approached—train running 35 miles an hour—afternoon of clear day—slight up grade in road at approach to crossing and surface somewhat sandy—nothing to distract attention of driver); Engel v. Minneapolis St. Ry. Co., — Minn. —, 183 N. W. 842 (country crossing near city—driver of motor truck saw train approaching before he reached track and in ample time to stop but attempted to cross).

(51) Haugen v. Northern Pacific Ry. Co., 132 Minn. 54, 155 N. W. 1058 (city crossing—three parallel tracks near depot—broad day light—gates open—pedestrian did not rely wholly on fact that gates were open—train running thirty miles an hour without giving signals).; Laurisch v. Minneapolis etc. Traction Co., 132 Minn. 114, 155 N. W. 1074 (country crossing—plaintiff riding in automobile—nine o'clock in the evening—engine had no headlight—train running at excessive speed —no signals given—view obstructed by bluff); Zenner v. Great Northern Ry. Co., 135 Minn. 37, 159 N. W. 1087 (plaintiff a gratuitous passenger in an automobile driven by another); Stepp v. Minneapolis & St. L. R. Co., 137 Minn. 117, 162 N. W. 1051 (city crossing—plaintiff driving heavy auto truck—some evidence that there was a flagman—gates temporarily out of commission—had been snowing or sleeting—high wind—street conditions bad); Martin v. Minneapolis & St. L. R. Co., 138 Minn. 40, 163 N. W. 983 (village crossing—industrial track near main track—view obstructed by buildings—just growing light in morning—heavy wind and sleet storm—plaintiff driving span of horses—curtains of carriage closed—familiar with crossing—leaned forward beyond curtains to look and listen—brought team to walk—did not see or hear train—sudden glare from locomotive frightened and nearly blinded one of the horses—team ran away and upon track); Ball v. Great Northern Ry. Co., 142 Minn. 31, 170 N. W. 847 (decedent caught between two freight cars coming together as he was attempting to pass between them); Praught v. Great Northern Ry. Co., 144 Minn. 309, 175 N. W. 998 (contributory negligence of passenger in automobile); De Vriendt v. Chicago G. W. R. Co., 144 Minn. 467, 175 N. W. 99 (engine backed over crossing without light or lookout on tender—dark night—view obstructed by building along track—plaintiff was driving his automobile five or six miles an hour and looked and listened but neither heard nor saw engine until it struck the automobile).

See Digest, § 7038.

8194. Imputed negligence—(52) Zenner v. Great Northern Ry. Co., 135 Minn. 37, 159 N. W. 1087; Gowan v. McAdoo, 143 Minn. 227, 173 N. W. 440; Praught v. Great Northern Ry. Co., 144 Minn. 309. 175 N. W. 998.

8195. Sudden emergency—Distracting circumstances—(54) Martin v. Great Northern Ry. Co., 132 Minn. 78, 155 N. W. 1047 (fact that plaintiff, a young man, was walking with his mother not a distracting circumstance—fact that boys were running across tracks ahead of approaching train not a distracting circumstance); Knapp v. Northern Pacific Ry. Co., 139 Minn. 338, 166 N. W. 409 (failure of bystander to warn of peril not a distracting circumstance); Anderson v. Great Northern Ry. Co., 147 Minn. 118, 179 N. W. 687 (bad road at approach to a crossing not a distracting circumstance).

8196. Wilful or wanton injury—(56) Knapp v. Northern Pacific Ry. Co., 139 Minn. 338, 166 N. W. 409.

8197. Proximate cause—(58) Martin v. Minneapolis & St. L. R. Co., 138 Minn. 40, 163 N. W. 983; Gowan v. McAdoo, 143 Minn. 227, 173 N. W. 440.

8200. Pleading—A complaint held not demurrable as showing contributory negligence. St. Paul Southern Electric Ry. Co. v. Flanagan, 138 Minn. 123, 164 N. W. 584.

8202. Evidence—Admissibility—(65) Knapp v. Northern Pacific Ry. Co., 139 Minn. 338, 166 N. W. 409 (custom of flagging trains in a neighboring village where decedent lived held inadmissible); MacLeod v. Payne, — Minn. —, 182 N. W. 718 (evidence showing character of crossing and extent of traffic thereon held admissible).

8203. Evidence—Sufficiency—Evidence held to justify a finding that defendant was negligent. Stepp v. Minneapolis & St. L. R. Co., 137 Minn. 117, 162 N. W. 1051.

Where the plaintiff was riding in a public auto bus at the time of the accident, held that the evidence did not justify a finding that the plaintiff was negligent and not to justify the submission of the issue to the jury. McDonald v. Mesaba Ry. Co., 137 Minn. 275, 163 N. W. 298.

Evidence held sufficient to justify a recovery where a child being driven home from school in a sleigh was killed by a collision with a train. Gowan v. McAdoo, 143 Minn. 227, 173 N. W. 440.

Evidence held sufficient to justify a recovery on the ground that a train was run at an excessive speed without proper signals. Praught v. Great Northern Ry. Co., 144 Minn. 309, 175 N. W. 998.

Verdict for defendant sustained. MacLeod v. Payne, — Minn. —, 182 N. W. 718.

FIRES CAUSED BY TRAINS

8207. Use of improved appliances—Spark arresters—An instruction to take the evidence as to the manner in which the locomotive was equipped with spark arresters into consideration in determining whether it set the fire was proper. Mathwig v. Minneapolis etc. Ry. Co., 145 Minn. 429, 177 N. W. 643.

8208. Possibility of preventing fires—(77) See Mathwig v. Minneapolis etc. Ry. Co., 145 Minn. 429, 177 N. W. 643 (instructions as to effect of use of spark arresters held proper).

8210. Proximate cause—The fact that a prolonged drought and a wind of extraordinary violence contributed to the spread of a railroad fire which destroyed plaintiff's property does not relieve the railroad company from liability. Such weather conditions are not new causes, intervening between the original wrongful act and the final injurious result, of such a nature as to be the proximate or efficient cause of the destruction of the property. If fire, wind, and weather are concurring causes of the destruction of property, and its destruction might reasonably have been anticipated as a consequence of the fire, and would

not have occurred without it, liability follows. That an independent concurring cause is what is termed as act of God does not alter the rule. A railroad company cannot escape liability for a fire started by one of its engines, by showing that the fire united with another of no responsible origin, and that plaintiff's property was destroyed by the combined fires, if it appears that the railroad fire was a material element entering into the destruction of the property. Anderson v. Minneapolis etc. Ry. Co., 146 Minn. 430, 179 N. W. 45; Borsheim v. Great Northern Ry. Co., — Minn. —, 183 N. W. 519.

See § 8211.

8211. Evidence—Sufficiency as to cause of fire—Where the evidence as to the origin of a fire alleged to have been negligently started points with substantially the same force to two or more independent sources, a jury should not be permitted to speculate as to which was in fact responsible. Lares v. Chicago, B. & Q. R. Co., 144 Minn. 170, 174 N. W. 834.

Evidence held insufficient to require a submission of the question to the jury. Lares v. Chicago, B. & Q. R. Co., 144 Minn. 170, 174 N. W. 834.

Evidence held to justify a finding for defendant. Mathwig v. Minneapolis etc. Ry. Co., 145 Minn. 429, 177 N. W. 643.

In an action to recover the value of certain buildings upon and adjoining the right of way of defendant railway company, alleged to have been destroyed by fire negligently started by defendant in the operation of a stationary engine in near proximity to the buildings on a windy day, held, that the evidence supports the verdict to the effect that the fire did not originate from the stationary engine and that defendant was in no way responsible therefor. Home Ins. Co. v. Chicago etc. Ry. Co., 146 Minn. 240, 178 N. W. 606.

(82) Lares v. Chicago, B. & Q. R. Co., 144 Minn. 170, 174 N. W. 834.

(83) Hall v. Davis, — Minn. —, 184 N. W. 25.

8212. Statutory liability absolute—Proof of negligence unnecessary—The statute having made defendant liable absolutely if its locomotive set the fire which caused the damage, the court properly excluded evidence to show that defendant was guilty of negligence in failing to patrol its right of way. Mathwig v. Minneapolis etc. Ry. Co., 145 Minn. 429, 177 N. W. 643.

G. S. 1913, § 4426, virtually makes railroad companies insurers against damage caused by fires set by their engines, and entirely eliminates the question of negligence. Anderson v. Minneapolis etc. Ry. Co., 146 Minn. 430, 179 N. W. 45.

The federal government was liable under the statute while the railroads were under government control during the war. Ringquist v. Duluth, M. & N. Ry. Co., 145 Minn. 147, 176 N. W. 344; Borsheim v. Great Northern Ry. Co., — Minn. —, 183 N. W. 519.

The evidence sustains a finding that a fire communicated by a locomotive engine of the defendant railroad company mingled with other fires

and came to the plaintiff's property and destroyed it; and that the railroad fire was a material element in its destruction and therefore the railroad or the Director General was responsible for the damage done. Borsheim v. Great Northern Ry. Co., — Minn. —, 183 N. W. 519.

(85) Mathwig v. Minneapolis etc. Ry. Co., 145 Minn. 429, 177 N. W. 643; Home Life Ins. Co. v. Chicago etc. Ry. Co., 146 Minn. 240, 178 N. W. 606 (assumed that statute applicable to fire alleged to have been caused by a stationary engine).

8215. Pleading—Issues—The court, as a corrective at the close of the charge, stated there was no claim that the locomotive set the fire in any other manner than by sparks from the smokestack and that the jury must find that such sparks set the fire in order to find that it was set by the locomotive. Plaintiff waived any objection to this statement by failing to indicate at the trial that he made any other or different claim. Mathwig v. Minneapolis etc. Ry. Co., 145 Minn. 429, 177 N. W. 643.

RAPE

8229. What constitutes—A female between ten and eighteen years of age comes under the protection of both sections 8655 and 8656, G. S. 1913. State v. Macbeth, 133 Minn. 425, 158 N. W. 793.

If there is to be a distinction between an assault to commit the felony denounced by section 8655 and the one covered by section 8656, G. S. 1913, so that the latter may be said to be one of lower degree embraced within the former, the distinction must be based upon whether or not the assault was against the will of the female. State v. Macbeth, 133 Minn. 425, 158 N. W. 793.

An act of carnal intercourse with a female of the age of ten years or upwards, when by reason of idiocy, imbecility, or unsoundness of mind she is incapable of giving her consent, constitutes the crime of rape, under G. S. 1913, § 8655, subd. 1, whether the person so committing the act knew of her mental deficiency or not. The person having relations of the kind with a female so mentally defective must know at his peril her state of mind in that respect. The statute includes females who by reason of mental unsoundness are so far deprived of the power to form or entertain an intelligent opinion upon the subject, of realizing the nature and moral wrong of the act, and the possible consequences thereof to them. State v. Dombroski, 145 Minn. 278, 176 N. W. 985.

(6) State v. Schmoker, — Minn. —, 182 N. W. 957.

8230. Indictment—An indictment held sufficient to charge the offence specified in subdivision 2 of G. S. 1913, § 8655. State v. Macbeth, 133 Minn. 425, 158 N. W. 793.

(9, 10) See State v. Christofferson, — Minn. —, 182 N. W. 961.

8231. Evidence—Admissibility—It was proper for the state to make use of portions of the testimony of the prosecutrix taken at the preliminary hearing to explain and supplement portions thereof as to which she was interrogated by way of impeachment upon cross-examination. It was not proper to introduce all of her testimony at the preliminary hearing; but in view of the nature of such testimony, and the issue presented, and the general conduct of the trial, there was no prejudice. State v. Schmoker, — Minn. —, 182 N. W. 957.

(13) See State v. Krantz, 138 Minn. 114, 164 N. W. 579; Nickolay v. Orr, 142 Minn. 346, 172 N. W. 222.

(14) State v. Schmoker, — Minn. —, 182 N. W. 957 (cross-examination of prosecutrix not unduly extended).

8232. Degree of proof required—Corroboration of prosecutrix—(15) See State v. Schmoker, — Minn. —, 182 N. W. 957.

8233. Evidence—Sufficiency—(16) State v. Schmoker, — Minn. —, 182 N. W. 957.

(17) See State v. Barnes, 140 Minn. 517, 168 N. W. 98.

8234. Conviction of lesser offence—Under an indictment under subdivision 2 of G. S. 1913, § 8655, the defendant may possibly be convicted of the offence punishable under G. S. 1913, § 8656. State v. Macbeth, 133 Minn. 425, 158 N. W. 796.

ATTEMPT TO COMMIT RAPE

8235. What constitutes—(19) State v. Krantz, 138 Minn. 114, 164 N. W. 579.

8236. Indictment—An indictment held sufficient to charge an attempt to commit rape under G. S. 1913, § 8655, subdivision 2. State v. Christofferson, — Minn. —, 182 N. W. 961.

8237. Evidence—Admissibility—Declarations of the prosecutrix made to a close friend soon after the assault in relation thereto held admissible. State v. Krantz, 138 Minn. 114, 164 N. W. 579.

8237a. Evidence—Sufficiency—The use of force in an endeavor to have carnal knowledge of a woman, tends to show an intent to commit rape, and if the evidence satisfies the jury that the defendant used such force and so conducted himself as to evince an intention to commit rape, it is sufficient to sustain a conviction of an assault with an intent to commit rape. State v. Krantz, 138 Minn. 114, 164 N. W. 579.

8238. Conviction of lesser offence—Under the evidence and the charge of the court there is no room for drawing a distinction between an attempt to commit the crime of rape and an assault with intent to commit that offence. Therefore that part of the verdict which specifically found defendant not guilty of an attempt cannot be reconciled with that part thereof which finds him guilty of assault in the second degree, an assault

in the second degree having been submitted to the jury as the equivalent of an assault with force and violence upon a female under the age of consent, and there being no basis in the evidence for any other finding than that the assault was against her will. State v. Macbeth, 133 Minn. 425, 158 N. W. 793.

A defendant may be convicted of an assault in the third degree under an indictment charging him with an attempt to commit rape by forcibly overcoming the resistance of the female, as the commission of an assault is necessarily included in the offence charged. State v. Christofferson, — Minn. —, 182 N. W. 961.

CARNAL ABUSE OF CHILD

8243. Time of offence—Variance—Election—The eyewitness to the offenee testified that it was committed on either November 4, 5, or 6, 1915, that she believed it was before the 6th, but could not say so positively. Under this testimony an instruction that the jury must acquit unless they found that the act was committed on either the 4th or 5th was properly refused. At the close of the charge, defendant suggested that the jury should be directed to acquit unless they found that the offence had been committed at the place and under the circumstances testified to by the eyewitness. Thereupon the court stated that the jury would not be warranted in convicting unless they found from all the evidence that defendant had committed the offence on or about November 4th. As the evidence was directed to the proof of this single offence and there was no proof of any other, the failure to define the offence more specifically was not error. State v. Kampert, 139 Minn. 132, 165 N. W. 972.

The indictment charged the commission of the offence on or about March 1, 1917, in Minneapolis, Hennepin county, Minnesota. There was evidence of several acts of intercourse. It was not error to refuse to require the state to elect, until the close of the state's case, on which alleged offence it proposed to rely. The time when such election is required rests largely within the discretion of the trial court. State v. Wassing, 141 Minn. 106, 169 N. W. 485.

(28) See State v. Kampert, 139 Minn. 132, 165 N. W. 972.

8243a. Evidence—Admissibility—Cross-examination of prosecutrix—In the trial of defendant, indicted for the crime of carnal knowledge of a girl under the age of consent, it was permissible to show his conduct towards the prosecutrix near to the time of the act upon which the state elects to rely for conviction, and it is not error if in so doing it incidentally appears that defendant, in the presence of prosecutrix, committed a like offence upon one of her companions; for, that also may characterize his conduct and disposition towards prosecutrix. Likewise conduct of defendant which serves to corroborate the story of prosecutrix and shows his purpose may be given in evidence, although such conduct

also affects other girls in the company of prosecutrix. State v. Shtemme, 133 Minn. 184, 158 N. W. 48.

A subsequent act of intercourse between the defendant and the prosecuting witness, if not too remote, may be shown. Such act occurring some ten and one-half months after the one for which a conviction is asked, and at a time when the girl was over the age of consent, there being improper familiarities but nothing criminal between the time of the two alleged acts, is too remote; but when the evidence is taken without objection this court will not reverse and grant a new trial unless the situation is very extraordinary. State v. Rutledge, 142 Minn. 117, 171 N. W. 275.

In the trial of an indictment for carnal knowledge of a female within the age of consent it is not proper to ask the defendant as to undue familiarities approaching the nature of indecent liberties suggested to have been taken by him at different times with other girls; but the statement of the court to the jury that such questions should not have been asked and its emphatic direction to disregard them and to permit no impression to come from them, was such, the trial court being of the opinion that no harm resulted, that a new trial should not be granted by this court because of them. State v. Rutledge, 142 Minn. 117, 171 N. W. 275.

In a prosecution for having carnal knowledge of a female child under the age of eighteen, where the intercourse upon which a conviction was had occurred on June 17, 1916, and where complaining witness testified to a prior act, exclusion of defendant's offer to show birth of a child on February 4, 1917, as bearing on the probability of intercourse on June 17, 1916, did not justify a new trial. State v. Kloempken, 145 Minn. 496, 176 N. W. 642.

A defendant charged with the crime of carnal knowledge of a female under the age of consent is entitled to much latitude in his cross-examination of the prosecutrix, but she ought not to be compelled to give the details of the act to any greater extent than is reasonably necessary, and it is largely within the discretion of the trial court to place limits upon her cross-examination on that subject. State v. Sandquist, 146 Minn. 322, 178 N. W. 883.

In prosecutions for crimes of this nature there is seldom any direct evidence on either side except the testimony of the two parties; and, where they squarely contradict each other, as they frequently do, all the available competent evidence, tending either to corroborate or discredit the testimony of the one or the other, should be submitted to the jury to aid them in determining where the truth lies. State v. Jouppis, 147 Minn. 87, 179 N. W. 678.

Defendant was accused of the crime of carnal knowledge of a female child At the trial, after he had rested, but before the prosecution had begun its rebuttal, he asked leave to reopen his case, and was permitted to call a witness, by whom he offered to prove that, before the prosecution was instituted, the witness had been asked by the prosecutrix and her mother to make a demand on the defendant for money, with the

threat that, unless defendant paid it, they would bring this charge against him, although the charge was untrue. Held, that the exclusion of this testimony was reversible error. State v. Jouppis, 147 Minn. 87, 179 N. W. 678.

8244. Evidence—Sufficiency—A conviction may stand on the uncorroborated testimony of the prosecutrix. A request for an instruction contrary to this rule held properly denied. State v. Wassing, 141 Minn. 106, 169 N. W. 485.

(29) State v. Bragdon, 136 Minn. 348, 162 N. W. 465; State v. Kampert, 139 Minn. 132, 165 N. W. 972; State v. Wassing, 141 Minn. 106, 169 N. W. 485; State v. Rutledge, 142 Minn. 117, 171 N. W. 275; State v. Kloempken, 145 Minn. 496, 176 N. W. 642.

8245. Conviction for lesser offence—(30) State v. Brown, — Minn. —, 183 N. W. 669.

RECEIVERS

8247. Nature of office—A receiver is the officer and agent of the court appointing him. He is a "natural person" within the statute relating to the service of process. Kading v. Waters, 137 Minn. 328, 163 N. W. 521.

(34) Pulver v. Commercial Security Co., 135 Minn. 286, 160 N. W. 781; Greenfield v. Hill City Land, L. & L. Co., 141 Minn. 393, 170 N. W. 343 (arm of court).

8248. In what cases appointed—Discretion of trial court—Subdivisions 3 and 4 of section 7892, G. S. 1913, do not limit the authority of the court in the appointment of receivers for corporations to the instances provided for in section 6634, G. S. 1913, but recognize the general equity powers of the court to appoint receivers for corporations when proper grounds are made to appear. Northwestern Nat. Bank v. Michelson-Shapiro Co., 134 Minn. 422, 159 N. W. 948.

The appointment of a receiver to take possession of property pendente lite is a matter resting largely in the discretion of the court. This discretion is not an arbitrary discretion, but one to be exercised as an auxiliary to the attainment of the ends of justice. A receiver will be appointed only under circumstances requiring summary relief, or where the court is satisfied that there is imminent danger of loss, and where there is no remedy at law. Northland Pine Co. v. Melin Bros., 136 Minn. 236, 161 N. W. 407.

Where a broker sought a receiver to collect and pay to him certain royalties to accrue in the future under a mining lease, it was held that the appointment of a receiver was properly denied, the right to the royalties being settled in his favor by the judgment and there being no reason to assume that they would not be paid when due. McRae v. Feigh, 143 Minn. 241, 173 N. W. 655.

The statute authorizes the courts of this state to appoint a receiver of the assets of a foreign corporation in this state under certain cir-

cumstances. Tasler v. Peerless Tire Co., 144 Minn. 150, 174 N. W. 731 See § 2185; L. R. A. 1917D, 295.

The appointment of a receiver in proceedings to wind up a partnership rests in the sound discretion of the trial court. Dahoot v. Colby, 146 Minn. 470, 177 N. W. 763.

(36) Northwestern Nat. Bank v. Mickelson-Shapiro Co., 134 Minn. 422, 159 N. W. 948.

(37) Dahoot v. Colby, 146 Minn. 470, 177 N. W. 763.

(40) Northland Pine Co. v. Melin Bros., 136 Minn. 236, 161 N. W. 407. See § 2124.

8249. Application for receiver—Practice—(46) Greenfield v. Hill, City Land, L. & L. Co., 141 Minn. 393, 170 N. W. 343.

(47) Bacon v. Engstrom, 129 Minn. 229, 152 N. W. 264, 537; Northland Pine Co. v. Melin Bros., 136 Minn. 236, 161 N. W. 407.

8251. Order of appointment—The court may modify its order of appointment. Northland Pine Co. v. Northern Insulating Co., 145 Minn. 395, 177 N. W. 635.

See §§ 2124, 8253.

8252. Collateral attack—An ex parte order appointing a receiver made by a court having jurisdiction over the subject-matter of an action is within the rule forbidding collateral attacks upon the judgments and orders of such a court. Greenfield v. Hill City Land, L. & L. Co., 141 Minn. 393, 170 N. W. 343.

(60) Greenfield v. Hill City Land, L. & L. Co., 141 Minn. 393, 170 N. W. 343.

8253. Powers—A receiver should not be permitted to conduct a business under the supervision of a court for any great length of time. Green v. National Advertising & Amusement Co., 137 Minn. 65, 162 N. W. 1056. See 12 A. L. R. 292.

The powers of a receiver may be enlarged from time to time through additional orders of the court appointing him. Greenfield v. Hill City Land, L. & L. Co., 141 Minn. 393, 170 N. W. 343.

In prescribing the powers of a receiver of the assets of a foreign corporation the court should limit them to assets in this state, but objection to a failure to do so cannot be raised for the first time on appeal. Tasler v. Peerless Tire Co., 144 Minn. 150, 174 N. W. 731.

(62) See Ihlan v. Chicago etc. Ry. Co., 137 Minn. 204, 163 N. W. 283 (foreign receiver of railroad company); Dahoot v. Colby, 146 Minn. 470, 177 N. W. 763.

8253a. Instructions from court—Orders—Modification and vacation—An ex parte order of court directing a receiver to pay over certain moneys to a claimant may be vacated on motion if the court concludes, after a hearing, that it was erroneous, no rights of third parties being seriously affected. Such an order is in the nature of instructions to the receiver, who is the officer of the court and subject to its control. While it protects the receiver it is not conclusive on interested parties

who are not given an opportunity to be heard. Pulver v. Commercial Security Co., 135 Minn. 286, 160 N. W. 781.

8259. Sales—Setting aside—A sale made by a receiver is a "judicial sale." In the absence of a statute regulating such sales, the time, manner, terms of sale, and notice thereof are matters to be determined solely by the court having jurisdiction over the proceedings and control of the property. The court has discretionary power to modify directions respecting sales which are contained in the original order appointing the receiver. A court is justified in refusing to set aside a receiver's sale on the ground that the property was sold en masse, in the absence of a showing of fraud, prejudice, or injustice resulting from making the sale in that way. Northland Pine Co. v. Northern Insulating Co., 145 Minn. 395, 177 N. W. 635

Evidence held to justify the court in refusing to set aside a sale of a receiver, or to interfere with the possession of the property. Barrette v. Melin Bros., 146 Minn. 92, 177 N. W. 933.

(75) Northland Pine Co. v. Northern Insulating Co., 145 Minn. 395, 177 N. W. 635.

8261. Actions against—Receivers are natural persons and the method of serving process on them is that prescribed by G. S. 1913, § 7732. Kading v. Waters, 137 Minn. 328, 163 N. W. 521.

Liability of receivers for torts of employees. 10 A. L. R. 1055.

(92) See Ihlan v. Chicago etc. Ry. Co., 137 Minn. 204, 163 N. W. 283; Kading v. Waters, 137 Minn. 328, 163 N. W. 521.

8262. Compensation—Attorney's fees—The allowance of compensation to a receiver and fees for his attorney rests largely in the discretion of the trial court. Northland Pine Co. v. Northern Insulating Co., — Minn. —, 183 N. W. 142.

(13) Small v. Anderson, 139 Minn. 292, 166 N. W. 340; Northland Pine Co. v. Northern Insulating Co., — Minn. —, 183 N. W. 142. See § 3549.

8264. Foreign receivers—A service of process on a local ticket and freight agent of a foreign railroad company in the hands of a foreign receiver held valid, the action being against the company. Ihlan v. Chicago etc. Ry. Co., 137 Minn. 204, 163 N. W. 283.

A service of process on a soliciting agent of a foreign receiver of a railroad not doing business in this state held invalid. Kading v. Waters, 137 Minn. 328, 163 N. W. 521.

It has been suggested that possibly receivers, being officers and agents of the court appointing them, cannot exercise any authority beyond the jurisdiction of that court. Kading v. Waters, 137 Minn. 328, 163 N. W. 521.

(19) See 3 Minn. L. Rev 188.

RECITALS—See Estoppel, § 3204b.

RECORDING ACT

IN GENERAL

8268. Duty to record—In the absence of special agreement it is the duty of a grantee to record his deed. Ingersoll v. Odendahl, 136 Minn. 428, 162 N. W. 525.

8269. Object of statute—(24) Akerberg v. McCraney, 141 Minn. 230, 169 N. W. 802.

8271. Right to rely upon record—(26) Akerberg v. McCraney, 141 Minn. 230, 169 N. W. 802; Havel v. Costello, 144 Minn. 441, 175 N. W. 1001. See Latourell v. Hobart, 135 Minn. 109, 160 N. W. 259.

8272. What required to be recorded—The statute applies to the assignment of a sale certificate of state lands. Krelwitz v. McDonald, 135 Minn. 408, 161 N. W. 156.

The assignment of the interest of a vendee in an executory contract for the sale of realty is within the recording act. Shraiberg v. Hanson, 138 Minn. 80. 163 N. W. 1032.

(33) Shraiberg v. Hanson, 138 Minn. 80, 163 N. W. 1032; Akerberg v. McCraney, 141 Minn. 230, 169 N. W. 802.

8273. Equitable titles—(45) Shraiberg v. Hanson, 138 Minn. 80, 163 N. W. 1032.

8277. Not to be used as instrument of fraud—(52) Kelly v. First State Bank, 145 Minn. 331, 177 N. W. 347. See § 5538.

RECORDING

8281a. What constitutes the record—The record is not limited to the transcribed instrument in the record book, but includes the entries made in the reception books required by law to be made. Each supplies defects in the other in giving constructive notice. Subsequent purchasers are presumed to have examined the whole record. Latourell v. Hobart, 135 Minn. 109, 160 N. W. 259.

8282. Time of recording—Presumption—When begins to operate as notice—Subsequent purchasers are charged with notice of a deed from the moment it is delivered to the register for record, though in the nature of things it cannot be transcribed into the record until some time later. Latourell v. Hobart, 135 Minn. 109, 160 N. W. 259.

(62) See Latourell v. Hobart, 135 Minn. 109, 160 N. W. 259.

8284. Entries in index and reception books—Subsequent purchasers are charged with notice of facts disclosed by entries made in the reception books as required by law. They are charged with notice of the

whole record and not merely of the transcribed instrument in the record book. Latourell v. Hobart, 135 Minn. 109, 160 N. W. 259.

(69) Latourell v. Hobart, 135 Minn. 109, 160 N. W. 259.

EFFECT OF RECORD AS NOTICE

8288. Instruments not "properly" recorded—(74) Dettis v. Western Union Tel Co., 141 Minn. 361, 170 N. W. 334.

8289. Insufficient or inaccurate description of premises—It is the duty of a grantee to see that his deed is correctly recorded. A misdescription of such a character that reformation is necessary in order to pass the legal title is fatal to the effect of the record as notice. Latourell v. Hobart, 135 Minn. 109, 160 N. W. 259. See L. R. A. 1916A, 530.

A deed as recorded in full described land as in section 32, town 39, range 19, Pine county, Minnesota. There was no such section and town in range 19 in Pine county, or in Minnesota. The grantor owned land in section 32, town 39, range 22, Pine county, Minnesota. The register of deed's reception book contained this latter description. These facts and other circumstances make it clear that the grantor intended to convey lands in section 32, town 39, range 22. The same facts make it clear that the mistake was in the record in extenso, and not in the drafting of the deed The entries in the reception book were required by statute, and the statute contemplated that they be made when the deed was received for record. These entries and the transcribing of the instrument into the record book together constitute the full record of the deed, and a purchaser is affected with notice of any facts which either book contains with reference to the title of his proposed grantor. Latourell v. Hobart, 135 Minn. 109, 160 N. W. 259.

8291. To whom notice—The record in one county of a mortgage covering after-acquired property is not constructive notice to a subsequent incumbrancer of property afterwards acquired by the mortgagor in another county. Minnesota Loan & Trust Co. v. Peteler Car Co., 132 Minn. 277, 156 N. W. 255.

(82) See Minnesota Loan & Trust Co. v. Peteler Car Co., 132 Minn. 277, 156 N. W. 255.

8293. General scope of notice—Constructive notice extends to the whole record, including entries in the reception books required by law to be made, and is not limited to the transcribed instrument in the record book. Latourell v. Hobart, 135 Minn. 109, 160 N. W. 259.

8297. Executory contracts for sale of land—(1) See Shraiberg v. Hanson, 138 Minn. 80, 163 N. W. 1032.

(2) Shraiberg v. Hanson, 138 Minn. 80, 163 N. W. 1032.

EFFECT OF NOT RECORDING

8302. Subsequent purchasers—Who are bona fide purchasers—In general—Where a subsequent purchaser of the equitable title protected

by the recording act seeks equitable relief against the unrecorded legal title, he may be required to "do equity" by paying the holder of the legal title the amount paid therefor, when such a requirement would be just under the circumstances. Krelwitz v. McDonald, 135 Minn. 408, 161 N. W. 156.

The record owner of real estate entered into an agreement to sell and convey the same to a grantee therein named, which was never recorded. Subsequent to the death of the grantee, the grantor conveyed the land to the grantee's widow. The defendant purchased the premises in good faith, paying an adequate consideration therefor, relying upon the record title without knowledge of such unrecorded contract, and received title through mesne conveyances from the widow, all of which were of record. Held, that defendant obtained good title to the premises as against the heirs of deceased. The correspondence leading up to the conveyance by the grantor in such contract was properly excluded upon the trial as being immaterial under the issues. Evidence to show that by slight inquiry in the vicinity of the land it could have been ascertained that the grantee named in the contract was, at the time of his death, occupying the premises as vendee under the contract, was properly excluded as being immaterial. Akerberg v. McCraney, 141 Minn. 230, 169 N. W. 802.

Where one is bound to make inquiry as to the title of a married man a separate inquiry as to the interest of his wife is not generally necessary. Havel v. Costello, 144 Minn. 441, 175 N. W. 1001.

Heirs and devisees are not bona fide purchasers within the recording act. See Colby v. Street, 146 Minn. 290, 178 N. W. 599.

(11) Krelwitz v. McDonald, 135 Minn. 408, 161 N. W. 156; Shraiberg v. Hanson, 138 Minn. 80, 163 N. W. 1032. See Nichols-Frissell Co. v. Crocker, 133 Minn. 153, 157 N. W. 1072 (evidence held not to show that the grantee paid a valuable consideration).

(12) Havel v. Costello, 144 Minn. 441, 175 N. W. 1001.

(14) Akerberg v. McCraney, 141 Minn. 230, 169 N. W. 802.

(15) Havel v. Costello, 144 Minn. 441, 175 N. W. 1001.

(16) Shraiberg v. Hanson, 138 Minn. 80, 163 N. W. 1032.

8303. Burden of proof as to good faith—(19) Ludowese v. Amidon, 124 Minn. 288, 144 N. W. 965; Shraiberg v. Hanson, 138 Minn. 80, 163 N. W. 1032.

8307. Judgments and attachments—A duly docketed judgment attaches as a lien only upon such real property as may stand of record in the office of the register of deeds in the name of the judgment debtor. It does not attach to unrecorded titles, nor upon interests of the judgment debtor which appear only from a will on file in the office of the probate court. An unrecorded executory contract for the sale of land, which is fully performed by the vendee before the docketing of a judgment against the vendor, vests in the vendee, where the title of the vendor does not appear of record, rights superior to the judgment cred-

itor, though the formal conveyance of the land pursuant to the contract be not made or filed for record until after the date of docketing of the judgment. Actual possession of the land by the vendee after the performance of the contract is notice to a subsequent judgment creditor of his equitable rights. A sale of land under an execution issued on such judgment held not to vest in the purchaser at the sale any title or interest adverse to the title of the vendee. Butterwick v. Fuller & Johnson Mfg. Co., 140 Minn. 327, 168 N. W. 18.

An unrecorded deed of a homestead is valid as against a judgment creditor who had notice thereof before the land became subject to his judgment. Where the title to a homestead is of record in the name of the husband, but has in fact been conveyed to the wife by unrecorded deeds, and the wife, her husband joining, leases it to a tenant who is in possession at the termination of the homestead right, such possession is notice of her title. Oxborough v. St. Martin, 142 Minn. 34, 170 N. W. 707.

Priority of attachment lien over unrecorded deed or mortgage. L. R. A. 1918A, 1089.

(27) 4 L. R. A. 434.

(28) Oxborough v. St. Martin, 142 Minn. 34, 170 N. W. 707.

(29) Butterwick v. Fuller & Johnson Mfg. Co., 140 Minn. 327, 168 N. W. 18.

REFERENCE

8314. Compulsory reference—(44) See 34 Harv. L. Rev. 321.

REFORMATION OF INSTRUMENTS

8328. When granted—General principles—Where parties verbally agree upon all the terms of a contract, but through the mistake of a scrivener in reducing it to writing the written document does not express the real agreement, a court will reform the written contract and make it conform to the real agreement orally made. Mahoney v. Minnesota Farmers Mut. Ins. Co., 136 Minn. 34, 161 N. W. 217.

Where one of the parties to a contract reduces the agreement to writing and in doing so, either through fraud or mistake, fails to conform the writing to the agreement, the instrument may be reformed. It is not necessary that the mistake should be mutual. Bredeson v. Nickolay, 147 Minn. 304, 180 N. W. 547.

(93) St. Nicholas Church v. Kropp, 135 Minn. 115, 160 N. W. 500.

(96) Bredeson v. Nickolay, 147 Minn. 304, 180 N. W. 547.

8329. When mistake must be mutual—Parties to an agreement may be mistaken as to some material fact which formed the consideration thereof or inducement thereto on the one side or the other; or they may

simply make a mistake in reducing their agreement to writing. In the former case, before the agreement can be reformed, it must be shown that the mistake is one of fact, and mutual; in the latter case, it may be a mistake of the draftsman, or one party only. Equity interferes, in such a case, to compel the parties to execute the agreement which they have actually made. Haley v. Sharon Township Mut. Fire Ins. Co., 147 Minn. 190, 179 N. W. 895.

(97) St. Nicholas Church v. Kropp, 135 Minn. 115, 160 N. W. 500; Mahoney v. Minnesota Farmers Mut. Ins. Co., 136 Minn. 34, 161 N. W. 217.

8331. What instruments may be reformed—In the course of negotiations between plaintiff's husband and the agent of a fire insurance company for a policy covering property owned by plaintiff, the agent was informed that the property belonged to plaintiff and that the title was in her name. The court found that it was mutually intended by the husband and the agent of the insurance company that the wife should be named in the policy as the person assured, and that, through oversight and inadvertence on the part of the company, the husband's name was written in the policy instead of the wife's, without knowledge of the mistake on the part of either the husband or the wife. Held, that the trial court was right in holding that there should be a reformation of the policy by substituting in the policy the name of the wife for that of her husband as the person insured thereby. Sundin v. County Fire Ins. Co., 144 Minn. 100, 174 N. W. 729.

(4) Zenith Box & Lumber Co. v. Nat. Union Fire Ins. Co., 144 Minn. 386, 175 N. W. 894 (insurance policy—reformation denied). See § 8347 (insurance policies).

8333. Validity of contract—Statute of frauds—See L. R. A. 1917A, 571 (effect of statute of frauds on right to reformation).

8334. Negligence of applicant—To prevent reformation the negligence of the applicant must amount to the violation of a positive legal duty. Haley v. Sharon Township Mut. Fire Ins. Co., 147 Minn. 190, 179 N. W. 895. See Digest, §§ 3822, 6124.

The negligence of the secretary of an insurance company in writing a policy so that it did not correctly express the actual agreement of the parties has been held not to prevent a reformation of the policy. Haley v. Sharon Township Mut. Fire Ins. Co., 147 Minn. 190, 179 N. W. 895.

(10) See Buckley v. Patterson, 39 Minn. 250, 39 N. W. 490.

8339a. Reformation and enforcement in same action—A contract may be reformed and enforced in the same action. Kelly v. Liverpool etc. Ins. Co., 94 Minn. 141, 102 N. W. 380; Mahoney v. Minnesota Farmers Mut. Ins. Co., 136 Minn. 34, 161 N. W. 217.

8340a. Reformation and injunction—A contract may be reformed and an injunction granted against its breach as reformed. Sharkey v. Batcher, 139 Minn. 337, 166 N. W. 350.

8341. In legal action—In a legal action a defendant may counterclaim for reformation. Haley v. Sharon Township Mut. Fire Ins. Co., 147 Minn. 190, 179 N. W. 895.

8344. Parties to action—A wife has been held authorized to maintain an action for the reformation of an insurance policy on her property negotiated by her husband and inadvertently taken in his name. Sundin v. County Fire Ins. Co., 144 Minn. 100, 174 N. W. 729.

8345. Pleading—(23) Lahiff v. Hennepin County etc. Assn., 61 Minn. 226, 63 N. W. 493 (action to reform a mortgage—answer held to constitute a counterclaim).

8347. Evidence—Sufficiency—There is less difficulty in reforming written instruments where the mistake is mainly or wholly made out by other preliminary written instruments or memoranda of the agreement. Haley v. Sharon Township Mut. Fire Ins. Co., 147 Minn. 190, 179 N. W. 895.

(26) Mahoney v. Minnesota Farmers Mut. Ins. Co., 136 Minn. 34, 161 N. W. 217; Haley v. Sharon Township Mut. Fire Ins. Co., 147 Minn. 190, 179 N. W. 895; Philippine Sugar Estates Development Co., v. Philippines, 247 U. S. 385.

(27) Mahoney v. Minnesota Farmers Mut. Ins. Co., 136 Minn 34, 161 N. W. 217.

(28) Mahoney v. Minnesota Farmers Mut. Ins. Co., 136 Minn. 34, 161 N. W. 217 (insurance policy—mistake in description of premises); Sundin v. County Fire Ins. Co., 144 Minn. 100, 174 N. W. 729 (insurance policy); Haley v. Sharon Township Mut. Fire Ins. Co., 147 Minn. 190, 179 N. W. 895 (insurance policy).

(29) Bissonett v. Bissonett, 131 Minn. 492, 154 N. W. 943; Wheeler v. McKeon, 137 Minn. 92, 162 N. W. 1070.

REGISTRATION OF TITLE

8354. Nature and object of proceeding—(42, 43) See L. R. A. 1916D, 14 (general note on Torrens system).

8361. Effect in establishing title—A decree creates an indefeasible title and is not merely evidence of title. Hammel v. Feigh, 143 Minn. 115, 173 N. W. 570. See L. R. A. 1916D, 50.

The registration of the land under the Torrens system, made with the consent of the plaintiff and with the understanding that it should not affect his rights, did not affect them; and if there was a partnership in the property before registration there was afterwards. Hammel v. Feigh, 143 Minn. 115, 173 N. W. 570.

8363. Opening and vacating decrees—In proceedings under G. S. 1913, § 6868 et seq., for the registration of land titles, a party to the proceeding who is served with the summons is not entitled to a vacation

of the final decree and for leave to answer and defend on the ground of his excusable neglect to appear and answer within the time allowed by the statute. The court is without authority, discretionary or otherwise, to grant such relief in that proceeding. The mistakes and amendment statute (G. S. 1913, § 7786) has no application to Torrens proceeding. Murphy v. Borgen, — Minn. —, 182 N. W. 449.

8364. Fraud—Error—Collateral attack—A decree cannot be collaterally attacked for error or for want of jurisdiction not affirmatively appearing on the face of the record. Jones v. Wellcome, 141 Minn. 352, 170 N. W. 224.

RELEASE

8369a. Contractual capacity—Whether a party giving a release of a claim for personal injuries had contractual capacity when he executed it, held a question for the jury. Johnson v. Brastad, 143 Minn. 332, 173 N. W. 668.

8370. Consideration—(66) Edwards v. Svea Fire & Life Ins. Co., 141 Minn. 285, 170 N. W. 206.

8373. Of joint tortfeasors—(70) 34 Harv. L. Rev. 442 (suggesting modification of rule); 5 Minn. L. Rev. 232; L. R. A. 1918F, 363; Ann. Cas. 1918D, 279.

8374. Fraud—Plaintiff was injured while a passenger on one of defendant's trains. Soon thereafter defendant's physician made a physical examination of plaintiff's person, and, to induce or cause him to act thereon, represented that he had suffered no serious injury, had no broken bones, and would recover in the course of two or three weeks. Held, that the representations were material, plaintiff had the right to rely thereon in effecting a settlement with defendant, and, since the representations were untrue in fact, though the falsity was not known to the physician at the time, and were not made with intent to deceive, plaintiff had the right to rescind the settlement. Such facts constitute fraud in law. Jacobson v. Chicago etc. Ry. Co., 132 Minn. 181, 156 N. W. 251.

A release for personal injuries may be avoided for the innocent misrepresentations of a physician of the defendant as to the extent of the injuries and the probability of recovery. Jacobson v. Chicago etc. Ry. Co., 132 Minn. 181, 156 N. W. 251; Vineseck v. Great Northern Ry. Co., 136 Minn. 96, 161 N. W. 494; Smith v. Great Northern Ry. Co., 139 Minn. 343, 166 N. W. 350; Enger v. Great Northern Ry. Co., 141 Minn. 86, 169 N. W. 474.

A release of damages for personal injuries may be avoided by the releaser if procured by intentionally deceiving him and causing him to believe that his injuries were trivial when they were known to be serious. Such a release may also be avoided if procured by misrepresenting the character and extent of the injuries although the representations were

made in good faith with no intention to deceive, if the releaser was in fact misled into believing that injuries of a serious and permanent nature were merely superficial or temporary, but the misrepresentations must have related to the character or extent of the injury and not merely to the probable duration of disability. Althoff v. Torrison, 140 Minn. 8, 167 N. W. 119.

Where the money received in settlement of a claim for personal injuries was expended for medical aid before plaintiff learned of the injury causing permanent disability and before learning of the fraud, it was held that his failure to return it did not operate as a ratification of the settlement, but that it was proper to instruct the jury to apply the amount in reduction of damages. Althoff v. Torrison, 140 Minn. 8, 167 N. W. 119.

Where an instrument, without consideration, is invoked as a confirmation or ratification of a former release induced by fraud, the party signing it may impair or destroy its force by showing that it was obtained by misrepresentation of its contents and that the same were unknown to him. Oestreich v. Chicago etc. Ry. Co., 140 Minn. 280, 167 N. W. 1032.

A party repudiating a release for fraud cannot be required, as a condition precedent, to return the amount paid upon a specific liquidated demand justly owing, simply because it was paid as part of the transaction of settlement. Helvetia Copper Co. v. Hart-Parr Co., 142 Minn. 74, 171 N. W. 272, 767.

To avoid a formal written settlement and release prepared by a party's own lawyer after full and adequate investigation, a proof of fraud or deceit inducing its signing must be clear and convincing. Rosenberg v. Nelson, 145 Minn. 455, 177 N. W. 659.

Whether a release was induced by fraud is a question for the jury, unless the evidence is conclusive. Kjerkerud v. Minneapolis etc. Ry. Co., 148 Minn. —, 181 N. W. 843; Bingham v. Chicago etc. Ry. Co., 148 Minn. —, 181 N. W. 845.

(71) Vineseck v. Great Northern Ry. Co., 136 Minn. 96, 161 N. W. 494 (claim for personal injuries); Althoff v. Torrison, 140 Minn. 8, 167 N. W. 119 (evidence held to make question of fraud for jury); Oestreich v. Chicago etc. Ry. Co., 140 Minn. 280, 167 N. W. 1032 (representations of physician of defendant as to extent of personal injuries and the length of disability); Rechtzigel v. National Casualty Co., 143 Minn. 302, 173 N. W. 670 (action on accident insurance policy—defence a release—plaintiff claimed that release was given because of a misrepresentation that it was a mere receipt—verdict for plaintiff sustained); Kjerkerud v. Minneapolis etc. Ry. Co., 148 Minn. —, 181 N. W. 843 (representation of physician that an injured arm would heal in a short time); Bingham v. Chicago etc. Ry. Co., 148 Minn. —, 181 N. W. 845 (evidence held to justify finding that release was procured by misrepresentations of physicians as to nature and extent of personal injuries—immaterial that representations were made in good faith with no intention to deceive).

(72) See Vineseck v. Great Northern Ry. Co., 136 Minn. 96, 161 N. W. 494.

8375. Mistake—A release of a claim for personal injuries executed under a mistake of the parties and physicians as to the extent of the injuries, held invalid in an action for the injuries. Smith v. Minneapolis St. Ry. Co., 132 Minn. 51, 155 N. W. 1046. See § 8374.

Such a release may be avoided on the ground of mutual mistake if a substantial injury existed which was not known and was not taken into account when the settlement was made and the release executed, unless it was expressly agreed that the release should apply to unknown as well as to known injuries. Althoff v. Torrison, 140 Minn. 8, 167 N. W. 119.

A release from all damages arising from and out of an accident may be avoided upon clear and convincing proof of mutual mistake as to an unknown injury caused by the accident and existing at the time of the settlement, not intended to be included therein. Of course, when parties intentionally settle for unknown injuries received in an accident, the release obtained is incontestable. Nygard v. Minneapolis St. Ry. Co., 147 Minn. 109, 179 N. W. 642.

(74) See Jacobson v. Chicago etc. Ry. Co., 132 Minn. 181, 156 N. W. 251.

(76) Althoff v. Torrison, 140 Minn. 8, 167 N. W. 119.

See L. R. A. 1916A, 776.

8376. Pleading—To avoid a release of a claim for damages for personal injuries on the ground of a mutual mistake of fact, the mistake must be pleaded. Bingham v. Chicago etc. Ry. Co., 148 Minn. —, 181 N. W. 845.

RELIGIOUS SOCIETIES

8379a. Powers—Religious corporations are authorized to hold, purchase, and receive title by gift, grant or other conveyance of and to any property, real or personal. In re Little's Estate, 143 Minn. 298, 173 N. W. 659.

They are authorized to acquire burial grounds by devise. In re Little's Estate, 143 Minn. 298, 173 N. W. 659.

8381. Meetings—Notice—(85) See Lost River N. E. L. Congregation v. Thoen, — Minn. —, 183 N. W. 954.

8387. Property in trust—Division of society—Change of doctrine—The court has power to make an equitable division of the property of a religious society, when its members separate by mutual consent, owing to an honest difference of opinion, and both parties still adhere to the faith or doctrines of the church, and agree upon and attempt to make a division of the property, which is invalid for want of the notice required by section 6598, G. S. 1913. Members who secede from a religious

society forfeit their rights in the church property. In case the members separate because of honest differences of opinion, but both parties still adhere to the doctrines of the church, the court may divide the property between them in proportion to their numbers at the time of the separation. A division on that basis was proper, though not asked for by either party, when the aid of the court was sought to set aside deeds of the property which were executed to accomplish the division which had been agreed upon. Lost River N. E. L. Congregation v. Thoen, — Minn. —, 183 N. W. 954.

(91) 8 A. L. R. 105.

8388. Questions of doctrine—Jurisdiction of courts—(92) Shepard v. Barkley, 247 U. S. 1; 8 A. L. R. 105; 32 Harv. L. Rev 180.

8388a. Liability for negligence—Religious societies are liable for negligence the same as individuals. See Mulliner v. Evangelischer etc. Synod, 144 Minn. 392, 175 N. W. 699.

REMOVAL OF CAUSES

8389. Petition—(95) See Miner v. Chicago, B. & Q. R. Co., 147 Minn. 21, 179 N. W. 483.

8395. Diversity of citizenship—A state court has concurrent jurisdiction of an action under the federal Employers' Liability Act, and such action is not removable to a federal court upon the ground of diversity of citizenship. When an attorney intervenes in the original action, after a settlement without his consent, to enforce his lien for compensation, his controversy with the defendant is not removable to the federal court on the ground of diversity of citizenship. Miner v. Chicago, B. & Q. R. Co., 147 Minn. 21, 179 N. W. 483.

RENDERING PLANTS—See Health, § 4152b.

REPLEVIN

8403. Nature and object of action—(22) Bradshaw v. Langum, 141 Minn. 39, 169 N. W. 148.

(23) Itasca Cedar & Tie Co. v. McKinley, 124 Minn. 183, 144 N. W. 768.

8404. Subject-matter—Replevin will lie for the recovery of a promissory note. Wade v. Nat. Bank of Commerce, 144 Minn. 187, 174 N. W. 889.

(26) See § 1561.

8406. Title to support—Parties plaintiff—Plaintiff held not to show sufficient title to maintain action to recover timber cut from land, where

the only evidence of his title was an executory contract for the sale of the land to him by one not shown in any way to have title, the land being vacant. Foley v. Richter, 134 Minn. 472, 159 N. W. 129.

An administrator held not entitled to maintain replevin for funds claimed by him to have been fraudulently obtained by defendant from the decedent, his remedy being an action under G. S. 1913, § 7131. Kemp v. Holz, — Minn. —, 183 N. W. 287.

(42) See Kemp v. Holz, — Minn. —, 183 N. W. 287.

See § 1455.

8407. Parties defendant—Replevin will lie, though the property sought to be recovered is not in the actual possession of the defendant, if it is under his control in the hands of another so that he may deliver possession of it if he so desires. Burkee v. Great Northern Ry. Co., 133 Minn. 200, 158 N. W. 41.

Replevin must be directed against a party in possession, but others interested, though not in possession, may be joined as defendants. In replevin against an attaching officer in possession, an attaching creditor who directed the attachment to be made may be joined as a defendant. Northern Timber Products Co. v. Stone-Ordean-Wells Co., 143 Minn. 200, 173 N. W. 439.

(44) Northern Timber Products Co. v. Stone-Ordean-Wells Co., 143 Minn. 200, 173 N. W. 439.

8409. Demand before suit—(53) Bradshaw v. Langum, 141 Minn. 39, 169 N. W. 148.

8409a. Joinder of causes of action—A complaint in replevin may join a demand for a recovery of the property and a demand for damages for its detention. G. S. 1913, § 7780; Northern Timber Products Co. v. Stone-Ordean-Wells Co., 143 Minn. 200, 173 N. W. 439.

A complaint against an attaching officer in possession and the attaching creditor, held to state a cause of action in replevin and not to be open to the objection that two causes of action were improperly joined. Northern Timber Products Co. v. Stone-Ordean-Wells Co., 143 Minn. 200, 173 N. W. 439.

8410. Complaint—A complaint against an attaching officer in possession and the attaching creditor, held to state a cause of action in replevin and not to be open to the objection that two causes of action were improperly joined. Northern Timber Products Co. v. Stone-Ordean-Wells Co., 143 Minn. 200, 173 N. W. 439.

A complaint held not to allege facts sufficient to justify the recovery of exemplary damages. Northern Timber Products Co. v. Stone-Ordean-Wells Co., 143 Minn. 200, 173 N. W. 439.

A complaint need not ask for the immediate delivery of the property. Northern Timber Products Co. v. Stone-Ordean-Wells Co., 143 Minn. 200, 173 N. W. 439. See § 8428.

A description of the property in a replevin action is sufficient if therefrom the officer may identify the property to be seized and defendant the

property involved so that a proper defence may be made. Wade v. Nat. Bank of Commerce, 144 Minn. 187, 174 N. W. 889.

Defendant was not entitled to judgment on the pleadings. The general allegations of ownership and right of immediate possession in the complaint were sufficient until met with the answer that the defendant was a bona fide holder, and then the reply could properly join issue on that point. Wade v. Nat. Bank of Commerce, 144 Minn. 187, 174 N. W. 889.

(56, 58) Wade v. Nat. Bank of Commerce, 144 Minn. 187, 174 N. W. 889.

8412. General denial—Evidence admissible under—(67) Bradshaw v. Langum, 141 Minn. 39, 169 N. W. 148 (general rule stated); 5 Minn. L. Rev. 563.

8415. Counterclaim—In an action based on a contract a cause of action on contract may be counterclaimed though unconnected with the cause of action on which the action is based. Griffith v. Dowd, 133 Minn. 305, 158 N. W. 420.

8416. Defences—An equitable title and right of possession in the defendant as against the plaintiff is a good defence. Allen v. Grady, 134 Minn. 118, 158 N. W. 811.

8418. Burden of proof—(80) Itasca Cedar & Tie Co. v. McKinley, 124 Minn. 183, 144 N. W. 768; Bradshaw v. Langum, 141 Minn. 39, 169 N. W. 148.

8420. Damages—Certain alleged damages to plaintiff's business and credit held too remote and speculative. Northern Timber Products Co. v. Stone-Ordean-Wells Co., 143 Minn. 200, 173 N. W. 439.

Interest and usable value cannot both be recovered. 6 A. L. R. 483.

(94) Northern Timber Products Co. v. Stone-Ordean-Wells Co., 143 Minn. 200, 173 N. W. 439; 6 A. L. R. 478; 34 Harv. L. Rev. 674.

8423. Evidence—Sufficiency—Evidence held to justify a verdict for defendant on the ground that he was shown to be the owner of the machine sought to be recovered. Dalton Adding Machine Co. v. Bailey, 137 Minn. 61, 162 N. W. 1059.

(5) National Bank of Commerce v. Tolan, 137 Minn. 474, 163 N. W. 1070.

8424. Verdict—Assessment of property—Statute—Where a party stipulates that a verdict may be returned as in an action for conversion he cannot thereafter complain that the case was submitted in accordance therewith. Olson v. Moulster, 137 Minn. 96, 162 N. W. 1068.

Where a note sought to be recovered was held by a party pending the trial under stipulation, to be delivered to the party the court should order, there was no mistrial because the jury failed to find the value of the note. Wade v. Nat. Bank of Commerce, 144 Minn. 187, 174 N. W. 889.

8425. Judgment in alternative—Statute—A judgment requiring a return of a certain certificate or bond has been sustained, where the issue was tried by consent and objection was first made on appeal. Bauman v. Krieg, 133 Minn. 196, 158 N. W. 40.

Where plaintiff alleges title and right to possession in general terms and the answer is a general denial, and the property is taken from the possession of defendant and delivered to plaintiff, defendant, upon dismissal of the action by plaintiff, is entitled to an alternative judgment for the return of the property, or, if it cannot be had, for its value. Bradshaw v. Langum, 141 Minn. 39, 169 N. W. 148.

A judgment of dismissal in an action of replevin annuls all the proceedings and leaves the parties as though no action had been commenced. In rendering such a judgment the court should restore the parties to the situation they were in before the action was commenced. Bradshaw v. Langum, 141 Minn. 39, 169 N. W. 148.

Where an action is tried at plaintiff's instance on the theory that it is an action of replevin he cannot claim judgment as for conversion. Grice v. Berkner, 148 Minn. —, 180 N. W. 923.

Effect of a voluntary dismissal upon defendants right to a judgment. 2 A. L. R. 200.

(12) Bauman v. Krieg, 133 Minn. 196, 158 N. W. 40; Bradshaw v. Langum, 141 Minn. 39, 169 N. W. 148.

CLAIMING IMMEDIATE DELIVERY

8428. Optional—(27) Taylor v. Duluth etc. Ry. Co., 139 Minn. 216, 166 N. W. 128; Northern Timber Products Co. v. Stone-Ordean-Wells Co., 143 Minn. 200, 173 N. W. 439.

RESIDENTIAL DISTRICTS—See Municipal Corporations, § 6525.

RESISTING OFFICER—See Obstructing Justice, § 7295a.

RESTAURANTS—See Innkeepers, § 4512a.

RESTRAINT OF TRADE

8434. Contracts in restraint of trade—Price restrictions on patented articles. Straus v. Victor Talking Machine Co., 243 U. S. 490.

Price restrictions on the resale of goods. Boston Store v. American Graphophone Co., 246 U. S. 8; Frey & Sons v. Cudahy Packing Co., 255 U. S. —. See 30 Harv. L. Rev. 68; 33 Id. 966; 7 A. L. R. 449.

(38) Stronge Warner Co. v. H. Choate & Co., — Minn. —, 182 N. W. 712.

8435. Monopolies—(41) 31 Harv. L. Rev. 246, 752.

8436. Contracts not to engage in business—A contract not to furnish premium catalogues and articles of merchandise to other dealers in the same locality, held not to be illegal as in restraint of trade. John Newton Porter Co. v. Kiewell Brewing Co., 137 Minn. 81, 162 N. W. 887.

Where the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between the parties, and not specially injurious to the public, the restraint is reasonable and valid. Williams v. Thomson, 143 Minn. 454, 174 N. W. 307.

In an action to recover damages for breach of a contract which the parties had entered into, and to restrain the defendant from engaging in the garage business within Blue Earth county for the period of ten years, held, that the contract was not void as being in restraint of trade. Williams v. Thomson, 143 Minn. 454, 174 N. W. 307.

An employee, upon entering the service, agreed that, for a certain period after the service ceased, he would not directly or indirectly engage in the same business as the employer in the city. Within the prescribed period he engaged in a like business in the city. In this action to enjoin him from working in the new employment, plaintiff failed to show that it had sustained or was likely to sustain irreparable damage on account of his conduct, and for that reason the dismissal ordered when plaintiff rested was right. Menter Co. v. Brock, 147 Minn. 407, 180 N. W. 553.

Restrictive covenants in contracts of employment. 9 A. L. R. 1456; 34 Harv. L. Rev. 555.

Enforcement of contract by third party who purchases business. 4 A. L. R. 1078.

(43) Williams v. Thomson, 143 Minn. 454, 174 N. W. 307. See 3 A. L. R. 250 (independent contract); 31 Harv. L. Rev. 193; L. R. A. 1916C, 626.

8437. Trusts—Combinations, etc.—Statute—The statute is not violated by an agreement among union employees in the building trades, who have a bona fide dispute with a contractor, to withhold their services from him or his subcontractors until the dispute is settled. George J. Grant Const. Co. v. St. Paul Building Trades Council, 136 Minn. 167, 161 N. W. 520, 1055. See Duplex Printing Press Co. v. Deering, 254 U. S. 443.

Certain contracts and acts relating to the operation of department stores in the general department stores of others held not a violation of G. S. 1913, §§ 8595, 8903, 8973, 8974. The record fails to show that either in obtaining the contracts under which plaintiff did business or in its conduct thereof there was an unlawful plan to stifle competition or to fix prices or to combine to defraud or mislead the public. Stronge-Warner Co. v. H. Choate & Co., — Minn. —, 182 N. W. 712.

(45) 30 Harv. L. Rev. 830 (good and bad trusts).

REWARDS

8439. Who entitled to award—A village constable who, without warrant, aids in making an arrest outside his village for an offence committed outside the village, may share in a reward offered for the arrest and conviction of the offender. Bystrom v. Rohlen, 134 Minn. 67, 158 N. W. 796.

ROADS

IN GENERAL

8443. Discretionary power to establish—Where the propriety or necessity of laying out a road is involved, the courts cannot set aside the action of the local board authorized to pass thereon unless such action was arbitrary and against the best interests of the public, or was based on an erroneous theory of the law, or unless the evidence was practically conclusive against it. Brazil v. Sibley County, 139 Minn. 458, 166 N. W. 1077.

8444. Dedication by user—Statute—A four-rod road was duly laid out, established and opened on the section line which was the boundary line of plaintiff's land. Some time before the road was laid out, plaintiff had built a fence on the south side of his land which he has continuously maintained ever since. This fence is more than four rods north of the center line of the road as laid out. Public travel deviated to the north of the four-rod road limit, but at no place was the traveled track less than one rod from the fence. Held, that the travel and use by the public was had with reference to the fact that a legal highway had been laid out on the section line; and that a deviation of travel outside the four-rod limit was not in itself such notice to the landowner as would set in motion the six-year statute of limitations. McCasland v. Walworth, 132 Minn. 460, 157 N. W. 715. See Hrdlicka v. Haberman, 140 Minn. 124, 167 N. W. 363.

The public cannot, by deviating from a road as laid out, encroach on an abutting landowner and then claim two rods beyond the center line of the road as traveled. Hrdlicka v. Haberman, 140 Minn. 124, 167 N. W. 363.

Evidence held not to show a public easement by statutory user of a strip of land inside the line of a sidewalk left open by the owner for the display of goods by occupants of business buildings erected five feet back from the line for that purpose. John A. Stees Co. v. Reinhardt, 142 Minn. 340, 172 N. W. 219.

A statutory user held insufficiently pleaded. Bruns v. Willems, 142 Minn. 473, 172 N. W. 772.

When a roadway is acquired by user its width, in the absence of statute, is measured by the user. But when it is evident that further

improvements will have to be made for the safety and convenience of travelers, and they become reasonably necessary, the public is entitled to the use of land outside the traveled way. In this case it was a question of fact for the jury whether the defendant in improving a roadway acquired by user so that the traveled surface was of a definite and uniform width, with ditches draining it, of a proper grade to meet a connecting road, and in general harmony with the road system of the county, used more of the plaintiff's land than was reasonably necessary. Schrack v. Hennepin County, 146 Minn. 171, 178 N. W. 484.

(66) Schrack v. Hennepin County, 146 Minn. 171, 178 N. W. 484.

(68) See Hrdlicka v. Haberman, 140 Minn. 124, 167 N. W. 363.

(69) Hrdlicka v. Haberman, 140 Minn. 124, 167 N. W. 363; Schrack v. Hennepin County, 146 Minn. 171, 178 N. W. 484.

(75) Mount Pleasant v. Florence, 138 Minn. 359, 165 N. W. 126; Hrdlicka v. Haberman, 140 Minn. 124, 167 N. W. 363.

8446. Prescription—(77) See Bruns v. Willems, 142 Minn. 473, 172 N. W. 772.

8448. Evidence as to location—In an action for trespass the court found that the town supervisors laid out a road along a section line. The further finding that it was never opened, but that another road a few feet to the north thereof was instead opened and traveled so as to become a road by user, is not sustained by the evidence. The opening must be considered to be pursuant to the order of the authorities establishing the road. The place where the alleged trespass was committed was within the boundaries of the road established by the town supervisors, and the finding that plaintiff by adverse hostile user had acquired title thereto to the exclusion of the public easement is not supported by the evidence. Other findings bearing upon the location of the road and the claimed damages for the alleged trespass are not sustained by the evidence. Hrdlicka v. Haberman, 140 Minn. 124, 167 N. W. 363.

8450. Seeding to grass—Statute—(84) Great Northern Ry. Co. v. Johannsen, 142 Minn. 208, 171 N. W. 775.

8452. State roads—The provision of section 14, c. 230, Laws 1905 (Gen. St. 1913, § 5536), requiring the auditor to advertise for bids for the construction of a state rural highway within ten days after the order has been made for its establishment and construction, is directory and not mandatory. The state highway commission is required to approve the petition for the establishment of the state rural highway, but is not to approve the order of the county board establishing the same. However, the first-mentioned approval having been obtained, no prejudicial error resulted from the admission in evidence of a subsequent approval and the finding to that effect. The board of county commissioners duly established and ordered constructed certain state rural highways in the county, and appellant thereafter duly advertised for bids for their construction. Bids were received within amounts permissible of acceptance,

if the bidders were found responsible. Appellant by his answer virtually admits, and the evidence conclusively shows, that he refused to consider any bid on its merit, but rejected all because he considered the county board had abandoned the whole project. For the purposes of this decision we assume that the county board has manifested an intention to wholly abandon the construction of the state rural highways herein referred to. But it is held, that the county board has no authority or power to abandon duly established highways, nor has the auditor been invested with discretion to determine whether or not the county board has attempted to abandon the construction ordered. Appellant was not justified in refusing to consider the bids on their merits on the ground that it appears that the contemplated project cannot be carried out. State v. Anding, 132 Minn. 36, 155 N. W. 1048.

Action by subcontractor against principal contractor and his surety for work done on a state road. Contract construed. Mistake in engineer's estimate of earth moved and overhaul. Extent of surety's liability. Dawson v. Northwestern Construction Co., 137 Minn. 352, 163 N. W. 772.

Action on a subcontract for the construction of a state road. Additional work. Admissibility of engineer's estimates. No errors in the trial and evidence held to justify findings of jury. Kinshella v. Small, 137 Minn. 406, 163 N. W. 744.

Whatever proprietary title or interest an organized town may have in and to the material in bridges and to culverts constructed and installed upon regularly laid out town roads ceases and terminates by operation of law upon a transfer of the road to the county by action of the board of county commissioners under G. S. 1913, § 2505, in declaring it a state road. In respect to such material the town holds the naked legal title in trust for the public, and the legislature lawfully may transfer it to the county as a new trustee; such was the necessary effect of the statute and the proceedings thereunder in this case. Roseau County v. Hereim, — Minn. —, 183 N. W. 518.

See § 6720 (bonds of contractors).

8452a. Municipal aid—The council of any village or of any city of the fourth class may appropriate and expend such reasonable sums as it may deem proper to assist in the improvement and maintenance of roads lying beyond its boundaries and leading into it. G. S. 1913, § 1797; Peterson v. Jordan, 135 Minn. 384, 160 N. W. 1026.

8452b. Construction of proceeding—Proceedings for the laying out of public roads are to be construed liberally and so as to facilitate the action of the public authorities. To apply strict rules of jurisdiction would defeat nearly all such proceedings and be subversive of the best interests of the public. State v. Morrison, 132 Minn. 454, 157 N. W. 706. See Digest, § 8464.

POWERS AND DUTIES OF TOWNS

8454. In general—The interest of a town in the materials of a bridge and culverts installed on town roads is subject to legislative control and may be transferred by the legislature to a county. Roseau County v. Hereim, — Minn. —, 183 N. W. 518.

8455. Powers and duties of town board—(90) Olson v. Honett, 133 Minn. 160, 157 N. W. 1092, 1103. See Rost v. O'Connor, 145 Minn. 81, 176 N. W. 166 (power to cut trees in road).

TOWN ROADS

8460. Notice of hearing—Waiver—(5) See State v. Morrison, 132 Minn. 454, 157 N. W. 706.

8461. Hearing—Order establishing—Adjournments—By G. S. 1913, § 2536, the order is prima facie evidence of the regularity of the prior proceedings. Hrdlicka v. Haberman, 140 Minn. 124, 167 N. W. 363.

A town board met, considered, and determined to grant the prayer of a road petition, and then separated without a formal adjournment. The order was not signed until four days thereafter. The delay in signing the order did not invalidate the proceeding. Goerndt v. Scandia Valley, 148 Minn. —, 180 N. W. 914.

8464. Construction of proceedings—(29) State v. Morrison, 132 Minn. 454, 157 N. W. 706; Goerndt v. Scandia Valley, 148 Minn —, 180 N. W. 914.

8466a. Cartways—Section 55, Laws 1915, c. 116, providing that the town board of supervisors "may" expend road and bridge funds in the care and improvement of cartways is not merely permissive, but must be construed as imposing a duty in that respect to the extent the public interests may require. Carlson v. Elmo, 141 Minn. 240, 169 N. W. 805.

8467. Vacation and alteration—The several pertinent provisions of chapter 235, Laws 1913 (G. S. 1913, §§ 2488–2578), construed, and held to confer upon the town board of supervisors authority to vacate cartways, theretofore laid out and maintained by the town, whenever justified by public interests. Cartways are included within "town roads," as declared by subdivision 3 of section 1 of the statute referred to (G. S. 1913, § 2488), and the authority to vacate the same is found in the general authority granted by that statute to town boards to lay out, vacate, or discontinue town roads. The evidence justified the vacation of the cartway involved in this case. Carlson v. Elmo, 141 Minn. 240, 169 N. W. 805.

Section 2520, G. S. 1913, authorizes the county board to alter or vacate a town road along the shore of a meandered lake, but does not take from the town board authority to establish or alter such a highway. An order made by a town board establishing a highway upon a town line where

there was an existing highway is not invalid as to the locus in quo within its township. Goerndt v. Scandia Valley, 148 Minn. —, 180 N. W. 914.

IN MORE THAN ONE TOWN

8471. Roads on town lines—Statutes 1894, §§ 1824 to 1827, relate to the establishment and keeping in repair of highways lying between two towns. Section 1824 provides for the location of a new road or the alteration or discontinuance of an old one, on the line between two towns, or as nearly on the line as the ground will permit. Section 1825 provides that the supervisors of the two towns, when there may be such highways, shall divide the highway into two or more road districts in such manner that the labor and expense of opening, working, and keeping in repair such highway through each of the districts may be as nearly equal as may be, and shall allot an equal number of districts to each town. Section 1826 provides that each district shall be considered as belonging wholly to the town in which it is allotted, for the purpose of opening the road and keeping it in repair. Section 1827 provides that all roads "heretofore laid out on the line between any two towns shall be divided, allotted, recorded and kept in repair in the manner above directed." Manifestly these provisions apply to highways already existing, as well as to those established under the provisions. Mount Pleasant v. Florence, 138 Minn. 359, 165 N. W. 126.

COUNTY ROADS

8474. In more than one county—Establishment—(50) State v. Morrison, 132 Minn. 454, 157 N. W. 706 (adjoining landowner did not submit to jurisdiction of court either by a general appearance or by taking part in the hearings before the appointed commissioners—discrepancy in date of presentation of petition to judge held not to have misled party—proceedings under statute liberally construed). See Mount Pleasant v. Florence, 138 Minn. 359, 364. 165 N. W. 126.

8475. Damages—Liability of county—The statute provides that damages shall be paid by the county. Brazil v. Sibley County, 148 Minn. —, 181 N. W. 329.

8476. Powers and duties of county board—County roads are established, altered or vacated only by the county board. Brazil v. Sibley County, 148 Minn. —, 181 N. W. 329.

8476a. Vacation and alteration—The authority of a county board to alter or vacate town roads is not exclusive. Goerndt v. Scandia Valley, 148 Minn. —, 180 N. W. 914.

A county board, in altering or changing or refusing to alter or change a highway, exercises legislative discretion with which the courts do not interfere except when its action is fraudulent or manifestly arbitrary and

unreasonable or is based upon an erroneous theory of the law. Brazil v. Sibley County, 148 Minn. —, 181 N. W. 329.

APPEAL TO DISTRICT COURT

8478. Bond—The evidence justified the trial court in correcting its records so as to show that a bond on appeal was filed within the required time, and in vacating a former order dismissing the appeal. Gross v. Lincoln, 137 Minn. 152, 163 N. W. 126.

8481. Trial in district court—Reversal—Remand—In proceedings for the establishment of public improvements authorized by law to be heard and determined by local municipal boards and officers, all questions in respect to the propriety and necessity of the particular improvement are legislative in character, and the determination thereof by the local tribunal is final, and will be set aside by the court on statutory appeal only when it appears that the evidence is practically conclusive against it, or that the local board proceeded on an erroneous theory of the law, or arbitrarily and against the best interests of the public. The appeal does not bring up such matters for determination by the court de novo, and the trial court erred in submitting the same to the jury in this cause as an original question. In appeals in highway proceedings the court, in its discretion, may submit specific issues to a jury, as in civil actions. Brazil v. Sibley County, 139 Minn. 458, 166 N. W. 1077.

A petition for laying out a road was denied by the town board. On appeal to the district court the jury reversed the order of the board. On appeal by the town board to the supreme court, held, that the evidence justified the verdict; that the court did not err in excluding a remonstrance against the road signed by many freeholders, and that a new trial was properly denied for newly discovered evidence. Trenda v. Wheatland, 139 Minn. 493, 165 N. W. 472.

The county board denied a petition for a change of a highway. It was induced to do so in part, as found by the trial court on sufficient evidence, by the erroneous theory which it adopted that it was incumbent upon the petitioners to pay the damages incident to the change. They refused to pay. The board did not exercise the legislative discretion with the correct theory of the law in mind. The court rightly reversed its order. When such an order is reversed because of an erroneous theory of law adopted, which in part induced the denial of the petition, there should not be a judgment changing the highway, but a remand to the county board for further proceedings upon the correct view of the law. Brazil v. Sibley County, 148 Minn. —, 181 N. W. 329.

8482. Dismissal—An order of dismissal held properly vacated. Gross v. Lincoln, 137 Minn. 152, 163 N. W. 126.

8483. Evidence—Sufficiency—(73) Blanchard v. Culdrum, 131 Minn. 494, 155 N. W. 1102.

ROBBERY

8488. What constitutes—"Highway robbery" differs from robbery in general only in the place where it is committed. Robbery by holdup originally applied to the stopping and robbery of traveling parties, but the term has acquired a broader meaning. It has come to be applied to robbery in general, by the use of force or putting in fear. Robbery implies force or the putting in fear. If force is used it must be to obtain or retain possession of the money taken or to prevent or overcome resistance to the taking. The degree of force used is immaterial. Taking from the person of another constitutes robbery whenever it appears that, although the taking was fully completed without his knowledge, such knowledge was prevented by the use of force. Duluth Street Ry. Co. v. Fidelity & Deposit Co., 136 Minn. 299, 161 N. W. 595.

Robbery may be committed though no bodily harm is inflicted. The statute does not in terms make intent a necessary element in the crime of robbery. Where the evidence of robbery was that the complaining witness was bludgeoned and relieved of his money in the nighttime, it was held that intent was not an issue in the case and there was no error in not charging that an intent to steal was an essential element of the crime. State v. Bruno, 141 Minn. 56, 169 N. W. 249.

8490. Evidence—Admissibility—(81) L. R. A. 1917D, 388 (evidence of other crimes).

8491. Evidence—Sufficiency—(82) State v. Dallas, 145 Minn. 92, 176 N. W. 491.

8491a. Instructions—The omission of the word "unlawful" in defining the crime of robbery is unimportant if the acts charged, if committed at all, could not be other than unlawful. State v. Bruno, 141 Minn. 56, 169 N. W. 249.

A charge held sufficient as to the issues in the case and the burden of proof. State v. Bruno, 141 Minn. 56, 169 N. W. 249.

ROYALTIES—See Estates, § 3163c.

SABOTAGE—See Syndicalism, § 9113a.

SAFETY APPLIANCE ACT—See Master and Servant, §§ 6022a–6022p.

SALES

THE CONTRACT IN GENERAL

8491b. Uniform Sales Act—The law of sales in this state is now largely governed by the Uniform Sales Act. Laws 1917, c. 465. See Ann. Cas. 1918D, 400 (construction of various provisions of act).

8492. Definition—A sale necessarily involves a money transaction but the price may be made payable in personal property. The fact that payment may be made in property or cash, at the option of the purchaser, is not decisive in determining whether a contract is one of sale or barter or exchange. Westfall v. Ellis, 141 Minn. 377, 170 N. W. 339.

(84) See Westfall v. Ellis, 141 Minn. 377, 170 N. W. 339; Laws 1917, c. 465, § 1.

8493. What constitutes—A certain contract construed and held to be one of sale and not one for an exchange of properties. Westfall v. Ellis, 141 Minn. 377, 170 N W 339.

A contract whereby plaintiff was to furnish defendant for a specified period certain advertising matter for use in advertising its business, and providing that such materials should be held subject to plaintiff's order when the contract expired, held a contract of service or hire, rather than one of sale. Outcault Advertising Co. v. Citizens State Bank, 147 Minn. 449, 180 N. W. 705.

Query whether a certain writing was an order for goods or a completed contract of sale. Hill v. James, 148 Minn. —, 181 N. W. 577.

(85) Gasser v. Great Northern Ins. Co., 145 Minn. 205, 176 N. W. 484.

(90) Farmers Store & Warehouse Assn. v. Barlow, — Minn. —, 182 N. W. 447.

8495. Parties—In an action to recover for the breach of an express warranty of the condition and capacity of a farm tractor, alleged to have been sold by defendant to plaintiff, it is held that the evidence is insufficient to justify submission to the jury of the claim presented on the trial that the sale was by the local agent of defendant and not by defendant. The contract relied on by plaintiff, formed by a written order for the tractor, addressed to and accepted by defendant by written indorsement thereon, held not overcome, as the contract between the parties, by the fact that payment of the purchase price of the property was made to the local agent, nor by the fact that the tractor was shipped from the factory in the name of the local agent. Gilbert Gulbrandson Estate v. Hart-Parr Co., 142 Minn. 465, 172 N. W. 704.

(2) George Gorton Machine Co. v. Grignon, 137 Minn. 378, 163 N. W. 748 (evidence held to justify a finding that a sale was between plaintiff as seller and defendant as buyer).

8495a. Bill of sale—No bill of sale is necessary to pass title and the buyer is not entitled to one unless the contract so provides. J. I. Case Threshing Machine Co. v. Bargabos, 143 Minn. 8, 172 N. W. 882.

8496. Mutuality—The parties to an executory contract for the sale of goods may recognize its binding effect by their conduct, so that it is no longer open to question on the ground that it lacks mutuality. Koehler & Hinrichs Mer. Co. v. Illinois Glass Co., 143 Minn. 344, 173 N. W. 703.

There is evidence in this case that an authorized agent of defendant agreed with plaintiff to purchase at a price fixed all the cabbage he could get and load. Such a contract constitutes at least an offer to purchase, and to the extent that the other party has, before revocation, acted on it by supplying cabbage according to its terms, it becomes a completed and binding contract. Bundy v. Meyer, 148 Minn. —, 181 N. W. 345.

Contract for goods to extent of buyer's requirements. 7 A. L. R. 498.

(3) Koehler & Hinrichs Mer. Co. v. Illinois Glass Co., 143 Minn. 344, 173 N. W. 703.

8499. Offer and acceptance—An offer to buy, or an order for goods subject to the approval of the seller, is not a contract until accepted. International Harvester Co. v. Swenson, 135 Minn. 141, 160 N. W. 255.

(7) Gasser v. Great Northern Ins. Co., 145 Minn. 205, 176 N. W. 484. See Farmers Handy Wagon Co. v. Askegaard, 143 Minn. 13, 172 N. W. 881.

8500a. Options—An option is an offer to sell coupled with an agreement to hold the offer open for acceptance for the specified time. Axford v. Western Syndicate Co., 141 Minn. 412, 168 N. W. 97, 170 N. W. 587. See Digest, § 10016.

If a party holding an option under a contract has bought his option for value paid or absolutely agreed to be paid, he may enforce it. This rule applies to a contract of sale giving to the buyer the privilege of increasing the quantity of goods specified in the contract as much as he may desire during the period covered by the contract. Koehler & Hinrichs Mer. Co. v. Illinois Glass Co., 143 Minn. 344, 173 N. W. 703.

8501. Conditional offer to buy—Order for goods—Modification—A written order given by defendant to plaintiff for certain machinery provided that it was subject to the approval of the latter. Before the order was so approved, it was competent for defendant and an agent of plaintiff to agree orally that defendant should accept and pay for a part only of the machinery ordered. The evidence was sufficient to warrant submitting to the jury the question whether the order was so modified. International Harvester Co. v. Swenson, 135 Minn. 141, 160 N. W. 255.

An order for goods subject to the approval of the seller is not a contract until approved and accepted by the seller and until so approved and accepted may be countermanded by the buyer. International Harvester Co. v. Swenson, 135 Minn. 141, 160 N. W. 255.

8503. Description of property—(11) Jordan v. Van Duzee, 139 Minn. 103, 165 N. W. 877 (an adding machine held included within a general description of property).

8504a. Order for manufacture of goods—Evidence held not to show a cancelation of an order for goods to be manufactured. Fisher v. Wellworth Mills Co., 133 Minn. 240, 158 N. W. 239.

8507a. Mistake—When ground for rescission—A mistake relating merely to the attributes, quality, or value of the subject of a sale, or respecting a matter of inducement to the making of the contract, is not sufficient to authorize a court to rescind the contract at the suit of the aggrieved party, where the means of information were open alike to both parties, and there was no concealment of facts or imposition. If the parties were mistaken only as to some point which did not affect the substance of the transaction between them, or go to the root of the matter involved, no case for rescission is presented. Costello v. Sykes, 143 Minn. 109, 172 N. W. 907.

8509a. Stipulations varying rules of law—Custom—Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale. Laws 1917, c. 465, § 71; Stein v. Shapiro, 145 Minn. 60, 176 N. W. 54.

8509c. Notice before performance—Generally, where the buyer or seller is entitled to notice before performing, the notice is not simply a condition qualifying his obligation, but it is also a legal duty of the other party to give such notice within a reasonable time. Accordingly, if the notice is not given, not simply is the party who should receive it excused from performing, but he has a right of action against the party who should have given it. Krause v. Union Match Co., 142 Minn. 24, 170 N. W. 848.

8509d. Stipulation for sale to third party—A contract, which authorizes one of two parties who are joint owners of property to sell the same, authorizes a sale for cash only, unless it expressly provides for a different disposition of the property. Westfall v. Ellis, 141 Minn. 377, 170 N. W. 339.

8509e. Agreement of seller to repurchase—Defendant sold and delivered to plaintiff five shares of the capital stock of a certain corporation, and as a part of the transaction agreed to repurchase or take the same back at a stipulated amount on a date specified, if plaintiff then wished to sell the same. Held, following Lyons v. Snider, 136 Minn. 252, 161 N. W. 532, that a breach of the agreement by defendant vested in plaintiff the right of action for the amount stipulated to be paid on the return of the stock. A tender of the stock and demand that defendant perform his contract to repurchase the same was seasonably made; time was not of the essence of the contract and it was not necessary that the demand for performance be made on the precise date named in the contract. The contract was the personal obligation of defendant, and the claim that the stock was sold by him as the agent of the corporation is not sustained. Matson v. Bauman, 139 Minn. 296, 166 N. W. 343. See § 8649a.

8509f. Assignment of contract—A contract to sell and deliver goods may be assigned by the person to whom the goods are to be delivered if there is nothing in its terms manifesting the intention of the parties that it shall not be assignable, but the rights arising out of a contract cannot be transferred if they involve a relation of personal confidence, conferring rights intended to be exercised only by him in whom confidence is reposed. Under this rule a contract of sale is assignable if it provides that the seller may require the buyer to pay cash or give satisfactory security before making delivery of the goods. Even though a contract of sale is not assignable, the parties may consent to its assignment or become estopped by their conduct from asserting that it was not assignable. Koehler & Hinrichs Mer. Co. v. Illinois Glass Co., 143 Minn. 344, 173 N. W. 703.

8510. Particular contracts construed—(18) Mitchell v. Remington, 131 Minn. 271, 154 N. W. 1070 (sale of controlling interest in a bank); Kempf v. Ranger, 132 Minn. 64, 155 N. W. 1059 (a representation as to the "cost" of a building is a representation as to the original cost of production); Jock v. O'Malley, 138 Minn. 388, 165 N. W. 233 (sale of lumber—meaning of "mill run"); Houck v. Hubbard Milling Co., 140 Minn. 186, 167 N. W. 1038 (sale of wheat to a milling company—contract construed as to the payment of freight); Sell v. Lenz, — Minn. —, 183 N. W. 135 (sale of stock of merchandise—"invoice price" construed as meaning retail or inventory price of goods and not wholesale or invoice price).

WHEN TITLE PASSES

8511. In general—The fact that the buyer has a right of inspection upon arrival of the goods, or the fact that the goods are lost in transportation, does not prevent title from passing. Lieb Packing Co. v. Trocke, 136 Minn. 345, 162 N. W. 449.

(19) See Laws 1917, c. 465, §§ 18, 19.

(21, 22) Jock v. O'Malley, 138 Minn. 388, 165 N. W. 233.

See § 8522.

8513. Sale out of uniform mass—(28) National Fire Ins. Co. v. Itasca Lumber Co., 148 Minn. —, 181 N. W. 337.

8514. Appropriation of property—In case of an executory contract to sell goods to be thereafter ascertained, the title passes when the goods conforming to the contract are appropriated to the contract. The obligation of the buyer to pay the price arises on the passing of title. Delivery of goods conforming to the contract by the seller to a common carrier consigned to the buyer is an appropriation, and title passes though the buyer has a right of inspection on arrival. Lieb Packing Co. v. Trocke, 136 Minn. 345, 162 N. W. 449.

In a sale of future goods by description, the title passes when goods of that description, in a deliverable state, are unconditionally appropriated to the contract by both parties or by either with the assent of

the other. The agreement in this case was to get and load cabbage into stock cars on tracks. Plaintiff bought cabbage, loaded it into a car on the track, had it weighed and turned over the weight tickets to defendant's agent. Held, there was an appropriation. Bundy v. Meyer, 148 Minn. —, 181 N. W. 345.

The fact that the buyer refuses to accept the goods does not negative an appropriation if the goods meet the requirements of the contract. Wood v. Michaud, 63 Minn. 478, 65 N. W. 963; Bundy v. Meyer, 148 Minn. —, 181 N. W. 345.

There may be appropriation without either delivery or payment. The essential thing is that the goods must be ascertained and applied irrevocably to the contract. Bundy v. Meyer, 148 Minn. —, 181 N. W. 345.

8515. Cash sales—(31) Dalrymple v. Randall, Gee & Mitchell Co., 144 Minn. 27, 174 N. W. 520.

8515a. Loss of goods—Upon whom falls—In the absence of express agreement to the contrary, the loss of goods which are the subject of a contract of sale falls on the buyer, if title has passed; otherwise on the seller. Rail v. Little Falls Lumber Co., 47 Minn. 422, 50 N. W. 471; Fredette v. Thomas, 57 Minn. 190, 58 N. W. 984; Jock v. O'Malley, 138 Minn. 388, 165 N. W. 233. See § 8530.

PRICE

8516. Payment as condition precedent—Where a sale is for cash, payment and delivery are concurrent and mutually dependent acts, and, if the vendor makes delivery in expectation of immediate payment, such delivery is conditional only and he may reclaim his goods if payment is not made. A sale is presumed to be for cash in the absence of evidence indicating that credit is to be given. Dalrymple v. Randall, Gee & Mitchell Co., 144 Minn. 27, 174 N. W. 520.

(32) Dalrymple v. Randall, Gee & Mitchell Co., 144 Minn. 27, 174 N. W. 520; Stein v. Shapiro, 145 Minn. 60, 176 N. W. 54.

(33) Dalrymple v. Randall, Gee & Mitchell Co., 144 Minn. 27, 174 N. W. 520.

8517a. Medium of payment—Cash—Property—Custom—Normally the price is payable in money, but it may be made to be payable in any personal property. Westfall v. Ellis, 141 Minn. 377, 170 N. W. 339

It is well settled that where a contract for the sale of goods is silent as to the manner of the purchase price, payment in money or legal tender must be made or offered before delivery of the goods can be demanded. Previous dealings, or a well-established usage or custom of a trade, cannot inject into a sales contract an obligation on the part of the seller to deliver the goods sold, upon being tendered a draft drawn by the buyer's agent upon the buyer. Stein v. Shapiro, 145 Minn. 60, 176 N. W. 54. See 8 A. L. R. 1264.

8520. Measurement by third party—The parties may stipulate that the quantity of the property sold shall be determined by the estimate of a designated individual or officer. Notice of the time and place of making the estimate is not necessary unless expressly required by the contract. The making of such an estimate is not an arbitration and the rules governing arbitration do not apply. State v. Equitable Surety Co., 140 Minn. 48, 167 N. W. 292.

8520a. Particular source of payment—A sale to a corporation may be made with an agreement to look only to the proceeds of sales of stock of the corporation for payment. A. J. Whitman & Co. v. Mielke, 139 Minn. 231, 166 N. W. 178.

DELIVERY OF GOODS

8521. Necessity—The buyer is not obliged to threaten damages for non-delivery as a condition to his right to assert such claim. Hjorth v. Albert Lea Machinery Co., 142 Minn. 387, 172 N. W. 488.

8522. To carrier—The carrier is the agent of the buyer unless the contract makes the shipment at the risk of the seller. Lieb Packing Co. v. Trocke, 136 Minn. 345, 162 N. W. 449.

Under the Uniform Sales Act, when the seller of goods delivers them to a carrier for transportation to the buyer pursuant to the contract between the seller and buyer, a presumption arises that the property in the goods passes to the buyer. If the bill of lading issued to the seller provides that the goods shall be delivered to him or his order, the property in the goods is reserved to the seller unless it would have passed to the buyer except for the form of the bill of lading, and in such case the seller retains the property in the goods only to secure the buyer's performance of the contract. Where the contract of sale provided that the buyer should receive and sell the goods and apply the proceeds to pay the seller's debt to him, the presumption arising from the taking of a bill of lading in the name of the seller is overcome, since the buyer could not perform the contract if the ownership or possession of the goods was retained by the seller. Banik v. Chicago etc. Ry. Co., 147 Minn. 175, 179 N. W. 899.

(40) Lieb Packing Co. v. Trocke, 136 Minn. 345, 162 N. W. 449.

8522a. Shipping instructions—Failure to observe—Demurrage—Reimbursement of buyer—Waiver—An acceptance of goods not shipped in accordance with the terms of the buyer's order waives his right to insist on the seller's compliance with such terms. Banik v. Chicago etc. Ry. Co., 147 Minn. 175, 179 N. W. 899.

Where a seller of goods undertakes to make shipment to the buyer and fails to obey shipping instructions and as a result the buyer fails to receive prompt notice of the arrival of the shipment and demurrage charges accrue which he is obliged to pay, the seller is liable to make reimbursement. The evidence in this case sustains a finding that the

seller disobeyed shipping instructions with the result stated. Dreyer Commission Co. v. Fruen Cereal Co., — Minn. —, 182 N. W. 520.

8523. Time—Where goods are sold to be delivered to the buyer when ordered, or when the seller is notified to make delivery, the law implies that the buyer is to exercise his right to require a delivery within a reasonable time. Krause v. Union Match Co., 142 Minn. 24, 170 N. W. 848.

In the sales of personal property, where the time for delivery is fixed, failure to deliver within such time is a breach of contract. If no time is fixed, failure to deliver within a reasonable time, taking into account the character of the goods, the purpose for which intended, the ability to produce them, and the usual course of trade, is a breach. No demand by the buyer is necessary in ordinary cases to put the seller in default. Hjorth v. Albert Lea Machinery Co., 142 Minn. 387, 172 N. W. 488; North Coast Lumber Co. v. Great Northern Lumber Co., 144 Minn. 304, 175 N. W. 547.

Where a time limit is fixed for delivery, a request made upon a defaulting party to perform after the time limited, waives the breach, and the contract thereafter becomes a subsisting contract with the time limit eliminated, giving the defaulting party a reasonable time after the request within which to perform. McDonald v. Union Hay Co., 143 Minn. 40, 172 N. W. 891.

The time of delivery may be fixed by custom. McDonald v. Union Hay Co., 143 Minn. 40, 172 N. W. 891.

(42) Hjorth v. Albert Lea Machinery Co., 142 Minn. 387, 172 N. W. 488; North Coast Lumber Co. v. Great Northern Lumber Co., 144 Minn. 304, 175 N. W. 547.

(43) See Hjorth v. Albert Lea Machinery Co., 142 Minn. 387, 172 N. W. 488 (rule in this state contrary to weight of authority); Laws 1917, c. 465, § 49.

8524. Place—One who buys personal property then on the premises of a third party must take the property where it then is unless he stipulates for a different place or manner of delivery. J. I. Case Threshing Machine Co. v. Bargabos, 143 Minn. 8, 172 N. W. 882.

(46) Lieb Packing Co. v. Trocke, 136 Minn. 345, 162 N. W. 449. See Laws 1917, c. 465, § 43.

8525. Time and place indefinite—Demand—(47) See Krause v. Union Match Co., 142 Minn. 24, 170 N. W. 848.

8530. Risk during transportation—As between buyer and seller the goods are at the risk of the former during transportation, unless the contract provides otherwise. Lieb Packing Co. v. Trocke, 136 Minn. 345, 162 N. W. 449. See § 8515a.

8531. Excuse for non-delivery—Instalments—The buyer's failure, without excuse, to make an instalment payment when due, relieves the seller from making further instalment deliveries; but where the seller

has first defaulted, and continues to be in default, and has caused substantial damage to the buyer, and the buyer withholds payment of an instalment on that account, and offers to pay for subsequent shipments on delivery, and is solvent, the seller is not justified in suspending further deliveries. Hjorth v. Albert Lea Machinery Co., 142 Minn. 387, 172 N. W. 488.

Where shipments are to be made from time to time, a request on the part of the buyer not to ship certain goods until further notice justifies the seller in suspending delivery while the request remains in force: but the seller is not relieved if such request is occasioned by some default of his own, and the buyer is at all times willing to receive all goods ordered if shipped in accordance with the contract. Hjorth v. Albert Lea Machinery Co., 142 Minn. 387, 172 N. W. 488.

The rule that failure of the buyer to make payment when due relieves the seller from making further delivery does not apply where the seller was in default in making delivery when the payment became due and the price of the goods had advanced and the buyer withheld only enough to protect him from loss. The court erred in ruling as a matter of law that plaintiff was released from its obligation to make further delivery by defendant's refusal to pay an instalment when it became due, as the evidence made a question for the jury as to whether defendants were justified in withholding this payment on the ground of an alleged prior breach of the contract by plaintiff. North Coast Lumber Co. v. Great Northern Lumber Co., 144 Minn. 304, 175 N. W. 547.

The failure of the buyer, without excuse, to make instalment payments when due excuses the seller from making further instalment deliveries, but if the seller is in default when the payment becomes due, and the price has advanced, the buyer may withhold enough to protect him from loss. Brickner Woolen Mills Co. v. Kurstin, 147 Minn. 446, 180 N. W 1015.

(57) Hjorth v. Albert Lea Machinery Co., 142 Minn. 387, 172 N. W. 488.

See Laws 1917, c. 465, § 45; 34 Harv. L. Rev. 327.

8531a. Discrepancy between quantity shipped and received—Evidence—A controversy arose as to the quantity of coal contained in a certain car at the time it was delivered to the railroad company at Duluth for defendant. The certificate of the state weighmaster at Duluth showed it to contain 83,500 pounds. The evidence justified a finding that it contained only 52,750 pounds on arrival at destination. There was no evidence tending to show a loss in transit. Held, that the evidence is sufficient to sustain the finding of the trial court that it contained only 52,750 pounds when delivered to the railroad company. The state weights were not made final or conclusive by either the statute or the contract. Whether the discrepancy in weight arose from a loss in transit or from an error in weighing, and if from an error in weighing, whether such error occurred at the place of shipment or the place of delivery, were questions of fact for the trial court to determine. Proof

of the quantity received was competent evidence tending to prove the quantity shipped, in the absence of evidence tending to show a loss in transit. Carnegie Dock & Fuel Co. v. Midland Lumber & Coal Co., — Minn. —, 182 N. W. 515.

8533. Cases determining sufficiency of delivery—(61) Hjorth v. Albert Lea Machinery Co., 142 Minn. 387, 172 N. W. 488 (sale of merchandise to be delivered from time to time—accepted orders—requests not to ship).

ACCEPTANCE OF GOODS

8535a. Refusal to accept—When justified—The bargain constituted an executory contract for the sale of personal property of a particular quality. Under such a contract, when possession is tendered, the purchaser may refuse to accept, if it is not substantially as represented in the contract, and recover the money paid. Cafferty v. Klatt, 147 Minn. 245, 179 N W. 1002.

8537. Delay in rejection—(67) The Encyclopedia Press v. Harris, 140 Minn. 145, 167 N. W. 363. See Laws 1917, c. 465, § 48.

8544. Inspection—The right of inspection on arrival is only a right to examine the goods to see whether they conform to the contract. If they do so conform, the title is held to have passed as of the date of shipment. Lieb Packing Co. v. Trocke, 136 Minn. 345, 162 N. W. 449.

(78) Lieb Packing Co. v. Trocke, 136 Minn. 345, 162 N. W. 449.

See Laws 1917, c. 465, § 47.

8545a. Evidence—Sufficiency—The evidence sustains a finding that there was an acceptance of an engine sold by the plaintiff to the defendants with a right of trial, and a completed sale, and that negotiations had between the parties relative to a return of the engine did not result in an agreement. Reliable Engine Co. v. Ferch Bros., 145 Minn. 420, 177 N. W. 657.

EXPRESS WARRANTIES AND CONDITIONS

8546. Requisites—In general—(86, 87) Johnson v. Foley Milling & Elevator Co., 147 Minn. 34, 179 N. W. 488. See Schmidt v. Ornes Esswein & Co., — Minn. —, 183 N. W. 840; Laws 1917, c. 465, § 12.

(88) Guindon v. Brusky, 142 Minn. 86, 170 N. W. 918.

8548. How far collateral—When an express contract falls any express warranties therein fall. Fargo Foundry Co. v. Calloway, 148 Minn. —, 181 N. W. 584.

8549a. Oral warranty—General printed disclaimers—The evidence sustains a finding of the jury that in the course of negotiations with the plaintiffs the vice president and general manager of the defendant corporation made an oral warranty of the germinating power of seed-wheat sold them; and the effect of such warranty was not as a matter of law

annulled by printed disclaimers of warranty in the letter of confirmation, invoice and shipping tags, though the contract was oral and within the statute of frauds. Moorhead v. Minneapolis Seed Co., 139 Minn. 11, 165 N. W. 484.

8550. Express refusal to warrant—(96) See Moorhead v. Minneapolis Seed Co., 139 Minn. 11, 165 N. W. 484 (oral warranty—printed disclaimers).

8551. Distinguished from fraud—The difference between a warranty and a fraudulent representation is that the latter contains the element of deceit, whereas that element is not essential to the former. But if the element of deceit be added to an ordinary warranty, the injured party is not deprived of the rights which would be his if this element were lacking and if the representations on which he relied were a mere warranty and nothing more. Barthelemy v. Foley Elevator Co., 141 Minn. 423, 170 N. W. 513.

8553. Good faith and intent of seller—In an action for breach of warranty a showing of intentional fraud or deceit on the part of the seller is not necessary. Dodson Fruit Co. v. Galanter, 145 Minn. 319, 177 N. W. 362.

(3) Helvetia Copper Co. v. Hart-Parr Co., 137 Minn. 321, 163 N. W. 665.

8558. Conformity to description—See Laws 1917, c. 465, § 14.

8559. Conformity to sample—See Laws 1917, c. 465, § 16.

8562. Machinery to work satisfactorily—(28) J. L. Owens Co. v. O'Keefe, 141 Minn. 275, 170 N. W. 204.

8563. Reliance on warranty—(29) Dodson Fruit Co. v. Galanter, 145 Minn. 319, 177 N. W. 362.

8564. Breach—(34) Moorhead v. Minneapolis Seed Co., 139 Minn. 11, 165 N. W. 484 (query as to sufficiency of evidence to prove a breach of a warranty respecting the germinating power of seed grain); J. L. Owens Co. v. O'Keefe, 141 Minn. 275, 170 N. W. 204 (warranty as to efficiency and capacity of a grain cleaner); R. S. Newbold & Son Co. v. Northern Dredge & Dock Co., 145 Minn. 88, 176 N. W. 193 (contract as to capacity of a dredge).

8565. Return of goods—Evidence held to show a return of goods as provided in a contract. Anderson v. Butterick Pub. Co., 132 Minn. 30, 155 N. W. 1045.

A contract for the sale of a grain cleaner required the buyer to pay the freight from Minneapolis to Sharon and gave thirty days' trial. The contract contained a warranty as to efficiency and capacity, and provided that if the warranty failed the machine might be rejected and that in such case the buyer would recrate the machine and ship it back. The buyer claimed the machine did not fulfil the warranty. The seller continued to try it out beyond the thirty-day period. Immediately after the

last try-out the buyer removed it and reshipped it so that it reached Minneapolis by freight within twenty days from that time. The evidence sustains a finding that the machine failed to fulfil the warranty. The making of alterations by the seller did not start a new thirty-day period of trial. An instruction to that effect was error. It was error without prejudice. The buyer had a reasonable time after such alterations to again test the machine and a return of the machine was made within a reasonable time. J. L. Owens Co. v. O'Keefe, 141 Minn. 275, 170 N. W. 204.

(36) Laws 1917, c. 465, § 49.

(37) J. L. Owens Co. v. O'Keefe, 141 Minn. 275, 170 N. W. 204.

(40) J. L. Owens Co. v. O'Keefe, 141 Minn. 275, 170 N. W. 204; Helvetia Copper Co. v. Hart-Parr Co., 142 Minn. 74, 171 N. W. 272, 767.

(44) See Helvetia Copper Co. v. Hart-Parr Co., 142 Minn. 74, 171 N. W. 272, 767.

8566. Waiver of breach—An acceptance of goods not shipped in accordance with the terms of the buyer's orders waives his right to insist on the seller's compliance with such terms. Banik v. Chicago etc. Ry. Co., 147 Minn. 175, 179 N. W. 899. See § 8522a.

8567. Authority of agent—The vice president and general manager of the defendant, who had general charge of its office and plant, had authority to bind it by a warranty, though the making of warranties on the sale of seed grain was contrary to the custom of the trade. Moorhead v Minneapolis Seed Co., 139 Minn. 11, 165 N. W. 484.

An agent employed to deliver seed grain to a cropper held to have no implied authority to bind his principal by a representation or warranty that obviously bad seed grain was in fact of good quality. Wavra v. Karr, 142 Minn. 248, 172 N. W. 118.

(51) See L. R. A. 1916C, 412.

8569. Various warranties considered—As to the germinating quality of seed grain. Moorhead v. Minneapolis Seed Co., 139 Minn. 11, 165 N. W. 484; Casper v. Frederick, 146 Minn. 112, 177 N. W. 936. See Wavra v. Karr, 142 Minn. 248, 172 N. W. 118.

As to the quality and capacity of a tractor. Harris v. Simplex Tractor Co., 140 Minn. 278, 167 N. W. 1045; Helvetia Copper Co. v. Hart-Parr Co., 142 Minn. 74, 171 N. W. 272, 767; Gilbert Gulbrandson Estate v. Hart-Parr Co., 142 Minn. 465, 172 N. W. 704; Rossing v. Pederson, 145 Minn. 276, 177 N. W. 125

As to the capacity of a furnace to heat a house. Madsen v. Latzke, 140 Minn. 325, 168 N. W. 11.

As to the efficiency and capacity of a grain cleaner. J. L. Owens Co. v. O'Keefe, 141 Minn. 275, 170 N. W. 204.

As to the condition and quality of a carload of corn. Cherry v. Hales & Edwards Co., 143 Minn. 481, 173 N. W. 400.

As to the capacity of a dredge. R. S. Newbold & Sons Co. v. Northern Dredge & Dock Co., 145 Minn. 88, 176 N. W. 193.

As to the condition and quality of apples. Dodson Fruit Co. v. Galanter, 145 Minn. 319, 177 N. W. 362.

As to the capacity of a heating plant. Loe v. Bjorkman Bros., 146 Minn. 471, 178 N. W. 316.

(62) Cafferty v. Klatt, 147 Minn. 245, 179 N. W. 1002.

(66) Barthelemy v. Foley Elevator Co., 141 Minn. 423, 170 N. W. 513; Wavra v. Karr, 142 Minn. 248, 172 N. W. 118.

IMPLIED WARRANTIES AND CONDITIONS

8570a. Patent defects—Where the buyer has an opportunity for inspection there is no implied warranty against patent defects of quality. Anderson v. Van Doren, 142 Minn. 237, 172 N. W. 117; Wavra v. Karr, 142 Minn. 248, 172 N. W. 118.

8571. Of title—There is an implied warranty of title applicable, in the absence of an express warranty, to all sales of personal property by the person in possession who assumes the right to sell it as his own. There is no waiver of a breach of such a warranty where the vendee, without coercion by judicial process, on demand surrenders the property to the holder of a title superior and paramount to that of his vendor. The vendee may in such case determine the validity of an adverse claim in his own way, but has the burden of establishing the same when necessary to support an action against his vendor for a breach of the warranty of title. Jordan v. Van Duzee, 139 Minn. 103, 165 N. W. 877. See Laws 1917, c. 465, § 13.

8572. Of quality—(83) See Laws 1917, c. 465, § 15.

8573. Of merchantable quality—A warranty is implied, upon a sale by a manufacturer of his own product, of freedom from latent defects affecting fitness or merchantability. Anderson v. Van Doren, 142 Minn. 237, 172 N. W. 117.

8575. Conformity to name or description—Upon a sale of seed wheat by a particular name, a warranty that the seed was of the kind named arises. An instruction as to what will constitute a warranty that seed sold for seeding purposes is true to name, considered and held to be proper under the pleadings and proofs. Johnson v. Foley Milling & Elevator Co., 147 Minn. 34, 179 N. W. 488. See Laws 1917, c. 465, § 15.

8576. Of fitness for intended use—There may possibly be an implied warranty against unfitness caused by the conduct or fault of the seller. See Skalsky v. Johnson, 138 Minn. 275, 164 N. W. 978.

(88) Skalsky v. Johnson, 138 Minn. 275, 164 N. W. 978; Anderson v. Van Doren, 142 Minn. 237, 172 N. W. 117. See Jefferson v. A. Guthrie Co., 139 Minn. 496, 165 N. W. 1074 (sale of maple flooring—claim of implied warranty that lumber was kiln dried).

(89) Skalsky v. Johnson, 138 Minn. 275, 164 N. W. 978.

(91) See Moorhead v. Minneapolis Seed Co., 139 Minn. 11, 165 N. W. 484.

See Laws 1917, c. 465, § 15.

8577. Of fitness for food—(93) See § 4512a; 32 Harv. L. Rev. 71 (food for immediate consumption).

8581. Latent defects—Upon a sale by a manufacturer of his own product there is an implied warranty of freedom from latent defects affecting fitness or merchantability. Anderson v. Van Doren, 142 Minn. 237, 172 N. W. 117.

A manufacturer of goods impliedly warrants that they are free from latent defects in the process of manufacture. Hjorth v. Albert Lea Machinery Co., 142 Minn. 387, 172 N. W. 488.

A buyer who has knowledge of latent defects cannot recover therefor on implied warranty. Anderson v. Van Doren, 142 Minn. 237, 172 N. W. 117.

8582. Parol evidence—Parol evidence is admissible to prove that the buyer knew of defects in goods before he purchased them. Anderson v. Van Doren, 142 Minn. 237, 172 N. W. 117.

SELLER'S LIEN

8583. Possession essential—So long as the seller has possession of the goods he has a seller's lien thereon, and may retain possession until the price is paid or tendered in money. Stein v. Shapiro, 145 Minn. 60, 176 N. W. 54.

See Laws 1917, c. 465, § 54.

STOPPAGE IN TRANSITU

8586. Definition and nature—See Laws 1917, c. 465, §§ 57-59.

8587. When right ends—(9) See 7 A. L. R. 1374.

FRAUD

8589. In general—By accepting goods after knowledge of fraudulent representations the buyer bars himself from relief for the fraud, but an acceptance before knowledge of the fraud does not have that effect. Knopfler v. Flynn, 135 Minn. 333, 160 N. W. 860. See Digest, § 8612.

It is not necessary that the false representation should be the sole motive or inducement to the sale. R. W. Boyea Piano Co. v. Wendt, 135 Minn 374, 160 N. W. 1030. See Digest, § 3821.

Where a person has been induced to enter into a contract by the unqualified representations of another as to material facts, and by reason of the falsity of the representations suffers injury, he is entitled to relief from the contract, even though the representations were made in

good faith, and there was no design or purpose to deceive or defraud. Helvetia Copper Co. v. Hart-Parr Co., 137 Minn. 321, 163 N. W. 665.

In an action for damages for deceit in the sale of an ice machine, the complaint alleged that the seller represented that the machine, when installed, could and would keep the buyer's ice box at a temperature low enough to prevent meat from spoiling. Such a representation is held to be more than an expression of opinion or a prediction. The machine was installed and an initial payment made on May 1st. On May 25th a second payment was made. Even if it should be presumed that the buyer had then discovered that the machine had been misrepresented, he might complete performance of his contract without waiving the fraud, and then sue for damages for deceit. Schmitt v. Ornes Esswein & Co., — Minn. —, 183 N. W. 840.

Fraudulent statements often involve the dividing line between statements of fact and of opinion, closely analogous to the same question in the law of warranty. The line is hard to draw, and, in a doubtful case, should be determined by the jury. There is a growing unwillingness on the part of the courts to allow statements to be made without liability, which are calculated to induce, and do induce, action on the part of the hearer. Where a statement is made with fraudulent intent there is still more reason for regarding it as a ground of liability, even though couched in the form of an opinion, or though it relates to a matter as to which certainty is impossible. Schmitt v. Ornes Esswein & Co., — Minn. —, 183 N. W. 840.

An innocent misrepresentation on the part of the seller may constitute fraud in this connection. It is not necessary to prove fraudulent intent on his part. Helvetia Copper Co. v. Hart-Parr Co., 137 Minn. 321, 163 N. W. 665; Fawkes v. Knapp, 138 Minn. 384, 165 N. W. 236.

Fraud and false warranty are distinguishable. See § 8551.

(11) Knopfler v. Flynn, 135 Minn. 333, 160 N. W. 860; Cafferty v. Klatt, 147 Minn. 245, 179 N. W. 1002.

(12) See contra, Helvetia Copper Co. v. Hart-Parr Co., 137 Minn. 321, 163 N. W. 665; Fawkes v. Knapp, 138 Minn. 384, 165 N. W. 236; § 3826.

(15) R. W. Boyea Piano Co. v. Wendt, 135 Minn. 374, 160 N. W. 1030; Tarara v. Novelty Electric Mfg. Co., 136 Minn. 216, 161 N. W. 409; Helvetia Copper Co. v. Hart-Parr Co., 137 Minn. 321, 163 N. W. 665; Vath v Wiechmann, 138 Minn. 87, 163 N. W. 1028; Fawkes v. Knapp, 138 Minn. 384, 165 N. W. 236; Peavey v. Wells, 139 Minn. 174, 165 N. W. 1063; Guggisberg v. Boettger, 139 Minn. 226, 166 N. W. 177; Schmidt v. Thompson, 140 Minn. 180, 167 N. W. 543; Cafferty v. Klatt, 147 Minn 245, 179 N. W. 1002; Dawson v. Thuet Bros., 147 Minn. 429, 180 N. W. 534; Farmers Store & Warehouse Assn. v. Barlow, — Minn. —, 182 N. W. 447; Remington v. Savage, — Minn. —, 182 N. W. 524.

See Digest, §§ 10059–10069.

8590. Representations as to value—Positive statements by a seller to a buyer as to the price paid or offers made for the property are actionable. Brody v. Foster, 134 Minn. 91, 158 N. W. 824.

The general rule does not apply where the parties are not dealing at arm's length but one of the parties is acting as the friend and adviser of the other. Prigge v. Selz, Schwab & Co., 134 Minn. 245, 158 N. W. 975.

A representation of the "invoice value" of a stock of merchandise is one of fact and actionable. Knopfler v. Flynn, 135 Minn. 333, 160 N. W. 860.

A misrepresentation of the factory price of a manufactured article is actionable. Roseberry v. Hart-Parr Co., 145 Minn. 142, 176 N. W. 175.

A statement by defendant that his stock could not be bought for less than $120 a share, taken in connection with statements of other alleged facts calculated to give it value, may be construed as a representation that the stock was worth $120 a share. Zeglin v. Tetzlaff, 146 Minn. 397, 178 N. W. 954.

(16) Brody v. Foster, 134 Minn. 91, 158 N. W. 824; Prigge v. Selz, Schwab & Co., 134 Minn. 245, 158 N. W. 975; Vath v. Wiechmann, 138 Minn. 87, 163 N. W. 1028; Thorpe v. Cooley, 138 Minn. 431, 165 N. W. 265. See Guggisberg v. Boettger, 139 Minn. 226, 166 N. W. 177.

(17) Knopfler v. Flynn, 135 Minn. 333, 160 N. W. 860; Schmidt v. Thompson, 140 Minn. 180, 167 N. W. 543 (representation that a stock of merchandise was worth and inventoried a certain amount and was a good, up-to-date stock); Rosenberger v. H. E. Wilcox Motor Co., 145 Minn. 408, 177 N. W. 625; Schmitt v. Ornes Esswein & Co., — Minn. —, 183 N. W. 840.

(19) Prigge v. Selz, Schwab & Co., 134 Minn. 245, 158 N. W. 975. See Digest, § 10060.

8591. Representations as to other sales—See § 10060.

8591a. Representations as to offers for sale—A misrepresentation that the seller has never offered the property for sale for less than a specified amount is actionable. Vath v. Wiechmann, 138 Minn. 87, 163 N. W. 1028.

BONA FIDE PURCHASERS

8594. General rule—Caveat emptor—(25) Northern Trust Co. v. Consolidated Elevator Co., 142 Minn. 132, 171 N. W. 265.

8597. From bailee—(29) Northern Trust Co. v. Consolidated Elevator Co., 142 Minn. 132, 171 N. W. 265. See § 10140a.

8602. Who is a bona fide purchaser—No one is bound to assume that the party with whom he deals is a wrongdoer, and if he presents property, the title to which it apparently valid, and there are no circumstances disclosed which cast suspicion upon the title, he may rightfully deal with him, and, paying the full value for the same, acquire the rights of a purchaser in good faith. When a person has not actual notice he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say, not only that he might have acquired, but also that he ought to have acquired, it but for his gross

negligence in the conduct of the business in question. What makes inquiry a duty is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell. Northern Trust Co. v. Consolidated Elevator Co., 142 Minn. 132, 171 N. W. 265.

(37) Northern Trust Co. v. Consolidated Elevator Co., 142 Minn. 132, 171 N. W. 265.

RESCISSION OF CONTRACT BY ACT OF PARTIES

8604. By seller—Where on a cash sale the buyer gives his check for the purchase price, the payment is conditional only, and if the check be not paid the seller may rescind the sale and retain or retake his goods. The seller may rescind the sale by any overt act evincing an intention to do so, and if he rescinds the sale he cannot enforce payment of the check thereafter. J. I. Case Threshing Machine Co. v. Bargabos, 143 Minn. 8, 172 N. W. 882.

See Laws 1917, c. 465, § 61.

8605. By buyer—The buyer is sometimes given a right to rescind and return the goods by an express condition in the sale. Lyons v. Snider, 136 Minn. 252, 161 N. W. 532. See § 8649a.

Upon rescission for breach of warranty the buyer is sometimes entitled to recover the freight advanced by him. J. L. Owens Co. v. O'Keefe, 141 Minn. 275, 170 N. W. 204.

(46) See L. R. A. 1916E, 940.

(47) J. L. Owens Co. v. O'Keefe, 141 Minn. 275, 170 N. W. 204; Cafferty v. Klatt, 147 Minn. 245, 179 N. W. 1002; Remington v. Savage, — Minn. —, 182 N. W. 524.

(49) Tarara v. Novelty Electric Mfg. Co., 136 Minn. 216, 161 N. W. 409; Fawkes v. Knapp, 138 Minn. 384, 165 N. W. 236; Zeglin v. Tetzlaff, 146 Minn. 397, 178 N. W. 954. See § 1810.

See §§ 8507a, 8612a; Laws 1917, c. 465, § 69.

8607. Waiver—(54) The Encyclopedia Press v. Harris, 140 Minn. 145, 167 N. W. 363; Zeglin v. Tetzlaff, 146 Minn. 397, 178 N. W. 954. See Ricker v. J. L. Owens Co., — Minn. —, 182 N. W. 960.

(55) Zeglin v Tetzlaff, 146 Minn. 397, 178 N. W. 954.

ACTION BY BUYER FOR FRAUD

8612. Action at law for damages—In general—Where the falsity of a representation is not discovered until after the acceptance of the goods the acceptance does not bar relief for the fraud. Knopfler v. Flynn, 135 Minn. 333, 160 N. W. 860.

Evidence held sufficient to justify a verdict for plaintiff. Guggisberg v. Boettger, 139 Minn. 226, 166 N. W. 177.

In an action for damages for fraud in the lease of a farm and a sale of certain live stock on the farm, held that the purchaser was not entitled to recover as damages the value of the feed consumed by the live

stock while he occupied the farm. Przyblyski v. Pellowski, 141 Minn. 193, 169 N. W. 707.

The measure of damages is the natural and proximate loss sustained. It differs from the measure of damages for breach of warranty. Barthelemy v. Foley Elevator Co., 141 Minn. 423, 170 N. W. 516. See Digest, § 3841.

If a party, induced by fraud to enter into a contract, discovers the fraud while the contract is still executory, and thereafter executes it, he waives the fraud. But, if he has partly performed the contract before discovery of the fraud, his completion of performance is not a waiver of the fraud. Property sold was consigned to the vendee and the vendee took it from the carrier, paid the freight or obligated himself to the carrier to pay it, and there is evidence that he paid a draft for the price attached to the bill of lading, and that thereafter, plaintiff discovered the misrepresentation. There was ample evidence that the contract was not wholly executory when the misrepresentation was discovered. Dawson v. Thuet Bros., 147 Minn. 429, 180 N. W. 534.

Evidence held to justify a verdict for plaintiff. Dawson v. Thuet Bros., 147 Minn. 429, 180 N. W. 534.

Damages for fraud in the sale of sheep held not excessive. Dawson v. Thuet Bros., 147 Minn. 429, 180 N. W. 534.

(60) Fawkes v. Knapp, 138 Minn. 384, 165 N. W. 236. See Roseberry v. Hart-Parr Co., 145 Minn. 142, 176 N. W. 175.

(61) Knopfler v. Flynn, 135 Minn. 333, 160 N. W. 860; The Encyclopedia Press v. Harris, 140 Minn. 145, 167 N. W. 363; Dawson v. Thuet Bros., 147 Minn. 429, 180 N. W. 534.

(62) Dawson v. Thuet Bros., 147 Minn. 429, 180 N. W. 534.

8612a. Action for rescission—Laches—If, upon an executory contract of sale, the goods are not substantially as represented, the buyer may refuse to accept them when tendered and bring an action for rescission of the contract and a recovery of the purchase price. Cafferty v. Klatt, 147 Minn. 245, 179 N. W. 1002.

In an action for rescission on the ground of fraud a preponderance of the evidence is sufficient. Martin v. Hill, 41, Minn. 337, 43 N. W. 337.

Representations made prior to the sale may be considered. This is true though an earlier contract was entered into between the parties embodying similar terms, if such earlier contract was repudiated and abandoned. Kempf v. Ranger, 132 Minn. 64, 155 N. W. 1059.

To entitle the buyer to rescind a sale for fraud and recover the price paid, he need not plead or prove that he was damaged in any particular amount by the fraud or suffered any real injury therefrom. Fawkes v. Knapp, 138 Minn. 384, 165 N. W. 236.

An action to rescind a contract and recover the purchase price will be defeated by laches. Ricker v. J. L. Owens Co., — Minn. —, 182 N. W. 960. See § 1196.

ACTION BY BUYER FOR NON-DELIVERY

8613. Default in delivery—See Laws 1917, c. 465, §. 67.

8615. Measure of damages—Evidence held to justify a finding as to the amount of damage caused by a failure to deliver all the goods promised. Brickner Woolen Mills Co. v. Kurstin, 147 Minn. 446, 180 N. W. 1015.

The measure of general damages upon a breach by a vendor of an executory contract to sell goods at an agreed price is the difference between the contract price and the market value at the time and place of delivery. Special damages, such as expected profits from a resale, may be recovered, if at the time of making the contract the buyer has an existing contract of resale and the purchase is made for the purpose of filling it and the goods cannot be otherwise procured and the seller is apprised of these facts when the contract is made. Within the principle of this rule it is held that, where the original contract of sale was repudiated by the seller and later renewed and at the time of the renewal agreement the fact of a subsale was known and was in contemplation of the parties, profits on such subsale, unavoidably lost, are a proper element of special damage. Dreyer Commission Co. v. Fruen Cereal Co., — Minn. —, 182 N. W. 520.

(68, 74) Dreyer Commission Co. v. Fruen Cereal Co., — Minn. —, 182 N. W. 520.

(78) See 33 Harv. L. Rev. 854.

See Laws 1917, c. 465, § 67.

8615a. Evidence—Sufficiency—Evidence held to justify a finding that a seller failed to deliver all the goods promised. Brickner Woolen Mills Co. v. Kurstin, 147 Minn. 446, 180 N. W. 1015.

ACTION BY BUYER FOR RECOVERY OF PRICE PAID

8616. In general—Evidence of the value of the goods at the time of the sale held admissible. Zeglin v. Tetzlaff, 146 Minn. 397, 178 N. W. 954.

(79) Zeglin v. Tetzlaff, 146 Minn. 397, 178 N. W. 954.

(81) See Zeglin v. Tetzlaff, 146 Minn. 397, 178 N. W. 954.

ACTION BY BUYER FOR BREACH OF WARRANTY

8618. When lies—An action for breach of implied warranty of title lies when the buyer surrenders the property on demand to the holder of a superior title. The buyer is not required to wait until he is dispossessed under judicial process. Jordan v. Van Duzee, 139 Minn. 103, 165 N. W. 877.

A provision in a sale contract that the sole remedy for breach of a warranty shall be a return of the article sold and recovery of the price paid is a valid provision, and an action for damages for such breach can-

not be maintained. The refusal of the vendor to receive a return and refund the price does not revive the remedy of damages for breach of warranty. Helvetia Copper Co. v. Hart-Parr Co., 142 Minn. 74, 171 N. W. 272, 767.

An action will lie though there was no intentional fraud or deceit on the part of the seller. Dodson Fruit Co. v. Galanter, 145 Minn. 319, 177 N. W. 362. See § 8553.

(84) Helvetia Copper Co. v. Hart-Parr Co., 142 Minn. 74, 171 N. W. 272, 767.

(88) Loe v. Bjorkman Bros., 146 Minn. 471, 178 N. W. 316.

See Laws 1917, c. 465, § 69.

8621. Complaint—A complaint held to be one for breach of warranty and not for fraud. Guindon v. Brusky, 142 Minn. 86, 170 N. W. 918.

A complaint for breach of implied warranty of title held sufficient. Jordan v. Van Duzee, 139 Minn. 103, 165 N. W. 877.

(4) Harris v. Simplex Tractor Co., 140 Minn. 278, 167 N. W. 1045. See Barthelemy v. Foley Elevator Co., 141 Minn. 423, 170 N. W. 513.

8623. Burden of proof—(7) Jordan v. Van Duzee, 139 Minn. 103, 165 N. W. 877 (as to breach of implied warranty of title).

8624. Measure of damages—Where there is an entire failure of germination, and therefore no crop, the measure of damages for the breach of warranty of germination is the amount paid for the seed, plus the cost of planting, plus the value of the use of the land for the cropping season, less the value of its use for a proper purpose to which it might reasonably have been put upon the ascertainment of a failure of germination, and not the value of the crop which would have been raised if the seed had been true to warranty less the cost of planting and producing. Moorhead v. Minneapolis Seed Co., 139 Minn. 11, 165 N. W. 484.

Evidence held to make it a question for the jury whether a machine, or a detachable part thereof, was useful for any purpose. Harris v. Simplex Tractor Co., 140 Minn. 278, 167 N. W. 1045.

The buyer is sometimes entitled to recover the freight advanced by him. J. L. Owens Co. v. O'Keefe, 141 Minn. 275, 170 N. W. 204

Where there is a breach of warranty as to the variety of seed grain, and as a result there is a crop of different variety and smaller quantity than would have been raised had the seed been as warranted, the measure of damages is the difference in value between the crop raised and the crop that would have been raised had the seed been of the variety it was warranted to be. Barthelemy v. Foley Elevator Co., 141 Minn. 423, 170 N. W. 513.

The complaint alleged a warranty and a breach thereof, and that false representations were made in connection with the warranty, which were relied upon by plaintiff. The jury was correctly instructed as to the measure of damages in case they found there had been a breach of warranty, but were not instructed as to the measure of damages for fraud. Held, that defendant was not prejudiced, since its liability for damages,

if the warranty was made with knowledge of its falsity, would not be less than if it made the warranty in good faith. Barthelemy v. Foley Elevator Co., 141 Minn. 423, 170 N. W. 513.

In an action for damages for the breach of warranty of the germinating quality of seed corn sold by the defendant to the plaintiff, the failure of the plaintiff to replant, if he reasonably should have done so, does not prevent a recovery for a loss occasioned by defects in the seed, but only reduces the amount of the recovery. Casper v. Frederick, 146 Minn. 112, 177 N. W. 936.

A purchaser of seeds under a warranty of kind, is entitled to recover for the breach of such warranty, the difference between the value of the crop raised from the seed furnished and that of a crop such as would ordinarily have been raised from the seed had it been of the kind as warranted. Johnson v. Foley Milling & Elevator Co., 147 Minn. 34, 179 N. W. 488.

The contract price is immaterial, but where the contract price and the value as warranted are the same, it is harmless error to instruct that the measure of damages is the difference between the contract price and the fair market value. McGuire v. Chambers, 148 Minn. —, 180 N. W. 1013.

(8) Fairmont Gas Engine etc. Co. v. Crouch, 133 Minn. 167, 157 N. W. 1090; Barthelemy v. Foley Elevator Co., 141 Minn. 423, 170 N. W. 513; McGuire v. Chambers, 148 Minn. —, 180 N. W. 1013. See Laws 1917, c. 465, § 69.

(10) 33 Harv. L. Rev. 610 (duty of buyer to mitigate consequential damages).

(17) See Harris v. Simplex Tractor Co., 140 Minn. 278, 167 N. W. 1045.

(20) Hjorth v. Albert Lea Machinery Co., 142 Minn. 387, 172 N. W. 488 (damages held not excessive); McGuire v. Chambers, 148 Minn. —, 180 N. W. 1013 (value of corn sold held sufficiently proved).

See Laws 1917, c. 465, § 69.

8625. Proof of damages—Evidence held not to show that plaintiff had suffered any damages. Loe v. Bjorkman Bros., 146 Minn. 471, 178 N. W. 316.

(21) Fairmont Gas Engine etc. Co. v. Crouch, 133 Minn. 167, 157 N. W. 1090.

8626. Evidence—Admissibility—If a defect in a machine is due to a detachable part, which may be replaced, irrespective of the whole, or which does not render the balance of the machine useless, such facts may be proved in order to establish the value of the machine for any purpose. This rule does not apply when the defect is in the structural design of the machine. Benson v. Port Huron Engine & Thresher Co., 83 Minn. 321, 86 N. W. 327; Harris v. Simplex Tractor Co., 140 Minn. 278, 167 N. W. 1045.

(22) Fairmont Gas Engine etc. Co. v. Crouch, 133 Minn. 167, 157 N.

W. 1090 (evidence of buyer as to value of article); Harris v. Simplex Tractor Co., 140 Minn. 278, 167 N. W. 1045 (evidence that other machines of the same kind, made by defendant in the same manner, put out the same season, developed the same imperfections); Barthelemy v. Foley Elevator Co., 141 Minn. 423, 170 N. W. 513 (evidence that defendant had previously bought seed wheat which looked like and was sold as the same kind of wheat as that which it delivered to plaintiff); Cherry v. Hales & Edwards Co., 143 Minn. 481, 173 N. W. 400 (correspondence of the parties leading up to the contract—telephone conversation relating to sale); Rossing v. Pederson, 145 Minn. 276, 177 N. W. 125 (testimony of witness corroboratory of that of plaintiff though it was not in the exact language of the warrranty alleged or of the testimony of plaintiff).

8627. Evidence—Sufficiency—(24) Fairmont Gas Engine etc. Co. v. Crouch, 133 Minn. 167, 157 N. W. 1090.

(24) Jefferson v. A. Guthrie Co., 139 Minn. 496, 165 N. W. 1074; Gilbert Gulbrandson Estate v. Hart-Parr Co., 142 Minn. 465, 172 N. W. 704; Cherry v. Hales & Edwards Co., 143 Minn. 481, 173 N. W. 400; Loe v. Bjorkman Bros., 146 Minn. 471, 178 N. W. 316; McGuire v. Chambers, 148 Minn. —, 180 N. W. 1013.

ACTION BY SELLER FOR BREACH OF CONTRACT

8628. When action lies—See Laws 1917, c. 465, § 64.

8629. Measure of damages—See Laws 1917, c. 465, § 64.

ACTION BY SELLER FOR PRICE

8630. When lies—A seller cannot maintain an action for the purchase price if he sold without title. J. L. Owens Co. v. Simbalenka & Rawuka, 140 Minn. 68, 167 N. W. 276.

See Laws 1917, c. 465, § 63.

8632. Part performance—Tender—On the facts stated in the opinion it is held that a tender or offer to deliver corporate stock to a purchaser was not necessary as a condition precedent to the right to sue upon a promissory note given for an instalment of the purchase price. Davies v. Price Merchants' Syndicate, 147 Minn. 6, 179 N. W. 215.

8633a. Defence of fraud and rescission—In an action to recover the contract price of a quantity of iron ore, in which it was interposed in defence that the contract was induced by the fraud of plaintiff, because of which and on the discovery thereof defendant rescinded the same, the evidence is held to support the verdict sustaining the defence of fraud. Remington v. Savage, — Minn. —, 182 N. W. 524.

8634. Counterclaim for breach of warranty—Certain damages awarded on a counterclaim for breach of warranty held not excessive. Hjorth v. Albert Lea Machinery Co., 142 Minn. 387, 172 N. W. 488.

A counterclaim for breach of warranty may be litigated by consent and relief awarded accordingly. Dodson Fruit Co. v. Galanter, 145 Minn. 319, 177 N. W. 362.

8635. Various counterclaims—Counterclaim for breach of implied warranty that maple flooring was kiln dried. Evidence held to justify finding for plaintiff. Jefferson v. A. Guthrie Co., 139 Minn. 496, 165 N. W. 1074.

The buyer may counterclaim for damages for failure of seller to deliver all the goods. Brickner Woolen Mills Co. v. Kurstin, 147 Minn. 446, 180 N. W. 1015.

8638. Pleading—A complaint may be drafted so as to permit a recovery either on an express contract or for the reasonable value of the goods. Paine & Nixon Co. v. United States F. & G. Co., 135 Minn. 9, 159 N. W. 1075.

(50) Cochrane-Sargent Co. v. Foote, 144 Minn. 474, 175 N. W. 538 (common count—answer in form of general denial held properly stricken out as sham).

8639. Failure of consideration—(51) Davies v. Price Merchant's Syndicate, 147 Minn. 6, 179 N. W. 215.

8640. Variance—(52) Gaylord v. Rosander & Co., 148 Minn. —, 181 N. W. 583.

8641. Measure of damages—There may be a deduction for breach of warranty. Dodson Fruit Co. v. Galanter, 145 Minn. 319, 177 N. W. 362.

8643. Evidence—Admissibility—(56) Farmers Handy Wagon Co. v. Askegaard, 143 Minn. 13, 172 N. W. 881 (evidence as to oral agreement—correspondence not the contract); Carnegie Dock & Fuel Co. v. Midland Lumber & Coal Co., — Minn. —, 182 N. W. 515 (evidence of quantity of goods received admissible to prove the quantity shipped, in the absence of evidence tending to show a loss in transit).

8644. Evidence—Sufficiency—Action held properly dismissed for want of proof of the value or price of the goods. Smith v. Hendelan, 136 Minn. 44, 161 N. W. 221.

(58) Jefferson v. A. Guthrie Co., 139 Minn. 496, 165 N. W. 1074; J. L. Owens Co. v. Simbalenka & Rawuka, 140 Minn. 68, 167 N. W. 276 (finding of no title in plaintiff sustained); Interior Lumber Co. v. O'Dowd, 141 Minn. 498, 169 N. W. 790; Dodson Fruit Co. v. Galanter, 145 Minn. 319, 177 N. W. 362; Currier v. Hendley, 146 Minn. 213, 178 N. W. 320; C. W. La Moure Co. v. Cuyuna-Mille Lacs Iron Co., 147 Minn. 433, 180 N. W. 540; Gayiord v. Rosander & Co., 148 Minn. —, 181 N. W. 583; Farmers Store & Warehouse Assn. v. Barlow, — Minn. —, 182 N. W. 447.

ACTION BY SELLER FOR VALUE OF GOODS (QUANTUM VALEBANT)

8645. When lies—(59) Rushfeldt v. Tall, 137 Minn. 281, 163 N. W, 505.

8647a. Evidence—Sufficiency—Evidence held to justify a finding as to the amount and value of goods sold. Rushfeldt v. Tall, 137 Minn. 281, 163 N. W. 505.

CONDITIONAL SALES

8648. What constitutes—A conditional vendee is an "owner" of the property within the statute giving a lien on motor vehicles for labor and materials. Reed v. Horton, 135 Minn. 17, 159 N. W. 1080.

8649a. Condition for repurchase by seller—A contract between the plaintiff, the purchaser, and the defendant, the seller, of corporate stock whereby the defendant agreed to repurchase upon certain conditions construed and held to be a conditional sale with the option in the purchaser to revoke or rescind. Upon exercising such option the plaintiff was entitled to recover in an action at law the amount which the defendant agreed to pay and it was not necessary to allege or prove damages arising as upon a breach of a contract of purchase or sale nor to allege or prove facts justifying the maintenance of an action for specific performance. When the plaintiff exercised the option he notified the defendant that he would deliver the stock certificates upon payment. At the trial he tendered the stock and it is now in court. Held, that the notice and offer were sufficient though no formal tender was made before action was brought. Lyons v. Snider, 136 Minn. 252, 161 N. W. 532. See §§ 2040a, 8509e; Ann. Cas. 1918D, 744.

8650. Effect of conditions subsequent—See § 2041.

8651. Title reserved—Election of remedies—(74) 12 A. L. R. 503.

8652. Retaking property on default—A vendor, in a conditional sale contract providing for a forfeiture of payments upon default, and a return of the property, cannot invoke a forfeiture during the time for which he has given an extension of time for payment, though the extension is without consideration. Reinkey v. Findley Electric Co., 147 Minn. 161, 180 N. W. 236.

(77) See 9 A. L. R. 1180 (liability for retaking forcibly).

See L. R. A. 1916A, 915 (effect of retaking on the rights and remedies of the parties).

8652a. Wrongful retaking by vendor—Conversion—Damages—When the vendor wrongfully takes possession, the vendee may recover in conversion. He cannot recover the payments made as upon a rescission. Damages as for a conversion were not alleged or proved, and no more than nominal damages could be recovered upon the theory of a conversion. Malice was not present, nor were there aggravating circumstances. There was a breach of contract if the defendant took the property during the period for which an extension had been granted. There was no right of recovery for injured feelings or humiliation resulting therefrom. Reinkey v. Findley Electric Co., 147 Minn. 161, 180 N. W. 236. See 34 Harv. L. Rev. 766; 5 Minn. L. Rev. 384.

8655. Filing—Effect of removal of property to another state. 5 Minn. L. Rev. 310.

SCHOOLS AND SCHOOL DISTRICTS

IN GENERAL

8656a. State aid—State legislatures prior to 1917 provided that public schools of certain designated classes, upon reaching certain specified standards, should receive stipulated amounts annually from the state, and that appropriations made for that purpose, if sufficient to pay all demands in full, should be distributed pro rata. Appropriations made from time to time left a deficit up to July 31, 1916. The legislature of 1917 appropriated an amount for state aid available for the year ending July 31, 1917, and an amount available for the year ending July 31, 1918. Construing this statute in the light of its history and circumstances, and in connection with other legislation, it is held it appropriates money for use in payment of aid accruing during the specific years mentioned and does not authorize payment, out of the amount appropriated, of a deficit accruing prior to those years. Mushel v. Schulz, 139 Minn. 234, 166 N. W. 179.

The statute provides that no consolidated school district containing less than twelve sections of land shall receive state aid. Consolidated School District No. 24 v. Stark, 144 Minn. 431, 175 N. W. 898.

8660. Pupils—Vaccination—(3) See Bright v. Beard, 132 Minn. 375, 157 N. W. 501; 25 L. R. A. 152; 17 L. R. A. (N. S.) 710.

8660c. Exclusion from schools—Contagious diseases—To support a judgment imposing a penalty under section 2900, G. S. 1913, upon a member of the board of education of a city for having voted to exclude a pupil from a public school, the findings must show that the vote related to such pupil and that no sufficient cause existed for the exclusion. In this case the findings show that a case of smallpox had developed in the public school wherein plaintiff was a pupil; that defendant, as a member of the board of education, voted for a resolution requiring the pupils in that school who had been exposed to the contagion to be vaccinated and in default thereof to be excluded from attendance until the lapse of two weeks; and that was the only act of defendant in the premises. But since the findings fail to show that plaintiff was either named in the resolution, or came within its terms, the judgment imposing a penalty is not sustained. It is also held, that the school authorities including members of boards of education have authority to temporarily exclude from school attendance pupils who have been exposed to contagious and infectious diseases, and that the danger of contracting and spreading the disease to which such pupils have been exposed is sufficient cause for voting to so exclude them. Chapter 299, Laws 1903 (section 4640, G. S. 1913), does not apply to a pupil who has been exposed to smallpox. Bright v. Beard, 132 Minn. 375, 157 N. W. 501.

SCHOOL DISTRICTS

8662. Nature—A school district, if not technically a municipal corporation, is at least a public corporation. Evens v. Anderson, 132 Minn. 59, 155 N. W. 1040.

School districts are governmental agencies subject to the control of the legislature. Their powers and privileges may be changed or abrogated by the legislature as it may see fit. Their boundaries or territorial jurisdictions may be enlarged, diminished or abolished in such manner and through such instrumentalities as the legislature may prescribe. Kramer v. Renville County, 144 Minn. 195, 175 N. W. 101.

School districts are not within section 2 of article 1 of the state constitution and section 1 of the fourteenth amendment of the federal constitution. Kramer v. Renville County, 144 Minn. 195, 175 N. W. 101.

(6) State v. Board of Education, 139 Minn. 94, 165 N. W. 880; Hammer v. Narverud, 142 Minn. 199, 171 N. W. 770.

8663. Organization—Where the county board denies a petition to form a new school district on the sole ground that its formation would be against the best interests of the territory affected, the district court, on appeal, must affirm the order of the board, unless the evidence justifies a finding that its action was arbitrary, oppressive, or fraudulent. The evidence examined, and held not to justify a finding to that effect. Froehling v. Independent School District, 140 Minn. 71, 167 N. W. 108.

(15) Froehling v. Independent School District, 140 Minn. 71, 167 N. W. 108 (no pleadings required—held not error to refuse to make findings).

8664. Change of boundaries—Enlargement—Statute—The determination of the county board in a proceeding under the statute for the enlargement of a school district is legislative in character, not judicial. Its discretion is not reviewable as a judicial question upon the appeal to the district court given by the statute, nor is there a trial de novo of the legislative question committed to it. The inquiry is whether its determination was arbitrary or fraudulent or oppressive or in unreasonable disregard of the best interests of the territory affected or such as to work manifest injustice. School District No. 36 v. School District No. 31, 134 Minn. 82, 158 N. W. 729; Farrell v. Sibley County, 135 Minn. 439, 161 N. W. 152; Hall v. Chippewa County, 140 Minn. 133, 167 N. W. 358; Common School District No. 85 v. Renville County, 141 Minn. 300, 170 N. W. 216; In re School District No. 58, 143 Minn. 169, 173 N. W. 850; Consolidated School District No. 24 v. Stark, 144 Minn. 431, 175 N. W. 898; Paulson v. Yellow Medicine County, 147 Minn. 7, 179 N. W. 217; Severts v. Yellow Medicine County, 148 Minn. —, 181 N. W. 919; Sartell v. Benton County, — Minn. —, 183 N. W. 148.

In a proceeding under G. S. 1913, § 2677, for the enlargement of a school district, held, that land within the petitioning district is "territory affected" by the change; that the interests of the rural districts from

which the lands are detached should not be considered independently from the interests of the urban district, so that the change should not be made if not conducive to the interests of the inhabitants of any of the districts; that the action of the county board was not arbitrary, fraudulent or oppressive; that there was no prejudicial error in the instructions; and that the order of the county board should be sustained. School District No. 36 v. School District No. 31, 134 Minn. 82, 158 N. W. 729.

On an appeal to the district court from an order of the board of commissioners changing the boundaries of a school district, in proceedings under G. S. 1913, § 2677, the only question presented to the court is whether the order appealed from was fraudulent, arbitrary, unjust, or an unreasonable disregard of the best interests of the territory affected. The question of the propriety and necessity of the proposed change is a legislative, and not a judicial, question. Where the evidence presented on the appeal leaves in doubt the question whether the best interests of the affected territory justify the proposed change, the decision of the county board should not be disturbed by the court. Evidence held insufficient to justify vacating the order of the county board here under review. Section 675, G. S. 1913, providing for pleadings on appeals from the board of county commissioners in the allowance or disallowance of claims against the county, has no application to appeals taken under section 2676, G. S. 1913. Farrell v. Sibley County, 135 Minn. 439, 161 N. W. 152.

The conclusion of the trial court that the action of the defendant county board was not arbitrary or fraudulent or oppressive, etc., is sustained. Hall v. Chippewa County, 140 Minn. 133, 167 N. W. 358.

The statute is not unconstitutional because it authorizes the attachment of territory contrary to the wishes of a majority of the residents thereof. Common School District No. 85 v. Renville County, 141 Minn. 300, 170 N. W. 216.

On appeal in proceedings under G. S. 1913, § 2677, for the annexation of additional territory to a school district, or the consolidation of existing districts, any evidence having a reasonable tendency to lay before the court the conditions and situation of the existing districts, and the results likely to follow a consolidation or annexation, is competent and should be received. The rules of evidence in ordinary judicial procedure do not necessarily control. The findings of the trial court in this proceeding that an order of the board of county commissioners annexing the territory of a rural school district to a district located within a village containing less than 7,000 inhabitants, as provided for by the statute above cited, was oppressive and unjust, held not sustained by the evidence. Common School District No. 85 v. Renville County, 141 Minn. 300, 170 N. W. 216.

The board of county commissioners, on petition, detached certain territory from a school district formed in 1911 by two districts uniting. Upon appeal the order of the county board was reversed. It is held: Under the rules governing the trial of such appeals, the evidence did not

warrant the court in finding that the board acted arbitrarily, unreasonably, or against the best interests of the people in the territory affected, unless it was proper to receive and consider the tesimony of two members of the county board, by whose affirmative vote the territory was detached, that they so voted because of the belief that the union of the two districts in 1911 was void and illegal. The union of the two districts was an accomplished fact, and the members of the county board and the judge of the district court were bound to consider the same as valid as if all the formalities required by law in the consolidation of school districts had been complied with. The testimony of the two members of the county board was admissible and warranted the finding made by the trial court. In re School District No. 58, 143 Minn. 169, 173 N. W. 850.

The proviso, added as an amendment to section 1286, Rev. Laws 1905, authorizes the board of county commissioners to attach the territory of an adjoining school district to a school district having a borough, village or city of not more than 7,000 inhabitants wholly or partly within its boundaries on the petition of a majority of the legal voters of the latter district if it deems such annexation "conducive to the good of the inhabitants of the territory affected." School districts are governmental agencies wholly under the control of the legislature, and the statute does not infringe any rights secured by the constitution. Kramer v. Renville County, 144 Minn. 195, 175 N. W. 101.

The territory added, if contiguous to the district, may lie wholly outside the incorporated borough, village or city. Kramer v. Renville County, 144 Minn. 195, 175 N. W. 101.

Upon a consideration of the evidence presented in an appeal to the district court from an order of the county board detaching a portion of the territory of a consolidated school district and creating therefrom a common school district, it is held not to sustain a finding that the action of the county board was arbitrary, oppressive and in disregard of the best interests of the territory affected. Consolidated School District No. 24 v. Stark, 144 Minn. 431, 175 N. W. 898.

The failure of the county board to apportion the indebtedness of the consolidated district between it and the newly organized district is of no consequence. The bonds need not be delivered to the purchaser, but may be recalled. If they are not recalled and were lawfully issued, notwithstanding the changed boundary lines, all property within the original consolidated district will continue to be liable for taxes to pay the bonds. Sections 1877 and 2677, G. S. 1913. Consolidated School District No. 24 v. Stark, 144 Minn. 431, 175 N. W. 898.

On appeal in proceedings under G. S. 1913, § 2677, for the enlargement of a school district, held, that the evidence sustains a finding of the trial court that the county boards did not act arbitrarily or oppressively, and that the enlargement of the district was conducive to the good of the public. Paulson v. Yellow Medicine County, 147 Minn. 7, 179 N. W. 217.

Evidence held insufficient to justify a decision vacating the order of a county board. Severts v. Yellow Medicine County, 148 Minn. —, 181 N. W. 919.

The order of the county board enlarging such a district may fix boundaries of the districts affected in a manner different from that asked for in the petition. Severts v. Yellow Medicine County, 148 Minn. —, 181 N. W. 919.

The statute providing for the enlargement of a village school district so as to include lands without the village but contiguous to said district merely requires that the acquired lands taken in connection with the original district shall form one contiguous block of land. Severts v. Yellow Medicine County, 148 Minn. —, 181 N. W. 919.

On an appeal from the order of the county board refusing to enlarge a school district, the order being legislative in character and not subject to reversal unless arbitrary and without due regard to the public interests, the evidence sustains a finding of the jury, approved by the trial court, that the act of the county board was arbitrary and without due regard to public interests. Sartell v. Benton County, — Minn. —, 183 N. W. 148.

The right of appeal from orders of county boards, changing the boundaries of school districts is statutory. There is no right of appeal, unless given by statute. The statutes of this state do not give a right of appeal from an order made on a rehearing of a petition for change of boundaries of a school district under G. S. 1913, § 2703. In re Consolidated School District No. 41, — Minn. —, 183 N. W. 979.

(17) Kramer v. Renville County, 144 Minn. 195, 175 N. W. 101.

8664a. Consolidation of school districts—An appeal lies from an order consolidating districts. Evens v. Anderson, 132 Minn. 59, 155 N. W. 1040.

A consolidated district held a de facto public corporation whose organization could not be attacked by a private individual, directly or collaterally. Evens v. Anderson, 132 Minn. 59, 155 N. W. 1040.

A petition, signed by the requisite number of qualified voters, is essential to the jurisdiction of the county superintendent to act under the statute. Evens v. Anderson, 132 Minn. 59, 155 N. W. 1040.

A petition signed by the requisite number of freeholders is jurisdictional in proceedings for the consolidation of school districts under G. S. 1913, § 2687. One who holds a land contract for the conveyance of land in consideration of a conveyance agreed to be made by him of other land is a "freeholder." The findings of the court that a particular contract of this kind was bona fide is sustained by the evidence. On the question whether a resident of the district was a freeholder, evidence that such person, present in court, but not a witness, and who did not sign a petition, had said that he had no interest in a certain tract of land was hearsay and was properly excluded. In re Consolidation of School Districts, 140 Minn. 475, 168 N. W. 552.

A vendor in an executory contract for the sale of land is a freeholder, within the meaning of the statute which requires that a petition for the consolidation of school districts shall be signed by a certain number of

resident freeholders. **School District v. Schmidt**, 146 Minn. 403, 178 N. W. 892.

8670. Records—Sufficiency and effect of minutes or records. 12 A. L. R. 235.

8672. Liability on unauthorized contracts—(44) See § 6710; Tracy Cement Tile Co. v. Tracy, 143 Minn. 415, 176 N. W. 189.

8673. Liability for negligence—(45) See 9 A. L. R. 911.

8674a. Bonds—Resolution of expediency—The issuance of bonds to construct a school house was voted at a meeting of a school district by a majority of the legal voters. No previous action had been taken by the officers of the district. In mandamus against the school board to compel such issuance it is held, construing G. S. 1913, §§ 1855, 1968. that the issuance of bonds must be initiated by the board and that a resolution declaring the expediency such as is contemplated by section 1855 must be passed before a vote of the district; and that without such prior resolution a vote at a school meeting to issue bonds is ineffective and does not under section 1855 nor under section 1968 authorize the board to issue bonds. State v. Board of Education, 139 Minn. 94, 165 N. W. 880.

8675. Powers and duties of school boards—Meetings—Notice—The notice required by G. S 1913, § 2745. to be given members of a school board of a meeting of the board, must be personal notice, must be given or authorized by the proper authority, and must be sufficient to give the member a reasonable opportunity to attend the meeting. Whether it must be in writing is not decided. The notice attempted to be given a member of the board in this case, stated in the opinion, was not a sufficient or legal notice. Wood v. School District, 137 Minn. 138, 162 N. W. 1081.

Authority to provide for comfort and convenience of teachers and pupils. 7 A. L. R. 791.

(52) Wood v. School District, 137 Minn. 138, 162 N. W. 1081.

8685. Building contracts—A school district held bound to make payments in accordance with its contract though the surety on the cantractor's bond had notified it not to pay orders given by the contractor. New Amsterdam Casualty Co. v. Wurtz, 145 Minn. 438, 177 N. W. 664.

TEACHERS

8686. Qualifications—Employment—A graduate from the advanced course of a Minnesota state normal school whose diploma is indorsed by the president of the school granting it, and by the state superintendent at the expiration of two years' actual successful teaching, is entitled to teach in any of the public schools in the state, regardless of the subjects taught therein. State high school board and state superintendent are vested with discretionary powers in fixing by rule the requirements of a principal in a graded school having a high school department, in con-

nection with the distribution of special state aid. A resolution of the high school board prescribing the requirements of a principal in a graded school having a high school department, in order to entitle the district to special state aid, does not disqualify the teacher, but only affects the right of the school to receive special state aid. Relator was legally elected as principal of the schools in respondent school district, and is entitled to have his contract signed and to receive his compensation thereunder. State v. Middleton, 137 Minn. 33, 162 N. W. 688.

8687. Certificates—Revocation—Suspension of teacher—Under a statute of this state (G. S. 1913, § 2855) the county superintendent of schools of a county may, after hearing and for cause shown, suspend a teacher's authority to teach in his county. An appeal lies to the state superintendent of education. On appeal, the state superintendent hears the case de novo and may suspend or revoke the teacher's certificate. The method of revocation prescribed by this statute is exclusive. The state superintendent has no implied power to revoke a certificate in any other manner. Where the state superintendent entertains original jurisdiction in such a case, and the parties appear and participate in the proceeding without objection until after a decision is made, they will not be heard to say that the proceedings were irregularly brought before the state superintendent. The defect in jurisdiction is not want of jurisdiction over the subject-matter. The trouble was irregularity of procedure. The witnesses were not sworn. Relator did not ask that they be sworn. He cannot now complain. State v. Schulz, 142 Minn. 112, 171 N. W. 263.

8688a. Removal under municipal charter provisions—The removal of teachers is sometimes regulated by municipal charter. State v. Wunderlich, 144 Minn. 368, 175 N. W. 677. See §§ 5767, 6564.

SEALS

8702. Use of private seals abolished—Statute—A seal is not essential to a deed. Schauble v. Hedding, 138 Minn. 187, 164 N. W. 808.

(5) Morrison v. Johnson, 148 Minn. —, 181 N. W. 945.

8706. Blanks in sealed instruments—Parol authority to fill—(12) Schauble v. Hedding, 138 Minn. 187, 164 N. W. 808.

SEARCHES AND SEIZURES

8707. Constitutional provision—(13) See Silverthorne Lumber Co. v. United States, 251 U. S. 385 (books and papers of corporation protected); Gouled v. United States, 255 U. S. —; 34 Harv. L. Rev. 361.

8708. Search warrants—When issued—The place to be searched is sufficiently described if the description in the warrant furnishes data from which the officer is enabled to locate the place definitely. A war-

rant for the search of the "premises" of a person authorizes a search of a dwelling house thereon. A warrant need not designate the owner of the premises. All that is required is reasonable certainty in the description. A description that would pass the title in a deed is sufficient. McSherry v. Heimer, 132 Minn. 260, 156 N. W. 130.

A search warrant fair on its face protects the officer executing it, and those called by the officer to assist him, though the complaint on which it is issued is insufficient. McSherry v. Heimer, 132 Minn. 260, 156 N. W. 130.

Right to enter and search premises to make an arrest without special warrant. 5 A. L. R. 263.

SECONDARY BOYCOTT—See Conspiracy, § 1566.

SECURITIES COMMISSION—See Banks and Banking, § 763b; Brokers, § 1125; Constitutional Law, § 1610.

SEDUCTION

CIVIL LIABILITY

8710a. Chastity of daughter—Reformation after lapse—In an action by a father for damages for seduction of his daughter, it is proper to instruct the jury, that, if the daughter had at some time in her life been unchaste, but at the time of the alleged seduction she had reformed and had actually acquired the virtue of chastity, she was then a woman of previous chaste character. The evidence justified this instruction in this case. Haeissig v. Decker, 139 Minn. 422, 166 N. W. 1085.

8716. Damages—(27) Haeissig v. Decker, 139 Minn. 422, 166 N. W. 1085 (verdict for $1,500 held large but not excessive).

CRIMINAL LIABILITY

8724. What is chaste character—(54) Haeissig v. Decker, 139 Minn. 422, 166 N. W. 1085.

SERVICE OF NOTICES AND PAPERS

8727. Notices must be in writing—(59) Timm v. Brauch, 133 Minn. 20, 157 N. W. 709.

8731. By mail—Where a person is entitled to personal notice service by registered mail is insufficient. Rost v. O'Connor, 145 Minn. 81, 176 N. W. 166.

(75, 76) Kay v. Elsholtz, 138 Minn. 153, 164 N. W. 665.

See § 7754a (postmark as evidence of time of mailing).

SHERIFFS AND CONSTABLES

IN GENERAL

8739. Deputy sheriff—(3, 4) Duluth v. Ross, 140 Minn. 161, 167 N. W. 485.

POWERS, DUTIES AND LIABILITIES

8740. In general—A sheriff, or his deputy, in serving a summons or attempting to take property in replevin proceedings in a county of which he is not an officer, acts in an individual and not an official capacity. Daigle v. Summit Mercantile Co., 144 Minn. 178, 174 N. W. 830.

The general presumption that public officers do their duty and conform to the law applies to sheriffs. Smith v. Duluth Log Co., 118 Minn. 432, 137 N. W. 6.

8743. Protected by process fair on face—A writ of replevin for the seizure of goods in the hands of a common carrier at their destination after an interstate shipment held fair on its face. Burkee v. Great Northern Ry. Co., 133 Minn. 200, 158 N. W. 41. See § 8708.

SHIPPING

8768. Actions against vessels—Statute—(97) See Lindstrom v. Mutual Steamship Co., 132 Minn. 328, 334, 156 N. W. 669.

SIDE TRACKS TO INDUSTRIAL PLANTS—See Constitutional Law, §§ 1610, 1646; Eminent Domain, § 3025; Railroad and Warehouse Commission, § 8070; Railroads, § 8125a.

SIGNATURES

8769. What constitutes—Intention—It is sufficient if the name of a corporation is attached to an instrument without adding the name of the officer signing it. National City Bank v. Zimmer Vacuum Renovator Co., 132 Minn. 211, 156 N. W. 265.

SOLDIERS—See Army and Navy; Bounties; Moratorium.

SOLDIERS AND SAILORS RELIEF ACT—See Army and Navy, § 510b.

SPECIFIC PERFORMANCE

IN GENERAL

8772. Election of remedies—(19) Eder v. Fink, 147 Minn. 438, 180 N. W. 542.

8773. Jurisdiction—Conflict of laws—Enforcement of foreign decrees. 17 Mich. L. Rev. 527; 33 Harv. L. Rev. 423.

8774. Mutuality of obligation and remedy—(27) Jones v. Blair, 137 Minn. 306, 163 N. W. 523.

8776. Inadequacy of legal remedy—Insolvency of a party as rendering the legal remedy inadequate. 31 Harv. L. Rev. 702.

8777. How far discretionary—Specific performance is not of absolute right, but rests in judicial discretion, to be exercised according to settled principles of equity, and not arbitrarily with reference to the facts of the particular case. Baker v. Polydisky, 144 Minn. 72, 174 N. W. 526.

A court may not arbitrarily refuse to grant specific performance. The discretion is a judicial discretion. Bredeson v. Nickolay, 147 Minn. 304, 180 N. W. 547.

(36) Enkema v. McIntyre, 136 Minn. 293, 161 N. W. 587. See 2 A. L. R. 416 (not granted to one who has refused to perform).

8778. Laches and non-performance by plaintiff—The defendant leased to the plaintiff for ten years a large tract of land in which there was a partially developed stone quarry, and agreed to convey to him one-half of the land at the expiration of the lease, it being then in force The plaintiff did not agree to develop a quarry, and expressly exempted himself from liability for a failure to do so. The parties contemplated, as a vital part of the consideration for a grant of one-half of the lands, that the plaintiff would develop or make a genuine effort to develop a quarry, and such development or effort to develop was an implied condition of the agreement to convey. There was no such development or effort to develop and the court rightly denied specific performance. Reynolds v. Pike-Horning Granite Co., — Minn. —, 182 N. W. 906. See § 8788.

8779. Possibility of performance—Partial performance—Clouded title—Where it did not appear that the defendant could sell a second mortgage for a third party, it was held that specific performance was not a proper remedy. Petrich v. Berkner, 142 Minn. 451, 172 N. W. 770.

A vendee is not required to take a clouded title, but if the vendor's title to part of the land is clouded, the vendee at his option may take such title as the vendor is able to convey. Bredeson v. Nickolay, 147 Minn. 304, 180 N. W. 547.

Where a tract of land sold is described in the contract of sale as of a given quantity, and the quantity is in fact deficient, the purchaser may

at his option have specific performance with pecuniary compensation or abatement of the price proportioned to the amount of the deficiency. Kies v. Warrick, — Minn. —, 182 N. W. 998.

Where the vendor, for himself and as agent for the other part owners, contracts to convey the entire property, but in fact lacked authority to execute the contract on behalf of the other part owners, the vendee may require him to perform the contract to the extent of conveying his own interest in the property on receiving a proportionate part of the purchase price, unless it be shown that the lack of authority in the vendor was known to the vendee when he executed the contract. The evidence sustains the finding that defendant executed the contract on behalf of all the owners, and the finding that plaintiffs had no knowledge of his lack of authority to do so. McCray v. Buttell, — Minn. —, 184 N. W. 191.

(43) Kies v. Warrick, — Minn. —, 182 N. W. 998; McCray v. Buttell, — Minn —, 184 N. W. 191.

THE CONTRACT

8780. Contract basis of right—A party cannot be compelled to do what he has never agreed to do. Luthey v. Joyce, 132 Minn. 451, 157 N. W. 708.

Specific performance will be denied if it is doubtful whether the defendant made the contract sought to be enforced. Baker v. Polydisky, 144 Minn 72. 174 N. W. 526.

Specific performance of contracts in relation to personal property. L. R A. 1918E, 597.

Contracts requiring continuous acts. 1 Minn. L. Rev. 169.

8781. Terms must be definite and certain—An executory contract too indefinite for enforcement against one party is not binding on the other. Nelson v. McElroy, 140 Minn. 429, 168 N. W. 179, 587.

(49) Wheeler v McKeon, 137 Minn. 92, 162 N. W. 1070; Appleby v. Dysinger, 137 Minn. 382, 163 N. W 739; Nelson v. McElroy, 140 Minn. 429, 168 N. W. 179, 587; Kociemba v. Kociemba, 146 Minn. 62, 177 N. W. 927.

(50) Kins v. Ginzky, 135 Minn. 327, 160 N. W. 868.

8782. Contracts held sufficiently definite and certain—(56) Kociemba v. Kociemba, 146 Minn. 62, 177 N. W. 927.

(59) Seigne v. Warren Auto Co., 147 Minn. 142, 179 N W. 648 (payment "at such time as the grantee might elect" sufficiently definite).

8783. Contracts held not sufficiently definite and certain—A contract held too indefinite as to the time of the conveyance. Sandberg v. Clausen, 134 Minn. 321, 159 N. W. 752.

8785. Minds of parties must have met.—(72) Kull v. Wilson, 137 Minn. 127, 162 N. W. 1072; Baker v. Polydisky, 144 Minn. 72, 174 N. W. 526. See § 8794.

8787. Must be fair—(77) Enkema v. McIntyre, 136 Minn. 293, 161 N. W. 587; Bredeson v. Nickolay, 147 Minn. 304, 180 N. W. 547. See Abernethy v. Hall. 139 Minn. 252, 166 N. W. 218.

8788. Contracts to convey land—Specific performance may be denied where the defendant entered into the contract by mistake, though the plaintiff was not a party to the misapprehension, or implicated in its origin. Buckley v. Patterson, 39 Minn. 250, 39 N. W. 490.

Where a tenant is entitled to an extension of a lease the execution of a new lease will not be specifically enforced, the landlord not having agreed to the execution of a new lease at the expiration of the original lease. Luthey v. Joyce, 132 Minn. 451, 157 N. W. 708.

Specific performance will be denied if it would be inequitable to grant it under the circumstances. It may be denied if the applicant has himself once refused to perform, or if he has been guilty of laches and third parties have in good faith acquired rights in the property. The situation is to be considered from a practical rather than a theoretical standpoint. Enkema v. McIntyre, 136 Minn. 293, 161 N. W. 587.

The object of the action, when it involves the enforcement of a land contract, is to compel defendant to perform his contract by the execution to plaintiff of a deed of the land. It is personal in its essential particulars, and in rem only incidentally and to the extent the final judgment may decree a transfer of the land in the event defendant refuses to comply with the command of the court to execute a proper deed. State v. District Court, 138 Minn. 336, 164 N. W. 1014.

The plaintiff contracted to sell to the defendant and the defendant agreed to purchase real property for a consideration of $10,000 and as a part of the consideration agreed to assume a mortgage of $5,200 recited as then being on the property. There was then upon the property a mortgage of $5,500 and it was the only mortgage. Conceding that the plaintiff under a proper allegation might show his ability to reduce the mortgage to $5,200 and give good title at the time of the decree subject to a mortgage indebtedness of $5,200, and upon a proper offer of proof or tender might have specific performance, he was not entitled to relief in the absence of an affirmative showing. Lindstrom v. Helk, 139 Minn. 100, 165 N. W. 873.

The fact that a vendee is in possession and is thereby protected in a measure is not a reason for denying him relief by specific performance. Porten v. Peterson, 139 Minn. 152, 166 N. W. 183.

A vendee cannot have specific performance before his payments of the purchase price are due, but he may sometimes have his equitable title determined. Porten v. Peterson, 139 Minn. 152, 166 N. W. 183.

Specific performance of a contract to convey real estate is not matter of absolute right. If the contract was the result of mistake, or if enforcement would be unconscionable or inequitable, performance will not be decreed. In so far as the court may take these things into account, specific performance is matter of discretion, but if the contract

is fair and was fairly made, specific performance should be decreed. Bredeson v. Nickolay, 147 Minn. 304, 180 N. W. 547.

Specific performance will not be ordered in favor of a party who is himself in default. Reynolds v. Pike-Horning Granite Co., — Minn. —, 182 N. W. 906.

(78) Enkema v. McIntye, 136 Minn. 293, 161 N. W. 587; Bredeson v. Nickolay, 147 Minn. 304, 180 N. W. 547.

8789. Contracts for sale of personalty—Corporate stock—Where the value of capital stock in a corporation is not easily ascertainable, or the stock cannot be readily obtained elsewhere, or where it is of peculiar value to the plaintiff, specific performance of a contract for the sale thereof will be decreed, but if such stock is easily obtainable and there are no particular reasons why the purchaser should have the particular stock, he is left to his action for damages. Nason v. Barrett, 140 Minn. 366, 168 N. W. 581. See 33 Harv. L. Rev. 430.

A contract giving to a corporation exclusive right to purchase its stock under certain conditions held enforceable specifically. Model Clothing House v. Dickinson, 146 Minn. 367, 178 N. W. 957. See § 2040a.

(91) L. R. A. 1918E, 597.

See Laws 1917, c. 465, § 68.

8789a. Contracts to devise or bequeath property—Colby v. Street, 146 Minn. 290, 178 N. W. 599. See § 10207.

8791. Miscellaneous contracts held not enforceable—(2) See 33 Harv. L. Rev. 437.

VARIOUS DEFENCES

8792. Bad faith—Fraud—(7) See Abernethy v. Halk, 139 Minn. 252, 166 N. W. 218.

8794. Mistake—If a contract was actually concluded, a misunderstanding by either party of its legal effect will not prevent specific performance, provided its terms are the same as they were designed to be, and were those to which the minds of the parties consented as the result of their negotiations. If the minds of both parties to a contract meet upon its terms, and those terms are free from ambiguity, in the absence of fraud or misrepresentation, a mistake of one of the parties alone, resting wholly in his own mind, though not ground for rescission, may be good ground for refusing specific performance. Within this principle the trial court was justified in refusing specific performance of an agreement giving to one of the parties an option to buy land. The facts in this case are different from the facts in Caldwell v. Depew, 40 Minn. 528, 42 N. W. 479, and do not charge defendants with negligence, which was the sole cause of their mistake. Although specific performance of a contract, according to its terms, be denied because of a mistake of the defendant, the plaintiff should be permitted, at his election, to take performance of the contract as it was intended by defendant. Baker v. Polydisky, 144 Minn. 72, 174 N. W. 526.

Findings held to negative defence of mistake set up in the answer. Bredeson v. Nickolay, 147 Minn. 304, 180 N. W. 547.

In an action for specific performance, the fact that a provision favorable to the defendant has been omitted from the contract by mistake is not a defence if the plaintiff is ready, able and willing to perform the whole agreement, including the omitted term. Kies v. Warrick,— Minn.—, 182 N. W. 998.

(10) Bredeson v. Nickolay, 147 Minn. 304, 180 N. W. 547.

8794a. Negligence—It is not every negligence that will stay the hand of the court. The neglect must amount to a violation of a positive legal duty. The highest possible care is not demanded. Even a clearly established negligence may not of itself be sufficient ground for refusing relief, if it appears that the other party was not prejudiced thereby. Buckley v. Patterson, 39 Minn. 250, 39 N. W. 490. See Digest, § 8334.

8795. Bona fide purchasers—(12) Enkema v. McIntyre, 136 Minn. 293, 161 N. W. 587.

8796. Various defences—A mutual abandonment of the contract is a good defence. Mathwig v. Ostrand, 132 Minn. 346, 157 N. W. 589. See § 10043.

Specific performance may be denied if the applicant has himself once refused to perform. Enkema v. McIntyre, 136 Minn. 293, 161 N. W. 587.

An agent of plaintiff entered into an unauthorized contract for the sale of land to two vendees and received part of the purchase price, a portion of which he misappropriated After learning all the facts plaintiff brought an action for specific performance against one of the vendees and defendant counterclaimed for like relief. Held: Plaintiff by bringing this action adopted the contract made by the agent in his behalf. It is the only contract upon which an action can be based. He is to be considered as the undisclosed principal. No point can now be raised by plaintiff from the fact that the contract had two vendees. He elected to assert a cause of action against the one only and that one does not object. By bringing this action, to specifically enforce the contract, after full knowledge of what this agent had done, plaintiff ratified and adopted his acts in toto, and must bear the loss arising from the agent's misappropriation of part of the money paid by the vendee, even though the agent had no authority under the written contract of employment to make a contract of sale or receive the purchase money. Jones v. Blair, 137 Minn. 306, 163 N. W. 523.

In an action for specific performance of a contract for the exchange of properties, the defence was that plaintiff by false and fraudulent representations induced the deal. The court found this defence not proved. The title to part of the property which plaintiff agreed to transfer had been seized in an abatement proceeding, but was being used in the business which defendant Halk received from plaintiff. After Halk learned of the proceeding he nevertheless remained in the undisturbed possession of the property transferred to him for more than two months,

and abandoned it on the day the title was perfected by plaintiff. Held, Halk was not entitled at that time to rescind; the contract not having been induced by fraud. Abernethy v. Halk, 139 Minn. 252, 166 N. W. 218.

ACTIONS

8796a. Jurisdiction—See §§ 2759, 7779.

8796b. Venue—An action for the specific performance of a contract for the sale of land is not wholly local and the place of trial is controlled by G. S. 1913 § 7721. State v. District Court, 138 Minn. 336, 164 N. W. 1014; State v. District Court, 141 Minn. 491, 169 N. W. 420.

8798. Laches in applying for relief—(22) Enkema v. McIntyre, 136 Minn. 293, 161 N. W. 587; Porten v. Peterson, 139 Minn. 152, 166 N. W. 183.

8799. Parties plaintiff—An undisclosed principal may enforce specific performance of a contract to sell real estate made by an agent in his own name, though the agent was not authorized in writing to make the sale. The right to enforce such a contract is not dependent on the fact that the principal is, in fact, unknown to the vendee. The purchaser in such a case is entitled to everything vouchsafed by his contract. If the contract calls for a warranty deed, he is entitled to the warranty of the party who executed the contract. If this is offered him he cannot complain that the real principal demands that he live up to the contract and pay the purchase price. The court found that a marketable title was furnished within the time limit which it is claimed was fixed by the contract, and the finding is sustained by the evidence. Unruh v. Roemer, 135 Minn. 127, 160 N. W. 251.

An undisclosed principal may maintain an action. Jones v. Blair, 137 Minn. 306, 163 N. W. 523.

Defendant Koch consented to act as a nominal vendee in a contract for the purchase of land by plaintiff, and verbally agreed that upon the conveyance to him by the vendor he would in turn convey to plaintiff, who paid the purchase price of the land. The transaction was executory, and the vendor refuses to convey to either party until the controversy between them is adjusted. Held, that the transaction, being wholly executory, is not affected by G. S. 1913, §§ 7002 or 6706, and may be enforced by plaintiff. Watters v. Northern Pacific Ry. Co., 141 Minn. 480, 170 N. W. 703.

Actions by receivers. 33 Harv. L. Rev. 64.

(27) See Watters v. Northern Pacific Ry. Co., 141 Minn. 480, 170 N. W. 703.

8800. Parties defendant—Actions against receivers. 33 Harv. L. Rev. 64.

8802. Complaint—(45) See Noyes v. Brown, 142 Minn. 211, 171 N. W. 803.

(52) Pierce v. Hanson, 147 Minn. 219, 179 N. W. 893 (complaint for specific performance of oral lease sustained as against objection to evidence thereunder); McCray v. Buttell, — Minn. —, 184 N. W. 191.

8806. Degree of proof required—(57) Kull v. Wilson, 137 Minn. 127, 162 N. W. 1072; Kociemba v. Kociemba, 146 Minn. 62, 177 N. W. 927; Colby v. Street, 146 Minn. 290, 178 N. W. 599.

8807. Tender of performance—(58) Kies v. Warrick, — Minn. —, 182 N. W. 998.

8810. Evidence—Admissibility—(70) Abernethy v Halk, 139 Minn. 252, 166 N. W. 218 (various rulings on the admissibility of evidence held not prejudicial).

8812. Findings—Findings held to negative the defence of mistake set up in the answer. Bredeson v. Nickolay, 147 Minn. 304, 180 N. W. 547.

8813. Judgment--Relief allowable—In general—The court may decree a transfer of the land if the defendant refuses to comply with its command to execute a proper deed. It may do so though the land is in another judicial district. State v. District Court, 138 Minn. 336, 164 N. W. 1014. See § 2761.

The plaintiff as vendee and the defendant as vendor entered into an oral contract for the purchase and sale of real property. The plaintiff took possession and made such part performance that the contract was taken out of the statute of frauds. He had an equitable interest. Certain instalments of the purchase price were not due. The defendant could not be required to take them in advance of the due date. Therefore the plaintiff, though he had an equitable interest, could not call in the legal title. The defendant repudiated the contract, claimed that the plaintiff had no interest, and that he was the sole owner free of any claim of the plaintiff. In an action for specific performance, praying also general relief, in which the plaintiff necessarily failed for the reason stated, it is held that the court should enter judgment determining the rights of the plaintiff and the defendant in the property, that is, that it should determine and adjudicate the equitable title of the plaintiff resting upon the defendant's legal title. Porten v. Peterson, 139 Minn. 152, 166 N. W. 183.

Where specific performance of a contract, according to its terms, is denied because of a mistake of defendant, plaintiff should be permitted, at his election, to take performance of the contract as it was intended by defendant. Baker v. Polydisky, 144 Minn. 72, 174 N. W. 526.

(74) Porten v. Peterson, 139 Minn. 152, 166 N. W. 183.

(76) See Jones v. Blair, 137 Minn. 306, 163 N. W. 523.

(81) See Duluth, P. & P. R. Co. v. Urban Investment Co., — Minn. —, 182 N. W. 605 (special agreement for deduction).

8814. Damages in lieu of performance—A complaint and findings held not to afford a sufficient basis for a judgment for damages. Baker v. Polydisky, 144 Minn. 72, 174 N. W. 526.

(84) Enkema v. McIntyre, 136 Minn. 293, 161 N. W. 587. See § 8779.
(89) See 30 Harv. L. Rev. 188.

8816. Reformation and specific performance—(98) See Eder v. Fink, 147 Minn. 438, 180 N. W. 542.

8817. Accounting—(2) Porten v. Peterson, 139 Minn. 152, 166 N. W. 183.

SPLIT VERDICTS—See New Trial, §§ 7115c, 7161.

SPUR TRACKS TO INDUSTRIAL PLANTS—See Constitutional Law, §§ 1610, 1646; Eminent Domain, § 3025; Railroad and Warehouse Commission, § 8070; Railroads, § 8125a.

STARE DECISIS

8819. In general—(4) Nelson v. Gjestrum, 118 Minn. 284, 136 N. W. 858; Steele v. Duluth, 136 Minn. 288, 161 N. W. 593. See 34 Harv. L. Rev. 74 (general discussion).

8820. Limitations of doctrine—(15, 16) See Vencedor Investment Co. v. Highland Canal & Power Co., 125 Minn. 20, 145 N. W. 611.

STATE

IN GENERAL

8823a. Member of federal union—While the states of the nation are sovereign in a certain field, they are also members of the family of states constituting the national organization. Gustafson v. Rhinow, 144 Minn. 415, 175 N. W. 903.

8825a. Territorial sovereignty—Territorial sovereignty of a state extends to a vessel of the state upon navigable waters, even upon the high seas. Lindstrom v. Mutual Steamship Co., 132 Minn. 328, 156 N. W. 669.

8825b. Boundaries—The boundary line between Minnesota and Wisconsin in Upper and Lower St. Louis bays defined and established. Minnesota v. Wisconsin, 252 U. S. 273.

8831. Actions by and against—Defences—In an action by the state to recover upon a promissory note given for binding twine under a contract executed pursuant to section 9313, G. S. 1913, held, that the court below erred in striking from the answer allegations of a modification of the contract pursuant to which the note was given, and for judgment upon the pleadings as asked for in the complaint. In an action by the state for the recovery of money, the defendant may assert in defence

any claims which are connected with and arise out of the transaction sued upon. State v. Schurz, 143 Minn. 218, 173 N. W. 408.

(39) See Roerig v. Houghton, 144 Minn. 231, 175 N. W. 542; 30 Harv. L. Rev. 20 (liability of state for tort).

(40) State v. Schurz, 143 Minn. 218, 173 N. W. 408.

LEGISLATURE

8831a. Legislative districts—Inequality of population or lack of compactness. 2 A. L. R. 1337.

OFFICERS

8843. Governor—It is the duty of the Governor to take care that the laws be faithfully executed. In this respect his position is the same as that of the President as regards federal laws. In the discharge of this constitutional duty the Governor cannot be controlled by the courts. State v. District Court, 141 Minn. 1, 168 N. W. 634.

(59) State v. District Court, 141 Minn. 1, 168 N. W. 634.

See § 8011 (removal of public officers).

8846. Treasurer—Liability on bond—The state treasurer caused to be abstracted from the office of the state auditor a warrant drawn by the auditor on the treasurer in favor of a school district for a loan and caused the indorsement of the treasurer of the school district to be forged thereon. He then sold and delivered the warrant to the plaintiff, assuming to represent the school treasurer, and received checks payable to himself. The plaintiff indorsed the warrant and deposited it in its bank, and the bank indorsed it and delivered it to another bank which received payment from the state treasury. Some months later the fraud and forgery and misappropriation were discovered, and the plaintiff, on pressure from state officials in which the official sureties of the treasurer participated, paid to the state what it received on the warrant with interest. In an action by the plaintiff to recover of the sureties it is held: That the sureties were liable to the state for the treasurer's defalcation; that the plaintiff was liable to restore to the state the money of the state which it received on the stolen warrant though free of fault or negligence; that as between the sureties which contracted against the wrongful conduct of the treasurer in office, and the plaintiff purchasing the warrant in good faith and without notice or negligence and suffering from his official misconduct, the sureties should bear the loss; and that the plaintiff, having refunded to the state what it received, may recover of the sureties if it purchased the warrant in good faith and without notice or negligence. That upon the facts stated and upon the issue between the plaintiff and the sureties the acts of misappropriation of the treasurer resulting in loss to the plaintiff and liability on its part to the state must be considered official, and as parts of one plan of misappropriation, and that, the plaintiff having paid to the state, the sureties cannot escape liability to reimburse it upon the theory that

the acts of the treasurer in abstracting, forging, and negotiating the warrant, and all acts which preceded payment were personal and unofficial and separable from the final act of payment, and therefore that they are not liable to reimburse it, though liable to the state before the plaintiff paid, and though the payment by the plaintiff relieved them of such liability, and though the act of payment was what involved both the sureties and the plaintiff in liability to the state. That in view of the facts recited and others stated in the opinion the complaint does not show that the plaintiff was without notice of defects in the warrant and free of negligence, though it contains an allegation that it purchased in due course and without notice. Cooper, Myers & Co. v. Smith, 139 Minn. 382, 166 N. W. 504.

8846a. Authority of employees—The act of an employee in the office of the adjutant general in forging certain state warrants held not within the apparent scope of his authority. State v. Merchants Nat. Bank, 145 Minn. 322, 177 N. W. 135.

FINANCES

8847. Public debt—Bonds—The soldiers' bonus act of 1919 does not offend the state constitution. Gustafson v. Rhinow, 144 Minn. 415, 175 N. W. 903.

Under section 7 of article 9 of the constitution there is no limitation of the amount of debt which may be contracted by the state "in time of war, to repel invasion or suppress insurrection." Gustafson v. Rhinow, 144 Minn. 415, 175 N. W. 903.

8848a. Budget system—In the year 1913 there was a complete remolding of the system for the conduct of the financial affairs of the state; all standing appropriations were abolished, and express biennial appropriations required in amounts necessary to meet all financial obligations of the state. This is known as the "budget system." Under it a sum of money sufficient to cover all obligations of the state for the biennial period is expressly appropriated, and the sum total thereof divided and distributed to the various state departments and purposes, so that the amount appropriated is thereby wholly absorbed; nothing remains in the revenue fund which may lawfully be resorted to for any purpose, however meritorious a particular demand may be. State v. Preus, 147 State v. Preus, 147 Minn. 125, 179 N. W. 725.

8849. No payment out of treasury without appropriation—No money can be drawn from the state treasury on a state auditor's warrant, or otherwise, except as authorized by legislative appropriation. Section 9 of article 9 of the constitution, and section 67, G. S. 1913. A statute creating a liability on the part of the state is not in itself, standing alone, an appropriation act. Chapter 223, Laws 1917, under which the state assumes a portion of the expenditures therein authorized by and imposed upon the several counties of the state, and directing the state

auditor to issue a warrant therefor and the state treasurer to pay the same, is not an appropriation act within the meaning of the constitution. State v. Preus, 147 Minn. 125, 179 N. W. 725.

8849c. Warrants—The state held entitled to recover from banks indorsing and presenting for payment certain state warrants forged by a clerk in the office of the adjutant general. State v. Merchants Nat. Bank, 145 Minn. 322, 177 N. W. 135.

STATUTE OF FRAUDS

IN GENERAL

8850. Construction—A meritorious defence—No distinction should be made in the interpretation of sections 6998 and 6999, G. S. 1913, in our statute of frauds, because of the fact that the one reads "no action shall be maintained," and the other "every contract * * * shall be void," unless evidenced by a writing, etc Halloran v. Jacob Schmidt Brewing Co., 137 Minn. 141, 162 N. W. 1082.

The right to invoke the statute of frauds as a defence is not regarded with disfavor, nor is the statute to be deemed obnoxious because of the consequences which sometimes follow its application. Upton Mill & Elevator Co. v. Baldwin Flour Mills, 147 Minn. 205, 179 N. W. 904.

8850a. Conflict of laws—The statute of frauds is a matter of substantive rather than remedial law. It enters into and becomes a substantive part of the contract. If a contract is executed in such form that it satisfies the statute of frauds of the state where it is made and to be performed, it will be enforced in other states though it does not satisfy the statute of frauds of the forum. Halloran v. Jacob Schmidt Brewing Co., 137 Minn. 141, 162 N. W. 1082; Matson v. Bauman, 139 Minn. 296, 166 N. W. 343.

8851. Contracts partly within statute—Plaintiff performed services and furnished goods to his mother under an oral contract that she would convey to him a farm for a certain price, and if she failed to so do to pay cash for what she had received from him. She died without having tendered a deed. It is held: By her failure to avail herself of the option or alternative engagement while she had the opportunity, the obligation to pay cash became fixed at her death, and the cause of action on the contract then accrued. The part of the contract relating to real estate and affected by the statute of frauds was thereby eliminated. Welsh v. Welsh's Estate, 148 Minn. —, 181 N. W. 356.

Where part of an entire and indivisible contract is void within the statute the entire contract is unenforceable. Todd v. Bettingen, 98 Minn. 170, 107 N. W. 1049. See Ann. Cas. 1918E, 498.

8852. Executed contracts—If there is a part performance the rights of the parties are governed by the terms of the contract to the extent of

the part performed. Halloran v. Jacob Schmidt Brewing Co., 137 Minn. 141, 162 N. W. 1082.

It is a well-settled and salutary rule applicable to contracts within the statute of frauds that if the vendee receives his grant pursuant to the unenforceable contract he must in turn pay the consideration agreed and he cannot avoid payment on the plea that the contract was not an enforceable one. A similar rule applies where the verbal contract is for an exchange instead of a sale of land. If one party conveys pursuant to the contract and the other receives the conveyance he cannot have free the land so conveyed. His verbal contract to convey cannot be specifically enforced, but he must respond to the value of the consideration he was to give. Nelson v. McElroy, 140 Minn. 429, 168 N. W. 179, 587.

(76) Hammel v. Feigh, 143 Minn. 115, 173 N. W. 570; McRae v. Feigh, 143 Minn. 241, 173 N. W. 655; Hanson v. Beaulieu, 145 Minn. 119, 176 N. W. 178; Holmstrom v. Barstad, 147 Minn. 172, 179 N. W. 737 State Bank v. Strandberg, 148 Minn. —, 180 N. W. 1006; Whitnack v. Twin Valley Produce Co., — Minn. —, 182 N. W. 444.

8854. Who may invoke statute—Only the party protected by the statute can invoke it. The other party to the contract cannot invoke it for him. Welsh v. Welsh's Estate, 148 Minn. —, 181 N. W. 356.

(81) See L. R. A. 1916D, 1213 (right of creditors).

8855. Parol modification of written contract—Waiver of forfeiture—Extension of time of payment—While a written contract, within the statute of frauds, cannot, so long as it remains executory, be altered orally, so as to bind the parties, as a part of the contract, yet evidence is admissible to prove an oral waiver of performance according to the terms of the contract as a ground of forfeiture, and extending the time of performance, as, for example, extending the time of payment. Scheerschmidt v. Smith, 74 Minn. 224, 77 N. W. 34; McDonald v. Union Hay Co., 143 Minn. 40, 172 N. W. 891; Reinky v. Findley Electric Co., 147 Minn. 161, 180 N. W. 236. See 34 Harv. L. Rev. 93.

(82) See McDonald v. Union Hay Co., 143 Minn. 40, 172 N. W. 891.

(83) C. S. Brackett Co. v. Lofgren, 140 Minn. 52, 167 N. W. 274. See Hammel v. Feigh, 143 Minn. 115, 173 N. W. 570; L. R. A. 1917B, 144.

8856. Recovery of money paid—If one party to an oral contract, void under the statute, has paid money in performance thereof, he cannot recover it if the other party has not defaulted and stands ready, able and willing to perform according to the terms of the contract. Holford v. Crowe, 136 Minn. 20, 161 N. W. 213.

In this case it appears that three parties made a verbal agreement to rent defendant's farm for five years and to pay annually $800 and furnish him room and board with them. Thereafter, and before the commencement of the term, one of the three refused to sign the lease or become a tenant. Prior to such refusal the three parties had paid $400 on the first year's rent. The two parties offered to execute the lease; the one who refused to execute it having assigned his interest to them. Defend-

ant declined to let the farm to the two, but was ready, willing, and able to execute a lease with the three as he had agreed. Held, the two, the plaintiffs herein, could not recover the $400 paid on the rent. Holford v. Crowe, 136 Minn. 20, 161 N. W. 213.

(84) See Welsh v. Welsh's Estate, 148 Minn. —, 181 N. W. 356; L. R. A. 1916D, 468.

(85) Holford v. Crowe, 136 Minn. 20, 161 N. W. 213. See Welsh v. Welsh's Estate, 148 Minn. —, 181 N. W. 356.

8857. Pleading—An answer in an action of ejectment held not to show such a part performance of an oral contract to convey as to take the case out of the statute of frauds. Sandberg v. Clausen, 134 Minn. 321, 159 N. W. 752.

It is discretionary with the trial court to allow an amendment pleading the statute. Halloran v. Jacob Schmidt Brewing Co., 137 Minn. 141, 162 N. W. 1082.

CONTRACTS NOT TO BE PERFORMED WITHIN ONE YEAR

8858. Not void but simply non-enforceable—(94) See Halloran v. Jacob Schmidt Brewing Co., 137 Minn. 141, 162 N. W. 1082.

8858a. Expression of consideration—A contract attached to and delivered with a certificate of corporate stock sold the same day recited the purchase of the stock and the payment of the price, and stipulated that the vendors agreed to pay a percentage of the price annually for five years. Held, that the consideration was expressed on the face of the agreement so as to satisfy the statute. Alger v. Minnesota Loan & Trust Co., 135 Minn. 235, 159 N. W. 565, 160 N. W. 765.

8859. Performance of one party within year—(95) McRae v. Feigh, 143 Minn. 241, 173 N. W. 655.

8860. Possibility not probability of performance the test—The statute has no application where the contract can be performed within a year, or where it runs for an indefinite period. Stitt v. Rat Portage Lumber Co., 98 Minn. 52, 107 N. W. 824; McRae v. Feigh, 143 Minn. 241, 173 N. W. 655.

(96) McRae v. Feigh, 143 Minn. 241, 173 N. W. 655.

8862. Effect of part performance—(99) See L. R. A. 1916D, 884, 895.

8862a. Separate writings—The separate writings received in evidence in terms connect each with the other so as to form a valid contract complying with the requirements of the statute of frauds. Halstead v. Minnesota Tribune Co., 147 Minn. 294, 180 N. W. 556.

8863. Held within the statute—An agreement to extend the term of a lease for the period of one year commencing in the future. Biddle v. Whitmore, 134 Minn. 68, 158 N. W. 808.

A lease for five years. Halford v. Crowe, 136 Minn. 20, 161 N. W. 213.

(5) See Benjamin v. Wilson, 34 Minn. 517, 26 N. W. 725; Hanson v. Marion, 128 Minn. 468, 151 N. W. 195; Biddle v. Whitmore, 134 Minn. 68, 158 N. W. 808.

(9) See Hammel v. Feigh, 143 Minn. 115, 173 N. W. 750.

8864. Held not within the statute—A contract of a broker for commissions in securing a lease for a mine, the contract being actually performed within one year and actually consummated within that period. McRae v. Feigh, 143 Minn. 241, 173 N. W. 655.

A partnership agreement for an accounting. Hammel v. Feigh, 143 Minn. 115, 173 N. W. 570.

The consent of a lessee to the substitution of new notes pursuant to an agreement between the lessor and third parties. Mikolas v. Val Blatz Brewing Co., 147 Minn. 230, 180 N. W. 109.

PROMISES TO ANSWER FOR ANOTHER

8865. In general—Proof of a verbal assurance of payment given after services were rendered, though not admissible, under our statute of frauds, to prove a contract, may be properly received as an admission of a contract previously made. Collins v. Joyce, 146 Minn. 233, 178 N. W. 503.

(18) See Halloran v. Jacob Schmidt Brewing Co., 137 Minn. 141, 162 N. W. 1082.

8866. The memorandum—A contract attached to and delivered with a certificate of corporate stock sold the same day recited the purchase of the stock and the payment of the price, and stipulated that the vendors agreed to pay a percentage of the price annually for five years. Held, that the consideration was expressed on the face of the agreement so as to satisfy the statute. Alger v. Minnesota Loan & Trust Co., 135 Minn. 235, 159 N. W. 565, 160 N. W. 765.

(19) Halloran v. Jacob Schmidt Brewing Co., 137 Minn. 141, 162 N. W. 1082.

(20) Halloran v. Jacob Schmidt Brewing Co., 137 Minn. 141, 162 N. W. 1082; National Surety Co. v. Winslow, 143 Minn. 66, 173 N. W. 181.

(22) Alger v. Minnesota Loan & Trust Co., 135 Minn. 235, 159 N. W. 565, 160 N. W. 765.

8867. Held within statute—A promise guaranteeing the payment of rent under a lease of premises to be used for a saloon. Halloran v. Jacob Schmidt Brewing Co., 137 Minn. 141, 162 N. W. 1082.

The promise of a stockholder to pay the debt of a corporation. 8 A. L. R. 1198.

8868. Held not within statute—A contract of insurance of the fidelity of employees. Quinn-Shepherdson Co. v. United States F. & G. Co., 142 Minn. 428, 172 N. W. 693.

Defendant procured a purchaser willing to buy plaintiff's farm, but only on condition that he could give a second mortgage due in fourteen

years for part of the price. Plaintiff desired cash. To induce plaintiff to sell on these terms, defendant signed and gave plaintiff this memorandum: "I agree to sell a second mortgage for August Petrich on March 1st." On receipt of this, plaintiff signed the contract of sale on the terms mentioned. Held, the memorandum was not a contract of guaranty. It was a memorandum of an enforceable agreement to sell the second mortgage which plaintiff was to take and to sell it at its face value. Petrich v. Berkner, 142 Minn. 451, 172 N. W. 770.

(46) 1 A. L. R. 383.

CONTRACTS UPON CONSIDERATION OF MARRIAGE

8869. In general—An oral agreement, entered into and reduced to writing before marriage and signed after marriage, held to have effect as an antenuptial contract, upon which an action may be maintained. An oral antenuptial agreement is voidable under the statute of frauds, but not void. Haraldson v. Knutson, 142 Minn. 109, 171 N. W. 201.

When promise is within statute. 10 A. L. R. 321.

CONTRACTS FOR THE SALE OF GOODS

8870. In general—G. S. 1913, §§ 6999, 7000, are superseded by Laws 1917, c. 465, § 4. Under the present statute an oral contract is not void but merely not enforceable by action.

(59) See Halloran v. Jacob Schmidt Brewing Co., 137 Minn. 141, 162 N. W. 1082.

8871. Receipt of part of goods—A transfer of the possession of property from a husband to his wife held sufficient to satisfy the statute. Davis v. Haugen, 133 Minn. 423, 158 N. W. 705.

An acceptance of goods pursuant to the contract satisfies the statute. Moorhead v. Minneapolis Seed Co., 139 Minn. 11, 165 N. W. 484.

A receipt and acceptance of a part of the goods takes the case out of the statute. McDonald v. Union Hay Co., 143 Minn. 40, 172 N. W. 891.

Goods left in custody of seller. 4 A. L. R. 902.

8872. Part payment—(70) Moorhead v. Minneapolis Seed Co., 139 Minn. 11, 165 N. W. 484.

8872a. Separate transactions—The contract in controversy was within the statute of frauds and unenforceable unless part of a prior transaction, and whether it was an independent contract or part of the prior transaction was a question which should have been submitted to the jury. Bundy v. Voelker, 145 Minn. 19, 175 N. W. 1000.

8873. The memorandum—At common law the contract or memorandum need not state the consideration. Matson v. Bauman, 139 Minn. 296, 166 N. W. 343.

There may be a sufficient compliance with the provisions of the statute of frauds, relating to a note or memorandum of a contract of sale, if

the party to be charged writes a letter to the opposite party admitting the contract and repudiating its obligation, but the letter of the defendant set out in the opinion is not such an admission. Upton Mill & Elevator Co. v. Baldwin Flour Mills, 147 Minn. 205, 179 N. W. 904.

The printed signature of the defendant at the bottom of a blank confirmation of sale slip, which had been filled out by one of his employees, was not sufficient to charge him under the statute of frauds, the signature being, "Baldwin Flour Mills, by ——;" defendant not having signed his name on the blank line after the word "By." Upton Mill & Elevator Co. v. Baldwin Flour Mills, 147 Minn. 205, 179 N. W. 904.

In order to recover for the breach of a verbal contract of sale of goods within the statute of frauds, where the memorandum is not signed by the defendant, the writing containing his signature must connect itself with the memorandum, or must with other writings be so connected therewith, by reference or internal evidence, that parol testimony is not necessary to establish the connection with the verbal contract of sale; or else if the signature was not appended to the writing for the purpose of becoming a part of the memorandum, the writing, in order to satisfy the statute, must clearly admit or confess that a sale was made. Quinn-Shepherdson Co. v. Triumph Farmers Elevator Co., — Minn. —, 182 N. W. 710.

(71) Quinn-Shepherdson Co. v. Triumph Farmers Elevator Co., — Minn. —, 182 N. W. 710. See Halstead v. Minnesota Tribune Co., 147 Minn. 294, 180 N. W. 556.

See L. R. A. 1917A, 153 (place of signature).

8874. Held within statute—A contract to sell things attached to land, but which the seller is to detach and pass title after separation, is an executory contract to sell personalty within the statue. See Rosenstein v. Gottfried, 145 Minn. 243, 176 N. W. 844.

(82, 83) See Rosenstein v. Gottfried, 145 Minn. 243, 176 N. W. 844.

CONVEYANCES OF REALTY

8876. In general—A transfer of unaccrued rents apart from the land falls within the statute. State v. Royal Mineral Assn., 132 Minn. 232, 156 N. W. 128.

A sale of growing grass or standing timber, to be severed by the purchaser, is within the statute. La Plant v. Loveland, 142 Minn. 89, 170 N. W. 920.

A party wall agreement is within the statute. Hanson v. Beaulieu, 145 Minn. 119, 176 N. W. 178.

There is much conflict in the cases as to when a sale of things attached to land but which are to be removed, is to be considered a sale of land, and when a sale of personalty. Rosenstein v. Gottfried, 145 Minn. 243, 176 N. W. 844.

An agreement for the rescission of an executory contract for the sale of land is virtually a reconveyance of the interest of the vendee and probably within the statute. See 31 Harv. L. Rev. 804.

See cases under §§ 8880–8884.

8877. Leases—A lease of real estate for more than one year cannot be canceled and surrendered by oral agreement. But where a landlord orally agrees with his tenant to cancel and surrender such a lease and the tenant performs the contract by vacating and surrendering possession, the landlord is estopped from asserting his right to enforce the covenants of the lease, if he acquiesces in the conduct of the tenant and resumes possession of the premises. Millis v. Ellis, 109 Minn. 81, 122 N. W. 1119; C. S. Brackett Co. v. Lofgren, 140 Minn. 52, 167 N. W. 274.

(9) 4 A. L. R. 666.

See §§ 8883, 8884.

8878. Trusts—An executory oral agreement to hold title to realty for another held not contrary to G. S. 1913, § 7002. Waters v. Northern Pacific Ry. Co., 141 Minn. 480, 170 N. W. 703.

Necessity of writing for extinguishment of trust by cestui que trust. 33 Harv. L. Rev. 691.

(16) Watters v. Northern Pacific Ry. Co., 141 Minn. 480, 170 N. W. 703.

8879. Partnership to deal in realty—There may be a partnership in real estate formed by parol, notwithstanding the provisions of the statute of frauds requiring contracts relative to interests in real estate to be in writing; and it may be limited to a designated tract of land. Hammel v. Feigh, 143 Minn. 115, 173 N. W. 570.

(17) Hammel v. Feigh, 143 Minn. 115, 173 N. W. 570.

CONTRACTS TO CONVEY REALTY

8880. In general—The statute cannot be nullified indirectly by giving the promisee a lien on the land for damages for breach of a contract to support the promisor. Sandberg v. Clausen, 134 Minn. 321, 159 N. W. 752.

An oral contract for the purchase of an interest in land is within the statute and void. The payment of the purchase price does not avoid the statute nor authorize a court to give effect to the contract. Werntz v. Bolen, 135 Minn. 449, 161 N. W. 155.

The statute is no bar to an action for the price of land actually conveyed, where the deed has been accepted or title has otherwise passed, although the grantor could not have been compelled to convey, or the grantee to accept, a deed, because the contract was oral. The aim and purpose of this section of the statute of frauds is to inhibit verbal contracts for the sale of land. When so much of the contract as would bring it within the statute has been executed, the mischief aimed at no longer exists, and there is no reason why all the remaining stipulations should

not then become enforceable, precisely as if no part of the contract had been within the terms of the statute. Holmstrom v. Barstad, 147 Minn. 172, 179 N. W. 737.

(28) See Holmstrom v. Barstad, 147 Minn. 172, 179 N. W. 737; Welsh v. Welsh's Estate, 148 Minn. —, 181 N. W. 356.

8881. The memorandum—Certain writings held to satisfy the statute. La Plant v. Loveland, 142 Minn. 89, 10 N. W. 920.

(37) Krohn v. Dustin, 142 Minn. 304, 172 N. W. 213.

8882. Authority of agent—An undisclosed principal may enforce specific performance of a contract to sell realty made by an agent in his own name, though the agent was not authorized in writing to make the sale. Unruh v. Roemer, 135 Minn. 127, 160 N. W. 251.

(43) La Plant v. Loveland, 142 Minn. 89, 170 N. W. 920.

8883. Held within statute—An agreement for a sale of a two-story frame building, built on a permanent stone foundation, to be wrecked and removed by the buyer, but not immediately, and which gives the buyer a present interest in the building and the material composing it, is a sale of an "interest in land," and, under our statute of frauds, it is required to be evidenced by writing. Rosenstein v. Gottfried, 145 Minn. 243, 176 N. W. 844.

A contract to convey land for a certain price or in case of failure to do so to pay cash for certain services. Welsh v. Welsh's Estate, 148 Minn. —, 181 N. W. 356.

(50) See Rosenstein v. Gottfried, 145 Minn. 243, 176 N. W. 844.

(51) La Plant v. Loveland, 142 Minn. 89, 170 N. W. 920. See Rosenstein v. Gottfried, 145 Minn. 243, 176 N. W. 844.

(58) Pierce v. Hanson, 147 Minn. 219, 179 N. W. 893.

8884. Held not within statute—Plaintiff and defendant agreed to buy together a quarter section of land, each to take one 80. Each then procured a contract from the owner for the purchase of one 80; each agreeing to pay half the purchase price of the quarter section. It was agreed that the 80's were of equal value, except that on one 80 there were some buildings. It was accordingly agreed that defendant should pay plaintiff half the value of the buildings. Held, this agreement was not within the statute of frauds, and was enforceable. Holmstrom v. Barstad, 147 Minn. 172, 179 N. W. 737.

(61) See Holmstrom v. Barstad, 147 Minn. 172, 179 N. W. 737.

8885. Part performance—Specific performance—The fact that the claimant has paid the purchase price in full and the time to recover the same is barred by the statute of limitations is a consideration of weight. Holland v. Ousbye, 132 Minn. 106, 155 N. W. 1071.

Where a lessee plowed land and spread manure in preparation for a crop during an extended term and in reliance on an oral agreement for an extension of his term, it was held that there was sufficient part performance to take the case out of the statute. Biddle v. Whitmore, 134 Minn. 68, 158 N. W. 808.

In an action of ejectment an answer held not to show an oral agreement that could be specifically enforced, or such part performance of an oral agreement as would take it out of the statute of frauds, or facts entitling defendant to a lien on the land. Sandberg v. Clausen, 134 Minn. 321, 159 N. W. 752.

The doctrine of part performance is applied more liberally to short term leases than to contracts of sale. Biddle v. Whitmore, 134 Minn. 68, 158 N. W. 808; Pierce v. Hanson, 147 Minn. 219, 179 N. W. 893.

To constitute a valid transfer of land by verbal gift, there must be a gift completely executed by delivery of possession, and performance of some acts sufficient to take the case out of the statute of frauds. The performance necessary for this purpose must be an acceptance, a taking of possession, under and in reliance upon the gift, and the doing of such acts in reliance thereon that it would work a substantial injustice to hold the gift void. Lindell v. Lindell, 135 Minn. 368, 160 N. W. 1031.

Taking possession of the land which was to be conveyed pursuant to an oral agreement, and paying taxes and making valuable improvements in reliance upon such agreement, is a sufficient part performance to take in out of the statute of frauds. Kociemba v. Kociemba, 146 Minn. 62, 177 N. W. 927.

Specific performance of an oral agreement to convey lands will not be enforced, unless the making of the contract is clearly proved and its terms are definite and certain. When such an agreement was made, the land to be conveyed was not designated, but subsequently the vendor pointed it out to the vendee, and the latter agreed to accept it. This supplied the omission in the terms of the agreement and made it complete. Kociemba v. Kociemba, 146 Minn. 62, 177 N. W. 927.

(63) Chapel v. Chapel, 132 Minn. 86, 155 N. W. 1054. See 33 Harv. L. Rev. 933 (general discussion of subject by Roscoe Pound); 34 Id. 791.

(65) Werntz v. Bolen, 135 Minn. 449, 161 N. W. 155.

(68) Holland v. Ousbye, 132 Minn. 106, 155 N. W. 1071; Porten v. Peterson, 139 Minn. 152, 166 N. W. 183; Kociemba v. Kociemba, 146 Minn. 62, 177 N. W. 927.

(73) See Kociemba v. Kociemba, 146 Minn. 62, 177 N. W. 927.

(74) Chapel v. Chapel, 132 Minn. 86, 155 N. W. 1054; Lindell v. Lindell, 135 Minn. 368, 160 N. W. 1031; Drager v. Seegert, 138 Minn. 6, 163 N. W. 756; Barrett v. Thielen, 140 Minn. 266, 167 N. W. 1030.

(76) See Biddle v. Whitmore, 134 Minn. 68, 158 N. W. 808 (held that there was no adequate remedy at law for the breach of an oral contract to extend a lease for a year).

(81) See Holland v. Ousbye, 132 Minn. 106, 155 N. W. 1071.

(84) Kociemba v. Kociemba, 146 Minn. 62, 177 N. W. 927; Seigne v. Warren Auto Co., 147 Minn. 142, 179 N. W. 648 (payment "at such time as the grantee might elect" sufficiently definite).

(86) Holland v. Ousbye, 132 Minn. 106, 155 N. W. 1071; Biddle v. Whitmore, 134 Minn. 68, 158 N. W. 808; Lindell v. Lindell, 135 Minn. 368, 160 N. W. 1031; Drager v. Seegert, 138 Minn. 6, 163 N. W. 756;

Porten v. Peterson, 139 Minn. 152, 166 N. W. 183; Barrett v. Thielen, 140 Minn. 266, 167 N. W. 1030; Kociemba v. Kociemba, 146 Minn. 62, 177 N. W. 927; Seigne v. Warren Auto Co., 147 Minn. 142, 179 N. W. 648; Pierce v. Hanson, 147 Minn. 219, 179 N. W. 893.

(87) Chapel v. Chapel, 132 Minn. 86, 155 N. W. 1054; Sandberg v. Clausen, 134 Minn. 321, 159 N. W. 752.

STATUTES

ENACTMENT

8894. Necessity of two-thirds vote—(1) See Missouri Pacific Ry. Co. v. Kansas, 248 U. S. 276 (to overcome veto of President two-thirds votes of members present, there being a quorum, is sufficient).

TIME OF TAKING EFFECT

8902. In general—A statute enacted without the usual declaration as to the time it shall take effect, but which acts upon certain specified classes or persons at different dates, as to some from the date of enactment and as to others at a future date, goes into effect as an entirety and at the time prescribed by law for the taking effect of statutes after approval by the Governor. State v. Lincoln, 133 Minn. 178, 158 N. W. 50.

8903. To be operative upon a contingency—If a statute is complete in itself, the legislature may provide that its operation shall be contingent on the existence of an act of Congress of a certain import. State v. Brothers, 144 Minn. 337, 175 N. W. 685.

(20) State v. Brothers, 144 Minn. 337, 175 N. W. 685.

TITLE

8907. Construed liberally—(28) Storrs v. Brush, 142 Minn. 350, 172 N. W. 224; Seamer v. Great Northern Ry. Co., 142 Minn. 376, 172 N. W. 765.

8908. Title may be general—Not an index—(29) State v. Dakota County, 142 Minn. 223, 171 N. W. 801; Seamer v. Great Northern Ry. Co., 142 Minn. 376, 172 N. W. 765; State v. Houghton, 144 Minn. 1, 174 N. W. 885, 176 N. W. 159.

(01) State v. Elliott, 135 Minn. 89, 160 N. W. 204; Seamer v. Great Northern Ry. Co., 142 Minn. 376, 172 N. W. 765.

8909. Restrictive titles—(31) State v. Kaercher, 141 Minn. 186, 169 N. W 699.

8910. Duplicity—Chapter 212 of the Laws of 1917, providing for the protection and care of homeless children and for the regulation of

societies receiving and placing them in suitable homes, and for the regulation and control of hospitals or places receiving and caring for women during confinement is void, because it contains more than one subject. State v. Women's & Children's Hospital, 143 Minn. 137, 173 N. W. 402.

(32) State v. Kaercher, 141 Minn. 186, 169 N. W. 699; State v. Brothers, 144 Minn. 337, 175 N. W. 685.

8918. Amendatory acts—(42) Storrs v. Brush, 142 Minn. 350, 172 N. W. 224.

8920. Titles held sufficient—"An act to punish the making or use of false statements to obtain credit." State v. Elliott, 135 Minn. 89, 160 N. W. 204.

"An act making it unlawful to interfere with or discourage the enlistment of men in the military or naval forces of the United States or of the state of Minnesota, and providing punishment therefor." State v. Kaercher, 141 Minn. 186, 169 N. W. 699.

"An act giving cities of the fourth class situated in two or more counties exclusive power to expend all moneys arising from taxation for roads, bridges and streets upon the real and personal property within their corporate limits." State v. Dakota County, 142 Minn. 223, 171 N. W. 801.

"An act amending certain sections of chapter two hundred thirty (230) of the General Laws of Minnesota for 1905 as amended by chapter three hundred sixty-seven (367) of the General Laws of Minnesota for 1907 and chapter four hundred sixty-nine (469) of the General Laws of Minnesota for 1909, relating to county and judicial drainage ditch proceedings and to procedure therein and validating drainage proceedings heretofore had, in certain cases." Storrs v. Brush, 142 Minn. 350, 172 N. W. 224.

"An act defining the liability of employers to their employees for personal injury or death." Seamer v. Great Northern Ry. Co., 142 Minn. 376, 172 N. W. 765.

"An act authorizing cities of the first class to designate and establish restricted residence districts and to prohibit the erection, alteration and repair of buildings thereon for certain prohibited purposes." State v. Houghton, 144 Minn. 1, 174 N. W. 885, 176 N. W. 159.

"An act authorizing cities of Minnesota of over fifty thousand inhabitants to issue and sell municipal bonds for certain public purposes." Minneapolis Real Estate Board v. Minneapolis, 145 Minn. 379, 177 N. W. 494.

REPEAL AND AMENDMENT

8922. Express repeal of inconsistent acts—(33) State v. Lincoln, 133 Minn. 178, 158 N. W. 50; Johnson v. Duluth, 133 Minn. 405, 158 N. W. 616.

8923. Effects—(42) Sheldon v. Padgett, 144 Minn. 141, 174 N. W. 827.

8925. Re-enactment of old law—(44, 45) Nelson v. Itasca County, 131 Minn. 478, 155 N. W. 752.

8927. By implication—The Workmen's Compensation Act does not repeal by implication section 52 of the charter of St. Paul, providing compensation for a fireman injured in the course of his employment. Markley v. St. Paul, 142 Minn. 356, 172 N. W. 215.

A general statute will not repeal a prior special statute on the same subject where it is clear that such was not the intention of the legislature. Sheldon v. Padgett, 144 Minn. 141, 174 N. W. 827.

Where a new statute, not in the form of amendments to prior statutes, is complete in itself, and shows that the legislature intended to substitute its provisions for those previously in force and intended the new statute to prescribe the only rules governing the subject matter of the legislation, it supersedes all prior legislation in respect to such subject matter and repeals all prior laws in so far as they apply thereto. Farm v. Royal Neighbors, 145 Minn. 193, 176 N. W. 489.

(51) State v. Lincoln, 133 Minn. 178, 158 N. W. 50.

(53) Farm v. Royal Neighbors, 145 Minn. 193, 176 N. W. 489.

(57) Hobart v. Minneapolis, 139 Minn. 368, 166 N. W. 411.

8928. Amendment "so as to read as follows"—All the provisions of the old law which continue in force after an amendment derive their force from the amendatory act. State v. District Court, 134 Minn. 131, 158 N. W. 798.

The new provisions are construed as enacted at the time the amendment took effect. State v. District Court, 134 Minn. 131, 158 N. W. 798.

When an amendatory statute is a substitute for the original statute, it repeals those parts of the prior act which it omits. Mannheimer Bros. v. Kansas Casualty & Surety Co., 147 Minn. 350, 180 N. W. 229.

(58) State v. District Court, 134 Minn. 131, 158 N. W. 798; Yoncalla State Bank v. Gemmill, 134 Minn. 334, 159 N. W. 798; Mannheimer Bros. v. Kansas Casualty & Surety Co., 147 Minn. 350, 180 N. W. 229.

CONSTITUTIONALITY

8929. Presumption in favor of constitutionality—Every statute is presumed constitutional and the presumption strengthens with the passing of time during which the statute remains unchallenged and is acted upon by the people and acquiesced in by those who are affected by its provisions. State v. Lincoln, 133 Minn. 178, 158 N. W. 50.

Courts are very reluctant to declare unconstitutional a statute which has for many years been generally regarded as constitutional. St. Paul v. Oakland Cemetery Assn., 134 Minn. 441, 159 N. W. 962.

Constitutional law, like other mortal contrivances, has to take some chances. Justice Holmes, Blinn v. Nelson, 222 U. S. 1, 7.

(61) State v. Lincoln, 133 Minn. 178, 158 N. W. 50; St. Paul Association of Commerce v. Chicago etc. R. Co., 134 Minn. 217, 158 N. W. 982.

8930. Duty of courts—Awaiting practical operation of statute—Courts will sometimes refuse to set aside a statute until its unconstitutionality more clearly appears. For example, they will not set aside a statute creating inspection fees immediately upon it being made to appear that the amount collected is beyond what is needed for inspection expenses, because of the presumption that the legislature will reduce the fees to a proper amount. State v. Bartles Oil Co., 132 Minn. 138, 155 N. W. 1035; State v. Pure Oil Co., 134 Minn. 101, 158 N. W. 723, affirmed, 248 U. S. 158.

8930a. Constitutionality determined only when necessary—The constitutionality of a statute will be determined only when such determination is absolutely necessary in order to determine the merits of the case. Baugh v. Norman County, 140 Minn. 465, 168 N. W. 348; Davidson v. Patnaude, 145 Minn. 371, 177 N. W. 495.

8930b. Legislative determination of facts conclusive—As a general rule, the determination by the legislature of an open question of fact is not subject to review, if the question is one which it has power to determine. Such a determination is as effectual as a final judgment of a competent tribunal of general jurisdiction in a like case. Davidson v. Patnaude, 145 Minn. 371, 177 N. W. 495. See Block v. Hirsh, 254 U. S. 640.

8931. Laws to be held constitutional if possible—(64) State v. Lincoln, 133 Minn. 178, 158 N. W. 50.

8932. Laws opposed to spirit of constitution—Oppressive and arbitrary laws—A legislative act may be so arbitrary and oppressive and such an abuse of legislative discretion as to be constitutionally invalid. If so, relief against it is given. In re Delinquent Taxes, 147 Minn. 344, 180 N. W. 240.

(68) Common School District No. 85 v. Renville County, 141 Minn. 300, 170 N. W. 216. See 29 Harv. L. Rev. 521.

8934a. Admissions of parties not conclusive—The public rights and interests are such that the parties to a civil action should not be permitted to abrogate a statute by admissions in their pleadings of facts which are made the basis of an attack upon the statute on the ground that it is unconstitutional. Davidson v. Patnaude, 145 Minn. 371, 177 N. W. 495.

A statute will not be held unconstitutional solely on the strength of the rule that a demurrer admits the facts alleged in a complaint. Davidson v. Patnaude, 145 Minn. 371, 177 N. W. 495.

8935. Unconstitutional statute void—Who may question—An unconstitutional statute is not void in the sense that it does not justify an executive officer in enforcing it prior to the determination of its unconstitutionality by the supreme court. State v. District Court, 141 Minn. 1, 168 N. W. 634.

If a statute is unconstitutional no vitality can be given to it or proceedings thereunder by the issuance of an order to show cause. The con-

stitutionality of a statute does not depend upon the acts of parties or the orders of courts. Gove v. Murray County, 147 Minn. 24, 179 N. W. 569.

A witness whose interests are not directly affected by a statute cannot refuse to testify on the ground that the statute is unconstitutional. Blair v. United States, 250 U. S. 273. See 33 Harv. L. Rev 119.

When public officers may question constitutionality of statute. 34 Harv. L. Rev. 86.

(71) State v. District Court, 141 Minn. 1, 168 N. W. 634; Davidson v. Patnaude, 145 Minn. 371, 177 N. W. 495.

(02) McNaney v. Chicago etc. Ry. Co., 132 Minn. 391, 157 N. W. 650; State v. Flaherty, 140 Minn. 19, 167 N. W. 122. See Park v. Duluth, 134 Minn. 296, 301, 159 N. W. 627; State v. Elliott, 135 Minn. 89, 160 N. W. 204.

8936. Partial unconstitutionality—(75) State v. Berg, 132 Minn. 426, 431, 157 N. W. 652; Davidson v. Patnaude, 145 Minn. 371, 177 N. W. 495; Lodoen v. Warren, 146 Minn. 181, 178 N. W. 741.

CONSTRUCTION

8937. Force of rules of construction—(78) State v. District Court, 134 Minn. 131, 158 N. W. 798.

(80) See State v. District Court, 134 Minn. 131, 158 N. W. 798 (founded on reason and experience).

8938. No construction if language plain—(82) State v. Rat Portage Lumber Co., 106 Minn. 1, 115 N. W. 162, 117 N. W. 922; State v. Minnesota Tax Commission, 135 Minn. 205, 160 N. W. 498; In re Thorne's Estate, 145 Minn. 412, 117 N. W. 638; Granite City Bank v. Tvedt, 146 Minn. 12, 177 N. W. 767; Caminetti v. United States, 242 U. S. 470.

8939. Must be reasonable and practical—(91) State v. Probate Court, 137 Minn. 238, 163 N. W. 285.

8940. Legislative intention the aim—The expression in a statute of the motive or purpose of the legislature in enacting it is not controlling, but may properly be considered in aid of construction in case of reasonable doubt. It cannot restrict the plain language of the statute. State v. Hosmer, 144 Minn. 342, 175 N. W. 683.

(92) Wipperman Mercantile Co. v. Jacobson, 133 Minn. 326, 158 N. W. 606.

(94) Edberg v. Johnson, — Minn. —, 184 N. W. 12.

(96) See 33 Harv. L. Rev. 711.

8941. Intention of individual legislators immaterial—(97) In re School Dist. No. 58, 143 Minn. 169, 173 N. W. 850.

8944. Expediency of statutes—(5) Common School District No. 85 v. Renville County, 141 Minn. 300, 170 N. W. 216.

8945. Public policy—A constitutionally enacted statute is the public policy of the state. Heim v. American Alliance Ins. Co., 147 Minn. 283, 180 N. W. 225.

8946. Prospective or retroactive operation—The postponement of the time when a statute shall become operative shows an intention to make it retrospective in operation. Burwell v. Tullis, 12 Minn. 572 (486); Stine v. Bennett, 13 Minn. 153 (138); Duncan v. Cobb, 32 Minn. 460, 21 N. W. 714; State v. General Accident etc. Corp., 134 Minn. 21, 158 N. W. 715.

A statute will be given a retroactive construction if such was clearly the intention of the legislature, as expressed in the language used. Long v. Long, 135 Minn. 259, 160 N. W. 687.

(8) State v. Probate Court, 142 Minn. 283, 171 N. W. 928; Soderstrom v. Curry & Whyte, Inc., 143 Minn. 154, 173 N. W. 649; Taylor v. McGregor State Bank, 144 Minn. 249, 174 N. W. 893; Nash v. Minneapolis & St. L. R. Co., 144 Minn. 322, 175 N. W. 610.

(10) Soderstrom v. Curry & Whyte, Inc., 143 Minn. 154, 173 N. W. 649 (distinction between remedial and substantive rights stated). See Carlson v. Pearson, 145 Minn. 125, 176 N. W 346 (application for certificate for organization of state bank).

See § 5595.

8947. Avoidance of absurd, unjust or inconvenient results—A statute should be so construed as to avoid a forfeiture when reasonably possible. Hage v. Benner, 111 Minn. 365, 127 N. W. 3. Needles v. Keys, — Minn. —, 184 N. W. 33.

(12) Wipperman Mercantile Co. v. Jacobson, 133 Minn. 326, 158 N. W. 606; Miller v. American Bonding Co., 133 Minn. 336, 158 N. W. 432; State v. General Accident etc. Corp., 134 Minn. 21, 158 N. W. 715; State v. Minnesota Tax Commission, 135 Minn. 205, 160 N. W. 498; Ratcliffe v. Ratcliffe, 135 Minn. 307, 160 N. W. 778; State v. Grindeland, 143 Minn. 435, 174 N. W. 312; Thomas v. Stevenson, 146 Minn. 272, 178 N. W. 1021; Edberg v. Johnson, — Minn. —, 184 N. W. 12.

(13) See State v. Minnesota Tax Commission, 135 Minn. 205, 160 N. W. 498.

8948. Restriction of general terms—Implied exceptions—Exceptions may be implied to avoid constitutional objections. See O'Neil v. O'Neil, — Minn. —, 182 N. W. 438.

(15) Plasch v. Fass, 144 Minn. 44, 174 N. W. 438; Goodrich v. Northwestern Tel. Exchange Co., 148 Minn. —, 181 N. W. 333; O'Neil v. O'Neil, — Minn. —, 182 N. W. 438; Baender v. Barnett, 255 U. S. —.

8949. Implied terms to effectuate objects—(17) Mannheimer Bros v. Kansas Casualty & Surety Co., 147 Minn. 350, 180 N. W. 229.

8950. To be sustained if reasonably possible—(18) State v. District Court, 134 Minn. 131, 158 N. W. 798.

8951. As a whole—Where several words in a statute are followed by a clause which is applicable as much to the first and other words as to the last, the clause will be held applicable to all. Porto Rico Railway, L. & P. Co. v. Mor, 253 U. S. 345.

(19) State v. District Court, 134 Minn. 131, 158 N. W. 798.

8952. Practical construction—The rule of practical construction is not entitled to much weight against the state in determining the taxability of property. In re Thorne's Estate, 145 Minn. 412, 177 N. W. 638.

(23) In re Boutin's Estate, — Minn. —, 182 N. W. 990.

(25) Peterson v. Koochiching County, 133 Minn. 343, 158 N. W. 605 (practical construction by bench and bar).

8954. Mandatory and directory provisions—(33) State v. Anding, 132 Minn. 36, 155 N. W. 1048.

8956. Statute adopted from another state—Although a statute is copied from the statutes of another state, the construction given it in that state is not necessarily controlling, where the courts of that state feel constrained to treat it as merely a revision of a former statute of that state and to give it the restricted operation of such former statute, nothwithstanding the fact that the restrictive provisions contained in the former statute have been eliminated, especially when giving effect to the fair import of the language used will make our law more complete and harmonious. Jacobs v. Jacobs, 136 Minn. 190, 161 N. W. 525.

8957. Presumption against changes in law—(42) See Marshall County v. Rokke, 134 Minn. 346, 159 N. W. 791.

8958. In derogation of common law—(49) 30 Harv. L. Rev. 742.

8961. General revisions of statutes—Revision of 1905—The statutes embodied in a general revision of the laws are presumed not to have changed the prior laws unless such intention clearly appears; and in ascertaining the intention of the legislature recourse may be had to the report of the revising commission taken in connection with the history of the law, the purpose sought to be accomplished by it, and the action of the legislature in changing or not changing the act as reported to them Wipperman Mercantile Co. v. Jacobson, 133 Minn. 326, 158 N. W. 606.

Since the main purpose of the revision of 1905 was to re-arrange and condense and not to abrogate or alter existing statutes, it is proper to look to the original form of a statute for light in cases where the revision, in the effort to make the code terse and compact, has left the meaning doubtful. Miller v. American Bonding Co., 133 Minn. 336, 158 N. W. 432.

Where the Revised Laws of 1905 clearly make a change in the prior law such change must be given effect. Swenson v. Lewison, 135 Minn. 145, 160 N. W. 253; Iona v. Todd County, 135 Minn. 183, 160 N. W. 669; Simmons v. Northern Pacific Ry. Co., 147 Minn. 313, 180 N. W. 114.

An intent to change a statute will not be inferred from a mere re-

arrangement and reduction of its language in the revision of 1905. State v. Henrionnet, 142 Minn. 1, 170 N. W. 699.

Changes made by a revision of statutes will not be regarded as altering the law, unless it is clear that such was the intention. Manson v. Chisholm, 142 Minn. 94, 170 N. W. 924.

In the revision of 1905, it was not the purpose of the legislature to enact a new body of laws, but to make a restatement of the previously existing general statutes in a more compact and orderly form with such changes and amendments as were necessary to bring the various acts into a harmonious whole and to make clear the meaning of conflicting, ambiguous or doubtful provisions. A previously existing statute is presumed to have continued unchanged in substance unless the intention to change it clearly appears from the language used in the revision when taken in connection with the subject matter of the act and its previous history, and a change in phraseology does not necessarily import an intention to change the substance of the statute. Bauman v. Metzger, 145 Minn. 133, 176 N. W. 497.

The revision of 1905 will be construed as changing the law where it is apparent that such was the intention of the legislature, and this, though the revision commission stated in their report that no change was intended in the chapter including the law in question. Simmons v. Northern Pacific Ry. Co., 147 Minn. 313, 180 N. W. 114.

(52) Marshall County v. Rokke, 134 Minn. 346, 159 N. W. 791; Manson v. Chisholm, 142 Minn. 94, 170 N. W. 924; Bauman v. Metzger, 145 Minn. 133, 176 N. W. 497; State v. Probate Court, 145 Minn. 344, 177 N. W. 354. See Davidson v. Patnaude, 145 Minn. 371, 177 N. W. 495.

(54) Bauman v. Metzger, 145 Minn. 133, 176 N. W. 497.

(55) See Devney v. Harriet State Bank, 145 Minn. 339, 177 N. W. 460.

(57) National Elevator Co. v. Great Northern Ry. Co., 138 Minn. 100, 164 N. W. 79; Manson v. Chisholm, 142 Minn. 94, 170 N. W. 924; State v. Probate Court, 145 Minn. 344, 177 N. W. 354.

(58) Devney v. Harriet State Bank, 145 Minn. 339, 177 N. W. 460.

8962. Object of statute and means employed—(61) Wipperman Mercantile Co. v. Jacobson, 133 Minn. 326, 158 N. W. 606; Mushel v. Schulz, 139 Minn. 234, 166 N. W. 179; Heim v. American Alliance Ins. Co., 147 Minn. 283, 180 N. W. 225.

(64) Heim v. American Alliance Ins. Co., 147 Minn. 283, 180 N. W. 225.

8963. Reference to legislative journals, debates, rules and reports of committees—Reports of a committee, including the bill as introduced, changes made in the frame of the bill in the course of its passage, and statements made by the committee chairman in charge of it, may be considered in aid of construction. United States v. St. Paul, M. & M. Ry. Co., 247 U. S. 310; Duplex Printing Press Co. v. Deering, 254 U. S. 443.

8964. Title of act—(72) State v. Kaercher, 141 Minn. 186, 169 N. W. 699; Caminetti v. United States, 242 U. S. 470; Strathearn Steamship Co. v. Dillon, 252 U. S. 348.

8965. History of statute—The history of the passage of an act through the legislature, including modifications during its course, may be considered, in case of doubt. Mushel v. Schultz, 139 Minn. 234, 166 N. W. 179.

(73) Wipperman Mercantile Co. v. Jacobson, 133 Minn. 326, 158 N. W. 606; Miller v. American Bonding Co., 133 Minn. 336, 158 N. W. 432; State v. District Court, 134 Minn. 131, 158 N. W. 798; National Elevator Co. v. Great Northern Ry. Co., 138 Minn. 100, 164 N. W. 79; Mushel v. Schultz, 139 Minn. 234, 166 N. W. 179; Manson v. Chisholm, 142 Minn. 94, 170 N. W. 924.

(74) Wipperman Mercantile Co. v. Jacobson, 133 Minn. 326, 158 N. W. 606; Miller v. American Bonding Co., 133 Minn. 336, 158 N. W. 432; State v. District Court, 134 Minn. 131, 158 N. W. 798.

(75) Mushel v. Schultz, 139 Minn. 234, 166 N. W. 179.

8968. Words how construed—Popular sense—(79) See 2 A. L. R. 778 (meaning of "owner" in statutes).

8971. Exceptions to general rules—Discriminatory statutes—A discriminatory statute is not to be extended by construction. Ratcliffe v. Ratcliffe, 135 Minn. 307, 160 N. W. 778.

(90) Ratcliffe v. Ratcliffe, 135 Minn. 307, 160 N. W. 778.

8976. "Or," "either or"—(96) Peterson v. Koochiching County, 133 Minn. 343, 158 N. W. 605 (force of disjunctives "either" and "or").

8977. Ejusdem generis—The rule is one of construction, employed as an aid in determining the intent of the legislature, and the effect thereof should not be permitted to confine the operation of the statute within narrower limits than intended by the lawmakers. That, as well as all other rules of construction, has but one object in view, namely, the ascertainment of the intent of the statute. The general purpose of a statute, as disclosed by the provisions thereof, taken as a whole, often requires that the final general clause, inserted with a view of bringing within its scope matters not specifically mentioned, should not be restricted in meaning by the preceding specifications. Westerlund v. Kettle River Co., 137 Minn. 24, 162 N. W. 680.

(98) Caminetti v. United States, 242 U. S. 470.

(1, 2) Westerlund v. Kettle River Co., 137 Minn. 24, 162 N. W. 680.

8979. "May," "shall" and "must"—(4) Carlson v. Elmo, 141 Minn. 240, 169 N. W. 805.

8983. Inconsistent clauses—Where two sections of a statute are inconsistent the one that best conforms to the general intent and policy of the statute should prevail. State v. District Court, 134 Minn. 131, 158 N. W. 798.

8984. In pari materia—If a thing contained in a subsequent statute is within the reason of a former statute, it will be taken to be within the meaning of that statute. Wold v. Bankers Surety Co., 133 Minn. 90, 157 N. W. 998.

(15) Byrnes v. Sexton, 62 Minn. 135, 64 N. W. 155; Radl v. Radl, 72 Minn. 81, 75 N. W. 111; Wold v. Bankers Surety Co., 133 Minn. 90, 157 N. W. 998; Tredway v. Western Union Tel. Co., 133 Minn. 252, 158 N. W. 247; Wipperman Mercantile Co. v. Jacobson, 133 Minn. 326, 158 N. W. 606; State v. District Court, 134 Minn. 131, 158 N. W. 798; National Elevator Co. v. Great Northern Ry. Co., 138 Minn. 100, 164 N. W. 79; State v. Nelson, 145 Minn. 31, 176 N. W. 181.

8985. Mistakes, errors and omissions—Casus omissus—Effect of mistake in reference to another statute. 5 A. L. R. 996.

(16) 3 A. L. R. 404 (supplying words).

(17) Gustafson v. Rhinow, 144 Minn. 415, 175 N. W. 903.

8986. Remedial statutes construed liberally—(18) In re Koopman, 146 Minn. 36, 177 N. W. 777; Heim v. American Alliance Ins. Co., 147 Minn. 283, 180 N. W. 225. See §§ 5854b, 6033.

8989. Penal statutes—(23) Ash Sheep Co. v. United States, 252 U. S. 159.

See § 2417.

8997. Amendments—It will be presumed that the legislature intended to make some change in the law by the amendment. State v. District Court, 134 Minn. 131, 158 N. W. 798.

(46) State v. District Court, 134 Minn. 131, 158 N. W. 798.

See § 8928.

STAY OF PROCEEDINGS

8999. In general—A stay of an action in this state brought by a nonresident plaintiff, to await the determination of an action in a court of the plaintiff's residence to restrain him from bringing the action in this state, the latter action being of a transitory nature, held improper. State v. District Court, 140 Minn. 494, 168 N. W. 589.

A stay may be granted as a coercive measure to render the jurisdiction of the court effective, or to prevent a fraud upon the court, or to force a party to obey proper orders of the court. Lipman v. Bechhoefer, 141 Minn. 131, 169 N. W. 536.

In an action by a vendor against a vendee to recover the purchase price of land, execution may be stayed until the vendor has deposited in court a deed conveying title to the vendee as stipulated in the contract, to be delivered on payment of the judgment. Noyes v. Brown, 142 Minn. 211, 171 N. W. 803.

(56) State v. District Court, 139 Minn. 464, 166 N. W. 1080.

STEAM

9002. Inspection of steam boilers—The federal statute relating to the inspection of locomotive boilers held inapplicable in an action by a switchman for personal injuries caused by his being thrown from a locomotive. Miller v. Chicago, B. & Q. R. Co., 140 Minn. 14, 167 N. W. 117.

Whether the title to chapter 240, Laws 1919, is sufficient to sustain the amendment to section 2186, R. L. 1905, which the act purports to accomplish, and whether section 7 of the amendatory act is invalid class legislation, are questions which do not require consideration, for, if section 7 should be held invalid, the statute relating to the inspection of steam boilers as it stood prior to the enactment of chapter 240 would remain in effect. Under that statute, as well as under chapter 240, appellant was required to have inspected a steam boiler used in heating an eight-family apartment house and to pay the inspection fee fixed by the statute. Davidson v. Patnaude, 145 Minn. 371, 177 N. W. 495.

(71) Davidson v. Patnaude, 145 Minn. 371, 177 N. W. 495.

STIPULATIONS

9003a. Validity—While stipulations which affect only individual rights of the parties thereto may be given effect, stipulations in respect to matters of law, especially if they affect public interests, are not binding upon and will be disregarded by the courts. St. Paul v. Chicago etc. Ry. Co., 139 Minn. 322, 166 N. W. 335.

9003b. Effect—A stipulation made by a party in the trial of a cause is binding upon him unless he is relieved therefrom. Pampusch v. National Council, 145 Minn. 71, 176 N. W. 158.

9003c. When favored—Stipulations designed to shorten litigation and save expense are favored by the courts. National Council v. Scheiber, 141 Minn. 41, 169 N. W. 272.

9004. Construction—A stipulation on the trial will be construed on appeal in the same way as on the trial. Bahneman v. Fritche, 147 Minn. 329, 180 N. W. 215.

Under a stipulation for settlement plaintiffs were not entitled to the entry of the judgment asked for in their motion. The stipulation must be held to contemplate a proper and separate judgment in each case, even though the cases were being tried together when the settlement was made. King v. Board of Education, 148 Minn. —, 181 N. W. 101.

(74) Behrens v. Kruse, 132 Minn. 69, 155 N. W. 1065, 156 N. W. 1 (as to testimony of absent witness); State v. Great Northern Ry. Co., 134 Minn. 249, 158 N. W. 972 (that judgment should be entered holding valid a certain contract between a municipality and a railroad company

as to the maintenance of a bridge—contract void as depriving municipality of its police power—stipulation and judgment void); Olson v. Moulster, 137 Minn. 96, 162 N. W. 1068 (as to form of verdict); Krieg v. Bofferding, 140 Minn. 512, 167 N. W. 1047 (stipulation limiting time to appeal held valid—time so limited cannot be extended by an ex parte order of the trial court); National Council v. Scheiber, 141 Minn. 41, 169 N. W. 272 (that an action shall abide the event of another action); Knudsen Fruit Co. v. Horner, 141 Minn. 59, 169 N. W. 251 (a stipulation entered into after service of demand for a change of venue held sufficient to justify trial court in striking the case from the calendar in the county where the action was brought); Pampusch v. National Council, 145 Minn. 71, 176 N. W. 158 (that the only issue in an action on a life insurance policy was whether the insured was in good health when he was reinstated in a benefit society); Baudette v. Miller, 146 Minn. 477, 178 N. W. 315 (for transfer of an action from a justice to a district court); Bahneman v. Fritche, 147 Minn. 329, 180 N. W. 215 (as to boundary lines); King v. Board of Education, 148 Minn. —, 181 N. W. 101 (for judgment in cases tried together held to contemplate a separate judgment in each case); Fletcher v. Taylor, — Minn. —, 182 N. W. 437 (for judgment in action to quiet title); O'Connell v. Holler, — Minn. —, 182 N. W. 617 (as to measure of damages).

9005. Vacation—Upon the showing made it cannot be held that the court below erred when denying defendant's motion to vacate a stipulation for settlement of the causes of action on the ground that it was improvidently made. The circumstances leading up to the making of the stipulation and the subsequent conduct of the majority of the directors of the defendant were such that the court might find a ratification thereof even though it was not signed by defendant's attorney, but by its president and secretary at the direction of such attorney, and even though the president and secretary were not directed, at a legally called meeting of the board of directors, to execute it. Dickinson v. Citizens Ice & Fuel Co., 139 Minn. 201, 165 N. W. 1056.

The attorneys may stipulate that an action shall abide the event of another action, if controlling issues in the action are involved in such other action; but such stipulation may be avoided for fraud or mistake, and the court may relieve a party therefrom if it was improvidently made and in equity and good conscience ought not to stand. National Council v. Scheiber, 141 Minn. 41, 169 N. W. 272.

Upon an application to vacate a stipulation the stipulation is presumed to be valid and binding. National Council v. Scheiber, 141 Minn. 41, 169 N. W. 272.

The vacation of stipulations is a matter resting largely in the discretion of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion. National Council v. Scheiber, 141 Minn. 41, 169 N. W. 272.

The court did not err in denying defendant's application to vacate a stipulation of settlement made in the course of litigation upon the ground

of the incompetency of one of the parties. In determining such application it was not necessary to make findings of fact; nor were findings necessary as a basis for the judgment the entry of which was stipulated in the event of the denial of the application to vacate the stipulation of settlement. Fletcher v. Taylor, — Minn. —, 182 N. W. 437.

(75) Dickinson v. Citizens Ice & Fuel Co., 139 Minn. 201, 165 N. W. 1056; National Council v. Scheiber, 141 Minn. 41, 169 N. W. 272.

STOCK SCALES—See Railroad and Warehouse Commission, § 8078; Railroads, § 8124a.

STOCKYARDS—See Constitutional Law, §§ 1607a, 1610; Factors, § 3714a; Railroad and Warehouse Commission, § 8078d.

STORAGE—See Bailment, §§ 731a, 736b; Warehousemen.

STREET RAILWAYS

IN GENERAL

9006. Definition and nature—An electric car operated on the tracks and right of way of a steam railroad company, in the manner in which such roads are operated, is governed by the rules applicable to the operation of steam railroads, and not by those applicable to the operation of street cars. Curran v. Chicago G. W. R. Co., 134 Minn. 392, 159 N. W. 955.

The term "vehicle" in a statute has been held to include street cars. Syck v. Duluth St. Ry. Co., 146 Minn. 118, 177 N. W. 944.

(81, 82) State v. Minneapolis etc. Ry. Co., 139 Minn. 405, 166 N. W. 770.

9007. Charter and franchises—A franchise to a street railway company to occupy a public street is to be construed strictly against the company. Duluth v. Duluth St. Ry. Co., 137 Minn. 286, 163 N. W. 659.

It is doubtful whether municipal officers can fritter away the rights of the public by the practical construction which they place on a charter or franchise. Duluth v. Duluth St. Ry. Co., 137 Minn. 286, 163 N. W. 659.

The franchise of the Duluth Street Railway Company construed as to its liability to pay for paving between its tracks. Duluth v. Duluth St. Ry. Co., 137 Minn. 286, 163 N. W. 659.

A franchise ordinance, adopted under the provisions of chapter 124, Laws 1915, by a majority vote of the city council, need not be submitted to the mayor of the city for his approval. The calling of a special election by the city council, to be conducted in all respects as required by the general election laws of the state, for the submission of a franchise ordinance to the voters of the city for ratification, to be held not less

than 90 days after the filing of the acceptance of the proposed franchise by the car company, is a sufficient compliance with the provisions of chapter 124, Laws 1915. The proposed franchise considered, and held, not to surrender by its provisions, the old car company franchise and the obligations incurred thereunder. It provides for ample consideration moving to the city for the franchise and rights thereby granted to the car company, to answer the requirements of chapter 124, General Laws 1915. Such franchise provides for the regulation of the affairs of the car company by the city council, and does not nullify the same by subsequent provisions. Meyers v. Knott, 144 Minn. 199, 174 N. W. 842.

Estoppel of municipality to deny giving franchise, 7 A. L. R. 1248.

See Laws 1921, c. 278.

9008. Use of street—Not an additional servitude—(92) St. Paul v. Great Northern Ry. Co., 138 Minn. 25, 163 N. W. 788.

9008a. Duty to pave—Special assessments—It is held by some courts that it is the common-law duty of a street railway company to repair, improve and pave the space occupied by its tracks so as to correspond with the rest of the street. Duluth v. Duluth St. Ry. Co., 137 Minn. 286, 163 N. W. 659. See 10 A. L. R. 928.

Under authority granted by a municipal ordinance, defendant occupied a portion of a paved street with its street car tracks. The pavement had worn out and it was necessary to replace it. The city council adopted a resolution to the effect that the street should be repaved and the cost paid out of a designated fund and assessed upon benefited property. This was done, but no part of such cost was assessed to defendant. By the collection of the assessments the city was fully reimbursed for its expenditures in so far as the same were not properly chargeable to it. Upon this state of facts, it is held that an action will not lie to compel defendant to pay the cost of the paving done on the portion of the street occupied by its tracks. Duluth v. Duluth St. Ry. Co., 145 Minn. 55, 176 N. W. 47.

9010. Regulation—Ordinances—Street railways are now under the general supervision of the Railroad and Warehouse Commission. Laws 1921, c. 278.

An ordinance requiring a company to sprinkle its tracks sustained against constitutional objections. Pacific Gas & Electric Co. v. Police Court, 251 U. S. 22.

Validity of ordinance prohibiting the use of one-man cars. Sullivan v. Shreveport, 251 U. S. 169.

Ordinances against overcrowding. 6 A. L. R. 124.

Power of public service commission to regulate. 5 A. L. R. 36.

LIABILITY FOR NEGLIGENCE

9013. Right of way—Relative rights of parties—The provisions of G. S. 1913, § 2552, as amended by Laws 1917, c. 119, relating to the right

of way at street intersections, apply to street railways. Syck v. Duluth St. Ry. Co., 146 Minn. 118, 177 N. W. 944.

(2) Curran v. Chicago G. W. R. Co., 134 Minn. 392, 159 N. W. 955. See Carson v. Turrish, 140 Minn. 445, 168 N. W. 349.

(3) See Carson v Turrish, 140 Minn. 445, 168 N. W. 349.

(4) See Syck v. Duluth St. Ry. Co., 146 Minn. 118, 177 N. W. 944.

9014. Excessive speed—There is evidence to sustain a finding that the motorman of a street car was negligent in driving his car twenty-five miles an hour in the vicinity of crowded public baths, and in failing to observe the approach of plaintiff. Hughes v. Minneapolis St. Ry. Co., 146 Minn. 268, 178 N. W. 605.

(9) Erickson v. St. Paul City Ry. Co., 141 Minn. 166, 169 N. W. 532.

(11) See Draves v. Minneapolis etc. R. Co., 142 Minn. 321, 172 N. W. 128.

9015. Duties of motormen—In general—When a motorman sees pedestrians on or near tracks at a place in the country where cars are accustomed to stop and take on passengers, he is bound to have his car well under control and to give signals of his approach. Draves v. Minneapolis etc. R. Co., 142 Minn. 321, 172 N. W. 128.

(17) Draves v. Minneapolis etc. R. Co., 142 Minn. 321, 172 N. W. 128.

(19) See Hughes v. Minneapolis St. Ry. Co., 146 Minn. 268, 178 N. W. 605.

(20) Draves v. Minneapolis etc. R. Co., 142 Minn. 321, 172 N. W. 128.

(23) McKenzie v. Duluth St. Ry. Co., 131 Minn. 482, 155 N. W. 758. See Johnson v. Johnson, 137 Minn. 198, 163 N. W. 160.

9016. Duty of motormen at street crossings—(28) Otto v. Duluth St. Ry. Co., 138 Minn. 312, 164 N. W. 1020.

9017. Sounding gong—(31) Erickson v. St. Paul City Ry. Co., 141 Minn. 166, 169 N. W. 532; Draves v. Minneapolis etc. R. Co., 142 Minn. 321, 172 N. W. 128.

9021. Injuries to children—(39) Hughes v. Minneapolis St. Ry. Co., 146 Minn. 268, 178 N. W. 605 (boy eleven years old struck as he was heedlessly rushing across double track to catch a ride in an automobile nearby). See L. R. A. 1917F, 172 (contributory negligence of children).

9022a. Frightening horses—Plaintiff was driving a horse and carriage along a highway beside which a street railway was operated. The horse was frightened at a car and shied, causing the carriage to strike a telephone post, whereby plaintiff was injured. Held, that the questions of negligence and contributory negligence were for the jury and the charge contained no reversible error. Peterson v. Minneapolis etc. Ry. Co., 146 Minn. 298, 178 N. W. 745.

9023. Collisions—In general—Collision with a horse tied behind a coal wagon standing in a street. Antel v. St. Paul City Ry. Co., 133 Minn. 156, 157 N. W. 1073.

A collision with a pedestrian at a place in the country where cars were accustomed to stop to receive passengers. Draves v. Minneapolis etc. Ry. Co., 142 Minn. 321, 172 N. W. 128.

Collisions with fire apparatus. L. R. A. 1917E, 415.

(44) Woll v. St Paul City Ry. Co., 135 Minn. 190, 160 N. W. 672 (runaway).

(45) McKenzie v. Duluth St. Ry. Co., 131 Minn. 482, 155 N. W. 758; Hughes v. Minneapolis St. Ry. Co., 146 Minn. 268, 178 N. W. 605.

(46) Moore v. St. Paul City Ry. Co., 136 Minn. 315, 162 N. W. 298.

(50) Kaiser v. Minneapolis St. Ry. Co., 147 Minn. 278, 181 N. W. 569.

(57) See Johnson v. Johnson, 137 Minn. 198, 163 N. W. 160.

9023a. Collisions with automobiles and other motor vehicles—Otto v. Duluth St. Ry. Co., 138 Minn. 312, 164 N. W. 1020; Erickson v. St. Paul City Ry. Co., 141 Minn. 166, 169 N. W. 532; Haleen v. St. Paul City Ry. Co., 141 Minn. 289, 170 N. W. 207; Kirk v. St. Paul City Ry. Co., 141 Minn. 457, 170 N. W. 517; Stock v. St. Paul City Ry. Co., 142 Minn. 315, 172 N. W. 122; Schrankel v. Minneapolis St. Ry. Co., 144 Minn. 465, 174 N. W. 820; Syck v. Duluth St. Ry. Co., 146 Minn. 118, 177 N. W. 944.

9026. Contributory negligence—Look and listen rule—Intoxicated persons—Children—Contributory negligence of pedestrian crossing a street on which there were double tracks held a question for jury. McKenzie v. Duluth St. Ry. Co., 131 Minn. 482, 155 N. W. 758.

The contributory negligence of a driver of an automobile at an intersection of two streets where there were double tracks held a question for the jury. Otto v. Duluth St. Ry. Co., 138 Minn. 312, 164 N. W. 1020.

In view of the specific charge that plaintiff was bound to use his senses to avoid collisions when crossing street car tracks, it cannot be said to be prejudicial error to instruct the jury that plaintiff had a right to rely upon defendant not operating its car negligently; for it was immediately followed by the statement that those operating the street cars had a right to assume that persons about to cross the car tracks would exercise ordinary care for their own safety. Otto v. Duluth St. Ry. Co., 138 Minn. 312, 164 N. W. 1020.

Plaintiff driving an automobile approached a street car track in the nighttime. He saw a street car approaching when it was 350 feet away, but kept on until he reached the track where a collision occurred. There were no distracting circumstances, except that it was dark and the road was rough. Held, plaintiff was negligent as a matter of law. Haleen v. St. Paul City Ry. Co., 141 Minn. 289, 170 N. W. 207; Kirk v. St. Paul City Ry. Co., 141 Minn. 457, 170 N. W. 517.

Plaintiff was injured while attempting to rescue a companion. The fact that the companion as well as the motorman was negligent did not necessarily defeat plaintiff's right to recover. Draves v. Minneapolis etc. R. Co., 142 Minn. 321, 172 N. W. 128.

An automobile driver, who crossed behind a street car and was struck

on the adjacent track by a car coming from the opposite direction in plain view, held not entitled to recover, though no signals were given. Schrankel v. Minneapolis St. Ry. Co., 144 Minn. 465, 174 N. W. 820.

Plaintiff's contributory negligence conclusively appeared from his own admission that he entered upon the intersecting street without looking to his right, from whence he might anticipate advancing vehicles having the right of way over him, and continued his course with his eyes fixed in the other direction until too late to avoid the collision with defendant's street car that had approached the intersection from plaintiff's right. Syck v. Duluth St. Ry. Co., 146 Minn. 118, 177 N. W. 944.

Where a person becomes intoxicated from the voluntary use of intoxicating liquor and in such condition wanders upon a railway track and there remains until he becomes unconscious and is run over and killed, such acts constitute contributory negligence so as to bar recovery for his death in an action for ordinary negligence. Kaiser v. Minneapolis St. Ry. Co., 147 Minn. 278, 181 N. W. 569.

Contributory negligence of children. L. R. A. 1917F, 172.

(66) McKenzie v. Duluth St. Ry. Co., 131 Minn. 482, 155 N. W. 758.

(67) Hughes v. Minneapolis St. Ry. Co., 146 Minn. 268, 178 N. W. 605 (boy eleven years old).

(68) See McKenzie v. Duluth St. Ry. Co., 131 Minn. 482, 155 N. W. 758.

(76) L. R. A. 1917C, 692.

(01) Moore v. St. Paul City Ry. Co., 136 Minn. 315, 162 N. W. 298.

9027. Assumption as to conduct of motorman—A traveler can rely in some measure on the assumption that a motorman in charge of a car will use due care but he cannot rely entirely on such assumption. If he could do so contributory negligence would never be a defence. If the speed of the approaching car is apparent the traveler cannot rely upon the assumption that it will be immediately operated at a different rate of speed. The traveler may sometimes be deceived as to the rapidity of approach of a car, but he cannot well be deceived when the approaching car is in plain sight and he actually sees it approaching. Haleen v. St. Paul City Ry. Co., 141 Minn. 289, 170 N. W. 207; Kirk v. St. Paul City Ry. Co., 141 Minn. 457, 170 N. W. 517.

(79) Otto v. Duluth St. Ry. Co., 138 Minn. 312, 164 N. W. 1020.

9029. Wilful or wanton injury—(83) Stock v. St. Paul City Ry. Co., 142 Minn. 315, 172 N. W. 122 (automobile stalled on track); Draves v. Minneapolis etc. R. Co., 142 Minn. 321, 172 N. W. 128; Kaiser v. Minneapolis St. Ry. Co., 147 Minn. 278, 181 N. W. 569.

9030. Sudden emergency—Distracting circumstances—Roughness in a road and darkness held not distracting circumstances. Haleen v. St. Paul City Ry. Co., 141 Minn. 289, 170 N. W. 207.

(85) McKenzie v. Duluth St. Ry. Co., 131 Minn. 482, 155 N. W. 758; Haleen v. St. Paul City Ry. Co., 141 Minn. 289, 170 N. W. 207.

(87) Christison v. St. Paul City Ry. Co., 138 Minn. 456, 165 N. W. 273.

9031. Imputed negligence—(87) Christison v. St. Paul City Ry. Co., 138 Minn. 456, 165 N. W. 273.

9031a. Proximate cause—The testimony made a case for the determination of a jury, whether the negligence of the motorman of an electric railroad passenger car as to speed and signals, upon approaching a place where cars usually stop to receive passengers, was the proximate cause of plaintiff's injuries. The jury could find that such negligence began to operate before plaintiff went to the rescue of her companion and continued until both were struck. That the companion came into danger of death because she was negligent as well as the motorman, does not necessarily defeat plaintiff's right of recover. Draves v. Minneapolis etc. R. Co., 142 Minn. 321, 172 N. W. 128.

9033. Evidence—Admissibility—(91) Draves v. Minneapolis etc. R. Co., 142 Minn. 321, 172 N. W. 128 (error in refusing to allow a motorman to answer a question as to how close he was to a woman when he first discovered that she was going to cross the tracks ahead of him held not prejudicial).

9033a. Evidence—Sufficiency—Evidence held sufficient to justify a recovery. Antel v. St. Paul City Ry. Co., 133 Minn. 156, 157 N. W. 1073 (injury to a horse); Erickson v. St. Paul City Ry. Co., 141 Minn. 166, 169 N. W. 532; Stock v. St. Paul City Ry. Co., 142 Minn. 315, 172 N. W. 122; Draves v. Minneapolis etc. R. Co., 142 Minn. 321, 172 N. W. 128.

Evidence held to justify a verdict for defendant. Woll v. St. Paul City Ry. Co., 135 Minn. 190, 160 N. W. 672.

SUBROGATION

9036. Nature—(94) Northern Trust Co. v. Consolidated Elevator Co., 142 Minn. 132, 171 N. W. 265. See Cooper, Myers & Co. v. Smith, 139 Minn. 382, 166 N. W. 504.

9037. Not allowed to work injustice—(99) Northern Trust Co. v. Consolidated Elevator Co., 142 Minn. 132, 171 N. W. 265.

(1) New Amsterdam Casualty Co. v. Wurtz, 145 Minn. 438, 177 N. W. 664.

9040. Entire debt must be paid—(7) United States v. National Surety Co., 254 U. S. 73. See 9 A. L. R. 1596.

9041. Voluntary payment—(9) See New Amsterdam Casualty Co. v. Wurtz, 145 Minn. 438, 177 N. W. 664 (right of surety of public contractor to subrogation held subordinate to right of bank loaning money to contractor after execution of bond of surety—bank held not a volunteer).

9045. Sureties and guarantors—The doctrine of subrogation is of purely equitable origin and nature. Whether a case for its application arises in favor of a surety as against third persons depends upon the balance of

equities between them and the surety. It does not arise where the result would be prejudicial to innocent purchasers. The object of subrogation is to place the charge where it ought to rest by compelling the payment of the debt by him who ought in equity to pay it. It will never be enforced when the equities are equal or the rights not clear. The right may be modified or extinguished by contract. It expires if it appears that at the time of payment the purpose was not to keep the debt alive, but to extinguish it. When it is sought to enforce the right, something more must be shown than that defendant could have been compelled by the original creditor to pay the debt. While a surety may assert the right against one with whom he has no contractual relations, it must appear that the defendant participated, with notice, in the illegal act of the principal which served to bring about the loss. The right to recover from a third person does not stand on the same footing as the right to recover from the principal. As to the latter, the right is absolute—as to the former, it is conditional. Northern Trust Co. v. Consolidated Elevator Co., 142 Minn. 132, 171 N. W. 265.

A surety on the bond of a public contractor held not entitled to subrogation as against a bank loaning money to the contractor after the execution of the bond. New Amsterdam Casualty Co. v. Wurtz, 145 Minn. 438, 177 N. W. 664.

(23) Way v. Mooers, 135 Minn. 339, 160 N. W. 1014.

(24) Calmenson v Moudry, 137 Minn. 123, 162 N. W. 1076; First Nat. Bank v. Iowa Bonding & Casualty Co., — Minn. —, 183 N. W. 832. See § 744.

9047. Subrogation allowed—Miscellaneous cases—Where a carrier innocently converted goods and paid the consignors therefor, taking from them an assignment of the goods and of a cause of action against certain other innocent converters of the goods, it was held that the company might be subrogated to the rights of the consignors as against one who had wrongfully converted the goods, or as against one who had practiced fraud whereby the company was induced to convert the goods. Greer v. Equity Co-operative Exchange, 137 Minn. 300, 163 N. W. 527.

9048. Subrogation allowed—Mortgages—A mortgagor who conveys land subject to a mortgage which the grantee assumes and agrees to pay may pay the mortgage himself and upon such payment is entitled to subrogation; and if upon such payment he procures an assignment of the mortgage to a third person such mortgage may be enforced by the assignee; and the evidence sustains a finding that a mortgagor so conveying certain real property paid the debt and became entitled to subrogation; and the assignee to whom he procured an assignment to be made by the holders of the mortgage became the legal owner of the mortgage and is entitled to enforce it. Minnesota Loan & Trust Co. v. Peteler Car Co., 132 Minn. 277, 156 N. W. 255.

9052a. Parties to actions—Whether the fact that a party entitled to be subrogated to the rights of the plaintiff is not made a party constitutes

a defect of parties, or may be taken advantage of by defendant by plea in abatement, is an open question. Ringquist v. Duluth, M. & N. Ry. Co., 145 Minn. 147, 176 N. W. 344.

SUBSCRIPTIONS

9058. Consideration—(63) See 34 Harv. L. Rev. 220.

SUNDAY

9064. Business—Work—The business of a photographer is "work," within the meaning of the statute. State v. Dean, — Minn. —, 184 N. W. 275.

SUPPORT FOR LIFE—See Deeds, § 2677.

SUPREME COURT

9071. Jurisdiction cannot be conferred by consent—(96) Neumann v. Edwards, 146 Minn. 179, 178 N. W. 589.

9074. Rules of court—An application for an oral argument, after a submission of the case on briefs, denied. Stock v. St. Paul City Ry. Co., 122 Minn. 315, 172 N. W. 959.

Order and judgment affirmed for failure to serve record and brief as required by Rule 12. Greenhut Cloak Co. v. Oreck, 134 Minn. 464, 159 N. W. 327.

Rule 8 requires the printing of only such matter as is necessary to a full presentation of the questions raised by the appeal. Appellants still have six weeks' time under the rule to print and serve the record and appellants' brief. No extension of time seems now necessary. The order of the trial court, denying the motion of one of the appellants to sign and settle the proposed case, determined that it was not a complete or a true record of what occurred at the trial. There is no showing that the court was in error in this particular. Chance v. Hawkinson, 148 Minn. —, 180 N. W. 214.

Case reviewed though appellant failed to print the evidence as required by Rule 8. McClean v. Meyer, 148 Minn. —, 181 N. W. 917.

(2) Stock v. St. Paul City Ry. Co., 142 Minn. 315, 172 N. W. 959.

SURETYSHIP

IN GENERAL

9077. Nature of liability—Secondary—The liability of a surety is secondary in the sense that if the principal is not liable the surety is not. Posch v. Lion Bonding & Surety Co., 137 Minn. 169, 163 N. W. 131; Duluth v. Ross, 140 Minn. 161, 167 N. W. 485.

(23) Way v. Mooers, 135 Minn. 339, 160 N. W. 1014.

9078a. New bond—Operation—Where a new bond is given in place of an old one it will not cover obligations incurred but not matured when it becomes operative, unless it is so expressly provided. Hughes v. Globe Indemnity Co., 139 Minn. 417, 166 N. W. 1075.

9079. Construction of contracts—(25) Hughes v. Globe Indemnity Co., 139 Minn. 417, 166 N. W. 1075.

(29) Macleod v. National Surety Co., 133 Minn. 351, 158 N. W. 619; Kildall Fish Co. v. Giguere, 136 Minn. 401, 162 N. W. 671; American Brick & Tile Co. v. Turnell, 143 Minn. 96, 173 N. W. 175; First Nat. Bank v. Iowa Bonding & Casualty Co., — Minn. —, 183 N. W. 832; 12 A. L. R. 382.

See §§ 1056, 9104a.

9080. Consideration—(30) Minneapolis Brewing Co. v. Yahnke, 148 Minn. —, 181 N. W. 331.

9081. Parol evidence—Where a person signs a joint note, at the request of the principal debtor, he may, in the absence of any understanding with a prior surety to the contrary, stipulate with the principal and make it a condition of his signing, that he signs only as a surety to those signing prior to his signing; and such fact may be shown by parol evidence without being subject to objection as hearsay. Pope v. Hoefs, 140 Minn. 443, 168 N. W. 584. See Aetna Casualty & Surety Co. v. Equitable Surety Co., 145 Minn. 326, 177 N. W. 137.

The inducement or consideration for signing a note as surety may be shown by parol. Minneapolis Brewing Co. v. Yahnke, 148 Minn. —, 181 N. W. 331. See § 9093.

9081a. Change in conditions—Operation—A bond given by a dealer in live stock was conditioned that he should pay for each lot of stock purchased within forty-eight hours after delivery. After the bond had been for some time in force the obligee requested and defendant consented that it be changed to provide for payment within two weeks after delivery. Held, this change was not retroactive and the bond did not secure money due from sales made during the two weeks period prior to the change. Under the terms of the bond, no recovery can be had on account of a sale made while the dealer is in default more than forty-eight hours on previous sales. If the forty-eight hour period ends on

Sunday, that day is not to be counted. Hughes v. Globe Indemnity Co., 139 Minn. 417, 166 N. W. 1075.

9081b. Condition requiring notice of default—A condition in a bond to secure the payment of money requiring notice within twelve hours after a default is valid. Where such notice is not given the surety is not liable. Hughes v. Globe Indemnity Co., 139 Minn. 417, 166 N. W. 1075.

9082. Condition as to others signing—See Ann. Cas. 1918D, 512.

9090. Contribution between sureties—(45) See Pope v. Hoefs, 140 Minn. 443, 168 N. W. 584 (plaintiff and defendant joint makers of note—controversy as to whether they were cosureties—parol evidence to show relation).

(46, 47) Stone-Ordeans-Wells Co. v. Taylor, 139 Minn. 432, 166 N. W. 1069.

DISCHARGE OF SURETY

9093. In general—There was evidence sufficient to sustain a finding that as an inducement and consideration for the defendant appealing to sign as surety a note made to the plaintiff payee the plaintiff agreed to apply moneys which were to come into its possession from the maker of the note, the maker assenting, to the payment of the note; that upon such condition the defendant signed; that moneys sufficient to pay the note came into the possession of the plaintiff; and that the plaintiff did not apply them as agreed. Held, that such an agreement was a material element of the contract, was made upon consideration, and that parol proof of it was not objectionable as varying the terms of the surety obligation; and that if the facts recited were proved the surety was released. Minneapolis Brewing Co. v. Yahnke, 148 Minn. —, 181 N. W. 331.

Discharge of surety without affirmative act of creditor. 2 Minn. L. Rev. 453.

9094. Discharge of main obligation—(56) Downs v. American Surety Co., 132 Minn. 201, 156 N. W. 5. See Haack v. Coughlan, 134 Minn. 78, 158 N. W. 908 (where the principal appeared and answered in an action on an official bond without claiming the bar of the statute of limitations it was held that his surety could not claim that the statute had run against the principal and that for that reason the surety could not be held).

9095. Neglect of creditor to pursue principal—Failure of creditor to comply with surety's demand or request to proceed to enforce obligation. L. R. A. 1918C, 10.

(60) See Miles v. National Surety Co., — Minn. —, 182 N. W. 996; 5 Minn. L. Rev. 485.

9096. Extension of time—An extension of the time of payment does not release a paid surety unless it affirmatively appears that he was materially prejudiced thereby. Standard Salt & Cement Co. v. National

Surety Co., 134 Minn. 121, 158 N. W. 802; American Brick & Tile Co. v. Turnell, 143 Minn. 96, 173 N. W. 175. See § 9104a.

A surety cannot be held to have consented to an extension, unless it appears that he evinced such consent by some positive act; and a charge to the effect that he will be deemed to have consented, if he knew of the extension and did not object to it, is erroneous. A. B. Klise Lumber Co. v. Enkema, 148 Minn. —, 181 N. W. 201.

The consent of the surety may be inferred from the fact that he was instrumental in procuring the extension. A consent to an extension is not a consent to a further extension. A. B. Klise Lumber Co. v. Enkema, 148 Minn. —, 181 N. W. 201.

(61) Standard Salt & Cement Co. v. National Surety Co., 134 Minn. 121, 158 N. W. 802; Way v. Mooers, 135 Minn. 339, 160 N. W. 1014; A. B. Klise Lumber Co. v. Enkema, 148 Minn. —, 181 N. W. 201.

(69) Standard Salt & Cement Co. v. National Surety Co., 134 Minn. 121, 158 N. W. 802.

(70) Way v. Mooers, 135 Minn. 339, 160 N. W. 1014.

9097. Alteration of contract—Where a building contract authorizes the owner to make changes in the work to be performed thereunder, and provides that the increase or decrease in the cost resulting therefrom shall be added or deducted from the contract price, and that any agreement for changes made in writing shall not affect the liability of the sureties, the contractor, by making the desired changes and receiving full payment therefor without having the agreement for the changes reduced to writing, waives that formality, and as such waiver does not affect the contract of his sureties in matter of substance they are not released thereby, in the absence of an express stipulation to that effect. The evidence is sufficient to sustain the finding of the jury that plaintiff substantially complied with the requirements of the contract in the matter of making payments during the progress of the work. Payments to the amount of three-fourths of the actual value of the work then performed were required to be made monthly; and the fact that, in consequence of paying these amounts as the work progressed, plaintiff had paid more than three-fourths of the contract price before the completion of the work, did not discharge the sureties. Milavetz v. Oberg, 138 Minn. 215, 164 N. W. 910.

(71) Stone-Ordean-Wells Co. v. Taylor, 139 Minn. 432, 166 N. W. 1069 (discharge of one of the cosureties on a continuing guaranty affects the contract as to all, and releases the other cosureties for future liabilities).

See § 9104a.

9098. Fraud—(74) 8 A. L. R. 1485.

9099. Securities—Where collateral, given by one of several sureties to secure his personal obligations and also his obligation as surety, is applied by the holder thereof upon such personal obligations, such applica-

tion does not release other sureties from their contract. National City Bank v. Zimmer Vacuum Renovator Co., 132 Minn. 211, 156 N. W. 265.

9104. Cosureties—Where collateral given by one of several sureties to secure his personal obligations and also his obligation as surety is applied by the holder thereof upon such personal obligations, such application does not release other sureties from their contract. National City Bank v. Zimmer Vacuum Renovator Co., 132 Minn. 211, 156 N. W. 265.

The discharge of one of the cosureties on a continuing guaranty affects the contract as to all and amounts to a release of the other cosureties for liabilities subsequently incurred. Stone-Ordean-Wells Co. v. Taylor, 139 Minn. 432, 166 N. W. 1069. See L. R. A. 1918E, 95.

9104a. Contractors' bonds—Surety companies—Liability—Release—The liability of surety companies on contractors' bonds is governed, in part at least, by the law of insurance rather than the law of suretyship. In some respects such bonds are practically policies of insurance. The strict rules of construction which are applied in determining the liability of ordinary sureties are not applicable to paid sureties. Facts that would release an ordinary surety will not always release a paid surety. Miller v. American Bonding Co., 133 Minn. 336, 158 N. W. 432 (bond of contractor on state road—what tools and machinery covered); Macleod v. National Surety Co., 133 Minn. 351, 158 N. W. 619 (paid surety can claim a release only by showing a departure from the terms of the contract resulting in substantial prejudice to his rights and depriving him of some material protection given by the contract—surety not released by the obligee's acquiescence in the contractor's default when, with knowledge of such default, the surety encourages a waiver thereof by the obligee—for a delay in performance which constitutes a breach of the contract, the obligee may recover of the surety such damages as naturally result from a delay, and such as might be recovered from the principal—certain items of alleged damages held properly submitted to the jury upon the question whether they were the natural result of the breach of the contract); Trustees v. United States F. & G. Co., 133 Minn. 429, 158 N. W. 709 (action to recover amount paid by owner to discharge mechanic's liens—evidence held not to require finding that owner failed to retain 20 per cent. of the contract price until completion—surety not released because some payments were made by note instead of in cash, the contract providing that payments should be made in current funds—surety not released because payments were made without the certificate of the architect in violation of the contract, it appearing that only one payment was made without a certificate and that such payment was made on an itemized statement approved in writing by the architect—judgment in lien suit against plaintiff held admissible against surety—unnecessary to prove incorporation of plaintiff or his title to the property on which the building was constructed); Standard Salt & Cement Co. v. National Surety Co., 134 Minn. 121, 158 N. W. 802 (contract in the nature of insurance—extension of payment by principal does not

release surety unless it affirmatively appears that he was materially prejudiced thereby); Paine & Nixon Co. v. United States F. & G. Co., 135 Minn. 9, 159 N. W. 1075 (recovery against surety for building materials sold to contractor sustained); Kildall Fish Co. v. Giguere, 136 Minn. 401, 162 N. W. 671 (action to recover amount of mechanic's liens which owner was forced to pay—evidence held to justify findings that no change was made in the plans and specifications which increased the amount to be paid the contractor more than 10 per cent. of the penalty of the bond, contrary to the conditions thereof—surety not released by failure of owner to give notice of failure of contractor to complete building by time specified in contract, no claim being made by owner because of such failure, and there being no showing of prejudice to surety because of failure to give notice—not error to refuse to permit surety to prove that contractors did not apply payments made by owner under contract to payment of claims for material and labor furnished for the building—surety not released or its liability reduced because delays on part of owner and other contractors caused loss to principal, the contract providing a remedy for such loss, and the principal not availing himself thereof); Dawson v. Northwestern Construction Co., 137 Minn. 352, 162 N. W. 772 (bond of contractor of state road—under G. S. 1913, § 8245, and the terms of the bond, the surety is liable for the rental value of horses necessarily used on the work, though the claims therefor do not include the services of teamsters—surety not liable for horses killed or injured on the work or for return freight on equipment leased by contractor—court held properly that plaintiff and the various claimants should share pro rata in a fund deposited in court by the county, the amount due by it to the original contractors, and recover the balance of their claims from the surety); American Brick & Tile Co. v. Turnell, 143 Minn. 96, 173 N. W. 175 (paid surety governed by the laws of insurance—price of certain tiles furnished by plaintiff was payable in instalments—defendant having executed a bond conditioned that the contractor should pay all just claims for material as they became due, is not released from liability thereon by the fact that plaintiff continued to furnish tile as required by its contract after the contractor had defaulted in his payments); Quinn-Shepherdson Co. v. United States F. & G. Co., — Minn. —, 183 N. W. 347 (evidence held to justify finding of an oral contract of insurance).

See § 9105; 12 A. L. R. 382.

9105. Fidelity bonds—Fidelity insurance—Fidelity bonds issued by compensated bonding companies are governed, in part at least, by the law of insurance rather than the law of suretyship. They are in most respects practically policies of insurance and are construed strongly in favor of the insured. The strict rules of construction which are applied in determining the liability of sureties are not applicable. Facts that would release an ordinary surety will not always release the surety on such bonds. Pearson v. United States F. & G. Co., 138 Minn. 240, 164 N. W. 919 (renewals of bonds held not separate bonds—effect of re-

newals was merely to extend the time covered by the bond—G. S. 1913, § 3292, is applicable to fidelity bonds—defendant not entitled to judgment non obstante on ground that it conclusively appeared that the assured had failed to carry out conditions of the bond—verdict for plaintiff justified by evidence); Quinn-Shepherdson Co. v. United States F. & G. Co., 142 Minn. 428, 172 N. W. 693 (contract one of insurance—oral contract of present insurance or for insurance to be effective from date is valid—contract not within statute of frauds—error in proof of contract required new trial); W. A. Thomas Co. v. National Surety Co., 142 Minn. 460, 172 N. W. 697 (bonds governed by laws applicable to contracts of insurance—misrepresentations by obligee of matters which increase risk of loss, even if made without intent to deceive, avoid bond—certain misrepresentations held to have increased the risk and avoided the bond); Farmers Co-operative Exchange Co. v. Fidelity & Deposit Co., — Minn. —, 182 N. W. 1008 (action on fidelity bond to recover for larceny or embezzlement of agent—admissibility of evidence—certain instructions held erroneous and new trial granted).

(85) 8 A. L. R. 1485.

See §§ 4875l, 9104a.

9107. Surety held not discharged—Miscellaneous cases—(91) Milavetz v. Oberg, 138 Minn. 215, 164 N. W. 910 (bond against mechanics' liens); First Nat. Bank v. Iowa Bonding & Casualty Co., — Minn. —, 183 N. W. 832 (paid bonding company guaranteeing payment of certificate of deposit not discharged by release of indorsers of certificate by purchaser thereof). See § 4076.

See §§ 9104a, 9105.

ACTIONS

9107a. Action against surety alone—Where the liability on a bond is joint and several an action for its breach may be maintained against the surety alone. Posch v. Lion Bonding & Surety Co., 137 Minn. 169, 163 N. W. 131; Miles v. National Surety Co., — Minn. —, 182 N. W. 996.

9108. Action by surety for reimbursement—If a party is obliged to defend against the act of another, against whom he has a remedy over, and defends solely and exclusively the act of such other party, and is compelled to defend no misfeasance of his own, he may notify such party of the pendency of the suit and may call upon him to defend it; if he fails to defend, then, if liable over, he is liable not only for the amount of damages recovered, but for all reasonable and necessary expenses incurred in such defence. Fidelity & Casualty Co. v. Northwestern Tel. Exchange Co., 140 Minn. 224, 167 N. W. 800.

(92) See Fidelity & Casualty Co. v. Northwestern Tel. Exchange Co., 140 Minn. 229, 167 N. W. 800 (recovery of attorney's fees and costs—notice to defend).

9109. Statutory action by surety—(95) See Metropolitan Milk Co. v. Minneapolis St. Ry. Co., — Minn. —, 183 N. W. 830.

9112. Pleading—(99) Hughes v. Globe Indemnity Co., 139 Minn. 417, 166 N. W. 1075 (fact that there was a default in a payment held defensive matter); State v. Reiter, 140 Minn. 491, 168 N. W. 714 (in action against foreign surety company it is unnecessary to allege that the company has obtained a certificate to do business in this state as required by G. S. 1913, § 8235—if it has not, that is a matter of defence); American Brick & Tile Co. v. Turnell, 143 Minn. 96, 173 N. W. 175 (denial of amendment of answer on the trial sustained).

9112a. Burden of proof—A plaintiff held not bound to prove prior defaults in payment. Hughes v. Globe Indemnity Co., 139 Minn. 417, 166 N. W. 1075.

SURGICAL OPERATION—See Death by Wrongful Act, § 2620 (causing death).

SYNDICALISM

9113a. Criminal offence—Sabotage—Chapter 215, Laws 1917, declaring and defining the crime of criminal syndicalism, and prohibiting the advocacy or teaching of sabotage or other methods of terrorism as a means of accomplishing industrial or political ends, is not obnoxious to either the state or federal constitution, and no rights thereby secured or protected are in any way impaired or abridged. The penalties imposed by the statute for a violation thereof do not come within the constitutional prohibition against excessive fines or cruel and unusual punishments. "Sabotage," as practiced by those advocating it as an appropriate and proper method of adjusting labor troubles, embraces among other lesser offensive acts, the wilful and intentional injury to or destruction of the employer's property in retaliation for his refusal to comply with wage or labor demands. On the facts presented by the indictment and certified case, it is held that the question whether defendant intended by the distribution of the posters referred to in the opinion to advocate the form of sabotage condemned by the statute was one of fact for the jury. State v. Moilen. 140 Minn. 112, 167 N. W. 345.

See Constitutional Law, §§ 1646, 1675, 1691.

TAXATION

GENERAL PRINCIPLES

9114. Definition—Taxation and protection are reciprocal and all persons who receive and are entitled to protection may be called upon to render an equivalent. State v. Pittsburgh Plate Glass Co., 147 Minn. 339, 180 N. W. 108.

(3) Park v. Duluth, 134 Minn. 296, 159 N. W. 627. See 34 Harv. L. Rev. 542.

(8) State v. Minnesota Tax Commission, 137 Minn. 37, 162 N. W. 686.

9114a. In rem or in personam—Real estate taxes are in rem against the land and not against the owner, while personal taxes are in personam against the owner and not against the property. See §§ 9263, 9281.

9115. Scope of taxing power—The power of the legislature to tax is plenary. It is not dependent on any constitutional grant. The power to tax inheres in the state as an attribute of sovereignty, and it is without limit except as restricted by the constitution. Park v. Duluth, 134 Minn. 296, 159 N. W. 627.

The legislature may impose a wheelage tax upon vehicles and provide that the proceeds shall be used for the maintenance and repair of highways Park v. Duluth, 134 Minn. 296, 159 N. W. 627.

The taxing power, when acting within its legitimate sphere, is one which knows no stopping place until it has accomplished the purpose for which it exists, namely, the actual enforcement and collection from every lawful object of taxation of its proportionate share of the public burdens; and, if prevented by any obstacles, it may return again and again, until, the way being clear, the tax is collected. State v. Security Nat. Bank, 143 Minn. 408, 173 N. W. 885. See § 9221.

The taxing power is not conferred by the constitution but merely limited thereby. It is an inherent power of the state. State v. Wells Fargo Co., 146 Minn. 444, 179 N. W. 221.

Jurisdiction to impose personal tax on one not domiciled but present within state. 34 Harv. L. Rev. 542.

(10) Park v. Duluth, 134 Minn. 296, 159 N. W. 627; State v. Probate Court, 145 Minn. 155, 176 N. W. 493.

9118. Delegation of taxing power—(17, 19) Park v. Duluth, 134 Minn. 296, 159 N. W. 627.

9119. Taxes must be for public purposes—The soldiers' bonus act of 1919 involves taxation for a public purpose and is valid. Gustafson v. Rhinow, 144 Minn. 415, 175 N. W. 903.

Courts, as a rule, have attempted no judicial definition of a "public" as distinguished from a private purpose, but have left each case to be determined by its own peculiar circumstances. Questions of public policy are for the legislature. Green v. Frazier, 253 U. S. 233.

Taxation to carry out the economic policy of North Dakota in establishing a state bank and various public utilities and business enterprises has been sustained as for a public purpose. Green v. Frazier, 253 U. S. 233.

What constitutes a public purpose. 34 Harv. L. Rev. 207.

(20, 22) Gustafson v. Rhinow, 144 Minn. 415, 175 N. W. 903.

9120. Federal property and agencies not taxable by state—The state cannot tax a national bank upon its capital but may tax its shareholders

upon their stock in the bank, and may require the bank to apply any earnings distributable to its shareholders in payment of such tax. Sections 2018 and 2021, G. S. 1913, impose a tax upon the stock of the shareholders and not upon the property of the bank. State v. Security Nat. Bank, 139 Minn. 162, 165 N. W. 1067.

The mere fact that property is used, among others, by the United States as an instrument for effecting its purpose, does not relieve it of taxation. Choctow, O. & G. R. Co. v. Mackey, 255 U. S. —.

(33) State v. Security Nat. Bank, 139 Minn. 162, 165 N. W. 1067. See § 9207.

9121. Interstate commerce not taxable by state—A state may tax property engaged in interstate commerce but it cannot tax interstate commerce itself. Property engaged in interstate commerce is subject to the same measure of state taxing authority as any other property, so long as it is taxed in the good-faith exercise of the taxing power. It is not an easy matter to draw the line between taxes that burden interstate commerce and those which simply impose a valid property tax. State v. Wells Fargo Co., 146 Minn. 444, 179 N. W. 221.

9125. All property not exempted taxable—The laws of this state impose taxation upon all unexempt personal property in the state. The state may tax all property having a situs within its territorial jurisdiction. State v. Pittsburgh Plate Glass Co., 147 Minn. 339, 180 N. W. 108.

(58) State v. Minnesota Tax Commission, 136 Minn. 260, 161 N. W. 516.

9126. What is real property for purposes of taxation—Unaccrued rents are real property for purposes of taxation. State v. Royal Mineral Assn., 132 Minn. 232, 156 N. W. 128.

9128. What is personal property for purposes of taxation—Membership in a chamber of commerce is assessable as personal property. A judgment sustaining an assessment of such property as moneys and credits under G. S. 1913, § 2316, is not a bar to its assessment for a subsequent year as personal property under the general statute. State v. Minnesota Tax Commission, 136 Minn. 260, 161 N. W. 516.

The interest of a vendor under an executory contract for the sale of realty is taxable as personal property. State v. Probate Court, 145 Minn. 155, 176 N. W. 493.

9129. What are credits—Credits include every claim and demand for money and every sum of money receivable at stated periods, due or to become due. Credits are, however, personal property and they include only such demands as are classed as personalty. Unaccrued rents to issue out of land are not credits. Rents due in July, for the period from April 1 to July 1, are not taxable as credits May 1. State v. Royal Mineral Assn., 132 Minn. 232, 156 N. W. 128.

(77) State v. Probate Court, 145 Minn. 155, 176 N. W. 493.

CONSTITUTIONAL REQUIREMENT OF EQUALITY AND UNIFORMITY

9132. Substantial equality sufficient—(82) See Park v. Duluth, 134 Minn. 296, 159 N. W. 627.

9140. Uniformity—Classification—The power of the legislature in classifying subjects for taxation is, under present constitutional provisions, exceedingly broad. State v. Royal Mineral Assn., 132 Minn. 232, 156 N. W. 128.

Classification is primarily a legislative question. Exact equality is not possible. If the classification is made on a reasonable basis, and is applicable without discrimination to all similarly situated, it is valid. Park v. Duluth, 134 Minn. 296, 159 N. W. 627.

A wheelage tax on vehicles has been held not to violate the constitutional requirement of uniformity. Park v. Duluth, 134 Minn. 296, 159 N. W. 627.

The legislature has a wide discretion in classifying property for the purposes of taxation, but the classification must be based on differences which furnish a reasonable ground for making a distinction between the different classes. The rule of uniformity established by the constitution requires that all similarly situated shall be treated alike. Ordinarily the amount of compensation paid by different companies to any one officer furnishes no proper basis for classifying such companies for the purposes of taxation. Town and farmers' mutual insurance companies are exempt from the tax on premiums. The amendments made by chapter 184, Laws 1915, to section 1625, Rev. Laws 1905, being section 3302, G. S. 1913, violate the constitutional requirement that "taxes shall be uniform on the same class of subjects" and are void. State v. Minnesota Farmers Mut. Ins. Co., 145 Minn. 231, 176 N. W. 756.

Matters of classification of property for taxation are matters of state policy. The state may resort to unequal taxation so long as the inequality is not based upon arbitrary distinctions. State v. Wells Fargo Co., 146 Minn. 444, 179 N. W. 221; State v. Pullman Co., 146 Minn. 458, 179 N. W. 224.

(1) State v. Minnesota Farmers Mut. Ins. Co., 145 Minn. 231, 176 N. W. 756.

(2) State v. Wells Fargo Co., 146 Minn. 444, 179 N. W. 221.

9140a. Gross earnings tax—The system of gross earnings taxation as applied to transportation companies violates no provision of the state or federal constitution. A gross earnings tax is not required to be an exact equivalent of the ad valorem tax imposed on other property. State v. Wells Fargo Co., 146 Minn. 444, 179 N. W. 221; State v. Pullman Co., 146 Minn. 458, 179 N. W. 224.

CONSTITUTIONAL REQUIREMENT OF DUE PROCESS OF LAW

9145. In general—Notice—Personal service of notice, in the assessment and levy of taxes, is not essential to due process of law. But in judicial

proceedings notice before judgment is a fundamental right. A personal judgment in tax proceedings has all the elements of a judgment in personam, and personal notice is essential to jurisdiction to render it. State v. Security Nat. Bank, 143 Minn. 408, 173 N. W. 885.

The property owner is entitled to notice and a hearing before his property can be subjected to a tax. He is not entitled to a notice and a hearing at every stage of the tax proceeding, nor to notice that an enterprise is about to be taken which will result in taxation, nor to notice of the levy of a tax. Due process does not require all this. The principle running through all the cases is that a law does not infringe upon the constitutional provision under consideration if the property owner has an opportunity to question the validity or amount of the tax either before that amount is determined, or in subsequent proceedings for its enforcement. Whenever by law a tax is imposed upon property, and those laws provide for a mode of confirming or contesting it in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law. In re Delinquent Taxes, 147 Minn. 344, 180 N. W. 240. See L. R. A. 1916E, 5.

(52) See State v. Security Nat. Bank, 143 Minn. 408, 173 N. W. 885.

(53) In re Delinquent Taxes, 147 Minn. 344, 180 N. W. 240.

DOUBLE TAXATION

9147. What forms of double taxation forbidden—Where the domicil of the decedent is in one state and the situs of the property in another, both have power to impose an inheritance tax. State v. Probate Court, 145 Minn. 155, 176 N. W. 493.

9148. To be avoided if possible by construction—Under the present constitutional provision double taxation is not forbidden, but the policy of the law is still to avoid it when reasonably possible. State v. Minnesota Tax Commission, 136 Minn. 260, 161 N. W. 516.

(72) State v. Minnesota Tax Commission, 136 Minn. 260, 161 N. W. 516

EXEMPTIONS

9150. Construction—The tax exemption extended by section 11 of chapter 43, Laws 1854. to the Hamline University of Minnesota, which was created and established by that act, is not affected nor in any manner controlled by the provisions of section 1, limiting the quantum of income producing property the corporation may own and hold, and remains in full force and effect as to all property of the corporation, though its income may exceed the limit stated in that section of the act. State v. W. L. Harris Realty Co., 148 Minn. —, 180 N. W. 776.

9151. Special assessments—(76) State v. Board of Education, 133 Minn. 386, 158 N. W. 635.
See § 6877.

9151a. Public property—As a general rule tax and assessment laws apply only to private property and they do not apply to public property unless the intent to so apply them affirmatively appears. State v. Board of Education, 133 Minn. 386, 158 N. W. 635.

9152. Held exempt—(78, 86) State v. W. L. Harris Realty Co., 148 Minn. —, 180 N. W. 776.

SITUS OF PROPERTY FOR PURPOSES OF TAXATION

9155. In general—Membership in the Chamber of Commerce of Minneapolis held by a non-resident or by one in this state out of Minneapolis is assessable in Minneapolis. State v. Minnesota Tax Commission, 136 Minn. 260, 161 N. W. 516.

Stock, bonds and like securities owned by a corporation of this state, with general offices here, have a taxable situs here, though the evidences thereof are kept in another state. State v. Great Northern Ry. Co., 139 Minn. 469, 167 N. W. 297.

The notion that personal property follows the owner and that his domicil fixes the taxable situs of his intangible property is a fiction which yields to fact and to practical considerations of justice in taxation and the owner by the use to which he puts his property may give it a location elsewhere. The owner of stock in a foreign corporation is subject to taxation in the state of his residence if the state chooses to tax it. The fact of residence of the owner is not a negligible one in determining the place of taxation of intangibles. That is the natural place of taxation. State v. Northern Pacific Ry. Co., 139 Minn. 473, 167 N. W. 294.

Land in one state cannot be taxed in another either directly or indirectly by an inheritance tax on its transfer. State v. Probate Court, 145 Minn. 155, 176 N. W. 493.

A trust held to have a situs in this state for purposes of a succession tax. In re Thorne's Estate, 145 Minn. 412, 177 N. W. 638.

The rule has long since been settled that tangible personal property acquires a situs at the place where it is permanently located and that a state has jurisdiction to tax tangible personal property having a fixed situs within its limits although belonging to a non-resident of the state. That it may be so taxed results from the doctrine that taxation and protection are reciprocal and that all persons who receive and are entitled to protection may be called upon to render an equivalent. State v. Pittsburgh Plate Glass Co., 147 Minn. 339, 180 N. W. 108.

(98, 99) State v. Pittsburgh Plate Glass Co., 147 Minn. 339, 180 N. W. 108.

(98-3) 32 Harv. L. Rev. 587; 3 Minn. L. Rev. 217; 28 Yale L. Journal 525.

(1) State v. Pittsburgh Plate Glass Co., 147 Minn. 339, 180 N. W. 108.
(2) State v. Pittsburgh Plate Glass Co., 147 Minn. 339, 180 N. W. 108. See 34 Harv. L. Rev. 95.
(3) State v. Great Northern Ry. Co., 139 Minn. 469, 167 N. W. 297; State v. Northern Pacific Ry. Co., 139 Minn. 473, 167 N. W. 294; Petition of Standard Oil Co., 147 Minn. 14, 179 N. W. 482.
See § 9572a.

9156. Moneys and credits of non-residents—Certain credits of a foreign corporation arising out of sales to residents of this state, constituting interstate commerce, held not taxable here. State v. National Cash Register Co., 136 Minn. 460, 161 N. W. 1054.

Money and credits, while for some purposes following the person of the owner, may acquire a fixed situs elsewhere. Money and credits of an established branch of a foreign mercantile corporation have a situs and are taxable where the branch is located. State v. Pittsburgh Plate Glass Co., 147 Minn. 339, 180 N. W. 108.

Moneys and credits of a non-resident having a situs here are taxable here though they may also be taxed in the state of the owner. State v. Pittsburgh Plate Glass Co., 147 Minn. 339, 180 N. W. 108.

(5, 6) See State v. National Cash Register Co., 136 Minn. 460, 161 N. W. 1054.

9157. Property of non-residents stored here—The evidence sustains findings that defendant, a manufacturer of automobiles at Detroit, Mich., procured orders for sale of automobiles for future delivery in Minnesota and other Northwest states, that, on account of difficulties in obtaining railroad equipment, automobiles were shipped by defendant from Detroit to Minneapolis to fill these orders in advance of the delivery dates, and were stored in Minneapolis until delivery was due, and then reshipped to the purchasers. A number of such automobiles were in storage in Minneapolis on May 1, 1916. Property in transit from state to state is exempt from state taxation, but if it be stored for an indefinite time during transit it may be lawfully assessed by the state authorities. This property was not in transit. It was at rest for an indefinite time in Minneapolis and was properly taxed. State v. Maxwell Motor Sales Corp., 142 Minn. 226, 171 N. W. 566.

(8) State v. Maxwell Motor Sales Corp., 142 Minn. 226, 171 N. W. 566.

9159. Property in transit—Property in transit from state to state is exempt from state taxation, but if it is stored for an indefinite time during transit it may be lawfully assessed by the state authorities. State v. Maxwell Motor Sales Corp., 142 Minn. 226, 171 N. W. 566.

Pulp wood was loaded and shipped by rail from the northern forests of Minnesota during the winter season to ports within the state on the shore of Lake Superior, where it was stored in the rail carrier's yards until navigation over the lakes opened in the spring, then shipped to its final destination, which was Erie, Pa., as shown by the shipping bill. Held, that the first movement was a part of an interstate journey, that

the delay at the ports did not destroy the interstate feature, and that the property did not acquire a situs at the ports for the purpose of taxation. State v. Hammermill Paper Co., — Minn. —, 184 N. W. 182.

THE STATE'S LIEN FOR TAXES

9160. Purely statutory—(14) State v. Security Nat. Bank, 139 Minn. 162, 165 N. W. 1067.

9162. Duration—(19) Glaze v. Stryker, 135 Minn. 186, 160 N. W. 490.

PRESUMPTIONS IN AID OF TAX PROCEEDINGS

9170. In general—No presumptions are ordinarily indulged in favor of tax titles, except as expressly created by statute, and the burden is on the holder to establish every fact essential to the validity of his title. Johnson v. Murphy, 133 Minn. 456, 158 N. W. 701.

(39) Deaver v. Napier, 139 Minn. 219, 166 N. W. 187.

(40) Burbridge v. Warren, 139 Minn. 346, 166 N. W. 403.

9171. Facts that will be presumed—That the auditor performed his duties in making up delinquent lists. Burbridge v. Warren, 139 Minn. 346, 166 N. W. 403.

9172. Facts that will not be presumed—(59, 62) Deaver v. Napier, 139 Minn. 219, 166 N. W. 187.

CONSTRUCTION OF TAX LAWS

9173. In general—A doubt as to the meaning of a statute relating to taxes will generally be resolved in favor of the taxpayer. State v. Minnesota Tax Commission, 132 Minn. 93, 99, 155 N. W. 1061.

Tax laws are to be construed so as to avoid inequality of taxation when reasonably possible. State v. Minnesota Tax Commission, 135 Minn 205, 160 N. W. 498.

9175. De minimis—(75) Arnold v. Cook County, 134 Minn. 373, 159 N. W. 825.

9177. Practical construction—The rule of practical construction is not entitled to much weight against the state in determining the taxability of property. In re Thorne's Estate, 145 Minn. 412, 177 N. W. 638.

(78) State v. Royal Mineral Assn., 132 Minn. 232, 156 N. W. 128. See State v. Great Northern Ry. Co., 139 Minn. 469, 167 N. W. 297 (held that there had been no practical construction preventing the taxation of property not theretofore taxed).

APPORTIONMENT OF TAXES—TAX DISTRICTS

9181. A legislative function—(91) Hughes v. Farnsworth, 137 Minn. 295, 163 N. W. 525.

LISTING AND ASSESSMENT

9188. Definition and nature—Assessment and equalization of taxes is an administrative proceeding. State v. Koochiching Realty Co., 146 Minn. 87, 177 N. W. 940.

(9-14) Trask v. Skoog, 138 Minn. 229, 164 N. W. 914.

9193. Constitutional right to be heard—(25) See State v. Security Nat. Bank, 143 Minn. 408, 173 N. W. 885; In re Delinquent taxes, 147 Minn. 344, 180 N. W. 240.

9195. As of what date—Rents due in July, for the period from April 1 to July 1, are not taxable as credits May 1. State v. Royal Mineral Assn., 132 Minn. 232, 156 N. W. 128.

Where a national bank sold and transferred all its property and assets before May 1, but retained the proceeds thereof until May 15 and distributed them to its shareholders on that date, the stock of the shareholders represented their interest in such proceeds on May 1 and is taxable therefor. Defendant bank went out of business, and in May distributed all its property and assets to its shareholders. In the following October an assessment was made upon the stock of the shareholders, and pursuant thereto the tax in controversy was levied. As defendant had no funds of its shareholders in its possession at any time after the tax was levied, it cannot be required to pay such tax. State v. Security Nat. Bank, 139 Minn. 162, 165 N. W. 1067.

(28) State v. Security Nat. Bank, 139 Minn. 162, 165 N. W. 1067; State v. Maxwell Motor Sales Corp., 142 Minn. 226, 171 N. W. 566.

9195a. Separate assessment of real and personal property—Our statutes provide for the separate assessment of real and personal property. State v. Royal Mineral Assn., 132 Minn. 232, 156 N. W. 128.

9197. Place of listing personal property—General rule—Membership in the Chamber of Commerce of Minneapolis held by a non-resident or by one in this state out of Minneapolis is assessable in Minneapolis. State v. Minnesota Tax Commission, 136 Minn. 260, 161 N. W. 516.

9199. Place of listing personal property of merchant or manufacturer—Under the facts stated in the opinion moneys and credits arising from, or pertaining to, the business of selling stations of the relator Standard Oil Company have a taxable situs at the location of such stations, where a business is localized, and not at the main station or office having jurisdiction over the local stations. Petition of Standard Oil Co., 147 Minn. 14, 179 N. W 482.

(45) Petition of Standard Oil Co., 147 Minn. 14, 179 N. W. 482 (G. S. 1913, § 2000, not repealed by Laws 1911, c. 285).

9203a. Moneys and credits—How listed and assessed—Credits must be listed as personalty but upon a separate blank. State v. Royal Mineral Assn., 132 Minn. 232, 156 N. W. 128.

Unaccrued rents are not to be listed as credits. State v. Royal Mineral Assn., 132 Minn. 232, 156 N. W. 128.

A claim for compensation as a broker in the sale of land is a credit which is required to be listed by G. S. 1913, § 2316, et seq. A failure to list a claim is evidence against its ownership or validity. Thaden v. Bagan, 139 Minn. 46, 165 N. W. 864.

See § 9129.

9205. Verified statement of companies and corporations generally—The statute provides for the taxation of stock in foreign corporations owned by residents but not for the taxation of stock in domestic corporations owned by residents. In the case of a stockholder in a domestic corporation, he is taxed in this state on his interest in the corporation when the corporation pays the tax on its property. State v. Minnesota Tax Commission, 136 Minn. 260, 161 N. W. 516.

Membership in a chamber of commerce is assessable in the same manner as stock in a corporation. A member stands in the relation of a stockholder. State v. Minnesota Tax Commission, 136 Minn. 260, 161 N. W. 516.

(86) See State v. Minnesota Tax Commission, 136 Minn. 260, 161 N. W. 516; State v. Wells Fargo Co., 146 Minn. 444, 179 N. W. 221.

9207. Verified statement of banks with shares—The tax imposed by section 2017, G. S. 1913, upon the capital stock of banking corporations, is a tax against the shares of stock, to be paid by the bank from earnings or dividends falling due to the stockholders. It is not a tax against the bank, and payment thereof cannot be enforced against its assets, where the bank is insolvent and in the hands of a receiver in insolvency proceedings. State v. Barnesville Nat. Bank, 134 Minn. 315, 159 N. W. 754.

The statute provides that the stock of every bank shall be assessed in the name of the bank; that the proper officer shall list all shares of the bank for assessment; that, "to aid the assessor in determining the value of such shares of stock, the accounting officer of every such bank * * * shall furnish to the assessor a sworn statement showing the amount and number of shares of the capital stock, the amount of its surplus or reserve fund and amount of its legally authorized investments in real estate"; that "the assessor shall deduct the amount of investments in real estate from the aggregate amount of such capital and surplus fund, and the remainder shall be taken as a basis for the valuation of such shares in the hands of the stockholders"; and that to secure the payment of taxes upon bank stock every bank shall, "before declaring any dividend, deduct from the annual earnings of the bank, such amount as may be necessary to pay any taxes levied upon the shares of the stock, and such bank * * * shall pay the taxes, and shall be authorized to charge the amount of such taxes paid to the expense account of such bank." G. S. 1913, §§ 2018, 2021. State v. Security Nat. Bank, 139 Minn. 162, 165 N. W. 1067.

On a former hearing it was held that a national bank cannot, under our statute, be required to pay an assessment levied upon its stock, unless it

has in its hands earnings, or, at least, assets of some sort, belonging to the stockholders. It was further held that the stock involved in this case was subject to taxation for the year 1915. This decision is followed. The tax in such case is not against the bank, nor in rem against the stock, but is a tax against the stockholder of the bank on account of the ownership of the stock, and the bank is constituted a tax collector to collect the tax from the stockholder. The tax is an absolute liability of the stockholder. Its vitality does not depend upon the contingency of the bank's having assets of the stockholder from which it may be required to make payment. Personal judgment may not be taken against the stockholder for the tax without personal service of citation upon him. Personal service of notice, in the assessment and the levy of taxes, is not essential to due process of law. But in judicial proceedings notice before judgment is a fundamental right. A personal judgment in tax proceedings has all the elements of a judgment in personam, and personal notice is essential to jurisdiction to render it. The bank is not the agent of the stockholder to receive service of such notice. The judgment rendered in this case against stockholders without personal notice or attachment of property was without jurisdiction, and is void. A tax on stock assessed in the name of the bank is a valid tax, and is binding as such upon the stockholders. The validity of any method of procedure for collection of the tax levied in this case, other than the method which was pursued, is not before the court for decision. State v. Security Nat. Bank, 143 Minn. 408, 173 N. W. 885.

(98) State v. Security Nat. Bank, 139 Minn. 162, 165 N. W. 1067. See § 9120.

9210. Assessment—Valuation at percentage of full value—Classification under G. S. 1913, § 1988—The mains, pipes and conduits used and employed by the Minneapolis Gaslight Company for the distribution of gas to its patrons, do not come within the expression of "tools, implements and machinery," as used in class 3 of chapter 483, Laws 1913 (G. S. 1913, § 1988), and are properly assessed for taxation under class 4 of that statute. State v. Minnesota Tax Commission, 132 Minn. 419, 157 N. W. 638.

The expression, "all unplatted real estate," as employed in chapter 483, Gen. Laws 1913 (G. S. 1913, § 1988), refers to and includes land which is adapted to and used for rural or agricultural purposes, and not to land within the limits of a city or village, though not a part of the platted portion thereof, which is used exclusively for urban purposes. A small tract of land once within the plat of a subdivision of Minneapolis, but which was taken therefrom by a vacation of a part of the plat, and which is used exclusively for urban purposes, held properly taxed at the rate prescribed by said statute for platted real estate. State v. Minnesota Tax Commission, 135 Minn. 205, 160 N. W. 498.

The land involved in this proceeding, though within the boundaries of the city of St. Paul, but in the outskirts thereof and unplatted, held assessable for taxation under G. S. 1913, § 1988, at 33⅓ per cent. of its

true value. State v. Tax Commission, 135 Minn. 205, 160 N. W. 498, limited. In re Delinquent Taxes, — Minn. —, 183 N. W. 671.

The assessable value of a membership in a chamber of commerce is found by apportioning the value of the memberships in excess of the value of the tangible property of the chamber already assessed equally among the membership, and taking 40 per cent. thereof. State v. Minnesota Tax Commission, 136 Minn. 260, 161 N. W. 516.

The price at which defendant sold automobiles held their value for purposes of taxation. State v. Maxwell Motor Sales Corp., 142 Minn. 226, 171 N. W. 566.

(4) State v. Maxwell Motor Sales Corp., 142 Minn. 226, 171 N. W. 566.

9211. **Auditor furnishes assessor with books**—(11) Trask v. Skoag, 138 Minn. 229, 164 N. W. 914.

9213. **Assessment of real property by assessor—When made**—The assessor assesses or values real estate for the purposes of taxation only in even-numbered years, except that in odd-numbered years improvements made since the previous assessment and real estate which since then has ceased to be exempt are assessed and returned by the assessor with the assessment of the personal property. In even-numbered years the assessor shall also make a separate list of real estate exempt from taxation and value the same. Sections 1979, 1989, and 1990, G. S. 1913. The books upon which the assessor enters his assessments or valuations are prepared and furnished by the auditor. When the assessor has completed his work, he returns them with his certificate to the auditor, as provided in section 2029, G. S. 1913. Trask v. Skoog, 138 Minn. 229, 164 N. W. 914.

9219a. **Disclosure of tax lists**—The statute forbids the disclosure of tax lists with certain specified exceptions. The statute does not forbid the use of the lists to prove that a claim made by a party to an action was not listed for taxation as a credit. Thaden v. Bagan, 139 Minn. 46, 165 N. W. 864.

ASSESSMENT OF OMITTED PROPERTY

9221. **Liability for taxes unaffected by omission**—(62) State v. Security Nat. Bank, 143 Minn. 408, 173 N. W. 885.

EQUALIZATION OF ASSESSMENTS

9232. **In general**—To what extent, if any, members of equalization boards may testify as to their motives, intentions, or reasons, is an open question. See In re School Dist. No. 58, 143 Minn. 169, 173 N. W. 850.

The equalization of taxes is an administrative proceeding. State v. Koochiching Realty Co., 146 Minn. 87, 177 N. W. 940.

9235. **State tax commission**—The action of the state tax commission in refusing to reduce an alleged excessive valuation of real estate for purposes of taxation is not reviewable by certiorari as the owner has an

adequate remedy on application for judgment under G. S. 1913, § 2108. State v. Minnesota Tax Commission, 135 Minn. 282, 160 N. W. 665.

The state tax commission, after a hearing on the application of the owners of mines situated in the city of Ely, materially reduced the valuation for taxation purposes of the unmined ore contained in the mines and the ore in stock piles. The city brought certiorari to review this action of the commission. Quaere, whether the city has such an interest in the matter as entitles it to have the action of the commission reviewed on certiorari? Assuming that the city had the right to have the action so reviewed, it is held: The state tax commission has the power under G. S. 1913, § 2344, subd. 5, to reduce the assessed valuation of real or personal property of any individual or corporation below that fixed by the city assessor or county board and without the approval of the city or county taxing authorities. The evidence sustains the order of the commission reducing the assessed valuations of the property in question, within the rules governing this court in reviewing on certiorari the action of the commission. The refusal of the commission to order the mine owners to produce their books showing the cost of mining, and its refusal to compel witnesses for the owners to answer questions on this subject, present no grounds for reversal. State v. Minnesota Tax Commission, 137 Minn. 20, 162 N. W. 675.

Under G. S. 1913, § 1978, the commission has power to grant reduction or abatement "as it may deem just and equitable." There is no limit as to the time or the stage of the proceedings at which such application for abatement or reduction shall be made. The power to abate or reduce is not confined to cases where the tax or assessment was unlawfully levied. It is a manifest purpose of the provision to give to the tax commission the right to abate or reduce a tax or assessment in cases where no right to such relief theretofore existed, and to give relief where taxing officers and the courts could not afford it under rules of law then existing. The limitation upon the power of the commission is that it shall only grant such abatement or reduction as it may deem just and equitable. We do not think this statute confers upon the commission arbitrary or unlimited power. The statute does confer discretionary power to act in cases where there is a fair showing that justice and equity call for the exercise of discretion. State v. Minnesota Tax Commission, 137 Minn. 37, 162 N. W. 686.

The commission has power on a proper showing to abate an assessment of benefits levied in proceedings to construct a county ditch. Such an assessment is an assessment levied by a municipality for local improvements. Such abatement or reduction may be made after the ditch is established and the assessment confirmed. State v. Minnesota Tax Commission, 137 Minn. 37, 162 N. W. 686.

The commission has no power to abate any part of the percentage of gross earnings tax fixed by statute. State v. Wells Fargo Co., 146 Minn. 444, 179 N. W. 221.

LEVY AND EXTENSION OF TAXES

9236. Definition of levy—(98) State v. Security Nat. Bank, 139 Minn. 162, 165 N. W. 1067.

COLLECTION OF TAXES BY COUNTY TREASURER

9244. County treasurer collector of taxes—The collection of general taxes is not a function of the city or of city officers. Under our tax system, county officers are charged with that duty. Thwing v. International Falls, 148 Minn. —, 180 N. W. 1017.

PAYMENT OF TAXES

9252. As a defence—A judgment in a proceeding to enforce delinquent taxes on real estate is void where it is made to appear that, after the tax upon a particular tract of land therein described became delinquent and before the delinquent list was published, it was paid by one who had purchased such tract at a delinquent tax sale for the preceding year's tax, and from which sale there had been no redemption. State v. Erickson, 148 Minn. —, 180 N. W. 544.

9253. Whose duty to pay—Banks are required to pay taxes on the shares of their stock. State v. Barnesville Nat. Bank, 134 Minn. 315, 159 N. W. 754. See § 9207.

(78) 12 A. L. R. 411 (as between vendor and vendee).

(81) See State v. Eberhard, 90 Minn. 120, 95 N. W. 1115.

(85) See State v. Barnesville Nat. Bank, 134 Minn. 315, 159 N. W. 754.

9259. Receipt for payment—The recital in a tax receipt of the treasurer that the property was assessed in the name of a particular person is not evidence thereof. Deaver v. Napier, 139 Minn. 219, 166 N. W. 187.

COLLECTION OF DELINQUENT PERSONAL PROPERTY TAXES

9262. When delinquent—(5, 6) State v. Barnesville Nat. Bank, 134 Minn. 315, 159 N. W. 754.

9263. Proceedings in personam—(7, 8) State v. Security Nat. Bank, 143 Minn. 408, 173 N. W. 885.

9266a. List filed prima facie evidence—Burden of proof—By section 2077, G. S. 1913, the delinquent tax list filed with the clerk of the district court is prima facie evidence that there has been a compliance with all the provisions of law in relation to the assessment and levy of the taxes shown by the list. The burden of proof is on the taxpayer to show the invalidity of the tax. State v. Minnesota & Ontario Paper Co., 147 Minn. 369, 180 N. W. 548. See § 9270.

9267a. Findings—The assessed valuation of certain automobiles held not excessive. State v. Maxwell Motor Sales Corp., 142 Minn. 226, 171 N. W. 566.

In a proceeding to enforce payment of delinquent taxes on personal property the court found that the assessed value was the true value of the property, that the assessment was based on values shown by a list returned to the assessor by an authorized agent of the taxpayer, and that timely application had not been made to the local boards of equalization or to the tax commission for a review and correction of the assessment. Because of the two last-mentioned facts, the court concluded that the taxpayer was estopped from questioning the amount of the assessment. Held that, whether the conclusion was right or wrong, the specific finding of the value of the property remained unaffected. State v. Minnesota & Ontario Paper Co., 147 Minn. 369, 180 N. W. 548.

In a proceeding by the state to enforce payment of delinquent taxes on personalty, evidence held to sustain the court's finding that on May 1, 1918, the property was of the true value of $964,150. State v. International Lumber Co., 147 Minn. 467, 180 N. W. 551.

9270. Citation—Burden of proof—(21) State v. Minnesota & Ontario Power Co., 147 Minn. 369, 180 N. W. 548.

9271. Admissible defences—(29) State v. Maxwell Motor Sales Corp., 142 Minn. 226, 171 N. W. 566.

(30) State v. Minnesota & Ontario Paper Co., 147 Minn. 369, 180 N. W. 548. See State v. Koochiching Realty Co., 146 Minn. 87, 177 N. W. 940.

DELINQUENCY OF REAL ESTATE TAXES

9276. What constitutes delinquency—(45) Burbridge v. Warren, 139 Minn. 346, 166 N. W. 403.

9278. When real estate taxes become delinquent—(47) Burbridge v. Warren, 139 Minn. 346, 166 N. W. 403.

9279. Penalties for non-payment—If an owner successfully asserts an objection to a tax on application for judgment he is not liable for penalties or interest in suffering it to become delinquent. State v. Board of Public Works, 134 Minn. 204, 158 N. W. 977.

COLLECTION OF DELINQUENT REAL ESTATE TAXES

9281. A proceeding in rem—(56) State v. Board of Education, 133 Minn. 386, 158 N. W. 635; State v. Security Nat. Bank, 143 Minn. 408, 173 N. W. 885. See § 6880.

9282. Constitutional right to notice—Constructive notice—(59) In re Delinquent Taxes, 147 Minn. 344, 180 N. W. 240.

FILING THE DELINQUENT LIST

9307. Effect of as commencement of action—(61) State v. Board of Public Works, 134 Minn. 204, 158 N. W. 977; In re Delinquent Taxes, 147 Minn. 344, 180 N. W. 240.

(62) State v. Board of Public Works, 134 Minn. 204, 158 N. W. 977.

DESIGNATION OF NEWSPAPER FOR PUBLICATION OF NOTICE AND LIST

9312. Jurisdictional—(80) Fry v. Morrison County, 136 Minn. 225, 161 N. W. 511.

ANSWER

9330. Who may appear and answer—Where taxes for local improvements are included in the general list the property owner may appear and answer. State v. Board of Public Works, 134 Minn. 204, 158 N. W. 977; In re Delinquent Taxes, 147 Minn. 344, 180 N. W. 240.

9334. Defences—In general—The objection that part of a tract is exempt and the assessment thereof invalid may be raised by answer. State v. Chicago etc. Ry. Co., 141 Minn. 472, 170 N. W. 613.

Where special taxes or assessments are included any objection to their validity may be raised. State v. Board of Public Works, 134 Minn. 204, 158 N. W. 977; In re Delinquent Taxes, 147 Minn. 344, 180 N. W. 204.

(45–47) State v. Board of Public Works, 134 Minn. 204, 158 N. W. 977.

9336. Defence of unfair, unequal, partial or excessive assessment—The objection of excessive valuation may be made though the state tax commission has passed on the valuation. State v. Minnesota Tax Commission, 135 Minn. 282, 160 N. W. 665.

The defence of overvaluation may be interposed without a prior application to the board of equalization. State v. Koochiching Realty Co., 146 Minn. 87, 177 N. W. 940.

The overvaluation must be made to appear very clearly. State v. Koochiching Realty Co., 146 Minn. 87, 177 N. W. 940.

The provision authorizing the defence of overvaluation is not unconstitutional as a delegation of legislative or administrative duties to the courts, or because it does not apply to personal property assessments. State v. Koochiching Realty Co., 146 Minn. 87, 177 N. W. 940.

(50) In re Delinquent Taxes, 145 Minn. 117, 176 N. W. 183.

(51) State v. Minnesota Tax Commission, 135 Minn. 282, 160 N. W. 665; State v. South St. Paul Syndicate, 140 Minn. 359, 168 N. W. 95 (review of findings on appeal); In re Delinquent Taxes, 145 Minn. 117, 176 N. W. 183; State v. Koochiching Realty Co., 146 Minn. 87, 177 N. W. 940.

(55, 57) See State v. Koochiching Realty Co., 146 Minn. 87, 177 N. W. 940.

9337. When prejudice must be shown—(59) State v. Board of Public Works, 134 Minn. 204, 158 N. W. 977.

9338. Admissible defences—It may be objected to a special assessment that certain items of expense were improperly included. State v. Board of Public Works, 134 Minn. 204, 158 N. W. 977.

(70) State v. Chicago etc. Ry. Co., 141 Minn. 472, 170 N. W. 613 (partially exempt).

(73, 74) In re Delinquent Taxes, 145 Minn. 117, 176 N. W. 183.

9339. Inadmissible defences—It cannot be objected by answer that the county auditor did not send to the state auditor a list of unredeemed lands as required by G. S. 1913, § 2127. In re Delinquent Taxes, 145 Minn. 117, 176 N. W. 183.

JUDGMENT

9360. Collateral attack—Grounds for—(54) State v. Erickson, 147 Minn. 453, 180 N. W. 544.

(55) State v. Chicago etc. Ry. Co., 141 Minn. 472, 170 N. W. 613 (partially exempt).

9361. Collateral attack—Defects not grounds for—A tax judgment cannot be collaterally attacked on the ground that the county auditor did not send to the state auditor a list of unredeemed lands as required by G. S. 1913, § 2127. In re Delinquent Taxes, 145 Minn. 117, 176 N. W. 183.

9362. Opening default judgment—The trial court did not err in denying the motion of a landowner to vacate a tax judgment and for leave to answer made something over five years after its entry when the landowner long before its motion had knowledge or notice of facts which if pursued would have disclosed the defence which it claimed. In re Delinquent Taxes, 145 Minn. 117, 176 N. W. 183.

(88, 89) In re Delinquent Taxes, 145 Minn. 117, 176 N. W. 183.

SALE

9370a. Entries by auditor as to sale—G. S. 1913, § 2122, requires the auditor to make certain entries respecting the sale in the copy judgment book. A failure to make any entry required by the statute is fatal. A failure to enter the date of sale is not fatal as the statute does not require it. Gabro Land Co. v. Michaud, 139 Minn. 22, 165 N. W. 480. See Digest, §§ 9373, 9380.

9373. Bidding in for state—Entries in copy judgment book—(39) Gabro Land Co. v. Michaud, 139 Minn. 22, 165 N. W. 480.

9374. Who may purchase—One in adverse possession of land may purchase a tax title thereon without affecting his rights acquired by adverse possession. Rupley v. Fraser, 132 Minn. 311, 156 N. W. 350.

Effect of purchase by mortgagee. L. R. A. 1917D, 522.

CERTIFICATE OF SALE

9380. Contents—(76) Gabro Land Co. v. Michaud, 139 Minn. 22, 165 N. W. 480.

9386. Indorsement before recording—(88) Deaver v. Napier, 139 Minn. 219, 166 N. W. 187.

9386a. Recording—Time—The seven-year period within which a certificate must be recorded begins to run from the date of the tax judgment sale, that is, the annual tax judgment sale, and not the issuance of a state assignment certificate. Northern Counties Land Co. v. Excelsior Land etc. Co., 146 Minn. 207, 178 N. W. 497. See § 9420a.

STATE ASSIGNMENT CERTIFICATE

9388. An official deed—Effect—The certificate does not have the conclusive effect of a deed of the Governor conveying forfeited land and executed after the time for redemption by the owner has expired. Arnold v. Cook County, 134 Minn. 373, 159 N. W. 825.

A state assignment certificate for land bid in by the state at a tax sale, wherein the assignees are named Goodrich and Oliphant, is sufficient to transfer to them the interest and tax lien of the state. Glaze v. Stryker, 135 Minn. 186, 160 N. W. 490.

9391. Purchaser must pay subsequent delinquent taxes—If the purchaser pays materially less than the amount required by the statute the certificate is void. Possibly a trifling error in computing the amount may be disregarded under the de minimis doctrine. Arnold v. Cook County, 134 Minn. 373, 159 N. W. 825.

The purchaser is not bound to pay taxes on the land arising subsequent to his purchase, but he may do so. If he pays subsequent taxes he is entitled to a refundment if they are invalid, at least if he did not know of their invalidity when paying them. Fry v. Morrison County, 136 Minn. 225, 161 N. W. 511.

(1) Arnold v. Cook County, 134 Minn. 373, 159 N. W. 825.

9392. Authority of auditor limited by statute—The authority of the auditor is strictly limited by the statute. Arnold v. Cook County, 134 Minn. 373, 159 N. W. 825.

9393a. Recording—Time—The seven-year period within which a certificate must be recorded begins to run from the date of the tax judgment sale and not from the date of the issuance of the certificate. Northern Counties Land Co. v. Excelsior Land etc. Co., 146 Minn. 207, 178 N. W. 479. See § 9420a.

RIGHTS OF CERTIFICATE HOLDER

9395. Before expiration of redemption—He has no more than a lien. The owner still has the title. Rupley v. Fraser, 132 Minn. 311, 156 N. W. 350.

(15) Northern Counties Land Co. v. Excelsior Land etc. Co., 146 Minn. 207, 178 N. W. 497.

(17) Glaze v. Stryker, 135 Minn. 186, 160 N. W. 490.

9398. Lien for purchase money and subsequent taxes—(39) See Nichols-Frisell Co. v. Crocker, 133 Minn. 153, 157 N. W. 1072.

CERTIFICATE AS EVIDENCE

9401. Of title—Preliminary proof necessary—To make out title the burden rests on the certificate holder to prove the facts essential to a valid notice of expiration of redemption by evidence dehors the notice. Lohn v. Luck Land Co., 129 Minn. 367, 152 N. W. 764; Lovine v. Goodridge-Call Lumber Co., 130 Minn. 202, 153 N. W. 517; Johnson v. Murphy, 133 Minn. 456, 158 N. W. 701.

There is no presumption that lands assessed in 1902 and 1904 in the name of a particular person are so assessed in 1908 when notice of expiration is issued; nor does the fact that the property was assessed in the name of the record owner in 1902 and 1904, coupled with the fact that there was no change in record ownership until after 1908, afford a presumption that the assessment was the same in 1908; nor does the presumption that public officers perform their duties dispense with proof that the property was assessed in the name of the person to whom the auditor directed the notice; nor is the recital in tax receipts of the treasurer that the property was assessed in the name of a particular person proof of the fact. Deaver v. Napier, 139 Minn. 219, 166 N. W. 187.

(49-52) Deaver v. Napier, 139 Minn. 219, 166 N. W. 187.

(52) Lohn v. Luck Land Co., 129 Minn. 367, 152 N. W. 764; Johnson v. Murphy, 133 Minn. 456, 158 N. W. 701.

See § 9475; Hasey v. Dodge, 131 Minn. 468, 155 N. W. 640.

9402. Of regularity—The prima facie effect as evidence given to tax certificates by G. S. 1913, § 2132, of title in fee in the grantee after the time for redemption has expired, does not prove the giving of the notice of expiration. Deaver v. Napier, 139 Minn. 219, 166 N. W. 187.

REDEMPTION FROM SALE

9406. Governed by law at time of sale—A vested right—(65, 66) Northern, Counties Land Co. v. Excelsior Land etc. Co., 146 Minn. 207, 178 N. W. 497.

9409a. Effect—A redemption merely annuls the sale. Sunderman Invest. Co. v. Craighead, 143 Minn. 286, 173 N. W. 653.

9410. Who may redeem—The statute (G. S. 1913 § 2137) gives the right to redeem from a tax sale to "any person claiming an interest" in the land; and any person who in good faith claims an interest therein which would be cut off by the tax title may protect such interest by redeeming from the sale. Defendant Craighead, having occupied the land

in question for more than twenty years, had a sufficient basis for his claim to entitle him to make the redemption in controversy although his fence had been removed several years before the redemption and he was not then in actual possession. Sunderman Invest. Co. v. Craighead, 143 Minn. 286, 173 N. W. 653.

Where a claimant redeems to prevent his claim from being cut off by the tax title, the court cannot annul the redemption unless it be shown that the claim is so devoid of merit as to warrant the conclusion that it was not made in good faith. Sunderman Invest. Co. v. Craighead, 143 Minn. 286, 173 N. W. 653.

(73) Sunderman Invest. Co. v. Craighead, 143 Minn. 286, 173 N. W. 653.

(76) See Sunderman Invest. Co. v. Craighead, 143 Minn. 286, 173 N. W. 653.

9419a. Non-redemption—Forfeiture to state—Though we use the term "forfeited to the state" upon expiration of three years from the date of sale, there is in fact no forfeiture of title. The owner still has title and a right to redeem until there has been a sale by the state to a private person and notice of expiration of redemption given and the time fixed by statute for redemption thereafter has expired. Until such time neither the state nor the purchaser therefrom has more than a lien. Rupley v. Fraser, 132 Minn. 311, 156 N. W. 350.

NOTICE OF EXPIRATION OF REDEMPTION

9420. History of legislation—Laws 1893, c. 58, incorporated into the 1894 statute as sections 1657 to 1661, was in force in the year 1900, and until the enactment of Laws 1902, c. 2. Under this law the time for redemption of land bid in by the state at a tax sale did not expire as to the state until 60 days after giving notice of expiration of the time. The 1902 law seems to have repealed this requirement, but by its terms it did not affect any rights accrued under prior laws. Laws 1905, c 270, § 1, again made it necessary to give notice of expiration as to tax sales made to the state. G. S. 1913, § 2149. Burbridge v. Warren, 139 Minn. 346, 166 N. W. 403.

The statute was amended by Laws 1915, c. 77. Northern Counties Land Co. v. Excelsior Land etc. Co., 146 Minn. 207, 178 N. W. 497.

9420a. Validity of statute—The provision of this statute requiring the holder of a tax certificate to give notice of expiration of redemption and to record his certificate within seven years does not impair the obligation of the certificate holder's contract with the state. Compliance with this law imposes the duty of paying subsequent taxes on the property but this does not impair his contract. It was within the power of the legislature to shorten the time within which an outstanding certificate should be recorded if a reasonable time was allowed for compliance before the statute became operative. Eleven months was a reasonable time. Northern Counties Land Co. v. Excelsior Land etc. Co., 146 Minn. 207, 178 N. W. 497.

9421. To what sales applicable—It is applicable to sales under Laws 1913, c. 543. Burbridge v. Warren, 139 Minn. 346, 166 N. W. 403.

State assignment certificates issued under Laws 1902, c. 2, § 29, now G. S. 1913, § 2126, were not included within the limitation of chapter 271, Laws 1905 (G. S. 1913, § 2150). Chaper 77, Laws 1915, applies to all state assignment certificates. Northern Counties Land Co. v. Excelsior Land etc. Co., 146 Minn. 207, 178 N. W. 497.

9422. Vested right to notice—(13) Burbridge v. Warren, 139 Minn. 346, 166 N. W. 403.

9424. Construction of statute—Mandatory—It is immaterial that the owner has actual notice of the sale and of the notice of redemption. He is entitled to a service of a notice as provided by statute. Glaze v. Stryker, 135 Minn. 186, 160 N. W. 490.

(17) Nichols-Frissell Co. v. Crocker, 133 Minn. 153, 157 N. W. 1072.

9425. When may be served—(20) Northern Counties Land Co. v. Excelsior Land etc. Co., 146 Minn. 207, 178 N. W. 497.

9426. Effect of statute in extending redemption period—(21) Glaze v. Stryker, 135 Minn. 186, 160 N. W. 490; Burbridge v. Warren, 139 Minn. 346, 166 N. W. 403.

9428. Misnomer—Illegibility—The name of the person to whom a notice was addressed held not so illegibly written as to render the notice a nullity. Johnson v. Murphy, 133 Minn. 456, 460, 158 N. W. 701.

9431. Statutory form—That part of R. L. 1905, § 956 (G. S. 1913, § 2148), which provides a form of notice of expiration of redemption from a tax sale, was superseded by Laws 1905, c. 270, so that a notice of expiration of redemption from any tax sale subsequent to 1902 must conform substantially to the form prescribed by Laws 1902, c. 2, § 47. A notice which does not state the rate of interest, or the date from which interest is to be computed is insufficient. Spear v. Noonan, 131 Minn. 332, 155 N. W. 107; Luck Land Co. v. Dixon, 132 Minn. 144, 155 N. W. 1038; Glaze v. Stryker, 135 Minn. 186, 169 N. W. 490.

9432. Statement of amount required to redeem—Where the amount stated in a notice of expiration of redemption includes delinquent taxes accruing subsequent to the sale in reference to which the notice is given, it is incumbent upon the holder of the tax certificate, and who presents the notice of expiration as evidence that the right of redemption has expired, affirmatively to prove by evidence outside of the recitals in the notice the amount of such delinquent taxes, and that he paid the same and the date of such payment. In the absence of such evidence the notice, though properly served and sufficient on its face, is ineffectual to terminate the right of redemption. Johnson v. Murphy, 133 Minn. 456, 158 N. W. 701.

Whether a notice is defective which does not contain recitals as to the payment of delinquent taxes or that the amount stated as necessary

to redeem includes such taxes is undetermined. Johnson v. Murphy, 133 Minn. 456, 158 N. W. 701.

9435. To whom directed and upon whom served—Land is assessed, within the meaning of section 2148, G. S. 1913, on the day the assessor certifies and returns to the auditor the assessment books wherein the assessor has valued the land for the purposes of taxation; and from and after that date a notice to terminate the right of redemption from a tax sale, issued before another assessment is made and returned by the assessor, must be directed to the person in whose name the land is assessed upon the books so certified and returned by him. Trask v. Skoog, 138 Minn. 229, 164 N. W. 914.

Under section 2148, G. S. 1913, requiring service of notice of the expiration of the time of redemption from a tax sale of real property, if there was occupancy which would require notice to be served, if the one in possession was the owner, then service of the notice on the occupant would be necessary, though the one in possession was there without title. Under the evidence it appears that the occupancy of the premises was such as to require service of notice of the expiration of the time of redemption from a tax sale upon the occupant. Pomroy v. Beattie, 139 Minn. 127, 165 N. W. 960.

(67) Deaver v. Napier, 139 Minn. 219, 166 N. W. 187.

(69, 72) Task v. Skoog, 138 Minn. 229, 164 N. W. 914.

(78) See St. Paul Swimming Pool v. First State Bank, — Minn. —, 182 N. W. 514.

9437. Publication—Under G. S. 1913, § 2148, when no one is in possession there must be a return of the sheriff to that effect as a prerequisite to a publication of the notice. Nichols-Frissell Co. v. Crocker, 133 Minn. 153, 157 N. W. 1072.

An affidavit of the publisher of the newspaper in which a notice was published stated that the paper was "generally circulated in Ramsey county and elsewhere." Held, that the affidavit did not show a legal publication. Burbridge v. Warren, 139 Minn. 346, 166 N. W. 403.

(82) See Nichols-Frissell Co. v. Crocker, 133 Minn. 153, 157 N. W. 1072.

SALES OF FORFEITED LANDS UNDER G. S. 1913, §§ 2127–2131

9479. In general—(91) See Arnold v. Cook County, 134 Minn. 373, 159 N. W. 825.

9479a. List of unredeemed lands to state auditor—A failure of the county auditor to send to the state auditor a list of unredeemed lands in June of each year, as provided by G. S. 1913, § 2127, does not prevent or defeat a sale. In re Delinquent Taxes, 145 Minn. 117, 176 N. W. 183.

REFUNDMENT UNDER G. S. 1894, § 1610

9488. History of legislation—See Fry v. Morrison County, 136 Minn. 225, 161 N. W. 511.

REFUNDMENT UNDER G. S. 1913, § 2157

9515a. When authorized—Under G. S. 1913, § 2157, Rev. Laws 1905, § 963, the holder of a tax certificate is entitled to a refundment of money paid for his certificate when the assessment of the tax is void, and he is entitled to a refundment of subsequent void taxes paid which the statute permits to be tacked to his certificate; he at the time of the payment being without knowledge of their invalidity, although such payment by the owner of the land assessed would be voluntary and not recoverable. Fry v. Morrison County, 136 Minn. 225, 161 N. W. 511.

9515b. Statute of limitations—G. S. 1913, § 2160, refers to refundments provided for in G. S. 1913, § 2157, and does not purport to place a limitation on the time after a tax sale within which a refundment may be had under the law providing for refundment after a tax sale void because of irregularity in the sale. State v. Chisago County, 115 Minn. 6, 131 N. W. 792.

RECOVERY OF TAXES PAID

9516. Taxes voluntarily paid can never be recovered—(69) Fry v. Morrison County, 136 Minn. 225, 161 N. W. 511.

9520. Payment held involuntary—A payment of subsequent taxes by one who takes a state assignment is not so far voluntary as to prevent a refundment in case of their invalidity, at least if he was ignorant of their invalidity when making payment. Fry v. Morrison County, 136 Minn. 225, 161 N. W. 511.

LIMITATION OF ACTIONS

9521. History of legislation—The revision of 1905 changed the time from which the period of limitations begins to run. In prior statutes the period ran from the date of the sale. Glaze v. Stryker, 135 Minn. 186, 160 N. W. 490.

9522. Actions to set aside sales—Three-year limitation—The statute does not commence to run until sixty days after a valid notice of the expiration of redemption has been served. Glaze v. Stryker, 135 Minn. 186, 160 N. W. 490.

The question whether a holder of a certificate may invoke the statute without pleading it has been raised but not determined. Glaze v. Stryker, 135 Minn. 186, 160 N. W. 490.

9526. No limitation on tax judgment lien—(19) Glaze v. Stryker, 135 Minn. 186, 160 N. W. 490.

9530a. Laches—Evidence held not to show laches on the part of an owner preventing him from asserting the invalidity of a tax title on his land. Glaze v. Stryker, 135 Minn. 186, 160 N. W. 490.

ACTIONS INVOLVING TAX TITLES—PLEADING AND PRACTICE

9531. Actions to test tax titles—Purchaser's lien determined—Under G. S. 1913, § 2168, a claimant whose title is invalid because of a defective notice of expiration of redemption is not entitled to a lien for the costs incurred upon such notice. Nichols-Frissell Co. v. Crocker, 133 Minn. 153, 157 N. W. 1072.

A statutory action to determine claims under G. S. 1913, § 8060, may be maintained to test a tax title. Deaver v. Napier, 139 Minn. 219, 166 N. W. 187.

(33) Glaze v. Stryker, 135 Minn. 186, 160 N. W. 490 (lien enforceable in statutory action to determine adverse claims); Deaver v. Napier, 139 Minn. 219, 166 N. W. 187.

9532. Pleading—(34) Glaze v. Stryker, 135 Minn. 186, 160 N W. 490 (whether statute of limitations may be invoked without pleading it).

9534. Plaintiff to pay taxes—Under G. S. 1913, § 8060, the fee owner may maintain an action to determine adverse claims against a tax title holder, without paying into court the amount paid at the tax sale and subsequent taxes, though if he had brought an action to cancel the tax certificate under G. S. 1913, §§ 2168–2170, he would be required to make such payment. Deaver v. Napier, 139 Minn. 219, 166 N. W. 187.

RAILROADS

9542. Historical policy of state—(57) State v. Wells Fargo Co., 146 Minn. 444, 179 N. W. 221.

9543. Thing taxed not changed by system—(58) State v. Northern Pacific Ry. Co., 139 Minn. 473, 167 N. W. 294.

9545. System applicable to all railroads—Defendant suburban railroad company operates certain lines of street and trolley railroad on the tracks of the Minneapolis Street Railway Company along the city streets to Thirty-First street and Hennepin avenue. From this point to the city limits, a distance of two miles, the lines are operated, not along the city streets, but on the private right of way of defendant. Held, that this right of way is not subject to an ad valorem tax; the lines not being a street railway after they leave the city streets, and defendant being subject to a tax on the gross earnings of the lines after they enter upon such private right of way. State v. Minneapolis etc. Ry. Co., 139 Minn. 405, 166 N. W. 770.

(61) See State v. Minneapolis etc. Ry. Co., 139 Minn. 405, 166 N. W. 770.

9547. Exemptions under charters prior to 1871 contracts—(64) See State v. Northern Pacific Ry. Co., 139 Minn. 473, 167 N. W. 294.

9552. Property not devoted to railroad uses subject to ad valorem tax—In a proceeding to enforce personal property taxes against the de-

fendant railway company it is held: That certain securities sought to be subjected to an ad valorem tax were owned and used for railway purposes within the gross earnings statute, that they paid a tax when the company paid its gross earnings tax, and that they were not subject to an ad valorem tax. That certain other securities, such as stocks and bonds or other indebtedness of corporations, though legitimately acquired and advantageously held by the company in connection with its railway operations, were not owned or used for railway purposes within the meaning of the gross earnings statute, and were subject to an ad valorem tax. The securities mentioned in the preceding paragraph have a taxable situs in Minnesota, under the laws of which the defendant is incorporated and in which it has its principal office and place of business and its principal operating and traffic offices, though it has a financial office in New York where it transacts some of its business and though it keeps the securities in New York. There has been no practical construction by the administrative officers of the state which prevents the taxation of such property now though not taxed heretofore. State v. Great Northern Ry. Co., 139 Minn. 469, 167 N. W. 297.

In a proceeding to enforce personal property taxes against the defendant railway company it is held: That certain corporate stocks and bonds and other corporate indebtedness were owned and used by the company for railway purposes within the meaning of the gross earnings statute; and that a tax upon such property is paid in the gross earnings tax and an ad valorem tax cannot be imposed. That certain stock in a foreign corporation, and an indebtedness owing by a foreign corporation, owned by the defendant, a foreign corporation, having its traffic and operative offices in Minnesota, such stock and indebtedness not being used in Minnesota nor arising from a transaction had there, and held in another state where the defendant has a financial and business office, under the facts detailed in the opinion had no taxable situs in Minnesota. State v. Northern Pacific Ry. Co., 139 Minn. 473, 167 N. W. 294. See State v. Chicago etc. Ry. Co., 139 Minn. 514, 167 N. W. 298.

Stocks and bonds of terminal companies used by defendant as part of its railway system are property owned and used for railway purposes within the meaning of the gross earnings statute. Bonds of a milling company were taken in payment of freight when the milling company was embarrassed financially. The finding of the trial court that they had not been held an unreasonable time or for such time as to separate them from the ordinary working capital of defendant company, is supported by the evidence. State v. Chicago etc. Ry. Co., 139 Minn. 514, 167 N. W. 298.

Certain land of a railroad company held not used for railroad purposes and therefor subject to an ad valorem tax and to an assessment for local improvements. State v. Chicago etc. Ry. Co., 140 Minn. 440, 168 N. W. 180.

The Great Northern Railway Company owned and occupied a large building in St. Paul for general office purposes. With another railway

company, it became the owner of a new building, to which it removed its general offices. On May 1, next following, limited use was being made of the old building for storage purposes, but shortly thereafter it was devoted to additional uses by different departments of the company. An express company, operating over the lines of the railway company, occupied one floor and part of another. There was no evidence that the railway company ever intended to abandon its use of the building for railway purposes. Held, that a finding that the property was at all times held and used in the operation and maintenance of a railway, and was exempt from general taxation, was sustained by the evidence. The occupancy of a portion of the building by the express company did not deprive it of its character as property owned and held in connection with and incident to the operation and maintenance of a railway. State v. Great Northern Ry. Co., 142 Minn. 173, 171 N. W. 317.

INSURANCE COMPANIES

9568. Percentage on premiums—Town and farmers' mutual insurance companies are exempt from the tax on premiums. The amendments made by Laws 1915, c. 184, to G. S. 1913, § 3302, violate the constitutional requirement that "taxes shall be uniform on the same class of subjects" and is void. State v. Minnesota Farmers Mut. Ins. Co., 145 Minn. 231, 176 N. W. 756.

EXPRESS COMPANIES

9570a. Gross earnings tax—The legislature has the power, since the constitutional amendment of 1906, as well as before, to impose this form of taxation upon express companies. A state may in good faith tax property engaged in interstate commerce. It may not tax the commerce itself. The statute of this state imposing a gross earnings tax of 8 per cent. upon express companies is a good-faith exercise of the taxing power. The state may tax defendant's entire property, tangible and intangible, as used within its limits, at its real value as part of a going concern. There is evidence that defendant's property had substantial intangible value. The market value of defendant's stock and bonds is not conclusive evidence of the value of its property used in the express business which is only part of its whole property. A recognized method of arriving at property value, including intangible value, is that of capitalizing net earnings. There is evidence that the value of defendant's property computed on this basis largely exceeded the value of its tangible assets, and the evidence sustains the finding of the court that the tax is a fair and reasonable exaction. State v. Wells Fargo Co., 146 Minn. 444, 179 N. W. 221. See State v. Pullman Co., 146 Minn. 458, 179 N. W. 224.

FREIGHT LINE COMPANIES

9570b. Gross earnings tax—See Cudahy Packing Co. v. Minnesota, 246 U. S. 450, affirming State v. Cudahy Packing Co., 129 Minn. 30, 151 N. W. 410.

SLEEPING CAR COMPANIES

9570c. Gross earnings tax—Chapter 480, Laws 1913, intends a property tax upon the property of sleeping car companies, taxable within the state, based on gross earnings, and it does not intend nor impose a tax upon interstate commerce. The tax imposed by the statute is not arbitrarily high and does not grossly exceed the amount of a property tax on the defendant's property, taxable in this state, assessed on an ad valorem basis. State v. Pullman Co., 146 Minn. 458, 179 N. W. 224.

INHERITANCE TAX

9572. Construction of statute—The statute is to be construed strictly against the state. State v. Probate Court, 137 Minn. 238, 163 N. W. 285.

The rule of practical construction is held to not control the court in this case, the statute being that when a decedent is a non-resident, the property within the jurisdiction of the state transferred by his will or by intestate law is subject to a tax, and the difficulty of its application being dependent chiefly on the facts of a given case. In re Thorne's Estate, 145 Minn. 412, 177 N. W. 638.

The state may impose a succession tax on the transfer of any property taxable under the general tax laws. The legislature intended to tax, under the inheritance tax law, everything which it had power to tax. State v. Probate Court, 145 Minn. 155, 176 N. W. 493.

9572a. Non-residents—Conflict of laws—Situs—Under the Minnesota Inheritance Tax Law, providing for a succession tax when a transfer is by will or intestate law of property within the jurisdiction of the state and decedent is a non-resident, bonds of a railroad company, incorporated under the laws of Minnesota, having its principal place of business and general offices in the state, payable in New York, owned by a resident of Illinois and in his possession there at the time of his death, the persons succeeding thereto being residents of Illinois, the railway being subject to jurisdiction in states other than Minnesota and it not being necessary to invoke the laws of Minnesota or resort to its courts, are not subject to a succession tax in Minnesota, distinguishing State v. Probate Court of St. Louis County, 128 Minn. 371, 150 N. W. 1094. Whether the fact that an obligation of a debtor resident in Minnesota is secured by a mortgage of real property situate there gives a situs rendering the obligation subject to a succession tax in Minnesota is not decided; but where the obligation is secured by a mortgage of real property of the corporate debtor, organized under the laws of the state as a railway cor-

poration a portion of which is in Minnesota and a larger portion in other states through which the railroad passes where it is subject to jurisdiction and where the debt can be enforced and the mortgage foreclosed and the whole mortgaged property sold, the fact that the mortgage covers property in Minnesota does not give it a taxable situs supporting a succession tax. State v. Chadwick, 133 Minn. 117, 157 N. W. 1076.

Capital stock represents the interest of its owner in the corporation and the rights of such owner rest on the laws of the state which created the corporation. And a transfer by will of the capital stock of a domestic corporation is subject to the inheritance tax of this state although the testator was a resident of another state and kept the certificates of stock in such state and the courts of that state could acquire jurisdiction of the corporation by service of process therein. The situation of a stockholder differs from that of a bondholder. State v. Chadwick, 133 Minn. 117, 157 N. W. 1076, 158 N. W. 637, distinguished. By exerting jurisdiction over the transfer from a non-resident decedent of the capital stock of a domestic corporation, the taxation statute severs the situs of such stock from the domicil of the decedent for the purposes of the statute. State v. Probate Court, 142 Minn. 415, 172 N. W. 318.

Shares of beneficial certificates in a trust, entitling the holder to dividends from the shares of mining corporations, domestic and foreign constituting the corpus of the trust and to ultimately share in the trust property, and which certificates have a market value, are subject to a succession tax when their non-resident owner dies, if the trust has a domicil or situs within the jurisdiction of this state. The trust here in question has such situs within this state from the fact that its principal place of administration is within this state where the corpus of the trust is kept and managed and where its president, secretary, and office force is located, notwithstanding, for convenience, some of its business is transacted in another state, where two of the four trustees reside. In re Thorne's Estate, 145 Minn. 412, 177 N. W. 638.

9572c. What interests or estates subject to—The statutory third of a surviving spouse is subject to the tax. This is true where a widow renounces a will and elects to take under the statute. State v. Probate Court, 137 Minn. 238, 163 N. W. 285.

The allowance to a surviving spouse pending administration and the personal property which a surviving spouse is entitled to select out of the estate are not subject to the tax. State v. Probate Court, 137 Minn. 238, 163 N. W. 285.

The expenditure by an executor, with the approval of the probate court, of a reasonable sum to provide a suitable tombstone upon the grave of the deceased, is an expense of administration of the estate, and the amount so expended is not subject to an inheritance tax under G. S. 1913, § 2271. State v. Probate Court, 138 Minn 107, 164 N. W. 365.

The interest of the vendor under an executory contract of sale is taxable as personal property, and where the vendor died a resident of this

state, such interest is subject to the inheritance tax of this state. State v. Probate Court, 145 Minn. 155, 176 N. W. 493.

The life estate of the widow in the homestead is not subject to the inheritance tax, and the value thereof is a proper deduction in the tax proceedings, even though she takes a fee title thereto by the last will and testament of her husband. In re Murphy's Estate, 146 Minn. 418, 178 N. W. 1003, 179 N. W. 728.

9573. Computation—Under Laws 1905, c. 288, prior to the amendments made by Laws 1911, c. 209, a tax upon an inheritance was computed upon the value at the time of the decedent's death of the right to receive the amount actually paid at the date of its payment; and it became due when the beneficiary entered into the possession and enjoyment of any part exceeding the statutory exemption. State v. Probate Court, 132 Minn. 104, 155 N. W. 1077.

The inheritance tax law requires the immediate payment of all inheritance taxes except in the single case of a tax measured by the value of an estate or interest not susceptible of present valuation. If the tax rate be uncertain the tax is to be paid at the highest rate to which the succession would in any event be subject. If subsequent events show that this rate was too high the excess tax is to be refunded. In this case the present value of the precedent estate has been ascertained, and the present value of the estate, which will pass to the remaindermen is the difference between the present value of the precedent estate and the present value of the entire estate, and the tax thereon is payable at this time. That the persons to whom the succession will ultimately pass may not yet be known, and that the amount which will pass to a particular person may not yet be known, is not made a ground for deferring the payment of the tax. State v. Probate Court, 136 Minn. 392, 162 N. W. 459.

The Minnesota inheritance tax is to be computed upon the clear value of the beneficial interest in the property which passes from the decedent to the beneficiaries designated by the will or by the statute, and the federal inheritance tax is to be deducted from the value of the estate in ascertaining such clear value. State v. Probate Court, 139 Minn. 210, 166 N. W. 125.

Where a domestic corporation is incorporated only in this state, the tax upon a transfer by will of its capital stock is to be computed on the full value of such stock (less the exemptions allowed by statute), although the properties of the corporation may be situated in several states. State v. Probate Court, 142 Minn. 415, 172 N. W. 318.

The statute imposes a tax on any transfer of property "by will or intestate law." Where a will contest has been amicably settled between the beneficiaries named in the will, and they have in good faith stipulated for a decree of distribution in accordance with the settlement, and there is no intent to evade or reduce the inheritance tax, the tax should be computed upon the share received by each beneficiary under the decree. State v. Probate Court, 143 Minn. 77, 172 N. W. 902.

In determining the value of an estate for the purpose of levying an

inheritance tax, incumbrances on the real estate must be deducted from the value of the real estate, and not from the value of the personal property. The value of the real estate for the purpose of such taxation is measured by the value of the decedent's interest therein determined by deducting the incumbrances from the value of the land. State v. Probate Court, 145 Minn. 155, 176 N. W. 493.

The practical interpretation, given the inheritance tax law by the state officials concerned in its enforcement during a long period of time, should be given weight by this court when the question of the proper construction of such law is presented. In view of the rule stated, it is held, that upon all property, passing to the heir or legatee, in excess of the clear value of $15,000, the secondary rate applies; the primary rate applying only to what remains of the first $15,000 after deducting the exemption. In re Boutin's Estate, — Minn. —, 182 N. W. 990.

Where testator devised all his property to his wife for life, remainder to their daughter, the title vests on the death of the testator, and the probate court in the first instance correctly determined the value of the legacy to each of the legatees for the purpose of inheritance taxation, under section 2272, G. S. 1913, as amended by chapter 410, Laws of 1919. In re Meldrum's Estate, — Minn. —, 183 N. W. 835.

Gross and net inheritance values. 2 Minn. L. Rev. 274.

(01) See In re Boutin's Estate, — Minn. —, 182 N. W. 990.

9575. Fraudulent transfers to avoid—A fraudulent transfer to avoid payment of an inheritance tax will not defeat the tax even though the transfer is not set aside. Ingersoll v. Odendahl, 136 Minn. 428, 162 N. W. 525.

Transfers in contemplation of death. 7 A. L. R. 1028.

MORTGAGE REGISTRY TAX

9576. In general—The proper registry tax on a mortgage of $850 was $4, as the law existed in 1912. Chance v. Hawkinson, 140 Minn. 250, 167 N. W. 734.

The failure to pay the statutory mortgage registry tax due upon an executory contract for the sale of land does not render the contract or an assignment thereof void; such failure simply suspends the remedy and renders the contract unenforceable until the tax is paid. Greenfield v. Taylor, 141 Minn. 399, 170 N. W. 345.

An executory contract for the sale of land, under which the vendee is entitled to or does take possession thereof, shall be deemed, for the purposes of this act, a mortgage of said land for the unpaid balance of the purchase price. G. S. 1913, § 2301. State v. Probate Court, 145 Minn. 155, 176 N. W. 493.

TAX COMMISSION

9577. Abatement of taxes—See § 9235.

MISCELLANEOUS

9578. Curative acts—(17) See 5 A. L. R. 164.

TAXICABS—See Carriers, §§ 1204, 1261, 1291a, 1292.

TELEGRAPHS AND TELEPHONES

9584. Rights in highways—Moving a house along a village street is not using the street for the purpose of ordinary travel, and the statutory requirement that a telephone company shall locate its lines so as not to interfere with the safety and convenience of ordinary travel does not make it the duty of the company to remove its wires from the street to permit the passage of a house along the same. Where a house-mover, with the consent of the company, removes such wires to permit the passage of the house, he is acting in furtherance of his own business rather than that of the company, and is not the servant of the company but a mere licensee. Collar v. Bingham Lake Rural Tel. Co., 132 Minn. 110, 155 N. W. 1075.

Chapter 152, Laws 1915, placed all telephone companies doing business in this state under the supervision and control of the Railroad and Warehouse Commission, and any telephone company, holding a franchise from a municipality at the time the law took effect, is permitted by section 15 thereof to surrender such franchise and receive, in lieu thereof, from the commission an indeterminate permit to occupy the streets of the municipality with its poles and wires. It is held that no private proprietary right, vested in the village of Litchfield by the franchise issued by its council in 1905, was impaired or affected by the written declaration of surrender tendered by relator to the village clerk for filing pursuant to said section 15. State v. Holm, 138 Minn. 281, 164 N. W. 989.

(26) See Blue Earth Valley Tel. Co. v. Commonwealth Utilities Co., 140 Minn. 198, 167 N. W. 554.

(29) 8 A. L. R. 1301.

9585a. Supervision of Railroad and Warehouse Commission—Telephone companies are under the supervision of the Railroad and Warehouse Commission. See § 8077a.

9586. Impartial public service—A telephone company must serve alike all persons similarly situated. State v. Four Lakes Tel. Co., 141 Minn. 124, 169 N. W. 480.

9586a. Rates—Contracts—State regulation—So far as interstate business of telegraph companies is concerned federal legislation is complete

and exclusive and all inconsistent state statutes are void. Dettis v. Western Union Tel. Co., 141 Minn. 361, 170 N. W. 334.

Under the authority delegated by the President to the Postmaster General pursuant to the joint resolution of Congress of July 16, 1918, 40 Stat. 904, c. 154, authorizing the President to assume control of the telephone systems during the war, the Postmaster General in the exercise of such control had authority to fix intrastate telephone rates. State v. Tri-State T. & T. Co., 143 Minn. 141, 173 N. W. 856.

A contract between the parties, fixing telephone rates and charges to be made and exacted by defendant for the use of its line, held ambiguous and uncertain in the respect stated in the opinion to such an extent as to leave the legal rights of the parties in doubt. In such a case, other essential facts appearing, a temporary injunction is properly granted in an action involving rights arising under the contract. Chapter 152, Gen. Laws 1915, held to except from its operation and effect private contracts with the telephone companies existing at the time of the passage thereof. Goodrich v. Northwestern Tel. Exch. Co., 148 Minn. —, 181 N. W. 333.

By chapter 152, Laws 1915, discriminatory telephone rates and charges were prohibited, with the exceptions stated therein, and all telephone companies of the state made subject to the regulation and control, including authority to fix and prescribe reasonable rates for telephone service, of the state Railroad and Warehouse Commission. Goodrich v. Northwestern Tel. Exchange Co., 148 Minn. —, 181 N. W. 333.

9586b. Interstate commerce—Federal regulation—Filing tariffs—A telegraph company engaged in transmitting interstate messages is not required to file copies of its regulations and tariffs with the Interstate Commerce Commission by virtue of the provisions of the Interstate Commerce Act. Notice of such regulations is not to be imputed to the sender of an interstate message solely by reason of the fact that the company has voluntarily filed them with the commission. No discrimination in the rates charged for an interstate message arises from the fact that such message is written upon a telegraphic blank containing no restrictions upon the liability of the company for damages growing out of its negligent delay in transmitting such message, instead of the blank ordinarily supplied by the company for the use of its patrons in sending messages. Dettis v. Western Union Tel. Co., 141 Minn. 361, 170 N. W. 334.

9587. Telegrams as evidence—Sufficient foundation was laid for the reception of a copy of a telegram sent by defendant, accepting plaintiff's written proposition to become the manager of the Minneapolis Tribune, defendant's publication, for the period of three years; and the genuineness and authenticity of such copy, being the message delivered to plaintiff, was so conclusively proven that the court was warranted in charging the jury that a valid three-year contract was made. Halstead v. Minnesota Tribune Co., 147 Minn. 294, 180 N. W. 556.

(35) Ikenberry v. New York Life Ins. Co., 134 Minn. 432, 159 N. W. 955.

9588. Telephone messages as evidence—A conversation over a telephone is admissible in evidence, since when one person in the usual manner calls another by phone, and the person who answers assumes to act, the rebuttable presumption arises that he was the person called and who he assumes to be. Wetmore v. Hudson, — Minn. —, 183 N. W. 672. See 2 Minn. L. Rev. 543.

Admissibility of telephone messages. 31 Harv. L. Rev. 794.

Necessity and sufficiency of identification of speaker. L. R. A. 1918D, 720.

9590. Failure to send message—Delay—Damages—A telegraph company is liable for all the damages which result proximately to the sender of an interstate message written upon a blank containing no restrictions upon its liability, where such message is accepted, but negligently delayed in transmission, provided such damages may reasonably be supposed to have been contemplated by the parties when the message was accepted as the probable result of such negligence. Dettis v. Western Union Tel. Co., 141 Minn. 361, 170 N. W. 334.

Federal legislation is exclusive so far as interstate messages are concerned. Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co., 251 U. S. 27; Western Union Tel. Co. v. Boegli, 251 U. S. 315; Western Union Tel. Co. v. Speight, 254 U. S. 17. See 33 Harv. L. Rev. 988.

(41) Tredway v. Western Union Tel. Co., 133 Minn. 252, 158 N. W. 247.

9591. Fraudulent and forged messages — Liability for forwarding forged messages. 10 A. L. R. 828.

9593. Limiting liability—The rule of law sustaining the valuation provision in contracts for the transportation of property by a common carrier can have no proper application to contracts attempting to limit the liability of a telegraph company, by an agreement fixing a "value" to the message, for the message has and can have no ascertainable value, and for that reason there is no fair basis, as in the case of property for transportation by a common carrier, the value of which may be readily ascertained, upon which the agreement may rest. Such an agreement as to a telegraph message is a violation of sections 6256 and 6259, G. S. 1913, and void, even though the effect thereof be not a total exemption from liability. Tredway v. Western Union Tel. Co., 133 Minn. 252, 158 N. W. 247.

A stipulation limiting liability unless a message is repeated does not affect liability for delay in transmission. A repeated message is one telegraphed back to the sending office for comparison. The object of repeating is not to guard against delays, but to guard against mistakes in transmission. Dettis v. Western Union Tel. Co., 141 Minn. 361, 170 N. W. 334.

Evidence considered, and held to raise a question for the jury as to whether plaintiffs had notice of the regulations and terms printed on the back of defendant's blank forms ordinarily used in sending messages, and as to whether the company accepted the message here involved under an agreement with plaintiffs that its transmission should be delayed on account of wire trouble. Dettis v. Western Union Tel. Co., 141 Minn. 361, 170 N. W. 334.

Federal legislation is exclusive so far as interstate messages are concerned. Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co., 251 U. S. 27; Western Union Tel. Co. v. Boegli, 251 U. S. 315. See 33 Harv. L. Rev. 988.

Liability for mistakes in the transmission of unrepeated interstate messages is limited by the established rates without regard to the assent of the sender. Western Union Tel. Co. v. Esteve Bros. & Co., 255 U. S. —.

TENANCY IN COMMON

9596a. Upon sale from mass—There may be a tenancy in common upon a sale of a certain quantity of goods out of a designated and uniform mass. Nash v. Brewster, 39 Minn. 530, 41 N. W. 105; Mackellar v. Pillsbury, 48 Minn. 396, 51 N. W. 222; National Fire Ins. Co. v. Itasca Lumber Co., 148 Minn. —, 181 N. W. 337.

9597. Upon grant or devise to two or more—Statute—(60, 61) See Dorsey v. Dorsey, 142 Minn. 279, 171 N. W. 933; 3 Minn L. Rev. 348.

9598. Relation of cotenants fiduciary—(62) See 6 A. L. R. 297 (purchasing at foreclosure sale).

9603. Waste—(75) See 2 A. L. R. 993.

9608. Lease of common property to stranger—(87) See 33 Harv. L. Rev. 482.

TENDER

9612. Necessity—(97) See Matson v. Bauman, 139 Minn. 296, 166 N. W. 343.

9616. Production of money—(9) Greenfield v. Taylor, 141 Minn. 399, 170 N. W. 345 (offer of payment in answer).

9618. Keeping good—Necessity of keeping tender good in equity. 12 A. L. R. 938

9619. Amount to be tendered—(21) 5 A . L. R. 1226 (effect of insufficiency of amount tendered).

THEATERS AND SHOWS

9622. Regulation—(26) See Ditkof v. Lifshitz, 141 Minn. 88, 169 N. W. 483.

TIME

9625. Computation—Statutory rule—The statute applies to a computation of a period of hours as well as of days. Hughes v. Globe Indemnity Co., 139 Minn. 417, 166 N. W. 1075.

9626. Exclusion of Sundays and holidays—(49) Hughes v. Globe Indemnity Co., 139 Minn. 417, 166 N. W. 1075.

9627a. At the end of a specified time—Davis v. Godart, 141 Minn. 203, 169 N. W. 711.

9629a. Force of word "about"—The use of the word "about" does not render time immaterial. Its force is like that of the expression "more or less." It gives some leeway and allows for contingencies, but it does not make a contract terminable at will. Costello v. Siems-Carey Co., 140 Minn. 208, 167 N. W. 551.

9630. Reasonable time—Law and fact—(58) C. S. Brackett & Co. v. General Accident etc. Corp., 140 Minn. 271, 167 N. W. 798; Davis v. Godart, 141 Minn. 203, 169 N. W. 711; Krause v. Union Match Co., 142 Minn. 24, 170 N. W. 848; Davis v. Godart, 147 Minn. 362, 180 N. W. 239.

(59) Hagstrom v. American Fidelity Co., 137 Minn. 391, 163 N. W. 670; Henry v. Hutchins, 146 Minn. 381, 178 N. W. 807.

9630a. Reasonable time—Evidence—Admissibility—Where the issue was whether a shipment of goods was made in a reasonable time, evidence of the time taken in a number of other shipments between the same points was held admissible. National Elevator Co. v. Great Northern Ry. Co., 141 Minn. 407, 170 N. W. 515.

TORTS

9631. Definition—Essential elements—A bad motive is not an essential element of a tort. Schlechter v. Felton, 134 Minn. 143, 158 N. W. 813.

Culpability is not an essential element of all torts. There may be liability without fault. See Digest, §§ 96, 275, 276, 7248, 7249; 29 Harv. L. Rev. 801; 30 Id. 241, 319, 409; 32 Id. 420; 33 Id. 86; New York Central R. Co. v. White, 243 U. S. 188; Arizona Copper Co. v. Hammer, 250 U. S. 400.

(61) See Schlechter v. Felton, 134 Minn. 143, 147, 158 N. W. 813.

(62) Keiper v. Anderson, 138 Minn. 392, 165 N. W. 237.
(65) See 30 Harv. L. Rev. 241, 319, 409.

9633. Arising out of contract—(67) Keiper v. Anderson, 138 Minn. 392, 165 N. W. 237; Burke v. Mayland, — Minn. —, 184 N. W. 32.

9634. Effect of bad motive—(69) See Roraback v. Motion Picture Machine Operators Union, 140 Minn. 481, 168 N. W. 766 ("bannering" plaintiff's place of business as unfair to labor with the intention of compelling him not to work for himself in his own business); Vojdich v. Jedelski, 140 Minn. 520, 168 N. W. 95; 2 Minn. L. Rev. 524.

9635. Wilful injury—Men, either singly or in combination, may use any lawful means to accomplish a lawful purpose, although the means adopted may cause injury to another; but they may not intentionally injure or destroy the business of another to accomplish an unlawful purpose. Roraback v. Motion Picture Machine Operators Union, 140 Minn. 481, 168 N. W. 766.
(70) See Canellos v. Zotalis, 145 Minn. 292, 177 N. W. 133 (injuring or destroying the business of another maliciously).

9636. Improper use of one's own property—Spite fences—One may use his property in a way that offends the aesthetic sense of others. State v. Houghton, 134 Minn. 226, 158 N. W. 1017.
(75) See Vojdich v. Jedelski, 140 Minn. 520, 168 N. W. 95.
(76) State v. Houghton, 134 Minn. 226, 243, 158 N. W. 1017. See Vojdich v. Jedelski. 140 Minn. 520, 168 N. W. 95.

9637. Interference with contract relations of others—In an action for a wrongful and malicious interference with the contract relations of others causing the breach of a contract for the sale of land, held, that the evidence justified a verdict for plaintiff; that he was entitled to recover all damages that were the natural and proximate result of such breach; that he was not entitled to recover certain damages claimed for the reason that they were too remote. Swaney v. Crawley, 133 Minn. 57, 157 N. W. 910.
In an action for a wrongful and malicious interference with the contract relations of others causing a breach of the contract the injured party may recover such damages as he might have recovered for a breach of the contract itself. If actual malice is shown exemplary damages may perhaps be recovered. Swaney v. Crawley, 133 Minn. 57, 157 N. W. 910.
(77) Canellos v. Zotalis, 145 Minn. 292, 177 N. W. 133. See 31 Harv. L. Rev. 1017.

9637a. Inducing another not to act—One cannot be charged with liability for inducing another to refrain from that which he was not legally bound to do. Seitz v. Michel, 148 Minn. —, 181 N. W. 106.

9640. Causing fright—(80) See 34 Harv. L. Rev. 260; 11 A. L. R. 1119.

9640a. Causing apprehension of injury from negligence—Causing apprehension of injury to real property from negligence, thereby depre-

ciating the market value of the property, is not actionable. Johnson v. Rouchleau-Ray Iron Land Co., 140 Minn. 289, 168 N. W. 1.

9641. Ratification and adoption—(81) Ehrhardt v. Wells, Fargo & Co., 134 Minn. 58, 158 N. W. 721.

9641a. Several joining in lawful act—What one may lawfully do singly, two or more may agree to do jointly. Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119; Hartle v. Neighbauer, 142 Minn. 438, 172 N. W. 498.

9643. Parties to actions—Joinder—Joint and several liability—All persons participating in a tort are liable as tortfeasors. Ehrhardt v. Wells, Fargo & Co., 134 Minn. 58, 158 N. W. 721.

Two parties whose concurrent negligence causes an injury to plaintiff may be joined as defendants though the liability of one depends on the federal Employers' Liability Act and that of the other on the common law Doyle v. St. Paul Union Depot Co., 134 Minn. 461, 159 N. W. 1081.

Where an agent commits a tort within the scope of his agency the principal and agent are jointly and severally liable. Melady v. South St. Paul Live Stock Exchange, 142 Minn. 194, 171 N. W. 806.

(83) Doyle v. St. Paul Union Depot Co., 134 Minn. 461, 159 N. W. 1081.

(84) Whittaker v. Collins, 34 Minn. 299, 25 N. W. 632; Fryklund v. Great Northern Ry. Co., 101 Minn. 37, 111 N. W. 727; Leibel v. Golden, 138 Minn. 90, 163 N. W. 991; Fidelity & Casualty Co. v. Northwestern Tel. Exchange Co., 140 Minn. 229, 167 N. W. 800; Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541; Wrabek v. Suchomel, 145 Minn. 468, 177 N. W. 764; Reader v. Ottis, 147 Minn. —, 180 N. W. 117. See Erickson v. Minnesota & Ontario Power Co., 134 Minn. 209, 158 N. W. 979; § 7006.

(85) Doyle v. St. Paul Union Depot Co., 134 Minn. 461, 159 N. W. 1081; Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541.

TOWNS

9645. Definition and nature—A town is a mere governmental agency of the state, with no rights in the discharge of governmental functions superior to the state. Roseau County v. Hereim, — Minn. —, 183 N. W. 518.

(91) Great Northern Bridge Co. v. Finlayson, 133 Minn. 270, 158 N. W. 392.

(95) Hammer v. Narverud, 142 Minn. 199, 171 N. W. 770; Newman v. St. Louis County, 145 Minn. 129, 176 N. W. 191; Roseau County v. Hereim, — Minn. —, 183 N. W. 518.

(3) Hammer v. Narverud, 142 Minn. 199, 171 N. W. 770.

9647. Control of legislature—(5) Great Northern Bridge Co. v. Finlayson, 133 Minn. 270, 158 N. W. 392. See Roseau County v. Hereim, — Minn. —, 183 N. W. 518.

9651. Powers limited—(11) Great Northern Bridge Co. v. Finlayson, 133 Minn. 270, 158 N. W. 392; Mount Pleasant v. Florence, 138 Minn. 359, 165 N. W. 126.

9652. Notice of limitations of power—(13) Great Northern Bridge Co. v. Finlayson, 133 Minn. 270, 158 N. W. 392.

9654. Contracts—Limit of indebtedness—A contract between two towns for keeping in repair a bridge forming part of a highway between them held valid. Mount Pleasant v. Florence, 138 Minn. 359, 165 N. W. 126.

Unauthorized contracts may sometimes be ratified so as to give them validity. See § 6710; Tracy Cement Tile Co. v. Tracy, 143 Minn. 415, 176 N. W. 180.

(16) See Great Northern Bridge Co. v. Finlayson, 133 Minn. 270, 158 N. W. 392.

9657. Claims against—Filing—Whether an action may be brought before the lapse of a reasonable time after a claim is filed as provided by statute is an open question. Halvorson v. Moranville, 137 Minn. 349, 163 N. W. 673 (answer held not to raise question).

(25) See Manson v. Chisholm, 142 Minn. 94, 170 N. W. 924.

9658. Liability for torts—(26, 27) Bolland v. Gihlstorf, 134 Minn. 41, 158 N. W. 725.

(28) Lindstrom v. Ramsey County, 136 Minn. 46, 161 N W. 222; Halvorson v. Moranville ,137 Minn. 349, 163 N. W. 673; Newman v. St. Louis County, 145 Minn. 129, 176 N. W. 191.

9658a. Liability of town officers for negligence—Town officers are not liable to one injured on a highway because of their failure to keep it in repair. Bolland v. Gihlstorf, 134 Minn. 41, 158 N. W. 725.

9659. Town boards—Under G. S. 1913, § 1280, the board may appropriate money from the town road fund to aid in the construction of a bridge by a village situated within the town, without previous authorization by the town electors. Great Northern Bridge Co. v. Finlayson, 133 Minn. 270, 158 N. W. 392.

The acts of the board in relation to town roads are the acts of the town. Lindstrom v. Ramsey County, 136 Minn. 46, 161 N. W. 222.

A town board held not to have lost jurisdiction by separating without adjourning to a certain time, before signing an order altering a road. Goerndt v. Scandia Valley, 148 Minn. —, 180 N. W. 914.

9659a. Annual town meetings—The town in respect to all its interests usually speaks through the electors thereof at the annual town meeting, when local taxes are levied for township highways and other local purposes, officers chosen, and the conduct of the town affairs for the pre-

ceding year examined and approved or disapproved. In fact, all money needed for public purposes must be provided for by the electors at the town meeting, and the creation of any indebtedness in excess of the amount so raised is prohibited by statute. Great Northern Bridge Co. v. Finlayson, 133 Minn. 270, 158 N. W. 392.

TRADE-MARKS AND TRADE-NAMES

9667. Definition and nature—(40) United Drug Co. v. Theodore Rectanus Co., 248 U. S. 90.

(41) Yellow Cab Co. v. Cooks Taxicab & Transfer Co., 142 Minn. 120, 171 N. W. 269; Citizens Wholesale Supply Co. v. Golden Rule, 147 Minn. 248, 180 N. W. 95.

9667a. To what goods applicable—The right to a trade-mark or trade-name is determined by priority of adoption and use. Once acquired as appertaining to a certain class of goods, the right of priority extends to all goods of the same general class. A merchant operating a department store may use its trade-mark and name in the sale of all merchandise reasonably incident to the conduct of a department store. If a line of groceries is taken on, the mark and name may be used in connection with that department. Citizens Wholesale Supply Co. v. Golden Rule, 147 Minn. 248, 180 N. W. 95.

9670. Trade-names—Unfair competition—Interference—Injunction—By prior adoption and use one does not acquire the exclusive right to use as a trade-name words properly descriptive of a business engaged in by him and by others; but if another, engaged in a like business, subsequently makes use of such descriptive words in his trade-name, he must so combine them that the two trade-names will be fairly distinguishable. Applying this rule, it is held that the defendant, engaged like the plaintiff in conducting a sulphur springs sanatorium, may use the words "sulphur springs" in its trade-name which is its corporate name, though prior thereto the plaintiff used the same words in its corporate and trade name, the two being fairly distinguishable. Jordan Sulphur Springs etc Co. v. Mudbaden Sulphur Springs Co., 135 Minn. 123, 160 N. W. 252.

Defendant, Review Publishing Company, a corporation doing a job printing business in St. Paul, expressly consented that a copartnership formed by its managing officer and those associated with him for the transaction of a similar printing business in the adjoining city of Minneapolis might use the name Review Publishing Company in its business affairs in that city; under that authority the copartnership adopted that name, and thereunder built up and established a prosperous printing business to the knowledge of defendant and its said managing officer. Plaintiff, Twin City Brief Printing Company, a corporation, was organized by some of those interested in the copartnership for the pur-

pose of taking over the partnership business; in consummation of that purpose the individual copartners executed to plaintiff separate bills of sale of the partnership plant, property, assets, and good will. The corporation thereafter for several years continued the business under the name stated precisely as the copartnership theretofore had done. Defendant thereafter established a branch department of its printing business in Minneapolis, and by unfair and deceptive methods attempted to divert to its office the business so built up and established by the copartnership and plaintiff. It is held: That the copartnership acquired by the consent and acquiescence of defendant corporation the right to use the particular name in the firm transactions in Minneapolis; that right passed to plaintiff on the sale to it of the partnership property, effects, and good will, and defendants may be restrained from unfairly and wrongfully interfering in the use thereof by plaintiff in that city, and by deceptive methods from attempting to divert to its branch office business that otherwise would go to plaintiff. The facts stated in the opinion entitle plaintiff to the relief substantially as prayed for in the complaint, against all the defendants. Twin City Brief Printing Co. v. Review Pub. Co., 139 Minn. 358, 166 N. W. 413.

Descriptive words, words of color, cannot be monopolized, and unless used in imitative combination one trader has no right to an injunction restraining their use by a rival. A person may adopt a trade-name, consisting of a combination of words, none of which are capable of exclusive appropriation. Descriptive words may, by long use, become identified with the business of a particular trader, and it is then unfair competition for a subsequent trader to use the same words in connection with a similar business in such manner as to deceive. The fact that the words used are part of a corporate name is not important. The essence of the wrong is deceit, and consists in the representation by the offender that his goods or his business are the goods or business of another. The words "Yellow Taxicab Company" may be acquired as a trade-name, and the evidence is such as to sustain the court's finding that defendant had acquired that trade-name. The use of these descriptive words by plaintiff will not be entirely enjoined. Merely the misleading manner of using them will be enjoined, leaving plaintiff at liberty to use them in all ways not deceptive. Yellow Cab Co. v. Cooks Taxicab & Transfer Co., 142 Minn. 120, 171 N. W. 269.

In this action to enjoin defendant from using its corporate name in its business in the vicinity where plaintiff was engaged in a like business on the ground of unfair competition, it was conceded that defendant neither intended nor attempted to actively mislead the public, but it was contended that, nevertheless, the natural result of the use of defendant's name was to create confusion and a wrongful diversion of plaintiff's business to defendant. It is held: The names of the two corporations are not so similar in appearance that it may be held, as a matter of law, that the mere selection and use by defendant of its name tends to work a fraud upon plaintiff or constitutes unfair competition.

The findings of fact to the effect that the use by defendant of its name, in doing business in the vicinity of plaintiff neither has caused loss to the latter nor is likely to wrongfully divert its business, and that defendant has not attempted to mislead the public, are sustained by the evidence. In determining the question of unfair competition, regard may be had to the fact that the commodity handled by the parties obtains no prestige from the name of the dealer or manufacturer. A person who has acquired a business reputation may, when he participates in organizing a corporation to take over that business, lawfully permit his name to become a part of the corporate name, provided it is not so similar to that of an existing corporation that the necessary result is loss to the latter, or the selection of the name is with a view to deceive. Thompson Lumber Co. v. Thompson Yards, 144 Minn. 298, 175 N. W. 550.

A simulation by defendant of plaintiff's taxicabs, used in a public taxicab business, will be enjoined pendente lite, where the imitation is obviously calculated to deceive the public into the belief that the defendant's taxicabs and service are those of the plaintiff, and thereby injure and interfere with its business. Yellow Cab Co. v. Becker, 145 Minn. 152, 176 N. W. 345.

(47) Twin City Brief Printing Co. v. Review Pub. Co., 139 Minn. 358, 166 N. W. 413; Yellow Cab Co. v. Cooks Taxicab & Transfer Co., 142 Minn. 120, 171 N. W. 269. See L. R. A. 1918A, 961.

(48) Twin City Brief Printing Co. v. Review Pub. Co., 139 Minn. 358, 166 N. W. 413; Yellow Cab Co. v. Cooks Taxicab & Transfer Co., 142 Minn. 120, 171 N. W. 296; Thompson Lumber Co. v. Thompson Yards, 144 Minn. 298, 175 N. W. 550. See Jordan Sulphur Springs etc. Co. v. Mudbaden Sulphur Springs Co., 135 Minn. 123, 160 N. W. 252; 31 Harv. L. Rev. 889 (application of maxim of clean hands).

9670a. Filing certificate of trade-name—G. S. 1913, §§ 6107–6113, providing for filing certificates as to trade-names, do not apply to non-residents doing business in this state as interstate commerce. Fisher v. Wellworth Mills Co., 133 Minn. 240, 158 N. W. 239.

TRADE SECRETS

9673. Property—Injunction—(52) E. I. Du Pont De Nemours Powder Co. v. Masland, 244 U. S. 100.

TRADE UNIONS

9674. Labor unions—Strikes—Bannering—"Bannering" the plaintiff's place of business as unfair to organized labor and thereby deterring the public from patronizing him, if done for the purpose of compelling him not to work as an operative himself in his own business, is unlawful and may be enjoined. Roraback v. Motion Picture Machine Operators Union, 140 Minn. 481, 168 N. W. 766.

(53) George J. Grant Const. Co. v. St. Paul Building Trades Council, 136 Minn. 167, 161 N. W. 520, 1055; Steffes v. Motion Picture Machine Operators Union, 136 Minn. 200, 161 N. W. 524.

See § 1566 (boycott); §§ 4478b, 4490 (injunction); § 7320 (liability to suit).

TRANSFER COMPANIES—See Carriers, §§ 1204, 1316, 1323, 1360.

TREATIES

9676. As municipal law—A treaty is a public law and presumptively within the knowledge of all persons affected by its provisions. Minneapolis Brewing Co. v. Bagley, 142 Minn. 16, 170 N. W. 704.

(56) Minneapolis Brewing Co. v. Bagley, 142 Minn. 16, 170 N. W. 704; 4 A. L. R. 1377 (relation of treaty to state law). See § 4350.

TRESPASS

TRESPASS TO PERSONALTY

9679. Title and possession of plaintiff—Right of tenant to maintain action. 8 A. L. R. 600.

TRESPASS TO REALTY

9684. What constitutes—To recover damages for injury to real property, resulting from negligence, the owner must wait until the injury or damage has actually happened. Damages based upon apprehension of future injury to such property by an act yet to happen are too remote and speculative. Johnson v. Rouchleau-Ray Iron Land Co., 140 Minn. 289, 168 N. W. 1.

Where floating logs are cast upon the land of a riparian owner the owner of the logs may enter upon the land to remove the logs. Plaude v. Mississippi & Rum River Boom Co., 141 Minn. 170, 169 N. W. 600.

Placing ditching machinery and digging holes on a farm held a trespass. Fletcher v. Glencoe Ditching Co., 141 Minn. 440, 170 N. W. 592.

An unauthorized entry upon land of another to save private property may be justified in an emergency; but as a rule, even in such case the law awards compensation for the actual injury to the land. Currie v. Silvernale, 142 Minn. 254, 171 N. W. 782.

Throwing stones against a house is a trespass. Muenkel v. Muenkel, 143 Minn. 29, 173 N. W. 184.

Throwing rocks on the premises of another by blasting. See § 3700.

Overhanging cornices and branches of trees or shrubs. See 32 Harv. L. Rev. 569.

Trespass by airplane. 32 Harv. L. Rev. 569.

9687. Title of plaintiff—Actual possession of real estate is prima facie evidence of ownership in fee in the absence of evidence showing a superior title, and in such case is sufficient proof of title to sustain an action for damages to the freehold. Gillespie v. Duluth, 137 Minn. 454, 163 N. W. 779. See § 7858.

(85) Gillespie v. Duluth, 137 Minn. 454, 163 N. W. 779.

9688. Possession of plaintiff—A wife living in the home of her husband may maintain an action for a trespass disturbing the peace and quiet of the home. Lesch v. Great Northern Ry. Co., 97 Minn. 503, 106 N. W. 955; Millett v. Minnesota Crushed Stone Co., 145 Minn. 475, 177 N. W. 641.

Possibly a mere guest in the home may maintain an action for a trespass disturbing the peace and quiet of the home. See Millett v. Minnesota Crushed Stone Co., 145 Minn. 475, 177 N. W. 641.

9689. Defences—Justification—Where logs are cast upon the land of a riparian owner the owner of the logs may enter upon the land to remove the logs. Plaude v. Mississippi & Rum River Boom Co., 141 Minn. 170, 169 N. W. 600.

Even if defendants' first entry upon plaintiff's land might be held justifiable, because of an unexpected emergency threatening destruction of private property, subsequent repeated entries, when the threatened destruction could not be said to arise from unexpected emergencies, must be held wrongful. Currie v. Silvernale, 142 Minn. 254, 171 N. W. 782.

(95) Currie v. Silvernale, 142 Minn. 254, 171 N. W. 782.

9693. Evidence—Admissibility—(10) Fletcher v. Glencoe Ditching Co., 141 Minn. 440, 170 N. W. 592 (ditch proceedings under which defendant justified his entry); Finberg v. St. Paul Gas Light Co., 141 Minn. 486, 170 N. W. 696 (cost of replacing plumbing, fixtures, etc.); Muenkel v Muenkel, 143 Minn. 29, 173 N. W. 184 (evidence that inmates of plaintiff's house were frightened by the throwing of stones against it held admissible—evidence that trespass caused plaintiff's wife to be partially incapable of performing her household duties held admissible—evidence

of previous conviction of defendants over a trouble with plaintiff held admissible—a provoking remark of plaintiff, made before the first trouble to the mother of one of the defendants, held properly rejected, there being no proof that it was communicated to defendants—evidence that one of several defendants, jointly sued, counseled restraint of lawlessness at the time of the affray, is admissible as to him—it was not error to reject certain evidence offered for that purpose, since it was not shown that the occasion was the same as the one complained of).

9693a. Evidence—Sufficiency—Evidence held insufficient to justify a finding of trespass. Roy v. Dannehr, 137 Minn. 464, 162 N. W. 1050.

Evidence held sufficient to justify a verdict against defendants for assault upon plaintiff's home and property in the nighttime by the throwing of rocks, accompanied by riotous language. Muenkel v. Muenkel, 143 Minn. 29, 173 N. W. 184.

9694. Damages—To recover damages for injury to real property, resulting from negligence, the owner must wait until the injury or damage has actually happened. Damages based upon apprehension of future injury to such property by an act yet to happen are too remote and speculative. Johnson v. Rouchleau-Ray Iron Land Co., 140 Minn. 289, 168 N. W. 1.

Where defendant encroached upon plaintiff's land and maliciously built an ugly and high board fence on the supposed boundary line, and built a garage on the line, and placed unnecessary excrescences on the roof of the garage and thereby cut off the light and air from some of plaintiff's windows, it was held that a verdict for $250 was justified by the evidence. Vojdich v. Jedelski, 140 Minn. 520, 168 N. W. 95.

In an action for trespass in taking certain fixtures from a house, held, that the evidence sustained the finding that damages were caused plaintiffs in excess of the amount admitted by defendant and there was no error in refusing to limit the verdict to the conceded amount. Finberg v. St. Paul Gas Light Co., 141 Minn. 486, 170 N. W. 696.

Where a landlord wrongfully and maliciously entered the leased premises in the absence of the tenant and removed her wearing apparel and other personal effects and excluded her therefrom, a verdict for $725 was held not excessive. Johnson v. Wolf, 142 Minn. 352, 172 N. W. 216.

Certain damages for throwing stones against a dwelling house held not excessive. Muenkel v. Muenkel, 143 Minn. 29, 173 N. W. 184.

(11) Plaude v. Mississippi & Rum River Boom Co., 141 Minn. 170, 169 N. W. 600 (overflowing lands); Fletcher v. Glencoe Ditching Co., 141 Minn. 440, 170 N. W. 592 (excavating ditch across farm); Berg v. Chisholm, 143 Minn. 267, 173 N. W. 423 (changing grade of street).

(12) Plaude v. Mississippi & Rum River Boom Co., 141 Minn. 170, 169 N. W. 600 (overflowing lands).

(22) See Currie v. Silvernale, 142 Minn. 254, 171 N. W. 782.

TRIAL

IN GENERAL

9697. Definition—(31) See Ratcliffe v. Ratcliffe, 135 Minn. 307, 160 N. W. 778.

NOTICE OF TRIAL AND NOTE OF ISSUE

9700. Notice of trial—After a case has been tried and determined and a new trial granted, a new notice is necessary to bring the case on again for trial and if a party is required to go to trial without such notice, he may have a verdict against him set aside and a new trial granted. Dr. Ward's Medical Co. v. Wolleat, — Minn. —, 182 N. W. 523.

(40) Dr. Ward's Medical Co. v. Wolleat, — Minn. —, 182 N. W. 523.

CALENDAR

9702. Court calendar and jury calendar—Action for instalments of rent. Defendant counterclaimed for rescission of lease on the ground of fraud and for damages. No reversible error may be found in the refusal to transfer to the court calendar. Plaintiff's case was properly for the jury, and so was the counterclaim for damages. The motion to transfer was first made when the trial began; and we are not convinced that defendant was prejudiced by the position, evidently taken by the trial court, that the evidence should be taken and then it could be decided whether the issues should be determined by the court or by the jury. If defendant is correct in the contention that the evidence made out a case for rescission, he could have protected his rights by moving the court, either before or after verdict, for findings on that issue. This was not done. O'Neil v. Davidson, 147 Minn. 240, 180 N. W. 102.

9704a. Cases tried in order on calendar—The rules of court provide that cases shall be tried in their order on the calendar and in preparing for trial litigants have a right to rely on this rule. First Nat. Bank v. Coon, 139 Minn. 320, 166 N. W. 400.

9704b. Reinstating case on calendar—An action dismissed for want of prosecution may be reinstated on the calendar. An application for reinstatement may be granted on condition that the applicant pay the expenses of witnesses theretofore procured and kept in attendance pending his delay. Murray v. Mulligan, 135 Minn. 471, 160 N. W. 1032.

SUPERVISORY POWER OF COURT

9706. In general—The court may examine jurors to ascertain whether they have been tampered with. State v. Bragdon, 136 Minn. 348, 162 N. W. 465.

The purpose of a trial is to do justice between the litigants. The court as well as the jury has a part to perform in attaining it. Flick v. Ellis-Hall Co., 138 Minn. 364, 165 N. W. 135.

The court may require a party to produce in court an article which has probable value as evidence. It is not necessary to establish its admissibility before production in court. McGuire v. Caledonia, 140 Minn. 151, 167 N. W. 425.

It is the duty of a trial court to stop counsel in asking improper questions and indulging in improper remarks. Johnson v. Brastad, 143 Minn. 332, 173 N. W. 668.

(57) Curran v. Chicago G. W. R. Co., 134 Minn. 392, 159 N. W. 955.

LAW AND FACT—PROVINCE OF COURT AND JURY

9707. In general—Where reasonable men might properly draw different inferences from the undisputed testimony, the case should be submitted to the jury. Krause v. Union Match Co., 142 Minn. 24, 170 N. W. 848.

A conclusion drawn by a trial court from evidential facts is one of fact and not of law. Great Northern Ry. Co. v. Minneapolis, 142 Minn. 308, 172 N. W. 135.

A question of law arises on the evidence in a particular case, where an impartial consideration thereof, together with all reasonable and fair inferences, will lead reasonable minds to but one conclusion. If reasonable minds may reach different conclusions the question becomes one of fact. To weigh evidence and declare the preponderance thereof is to determine a question of fact and not a question of law. State v. District Court, 142 Minn. 335, 172 N. W. 133.

It is not a violation of due process of law for the legislature to change the line of distinction between the functions of the court and the functions of the jury. Chicago etc. Ry. Co. v. Cole, 251 U. S. 54.

(61) See Great Northern Ry. Co. v. Minneapolis, 142 Minn. 308, 172 N. W. 135; State v. District Court, 142 Minn. 335, 172 N. W. 133.

9708. Construction of laws—(63) State v. Whipple, 143 Minn. 403, 173 N. W. 801.

9709. Construction of writings—Where negotiations are conducted wholly by letters and telegrams and these are unambiguous, it is the duty of the court to determine their effect. Vasey v. Saari, 141 Minn. 103, 169 N. W. 478.

(69) Vasey v. Saari, 141 Minn. 103, 169 N. W. 478.

OPENING AND CLOSING CASE

9712. Right to open and close—In a suit on a promissory note where defendant admits the execution of the note, but denies plaintiff's title, and alleges that the note is, and always had been, the property of a

third party against whom he asserts a defence, the plaintiff has the affirmative and is entitled to the opening. Kipp v. Welsh, 141 Minn. 291, 170 N. W. 222.

9713. Scope and effect of opening—(90) See § 2478.

RECEPTION OF EVIDENCE

9714. Preliminary questions as to admissibility of evidence—It has been held not error to receive certain evidence for all purposes for which it is properly admissible. McKay v. Minnesota Commercial Men's Assn., 139 Minn. 192, 165 N. W. 1061.

9715. Order of proof—A decision will not be reversed because material and proper evidence is received out of its regular order. Nardinger v. Ladies of the Maccabees, 138 Minn. 16, 163 N. W. 785.

The order in which proof is received does not concern the supreme court on appeal. McWethy v. Norby, 143 Minn. 386, 173 N. W. 803.

(97) Nardinger v. Ladies of the Maccabees, 138 Minn. 16, 163 N. W. 785; Mc Wethy v. Norby, 143 Minn. 386, 173 N. W. 803.

9716. Reopening case—Where a defendant whose liberty is at stake rests, perhaps through the inadvertence of his attorney, and then, before the prosecution enters upon its rebuttal or any further proceedings are taken, asks to reopen his case and tenders material evidence, not cumulative, upon a controlling issue, and there is nothing to indicate any improper purpose in failing to produce such evidence earlier, we think he should be permitted to present it in furtherance of a fair trial. State v. Jouppis, 147 Minn. 87, 179 N. W. 678.

The trial court may in its discretion after trial and decision of a cause reopen the case for further evidence on the application of either party, and an order of the kind will be reversed only when an abuse of discretion. Smith v. Kurtzenacker, 147 Minn. 398, 180 N. W. 243.

(4) Clinton Film Service Co. v. Conan, 140 Minn. 94, 167 N. W. 289; Brede v. Minnesota Crushed Stone Co., 146 Minn. 406, 178 N. W. 820.

9717. Offer of evidence—Where an offer contains all the facts relied upon to constitute a cause of action and they do not make out a cause the offer is properly excluded. Millers Nat. Ins. Co. v. Minneapolis etc. Ry. Co., 132 Minn. 151, 156 N. W. 117.

The rule that to render the exclusion of evidence on the trial of an action prejudicial error the relevancy and materiality thereof to the issues involved must affirmatively appear applies to criminal prosecutions as well as civil actions. State v. Henrionnet, 142 Minn. 1, 170 N. W. 699.

The propriety of sustaining an objection to a question asked a witness cannot be considered on appeal, if there is no showing as to what testimony the witness would give. Muenkel v. Muenkel, 143 Minn. 29, 173 N. W. 184.

The supreme court will not reverse a case for rejection of an answer to a question unless it is made to appear that the answer would be material and favorable to appellant. Germain v. Great Northern Lumber Co., 143 Minn. 311, 173 N. W. 667.

The supreme court is not strict in requiring an offer of evidence. Licensed Retail Liquor Dealers Assn. v. Denton, 144 Minn. 81, 174 N. W. 526.

Two questions were asked calling for conclusions; and one was asked as to which it was at least doubtful whether the witness was qualified to testify. No offers were made to show what the proofs would be. There was no error in sustaining objections to the questions. Licensed Retail Liquor Dealers Assn. v. Denton, 144 Minn. 81, 174 N. W. 526.

A new trial will not be ordered for the purpose of admitting a letter in evidence without a showing that its contents were material to the issues. Ryan v. Simms, 147 Minn. 98, 179 N. W. 683.

(5) State v. Henrionnet, 142 Minn. 1, 170 N. W. 699.

(6) Haack v. Coughlan, 134 Minn. 78, 158 N. W. 908; American Multigraph Sales Co. v. Grant, 135 Minn. 208, 160 N. W. 676; Bergh v. Calmenson, 136 Minn. 322, 162 N. W. 353; Flick v. Ellis-Hall Co., 138 Minn. 364, 165 N. W. 135; Thaden v. Bagan, 139 Minn. 46, 165 N. W. 864; State v. Henrionnet, 142 Minn. 1, 170 N. W. 699; Segerstrom v. Holland Piano Mfg. Co., 142 Minn. 104, 170 N. W. 930; Muenkel v. Muenkel, 143 Minn. 29, 173 N. W. 184; Germain v. Great Northern Lumber Co., 143 Minn. 311, 173 N. W. 667; Fruen Cereal Co. v. Chenoweth, — Minn. —, 148 N. W. 30.

(8) Antel v. St. Paul City Ry. Co., 133 Minn. 156, 157 N. W. 1073 (general offer of all the pleadings properly denied).

(10) Ryan v. Simms, 147 Minn. 98, 179 N. W. 683.

9719. Limiting number of witnesses—The trial court should not attempt to limit the number of witnesses of a party upon the main controverted issue or controlling fact of a case, unless it becomes apparent that there is a purpose to trifle with the administration of justice. State v. Randall, 143 Minn. 203, 173 N. W. 425.

(12) State v. Randall, 143 Minn. 203, 173 N. W. 425.

9720. Exclusion of witnesses from court room—On the trial of an indictment the court made an order excluding the state witnesses from the court room until called to testify. Prior to the indictment the witnesses had given their testimony before an examining magistrate, which was reduced to writing. Subsequent to the order excluding the witnesses from the court room the prosecuting attorney handed to each of them a transcript of the evidence given before the magistrate, with the suggestion that each read over what he had formerly testified to, for the purpose of refreshing his memory, and each did so. Held not misconduct on the part of the prosecuting attorney. State v. Pugliese, — Minn. —, 182 N. W. 958.

9721. Granting a view—In a criminal case it is not essential that the accused be allowed to accompany the jury on the view. State v. Rogers, 145 Minn. 303, 177 N. W. 358.

(15) State v. Rogers, 145 Minn. 303, 177 N. W. 358.

(19, 20) Laurisch v. Minneapolis etc. Traction Co., 132 Minn. 114, 155 N. W. 1074.

9721a. Compelling production of evidence—The court may require a party in a civil action to produce in court an article which has probable value as evidence. It is not necessary to establish its admissibility before production in court. McGuire v. Caledonia, 140 Minn. 151, 167 N. W. 425.

9722a. Weight of evidence—Testimony of witness to be considered as a whole—In determining what fact the testimony of a particular witness establishes or tends to establish, his whole evidence as brought out on direct and cross-examination should be considered. Kivak v. Great Northern Ry. Co., 143 Minn. 196, 173 N. W. 421.

OBJECTIONS AND EXCEPTIONS TO EVIDENCE

9728. Necessity—Objection that a hypothetical question assumes facts not in evidence must be raised on the trial and cannot be raised for the first time on appeal. Geiger v. Sanitary Farm Dairies, 146 Minn. 235, 178 N. W. 501.

(36) Koch v. Speiser, 145 Minn. 227, 176 N. W. 754.

9736. Evidence inadmissible under pleadings—(47) Aaberg v. Minnesota Commercial Men's Assn., 143 Minn. 354, 173 N. W. 708.

9737. Evidence admitted subject to future ruling—(48, 49) State v. District Court, 139 Minn. 30, 165 N. W. 478.

9739. Grounds of objection must be stated—An objection to the admission of testimony on a former trial that it is "incompetent, irrelevant and immaterial, hearsay, and for the reason that neither the parties nor the issues in the two actions are substantially the same," held sufficient. Palon v. Great Northern Ry. Co., 135 Minn. 154, 160 N. W. 670.

(52) State v. District Court, 140 Minn. 216, 167 N. W. 1039.

9740. Objection that evidence is incompetent, irrelevant and immaterial—(57) Viita v. Fleming, 132 Minn. 128, 155 N. W. 1077.

STRIKING OUT EVIDENCE

9742. In general—Where no exception was taken to an order refusing to strike out testimony and the facts were proved by subsequent evidence unobjected to, it was held that there was no prejudicial error. State Bank v. Ronan, 144 Minn. 236, 174 N. W. 892.

9743. When motion must be made—(83) McNab v. Wallin, 133 Minn. 370, 158 N. W. 623.

9744. Motion must specify the objectionable evidence—(84) McNab v. Wallin, 133 Minn. 370, 158 N. W. 623.

9745. When a matter of right—(86) State v. Kasper, 140 Minn. 259, 167 N. W. 1035.

DISMISSAL OR NONSUIT

9752. Grounds for dismissal—(5) Smith v. Hendelan, 136 Minn. 44, 161 N. W. 221.

(6) First State Bank v. Krueger, 136 Minn. 457, 161 N. W. 1054.

9753. Improper when more than one reasonable inference—(10) Kraus v. National Bank of Commerce, 140 Minn. 108, 167 N. W. 353.

9754. Effect of evidence on motion—Where the facts alleged in the complaint and admitted by the answer, together with the facts proved on the trial, are sufficient to constitute a cause of action, it is proper to deny defendant's motion for a dismissal. Where the ultimate facts alleged in the complaint are admitted by the answer the plaintiff is not required to prove the subsidiary facts going to make up the ultimate facts. Sclawr v. St. Paul, 132 Minn. 238, 156 N. W. 283.

9756. Improper when right to nominal damages—While it is error to dismiss when the plaintiff has proved a cause of action entitling him to nominal damages, the error is not always a ground for a new trial. Where the evidence shows that substantial damage has been suffered, though the amount has not been proved, or where a verdict for plaintiff would determine some matter of substantial right, a new trial should be granted. Erickson v. Minnesota & Ontario Power Co., 134 Minn. 209, 158 N. W. 979.

9758. Time of motion—(20) See Vineseck v. Great Northern Ry. Co., 136 Minn. 96, 161 N. W. 494 (opening statement of counsel held not to justify a dismissal).

9760. Error in denying motion cured by subsequent evidence—(24) George Gorton Machine Co. v. Grignon, 137 Minn. 378, 163 N. W. 748.

DIRECTING A VERDICT

9764. In general—The mere fact that a new trial is ordered on the ground that the evidence is not sufficient to sustain the verdict does not entitle the party in whose favor the order was made to a directed verdict on the second trial, if the evidence is substantially the same as it was on the first trial. McKenzie v. Banks, 94 Minn. 496, 103 N. W. 497. See Mullen v. Otter Tail Power Co., 134 Minn. 65, 158 N. W. 732.

(29) Baxter v. Brandenburg, 137 Minn. 259, 163 N. W. 516.

(32) Gorse v. Gouze, 141 Minn. 97, 169 N. W. 423.

(33) Jensen v. Fischer, 134 Minn. 366, 159 N. W. 827; Olsson v. Midland Ins. Co., 138 Minn. 424, 165 N. W. 474.

(34) Summit Mercantile Co. v. Daigle, 146 Minn. 218, 178 N. W. 588.

REQUESTS FOR INSTRUCTIONS

9771. **Statute—Object**—The statute provides a full and complete protection to both parties and the court in the matter of giving instructions to the jury. It is not rigidly enforced in practice, by reason of mutual concessions by the court and counsel, the court generally giving the instructions necessary to present the issues, and readily accepting suggestions of counsel as to any oversights or mistakes in the charge. Smith v. Great Northern Ry. Co., 132 Minn. 147, 153 N. W. 513, 155 N. W. 1040.

Where counsel read to the jury certain requests which he had prepared, but which had not been considered by the court and marked "given" as required by G. S. 1913, § 7802, it was held that there was no prejudice, it not appearing from the record that anything was read which was not covered by the instructions. Curran v. Chicago G. W. R. Co., 134 Minn. 392, 159 N. W. 955.

The statute is applicable to criminal trials. State v. Townley, — Minn. —, 182 N. W. 773.

9772. **Time of presenting to the court**—The court need not receive or consider requests submitted by defendant near the close of the argument of the prosecuting attorney. State v. Townley, — Minn. —, 182 N. W. 773.

(59) Henry v. Hutchins, 146 Minn. 381, 178 N. W. 807.

9774. **When requests may be refused**—A request which asks the court to decide disputed questions of fact is properly denied. Olson v. Moulster, 137 Minn. 96, 162 N. W. 1068.

Held not error to refuse a request which singled out two of the many witnesses whose testimony should be considered under the caution, of doubtful value, of falsus in uno, falsus in omnibus. State v. Dunn, 140 Minn. 308, 168 N. W. 2.

No reversible error is made when a requested instruction, not based upon a cause of action pleaded or tried and less favorable to the party making the request than the charge given, is refused. Gibbons v. Yunker, 145 Minn. 401, 177 N. W. 632.

The court may refuse a request to charge specifically as to each particular wrongful act charged against the defendant in an action for tort, that there is no evidence to justify a finding that he committed it. Mullen v. Devenney, — Minn. —, 183 N. W. 350.

(61) State v. Townley, — Minn. —, 182 N. W. 773.

(62) Falk v. Chicago & N. W. Ry. Co., 133 Minn. 41, 157 N. W. 904.

(63) State v. Meyers, 132 Minn. 4, 155 N. W. 766; Laurisch v. Minneapolis etc. Traction Co., 132 Minn. 114, 155 N. W. 1074; Patterson v. Blatti, 133 Minn. 23, 157 N. W. 717; Benson v. Larson, 133 Minn. 346, 158 N. W. 426; McClure v Browns Valley, 143 Minn. 339, 173 N. W. 672; Rosenberg v. Nelson, 145 Minn. 455, 177 N. W. 659.

(65) Elvidge v. Stronge & Warner Co., 148 Minn. —, 181 N. W. 346.

(66) Fransen v. Martin Falk Paper Co., 135 Minn. 284, 160 N. W. 789 (likely to confuse the jury).

(67) Farrell v. G. O. Miller Co., 147 Minn. 52, 179 N. W. 566.

(68) Fransen v. Martin Falk Paper Co., 135 Minn. 284, 160 N. W. 789; Draves v. Minneapolis etc. R. Co., 142 Minn. 321, 172 N. W. 128.

9776. Giving requests with disparaging comment—It is bad practice to announce to the jury that certain instructions given were requested by one of the parties, but it is not ordinarily reversible error if the court makes it clear that the instruction is given as the law of the case. Curran v. Chicago G. W. R. Co., 134 Minn. 392, 159 N. W. 955.

(75) See O'Connell v. Holler, — Minn. —, 182 N. W. 617 (giving measure of damages as agreed upon by counsel without disparaging comment though the court disagreed). See MacLeod v. Payne, — Minn. —, 182 N. W. 718.

9777. Not error to deny requests covered by general charge—(76) State v. Keehn, 135 Minn. 211, 160 N. W. 666; H. L. Elliott Jobbing Co. v. Chicago etc. Ry. Co., 136 Minn. 138, 161 N. W. 390; Drimel v. Union Power Co., 139 Minn. 122, 165 N. W. 1058; Carlson v. Schoch, 141 Minn. 236, 170 N. W. 195; Allen v. Johnson, 144 Minn. 333, 175 N. W. 545; McGillivray v. Great Northern Ry. Co., 145 Minn. 51, 176 N. W. 200; State v. Nordstrom, 146 Minn. 136, 178 N. W. 164; State v. Couplin, 146 Minn. 189, 178 N. W. 486; Farrell v. G. O. Miller Co., 147 Minn. 52, 179 N. W. 566; Farmers Store & Warehouse Assn. v. Barlow, — Minn. —, 182 N. W. 447; MacLeod v. Payne, — Minn. —, 182 N. W. 718; State v. Morris, — Minn. —, 182 N. W. 721.

9778. General charge in language of court preferable—(77) Farrell v. G. O. Miller Co., 147 Minn. 52, 179 N. W. 566; MacLeod v. Payne, — Minn. —, 182 N. W. 718.

INSTRUCTIONS

9781. In general—A certain latitude as to the form and expression of a charge is necessarily left to the trial judge. Flick v. Ellis-Hall Co., 138 Minn. 364, 165 N. W. 135.

It is not improper for the court to give reasons which called legal rules into being. Flick v. Ellis-Hall Co., 138 Minn. 364, 165 N. W. 135.

The court may properly confine the charge so as to accord with the theory upon which a party predicates his case in the pleadings and upon the trial, and need not give instructions not pertinent to the case as pleaded and proved, even though the same be correct as abstract propositions of law. Rosenberg v. Nelson, 145 Minn. 455, 177 N. W. 659.

The instructions given were correct and complete. The court concededly gave a full and correct explanation of the meaning of assumption of risk, and it was not necessary to repeat it with every mention of the phrase. Brown v. Duluth etc. Ry. Co., 147 Minn. 167, 179 N. W. 1003.

(91) McFarland v. L. M. Summerville, 141 Minn. 343, 170 N. W. 214; Johnson v. Smith, 143 Minn. 350, 173 N. W. 675; State v. Dallas, 145

Minn. 92, 176 N. W. 491; Wetmore v. Hudson, — Minn. —, 183 N. W. 672 (held not argumentative).

(93) See Whitnack v. Twin Valley Produce Co., — Minn. —, 182 N. W. 444.

(94) State v. Maddaus, 137 Minn. 249, 163 N. W. 507.

9782. **Discretionary**—(5) Flick v Ellis-Hall Co., 138 Minn. 364, 165 N. W. 135.

9783. **Defining the issues**—In a proper case the court may submit a cause to the jury on a narrower ground of liability than that claimed in the complaint. Bannister v. George H. Hurd Realty Co., 131 Minn. 448, 155 N. W. 627.

(6) State v. Bruno, 141 Minn. 56, 169 N. W. 249.

9784. **Reviewing the evidence**—(11) Flick v. Ellis-Hall Co., 138 Minn. 364, 165 N. W. 135; Bogstad v. Anderson, 143 Minn. 336, 173 N. W. 674.

(12) State v. Maddaus, 137 Minn. 249, 163 N. W. 507; Quinn-Shepherdson Co. v. United States F. & G. Co., — Minn. —, 183 N. W 347.

9785. **Expressing an opinion on the issues**—The expression of an opinion by the court on disputed facts is harmless where it is clear that the jury did not adopt the opinion so expressed. McArdle v. Chicago etc. Ry. Co., 138 Minn. 379, 165 N. W. 232.

(13) McArdle v. Chicago etc. Ry. Co., 138 Minn. 379, 165 N. W. 232.

9786. **Instructions as to credibility of witnesses**—It should not be stated to a jury as a proposition of law that the veracity of a witness is to be discredited if he is a detective or was employed as such in the case. It is improper to single out witnesses who are detectives and to charge that their testimony is to be closely scrutinized. State v. Meyers, 132 Minn. 4, 155 N. W. 766.

A statement in a charge to the jury, that the testimony is squarely in conflict and that some of the witnesses have committed perjury, but that it is for the jury to say who is to be believed, is not an erroneous charge. State v. Hatch, 138 Minn. 317, 164 N. W. 1017.

In a proper case the court may instruct the jury that they may take into consideration the fact that there was a complete lapse of memory on the part of a witness. Barrett v. Van Duzee, 139 Minn. 351, 166 N. W. 407.

(17) See State v. Dunn, 140 Minn. 308, 168 N. W. 2.

(18) Jensen v. Fisher, 134 Minn. 366, 159 N. W. 827; Olsson v. Midland Ins. Co., 138 Minn. 424, 165 N. W. 474. See 8 A. L. R. 796.

(19) Jensen v. Fischer, 134 Minn. 366, 159 N. W. 827; Olsson v. Midland Ins. Co., 138 Minn. 424, 165 N. W. 470; Uphoff v. McCormick, 139 Minn. 392, 166 N. W. 788; McWethy v. Norby, 143 Minn. 386, 173 N. W. 803; Summit Mercantile Co. v. Daigle, 146 Minn. 218, 178 N. W. 588; Stephon v. Topic, 147 Minn. 263, 180 N. W. 221; Elvidge v. Stronge & Warner Co., 148 Minn. —, 181 N. W. 346. See 8 A. L. R. 796.

(20) Greenfield v. Unique Theatre Co., 146 Minn. 17, 177 N. W. 666;

Farrell v. G. O. Miller Co., 147 Minn. 52, 179 N. W. 566 (this instruction is of doubtful practical value and it is not error to refuse to give it); Skillings v. Allen, 148 Minn. —, 180 N. W. 916 (failure to charge not error). See State v. Dunn, 140 Minn. 308, 168 N. W. 2 (maxim falsus in uno, falsus in omnibus of doubtful value); § 10345.

(25) See Jacobson v. Chicago etc. Ry. Co., 136 Minn. 181, 156 N. W. 251.

9787. Improper to charge as to credibility of particular witnesses—The rule against charging as to the credibility of particular witnesses is not violated by charging that the testimony is squarely in conflict and that some of the witnesses have committed perjury, but that it is for the jury to determine which witnesses to believe. State v. Hatch, 138 Minn. 317, 164 N. W. 1017.

(27) State v. Meyers, 132 Minn. 4, 155 N. W. 766 (detectives); State v. Dunn, 140 Minn. 308, 168 N. W. 2; State v. Dallas, 145 Minn. 92, 176 N. W. 491. See § 10307.

9789. Cautionary instructions—It is proper to give cautionary instructions relative to the consideration of oral admissions; but if given they should be so framed as not to disparage or minimize their natural or reasonable effect as items of evidence. Blume v. Chicago etc. Ry. Co., 133 Minn. 348, 158 N. W. 418. See Ann. Cas. 1918D, 298.

When evidence of other crimes is admitted in a criminal case for a specific purpose, it is proper to give instructions limiting its effect accordingly. State v. Newell, 134 Minn. 384, 159 N. W. 829; State v. Van Fleet, 139 Minn. 144, 165 N. W. 962.

It is proper to instruct the jury as to the limited purpose of admitting evidence of other crimes in criminal cases. It is improper to charge that such evidence is admitted to show an "inclination" on the part of defendant to commit crime. State v. Monroe, 142 Minn. 394, 172 N. W. 313.

Where evidence is admissible for one purpose but not for others the court should caution the jury against a misuse of the evidence. State Bank v. Strandberg, 148 Minn. —, 180 N. W. 1006.

It is improper to put questions to an adverse witness ostensibly to lay a foundation for impeachment but with no intention of following it up. If it appears that this has been done, the court may properly instruct the jury that they have no right to infer that the facts are as stated in the questions or that the witness' answers were untrue. Mullen v. Devenney, — Minn. —, 183 N. W. 350.

(37) Laurisch v. Minneapolis etc. Traction Co., 132 Minn. 114, 155 N. W. 1074.

(38) Blume v. Chicago etc. Ry. Co., 133 Minn. 348, 158 N. W. 418.

9790. Additional instructions—Requests of jurors—Presence of counsel—There was no contradiction of the rules laid down in the court's general instructions to the jury in a special instruction given on the following day in response to a question asked by the jury. The later

instruction stated the law correctly, was applicable to facts which the evidence tended to show, and was addressed to a subject which had not been distinctly referred to in the general instructions. Anderson v. Minneapolis etc. Ry. Co., 146 Minn. 430, 179 N. W. 45.

A trial judge may change his mind as to the law applicable to the case and change his instructions accordingly. Anderson v. Minneapolis etc. Ry. Co., 146 Minn. 430, 179 N. W. 45.

(39) Anderson v. Minneapolis etc. Ry. Co., 146 Minn. 430, 179 N. W. 45; Northern Timber Products Co. v. Stone-Ordean-Wells Co., 148 Minn. —, 180 N. W. 920. See State v. Kruse, 137 Minn. 468, 163 N. W. 125.

9792. Instructions unobjected to become law of case—Instructions unobjected to either on the trial or in the motion for a new trial become the law of the case. Smith v. Minneapolis St. Ry. Co., 132 Minn. 51, 155 N. W. 1046.

Instructions to the jury, not excepted to, while for some purposes the law of the case, do not furnish the test by which the admissibility of evidence is to be determined. Riser v. Smith, 136 Minn. 417, 162 N. W. 520.

Where an erroneous charge unobjected to is favorable to the defendant and the verdict is for the plaintiff, the defendant cannot object to the charge on appeal. Nardinger v. Ladies of the Maccabees, 138 Minn. 16, 163 N. W. 785.

Where, during the trial, there was no controversy over the question of defendant's negligence, and in its charge the court instructed the jury, in effect, that there was no dispute but that defendant was negligent, and that defendant admitted that it was negligent, if defendant had any objection to the instruction as given, it should have called the court's attention to the particular part of the charge complained of. Not having done so, the error was waived. Nelson v. Chicago etc. Ry. Co., 139 Minn. 52, 165 N. W. 866.

A respondent ought not to lose his verdict because the jury were erroneously instructed that he must prove something he did not have to prove in order to make out a case, though he took no exception to the charge. Staley v. Theo. Hamm Brewing Co., 142 Minn. 399, 172 N. W. 491.

(42) International Lumber Co. v. Bradley T. & R. Supply Co., 132 Minn. 155, 156 N. W. 274; Leonard v. Schall, 132 Minn. 446, 157 N. W. 723; Rushfeldt v. Tall, 137 Minn. 281, 163 N. W. 505; Nordinger v. Ladies of the Maccabees, 138 Minn. 16, 163 N. W. 785; Burmaster v. Alwin, 138 Minn. 383, 165 N. W. 135; Staley v. Theo. Hamm Brewing Co., 142 Minn. 399, 172 N. W. 491; Petrich v. Berkner, 142 Minn. 451, 172 N. W. 770; Farmers Handy Wagon Co. v. Askegaard, 143 Minn. 13, 172 N. W. 881; State Bank v. Ronan, 144 Minn. 236, 174 N. W. 892.

(43) See Staley v. Theo. Hamm Brewing Co., 142 Minn. 399, 172 N. W. 491.

9793. Party concluded by requested instructions—Where the court gives the measure of damages as agreed upon by the parties, without

disparaging comment, there is no error, however erroneous the rule agreed upon may be. O'Connell v. Holler, — Minn. —, 182 N. W. 617.

(44) McAlpine v. Fidelity & Casualty Co., 134 Minn. 192, 158 N. W. 967.

9794. Construction on appeal—(46) Curran v. Chicago G. W. R. Co., 134 Minn. 392, 159 N. W. 955.

9797. Objections and exceptions—In general—Laws 1901, c. 113, making it no longer necessary to take an exception to instructions on the trial, has been characterized as "unfortunate" by the supreme court. Esterly-Hoppin Co. v. Burns, 135 Minn. 1, 159 N. W. 1069.

(52) Esterly-Hoppin Co. v. Burns, 135 Minn. 1, 159 N. W. 1069; Richey v. Minneapolis St. Ry. Co., 135 Minn. 54, 160 N. W. 188. See § 7091

(53) Esterly-Hoppin Co. v. Burns, 135 Minn. 1, 159 N. W. 1069.

(57) Barthelemy v. Foley Elevator Co., 141 Minn. 423, 170 N. W. 513; State Bank v. Ronan, 144 Minn. 236, 174 N. W. 892; Maryland v. L. R. Christenson, — Minn. —, 182 N. W. 951; Farmers State Bank v. Cooke, — Minn. —, 183 N. W. 137.

9798. Indefinite, incomplete or verbally inaccurate instructions—Necessity of objection—Rule of Steinbauer v. Stone—(66) McKenzie v. Duluth St. Ry. Co., 131 Minn. 482, 155 N. W. 758; Laurisch v. Minneapolis etc. Traction Co., 132 Minn. 114, 155 N. W. 1074; Peterson v. Northern Pacific Ry. Co., 132 Minn. 265, 156 N. W. 121; Carpenter v. Minneapolis etc. Traction Co., 133 Minn. 46, 157 N. W. 902; Miller Publishing Co. v. Orth, 133 Minn. 139, 157 N. W. 1083; State v. Shtemme, 133 Minn. 184, 158 N. W. 48; State v. Macbeth, 133 Minn. 425, 158 N. W. 793; Grimes v. Minneapolis etc. Traction Co., 133 Minn. 442, 158 N. W. 719; Paine & Nixon Co. v. United States F. & G. Co., 135 Minn. 9, 159 N. W. 1075; Manning v. Chicago G. W. R. Co., 135 Minn. 229, 160 N. W. 787; R. W. Bonyea Piano Co. v. Wendt, 135 Minn. 374, 160 N. W. 1030; Turner v. Chicago etc. Ry. Co., 136 Minn. 383, 162 N. W. 469; Posch v. Lion Bonding & Surety Co., 137 Minn. 169, 163 N. W. 131; Dawson v. Northwestern Construction Co., 137 Minn. 352, 163 N. W. 772; Martinson v. State Bank, 137 Minn. 476, 163 N. W. 503; Flick v. Ellis-Hall Co., 138 Minn. 364, 165 N. W. 135; McArdle v. Chicago etc. Ry. Co., 138 Minn. 379, 165 N. W. 232; Christison v. St. Paul City Ry. Co., 138 Minn. 456, 165 N. W. 273; Nelson v. Chicago etc. Ry. Co., 139 Minn. 52, 165 N. W. 866; State v. Kasper, 140 Minn. 259, 167 N. W. 1035; State v. Dunn, 140 Minn. 308, 168 N. W. 2; Johnson v. Sinclair, 140 Minn. 436, 168 N. W. 181; Carson v. Turrish, 140 Minn. 445, 168 N. W. 349; Nickolay v. Orr, 142 Minn. 346, 172 N. W. 222; Altona v. Electric Mfg. Co., 142 Minn. 358, 172 N. W. 212; Mooney v. Burgess, 142 Minn. 406, 172 N. W. 308; Periodical Press Co. v. Sherman-Elliott Co., 143 Minn. 489, 174 N. W. 516; Mathwig v. Minneapolis etc. Ry. Co., 145 Minn. 429, 177 N. W. 643; Greenfield v. Unique Theatre Co., 146 Minn. 17, 177 N. W. 666; Peterson v. Minneapolis etc. Ry. Co., 146 Minn. 298,

178 N. W. 745; Whitnack v. Twin Valley Produce Co., — Minn. —, 182 N. W. 444; State v. Shea, — Minn. —, 182 N. W. 445; State v. Hines, — Minn. —, 182 N. W. 450; State v. Pennington, — Minn. —, 182 N. W 962.

(68) See Nelson v. Chicago etc. Ry. Co., 139 Minn. 52, 165 N. W. 866.

(69) Esterly-Hoppin Co. v. Burns, 135 Minn. 1, 159 N. W. 1069; Richey v. Minneapolis St. Ry. Co., 135 Minn. 55, 160 N. W. 188.

(70) Richey v. Minneapolis St. Ry. Co., 135 Minn. 54, 160 N. W. 188.

ARGUMENT OF COUNSEL

9799. In general—It is error for a court to instruct the jury to disregard the arguments of counsel. For the court to say to the jury that it makes no difference what counsel think of the guilt or innocence of the accused does not violate this rule. State v. Maddaus, 137 Minn. 249, 163 N. W. 507.

A prosecuting attorney in a criminal case is not bound to make his argument colorless or argue both sides of the case. He may express his opinion as to the deductions which may reasonably be drawn from the evidence. State v. Dunn, 140 Minn. 308, 168 N. W. 2.

Counsel may comment on the interest of an insurance company having insurance on property involved. State v. Ettenburg, 145 Minn. 39, 176 N. W. 171.

The prosecuting attorney should abstain from expressing his own opinion of the guilt of the accused. State v. Couplin, 146 Minn. 189, 178 N. W. 486.

It is improper for counsel to remark that the costs and disbursements of the action will be so large that an adverse verdict would ruin his client. Anderson v. Minneapolis etc. Ry. Co., 146 Minn. 430, 179 N. W. 45.

It is improper for counsel to refer to newspaper reports or to the probability that the jurors have read the newspapers. State v. Hass, 147 Minn. 269, 180 N. W. 94.

It is improper for the prosecuting attorney to state that certain evidence was given before the grand jury. State v. Nelson, 148 Minn. —, 181 N. W. 850.

The statement, as a fact within counsel's knowledge, of something which is not in the evidence, is wrong. State v. Bernstein, 148 Minn. —, 181 N. W. 947.

A prosecuting attorney is a public officer whose duties and obligations in the trial of a case are not simply those of an attorney in a civil action. Much latitude is allowed him in making his final argument before the jury, but he may not inject into it extrinsic and prejudicial matters which have no basis in the evidence. State v. Bernstein, 148 Minn. —, 181 N. W. 947. See 33 Harv. L. Rev. 956.

(72) State v. Price, 135 Minn. 159, 160 N. W. 677; State v. Wassing, 141 Minn. 106, 169 N. W. 485; State v. Liss, 145 Minn. 45, 176 N. W. 51; State v. Bernstein, 148 Minn. —, 181 N. W. 947.

(73) Smith v. Great Northern Ry. Co., 133 Minn. 192, 158 N. W. 46.

(74) State v. Bernstein, 148 Minn. —, 181 N. W. 947. See Smith v. Great Northern Ry. Co., 133 Minn. 192, 158 N. W. 46.

(81) See Smith v. Great Northern Ry. Co., 133 Minn. 192, 158 N. W. 46.

See §§ 2478, 7102, 10307.

9799a. Several counsel for one side—It is discretionary with the trial court to permit two attorneys on the same side to argue the case to the jury. Curran v. Chicago G. W. R. Co., 134 Minn. 392, 159 N. W. 955.

9800. Objections—Instructions to disregard—The language used by the prosecuting attorney in the closing argument to the jury, though at times subject to criticism, was not of the sort that when once uttered no act or admonition of the court could thereafter cure the harm done and secure a fair trial; hence defendant should have sought redress while it could be had, and should not be allowed to treasure up the alleged misconduct for use in the event of an adverse verdict. State v. Couplin, 146 Minn. 189, 178 N. W. 486.

If it is prejudicial in its tendency, it is the duty of the court, when requested, to direct the jury to disregard it, and a failure to do so may require a new trial notwithstanding a cautionary instruction given later by the trial court. State v. Bernstein, 148 Minn. —, 181 N. W. 947.

If counsel for one of the parties makes an improper statement in his closing argument to the jury, prompt objection should be made in order that there may be an opportunity to correct its prejudicial effect by appropriate action at the time. Mullen v. Devenney, — Minn. —, 183 N. W. 350.

(84) State v. Liss, 145 Minn. 45, 176 N. W. 51; Mathwig v. Minneapolis etc. Ry. Co., 145 Minn. 429, 177 N. W. 643; State v. Couplin, 146 Minn. 189, 178 N. W. 486; Gibson v. Gray Motor Co., 147 Minn. 134, 179 N. W. 729; Mullen v. Devenney, — Minn. —, 183 N. W. 350.

INTERROGATORIES TO THE JURY

9802. Discretionary—The discretion of the court extends to the form and substance of the interrogatories. See Jacobson v. Chicago etc. Ry. Co., 132 Minn. 181, 156 N. W. 251.

(90) See Jacobson v. Chicago etc. Ry. Co., 132 Minn. 181, 156 N. W. 251.

CONDUCT AND DELIBERATIONS OF JURY

9811. Allowing jury to take pleadings to jury room—It is probable that under the statute the jury are not entitled to take pleadings to the jury room which have not been put in evidence. Antel v. St. Paul City Ry. Co., 133 Minn. 156, 157 N. W. 1073.

VERDICT

9813. Definition—(27) Lind v. Hurd, 148 Minn. —, 181 N. W. 326.

9813b. Five-sixth verdict—The statute authorizing a five-sixth verdict is constitutional. Winters v. Minneapolis & St. Louis R. Co., 126 Minn. 260, 148 N. W. 106; McNaney v. Chicago etc. Ry. Co., 132 Minn. 391, 396, 157 N. W. 650.

It applies to an action in a state court under the federal Safety Appliance Act and Employers' Liability Act. See § 6022c.

It applies to bastardy proceedings to charge the father. State v. Longwell, 135 Minn. 65, 160 N. W. 189.

The allowance of a five-sixth verdict is a matter of procedure and not of substantive law. State v. Longwell, 135 Minn. 65, 160 N. W. 189.

The court did not instruct as to when a verdict by five-sixths of the jury could be rendered. The omission was not prejudicial, since a unanimous verdict was returned within three hours after the cause was submitted to the jury. Brown v. Duluth etc. Ry. Co., 147 Minn. 167, 179 N. W. 1003.

9814. Effect of in determining rights—A verdict upon which no judgment has been entered is not subject to garnishment. Lind v. Hurd, 148 Minn. —, 181 N. W. 326.

(30) Lind v. Hurd, 148 Minn. —, 181 N. W. 326.

9816a. For nominal damages—Effect—A verdict for the plaintiff in a personal injury action, though awarding damages only nominal in amount, necessarily includes a finding of the liability of the defendant; and a verdict awarding nominal and inadequate damages cannot be sustained upon the ground that it was really a finding for the defendant upon the issue of liability. Greenfield v. Unique Theatre Co., 146 Minn. 17, 177 N. W. 666.

9817. Definiteness—Informality—(39) Anderson v. Van Doren, 142 Minn. 237, 172 N. W. 117.

9817a. Construction—Under the court's instructions, by returning a verdict against the particular defendants by whom the assault was found to have been committed, without naming the other defendants, the jury in effect found in favor of the latter defendants. Wrabek v. Suchomel, 145 Minn. 468, 177 N. W. 764.

9821. Practice on coming in of verdict—A failure to observe the provisions of G. S. 1913, § 7812, in opening a sealed verdict in the absence of the jury and recording it without reading it to them, and ascertaining whether it was their verdict, held ground for a new trial. Klemmer v. Biersdorf, 137 Minn. 474, 163 N. W. 527.

9823. Sending jury back to correct verdict—(55) Anderson v. Van Doren, 142 Minn. 237, 172 N. W. 117.

9824. Sealed verdicts—The provisions of G. S. 1913, § 7812, relating to the procedure upon the rendition of a verdict, apply to a sealed verdict. Klemmer v. Biersdorf, 137 Minn. 474, 163 N. W. 527.

9829. Amendment by court—It may be shown by the affidavit of all the jurors that, by a clerical error of the jury, the verdict returned in court was the opposite of the verdict unanimously agreed upon by them. Paul v. Pye, 135 Minn. 13, 159 N. W. 1070.

(76) See Paul v. Pye, 135 Minn. 13, 159 N. W. 1070.

SPECIAL VERDICTS

9831. Must cover all issues to authorize judgment—Plaintiff sued for the loss resulting from the fire, and, in the complaint, also set forth another independent cause of action. The jury returned a general verdict for plaintiff for the amount allowed upon the other cause of action, but included nothing therein for the loss resulting from the fire. By direction of the court they also returned a special verdict fixing the amount of loss resulting from the fire. The jury not having included such loss in the general verdict, and not having found that it resulted from the negligence of defendant, plaintiff is not entitled to judgment against defendant for the amount thereof. Keithley v. Hettinger, 133 Minn. 36, 157 N. W. 897.

9833. How far optional with jury—The matter of submitting special issues to a jury in an action at law rests in the sound discretion of the trial court and this discretion extends to their form and substance. Jacobson v. Chicago etc. Ry. Co., 132 Minn. 181, 156 N. W. 251.

(97) Jacobson v Chicago etc. Ry. Co., 132 Minn. 181, 156 N. W. 251.

TRIAL BY COURT

ISSUES TO THE JURY

9837. In general—Statute—The statute applies to appeals in highway proceedings. Brazil v. Sibley County, 139 Minn. 458, 166 N. W. 1077.

(7) Johnson v. Holmes, 142 Minn. 54, 170 N. W. 709.

9838. How far discretionary—In special proceedings the issues may be intrinsically unfit for submission to a jury. See Brazil v. Sibley County, 139 Minn. 458, 166 N. W. 1077.

(9) Johnson v. Holmes, 142 Minn. 54, 170 N. W. 709.

See § 666 (in summary proceedings against attorneys).

9838a. Time of submission—Issues may be framed and submitted after the commencement of the trial on the court's own motion. Johnson v. Holmes, 142 Minn. 54, 170 N. W. 709.

9841. Motion for submitting issues—Framing issues—Rule of court—The rule of court has no application where the court submits issues on its own motion. Johnson v. Holmes, 142 Minn. 54, 170 N. W. 709.

(15) Johnson v. Holmes, 142 Minn. 54, 170 N. W. 709.

9844. Mode of trial when issues are submitted—Held that no prejudice resulted to appellant because the jury heard evidence upon issues reserved for the determination of the court. Johnson v. Holmes, 142 Minn. 54, 170 N. W. 709.

(25) Johnson v. Holmes, 142 Minn. 54, 170 N. W. 709.

9845. Findings of jury how far conclusive on court—Special findings made by a jury upon questions of fact submitted to them are not simply advisory, but are as binding on the court as a general verdict. Nienow v. Mapleton, 144 Minn. 60, 174 N. W. 517.

(27) Nienow v. Mapleton, 144 Minn. 60, 174 N. W. 517.

FINDINGS

9849. When necessary—The record is held to show that the parties submitted the case for decision; and this being so it was proper to make findings on the merits. Lindstrom v. Helk, 139 Minn. 100, 165 N. W. 873.

A failure to make findings when none in favor of appellant would be justified is harmless error. Froehling v. Independent School District, 140 Minn. 71, 167 N. W. 108.

Findings are not necessary as a basis for a judgment entered on stipulation. Fletcher v. Taylor, — Minn. —, 182 N. W. 437.

(46) Fletcher v. Taylor, — Minn. —, 182 N. W. 437.

See § 7794 (on appeal from probate court).

9850. Waiver—Where a party raises no objection, on the trial, or in a motion for a new trial, to the failure of the court to make any findings, he waives the objection and cannot raise it for the first time on appeal. Wood v. Wood, 137 Minn. 252, 163 N. W. 297.

9851. Nature of facts to be found—(49) Luck Land Co. v. Dixon, 132 Minn. 144, 155 N. W. 1038.

9852. Sufficiency of particular findings—Where the title to realty is in issue a finding that one of the parties is the owner thereof is sufficient, without stating the evidentiary facts upon which his title rests. Luck Land Co. v. Dixon, 132 Minn. 144, 155 N. W. 1038.

A finding of "actual notice" held equivalent to a finding of actual knowledge. State v. District Court, 132 Minn. 251, 156 N. W. 278.

A finding that all the allegations of the pleading not embraced in the findings expressly made are not true, held not to negative the truth of express admissions made by such pleadings. Martinson v. Hensler, 132 Minn. 437, 157 N. W. 714.

A finding that the allegation of the complaint that the boundary line had never been determined was true is a finding against a contention

that the boundary line had been located by arbitration. Lejonquist v. Bukowski, — Minn. —, 182 N. W. 513.

(55) Bredeson v. Nickolay, 147 Minn. 304, 180 N. W. 547.

See § 10081.

9857. Judgment must be justified by findings—(70) Gross Iron Ore Co. v. Paulle, 132 Minn. 160, 156 N. W. 268; Halvorson v. Halvorson, 133 Minn. 78, 157 N. W. 1001.

(71) Gross Iron Ore Co. v. Paulle, 132 Minn. 160, 156 N. W. 268.

9858a. Immaterial findings—A finding that has no bearing on the conclusions of law may be disregarded. Stoering v. Swanson, 139 Minn. 115, 165 N. W. 875.

9860. Construction—The findings of the trial court are to be construed in the light of the evidence offered and received on the trial, and technical defects therein will be supplied by intendment as to issues not controverted or disputed by the parties, and upon which the evidence leaves no fair doubt. Aiken v. Timm, 147 Minn. 317, 180 N. W. 234.

In an action for specific performance a finding that the allegations of the complaint were true held to negative the defence of mistake set up in the answer. Bredeson v. Nickolay, 147 Minn. 304, 180 N. W. 547.

Trial courts are presumed to make findings of fact solely from a consideration of the evidence, uninfluenced by the legal conclusions which may be drawn from the findings. State v. Minnesota & Ontario Paper Co., 147 Minn. 369, 180 N. W. 548.

Findings are to be construed in the light of the entire record, including the evidence. O'Neil v. O'Neil, — Minn. —, 182 N. W. 438.

(76) O'Neil v. O'Neil, — Minn. —, 182 N. W. 438.

(77) Pushor v. American Railway Express Co., — Minn. —, 183 N. W. 839.

(79) See § 338.

OBJECTIONS TO FINDINGS—AMENDMENT

9866. Failure to find on material issues—Where the court erroneously fails to make any findings whatever the remedy is by motion in the trial court. Objection cannot be made for the first time on appeal. Wood v. Wood, 137 Minn. 252, 163 N. W. 297.

A failure to make findings when none in favor of appellant would be justified is harmless error. Froehling v. Independent School District, 140 Minn. 71, 167 N. W. 108.

(90) Rockey v. Joslyn, 134 Minn. 468, 158 N. W. 787; Jankowitz v. Kaplan, 138 Minn. 452, 165 N. W. 275.

(91) Rockey v. Joslyn, 134 Minn. 468, 158 N. W. 787.

(96) Malchow v. Malchow, 143 Minn. 53, 172 N. W. 915.

(99) Stoering v. Swanson, 139 Minn. 115, 165 N. W. 875.

9868. Findings not within the issues—That parts of a finding are immaterial does not require a new trial or a change in the conclusions of law. Wandersee v. Wandersee, 132 Minn. 321, 156 N. W. 348.

9869. Findings not justified by the evidence—There should be no reversal on appeal for a material error in the findings where no application to correct it is made in the trial court. McDonald v. Whipps, 137 Minn. 450, 163 N. W. 746.

Inaccuracies in findings of fact which have no bearing upon the conclusions of law are not a ground for a new trial. McDonald v. Whipps, 137 Minn. 450, 163 N. W. 746.

9870. Inconsistent findings—Where there is no settled case objection to the inconsistency of findings cannot be raised on appeal. Mascall v. Reitmeier, 145 Minn. 214, 176 N. W. 486.

9870a. Immaterial findings—That parts of a finding are immaterial does not require a new trial or a change in the conclusions of law. Wandersee v. Wandersee, 132 Minn. 321, 156 N. W. 348.

9873. Amendment of findings—The trial court may, at any time before judgment, and before the cause has been removed from its jurisdiction by appeal, amend its findings of fact and conclusions of law, even though the result thereof be an order for judgment the reverse of that ordered by the original findings. Wold v. Wold, 138 Minn. 409, 165 N. W. 229.

A refusal to make an amendment so as to find the existence of certain facts is equivalent to a finding that such facts do not exist. Malchow v. Malchow, 143 Minn. 53, 172 N. W. 915.

9874. Amendment of conclusions of law or judgment—The trial court may at any time before judgment, and before the cause has been removed from its jurisdiction by appeal, amend its findings of fact and conclusions of law, even though the result thereof is an order for judgment the reverse of that ordered by the original findings. Wold v. Wold, 138 Minn. 409, 165 N. W. 229.

TRUSTS

IN GENERAL

9875. Definition and nature—The origin of trusts was no doubt for the protection of the beneficiary so as to assure to him the income from the corpus of the trust and closing every avenue by which he, or others, might acquire, dispose of, impair, or incumber the property itself. And the courts, when dealing with trusts have, of course, adopted and applied principles of law which, as between the beneficiary, his creditors and his trustees, conserve the trust estate and attain the purposes of the trust. In re Thorne's Estate, 145 Minn. 412, 177 N. W. 638.

9875a. Situs—A trust held to have a situs in this state for purpose of a succession tax. In re Thorne's Estate, 145 Minn. 412, 177 N. W. 638.

9876. Following trust property or its proceeds—Equity has always recognized the right of the beneficiary of a trust to follow the trust fund

or estate so long as it can be traced and identified and to assert his rights in it as against any one not a bona fide purchaser for value. It is not the identity of the form, but the substantial identity of the fund or property which is the important thing, and it is immaterial that the transmutation of the form of the property may have been effected with the acquiescence of the beneficiary of the trust. Colby v. Street, 146 Minn. 290, 178 N. W. 599. See L. R. A. 1916C, 21.

If a conveyance to a third party carries the land beyond the reach of a prior vendee, the trust which affected the land in the hands of the vendor will attach to the unpaid purchase money due to him from his grantee and to whatever portion of the purchase money the vendor has received. The purchase money becomes a fund which takes the place of the land by substitution, and the trust attaches to the proceeds of the sale upon the principle that equity never suffers a trust to be defeated by a conversion of the subject-matter so long as the trust fund, under whatsoever form, can be traced in the hands of those who would be liable in respect of the original subject-matter if it had remained in specie under their control. Colby v. Street, 146 Minn. 290, 178 N. W. 599.

(34) See Stein v. Kemp, 132 Minn. 44, 155 N. W. 1052; Hohag v. Northland Pine Co., 147 Minn. 38, 179 N. W. 485.

(35) Colby v. Street, 146 Minn. 290, 178 N. W. 599

EXPRESS TRUSTS

9878. Abolished except as authorized by statute—(41) 1 Minn. L. Rev. 201.

9880. Unauthorized trusts enforceable as powers in trust—(44) See Whittaker v. Meeds, 146 Minn. 160, 178 N. W. 597.

9885. Beneficiaries must be certain—Testatrix by her will bequeathed to a person named therein the sum of $4,000, to be used by him for the extension of the kingdom of God in a certain church. Held, that the bequest was not an absolute gift to the person named, but was an attempted bequest in trust for the purpose stated in the will, and invalid because the beneficiaries are not certain or capable of being made certain. Bogart v. Taylor, 144 Minn. 454, 175 N. W. 913.

(51) Bogart v. Taylor, 144 Minn. 454, 175 N. W. 913.

9886. For what purposes authorized—A trust under subdivision 6 of G. S. 1913, § 6710, providing for the accumulation of income from the rents and profits of realty, is void if it is contrary to the limitations provided in G. S. 1913, §§ 6687, 6688. Minnesota Loan & Trust Co. v. Douglas, 135 Minn. 413, 161 N. W. 158.

A trust to invest funds for the benefit of a class, as provided by subdivision 5, § 6710, G. S. 1913, is not invalid because it may suspend the power of alienation beyond the period fixed by statute, where personal property is the subject of the trust. In re Bell's Will, 147 Minn. 62, 179 N. W. 650. See 34 Harv. L. Rev. 650.

(57) Walso v. Latterner, 140 Minn. 455, 168 N. W. 353 (deposit of money by an owner in his own name in trust for another held authorized by the statute); In re Bell's Will, 147 Minn. 62, 179 N. W. 650.

(58) Minnesota Loan & Trust Co. v. Douglas, 135 Minn. 413, 161 N. W. 158.

(59) See 10 A. L. R. 1368.

9886a. Deposit in trust for another—Where one deposits his own money in a bank in his own name in trust for another, upon the death of the depositor the money belongs to the beneficiary if such was the intention of the depositor. His intention may be proved by his declarations. It being a question of the intention of the depositor, all his acts and declarations throwing light on that question should be received in evidence, as well as all other facts and circumstances surrounding the transaction. Such a trust is not irrevocable and the depositor may withdraw the money at any time. Walso v. Latterner, 140 Minn. 455, 168 N. W. 353. See L. R. A. 1917C, 550.

Where a depositor makes a deposit in a savings bank of his own money in his own name in trust for a relative and dies before the beneficiary without doing any decisive act to disaffirm the trust, a presumption arises that an absolute trust was created as to the balance remaining on deposit at the death of the depositor. The fact that the depositor had deposited in his personal account the maximum amount permitted by the bank before making this deposit, and that he could withdraw this deposit during his lifetime, and did withdraw a part of it unaided by other evidence, is not sufficient to overcome this presumption. The facts stated by the nonexpert witnesses as a basis for their opinions did not tend to show that the depositor was incompetent to transact business and their opinions as to his competency were properly excluded. Walso v. Latterner, 143 Minn. 364, 173 N. W. 711.

9887. What constitutes—(60) Peavey v. Wells, 139 Minn. 174, 165 N. W. 1063; Walso v. Latterner, 140 Minn. 455, 168 N. W. 353; Malchow v. Malchow, 143 Minn. 53, 172 N. W. 915.

9887a. Interest not disposed of—It is provided by statute that when an express trust is created, every estate and interest not embraced in the trust, and not otherwise disposed of, shall remain in or revert to the person creating the trust, or his heirs, as a legal estate. G. S. 1913, § 6717; Whittaker v. Meeds, 146 Minn. 160, 178 N. W. 597.

9890. Transfer of interest of beneficiary—Where the cestui que trust has acquired the whole beneficial interest in the trust property he may alienate it, either the corpus or the income. Simmons v. Northwestern Trust Co., 136 Minn. 357, 162 N. W. 450.

9891. Revocation—Termination—An express trust may be terminated by decree of the court when the entire beneficiary interest in and to the trust property, including the estate in reversion, has become vested in the cestui que trust, and the character and purpose of the trust as

expressed in the instrument creating it does not conflict with or preclude the right of termination. Simmons v. Northwestern Trust Co., 136 Minn. 357, 162 N. W. 450.

9893. Jurisdiction of courts—A court may terminate an express trust under certain circumstances. Simmons v. Northwestern Trust Co., 136 Minn. 357, 162 N. W. 450. See § 9891.

RESULTING TRUSTS

9896. Grant to one for consideration paid by another—No resulting trust—Statute—G. S. 1913, § 6706, providing that where a grant of land is made to one person, the consideration being paid by another, no trust shall result in favor of the one making the payment, applies to a case where the husband pays the consideration and causes the title to be vested in the wife. In such case the wife becomes the absolute owner of the land, subject only to the rights of creditors, and it cannot be taken from her in divorce proceedings, except to the extent authorized by G. S. 1913, § 7124, where a divorce is granted the husband. Nelson v. Nelson, — Minn. —, 183 N. W. 354.

Plaintiff was the lawful wife and sole heir of George J. Speiss when he died, the record owner of the real estate involved in the action. Before his death he had conveyed direct to defendant an undivided one-half thereof by deeds which she recorded after such death. Subsequent to his marriage to plaintiff, he entered a bigamous marriage with defendant, and continuously thereafter cohabited with her. The whole of the real estate mentioned, consisting of his homestead in the city and an 80-acre farm, is claimed by each party to the suit. It is held: By virtue of section 6706, G. S. 1913, the absolute title vested in George J. Speiss when the real estate was conveyed to him, even though the purchase price was paid by defendant. She cannot have a constructive trust or a trust ex maleficio declared, for the findings, amply sustained, are that she knew of and acquiesced in the title being taken in the name of George J. Speiss, and that she knew from the start that her relations with Speiss were bigamous. The burden was on defendant to prove that her money paid for the real estate involved. She did not sustain this burden. The findings, which do not harm, but rather justify greater relief than appellant otherwise could have, cannot be complained of by her. The record justifies the judgment rendered. Speiss v. Speiss, — Minn. —, 183 N. W. 822.

Where the husband's earnings pay for land, but the title is taken in the wife's name, she becomes the absolute owner under section 6706, G. S. 1913; and no resulting trust or trust ex maleficio can be declared under section 6708, G. S. 1913, when it appears that the title was so taken with his knowledge and acquiescence and the only fraud charged against her was misrepresentations as to the law bearing upon the property rights of husband and wife. Gummison v. Johnson, — Minn. —, 183 N. W. 515.

(88) Watters v. Northern Pacific Ry. Co., 141 Minn. 480, 170 N. W. 703.

9897. Exception to statute—(95) See Speiss v. Speiss, — Minn. —, 183 N. W. 822; Gummison v. Johnson, — Minn. —, 183 N. W. 515.

IMPLIED TRUSTS

9914. Bona fide purchasers protected—(34) See Larson v. Larson, 133 Minn. 452, 158 N. W. 707.

CONSTRUCTIVE TRUSTS

9915. Definition and nature—(35) 33 Harv. L. Rev. 420 (constructive trusts are of a remedial rather than substantive nature).

9916. In general—(37) Barrett v. Thielen, 140 Minn. 266, 167 N. W. 1030.

9919. Preventing will or deed—(44) Barrett v. Thielen, 140 Minn. 266, 167 N. W. 1030.

9922. Liability of trustee for value of property sold—Where one holds legal title to property charged with a constructive trust in favor of another the latter cannot recover from the trustee the value of the property unless it has passed into the hands of bona fide purchasers. Wellington v. St. Paul etc. Ry. Co., 123 Minn. 483, 144 N. W. 822; Larson v. Larson, 133 Minn. 452, 158 N. W. 707.

9923. Murderer inheriting from victim—(51) 30 Harv. L. Rev. 622.

TRUSTEES

9927. Not officer of court—Judicial control of discretionary powers of trustees. 2 Minn. L. Rev. 535.

9930. Good faith—(60) Boyum v. Jordan, 146 Minn. 66, 178 N. W. 158.

9931. Care and diligence—Liability for neglect—Liability to third parties for negligence. 7 A. L. R. 408.

Liability of an inactive co-trustee. 34 Harv. L. Rev. 483.

9934. Purchase of trust property—An assignment by a widow of her interest in the estate of her husband to a trustee under the will of her husband, held to have been made by her with full knowledge of her rights, for an adequate consideration, and that it was fair, to her advantage and valid. Merriam v. Merriam, 136 Minn. 246, 161 N. W. 518.

A cestui que trust cannot allege that to be a breach of trust which has been done under his own sanction, whether by previous consent or subsequent ratification. Either concurrence in the act or acquiescence

without original concurrence will relieve the trustee from responsibility to the beneficiary. Boyum v. Jordan, 146 Minn. 66, 178 N. W. 158.

(65) Minnesota Loan & Trust Co. v. Peteler Car Co., 132 Minn. 277, 156 N. W. 255; Johnson v. Bruzek, 142 Minn. 454, 172 N. W. 700.

(67-69) See Johnson v. Bruzek, 142 Minn. 454, 172 N. W. 700.

(71) Boyum v. Jordan, 146 Minn. 66, 178 N. W. 158.

9937. Cannot make private profit—Where a trustee receives a profit other than interest on his money by furnishing his own funds to a third party to buy up the claims of creditors, he violates his duty to such creditors and they, and not the assignor, have the right to call him to account. Boyum v. Jordan, 146 Minn. 66, 178 N. W. 158.

(77) Boyum v. Jordan, 146 Minn. 66, 178 N. W. 158.

9939. Misapplication of funds—(81) 34 Harv. L. Rev. 454 (participating in a breach of trust); 12 A. L. R. 1048.

9945. Compensation—Reimbursement—(97) See Boyum v. Jordan, 146 Minn. 66, 178 N. W. 158.

UNDERTAKING ESTABLISHMENTS—See Municipal Corporations, §§ 6525, 6768.

UNDUE INFLUENCE

9949. Definition and nature—It is not enough that the one benefited had an opportunity to exert undue influence and the motive for exercising it. There must be undue influence exercised in fact and it must be effective. Thill v. Freiermuth, 132 Minn. 242, 156 N. W. 260.

(12) Thill v. Freiermuth, 132 Minn. 242, 156 N. W. 260; Merchants Trust & Savings Bank v. Schudel, 141 Minn. 250, 169 N. W. 795.

9950a. Burden of proof—The burden of proving undue influence is ordinarily on him who asserts it. Thill v. Freiermuth, 132 Minn. 242, 156 N. W. 260.

An evidentiary presumption of fact arising from confidential relations between the parties does not shift the burden of proof. Shaughnessy v. Shaughnessy, 135 Minn. 262, 160 N. W. 769.

The burden of proof to establish undue influence is upon the party attacking the conveyance, and the charge that the burden shifted, because during the trial certain presumptions of fact might arise in aid of the other party, was erroneous. Shaughnessy v. Shaughnessy, 135 Minn. 262, 160 N. W. 769.

See §§ 7310, 7311 (conveyances from parent to child).

9951. Evidence—Admissibility—The declarations of the person claimed to have been unduly influenced are admissible to show the effect of undue influence otherwise proved to have been exerted. Undue influence

cannot be proved by such declarations alone, at least if they are not made in connection with the execution of the instrument so as to be a part of the res gestae. The attorney employed to draft the instrument may testify as to such declarations. Thill v. Freiermuth, 132 Minn. 242, 156 N. W. 260.

The fact that a person is old and his mental faculties impaired by age so that he is more susceptible to undue influence may be considered. Shaughnessy v. Shaughnessy, 135 Minn. 262, 160 N. W. 769.

(17) Thill v. Freiermuth, 132 Minn. 242, 156 N. W. 260; Shaughnessy v. Shaughnessy, 135 Minn. 262, 160 N. W. 769.

9951a. Evidence—Sufficiency—Evidence held insufficient to justify a finding that a deed was procured by undue influence. Manchester v. Manchester, 131 Minn. 487, 154 N. W. 1102.

Evidence held to justify a finding of want of undue influence. Malley v. Quinn, 132 Minn. 254, 156 N. W. 263.

Evidence held not to justify a finding that a deed was procured by undue influence. Thill v. Freiermuth, 132 Minn. 242, 156 N. W. 260.

Evidence held to justify a finding that a deed from a parent to a child was obtained by undue influence. Shaughnessy v. Shaughnessy, 135 Minn. 262, 160 N. W. 769.

The evidence sustains the finding of the trial court that a deed was obtained from a man of advanced age, mentally incompetent to transact business, through the exercise of undue influence by one who had acted as his confidential adviser. Merchants Trust & Savings Bank v. Schudel, 141 Minn. 250, 169 N. W. 795. See Digest, § 1191.

Evidence held to justify a finding that a relinquishment of a right of inheritance was procured by undue influence. Bruski v. Bruski, — Minn. —, 182 N. W. 620.

9952. Law and fact—(18) Thill v. Freiermuth, 132 Minn. 242, 156 N. W. 260.

UNFAIR COMPETITION

9953. Right to competition not unlimited—(19) See Steffes v. Motion Picture M. O. Union, 136 Minn. 200, 161 N. W. 524; Canellos v. Zotalis, 145 Minn. 292, 177 N. W. 133; International News Service v. Associated Press, 248 U. S. 215; § 9670.

9954. Interference with business of another—As a rule one man has no right to interfere in the business affairs of another, but if his act in so doing is in pursuit of a just purpose to further his own interests he may be justified in so doing, and so long as he does not act maliciously and does not unreasonably or unnecessarily interfere with the rights of his neighbor he cannot be charged with actionable wrong. George J. Grant Const. Co. v. St. Paul Building Trades Council, 136 Minn. 167, 161 N. W. 520; Steffes v. Motion Picture M. O. Union, 136 Minn. 200, 161 N. W. 524.

No person has the right maliciously to injure or destroy the business of another by acts which serve no legitimate purpose of his own. To interfere with a profitable sale made by a business competitor by inducing the purchaser to break the contract of sale amounts to an actionable tort. An act of that kind and a slander intended to injure a competitor in his business, may be pleaded in the same complaint, as each wrongful act is connected with the same subject of action. Canellos v. Zotalis, 145 Minn. 292, 177 N. W. 133.

UNITED STATES

9956c. A corporation—The United States may be deemed a corporation. Trumer v. South Side State Bank, 139 Minn. 222, 166 N. W. 127.

9956d. United States Senators—Qualification and election—The office of United States Senator is a federal office, created by the federal constitution. The qualifications of those aspiring to or holding the position are also prescribed by the federal constitution, which the state is without authority to modify or enlarge in any way; and the provisions of the state constitution imposing restrictions upon the right of suffrage, and upon the right to hold public office, can have no application to the office of United States Senator. The method of election to such office is also prescribed by federal law, and the mere fact that the state election machinery is adopted for that purpose does not render applicable to a particular candidate the general disqualifications for public office found in the state constitution. State v. Schmahl, 140 Minn. 219, 167 N. W. 481.

See §§ 2929, 7992.

USURY

9961. What constitutes—In general—(35) Patterson v. Wyman, 142 Minn. 70, 170 N. W. 928.

See § 1540 (conflict of laws).

9964. Intent—Presumption—(44–47) Patterson v. Wyman, 142 Minn. 70, 170 N. W. 928.

9965. Form not controlling—(48) Rantala v. Haish, 132 Minn. 323, 156 N. W. 666.

9967. Payment of interest in advance—(52) See Evans v. National Bank, 251 U. S. 108.

9971. Bonus or commission to lender—(64) Patterson v. Wyman, 142 Minn. 70, 170 N. W. 928.

(65) Rantala v. Haish, 132 Minn. 323, 156 N. W. 666.

9973. Note for more than received—(67) Rantala v. Haish, 132 Minn. 323, 156 N. W. 666.

9977. Note for services in procuring loan—(71) See Rantala v. Haish, 132 Minn. 323, 156 N. W. 666.

9988. Bona fide purchasers—(89, 90) Rantala v. Haish, 132 Minn. 323, 156 N. W. 666.

9989. Cancelation of instruments—Statute—The statute has no extra-territorial effect. Patterson v. Wyman, 142 Minn. 70, 170 N. W. 928.

A party who seeks affirmative equitable relief against a usurious contract will be aided only on condition of his doing equity. Where he asks for cancelation of instruments he will first be required to pay what he owes with legal interest, and his so doing will be made a condition to the granting of the equitable relief he asks. Patterson v. Wyman, 142 Minn. 70, 170 N. W. 928.

(96) Patterson v. Wyman, 142 Minn. 70, 170 N. W. 928.

9991. Recovery of money paid—A provision of the North Dakota statute for recovery of double interest paid on a usurious contract is a penalty and will not be enforced in Minnesota. Patterson v. Wyman, 142 Minn. 70, 170 N. W. 928.

9992. Pleading—(6) Greenfield v. Minnesota M. & D. Co., 138 Minn. 446, 165 N. W. 274 (general charge of usury insufficient).

9994. Law and fact—Whether a transaction is usurious is generally a question of fact. But where the facts are undisputed and only one conclusion can reasonably be drawn from them, usury becomes a question of law. Rantala v. Haish, 132 Minn. 323, 156 N. W. 666.

(12) Rantala v. Haish, 132 Minn. 323, 156 N. W. 666.

9996. Evidence—Sufficiency—Evidence held to justify a finding that a transaction was usurious. Patterson v. Wyman, 142 Minn. 70, 170 N. W. 928.

VAGRANCY

9997a. Municipal ordinances—Evidence held to justify a conviction under a vagrancy ordinance of the city of Minneapolis. State v. Woods, 137 Minn. 347, 163 N. W. 518.

VENDOR AND PURCHASER

THE CONTRACT

9998. In general—A sale involves a money transaction. The fact that payment may be made in property or in cash, at the option of the purchaser, is not controlling in determining whether a contract is one of sale or barter or exchange. A certain contract construed and held to be one of sale and not one for exchange of properties. Westfall v. Ellis, 141 Minn. 377, 170 N. W. 339.

9998b. Mutual and dependent covenants—If the vendee in a contract for the sale of lands covenants that payment of the purchase price shall be a condition precedent to the performance by the vendor of his covenant to convey, the covenant to pay is an independent one, enforceable in an action brought to recover the purchase price. The intention of the parties to such a contract is the paramount consideration in determining whether their respective covenants are independent or mutual and dependent, and in ascertaining such intention the order of time in which performance shall take place is a controlling circumstance. Noyes v. Brown, 142 Minn. 211, 171 N. W. 803.

10000. Offer and acceptance—To establish a contract for the sale of real property by correspondence, there must be a definite offer in writing and an unqualified acceptance of the offer in writing. An acceptance upon terms varying from those offered is a rejection of the offer. A party making an offer to sell real property may, in the absence of an unqualified acceptance of the offer, withdraw it and terminate the negotiations. Kull v. Wilson, 137 Minn. 127, 162 N. W. 1072.

To constitute a complete contract for the sale of land by offer and acceptance the acceptance must be of the precise terms of the offer, for otherwise the minds of the parties do not meet. Krohn v. Dustin, 142 Minn. 304, 172 N. W. 213.

A written instrument held not a mere offer, but a complete contract specifically enforceable. Krohn v. Dustin, 142 Minn. 304, 172 N. W. 213.

(29) Kull v. Wilson, 137 Minn. 127, 162 N. W. 1072.

10001. Parties—Evidence held to justify a finding that defendant was not the agent of plaintiff in the purchase of certain land, but purchased for himself and sold to plaintiff. Burnett v. Sulflow, 134 Minn. 407, 159 N. W. 951.

10001a. Competency of parties—Evidence held to justify a finding that a vendor was incompetent at the time of entering into a contract. Wheeler v. McKeon, 137 Minn. 92, 162 N. W. 1070.

Evidence held not to justify a finding that plaintiff was lacking in contractual capacity. Rogers v. Central Land & Invest. Co., — Minn. —, 183 N. W. 961.

10003. Mutuality—(41) Nelson v. McElroy, 140 Minn. 429, 168 N. W. 179, 587.

10004. Description of the land—A contract to convey land recited that part of the consideration should be the conveyance of a quarter section of land "near Weyburn * * * agreed upon," and "owned by said second party." The "said second party" owned no land "near Weyburn." He received the conveyance due him, but refused to convey any land himself. The court received evidence that it was verbally agreed that the land to be conveyed should represent a consideration of $2,000. The contract was not a binding one to convey any particular piece of land. While executory, it could not have been enforced on either side. Nelson v. McElroy, 140 Minn. 429, 168 N. W. 179, 587.

10005a. Stipulation for rescission and return of money at option of vendee—Plaintiff contracted for the purchase of a section of land, but reserved the right to rescind the contract at the end of one year and reclaim the money paid. Twelve days after the expiration of the year, he gave notice of his election to rescind. The jury found that the notice was given within a reasonable time. Held, that the evidence justified the finding. Davis v. Godart, 147 Minn. 362, 180 N. W. 239. See L. R. A. 1917C, 763.

An agreement by plaintiff to purchase land, with a provision that, if the purchaser desires to relinquish the land at the end of one year from the date of the contract, the amount paid thereon will be returned to him, affords plaintiff a reasonable time after the expiration of the year in which to exercise the option. Under the circumstances disclosed by the evidence, the question of what constituted a reasonable time was a question of fact for the jury. Davis v. Godart, 141 Minn. 203, 169 N. W. 711.

10005b. Stipulation for deduction if all land not conveyed—A contract to sell and convey certain tracts of land, reciting that grantor does not own all of such tracts, but will attempt to acquire title thereto, and that failure so to do is not to work a rescission, but a reduction in the purchase price shall be made, corresponding with the difference in value of all tracts described in the contract and those to which title is procured, provides the method of arriving at the amount to be deducted on account of the lots not procured or conveyed. Duluth, W. & P. R. Co. v. Urban Investment Co., — Minn. —, 182 N. W. 605.

10005c. Stipulation as to resale—Attached to and made part of a contract to purchase land was an agreement of the vendor to resell the land by certain dates, at a certain price, provided the vendee gave notice by a specified prior date of his desire to have it resold. The vendee gave the notice, but the vendor failed to resell. In this action to recover damages for a breach by the vendor of the agreement it is held: The agreement is not inherently impossible of performance; the inability of the vendor to find a third person willing to buy at the required price does not render the contract void as being impossible of performance; nor should the agreement be so construed that the only consequence of a failure to resell would be an extension of time upon the deferred payments, to be made by the vendee for the land, until a resale. Hokanson v. Western Empire Land Co., 132 Minn. 74, 155 N. W. 1043.

10005d. Stipulation as to recovery when title cannot be made good—The parties may stipulate that in case title cannot be made good the contract shall be inoperative and only the consideration paid be recovered. The remedy so fixed by the contract is exclusive. The contract binds both parties and either may invoke it. Such a provision has no reference to a situation where the vendor can make title but fails to do so. It applies only where the title is not good and in good faith cannot be made good. Mackey v. Ames, 31 Minn. 130, 16 N. W. 541; Heisley v. Swanstrom, 40 Minn. 196, 41 N. W. 1029; Joslyn v. Schwend,

85 Minn. 130, 88 N. W. 410. 744; Schwab v. Baremore, 95 Minn. 295, 104 N. W. 10; Hubachek v. Maxbass Security Bank, 117 Minn. 163, 134 N. W. 640; Nostdal v. Morehart, 132 Minn. 351, 157 N. W. 584.

10005e. Stipulation as to inclusion of other land—An executory contract for the sale of land contained a stipulation that other lands owned by the vendor might be included therein if within a time therein stated an outstanding contract to a third person should be canceled. Held, on the facts stated in the opinion, that there was no cancelation of the outstanding contract as contemplated by the parties, and that the lands therein included did not therefore become a part of plaintiff's contract. Wortham v. Minnesota Land Corp., 143 Minn. 133, 172 N. W. 889.

10008. Construction—(55) Hokanson v. Western Empire Land Co., 132 Minn. 74, 155 N. W. 1043 (agreement for resale by vendor); Westfall v. Ellis, 141 Minn. 377, 170 N. W. 339 (sale and exchange of properties at fixed valuation—authority to exchange stock of merchandise and fixtures for other land—modification of contract); Rosendahl v. Mudbaden Sulphur Springs Co., 144 Minn. 361, 175 N. W. 609 (stipulations against liens, for payment of taxes, keeping up insurance).

10008a. Contract and notes separate contracts—Where notes are given for the purchase price the executory contract for sale and the notes may be regarded as separate and distinct contracts. Greenfield v. Taylor, 141 Minn. 399, 170 N. W. 345.

10009. Alteration—Evidence held to justify a finding that plaintiff did not consent to a modification of his contract with defendant, whereby the latter was authorized to exchange a stock of merchandise, in which they were jointly interested, for land. Westfall v. Ellis, 141 Minn. 377, 170 N. W. 339.

10013. Assignment—An assignment is of equal rank with the contract, and grants to the assignee the same but no greater rights as respects the enforcement of the contract than were vested in the assignor. Greenfield v. Taylor, 141 Minn. 399, 170 N. W. 345.

10016. Options—The usual option does not give a legal or equitable title. It gives a legal right the exercise of which may result in the transfer of title. Mineral Land Investment Co. v. Bishop Iron Co., 134 Minn. 412, 159 N. W. 966.

An option is an offer to sell coupled with an agreement to hold the offer open for acceptance for the time specified. Axford v. Western Syndicate Invest. Co., 141 Minn. 412, 168 N. W. 97, 170 N. W. 587.

An option is merely an agreement to hold an offer to sell property open for a specified time. Morrison v. Johnson, 148 Minn. —, 181 N. W. 945.

An option to purchase property if given for a valuable consideration is a valid contract, but if given without a consideration is a mere offer which may be withdrawn at any time before acceptance. The consideration for an option must be separate and distinct from the purchase price

to be paid for the property, and the burden of proving it rests on the party asserting the option. The payment of one dollar will sustain a short-time option to purchase on fair terms. Morrison v. Johnson, 148 Minn. —, 181 N. W. 945.

A provision in an option contract for the sale of land, requiring the option to be exercised within a specified time, may be waived. Waiver does not necessarily rest on contract. If, after default in performance of a contract within the time stipulated, the party entitled to take advantage of the default, with knowledge of the facts, treats the contract as still in force, or deals with the other party in a manner consistent only with a purpose on his part to regard the contract as still subsisting and not terminated by the default, he waives the default. Malmquist v. Peterson, — Minn. —, 183 N. W. 139.

(65) See 3 A. L. R. 576 (whether an instrument is a contract of sale or option).

See §§ 2, 5404, 6123, 7480.

THE DEED

10017. By whom—Where a contract is sought to be enforced by an undisclosed principal, if a deed executed by the agent and one executed by the principal is offered the vendee cannot complain. Unruh v. Roemer, 135 Minn. 127, 160 N. W. 251.

Where the vendee acquiesces in the proposition of the vendor to furnish a deed executed by a third party he waives his right to insist on a deed by the vendor. Schmidt v. Scandinavian Canadian Land Co., 136 Minn. 14, 161 N. W. 218.

The vendee is not unqualifiedly entitled to a deed from his immediate vendor if the latter is under no duty to convey with personal covenants of title. A deed from one who has succeeded to the title of the vendor is all the vendee has a right to require, provided it conveys the title he was to get under the terms of his contract. Noyes v. Brown, 142 Minn. 211, 171 N. W. 803.

(67) Unruh v. Roemer, 135 Minn. 127, 160 N. W. 251.

10017a. When takes effect—Relation—A deed given in pursuance of an executory contract therefor relates back and takes effect as of the date of the contract, when necessary to protect the interests of the parties. Greenfield v. Olson, 143 Minn. 275, 173 N. W. 416.

10019. Merger of contract in deed—There is no merger of the contract in the deed when the deed is expressly made subject to the terms of the contract. Rosendahl v. Mudbaden Sulphur Springs Co., 144 Minn. 361, 175 N. W. 609.

The plaintiffs gave a contract of sale of certain lands and the grantees assigned to the defendant Mudbaden Company. The contract provided that when the purchase price was reduced by payments to $18,000 a deed should be executed by the grantors and notes for $18,000 should be given by the grantees; and that the grantees until the payment of

the purchase price should suffer no lien to attach, should pay all taxes, and should keep up insurance the proceeds of which, in case of loss, should be used in rebuilding or should be paid to the grantors. The plaintiffs gave a deed to the Mudbaden Company, pursuant to this contract, which recited that it was subject to all its terms and conditions, the company gave its notes, and afterwards mortgaged to the defendant trust company. Held, that the contract reserved a lien for the purchase price which survived the giving of the deed and which is superior to the mortgage to the trust company. Rosendahl v. Mudbaden Sulphur Springs Co., 144 Minn. 361, 175 N. W. 609.

Whether the executory contract between the vendor and the purchaser could have been enforced is immaterial as it has been performed. Union Investment Co. v. Abell, 148 Minn. —, 181 N. W. 353.

THE TITLE

10022. Marketable title required in absence of special agreement—(78) Johnson v. Herbst, 140 Minn. 147, 167 N. W. 356.

10023. Special agreements—A contract for a "deed of general warranty" calls for a marketable or fee title. Geray v. Mahnomen Land Co., 143 Minn. 383, 173 N. W. 871.

(85) See 7 A. L. R. 1166 (agreement for abstract showing title calls for title of record).

10024. What is a marketable title—Where the title depends for its validity on matters of fact dehors the record, the determination whereof requires a judicial decree, it is not marketable, and the vendee in an executory contract of sale is not bound to accept it. The rule applies to "trust patents" issued by the federal government to certain Indians of the White Earth Indian Reservation under the "general Indian Allotment Act" of Feb. 8, 1887, and acts supplementary thereto, which on their face do not convey the fee title. The fact that the Clapp Amendment to the acts referred to, approved June 21, 1906, declares that such patents shall operate as a transfer of the fee title as to mixed-blood Indians, does not clear the title until the character of the particular Indian as a mixed blood is established as a matter of record. With that fact unsettled and undetermined, a title derived through a trust patent so issued is not marketable within the rule stated. Geray v. Mahnomen Land Co., 143 Minn. 383, 173 N. W. 871.

(86) Geray v. Mahnomen Land Co., 143 Minn. 383, 173 N. W. 871.

(87) See 33 Harv. L. Rev. 929.

(90) Johnson v. Herbst, 140 Minn. 147, 167 N. W. 356.

(94) 33 Harv. L. Rev. 929; 3 Minn. L. Rev. 213.

10025. Held to render title defective—A charge on land to pay certain sums of money to third parties. Johnson v. Herbst, 140 Minn. 147, 167 N. W. 356.

The fact that the character of an allotee as a mixed blood Indian had not yet been determined. Geray v. Mahnomen Land Co., 143 Minn. 383, 173 N. W. 871; Smith v. Kurtzenacker 147 Minn. 398, 180 N. W. 243.

10026. **Held not to render title defective**—The fact that in one instrument the name of the owner is written out in full and in another that only the initial is given probably does not render a title unmarketable. See Trask v. Bodson, 141 Minn. 114, 169 N. W. 489.

10027. **When vendor must have title**—Evidence held to justify a finding that a marketable title was furnished within the time stipulated by the contract. Unruh v. Roemer, 135 Minn. 127, 160 N. W. 251.

The rule that where an incumbrance is presently payable, the vendor is not required to discharge it out of his own funds, but may do so out of the purchase price simultaneously with the payment of the price and delivery of the deed, does not apply where time is of the essence of the contract, unless the vendor is able to cause the liens to be satisfied at the time fixed for performance. Johnson v. Herbst, 140 Minn. 147, 167 N. W. 356.

In the absence of fraud, insolvency, or other equitable considerations, or a contract stipulation requiring an abstract showing perfect title, a defect in the record title of the vendor, in an executory contract for the sale of land, existing at the date thereof, will constitute no ground for rescission by the vendee or justification for refusal to make deferred payments on the agreed purchase price of the property. All the vendee may rightfully insist upon in such case is that the title be perfect at the time fixed by the contract for final performance. Smith v. Kurtzenacker, 147 Minn. 398, 180 N. W. 243.

(16) Unruh v. Roemer, 135 Minn. 127, 160 N. W. 251; Smith v. Kurtzenacker, 147 Minn. 398, 180 N. W. 243.

PERFORMANCE IN GENERAL

10032. **Time of performance—In general**—Defendant was entitled to a reasonable time after demand to prepare a deed. As to other obligations assumed, it was defendant's duty to be ready to perform when the time for performance arrived. An agreement to furnish title insurance upon completion of payments obliges the vendor to procure the insurance. The two obligations are concurrent. Brown v. California & Western Land Co., 145 Minn. 432, 177 N. W. 774.

10033. **Time as essence of contract**—(25) Porten v. Peterson, 139 Minn. 152, 166 N. W. 183.

(33) 9 A. L. R. 996 (accepting payment).

10035. **Demand**—Evidence held to show a sufficient demand by the vendee prior to a rescission of the contract by him for non-performance by the vendor. Schmidt v. Scandinavian Canadian Land Co., 136 Minn 14, 161 N. W. 218.

(35) See Schmidt v. Scandinavian Canadian Land Co., 136 Minn. 14, 161 N. W. 218.

10036. Tender—Evidence held to justify a finding that certain vendees made full tender of performance on two occasions. Brown v. California & Western Land Co., 145 Minn. 432, 177 N. W. 774.

10037. Preparation and delivery of deed—(51) Schmidt v. Scandinavian Canadian Land Co., 136 Minn. 14, 161 N. W. 218; Brown v. California & Western Land Co., 145 Minn. 432, 177 N. W. 774.

10038. Mutual forbearance—(56) See Porten v. Peterson, 139 Minn. 152, 166 N. W. 183.

10039. Waiver—Extending time of performance—The default of the plaintiff in making payments when due did not bar him of his equitable interest in the absence of laches or abandonment, or of forfeiture by the affirmative action of the defendant, and under the evidence none of these was present; and strict payment was waived. Porten v. Peterson, 139 Minn. 152, 166 N. W. 183.

Where strict performance has been waived the vendee must be given a reasonable time and opportunity in which to perform. Malmquist v. Peterson, — Minn. —, 183 N. W. 138.

Time for performance when time fixed by contract has been waived. 4 A. L. R. 815.

(57) Malmquist v. Peterson, — Minn. —, 183 N. W. 138.

10040. Of payment—The vendor cannot be required to accept payments before due. Porten v. Peterson, 139 Minn. 152, 166 N. W. 183.

10040a. Application of payments—The defendant sold to the plaintiff land upon which there was a mortgage, and gave a contract of sale. Payments on the sale were due in instalments. The defendant is insolvent. The plaintiff did not know of the mortgage. Held, that the plaintiff should be allowed to apply the amounts coming due on the contract in discharge of the amount coming due on the mortgage, in the manner specified in the opinion, and that enforcement of the contract should be stayed. Burnett v. Suflow, 134 Minn. 407, 159 N. W. 951.

10041. Abstract of title—(60) Brown v. California & Western Land Co., 145 Minn. 432, 177 N. W. 774. See § 10023.

10042a. Evidence—Sufficiency—The evidence sustains a finding that plaintiffs, vendees in a contract for sale of realty, upon two occasions made full tender of performance. The evidence further sustains a finding that on neither occasion, nor at any time prior to the commencement of this action to recover the consideration paid, was defendant ready, able, or willing to perform, and that plaintiffs were entitled to rescind for such nonperformance and to recover the money they had paid. Brown v. California & Western Land Co., 145 Minn. 432, 177 N. W. 774.

ABANDONMENT

10043. In general—Evidence held to justify a finding of mutual abandonment of a contract, that is, an abandonment by the defendant which the plaintiff elected to treat as such and in which he acquiesced. Mathwig v. Ostrand, 132 Minn. 346, 157 N. W. 589.

(62) See Colby v. Street, 146 Minn. 290, 178 N. W. 599.

(64, 65) Mathwig v. Ostrand, 132 Minn. 346, 157 N. W. 589.

RIGHTS AND LIABILITIES OF PARTIES

10044. Legal title in vendor—Upon the death of a vendor a claim for the purchase price passes to his personal representative as personal property. State v. Rand, 39 Minn. 502, 40 N. W. 835.

The interest of the vendor may be mortgaged. Lamm v. Armstrong, 95 Minn. 434, 104 N. W. 304; School District v. Schmidt, 146 Minn. 403, 178 N. W. 892.

The interest of the vendor is taxable as personal property. State v. Probate Court, 145 Minn. 155, 176 N. W. 493.

The vendor has an inheritable estate in the land under the usual form of contract and is a freeholder. School District v. Schmidt, 146 Minn. 403, 178 N. W. 892.

Where the vendor has received the entire purchase price and has executed and delivered a deed under which the purchaser has taken possession of the property, but which is inoperative because the name of the grantee has not been inserted therein, the vendor retains no attachable interest in the property but merely holds the bare legal title as trustee for the purchaser. Union Investment Co. v. Abell, 148 Minn. —, 181 N. W. 353.

(67) State v. Rand, 39 Minn. 502, 40 N. W. 835; Shraiberg v. Hanson, 138 Minn. 80, 163 N. W. 1032; State v. Probate Court, 145 Minn. 155, 176 N. W. 493; Colby v. Street, 146 Minn. 290, 178 N. W. 599.

(67–72) School District v. Schmidt, 146 Minn. 403, 178 N. W. 892.

(68) Colby v. Street, 146 Minn. 290, 178 N. W. 599.

(69) Shraiberg v. Hanson, 138 Minn. 80, 163 N. W. 1032: Porten v. Peterson, 139 Minn. 152, 166 N. W. 183.

10045. Interest of vendee—A vendee, who has purchased in good faith for a valuable consideration and without notice, is entitled to equitable protection even against his vendor. Bausman v. Kelley, 38 Minn. 197, 36 N. W. 333; Wood v. Newell, — Minn. —, 182 N. W. 965.

The interest of the vendee is real estate. Shraiberg v. Hanson, 138 Minn. 80, 163 N. W. 1032.

A vendee may have his rights protected before he is entitled to call in the legal title and to have specific performance. He may maintain an action to determine adverse claims against a third party. He may have his rights as against the vendor determined by judgment, even

before he is entitled to specific performance, if they are endangered by lapse of time. He is entitled to an accounting when necessary to determine such rights. Porten v. Peterson, 139 Minn. 152, 166 N. W. 183.

The vendee has an inheritable estate in the land and is a freeholder. In re Consolidation of School Districts, 140 Minn. 475, 168 N. W. 552.

An executory contract for the sale of land vests in the vendee an equitable title to the land; a title and interest which he may convey or otherwise transfer to others. A subsequent lease of a part of the land by the vendee to the vendor is valid, and the rights thus granted to the vendor will not be affected by a deed thereafter delivered by him to the grantee in performance of the executory contract of sale. The deed will relate back and take effect as of the date of the contract. Greenfield v. Olson, 143 Minn. 275, 173 N. W. 416.

(73) State v. Rand, 39 Minn. 502, 40 N. W. 835; Mathwig v. Ostrand, 132 Minn. 346, 157 N. W. 589; Porten v. Peterson, 139 Minn. 152, 166 N. W. 183; Colby v. Street, 146 Minn. 290, 178 N. W. 599; Wood v. Newell, — Minn. —, 182 N. W. 965.

(73–84) Shraiberg v. Hanson, 138 Minn. 80, 163 N. W. 1032.

(74) Colby v. Street, 146 Minn. 290, 178 N. W. 599.

10048. Subsequent purchaser from vendor—A subsequent bona fide purchaser from the vendor has rights superior to those of the vendee. Colby v. Street, 146 Minn. 290, 178 N. W. 599.

If the vendor conveys to a third person who purchases with notice of the vendee's rights, the latter may enforce specific performance against the purchaser or, at his option, treat the conveyance as a breach of the contract and resort to an action for damages. Colby v. Street, 146 Minn. 290, 178 N. W. 599.

(91) Colby v. Street, 146 Minn. 290, 178 N. W. 599.

VENDOR'S LIEN

10054. Disfavored—Governed by no fixed rules—The application of the doctrine is governed by no fixed rules but depends on the equities of the particular case. Radke v. Myers, 140 Minn. 138, 167 N. W. 360.

(98) Radke v. Myers, 140 Minn. 138, 167 N. W. 360. See 33 Harv. L. Rev. 485.

10055. Not assignable—(99) 33 Harv. L. Rev. 485.

10056. Subsequent purchasers, incumbrancers and creditors—The evidence sustains a finding that one of the defendants who took a mortgage from a codefendant of property purchased by such codefendant of the plaintiff took in good faith for a present consideration without notice that the payment of a portion of the purchase money was deferred. Under the findings, which are sustained by the evidence, the plaintiff vendor did not have a lien for the unpaid portion of the purchase price superior to that of the defendant mortgagee taking under the defendant vendee. Radke v. Myers, 140 Minn. 138, 167 N. W. 360.

(1) Rosendahl v. Mudbaden Sulphur Springs Co., 144 Minn. 361, 175 N. W. 609.

10057. Waiver—Taking security—(4) Radke v. Myers, 140 Minn. 138, 167 N. W. 360.

FRAUD

10059. As to title—(7) Bullock v. Ferch, 137 Minn. 232, 163 N. W. 159. See Cobb v. Wright, 43 Minn. 83, 44 N. W 662; 9 A. L. R. 1051.

10060. As to value and situation of land—A false representation by a vendor of real estate as to its value is usually a mere statement of opinion, and not actionable; but a false representation as to the prices received on specific sales and the amounts of specific offers for similar property in the same locality, coupled with a false representation as to the general selling price, are actionable. Brody v. Foster, 134 Minn. 91, 158 N. W. 824.

Evidence held insufficient to justify a finding that a representation as to the value of land was false. Rogers v. Central Land & Investment Co., 140 Minn. 295, 168 N. W. 16.

A misrepresentation as to the terms on which the land is rented is actionable. Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736.

(9) Rogers v. Central Land & Investment Co., 140 Minn. 295, 168 N. W. 16.

(10) Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736; Kies v. Searles, 146 Minn. 359, 178 N. W. 811; Townsend v. Jahr, 147 Minn. 30, 179 N. W. 486; Johnson v. Donovan, 148 Minn. —, 181 N. W. 332. See §§ 3479, 8590, 10061-10068.

10061. As to quantity of land—(12) Straabe v. Jackson, 134 Minn. 179, 158 N. W. 915. See Schlauderaff v. Wortham, 140 Minn. 25, 167 N. W. 118; Schonberg v. Haubris, 141 Minn. 188, 169 N. W. 546; Ann. Cas. 1918D, 693 (use of "about").

10062. As to character of land and improvements—Fitness for agriculture—A misrepresentation as to the extent to which land is tiled or drained is actionable, though innocently made. Shane v. Jacobson, 136 Minn. 386, 162 N. W. 472.

Where, in an action for deceit brought by the purchaser of a farm, it appeared that nearly one-half of the land lay in a lake bed and in most years was covered with water, but at the time it was examined by the purchaser a large part of the portion within the lake bed was in crop and the remainder in pasture, and that the vendor, without making known the fact that the condition of the land at that time was not its usual or natural condition, represented the farm to be a good farm and to have raised the best crops in that vicinity every year for the last twenty years, the question as to whether the purchaser had been deceived to his damage was for the jury. Humphrey v. Sievers, 137 Minn. 373. 163 N. W. 737.

Misrepresentation of acreage of the cultivated portion as well as the distance to the schoolhouse were for the jury, notwithstanding the fact that plaintiff had seen the farm. No assignment of error reaches the misrepresentation that the farm was as good as any in the county, and upon that issue it was not error to receive evidence as to the character of the subsoil and market value of the farm. Nelson v. Berkner, 139 Minn. 301, 166 N. W. 347.

A misrepresentation as to the fitness of land for agricultural purposes is actionable. Gunderson v. Halvorson, 140 Minn. 292, 168 N. W. 8.

Although the seller informs the purchaser that certain written representations concerning the character and condition of the property were made by a former owner, yet if he also asserts positively that such representations are true, and the purchaser relies thereon, he is liable in damages if they prove untrue. Ristvedt v. Watters, 146 Minn. 146, 178 N. W. 166.

A misrepresentation as to the acreage under cultivation is actionable Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736.

(14) Freeman v. Fehr, 132 Minn. 384, 157 N. W. 587 (representations that land was free from quack grass); Woodward v. Western Canada Colonization Co., 134 Minn. 8, 158 N. W. 706 (representation that farm was in good condition for cropping held to cover foul weeds in such amounts as to prevent practical or successful cropping and to be actionable); Schlauderaff v. Wortham, 140 Minn. 25, 167 N. W. 118 (representation that land was fit and suitable for agricultural purposes); Tysdal v. Bergh, 142 Minn. 288, 172 N. W. 130 (representations as to freedom from foul seeds and weeds, as to presence of stones, as to drainage —presence of weed called kinghead); Otterstetter v. Steenerson Bros. Lumber Co., 143 Minn. 442, 174 N. W. 305 (representations that farm lands were tillable and capable of being broken and planted to crops; that the soil was black sandy loam, with clay subsoil; that it would produce good crops of wheat, rye, corn, potatoes, and similar crops; and that it had only a few stones in it); Perkins v. Orfield, 145 Minn. 68, 176 N. W. 157 (representation that land was sandy loam with a good well, house, and barn thereon, and twenty acres under cultivation); Townsend v. Jahr, 147 Minn. 30, 179 N. W. 486 (misrepresentations that land was near a schoolhouse, that it was on a rural mail route, that good water could be obtained at a depth of 10 or 15 feet, that there was no sand and no stones on the land, that it was rich, fertile soil, well drained and in good condition for farming, held actionable); Johnson v. Donovan, 148 Minn. —, 181 N. W. 332 (representation that land was level, free from stones, good agricultural land and capable of being plowed); O'Connell v. Holler, — Minn. —, 182 N. W. 617 (representation that land was good agricultural land, could all be cultivated, was all well tile drained, had a good drainage outlet, and was free from quack grass).

See §§ 3479, 10060; L. R. A. 1917C, 273 (as to quality or condition of soil).

10063. As to intentions of vendor—Evidence of fraudulent promissory representations made with no intention to keep them and solely for the purpose of inducing another to enter a contract may be proven, though at variance with the written contract. But such representations are not grounds for rescission when the written contract, to the promisee's knowledge, reveals the falsity of the promise; for he cannot then be said to have relied thereon in entering the contract. If, however, such a promise is based upon false representations in respect to existing facts, made in connection with the promise, it affords a ground for rescinding the contract induced thereby. Nelson v. Berkner, 139 Minn. 301, 166 N. W. 347.

10066. As to immaterial matters—Plaintiff purchased a block of residence property from defendants. There is evidence sufficient to sustain a verdict that plaintiff was induced to purchase the block by representations that the city railway company had agreed to extend a line to this block and that it was practicable to extend the sewer system of the city to the block and that the representations were untrue. These representations were of material matters of fact. Kremer v. Lewis, 137 Minn. 368, 163 N. W. 732.

See § 3820.

10067. Reliance on misrepresentations—The fact that the vendee saw the land before he purchased is not conclusive proof that he did not rely on the representations as to its character, though important for consideration in whether he did. Woodward v. Western Canada Colonization Co., 134 Minn. 8, 158 N. W. 706.

The fact that the vendor afforded the vendee only a limited opportunity to examine the land may be considered. Woodward v. Western Canada Colonization Co., 134 Minn. 8, 158 N. W. 706.

Misrepresentations as to the acreage of the cultivated portion of the land and its distance from a school house may be actionable though the purchaser has seen the land. Nelson v. Berkner, 139 Minn. 301, 166 N. W. 347.

Whether the vendee relied on the misrepresentations or on other sources of information is a question for the jury, unless the evidence is conclusive. Schlauderaff v. Wortham, 140 Minn. 25, 167 N. W. 118.

Evidence held insufficient to justify a finding that plaintiff relied on a representation that the land was cut over land. Rogers v. Central Land & Investment Co., 140 Minn. 295, 168 N. W. 16.

The fact that public records may disclose information concerning land does not preclude reliance upon representations as to the quality of the soil. Where a vendee examined certain soil maps or plats on file in the office of the secretary of state, it was held that this did not preclude him from relying on representations of the vendor as to the quality of the land, though he relied in part on the information derived from the maps, it appearing that he did not fully understand the maps. Schlauderaff v. Wortham, 140 Minn. 25, 167 N. W. 118.

Where the vendee in a contract for the purchase of a tract of land undertakes to and does personally examine the same as fully and completely as he chooses, and determines in his own mind the number of acres of tillable land, as well as the number of acres of slough thereon, the same never having been measured, and having communicated his opinion thereof to the seller, who replied thereto that he believed that there were more acres of tillable land, and the vendee then enters into a contract for the purchase of the same, he cannot thereafter be heard to assert that he relied upon the representations of the seller as to the number of acres of tillable land, and thereby avoid the contract upon the ground of fraud. Citizens State Bank v. Moebeck, 143 Minn. 291, 173 N. W. 853.

The mere fact that a party was suspicious that something was wrong does not show conclusively that he did not rely on the representations. Perkins v. Orfield, 145 Minn. 68, 176 N. W. 157.

The evidence, stated in the opinion, does not justify the conclusion that plaintiff sought and obtained independent advice as to the character of the land, and in making the exchange relied thereon, and not upon the representations claimed to have been made by defendants. Johnson v. Donovan, 148 Minn. —, 181 N. W. 332.

Evidence held to justify a finding that the vendee relied on the representations of the vendor regarding the character of the land and not on his own knowledge thereof. O'Connell v. Holler, — Minn. —, 182 N. W. 617.

(21) Woodward v. Western Canada Colonization Co., 134 Minn. 8, 158 N. W. 706; Schlauderaff v. Wortham, 140 Minn. 25, 167 N. W. 118; Kraus v. National Bank of Commerce, 140 Minn. 108, 167 N. W. 353.

See §§ 3479, 3821.

10067a. Waiver—One who is induced by false representations to enter into a contract, and who, after discovering the falsity of the representations, ratifies the contract while it still remains wholly executory, waives the fraud and cannot recover damages therefor. If he has partly performed the contract before discovering the fraud, he may affirm it and bring his action for deceit; but an agreement, modifying the prior contract, made after discovery of the fraud, operates as a waiver of his right to bring such action. Humphrey v. Sievers, 137 Minn. 373, 163 N. W. 737.

One induced by fraud to purchase land waives the fraud if, after discovering it, he enters into a new agreement or engagement with the vendor in relation thereto. Held error to exclude evidence that, after discovering a fraud, plaintiff took a deed and gave defendant a large mortgage upon the land, without claiming that he had an offset in damages for fraud. Tysdal v. Bergh, 142 Minn. 288, 172 N. W. 130.

10067b. Law and fact—Here, as elsewhere, the question of fraud is for the jury, unless the evidence is conclusive. Nelson v. Berkner, 139 Minn. 301, 166 N. W. 347.

10068. Evidence—Sufficiency—(25) Woodward v. Western Canada Colonization Co., 134 Minn. 8, 158 N. W. 706; Brody v. Foster, 134 Minn. 91, 158 N. W. 824; Kremer v. Lewis, 137 Minn. 368, 163 N. W. 732; Nelson v. Berkner, 139 Minn. 301, 166 N. W. 347; Kraus v. National Bank of Commerce, 140 Minn. 108, 167 N. W. 353; Rogers v. Central Land & Investment Co., 140 Minn. 295, 168 N. W. 16; Schonberg v. Haubris, 141 Minn. 188, 169 N. W. 546; Tysdal v. Bergh, 142 Minn. 288, 172 N. W. 130; Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736; Johnson v. Donovan, 148 Minn. —, 181 N. W. 332; Rogers v. Central Land & Invest. Co., — Minn. —, 183 N. W. 961 (finding of fraud held not justified by the evidence).

MISTAKE

10069a. Recovery of payments—The court, in substance, found that plaintiff bought from defendant, his sister, and from four other brothers and sisters, what all understood to be the whole title to a farm descending to the children from their father, that in so purchasing plaintiff, defendant, and the other grantors in the deeds, assumed and believed that a brother Frank and a sister Lena, who had not been heard of for more than fifteen years, were dead, and that the purchase price paid defendant was based on the assumption that it paid for one-sixth share of the children's part of the farm, and that afterwards, when plaintiff had made valuable improvements on the farm, Frank appeared and demanded his share, which plaintiff was compelled to purchase, and the court concluded that what was paid defendant in excess of one-seventh of the whole purchase price was paid under a mutual mistake of fact in assuming Frank to be dead and should be returned. Held, that the evidence justified the findings, and the conclusion from the findings is right. The recovery herein is not to be adjusted upon the possibility that Lena may be alive; for until damnified, plaintiff has no claim to a return of any part paid on the assumption that she was dead. Bechthold v. King, 134 Minn. 105, 158 N. W. 910.

BONA FIDE PURCHASERS

10072. What is a valuable consideration—Assumption of a mortgage on the land by the grantee is a valuable consideration. Enkema v. McIntyre, 136 Minn. 293, 161 N. W. 587.

(30) Nichols-Frissell Co. v. Crocker, 133 Minn. 153, 157 N. W. 1072.

10075. Notice from possession—Duty to make inquiry—Where the title to a homestead is of record in the name of the husband, but has in fact been conveyed to the wife by unrecorded deeds, and the wife, her husband joining, leases it to a tenant who is in possession at the termination of the homestead right, such possession is notice of her title. Oxborough v. St. Martin, 142 Minn. 34, 170 N. W. 707.

Where one is bound to make inquiry as to the title of a married man

a separate inquiry as to the interest of his wife is not generally necessary. Havel v. Costello, 144 Minn. 441, 175 N. W. 1001.

A party wall charges a purchaser with notice of the occupier's rights. Hanson v. Beaulieu, 145 Minn. 119, 176 N. W. 178.

The tenant of the vendor having attorned to the purchaser before the attachment was levied, his possession was notice to the attaching creditor of the rights of the purchaser. Union Investment Co. v. Abell, 148 Minn. —, 181 N. W. 353.

(35) Butterwick v. Fuller & Johnson Mfg. Co., 140 Minn. 327, 168 N. W. 18; Oxborough v. St. Martin, 142 Minn. 34, 170 N. W. 707; Hanson v. Beaulieu, 145 Minn. 119, 176 N. W. 178; Union Investment Co. v. Abell, 148 Minn. —, 181 N. W. 353. See Akerberg v. McCraney, 141 Minn. 230, 169 N. W. 802.

(36) Oxborough v. St. Martin, 142 Minn. 34, 170 N. W. 707.

10076. Constructive notice of unrecorded conveyance—(42) Shraiberg v. Hanson, 138 Minn. 80, 163 N. W. 1032.

10078. Equitable interests—Conflict between legal and equitable interests—A vendee in an executory contract who purchased in good faith, for a valuable consideration and without notice, is entitled to protection in equity as a bona fide purchaser even against his vendor. Wood v. Newell, — Minn. —, 182 N. W. 965.

(45) Wood v. Newell, — Minn. —, 182 N. W. 965.

10079a. Held bona fide purchaser or the reverse—Heirs and devisees are not bona fide purchasers as against a purchaser from the decedent. Colby v. Street, 146 Minn. 290, 178 N. W. 599.

Evidence held to justify a finding that one was a bona fide purchaser. Bullock v. Miley, 133 Minn. 261, 158 N. W. 244; Enkema v. McIntyre, 136 Minn. 293, 161 N. W. 587; Akerberg v. McCraney, 141 Minn. 230, 169 N. W. 802.

Evidence held to justify a finding that one was not a bona fide purchaser. Nichols-Frissell Co. v. Crocker, 133 Minn. 153, 157 N. W. 1072.

Evidence held not to justify a finding that one was a bona fide purchaser within the recording act. Shraiberg v. Hanson, 138 Minn. 80, 163 N. W. 1032.

10081. Findings—A finding held sufficient to show that one was a bona fide purchaser within the recording act though it did not expressly so find. Krelwitz v. McDonald, 135 Minn. 408, 161 N. W. 156.

REMEDIES OF VENDOR

10082. Election of remedies—(49) Citizens State Bank v. Moebeck, 143 Minn. 291, 173 N. W. 853.

10083. Action for breach of contract—Damages—Certain instructions as to the measure of damages held proper. Westfall v. Ellis, 141 Minn. 377, 170 N. W. 339.

In an action for the breach of an executory contract for the sale of land, brought by the vendor against the vendee, the evidence is held to support the findings of the trial court to the effect that plaintiff suffered no loss or damage by the refusal of defendants to perform the contract. Howe v. Gray, 144 Minn. 122, 174 N. W. 612.

The general rule of damages in such an action is the difference between the value of the land and the contract price. A claim for interest on the purchase price, and for taxes paid by the vendor, are special in character and should, if recoverable at all, be specially pleaded. The particular claims are, however, presumptively included in the general finding that plaintiff suffered no damage by defendants' failure to perform. Howe v. Gray, 144 Minn. 122, 174 N. W. 612.

(51) Noyes v. Brown, 142 Minn. 211, 171 N. W. 803.

10084. Action for purchase price—If the vendee in a contract for the sale of land covenants that payment of the purchase price shall be a condition precedent to the performance by the vendor of his covenant to convey, the covenant to pay is an independent one, enforceable in an action brought to recover the purchase price. The intention of the parties to such a contract is the paramount consideration in determining whether their respective covenants are independent or mutual and dependent, and in ascertaining such intention the order of time in which performance shall take place is a controlling circumstance. A contract for the sale of land provided that the vendee should be entitled to a conveyance when he had paid the full purchase price, surrendered the contract, and made demand upon the vendor at his office for a deed. Held, that the vendor could maintain an action for the recovery of the purchase price without pleading or proving a tender of a deed or ability and willingness to convey, but that, in case he obtained judgment, he should not be permitted to enforce it until he had deposited in court a deed conveying title to the vendee as stipulated in the contract, to be delivered on payment of the judgment, and that execution should be stayed in the meantime. Noyes v. Brown, 142 Minn. 211, 171 N. W. 803.

(55) Lindstrom v. Helk, 139 Minn. 100, 165 N. W. 873; Noyes v. Brown, 142 Minn. 211, 171 N. W. 803.

10087. Action to rescind or cancel for default—A vendee, who defaults in the payments due and announces his inability to perform, is not entitled, unless the contract so provides, to a return of a payment made when the contract was entered into; nor has the court, in the absence of a statute to that effect, authority in equity to require a return of the money by the vendor as a condition to a cancelation of the contract. Nelson Real Estate Agency v. Seeman, 147 Minn. 354, 180 N. W. 227. See 5 Minn. L. Rev. 466.

10088. Action to rescind for fraud—A contract may be canceled on the ground that the vendee fraudulently entered into it with knowledge that the agent of the vendor, who executed it under a power of attorney, violated his instructions. Ziebarth v. Donaldson, 141 Minn. 70, 169 N. W. 253.

10089. Ejectment—In an action by the vendor to recover, from a defaulting vendee, possession of real estate sold upon an executory contract, an instruction that the vendee is entitled to retain possession, if the sale was effected through the vendor's fraud, is erroneous. Straabe v. Jackson, 134 Minn. 179, 158 N. W. 915.

Where judgment was for defendant there was error in not allowing interest on the balance of the purchase price of the land up to the time of payment to be made under the terms of the judgment. Greenfield v. Taylor, 141 Minn. 399, 170 N. W. 345.

10091. Rescission by notice under statute—Where the contract has been lawfully terminated by a notice under the statute the vendee cannot thereafter maintain an action for damages for fraud. Olson v. Northern Pacific Ry. Co., 126 Minn. 229, 148 N. W. 67; Freeman v. Fehr, 132 Minn. 384, 157 N. W. 587.

The method prescribed by the statute is the exclusive one of terminating the contract by the vendor. The proceeding is in legal effect the foreclosure of the vendee's equity of redemption. The statute does not relieve the vendee of the effect of an abandonment of the contract by him which the vendor elects to treat as such and in which he acquiesces. Mathwig v. Ostrand, 132 Minn. 346, 157 N. W. 589.

A vendor has been held properly restrained from serving a notice under the statute pending an action by the vendee against him for a rescission of the contract for fraud. Freeman v. Fehr, 132 Minn. 384, 157 N. W. 587.

The statute was designed to protect those who would pay but cannot, not to protect those who can pay but will not. It does not prevent the vendee from abandoning his contract. Enkema v. McIntyre, 136 Minn. 293, 161 N. W. 587.

A notice is ineffective if the registration tax has not been paid. Enkema v. McIntyre, 136 Minn. 293, 161 N. W. 587; Greenfield v. Taylor, 141 Minn. 399, 170 N. W. 345.

A certain notice held sufficient as to form, signature and service. First Nat. Bank v. Coon, 143 Minn. 262, 173 N. W. 431.

The notice need not state the amount due and unpaid. It need not be signed by the vendor personally. The authority of an agent to sign the notice in behalf of the vendor need not be in writing. First Nat. Bank v. Coon, 143 Minn. 262, 173 N. W. 431.

The vendee made a default, which, by the terms of the contract, authorized the vendor to declare the deferred instalments due immediately and to cancel the contract. After declaring the deferred instalments due immediately, the vendor instituted the statutory proceeding to cancel the contract. The vendee complied with the conditions in which he had made default within the statutory time, but did not pay the deferred instalments. Held, that the payment of the deferred instalments could not be required in the statutory proceeding, and that the removal of the default which authorized its cancelation reinstated the contract. Needles v. Keys, — Minn. —, 184 N. W. 33.

(91) Higgins v. Farmers State Bank, 137 Minn. 326, 163 N. W. 522.
(93) See Kryger v. Wilson, 242 U. S. 171.
(01) First Nat. Bank v. Coon, 143 Minn. 262, 173 N. W. 431.

REMEDIES OF VENDEE

10092. Election of remedies—By bringing an action for the rescission of the contract for fraud the vendee does not necessarily bar himself from subsequently affirming the contract and recovering damages for the fraud. Freeman v. Fehr, 32 Minn. 384, 157 N. W. 587.

Where the vendor contracts to convey a clear title at a stipulated date on receiving payment from the vendee, and time is of the essence of the contract, and the vendee is ready and offers to pay on receiving a clear title, but the land is subject to liens which the vendor is unable to have discharged at the time fixed for performance, the vendee may rescind the contract and recover back the earnest money paid. Johnson v. Herbst, 140 Minn. 147, 167 N. W. 356.

An action for rescission on the ground of fraud is not a bar to an action for damages for the same fraud. Gunderson v. Halvorson, 140 Minn. 292, 168 N. W. 8.

Where judgment is given to the vendee for a conveyance of the land upon the payment of the purchase price and the wife of the vendor refuses to join in the conveyance, the judgment, upon payment of the money into court, operates as a transfer of the interest of the vendor, leaving the vendee with his right of action against the vendor for damages for the failure to convey full title to the land, as required by the contract. Greenfield v. Taylor, 141 Minn. 399, 170 N. W. 345.

If the vendor conveys to a bona fide purchaser the vendee is not limited to an action for damages against the vendor, but may treat the proceeds of the sale, so long as they are in the hands of the vendor or his personal representative and can be traced and identified, as substituted for the land described in the contract. Colby v. Street, 146 Minn. 290, 178 N. W. 599.

(96) Johnson v. Herbst, 140 Minn. 147, 167 N. W. 356.
(97) Kremer v. Lewis, 137 Minn. 368, 163 N. W. 732; Nelson v. Berkner, 139 Minn. 301, 166 N. W. 347. See § 1815.
(98) Colby v. Street, 146 Minn. 290, 178 N. W. 599.

10094a. Injunction against enforcement of contract—Defendant sold to plaintiff land upon which there was a mortgage and gave a contract of sale. Payments on the sale were due in instalments. Defendant was insolvent. Plaintiff did not know of the mortgage when he purchased. Held, that plaintiff should be allowed to apply the amounts coming due on the contract in discharge of the amount coming due on the mortgage and that enforcement of the contract should be stayed. Burnett v. Sulflow, 134 Minn. 407, 159 N. W. 951.

10095. Rescission—In general—For more than a year the vendee kept his money on deposit at the place of payment ready for the vendor at

any time, and at short intervals repeated his demand upon the vendor for the deed, and each time received an assurance that it would soon be ready, the vendee then withdrew his money and notified the vendor that he rescinded the contract for the failure of the vendor to perform. Held, that the conduct of the vendee was a continuing demand for performance by the vendor, and that the effect of such demand was not waived by the fact that the vendor was afforded more than a reasonable time in which to cause the execution and delivery of the deed. If the vendor was entitled to notice of the intention to rescind, he cannot be relieved from the effect of the rescission, unless he tendered performance within a reasonable time after notice thereof, which he did not do in this case. Schmidt v. Scandinavian Canadian Land Co., 136 Minn. 14, 161 N. W. 218.

The vendee may by his own act rescind the contract for fraud of the vendor. Kremer v. Lewis, 137 Minn. 368, 163 N. W. 732; Schlauderaff v. Wortham, 140 Minn. 25, 167 N. W. 118.

Evidence held to show that the vendee rescinded the contract in toto and that the vendors repossessed themselves of the land. Kremer v. Lewis, 137 Minn. 368, 163 N. W. 732.

Offer of performance after rescission by the other party is unavailing. Rescission annihilates the contract. Tender of performance waives previous rescission but does not waive right of rescission for continuing failure to convey a good title. Brown v. California & Western Land Co., 145 Minn. 432, 177 N. W. 774.

(5) Johnson v. Herbst, 140 Minn. 147, 167 N. W. 356.

10095a. Notice of rescission—Plaintiffs rescinded and they gave notice of the rescission. Such notice is sufficient if it advises the vendor that failure to perform on its part will be followed by suit to recover back the price paid. Brown v. California & Western Land Co., 145 Minn. 432, 177 N. W. 774.

10096. Action for rescission for default—Where the title of the vendor has failed, wholly or in part, the vendee may possibly be entitled to remain in possession while he maintains an action for rescission. Straabe v. Jackson, 134 Minn. 179, 158 N. W. 915.

10097. Action to rescind for fraud—An action may be maintained without any affirmative showing of damages. Straabe v. Jackson, 134 Minn. 179, 158 N. W. 915.

Upon the facts here disclosed, the deceit, if any, practiced in substituting a contract for deed in place of a deed and mortgage, does not furnish equity ground for rescinding the sale. The remedy would be reformation of the instrument. The vendee, while claiming the right to rescind on account of the vendor's misrepresentation as to the acreage of the farm, still persisted in its retention and use for such a long time after knowledge of the deception that equity should not now decree a rescission, since, by proper allowance for the deficiency, he may be placed in the same position he would have occupied had there been no

misrepresentation; for it appears that the purposes for which the land was bought were such that it could not have been deemed by the vendee to be essential that there should be the exact acreage represented, the character and boundary of the land being well known to the vendee and, according to his claim, the purchase price being determined by a fixed price per acre. Straabe v. Jackson, 134 Minn. 179, 158 N. W. 915.

The right to maintain an equitable action for rescission is not defeated by a prior offer to rescind. Bauer v. O'Brien Land Co., 144 Minn. 130, 174 N. W. 736.

(15) Straabe v. Jackson, 134 Minn. 179, 158 N. W. 915.

(16) Gunderson v. Halvorson, 140 Minn. 292, 168 N. W. 8.

(17) Straabe v. Jackson, 134 Minn. 179, 158 N. W. 915; Gunderson v. Halvorson, 140 Minn. 292, 168 N. W. 8.

(20) Rogers v. Central Land & Investment Co., 140 Minn. 295, 168 N. W. 16; Schonberg v. Haubris, 141 Minn. 188, 169 N. W. 546.

See §§ 10091, 10092, 10095.

10098. Action for recovery of payments—Default or fraud of vendor—The vendee may rescind the contract for fraud and maintain an action at law for the purchase money paid. Woodward v. Western Canada Colonization Co., 134 Minn. 8, 158 N. W. 706.

The vendee may rescind the contract by his own act for fraud of the vendor and recover payments in an action for money had and received. Kremer v. Lewis, 137 Minn. 368, 163 N. W. 732.

In this action to recover what was paid on a land purchase contract, alleged to have been induced by the alleged false and fraudulent representations of the defendant, the court rightly denied the motion for judgment in defendant's favor notwithstanding the verdict. Nelson v. Berkner, 139 Minn. 301, 166 N. W. 347.

While an unsatisfied judgment for an instalment on an executory land contract will be discharged of record if the contract is terminated by the vendor, instalments paid may not be recovered. The foreclosure of purchaser's chattel mortgage to secure his note while the contract was in force amounted to a payment not recoverable by the purchaser upon the vendor's forfeiting the contract for the purchaser's non-performance. Citizens State Bank v. Moebeck, 143 Minn. 291, 173 N. W. 853.

Notice of rescission for default is a prerequisite to an action to recover payments, but it need not be in express terms or couched in any particular language. Brown v. California & Western Land Co., 145 Minn. 432, 177 N. W. 774.

When vendee may recover payments. L. R. A. 1918B, 540.

(21) Johnson v. Herbst, 140 Minn. 147, 167 N. W. 356; Geray v. Mahnomen Land Co., 143 Minn. 383, 173 N. W. 871; Brown v. California & Western Land Co., 145 Minn. 432, 177 N. W. 774.

(22) Citizens State Bank v. Moebeck, 143 Minn. 291, 173 N. W. 853; Nelson Real Estate Agency v. Seeman, 147 Minn. 354, 180 N. W. 227.

(31) Brown v. California & Western Land Co., 145 Minn. 432, 177 N. W. 774 (evidence of tender and vendor's non-performance).

10099. Damages for withholding possession—(32) See Greenfield v. Taylor, 141 Minn. 399, 170 N. W. 345.

10100. Action for damages for fraud—A vendee in an executory contract for the sale of land cannot maintain an action for damages for fraud, if he has failed to make the stipulated payments and by reason thereof the vendor has lawfully terminated the contract by notice under the statute. Freeman v. Fehr, 132 Minn. 384, 157 N. W. 587.

Certain conversations between the vendee and an agent of defendant regarding a resale of the land held admissible. Schlauderaff v. Wortham, 140 Minn. 25, 167 N. W. 118.

The measure of damages is the difference between the purchase price and the market value of the land and this rule is not affected by the price for which the vendee has sold the land. Humphrey v. Sievers, 137 Minn. 373, 163 N. W. 737.

It was error to exclude evidence that, after discovery of the misrepresentation, plaintiff took a deed and gave defendant a large mortgage upon the property, without making any claim that he had an offset in damages for fraud. Tysdal v. Bergh, 142 Minn. 288, 172 N. W. 130.

In an action for damages for fraud alleged to have been committed by defendants in a real estate transaction, it is held that the evidence supports the verdict affirming the truth of the alleged fraud, and negativing the allegations of the defence that, in entering into the transaction plaintiff relied upon his own knowledge as to the character of the land, and not upon the representations made by defendants. O'Connell v. Holler, — Minn. —, 182 N. W. 617.

(33) Schlauderaff v. Wortham, 140 Minn. 25, 167 N. W. 118. Kraus v. National Bank of Commerce, 140 Minn. 108, 167 N. W. 353.

(34) Shane v. Jacobson, 136 Minn. 386, 162 N. W. 472 (special measure of damages applied); Humphrey v. Sievers, 137 Minn. 373, 163 N. W. 737. See O'Connell v. Holler, — Minn. —, 182 N. W. 617 (measure of damages stipulated by parties and given by court as stipulated).

See §§ 3482, 3841.

10101. Action for breach of contract—Damages—Ordinarily the measure of damages for the breach by the vendor of a contract to convey land, if the market value exceeds the contract price, is the difference between them. The parties may, however, fix by their contract a different measure of liability. They may stipulate that in case title cannot be made good the contract shall be inoperative and only the consideration paid recovered. Such a provision means that, if the title which the vendor can convey to the purchaser cannot be made good, the agreement is to be at an end as to both parties. This remedy when so fixed is exclusive and either party has a right to invoke it. A provision to this effect in a contract involved in this case is not controlled or modified by a subsequent provision that in the event the purchaser repudiates the contract the consideration paid shall be forfeited if the title be good in a person named, other than the vendor. Nostdal v. Morehart, 132 Minn. 351, 156 N. W. 584. See § 10005d.

The vendee cannot recover on a cause of action for breach of contract to furnish title, which the vendor may have against a third party, such cause of action not having been transferred to the vendee. Werntz v. Bolen, 135 Minn. 449, 161 N. W. 155.

(36) Werntz v. Bolen, 135 Minn. 449, 161 N. W. 155.

(40) Nostdal v. Morehart, 132 Minn. 351, 156 N. W. 584.

See § 8615.

VENUE

PLACE OF TRIAL

10104. Not jurisdictional—(49) Wade v. Nat. Bank of Commerce, 144 Minn. 187, 174 N. W. 889. See Delasca v. Grimes, 144 Minn. 67, 174 N. W. 523.

10105. Distinction between local and transitory actions—It is the primary and not the incidental relief sought that determines whether an action is local or transitory. State v. Jelley, 134 Minn. 332, 159 N. W. 788.

An action for damages for false and fraudulent representations made to plaintiff by defendants as to certain lands sold by them to him held transitory. State v. Jelley, 134 Minn. 332, 159 N. W. 788; State v. District Court, 136 Minn. 471, 162 N. W. 351.

Actions on the bonds of public contractors are transitory. State v. Tryholm, 139 Minn. 389, 166 N. W. 533.

An action under a statute for death by wrongful act is transitory. State v. District Court, 140 Minn. 494, 168 N. W. 589.

(50) See 5 Minn. L. Rev. 63.

(52) State v. District Court, 138 Minn. 336, 164 N. W. 1014; State v. District Court, 146 Minn. 422, 178 N. W. 1004.

(53) State v. District Court, 146 Minn. 422, 178 N. W. 1004.

10106. General rule—Where defendant resides—The general rule is inapplicable to proceedings to charge the father of a bastard. State v. District Court, 138 Minn. 77, 163 N. W. 797.

(55) State v. Tryholm, 139 Minn. 389, 166 N. W. 533.

10107. Replevin—Waiver—The objection that an action is brought in the wrong county may be waived. Wade v. Nat. Bank of Commerce, 144 Minn. 187, 174 N. W. 889.

10108. Actions relating to land—The statute is inapplicable to an action to recover damages for breach of a contract to establish a railroad station on land of the plaintiff. Grimes v. Minneapolis etc. Traction Co., 133 Minn. 442, 158 N. W. 719.

G. S. 1913, § 7715, providing for the trial of actions concerning rights and interests in real property in the county where the land is located, applies only to such actions as are wholly local, as distinguished from those that are partly local and partly transitory. The action for the

specific performance of a contract for the sale of land is not wholly local in its essential respects, and as to the place of trial is controlled by G. S. 1913, § 7721. Such an action is local or in rem only incidentally and to the extent the judgment therein may decree title to the land in the event the defendant refuses to convey the same in obedience to the command of the court. State v. District Court, 138 Minn. 336, 164 N. W. 1014; State v. District Court, 141 Minn. 491, 169 N. W. 420.

Where a farm lying in two counties was operated as one tract, an action for trespass in digging a ditch on the farm in one of the counties was held triable in the other county. Fletcher v Glencoe Ditching Co., 141 Minn. 440, 170 N. W. 592.

If the subject-matter of an action is land, and the principal relief sought relates to the land, the action must be brought and tried in the county where the land is situated. Delasca v. Grimes, 144 Minn. 67, 174 N. W. 523.

It is a general principle of equity jurisdiction that, although a question of title to land may be involved in the inquiry, and may even constitute the essential point upon which the case depends, yet if the question before the court is not a naked question of title, but a question of defendant's personal obligation because of a contract or as a trustee, or as a holder of a legal title acquired by a species of mala fides practiced on plaintiff, then the place of trial is not restricted to the location of the land. In such cases the subject-matter of the inquiry is not the title to the land, although the title is involved in the inquiry, but the personal obligation of contract or of trust. State v. District Court, 146 Minn. 422, 178 N. W. 1004.

The subject-matter of the action is held to be the cancelation and termination of a trust agreement and for an accounting; the agreement covering a large amount of personal property and 1,208 acres of land. Before the action was brought, the personal property and about half of the land had been disposed of by defendants, and the proceeds applied in part only, pursuant to the agreement. Held, that the action is transitory, and not local, and defendants, the relators, are entitled to have it tried in the county of their residence. State v. District Court, 146 Minn. 422, 178 N. W. 1004.

(61) State v. District Court, 146 Minn. 422, 178 N. W. 1004.

(68) See Delasca v. Grimes, 144 Minn. 67, 174 N. W. 523.

10111. Actions against foreign corporations—The statute providing that a foreign corporation may be sued in any county selected by the plaintiff is limited to cases where there are no resident defendants. State v. Tryholm, 139 Minn. 389, 166 N. W. 533.

10111a. Actions against municipal corporations—Actions against municipal corporations are inherently local, and the statutory provisions in respect to the place of trial of transitory actions do not apply to actions brought against such corporations. **State v.** District Court, — Minn. —, 182 N. W. 165.

CHANGE OF VENUE—IN GENERAL

10114. Object of statute—(77) See Merrill, Cowles & Co. v. Shaw, 139 Minn. 1.

10116. Waiver of right to a change—When the venue does not go to the jurisdiction of the court over the subject-matter of the action, a party may waive his right to a trial in a particular county, and such waiver may be implied. By going to trial without objection in a county in a judicial district to which the case was remanded by the district court of another judicial district, and by failing to ask or obtain a ruling by the trial court on the question of whether the action was properly triable in such county, a defendant waives his right to assert that he was entitled to a trial in the county where he resides and that the order remanding the case to the county where it was tried was erroneous. Delasca v. Grimes, 144 Minn. 67, 174 N. W. 523.

By answering in an action in replevin without objecting to the venue and asking affirmative relief, and by stipulating to a transfer of the property involved, during the pendency of the suit, to the custody of a party in the county where the action was instituted, a defendant is precluded from raising the question whether the suit can be maintained in any other county than the one wherein the property was located when the action was begun. Wade v. Nat. Bank of Commerce, 144 Minn. 187, 174 N. W. 889.

(79) Delasca v. Grimes, 144 Minn. 67, 174 N. W. 523.

CHANGE OF VENUE—BY PARTIES AS OF RIGHT

10121. Statute—Application—To effect a change of venue under the provisions of this statute, defendant must make a record showing full compliance therewith. It must appear from the affidavit that at the time of the commencement of the action the defendant resided in a county other than the one in which the action was brought, the demand must be made seasonably, in due form, and the same with proof of service thereof upon plaintiff's attorneys must be filed with the clerk in the county where the action was begun within thirty days of the day of its service. Knudsen Fruit Co. v. Horner, 141 Minn. 59, 169 N. W. 251.

The statute has no application to proceedings under the Workmen's Compensation Act. State v. District Court, 142 Minn. 503, 172 N. W. 486.

The proper place of trial of an action against a municipal corporation is the county within which such municipal corporation is located and, if the action be brought in another county, the corporation may have it transferred to the proper county under G. S. 1913, § 7722. State v. District Court, — Minn. —, 182 N. W. 165.

10124a. Filing proof of service of papers—To effect a change of venue under G. S. 1913, § 7722, defendant must make a record showing full

compliance therewith. It is not enough that the affidavit and demand be served upon plaintiff's attorneys, but the same, together with the proof of service thereof, must be filed with the clerk of the court in the county where the action was begun, within the time fixed by the statute. Knudsen Fruit Co. v. Horner, 141 Minn. 59, 169 N. W. 251.

10125. **Where there are several defendants**—In an action brought against two defendants residing in different counties, one defendant being an individual, the other a municipal corporation, the individual defendant has no right, the other defendant not joining in the demand, to a change of the place of trial to the county of his residence, unless it appears that the other party was made a defendant for the purpose of preventing a change of venue. State v. Quinn, 132 Minn. 219, 156 N. W. 284.

In actions not made local by the provisions of sections 7715–7720, G. S. 1913, a resident defendant is not deprived of the right to have the place of trial changed to the county of his residence by joining a foreign corporation as a party defendant. State v. Tryholm, 139 Minn. 389, 166 N. W. 533.

CHANGE OF VENUE—BY COURT

10127. **For convenience of witnesses**—The fact that a change of venue would delay the trial over a term of court is a consideration of importance. Mullen v. Mullen, 135 Minn. 179, 160 N. W. 494.

(3) Mullen v. Mullen, 135 Minn. 179, 160 N. W. 494.

10128. **When parties are made defendants to prevent change**—Evidence held not to show that a municipality was made a defendant for the purpose of preventing a change of venue. State v. Quinn, 132 Minn. 219, 156 N. W. 284.

Evidence held to show that a defendant was a proper party and was not made a party defendant to prevent a change of venue. State v. District Court, 147 Minn. —, 179 N. W. 677.

(6) State v. District Court, 141 Minn. 489, 169 N. W. 22 (denial of application sustained).

VOTING TRUST—See Corporations, § 2073a; 18 Col. L. Rev. 123.

WAGERS

10132. **Void—Recovery—Stakeholders**—While a wager is void a mortgage may be canceled on the ground that it was given to secure a debt incurred in gambling. Bolfing v. Schoener, 144 Minn. 425, 175 N. W. 901.

Liability of stakeholders. L. R. A. 1918F, 972.

10133. Options and margins—Evidence examined and held sufficient to sustain the finding that the indebtedness secured by the mortgage in controversy arose out of wagers on the rise or fall of the market price of grain. Bolfing v. Schoener, 144 Minn. 425, 175 N. W. 901.

10133a. Hedging in grain—The price of grain varies from day to day, and the country buyer who pays the market price at the time he receives the grain stands to lose if the price should fall before the grain arrives at the place where he sells it. To guard against such loss a practice has grown up known as "hedging." Under this practice, in theory at least, when a buyer purchases grain in the country he also sells on the board of trade for future delivery a sufficient quantity to cover such purchase so that whether the price goes up or down his gain on one transaction will offset his loss on the other. As sales for future delivery in the terminal markets are made for delivery on the last day of either May, July, September, or December, a country buyer who is "hedging" usually sells his grain when it arrives at the terminal market and then closes his previous sale for future delivery by buying back an equal quantity on the board of trade. One board of trade transaction thus cancels the other and the gain or loss balances approximately the loss or gain on the actual grain bought, shipped and sold, leaving the dealer his regular profit. Bolfing v. Schoener, 144 Minn. 425, 175 N. W. 901.

Hedging for the purpose of avoiding loss or gain in a business is not illegal. Farmers Co-operative Exchange Co. v. Fidelity & Deposit Co., — Minn. —, 182 N. W. 1008.

WAIVER

10134. Definition and nature—Waiver is either the result of an intentional relinquishment of a known right or an estoppel from enforcing it. Hohag v. Northland Pine Co., 147 Minn. 38, 179 N. W. 485.

10135. What may be waived—Mere irregularity in the method of procedure may be waived by consent. State v. Schulz, 142 Minn. 112, 171 N. W. 263.

(27) See Bell v. Jarvis, 98 Minn. 109, 107 N. W. 547; Thwing v. McDonald, 134 Minn. 148, 156 N. W. 780, 158 N. W. 820.

10136. Public policy—A statute expressing the public policy of the state cannot be waived by those for whose protection it was enacted. Heim v. American Alliance Ins. Co., 147 Minn. 283, 180 N. W. 225.

10136b. Must clearly appear—To justify a court in declaring a waiver of an existing legal right, in the absence of facts creating an estoppel, an intention to waive should be made to appear clearly. Kubu v. Kabes, 142 Minn. 433, 172 N. W. 496.

To justify a court in depriving a party of the benefits of express contract stipulations on the ground of waiver, an intention to waive them

should clearly be made to appear or arise by necessary implication from the facts disclosed. Henry v. Hutchins, 146 Minn. 381, 178 N. W. 807.

WAR

10136c. Discouraging aid to government in war—Statute—It is provided by Laws 1917, c. 463, that "it shall be unlawful for any person to teach or advocate by any written or printed matter whatsoever, or by oral speech, that the citizens of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States." State v. Hartung, 141 Minn. 207, 169 N. W. 712 (evidence held sufficient to justify a conviction—judicial notice of war and that the Red Cross was an agency by which the citizens of the whole country were assisting the United States in carrying on the war—unnecessary that indictment name persons to whom defendant's language was addressed—discrepancies in language—cross-examination of defendant—striking out evidence); State v. Townley, 142 Minn. 326, 171 N. W. 930 (indictment for conspiracy in violation of statute sustained); State v. Ludemann, 143 Minn. 126, 172 N. W. 887 (statements made by defendant in giving his reasons to a committee for not joining the Red Cross held not a violation of the statute); State v. Rempel, 143 Minn. 50, 172 N. W. 888 (statements in private conversation held not a violation of statute); State v. Rempel, 143 Minn. 52, 172 N. W. 919 (evidence held not to justify a conviction); State v. Randall, 143 Minn. 203, 173 N. W. 425 (language used by defendant held to constitute a violation of the statute); State v. Hartung, 147 Minn. 128, 179 N. W. 646 (indictment held insufficient). See §§ 510a, 1654.

10136d. Control of stockyards during war—By the Food Control Act, Congress, acting under the war power of the constitution, authorized the taking control and regulation of the business of public stockyards, including the business of commission men buying and selling live stock there. Under such authority the government assumed control of the public stockyards at South St. Paul and of the business of commission men doing business there; and during such control the state could not interfere by fixing and enforcing commission charges through the delegated authority of the Railroad and Warehouse Commission pursuant to Laws Ex. Sess 1919, c. 39. State v. Rogers & Rogers, — Minn. —, 182 N. W. 1005.

WAREHOUSEMEN

10137. Regulation—The rights and liabilities of warehousemen are largely governed by the Uniform Warehouse Receipts Act. G. S. 1913, §§ 4514–4575.

10139. Removal of goods to another warehouse—(31, 32) 12 A. L. R. 1322.

10140a. Sale of grain—Rights of purchaser—Notice—Equities between purchaser and surety of warehouseman—Evidence considered, and held to justify the trial court in finding that the purchaser of grain from a warehouseman with whom it had been stored bought in good faith, without notice of the fact that its vendor did not own the grain. Unless the circumstances under which such grain was offered for sale were such as to make it the duty of a prudent and honest man to make inquiry concerning its ownership, the purchaser thereof was not chargeable with constructive notice of the fact that his vendor was only a bailee of the grain. The equities of one who buys grain in the open market, in good faith and for full value, from a warehouseman with whom it was stored, are superior to those of the surety on a bond of the latter, given for the protection of those storing grain with it, where such warehouseman has become insolvent and the surety has been required to pay the amount of the bond. Because of the superiority of such purchaser's equities, the surety does not become subrogated to rights which the true owners of the grain may have had, to follow it into the hands of the purchaser and to hold the latter as for a conversion thereof. After such purchaser and surety had each paid the full amount for which it was ultimately liable, to the representative of all persons to whom such warehouseman had issued grain storage receipts, outstanding when it became insolvent, all equities between them ceased, and each became an independent creditor of the warehouseman, and was entitled to retain any moneys, subsequently received in partial reimbursement of its original loss. Northern Trust Co. v. Consolidated Elevator Co., 142 Minn. 132, 171 N. W. 265.

10141. Liability for negligence—The care required of a warehouseman may be affected by instructions given to him by the bailor as to the care of the articles stored. A recovery may be had for negligence in carrying out such instructions. H. A. Dreves Co. v. Northern Cold Storage & Warehouse Co., 135 Minn. 63, 160 N. W. 200.

Plaintiff stored with defendant a quantity of Finnish silakka. When taken from storage it was spoiled. The evidence is sufficient to sustain a finding that the silakka was spoiled while in storage, and that the injury was caused by the manner in which it was handled by defendant. H. A. Dreves Co. v. Northern Cold Storage & Warehouse Co., 135 Minn. 63, 160 N. W. 200.

Evidence held to justify a recovery for millet seed spoiled while in an elevator. Iverson v. Farmers Elevator Co., 146 Minn. 467, 177 N. W. 924.

(50) G. S. 1913, § 4534. See 9 A. L. R. 559 (loss by fire).

10142. Commingling grain—(53) See G. S. 1913, § 4536.

10143. Delivery of grain for storage a bailment—(56) See Northern Trust Co. v. Consolidated Elevator Co., 142 Minn. 132, 171 N. W. 265 (similar North Dakota statute).

10145. Warehouse receipts—Warehouse receipts are now governed by the Uniform Warehouse Receipts Act. G. S. 1913, §§ 4514–4575.

10147. Lien for charges—Statute—(77) G. S. 1913, § 4540. See Grice v. Berkner, 148 Minn. —, 180 N. W. 923.

10148. Sites for public warehouses on railroad rights of way—The right to use a railroad right of way as a site for a public warehouse, given by Rev. Laws 1905, §§ 2106–2113 (G. S. 1913, § 4506–4513), includes the right of use for a public potato warehouse, and is not limited to grain elevators. The changed language in the Revision of 1905 indicates an intention not to limit the use to grain warehouses or elevators as limited by the original statute. The use of a warehouse on a right of way as a public potato warehouse is a public use; and the use proposed to be made of the defendant's right of way by the plaintiff is a public use. That the right of way of the defendant came by grant from the United States does not prevent the state from requiring it to permit the location thereon of a warehouse for public use. Chapter 490, Laws 1919, does not vest exclusive jurisdiction in the Railroad and Warehouse Commission to subject a railroad right of way to use as a site for a public warehouse; and a proceeding may be taken under R. L. 1905, §§ 2106–2113, G. S. 1913, §§ 4506–4513. Simmons v. Northern Pacific Ry. Co., 147 Minn. 313, 180 N. W. 114. See Laws 1921, c. 140.

(80) Simmons v. Northern Pacific Ry. Co., 147 Minn. 313, 180 N. W. 114; Northern Pacific Ry. Co. v. Pioneer Fuel Co., 148 Minn. —, 181 N. W. 341. See §§ 3021, 3025; Laws 1921, c. 140.

10149. Criminal liability—Under the North Dakota statute failure of a warehouseman to deliver the grain covered by a storage receipt or pay the market value thereof is larceny. Northern Trust Co. v. Consolidated Elevator Co., 142 Minn. 132, 171 N. W. 265.

See G. S. 1913, §§ 4563–4568.

WASTE

10150. Definition—(84) See Donnelly v. Butts, 137 Minn. 1, 162 N. W. 674; Ann. Cas. 1918D, 543 (changing character of land as waste).

10151. Action for waste—Statute—(86) 33 Harv. L. Rev. 618; L. R. A. 1916A, 792 (action by reversioner).

WATERS

IN GENERAL

10157a. Agreements for private drains—Estoppel—Where neighboring landowners unite in the construction of a ditch to drain and improve their several holdings, each of them is thereafter estopped from closing the ditch in a way to deprive the others of the drainage provided. The

estoppel arises as soon as the ditch is established. It is not thereafter lost by a failure to assert dominion over the ditch upon the land of the other interested parties so long as they do not create an obstruction to the flow of the water therein. Stoering v. Swanson, 139 Minn. 115, 165 N. W. 875. See 2 Minn. L. Rev. 388.

The doctrine of Sheehan v. Flynn is applicable to such drainage projects. Hartle v. Neighbauer, 142 Minn. 438, 172 N. W. 498. See § 10165.

SURFACE WATERS

10160. Definition—"Surface waters" of which the land owner may rid his land, doing no unnecessary damage to his neighbor, are such as come from rains and snows, do not belong to any well-defined body of water or natural stream, but are confined partly to the surface and partly beneath the surface in swamps and sloughs, where they lie stagnant and inactive. They do not lose their character as surface waters merely because in a measure they are absorbed by or soak into the marshy or boggy land where collected. Hartle v. Neighbauer, 142 Minn. 438, 172 N. W. 498.

(2) Hartle v. Neighbauer, 142 Minn. 438, 172 N. W. 498.

10164. Consent to diversion—Damages awarded in condemnation proceedings do not bar a recovery for subsequent negligence in so maintaining a railroad as to flood adjacent property unreasonably and unnecessarily. Peterson v. Northern Pacific Ry. Co., 132 Minn. 265, 156 N. W. 121.

(12) Evans v. Northern Pacific Ry. Co., 117 Minn. 4, 134 N. W. 294; Peterson v. Northern Pacific Ry. Co., 132 Minn. 265, 156 N. W. 121.

10165. Diversion—Doctrine of Sheehan v. Flynn—Doctrine of Sheehan v. Flynn applied. Peterson v. Northern Pacific Ry. Co., 132 Minn. 265, 156 N. W. 121. See 2 Minn. L. Rev. 449.

The rule laid down and applied in Sheehan v. Flynn, 59 Minn. 436, 61 N. W. 462, 26 L. R. A. 632, to the effect that the owner may rid his land of the surface waters coming thereon doing no unnecessary or unreasonable injury to his neighbor, applies to a private drainage project joined in by several owners of contiguous lands. So long as such drainage be limited to surface waters, it is immaterial whether tile or open ditch drains be adopted for the purpose. Hartle v. Neighbauer, 142 Minn. 438, 172 N. W. 498.

In an action to enjoin defendant from maintaining a tile drain which conducts surface water to a place on defendant's land from which it finds its way to plaintiff's land, it is held, that the findings are sustained by the evidence, and that the rule stated in Sheehan v. Flynn, 59 Minn. 436, 61 N. W. 462, 26 L. R. A. 632, and followed in Hartle v. Neighbauer, 142 Minn. 438, 172 N. W. 498, is applicable. Wiltschek v. Werring, 146 Minn. 115, 178 N. W. 169.

10168. Removal of obstructions—Entry on adjoining land—Plaintiff entered upon defendant's land and enlarged a natural depression, which was the natural outlet for surface water from his own land, and defendant thereafter filled up such outlet, "practically level with the ground on the sides thereof." The findings of fact fail to show to what extent, if any, defendant filled the outlet above its height when in its natural condition, and do not justify a judgment requiring her to remove all the filling placed in such outlet. Halvorson v. Halvorson, 133 Minn. 78, 157 N. W. 1001.

(21) See Halvorson v. Halvorson, 133 Minn. 78, 157 N. W. 1001.

10171. Marshes—Drainage—(26) See Hartle v. Neighbauer, 142 Minn. 438, 172 N. W. 498.

10172. Diversion by municipalities—Improper discharge of sewers and drains—A municipality is liable where it collects in a ditch the overflow of cesspools, sinks and septic tanks and through a tile drain discharges the same, together with surface waters, upon the premises of another. Joyce v. Janesville, 132 Minn. 121, 155 N. W. 1067.

A municipality is liable where, in the improvement of a highway, it deposits materials in a culvert and thereby overflows adjacent lands. Lindstrom v. Ramsey County, 136 Minn. 46, 161 N. W. 222.

A municipality has been held liable where it allowed a sewer from a lot to collect and discharge more surface water into its street sewer than the latter could carry off, in consequence whereof the water in the street sewer backed up and overflowed plaintiff's basement. Gillespie v. Duluth, 137 Minn. 454, 163 N. W. 779.

The act of a municipal corporation while engaged in improving one of the public highways thereof in diverting the flow of surface waters from their natural channel and by artificial means casting them in destructive quantities upon private property constitutes a "trespass" for which the municipality is liable without regard to the question of negligence. Kiefer v. Ramsey County, 140 Minn. 143, 167 N. W. 362.

(27) Lindstrom v. Ramsey County, 136 Minn. 46, 161 N. W. 222 (county liable for acts of county board); Kiefer v. Ramsey County, 140 Minn. 143, 167 N. W. 362.

(31) Kiefer v. Ramsey County, 140 Minn. 143, 167 N. W. 362; Joyce v. Janesville, 132 Minn. 121, 155 N. W. 1067; Newman v. St. Louis County, 145 Minn. 129, 176 N. W. 191; Sammons v. Westbrook, 145 Minn. 296, 176 N. W. 991.

(32) Weber v. Minneapolis, 132 Minn. 170, 156 N. W. 287; Halvorson v. Moranville, 137 Minn. 349, 163 N. W. 673.

See § 6661a.

10173. Diversion by railroad companies—A ditch dug along a railroad right of way and maintained for a long period by the railroad company to carry away surface waters which are prevented from passing in the direction of the natural course of drainage by the railway roadbed constructed upon a fill without culverts cannot be closed by the company,

the defendant, when it results in flooding the lands of plaintiff, bought and improved while the ditch existed and took care of all the surface waters intercepted by the fill; such closing being an unreasonable and negligent use of defendant's property to the needless injury of plaintiff's. The ditch, having been voluntarily constructed by the railway company for the drainage of its right of way and roadbed, and being in existence for that purpose when chapter 377, Laws 1909 (G. S. 1913, §§ 4269–4271), was enacted, must now be kept open as therein provided. Peterson v. Northern Pacific Ry. Co., 132 Minn. 265, 156 N. W. 121.

(39) Peterson v. Northern Pacific Ry. Co., 132 Minn. 265, 156 N. W. 121 (closing ditch and thereby flooding adjacent lands).

10174b. Pleading—A complaint held to state a cause of action for wrongfully obstructing the natural flow of surface water. Halvorson v. Halvorson, 133 Minn. 78, 157 N. W. 1001.

DAMS AND WATER POWERS

10183a. Congressional authorization—In relation to a dam in the Rainy River the acts of Congress authorizing it have been held not to relieve the owner of the dam from liability for overflowing adjacent land. Such acts did not grant any right of flowage of land not privately owned, but which, at the time of their enactment, was government land. Erickson v. Minnesota & Ontario Power Co., 134 Minn. 209, 158 N. W. 979.

10185. Grants and contracts relating to dams and water powers—(54) Currie v. Silvernale, 142 Minn. 254, 171 N. W. 782 (the words "said dam may maintain the water at a height of seven feet" contained in a deed conveying 2.3 acres upon which was a mill dam did not create an easement giving the grantees the use of a swale, some seven hundred feet above the premises conveyed, for a permanent spillway—nor did the deed by implication grant a right of way over the grantor's land above the tract conveyed to repair the erosion of the sod of the swale where the waters in times of flood enter from the stream and threaten to cut a new channel).

10187. Dams to maintain waters in lakes at uniform height—(58) State v. District Court, 146 Minn. 150, 178 N. W. 595 (evidence did not show that any one was entitled to damages—failure to assess benefits immaterial).

10188. To what height water may be raised—(59) Erickson v. Minnesota & Ontario Power Co., 134 Minn. 209, 158 N. W. 979.

10189. Definition of natural state of water—(60) Erickson v. Minnesota & Ontario Power Co., 134 Minn. 209, 158 N. W. 979.

10196. Actions for unlawful flowage—(70, 72) Erickson v. Minnesota & Ontario Power Co., 134 Minn. 209, 158 N. W. 979 (authorization by Congress).

WEIGHTS AND MEASURES

10201a. Municipal regulation—In a prosecution for the violation of an ordinance of the city of Minneapolis, by which ordinance it is declared that one who knowingly sells commodities at short weight shall be punished by fine, it is held that knowledge is an essential element of the offence so defined, and since the complaint contained no charge, that the sale in question was underweight to the knowledge of defendant, and no evidence of such knowledge was offered on the trial, no violation of the ordinance was shown. State v. Washed Sand & Gravel Co., 136 Minn. 361, 162 N. W. 451.

10202. State weighmaster of grain—Conclusiveness of certificate—The statute makes the certificate only prima facie evidence. While the parties may by agreement make it conclusive evidence an intention to do so must clearly appear. Carnegie Dock & Fuel Co. v. Midland Lumber & Coal Co., — Minn —, 182 N. W. 515.

WELL DRILLERS—See Contracts, § 1783b.

WILLS

IN GENERAL

10203. What constitutes—(89) See German v. McKay, 136 Minn. 433, 162 N. W. 527; 11 A. L. R. 23; 18 Mich. L. Rev. 470.

10205. Right to make statutory—The right to dispose of property by will may be restricted by the legislature. Minnesota Loan & Trust Co. v. Douglas, 135 Minn. 413, 161 N. W. 158.

(93) State v. Probate Court, 137 Minn. 238, 163 N. W. 285.

10206a. Consent of spouse—The evidence is held to sustain a finding of the trial court that the widow of a testator who consented in writing to the will of her husband was fully advised as to the extent of her husband's property and of her rights under the law, and in executing her consent acted with intelligent knowledge of the situation. Lindquist v. Security Loan & Trust Co., 142 Minn. 271, 172 N. W. 121.

10207. Contracts to make a devise or bequest—To justify specific performance of such a contract the contract must be so specific and distinct in its terms as to leave no reasonable doubt as to its meaning, and the proof must be clear, positive and convincing. Kins v. Ginzky, 135 Minn. 327, 160 N. W. 868.

The contract may be enforced by heirs of the promisee. Lindell v. Lindell, 135 Minn. 368, 160 N. W. 1031.

In an action to enforce a contract by which defendants agreed to make plaintiff their heir at law, and to leave him at their death all their property in consideration that plaintiff would become a member of their household and render and perform such services and labor as would be expected from a natural son, it is held that the evidence supports the findings of the trial court, and that the conclusions of law are sustained by the findings of fact. A contract of the kind stated is continuing in character, and an attempted renunciation thereof by the promisor does not set in motion the statute of limitations. The promisee in such case may act upon such repudiation and sue at once to protect his rights, or he may delay such suit until the happening of the event, the death of the promisor, that would vest in him the right secured by the contract. Wold v. Wold, 138 Minn. 409, 165 N. W. 229.

To obtain specific performance of the contract the plaintiff must offer clear, satisfactory and convincing proof of the contract and of the fairness of the transaction. Colby v. Street, 146 Minn. 290, 178 N. W. 599.

By the terms of the contract set out in the complaint, plaintiff was to give up her occupation, remove from New York to Minnesota, and come to live with her widowed sister, an aged childless woman, and the latter was to devise her homestead to plaintiff. After full performance by plaintiff, the rule that an executory contract is not enforceable unless supported by a consideration cannot be invoked. The contract was one which contemplated the giving by plaintiff to her sister of personal care and companionship in her daily life. Her services were of a nature not capable of being measured by any pecuniary standard and cannot be adequately compensated by a money judgment. Plaintiff's cause of action accrued at the date of her sister's death and was not barred by the statute of limitations by reason of the fact that more than six years before her death her sister sold and conveyed her homestead to a stranger. The effect of the contract, if performed, was to create an equitable interest in the homestead in plaintiff, with the legal title held by her sister subject to such interest. The beneficiaries named in the sister's will do not occupy the position of bona fide purchasers, but take the legal title to her property subject to a trust in favor of plaintiff in so far as such property represents the proceeds of the sale of the homestead. When the vendor in a contract for the sale of land conveys it to one who purchases without notice of the vendee's rights, the latter is not limited to an action for damages against the vendor, but may treat the proceeds of the sale so long as they are in the hands of the vendor or his personal representative and can be traced and identified, as substituted for the land described in the contract, and plaintiff has similar rights under her contract with her sister. Colby v. Street, 146 Minn. 290, 178 N. W. 599.

An action at law for damages will lie for a breach of the contract. In re Simons, 247 U. S. 231.

(96) Kins v. Ginzky, 135 Minn. 327, 160 N. W. 868; Lindell v. Lindell, 135 Minn. 368, 160 N. W. 1031; Greenfield v. Peterson, 141 Minn. 475, 170 N. W. 696. See Odenbreit v. Utheim, 131 Minn. 56, 154 N. W.

741; Wagner v. Seaberg, 138 Minn. 37, 163 N. W. 975; 33 Harv. L. Rev. 933.

10207a. Contracts between beneficiaries of a will—The beneficiaries under a will cannot by contract between themselves modify the terms of the will, but they may divide the property received by them under the will contrary to the terms of the will. When a widow enters into such a contract she will be bound thereby provided it is fair and provident and those occupying a fiduciary or confidential relation toward her make a full disclosure of the facts and fully inform her of her rights. A widow, heir to an estate, without business training, is a ward of the courts, and the courts will jealously guard her rights and secure them against the slightest imposition. Rogers v. Benz, 136 Minn. 83, 161 N. W. 395, 1056.

Parties interested under a will in the residue of an estate agreed to divide the residue in a manner different from that provided by the will and directed the executor to make division in accordance with their agreement. This the executor did. Held, that after such distribution those who received under the agreement less than they would have received under the will could not recover the difference from the executor or from the other heirs. Kauffman v. Kauffman, 137 Minn. 457, 163 N. W. 780.

TESTAMENTARY CAPACITY

10208. Test—So long as the understanding and reason are so far unclouded that a testator has sufficient intelligence to be able to transact ordinary business, a court is not bound to conclude that he did not have sufficient mental capacity to make a will because he was the victim of delusions. In re Olson's Estate, 148 Minn. —, 180 N. W. 1009.

Fantastic beliefs are not so uncommon as to indicate a mind incapable of collecting and comprehending the facts a person should consider in making his will. The existence of a delusion with respect to a particular subject or subjects is not conclusive evidence of mental incapacity. The delusion may have no basis whatever, and no evidence may suffice to dispel it; but if it did not influence the testator with respect to the terms of his will, its existence does not invalidate the will. In re Olson's Estate, 148 Minn. —, 180 N. W. 1009.

One under guardianship may make a will. 8 A. L. R. 1375.

(4) In re Olson's Estate, 148 Minn. —, 180 N. W. 1009.

10209. Burden and order of proof—(5) Bush v. Hetherington, 132 Minn. 379, 157 N. W. 505.

10210. Evidence—Admissibility in general—Attesting witnesses are competent to testify as to the testamentary capacity of the testator though they are legatees or devisees under the will. Benrud v. Anderson, 144 Minn. 111, 174 N. W. 617.

Appointment of guardian as evidence of testamentary incapacity. 7 A. L. R. 568.

(11) See Wheeler v. McKeon, 137 Minn. 92, 162 N. W. 1070.

10211. Opinion evidence—Interested parties are not incompetent to testify as to conversations with the testator when the object is to lay a foundation for their opinions. Chapel v. Chapel, 137 Minn. 420, 163 N. W. 771.

Attesting witnesses may testify as to the testamentary capacity of the testator though they are legatees or devisees under the will. Benrud v. Anderson, 144 Minn. 111, 174 N. W. 617.

(13) Benrud v. Anderson, 144 Minn. 111, 174 N. W. 617.

(14) In re Olson's Estate, 148 Minn. —, 180 N. W. 1009.

10212. Evidence—Sufficiency—(18) Bush v. Hetherington, 132 Minn. 379, 157 N. W. 505 (finding of capacity sustained); Hanson v. Hanson, 141 Minn. 373, 170 N. W. 348 (id.); In re Olson's Estate, 148 Minn. —, 180 N. W. 1009 (id.).

EXECUTION

10213a. Conflict of laws—A will made out of the state and valid according to the laws of the state or country in which it was made, or of the testator's domicil, if in writing and signed by the testator, may be proved and allowed in this state, and shall thereupon have the same effect as if it had been executed according to the laws of this state. G. S. 1913, § 7253; Seccomb v. Bovey, 135 Minn. 353, 160 N. W. 1018.

10214a. Signature of testator—Sufficiency—In general—A signature to a will, imperfectly made, is a valid legal signature, if the name can without difficulty be made out, and it is written by the testator voluntarily and with knowledge of the fact that he is signing a will. Hanson v. Hanson, 141 Minn. 373, 170 N. W. 348. See Crowley v. Farley, 129 Minn. 460, 466, 152 N. W. 872.

10214b. Testator's knowledge of contents—Where a will has been drawn in the English language, but all the directions as to its preparation have been given by the testator in another tongue, it may nevertheless be found to be his last will and testament, if, prior to its execution, a substantially accurate translation or explanation of its provisions is given the testator, so that he understands their meaning. It is not necessary that he should correctly appreciate their legal effect. Benrud v. Anderson, 144 Minn. 111, 174 N. W. 617. See L. R. A. 1918D, 747.

10218. Attestation—The evidence sustains the special verdict to the effect that the instrument presented for probate was signed by testator in the presence of two persons, who duly attested the execution of the same as testator's last will and testament and subscribed their names as such witnesses. Baxter v. Baxter, 136 Minn. 59, 161 N. W. 261.

Attestation is the act of witnessing the execution of an instrument and subscribing the name of the witness in testimony of such fact. It is not necessary that attestation be formally requested by the testator. Whether it is necessary that the witnesses should know that the document is a will is not decided. There is evidence that when one of the

witnesses was called, he was told that he was to witness a testament, that he saw the testator and the other witness sign, and was told in the conscious presence of the testator and within his hearing, that the instrument was the testator's will and he was asked to sign it as a witness, and that he then did so. This evidence was sufficient to sustain a finding of attestation under any definition of that term. Kroschel v. Drusch, 138 Minn. 322, 164 N. W. 1023.

There is evidence that, immediately after the testatrix signed the will, the witnesses subscribed their names in a room adjoining the one in which the testatrix lay in bed and but a few feet from her; that the view was unobstructed and the act of signing could be plainly seen by testatrix if she looked. Held sufficient proof that the witnesses subscribed in the presence of the testatrix, whether she actually saw them sign or not. This was also sufficient attestation. Attestation presupposes an execution of the will or an acknowledgment of it in the presence of the witnesses and a publication of the will as such, and it certifies to the facts necessary to constitute execution and publication; but formality in such matters is not required. Hanson v. Hanson, 141 Minn. 373, 170 N. W. 348.

It is not necessary under our statutes that witnesses to a will sign as such in the presence of each other, though each must sign at the instance, express or implied, of the testator, and in his conscious presence. In re Gates' Estate, — Minn. —, 183 N. W. 958. See L. R. A. 1917F, 872.

It is not necessary that the testator should personally request the witnesses to sign as such. It is sufficient if the request is made by the scrivener or other person in the presence of the testator and he acquiesces therein. In re Gates' Estate, — Minn. —, 183 N. W. 958.

The evidence made the question whether there was a legal and sufficient attestation of the will here involved one of fact, and the findings of the court thereon are sufficiently supported by competent proof. In re Gates' Estate, — Minn. —, 183 N. W. 958.

(26) Kroschel v. Drusch, 138 Minn. 322, 164 N. W. 1023.

10219. Competency of witnesses—Legatees and devisees are competent witnesses. Benrud v. Anderson, 144 Minn. 111, 174 N. W. 617.

10221. Findings as to execution—A new trial granted by the supreme court where there was such serious doubt of the correctness of the verdict as to justify reconsideration, though the evidence was conflicting. In re Murphy's Estate, 148 Minn. —, 181 N. W. 320.

(36) Hanson v. Hanson, 141 Minn. 373, 170 N. W. 348; In re Gates' Estate, — Minn. —, 183 N. W. 958.

REVOCATION

10226. Statutory modes—What law governs. 34 Harv. L. Rev. 768.

10230a. Dependent relative revocation—See 33 Harv. L. Rev. 337.

10233. By implication—Change of circumstances—The statute which defines the different methods of express revocation provides that "nothing in this section shall prevent the revocation implied by law from subsequent change in the condition or circumstances of the testator." G. S. 1913, § 7256. This has been construed to adopt the common-law doctrine of implied revocation whether by change of status or by alteration of estate. In re Evans' Estate, 145 Minn. 252, 177 N. W. 126.

10234. By transfer of property devised—The rule is general that a conveyance of property devised revokes the will wholly or pro tanto in the sense that the will cannot operate upon property conveyed after its execution. This is but the statement of a truism. There is ample authority for holding under the common-law rule that a contract for the conveyance of real property, whereby the vendee takes the equitable title and the vendor retains the legal title as security for the unpaid purchase money, operates as an implied revocation. The question is an open one in this state. In re Evans' Estate, 145 Minn. 252, 177 N. W. 126.

The testator, after making his will, whereby he devised the greater portion of his property in trust, made an enforceable contract to lease for 100 years a portion of the property devised in trust, with an option in the lessee to purchase within ten years. Held, that this contract did not revoke the will by implication of law; and that the trusts can be carried out in substantially the manner directed by the will. In re Evans' Estate, 145 Minn. 252, 177 N. W. 126.

UNDUE INFLUENCE

10238. What constitutes—(60) Thill v. Freiermuth, 132 Minn. 242, 156 N. W. 260; Kroschel v. Drusch, 138 Minn. 322, 164 N. W. 1023.

(62) Bush v. Hetherington, 132 Minn. 379, 157 N. W. 505.

10239. Evidence of undue influence—The declarations of the testator before, after, or at the time of the execution of the will, are admissible to show the extent and effect of undue influence otherwise proved to have been exerted. Thill v. Freiermuth, 132 Minn. 242, 156 N. W. 260.

An attorney employed to draft the will may testify as to such declarations. Thill v. Freiermuth, 132 Minn. 242, 156 N. W. 260.

Certain evidence to show the intended disposition of her property disclosed by a conversation of testatrix long before she made her will, held too remote. In re Olson's Estate, 148 Minn. —, 180 N. W. 1009.

(65, 66) Thill v. Freiermuth, 132 Minn. 242, 156 N. W. 260.

10243. Evidence—Sufficiency—Evidence held insufficient to justify a finding of undue influence. Bush v. Hetherington, 132 Minn. 379, 157 N. W. 505.

A new trial granted by the supreme court where there was such serious doubt of the correctness of the verdict as to justify reconsideration, though the evidence was conflicting. In re Murphy's Estate, 148 Minn. —, 181 N. W. 320.

(76) Kroschel v. Drusch, 138 Minn. 322, 164 N. W. 1023; Hetherington v. Bush, 139 Minn. 501, 166 N. W. 1084; Hanson v. Hanson, 141 Minn. 373, 170 N. W. 348; In re Olson's Estate, 148 Minn. —, 180 N. W. 1009; Id., 148 Minn. —, 181 N. W. 569.

PROBATE

10244. Who may petition for probate of will—The person named in a will as the executor may present it for probate, but it is not his duty to do so. If he has it in his possession it is his duty to deliver it to the probate court. Kelly v. Kennedy, 133 Minn. 278, 158 N. W. 395.

Any person interested in the estate may petition for the probate of a will. Bogart v. Taylor, 144 Minn. 454, 175 N. W. 913.

10245a. Specification of grounds of objection—No one shall be heard to contest the validity of a will unless the grounds of objection thereto are stated in writing and filed in court before the time appointed for proving the will. G. S. 1913, § 7270. Bogart v. Taylor, 144 Minn. 454, 175 N. W. 913.

10246. Proof—Admissibility of evidence—Where there are several legatees in a will, declarations or admissions by one of them tending to cast doubt on the instrument presented for probate are not admissible, where such legatee has not taken the stand to sustain the will, and such declarations are not part of the res gestae of its execution. The contestants may not call the legatee, who has made such admissions, for cross-examination under the statute, to lay the foundation for impeachment, and thus indirectly introduce that which is inadmissible directly. Benrud v. Anderson, 144 Minn. 111, 174 N. W. 617.

Since section 7254, G. S. 1913, annuls the interest of a devisee or legatee in a will, where he is an attesting witness thereto and there is but one other attesting witness, such devisee or legatee is a competent witness to prove the will. Benrud v. Anderson, 144 Minn. 111, 174 N. W. 617.

10246a. Not defeated by testator's misapprehension of effect—If a testator comprehends and approves the instrument as written, it should not be refused probate because it fails to carry out the intention of the testator as to part of his property. Benrud v. Anderson, 144 Minn. 111, 174 N. W. 617.

It frequently happens that courts construe the dispositions in a will, even when drawn by experienced lawyers, contrary to what the testator thought he had made. Because a will may or even must be construed as to some provision differently from what a testator intended is no reason why it should be refused probate. Benrud v. Anderson, 144 Minn. 111, 174 N. W. 617.

10246b. Foreign wills—Original probate here—A will executed by a non-resident leaving property in the state upon which the will is operat-

ive may be probated here though it has not been probated at the domicil of the testator. Seccomb v. Bovey, 135 Minn. 353, 160 N. W. 1018.

10250. Burden of proof—Physical or educational disability, as blindness or inability to read the language if accompanied by circumstances leading the court to suspect possible imposition, subjects proponents of a will to the additional burden of showing to the satisfaction of the court that testator knew its contents, so that he understood them. Benrud v. Anderson, 144 Minn. 111, 174 N. W. 617.

10251. Who may contest—Who may contest will. L. R. A. 1918A, 447.

10252. Scope and effect—What matter is contained in a will is for determination when the instrument is being considered at the hearing for proving the will. What construction is to be placed thereon is for later consideration. Bogart v. Taylor, 144 Minn. 454, 175 N. W. 913.

A decree of the probate court establishing a will, unless reversed on appeal, is conclusive that the instrument was duly executed by the person whose will it purports to be, and that such person had legal capacity to execute it. Bogart v. Taylor, 144 Minn. 454, 175 N. W. 913.

10253. Vacation—If the probate of a will is vacated on the ground that the will was forged or void the vacation does not invalidate the prior acts of the executor. Fridley v. Farmers & Mechanics Sav. Bank, 136 Minn. 333, 162 N. W. 454.

10255. In what county—In case of a non-resident, his will may be probated in a county where he left property subject to administration, regardless of his domicil or whether the will has been first probated at his domicil in another state. For purposes of probate and administration the determination of domicil by the courts of one state is not conclusive upon the courts of another state. Lipman v. Bochhoefer, 141 Minn. 131, 169 N. W. 536.

10256a. Effect of foreign decree—The judgment of the probate court in Massachusetts holding a will invalid because not executed in accordance with the laws of that state held not to be binding upon the probate court of Minnesota, where the decree in Massachusetts was entered subsequent to the one in Minnesota. Seccomb v. Bovey, 135 Minn. 353, 160 N. W. 1018.

CONSTRUCTION

10257. In general—The meaning of isolated clauses or paragraphs may be modified by the evident intention inferred from a consideration of the will as a whole. Long v. Willsey, 132 Minn. 316, 156 N. W. 349.

A will should not be approached with the mind fixed on the canons of construction. They are merely aids to the court in resolving doubts arising from obscurity in the language of the will. To read a will with an eye upon decisions in cases involving other wills may suggest doubts and obscurities where none would otherwise have appeared. In re Bell's Will, 147 Minn. 62, 179 N. W. 650.

To carry out the intention of the testator the same word may be given a different meaning in different parts of the will. Liedel v. Holman, — Minn. —, 183 N. W. 355.

(11) Elberg v. Elberg, 132 Minn. 15, 155 N. W. 751; Long v. Willsey, 132 Minn. 316, 156 N. W. 349; Hutchins v. Wenger, 133 Minn. 188, 158 N. W. 52; Barney v. May, 135 Minn. 299, 160 N. W. 790; In re Bell's Will, 147 Minn. 62, 179 N. W. 650; Anderson v. Brower, 148 Minn. —, 180 N. W. 1019.

(12) In re Meuwissen's Estate, 146 Minn. 9, 177 N. W. 668.

10260. Resort to surrounding circumstances—The extent of the testator's property and his relation to the objects of his bounty may be considered. Miller v. Klossner, 135 Minn. 377, 160 N. W. 1025.

(22) Miller v. Klossner, 135 Minn. 377, 160 N. W. 1025; In re Bell's Will, 147 Minn. 62, 179 N. W. 650; Anderson v. Brown, 148 Minn. —, 180 N. W. 1019.

(23) In re Bell's Will, 147 Minn. 62, 179 N. W. 650.

10261. Extrinsic evidence—Certain statements of the testator to the scrivener of the will were admitted. Held, that if they were erroneously admitted the error was without prejudice. Hutchins v. Wenger, 133 Minn. 188, 158 N. W. 52.

10263. Popular sense of words—It is not necessary that the intention of the testator be expressed in exact legal terms. Any language from which such intention may be ascertained is sufficient. Elberg v. Elberg, 132 Minn. 15, 155 N. W. 751.

(31) Barney v. May, 135 Minn. 299, 160 N. W. 790.

10263a. Technical words—Heirs—The cardinal purpose in construing a will is to reach the intent of the testator. The viewpoint of the testator is to be considered; and, while the technical meaning of words is not to be overlooked, it will not be followed, if thereby the testator's intent is not given effect. Words such as "heirs," or "legal heirs," may, to give effect to the intent of the testator, be held to refer to others than those who are technically heirs, or to exclude those who are technically heirs. Anderson v. Brower, 148 Minn. —, 180 N. W. 1019.

10264a. Ejusdem generis—The doctrine of ejusdem generis applies in the construction of wills. Barney v. May, 135 Minn. 299, 160 N. W. 790.

10264b. Expressions of desire—Precatory trusts—Expressions of desire will not be construed to create a precatory trust unless that was clearly the intention of the testator. Long v. Willsey, 132 Minn. 316, 156 N. W. 349.

10265. Will speaks as of what date—Gift to a class—Where a gift is made by will to a class of persons and immediate distribution is contemplated, the persons constituting the class are determined as of the death of the testator. Where the bequest to the class is contingent, the members constituting the class are not determined as of any time earlier than

the vesting of the estate. Where a gift is to a class and the right of enjoyment is postponed, beyond the time that it vests in right, and until the termination of a preceding estate, the members entitled to take are determined as of the time when the gift to the class vests in enjoyment. Savela v. Erickson, 138 Minn. 93, 163 N. W. 1029.

A will construed as showing an intention on the part of the testator that upon the death of one of his children without issue, the others should take his share, whether such death occurred before or after the death of the testator. In re Peavey's Estate, 144 Minn. 208, 175 N. W. 105. See 34 Harv. L. Rev. 527.

The general rule that the members of a class for whom a legacy is provided are to be ascertained on the death of the testator, and the rule that the law favors the early vesting of legacies should not be applied if to do so would defeat the accomplishment of the testator's purpose as expressed in his will. In re Bell's Will, 147 Minn. 62, 179 N. W. 650.

(33) Barney v. May, 135 Minn. 299, 160 N. W. 790.

(34) Savela v. Erickson, 138 Minn. 93, 163 N. W. 1029.

10267. Near kindred favored—The kin of the testator are to be favored by construction as against strangers to his blood. In re Peavey's Estate, 144 Minn. 208, 175 N. W. 105.

(40) In re Bell's Will, 147 Minn. 62, 179 N. W. 650.

10267a. Against partial intestacy—While a construction is to be applied, if possible, that will avoid partial intestacy, the presumption against intestacy does not prevail when the language of the will, fairly construed, is not sufficient to carry the whole estate. Atwater v. Russell, 49 Minn. 22, 51, 51 N. W. 624, 52 N. W. 26; Barney v. May, 135 Minn. 299, 160 N. W. 790.

10268. After acquired property—Statute—By virtue of statute after acquired property passes unless a different intention manifestly and clearly appears from the will. In re Evans' Estate, 145 Minn. 252, 177 N. W. 126.

10269. Disinheriting children—Statute—An adopted child is probably within the protection of the statute. 33 Harv. L. Rev. 724.

10272a. Residuary clauses—A testatrix at the time of making a will owned a valuable apartment building which constituted the bulk of her estate. She then had no personal property of consequence except household and personal belongings. By her will she first divided her realty equally between her son and daughter, her sole heirs at law. She then made four bequests, numbered three to six, giving to different persons enumerated personal belongings, such as jewelry, plate, china, pictures, furniture and books, and then by a seventh bequest gave "the residue * * * of my personal effects * * * not herein enumerated" to her son. After making her will she sold the apartment and received money and securities therefor. Held, the money and securities did not pass under the residuary clause. Barney v. May, 135 Minn. 299, 160 N. W. 790.

10273. Particular words and phrases construed—The expression, "my * * * wife * * * shall have and be lawful owner of one-half * * * my * * * property," and certain children "shall have their equal share" after my wife takes her half, held to have been intended as express grants to the legatees named. Elberg v. Elberg, 132 Minn. 15, 155 N. W. 751.

The phrase "after my death" held to fix the death of the testator as the time when the legatees should come into possession of their legacies. Elberg v. Elberg, 132 Minn. 15, 155 N. W. 751.

The term "personal effects" commonly means such tangible property as attends the person. Its scope may be restricted by the rule of ejusdem generis. It has been held not to include a residue of money and securities not in existence at the time the will was made. Barney v. May, 135 Minn. 299, 160 N. W. 790. See L. R. A. 1918F, 769.

"Legal heirs" held to exclude widow. Anderson v. Brower, 148 Minn. —, 180 N. W. 1019. See L. R. A. 1918A, 1108.

"Nearest heir" or the like. 11 A. L. R. 329.

"Issue." 2 A. L. R. 930.

"Things." L. R. A. 1918A, 222.

Devise of "house," "dwelling house," or the like. 12 A. L. R. 1179.

10274. Particular wills construed—(67) Prentiss v. Prentiss, 14 Minn. 18 (5) (disinheriting subsequent-born child); Chemedlin v. Prince, 15 Minn. 331 (263) (life estate to widow with remainder in fee to children); Simpson v. Cook, 24 Minn. 180, Officer v. Simpson, 27 Minn. 147, 6 N. W. 488 (trust for support of widow and children—suspension of power of sale until youngest child becomes of age); Butler v. Trustees, 27 Minn. 355, 7 N. W. 363 (mistake in description of lots disregarded); Greenwood v. Murray, 28 Minn. 120, 9 N. W. 629 (trust in executor with power of sale after certain period—meaning of "heirs"); Farmers Nat. Bank v. Moran, 30 Minn. 165, 14 N. W. 805 (trust in executors for benefit of son-in-law—title held to vest in him under statute of uses); Johnson v. Johnson, 32 Minn. 513, 21 N. W. 725 (gift to widow of statutory interest—widow held entitled to share in lapsed devise—election); Huntsman v. Hooper, 32 Minn. 163, 20 N. W. 127 (residuary gift to children—investment of funds for income until they become of age); Washburn v. Van Steenwyk, 32 Minn. 336, 20 N. W. 324 (gift to wife in lieu of statutory interest—election); In re Gotzian's Estate, 34 Minn. 159, 24 N. W. 920 (residuary gift to wife); In re Oertle's Estate, 34 Minn. 173, 24 N. W. 924 (life estate to wife with remainder to children—provision for support of children—power of sale); Cheever v. Converse, 35 Minn. 179, 28 N. W. 217 (directions to executors to sell estate and invest proceeds in bonds); Gates v. Shugrue, 35 Minn. 392, 29 N. W. 57 (direction to pay debts); Brown v. Brown, 42 Minn. 270, 44 N. W. 250 (provision against division of lot—proceeds of sale to be divided between three sons); Whiting v. Whiting, 42 Minn. 548, 44 N. W. 1030 (word "issue" one of purchase—trust in executrix for use of son of testator—son held to take fee under statute of uses—conditional limitation); Mattison v. Farnham, 44 Minn. 95, 46 N. W. 347; Brown v. Morrill, 45 Minn. 483,

48 N. W. 328; Lovejoy v. McDonald, 59 Minn. 393, 61 N. W. 320 (authority to executors to execute notes for firm debts); Sherman v. Lewis, 44 Minn. 107, 46 N. W. 318 (residuary clause held not to cover interest under marriage settlement); Redford v. Redford, 45 Minn. 48, 47 N. W. 308 (clause saving statutory interest of wife); Brown v. Morrill, 45 Minn. 483, 48 N. W. 328; Lovejoy v. McDonald, 59 Minn. 393, 61 N. W. 320 (provision for continuing and closing up a firm business—power of executors to contract, deed, mortgage, etc.); McGowan v. Baldwin, 46 Minn. 477, 49 N. W. 251 (general devise to wife held not to include interest of wife in homestead); Atwater v. Russell, 49 Minn. 22, 51 N. W. 624; Id., 49 Minn. 57, 51 N. W. 629 (trust for a charity); Society of the Most Precious Blood v. Moll, 51 Minn. 277, 53 N. W. 648 (charitable devise held void for indefiniteness); Armstrong v. Armstrong, 54 Minn. 248, 55 N. W. 971 (trust for benefit of wife and children—contingent remainders in children); Hale v. St. Paul, 54 Minn. 421, 56 N. W. 63 (trust for charitable purposes—other legacies—meaning of "net income" for payment of debts and legacies—funds liable for payment of debts); In re Swenson's Estate, 55 Minn. 300, 56 N. W. 1115 (life estate to wife with remainder to heirs at law—heirs at law held to mean next of kin); Cowles v. Henry, 61 Minn. 459, 63 N. W. 1028 (life estate to father and mother with remainder to brother and sisters—gift of absolute use of personal property to parents in addition to income therefrom—no vested remainder in brother and sisters); Blakeman v. Blakeman, 64 Minn. 315, 67 N. W. 69 (devise to wife in lieu of statutory interest—election); Bedell v. Fradenburgh, 65 Minn. 361, 68 N. W. 41 (gift of personal property held not to include real property—after-acquired property held not to pass); Lane v. Eaton, 69 Minn. 141, 71 N. W. 1031 (charitable trust in favor of Salvation Army with provision for incorporation—gift to a church in aid of missions held an absolute gift and not a devise in trust); Hershey v. Meeker County Bank, 71 Minn. 255, 73 N. W. 967 (devise for life with power to devise remainder in fee held to pass a fee absolute—directions as to use of property by life tenant); Eddy v. Kelly, 72 Minn. 32, 74 N. W. 1020 (gift with payment of legacies a charge on the property); State v. Willrich, 72 Minn. 165, 75 N. W. 123 (life estate to husband with vested remainder to children); Faloon v. Flannery, 74 Minn. 38, 76 N. W. 954 (gift to wife with directions to divide it among their children when they become of age); Merriam v. Wagener, 74 Minn. 215, 77 N. W. 44. See Merriam v. Merriam, 80 Minn. 254, 83 N. W. 162; Eggleston v. Merriam, 83 Minn. 98, 85 N. W. 937, 86 N. W. 444; Eggleston v. Merriam, 86 Minn. 88, 90 N. W. 118 (annuity for widow—interest of residuary legatees in trust fund); Ashton v. Great Northern Ry. Co., 78 Minn. 201, 80 N. W. 963 (life estate to wife with power to sell and convey fee); Fox v. Hicks, 81 Minn. 197, 83 N. W. 538 (gift of money to executors in trust to invest, principal and interest to be paid grandchild when of certain age); Yates v. Shern, 84 Minn. 161, 86 N. W. 1004 (residuary clause—gift according to the statutes of descent and distribution—provision for children of deceased

parents—meaning of "child" and "children"); Schacht v. Schacht, 86 Minn. 91, 90 N. W. 127 (devise of homestead to wife with remainder to a child); Shanahan v. Kelly, 88 Minn. 202, 92 N. W. 948. See Church of St. Vincent de Paul v. Brannan, 97 Minn. 349, 107 N. W. 141 (gift for masses and education of priests); Owatonna v. Rosebrock, 88 Minn. 318, 92 N. W. 1122 (gift to a city in trust for maintenance of a kindergarten); Rice County v. Scott, 88 Minn. 386, 93 N. W. 109 (revocation of bequest by codicil—void disposition of property affected—direction to destroy money and other property); Morgan v. Joslyn, 91 Minn. 60, 97 N. W. 449 (devise of "real estate" held to include interest under sheriff's certificate on execution sale); Johnson v. Linstrom, 92 Minn. 8, 99 N. W. 212 (gift to wife of what she would take under statute); Mingo v. Huntington, 92 Minn. 13, 99 N. W. 45 (gift to insane daughter to be paid on her recovering sanity—gift to her children conditional on her not recovering sanity or dying); Brookhouse v. Pray, 92 Minn. 448, 100 N. W. 235 (conditional gift to person whose whereabouts was unknown—directions in case of death of other beneficiaries—when legacies vested); Semper v. Coates, 93 Minn. 76, 100 N. W. 662 (devise of life estate with power of alienation); Watkins v. Bigelow, 93 Minn. 210, 100 N. W. 1104 (charity —gift to charitable corporation to be thereafter formed to administer charity—poor of a city the beneficiaries); Watkins v. Bigelow, 93 Minn. 361, 101 N. W. 497. See Appleby v. Wilder, 100 Minn. 408, 111 N. W. 305 (contingent legacy—when vested); Davis v. Hancock, 95 Minn. 340, 104 N. W. 299 (gift to employees of testator—provision as to their continuing business); Rosbach v. Weidenbach, 95 Minn. 343, 104 N. W. 137 (life estate to husband in rents, profits and income of real estate—directions against placing incumbrances on property); Sorenson v. Carey, 96 Minn. 202, 104 N. W. 958 (life estate in farm to wife—indefinite description of farm held sufficient); State v. Probate Court, 100 Minn. 192, 110 N. W. 865 (trust for benefit of grandson—income of estate payable to him semi-annually—corpus of estate payable to him on his arriving at certain ages); State v. Probate Court, 101 Minn. 485, 112 N. W. 878; Id., 132 Minn. 104, 155 N. W. 1077 (trust for benefit of children); Howe Lumber Co. v. Parker, 105 Minn. 310, 117 N. W. 518 (provision for wife in lieu of statutory rights—directions in case wife elects to take under statute—provision in case of death of beneficiaries without issue); Goodwin v. McGaughey, 108 Minn. 248, 122 N. W. 6 (trust—annuity for sister —power of sale—income—interest—gift to church for music); Rong v. Haller, 109 Minn. 191, 123 N. W. 471 (trust for maintenance of a charity —power of alienation unlawfully suspended); Casey v. Brabec, 111 Minn. 43, 126 N. W. 401 (bequest of money to executors to use as they see proper); Barnes v. Gunter, 111 Minn. 383, 127 N. W. 398 (devise of farm to son for life with a provision against sale—remainder to his children to take effect immediately in case of sale); Lohlker v. Lohlker, 112 Minn. 273, 127 N. W. 1122 (estate for life in homestead to wife with remainder to children—provision granting children right to occupy homestead "until they shall have homes of their own"—trust to maintain

homestead and provide for support of wife and children); State v. Probate Court, 112 Minn. 279, 128 N. W. 18 (trust for benefit of wife and children); Baldwin v. Zien, 117 Minn. 178, 134 N. W. 498 (devise of a leasehold interest for life to wife with remainder to brother—specific legacies—sale); Bemis v. Northwestern Trust Co., 117 Minn. 409, 135 N. W. 1124 (trust for charity—annuity to sons of testator—annuity valid though charitable trust invalid); Empenger v. Fairley, 119 Minn. 186, 137 N. W. 1110 (devise with reference to deed on record); Larson v. Curran, 121 Minn. 104, 140 N. W. 337 (residuary clause held to include homestead); State v. Probate Court, 124 Minn. 508, 145 N. W. 390 (trust for benefit of children—power of appointment to children); Greenman v. McVey, 126 Minn. 21, 147 N. W. 812 (gift of real and personal property to wife for life with specific legacies to children after her death—implied power of sale—equitable conversion); Johrden v. Pond, 126 Minn. 247, 148 N. W. 112 (life estate in all real and personal property to wife—after her death all property to be sold and specified amounts given to children—when interest of children vested); Elberg v. Elberg, 132 Minn. 15, 155 N. W. 751 (absolute gift of one-half of all property to wife); Long v. Willsey, 132 Minn. 316, 156 N. W. 349 (absolute gift of all property to wife—directions to divide property among children held not to raise a precatory trust); Hutchins v. Wenger, 133 Minn. 188, 158 N. W. 52 (absolute gift of one-third to each of two sons—gift of other one-third to trustees for benefit of daughter for life with remainder to two grandchildren); Held v. Keller, 135 Minn. 192, 160 N. W. 487 (trust for benefit of wife—income to wife subject to expenses of administering trust—title of wife to income); Barney v. May, 135 Minn. 299, 160 N. W. 790 (devise of real estate equally between two children—specific bequests to various persons—residuary bequest to son—construction of residuary clause); Miller v. Klossner, 135 Minn. 377, 160 N. W. 1025 (devise to each of three children of a farm—bequests to two daughters made payable by son—all three children residuary legatees—farms devised conveyed by testator to devisees during his life—specific legacies not revoked by conveyance); Minnesota Loan & Trust Co. v. Douglas, 135 Minn. 413, 161 N. W. 158 (trust for accumulation of fund from income of mines for benefit of unborn children held invalid); Hause v. O'Leary, 136 Minn. 126, 161 N. W. 392 (devise of a remainder in fee to a son with restriction on sale held invalid—legacies held charge on land); State v. Probate Court, 136 Minn. 392, 162 N. W. 459 (trust for benefit of son); Robinson v. Thomson, 137 Minn. 446, 163 N. W. 786 (gift to wife for life conditional on her not marrying again—reversion to children in case of such marriage—provision for children living at death of testator, and for the issue, if any, of children not then living); Savela v. Erickson, 138 Minn. 93, 163 N. W. 1029 (life esate to wife—legacy to daughter—remainder to son—contingent remainders to grandchildren in case son died before wife); Kelleher v. Kelleher, 140 Minn 409, 168 N. W. 586 (gift of proceeds of insurance policy); Little v. Universalist Convention, 143 Minn. 298, 173 N. W. 659 (gift to religious corporation—

absolute and not in trust—restraint on alienation of burial lot); Heffelfinger v. Appleton, 144 Minn. 208, 175 N. W. 105 (several trusts created —deposit of funds in trust—income to be paid to beneficiaries for life—directions as to disposition of residuary estate—death of child without issue); Bogart v. Taylor, 144 Minn. 454, 175 N. W. 913 (gift to be used for the extension of the Kingdom of God in a certain church—gift not absolute but in trust—invalid because beneficiaries not certain); Benrud v. Anderson, 144 Minn. 111, 174 N. W. 617 (bequests to stepchildren with remainder to others); In re Evans' Estate, 145 Minn. 252, 177 N. W. 126 (devise to trustee for benefit of surviving spouse); In re Meuwissen's Estate, 146 Minn. 9, 177 N. W. 668 (devise to widow of a fee in undivided one-half of part of farm with remainder to children excepting two daughters); Whittaker v. Meeds, 146 Minn. 160, 178 N. W. 597 (trust held a power in trust with no title in cestui que trust); In re Bell's Will, 147 Minn. 62, 179 N. W. 650 (legacy in trust for benefit of children—grandchildren born after testator's death not excluded—husband of testator's daughter not entitled to share in trust estate for children—when legacy to a class vests); Anderson v. Brower, 148 Minn. —, 180 N. W. 1019 (trust in executors with monthly payment to widow—residue to an adopted son when he became thirty if he should be worthy to have it in the judgment of the executors; otherwise to testator's "legal heirs"—widow held not to come within "legal heirs" but only blood relations); Liedel v. Holman, — Minn. —, 183 N. W. 355 (gift to trustees to be converted into income-bearing securities—monthly payment to wife during her life—annuities to a brother and sisters out of balance of income—specific legacies to others out of balance of income—latter legacies held payable only out of any residue remaining after providing for preceding gifts and annuities); In re Meldrum's Estate, — Minn. —, 183 N. W. 835 (life estate to wife, with power of disposition, remainder to daughter—fee held to vest in daughter upon death of testator).

DEVISES AND LEGACIES

10275a. General and specific legacies distinguished—A specific legacy is a testamentary gift of personal property separated and distinguished from other property of the same kind, not payable or deliverable out of the general assets of the testator's estate, but calling for the delivery of a particular thing or the payment of money out of a particular source or fund. Merriam v. Merriam, 80 Minn. 254, 259, 83 N. W. 162; Kelleher v. Kelleher, 140 Minn. 409, 168 N. W. 586; Liedel v. Holman, — Minn. —, 183 N. W. 355.

10276. Demonstrative legacies—(69) Liedel v. Holman, — Minn. —, 183 N. W. 355 (gift held not a demonstrative legacy). See 6 A. L. R. 1353.

10278. Conditional—(71) Miller v. Klossner, 135 Minn. 377, 160 N. W. 1025 (whether devise and bequest to a son was conditional undeter-

mined); Anderson v. Brower, 148 Minn. —, 180 N. W. 1019 (residuary gift to a son when he became thirty years of age if he should be worthy to have it in the judgment of the executors).

10280. **Uncertainty**—A gift of money to a person to be used by him for the extension of the Kingdom of God in a certain church, held invalid because of the uncertainty of the beneficiaries. Bogart v. Taylor, 144 Minn. 454, 175 N. W. 913.

A bequest for the celebration of masses is probably valid. See 33 Harv. L. Rev. 472.

10281a. **Devise in general terms—Extent of interest conveyed—Statute**—It is provided by statute that every devise of land shall convey all the estate of the testator unless it appears by the will that he intended a lesser estate. Under this statute a fee may pass though heirs or assigns or others than the devisee are not mentioned. In re Evans' Estate, 145 Minn. 252, 177 N. W. 126.

10281b. **What passes**—Unaccrued rents pass with a devise of the land. State v. Royal Mineral Assn., 132 Minn. 232, 156 N. W. 128.

10283a. **Devise of fee with repugnant limitations**—A devise of a remainder in fee to the son of the testatrix, "provided that he shall not sell the said described premises for five years after his father's death," does not violate the statute (G. S. 1913, §§ 6664, 6665) against perpetuities, as the restriction is imposed upon the son only and would terminate at his death; but the restriction is void as repugnant to the grant of a remainder in fee. Hause v. O'Leary, 136 Minn. 126, 161 N. W. 392.

10285. **Absolute or in trust**—A will of testatrix clearly discloses an intention that the religious corporation representing her faith should dispose of the bulk of her property for benevolent and religious purposes in accordance with the practice of such corporation. Held, that the devise should be construed as absolute to the corporation, and not in trust, although words importing a trust are used in the will. The direction that the property, consisting mainly of a valuable 160-acre farm, be sold and converted into a fund, only the income of which should be used for benevolent and religious purposes, merely follows the by-laws and practice of the corporation, and does not indicate a trust. Nor does the fact that one acre of the farm, the burial plot of herself and her father, is never to be sold, and that a part of the income from the fund is to be devoted to the care of the graves, compel the conclusion that the will proposes the creation of an illegal trust, the corporation being empowered to take gifts of burial places, and there being nothing in the will restricting the corporation from permitting other interments in the acre mentioned. In re Little's Estate, 143 Minn. 298, 173 N. W. 659.

A trusteeship created by a last will and testament, by which the trustee was authorized and empowered to sell the trust property and divide the proceeds equally among the persons named and designated therein, is held to amount to nothing more than a power in trust, vesting no title

to the trust property in the trustee, all of which passed to the cestui que trust on the death of the testator, subject only to the power of sale for the distributive purposes stated in the will. The same person was named executor and also trustee. He duly administered the estate, sold the property, and distributed the proceeds as directed by the will. Upon report thereof to the court having jurisdiction, which was in all things assented to and acquiesced in by the cestui que trust, the court duly made a final decree, confirming the distribution and formally discharging the executor trustee from his duties and obligations as such. It is held: That by his discharge the authority of sale conferred upon him by his appointment became functus officio, and that a deed of a remnant of the estate, which was not included in the trust or probate proceeding executed some twenty years after such final decree and discharge without authority from the court or the cestui que trust, was a nullity, and conveyed no title to the grantee. Whittaker v. Meeds, 146 Minn. 160, 178 N. W. 597.

There may be a devise in trust without using the word "trust." Anderson v. Brower, 148 Minn. —, 180 N. W. 1019.

(82) Bogart v. Taylor, 144 Minn. 454, 175 N. W. 913.

10285a. Annuities—Income from trust fund—Expenses—A will created a trust in certain funds with directions that the income therefrom, less the expense of administration, be paid to the wife of the testator, semi-annually during her life. Held, conceding for the purposes of the case, that the rights of the wife became vested as of the date of the death of the testator, and before the trust property had been turned over to the trustees, that the payment of the income to the beneficiary was subject to deductions of the necessary expense of administering the property while in the hands of the executors of the will. The will is construed to have intended to vest in the beneficiary the absolute title and right to the income, received by the trustees, less expenses, and income in the form of interest upon money investments which had accrued but was not due and collectible at the time of the death of the beneficiary, as well as interest which was then due but not collected, was the property of the beneficiary, and passed to the executor of her last will and testament. Held v. Keller, 135 Minn. 192, 160 N. W. 487. See L. R. A. 1917E, 580 (whether payable out of corpus of income).

10286. Charge of legacy on devise—A specific devise with a direction to the devisee to pay legacies, or upon condition that he pays them, or subject to their payment, or after their payment, charges the devise with the legacies. In re Oertle's Estate, 34 Minn. 173, 24 N. W. 924; Eddy v. Kelly, 72 Minn. 32, 74 N. W. 1020; Whereley v. Rowe, 106 Minn. 494, 119 N. W. 222; Casey v. Brabec, 111 Minn. 43, 126 N. W. 401; Miller v. Klossner, 135 Minn. 377, 380, 160 N. W. 1025; Hause v. O'Leary, 136 Minn. 126, 161 N. W. 392. See L. R. A. 1917A, 617.

A general, formal direction, in the introductory part of a will for the payment of legacies, does not charge the realty specifically devised, or

even realty in the residuary clause. Larson v. Curran, 125 Minn. 104, 140 N. W. 337.

Where there is a general pecuniary legacy with a residuary gift of real and personal property blended in one mass, the legacy is charged on the entire residue, including the residuary realty. Bengtsson v. Johnson, 75 Minn. 321, 78 N. W. 3. See Larson v. Curran, 121 Minn. 104, 140 N. W. 337.

Where realty is devised with a naked direction to the devisee to pay a legacy, or upon condition that he pay it, the legacy is a charge on the person of the devisee, and, if he accepts the devise, he is personally liable for its payment. But where the devise is merely subject to the payment of the legacy, the legacy is not a charge on the person of the devisee, and the acceptance of the devise does not render him personally liable. The personal liability of the devisee is not affected by the fact that the land is of less value than the legacy. In re Oertle's Estate, 34 Minn. 173, 24 N. W. 924; Eddy v. Kelly, 72 Minn. 32, 74 N. W. 1020; Miller v. Klossner, 135 Minn. 377, 160 N. W. 1025.

A charge upon property devised for life is also a charge upon the rents and profits thereof to which the life-tenant is entitled. In re Oertle's Estate, 34 Minn. 173, 180, 24 N. W. 924.

Where land is devised subject to the payment of a legacy by the devisee the legacy carries interest from the time it is due. Wherley v. Rowe, 106 Minn. 494, 119 N. W. 222.

Gifts were made to two daughters on condition that each should keep two of the children of a deceased daughter of the testator "until such time as they are able to provide for themselves, or until their father will come and claim them." Whether this provision was a charge on real estate devised to the daughters was left undetermined. Casey v. Brabec, 111 Minn. 43, 126 N. W. 401.

Where a specific legacy is made a charge on real property a subsequent sale and conveyance of the property by the testator adeems the legacy, unless a contrary intention is clearly manifested by the will. Miller v. Klossner, 135 Minn. 377, 160 N. W. 1025.

A testator devised a farm to each of his three children, two daughters and a son. He gave to each daughter a certain sum of money and provided that it should be paid by the son. The three children were also residuary legatees. During his lifetime the testator conveyed to each child the farms so devised. Held, that the specific legacies to the daughters were not revoked by the conveyances since they were not made a charge on the land devised. Miller v. Klossner, 135 Minn. 377, 160 N. W. 1025.

A wife who possessed no other property devised certain land to her husband for life and gave the remainder to her son, with a provision that certain legacies should be paid to her daughter. Held, that the legacies were a charge on the land. Hause v. O'Leary, 136 Minn. 126, 161 N. W. 392.

In an action in the district court to enforce a charge the plaintiff is concluded by the decree of distribution in the probate court and cannot

rely on the will in opposition to the decree. If the decree does not make the legacy a charge no recovery can be had in the district court. Eddy v. Kelly, 72 Minn. 32, 74 N. W. 1020; Bengtsson v. Johnson, 75 Minn. 321, 78 N. W. 3.

10286a. Estate or interest created—Where an absolute estate is clearly granted it will not be cut down to one for life by subsequent indefinite language. Elberg v. Elberg, 132 Minn. 15, 155 N. W. 751; Long v. Willsey, 132 Minn. 316, 156 N. W. 349.

10287. Particular estates held to pass—A testator made a devise to his wife as follows: "I give, devise and bequeath to her all of the property and estate of which I may die seized in fee, simply requesting her to do with the property when she is done with it or can spare it or any portion thereof, as I know she intends to do, and as I desire shall be done with it, that is, divide all property equally among our children." Held, that the wife took a fee and that there was no precatory trust in favor of the children. Long v. Willsey, 132 Minn. 316, 156 N. W. 349.

A will construed to give one-third of the property of the testator to each of his two sons absolutely, and to dispose of the remaining one-third to trustees for the benefit of his daughter during her life with remainder over to his two grandchildren. Hutchins v. Wenger, 133 Minn. 188, 158 N. W. 52.

A contingent remainder to grandchildren of the testator. Savela v. Erickson, 138 Minn. 93, 163 N. W. 1029.

A devise to the wife of "one-half of my farm situate in section 14, containing 152 acres, and also for the full term of her natural life the house and lot situated in Cologne, Minnesota, but upon the death of my wife it shall be equally divided amongst all my children," gave the wife title in fee to the undivided one-half of that part of the farm owned by testator at his death. In re Meuwissen's Estate, 146 Minn. 9, 177 N. W. 668.

Devise by testator to his wife of all his property for life, with power to sell and convey as she may think best, without accounting to the court for the proceeds, remainder to their daughter, does not convey a fee to the life tenant, but only the naked power to dispose of the fee. In re Meldrum's Estate, — Minn. —, 183 N. W. 835.

See cases under § 10274.

10291. Death of devisee or legatee—A will construed as showing an intention on the part of the testator that upon the death of one of his children without issue, the others should take his share, whether such death occurred before or after the death of the testator. Heffelfinger v. Appleton, 144 Minn. 208, 175 N. W. 105. See 34 Harv. L. Rev. 527.

A will bequeathed testator's residuary estate, consisting wholly of personal property, to a trustee to be held, invested, and disposed of as follows: The income was to be divided among all his children living at the time of his death, or, if any should die, then to their children. When the youngest child reached the age of thirty years, the trustee was directed to divide one-half of the corpus of the estate among all of

testator's children or the descendants of a deceased child, and when the youngest child reached the age of forty years the remainder was to be divided among the testator's children or their descendants living at that time. The will was made in contemplation of testator's early death. In construing the will, it is held: That the husband of one of testator's daughters, entitled by law to the estate of his wife (who died after the death of testator) is not entitled to the share in the trust estate which would have been received by the daughter if she had lived. In re Bell's Will, 147 Minn. 62, 179 N. W. 650. See 5 Minn. L. Rev. 367.

10292. Lapsed devises and legacies—(2) See Mechling v. McAllister, 135 Minn. 357, 160 N. W. 1016.

10297. When vest—The phrase "after my death" held to fix the death of the testator as the time when the legatees should come into possession of their legacies. Elberg v. Elberg, 132 Minn. 15, 155 N. W. 751.

Where there is no gift in a will, except by way of a direction to a trustee to divide and pay in the future, the legacy does not vest until the time for payment arrives, in the absence of some provision in the will indicating a different intention. In re Bell's Will, 147 Minn. 62, 179 N. W. 650.

When time is annexed to the substance of a gift as a condition precedent the gift does not vest until the time for payment arrives. In re Bell's Will, 147 Minn. 62, 179 N. W. 650.

Where a testator devised his property to his wife for life, with a power of disposition, remainder to his daughter, it was held that the fee vested in the daughter upon the death of the testator. In re Meldrum's Estate, — Minn. —, 183 N. W. 835.

10297a. Ademption of legacies—The doctrine of ademption does not apply to general or demonstrative legacies, but is limited to specific legacies. Merriam v. Merriam, 80 Minn. 254, 83 N. W. 162; Liedel v. Holman, — Minn. —, 183 N. W. 355.

Where a specific legacy is made a charge on real property a subsequent sale and conveyance of the property adeems the legacy. Miller v. Klossner, 135 Minn. 377, 160 N. W. 1025. See Ann. Cas. 1913B, 57.

Certain specific legacies held not revoked by conveyances as they were not made specific charges on the land devised. Miller v. Klossner, 135 Minn. 377, 160 N. W. 1025.

10297b. Payment of legacies—Out of what fund—Personal property is the primary fund for the payment of legacies, while devised realty is only a secondary fund. Miller v. Klossner, 135 Minn. 377, 160 N. W. 1025.

A will held to authorize payment of a legacy only out of any residue remaining after providing for certain gifts and annuities. Liedel v. Holman, — Minn. —, 183 N. W. 355.

10297c. Acceptance—A beneficiary under a will may refuse to accept a gift thereunder. State v. Probate Court, 143 Minn. 77, 172 N. W. 902.

10298a. Devisees not bona fide purchasers—Devisees are not bona fide purchasers. Colby v. Street, 146 Minn. 290, 178 N. W. 599. See § 10207.

10299. Revocation—After making his will whereby he devised the greater portion of his property in trust, the testator made an enforceable contract to lease for one hundred years a portion of the property so devised, with an option in the lessee to purchase within ten years. Held, that this contract did not revoke the will by implication of law, and that the trusts can be carried out in substantially the manner directed by the will. In re Evans' Estate, 145 Minn. 252, 177 N. W. 126.

ELECTION TO TAKE UNDER WILL

10300. In general—The doctrine of election rests upon the ground that one who asserts his claim to property under a will must acknowledge the equitable rights of all others under the same will. It is a well-settled rule of equity that a person cannot take under a will and at the same time set up any right which will defeat any part of it. If a testator has disposed of property owned by a beneficiary under the will, such beneficiary must either relinquish his right to such property, or to that which is given him by the will, and must accept the will as a whole, or not at all. Kelleher v. Kelleher, 140 Minn. 409, 168 N. W. 586.

Where a testator bequeathed to four of his children the proceeds of an insurance policy on his life, payable at his death to his wife, the latter, by accepting another provision in the will for her benefit, relinquishes her interest in the insurance. Kelleher v. Kelleher, 140 Minn. 409, 168 N. W. 586.

Compensation of legatees disappointed by election. 5 A. L. R. 1628.

10301. By spouse—Statute—Where a widow elects to take under a will she is estopped from claiming any part of her husband's estate as to which he dies intestate. Mechling v. McAllister, 135 Minn. 357, 160 N. W. 1016. See 30 Harv. L. Rev. 649.

The widow was not put to a statutory election by G. S. 1913, § 7239, which refers to the will of a parent, for the testator was not a parent; but if the devise in trust was not intended to be additional to the statutory one-third, she was required to elect. Under the statute a gift to the wife is not treated as additional to the statutory right unless it clearly appears from the will that such was the testator's intent. It did not so appear and the widow was put to an election. The statute, G. S. 1913, § 7239, provides that "no devise or bequest to a surviving spouse shall be treated as adding to the right or interest secured to such survivor, by statute, unless it clearly appears from the contents of the will that such was the testator's intent." A devise to a trustee, for the benefit of the surviving spouse, out of which a substantial income was to be paid, not intended by the testator to be additional to the statutory right, puts the spouse to an election as if the devise had been direct. In re Evans' Estate, 145 Minn. 252, 177 N. W. 126.

(18) Mechling v. McAllister, 135 Minn. 357, 160 N. W. 1016; In re Evans' Estate, 145 Minn. 252, 177 N. W. 126.

(23) Mechling v. McAllister, 135 Minn. 357, 160 N. W. 1016

10301a. Conflict of laws—A resident of Iowa made his will, in which, after giving his wife certain real and personal property in that state, he devised and bequeathed the residue of his estate in equal shares to his wife and his son. The son died before his father. The testator, at the time of his death, had no lineal descendants. His widow filed in the Iowa courts an election to accept the provisions of the will. The testator owned real estate in Minnesota which was a part of the residue so devised. Held, that the election in Iowa by the widow to accept the provisions of the will estops her from taking under the statutes of this state property of the testator as to which, by reason of the lapsing of the devise to the son, he died intestate. Mechling v. McAllister, 135 Minn. 357, 160 N. W. 1016. See 30 Harv. L. Rev. 649.

WITNESSES

IN GENERAL

10302b. Necessity of being sworn—In proceedings not of a strictly judicial nature witnesses need not be sworn unless the statute so provides. Parties may waive the objection that witnesses are not sworn. State v. Truax, 139 Minn. 313, 166 N. W. 339; State v. Schulz, 142 Minn. 112, 171 N. W. 263.

10302c. Peculiar modes of swearing—There was neither a showing nor a sufficient offer to show that certain witnesses for the state were of the Jewish faith, and that there was a mode of administering the oath to them according to the ritual of their church, which would be more solemn and obligatory than the usual oath administered to witnesses, and hence the failure to swear such witnesses as provided by section 8379, G. S. 1913, was not reversible error. State v. Friedman, 146 Minn. 373, 178 N. W. 895.

10302d. Speaks for himself—When a witness testifies he speaks for himself and his own conscience, and is not acting for any master or principal. Remick v. Langfitt, 141 Minn. 36, 169 N. W. 149.

COMPETENCY

10305a. Trial judge incompetent—The presiding judge should not leave the bench and go upon the witness stand to give testimony during the trial of a case before him. Under the circumstances stated in the opinion, the substantial rights of the defendant were prejudiced by the trial judge's testimony and its effect was not removed by the statement

made preliminary to the giving thereof or by the charge to the jury. State v. Sandquist, 146 Minn. 322, 178 N. W. 883.

10307. **Defendant in criminal proceedings**—If the defendant admits on the direct examination that he has been convicted of another crime the particulars of the crime may be brought out on the cross-examination. State v. Price, 135 Minn. 159, 160 N. W. 677.

The statute forbidding a reference to the failure of the defendant to testify applies to all criminal prosecutions without exception, and a violation thereof is error though the result of inadvertence or mistake. State v. Richman, 143 Minn. 314, 173 N. W. 718.

The extent to which the cross-examination of a witness upon collateral matters to affect his credibility may be pursued is largely discretionary; but in this case where the county attorney conducted a prolonged cross-examination of the defendant which carried insinuations as to the character and disposition of the defendant which were likely to be applied by the jury unfavorably to him in considering the particular issue and not confined to its proper scope it was prejudical and a new trial should be had. State v. Taylor, 144 Minn. 377, 175 N. W. 615.

A defendant in a criminal case who becomes a witness subjects his credibility to the usual tests and invites attack upon his character for truthfulness. The extent of the cross-examination to test credibility is largely discretionary. It may be severe. The cross-examination was directed to quarrels alleged to have been had by the defendant with others, to independent offences committed or assumed to have been committed by him, and to quarrels with and threats against others. It was sought to discredit him by insinuation and innuendo. It is held that the cross-examination was not within proper limits. State v. Nelson, 148 Minn. —, 181 N. W. 850.

Exception is taken to that part of the charge which refers to the fact that defendants had testified, and stating that in weighing their testimony the jury were to apply the same rules that had been given for weighing the testimony of witnesses generally. This is accurate enough, but the reference to defendants might with more propriety have been omitted. State v. Pennington, — Minn. —, 182 N. W. 962.

(38) State v. Richman, 143 Minn. 314, 173 N. W. 718.

(39) State v. Kloempken, 145 Minn. 496, 176 N. W. 642 (record held not to show violation of statute).

(40) See State v. Richman, 143 Minn. 314, 173 N. W. 718.

(42) State v. Dallas, 145 Minn. 92, 176 N. W. 491.

(44) State v. Pennington, — Minn. —, 182 N. W. 962.

(46) State v. Price, 135 Minn. 159, 160 N. W. 677; State v. Hartung, 141 Minn. 207, 169 N. W. 712.

(47) State v. Price, 135 Minn. 159, 160 N. W. 677; State v. Taylor, 144 Minn. 377, 175 N. W. 615; State v. Nelson, 148 Minn. —, 181 N. W. 850.

(48) See 6 A. L. R. 1608.

(49) State v. Rutledge, 142 Minn. 117, 171 N. W. 275; State v. Tay-

lor, 144 Minn. 377, 175 N. W. 615; State v. Nelson, 148 Minn. —, 181 N. W. 850. See State v. Price, 135 Minn. 159, 160 N. W. 677.

10309. **Convicts**—(52-55) See 6 A. L. R. 1608.

10311. **Children**—Competency to testify must be determined as of the time of trial. An intelligent girl eight years old is competent to testify to occurrences which she remembers, though they happened at a time when she was too immature to testify. Maynard v. Keough, 145 Minn. 26, 175 N. W. 891.

10312. **Husband and wife**—In an action against husband and wife to set aside a deed to the wife the latter cannot be compelled to testify. Ingersoll v. Odendahl, 136 Minn. 428, 162 N. W. 525.

Where husband and wife are parties to an action a motion to dismiss as to the husband so as to render the wife a competent witness is addressed to the discretion of the trial court. Ingersoll v. Odendahl, 136 Minn. 428, 162 N. W. 525.

A widow held not precluded by the statute from testifying as to a conversation between plaintiff and herself in the presence of her deceased husband in which he did not participate. Thaden v. Bagan, 139 Minn. 46, 165 N. W. 864.

One spouse cannot testify before a grand jury against the other on a charge of adultery against the latter, the protection of the statute not being waived. State v. Marshall, 140 Minn. 363, 168 N. W. 174.

The prosecuting attorney cross-examined defendant as to his reasons for refusing to permit his wife to testify, but discontinued that line of questions as soon as objection was made. In his address to the jury, he commented upon this testimony and upon defendant's failure to call his wife as a witness. It appeared defendant's wife was prosecuting an action for divorce against him and if permitted to testify would be a hostile witness. Held that, while the conduct of the prosecuting attorney is disapproved, it does not constitute reversible error under the circumstances disclosed. State v. Kampert, 139 Minn. 132, 165 N. W. 972.

(68) State v. Marshall, 140 Minn. 363, 168 N. W. 174.

(75) Ingersoll v. Odendahl, 136 Minn. 428, 162 N. W. 525.

See L. R. A. 1917A, 2 (competency of spouse in action involving decedent's estate).

10313. **Attorneys**—An attorney employed to draft an instrument made by a person since deceased may testify as to the declarations of such person showing the effect of undue influence otherwise proved to have been exerted with reference thereto. Thill v. Freiermuth, 132 Minn. 242, 156 N. W. 260.

Certain testimony of an attorney as to conversations with his deceased client prior to his employment held not privileged. Savage v. Minnesota Loan & Trust Co., 142 Minn. 187, 171 N. W. 778.

In proceedings for the restoration of a person under guardianship to

capacity, held proper to exclude the opinion of his attorney as to his capacity based on confidential communications. Hallenberg v. Hallenburg, 144 Minn. 39, 174 N. W. 443.

(84) 5 A. L. R. 728.

(88) Thill v. Freiermuth, 132 Minn. 242, 156 N. W. 260.

10314. Physicians—The statute applies though the services of the physician were gratuitous. Hallenberg v. Hallenberg, 144 Minn. 39, 174 N. W. 443.

(90) See 34 Harv. L. Rev. 312 (liability of physician for revealing out of court his patient's confidences).

10315. Public officers—The statute has been held not to forbid the proof of a failure to list a credit for taxation. Thaden v. Bagan, 139 Minn. 46, 165 N. W. 864.

The members of a county board have been held competent to testify as to their reasons for voting to detach certain territory from a school district. In re School District No. 58, 143 Minn. 169, 173 N. W. 850.

(1) See 9 A. L. R. 1099.

10316. Parties and interested persons—Conversations with deceased or insane persons—Statute—Since the enactment of Laws 1907, c. 123, § 1 (G. S. 1913, § 6814), giving a wife the right to convey her real estate by her separate deed, the husband, in an action involving real estate not the homestead, to which action his wife is a party, is not prohibited from testifying to conversations with a deceased person. Thill v. Friermuth, 132 Minn. 242, 156 N. W. 260. See Malley v. Quinn, 132 Minn. 254, 156 N. W. 263.

A wife of a party to an action is not disqualified under the statute, though the action involves real estate claimed by the husband. Malley v. Quinn, 132 Minn. 254, 156 N. W. 263.

A devisee, who voluntarily enters upon a contest opposing the probate of a will, thereby asserts such an interest in the issue as to be precluded from testifying to conversations with the testator concerning his intentions in respect to the disposition of his property. Bowler v. Fahey, 136 Minn. 408, 162 N. W. 515.

In an action involving the competency of a person since deceased persons interested in the event of the action may testify as to conversations and declarations of the deceased, in the nature of verbal acts, tending to show loss of memory, a wandering mind and delusions, as bearing on the question of his competency. Wheeler v. McKeon, 137 Minn. 92, 162 N. W. 1070.

The statute does not prevent interested witnesses from testifying to conversations with a testator since deceased, when the issue is testamentary capacity and the object is to lay a foundation for opinions of the witnesses. Chapel v. Chapel, 137 Minn. 420, 163 N. W. 771.

Error in the admission of evidence contrary to the statute is harmless if the evidence is cumulative and the other evidence in the case is clearly

sufficient to justify the verdict. Drager v. Seegert, 138 Minn. 6, 163 N. W. 756.

No prejudice resulted from the admission of the testimony of the wife of defendant, a mere fragment of the whole evidence tendered by defendant, of a conversation had by her with deceased, though she was interested in the homestead part of the land involved in the action, and perhaps disqualified under the statute. Drager v. Seegert, 138 Minn. 6, 163 N. W. 756.

If no objection is made to the admission of evidence forbidden by the statute, it will be treated on appeal as properly in the case. Lovell v. Beedle, 138 Minn. 12, 163 N. W. 778.

A widow held not precluded by the statute from testifying as to a conversation between plaintiff and herself in the presence of her deceased husband in which he did not participate. Thaden v. Bagan, 139 Minn. 46, 165 N. W. 864.

A party does not waive the statute by introducing the testimony of a competent witness as to such a conversation. Caldwell Milling & Elevator Co. v. L. L. May Co., 141 Minn. 255, 169 N. W. 797.

The president of a mercantile corporation is presumptively a director and a stockholder, and a person interested in the event of an action against the corporation, and under G. S. 1913, § 8378, he is presumptively incompetent to give evidence concerning a conversation with a deceased person relative to a matter at issue in the action. Caldwell Milling & Elevator Co. v. L. L. May Co., 141 Minn. 255, 169 N. W. 797.

A stockholder of a corporation is a person interested in the event of an action against the corporation and incompetent under the statute. Caldwell Milling & Elevator Co. v. L. L. May Co., 141 Minn. 255, 169 N. W. 797.

Where a party, who has the right to exclude a conversation with a deceased person, on cross-examination elicits conclusions and deductions drawn from such conversation, he waives his right, and the other party may give the conversation. Schwantz v. Kleiber, 141 Minn. 332, 170 N. W. 210.

The statute is probably inapplicable to criminal prosecutions. State v. Henrionnet, 142 Minn. 1, 170 N. W. 699.

The wife of a deceased employee claiming under the Workmen's Compensation Act is disqualified to testify as to what he said to her as to the cause of his sudden illness. State v. District Court, 142 Minn. 420, 172 N. W. 311.

An interested party may testify as to the contents of a lost letter of a person since deceased. Anderson v. Oleson, 143 Minn. 328, 173 N. W. 665.

A devisee or legatee who is a witness to the will is not precluded by this statute from testifying as to the execution of the will and the mental condition of the testator, including conversations with him regarding the will and his testamentary intentions. Benrud v. Anderson, 144 Minn. 111, 174 N. W. 617.

The statute does not disqualify a member and agent of a township mutual fire insurance company from testifying to a conversation had with the insured when he took an application for insurance, because the insured was dead at the time of the trial of an action brought on the policy issued on such application. Haley v. Sharon Township Mut. Fire Ins. Co., 147 Minn. 190, 179 N. W. 895.

Where a general conversation between A and B is relevant and admissible it cannot be excluded as a whole because one of them recounts therein a conversation with a third party, since deceased. A general objection to the whole conversation is properly overruled. State Bank v. Strandberg, 148 Minn. —, 180 N. W. 1006.

It is doubtful whether it is permissible to allow a party to testify that he had a conversation with a person since deceased relating to a matter relevant to the issues, even though no attempt is made to disclose the conversation. State Bank v. Strandberg, 148 Minn. —, 180 N. W. 1006.

Statute held not to forbid a party from testifying as to her care of a deceased person in his last sickness. State Bank v. Strandberg, 148 Minn. —, 180 N. W. 1006.

(4) Drager v. Seegert, 138 Minn. 6, 163 N. W. 756; Havlicek v. Western Bohemian Fraternal Assn., 138 Minn. 62, 163 N. W. 985 (financial secretary of a local mutual benefit society held not disqualified); Wold v. Wold, 138 Minn. 409, 165 N. W. 229 (sister of plaintiff held not disqualified); Schwantz v. Kleiber, 141 Minn. 332, 170 N. W. 210 (a witness who had disposed of all interest in the property in controversy before suit and who would not be affected by the outcome held not incompetent); Haley v. Sharon Township Mut. Fire Ins. Co., 147 Minn. 190, 179 N. W. 895.

(01) Caldwell Milling & Elevator Co. v. L. L. May Co., 141 Minn. 255, 169 N. W. 797.

(10) Schwantz v. Kleiber, 141 Minn. 332, 170 N. W. 210.

(12) See Wheeler v. McKeon, 137 Minn. 92, 162 N. W. 1070.

(15) Chapel v. Chapel, 137 Minn. 420, 163 N. W. 771. See Wheeler v. McKeon, 137 Minn. 92, 162 N. W. 1070.

(18) Anderson v. Oleson, 143 Minn. 328, 173 N. W. 665.

(20) Stair v. McNulty, 133 Minn. 136, 157 N. W. 1073 (party cross-examined may give further testimony as to conversations at any appropriate time in the trial though not questioned relative thereto on redirect examination); Caldwell Milling & Elevator Co. v. L. L. May Co., 141 Minn. 255, 169 N. W. 797; Schwantz v. Kleiber, 141 Minn. 332, 170 N. W. 210. See Welsh v. Welsh's Estate, 148 Minn. —, 181 N. W. 356 (waiver by cross-examination on one trial not a waiver on another). See Ann. Cas. 1918D, 202.

(25) See Drager v. Seegert, 138 Minn. 6, 163 N. W. 756; State Bank v. Strandberg, 148 Minn. —, 180 N. W. 1006.

(27) Bowler v. Fahey, 136 Minn. 408, 162 N. W. 515; Wheeler v. McKeon, 137 Minn. 92, 162 N. W. 1070; Caldwell Milling & Elevator Co.

v. L. L. May Co., 141 Minn. 255, 169 N. W. 797 (while the statute must be strictly construed it must be fairly construed).

(28) 8 A. L. R. 1097.

EXAMINATION

10317. Leading questions on direct examination—Leading questions, not otherwise admissible, are not made admissible by the claim that the purpose is to impeach an adverse witness to whom the same questions had been propounded, if the answer could have no tendency to prove that the adverse witness ever made any statement inconsistent with his testimony. State v. Gilbert, 141 Minn. 263, 169 N. W. 790.

(31) Heuser v. Chicago, B. & Q. R. Co., 138 Minn. 286, 164 N. W. 984.

10318. Scope of cross-examination on the merits—Defendant having testified to the value of the land which he had owned less than two years, it was not an abuse of discretion to permit him to be asked on cross-examination what he had paid for it. Humphrey v. Sievers, 137 Minn. 373, 163 N. W. 737.

Ordinarily, it is proper to examine a claimant in a personal injury case as to the fact of having made previous claims for injuries. No prejudice is apparent from restriction of such inquiry in this case. Other limitations on cross-examination are considered and held not error. McGuire v. Caledonia, 140 Minn. 151, 167 N. W. 425.

A witness who is not an expert and who has not attempted on direct examination to express an opinion, should not be required to give one on cross-examination. State v. Kasper, 140 Minn. 259, 167 N. W. 1035.

Appellant and the other defendants, two doctors, occupied antagonistic positions, to a certain extent, in that plaintiff charged that the separate and distinct acts of negligence of the appellant in furnishing unfit anaesthetic ether, and of the doctors in administering the same, in operating on plaintiff's intestate, caused and contributed to cause his death. And because of such antagonistic positions appellant was accorded a wide range in cross-examining the doctors, even though called by plaintiff for cross-examination, and no just complaint can be made that appellant was unduly restricted in this respect. Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541.

The rule that the cross-examination should be confined to facts to which the witness testified on direct examination is not absolute. Wrabek v. Suchomel, 145 Minn. 468, 177 N. W. 764.

It is improper to inquire if the witness has been indicted. Wolf, Habein & Co. v. Mapson, 146 Minn. 174, 178 N. W. 318. See § 10348(13).

Where a charge of fraud depends on the testimony of plaintiff, great latitude should be allowed on cross-examination. Sufficient latitude was allowed in this case. Zeglin v. Tetzlaff, 146 Minn. 397, 178 N. W. 954.

(32) Wrabek v. Suchomel, 145 Minn. 468, 177 N. W. 764. See 7 A. L. R. 1116 (limitation when witness is called to testify on a particular point or under order of court).

(33) Dalton Adding Machine Co. v. Bailey, 137 Minn. 61, 162 N. W. 1059; George Gorton Machine Co. v. Grignon, 137 Minn. 378, 163 N. W. 748; Nardinger v. Ladies of the Maccabees, 138 Minn. 16, 163 N. W. 785.

(34) State v. Townley, — Minn. —, 182 N. W. 773.

(35) George Gorton Machine Co. v. Grignon, 137 Minn. 378, 163 N. W. 748.

(36) Backe v. Curtis, 139 Minn. 64, 165 N. W. 488 (conspiracy). See Zeglin v. Tetzlaff, 146 Minn. 397, 178 N. W. 954.

(37) Antel v. St. Paul City Ry. Co., 133 Minn. 156, 157 N. W. 1073. See Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541.

(38) Antel v. St Paul City Ry. Co., 133 Minn. 156, 157 N. W. 1073; Nardinger v. Ladies of the Maccabees, 138 Minn. 16, 163 N. W. 785.

(41) Humphrey v. Sievers, 137 Minn. 373, 163 N. W. 737; Wrabek v. Suchomel, 145 Minn. 468, 177 N. W. 764; State v. Sandquist, 146 Minn. 322, 178 N. W. 883.

10319. Re-direct examination—Certain witnesses were interrogated upon cross-examination as to whether they had a conversation with the defendant at a certain time. They answered that they had. They were not asked as to the conversation. Upon redirect examination the defence undertook to elicit the conversation, but was not permitted to do so. The ruling was correct. State v. Chodos, 147 Minn. 420, 180 N. W. 536.

(43, 44) See State v. Schmoker, — Minn. —, 182 N. W. 957.

10326. Court questioning witness—It is within the discretion of the trial judge to question a witness, and ordinarily error cannot be predicated upon his doing so. As a rule the examination of a witness should be conducted by counsel, and only under exceptional conditions is the judge justified in conducting an extended examination. State v. Sandquist, 146 Minn. 322, 178 N. W. 883. See L. R. A. 1916A, 1191.

(53) Wagner v. Seaberg, 138 Minn. 37, 163 N. W. 975.

10327. Adverse party—Cross-examination under statute—Where an election is contested on the ground that the contestees voted illegally, such contestees may be called as adverse parties for cross-examination. Hanson v. Adrian, 126 Minn. 298, 148 N. W. 276.

To authorize the calling of an officer or agent of a corporation he must be such at the time of the trial; it is not enough that he was such at the time of the transaction. Snelling State Bank v. Clasen, 132 Minn. 404, 157 N. W. 643.

A proponent of a will for probate is a mere nominal party to the proceeding, though named as executor in the will, and he is not interested in the event by reason of being so named, nor by reason of being the husband of one of the devisees, so as to constitute him an adverse party to the contestants, within the meaning of the statute. Bowler v. Fahey, 136 Minn. 408, 162 N. W. 515.

The statute is inapplicable to a proceeding for the appointment of a guardian. Wood v. Wood, 137 Minn. 252, 163 N. W. 297.

A, B and C were codefendants. A and B offered no evidence, but

rested when plaintiff rested. They had been thoroughly cross-examined by C when called as witnesses for plaintiff. Held, that C could not call them for cross-examination after they rested; that if he desired their testimony he should have called them as his own witnesses. Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541.

No reversible error may be predicated on the fact that defendant was called for cross-examination without being tendered witness fees, or that plaintiff's whole case rested on the testimony so obtained. Boyea v. Besch, 144 Minn. 254, 174 N. W. 894.

This statute is subject to the constitutional guaranty against compulsory self-incrimination. State v. District Court, 144 Minn. 326, 175 N. W. 908.

An engineer, charged at the time of such an accident with the duty of driving his engine, cannot be called for cross-examination under the statute. May v. Chicago etc. Ry. Co., 147 Minn. 310, 180 N. W. 218.

(58) Boyea v. Besch, 144 Minn. 254, 174 N. W. 894.

(59) Bowler v. Fahey, 136 Minn. 408, 162 N. W. 515.

(61) Moore v. St. Paul City Ry. Co., 136 Minn. 315, 162 N. W. 298 (a motorman of a street car cannot be called under the statute).

(62) Snelling State Bank v. Clasen, 132 Minn. 404, 157 N. W. 643.

(71) Cookson v. Hill, 146 Minn. 165, 178 N. W. 591 (limitation of cross-examination held proper). See Nicolay v. Orr, 142 Minn. 346, 172 N. W. 222 (in action for indecent assault improper to inquire of defendant as to his conduct toward others).

(74, 75) Bowler v. Fahey, 136 Minn. 408, 162 N. W. 515.

USE OF MEMORANDA TO REFRESH MEMORY

10328. General rule—A witness may testify from a memorandum where he has no independent recollection of the facts even after seeing it, if he recollects having seen it before and remembers that at the time he saw it he knew the contents to be true. Want of independent recollection, if obvious, need not be directly proved. State v. Boekenoogen, 140 Minn. 120, 167 N. W. 301.

10329. Necessity for use—Where want of independent recollection is obvious it need not be directly proved. State v. Boekenoogen, 140 Minn. 120, 167 N. W. 301.

10330. When made—Slips kept by plaintiff's foreman and bookkeeper of the number of cars of earth moved by plaintiff in an excavating job held admissible to refresh the memories of witnesses and also as substantive evidence. Dawson v. Northwestern Construction Co., 137 Minn. 352, 163 N. W. 772. See § 3346.

PRIVILEGE AGAINST SELF-INCRIMINATION

10337. General rule—This provision of the constitution is jealously guarded by the courts. It applies to a proceeding for the punishment

of criminal contempt. State v. District Court, 144 Minn. 326, 175 N. W. 908.

The danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things, and not imaginary or unsubstantial, or a mere remote and naked possibility. Mason v. United States, 244 U. S. 362.

(95) Hawley v. Wallace, 137 Minn. 183, 163 N. W. 127.

10339. Scope and meaning of statute—In an election contest the constitutional provision does not forbid the contestant calling the contestee as a witness, but when so called the contestee cannot be required to give testimony that would incriminate him. Hawley v. Wallace, 137 Minn. 183, 163 N. W. 127.

(95) Hawley v. Wallace, 137 Minn. 183, 163 N. W. 127.

10340. Papers of citizen protected—In a criminal prosecution, the defendant cannot be required to produce a document in his possession for use at the trial, and showing that it is in his possession is a sufficient foundation for the introduction of secondary evidence of its contents. State v. Minor, 137 Minn. 254, 163 N. W. 514; State v. Dunn, 140 Minn. 308, 168 N. W. 2.

Documentary evidence obtained upon a search warrant is admissible against an accused person. The rule against self-incrimination does not exclude all evidence that may proceed directly from the accused. Schenck v. United States, 249 U. S. 47. See Gouled v. United States, 255 U. S. —.

(96) See Silverthorne Lumber Co. v. United States, 251 U. S. 385.

10341. Court need not inform witness of privilege—It is not the duty of the court to inform the witness of his privilege. Hanson v. Adrian, 126 Minn. 298, 148 N. W. 276. See 33 Harv. L. Rev. 119.

10342. Waiver—An involuntary bankrupt does not, by filing schedules of assets and liabilities without objection, waive his right to refuse to answer incriminating questions regarding them. Arndstein v. McCarthy, 254 U. S. 71.

10343. Privilege belongs to witness alone—Hanson v. Adrian, 126 Minn. 298, 148 N. W. 276; Berg v. Veit, 136 Minn. 443, 162 N. W. 522.

CREDIBILITY

10344. A question for jury—In an action for slander based on defendant's statement in the hearing of third persons that plaintiff was a thief and that it could be proved, wherein there is a verdict for plaintiff on conflicting evidence, the supreme court on appeal has no right to say that defendant's witnesses were more deserving of credence than plaintiff's witnesses. McCusky v. Kuhlmann, 147 Minn. 460, 179 N. W. 1000.

(2) Sheey v. Minneapolis & St. Louis R. Co., 132 Minn. 307, 156 N. W. 346; Jensen v. Fischer, 134 Minn. 366, 159 N. W. 827; Turner

v. Minneapolis St. Ry. Co., 140 Minn. 248, 167 N. W. 1041; State v. Dallas, 145 Minn. 92, 176 N. W. 491.

10344a. Uncontradicted testimony of unimpeached witness—It is the general rule that it is the duty of the jury to accept as true the uncontradicted testimony of an unimpeached witness, given with apparent candor and truthfulness, and unopposed by circumstances impairing its credibility, but the jury need not accept the testimony of a witness as true merely because there is no direct testimony contradicting it, if it contains improbabilities and contradictions, which alone, or in connection with other facts and circumstances in evidence, furnish a reasonable ground for concluding that it is false. See § 9786.

It need not be accepted as true if it is inconsistent with the physical facts in evidence. Brown v. Minneapolis, 136 Minn. 177, 161 N. W. 503.

Case held not one for an application of the general rule that testimony uncontradicted and unimpeached cannot be disregarded by the jury. Lewer v. Minneapolis & St. Louis R. Co., 132 Minn. 173, 156 N. W. 6.

10345. Falsus in uno, falsus in omnibus—One of the elements in the falsus in uno charge is that the testimony found by the jury to be false be upon a material issue. In giving the charge the court did not in direct words refer to the element of materiality. Counsel did not call attention to the omission. Held, under the facts stated in the opinion that the omission did not constitute reversible error. Greenfield v. Unique Theatre Co., 146 Minn. 17, 177 N. W. 666.

Failure to charge on maxim held not error. Farrell v. G. O. Miller Co., 147 Minn. 52, 179 N. W. 566; Skillings v. Allen, 148 Minn. —, 180 N. W. 916.

(5) State v. Dunn, 140 Minn. 308, 168 N. W. 2; Greenfield v. Unique Theatre Co., 146 Minn. 17, 177 N. W. 666; Farrell v. G. O. Miller Co., 147 Minn. 52, 179 N. W. 566 (not error to refuse to instruct jury as to maxim—such instructions of doubtful practical value). See § 9786.

10346. Detectives and informers—The mere fact that a witness is a detective employed by the state to ascertain whether the liquor laws have been violated does not justify the court in holding as a matter of law that his testimony is not entitled to credence. State v. Thorvildson, 135 Minn. 98, 160 N. W. 247.

(6) State v. Meyers, 132 Minn. 4, 155 N. W. 766.

IMPEACHMENT

10348. Cross-examination to credit—When a witness on cross-examination is asked to disclose particular facts in his past life of a character that tend to disgrace him, but which are wholly irrelevant to any issue and have no fair tendency to throw light on his credibility, an objection should be sustained. State v. Macbeth, 133 Minn. 425, 158 N. W. 793 (witness asked if he had not been an inmate of an inebriate asylum).

The extent to which, upon cross-examination, inquiry may be made

concerning a witness' pecuniary interest in the claim in litigation, is left to the sound discretion of the trial court. Flick v. Ellis-Hall Co., 138 Minn. 364, 165 N. W. 135.

Defendant's brother testified as a witness on behalf of defendant. On cross-examination he was asked if he did not say to the complaining witness that his brother was a "crook." He denied making such statement. His answer was final, and it was prejudicial error to permit complaining witness to testify in rebuttal that the witness made such statement to her. State v. Marx, 139 Minn. 448, 166 N. W. 1082.

How long the witness' husband had been engaged in the real estate business could be of no possible aid in determining any issue involved, and could not bear upon the credibility of the witness. Barrett v. Van Duzee, 139 Minn. 351, 166 N. W. 407.

Where an attorney testifies as a witness for his client it is permissible to show by his cross-examination that he has a financial interest in the result of the action, as bearing on the weight to be given his testimony. It may be shown that he took the case on a contingent fee, but the particulars of the agreement should not ordinarily be gone into. Olson v. Moorhead, 142 Minn. 267, 171 N. W. 923.

In an action against several joint trespassers held proper to prove their previous conviction and that if the conviction arose out of trouble with plaintiff, the trouble might be proved to show malice. Muenkel v. Muenkel, 143 Minn. 29, 173 N. W. 184.

Testimony as to occurrences, immaterial because happening at a time after the alleged cause of action arose, is not admissible for purposes of impeachment. Koch v. Speiser, 145 Minn. 227, 176 N. W. 754.

Facts tending to show interest, bias, or motive on the part of a witness may be elicited on cross-examination as bearing on the weight to be given his testimony, although such examination may necessarily disclose that the defendant in a personal injury action is protected by insurance. Gibson v. Gray Motor Co., 147 Minn. 134, 179 N. W. 729.

The witness may be questioned to bring out his feelings and his disposition to tell or conceal the truth. State v. Townley, — Minn. —, 182 N. W. 773.

The reasons for a change from friendly to unfriendly sentiments on the part of a witness for the state having been inquired into on his cross-examination, it was not error to permit the state to further develop the subject within reasonable limits. State v. Townley, — Minn. —, 182 N. W. 773.

(8) State v. Marx, 139 Minn. 448, 166 N. W. 1082; State v. Nelson, 148 Minn. —, 181 N. W. 850.

(10) State v. Hartung, 141 Minn. 207, 169 N. W. 712.

(11) Olson v. Moorhead, 142 Minn. 267, 171 N. W. 923.

(13) Wolf, Habein & Co. v. Mapson, 146 Minn. 174, 178 N. W. 318.

(16) State v. Price, 135 Minn. 159, 160 N. W. 677; Flick v. Ellis-Hall Co., 138 Minn. 364, 165 N. W. 135; State v. Taylor, 144 Minn. 377, 175 N. W. 615; Wrabek v. Suchomel, 145 Minn. 468, 177 N. W. 764; State v. Townley, — Minn. —, 182 N. W. 773.

(17) State v. Nelson, 148 Minn. —, 181 N. W. 850.

(18) State v. Macbeth, 133 Minn. 425, 158 N. W. 793.

(19) State v. Solem, 135 Minn. 200, 160 N. W. 491; State v. Kasper, 140 Minn. 259, 167 N. W. 1035; State v. Taylor, 144 Minn. 377, 175 N. W. 615; State v. Nelson, 148 Minn. —, 181 N. W. 850. See Wolf, Habein & Co. v. Mapson, 146 Minn. 174, 178 N. W. 318.

(20) Finseth v. Scherer, 138 Minn. 355, 165 N. W. 124; State v. Marx, 139 Minn. 448, 166 N. W. 1082; State v. Kasper, 140 Minn. 259, 167 N. W. 1035; State v. Liss, 145 Minn. 45, 176 N. W. 51; State v. Nelson, 148 Minn. —, 181 N. W. 850. See State v. Van Vleet, 139 Minn. 144, 165 N. W. 962 (matter held not irrelevant).

(21) State v. Price, 135 Minn. 159, 160 N. W. 677; Muenkel v. Muenkel, 143 Minn. 29, 173 N. W. 184; State v. Storey, — Minn. —, 182 N. W. 613. See §§ 10307, 10309.

(22) State v. Kampert, 139 Minn. 132, 165 N. W. 972; State v. Townley, — Minn. —, 182 N. W. 773.

10348a. Mitigating impeachment on re-direct examination—Where a witness, on cross-examination, admits that he has been convicted of crime, it is proper on redirect examination to mitigate the odium of his conviction by showing that after he paid the penalty he was received into the employ of the attorney who prosecuted him. State v. Storey, — Minn. —, 182 N. W. 613.

10350. Proof of bias—Evidence tending to show a disposition on the part of a witness to withhold the truth by concealing facts is admissible for the purpose of showing bias and impugning the credibility of the witness, and the court did not abuse its discretion as to the admission of such testimony. State v. Kampert, 139 Minn. 132, 165 N. W. 972.

(26) See State v. Townley, — Minn. —, 182 N. W. 773.

10351. Proof of contradictory statements—In order to lay a foundation for the introduction of an affidavit for the purposes of impeachment, in a case where the witness sought to be impeached does not understand the language in which the affidavit is written, there must be proof by one who knows the language in which it is written and the language the witness understands that the affidavit was correctly translated before the purported signature by mark was attached. Hyde v. Kloos, 134 Minn. 165, 158 N. W. 920.

Prior written or verbal statements of a witness inconsistent with his testimony on the stand may be brought out in cross-examination; but it is not permissible on redirect to rebut such inconsistent statements by others of a contrary tenor made by the witness on other occasions. George Gorton Machine Co. v. Grignon, 137 Minn. 378, 163 N. W. 748.

A contradictory statement made in writing by one of defendant's witnesses was properly authenticated and properly received. Young v. Avery Co. 141 Minn. 483, 170 N. W. 693.

The stipulated testimony of an absent witness received under G. S. 1913, § 7796, may be used for purposes of impeachment. Young v. Avery Co., 141 Minn. 483, 170 N. W. 693.

An affidavit by plaintiff offered by defendant to impeach her testimony should have been received. Proper foundation for its reception was furnished by a witness who testified that he correctly read it to her before she signed it. Rittle v. St. Paul City Ry. Co., — Minn. —, 183 N. W. 146.

(36) Baxter v. Brandenburg, 137 Minn. 259, 163 N. W. 516. See Rittle v. St. Paul City Ry. Co., — Minn. —, 183 N. W. 146.

(47) See State v. Schmoker, — Minn. —, 182 N. W. 957 (testimony at preliminary examination typewritten and signed by prosecutrix).

10353. Proof of bad reputation for truthfulness—(53) Kilburn v. National Surety Co., 132 Minn. 472, 157 N. W. 498.

10356. Impeachment of one's own witness—It is discretionary with the trial court to allow a party to cross-examine a hostile or unwilling witness whom he has called. Muenkel v. Muenkel, 143 Minn. 29, 173 N. W. 184.

It is proper to allow a party calling a witness to ask him if an adverse party had not told him to answer "I don't know" to everything asked him on the stand. Muenkel v. Muenkel, 143 Minn. 29, 173 N. W. 184.

The prosecution, surprised by the adverse answers of an unwilling witness called for the state, may be permitted by the trial court in a proper case and in the exercise of a sound discretion to cross-examine him to refresh his recollection or to get a possible correction or change of his testimony; and failing in this may be permitted to impeach him by showing contradictory statements. State v. Shea, — Minn. —, 182 N. W. 445.

(68) Schmidt v. Thompson, 140 Minn. 180, 167 N. W. 543; State v. Shea, — Minn. —, 182 N. W. 445.

(69) State v. Wassing, 141 Minn. 106, 169 N. W. 485; State v. Shea, — Minn. —, 182 N. W. 445.

CORROBORATION

10357. By proof of similar statements—As a rule it is not permissible by redirect examination of a witness to bring out the fact that he has repeated the story told on the witness stand for the purpose of counteracting the admission of a prior contradictory statement, made in his cross-examination. Plaintiff did not bring the witness within the exception pointed out in State v. La Bar, 131 Minn. 432, 155 N. W. 211. Barrett v. Van Duzee, 139 Minn. 351, 166 N. W. 407.

(73) Barrett v. Van Duzee, 139 Minn. 351, 166 N. W. 407. See George Gorton Machine Co. v. Grignon, 137 Minn. 378, 163 N. W. 748.

10357a. By proof of good reputation for truthfulness—Corroboration by proof of good reputation for truthfulness after evidence of contradictory statements. 6 A. L. R. 862.

ATTENDANCE AND FEES

10358. Prepayment of fees—(74) See Boyea v. Besch, 144 Minn. 254, 174 N. W. 894 (no reversible error may be predicated on the fact that an adverse party is called for cross-examination under the statute without being tendered witness fees).

10360. Subpoena—Ordinarily it is not material for the jury to know whether plaintiff or defendant subpoenaed a witness. Barrett v. Van Duzee, 139 Minn. 351, 166 N. W. 407.

10360a. Fees, mileage and per diem—A witness who attends the trial of an action for the purpose of giving evidence therein is entitled to the mileage and per diem prescribed by statute, and the party so procuring his attendance is liable therefor. The fact that the party so calling the witness provides him with free transportation to the place of trial does not, in the absence of some agreement releasing or relinquishing the right to the statutory fees, relieve him of such liability to the witness. A non-resident witness is entitled to mileage for the actual distance traveled within the state, computed by the usually traveled route from his residence to the place of trial. The witness in coming to the state is under no obligation, where there are several usually traveled routes, to select the one with the least mileage in this state. Jakutis v. Illinois Central R. Co., 133 Minn. 33, 157 N. W. 896.

10362. Recovery of fees by action—(84) Jakutis v. Illinois Central R. Co., 133 Minn. 33, 157 N. W. 896.

10364a. Dissuading from attendance—Criminal offence—An indictment under G. S. 1913, § 8568, held sufficient and a conviction thereunder justified by the evidence. State v. Danaher, 141 Minn. 490, 169 N. W. 420.

WOLVES—See Bounties, § 1086a.

WORDS AND PHRASES

Abandon. State v. Clark,—Minn.—, 182 N. W. 452.
Abandonment. Schlawr v. St. Paul, 132 Minn. 238, 156 N. W. 283.
Abetting. State v. Gesell, 137 Minn. 43, 162 N. W. 683.
About. Costello v. Siems-Carey Co., 140 Minn. 208, 167 N. W. 551.
Accident State v. District Court, 140 Minn. 470, 168 N. W. 555.
Acquiescence. Schlawr v. St. Paul, 132 Minn. 238, 156 N. W. 283.
Act of God. Northwestern Consolidated Milling Co. v. Chicago, B. & Q. R. Co., 135 Minn. 363, 160 N. W. 1028.
Actually occupied. St. Paul Swimming Pool v. First State Bank,—Minn.—, 182 N. W. 514.

Actual notice. State v. District Court, 132 Minn. 251, 156 N. W. 278.
Adjacent. Hobart v. Minneapolis, 139 Minn. 368, 166 N. W. 411.
Advancement. Kuhne v. Gau, 138 Minn. 34, 163 N. W. 982.
After. Davis v. Godart, 132 Minn. 221, 154 N. W. 1091.
Aiding. State v. Gesell, 137 Minn. 43, 162 N. W. 683.
Alienation. Bacon v. Mirau, 148 Minn. —, 181 N. W. 579.
Apprentices. Williams v. Evans, 139 Minn. 32, 165 N. W. 495.
Appurtenance. Leuthold v. John A. Stees Co., 141 Minn. 213, 169 N. W. 709; Cohen v. Whitcomb, 142 Minn. 20, 170 N. W. 851.
As per contract. Snelling State Bank v. Classen, 132 Minn. 404, 157 N. W. 643.
Assess. Trask v. Skoog, 138 Minn. 229, 164 N. W. 914.
Assessed. Trask v. Skoog, 138 Minn. 229, 164 N. W. 914.
Assigned. King v. Hartford Fire Ins. Co., 133 Minn. 322, 158 N. W. 435.
Assignment. King v. Hartford Fire Ins. Co., 133 Minn. 322, 158 N. W. 435.
At. Davis v. Godart, 131 Minn. 221, 154 N. W. 1091.
Auditing. Manson v. Chisholm, 142 Minn. 94, 170 N. W. 924.
Available. Mushel v. Schulz, 139 Minn. 234, 166 N. W. 179.
Blacklisting. Cleary v. Great Northern Ry. Co., 147 Minn. 403, 180 N. W. 545. See §§ 1565, 5832a.
Blanket policy. Zenith Box & Lumber Co. v. Nat. Union Fire Ins. Co., 144 Minn. 386, 175 N. W. 894.
Brick measure. Paine & Nixon Co. v. United States F. & G. Co., 135 Minn. 9, 159 N. W. 1075.
Budget system. State v. Preus, 147 Minn. 125, 179 N. W. 725.
Business. State v. District Court, 138 Minn. 103, 164 N. W. 366.
Cartway. Carlson v. Elmo, 141 Minn. 240, 169 N. W. 805.
Check kiting. Backe v. Curtis, 139 Minn. 64, 165 N. W. 488.
Child. State v. District Court, 134 Minn. 131, 158 N. W. 798.
Chiropractic. State v. Rolph, 140 Minn. 190, 167 N. W. 553.
Civil process. Farmers Implement Co. v. Sandberg, 132 Minn. 389, 157 N. W. 642.
Competent evidence. In re Mason, 148 Minn. —, 181 N. W. 570.
Conveyance. Bacon v. Mirau, 148 Minn. —, 181 N. W. 579.
Co-operative association. Mooney v. Farmers Mercantile & Elevator Co., 138 Minn. 199, 164 N. W. 804.
Corporation. Trumer v. South Side State Bank, 139 Minn. 222, 166 N. W. 127; Red Wing v. Wisconsin etc. Co., 139 Minn. 240, 166 N. W. 175.
Cost of a building. Kempf v. Ranger, 132 Minn. 64, 155 N. W. 1059.
Credit. Thaden v. Bagan, 139 Minn. 46, 165 N. W. 864.
Credits. State v. Royal Mineral Assn., 132 Minn. 232, 156 N. W. 128.
Delinquent. Burbridge v. Warren, 139 Minn. 346, 166 N. W. 403.
Demand. Manson v. Chisholm, 142 Minn. 94, 170 N. W. 924.
Dependent. Potz v. Cigarmakers International Union, 140 Minn. 339, 168 N. W. 126.

Desert. State v. Clark, — Minn. —, 182 N. W. 452.
Effects. Barney v. May, 135 Minn. 299, 160 N. W. 790.
Either. Peterson v. Koochiching County, 133 Minn. 343, 158 N. W. 605.
Employee. State v. District Court, 134 Minn. 26, 158 N. W. 790.
Employer. State v. District Court, 147 Minn. —, 179 N. W. 216.
Enlist. State v. Holm, 139 Minn. 267, 166 N. W. 181.
Estimate. P. M. Hennessey Const. Co. v. Hart, 141 Minn. 449, 170 N. W. 597.
Evidence. State v. Nordstrom, 146 Minn. 136, 178 N. W. 164.
Existing creditors. Lebens v. Nelson, 148 Minn. —, 181 N. W. 350.
Farm laborer. State v. District Court, 140 Minn. 398, 168 N. W. 130.
Father. McGaughey v. Grand Lodge, 148 Minn. —, 180 N. W. 1001.
Floater form. Zenith Box & Lumber Co. v. Nat. Union Fire Ins. Co., 144 Minn. 386, 175 N. W. 894.
Foolhardy. State v. Goldstone, 144 Minn. 405, 175 N. W. 892.
Freeholder. In re Consolidation of School Districts, 140 Minn. 475, 168 N. W. 552; School District v. Schmidt, 146 Minn. 403, 178 N. W. 892.
Furnish. State v. Whipple, 143 Minn. 403, 173 N. W. 801.
Hatchway. Kelly v. Theo. Hamm Brewing Co., 140 Minn. 371, 168 N. W. 131.
Hedges. Bolfing v. Schoener, 144 Minn. 425, 175 N. W. 901.
Heirs. Anderson v. Brower, 148 Minn. —, 180 N. W. 1019.
Highway robbery. Duluth St. Ry. Co. v. Fidelity & Deposit Co., 136 Minn. 299, 161 N. W. 595.
Holdup. Duluth St. Ry. Co. v. Fidelity & Deposit Co., 136 Minn. 299, 161 N. W. 595.
House drains. State v. Nash, 134 Minn. 73, 158 N. W. 730.
Household furniture and effects. Barney v. May, 135 Minn. 299, 160 N. W. 790.
Immoral conduct. Paust v. Georgian, 147 Minn. 149, 179 N. W. 735.
Improvements. Cohen v. Whitcomb, 142 Minn. 20, 170 N. W. 851.
Income. State v. District Court, 133 Minn. 454, 158 N. W. 792.
Incorporeal hereditaments. State v. Royal Mineral Assn., 132 Minn. 232, 156 N. W. 128.
Inside leaders. State v. Nash, 134 Minn. 73, 158 N. W. 730.
Insolvent. See § 739.
Investment. State v. Gopher Tire & Rubber Co., 146 Minn. 52, 177 N. W. 937.
Invoice price. Sell v. Lenz, — Minn. —, 183 N. W. 135.
Invoice value. Knopfler v. Flynn, 135 Minn. 333, 160 N. W. 860.
Kiting checks. Backe v. Curtis, 139 Minn. 64, 165 N. W. 488.
Learners. Williams v. Evans, 139 Minn. 32, 165 N. W. 495.
Legal voters residing within such territory. State v. McKinley, 132 Minn. 48, 155 N. W. 1064.
Levied. State v. Security Nat Bank, 139 Minn. 162, 165 N. W. 1067.
Machinery. Miller v. American Bonding Co., 133 Minn. 336, 158 N. W. 432.

Make and maintain. Boecher v. St. Paul, — Minn. —, 182 N. W. 908.
Malfeasance in office. State v. Burnquist, 141 Minn. 308, 170 N. W. 201, 609.
Manufacturer. Graff v. Minnesota Flint Rock Co., 147 Minn. 58, 179 N. W. 562.
May. Carson v. Turrish, 140 Minn. 445, 168 N. W. 349; Carlson v. Elmo, 141 Minn. 240, 169 N. W. 805.
Member. Zinken v. Melrose Granite Co., 143 Minn. 397, 173 N. W. 857; Chiovitte v. Zenith Furnace Co., 148 Minn. —, 181 N. W. 643.
Merchantable. State v. Hobart Iron Co., 143 Minn. 457, 172 N. W. 899, 175 N. W. 100.
Middleman. James E. Carlson, Inc., v. Babler, 144 Minn. 125, 174 N. W. 824.
Mill run. Jock v. O'Malley, 138 Minn. 388, 165 N. W. 233.
Misconduct in office. State v. Burnquist, 141 Minn. 308, 170 N. W. 201, 609.
Modify. State v. Lincoln, 133 Minn. 178, 158 N. W. 50.
Money demand. Manson v. Chisholm, 142 Minn. 94, 170 N. W. 924.
More or less. Costello v. Siems-Carey Co., 140 Minn. 208, 167 N. W. 551.
Mother. McGaughey v. Grand Lodge, 148 Minn. —, 180 N. W. 1001.
Necessarily. State v. Great Northern Ry. Co., 142 Minn. 173, 171 N. W. 317.
Necessarily traveled. Marshall County v. Rokke, 134 Minn. 346, 159 N. W. 791.
Necessary. Marshall County v. Rokke, 134 Minn. 346, 159 N. W. 791.
Obligations. Geiger v. Sanitary Farm Dairies, 146 Minn. 235, 178 N. W. 501.
Occupied. St. Paul Swimming Pool v. First State Bank, — Minn.—, 182 N. W. 514.
Officer. State v. District Court, 134 Minn. 26, 158 N. W. 790.
Official. State v. District Court, 134 Minn. 26, 158 N. W. 790.
Often. Axford v. Western Syndicate Invest. Co., 141 Minn. 412, 168 N. W. 97, 170 N. W. 587.
Or. Peterson v. Koochiching County, 133 Minn. 343, 158 N. W. 605.
Ordinary travel. Collar v. Bingham Lake Rural Tel Co., 132 Minn. 110, 155 N. W. 1075.
Original packages. State v. Pure Oil Co., 134 Minn. 101, 158 N. W. 723.
Orphan. State v. District Court, 143 Minn. 144, 172 N. W. 897.
Owelty. Hoerr v. Hoerr, 140 Minn. 223, 165 N. W. 472, 167 N. W. 735.
Owner. Reed v. Horton, 135 Minn. 17, 159 N. W. 1080; State v. Grindeland, 143 Minn. 435, 174 N. W. 312. See 2 A. L. R. 778.
Permanent and total disability. Collopy v. Modern Brotherhood, 133 Minn. 409, 158 N. W. 625.
Person. State v. Reiter, 140 Minn. 491, 168 N. W. 714.
Personal effects. Barney v. May, 135 Minn. 299, 160 N. W. 790.
Personal injury. State v. District Court, 140 Minn. 470, 168 N. W. 555.
Place. McSherry v. Heimer, 132 Minn. 260, 156 N. W. 130.
Plumbing. State v. Foss, 147 Minn. 281, 180 N. W. 104.

Police patrol wagon. Edberg v. Johnson, — Minn. —, 184 N. W. 12.
Policy. Aaberg v. Minnesota Commercial Men's Assn., 143 Minn. 354, 173 N. W. 708.
Possession. State v. Giller, 138 Minn. 369, 165 N. W. 132.
Premises. McSherry v. Heimer, 132 Minn. 260, 156 N. W. 130.
Prescribe. State v. Whipple, 143 Minn. 403, 173 N. W. 801.
Process. Farmers Implement Co. v. Sandberg, 132 Minn. 389, 157 N. W. 642.
Profession. State v. District Court, 138 Minn. 103, 164 N. W. 366.
Profits. Cochrane v. Interstate Packing Co., 139 Minn. 452, 167 N. W. 111.
Proof. State v. Nordstrom, 146 Minn. 136, 178 N. W. 164.
Properly supported. Big Diamond Milling Co. v. Chicago etc. Ry. Co., 142 Minn. 181, 171 N. W. 799.
Pudlock scaffold. Burch v. Hoy & Elzy Co., 131 Minn. 475, 155 N. W. 767.
Quiet and orderly house. Lynch v. Brennan, 131 Minn. 136, 154 N. W. 795.
Quotient verdict. Larson v. Wisconsin R. L. & P. Co., 138 Minn. 158, 164 N. W. 666.
Railway. Duluth v. Duluth St. Ry. Co., 137 Minn. 286, 163 N. W. 659.
Ratify. Farmers Co-operative Exchange Co. v. Fidelity & Deposit Co., — Minn. —, 182 N. W. 1008.
Real estate. Shraiberg v. Hanson, 138 Minn. 80, 163 N. W. 1032.
Real property. State v. Royal Mineral Assn., 132 Minn. 232, 156 N. W. 128.
Reasonable time. Davis v. Godart, 147 Minn. 362, 180 N. W. 239
Relative. McGaughey v. Grand Lodge, 148 Minn. —, 180 N. W. 1001.
Rental value. Ford Motor Co. v. Minneapolis, 147 Minn. 211, 179 N. W. 907.
Repair. Christison v. St. Paul Fire & Marine Ins. Co., 138 Minn. 51, 163 N. W. 980.
Replacement. Christison v. St. Paul Fire & Marine Ins. Co., 138 Minn. 51, 163 N. W. 980.
Resident owners. Sullwold v. St. Paul, 138 Minn. 271, 164 N. W. 983.
Right. Soderstrom v. Curry & White, Inc., 143 Minn. 154, 173 N. W. 649.
Sabotage. State v. Moilen, 140 Minn. 112, 167 N. W. 345.
Sale. State v. Myers, 132 Minn. 4, 155 N. W. 766; State v. Provencher, 135 Minn. 214, 160 N. W. 673.
Saloon. Halloran v. Jacob Schmidt Brewing Co., 137 Minn. 141, 162 N. W. 1082; Kelly v. Theo. Hamm Brewing Co., 140 Minn. 371, 168 N. W. 131.
Securities. State v. Gopher Tire & Rubber Co., 146 Minn. 52, 177 N. W. 937.
Sell. State v. Meyers, 132 Minn. 4, 155 N. W. 766; State v. Provencher, 135 Minn. 214, 160 N. W. 673; Westfall v. Ellis, 141 Minn. 377, 170 N. W. 339.

Situated. Zenith Box & Lumber Co. v. Nat. Union Fire Ins. Co., 144 Minn. 386, 175 N. W. 894.

Stepmother. McGaughey v. Grand Lodge, 148 Minn. —, 180 N. W. 1001.

Store. Kelly v. Theo. Hamm Brewing Co., 140 Minn. 371, 168 N. W. 131.

Strawing a car. Victor Produce Co. v. Chicago etc. Ry. Co., 135 Minn. 49, 160 N. W. 201.

Sunstroke. State v. District Court, 138 Minn. 250, 164 N. W. 916.

Syndicalism. State v. Moilen, 140 Minn. 112, 167 N. W. 345.

Tea-chest. Japan Tea Co. v. Franklin MacVeagh & Co., 142 Minn. 152, 171 N. W. 305.

Testimony. State v. Truax, 139 Minn. 313, 166 N. W. 339.

Tools. Miller v. American Bonding Co., 133 Minn. 336, 158 N. W. 432; Dawson v. Northwestern Construction Co., 137 Minn. 352, 163 N. W. 772.

Trade. State v. District Court, 138 Minn. 103, 164 N. W. 366.

Trial. Ratcliffe v. Ratcliffe, 135 Minn. 307, 160 N. W. 778.

Unfair. Steffes v. Motion Picture M. O. Union, 136 Minn. 200, 161 N. W. 524.

Unlicensed drinking place. State v. Northern Pacific Ry. Co., 139 Minn. 334, 166 N. W. 351.

Usual traveled route. Marshall County v. Rokke, 134 Minn. 346, 159 N. W. 791.

Vehicle. Syck v. Duluth St. Ry. Co., 146 Minn. 118, 177 N. W. 944.

Void. Mitchell v. Remington, 131 Minn. 271, 154 N. W. 1070.

Volunteer. White v. Great Northern Ry. Co., 142 Minn. 50, 170 N. W. 849.

Voting on the question. Powers v. Chisholm, 146 Minn. 308, 178 N. W. 607.

Wagon. Edberg v. Johnson, — Minn. —, 184 N. W. 12.

Wash ores. State v. Hobart Iron Co., 143 Minn. 457, 172 N. W. 899, 175 N. W. 100.

Wet excavation. Griffith v. Dowd, 133 Minn. 305, 158 N. W. 420.

Wilfully. State v. Lehman, 131 Minn. 427, 155 N. W. 399; State v. Damuth, 135 Minn. 76, 160 N. W. 196.

Will. Carson v. Turrish, 140 Minn. 445, 168 N. W. 349.

Workman. State v. District Court, 134 Minn. 26, 158 N. W. 790.

Yard. Thompson Lumber Co. v. Thompson Yards, Inc., 144 Minn. 298, 175 N. W. 550.

WORK AND LABOR

10367. Gratuitous services—One who merely volunteers his services cannot recover therefor on implied contract. Wallace v. Higgins Land Co., 136 Minn. 278, 161 N. W. 597.

(91) See Wallace v. Higgins Land Co., 136 Minn. 278, 161 N. W. 597.

10368. Services rendered at request—(92) Courtney v. Nagle, 144 Minn. 65, 174 N. W. 436; Stanger v. Pandolfo, 144 Minn. 294, 175 N. W. 912. See Wallace v. Higgins Land Co., 136 Minn. 278, 161 N. W. 597.

10369. Services under unfinished contract—Where a client exercises his legal right to settle with his adversary, in good faith and without purpose to defraud the attorney out of his compensation, the latter may recover only the reasonable value of the services rendered by him down to the time of the settlement. Southworth v. Rosendahl, 133 Minn. 447, 158 N. W. 717. See § 699a.

(93) See Magnuson v. Stevens Bros., 146 Minn. 38, 177 N. W. 929; L. R. A. 1916E, 790.

(95) Boydstun v. Hackney Land Credit Co., 145 Minn. 392, 177 N. W. 779.

10374. Stipulated compensation not made—(4) Matteson v. Blaisdell, — Minn. —, 182 N. W. 442 (services rendered on the promise of a devise—defendant thereafter conveyed the land promised). See Mascall v. Reitmeier, 145 Minn. 214, 176 N. W. 486.

10375. Services between members of family—(5) See 10 A. L. R. 8 (liability for services of child taken into a family).

10376. Services under illegal contract—Services not gratuitous, and neither mala in se nor mala prohibata, rendered under a contract that is invalid or unenforceable, may furnish a basis for an implied or constructive contract to pay their reasonable value. Winton v. Amos, 255 U. S. —.

(6) See Southworth v. Rosendahl, 133 Minn. 447, 158 N. W. 717; 29 Harv. L. Rev. 874; § 6703.

10377. Pleading—Generally a recovery may be had upon proof of either an express or implied contract, but the instructions and conduct of the trial may prevent this. Leonard v. Schall, 132 Minn. 446, 157 N. W. 723.

Where a complaint alleges the value of the services and that plaintiff agreed to pay such amount, and that no part thereof has been paid except a certain amount, the fact that the latter amount was accepted as an accord and satisfaction is inadmissible under a general denial. Lankester v. Fine, 134 Minn. 330, 159 N. W. 622.

Under a complaint in the form of quantum meruit the plaintiff may recover upon proof either of the reasonable value of the services, or upon

proof of an express contract which has been fully performed on his part. If the evidence shows an express contract the amount of recovery is determined by the contract. Northwestern M. & T. Co. v. Swenson, 139 Minn. 365, 166 N. W. 406; James E. Carlson, Inc., v. Babler, 144 Minn. 125, 174 N. W. 824.

Where the complaint is in the form of a quantum meruit an admission in a reply of an express contract is not a departure. Where the plaintiff alleges an express contract and full performance thereof he can only recover on proof of such performance. It is now, as always, the law that where parties enter into an express contract they are bound by its terms. Neither party can, as plaintiff claims, "lay it aside" and proceed as though no contract had ever been made. The contract determines the rights of the parties and if the plaintiff either alleges or admits the existence of an express contract it must show a right of recovery consistent with its terms. This is part of its cause of action. This is true whether it relies on full performance by itself or on a breach of the other party, or on any other condition that may give it a right of recovery. Northwestern M. & T. Co. v. Swenson, 139 Minn. 365, 166 N. W. 406.

Under a complaint in the form of a common count in indebitatus assumpsit for services performed, a recovery may be had for the agreed price of services rendered under a completed contract; and under such a count a recovery may be had for the reasonable value of services in the performance of an entire contract the completion of which is prevented by the defendant. Boydstun v. Hackney Land Credit Co., 145 Minn. 392, 177 N. W. 779.

(7) Boydstun v. Hackney Land Credit Co., 145 Minn. 392, 177 N. W. 779. See Northwestern M. & T. Co. v. Swenson, 139 Minn. 365, 166 N. W. 406.

(11) Leonard v. Schall, 132 Minn. 446, 157 N. W. 723.

10378. Burden of proof—Modification of contract—Whether, after making the original contract, the parties made a subsequent contract by which certain services were not to be paid for under the original contract was a question for the jury; and the burden of establishing such modification of the original contract was on the defendant. Leonard v. Schall, 132 Minn. 446, 157 N. W. 723.

10378a. Evidence—Admissibility—Customary compensation is sometimes admissible to prove the reasonable value of services. Matloch v. Jerabek, 138 Minn. 128, 164 N. W. 587.

Plaintiff was properly permitted to testify to her employment by defendant as his agent to procure certain work to be done for him, and a letter from him to her was properly excluded as being merely a statement of the same facts as were disclosed by his testimony. Stanger v. Pandolfo, 144 Minn. 294, 175 N. W. 912.

In an action on quasi contract for installing a heating plant, held that evidence as to the cost of removing the plant was admissible. Fargo Foundry Co. v. Calloway, 148 Minn. —, 181 N. W. 584.

Evidence supporting plaintiff's contentions held admissible. Matteson v. Blaisdell, — Minn. —, 182 N. W. 442 (fact that plaintiff left home just before an alleged agreement was made admissible as bearing on the probability of an inducement for him to return).

10379. **Evidence—Sufficiency**—(15) Totten v. Kipp, 132 Minn. 459, 157 N. W. 713; Lamoreaux v. Weisman, 136 Minn. 207, 161 N. W. 504 (services of architect in making preliminary sketches and for superintendence); Ramstadt v. Thunem, 136 Minn. 222, 161 N. W. 413; Wallace v. Higgins Land Co., 136 Minn. 278, 161 N. W. 597; Boddy v. Northwestern Realty Co., 139 Minn. 497, 166 N. W. 124; Keller Electric Co. v. Burg, 140 Minn. 360, 168 N. W. 98; Courtney v. Nagle, 144 Minn. 65, 174 N. W. 436; Stanger v. Pandolfo, 144 Minn. 294, 175 N. W. 912; Matteson v. Blaisdell, — Minn. —, 182 N. W. 442.

10379a. **Damages**—Certain damages held not so excessive as to indicate that they were given under the influence of passion or prejudice. Courtney v. Nagle, 144 Minn. 65, 174 N. W. 436.

A verdict held not so excessive as to require the trial court to set it aside. Stanger v. Pandolfo, 144 Minn. 294, 175 N. W. 912.

Where a contract is illegal and recovery is sought for labor and materials upon quasi contract the contract does not control. The measure of damages is not the reasonable value of the labor and materials but the benefit received by the defendant. If some part of the work is of value and another is a detriment, the net benefit is the measure of the damages. Fargo Foundry Co. v. Calloway, 148 Minn. —, 181 N. W. 584.

10379b. **Judgment—Amount of recovery**—A charge held not to take from the jury the question of amount of recovery. Keller Electric Co. v. Burg, 140 Minn. 360, 168 N. W. 98.

WORKMEN'S COMPENSATION ACT—See Appeal and Error, §§ 331 411; Certiorari, §§ 1400, 1401; Judgment, § 5206; Master and Servant, §§ 5854a–5854z.

TABLE OF MINNESOTA CASES

COVERING MINNESOTA REPORTS, 131—146;
NORTHWESTERN REPORTER, 155—179.